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Foreword and Executive Summary

Introduction

In recent years an increasing number of large, high-profile cross-border M&A deals, both in the US and internationally, have been scrutinized, delayed, or blocked on the basis of foreign investment review, or have been the subject of political commentary. This trend shows no sign of abating; to the contrary, it is gaining momentum. Indeed, heightened concerns over cyber-security and an increasingly complex geopolitical matrix have made it more likely that transactions will involve national security considerations.

In the US, CFIUS reviews of Chinese involvement in the acquisition of a pork producer (Smithfield Foods, Inc.) and in the construction of wind turbines near a US naval base (Ralls Corp) have raised the profile of national security reviews and highlighted the increasing scope of such reviews. Internationally, examples of the roles that national interest and national security are playing in mergers have proliferated: The interim refusal of BHP Billiton’s bid for Potash in Canada, Archer Daniels Midland’s failure to secure foreign investment approval for its bid for GrainCorp after clearing competition review in Australia, and the French government’s intervention in the General Electric acquisition of Alstom are just some of the most visible of such examples.

National concerns today play out in a complex legal environment in which a transaction may raise eyebrows in each jurisdiction in which a target operates – often resulting in a multiplicity of reviews. For example, a communications company operating in both the US and Canada may face no fewer than six potential reviews; In the US, antitrust, FCC, and CFIUS; in Canada, competition, Minister of Industry, and Investment Canada.

Antitrust lawyers are often the first regulatory lawyers to whom a client will look for advice regarding the issues to be considered in an international merger, the probability of success, and the timing of the approval process. Given the current foreign investment environment, it is increasingly important for antitrust counsel to be aware of the significant impact that successfully obtaining such regulatory approvals in international mergers can have on the timing of a transaction and potentially the transaction’s consummation.

ABA Section of Antitrust Law Task Force on Foreign Investment Review

The ABA Section of Antitrust Law Task Force on Foreign Investment Review (the “Task Force”), co-chaired by Calvin Goldman and Richard Steuer, has developed this analytical Report on the interface between (i) competition and antitrust reviews and (ii) national security, national interest and industry-specific regulatory reviews. The Task Force members, namely, Rita Sinkfield Belin, Michael Cowie, John Davies, Judge Douglas Ginsburg, Ilene Gotts, Chris Griner, Michael Keeley, Joseph Krauss, Carl Shapiro, David Turetsky, John Veroneau, and Christine Wilson, bring a wide range of experience not
only from antitrust law but also from trade and national security law. There are a number of other highly skilled persons who also made important contributions and their service to the ABA Section of Antitrust Law is most appreciated.¹

This Report, running more than 200 pages, describes the merger review and approval process within a number of major jurisdictions. It points out similarities and differences among these jurisdictions, as well as issues arising between agencies within a single jurisdiction. It focuses in particular on outlining the procedural and substantive issues both within and between jurisdictions in relation to concurrent antitrust and foreign investment reviews. It also addresses concerns raised by parties, governments, and other interested observers. Finally, it offers some recommendations for the future.

To appreciate the significance of this Report, it will help to have familiarity with the factors driving an increase in foreign investment review.

**Factors Driving an Increase in Foreign Investment Review**

There has been no progress in the Doha round of multilateral trade negotiations since they collapsed in July 2008, after a failure to reach a compromise on agricultural import rules. The absence of trade negotiations has left little opportunity for political leadership; instead, it has increased the focus by jurisdictions on protecting domestic industries and employment.

Foreign investment has become a “front burner” topic, even in political campaigns. For example, the pending election in Canada arguably played a role in derailing BHP Billiton’s bid for Potash in late 2010. Similarly, Archer Daniel Midland’s bid for GrainCorp, which was blocked by the Federal Treasurer of Australia upon the recommendation of the Australian Foreign Investment Review Board following approval of the transaction by the Australian Competition and Consumer Commission may have been a victim of national interest protectionism. Indeed, the Treasurer publicly provided as grounds for the decision the competitive health of the relevant sector of Australia’s economy.

Under the rubric of “national interest,” there has been an increasing focus on protecting “national champions” and key economic sectors or infrastructure. In GE’s bid for Alstom, the French government, seeking to prevent the sale of a “national champion behind the back of its shareholders,” initially sought out other European suitors for the 86 year-old group that had built France’s power grid and high-speed trains.

France subsequently extended the state’s veto scope from “national security and defence” to include the energy, water, transport, telecoms and health sectors. Likewise, in the UK, members of a House of Commons committee urged the application of a “public interest” test to protect pharmaceuticals giant AstraZeneca from being acquired by US competitor Pfizer, based on AstraZeneca’s British roots.

The flood of capital from state-owned enterprises (“SOEs”) generally, and from China in particular, has driven greater scrutiny of proposed investments in economic sectors viewed as important to economic security – sometimes referred to as “strategic assets.” This has particularly been the case for investments

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¹ The following additional persons made significant contributions to this Report: Christopher Brewster, Michael Koch, Shannon Reaves, Anne Salladin, Gabriel Slater and Joseph Tipograph.
in natural resources, to which Chinese SOEs have devoted much of their capital investment in order to guarantee a supply of raw materials for their domestic manufacturing needs.

In 2005, the China National Offshore Oil Corporation (“CNOOC”) withdrew its $18 billion bid for US-based Unocal. Pressure was brought to bear by US lawmakers. In December 2012, while approving CNOOC’s takeover of Nexen and Petronas’s acquisition of Progress Energy, the Government of Canada tightened guidelines applicable to SOE acquisitions generally. With respect to investments in oil sands specifically, the Prime Minister himself (rather than the Industry Minister) announced that “further SOE control of Canadian oil-sands business would only be permitted in an “exceptional circumstance.”

National security concerns have fueled a series of delays or denials of transactions in an ever broadening set of circumstances. Historically, national security concerns were limited to businesses involved in the manufacture or supply of military equipment and to infrastructure industries critical to national sovereignty.

In 2006, Dubai Ports World, based in the United Arab Emirates, acquired Peninsular and Oriental Steam Navigation Company, including terminal operations in six American ports. CFIUS approved the deal, but some US lawmakers opposed the acquisition, and one even labelled the acquirer “a company coming out of a country where al Qaeda had such a strong presence.” As a result, the US operations were ultimately sold by Dubai Ports World to a US buyer. Also in the United States, CFIUS ordered Chinese-controlled Ralls Corporation to sell wind turbines it had acquired because they were near a US Navy facility, which signalled the importance not only of transactions involving the military directly, but of co-location of businesses near military facilities.

The first transaction to be denied outright in Canada was the proposed takeover of MacDonald Dettwiler and Associates by Alliant Techsystems in 2008. This transaction would have seen the US suitor take control over satellite technology instrumental in monitoring Canada’s arctic regions. Since then, Canada has modified the Investment Canada Act to provide for national security reviews expressly, and a number of proposed transactions, particularly in the data and communications sectors, have been affected. Since the Act was amended, successive transactions in the telecommunications sector have been variously blocked outright (e.g., the acquisition of backbone provider MTS Allstream by an Egyptian-owned investor), withdrawn by the parties after concerns were raised by government (e.g., the proposed acquisition of wireless carrier Wind by a Russian-controlled entity), or effectively precluded by reported statements attributed to officials of the Government (e.g., the prospect of a Chinese takeover of BlackBerry).

The continually increasing scope of transactions and industries that can raise national security considerations has been underlined by three recent transactions in the US, each of which passed CFIUS review despite concerns raised by US lawmakers. First, the 2013 sale of pork producer Smithfield to Shuanghui Holdings International Limited, a Chinese company based in Hong Kong, was subjected to warnings and concerns about the effects of increased foreign ownership of the US food supply (as “critical infrastructure”).

Second, a sale at about the same time, of Complete Genomics, again to Chinese interests, underwent extended CFIUS review.
Third, CFIUS scrutinized the acquisition of the Waldorf Astoria hotel in New York City by China’s Anbang Insurance Group to determine the national security implications of the transaction. Although the purchase of real estate is not always thought of as raising national security considerations, certain real estate transactions can implicate national security. In this case, the hotel has long been the official residence of the US Ambassador to the U.N., as well as a frequent venue for meetings involving US and international political leaders, including the President of the United States.

As if all of the foregoing were not sufficient to raise the stakes in foreign investment reviews, developments around cyber-security have pushed national security considerations, and the number of transactions that might be affected thereby, to unprecedented levels.

These developments have affected, and will continue to impact, governments’ attitudes toward foreign investment – not only in the US, but among the so-called “Five Eyes,” that reportedly share certain electronic intelligence - the US, Canada, the UK, Australia, and New Zealand.

Findings of the Task Force

Parties to cross-border and multi-national mergers, acquisitions, joint ventures, and other transactions, and some reviewing agencies, have expressed an interest in fostering greater harmony, transparency, consistency, and predictability in conducting multiple reviews.

The first part of this Report presents an overview of the substantive and procedural aspects of antitrust and competition reviews as well as of national interest and national security (i.e., foreign investment) reviews and of sector-specific reviews in the US and in a number of its major trading partners, specifically, Canada, the European Union, China, Japan, Brazil, the United Kingdom, France, Germany, and Australia.

The second part of this Report details (for the first time to the knowledge of the Task Force’s members) the significant substantive and procedural interface issues arising between agencies within the same jurisdiction, as well as between agencies with a similar mandate but in different jurisdictions. As might be anticipated, many differences exist in both dimensions. These break down into two principal categories: (1) differences in timing and procedure and (2) differences in substance.

Even within the same jurisdiction, the mandates of multiple agencies mean that different review periods and procedures may be applied to the same transaction. These include notification obligations, waiting periods and standstill obligations, pre-notification contacts, third-party rights, confidentiality, and rights to challenge a negative decision.

From jurisdiction to jurisdiction, the timetables for conducting antitrust and competition reviews vary considerably, which can create difficulties for parties endeavouring to close transactions. These differences are typically even more marked in the case of national interest/national security reviews, and extend beyond timing considerations and filing requirements, to the procedure involved and, possibly, the requirement to negotiate mitigation measures. Post-closing government powers and industry-specific considerations add to the mix. An understanding of the applicable procedures and anticipated review

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2 The sectors reviewed include banking and finance, media and telecom, energy and electric power, transportation, agriculture and land use, and insurance.
timing is necessary in order for counsel to consider whether and when certain filings or other engagement with host governments should be undertaken. Given the political, economic, and security sensitivities that may be raised by a given transaction, there is likely some level of uncertainty that transaction parties will have to accept, although the purpose of the Task Force’s work is to equip antitrust counsel to foresee and manage these areas of uncertainty so as to reduce their potential negative impact on the success of the transaction.

Substantively, counsel should be prepared to manage the myriad considerations that may arise in the course of agencies’ reviews both within and between jurisdictions. Put simply, different agencies may reach different conclusions about a transaction because they apply different tests. This is particularly the case as between competition/antitrust reviews and foreign investment reviews. Transactions that are permissible on antitrust grounds may be prohibited because they involve “sensitive” sectors of the economy, while in other cases a transaction may fall victim to specific statutes concerning foreign ownership. Areas of concern exist in sectors such as aviation, nuclear, defense, land ownership or leasing, and other areas that may be considered sensitive for security or cultural reasons. Such areas of national concern may be country specific, and may also be more political than legal in nature.

There is also potential for inconsistent – or even contradictory – outcomes of reviews by competition agencies in different jurisdictions. The potential for these types of unsatisfactory outcomes will persist as long as there are substantive differences between jurisdictions and uncoordinated enforcement actions undertaken by the reviewing authorities. Due to the work of international organizations such as the International Competition Network (“ICN”) and the Organization for Economic Cooperation and Development (“OECD”) and to interagency cooperation on particular matters, the likelihood of materially inconsistent outcomes of competition/antitrust reviews is relatively small, however. Moreover, divergent outcomes, where they do occur, do not raise concerns if they reflect different market conditions, or the scope and scale of operations of the transacting parties in the respective markets. They do raise concerns, however, when the differences stem from non-competition oriented objectives, or from different analyses, or from the imposition of conflicting remedies.

Recommendations

We present some recommendations for best practices and further initiatives to address issues arising from the transaction reviews by multiple agencies and multiple jurisdictions, as well as to ameliorate the hardship created by inconsistencies in review processes. By way of summary:

Timetables: Agencies should be more transparent with regard to timetables. Without transparency, parties find it hard to predict the length of time agencies require to complete a review process, and it will be difficult to achieve greater consistency between and among agencies and jurisdictions.

Agencies within each jurisdiction should endeavor to make the timetables for reviews more consistent with one another. Likewise, agencies in different jurisdictions should endeavor to make the timetables for reviews more consistent with one another. These time periods should be made known in the public domain.

Together, achievement of the twin objectives of transparency and consistency should go a long way toward eliminating uncertainty and facilitating investment.
**Communication:** To the extent consistent with confidentiality obligations imposed by law, agencies within each jurisdiction should institutionalize communication with comparable agencies in other jurisdictions that review foreign investment.

To the extent consistent with confidentiality obligations imposed by law, agencies should also institutionalize communication with comparable agencies in other jurisdictions that can be expected to review some of the same foreign investments. The ICN provides a model. Comparable communication protocols could be arranged for other types of regulatory review. Although it will be easier to communicate about some types of review than about others - national security, of course, being the most difficult - to the extent possible and consistent with law, agencies in different countries should develop protocols for communicating with one another.

**Substantive Criteria:** Agencies should be more transparent with regard to the substantive criteria they apply. Recognizing that some criteria for reviews will remain classified, or at least confidential, agencies can endeavor to be as transparent as possible, even if only in general terms, with regard to the substantive criteria they apply to reviews. Agencies should prepare guidelines for their reviews and measure the consistency with which those guidelines are being applied. Whether such assessments are conducted by different agencies within a jurisdiction or by the same agency, assessment of the effects of the transaction on the national interest should be separated from an assessment of the effects on competition. In any event, such assessments should be made separately, regardless of whether there is balancing among such assessments or whether one assessment may result in disapproval of a transaction regardless of the outcome of other assessments.

**Involvement of Other Entities:** The American Bar Association Section of Antitrust Law (“ABA Antitrust Section”) should send copies of this Report to agencies responsible for foreign investment review, as well as to entities such as the OECD and ICN, to draw greater attention to the issues created by multi-agency foreign investment review.

Entities such as the OECD and ICN should consider playing a role in seeking greater harmonization of foreign investment review among different jurisdictions.

The ABA Antitrust Section should present programs in collaboration with organizations such as the OECD, ICN, or World Trade Organization (“WTO”), to augment and refine the findings made in this Report.

**Further Work:** The ABA Antitrust Section should undertake to examine jurisdictions not included in this Report and add them to the analysis.

The ABA Antitrust Section should undertake further analysis of the regime for national security reviews by CFIUS in the United States. This could take the form of programs, presentations, and/or written analysis.

The ABA Antitrust Section should undertake programs, seminars, or other means to study the advantages and disadvantages – in practice – of including objectives other than the maximization of consumer welfare in reviews conducted by competition agencies.
Through its Long Range Planning Committee, the ABA Antitrust Section should consider how it can further address the issues raised in this Report, including through the establishment of a new committee of the ABA Antitrust Section specifically focused on Foreign Investment, an ongoing working group within the Antitrust Section, or possibly through a Task Force drawn from more than one section of the ABA, for example, Antitrust Law, International Law and Business Law.
Overview

Cross-border and multi-national mergers, acquisitions, joint ventures and other transactions have become commonplace in today’s global economy. Often, these deals require review and approval in multiple jurisdictions. Moreover, depending on the size of the transaction, the relevant industry, and the regulatory framework, more than one review may be required within each jurisdiction. These include not only antitrust reviews, but also national security, national interest, and industry-specific regulatory reviews. Sometimes, this results in friction between jurisdictions and/or between agencies within a jurisdiction. As a consequence, parties to these transactions and some agencies have expressed an interest in fostering greater harmony, transparency, consistency, and predictability in conducting multiple reviews.

Competition and antitrust reviews have existed for decades. The Hart-Scott-Rodino Act has required premerger approval of large deals in the United States since 1976, and today dozens of countries have adopted mechanisms for the review of large transactions by competition authorities. Although the process for conducting these reviews varies substantially from one jurisdiction to the next, all of these reviews focus largely, if not entirely, on the expected impact of a deal on competition and economic welfare.

Of course, mergers, acquisitions, joint ventures and other transactions often raise other kinds of issues. Chief among these are national military security, national economic security, job preservation, job creation, environmental concerns, diversity of viewpoints, and cultural protection. Only certain countries include these factors in their antitrust and competition reviews but elsewhere the issues have not disappeared. Instead, they have found their way into other regulatory reviews, giving rise to the current state of affairs.

This report describes the review and approval process within several major jurisdictions. It points out similarities and differences among these jurisdictions, as well as issues arising between agencies within a single jurisdiction. It also addresses concerns raised by parties, governments, and other interested observers. Finally, it offers some recommendations for the future.

We begin with an overview of each of the jurisdictions examined in this report, followed by a survey of particular types of foreign investment review, and conclude with some observations and recommendations.

United States

In the United States, foreign investment affecting national security is primarily regulated through the Committee on Foreign Investment in the United States (“CFIUS”). CFIUS is chaired by the
Department of the Treasury and comprises several other voting member-agencies, including the Departments of Commerce, State, Defense, Homeland Security, Energy, and Justice, as well as the Office of the United States Trade Representative and the Office of Science & Technology Policy. The Committee can review “any merger, acquisition, or takeover ... by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.” 50 U.S.C. app. § 2170(a)(3). By regulation, “control” means the “power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity[.]” 31 C.F.R. § 800.204(a).

CFIUS, however, is not the only regulatory regime that may be implicated by foreign investment. For instance, ordinary merger review might also apply. Where a proposed transaction is significant, the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“DOJ”) have statutory authority to determine whether the deal would be anticompetitive. Although some transactions involving foreign entities may be exempt from such agency review, many are subject to the jurisdiction of the United States because they would have an effect upon commerce in the United States.

Similarly, if one of the companies involved in a potential transaction is publicly listed in the United States, the deal may be subject to review by the Securities and Exchange Commission (“SEC”). The SEC requires that registered entities submit filings and disclosures for a foreign investment or merger. State laws may also impose procedural requirements.

Additionally, if a proposed transaction involves a target in an industry that is governed by specific regulatory provisions, the transaction may not be allowed at all or additional review may be required. For instance, in transactions involving electricity, the Federal Energy Regulatory Commission (“FERC”) may decline to license foreign owners, although in practice it has permitted foreign ownership of US electricity assets through domestic subsidiaries. Similarly, the Department of Agriculture has substantial authority over transactions involving agricultural interests, just as the Department of Interior has substantial authority over transactions involving mineral rights. Other sectors are subject to their own regulatory requirements.

The United States is generally hospitable to foreign investment. Although there are examples where potential foreign transactions have been subject to intense political or regulatory scrutiny (e.g., the Dubai Ports World transaction), as a general rule foreign investment is welcomed and common.
AUSTRALIA

It is Australian government policy to encourage foreign investment in Australia. Foreign investment proposals are considered under the Foreign Acquisitions and Takeovers Act 1975 (“FATA”) and Australia’s foreign investment policy (the “Policy”). The FATA empowers the Treasurer of the Australian Government to examine proposals by foreign investors, prioritising the national interest of Australia in considering each application. The Treasurer is advised by the Foreign Investment Review Board (“FIRB”) and the Treasury. Applications must be made to the FIRB in relation to certain business, real estate, and agricultural investments. Approval must be sought for foreign investors in proposed deals which meet certain thresholds, such as acquiring 15% or more of an Australian company valued at A$252 million or above, purchasing certain types of real estate or acquiring any interest in rural land.

Over the past few years, the Treasurer has approved almost all proposals submitted to the FIRB. Of the handful of proposals that were rejected, a majority had proposed a degree of foreign government control which was deemed too great, or which resulted in a significant reduction of competition in a particular industry.

In addition, there is industry-specific legislation which may impose further requirements and/or limits on foreign investment in certain industries such as the banking sector, international airlines and telecommunications.

On May 5, 2015, the Australian Government announced plans to modernise and simplify Australia’s foreign investment framework and reduce the compliance burden on international business when engaging with Australia. To date, this plan has not passed into law.

BRAZIL

The review of foreign investment in Brazil (including full or partial acquisitions, mergers, and the formation of joint ventures) differs from foreign investment review in other jurisdictions in several respects, and the relationships among different review processes within Brazil may pose special challenges to foreign investors in certain sectors.

Brazil does not have a broad “national interest” review that can be invoked to block foreign acquisition of a conventional company but it does have narrower national security reviews that apply in certain instances. Also, like other countries, it has prohibitions or limitations on foreign investment in some specific industries. Brazil places tight control over foreign investment in the financial services industry, and largely prohibits foreign investment in the media and along national borders. In most other sectors of the economy, however, foreign investment is subject to fewer impediments than in many other countries. Indeed, an amendment to the Brazilian Constitution nullifies any provision affording different treatment to Brazilian companies
controlled by foreign investors, except where foreign investment is explicitly prohibited or restricted.

At the same time, the Brazilian Constitution requires that certain economic activity affecting the national interest must be conducted under a concession or permission regime. Examples of industries subject to this regime include oil and gas exploration and production, electric energy, telecommunications, distribution of natural gas to consumers, sanitation, and the administration of highways, ports, and airports. The transfer of concession rights or corporate control of a company operating under a concession without the prior approval of the applicable authority will result in the revocation of the concession rights. Accordingly, every concessionaire, regardless of which agency or authority oversees its activities, must submit any transfer of its concession rights or corporate control to the applicable authority for prior approval. Foreign investment is permitted, subject to certain restrictions, in a variety of sectors that operate under these concessions, including aviation, airports, telecommunications, petroleum, natural gas, biofuels, ground and water transportation, highway construction, ports, insurance, health insurance, electric power, mining, sanitation, and water supply, but not broadcasting or the press, or nuclear energy.

To the extent that friction exists between countries, Brazil is likely to be the less restrictive. As for friction between regulators within Brazil, there is relatively little of this, with the exception of friction that exists between the Brazilian Central Bank and the Brazilian competition agency, CADE.

There are no prominent examples of regulatory reviews blocking foreign investment in Brazil. This likely is because of the hospitable policy reflected in the Constitutional amendment. This policy does not apply to foreign companies operating directly in Brazil, but as a practical matter most business transacted by foreign companies is conducted through subsidiaries incorporated in Brazil.

**CANADA**

Foreign investment in Canada, which has been regulated since the early 1970s, is governed primarily under the *Investment Canada Act* (the “ICA”). The ICA, introduced in 1985, marked a shift away from Canada’s more protectionist stance towards foreign investment under the former *Foreign Investment Review Act* (“FIRA”). The ICA’s express purpose is to provide for the review of “significant investments” in Canada by non-Canadians in a manner that encourages investment, economic growth and employment in Canada, as well as to review investments by non-Canadians that “could be injurious to national security”. The ICA applies to acquisitions of existing Canadian businesses by non-Canadian investors, as well as instances where non-

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3 *Investment Canada Act*, R.S.C, 1985, c. 28 [ICA].

4 *ICA*, § 2.
Canadians establish new Canadian businesses. The Minister of Industry is responsible for administering the majority of investments subject to the ICA, with the exception of investments pertaining to “cultural” businesses, which are overseen by the Minister of Canadian Heritage. The introduction of the ICA removed the high threshold previously facing foreign investors under FIRA – instead of requiring foreign investors to demonstrate that a proposed transaction would be of “significant benefit” to Canada, as was the case under FIRA, the ICA implemented a less onerous “net benefit” test.

Under the current “net benefit” test, in order to determine whether a proposed transaction is likely to be of “net benefit” to Canada, the responsible Minister, the Minister of Industry, considers a set of relevant factors enumerated in the ICA, none of which is individually determinative. These include considerations that would be predictable under most foreign investment regimes, such as the effect of the investment on the level and nature of economic activity in Canada, but also include factors idiosyncratic to Canada such as the compatibility of the investment with national and provincial industrial, economic and cultural policies likely to be significantly affected by the investment. In particular, this latter criterion in the “net benefit” test opens the door to protectionism at not only the national, but sub-federal level. The “net benefit factors” listed in the ICA contain broad language, and grant the responsible Minister wide discretion to approve or reject proposed transactions.

Transactions falling under the purview of the ICA are either “reviewable” or “notifiable”. Investments are reviewable if a foreign investor (i.e., an entity controlled directly or indirectly by non-Canadians) (i) acquires control of a “Canadian business,” and (ii) the book value of the acquired assets exceeds the statutory threshold. Reviewable investments require filing an application with the Investment Review Division of Industry Canada, and to receive approval the Minister of Industry must be satisfied the investment is likely to be of “net benefit” to Canada.

Since April 2015, the statutory review threshold has been C$600 Million for investors from WTO member states making direct acquisitions, other than state-owned enterprises (“SOEs”). Non-WTO investors are subject to a reviewable threshold for direct acquisitions of only C$5 million book value. The threshold for direct acquisitions of Canadian “cultural businesses,” irrespective of nationality, is also C$5 million book value. Foreign investments falling below the aforementioned reviewable thresholds are considered “notifiable,” and the foreign investor need only file a short notice with the Investment Review Division either before the transaction or within 30 days of closing, but such investments are not subject to Ministerial review. In addition, amendments made to the ICA in 2009 allow the Minister of Industry to review investments that “could be injurious to national security” irrespective of the size of the transaction or whether the

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5 This threshold will increase to $800 million in 2017 and $1 billion in 2019. SOEs, even those from WTO member states, will continue to be subject to the current statutory threshold, which was set a C$ 369 million for 2015, but is adjusted annually. Indirect acquisitions (where a non-Canadian parent company which controls a Canadian subsidiary is being acquired) are not reviewable under the ICA for investors from WTO member states, unless pertaining to a “cultural business”.
investment would result in the acquisition of control by a non-Canadian (even if no application for review or notification is required under the net benefit provisions of the ICA). Following national security review, the Minister of Industry can allow the investment to proceed or refer the investment to the Governor in Council (federal Cabinet), which can then block the investment or require undertakings or stipulate terms and conditions.

The timeline for foreign investment and national security reviews can add uncertainty to proposed transactions. The Minister of Industry has 45 days to review investments under the “net benefit” review, which may be unilaterally extended for a further 30-day period if required (and which is commonly extended on consent). More problematic, however, is that the national security review process runs on a different timeline than the net benefit review, and can total up to 200 days (and can also be extended on consent).

A final consideration for foreign investors is that investments by foreign SOEs must meet specific guidelines as part of the Minister’s “net benefit” assessment. SOEs are very broadly defined under the ICA, and include entities “controlled or influenced directly or indirectly” by a foreign government.6 [emphasis added] The ICA allows the Minister to make “control in fact” determinations about SOEs, which in practice allows the Minister to declare that a Canadian-controlled investor is “controlled in fact” by an SOE, possibly subjecting the investment to review under the ICA.

While Canada, like the United States, is generally hospitable to foreign investment, counsel on behalf of foreign investors must undertake a thorough investigation of unique policy considerations such as the sensitivities of a particular province affected by the transaction, remain cognizant of potentially unpredictable review timelines, and prepare for the parallel considerations of economic protectionism and national security, which can influence the approval of foreign investment in Canada.

**CHINA**

In China, a foreign investor generally may establish a new entity, including a wholly foreign-owned enterprise (“WFOE”), equity joint venture (“ECJV”) or a contractual joint venture (“CJV’), or may establish a representative office (“RO”), a foreign-invested partnership enterprise (“FIPE”), a foreign-invested holding company, or a foreign-invested joint stock limited company. Generally, a foreign investor also may merge with or acquire an existing Chinese company.7

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6 *ICA*, § 3.

7 Two significant laws related to mergers and acquisitions of Chinese companies are the *Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* and the *Interim Measures for the Administration of Examining and Approving Foreign Investment Projects*. 
The People’s Republic of China (“PRC”) reviews foreign investments through various regulatory review processes. These include a National Security Review (“NSR”) process to review transactions involving certain sensitive sectors; various other non-national security-specific reviews and approvals; and certain sector-specific reviews and approvals. An overview of these processes is provided later in this report. The approval processes discussed below generally apply whether a foreign investor is creating a new legal entity (such as a WFOE, EJV or CJV) or acquiring an existing Chinese company (and thus converting it into a foreign invested enterprise (“FIE”)). Additionally, purchasing shares of publicly traded companies may proceed without government approval provided purchases do not exceed 10 percent of the shares of a publicly traded company in China. Acquiring more than 10 percent of public shares of a Chinese company will be deemed as a “strategic investment” and require approval by government agencies.

In considering foreign investments in China, the first step is determining whether foreign investment is permitted in the target industry. This is done through consultation of the Catalogue of Industries for Guiding Foreign Investment (“Foreign Investment Catalogue” or “Catalogue”), maintained by the Ministry of Commerce (“MOFCOM”) and the National Development and Reform Commission (“NDRC”). The Foreign Investment Catalogue (1) divides industries into “encouraged,” “restricted” and “prohibited” categories and (2) may require that investment take certain forms and/or limit the foreign shareholder’s investment. Foreign investment in “restricted” industries often is subject to heightened government review and more burdensome application requirements, which may prolong government approvals, while foreign investment in “encouraged” industries may be subject to less stringent government review. Investment in industries not specifically listed in the Catalogue is permitted by default.

The required approvals and processes/sequence for obtaining approvals vary depending on the specific industry involved and/or local regulations. For example, site-related opinion letters and DRC Project Approval may not apply to certain service sector investments. It is important to note that government requirements are subject to change. Investors therefore should consult with the relevant authorities and/or local counsel to confirm investment application requirements on a case-by-case basis. This is especially true in China, where the government has decentralized, adjusted, or cancelled many investment-related approvals and procedures in recent years. The recently created Shanghai Free Trade Zone also replaces the current investment approval process with a “negative list” approach, which eliminates all but filing obligations for investments (within the zone) for industries not included on the list.

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8 MOFCOM and NDRC also administer a Catalogue for Foreign Investment in the Western and Central Regions.
EUROPEAN UNION

There are no filing obligations on the EU level specific to foreign investment, but EU Member State laws create certain foreign investment filing obligations on the EU Member State level.

FRANCE

France’s foreign investment review process is structured around the protection of seventeen sensitive national security sectors. A foreign investor seeking to invest in one of these sectors is required to notify the Ministry of Economy, Finance and Employment (Ministry of Finance) of its intentions and may be subjected to a review process if the Ministry believes the transaction will harm national interests. Additionally, several sectors, which are not related to national security, have restrictions that may pose challenges to prospective investors.

In addition to France’s relatively structured foreign investment review process, political considerations play a large role in determining whether a foreign investment transaction can go forward. There are several prominent examples of deals in which political opposition, both in the executive and legislature, has led to increased obstacles or outright abandonment. Foreign investors must be wary of the political climate when considering a high-profile investment in France, especially if the proposed investment is in a culturally and historically important business or sector. Foreign investors considering investing in France should consider developing relationships with the Ministry of Finance and political leaders well in advance to counteract any negative publicity that may surround an investment from a foreign investor. Opposition to high-profile foreign investment can become politicized, leading to pressure on a foreign investor to abandon a deal.

Despite this, France remains a welcoming place for foreign investment for most investors and France continues to attract high levels of foreign investment.

GERMANY

The Federal Republic of Germany prides itself on having an open foreign investment regime, which it considers as one of the cornerstones of its economic development strategy. The German foreign investment regime was designed to place as light a burden as possible on foreign investors. There are no special rules governing foreign investments by state-owned enterprises or sovereign wealth funds. Mandatory notification applies only to the defense industry. While information on foreign investment notifications, approvals or prohibitions is not published, it is estimated that in the last five years more than 100 foreign investments were reviewed on national security grounds. There have been no reports of foreign investment prohibitions on national security grounds under the current legal framework.
**JAPAN**

In Japan, foreign investment is primarily governed by the Foreign Exchange and Foreign Trade Act (Act No. 228 of December 1, 1949). Under the Act, the Minister of Finance (the “Minister”) has jurisdiction over foreign investment decisions. The Minister’s enforcement power is generally triggered if the investment involves (i) an acquisition of 10 percent or more of the outstanding shares of a public company; (ii) an acquisition of shares of a private company; or (iii) a loan exceeding ¥0.1 billion for a period of more than one year. If one of these thresholds is met, a foreign investor must then either notify the Minister in advance of making the investment or report to the Minister post investment, depending on the industry involved. Advance notification is required in the following industries: weapons and arms, airplanes, satellites, nuclear energy, agriculture, livestock, fisheries, oil and gas, utilities, IT, postal services, banking, insurance, and certain types of manufacturing. It is acceptable to report an investment post transaction in all other industries, unless they are governed by sector-specific regulations. For example, the Civil Aeronautics Act limits foreign investors’ shareholdings of air transport service companies to one-third of outstanding shares. Under the Mining Act, only Japanese citizens or entities may hold mining rights.

In investments for which prior notification is required, the foreign investor must notify the Minister within six months of the investment. The waiting period is generally thirty days. If national security issues are not implicated, the Minister may shorten the waiting period to two weeks. Otherwise, the Minister may extend the waiting period for up to five months, and alter, prohibit or terminate a foreign investment if such investment is likely to impair national security, disturb the maintenance of public order, hinder public safety, or adversely affect the management of the Japanese economy. If a foreign investor fails to notify the Minister when required or provides false information, imprisonment of up to three years and/or a fine not exceeding ¥1 million may be imposed.

Where an investment is reportable post transaction, the foreign investor must report to the Minister within fifteen days of completing the investment. Failure to report or providing false information may be punishable by imprisonment not exceeding six months or a fine not exceeding ¥500,000.

**UNITED KINGDOM**

Unlike countries that have separate regimes for reviewing investments by foreign investors, the UK subjects all transactions to the same review process. The review of transactions for public interest considerations is closely intertwined with the competition review performed by the Competition and Markets Authority. However, a great deal of discretion is left to the Secretary of State for Business, Innovation and Skills (“SoS”) in investigating any of three types of public interest merger cases. The major sectors involved in public interest review are the national security, media and financial sectors. There is also a specialized merger review regime for the water and sewerage sector. Although notification of a merger for competition or public interest
purposes is voluntary, the government has shown a willingness to intervene in these sectors and impose conditions as necessary. A foreign investor should, therefore, consider the public interest review regime when investing in any of these sectors. Review by the SoS can be a protracted and highly political process, which may lead to modification, delay, or even abandonment of the transaction. Nevertheless, for the past decade the UK has received more foreign direct investment than any other country in Europe.
National Interest Review

Most sovereign nations have some mechanism to limit foreign investment that poses a threat to the nation’s security or national interests. The line between national security and key national interests isn’t always clear and may change as issues evolve. In some jurisdictions, this authority rests with the executive branch or head of state. In other jurisdictions, a specialized agency or branch of the military may conduct a national security review in the first instance. In certain jurisdictions, the same agency is also responsible for other types of reviews. Often, the standards for conducting these reviews are loosely defined. Usually, the decision maker is not required to disclose the reasons for its decisions. Moreover, in some jurisdictions there are no deadlines for reaching a decision, while in others, the initial deadlines may be repeatedly extended. And, because reviews of this kind can become politically charged, it is not uncommon for legislators, public interest groups, and the press to weigh in. The following is an overview of the national interest review process in each of the jurisdictions surveyed.

UNITED STATES

Which agency is responsible?

CFIUS

The Committee on Foreign Investment in the United States (“CFIUS” or the “Committee”) is a federal inter-agency committee, originally established by President Gerald Ford in 1975 via Executive Order 11858. The Executive Order gave CFIUS “primary continuing responsibility within the Executive Branch for monitoring the impact of foreign investment in the United States, both direct and portfolio, and for coordinating the implementation of United States policy on such investment.” Exec. Order No. 11,858, Pres. Exec. Order, May 07, 1975. In 1988, Congress amended section 721 of the Defense Production Act of 1950 (“Section 721”) to give the President the statutory authority to review and investigate transactions with foreign persons that may affect US national security, and to prohibit foreign takeovers that the President deems a threat to US national security. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107, 1425 (1988), codified as amended at 50 U.S.C. app. § 2170. In 2007, Congress again amended Section 721 with the Foreign Investment and National Security Act of 2007 (“FINSA”), which (among other things) made clear that the term “national security” should be construed to include issues relating to homeland security, including the impact of the transaction on “critical infrastructure,” defined by the statute to mean “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.” Pub. L. No.

Under FINSA, CFIUS can review and investigate “any merger, acquisition, or takeover … by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States” (a “covered transaction”). 50 U.S.C. app. § 2170(a)(3); see also 31 C.F.R. § 800.207. An “entity” engaged in interstate commerce in the United States is termed a “U.S. business.” 31 C.F.R. § 800.226; 31 C.F.R. § 800.211. The concept of “control” is central to CFIUS jurisdiction, and the Treasury Department regulations implementing FINSA define the term broadly.

The regulations define “control” as the “power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity[].” Id. § 800.204(a). A foreign person may be found to control a “U.S. business” in a number of ways, including not only majority ownership, but also minority ownership, when accompanied by board control or significant governance rights, such as the power to direct or veto major decisions. See id. § 800.204, Example 4.

The issue of foreign government control is of particular concern. Under FINSA, following a 30-day review, an additional 45-day investigation is presumed if CFIUS finds the transaction to be “foreign government-controlled.” The investigation can be waived, however, if the Deputy Secretaries of the lead agencies for the review jointly determine that the transaction “will not impair” the national security of the United States. 50 U.S.C. app. § 2170(b)(2)(D)(i); see also 31 C.F.R. § 800.503(b)-(c). A “foreign government-controlled transaction” is a transaction that “could result in the control of any person engaged in interstate commerce in the United States by a foreign government or an entity controlled by or acting on behalf of a foreign government.” 50 U.S.C. app. 2170(a)(4); 31 C.F.R. § 800.214. In finding that a transaction is foreign government-controlled, CFIUS may consider (1) government-held “golden” or “special” shares that carry extraordinary rights, (2) shareholder or contractual agreements, or (3) the statutes or regulations of the foreign nation. 31 C.F.R. § 800.402(c)(6)(iv)(D).

CFIUS is only authorized to review transactions by foreign persons that could result in control of a US business. See 50 U.S.C. app. § 2170(b)(1); 31 C.F.R. § 800.101, 800.301, 800.503(b). A US business is defined as any “entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce.” 31 C.F.R. § 800.226. (Emphasis supplied.) A foreign acquisition of a foreign entity may therefore be subject to CFIUS review if the acquired foreign entity owns or controls a US business and control of such foreign entity would confer control over that US business. An asset purchase may constitute a covered transaction and trigger CFIUS jurisdiction
if the assets, taken together, constitute a US business. *See id.* § 800.301(c), Examples 4, 6, and 7. Additionally, a joint venture involving a foreign person may constitute a covered transaction if one party to the joint venture contributes a US business and a foreign person could control the joint venture. *Id.* at § 800.301(d).

The voting member-agencies of CFIUS are the US Department of the Treasury, which chairs the Committee, the US Departments of Justice, Homeland Security, Commerce, Defense, State, and Energy, the Office of the US Trade Representative, and the Office of Science and Technology Policy. 50 U.S.C. app. § 2170(k)(2). The Director of National Intelligence and the Secretary of Labor serve as non-voting, ex-officio members of the Committee. *Id.* § 2170(k)(2)(H),(I). Additionally, the President may appoint “heads of any other executive department, agency, or office, as the President determines appropriate[.]”*Id.* § 2170(k)(2)(J). Currently, pursuant to Executive Order, the Office of Management and Budget, Council of Economic Advisors, National Security Council, National Economic Council, and Homeland Security Council observe CFIUS proceedings and, as appropriate, may participate in CFIUS reviews. Exec. Order No. 13,456, 3 C.F.R. 13,456 (2008). President Obama has not modified the makeup of the Committee since it was constituted by President George W. Bush in Executive Order 13,456 (which added the Office of the US Trade Representative and the Office of Science and Technology Policy to CFIUS), but has the statutory authority to do so.

**“FOCI” (Foreign Ownership, Control or Influence)**

Foreign acquisition of a US contractor holding a facility security clearance (“FCL”) will trigger not only CFIUS review, but also an industrial security review by the US Government agency with oversight responsibility for the FCL. Indeed, even if a foreign investment does not warrant CFIUS review (e.g., because the transaction will not result in foreign control of the cleared company), the investment will still trigger an industrial security review. Foreign investments as low as 5% will prompt an in-depth review of FOCI at the cleared entity. If the US Government determines that the company is under FOCI, maintaining the FCL will require the cleared entity and the foreign investor to take measures to mitigate or negate the FOCI. The chief purpose of these efforts is to address FOCI that could otherwise “undermine US security and export controls,” allowing “unauthorized access to critical technology, classified information, and special classes of classified information.” DoD 5220.22-M “National Industrial Security Program Operating Manual” (hereinafter “NISPOM”) 2-300.

Whether FOCI mitigation or negation is required is determined by the degree of FOCI, not by the relationship between the United States and the country that is the source of FOCI. Foreign investment that gives the investor the ability to elect one or more directors will require FOCI mitigation or negation, even if the foreign investor is headquartered in an allied country. The level of FOCI mitigation or negation will be influenced, however, by the relationship between the United States and the country that is the source of FOCI, the classified and export-controlled information at risk, the investor’s and target’s records of cyber security, the degree (if any) of
foreign government control, and similar factors, as described in 32 C.F.R. §§ 117.56(b)(3)(i)(A)-(H).

The Department of Defense ("DoD") Defense Security Service ("DSS") oversees plans for the mitigation or negation of FOCI (FOCI action plans9) at most cleared facilities. DSS has oversight responsibility for contractors to DoD and more than 25 US Government departments and agencies. In addition to DSS, the Department of Energy ("DOE"), the National Nuclear Security Administration ("NNSA"), and the Central Intelligence Agency ("CIA") are each Cognizant Security Agencies ("CSA"), which independently implement FOCI action plans for contractors with access to classified information under their cognizance.10 DSS agreements, in practice, often serve as the models for other agencies. The FOCI action plans of other CSAs thus generally mirror the form of DSS agreements, but need not do so.

If classified information held or accessed by an entity falls under the cognizance of more than one CSA (e.g., a contractor with both DoD and DOE classified contracts), the CSA “shall be determined by the preponderance of classified contract activity per agreement[.]” 32 C.F.R. § 2004.22(a). This decision is made between and among the CSAs with an interest in the information at issue.

A Note on Export Controls

Export control regulations govern the shipment, transmission, and retransmission of items, technology, and information to locations outside of the US, as well as the disclosure of export-controlled information or the transfer of export-controlled items to foreign persons in the US. The authority to implement and enforce the principal US export control regulations is primarily split between the Department of Commerce and the Department of State:11 The Commerce Department regulates the export of items and technology that are commercial or “dual use” products (i.e., products with commercial and military applications), and the State Department regulates the export of items and technology that are designated on the United States Munitions List ("USML"), provide the “equivalent performance capabilities of a defense article” on the

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9 “Methods or agreements that can be applied to mitigate or negate the risk of foreign ownership or control to allow a US contractor to maintain or a US company to be granted an FCL.” 32 C.F.R. § 117.53. A FOCI action plan may include a Commitment Letter, a FOCI mitigation agreement, and supplemental plans such as a Technology Control Plan. FOCI mitigation agreements along with each type of supplemental plan are described below.

10 The Atomic Energy Act restricts the grant of licenses where the Nuclear Regulatory Commission ("NRC") "knows or has reason to believe [the applicant] is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government." 42 U.S.C. § 2133(d). The NRC maintains its own regulatory regime governing FCLs for licensees and others having a need to use, process, store, reproduce, transmit, transport or handle NRC classified information. See 10 C.F.R. § 95.

11 Certain nuclear exports may fall outside this binary regime and instead be subject to the jurisdiction of the Department of Energy or the NRC. In addition, the Department of the Treasury administers trade sanctions and embargoes imposed by the US Government.
USML, are “specially designed” for certain USML items, or otherwise provide a “critical military or intelligence” advantage.12

**Commercial and Dual Use Items:** The Export Administration Act of 1979 authorizes the Department of Commerce to regulate the export and re-export of commercial items and technologies, including: (1) items and technologies that have military as well as commercial applications, and (2) items and technologies that are exclusively used for military applications, but do not warrant control by the US Department of State, because they are neither on the UMSL nor provide the “equivalent performance capabilities” of anything on the USML, were not “specially designed” for certain USML items, and do not provide a critical military or intelligence advantage. See 15 C.F.R. § 730.3; 22 C.F.R. §§ 120.3; 120.41. The Commerce Department implements this authority through the Export Administration Regulations (“EAR”), 15 C.F.R. parts 730-774.

Depending on the product and its destination, a license may or may not be required for export under the EAR. Most items subject to the EAR do not require a license to export, unless the end-user is subject to trade sanctions or is located in a country subject to sanctions or the item is being exported for a restricted end use (such as nuclear activities). Nonetheless, items identified on the Commerce Control List (“CCL”), maintained by the Commerce Department’s Bureau of Industry & Security (“BIS”), may require an export license depending on the product’s destination. Each product on the CCL is assigned an Export Control Classification Number (“ECCN”), which must be cross-referenced with the “Country Chart” in part 738 of the EAR. Depending on the ECCN, the Country Chart identifies which products may be barred from export to certain countries, depending on the reasons for control (e.g., national security, regional stability, crime control, and anti-terrorism). See 15 C.F.R. part 738, Supp. No. 1.

**Military Items:** The Department of State Directorate of Defense Trade Controls (“DDTC”) implements the Arms Export Control Act (“AECA”) through the International Traffic in Arms Regulations (“ITAR”). The ITAR governs the export of defense articles (defined below), which: (1) are identified on the USML, or (2) provide the equivalent performance capabilities of a defense article on the USML. 22 C.F.R. § 120.3(a), (b).13 The ITAR also governs related

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12 22 C.F.R. §§ 120.3, 120.6, 120.41. The USML is contained at 22 C.F.R. § 121.1. Note that the US export control regime is currently undergoing significant regulatory reform, including the reclassification of many items and technologies from “military” to commercial or dual-use, placing these items and technologies under the jurisdiction of the Department of Commerce.

13 The Department of State is currently revising the USML to clarify the treatment of items that are “specially designed” for use in or with other defense articles. These revisions will exclude from the USML, among other things: fasteners (e.g., screws, bolts, and nuts) used in or with defense articles; articles that have the same function, performance capabilities, and the same or equivalent form and fit as a commodity or software that is used in or with a commercial commodity; and commodities or software that were or are being developed with knowledge that they were or will be for use in or with both military and commercial items. 22 C.F.R. § 120.41(b)(2), (3), (4).
Finally, the ITAR governs “defense services,” which are defined as:

“(1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) the furnishing to foreign persons of any technical data … whether in the United States or broad; or

(3) military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.” 22 C.F.R. § 120.9.

The ITAR restricts the above exports both abroad and to foreign persons in the US, which includes natural persons who are not permanent residents of the US and who are not “protected individuals,” as defined by 8 U.S.C. § 1324b(a)(3), and foreign corporations, business associations, partnerships, trusts, societies, “or any other entity or group that is not incorporated or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of foreign governments (e.g., diplomatic missions).” 22 C.F.R. § 120.16.

Unlike commercial items under the EAR, which often may be exported without a license, the export of defense articles and services, with limited exceptions, will require authorization from DDTC regardless of the end-user. The location of the end-user is nonetheless important. DDTC maintains a list of specific countries to which the export of some or all defense articles and services is prohibited for various reasons, including national security, anti-terrorism, and UN Security Council embargos. Id. § 126.1. For example, the United States maintains an arms embargo against China that prohibits the export of ITAR-controlled products and services. Pursuant to the limited exceptions mentioned above, however, certain defense articles and services may be exported to specific countries without a license pursuant to various treaties, for

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14 “Technical data” includes information “required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles.” 22 C.F.R. § 120.10. It does not include “basic marketing information” on the function or purpose of a defense article, or “general systems descriptions.” Id. § 120.6. It does include, however, information in the form of blueprints, drawings, photographs, plans, instructions, models, and mockups. Id. §§ 120.6; 120.10.

15 On May 24, 2013, the State Department published for public comment a proposed amended definition of “defense service.” Amendment to the International Traffic in Arms Regulations, 78 Fed. Reg. 31,445 (May 24, 2013) (to be codified at 22 C.F.R. § 120.9). If adopted, the rule would narrow the definition of a “defense service” in several important respects. For instance, the proposed rule would expressly exclude as a defense service training foreign persons “basic-level maintenance” of defense articles, as well as “servicing” of commercial or dual-use items that have been incorporated or installed into a defense article. 78 Fed. Reg. 31,449 (to be codified at 22 C.F.R. § 120.9(b)(1), (3)).
example, those with Canada, the United Kingdom, and Australia. See id. §§ 126.5, 126.15 – 12.17.

The treatment of assets under US export control laws can have a significant impact on the treatment of an acquisition. A Chinese-controlled company, by way of example, would encounter significant obstacles if it sought to acquire a company that manufactured or dealt in ITAR-controlled technology.

**Factors considered**

**CFIUS**

CFIUS may review any transaction that “could result in foreign control of any person engaged in interstate commerce in the United States.” 50 U.S.C. app. § 2170(a)(3); see also 31 C.F.R. § 800.207. There is no de minimis threshold of ownership that triggers CFIUS review. The regulatory definition of “control” is not a bright line standard, and CFIUS casts a broad net. “Control” may be found in formal ownership interests, informal governance arrangements, and other arrangements. Control may be found with a minority ownership interest, for example, when it is accompanied by board control or significant governance rights, such as the power to direct or veto key decisions. See 31 C.F.R. § 800.204, Example 4. By way of further example, a foreign-controlled private equity fund that holds a minority share of a US business but has the authority to terminate significant contracts could be deemed to control the US business for purposes of CFIUS. See Id., Example 3. Moreover, the fact that an acquiring entity is also a US business will not bar CFIUS review if the acquiring entity is controlled by a foreign person.

Filing notice with CFIUS is ostensibly a voluntary process initiated by the parties to a transaction. Nevertheless, where the Committee believes that a transaction may raise national security considerations, it may request a filing from the parties. In addition, even in the absence of a filing, any member of the Committee may file an agency notice initiating a review. Further, CFIUS can and has initiated post-closing reviews. The President has the authority to take action to suspend or prohibit a covered transaction (including a completed transaction) that threatens to impair the national security based upon a finding by the President that the foreign interest exercising control presents a credible threat to national security. 50 U.S.C. app. §§ 2170(d)(4)(A)-(B). A number of factors can influence the number of filings in any given year, including the state of the economy. Post-FINSA, the number of notices filed with CFIUS each year, as reported in the Committee’s annual reports, has ranged between 65 and 155.

For each transaction, Treasury designates a “lead agency,” in addition to itself, for the review. In order to reach the determination that there are “no unresolved national security concerns,” the standard that CFIUS uses for concluding action on cases, CFIUS (or the lead agency or agencies on behalf of the Committee) may “negotiate, enter into or, impose, and enforce any agreement or condition with any party to the covered transaction in order to mitigate any threat to the national
security of the United States that arises as a result of a covered transaction” (e.g., measures that restrict foreign person access to sensitive data (whether or not the data is export-controlled), appointment of independent outside directors, divestment of lines of business or business units to US buyers, etc.). *Id.* § 2170(l)(1)(a); *see also* 31 C.F.R. § 800.101.

Most transactions clear CFIUS review without requiring mitigation. Nevertheless, if the Committee determines that a national security risk is present, it may seek to negotiate a mitigation agreement with the parties or unilaterally impose conditions that must be accepted if the transaction is to be cleared and go forward. Mitigation may be required even if the transaction does not involve classified or export-controlled technology. In some (but not all) cases, mitigation may take the form of a formal National Security Agreement or a simple Letter of Assurances or Letter of Agreement. If CFIUS finds that a national security risk cannot be mitigated, whether because it is not possible or the parties refuse to agree to the mitigation, CFIUS can impose mitigation on the parties without their consent, or send a report to the President for a decision, which could include suspending or prohibiting the transaction (including unwinding a completed transaction). *See* 31 C.F.R. §§ 800.501(a), 800.503, 800.506(b)(1). When the parties are advised that CFIUS will send a report to the President, and no mitigation is possible, the parties frequently abandon the transaction or choose to unwind it. To date, there have been only two instances in which the President has acted to prohibit a transaction, but other transactions have been abandoned or unwound when it was clear that CFIUS would send a report to the President.

Acquisitions of “critical infrastructure” receive heightened scrutiny and are presumed to merit the additional 45-day investigation period (discussed below). 50 U.S.C. app. § 2170(b)(2)(B)(i)(III); 31 C.F.R. § 800.503(b)(2). The law defines “critical infrastructure” as “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.” 50 U.S.C. app. § 2170(a)(6); *see also* 31 C.F.R. § 800.208. The term reaches businesses within the energy, telecommunications, and transportation sectors, among others, and can reach sectors that are not commonly associated with national security, such as food.16

Despite clearing CFIUS, a transaction may still face significant national security hurdles. A target with an FCL may lose its clearance if the buyer fails or refuses to agree to a FOCI action plan that is acceptable to the US Government. In other cases, even if the target retains its FCL, it may be barred from receiving contracts that require access to certain highly classified contracts because customers refuse to support National Interest Determinations (“NID”), discussed below.

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FOCI

The NISPOM, among other policies and regulations, governs the protection of classified information entrusted to US Government contractors and subcontractors. See NISPOM 1-100. To access or possess classified information or perform on a classified contract or subcontract (i.e., a contract that requires access to classified information or to classified areas), a contractor must hold an FCL. NISPOM 2-100. Even simple tasks, such as janitorial services, may require a clearance if the contract requires access to areas where classified material is stored or accessible.

The industrial security and FOCI review process, discussed below, is only implicated when the acquired company has an FCL or is pursuing an FCL. Additionally, however, even if the company has an FCL, a change in FOCI may require changes to an existing FOCI action plan. This is an important consideration if classified contracts are a significant factor in the valuation of the company.

The government will deem a contractor to be under FOCI whenever a foreign interest has the ability, whether or not exercised, and, however, “exercisable” (e.g., through contractual arrangements or ownership of the contractor’s securities), “to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.” NISPOM 2-300.a. FOCI is presumed in majority foreign ownership cases, and in any case in which a foreign owner has the power (whether or not exercised) to secure representation on the board. See NISPOM 2-301(d). A company typically may not hold an FCL unless its senior management official is a US citizen and possesses a personnel security clearance at the level of the FCL. NISPOM 2-104. Further, the presence of foreign management officials generally is a FOCI consideration, as are foreign financing and a foreign customer base.

In practice, the government initiates a FOCI review for any investment that equals or exceeds 5%, although not all minority investments require formal mitigation. A target company must address FOCI, however, in order to maintain its FCL. See 32 C.F.R. § 117.56(b)(3).

Under the NISPOM, a company under FOCI cannot access classified information until the FOCI has been properly mitigated or negated, typically through one of several types of FOCI mitigation or negation plans. NISPOM 2-300.c. The US Government, not the contractor, determines the appropriate means of FOCI mitigation or negation. Within limited parameters, the contractor may negotiate the terms of the plan with the government, but the outlines of the plans are largely fixed.
In almost all cases, one of following conventional FOCI mitigation or negation plans may be required to mitigate or negate FOCI:

- **Board Resolution** (32 C.F.R. § 117.56 (b)(4)(iii)(A); NISPOM 2-303.a) – This is generally used where the foreign interest does not own or control voting interests sufficient to guarantee representation on the company’s governing board. It requires no change in corporate governance, but does require formal acknowledgment of the foreign interest and the implementation of policies and procedures to protect classified and export-controlled information against unauthorized disclosure.

- **Security Control Agreement ("SCA")** (32 C.F.R. § 117.56 (b)(4)(iii)(B); NISPOM 2-303.c) – This is often used for companies that are “not effectively owned or controlled by a foreign interest,” where the foreign interest is nevertheless entitled to representation on the company board. SCAs require at least one independent Outside Director\(^{17}\) and restrictions on visits and on shared operations\(^{18}\) and locations\(^{19}\) between the cleared company and the foreign investor and its affiliates. Communications\(^ {20}\) with the foreign shareholder may also be restricted.

- **Special Security Agreement ("SSA")** (32 C.F.R. § 117.56 (b)(4)(iii)(C); NISPOM 2-303.c) – This is used for companies “effectively owned or controlled by a foreign interest.” Under an SSA, the parent company’s control of the cleared company is constrained: management control can only be exercised through “Inside Directors,” who may be foreign persons, appointed to the cleared company’s board by the parent to represent the parent. The number of Inside Directors cannot equal or exceed the number of Outside Directors. 32 C.F.R. § 117.56(b)(6)(iii). SSAs also restrict visits and communications between the cleared company and its subsidiaries and affiliated

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\(^{17}\) Outside Directors are: “(a) Resident US citizens who can exercise management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively insulated from the company; (b) Except as approved by the CSA in advance and in writing, completely disinterested individuals with no prior involvement with the company, the entities with which it is affiliated, or the foreign owner; and (c) Issued a [personnel security clearance (“PCL”)] at the level of the facility’s FCL.” NISPOM 2-305.

\(^{18}\) When a company cleared under an SCA, Special Security Agreement, or Proxy Agreement (or potentially a Voting Trust) and its parent or affiliate companies propose to provide administrative services to one another, share third party vendors or employees, or team on commercial ventures, such operations requires DSS approval in an “Affiliated Operations Plan” or AOP (also known as an Administrative Support Agreement). 32 C.F.R. § 117.56(b)(5)(ii)(D)(9).

\(^{19}\) When a company cleared under an SCA, Special Security Agreement, or Proxy Agreement (or potentially a Voting Trust) and its parent or affiliate companies are located within a proximity of each other that may reasonably inhibit compliance with the FOCI action plan (e.g., in the same office building or campus), such proximity requires DSS approval in a “Facility Location Plan” or FLP.

\(^{20}\) Companies cleared under a Special Security Agreement, Proxy Agreement, or Voting Trust (or potentially an SCA) are required to implement a DSS-approved Electronic Communications Plan (“ECP”) to monitor electronic communications between representatives of the cleared company and representatives of the parent or affiliate companies to ensure that such communications do not inadvertently or purposefully transmit classified or export-controlled information, and that such communications are not used to exert foreign control or influence prohibited by the FOCI action plan. 32 C.F.R. § 117.56(b)(5)(ii)(D)(8).
companies that operate outside the SSA, with Outside Director oversight. SSAs have access limitations (discussed below), meaning that the cleared company must obtain an NID (defined below) prior to accessing “proscribed information.” Despite their constraints, foreign investors often favor SSAs over Proxy Agreements (see below) because they allow direct representation on the board.

- **Proxy Agreement (32 C.F.R. § 117.56 (b)(4)(iii)(D); NISPOM 2-303.b)** – This is generally used for companies with majority foreign ownership or control where highly sensitive information or programs are present, where the owner is controlled by a foreign government, or where the foreign investor’s record of compliance with US law or its foreign affiliations raises concerns. Under the Proxy Agreement, the shareholder’s voting rights are conveyed to independent Proxy Holders under a limited grant of proxy; the shareholder must grant most rights associated with ownership to the Proxy Holders, although the Proxy Holders do not have the independent right to take certain actions reserved to the shareholder (e.g., declaring bankruptcy, acquiring or selling businesses, or altering the company’s charter documents). Proxy Agreements restrict visits and communications between the cleared company and the shareholder, and the shareholder is barred from representation on the board. Proxy Agreements, however, have no access limitations, so companies operating under Proxy Agreements may receive contracts that require access to proscribed information without obtaining NIDs.

- **Voting Trust (32 C.F.R. § 117.56(b)(4)(iii)(D); NISPOM 2-303.b)** – This is used only in rare and extreme circumstances, under which the threats posed by the foreign interests render a company ineligible for any other FOCI mitigation or negation plan. Under a Voting Trust, the foreign owner transfers full legal title of its company to US Government-approved Trustees. A Voting Trust restricts visits and communication between the cleared company and the foreign interest and the foreign interest has no representation on the cleared company board. There are no access limitations under a Voting Trust; this allows companies operating under Voting Trusts to be awarded contracts requiring access to proscribed information without an NID.

In acquisition cases involving cleared target companies, approval and execution of an acceptable FOCI mitigation plan is necessary for the target to secure future classified contracts, and to prevent the possible loss of existing classified contracts. If a target has an existing FCL at the

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21 Proxy Holders are: “(a) Resident US citizens who can exercise management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively insulated from the company; (b) Except as approved by the CSA in advance and in writing, completely disinterested individuals with no prior involvement with the company, the entities with which it is affiliated, or the foreign owner; and (c) Issued a PCL at the level of the facility’s FCL.” NISPOM 2-305.

22 Trustees are: “(a) Resident US citizens who can exercise management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively insulated from the company; (b) Except as approved by the CSA in advance and in writing, completely disinterested individuals with no prior involvement with the company, the entities with which it is affiliated, or the foreign owner; and (c) Issued a PCL at the level of the facility’s FCL.” NISPOM 2-305.
time of acquisition and FOCI concerns remain unmitigated, the US Government may invalidate or even terminate the FCL and will not grant a new FCL until the FOCI issues are favorably resolved. If invalidated, a contractor may generally complete performance on existing classified contracts if “the affected [Government Contracting Activity23 (“GCA”) ] determines that continued access to classified material is required[.]” 32 C.F.R. § 117.56(b)(2)(iv). If invalidated, contractors cannot bid on or be awarded new classified contracts. Id. Typically, invalidated contractors may not obtain new personnel security clearances for its employees until FOCI issues are addressed and the FCL is reinstated.

**National Interest Determination Reviews.** Foreign-controlled entities under an SSA (defined above) must obtain NIDs from the applicable GCA for contracts requiring access to “proscribed information” (i.e., Communications Security (“COMSEC”) information except for Controlled Cryptographic Items when unkeyed or utilized with unclassified keys, Restricted Data, Top Secret, Sensitive Compartmented Information, and Special Access Program information). 32 C.F.R. § 2004.22(c). A GCA will conduct an NID review in coordination with the owner of the proscribed information. NIDs are generally tailored to a specific contract, program, or project, but under narrow circumstances, a GCA can issue an NID that is not contract, program, or project specific (a “blanket” NID). Directive Type Memorandum 15-002, Attachment 2, 2.f. NIDs are required for new contracts issued to a company that has (or is in process for obtaining) an FCL under an SSA and for existing contracts when a cleared company is acquired by a foreign interest and the proposed or agreed-upon mitigation plan is an SSA. 32 C.F.R. § 2004.22(c)(1).

The standard that GCAs must use in deciding whether to authorize a foreign-controlled company to access proscribed information under NIDs has changed over time. DoD has recently modified the standard to state that GCAs will confirm that disclosure is “consistent with the national security interests of the United States.” 32 C.F.R. § 117.56(b)(4)(iii)(C)(1). Previous standards required the GCA to demonstrate that the company’s access to proscribed information either furthered, or did not harm, the national security of the United States. Meeting the current standard should prove to be less onerous for GCAs, ideally leading to increased timeliness in the NID process.

**Secretarial Waivers.** By statute, no contract that requires access to proscribed information may be awarded to companies that are foreign-government controlled. 10 U.S.C. § 2536(a). Under very rare circumstances, the Secretary of Defense or the Secretary of Energy, as appropriate, may waive this prohibition, among other circumstances, if “[t]he Secretary concerned determines that the waiver is essential to the national security of the United States[.]” Id. § 2536(b)(1)(A). The Department of Defense has taken the position, however, that foreign government-controlled entities operating under Proxy Agreements are not foreign government-controlled, and thus are

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23 Defined in NISPOM Appendix C as “[a]n element of an agency designated by the agency head and delegated broad authority regarding acquisition functions.”
not subject to Secretarial Waiver requirements; they may therefore perform on contracts that require access to proscribed information without a Secretarial Waiver (and, as with all companies operating under Proxy Agreements, without an NID). 32 CFR § 117.56(b)(11)(ii).

Other reviews conducted by same agency

CFIUS

CFIUS only conducts national security reviews of covered transactions.

FOCI

Although this section concerns mergers and acquisitions involving foreign interests, all companies that seek to obtain or maintain an FCL, regardless of ownership, are subject to a FOCI review during the FCL application process. DSS conducts annual site-specific reviews of companies operating under FOCI action plans.

Timetable for review

CFIUS

CFIUS strongly encourages companies to file a draft notice prior to formal submission of a filing – generally 5-7 days prior to the anticipated formal filing date in order to allow CFIUS to identify any significant issues for the government – and the parties – that have the potential to complicate review and may warrant changes to the filing. Following formal filing, CFIUS conducts a 30-day review. 24 50 U.S.C. app. § 2170(b)(1)(E). Initial reviews generally take the full 30 days; however, in rare instances, CFIUS may conclude action in less than 30 days.

If CFIUS determines within the 30-day review that no unresolved national security concerns are present, it will conclude action and notify the parties. CFIUS may determine, however, that the facts of the case require additional time for review – whether because, as noted below, investigation is presumed by statute and not waived, or because the lead agency or agencies simply desire more time to review the transaction. Id. § (b)(2). In these instances, the Committee will undertake an additional 45-day investigation. In the case of a foreign government-controlled transaction or a transaction involving critical infrastructure, investigations are presumed by statute, but the Deputy Secretaries of the lead agencies may

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24 CFIUS may determine that a transaction does not constitute a covered transaction (for example, because the acquisition does not involve a US business or because the acquisition will not result in foreign control of the acquired firm). In some cases, the parties may file transactions (or lenders may require filing) where jurisdiction is questionable, in order to get a formal determination from CFIUS that the transaction is not a covered transaction. Because covered transactions that are not reviewed and approved by CFIUS are open to review in perpetuity, filing may help to quiet investor concerns, and may have value in later financings or acquisitions.
waive the investigation if they jointly determine that the transaction “will not impair” the national security of the United States. *Id.* § 2170(b)(2)(D)(i); *see also* 31 C.F.R. § 800.503(c).

In the rare event that CFIUS sends a report to the President after completing an investigation, the President has 15 days to make a decision as to whether to take action. 50 U.S.C. app. § 2170(d)(2). To take action to suspend or prohibit a covered transaction, the President must find “credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security[.]” *Id.* § 2170(d)(4)(A). The President must also find that “provisions of law other than [Section 721] and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority to protect the national security in the matter[.]” *Id.* § 2170(d)(4)(B).

If CFIUS sends a report to the President and the President takes action, the actions and findings of the President are not subject to judicial review, although CFIUS is obliged to accord due process to the parties, where applicable, and due process challenges are possible. *Id.* § 2170(e). *See Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 987 F.Supp.2d 18 (D.D.C. 2013), *rev’d on other grounds*, 758 F.3d 296 (D.C. Cir. 2014).

With few exceptions, once CFIUS has concluded review of a transaction, it cannot re-open the review. 31 C.F.R. § 800.601. Note, however, that the Committee or the President may unilaterally initiate a review or investigation of any covered transaction that has been previously reviewed or investigated – at any time – (1) if the parties submitted false or misleading material information or omitted material information or (2) if a party intentionally and materially breaches a mitigation agreement or condition, the breach is certified by the lead agencies to the Committee, and the Committee determines that no other remedies or enforcement tools are available to address the breach. 50 U.S.C. app. § 2170(b)(1)(D). Nevertheless, barring such events, the conclusion of a CFIUS review operates as a safe harbor for the transaction. Absent fraud, “the President and committee may not initiate another review of the transaction.” *Ralls*, 987 F. Supp. 2d 18 at 28 (citing 50 U.S.C. app. § 2170(b)(1)(D)). By contrast, a covered transaction that is not reviewed by CFIUS is open to review in perpetuity. *Id.* § 2170(b)(1)(D)(ii).

**FOCI**

Acquisition of a cleared US entity by a foreign party will generally require concurrent efforts to address FOCI and CFIUS concerns, since the two processes trigger internal notification of the transaction to one another and to affected GCAs if NIDs are required.

Cleared companies are required to advise their CSAs whenever they enter into negotiations for a proposed merger, acquisition, or takeover by or with a foreign interest. NISPOM 2-302.b. The cleared entity must submit notification of negotiations, to include the “type of transaction under negotiation (stock purchase, asset purchase, etc.), the identity of the potential foreign interest investor, and a plan to [mitigate or] negate the FOCI.” NISPOM 2-302.b. It is advisable for the
Buyer and Seller to discuss proposed FOCI mitigation plans with the applicable CSA in advance of the CFIUS process. In new-FCL cases, FOCI mitigation or negation must be completed prior to the issuance of an FCL. NISPOM 2-300.c. In most acquisition cases, however, FOCI mitigation or negation will not be completed before the sale closes. In such an event, the parties may be required to execute a Commitment Letter agreeing to interim mitigation measures in order to prevent invalidation of an existing FCL.

On average, FOCI action plans require between four and six months to negotiate and execute. Prior to the execution of a FOCI mitigation plan, companies must provide certain ancillary compliance plans where applicable. Such ancillary compliance plans may include:

(i) Implementation procedures, which are drafted by the cleared company as a guide to how the company will apply the FOCI action plan;

(ii) An Electronic Communications Plan (“ECP”), which details a cleared company’s mechanisms that ensure that electronic communications (e.g., email, telephone, facsimile) are not used for the unauthorized transfer of classified or export controlled information, or to exert FOCI in circumvention of the mitigation agreement (32 C.F.R. § 117.56(b)(5)(ii)(D)(8));

(iii) A Technology Control Plan (“TCP”), which describes policies and procedures in place at the cleared company to protect export-controlled information from unauthorized disclosure (Id. § 117.56(b)(5)(ii)(D)(7));

(iv) An Affiliated Operations Plan (“AOP”), which sets forth the service relationships (e.g., back office administrative services, shared employees) between the cleared company and the parent and affiliated companies, as well as the risk mitigation measures for each operation (Id. § 117.56(b)(5)(ii)(D)(9)); and

(v) A Facility Location Plan (“FLP”), which is used when a cleared company and its parent or affiliated companies operate in the same space, building, or campus, and describes the methods in place to ensure that there is adequate separation between the entities to allow the cleared company to continue to comply with the provisions of its mitigation agreement.

Each of these plans is designed to mitigate FOCI over management of the company, and to protect classified and controlled unclassified information against unauthorized disclosure. The FOCI mitigation process is outlined in an Interim Final Rule published by DoD on April 9, 2014. National Industrial Security Program, 79 Fed. Reg. 19,467 (Apr. 9, 2014) (codified at 32 C.F.R. part 117).

If DoD determines that a company is ineligible for an FCL based on FOCI, DSS will provide the company 30 days to submit a FOCI action plan and, if the plan is not received in that time, DSS
will terminate the initial FCL process or begin to process the company for revocation of the FCL. 32 C.F.R. § 117.56(b)(3)(iv). DSS must provide a company with written feedback on its FOCI action plan within 30 days. *Id.* § 117.56(b)(3)(vi). DSS must also provide the concerned GCAs with the proposed FOCI action plan and a 30-day opportunity to provide written objections to the plan. *Id.* § 117.56(b)(4)(v). As referenced above, if DSS informs a GCA of the need for an NID, the GCA is directed by regulation to provide an NID determination within 30 days, or within 60 days if coordination with other GCAs is required. *Id.* §§ 2004.22(c)(1)(iii), (c)(4)(i), (c)(4)(ii). Under the regulation, GCAs will also “initiate action to consider an NID at the pre-contract phase[.]” *Id.* § 117.56(b)(4)(iii)(C)(1).

**A Note on Export Control Requirements**

US export control regulations also may require notifying the relevant government agency if the target company is exporting US items, services, or technologies pursuant to authorizations from the Commerce Department or the State Department.

Commercial or dual use items: Companies exporting commercial or dual use items pursuant to export authorizations from BIS – or who have applied for such authorizations and the application is still pending – must report “[a]ny material or substantive change in the terms of the order, or in the facts relating to the transaction.” 15 C.F.R. § 748.6(f). Material changes include a change in the ownership of the company by merger or acquisition. *See id.*; 15 C.F.R. § 750.7(c)(2). The current licensee must submit a written request to BIS for the authorization to transfer any licenses, including the reason for the request for a transfer; the name and address of the entity to which the licenses will be transferred; relevant facts necessitating the transfer, and a signed letter from the transferee stating their eligibility to receive the license, acceptance of responsibility and obligations by such transfer, and certifications of compliance with the EAR requirements related to the transfer. *Id.* § 750.10. These requirements also apply to assets sales. *Id.* § 748.6(f).

**Military items:** If the acquired company is registered as a manufacturer, exporter, or broker under the ITAR, it must notify DDTC 60 days in advance of an intended sale or transfer to a foreign person of ownership or control of the registrant or any entity thereof (e.g., a subsidiary or business unit). 22 C.F.R. §122.4(b). DDTC requires a number of disclosures related to the notice. The registrant must also notify DDTC that the transaction has closed within five days of the transaction’s effective date. *Id.* §122.4(a).25

As under the EAR, changes to material facts provided in ITAR licenses will require, at minimum, amendment of the license. *Id.* § 123.25. A simple change of name will require notification to DDTC 5 days prior to the change. *Id.* § 122.4(a)(2)(i).

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25 The form and scope of the notice is prescribed by DDTC, with templates available on the agency’s website ([http://www.pmddtc.org](http://www.pmddtc.org)).
Coordination with other agencies

CFIUS

As noted above, CFIUS and DSS have concurrent, but separate processes, during which the two bodies may exchange relevant information. Additionally, CFIUS is an inter-agency committee, and may include, generally or on a case-by-case basis, the heads of any additional executive department, agency, or office determined appropriate by the President. 50 U.S.C. app. § 2170(k)(2)(J). Further, on a case-by-case basis, the Treasury Department, as CFIUS Chair, can consult with the heads of other departments, agencies, or independent establishments as appropriate. Id. § 2170(k)(6). After a pre-filing period and upon acceptance of the notice, the Treasury Department, as CFIUS Chair, distributes the notice to the members of CFIUS to begin the review. Treasury will also appoint early on in the process a lead agency or agencies for the review in addition to itself. Each agency then proceeds with its review, including canvassing its components to gather and assess information. Within 20 days of acceptance of the notice, CFIUS will obtain a threat assessment from the Director of National Intelligence that considers the level of threat posed by the foreign acquirer, the vulnerability of the US business, and the potential consequences of those two factors for US national security. CFIUS may also engage US Embassy staff in a foreign country to obtain information on the foreign acquirer.

In order to conclude action with respect to a covered transaction, CFIUS must certify to Congress that it has no unresolved national security concerns. 50 U.S.C. app. §§ 2170(b)(3)(A)-(B). The certification must provide a description of actions taken by the Committee and identify the factors that the Committee used to make its determination. Id. §§ 2170(b)(3)(C)(i)(I)-(II).

FOCI

DSS is required to provide affected GCAs with the opportunity to provide written objections to a proposed FOCI action plan. 32 C.F.R. § 117.56(b)(4)(v). If GCA responses are not provided within 30 days, DSS may move forward with the proposed FOCI action plan. Id. Additionally, as discussed above, when DSS has agreed to accept an SSA for an entity, or when a company operates under an SSA, DSS must obtain NIDs from GCAs in any case where the cleared company is operating under a contract that will require it to have access to proscribed information. 32 C.F.R. § 2004.22(c)(1)(iii). As discussed above, in cases where the company has contracts under the cognizance of more than one CSA (i.e., DoD, DOE, NNSA, CIA), the parties may jointly determine that a single CSA will execute and oversee the FOCI action plan and other NISP compliance measures. NISPOM 1-104.a.
Coordination with other jurisdictions

CFIUS

Confidentiality considerations strictly limit any communication between CFIUS and other jurisdictions respecting a notice. In foreign government-controlled transactions, however, the foreign government of the jurisdiction in which the buyer is organized (in its capacity as an owner) has in some instances engaged with CFIUS regarding the transaction. In addition, in the course of conducting due diligence, and without disclosing the existence of a CFIUS filing, CFIUS member-agencies have in certain instances made inquiries of state and local governments in matters in which a party to a transaction has contracts with state and local governments that may implicate national security.

FOCI

The United States has developed bilateral General Security Agreements (“GSAs”) and Industrial Security Agreements (“ISAs”) with a number of foreign jurisdictions to ensure the protection of foreign government-classified information held by the US Government or US contractors, as well as US classified information lawfully disclosed to foreign jurisdictions, according to standards that are mutually agreed by the two governments. See NISPOM 10-102. The existence of bilateral agreements (or lack thereof) is a FOCI factor that may affect the assessment of a FOCI mitigation agreement. 32 C.F.R. § 117.56(b)(3)(i)(F).

AUSTRALIA

The Foreign Acquisitions and Takeovers Act 1975 (“FATA”) provides the legislative framework for the Treasurer or his delegate to review foreign investment proposals to decide if they are contrary to Australia’s national interest. The Foreign Investment Review Board (the FIRB) is the body which examines proposals by foreign persons to invest in Australia and makes recommendations to the Treasurer in accordance with the FATA and Australia’s foreign investment policy (the “Policy”).

As of 4 May 2015, the Australian Taxation Office (“ATO”) is responsible for the residential real estate functions of the foreign investment framework – including audit, compliance and enforcement activities. Where a transaction falls within the banking or insurance sector, the Treasurer may delegate authority to the Australian Prudential Regulation Authority (“APRA”), and in practice APRA administers this approval process.

Threshold Tests

Under the FATA, all foreign investors must seek “approval” from FIRB for:

1. acquisitions that result in 15% or more of interests in shares in a company being held by a foreign person and its associates (or 40% or more being held by several foreign persons
and their associates) in a company that has the requisite connection to Australia, if the relevant company is valued at A$252 million or more (or A$1,094 million in the case of certain private prescribed foreign investors, as discussed below);

2. acquisitions of the assets of an Australian business valued at A$252 million or more (or A$1,094 million in the case of certain private prescribed foreign investors);

3. acquisitions of urban land located in Australia (or shares in urban land corporations or urban land unit trust estates), regardless of value, unless an exemption in the FATA or its Regulations applies;

4. acquisitions of cumulative interests (direct and indirect) in Australian rural land valued at $15 million or more by a foreign person and their associates; and

5. acquisitions that result in 15% or more of interests in shares being held by a foreign person and their associates (or 40% or more being held by foreign persons and their associates) in a primary production business valued at more than $1,094 million (in the case of US, NZ and Chilean investors) or more than $50 million (in the case of Singaporean and Thai investors).

Following the implementation of various free trade agreements between Australia and the US, New Zealand, Korea, Chile and Japan, certain individuals and entities from these countries (defined as ‘prescribed foreign investors’ in FATA and ‘prescribed investors’ in the Policy) enjoy a higher monetary threshold when it comes to triggering the FIRB approval requirement. Broadly speaking, this means that non-government related citizens of those countries and non-government related entities constituted or organised under the laws of those countries do not have an obligation to notify FIRB of a proposed acquisition in a “non-prescribed sensitive sector” if the value of the target is less than A$1,094 million (as opposed to A$252 million). Value thresholds are indexed annually according to inflation.

**Foreign Government Investors**

Regulation of foreign government investors under the FATA (including monetary thresholds) has effectively been superseded by the Policy. Under the Policy, proposals for direct investments by foreign government investors are required to be notified to FIRB regardless of value. This is the case even though notification is not strictly required under the FATA. While the Policy does not have legislative force, FIRB has made it clear that it will advise the Treasurer to consider the use of other Federal Government powers to ensure compliance.

Foreign government investors include: (1) a body politic of a foreign country; (2) entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15% or more; (3) entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct
or indirect) of 40% or more; and (4) entities that are otherwise controlled by foreign
governments, their agencies or related entities, and any associates controlled by them including
as part of a controlling group. Foreign government investors must also notify the Treasurer and
obtain prior approval to start a new business or to acquire an interest in land, including any
interest in a prospecting, exploration, mining or production tenement (except when buying land
for diplomatic or consular requirements).

**Coordination with other agencies**

As a matter of practice, the FIRB will generally notify the Australian Competition and Consumer
Commission (“ACCC”) of any proposed acquisitions for which it receives approval applications.
There is no compulsory antitrust / competition merger notification regime in Australia. However,
given FIRB’s practice, merging parties may consider making a voluntary notification to the
ACCC.

**National Interest Considerations**

The Treasurer has the authority to block proposals that are contrary to the “national interest,” or
can apply conditions to the way proposals are implemented to ensure they are not contrary to the
national interest (the majority of conditional approvals are in the real estate sector). There are
five national interest considerations that the Treasurer typically considers when assessing
whether foreign investment proposals are contrary to the national interest: (1) national security;
(2) competition; (3) other Australian Government policies, including tax and environmental
impact; (4) impact on the economy and the community; and (5) the character of the investor.

In relation to national security, the Treasurer considers the extent to which investments affect
Australia’s ability to protect its strategic and security interests. The Treasurer relies on advice
from the relevant national security agencies for assessments as to whether an investment raises
national security.

**Timetable for review**

The Treasurer has 30 days to consider a foreign investment application and make a decision. The
Treasurer may extend this period by up to a further 90 days by publishing an interim order (and
may extend the review period for successive 90 day periods). An interim order is only usually
issued if a proposal is particularly complicated or where further information is required. Where
FIRB does not consider it will need the full 90 days and the applicant does not wish for the
proposal to be publicised, FIRB is usually prepared to allow the applicant to withdraw and
resubmit its application, giving FIRB a further 30 days to consider the proposal. The Treasurer
will then inform the Applicant of his/her decision within 10 days of it being made. If a foreign
investor enters into an agreement that is conditional upon FIRB approval, that agreement will not
become binding until FIRB approval has been granted.
Other industries

In addition to the FATA, additional requirements and/or limits on foreign investments exist as follows: (1) foreign ownership in the banking sector must be consistent with the Banking Act 1959, the Financial Sector (Shareholdings) Act 1998 and banking policy; (2) aggregate foreign ownership in an Australian international airline is limited to 49%, and the Airports Act 1996 limits foreign ownership of some airports to 49%, with a 5% airline ownership limit; and cross-ownership limits between Sydney airport (together with Sydney West) and either Melbourne, Brisbane, or Perth airports; (3) the Shipping Registration Act 1981 requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator; (4) aggregate foreign ownership of Telstra is limited to 35% and individual foreign investors are only allowed to own up to 5%; and (5) any investment of 5% or more in the media sector must be notified (the media sector refers to daily newspapers, television and radio, including internet sites that broadcast or represent these forms of media).

Investments in sensitive industries may also raise concerns. Under the Foreign Investment Policy, which supports the FATA, the ‘prescribed sensitive sectors’ are: (1) media; (2) telecommunications; (3) transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia); (4) the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces; (5) the manufacture or supply of goods, equipment or technology able to be used for a military purpose; (6) the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and (7) the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities.

Furthermore, foreign investors seeking to buy real estate in Australia face additional requirements, depending on whether the real estate is commercial, rural or residential land. For commercial land, foreign investors must apply for FIRB approval before purchasing and developing vacant commercial land regardless of value, and before purchasing previously developed commercial real estate that is valued at $55 million or more, or $5 million if the real estate is heritage listed. In March 2015 the Policy was updated to include new thresholds for acquisitions of interests in Australian rural land and primary production businesses. Cumulative acquisitions by private foreign investors of rural land valued in excess of $15 million must be notified under the Policy (higher dollar thresholds apply for investors from US, NZ, Chile, Singapore and Thailand).

Case studies

Only rarely does the Treasurer block a foreign investment proposal. Since 2007 only 66 of 62,692 applications have been rejected - the bulk of these rejections being in the real estate
sector. Only three major corporate acquisitions have been rejected outright since 2000: (1) the bid by Archer Daniels Midland’s (“ADM”) to purchase Graincorp Limited (“Graincorp”) in 2013; (2) the Singapore Stock Exchange’s bid for the Australian Stock Exchange (“ASX”) in 2011; and (3) Shell Group’s takeover bid for Woodside Petroleum in 2001. In each of these high profile cases, the respective Treasurer cited ‘national interest’ concerns as the reason for blocking the proposed foreign investment.

Graincorp

On November 29, 2013, the Treasurer blocked a proposal by ADM to purchase Graincorp for $3.4 billion. Graincorp is a former government-owned grain handling business, which handles approximately 85% of grain exports from the east coast of Australia.

ADM had built a 19.85% stake in Graincorp and had reached an agreed position with Graincorp’s directors in relation to the proposed takeover after lengthy negotiations. The ACCC had decided that it did not have any competition concerns.

Due to the complexity of the proposal, ADM withdrew and re-submitted its application a number of times after its initial lodgement with FIRB in May 2013. The Treasurer also signed an interim order to extend the time period for a decision to be made regarding the proposal.

The Treasurer cited competition concerns associated with a foreign buyer acquiring such a significant market player in a changing industry, as well as community concern about the transaction as reasons why the ADM proposal was ‘contrary to Australia’s national interest.’ The Treasurer indicated that he would, however, be open to approving an acquisition by ADM of up to a 24.9% interest in Graincorp.

Singapore Stock Exchange’s bid for the ASX

In 2011, the Treasurer rejected the merger proposal by the Singapore Stock Exchange to acquire the ASX for $8 billion. The Treasurer represented the view that the proposal would diminish Australia’s economic and regulatory sovereignty, presenting a material risk to the ability to effectively regulate the ASX’s operations. The Treasurer was of the view that this risk was not justified, particularly due to the size and nature of the Singapore Stock Exchange, being a smaller exchange with a smaller equities market than the ASX.

Shell takeover of Woodside Petroleum

Shell Group’s proposal to increase its shareholding in Woodside Petroleum Limited to 56% was rejected by the Treasurer in 2001. The Treasurer expressed that Woodside Petroleum’s liquefied natural gas projects in the North West gas field had the capacity to become Australia’s biggest export, and therefore it was in the national interest to maintain Australian control of the project.
Recent developments

In February 2015 the Treasury released an options paper entitled “Strengthening Australia’s foreign investment framework.” The paper forms the basis of the Government’s consultation on reforms to the foreign investment framework. The proposed reforms include:

- Introducing new civil penalties and increased criminal penalties for foreign investors and third parties who breach the foreign investment rules.
- Introducing application fees of between A$10,000 and $100,000 for business and commercial real estate (more specifically, $10,000 for new business proposals and acquisitions of interests in urban land (excluding residential real estate), $25,000 for commercial real estate and business acquisitions, and $100,000 for business acquisitions where the value of the target’s assets are greater than A$1 billion).
- Introducing application fees of between A$5,000 and $100,000 for rural land/agribusiness investments.
- Establishing a national foreign ownership register for agricultural land.
- Lowering the monetary threshold for investments in agribusiness to A$55 million.
- Reconsidering the definition of ‘rural land’ and ‘urban land’ and new terms ‘agribusiness’ and ‘agricultural land’.

On May 2, 2015 the Government announced its intention to introduce legislation to implement many of the changes proposed in the Options Paper by December 1, 2015.

BRAZIL

Brazil does not have a broad “national interest” review procedure that could be invoked to block foreign acquisition of a conventional company. However, it has certain narrower national security reviews that apply in situations concerning the nation’s borders or concerning products that could be hazardous.

Brazil requires prior review and approval by the National Security Council of the Presidency for activities that are conducted within 150 kilometers of Brazil’s borders with other counties. The review is applicable to the following activities if carried out in the borderline areas: (a) activities that may jeopardize “national security,” (b) mining activities, or (c) “colonization” (i.e., activity with the purpose of promoting use of the land). Failure to obtain prior approval will render such activities void and will result in a substantial fine. Also, such activities are flatly prohibited and never may be conducted by companies (a) controlled by foreign entities or individuals, (b) of which more than one-third of its employees are non-Brazilian, or (c) in which the majority of its management is not composed of Brazilians. Accordingly, for foreign investors, this review process (and not the flat prohibition) will apply to acquisitions that do not confer control and do
not result in non-Brazilians taking over more than a third of the jobs or a majority of the management.

There is no deadline for completing these reviews and it is difficult to predict how long such a review will take, since there is relatively little experience or transparency. “National security” is not defined in the law and there is no limitation on the meaning it may be given. As for control, Brazilians must hold 51 percent of the corporate capital of companies carrying out restricted activities in borderline areas and foreign ownership in excess of 49 percent is prohibited.

Brazil also requires approval by the Controlled Products Surveillance Management of the Department of Logistics of the Brazilian Army for any transaction involving companies that produce and commercialize products classified as “dangerous” by the applicable regulation. There exists a list of 385 dangerous items, which may be changed at any time by the Department of Logistics. These are products that have destructive power or other features that create risk or require that they be restricted to individuals and companies demonstrating the technical, moral, and psychological capability to ensure public safety. The factors taken into account in the review include (a) whether approval is in the national interest; (b) the nature of the product being produced; (c) the applicant’s moral, technical, and financial fitness; (d) the applicant’s compliance with prior agreements; and (e) the possibility of military use for the product. Note that the chief of the armed forces in Brazil is the President, so that although an office of the army carries out the review process, the ultimate authority rests with the President.

There is no prohibition against foreign investors obtaining control over companies in this category. There also is no formal review process, but any change in control of a company producing or commercializing dangerous products would require a new authorization before that company would be permitted to engage in further transactions. There is no deadline for deciding upon such authorizations and the Department of Logistics has considerable discretion in making its decisions. (Note, however, that there are no restrictions on minority investments by foreign investors in companies of this nature.) In instances where a foreign company incorporates a subsidiary in Brazil to make or sell dangerous products, the Army is responsible for analyzing the advantages and disadvantages for economic development and enhancement of the national industrial capacity.

**CANADA**

**Which agency is responsible?**

In Canada, foreign investment is primarily regulated under the ICA. The ICA’s purpose is to provide for the review of “significant investments” in Canada by non-Canadians in a manner that encourages investment, economic growth and employment in Canada, as well as to review investments by non-Canadians that “could be injurious to national security.”
The Minister of Industry (the “Minister”) is responsible for administering the majority of investments subject to the ICA, supported by the Investment Review Division (the “IRD”) of Industry Canada, which is led by the Director of Investments. Investments pertaining to cultural businesses are overseen by the Minister of Canadian Heritage. In the case of review of investments by non-Canadians that “could be injurious to national security”, the Minister of Industry consults with the Minister of Public Safety and Emergency Preparedness.

Factors considered

Review Thresholds

Investments in Canada by foreign investors are either “reviewable” or “notifiable”, depending on whether there is an acquisition of control of a Canadian business and whether the applicable financial review threshold is met. The financial thresholds that trigger review under the ICA vary depending on whether the target Canadian business is a cultural business,26 the transaction is a direct or indirect acquisition,27 the investor is a state-owned enterprise (“SOE”),28 and/or the investor is a “WTO investor”.29

The tables below illustrate the transaction review process under the ICA. Investments are reviewable if i) a foreign investor (i.e., an investor controlled directly or indirectly by non-Canadians) acquires control of a “Canadian business” and ii) the value of the Canadian business in which control is being acquired exceeds the statutory threshold.30 A “Canadian business” is defined as “a business carried on in Canada that has (a) a place of business in Canada, (b) an individual or individuals in Canada who are employed or self-employed in connection with the business, and (c) assets in Canada used in carrying on the business.”31 The tables below show that the review threshold for direct acquisitions in 2014 was C$354 million in 2014 for investors from WTO member states and C$5 million for investors from non-WTO member states. Indirect acquisitions (where a non-Canadian parent company which controls a Canadian subsidiary is

26 For transactions involving business activities relating to Canada’s cultural heritage or national identity (e.g., publishing, film, video, music and broadcasting), the responsible minister under the ICA is the Minister of Canadian Heritage, supported by the Cultural Sector Investment Review Division (“CSIRD”) at the Department of Canadian Heritage.

27 “Direct acquisition” means acquisition of all or substantially all of the assets, or a majority (or, in some cases, one-third or more) of the shares of the entity carrying on business in Canada. “Indirect acquisition” means acquisition of a Canadian business by acquiring its non-Canadian parent.

28 In addition to capturing foreign governments and their agencies, the definition of SOE captures any entity controlled or influenced, directly or indirectly, by such government or agency. SOE also includes “an individual who is acting under the direction of” or “who is acting under the influence of” such government or agency. Unlike the concept of “control”, which is defined under the ICA, the concepts of “influence” and “direction” are quite broad.

29 A “WTO investor” is an investor controlled by a person resident or national of a WTO member country, or where two-thirds or more of the corporation’s board of directors or general partners of a limited partnership are residents or nationals of a WTO member country.

30 ICA, § 14.

31 ICA, § 3. See also discussion of thresholders at page 4 above.
being acquired) are not reviewable under the ICA for investors from WTO member states, unless the Canadian subsidiary of the target is a cultural business.\(^{32}\)

Table 1. Financial review thresholds for direct acquisitions

<table>
<thead>
<tr>
<th>WTO Member State Investor</th>
<th>Cultural</th>
<th>Non-cultural</th>
<th>National Security</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOE</td>
<td>C$5 million</td>
<td>C$369 million book value of assets (annual adjustment for 2015)</td>
<td>No threshold</td>
</tr>
<tr>
<td>Non-SOE</td>
<td>C$5 million</td>
<td>C$600 million enterprise value of Canadian business for 2015(^{33})</td>
<td>No threshold</td>
</tr>
<tr>
<td>Non-WTO Member State Investor</td>
<td>SOE</td>
<td>C$5 million</td>
<td>No threshold</td>
</tr>
<tr>
<td></td>
<td>Non-SOE</td>
<td>C$5 million</td>
<td>No threshold</td>
</tr>
</tbody>
</table>

Table 2. Financial review thresholds for indirect acquisitions through non-Canadian corporations\(^{34}\)

<table>
<thead>
<tr>
<th>WTO Member State Investor</th>
<th>Cultural</th>
<th>Non-cultural</th>
<th>National Security</th>
</tr>
</thead>
<tbody>
<tr>
<td>SOE</td>
<td>C$5 million or C$50 million depending on the proportion of Canadian assets(^{35})</td>
<td>Not reviewable</td>
<td>No threshold</td>
</tr>
<tr>
<td>Non-SOE</td>
<td>C$5 million or C$50 million depending on the proportion of Canadian assets</td>
<td>C$5 million or C$50 million depending on the proportion of Canadian assets</td>
<td>No threshold</td>
</tr>
</tbody>
</table>

“Reviewable” investments cannot be completed until the non-Canadian investor has filed an application with the Director of Investments, and the Minister has reviewed the investment and is


\(^{33}\) The *ICA* was amended to change the threshold for non-SOE WTO investors from the previous C$369 million in book value of assets to C$600 million in enterprise value for two years, then to C$800 million in enterprise value for two years, then to C$1 billion in enterprise value for the fifth year, after which the threshold will be indexed to changes in Canada’s GDP (Bill C-60, An Act to implement certain provisions of the budget tabled in Parliament on 21 March 2013 and other measures, 1st Sess, 41st Parl, 2013 (assented to on 26 June 2013)). The new threshold commencing at C$600 million came into effect in April 2015.

\(^{34}\) For indirect acquisitions through non-Canadian partnerships, joint ventures or trusts, see Table 1.

\(^{35}\) See Brian A Facey and Joshua A Krane, *Investment Canada Act: Commentary and Annotation*, 2014 edition (Toronto: LesixNexis Canada, 2013): “Where the indirect acquisition occurs directly or indirectly through the acquisition of voting shares of a non-Canadian corporation (i.e., control of any non-Canadian corporation is acquired), the investment is reviewable where: (a) the book value of all of the Canadian assets acquired in the transaction is (i) greater than 50 per cent of the book value of all of the assets and (ii) is equal to or exceeds $5 million, or (b) is (i) less than or equal to 50 per cent of the book value of all of the assets and (ii) is equal to or exceeds $50 million or more.”
satisfied that it will likely be of net benefit to Canada.\textsuperscript{36} Foreign investments not captured by the aforementioned thresholds for review do not need Ministerial approval. Instead, these investments are considered “notifiable” because the foreign investor need only file a short notice to the Director either before the transaction or within 30 days of closing.

**“Net benefit to Canada”**

In conducting a review, the Minister will consider the following factors to determine whether the proposed foreign investment will be of “net benefit to Canada,” where relevant: (i) the effect on the level of economic activity in Canada, such as employment, resource processing, exports from Canada and the use of Canadian suppliers of goods and services; (ii) the degree of participation of Canadians in the Canadian business (such as participation in management and in the board of directors by Canadians); (iii) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety; (iv) the effect on the investment on competition within any industry or between industries in Canada;\textsuperscript{37} (v) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and (vi) the contribution of the investment to Canada’s ability to compete in world markets.

Although not mandatory under the ICA, in practice, the Minister requires “undertakings” (i.e., contractual commitments from the investor) in virtually all reviewable transactions. Commitments regarding the acquired Canadian business might address, for example, future employment levels, future capital expenditures, research and development, or charitable contributions. If unsatisfied that a transaction will likely be of net benefit to Canada, the Minister may block it from going forward or, if a transaction has already been completed, order that control of the Canadian business in question be divested. While there have not been any divestitures ordered under these provisions, at least two transactions have been blocked under these provisions: the BHP/Potash transaction in which there was a provisional rejection, and the Alliant/MDA transaction discussed below, which is suspected to have raised national security considerations, notwithstanding the absence of explicit national security review provisions at the time.

**National Security**

As a separate consideration and pursuant to Part IV.1 of the ICA, which was enacted in 2009, the Minister, after consultation with the Minister of Public Safety and Emergency Preparedness, may initiate a review of any foreign investment in a Canadian business that “could be injurious to national security.”\textsuperscript{38} A national security review can occur even if the proposed transaction has

\textsuperscript{36} *ICA*, §§ 16-17.

\textsuperscript{37} The Minister will consult with the Commissioner of Competition in respect of this specific factor.

\textsuperscript{38} *ICA*, §§ 25.1-25.2.
only C$4.5 million of assets in the Canadian business or if the acquirer only proposes to buy less
than a one-third interest. There is no definition of “national security” in the ICA. Since the
Minister has broad discretion as to what may constitute a threat to national security, the national
security review process can present an additional challenge for deal certainty and execution.

National security concerns may sometimes indirectly influence whether a foreign investment
transaction proceeds. In May 2008, the Canadian government blocked US-based Alliant
Techsystems Inc.’s (“Alliant”) proposed acquisition of the information systems and geospatial
services business of MacDonald, Dettwiler and Associates Ltd. (“MDA”). The Alliant/MDA
transaction was rejected on “net benefit to Canada” grounds. Although the national security
provisions had not yet been enacted, it was widely believed at the time that national security
played an important role in the Minister’s determination regarding the Alliant/MDA transaction,
in light of the role of MDA’s satellite in monitoring Canada’s arctic regions. Another example
that has been the subject of more recent speculation involves Lenovo Group Ltd. (“Lenovo”), a
Chinese computer manufacturer, which reportedly considered a bid for Blackberry Ltd.
(“Blackberry”), but never formally proposed one because of the prevalent view that the Canadian
government likely would reject the transaction. Blackberry is a telecommunications and wireless
equipment company operating a secure network for many Canadian government agencies and
large businesses. It is reported that during September and October of 2013, the government had
discussions with Blackberry in which it apparently raised national security concerns about a
Chinese company’s proposal to purchase a company deeply integrated into Canada’s
telecommunications infrastructure.

Once a transaction is subject to national security review, the Minister may refer the transaction to
the Governor in Council (federal Cabinet) who, following a review, may make decisions related
to the nature and scope of measures to be imposed on the impugned transaction. This can
include blocking the investment entirely, ordering a divestiture, or requiring undertakings or
stipulating terms and conditions for the proposed transaction.

Other reviews conducted by same agency

The Minister of Industry is responsible as well for the licensing of wireless spectrum under the
Radiocommunication Act, discussed further below in respect of telecommunications.

Timetable for review

If an investment is reviewable (and does not raise national security concerns), the Minister has
45 days under the ICA to conduct an initial review and a 30-day review extension if the Minister
requires. The applicant and Minister can also agree to extend the review time frame for “any

39 See CBC News, Govt. confirms decision to block sale of MDA space division (May 9, 2008).
40 See Steven Chase and Boyd Erman, Lenovo pursued Blackberry bid, but Ottawa rejected idea (November 4,
further period” necessary to complete his or her consideration of the investment. If a proposed transaction is provisionally rejected by the Minister, the applicant has an additional 30 days to make representations and undertakings. Accordingly, while some reviewable transactions are cleared earlier, the review period to secure ICA approval of a reviewable transaction raising issues that could warrant undertakings is typically close to 75 days, and often longer in complex cases.

For investments that are reviewed on national security grounds, the Minister has 45 calendar days to initiate a national security review, and five days thereafter to notify the parties of the decision to review. The entire national security review process can last up to 200 days.

**Coordination with other agencies**

Foreign investment reviews under the ICA and competition merger control under the Competition Act, R.S.C. 1985, c. C-34 (the “Competition Act”) overlap in various ways. For example, the Commissioner of Competition provides a competition assessment to the IRD as part of the “net benefit to Canada” analysis under the ICA. Factors relevant to competition and considered under the ICA include, *inter alia*: the effect of the investment on competition within any industry or industries in Canada, and the contribution of the investment to Canada’s ability to compete in the world markets.

Likewise, foreign competition and related factors are considered under the Competition Act and include, *inter alia*, the extent to which foreign products or competitors provide or are likely to provide effective competition; and tariff or non-tariff barriers to international trade in the relevant markets. In addition, concurrent reviews under the ICA and the *Competition Act* may occur when the acquisition of intellectual property (“IP”) rights are involved, as discussed below.

In determining whether to review an investment under the national security provisions, the Minister will consult with the Department of Public Safety and Emergency Preparedness; in making his or her assessment in the course of such review, he or she may also consult, and share information with, the Canadian Security Intelligence Services; the Royal Canadian Mounted Police; the Canadian Border Services Agency; the Communications Security Establishment; the Department of National Defence; the Department of Foreign Affairs and International Trade; the Privy Council Office; and provincial, regional and municipal police forces.

**Coordination with other jurisdictions**

To date, Canada has not indicated the extent to which there is co-ordination with other countries regarding foreign investment review either on “net benefit to Canada grounds” or national security grounds, or even if there is any coordination at all. This stands in contrast to the considerable cross-border coordination undertaken by Canada’s Competition Bureau, which has

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41 *ICA*, § 23(1).
a long history of information exchanges and cooperation with the US in the review of mergers that affect both countries (e.g., the 1995 Canada-U.S. Cooperation Agreement on competition law enforcement).

Although a reasonable level of coordination can be anticipated between Canada and the US in respect of security risks, the national security review procedures in Canada and the US bear significant differences. Unlike the Committee on Foreign Investment in the US (“CFIUS”) regime, which allows for national security pre-acquisition clearance, pre-clearance cannot be obtained under the national security provisions of the ICA. In the case of certain transactions, that is, where the thresholds for notification or review under the net benefit provisions of the ICA are not triggered (and therefore there is no waiting period that could formally expire prior to closing), this could mean that the parties are a risk of having a national security review arise after completion of the transaction, a situation that has raised considerable difficulty in a number of transactions. Furthermore, whereas CFIUS’s enabling statute lists factors to be considered when determining if a proposed transaction presents a national security risk, there is no list of factors in the ICA that could help foreign investors identify ahead of time which types of investments are more likely to be subject to national security review in Canada.

While national security concerns are by their very nature opaque, and defining national security would limit the federal government’s flexibility to reject potentially injurious transactions, commentators have pointed out that the federal government could have “prescribe[d] a non-exclusive list of national security risks that would be helpful for investors in identifying areas of concern ex ante”. This would be akin to the listing of national security risks by the CFIUS.

**CHINA**

**Responsible Agency**


**Factors Considered**

The NSR process applies to all transactions in which a foreign investor would obtain “actual control” of a Chinese enterprise in the following sectors:

- Military and military support enterprises;
- Enterprises in the vicinity of key and/or sensitive military facilities;
Other entities associated with national defense and security; and

Domestic enterprises engaged in sectors that “relate to national security,” including key technologies, major equipment manufacturing industries, important agricultural products, energy and resources, infrastructure, and transportation services.

“Actual control” is defined to include circumstances in which the foreign investor becomes the controlling shareholder or actual controller of the domestic enterprise through M&A, such as where:

- a foreign investor or its parent company or subsidiary holds a 50% or more stake in the domestic company;
- more than one foreign investor holds an aggregate 50% stake or more in the domestic company;
- a foreign investor holds less than a 50% stake in the domestic company, but the voting rights actually enjoyed by the foreign investor are sufficient to exert a major impact on the shareholders’ meeting or board of directors; or
- there exist “other circumstances that may result in the actual controlling right in business decision-making, financial affairs, human resources, technologies, etc., being transitioned to the foreign investor.”

The PRC government takes a broad view of “national security,” and may consider economic security, social stability, and R&D capabilities related to key technologies, among other economic and security considerations. In addition, China generally encourages investments that involve the transfer of advanced technology and otherwise benefit China’s economic development.

Note, in addition to a filing initiated by the foreign investor(s), other government agencies, including local commerce authorities, may also request an application for NSR. Chinese parties, including Chinese national industry associations, enterprises in the same industry as the transaction parties, or “upstream or downstream” enterprises, also may propose to MOFCOM that a NSR be conducted.

**Other Reviews by the Same Agencies**

See additional reviews by MOFCOM, NDRC and other agencies, discussed below.
Timetable for Review

If potentially subject to a NSR, the foreign investor(s) should file an application for NSR review with MOFCOM. Once the application documents are complete, MOFCOM will notify the applicant in writing within 15 business days if the transaction is subject to a NSR. The regulatory timeline is then as follows:

- 5 working days for MOFCOM to forward the filing to the Ministerial Panel, an interagency panel consisting of representatives from MOFCOM, the National Development Reform Commission (“NDRC”), and other departments.
- 5 working days for the Ministerial Panel to request written opinions on the filing from relevant government agencies.
- 20 working days for relevant government agencies to provide written opinions.
- If any department determines that the transaction may affect national security, 5 working days for the Ministerial Panel to initiate a special review.
- 60 working days – or longer if transaction is submitted to State Council – to approve, reject, or approve a transaction with conditions (e.g., requiring changes to transaction terms and conditions to obtain approval).

Under Chinese law, parties that have been declined authorization for an investment or that are otherwise dissatisfied by an agency decision may file an application for administrative reconsideration either with the government agency or its supervising department within 60 days of the applicant’s knowledge of the decision. The investor also may file an administrative lawsuit against the government agency within 3 months of receiving the administrative decision.

During the review, MOFCOM may request “interested parties” to submit information to inform its review of a merger or acquisition. MOFCOM also may unwind a transaction after it has closed if it is determined to have a potentially serious impact on national security.

The review by all relevant authorities must be completed before the parties can close the transaction. Without approvals by MOFCOM and NDRC, or their local counterparts, later registrations/filings (e.g., foreign exchange, etc.) cannot proceed.

Coordination with or Approvals from Other Agencies

The below regulatory approvals also may be needed from relevant governmental agencies.

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42 Before filing with MOFCOM, an applicant may request a meeting with MOFCOM to discuss the transaction, and potentially alter transaction terms and conditions to address any concerns. A request for consultation with MOFCOM prior to filing is not, however, a prerequisite for filing an NSR application and the consultation does not have a legal and binding effect.
• **Name Pre-Approval.** Register the FIE’s name with the State Administration of Industry and Commerce (“SAIC”) or relevant local AIC. The name pre-approval normally is provided on the same day the application is made and is valid for 6 months.

• **Local Site-Related Opinion Letters.** As part of its submission to the local Development and Reform Commission (“DRC”) (see next bullet), an investor may need to obtain: (1) an opinion on pre-approval of land-use rights issued by the Land and Resources Department; (2) an environmental impact assessment issued by the provincial or central-level administrative authority for environmental protection; (3) a zoning opinion issued by the provincial planning department; and (4) an opinion on the use of state assets or state-owned land-use rights issued by the State-owned Assets Supervision and Administration Commission (“SASAC”), if applicable.

• **Project Approval.** In principle, the NDRC or relevant authorized local DRC (collectively, the “DRCs”) are responsible for reviewing and approving or rejecting all foreign investment projects. In practice, such “project approval” is generally required only for investments in fixed assets, manufacturing, or specific energy or resource sectors. Investors should consult with officials on a case-by-case basis. As part of this process, the DRC may seek opinions from an industry regulator or an evaluation from a “qualified consultation institution.”

The application is generally submitted to the relevant local DRC, which may forward it to NDRC (depending on the industry designation in the Catalogue and the planned investment amount). For investments in “encouraged” or “permitted” industries, project approval is required from the local DRC for investments below $300 million, from the NDRC for investments of $300-$500 million, and from the State Council for investments greater than $500 million. For investments in “restricted” industries, the thresholds are: less than $50 million (local DRC), $50-100 million (NDRC), and $100 million (State Council).

Typically, 20 business days are required for each level of applicable DRC review (extendable to 30 business days at DRC discretion), although local DRC approval may proceed more quickly. However, if a DRC seeks an opinion from an industry regulator or “qualified consultation institution,” the law does not specify an exact time limit for these third parties to complete their consultations.

• **Foreign Investment Approval.** After the relevant DRC (or State Council) has approved a project, the relevant commerce authority – in general, MOFCOM if NDRC or the State Council approved the project, or the local commerce authority if a local DRC approved the project – is responsible for examining and approving the formation of the FIE. The commerce authority will issue either a foreign-invested enterprise certificate (“FIE Certificate”) or specify its reasons for disapproval. This may take up to 45 days for a CJV and 90 days for a WFOE or EJV, although in practice, 20 days may be sufficient.
• **Industry-Specific Regulatory Approval.** The FIE must procure any required industry-specific license(s) or permit(s), which may be required for more than 100 business activities including food and drug production, pesticide manufacturing, cigarette manufacturing, and mining. Normally, 20 business days to 6 months are needed to obtain this approval, depending on the specific industry(ies) and the requirements of provincial authorities. Any required industry-specific license generally must be obtained before the FIE can register with the AIC, although in practice, an FIE may be able to register and receive a business license before obtaining the industry license. In such cases, after the FIE receives its industry license, the FIE must apply to the AIC to update its business registration. The industry license must be obtained before engaging in the regulated activity.

• **Enterprise Registration.** Register the FIE with the FIE Registration Bureau under the SAIC or the local AIC. This involves submission of certain documents and payment of registration fees. If approved, the AIC will grant a “business license” to the enterprise. The SAIC or local AIC generally will decide whether to grant the registration/license within 1-15 days depending on whether the application is made in person or via electronic means, and it generally will issue the business license within 10 business days of making the decision.

• **Other Administrative Registrations.** Following registration, the FIE may need to obtain and/or file certain other administrative registrations, including: (1) obtaining an “Organization Code Certificate” from the Quality and Technical Supervision Department; (2) obtaining a permit to engrave company seals from the local Public Security Bureau; (3) registering with state and local tax bureaus; (4) registering with the State Administration of Foreign Exchange (“SAFE”) or its counterparts at the local level, and opening foreign exchange and RMB accounts at authorized banks; (5) registering with customs; and (6) registering with labor and social security bureaus to handle the employment related formalities.

As stated in the Overview section above, the approval requirements in the Shanghai FTZ, for investments in certain industries, are intended to be simpler than similar investments in other areas of China. In mid-2014, China issued a revised negative list for the FTZ. For a comparison with the previous (2013) list, see this matrix: [http://www.cov.com/files/upload/Comparative_Chart_for_Negative_List_shanghai_FTZ_English.pdf](http://www.cov.com/files/upload/Comparative_Chart_for_Negative_List_shanghai_FTZ_English.pdf). An accompanying statement by the Shanghai municipal government stated that the new list was “17.4%” less restrictive than the previous list, but certain US officials have sought greater liberalization in sectors of major interest to foreign investors.

**Coordination with Other Jurisdictions**

Dialogue with regulatory agencies in other jurisdictions may occur on a case-by-case basis.
EUROPEAN UNION

There are no foreign investment filing obligations on the EU level. EU Member State laws do however provide for foreign investment filing obligations.

In that context, it should be noted that, although the European Commission in principle has sole competence over concentrations with Community dimension, the European Union Merger Regulation ("EUMR") recognizes in Article 21(4) that EU Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the EUMR, provided that those measures are compatible with the general principles and other provisions of EU law. The EUMR recognizes that public security, the plurality of the media, and prudential rule are legitimate interests within the meaning of Article 21(4) EUMR. EU Member States do not have to notify such measures to the European Commission, provided that they are necessary and proportionate for the protection of the interest at stake and compatible with EU law. Pursuant to Article 21(4) EUMR, measures relating to other public interests must, however, be communicated to the European Commission and cannot be adopted prior to the European Commission’s approval. The European Commission has 25 working days to render its decision. The European Commission has challenged under Article 21(4) EUMR a number of measures adopted by EU Member States because, in the European Commission’s view, their objective was to favor local target companies at the expense of acquirers located in other EU Member States.

Article 346 of the Treaty on the Functioning of the European Union ("TFEU") allows EU Member States to take the necessary measures for the protection of essential security interests relating to the production of or trade in arms, munitions and war materials. Pursuant to the same Article, such measures must not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes. This provision has been invoked by EU Member States to instruct companies not to notify to the European Commission certain aspects of concentrations in the defense sector. In certain cases, the European Commission has nevertheless requested and received information concerning military products in order to assess the effect of concentrations on competition in certain defense-related markets.

FRANCE

Under the French Monetary and Financial Code Article L. 151-3, as implemented by Decree No. 2005-1739, the Ministry of Finance is responsible for France’s national interest review and the Minister of Finance administers the review. In addition, the Minister of Finance actively seeks input from the Ministry of Defense during the review process.

In 2000, the European Court of Justice found France’s foreign investment review process, requiring advanced authorization for transactions that might present a security risk, to be overly
broad. As a result of the case, the French government refined its national interest review to create the modern regime.

The Monetary and Financial Code Article L. 151-3, as implemented by Decree No. 2005-1739, allows the Minister of Finance to block or alter a merger if it involves (A) activities likely to jeopardize public order, public safety or national defense interests; or (B) research in, and production or marketing of, arms, munitions, or explosive powders or substances. Decree No. 2012-691 further specified the scope of national security review and eliminated references to the notion of indirect control by an investor. Finally, following a bid by General Electric for the energy business of Alstom, a French conglomerate, the French government published a decree (nicknamed the “Alstom Decree”) on May 15, 2014 broadening the scope of national security review. The result is a two-tiered national security review regime, in which 17 sectors are subject to national security review. Seven of the sectors are deemed “sensitive” and have different rules for EU and non-EU investors. Ten of the sectors are “extra sensitive” and have uniform rules for EU and non-EU investors.

The seven “sensitive” sectors, and accompanying rules, are:

1. **Gambling**: For non-EU investors, the gambling sector, excluding casinos, is considered a “sensitive sector.” Gambling is not a sensitive sector for EU investors.

2. **Private Security**: For non-EU investors, all regulated private security services are considered a sensitive sector. For EU investors, regulated private security services are considered a sensitive sector when they (1) provide services to public or private sector clients operating critical facilities or infrastructures as defined in the Defense Code; (2) provide airport or harbor services; or (3) operate in restricted sectors privy to classified information.

3. **Research, development, or production of means to stem the unlawful use, in terrorist activities, of pathogens or toxins**: For non-EU investors the entire sector of research, development, or production of means to stem the unlawful use, in terrorist activities, of pathogens or toxins is considered a sensitive sector. For EU investors, the same activities are considered to be part of a sensitive sector only if the research, development of production relates to pathogens and toxins listed in Annex I of EC Regulation No. 428/2009 or the means of fighting chemical agents prohibited by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (to the extent necessary to fight terrorism).

4. **Equipment designed to intercept correspondence and monitor conversations**: For non-EU investors wiretapping and mail interception equipment is considered a sensitive sector.

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For EU investors, wiretapping and mail interception equipment is considered a sensitive sector only to the extent necessary to fight terrorism and crime.

5. **Testing and certification of the security of information technology products and systems:** For non-EU investors, the sector consisting of businesses licensed to audit and certify services relating to the security of information technology systems and products is considered a sensitive sector. For non-EU investors, the sector consisting of businesses licensed to provide evaluation and certification services to the French government relating to the security of information technology systems and products to the extent necessary to fight terrorism and crime is considered a sensitive sector.

6. **Production of goods or services to ensure the security of information systems:** For non-EU investors, the sector consisting of businesses providing goods or services relating to security of information systems of public or private companies managing critical infrastructures as defined in the Defense Code is considered a sensitive sector. For EU investors, the sensitive sector designation only applies to the goods or services related to security of information systems for companies managing critical infrastructures to the extent necessary to protect such critical infrastructures.

7. **Dual-use items and technologies:** For non-EU investors, dual-use items and technologies defined in EC Regulation No. 428/2009 are considered to be part of a sensitive sector. For EU investors, only those dual-use items and technologies related to companies involved in national defense are considered to be part of a sensitive sector.

The ten “extra sensitive” sectors are:

1. **Cryptology equipment and services.**

2. **Activities carried out by firms with national defense secrets, in particular, under the terms of national defense contracts or of security clauses.**

3. **Research, production, or trade in weapons, ammunitions, powders, and explosives intended for military purposes or war materials.**

4. **Activities carried out by firms holding a contract for the design or supply of equipment for the Ministry of Defense, either directly or as subcontractors, to produce an item or supply a service for one of the sectors referred to in points 1 through 3 above.**

5. **Activities relating to the provision of services, equipment or products essential to guarantee the continued supply of electricity, gas, oil, or other energy resources.**

6. **Activities relating to the provision of services, equipment, or products essential to guarantee the continued supply of water in accordance with public health standards.**
7. Activities relating to the provision of services, equipment, or products essential to guarantee the continued operation of transportation networks and services.

8. Activities relating to the provision of services, equipment, or products essential to guarantee the continued operation of electronic communications networks and services.

9. Activities relating to the provision of services, equipment, or products essential to guarantee the continued operation of facilities, installations, or works of critical importance, as defined by the French Defense Code.

10. Activities relating to the provision of services, equipment, or products essential to guarantee the protection of public health.

While the Ministry of Finance’s national security review is supposed to be limited to consideration of threats to national security, it is clear that other considerations are often in play when a controversial foreign investment is announced. In particular, domestic employment is a large concern for the French government. For example, in the government’s opposition to GE’s bid for Alstom (leading to the most recent national security review decree) it plainly stated that retaining French jobs was a primary concern.\textsuperscript{44} The government favored Siemens, a German company, in its rival bid for Alstom after Siemens agreed not to fire any Alstom employees for three years.\textsuperscript{45} GE revised its bid to include assurances about French jobs, including a pledge to bring 1,000 new jobs to France.\textsuperscript{46} Following the announcement, President Hollande’s office commented that “we can see that GE’s offer has been detailed, improved, strengthened.”\textsuperscript{47} Some consider the government’s intervention in the GE bid for Alstom to be an exercise of economic nationalism.\textsuperscript{48} Whatever it may be called, as further examples below show, it is clear that foreign investments often trigger political considerations that go beyond national security. Moreover, in the Law on the Modernization of the Economy (August 4, 2008) the Ministry of Finance was given the power to revoke mergers that imply issues of fundamental interest other than competition within 25 days of the Competition Authority’s merger review. Issues of fundamental interest include industrial development and employment sustainment. As of yet, the Ministry of Finance has not used this right of revocation.

\textsuperscript{45} Id.
\textsuperscript{47} Id.
Threshold Tests

The first step in the foreign investment review process requires the foreign investor to determine if its investment in a sensitive sector meets certain thresholds for review. There are three tests to determine whether the foreign investment review process is triggered.49

The first test, called the “stock transfer test,” looks at whether the transaction will involve a direct or indirect acquisition of a controlling stake in a company having its registered office in France. Article L233-3 of the Commercial Code provides the definition of “controlling stake.” A company is presumed to have control when it holds, directly or indirectly, a percentage of the voting rights above 40 percent and when no other shareholder holds, directly or indirectly, a percentage higher than its own. For non-EU investors, this test applies to investment in any of the 11 sensitive or extra sensitive sectors. For EU investors, this test only applies to deals involving extra sensitive sectors. This test does not apply to foreign-controlled French investors.

The second test, called the “asset transfer test,” looks at whether the transaction will involve acquisition of all or part of a line of business of a company having its registered office in France. This test applies to all transactions involving foreign investors.

The third test, called the “threshold test,” looks at whether the transaction involves an acquisition of more than 33.33 percent of the stock or voting rights of a company having its registered office in France. This test only applies to non-EU investors and does not apply to foreign-controlled French investors.

Procedure

After a foreign investor determines that its investment meets one of the threshold tests, the investor must submit an application to the Ministry of Finance.

The Ministry of Finance must review the transaction and respond within two months from when a completed application is submitted. The Minister of Finance must determine whether the investment will harm national interests. Additionally, the Minister must determine whether there is a “serious presumption” that the investor will commit any of the following crimes: drug trafficking, criminal exploitation of a person’s weakness or ignorance, procurement and related crimes, money laundering, acts of terrorism or financing of terrorism, corruption and influence peddling, and acting in a conspiracy.50 If the Ministry of Finance does not respond in two months, the transaction is considered automatically approved. During the review period informal consultations between the Ministry and the investor may take place. Based on these consultations, the investor may revise its proposal to obtain approval.

49 Foreign Investment Regulation Review 2013, 92-93.
50 Id. at 94-95.
If the Ministry does not approve the transaction, the investor has the right to appeal the decision in French administrative courts. Additionally, an investor can challenge the Ministry’s decision before the European Court of Justice if any EC Treaty provisions are violated.

**Remedies**

Article L. 151-3 of the Monetary and Financial Code describes the remedies available if the Minister of Finance finds that a transaction is likely to harm national interests. The Minister may order the investor to desist from proceeding with the transaction or alter the nature of the transaction to restore the status quo at the investor’s expense. This order cannot be given until formal notice has been served on the investor to allow the investor to make its observations known within 15 days. If the Minister’s order is not complied with, the Minister may impose a financial penalty on the investor, the amount of which shall not be more than double that of the irregular investment. The amount of the financial penalty is shall be proportional to the seriousness of the violations committed.

If an investment is carried out without approval from the Minister of Finance or in contravention of agreed-upon conditions, the investment may be enjoined and/or have new conditions attached. The investor may be required to return to the status quo ante within 12 months at its own expense.51

**GERMANY**

**Which agency is responsible?**


The government body entrusted with the duty to supervise the application of these laws and to review foreign investments on national security grounds is the Federal Ministry for Economic Affairs and Energy (*Bundesministerium für Wirtschaft und Energie*, the “Ministry”). As of June 3, 2014, Sigmar Gabriel was the Federal Minister for Economic Affairs and Energy.

As a general rule, foreign investment laws apply to direct or indirect acquisitions by foreign investors of an interest of at least 25% in a German company. All kinds of transactions by which a foreign investor obtains, directly or indirectly, an interest of at least 25% in a German company are caught (e.g., share and asset transactions, joint ventures).

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51 Id. at 96.
Any investor not established in the Federal Republic of Germany is considered a foreign investor for investments in German companies that (i) manufacture war weapons; (ii) manufacture engines or gears for battle tanks or other armored military tracked vehicles; (iii) manufacture products with IT security functions to process classified state information or components essential to the IT security function of such products (or have manufactured such products in the past, licensed them to the Federal IT Security Agency, and still dispose of the relevant technology); or (iv) operate satellite systems (the four categories are collectively referred to as the “defense industry”\(^52\)).

Any investor not established in the European Union or the European Free Trade Association\(^53\) is considered a foreign investor for investments in German companies that are not active in the defense industry\(^54\).

There are no special rules governing foreign investments by state-owned enterprises or sovereign wealth funds.

If a foreign investor acquires an interest of at least 25% in a German company that is active in the defense industry, it must submit a foreign investment notification to the Ministry. The foreign investment notification must describe the investment and identify the foreign investor, the German target company, and their respective fields of activities.

If a foreign investor acquires an interest of at least 25% in a German company that is not active in the defense industry there is no notification obligation. The Ministry is, however, entitled to review the transaction on national security grounds. Since there is no notification obligation, it is up to the Ministry to learn about the investment. Foreign investors may also submit a notification on a voluntary basis.

**Factors considered**

The test for foreign investments in the defense industry is whether the investment would endanger essential security interests of the Federal Republic of Germany. The wording of the law allows broad discretion to the Ministry. The burden of proof that a foreign investment could endanger essential security interests of the Federal Republic of Germany lies with the Ministry.

The test for foreign investments in all other industries is whether the investment would endanger the public order or security of the Federal Republic of Germany. Danger to the public order or security is an “actual and sufficiently serious danger to the fundamental interests of society”.

\(^{52}\) An investor established in the Federal Republic of Germany that has a shareholder not established in the Federal Republic of Germany and who holds at least 25% in it is also considered a foreign investor.

\(^{53}\) Iceland, Liechtenstein, Norway, Switzerland.

\(^{54}\) An investor established in the European Union or the European Free Trade Association that has a shareholder not established in the European Union or the European Free Trade Association and who holds at least 25% in it is also considered a foreign investor.
Examples of such fundamental interests of society are ensuring the availability of supplies in times of crisis in the areas of telecommunications, water, energy and other services of strategic importance. The burden of proof that a foreign investment could endanger the public order or security of the Federal Republic of Germany lies with the Ministry.

Upon approval by the Federal Government, the Ministry may prohibit a foreign investment or order other appropriate measures. In order to enforce a prohibition, the Ministry may prohibit or restrict the exercise of voting rights in the German target company or appoint a trustee to unwind the transaction if it has already closed.

The applicable laws do not, however, specify the types of appropriate measures the Ministry may order instead of a prohibition decision. In practice, the Ministry may order, for example, that future transactions involving the German target company must be notified to the Ministry; or that they must be subject to prior approval by the Ministry; or that the foreign investor may only exercise limited voting rights; or that certain management decisions require prior government approval. Such measures may also be negotiated and agreed between the parties and the Ministry in the form of remedies. Remedy discussions with the Ministry should ideally take place prior to submitting a foreign investment notification or even prior to signing since the relevant measures may need to be included in the investment contract.

**Other reviews conducted by same agency**

The Ministry does not conduct merger control reviews. Industry-specific reviews in the banking and finance, insurance, postal, and media sectors are conducted by different government agencies.

**Timetable for review**

**Defense industry**

The Ministry has one month from the submission of the notification to decide whether to clear a foreign investment or initiate an examination procedure. If the Ministry does not react within one month, it is deemed to have approved the investment. If the Ministry decides to initiate an examination procedure, it will request the submission of additional documentation. Once the additional documentation has been submitted, the Ministry has one month to decide whether to clear, restrict, or prohibit the foreign investment.

The rules for foreign investments in the defense industry do not set a specific deadline for submitting the required notification to the Ministry. Transactions cannot, however, be implemented prior to clearance.
**Other industries**

The Ministry has three months from signing\(^{55}\) to notify the foreign investor if it intends to initiate a foreign investment review. Since there is no notification obligation, it is up to the Ministry to learn about the investment. If the Ministry notifies the foreign investor that it intends to initiate a foreign investment review, it will also request the foreign investor to submit certain documentation, the specifics of which are determined by the Ministry on a case-by-case basis. Once the documentation has been submitted, the Ministry has two months to decide whether to clear, restrict, or prohibit the foreign investment. If the Ministry does not react within this time frame, it is deemed to have approved the investment.

The initial three-month period can be shortened if the foreign investor submits a voluntary foreign investment notification to the Ministry. In such cases, the Ministry has one month to decide whether to clear the foreign investment or initiate an examination procedure. If the Ministry does not react within one month, the foreign investment is deemed to have been cleared. If the Ministry decides to initiate an examination procedure, it will request the foreign investor to submit certain documentation which is determined by the Ministry on a case-by-case basis. Once the documentation has been submitted, the Ministry has two months to decide whether to clear, restrict or prohibit the foreign investment. If the Ministry does not react within this time frame, it is deemed to have approved the investment.

While there is no mandatory filing requirement, given that the Ministry has the power to order that a transaction be unwound, it is recommended to submit a voluntary filing and seek clearance prior to closing if there is a risk that the Ministry may restrict or prohibit a foreign investment on national security grounds.

**Coordination with other agencies**

The Ministry is not obliged to consult or otherwise involve other government agencies in its review, even though it may do so, for example on an informal basis. Also, a decision to prohibit or restrict a foreign investment in non-defense industries needs prior approval by the federal government.

**Coordination with other jurisdictions**

Given that the Ministry seeks to determine whether a foreign investment could endanger essential security interests, or the public order or security of the Federal Republic of Germany, it does not, in principle, consult or otherwise involve foreign administrations in its review.

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\(^{55}\) For public bids the three-month period starts as of the publication of the decision to submit a public bid or the publication of the acquisition of control.
JAPAN

In respect of foreign shareholdings in Japanese companies, there are some regulated industries where foreign ownership levels are limited by specific sectorial legislation. For example, NTT, a holding company of the dominant national telephone carrier, must be less than 33.3 per cent foreign-owned. Also, foreign shareholdings must be less than 20 per cent for terrestrial and radio broadcasters and less than 33.3 per cent for domestic airlines.

In addition, the Foreign Exchange and Foreign Trade Law applies to foreign direct inward investments to Japan, requiring a party that has made an investment in Japan to make an after-the-fact filing with the Ministry of Finance through the Bank of Japan within 15 days of such an investment in most cases. For certain industries (such as the energy sector) prior filing is required.

Generally, the types of the Investment the foreign investor shall notify or report include:

(i) Acquisition of the shares of a listed company for not less than 10% of outstanding shares;

(ii) Acquisition of the shares or equity of a no-listed company; or

(iii) Loan of money aggregately exceeding 0.1 billion Yen, for which the period exceeds 1 year.

Furthermore, under Foreign Exchange and Foreign Trade Act, the industries where the prior notification is required include arms, airplanes, satellites, nuclear energy, agriculture, stock raising, fishery, oil and natural gas, utility (gas, electricity, heating and water), IT, post, banking, insurance, and a certain types of manufacturing. For all other industries, a report after the Investment is required.

In a prior notification case, the foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months.

In a reportable case that does not require prior notification, the foreign investor must report to the Ministers by the 15th day of the month following the month of the Investment. There are no statutory post-closing powers granted to the authorities.

Under the Foreign Exchange and Foreign Trade Act, the Minister of Finance and the minister having jurisdiction over the business may order the foreign company to change the extent or
character of their investment or discontinue the investment when the investment is likely to raise the following issues (collectively, the “National Security Issues”):

(a) National security is impaired, the maintenance of public order is disturbed, or the protection of public safety is hindered.

(b) Significant adverse effect is brought to the smooth management of the Japanese economy.

Any person who made an inward direct investment without giving a prior notification when required or by giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.

Any person who has failed to make a report of a prior investment (when a pre-notification is not required) or has made a false report may be punished by imprisonment for not more than 6 months or a fine of not more than 5 hundred thousand yen (approximately 5 thousand dollars).

UNITED KINGDOM

Public interest review is conducted by the Secretary of State for Business, Innovation and Skills (SoS) in parallel and with support from the Competition and Markets Authority or, in media mergers, Ofcom, the regulator and competition authority for UK communications industries. However, ultimately, the SoS makes the public interest determination in his/her sole discretion.

A great deal of discretion is left to the SoS in investigating any of the three types of public interest merger cases. The three sectors involved in public interest review are the national security, media and financial sectors. Although notification of a merger for competition or public interest purposes is voluntary, the government has shown a willingness to intervene in these sectors and impose conditions as necessary. Review by the SoS can be a protracted and highly political process, which may lead to modifications, delays, or even abandonment of the transaction.

Three Types of Cases

Public Interest Cases: The Public Interest cases category is the broadest category that may be reviewed by the SoS. Under Section 58(1) and (2) of the Enterprise Act 2002, national security, newspaper and media mergers are specifically identified as public interest considerations. Section 58(3) provides that the SoS may add, remove or modify any consideration to or from Section 58.⁵⁶ In 2008, in the context of the proposed Lloyds/HBOS merger, the SoS announced

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⁵⁶ However, if the SoS identifies a public interest consideration that has not been approved by Parliament when issuing an intervention notice, the intervention notice will be cancelled by the Competition Commission if Parliament does not approve the consideration within 24 weeks. See Section 53 of the Enterprise Act 2002.
that “ensuring the stability of the UK financial system” was a public interest consideration and it was approved by Parliament.

A Public Interest case may result anytime there is a “relevant merger situation,” which means any reportable merger under the UK’s competition laws. The threshold for a relevant merger situation is (1) the value of the turnover in the UK of the enterprise being taken over exceeds £70 million; or (2) as a result of merger, in relation to the supply of goods and/or services of any description, at least one-quarter of the goods and/or services of that description which are supplied in the UK, or in a substantial part of the UK (a) are supplied by one and the same person or are supplied to one and the same person, or (b) are supplied by persons by whom the enterprises concerned are carried, or supplied for those persons.

In addition, to trigger review, two enterprises must be brought under common ownership or control. At a minimum, the acquirer must be able to exercise “material influence” over the target. An acquisition of 25 percent of voting rights is likely to be seen as presumptively conferring material influence. Acquisitions of 15 percent or more of the voting rights in a company may be examined.

**Special Public Interest Cases:** For SoS review of Special Public Interest cases, a relevant merger situation is not required. Special Public Interest cases can arise if immediately prior to the implementation of a transaction: (1) at least one of the enterprises concerned was carried on in the UK or by or under the control of a body corporate incorporated in the UK and a person carrying on one or more of the enterprises concerned was a relevant government contractor; or (2) the person or persons by whom one of the enterprises was carried on supplied at least 25 percent of all newspapers of any description, or all broadcasting of any description, in the UK, or a substantial part of the UK. Therefore, Special Public Interest cases only involve certain mergers in the government contracting or media industries.

**“Community Dimension” Cases:** Concentrations with a “Community Dimension” are transactions reviewed by the European Commission (“EC”). Under the EC Merger Regulation, Member States are permitted to intervene to protect “legitimate interests.” Included in “legitimate interests” are the interests currently identified in Section 58 of the Enterprise Act 2002 (not including “ensuring the stability of the UK financial system,” which is not listed in Section 58). This category encompasses national security and media mergers.

The thresholds for merger review under the ECMR are as follows: (1) Aggregate worldwide turnover of all the parties exceeds €5 billion and the aggregate EU-wide turnover of each of at least two parties exceeds €250 million; or (2) Aggregate worldwide turnover of the parties exceeds €2.5 billion; the combined EU-wide turnover of each of at least two of the parties exceed €100 million; in each of at least three EU Member States, the combined aggregate turnover of all the parties exceed €100 million; and in each of the same three Member States the aggregate turnover of each of at least two of the parties concerned exceeds €25 million.
National Security Mergers

The review of mergers raising national security issues is subject to the same procedure as other mergers (either as Public Interest, Special Public Interest or “Community Dimension” cases). Section 58 of the Enterprise Act 2002 includes national security (including public security) as a public interest ground upon which the SoS can challenge a merger. This means that the SoS may challenge mergers involving national security issues as Public Interest or “Community Dimension” cases. Mergers raising national security issues may also arise in the context of government contractors, and thus may give rise to a Special Public Interest case. There have been seven intervention notices issued in mergers with a national security element.57

In 2009, the SoS intervened in the proposed Atlas Elektronik/QinetiQ acquisition on national security grounds. The deal involved a proposal by a German company, Atlas, to acquire a UK company, Underwater Systems Winifrith (owned by QinetiQ). Underwater Systems was a supplier of research, advice, enabling technology, systems and support for the UK military, and thus the deal was analyzed as a Special Public Interest case (as it involved a government contractor). The Office of Fair Trading reported to the SoS that the Ministry of Defence and other third parties had raised concerns, including the possibility that: essential UK capabilities could be sold or transferred abroad; Atlas’ influence of Underwater Systems might prejudice national security; Underwater Systems was privy to information and technology that was only available to UK nationals; and the acquisition could call into question the future independence and impartiality of research output and customer support provided by Underwater Systems to the Ministry of Defence.58 Ultimately, the SoS accepted Atlas’ undertakings to avoid a reference to the Competition Commission. Atlas agreed that, for as long as the companies remained a supplier to the Ministry of Defence, a significant number of directors of the companies would be UK security-cleared British citizens and military programs would be controlled by companies incorporated within the UK. Atlas also undertook to inform and consult the Ministry of Defence at least six months prior to removal of a significant part of UK military capability to any locations outside the UK, the disposal of any UK military capability to an entity not directly or indirectly controlled by Atlas, the voluntary winding-up or dissolution of Atlas Elektronik UK, or the reduction in any significant way of the UK’s military capability with respect to funded military programs.59

In 2007, the SoS intervened in the transaction between General Electric, an American company, and Smiths Aerospace, a UK company. The transaction was reviewed as a “Community Dimension” case, as it had been notified to the EC. The “legitimate interest” the SoS claimed to be protecting was national security. The OFT reported that the Ministry of Defense was

concerned that: Smiths was a key supplier of sub-systems for important weapons systems and it was essential to keep these capabilities within the UK; Smiths’ capabilities were to some extent dependent on classified technology and information; and General Electric might be able to influence Smiths in ways that could prejudice national security.\(^{60}\) The challenge was resolved by assurances from General Electric and Smiths. It was agreed that (1) as long as Smiths was a prime contractor on UK military programs, a sufficient number of directors would be UK security-cleared British citizens; (2) capabilities that exited within Smiths would continue to be made available to the UK; (3) such capabilities would be maintained in the UK; and (4) the parties would implement a compliance regime to protect classified information.\(^{61}\)

In 2004, the first European Intervention Notice was issued regarding the proposed takeover of the British defense firm Alvis plc by General Dynamics, a US firm. General Dynamics proposed certain undertakings related to the maintenance of strategic capabilities in the United Kingdom and the protection of classified information. However, after General Dynamics’ bid, BAE Systems offered a higher amount which was accepted by Alvis’ shareholders.

Prior to the implementation of the Enterprise Act 2002, the British government reviewed the joint venture of BAE Systems plc, European Aeronautic Defence and Space Company NV and Finmeccanica SPA. The OFT’s report on the transaction separated out the national security concerns from the competition concerns. The OFT did not involve itself in the analysis of the national security concerns and instead allowed the Ministry of Defence to review the transaction and negotiate a remedy. The Ministry of Defence and the parties agreed to keep certain information and technology related to BAE’s weapons business within the control of UK persons.

**Media Merger Review**

Because newspaper and media sector mergers are listed in Section 58 of the Enterprise Act 2002, media mergers may be reviewed by the SoS as Public Interest or “Community Dimension” mergers. Moreover, for certain media sector mergers, the SoS may review the transactions as Special Public Interest cases (see above). In media merger cases, the SoS is advised by Ofcom, the independent regulator and competition authority for the UK communications industry, on the public interest aspects of the case.

A primary concern in media merger cases is the preservation of a plurality of sources of information and views available to different audiences throughout the UK. The “plurality test” adopted by the CC in its decision in BSkyB/ITV (2006) (a domestic investment case), and set out in Section 58(2C)(a) of the Enterprise Act 2002, states that a goal of public interest review of media mergers is “the need, in relation to every different audience in the United Kingdom or a

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particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience.” In the BSkyB/ITV case, the CC found that, while BSkyB’s acquisition of 17.9% of ITV’s issued shares gave BSkyB “control” under the competition laws, under the media plurality inquiry BSkyB’s control was limited and there was sufficient “internal plurality” post-acquisition to avoid an adverse finding under the public interest inquiry. The CC’s decision regarding the plurality test was reversed by the Competition Authority Tribunal (“CAT”), but upheld by the superior court, the Court of Appeals (“CA”). Ultimately, while BSkyB had to divest stock under the competition laws, the courts found that the acquisition had not lessened media plurality under the public interest review. Thus, the concept of “control” traditionally associated with competition review is not entirely applicable to the media plurality inquiry because media plurality may exist within a single organization.

Other important concerns involving media mergers are listed in Section 58(2C). They are “the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests; and the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in Section 319 of the Communications Act 2003.”

An example the importance and contentiousness of media mergers in the UK was the abandoned acquisition of BSkyB’s outstanding stock by News Corporation. In 2010, News Corporation, an American company, proposed to acquire the 60.9 percent of BSkyB that it did not already own. While the European Commission unconditionally approved the deal, the SoS referred the transaction to Ofcom to consider media plurality issues. During the review, unflattering remarks by the SoS about the deal became public, leading Parliament to strip the SoS of jurisdiction over the transaction. In his place the Secretary of State for Culture, Media and Sport (“SoS for Culture”) was put in charge of the review. The SoS for Culture decided not to refer the case to the CC and accepted undertakings that would have required News Corporation to keep BSkyB as a separate company as a condition of the takeover. The UK government supported the conditional approval of the transaction and gave one week for final objections from the public. During that week, the News of the World phone hacking scandal involving Rupert Murdoch was reported and Ofcom stated that it has “a duty to be satisfied on an ongoing basis that the holder of a broadcasting license is ‘fit and proper.’” In the wake of the phone hacking revelations, the SoS for Culture received thousands of objections to the transactions, leading the SoS for Culture

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62 Including that the SoS had “declared war on Mr. Murdoch,” News Corporation’s CEO.
to withdraw his acceptance of the proposed undertakings.\textsuperscript{64} This triggered a referral to the CC. Ultimately, News Corporation withdrew its bid for BSkyB before any decision was rendered.

In light of the controversies\textsuperscript{65} surrounding the News Corporation/BSkyB transaction, a House of Lords committee has recommended that Ofcom take a “leading role” in reviewing media mergers. Giving power to Ofcom, and taking power away from the SoS, “is intended to safeguard against the type of ‘messing political interference’ that most UK mergers are protected from.”\textsuperscript{66}

**Ensuring the Stability of the UK Financial System**

In 2008, amidst worldwide financial crisis, the SoS reviewed the merger of Lloyds and HBOS, declaring that “ensuring the stability of the UK financial system” was a public interest concern for the purposes of Section 58 of the Enterprise Act 2002. Despite the OFT’s finding that the merger would substantially lessen competition, the SoS concluded that concerns regarding stability of the financial system “justified the anticompetitive outcome which the OFT has identified and the public interest is best served by clearing the merger.” The SoS’s decision not to refer the transaction to the CC was challenged before the CAT, however the challenge was dismissed and the merger was consummated.\textsuperscript{67} Parliament ratified the SoS’s decision to include the stability of the financial system as a public interest concern. Therefore, the SoS may challenge financial sector mergers as Public Interest cases.

**“Important Manufacturing Undertaking”**

Under Section 13 of the UK Industry Act 1975, the SoS can block an acquisition of an “important manufacturing undertaking” by a non-UK based entity when it appears to the SoS that the change of control would be contrary to the interests of the UK or any substantial part of the UK. There is no record of this provision ever being used to prevent a transaction.\textsuperscript{68}

**Procedure**

As noted above, the UK is a voluntary notification regime. Thus, mergers meeting the various thresholds for competition and foreign investment review do not have to be notified to the relevant agencies. Instead, the thresholds serve as limitations on the agencies involved in the reviews. The CMA is obligated to inform the SoS where it is investigating a merger at Phase 1 that it believes raises material public interest considerations.

\textsuperscript{65} In addition to the SoS’s comments, “it emerged that a News Corp lobbyist had approached the Department for Culture, Media and Sport over a thousand times over the deal.” http://globalcompetitionreview.com/news/article/35166/ofcom-final-say-media-mergers-says-uk-lord/.
\textsuperscript{67} Getting the Deal Through 2013, 120.
\textsuperscript{68} Foreign Investment Regulation Review 2013, 289.
The first step in the review of Public Interest, Special Public Interest or “Community Dimension” cases is the issuance of an intervention notice by the SoS. The SoS issues a Public Interest Intervention Notice (“PIIN”) in public interest cases, a Special Public Interest Intervention Notice (“SPIIN”) in special public interest cases or a European Intervention Notice (“EIN”) in “Community Dimension” cases. The effect of the issuance of an intervention notice is to require the CMA to investigate the merger and provide a report.

Once the SoS receives the CMA’s Phase 1 report, the SoS may refer the case to Phase 2 review. The SoS is required to accept the CMA’s findings on whether there is a “relevant merger situation” and, where appropriate, competition matters including the description of undertakings the CMA considers appropriate in lieu of a reference. The SoS may accept undertakings from the parties in lieu of a reference to Phase 2 review. If the SoS finds that the merger does not implicate any relevant public interest considerations, the CMA is required to undertake its normal competition review of the merger, which may entail making a reference to Phase 2 under Sections 22 or 33 of the Enterprise Act 2002.

If the case is referred to Phase 2, the CMA will issue its Phase 2 report to the SoS. On receipt of the CMA’s report, the SoS has 30 working days to make a decision on the questions considered by the CMA. The SoS must accept the CMA’s decision on whether a relevant merger situation exists and whether that merger results in a substantial lessening of competition (Public Interest cases), a special merger situation exists (Special Public Interest cases), or a “European relevant merger situation” exists (“Community Dimension” cases). However, the SoS is not bound by the CMA’s views on the public interest test. It is up to the SoS’s discretion to determine whether the merger implicates one of the public interest considerations. In its review, the SoS will generally consult with agencies within the government with experience in the relevant sector, such as the Ministry of Defence or Ofcom.

**Remedies**

The SoS has discretion in considering whether and which remedies are necessary to address the adverse public interest effects of the merger. If the SoS determines that the merger is against the public interest, the SoS has the power to take remedial action. In Public Interest cases, if the SoS decides that the public interest issue is not relevant, the CMA then decides how to remedy any competition issues identified.

For Public Interest and Special Public Interest cases involving mergers which have not yet closed, the issuance of an intervention notice is not a bar to closing. However, the SoS usually asks the parties to provide “hold separate” undertakings, which require the parties not to consummate the merger until the SoS clears the transaction.\(^69\)

\(^69\) Getting the Deal Through.
“hold separate” undertaking, the SoS may issue a hold separate order. For “Community Dimension” mergers, clearance must be obtained before closing. The parties may be fined up to 10 percent of their group worldwide turnover if they breach this provision.

The SoS can modify or prohibit any of the three types of mergers if, following a CMA report, the SoS has made an adverse public interest finding and considers that such action is reasonable and practicable to remedy, mitigate or prevent any of the adverse public interest effects that have resulted from, or may be expected to result from, the transaction.

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70 Id.
71 Enterprise Act Sections 55(2), 66(6) and Schedule 8, and Protection of Legitimate Interests Order 2003 (PLIO) Section 12(7).
Industry-Specific Reviews

In addition to antitrust/competition law reviews, and national security/national interest reviews, foreign investments may be subject to more specialized reviews—or to outright prohibitions—if they occur in strategically significant industries, such as banking, telecom, media, energy, transportation, or food and agriculture. Not every country places limits on foreign investment in all of these sectors, but the same sectors commonly are targeted in country after country around the world. Often, these reviews are conducted by specialized agencies, such as bank regulators, communications agencies, and transportation ministries. Sometimes these agencies coordinate their reviews with the jurisdiction’s antitrust or competition authority but in other instances these reviews may be conducted through different means, on different timetables, under different standards, and with little communication among the agencies involved. The following is a look at the industry-specific review processes in each of the jurisdictions surveyed.72

Banking and Finance

UNITED STATES

Banking is one of the more heavily regulated industries in the United States. Foreign banks that operate in the US and seek to acquire another bank operating in the US may need to notify a number of regulators of their transaction for antitrust review. In addition to the Department of Justice (DOJ)—which reviews mergers in a variety of industries—the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC) and the Office of the Controller of the Currency (OCC) all have statutory authority to review the competitive effects of proposed bank mergers and acquisitions under applicable banking laws. Accordingly, merging banks must both notify DOJ’s Premerger Notification Office and submit an Interagency Bank Merger Act Application73 to all of the relevant banking agencies in the banking district where their headquarter offices are located.

Competition

The objective of each reviewing agency’s competitive inquiry is by and large the same; to assess how each transaction affects competition in the various markets the merging parties both serve.

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72 There are no filing obligations on the basis of industry-specific rules on the EU level. EU Member State laws however provide for industry-specific filing obligations.

For the most part, two published guidance documents outline the frameworks that will be used to make this determination: the FRB/DOJ’s jointly developed 1995 Bank Merger Guidelines\textsuperscript{74} and the FDIC’s “Statement of Policy on Bank Merger Transactions.”\textsuperscript{75} The FDIC has merger approval for combinations (a) in which the resulting institution is an insured state non-member bank or (b) that involve an uninsured bank or institution.\textsuperscript{76} These transactions include any merger transaction in which the resulting institution is an insured non-federal branch of a foreign bank.\textsuperscript{77}

All of the agencies’ merger reviews involve defining product and geographic markets of competition. According to a recently issued FAQ\textsuperscript{78} update to the Bank Merger Guidelines, FRB and DOJ typically adopt product markets limited to the “cluster” of commercial banking products and services provided to most households and small businesses.\textsuperscript{79} Occasionally, the FRB will investigate the competitive effects in other, more specific product markets, such as credit card issuance or mortgage lending.\textsuperscript{80} The FDIC’s product markets may include the functional equivalent of certain services offered by other types of competitors, such as captive finance companies of automobile manufacturers and mortgage bankers.\textsuperscript{81}

Both the FRB and FDIC typically define geographic markets by Metropolitan Statistical Area (“MSA”) or by similar pre-defined banking markets.\textsuperscript{82} The banking regulators do not define geographic markets that are specific to each application for the sake of efficiency and predictability.\textsuperscript{83} DOJ, on the other hand, does not bind itself to pre-defined banking markets and, instead, defines geographic markets on a case-by-case basis.\textsuperscript{84}

The agencies that review bank mergers use the same Herfindahl-Hirschman Index (“HHI”) used by the Federal Trade Commission and DOJ to analyze the competitive effects of mergers in all other industries,\textsuperscript{85} but the HHI analysis for bank mergers is unique in a few ways:

\textsuperscript{76}12 CFR § 303.62(a).
\textsuperscript{77}12 CFR § 303.185(a).
\textsuperscript{78}\url{http://www.federalreserve.gov/bankinforeg/competitive-effects-mergers-acquisitions-faqs.htm}.
\textsuperscript{79}FAQs at 9.
\textsuperscript{80}Id.
\textsuperscript{81}FDIC Policy Statement at III.2.
\textsuperscript{82}FAQs at 7; FDIC Policy Statement at III.3.
\textsuperscript{83}FAQs at 12.
\textsuperscript{84}Id. at 29.
• **The Relevant Thresholds.** While DOJ and the FTC generally classify markets into three types: unconcentrated (HHI below 1500), moderately concentrated (between 1500 and 2500), and highly concentrated (above 2500), in bank mergers, the agencies typically focus on whether the post-merger HHI exceeds 1800.

• **The Significance of the Thresholds.** The 2010 FTC/DOJ Horizontal Merger Guidelines discuss HHI analysis as “one useful indicator of likely competitive effects of a merger,” which is “used in conjunction with other evidence of competitive effects,” because “market shares may not fully reflect the competitive significance of firms in the market.” On the other hand, for bank mergers, the agencies “rely primarily” on the HHI screen. In fact, an application cannot be approved by a FRB Reserve Bank under delegated authority and must be reviewed by the Board if the merger or acquisition would raise the HHI by 200 points or more to a level of 1800 or higher in any local banking market in which the parties to a transaction have overlapping operations.

• **Parties’ Post-Merger Market Share.** The framework in the DOJ/FTC 2010 Merger Guidelines for most other industries does not discuss any thresholds based solely on the parties’ post-merger market shares. However, in bank mergers, an application cannot be approved by a Reserve Bank under delegated authority and must be reviewed by the Board if the merger or acquisition would increase the post-transaction market share for the acquiring firm to more than 35 percent in any overlapping market.

In cases where the HHI screen highlights a transaction for further scrutiny, additional information may establish a clearer picture of competitive realities in the market. Under the Bank Merger Guidelines, such information may include evidence:

- That the merging parties do not significantly compete with one another;
- That rapid economic change has resulted in an outdated geographic market definition, and that an alternate market is more appropriate;
- That market shares are not an adequate indicator of the extent of competition in the market;
- That a particular institution’s market share overstates or understates its competitive significance;

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86 Horizontal Merger Guidelines at 5.3.
87 Bank Merger Guidelines Section 1; FDIC Policy Statement at III.3.
88 Horizontal Merger Guidelines at 5.3.
89 Bank Merger Guidelines Section 1.
90 FAQs at 4.
91 Id.
Concerning entry conditions, including evidence of entry and growth by institutions within the last two years, evidence of likely entry within the next two years, and expectations about potential entry by institutions not now in the market.92

The FDIC will consider evidence:

- About the number, size, financial strength, quality of management, and aggressiveness of current market participants;
- Related to entry including market attractiveness (based on population, income levels, economic growth, and other features), legal impediments to entry, definitive entry plans by specific entities and indirect entry (such as through advertising of electronic banking); and
- That the proposed merger transaction likely would create a stronger, more efficient institution able to compete more vigorously in the relevant geographic markets.93

The FDIC may approve a merger transaction even if it is anticompetitive if the transaction is the least costly alternative to the probable failure of an insured depository institution or if the effects would be clearly outweighed in the public interest in meeting the convenience and needs of the community to be served.94

**Foreign Ownership**

Federal bank regulatory law deals specifically with foreign banks in a number of statutes, such as the International Banking Act (“IBA”), the Foreign Bank Supervision Enhancement Act of 1991 (“FBSEA”) and Bank Holding Company Act (“BHCA”). These provisions were enacted largely “to assure the foreign banks meet prudential standards that apply to US banking organizations.”95

The IBA, as amended by the FBSEA generally precludes US branches of foreign banks from engaging in domestic retail deposit taking, except for those branches that were already FDIC-insured in 1991 when FBSEA was enacted.96 Thus, to engage in full deposit-taking a foreign entity must establish one or more domestic bank subsidiaries.

With limited exception, foreign banks are required under BHCA to receive FRB approval before acquiring ownership or control of a bank in the US, and before acquiring 25% or more or otherwise acquiring control of a US bank97 or commercial lending company.98 Additionally,
foreign banks must generally be subject to comprehensive supervision on a consolidated basis by appropriate authorities in their home country or—at the very least—the appropriate authorities must be actively working to establish supervision. As part of the approval process, the FRB:

- monitors press releases and other public sources of information;
- relies on existing relationships within the banking community;
- examines ownership data records provided by applicants;
- conducts background checks on the relevant individuals and corporate entities looking for any crimes involving dishonesty, including by fingerprinting individuals;
- performs Internet searches for background information on individuals and corporate entities;
- does full due diligence, including checking with Central Intelligence Agency, Drug Enforcement Agency, and US Citizenship and Immigration Services;
- collects information on and reviews ownership up to ultimate beneficial owners;
- investigates and makes a determination of whether or not foreign bank is subject to comprehensive supervision on a consolidated basis by appropriate authorities in its home country.

After the initial transaction, banks are required to notify the FRB of changes in ownership that constitute a change in bank control. Also, by virtue of acquiring a US bank the foreign bank will become a “bank holding company.” That designation typically comes with restrictions on conducting certain banking and nonbanking related activities, but some exemptions are made for foreign bank holding companies.

Other Issues

In general, a foreign bank must submit an application to, and obtain approval from, the Office of the Comptroller of the Currency (OCC) before acquiring control of the operations of a US federal branch or agency that is open and conducting business. In reviewing the foreign bank’s application, the OCC considers among other things:

- the financial and managerial resources and future prospects of the applicant foreign bank and the proposed federal branch or agency.

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100 GAO Foreign Investment Report.
101 Id.
103 12 C.F.R 28.12(b)(1).
the convenience and needs of the community to be served;\textsuperscript{104} and

whether adequate controls for the detection of money laundering are in place and at the foreign bank.\textsuperscript{105}

OCC prior approval is generally required, but a foreign bank may consummate a transaction without OCC approval, if certain conditions are met and the bank either files an after-the-fact application or provides after-the-fact notice to OCC.\textsuperscript{106} The applicant can seek after-the-fact approval of the establishment by providing reasonable advance written notice of the transaction, committing to comply with the OCC’s after-the-fact application procedures and abide by the OCC’s decision.\textsuperscript{107} A foreign bank may provide after-the-fact notice to the OCC if it does not accept FDIC-insured deposits and meets the criteria of being an “eligible bank.”\textsuperscript{108} Generally speaking, the resulting bank is “eligible” if every US branch (a) has a composite ROCA rating of 1 or 2,\textsuperscript{109} (b) has a CRA rating of “outstanding” or “satisfactory,”\textsuperscript{110} and (c) is not subject to a cease and desist order, consent order, formal written agreement or prompt corrective action directive.\textsuperscript{111}

**AUSTRALIA**

Foreign ownership in the banking sector must be consistent with the Banking Act 1959 (the “Banking Act”) and the Financial Sector (Shareholdings) Act 1998 (the “FSSA”).

**The Banking Act**

Under the Banking Act, foreign corporations seeking to carry on banking in Australia are subject to the same requirements as domestic corporations. The corporation must apply to the Australian Prudential Regulation Authority (“APRA”) to become an “authorised deposit-taking institution” (“ADI”). APRA can attach conditions to any grant of authority and is able to revoke an ADI’s authority where the ADI breaches these conditions, a provision in the Banking Act or its regulations, or if the authorisation would be contrary to the interests of depositors or the national interest. APRA approval is required before an ADI is permitted to use the title “bank” in its name.

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\textsuperscript{104} 12 C.F.R 28.12(b)(4).
\textsuperscript{106} Id. at 34.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} ROCA stands for “risk management, operational controls, compliance, and asset quality” and are scored out of a possible 5.
\textsuperscript{110} if applicable.
\textsuperscript{111} Comptroller’s Licensing Manual: Federal Branches and Agencies, at 94; 12 CFR 28.12(f)
These requirements apply to foreign banks regardless of whether they operate as an Australian incorporated subsidiary or through a branch. However, Australian-incorporated subsidiaries of foreign banks and branches of foreign banks are treated differently with respect to depositor protections. The depositor protections available under the Banking Act to depositors where an ADI is unable to meet its obligations only apply to a foreign bank if it is an Australian-incorporated subsidiary. A foreign bank which operates through a foreign branch must inform each depositor of this before it accepts their deposit.

If a foreign bank cannot meet its obligations (either in Australia or internationally), its assets in Australia must first be made available to meet the claims of creditors in Australia before they are made available to all other creditors.

**The Financial Sector (Shareholdings) Act**

The FSSA prohibits any person from owning a stake of more than 15% of the voting power in an Australian bank or insurance company (an “unacceptable holding”) unless the person has obtained prior approval from the Treasurer. In granting this approval, the Treasurer must be satisfied that it is in the national interest to do so. This restriction applies equally to domestic and foreign investors (including foreign investors who are exempt from the FATA provisions relating to acquisitions of shares in financial sector companies).

A person who makes an acquisition which results in acquiring an unacceptable holding is guilty of an offence if he or she was reckless as to whether or not the acquisition would have that result. The maximum penalty is currently A$68,000.

The Treasurer is able to declare that a person has ‘practical control’ in an Australian bank or insurance company even if that person does not hold an unacceptable holding. If the Treasurer makes this declaration, the person is required to take steps to dispose of this control.

Where a transaction falls within the banking or insurance sector, the Treasurer may delegate authority to APRA, and in practice APRA administers this approval process. There is no prescribed time limit for a decision under the FSSA. The timing for approval is generally comparable to the FIRB approval timeline in uncontroversial cases. The FSSA process may take longer if APRA perceives that it is a more complex situation.

**Recent Developments**

In an options paper to modernise the Foreign Acquisitions and Takeovers Act, the Federal Government has proposed to remove the requirement for investments in financial sector companies, such as banks, to be approved under the Foreign Acquisitions and Takeovers Act, as this is already covered under the Financial Sector (Shareholdings) Act. The Options Paper notes the current double-up adds to “cost, time and additional red tape.”
BRAZIL

In Brazil, the review of investments in the financial services industry poses a special challenge to foreign and domestic investors alike. The Brazilian Central Bank (Banco Central do Brasil – “BACEN”) has broad powers to regulate and oversee financial services in Brazil. BACEN is part of the Brazilian Financial System, which also includes (1) the National Monetary Council; (2) Banco do Brasil S.A.; (3) the Brazilian Development Bank (Banco Nacional do Desenvolvimento – “BNDES”); and (4) all other financial institutions in Brazil.

Significant systemic friction has arisen between BACEN and CADE, and the conflict has been unusually public. BACEN is involved in a long-standing litigation (against Banco de Crédito Nacional S.A. and Bradesco S.A.) to decide which agency has authority to review transactions in the financial market. According to article 10, item X, letter “c”, of the Law no. 4,595/1964, BACEN has exclusive authority to review transactions in the financial system. This provision conflicts with Law no. 12,529/2011, which grants CADE authority to review transactions that meet certain turnover thresholds. Although CADE accepts that it shares authority with BACEN – with BACEN’s review being restricted, in CADE’s view, to regulatory aspects of transactions – BACEN has consistently contended that it possesses exclusive authority to review transactions in the financial system, including review from an antitrust perspective, without CADE’s participation. BACEN’s principal argument is that the antitrust analysis, as a general rule, does not take into account systemic risks, and consequently a decision based solely on the competition implications of a transaction could jeopardize the balance of the financial system.

In an effort to resolve this controversy, the General Attorney’s Office issued an opinion in 2001, declaring that BACEN has exclusive authority to review transactions in the financial system. The opinion was ratified by the President of the Republic and became binding on all public authorities. However, CADE has claimed that, due to its status as an independent agency, it is not bound by the opinion of the General Attorney. In 2010, Brazil’s Superior Court of Justice ruled against CADE and in favor of BACEN but that decision has been challenged by CADE and is still pending a final judgment.

In 2012, BACEN issued a regulation setting forth procedures for the review of transactions in the financial system. The regulation does not impose a deadline for review and leaves most of the details to a set of guidelines published by the Department of Organization of the Financial System, a specialized body within BACEN. These guidelines define the parameters of an antitrust review, which includes analysis of barriers to entry, efficiencies, market power, market definition, etc.

As a result of this ongoing tension between CADE and BACEN, financial institutions have, in practice, been filing applications for review of transactions with both agencies. This is not necessarily inconsistent with the practice in other jurisdictions, where concurrent competition
reviews are not unheard of, but it does add to the complexity and uncertainty of closing a deal within the financial services industry in Brazil.

Transactions involving foreign investors require the approval of the President of the Republic through a decree in addition to clearance from BACEN. According to a BACEN regulation, approval from the President is necessary for the following transactions involving direct or indirect participation of foreign investors: (1) incorporation of a financial institution; (2) acquisition of a participation interest; (3) increase in a participation interest; or (4) establishment of branches of a foreign financial institution.

**Canada**

The Office of the Superintendent of Financial Institutions (“OSFI”) is the principal bank regulator in Canada. The Minister of Finance also has supervisory and approval authority. The *Bank Act*, S.C. 1991, c. 46 (the “*Bank Act*”) permits foreign banks to establish a bank subsidiary in Canada (referred to as Schedule II banks) or maintain an authorized branch in Canada (referred to as Schedule III banks). Canadian banks not controlled by a foreign bank (referred to as Schedule I banks) are subject to certain ownership restrictions. In particular, the *Bank Act* restricts ownership by Canadians and non-Canadians alike, to 20% of voting shares and 30% of non-voting shares of Schedule I banks with over C$12 billion in equity, and 65% of voting shares of Schedule I banks with C$2 billion to C$12 billion in equity. If an investor is not a WTO investor, it may not invest in Canadian banks without the reciprocal ability of Canadians to make significant investments in banks of the investor’s home jurisdiction. Further, governments that invest in Canadian banks are not permitted to vote their shares. Approval from the Minister of Finance is required if a foreign bank or an entity associated with a foreign bank wishes to carry on business in Canada or own or acquire control of a substantial investment in any Canadian entity formed or incorporated under an act of Parliament or provincial legislature or otherwise formed in Canada.

**China**

When investing in banking and certain other service industries, including legal, securities and education services, approval generally must be obtained from the industry regulator (to determine whether the investor is qualified to provide the specified service and to ensure compliance with PRC laws and policies). In general, no MOFCOM/local commerce approval is required.

As with each of the industries highlighted in this report, China maintains various measures that could impact foreign investment in the banking and finance industries. Select measures that may restrict investment in the banking, finance and other financial services sectors include the following:
FRANCE

Mergers in the financial sector are subject to challenge by the Comité des Etablissements de Credit et des Entreprises d’Investissement (“CECEI”), which is chaired by the governor of the Bank of France. The CECEI has in the past reviewed mergers for competition issues and imposed conditions to closing. For example, in 2003, the CECEI investigated the merger of Credit Agricole and Credit Lyonnais, eventually allowing the merger to be consummated on the condition that the firms divested assets in markets in which the merged entity would have a 45 percent market share.

Additionally, France’s market regulator, Autorité de marchés financiers (“AMF”), can condition the opening of the acceptance period for takeovers on receipt of mandatory regulatory approvals, including foreign investment review.

Outside of formal reviews, foreign investment in France’s financial sector has engendered political opposition. In 2013, the proposed acquisition of NYSE Euronext by IntercontinentalExchange, an American company, generated a great deal of political opposition in France. The Minister of Finance, Pierre Moscovici, reviewed the merger, ultimately approving it on November 12, 2013. However, Moscovici urged French banks and insurance companies to take a large share in the European branch of NYSE Euronext, which is to be spun off following the merger.

Moscovici “stressed that the French government was expected to find support from the country’s largest banks and insurers, given that it was in their best interests to ensure that Paris remains a financial hub in Europe.” A report commissioned by Moscovici,

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118 Id.
written by Thierry Francq, a former chief of France’s stock market regulator, recommended that a core group of shareholders holding at least 25 percent of Euronext be found to represent the interests of France, Belgium, the Netherlands and Portugal.\footnote{http://www.reuters.com/article/2013/11/13/ice-nyse-france-idUSL5N0IY00320131113.} The report stated, “Only a locally rooted stock exchange operator can adequately address the needs and specificities of its client base” and also noted the need to protect thousands of high-value jobs associated with France’s financial ecosystem.\footnote{Id.}

**GERMANY**

Investments in the banking and finance industry must be reviewed by the German Federal Bank (Deutsche Bundesbank, “Bundesbank”) and the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, “BaFin”). As of June 3, 2014, the Bundesbank was chaired by Jens Weidmann and the BaFin by Elke König.

Pursuant to the German Banking Act (Gesetz über das Kreditwesen, “KWG”) an investor who intends to acquire or increase a “qualified participating interest” in a financial institution, either alone or through collaboration with other persons or enterprises, must promptly notify this intention in writing to the Bundesbank and the BaFin. The threshold for a “qualified participating interest” is met when at least 10% of the capital of or the voting rights in a financial institution is acquired or when an investor is able to exert a significant influence on the management of a financial institution. The mandatory notification requirement also applies if the holder of a qualified participating interest intends, either alone or through collaboration with other persons or enterprises, to increase the amount of the qualified participating interest in such a way that the thresholds of 20%, 30%, or 50% of the voting rights or capital are reached or exceeded, or if the holder of the qualified participating interest intends to acquire control over the financial institution. The BaFin has to review the envisaged transaction within an assessment period of 60 working days, which starts from the day the authority confirms the receipt of a complete report (within two days from notification), and which can be extended to no more than 90 working days. After the assessment period expires, the transaction may be closed. In case of closing prior to the expiration of the assessment period, the BaFin has the power to prohibit the holder of a qualified participation interest from exercising its voting rights or from disposing of its interest without the BaFin’s prior approval.

**JAPAN**

Under the Foreign Exchange and Foreign Trade Act, investments in the banking industry require a prior notification. In prior notification case, the foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has
nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months.

The Ministers may order the foreign company to change the extent or character of its investment or discontinue the investment when the investment is likely to cause the National Security Issues.

Any person who made an inward direct investment without giving the proper pre-notification or after giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.

**UNITED KINGDOM**

As noted above, during the financial crisis, “ensuring the stability of the UK financial system” was recognized as a public interest concern capable of allowing the SoS to intervene in banking or finance transactions.

In addition, an acquiring party may be subject to The City Code on Takeovers and Mergers (“City Code”), governed by the Takeover Panel, if the party seeks to acquire (1) a company with registered offices in the UK with securities traded on a UK exchange; (2) a public company with registered offices in the UK but no securities traded on a UK exchange if the company is found to be a UK resident; or (3) a private company with registered offices in the UK if the company is found to be a UK resident and had its equity held publicly in the past ten years. The overarching goal of the City Code is to protect the interests of British shareholders of target companies. Thus, the status or residence of the acquiring party is immaterial for the application of the City Code.

Deals conducted under the City Code are generally structured as “offers” subject to certain conditions or pre-conditions. The City Code requires a potential acquirer to commit to making an offer within 28 days of the potential deal becoming public (through, for example, a “leak”). The City Code allows an offeror to include certain conditions (which may be satisfied or waived after a formal offer is made) and pre-conditions (which must be satisfied or waived before the offer is formally made). An offeror must consult the Takeover Panel regarding pre-conditions (other than approval by the CMA or the EC) before including the pre-conditions in the deal’s announcement. Under the City Code, an offeror can only invoke a condition or pre-condition if the Takeover Panel determines that the condition or pre-condition is “material.” The Takeover Panel will consider, among other things, the negotiations related to the condition or pre-condition, the extent to which the target’s shareholders were informed about the condition or precondition, and whether the condition or pre-condition was adapted to fit the circumstances of the target. There are various documents that an offeror must issue, including an announcement, the offer, and (in some cases) a prospectus. However, the City Code also includes alternative

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121 The City Code also applies to companies with registered offices or shares listed on exchanges in the Channel Islands or the Isle of Man.
“schemes” to effect a takeover which have procedures that differ from offers under the City Code.

In general, Takeover Panel is responsible for applying the general principles and rules of the City Code. The six general principles that govern are:

1. All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.

2. The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company’s places of business.

3. The board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.

4. False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.

5. An offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.

6. An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

**Media and Telecom**

**UNITED STATES**

Other than cross-ownership restrictions relating to newspapers, cable, and broadcast, the United States does not have any media-specific restrictions on mergers and acquisitions. Such transactions, however, are still subject to antitrust review.
Telecom

In the United States, the Federal Communications Commission (“FCC” or “Commission”), an independent federal regulatory authority, is responsible for the issuance, transfer, or assignment of various types of communications-related licenses and service authorizations, including the approval of certain changes in ownership of those licenses or authorizations. This may involve satellite, broadcast, wireless or wireline services, including submarine cable landing licenses. Where granting the request would not violate communications laws or regulations, the FCC typically applies a “public interest test” to guide it in making the relevant determinations. While flexible, this standard typically includes a series of factors tailored to the type of request.

Competition

One factor that is typically included in the public interest test is competition. The FCC often is the only agency to evaluate competition issues in connection with applications. Where a merger, acquisition or joint venture is involved, however, federal and possibly state antitrust authorities may also evaluate competition issues. At the federal level, the Antitrust Division of the DOJ or the FTC would conduct a review pursuant to federal antitrust law (although the Justice Department is more likely to do so than the FTC because of the direct and indirect consequences of the statutory carve-out of common carrier transactions from the FTC jurisdiction). While the FCC’s competition analysis under the public interest test typically overlaps substantially with that applied by the DOJ or the FTC, the FCC’s analysis is potentially more flexible and is not bounded strictly by the limits of antitrust statutes or case law (i.e., antitrust law informs but does not limit the FCC’s public interest test). Nonetheless, the FCC and the federal antitrust agencies typically coordinate their reviews closely to promote efficiency – for themselves, the parties to the transaction, and other interested entities such as customers and vendors who may have relevant interests and information – and to avoid inconsistency in determining facts, engaging in relevant analysis, and imposing remedies (e.g., if relief, such as conditions, may be needed). Facilitating this coordination, the FCC and DOJ often employ staff that have worked at both agencies. For example, on July 7, 2014, the FCC issued a press release identifying the team leaders for review of both the Comcast-Time Warner Cable-Charter transaction and the AT&T-DirecTV transaction, and both have experience working at the DOJ Antitrust Division. As of the same date, the DOJ employed lawyers who had worked at the FCC including, among others, a Deputy Assistant Attorney General for Antitrust who had led the review of the AT&T-T-Mobile transaction while at the FCC. Typically, the FCC targets completion of its review of major mergers within 180 days, but it is not unusual for it to take longer due to a range of factors. Sometimes it also “stops the clock” as it awaits needed information from the parties that was not


included in the original filing. More often than not, the antitrust enforcers publicly take action prior to the FCC issuing an order on the transaction.

**Foreign Ownership**

Where an application involves foreign ownership or investment, another factor included in the public interest test applied by the FCC is whether the proposed foreign investment poses a risk to national security (including in relation to cybersecurity), law enforcement, foreign policy or trade.\(^{124}\) To address such concerns, the FCC seeks input from the Executive Branch and typically accords deference to that input in making its public interest determination. The Executive Branch pursues its own review process before responding to the FCC, which may include submitting questions to applicants, evaluating their responses and other information that is or becomes available to the Executive Branch, and possibly entering into an agreement with the applicants, or accepting a letter of assurance, to mitigate or resolve any Executive Branch concerns in these areas. This relief may become a condition of an FCC approval.

Although the FCC has a process for streamlining applications and could deliver an outcome within weeks, the Executive Branch typically asks that the FCC delay acting on applications raising such issues until they finish a review and are prepared to inform the FCC of any concerns and recommendations.\(^{125}\) There is no firm timetable for the Executive Branch to provide input to the FCC, and the result has been a process that has been extended to months, and sometimes to a year or longer. That is partly why the FCC is seeking to work with the Executive Branch to reform and shorten this process.\(^{126}\)

The FCC staff seeks Executive Branch input on national security and law enforcement issues by referring applications with foreign ownership to a group known informally as “Team Telecom,” led by the Departments of Justice, Homeland Security and Defense, with the FBI, and with other law enforcement or intelligence community entities sometimes contributing to the Executive Branch process. The FCC seeks additional input, primarily from the Office of the US Trade Representative on trade policy, and the State Department on foreign policy, again with other agencies sometimes contributing.

There is sometimes overlap between the more formal CFIUS process and the FCC’s less formal consultation process with Team Telecom. This comes mainly in the area of changes of control that involve companies that provide services regulated by the FCC, where CFIUS may also

\(^{124}\) Certain of these criteria could possibly apply to applications without foreign ownership or investment. For example, Section 60004 of the Middle Class Tax Relief and Job Creation Act of 2012 precludes participation by anyone (whether US or foreign) who is “barred” by a federal agency from participating in an auction or certain contracts or grant solicitations “for reasons of national security.”


\(^{126}\) Id.
apply; but the FCC’s process also applies to a broad range of applications and requests for authorization that CFIUS does not. Team Telecom participants may also participate in the CFIUS process in appropriate instances. Because the CFIUS process has a statutory structure and timetables, and the FCC consultation process with Team Telecom does not for the most part, parties sometimes take these differences into account in determining the best way to move forward. In either instance, however, the FCC can consult and make decisions on its own timetable.

In some areas, the FCC has issued policy statements and precedents that provide guidance on how it applies some of these criteria. For example, the FCC will consider prior convictions or violations of FCC rules.127

The FCC has several authorities that enable it to address issues of foreign investment or ownership. It applies the public interest test where it reviews an application with foreign ownership for domestic or international Section 214 authority (including wireline service and service across national borders), Title III broadcast or common carrier licenses (including for the provision of mobile wireless service), submarine cable landing licenses, and transfer of control or assignment of authorizations/licenses, or Section 310 (b) petitions for declaratory rulings on foreign ownership.128 The two broadest sources of FCC authority are Section 214 and Section 310 (b), including various subsections. These statutes can interact—Section 214 requires authorizations from the FCC to provide various domestic and international services (i.e., service to foreign points), usually characterized as common carrier services,129 and when common carrier wireless licenses are involved, those authorizations also must satisfy the provisions of Section 310 that pertain to foreign ownership and investment. Under Section 214 (a), applicants must obtain a certificate from the Commission that the “present or future public convenience and necessity will require” the proposed service. The FCC notice to Executive Branch agencies is given where there is a proposed direct or indirect investment by individual foreign investors of 10% or more, regardless of country, or the application involves service to Cuba. This may involve a new applicant for Section 214 authority or a proposed buyer of or investor in a Section


128 See, Report on FCC Process Reform, GN Docket No. 14-25 (FCC Staff Working Group led by Diane Cornell of the Office of the Chairman, February 14, 2014) at Recommendation 1.15 (hereinafter “FCC Process Reform Report”). See also 47 U.S.C Sec 214 (a); 47 U.S.C. Sec 310(b)(4); Cable Landing License Act of 1921, Executive Order 10530 and application requirements, 47 C.F.R. 1.767 (under which President delegates responsibility to the FCC to make determinations concerning permission to land international cables in the US and application procedures are established).The FCC must coordinate all cable landing applications with the State Department and State must notify the FCC within 30 days whether it has concerns. As with other types of applications, the FCC has available a streamlined process, but it will not be followed if there are concerns and the period in which the FCC must act will be extended.

129 The Commission is required to provide notice of certain applications made under Section 214 and an opportunity to be heard to the Secretaries of Defense and State (and to certain Governors). See 47 U.S.C. Sec. 214 (b).
licensee. The FCC provides that it may attach to any grant of an application “such terms and considerations as in its judgment the public convenience and necessity may require,” which also enables the FCC to rely on or incorporate agreements that the Executive branch has reached with an applicant.\(^{130}\) Section 310 (b) (4) allows investment in the US parent of a Title III (including broadcast and wireless) licensee in excess of 25% unless “the Commission finds that the public interest will be served by the refusal or revocation of such license.” Express prior action by the Commission is required. Again, the FCC gives notice to the Executive Branch of applications involving a foreign ownership interest in excess of 10%, regardless of whether the aggregate foreign ownership exceeds the 25% threshold. FCC waivers have been granted many times to permit foreign investment well in excess of 25% in nationwide wireless carriers, cable operators, and Internet service providers.\(^{131}\) When waivers were granted, factors have included WTO commitments and effective competition opportunities (“ECO”), (i.e., national reciprocity, and a host of other considerations).\(^{132}\) Although waivers of the 25% foreign ownership threshold have not generally been granted to broadcasters, which are considered to have editorial discretion, the Commission recently announced that it will review on a case-by-case basis applications for approval of foreign investment above 25% in the controlling US parent of a broadcast licensee.\(^{133}\)

As a practical matter, if concerns arise that cannot be satisfactorily addressed by a mitigation agreement or other device, the applicant could withdraw its request or seek designation of the matter for hearing at the FCC, but the latter is a lengthy process that is rarely invoked.\(^{134}\) Judicial review may also be available.

**Other Issues**

The public interest test is generally flexible enough to include a wide range of considerations in appropriate instances, such as promotion of universal service, expansion and improvement of broadband, increased network reliability, greater diversity, increased access and localism, etc.

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\(^{130}\) 47 U.S.C. 214 (c).

\(^{131}\) Section 310 (b) (3) has a 20% limit on certain direct investments. The Commission forborne from applying the 20% limit to foreign equity and voting interests held in a common carrier licensee through US-organized entities that do not “control” the licensee. Instead, the Commission assesses on a case-by-case process whether the proposed foreign ownership in excess of 20% is in the public interest, using a declaratory ruling process for those seeking approval that is the same as is used in analysis under Section 310 (b) (4).


\(^{133}\) See e.g., In the Matter of Commission Policies and Procedures Under Section 310(b)(4) of the Communications Act, Foreign Investment in Broadcast Licensees MB Docket No. 13-50 Nov. 14, 2013. The FCC did not determine that historical concerns concerning foreign influence over broadcast stations has disappeared or that new issues have not arisen as technology has advanced. But as it considers these matters case-by-case on the facts of each broadcast application, it will also consider potential benefits as whether new sources of capital may create greater ownership diversity or advance other Commission goals.

\(^{134}\) 47 U.S.C. Sections 308, 309(e), 310(d).
The FCC also applies a variety of limitations on ownership and cross-ownership of telecommunications and media-related entities that are not related to whether ownership is domestic or otherwise. These limitations derive from statutes and rules and are intended to advance policies such as the promotion of diversity of ownership and content, including as focused on underserved communities. For example, Congress limited the number of radio stations that may be owned in a single market varying by the size of the market. See, Telecommunications Act of 1996, Sec 202 (b). The FCC also may not permit, among other things, certain types of cross-ownership in a market, for example, of newspapers and broadcasters, and of radio and television stations, and it limits the extent of ownership of broadcast stations nationally. The focus of this section is not to identify or review the full collection of ownership limitations enforced by the FCC that may apply to all owners, domestic or foreign, but rather to focus on those that are specific to foreign investment or which may overlap the HSR reviews conducted by the US antitrust agencies.

**AUSTRALIA**

Media is a prescribed sensitive sector under the FATA. The media sector refers to daily newspapers, television and radio (including internet sites that broadcast or represent these forms of media). All foreign investors, including prescribed foreign investors, must notify the Government and obtain prior approval in order to make investments of 5 per cent or more in the media sector, regardless of the value of the investment.

In an Options Paper to modernise the Foreign Acquisitions and Takeovers Act, the Federal Government has proposed to lift the threshold to either 10 per cent or 15 per cent. At 10 per cent it would match the threshold that applies to direct investments by foreign government investors. At 15 per cent, it would match the substantial interest threshold. In 2007, foreign ownership restrictions in the media sector were removed from the Broadcasting Services Act (it has a 15 per cent threshold at which it deems control). The government’s Options Paper notes that “media diversity rules continue to apply to both foreign persons and Australians”.

**BRAZIL**

Foreign investment in media companies in Brazil is quite limited. Under article 222 of the Brazilian Constitution, only Brazilian-born citizens and naturalized citizens who have been naturalized for more than ten years may own press and broadcasting companies. In the case of legal entities, at least 70 percent of an entity’s corporate capital must be held by Brazilian-born citizens or naturalized citizens of at least ten years (article 222, paragraph 1, of the Brazilian Constitution). Moreover, programming and editorial responsibilities must be performed exclusively by Brazilian-born citizens or naturalized citizens of at least ten years. Foreign investment is permitted in cable television companies but ownership of no more than 30 percent
of the voting capital of companies responsible for programming or audio-visual content is permitted.

**Telecom**

Unlike some counties, Brazil permits foreign investment in telecommunications companies but it can take a long time to obtain approval. Telecommunication is defined by Brazilian law as the “transmission, emission or reception, by wire, radioelectricity, optical cables or any other electromagnetic process, of symbols, signals, scripts, images, sounds or information of any nature.” All companies that render any of these services are subject to regulation.

The spin-off, merger, transformation, capital reduction or transfer of control of telecommunication companies in Brazil is subject to the prior approval of the Brazilian Telecommunications Agency (Agência Nacional de Telecomunicações – “ANATEL”). The transaction shall be approved by ANATEL if it does not have the potential to harm competition or jeopardize the performance of a company’s concession contract for telecommunication services.

There is no statutory timetable for this review and ANATEL has been criticized, including by CADE’s officials, for taking too long to approve transactions.

**Canada**

The Canadian Radio-television and Telecommunications Commission (“CRTC”) regulates broadcasting in Canada pursuant to the Broadcasting Act, S.C. 1991, c. 11. As the regulator of broadcasting in Canada, the CRTC is responsible for reviewing proposed mergers and acquisitions in the broadcasting sector specifically to ensure that they are aligned with the policy objectives of the Broadcasting Act, such as fostering certain cultural goals. Similar to the restriction on foreign ownership of telecommunications carriers, non-Canadians may not own, directly or indirectly, more than 46.7%, of the voting securities of a broadcasting licensee. The timelines for reviews of broadcasting license applications depend on the characteristics of the transaction, such as complexity, nature and size. Larger, more controversial applications are often reviewed in a public process and may take six to nine months. Less complex, largely administrative reviews may be completed in as a little as two months.

Acquisitions of media-related entities not subject to CRTC licensing, e.g. in the periodical publishing sector, may trigger foreign investment review by the Minister of Heritage pursuant to the ICA, since media-related entities may qualify as “cultural businesses” under that legislation (and the reviewable threshold for acquisitions of cultural businesses is C$5 million, irrespective of the nationality of the non-Canadian investor, i.e., regardless of whether it is from a WTO member country). The Department of Canadian Heritage has published written policies concerning “Book Publishing and Distribution,” “Film Distribution,” and the “Periodical
Publishing Sector Policy,” which outline specific conditions for foreign investment in these respective media-related industries, discussed further below under “Other - Culture”.135

**Telecom**

The CRTC conducts reviews involving telecommunications carriers under the *Telecommunications Act*, whereas the Minister of Industry – the same Minister responsible for approving investments under the ICA – conducts reviews of mergers involving licenses for wireless spectrum under the *Radiocommunication Act*. These reviews can concern compliance of transactions with restrictions on foreign ownership, which despite recent liberalisation still apply to the largest telecommunications common carriers, such as Rogers Communications, TELUS and Bell Canada.

The *Telecommunications Act* was amended in 2012, with the purpose of improving access to capital for smaller telecommunication carriers by removing the foreign ownership restrictions for telecommunications companies whose annual revenues represent less than 10% of total Canadian telecommunications revenues. Although these carriers are still exempt from foreign ownership restrictions if their market share increases above 10% by ways other than a merger or acquisition, the ICA still applies to such entities where review and notification thresholds are met.

Where the *Telecommunications Act* and *Radiocommunication Act* still place restrictions on foreign ownership non-Canadians may not own, directly or indirectly, more than 46.7%136 of the voting securities and may not otherwise exercise “control in fact” of such carrier.

In addition to reviewing merger transactions for compliance with foreign ownership restrictions, Industry Canada reviews telecommunications mergers involving wireless licenses in light of Canadian spectrum policy, including concerns regarding concentration of spectrum among a small number of wireless service providers. Timelines for these communications-specific reviews can vary dramatically depending on the nature, size and complexity of the proposed transaction. For example, whereas Industry Canada has announced its intention to complete typical transfers of spectrum licenses within 12 weeks, this process can, and typically has, taken longer.137

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136 See § 16 of *Telecommunications Act*. This figure is arrived at by aggregating both a direct 20% voting interest and an indirect 33 1/3% interest.

CHINA

China imposes various restrictions on investments in media and advertising sectors. Select measures that may restrict foreign investment in the media and advertising industries include the following:


Telecom

Investments in telecommunications (as well as medical, advertising, asset valuation, cinema, printing services, and other industries), require pre-approval from the industry regulator, followed by MOFCOM or provincial commerce authority approval to establish the FIE (although in practice, the industry regulator usually decides whether to approve the FIE and MOFCOM will defer to that opinion). Timelines for these approvals vary by industry.

Select measures that may restrict foreign investment in the telecom industry are as follows:

- *Provisions on the Administration of Foreign-funded Telecommunications Enterprises.*
- *Administrative Measures for the Licensing of Telecommunication Business Operations.*

FRANCE

Non-EU media companies are restricted from acquiring more than a 20 percent stake in French-language audio visual communication companies. France has a well-known tradition of protecting and supporting domestic media constituencies. For example, France has vigorously defended the “cultural exception” in trade negotiations to prevent the liberalization of its media sector. In 2013, France threatened to block the opening of the Transatlantic Trade and

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Investment Partnership talks if the audiovisual sector was included in the liberalization talks.\textsuperscript{143} The audio-visual sector was carved out of the European Commission’s mandate subject to being raised in later negotiations.\textsuperscript{144}

**Telecom**

The Telecommunications Act of 1996 restricts foreign investment in a licensed telecommunications company to 20 percent of the share capital or the voting rights at a general meeting.

The Autorité de régulation des communications électroniques et des postes (“ARCEP”) is the telecommunications regulator in France. Under the Telecommunications Act, non-broadcast and cable TV telcom companies must apply for licenses to operate in France which “may only be refused on the grounds of public order or in the interests of national defence and public security, or as a result of technical constraints due to the limited availability of frequencies, or when the applicant does not have the technical and financial capacity to sustainably meet the obligations resulting from the conditions under which its activity is carried out, or when it has been a subject of” penalties.

The “Alstom Decree” listed the telecom industry as an extra sensitive national security sector. Specifically, the Minister of Finance is empowered to review foreign investments in “activities relating to the provision of services, equipment or products essential to guarantee the continued operation of electronic communications networks and services.”

**Germany**

Pursuant to the Interstate Broadcasting Treaty (*Rundfunkstaatsvertrag*, “RStV”), a broadcaster must notify the competent State Media Authority (*Landesmedienanstalten*) of any planned change in participating interests or shareholdings. The notification has to be in written form. A broadcaster commits an administrative offence if it omits to report any proposed changes and can be sanctioned with a fine of up to EUR 500,000. The RStV does not stipulate a time frame for the review process. If a transaction is implemented prior to clearance and the requirements for approval are not fulfilled, the broadcasting license must be revoked. A license can only be granted if the envisaged transaction is classified as harmless (so-called *Unbedenklichkeitsbestätigung*) and does not endanger the diversity of public opinions within the Federal Republic of Germany. Also, a license for nationwide broadcasting can only be granted to a natural or legal person established in the Federal Republic of Germany or another EEA


\textsuperscript{144} http://www.euractiv.com/trade/eu-us-leaders-kick-transatlantic-news-528668.
Member State. National and foreign public law entities as well as political parties cannot in principle own broadcasting entities.

**JAPAN**

Under the Broadcast Act and Radio Act, Foreign investors may not own more than 20% of the outstanding shares of certain Japanese broadcast companies. In addition, foreign investors may not have shares of Nippon Telegraph and Telephone Corporation exceeding 1/3 of the outstanding shares.

**UNITED KINGDOM**

As noted above, Ofcom, the communications regulator, has an advisory role in the SoS’s review of media mergers. However, as mentioned, controversies surrounding the SoS’s review of the News Corporation/BSkyB transaction have led to calls for Ofcom to gain more power in public interest reviews of media mergers. Giving Ofcom, an independent regulator, a “leading role” in media merger reviews may help prevent political interference with the review process.

As with competition and public interest review, there is no obligation to notify Ofcom about a media merger. However, Ofcom encourages parties to notify it of mergers that may raise public interest issues. Parties can notify Ofcom of a proposed transaction in a number of ways: informal advice; confidential guidance; pre-notification discussion; statutory voluntary notification; or informal submission/common notification form. The first three are confidential processes that occur before a transaction is made public, while the last two are public processes. Ofcom gathers information through submitted materials from the merging parties as well as third parties and from other sources. Failure to abide by Ofcom information request deadlines may lead to a suspension of administration timelines. Also, failure by a broadcast company to provide information requested by Ofcom may lead to a suspension of the company’s license. Information shared with Ofcom will also be transmitted to the SoS. If no public interest issues are found (or the issues are easily resolvable), Ofcom will prepare a short report and provide the report to the SoS. If, however, more complex or material public interest issues are found, Ofcom will convene a meeting with the merging parties. Prior to the meeting, an issues letter will be prepared by Ofcom and sent to the parties. The merging parties may comment on the issues letter in writing and/or orally at the meeting. The time period between the issues letter and the meeting is approximately one to two working days. Following the meeting, a draft report will be finalized by Ofcom, passing through various stages of the approval process, and will be sent to the SoS.
Energy and Electric Power

UNITED STATES

The United States is generally open to foreign investment in the energy sector, especially if the would-be foreign investor is from a country that affords reciprocal benefits to US companies. Coal provides an excellent example. Although foreign investors cannot directly purchase mineral leases, such investors can own up to 100% of a domestic company that holds mineral leases unless the foreign investor is a citizen of a country which “den[ies] similar or like privileges to citizens or corporations” of the United States. 30 U.S.C. § 181. The Department of the Interior is responsible for implementing this law. Although the coal industry is subject to a host of health, safety, and environmental regulations, there is no specific law or regulatory body focused on mergers, acquisitions, or other corporate transactions in this sector. This means that while review by either the FTC or DOJ may be required, as well as by CFIUS, there are not additional sector-specific regulatory hurdles.

Likewise, there are no sector-specific restrictions on the foreign ownership of electric facilities, although CFIUS may review transactions related to such facilities. FERC reviews transfers of ownership or control of electric generation and transmission facilities to determine if they are in the public interest. Although FERC looks at a number of factors affecting the public interest, including, in particular, whether the transaction will raise market power concerns, the commission is indifferent towards foreign ownership. However, the owners of public utilities within FERC’s jurisdiction are required to grant FERC access to their books and records; this requirement also applies to foreign companies that acquire US energy assets under FERC’s jurisdiction. State and local governments may also regulate electricity mergers and acquisitions within their specific jurisdictions; such entities may approve or deny a given transaction independent of FERC.

FERC also issues licenses for the ownership and operation of hydroelectric facilities. FERC is prohibited by statute from issuing such licenses directly to foreign persons or entities, but it allows a domestic subsidiary or affiliates of foreign companies (even if 100% foreign-owned) to hold a hydroelectric license.

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145 See Ralls Corp. v. CFIUS, 758 F.3d 296 (D.C. Cir. 2014).
147 See e.g. PacifiCorp, 87 FERC ¶ 61,288, 62, 152 (1999).
149 See SUEZ energy North America, Inc. 125 FERC ¶ 61,188 (2008) (authorizing the purchase of hydroelectric facilities by a French-owned company); see also Trafalgar Power Inc. 87 FERC ¶ 61,207, 61,795-796 (1999) (requiring Canadian company’s rights relating to a hydroelectric facility be transferred to an American assignee.
One exception to the lack of foreign-ownership restrictions in the energy sector is nuclear generation. The Nuclear Regulatory Commission (“NRC”) cannot issue a reactor license to any entity that “is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” 42 U.S.C. § 2133(d). This prohibition, however, does not preclude a foreign company from having a direct or indirect ownership interest in a US company that, in turn, holds an ownership interest in such a nuclear reactor. The NRC, for instance, allows foreign entities to hold substantial ownership interests150 so long as acceptable “negation actions” are included as license terms to ensure that US entities or individuals exercise control over safety. For instance, AmerGen Energy Company LLC (“AmerGen”), which at the time of its formation was 50% owned by a wholly-owned US subsidiary of a British company, obtained the NRC’s consent to acquire multiple nuclear plants. In consenting to the transfers, the NRC relied heavily on the following negation measures: (1) the CEO, chief nuclear officer, and other principal officers of AmerGen were US citizens; and (2) the chairman of the management committee was a US citizen appointed by the US partner and that US citizen would have the deciding vote on nuclear safety and security issues.

AUSTRALIA

Mining Tenements

Foreign private investment in Australian mining tenements may require FIRB approval, depending on the type of tenement acquired and the availability of various thresholds and exceptions. In most cases, an acquisition by a foreign person of an interest in a mining licence or lease in Australia requires FIRB approval (regardless of the value of the tenement or the size of the interest being acquired).

The Policy provides that the acquisition of an interest in prospecting, exploration, production or mining tenements will require FIRB approval where:

- they provide the right to occupy Australian urban land and the term of the lease or licence (including extensions) is likely to exceed 5 years; or

- they provide an interest in an arrangement involving the sharing of profits or income from the use of, or dealings in, Australian urban land.

or that certain agreements be altered to modify such rights so as not to impede the licensee’s exercise of its responsibilities).

150 The NRC has never approved foreign ownership interest exceeding 50%. However, it has undertaken a review of its policies with regard to foreign ownership. See Calvert Cliffs 3 Nuclear Project, LLC And Unistar Nuclear Operating Services, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-13-4, 77 NRC 101 (2013); Nuclear Regulatory Comm’n., SECY-14-0089, Fresh Assessment Of Foreign Ownership, Control, or Domination of Utilization Facilities (2014).
Given the broad definition of “Australian urban land,” the area of land subject to a mining tenement will invariably fall within the definition of Australian urban land.

Most mining licences and leases will be captured by the Policy, since they confer more extensive access rights to the underlying land (which is generally Australian urban land) and have a longer life term reflecting expected mine life). In the rarer case where land that is the subject of a mining lease is ‘Australian rural land,’ the rural land threshold of $15 million applies.

The FATA provides that where a mining lease or exploration licence is granted to a foreign person by the Commonwealth or a State or Territory government, this will not require FIRB approval as it will not constitute an acquisition of an interest in Australian urban land. Practically, this means that where a foreign person is applying for a mining tenement directly from the government, a FIRB notification is generally not required. This exemption is not available for foreign government investors.

The Policy also states that “[w]here a mining tenement is developed to an operational mine, it will then be considered a developed commercial property.” Foreign investors need to apply to acquire an interest in developed commercial real estate valued at $55 million or more. As a result, investors wishing to acquire an interest in operational mines worth less than $55 million do not need to apply for FIRB approval. Prescribed investors only need to apply for developed commercial real estate valued at $1,094 million or more.

The exemption for operational mines worth less than $55 million applies only to the mining tenements being acquired. If a foreign person is acquiring a mining project (e.g., by the acquisition of a private company that owns the project), then the investor will need to analyse all land being acquired as part of the transaction in order to decide whether the exemption is available. For example, if a mining project includes residential real estate in a nearby town (say, as a buffer zone), then the exemption for developed commercial real estate will not extend to the acquisition of residential real estate. That land may need to be carved out of the acquisition or discussed with FIRB. In addition, foreign government investors do not have the benefit of the ‘less than $55 million exemption’ and must notify FIRB for any interest in land that they seek to acquire.

**Australian Urban Land Corporation**

Foreign investors that wish to acquire shares in a mining company will require FIRB notification as doing so constitutes an acquisition of an interest in an ‘Australian urban land corporation.’ An ‘Australian urban land corporation’ is a corporation whose interests in Australian urban land exceed 50% of the value of its total assets (including any assets held by subsidiaries). In the usual course, the value of the corporation’s Australian urban land interests and the value of the corporation’s total assets are as shown in its last audited balance sheet. Any foreign acquisition of an interest in an Australian urban land corporation requires FIRB approval. There are some exceptions to this rule. For a publicly listed company, FIRB approval is not required if the
acquisition is less than 15% of shares, or following the acquisition, if foreign persons hold less than 40% of shares.

**Foreign Government Investors**

Foreign government investors face stricter investment requirements. Under the Policy, foreign government investors must notify and receive approval to acquire an interest in land, including any interest in a prospecting, mining or production tenement. This is the case even if notification and approval is not required under the FATA. In 2011, the Treasurer stated that the FIRB intended to adopt a 2-stage approach to acquisitions of mining and petroleum tenements by foreign governments and their related entities. Foreign government investors need to seek approval not only when acquiring an exploration tenement (Stage 1), but also later when applying for a mining lease to enable development of the tenement into a mine (Stage 2).

**Acquisition of Uranium Rights**

If the particular mining lease or exploration licence being acquired by a foreign person grants the relevant holder rights to mine or explore for uranium, FIRB is likely to be more sensitive in granting its approval to the acquisition, especially where the investor is a government controlled investor. FIRB will consider whether the acquisition is in the national interest, having regard to the history of uranium mining in Australia as well as to government policy on uranium extraction and restrictions on uranium exports.

Any approval granted in respect of the acquisition of uranium rights will likely be subject to legally enforceable conditions.

Conditions that have previously been applied to the acquisition of uranium interests include requirements that the acquirer will:

- abide by all Australian Federal and State laws and regulations relating to mining and the export of uranium; and
- undertake prior consultations with the Department of Resources, Energy and Tourism on the terms of any marketing agreement as part of the Australian Government’s regulations and disclosure rules relating to uranium sales from Australia.

Where an interest in a uranium tenement is deemed to be an interest in Australian urban land, no monetary thresholds apply because the acquisition is in respect of acquiring an interest in Australian urban land (as discussed above).

The uranium sector is a prescribed sensitive sector which impacts the applicable monetary thresholds for US and New Zealand investors indirectly investing in uranium tenements (e.g., through an acquisition of the shares in a company that holds uranium tenements, unless the company is an Australian urban land corporation).
Petroleum Titles

The analysis of acquisitions of petroleum titles is similar to that for mining tenements as most grant an interest in Australian urban land. Australian urban land includes offshore petroleum tenements, as the definition includes all seabed within Australia’s Exclusive Economic Zone.

Similarly to the FIRB mining tenement requirements, any petroleum titles acquired from the Government (Commonwealth, State or Territory, or local) do not require FIRB approval, but any interest gained from a third party will require FIRB approval, if what is acquired is an interest in Australian urban land. The stricter requirements for foreign government investors also apply to petroleum titles.

BRAZIL

Unlike some countries, Brazil permits foreign investment in energy companies but regulatory review is required, including institutionalized coordination with CADE. Specifically, a transaction will be subject to prior review by the National Agency of Petroleum, Natural Gas and Biofuels (Agência Nacional do Petróleo, Gás Natural e Biocombustíveis – “ANP”) if it would result in the assignment to anyone of rights and obligations under a concession contract for the exploration and production of hydrocarbons. The assignee must meet the technical, financial and legal criteria established by ANP in order to assume the rights and obligation of the concession contract.

The law sets forth no statutory deadline for the conclusion of the review by ANP.

ANP formally coordinates with CADE, to which it looks for antitrust analysis and approval. On April 4, 2013, the ANP sent a letter to all concessionaires in Brazil announcing that any request for prior authorization to assign a concession contract must be accompanied by either (a) a decision by CADE approving the transaction, or (b) a statement signed by the parties to the transaction confirming that their entities do not meet the threshold for mandatory antitrust notification.

Foreign investors are permitted to invest in electric power generation, transmission, and distribution companies in Brazil, so long as they comply with regulation by the Brazilian Electricity Regulatory Agency (Agência Nacional de Energia Elétrica – “ANEEL”), which is responsible for overseeing the production, transmission, distribution and commercialization of electric energy. In that role, ANEEL has authority to control, on an ex-ante and ex-post basis, any transaction carried out by concessionaires and permitted or authorized operators, as well as by their controllers and affiliates, and it has the power to block or impose restrictions over the assumption of rights and obligations. In addition, ANEEL may impose restrictions, limits or conditions on the transfer or grant of concessions, permissions and authorizations in view of market concentration. Although the law does not specify criteria applicable to the review of transactions, ANEEL’s decisions must be competition-oriented - they are required by law to
ensure compliance with Brazil’s competition legislation and ANEEL is required to monitor the market practices of competitors in the electric energy sector. ANEEL works together with CADE, through a cooperation agreement between the agencies.

**CANADA**

In Canada, a federal country that divides power between Parliament and the provincial legislatures, the energy industry is primarily regulated by the provinces. The *Constitution Act* grants the provinces jurisdiction over the exploration and development of energy resources.**\(^{151}\)** Provincial utilities regulators (and, in Alberta, the recently created Alberta Energy Regulator) regulate energy matters within provincial borders. However, because the federal government possesses jurisdiction over international and inter-provincial trade and commerce, it regulates matters such as nuclear safety, pipelines and power lines that cross international or provincial borders, as well as energy exports and imports (such as electricity, natural gas, and crude oil). Regulation at the federal level occurs through the National Energy Board (“NEB”), a tribunal established under the *National Energy Board Act* that reports to the federal Minister of Natural Resources.

Several high profile transactions over the past few years have emphasized the difficulties foreign investors can face when seeking to complete acquisitions in the energy or natural resources industries. In November 2010, the Industry Minister issued an interim rejection of BHP Billiton’s (“BHP”) C$40 billion hostile bid to acquire the Potash Corporation of Saskatchewan (“Potash”). Potash, the world’s largest integrated fertilizer company, was a source of many jobs and significant tax revenue for the province of Saskatchewan. The Industry Minister found that BHP’s investment was not likely to be of “net benefit” to Canada, and issued an interim denial under the ICA. Several weeks later, BHP decided to withdraw its bid, but publicly released extensive proposed undertakings that were largely unprecedented in their scope and potential contribution to Saskatchewan and Canada.

The failed BHP transaction demonstrates how the Canadian natural resources industry can raise particular sensitivities in an economy that depends to a large degree on such resources. Natural resources, and particularly the oil and gas sector, are considered strategic assets in the Canadian economic landscape. Following several high profile investments by Chinese SOEs in the Canadian oil sands, particularly the Industry Minister’s approval of China National Offshore Oil Corporation’s (“CNOOC”) acquisition of Nexen Inc., the Canadian government issued a statement limiting further SOE investment in the Canadian oil sands to “exceptional circumstances”.**\(^{152}\)** The Prime Minister of Canada, Stephen Harper indicated that:

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“In light of growing trends, and following the decisions made today, the Government of Canada has determined that foreign state control of oil sands development has reached the point at which further such foreign state control would not be of net benefit to Canada. Therefore, going forward, the Minister will find the acquisition of control of a Canadian oil-sands business by a foreign state-owned enterprise to be of net benefit, only in an exceptional circumstance.”\textsuperscript{153} [emphasis added]

Given that energy is one of the most economically sensitive sectors of Canada’s economy, foreign investment in the energy industry is bound to attract additional scrutiny under the foreign investment review process. As such, investors should thoroughly investigate policy considerations such as economic protectionism, labour and taxation issues, and retail politics to minimize the chance of rejection under ICA review.

The regulation of the electricity sector in Canada is primarily the responsibility of the provinces. As such, the review of foreign investment in this sector is a coordinated effort between the federal government under the ICA regime and provincial utilities commissions. For example, in July of 2014, Industry Canada approved an application by Berkshire Hathaway Energy under the ICA to acquire control of AltaLink, one of Canada’s largest electricity transmission companies, for CAD $3.2 billion. However, despite the Minister of Industry being satisfied that the proposed acquisition would be of “net benefit” to Canada, the Alberta Utilities Commission (“AUC”) had to also independently approve the transaction before it could proceed.\textsuperscript{154} After examining the impact of the proposed transaction on consumer rates, reliability and service quality for Albertans, the AUC granted its approval on November 28, 2014.\textsuperscript{155}

**China**

As with other industries, China imposes various restrictions on investments in energy sectors. Select measures that may restrict foreign investment in the energy industry include the following:

- *Notice of the Ministry of Commerce, National Development and Reform Commission, and the Ministry of Land and Resources on Issues Concerning Further Expanding the Cooperation with Foreign Parties in Mining Coalbed Methane.*\textsuperscript{156}

- *Measures for the Administration of the Refined Oil Market.*\textsuperscript{157}


\textsuperscript{154} Public Utilities Act, RSA 2000, c P-45, ss 101, 102.


• Notice of the Ministry of Land and Resources on Strengthening Exploration, Mining and Supervision and Administration of Shale Gas.\textsuperscript{158}

• Interim Measures for the Administration of the Surveying and Mapping Conducted by Foreign Organizations or Individuals in China.\textsuperscript{159}

\textbf{FRANCE}

The atomic energy industry and coal mines are monopolies not open to foreign investment.

The “Alstom Decree” listed the energy industry as an extra sensitive national security sector. Specifically, the Minister of Finance is empowered to review foreign investments in “activities relating to the provision of services, equipment or products essential to guarantee the continued supply of electricity, gas, oil or other energy resources.”

Foreign investment in the electrical power sector has generated political backlash in the past. In 2006, Enel, an Italian firm, expressed interest in acquiring Suez, a publicly traded Franco-Belgian water and power company. The French government, led by Prime Minister Dominique de Villepin, intervened to put together a merger between Suez and GDR, a French public utility in which the French government owned an 80 percent stake. However, because the government owned such a large stake in GDF, the legislature was required to pass a law to permit the merger. The political left opposed the deal, submitting a record 137,449 amendments to the proposed law. Ultimately, in December 2006, however, Law No. 2006-1537 was passed allowing the privatization of GDF, and thereby allowing GDF and Suez to consummate the merger. GDF-Suez came into being in July 2008 with the French government holding a 35 percent stake in the company. The company was required to divest several Belgian assets as well as its water and waste assets to avoid a challenge from European competition authorities.

\textbf{JAPAN}

Under the Foreign Exchange and Foreign Trade Act, investments in the energy industry require a prior notification. In a prior notification case, the foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months.


The Ministers may order the foreign company to change the extent or character of its investment or discontinue the investment when the investment is likely to cause the National Security Issues.

Any person who made an inward direct investment without giving the required pre-notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.

**UNITED KINGDOM**

Although not formally imbued with the power to stop or unwind transactions involving energy networks, the Office of Gas and Electricity Markets (“Ofgem”) will advise merger authorities on impacts potential transactions may have on the regulated market. Ofgem released a public statement regarding its merger policy which identified two concerns regarding the potential for mergers to impact Ofgem’s ability to protect consumers’ interests: concerns over the loss in diversity following a network merger and concerns over increased market share within the energy network sectors.

**Transportation**

**UNITED STATES**

The United States has an elaborate regulatory structure for foreign investment involving transportation - specifically, for air travel. Foreign investors in US air carriers, for instance, are generally limited to having 25% voting interests and can only appoint up to one third of the directors. The European Union, however, presents a special case. An Open Skies Agreement between the United States and the European Union encourages the relaxation of ownership rules by providing the US with benefits should it authorize majority ownership or effective control of US carriers by EU nationals. The relationship is still a work in progress.

Similarly, the Department of Transportation strictly regulates new carriers. New carriers must request a Certificate of Public Convenience and Necessity, which the Transportation Department can only grant to a “citizen of the United States.” During the application process, the Department of Transportation requires, among other things, extensive citizenship information for the applicant, including for shareholders. The agency emphasizes that 100% of ownership must be accounted for in the application. The regulatory review process can take a considerable amount of time.

Foreign investment in the airline industry can be difficult. For instance, when Virgin Atlantic wanted to expand its services in the United States, it created a domestic subsidiary called Virgin America. But when Virgin America applied for a Certificate of Public Convenience and Necessity, it met with opposition from the Department of Transportation. The agency ultimately
denied Virgin America’s application on the grounds that foreign interests could exert management influence. The Department of Transportation accordingly required Virgin America to substantially revise its corporate structure before it would be authorized to operate. Along related lines, Norwegian Air International’s effort to expand service into the United States is currently attracting a great deal of political opposition. Congress, for instance, has recently conditioned approval of the Department of Transportation’s budget on the agency’s rejection of a domestic operating license for the Europe-based airline. Although Norwegian Air International’s experience is not strictly an example of foreign investment, it does illustrate the difficulty non-US airlines have in entering the market.

There are also restrictions on the shipping industry. Most importantly, the Merchant Marine Act of 1920—also known as the Jones Act—imposes ownership and control requirements on owners and operators of ships that transport goods between US ports. Specifically, the vessels must (1) be owned by US companies that are controlled by US citizens with at least 75% US ownership; (2) have crews that are at least 75% US citizens; (3) be built (or rebuilt) in the US; and (4) be registered domestically.

**Australia**

Transport is a prescribed sensitive sector under the FATA. This means that investors from the US, New Zealand, Chile, Japan and Korea are subject to the same threshold as other foreign investors ($252 million), rather than the $1,094 million that would apply in non-sensitive sectors.

Transport includes airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia. All investors who enter into transactions in the transport sector that result in 15% or more of interests in shares in a company that has the requisite connection to Australia and is valued at $252 million or more being held by a foreign person and its associates (or 40% or more being held by several foreign persons and their associates) will be required to notify the FIRB to obtain approval for the transaction.

Foreign investors need to be aware of foreign investment restrictions within specific transport legislation. Under the Air Navigation and Qantas Sale Act, aggregate foreign ownership in an Australian international airline (including Qantas) is limited to 49 per cent. The Airports Act limits foreign ownership of some airports to 49 per cent, with a 5 per cent airline ownership limit and cross ownership limits between Sydney airport (together with Sydney West) and either Melbourne, Brisbane, or Perth airports. The Shipping Registration Act requires a ship to be majority Australian-owned (i.e., owned by an Australian citizen, a body corporate established by

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160 The cross-ownership provisions in the *Airports Act* apply when a foreign person has more than a 15 per cent stake in the Sydney airport (together with Sydney West) airport-operator company and one of the Perth, Brisbane, or Melbourne airport-operator companies. Also for stakes of 15 per cent or less, the Minister may declare practical control.
or under the law of the Commonwealth) if it is to be registered in Australia, unless it is designated as chartered by an Australian operator).

**BRAZIL**

Foreign investment in companies conducting air transportation services inside Brazil (including airlines, chartering, air taxis, and specialized operations such as air ambulances and pilot instruction) is strictly limited. Aviation companies operating in Brazil must obtain authorization from the Brazilian Civil Aviation Agency (Agência Nacional de Aviação Civil – “ANAC”) and such authorization may only be granted to companies that have (a) their head office in Brazil, (b) at least 4/5 of voting capital held by Brazilians and (c) management consisting entirely of Brazilians.

Transfer of the remaining 1/5 of voting capital to non-Brazilians requires ANAC’s approval, as does any transaction that results in (a) the acquisition of control, (b) the acquirer holding shares representing 10 percent or more of the target’s corporate capital, or (c) transfer of shares representing two percent or more of the target’s corporate capital.

Since the aviation market is deemed to be of “national interest,” ANAC strictly supervises the companies under its regulation. Aviation companies regularly are required to submit reports to ANAC containing information on their shareholders and all transfers of shares performed during the period covered by the report. Such transfers may only be filed within the Board of Trade with the consent of the ANAC.

There is no statutory deadline for the review, and the length of time may depend on the political and economic implications. Review of GOL’s acquisition of WEBJET was completed in about four months. Review of the merger of TRIP and Neeleman’s took six months. There is no indication in the law of the remedies that can be applied. As for the standard of review, the law lists “improvement of economic and technical performance, reduction of costs, public patrimony and better service for costumers” as acceptable reasons for transactions.

Foreign investment in ground and water transportation entities is permitted in Brazil but, like all investments in these sectors, it requires regulatory review. A new regulatory framework for ground and water transportation was introduced in 2001 with the creation of the National Agency of Terrestrial Transportation (Agência Nacional de Transporte Terrestre – “ANTT”) and the National Agency of Waterway Transportation (Agência Nacional de Transportes Aquaviários – “ANTAQ”). Management of such transportation now rests with either the government or private parties, provided that private parties operate under a concession, permission or authorization.

The prior approval of ANTAQ or ANTT, as appropriate, is required whenever a transaction results in the assignment of ownership of a concession or permission to operate. There are no remedies or specific guidelines applicable to such reviews specified in the applicable law, but any approval must be based on consideration the following goals: (a) to ensure the transportation
of persons and goods, under adequate standards of quality, safety, comfort, regularity, punctuality, and reasonableness of prices and tariffs; and (b) to harmonize, preserving the public interest, the goals of users, companies, concessionaires, permitted and authorized entities, and of public entities, resolving conflicts of interests and avoiding situations that may cause imperfect competition and economic violations.

**CANADA**

The *Canada Transportation Act*, S.C. 1996, c. 10 (“*CTA*”), governs inter-provincial and international transportation matters that fall under the legislative authority of Parliament, such as air or rail transport. Under the *CTA*, persons must notify the Minister of Transport of proposed transactions involving a “transportation undertaking” if notice to the Commissioner of Competition would also be required under the *Competition Act*. This notice includes both the information provided to the Competition Commissioner during the pre-merger review process, and information concerning transportation-related public interest matters. For proposed transactions involving an air transportation undertaking, notice must be provided to the Canadian Transportation Agency, an “independent, quasi-judicial tribunal and economic regulator” that resolves disputes arising under the *CTA* and issues transportation related approvals and licences.

Transportation undertakings are not defined in the *CTA*, although in practice the term encompasses any transaction or business undertaking that provides transport services (which can include oil pipeline-related transactions). The Minister of Transport informs the parties within 42 days of receiving notice if the transaction does not raise any public interest issues; otherwise, if the Minister of Transport’s merger review raises issues with respect to the public interest, the transaction may undergo a public interest inquiry (which can last 150 days or longer) before being approved by the Governor in Council.

**CHINA**

China regulates various sub-sectors of the transportation industry, including aviation, road and rail transport. Select measures that may restrict foreign investment in the transportation industry are as follows:

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163 *CT Act*, § 53.1(2.1)(4).
• Provisions on Foreign Investment in Civil Aviation.\textsuperscript{165}
• Regulation of the People’s Republic of China on Road Transport.\textsuperscript{166}
• Regulations of the People’s Republic of China on the Nationality Registration of Civil Aircraft.\textsuperscript{167}

\textbf{FRANCE}

The railway passenger transport industry is a monopoly not open to foreign investment. Moreover, the French government reserves the right to restrict foreign-controlled enterprises in the aerospace sector.\textsuperscript{168}

The “Alstom Decree” listed the transport industry as an extra sensitive national security sector. Specifically, the Minister of Finance is empowered to review foreign investments in “activities relating to the provision of services, equipment or products essential to guarantee the continued operation of transportation networks and services.”

\textbf{GERMANY}

Pursuant to Article 4 of Council Regulation 2407/92 of 23 July 1992 on licensing of air carriers, an airline must be majority-owned by EU Member States or their nationals and, at all times, be under their control in order to be licensed by an EU Member State for air traffic operations. Hence, the German Aviation Compliance Documentation Act (\textit{Luftverkehrsnachweissicherungsgesetz}, “LuftNaSiG”) aims to ensure the documentation of matters relating to the ownership and control of airlines (\textit{i.e.}, each shareholder is listed with name, address and nationality in a share register). As soon as non-EU investors hold 40\% or more in an airline, the LuftNaSiG provides for capital measures to prevent a revocation of the operating license (\textit{i.e.}, the airline is entitled to buy back shares, issue new shares and request foreign shareholders to sell their stock).

\textbf{JAPAN}

Under the Foreign Exchange and Foreign Trade Act, investments in the transportation industry require a notification after the investment. In a reportable case, the foreign investor must report to the Ministers by 15\textsuperscript{th} day of following month of the Investment. There are no statutory post-closing powers granted to the authorities.

\textsuperscript{166} State Council, \url{http://www.gov.cn/zwgk/2005-05/23/content_216.htm} (Nov. 9, 2012).
\textsuperscript{167} State Council, \url{http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=18972} (Oct. 21, 1997).
\textsuperscript{168} Foreign Investment: Laws and Policies Regulating Foreign Investment in 10 Countries, United States Government Accountability Office (February 2008).
Any person who has failed to make a report of a prior investment or has made a false report may be punished by imprisonment for not more than 6 months or a fine of not more than 5 hundred thousand yen (approximately 5 thousand dollars).

Agriculture and Land Use

UNITED STATES

The United States also has a detailed regulatory scheme for foreign investment involving agriculture. In particular, foreign entities must file a report with the Department of Agriculture upon purchasing more than ten acres of agricultural land or if the transaction produces agricultural products of $1,000 or more per year. This filing requirement applies to foreign governments, entities created under the laws of a foreign country or that have their principal place of business in a foreign country, and US entities in which a foreign entity has a direct or indirect “significant interest” or in which it can exercise “substantial control.” The Department of Agriculture requires documentation from investors to evaluate foreign ownership.

Agriculture transactions can be difficult. For example, Smithfield Foods, Inc. was bought by Chinese company, Shuanghui, which triggered a searching review by CFIUS. In addition to evaluating potential national security concerns, the Committee also invited the Department of Justice to review antitrust concerns and the Department of Agriculture to assess the possible implications for food safety standards. The Senate Agriculture Committee also held a hearing regarding the transaction to address food safety and increased foreign ownership of the food supply. Despite fierce political opposition, CFIUS ultimately approved the merger.

AUSTRALIA

Rural Land

Foreign investors must notify FIRB and obtain prior approval for a proposed acquisition of an interest in rural land where the cumulative value of rural land that the foreign person (and any associates) already holds exceeds, or immediately following the proposed acquisition is likely to exceed, $15 million. “Rural land” is defined in the Policy as “land used wholly and exclusively for carrying on a business of primary production.” To be a business of primary production, the business must be substantial and have a commercial purpose or character. The definition of a primary production business is taken from the Income Tax Assessment Act 1997. An interest in rural land includes interests acquired:

- directly (for example, acquiring a legal or equitable interest); and
• indirectly (for example, acquiring a substantial interest in a corporation or trust where
more than 50 per cent of the assets of the corporation or trust comprise of rural land).

A ‘substantial interest’ in a company is share ownership of 15 per cent for a single foreign
person or 40 per cent for several foreign persons. The value of existing landholdings should be
calculated on a reasonable basis having regard to the market value of the land (including
buildings or other structures on the land). If the foreign person acquiring the interest holds a
substantial interest in a corporation or trust that holds rural land, the value of the interest is to be
included when calculating the existing rural land holdings.

Pre-approval may be sought for a program of acquisitions of interests in rural land that are
incidental to an activity other than agriculture (for example, acquiring interests in rural land for
easements for pipelines). Such a pre-approval program will be limited to a certain monetary
value and provided for periods of no more than twelve months. Investors will not need to seek
individual approval for each acquisition but will be required to report to the FIRB every three
months the details of each acquisition made during the preceding three months.

Consistent with Australia’s free trade agreement commitments, some foreign investors are not
subject to the cumulative $15 million threshold. Private foreign investors from the United States,
Chile and New Zealand are subject to a higher threshold of $1,094 million for cumulative
interests in rural land. Private investors from Singapore and Thailand are subject to a higher
threshold of $50 million.

FIRB approval is not required for an interest in rural land acquired by will or devolution by
operation of law; from the Commonwealth/State/Territory/local government; or solely as
security or by way of enforcement of a security for the purposes of a money lending agreement.

Foreign government investors must seek approval for the acquisition of any interest in land
regardless of the value.

**Agricultural Resources**

In assessing foreign investment applications in agriculture, the Policy states that the FIRB
typically considers the effect of the proposal on:

• the quality and availability of Australia’s agricultural resources, including water;
• land access and use;
• agricultural production and productivity;
• Australia’s capacity to remain a reliable supplier of agricultural production, both to the
  Australian community and our trading partners;
• biodiversity; and
• employment and prosperity in Australia’s local and regional communities.

**Recent Developments**

On May 2, 2015, the Australian Government announced its intention to reduce the general threshold for private foreign investments in agribusinesses from $252 million (which applies to other Australian businesses) to $55 million by December 1, 2015. This threshold would apply to all private foreign investors (including those from Japan, China, and Korea) except those from the US, New Zealand, Chile, Singapore and Thailand – which would remain subject to the thresholds outlined above.

The Government also intends to:

• introduce a newly defined term “agribusiness”, to replace ‘primary production business’;
• replace ‘rural land’ and ‘urban land’ with newly defined terms ‘agricultural land’, ‘residential land’ and ‘other land’; and
• establish a foreign ownership of land register from 1 July 2015.

As at the date of this publication, these proposed changes had not been enacted.

**Brazil**

Like many countries, Brazil places tight limits on the amount of land non-Brazilians may own. On August 23, 2010, Brazil’s Federal General Attorney’s office issued an opinion reinterpreting a 1971 law, and reasserting that law’s limitations on the acquisition or leasing of Brazilian rural land by non-resident persons, foreign companies, or Brazilian companies controlled by foreign entities and individuals. Such limitations include maximum areas defined in square kilometers or as a percentage of a municipality. Under the provisions of this law, foreigners are restricted from acquiring rural land in Brazil either directly or through legal entities, whether such entities are incorporated in Brazil or not.

**Canada**

Similar to the regulatory scheme for foreign investment food and agriculture sector in the US, purchases of agricultural land in Canada by foreign entities are restricted. However, while American regulations are imposed primarily at the federal level, in Canada the ICA specifically exempts the acquisition of Canadian farming businesses from the application of the Act except for Part IV.1, which addresses review of investments that are believed to be injurious to national security. Specifically, “the acquisition of control of a Canadian business where the revenue is generated from farming carried out on the real property acquired in the same transaction” is

\[169 \text{ ICA, § 10(1)(k).}\]
exempt from the investment review provisions of the ICA. Therefore, restrictions on foreign investment in Canadian agricultural land vary from province to province, with different provinces imposing different restrictions and certain provinces allowing non-residents to purchase land without any restrictions. For example, Saskatchewan and Manitoba cap ownership of agricultural land by non-residents and foreign entities at 10 acres and 40 acres respectively. In both of these provinces however, established review boards can exempt foreign entities from the prescribed limitations on whatever terms and conditions they deem appropriate if the boards deem the purchase of such land to be in the public interest or to confer a significant benefit on the province. These boards have an array of remedies if foreign entities do not comply with the restrictions, such as ordering a foreign entity to divest itself of land or obtaining a court order for judicial sale or voiding the interest in the land. In contrast, neither British Columbia nor Ontario has legislation restricting foreign ownership of agricultural land.

Like the majority of acquisitions of Canadian businesses by foreign entities, foreign acquisitions involving Canadian food or agricultural businesses are subject to the “net benefit” test under the ICA. Though the ultimate decision to approve a proposed transaction lies with the federal government, the Minister of Industry is required as part of its review to consult with the governments of the provinces affected, who may not only prove influential in the federal process, but may also run parallel reviews of their own. For example, in 2012, the Saskatchewan Government commissioned an independent review of the proposed acquisition of Viterra Inc., a Saskatchewan-based agribusiness, by Swiss company Glencore International. As a result of this provincial review, which examined the impact of the acquisition on factors such as competition and employment in Saskatchewan, the Saskatchewan government laid out specific points that it wanted the federal government to include as undertakings as part of the approval process.

Canada has few restrictions on foreign ownership of land other than agricultural land, and, as noted above, the limits that do exist are at the provincial level. In fact, in provinces that have restrictions on foreign ownership of agricultural land, the land is often exempted from such restrictions if it will be used for certain commercial uses. For example, Saskatchewan and Manitoba both allow foreign entities to acquire more than the stated limit if the land will be used for extracting or processing minerals.

Alberta is the one province in Canada that specifically protects recreational land from foreign ownership. Under the *Agricultural and Recreational Land Ownership Act*, recreational land, specifically land outside the boundaries of a city, town, or village, is deemed to be “controlled

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170 Ibid.
171 *Saskatchewan Farm Security Act*, SS 1988-89, c S-17.1, § 80(1) [*SFSA*]. However, entities that are partially foreign-owned but controlled by Saskatchewan residents or their farming corporations can own up to 320 acres of agricultural land.
172 *The Farm Lands Ownership Act*, CCSM c F-35, § 4 [*FLOA*].
173 *SFSA*, § 2(1); *FLOA*, § 8(1).
land”174, and a foreign-controlled corporation may only acquire an interest in up to twenty acres of such land.175 This restriction does not apply to acquisitions of recreational lands for certain commercial uses such as establishing an industrial or manufacturing facility (as long as the area does not exceed 80 acres for any separate facility), constructing a pipeline or power plant, or carrying out a residential development on no more than 80 acres.176 However, if an interest in controlled land is taken or acquired by a foreign controlled corporation for the exempted commercial purposes, the owner must divest itself of the interest in the land within three years of completion or abandonment of that purpose.177

CHINA

Chinese law includes various investment-related measures on specific agricultural sectors and subsectors. Select measures that may restrict foreign investment in the food and agriculture industries include the following:

- *Opinions of the State Council on Supporting the Development of Leading Enterprises in Agriculture Industrialization.*178
- *Opinions of the State Council on Accelerating and Facilitating the Development of Modern Crop Seed Industry.*179

FRANCE

Foreign investment in the food sector has been met with suspicion by French politicians in the past. In 2006, various high-ranking French politicians expressed hostility to rumors that PepsiCo was considering a hostile takeover of Danone, the French food conglomerate. Prime Minister Villepin stated that he and the government would “defend France’s interests” and called Danone “a flower of [France’s] industry.”180 The Labor Minister, Jean-Louis Borloo, stated that the government would do “all we can” to stop the takeover.181 The Finance Minister, Thierry Breton, stated, “France is not the wild west. We have a strict framework of laws, and we will ensure that the law is applied so that the interest of employees will be protected.”182 In response to the negative response of these and other politicians, PepsiCo stated that it would not seek a

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174 *Agricultural and Recreational Land Ownership Act*, RSA 2000, c A-9, § 2 [ARLOA].
175 *ARLOA*, § 5(1).
176 *ARLOA*, § 8(1).
177 *ARLOA*, 8(2).
takeover of Danone. Ultimately, the outrage sparked by the PepsiCo/Danone takeover rumors led to an amendment of France’s Takeover Code, dubbed the “Danone amendment.”

**JAPAN**

Under the Foreign Exchange and Foreign Trade Act, investments in certain aspects of the food and agriculture industry requires a prior notification. In a prior notification case, the foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months.

The Ministers may order the foreign company to change the extent or character of its investment or discontinue the investment when the investment is likely to cause the National Security Issues.

Any person who made an inward direct investment without giving the required pre-notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.

Under Foreign Exchange and Foreign Trade Act, investments in the land use industry require a notification after the investment. In reportable case, the foreign investor must report to the Ministers by 15th day of following month of the Investment. There are no statutory post-closing powers granted to the authorities.

Any person who has failed to make a report of a prior investment or has made a false report may be punished by imprisonment for not more than 6 months or a fine of not more than 5 hundred thousand yen (approximately 5 thousand dollars).

**Insurance**

**UNITED STATES**

Apart from federal and state attorney general antitrust enforcement, state insurance departments typically review insurance mergers and acquisitions under the state’s insurance holding company law for both foreign and domestic transactions. The National Association of Insurance

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183 “The amendments to the Takeover Code…require[e] that potential offerors be named at the very earliest stage of the procedure marking the beginning of the offer period. Any potential offeror that has been identified then automatically has to ‘put up or shut up’ (either present a firm offer or remain silent) and must specify its intentions in respect of the offeree company within 28 days.” Lexology. [http://www.lexology.com/library/detail.aspx?g=c651e3e1-af04-4be5-9808-0f5d2ec7275d](http://www.lexology.com/library/detail.aspx?g=c651e3e1-af04-4be5-9808-0f5d2ec7275d).
Commissioners (NAIC) issued the Model Insurance Holding Company System Regulatory Act (the “NAIC Model Act”), which states across the country have adopted to varying degrees. The NAIC Model Act establishes pre-acquisition notification and approval requirements for mergers involving state-authorized insurers.

Market share thresholds codified in these laws are in most cases significantly lower than those that would exceed the HHI thresholds in the FTC-DOJ Merger Guidelines. Under the NAIC Model Act, there is a rebuttable presumption of a violation of this standard where the insurers have the following respective market shares:

Highly concentrated markets (combined share of the four largest insurers is 75 percent or more):\(^{184}\)

<table>
<thead>
<tr>
<th>Insurer A</th>
<th>Insurer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>4%</td>
<td>4% or more</td>
</tr>
<tr>
<td>10%</td>
<td>2% or more</td>
</tr>
<tr>
<td>15%</td>
<td>1% or more</td>
</tr>
</tbody>
</table>

Markets that are not highly concentrated:\(^{185}\)

<table>
<thead>
<tr>
<th>Insurer A</th>
<th>Insurer B</th>
</tr>
</thead>
<tbody>
<tr>
<td>5%</td>
<td>5% or more</td>
</tr>
<tr>
<td>10%</td>
<td>4% or more</td>
</tr>
<tr>
<td>15%</td>
<td>3% or more</td>
</tr>
<tr>
<td>19%</td>
<td>1% or more</td>
</tr>
</tbody>
</table>

Most states have adopted provisions similar to the NAIC Model Act, but there are exceptions. For example, Nevada law departs from the aforementioned market share benchmarks, instead applying the standards set forth in the FTC-DOJ Merger Guidelines.\(^{186}\) Some states, such as Pennsylvania, do not subject acquisitions of HMOs or non-profit health services corporations (e.g., certain Blue Cross and Blue Shield plans) to the same review requirements.\(^{187}\)

In addition to merger reviews, a majority of the states in the US have enacted laws addressing foreign government ownership of insurance companies in their state. NAIC compiles a database

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\(^{184}\) NAIC Model Act Section 3.1(D)(2)(a)(i).

\(^{185}\) NAIC Model Act Section 3.1(D)(2)(a)(ii).


of these laws in chart I-CS-50 of its Compendium of State Laws on Insurance Topics. Examples of such laws include:

- **Alabama.** No insurer the voting control of which is held, in whole or substantial part, by any government or governmental agency shall be authorized to transact insurance in this state. Membership in a mutual insurer or subscribership in a reciprocal insurer shall not be deemed to be either an ownership or control of the insurer for the purposes of this subdivision.188

- **Alaska.** A foreign insurer that is directly or indirectly owned or controlled in whole or in substantial part by a government or governmental agency may not be authorized to transact insurance in this state. Membership or subscribership in a mutual or reciprocal insurer by virtue of being a policyholder thereof, or ownership of stock or other security that does not have voting rights with respect to the management of the insurer, or supervision of an insurer by public authority, is not considered to be an ownership or control of the insurer for the purposes of this provision.189

- **Arkansas.** No certificate of authority or license to transact any kind of insurance business shall be issued, renewed, or continued in effect to any insurer which is owned or controlled, in whole or in substantial part, by any state of the United States, or by a foreign government, or by any political subdivision, instrumentality, or agency of either unless the insurer was so owned, controlled, or constituted and was authorized to transact insurance in this state, prior to March 3, 1959.190

- **Wyoming.** No foreign insurer that is owned or controlled in any manner or degree by any government or governmental agency shall be authorized to transact insurance in Wyoming. Membership in a mutual insurer, or subscribership in a reciprocal insurer, or ownership of stock of an insurer by the alien property custodian or similar official of the United States, or ownership of stock or other security which does not have voting rights with respect to the insurer’s management, or supervision of an insurer by public authority, is not ownership or control of the insurer for the purposes of this subsection.191

**AUSTRALIA**

Foreign ownership in the insurance sector must be consistent with the Financial Sector (Shareholdings) Act 1998 (the “FSSA”) and the Insurance Acquisitions and Takeovers Act 1991 (“IATA”),

188 Ala. Code § 27-3-4(4).
191 Wyo. Stat. § 26-3-104.
The Financial Sector (Shareholdings) Act

As noted in the Banking section of this paper, the FSSA prohibits any person from owning a stake of more than 15% of the voting power in an Australian bank or insurance company (an “unacceptable holding”) unless the person has obtained prior approval from the Treasurer. In granting this approval, the Treasurer must be satisfied that it is in the national interest to do so. This restriction applies equally to domestic and foreign investors (including foreign investors who are exempt from the FATA provisions relating to acquisitions of shares in financial sector companies).

A person who acquires an unacceptable holding is guilty of an offense if he or she was reckless as to whether or not the acquisition would have that result. The maximum penalty is currently A$68,000.

The Treasurer is able to declare that a person has “practical control” in an insurance company even if that person does not hold an unacceptable holding. If the Treasurer makes this declaration, the person is required to take steps to dispose of this control.

Where a transaction falls within the banking or insurance sector, the Treasurer may delegate authority to the Australian Prudential Regulatory Authority (“APRA”), and in practice APRA administers this approval process. There is no prescribed time limit for a decision under the FSSA. The timing for approval is generally comparable to the FIRB approval timeline in uncontroversial cases. The FSSA process may take longer if APRA perceives that it is a more complex situation.

The Insurance Acquisitions and Takeovers Act

Under the IATA any person proposing to acquire or lease assets which represent 15 per cent or more of the total book value of the assets of an Australia-registered insurance company (“ARIC”) must notify the Treasurer. The Treasurer must give his or her permission before the acquisition goes ahead. It is an offence to fail to notify the Treasurer or to continue the transaction without the Treasurer’s approval.

If the Treasurer considers a proposal to be contrary to the public interest, the Treasurer can prohibit the transaction or make a divestment order if the transaction has already occurred. A proposal may be found contrary to the public interest in the following circumstances:

- where it is likely to adversely affect the prudential conduct of the affairs of the ARIC;
- where it is likely to result in an unsuitable person being in a position of influence over the ARIC;
- where it is likely to unduly concentrate economic power in the Australia general insurance industry, life insurance industry, or financial system; or
• where it is contrary to the national interest.

The same notification process and rules apply where a person proposes to enter into an agreement relating to an AIRC or to change a constituent document of an AIRC if it results in:

• one or more directors of the AIRC becoming accustomed or obliged to act according to the instructions or wishes of a person with an associate-inclusive control interest of 15 per cent or more; or

• a person with an associate-inclusive control interest of 15 per cent or more being able to appoint or remove one or more directors of the AIRC.

The IATA applies only to a limited range of insurance industry transactions (*i.e.*, the IATA does not apply to share acquisition transactions, which are regulated under the FSSA). If an application is made under the IATA, the Treasurer or APRA (if the Treasurer delegates the transaction for APRA to approve) would generally deal with the transaction on the same timeframe as the FSSA approval.

**BRAZIL**

The Brazilian insurance, reinsurance and retrocession market is regulated by the Superintendence of Private Insurance (*Superintendência de Seguros Privados* – “SUSEP”), an agency that performs its activities under the guidance of the National Council of Private Insurance (“CNSP”), an administrative body formed by: (1) the Minister of Finance; (2) the Minister of Justice; (3) the Minister of Social Security; (4) the Superintendent of SUSEP; (5) a representative of the Brazilian Central Bank; and (6) a representative of the Brazilian Securities Exchange Commission.

SUSEP has authority to analyze requests for authorization for the following acts: (a) incorporation of an insurance company; (b) a merger involving insurance companies; (c) transfer of control of an insurance company; and (d) amendments to the by-laws of an insurance company. These transactions require prior approval. After analysis of the transaction, SUSEP issues an opinion to CNSP, which has authority to issue a final decision.

Although there are no statutory rules applicable specifically to the review of such transactions by SUSEP and CNSP, there are certain values and principles that must guide decisions of the authorities, including equality of conditions for foreign and national insurance companies. Other values and principles include expansion of the insurance market, avoidance of tax evasion, improvement of insurance companies, protection of the insurance companies’ financial condition, and coordination of the policy for the insurance market with the Federal Government’s economic policy.
There is no statutory timetable for this review and it is difficult to predict how long SUSEP will take to analyze a transaction. Review of recent transactions involving Maritíma/Yasuda Seguros and BMG/Itaú Seguros took approximately six months.

Cooperation between SUSEP and CADE is limited, but under the applicable legislation there is no conflict between these authorities as the scope of their analysis is not the same. SUSEP’s review is focused on regulatory issues, such as identification of the shareholders and proof of financial capacity, while CADE’s analysis is directed to the protection of competition.

Risks located in Brazil must be underwritten by insurers and reinsurers established in Brazil. There is no restriction on foreign ownership interests, but except for companies registered as “occasional reinsurers,” foreign-controlled companies must be incorporated in Brazil and provide for reserves and securities locally.

Brazil’s Constitution grants every citizen free universal health coverage. In addition, any individual is free to purchase supplemental health coverage from private companies. The provision of such supplemental health care is regulated by the National Agency of Supplementary Health (Agência Nacional de Saúde Suplementar – “ANS”), which by law is responsible for authorizing the incorporation of private health care operators, as well as any spin-off, merger, amendment to the Bylaws, or transfer of control of such operators. Foreign companies themselves may not provide health assistance services but foreign investment is permitted in companies incorporated in Brazil that provide private health care plans. There are no specific statutory rules to serve as guidance for conducting a review of such investments. This, together with some perceived lack of transparency, can make the review process challenging.

CANADA

In Canada, most insurance companies are incorporated under the federal Insurance Companies Act and are therefore subject to federal regulation, although a small minority of insurers are incorporated under provincial legislation and are subject to provincial regulation. There are a number of exemptions from net benefit review pursuant to the ICA relating to the acquisition of control of a Canadian business in the area of insurance. For example, acquisitions by a foreign entity have been approved by order of the Superintendent of Financial Institutions under the Insurance Companies Act under certain circumstances.192

The Insurance Companies Act also contains merger review provisions that apply to foreign and domestic investors alike. Share acquisitions or mergers that would provide a person or entity with more than 10% beneficial ownership of an insurer’s class of shares must receive approval

192 Investment Canada Act, § 10(j).
from the Minister of Finance.\textsuperscript{193} Furthermore, Ministerial approval is also required for asset acquisitions (such as purchasing an insurance portfolio) that involve transfer of all or substantially all of the assets of a federally incorporated insurer.\textsuperscript{194} Particular caution must be exercised if the foreign investor falls under the definition of a “foreign bank” under the \textit{Bank Act}, in which case acquiring 10\% or more of an insurer’s class of shares requires approval of the Governor in Council.\textsuperscript{195}

\textbf{CHINA}

China imposes various restrictions on investments in the insurance industry. Select measures that may restrict foreign investment include the following:

- \textit{Regulation of the People’s Republic of China on the Administration of Foreign-funded Insurance Companies (2013 Revision)}\textsuperscript{196}

- \textit{Notice of the People’s Bank of China on Interest Rates and Other Issues concerning the Handling of RMB Negotiated Deposit Businesses of Foreign-funded Insurance Companies by Commercial Banks.}\textsuperscript{197}

\textbf{GERMANY}

Investments in the insurance industry must be reviewed by the BaFin. Pursuant to the Act on the Supervision of Insurance Undertakings (\textit{Versicherungsaufsichtsgesetz}, “VAG”) an investor who intends to acquire or increase a qualified participation interest in an insurance company must notify without delay the envisaged transaction to the BaFin. The rules concerning the insurance industry are similar to the banking and finance rules (see above) (\textit{i.e.}, the notification threshold is the acquisition of at least 10\% of the capital of or the voting rights in an insurance company or the acquisition of the ability to exert a significant influence on the management of an insurance company). Also, the holder of a qualified participation interest in an insurance company who intends to increase its participation (thresholds of 20\%, 30\% or 50\%) is subject to a notification obligation. Again, the assessment period is 60 working days (with the possibility of an extension of up to 90 working days) and the BaFin may prohibit the holder of a qualified participating interest from exercising its voting rights and/or from disposing its interest without the BaFin’s prior approval.

\textsuperscript{193} \textit{Insurance Companies Act}, S.C. 1991, c. 47, § 407 [\textit{see also} § 8 for the definition of “significant interest”].

\textsuperscript{194} \textit{Insurance Companies Act}, § 257.

\textsuperscript{195} \textit{Bank Act}, S.C. 1991, c. 46 § 251.


JAPAN

Under the Foreign Exchange and Foreign Trade Act, investments in the insurance industry require a prior notification. In a prior notification case, the foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months.

The Ministers may order the foreign company to change the extent of character of its investment or discontinue the investment when the investment is likely to cause the National Security Issues.

Any person who made an inward direct investment without giving the required pre-notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.

Other Industry-Specific Reviews

AUSTRALIA

Real Estate

Certain acquisitions of commercial and residential real estate by foreign investors will require FIRB approval. According to the Policy, commercial real estate includes vacant and developed property that is not for residential purposes, such as offices, factories, warehouses, hotels and shops. It may also include land that does not meet the definition of rural land, such as mining operations. Residential real estate refers to all land and housing that is not commercial property or rural land. In this regard, “hobby farms” and “rural residential” blocks are residential real estate.

There are some exceptions to the approval process that apply to both commercial and residential real estate purchases. For example, the following purchases would not require FIRB approval:

- an interest acquired by will or devolution by operation of law;
- an interest acquired from the Government; and
- acquisitions for a company, trust or managed investment scheme (primarily) for the benefit of individuals ordinarily resident in Australia or a corporation that is providing custodian services.
Further exemptions may apply if foreign investors purchase shares in an Australian urban land corporation. An ‘Australian urban land corporation’ is a corporation whose interests in Australian urban land exceed 50% of the value of its total assets (including any assets held by subsidiaries). In the usual course, the value of the corporation’s Australian urban land interests and the value of the corporation’s total assets are as shown in its last audited balance sheet. FIRB approval is required for a foreign acquisition of an interest in an Australian urban land corporation if the acquisition exceeds 15% of shares, or if following the acquisition, foreign persons hold more than 40% of shares.

**Commercial Real Estate**

Foreign investors that are looking to buy or take an interest in vacant land for commercial development (including to start a primary production business) need to apply regardless of the value of the land. However, if the land is currently being used as rural land, then it is **not vacant** land and other rules apply (see section on ‘Agriculture and Land Use’). Proposals to acquire interests in vacant land are normally approved subject to development conditions.

Foreign investors looking to acquire an interest in developed commercial real estate valued at $55 million or more would need to apply to FIRB for approval, unless the real estate is heritage listed and a $5 million threshold applies. Prescribed investors only need to apply for developed commercial real estate valued at $1,094 million or more. Such proposals are normally approved without conditions. Developed commercial property includes hotels, motels, hostels and guesthouses, as well as individual dwellings that are a part of these properties. A unit in a hotel that is owner-occupied or rented out privately (that is, it is not part of the hotel business) is considered to be residential property.

FIRB approval is not required for acquisitions of an interest in developed commercial property (regardless of value) where the property is to be used immediately and in its present state for industrial or non-residential commercial purposes. In this instance, the acquisition must be wholly incidental to the purchaser’s proposed or existing business.

**Residential Real Estate**

The Australian Government’s policy towards foreign investment in residential real estate is that it should increase Australia’s housing stock. All applications are considered in light of this overarching principle. Different rules apply, however, depending on whether the foreign investor is a temporary resident or not. A temporary resident resides in Australia and holds a temporary visa which permits them to stay in Australia for a continuous period of more than 12 months, or has submitted an application for permanent residency and holds a bridging visa which permits them to stay in Australia until that application has been finalised. If a foreign investor is not classified as a temporary resident, then the non-temporary resident rules apply.
New Zealand citizens, holders of an Australian permanent resident visa or foreign nationals buying a property as joint tenants with their Australian citizen spouse do not need approval to buy residential real estate.

Temporary residents need to apply if they wish to buy an established dwelling. Only one established dwelling may be purchased by a temporary resident and it must be used as their residence in Australia. Such proposals are normally approved subject to conditions, including that the temporary resident sells the property within three months of it ceasing to be their primary residence (including where the temporary resident leaves Australia or otherwise becomes ineligible to maintain ownership of the property). Non-resident foreign persons cannot buy established dwellings as homes.

Foreign persons that operate a substantial Australian business need to apply to buy established dwellings to house their Australian based staff. Such proposals are normally approved subject to conditions (such as, that the foreign person sells the property within three months if it is expected to remain vacant for six months or more).

Both temporary and non-resident foreign persons cannot buy established dwellings as investment properties, but they can apply to buy established dwellings for redevelopment (that is, to demolish the existing dwelling and build new dwellings). Proposals for redevelopment are normally approved as long as the redevelopment increases Australia’s housing stock (at least two dwellings built for the one demolished) or where it can be shown that the existing dwelling is derelict or uninhabitable. Approvals are usually subject to conditions.

Both temporary and non-resident foreign persons need to apply if they wish to buy new dwellings in Australia. Such proposals are normally approved without conditions. Approval is not required for purchases of vacant land for residential development; however, these purchases are normally approved subject to conditions (such as, that construction begins within 24 months).

Regardless of citizenship or residency, investors do not need approval for purchases of new dwellings bought from a developer that has pre-approval to sell them to foreign investors. Foreign investors with an interest in a time share scheme that allows the investor to use it for up to four weeks per year do not require approval.

Foreign investors do not need approval to buy residential property that is within the bounds of a resort designated as an Integrated Tourism Resort prior to September 1999. For resorts designated from September 1999, the exemption only applies to developed residential property that is subject to a lease of 10 years or more to the resort operator and that is available as tourist accommodation when it is not occupied by the owner. The FIRB website has a list of these designated resorts. The normal foreign investment rules apply to all other property within the resort, including vacant land for development. Conditions must be met to qualify for designation.
Recent Developments

As of May 4, 2015, the Australian Taxation Office (“ATO”) will be responsible for the residential real estate functions of the foreign investment framework – including audit, compliance and enforcement activities. From December 1, 2015 a new penalty regime, including civil penalties and infringement notices will be introduced, and it will be administered by the ATO.

Canada

Culture

As noted above, investments by foreign entities in Canadian cultural businesses are subject to various special foreign investment rules under the ICA, namely, lower financial thresholds for review. The Minister of Canadian Heritage also has the power to review indirect acquisitions and to order discretionary reviews regardless of the size of the transaction. Transactions related to Canadian cultural businesses are potentially subject to control in fact determinations by the Minister of Canadian Heritage, and they must align with Canada’s cultural policy objectives in addition to meeting the standard “net benefit to Canada” test. Various cultural sectors are subject to special policies that impact or further restrict foreign ownership, including book publishing and distribution, magazine publishing and film. Timelines for review are the same as for foreign investments generally, as discussed above.

When determining whether foreign investments in Canadian book publishing and distribution businesses will be a “net benefit to Canada,” the Minister typically seeks undertakings from the foreign investor, such as a commitment to the development of Canadian authors, or joint ventures with Canadian-controlled publishers. For acquisitions of magazine publishing businesses, the government typically seeks to ensure a commitment to the production of a majority of Canadian editorial content. In the film production and distribution sector, the government has announced a foreign investment policy, which retroactively applies to all Investment Canada applications made after February 13, 1987. This policy states that takeovers of Canadian-owned and Canadian-controlled distribution businesses will not be allowed, and that investments to establish new distribution businesses in Canada will only be allowed in importation and distribution activities where the importer owns world rights or is a major investor. The policy also requires an investor to reinvest a portion of its Canadian earnings in accordance with national and cultural policies.

**Intellectual Property**

The key regulators involved in a merger review that engages IP issues are the Minister of Industry under the ICA and the Competition Bureau under the *Competition Act*. While the Canadian Intellectual Property Office ("CIPO") does not have any jurisdiction to review transactions, transfers of ownership of registered IP rights would have to be registered with CIPO. Timelines for review under the ICA are the same as for foreign investments generally. Under the *Competition Act*, the acquisition of IP rights can constitute a merger. The relevant timeline for merger review may include (a) a 30-day waiting period commencing once the parties file complete notification forms, in the absence of receiving affirmative clearance; and (b) a potential second 30-day waiting period in case the Commissioner of Competition ("Commissioner") issues a supplementary information request, similar to a second request, in the absence of receiving affirmative clearance from the Commissioner.

In contrast to reviews under the ICA, under the *Competition Act*, all mergers are potentially subject to substantive review under Part VIII of the *Competition Act*, even where the financial thresholds that trigger a pre-merger notification and review requirement under Part IX are not met.

Certain industries with high IP content, namely, cultural industries, are subject to special rules under the ICA. IP can also be relevant in the context of a national security review under Part IV.1 of the ICA. For example, it was widely suspected that the Canadian government’s decision to block the Alliant/MDA transaction was based on national security concerns related to MDA’s Radarsat-2 remote sensing satellite. In this respect, the government’s rejection of the investment may have been driven by the IP derived from this satellite.

Given that competition law may result in limitations on the terms and conditions under which IP rights owners may transfer or license the rights and to whom the rights may be transferred or licensed, the Competition Bureau issued IP Enforcement Guidelines to clarify the circumstances where the Bureau would consider intervention appropriate.

**CHINA**

**Culture**

Chinese law includes various measures in the radio, film, television, and other cultural sectors. Select measures that may restrict foreign investment in the culture sector are as follows:

- *Several Opinions of the Ministry of Culture, State Administration of Radio, Film and Television, General Administration of Press and Publication, National Development and*
Reform Commission and the Ministry of Commerce on Canvassing Foreign Investment into the Cultural Sector.199


**Distribution Services, Direct Sales, Leasing, International Freight Forwarding, and Conference and Exhibition**

Generally, a foreign investor should apply to the local commerce authority for preliminary examination, which then will forward the application to MOFCOM for approval to establish the FIE. Timelines for approval vary by industry. MOFCOM may devolve final approval authority to the provincial commerce authority.

**Construction and Design Services**

A foreign investor should seek approval to establish the FIE from the relevant commerce authority, which will then consult with the industry regulator.

**FRANCE**

**Gunpowder, Explosives, and Postal Services**

The gunpowder and explosives industry as well as certain postal services are monopolies not open to foreign investment.

**Pharmaceuticals**

The French government has indicated that it has a special interest in maintaining a local pharmaceutical industry. For example, in 2004, Aventis, a French pharmaceutical company, rejected a hostile takeover bid by Sanofi-Synthélabo, another French company. Then-Finance Minister Nicholas Sarkozy pressured Sanofi-Synthélabo to raise its bid when Novartis, a Swiss company, indicated an interest in buying Aventis. The French government also indicated its general desire for a “local solution.”201 Eventually, Sanofi-Synthélabo launched a friendly bid for more money and the two firms merged.

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**GERMANY**

**Postal services**

Pursuant to the German Postal Services Act (*Postgesetz*, “PostG”), investors in the postal sector are obliged to notify their investments to the Federal Network Agency (*Bundesnetzagentur*, “BNetzA”), presided by Jochen Homann, when an interest of at least 10% is acquired. There is no time frame for the review process, or an execution prohibition similar to the standstill obligation under the German merger control rules. The BNetzA cooperates closely with the Federal Cartel Office.

**JAPAN**

Under the Foreign Exchange and Foreign Trade Act, the investment in other industries not specifically mentioned in the Act requires a notification after the investment. In a reportable case, the foreign investor must report to the Ministers by 15th day of following month of the Investment. There are no statutory post-closing powers granted to the authorities. Any person who has failed to make a report of a prior investment or has made a false report may be punished by imprisonment for not more than 6 months or a fine of not more than 5 hundred thousand yen (approximately 5 thousand dollars).

**UNITED KINGDOM**

**Water and Sewerage Mergers**

Mergers in the water and sewerage sector are subject to a special merger regime, found in the Water Industry Act 1991, which requires the CMA to refer the case to Phase 2 review if the annual turnover of the target water enterprise exceeds £10 million. The CMA is required to determine what effect a merger will have on the ability of Ofwat, the Water Services Regulation Authority, to make comparisons between water companies. It is Ofwat’s duty to compare the performance of various water companies, determine which company performs the best and provide incentives to other companies to better their performances. As such, the inquiry is not based on the costs and benefits of a particular transaction.

**Golden Shares**

Although the UK government privatized many industries since the 1980s, it has retained “golden shares” in certain companies, giving the government final approval power over major transactions involving those companies. In 2003, the European Court of Justice found that the UK government’s golden shares in BAA (the UK airport authority) violated the principles of free movement of capital within the European Union. Since the decision, the UK has given up most of its golden shares.
However, one company in which the UK retains golden shares is BAE Systems, a British defense company. In 2012, the proposed merger of BAE Systems and EADS was abandoned amid a breakdown in negotiations between the British, French and German governments. The UK government demanded assurances that the French and German governments would not increase their stakes in the merged entity, out of concern about BAE contracts with the United States, and that neither Germany nor France would have enough ownership to control the merged entity or create a voting bloc of the two countries. Ultimately, the deal failed because France refused to agree to caps on its ownership and Germany demanded long-term job guarantees. 202 Moreover, UK Prime Minister David Cameron’s fellow Tory MPs actively called upon Cameron to kill the deal unless the merged entity would not have any state ownership. As this case shows, the UK government’s ownership of golden shares subjects a deal to political considerations and actively involves the UK government in the negotiation process.

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202 The CEO of BAE Systems stated that Germany’s demands were the main sticking point in the negotiations.
Antitrust/Competition Review

Well over a hundred jurisdictions around the world have mechanisms for antitrust or competition law review of mergers, acquisitions, joint ventures, and other means of foreign investment. Some of these reviews are conducted by agencies with no responsibilities other than the enforcement of antitrust and competition laws. In other jurisdictions, the body responsible for antitrust/competition law review also has responsibility for other types of review. In most jurisdictions, antitrust/competition review is confined largely to an assessment of impact on consumer or economic welfare. In other jurisdictions, additional goals play a role in antitrust/competition review, including such goals as open borders and job creation. The following is a snapshot of the antitrust/competition review process in each of the jurisdictions surveyed in this report.

United States

In general, antitrust review in the United States is conducted by the FTC and the DOJ. Pursuant to Section 7 of the Clayton Act, the FTC and DOJ will analyze a transaction to determine whether “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly” in any line of commerce in any section of the country. 15 U.S.C. § 18.

The Hart-Scott-Rodino Act (“HSR” or the “HSR Act”), 15 U.S.C. § 18a, and its implementing regulations establish a pre-acquisition notification and waiting period procedure that provides the FTC and the DOJ with information about planned transactions that meet prescribed jurisdictional tests. HSR also establishes time periods within which these agencies have an opportunity to analyze the potential anticompetitive effects of such transactions prior to their consummation. The HSR Act prohibits the closing of a proposed transaction, if reportable, until the transaction has been notified and the applicable waiting period has expired.

HSR applies to acquisitions of assets, voting securities, and/or controlling interests in non-corporate entities (e.g., partnerships and limited liability companies) that meet the statutory jurisdictional tests and are not otherwise exempt. Various types of transactions are subject to HSR reporting, including mergers, consolidations, and tender offers, as well as the formation of joint venture entities. Since the intent of HSR is to allow the US antitrust agencies to determine the anticompetitive effects, if any, of certain transactions prior to their consummation, it applies regardless of whether a transaction is, in fact, anticompetitive.

In general, HSR applies to acquisitions of assets valued in excess of $79.5 million or acquisitions that will result in the acquiring person holding voting securities or controlling interests in non-
corporate entities with an aggregate value in excess of $79.5 million.\textsuperscript{203} For transactions valued at or below $303.4 million, an additional jurisdictional test, the “size-of-person” test, applies. There are a number of complex exemptions that, if applicable, excuse filing even though a transaction meets the jurisdictional tests.

Transactions that meet the jurisdictional tests and are not otherwise exempt from HSR must be preceded by the filing of an HSR notification and report form (the “HSR Form”) by each of the parties to the transaction. The acquiring party must pay a filing fee based on the value of the transaction.\textsuperscript{204} In most situations, the HSR Act provides for an initial thirty (30) day waiting period that commences when both parties file their respective HSR Forms and the acquiring party pays the applicable filing fee.\textsuperscript{205} The thirty (30) day initial waiting period is shortened to fifteen (15) days when an acquisition is being made pursuant to certain bankruptcy statutes\textsuperscript{206} or the transaction is a cash tender offer. Where a transaction is reportable but clearly does not raise any antitrust concerns, the waiting period generally can be shortened through a procedure known as “early termination,” at the discretion of the agencies, when requested by at least one of the parties. Conversely, the waiting period can be extended significantly if either the FTC or the DOJ issues a Request for Additional Information, referred to in the vernacular as a “Second Request,” which is a comprehensive set of interrogatories (written questions) and document requests.

The HSR Form requires detailed information about the filing party and the transaction, including identification of North American Industry Classification (“NAICS”) codes in which the parties to the transaction derived US revenues in the most recent fiscal year, and the amount of those revenues, copies of the most recent annual financials, copies of documents prepared in connection with the transaction that discuss synergies, efficiencies or certain competition-related topics. Filings are held in strict confidence, as is the fact of filing (unless early termination is granted or the agencies undertake an investigation of the competitive effects of the transaction). Failure to comply with the HSR Act may give rise to civil penalties of up to $16,000 per day during the pendency of the violation.

After the HSR Forms are submitted, the FTC and the DOJ each will review the parties’ respective filings and document submissions to determine whether they are interested in

\textsuperscript{203} To determine whether certain acquisitions of voting securities and non-corporate interests are subject to the HSR Act, it is necessary to take into account voting securities and non-corporate interests currently held, in addition to the value of voting securities and non-corporate interests to be acquired. The HSR jurisdictional thresholds are adjusted annually based on changes in the Gross National Product (“GNP”).

\textsuperscript{204} For transactions valued in excess of $75.9 million, but less than $151.7 million, the filing fee is $45,000. For transactions valued at $151.7 million or greater, but less than $758.6 million, the filing fee is $125,000. For transactions valued at, or in excess of, $758.6 million, the filing fee is $280,000.

\textsuperscript{205} In the case of certain non-consensual transactions, such as tender offers, the waiting period commences when the acquiring person files its HSR Form.

\textsuperscript{206} 11 U.S.C. § 363(b).
investigating the transaction further. The agencies then will communicate with each other and the transaction will be “cleared” to one agency for further investigation. The decision as to which agency investigates a matter is a function of many variables, but the primary variable is prior experience with the industry and/or the merging parties. If neither agency is interested in investigating the transaction, the agencies can grant early termination of the waiting period or let the waiting period expire, thereby allowing the parties to consummate the transaction.

After the transaction is cleared to either the FTC or the DOJ for further review, that agency will begin investigating the deal by, among other things, reviewing publicly available information and statistics regarding the parties and their industries and conducting telephone interviews of customers. During this period, the parties can contact the agency staff conducting the investigation to explain why the proposed acquisition raises no anticompetitive concerns. The staff also may contact the parties and ask to interview business executives to obtain a better understanding of the relevant market(s).

During this initial investigation, the agency tries to determine whether concerns about the competitive impact of the proposed transaction—including the potential for increased prices, restricted output, decreased quality, and dampened innovation in various product markets or geographic regions—warrant further investigation. If a sufficient basis for such concerns is found, the agency will issue a Second Request, as referenced above. A Second Request typically is issued on the last day of the initial waiting period. (If the end of any waiting period falls on a weekend or public holiday, the period is extended to the next business day.) The parties to the transaction will receive essentially identical Second Requests.

A Second Request generally extends the HSR waiting period until thirty (30) days after both parties have substantially complied with the Second Request (the waiting period is extended for ten (10) days when a bankruptcy or cash tender offer is involved). The time required to comply with the Second Request varies with, among other things, the scope of the Second Request, the number of potentially problematic relevant markets, the volume of documents to be searched, and the resources that the parties dedicate to the Second Request process. The agencies frequently seek to extend this Second Request period by agreement of the parties, using as their negotiating “stick” the threat of a lawsuit to enjoin the transaction.

During the Second Request period, the agency staff will review the documents and data that the parties have produced and may conduct depositions (DOJ) or investigational hearings (FTC) of the parties’ employees. In addition, the staff will continue to interview customers regarding their reactions to the proposed transaction. During this same period, the parties can open a dialogue with staff regarding the issues about which the staff is most concerned, and prepare white papers or presentations that incorporate factual and empirical evidence, as well as customer statements, in an effort to allay staff concerns.
At the end of the extended Second Request waiting period, the agency either must allow the transaction to close or file an action in federal court seeking to enjoin the transaction. In addition, the FTC (but not the DOJ) has the option of bringing an administrative complaint to challenge the transaction while permitting the transaction to close.

At any time after the Second Request issues, the parties can seek to resolve the agency’s competitive concerns by agreeing to undertake certain remedial actions, including the divestiture of assets or the licensing of technology. (Conduct remedies – such as agreements to provide services or to refrain from raising prices – are disfavored, and are not likely to be considered a sufficient remedy.) If the agency and the parties agree to such measures, that agreement would be embodied in a consent order.

In conducting their competitive analysis, the FTC and DOJ often will coordinate with other agencies that may be conducting concurrent reviews of the transaction, such as the United States FERC, the FCC and the State Attorneys General. Moreover, the United States cooperates regularly with competition authorities around the world that are concurrently reviewing a transaction and, in particular, has bilateral antitrust cooperation agreements with countries such as Australia, Canada, Israel, and Japan.

**Australia**

The Australian Competition and Consumer Commission (“ACCC”) is responsible for administering the merger control regime in Australia. Section 50 of the Competition and Consumer Act 2010 (“CCA”) prohibits mergers and acquisitions that have the effect, or would be likely to have the effect, of substantially lessening competition in any market in Australia.

There is no mandatory requirement to seek merger clearance from the ACCC. However, the ACCC can investigate any merger that it considers may raise competition law issues, whether or not the merger is notified to it. If the ACCC considers that a merger contravenes Section 50 of the CCA it may commence proceedings in the Federal Court.

There are currently three potential routes for obtaining voluntary regulatory clearance in relation to a proposed merger. Merger parties can choose to seek either:

(a) informal clearance from the ACCC (a form of regulatory comfort letter which is not legally binding but remains overwhelmingly the most popular form of clearance for merger parties);

(b) formal clearance from the ACCC (a statutory-based clearance, which is binding on the ACCC and third parties); or

(c) authorization from the Australian Competition Tribunal, a quasi-judicial body, on the basis that public benefits outweigh any anti-competitive detriment.
A recent review of Australian competition law and policy has proposed changes to the formal clearance and authorisation process. The proposed reform suggests that formal clearance and authorisation be considered by the ACCC in a single process.

The ACCC does not have direct power to block a merger or acquisition. Where the ACCC considers that the merger contravenes Section 50 of the CCA, it can apply to the Federal Court for an injunction, divestiture or penalties. Third parties can apply for declarations and/or divestiture (including setting aside the acquisition in certain cases). Any person suffering loss or damage as a result of a merger that breaches Section 50 of the CCA can apply for damages. Conversely, the merger parties themselves may seek a declaration from the Federal Court relating to the validity of a merger (whether proposed or completed).

**Relevance of non-competition issues**

Non-competition issues are not considered in formal and informal merger clearance reviews. Efficiencies will be considered by the ACCC but only to the extent that they impact competition in the market.

In relation to applications for merger authorisation, the Tribunal will weigh the public benefits of the proposed acquisition against any lessening of competition. Non-competition issues (e.g., employment, environmental and social issues) may be relevant to the Tribunal’s assessment of any public benefit of the proposed acquisition.

**Thresholds**

The CCA does not proscribe a threshold shareholding for the purposes of Section 50. All acquisitions of shares or assets are therefore subject to the CCA. Accordingly, the acquisition of a controlling interest, or of a minority shareholding that does not confer control (with or without the acquisition of other non-shareholding interests), is sufficient to attract competition law review. A joint venture may also be subject to Section 50 of the CCA, where the joint venture involves the acquisition of shares or assets.

**Notification and procedure**

There is no compulsory pre-notification requirement for mergers in Australia. However, the ACCC Merger Guidelines encourage merger parties to notify the ACCC well in advance of completing a merger where the products of the merger parties are either substitutes or complements and the merged firm would have a post-merger market share of greater than 20% in the relevant markets.
**Time frames**

*Informal clearance*

According to the ACCC’s Informal Merger Review Process Guidelines, ‘phase 1’ review typically takes 6-12 weeks following a pre-assessment process. The pre-assessment process itself typically takes around 2 weeks. If a Statement of Issues is released, a ‘phase 2’ will be commenced and the timeline will be extended (typically for a further 6-12 weeks). Timelines are indicative and can be suspended or extended at any stage. The parties may request that the timeframe be suspended for commercial reasons, or the ACCC may suspend the timeframe if it is awaiting additional information from the parties. The ACCC will inform the merger parties of any intention to suspend the timeframe.

*Formal merger clearance*

The ACCC is required to issue its determination on a formal clearance application within 40 business days of receiving a valid application. If additional information is requested by the ACCC, the applicant must provide the information within the timeframe specified by the ACCC. If no decision is made within the 40-business-day period, the ACCC is deemed to have refused to grant the clearance. The ACCC may extend the time for its review of the formal application by agreement with the acquiring party. In a complex and/or contentious matter, the ACCC may extend the review period by a further 20 business days.

*Authorization (on public benefit grounds)*

Under the authorization regime, the Tribunal has three months to make its decision, unless complexity or other special circumstances warrant extending the period to no more than six months.

**Appeals**

The potential avenues for appeal differ depending on the type of merger clearance that was sought by the merger parties.

There is no right of appeal in relation to the ACCC’s decision in an informal merger clearance process. If the ACCC chooses to oppose a proposed merger, the merger parties could offer an undertaking, defend any proceeding initiated by the ACCC, or themselves institute court proceedings seeking a declaration that the proposed acquisition does not contravene Section 50 of the CCA.

If the ACCC rejects an application for formal clearance, or does not make a decision (which is taken to be a rejection of the application for formal clearance), an applicant may seek merits review by the Tribunal.
There is no formal right of appeal in relation to the Tribunal’s decision where a merger party has sought authorisation of a merger. Judicial review is available where there has been a prima facie error of law.

**BRAZIL**

Generally, antitrust/competition review in Brazil is conducted by Brazil’s antitrust agency, the Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica, or “CADE”). In the financial sector, however, there has been a struggle for jurisdiction over antitrust/competition review between CADE and the Brazilian Central Bank, as described in the discussion of industry-specific reviews, earlier in this report.

In most instances, CADE’s analysis is limited to the assessment of anticompetitive effects. In at least one instance, it has considered broader national interests, but that is the exception, not the rule.

A transaction is subject to antitrust review by CADE if the parties meet the thresholds provided by Law No. 12,529/2011 (“Brazilian Antitrust Law”). The Brazilian Antitrust Law sets forth a two-step test as threshold for filing: (i) gross turnover in the last financial year in Brazil of at least R$750 million by one of the economic groups involved; and (ii) gross turnover in the last financial year in Brazil of at least R$75 million by another economic group involved.

An “economic group” for antitrust purposes is defined as a group comprising companies under common control and the companies in which the former, directly or indirectly, hold no less than 20 percent of the total or voting capital stock.

Brazil has a pre-merger review system. Thus, the final CADE clearance is a condition precedent to the completion of the transaction under antitrust review. The standstill obligation must be observed by the parties until the CADE final decision (maximum term of 330 days), subject to gun-jumping penalties ranging from R$60 thousand to R$60 million.

If the transaction involves the acquisition of “participation” in an enterprise, the obligation to notify must be determined in accordance with the rules set forth by CADE’s Resolution No. 2/2012 (“Resolution”). The Resolution defines participation as either direct or indirect (i.e., direct participation or participation through a subsidiary). Additionally, the Resolution is applicable for both acquisition of participation from a shareholder or a quota-holder or investment through the issuance of new shares or quotas by the target company. Provided that the turnover thresholds are met by the parties’ economic groups, the following types of acquisition of participation must be notified to CADE:

(a) acquisition of participation resulting in control by the acquiring party;
acquisition, by the controller of the company, of additional 20% of participation, provided that such portion is acquired from one seller (e.g., if the controller acquires 10% from one seller and 15% from another seller, none of these transactions must be notified to CADE, even though the overall acquired participation exceeds 20%);

acquisition of participation involving companies that do not compete with each other in any horizontally or vertically related market, if: (i) the acquiring party acquires 20% or more of participation in the target company; (ii) the acquiring party becomes the major individual shareholder of the company; or (iii) in cases in which the acquiring party already holds participation of 20% or more of the target company, the acquiring party acquires additional 20% or more, provided that such portion is acquired from one seller (e.g., if the acquiring party acquires 10% from one seller and 15% from another seller, none of these transactions must be notified to CADE, even though the overall acquired participation exceeds 20%);

acquisition of participation involving rival companies, i.e., that compete against each other in some horizontally or vertically related market, if: (i) the acquiring party acquires 5% or more of participation in the target company; (ii) the acquiring party becomes the major individual shareholder of the company; or (iii) in cases in which the acquiring party already holds a participation of 5% or more in the target company, the acquiring party acquires an additional 5% or more, including if such portion is acquired through more than one transaction (e.g., if the acquiring party acquires 2% of participation and subsequently acquires additional 3%, the second transaction must be notified);

The timeframe for review by CADE depends on the complexity of the transaction from an antitrust perspective (i.e., relevant horizontal overlap or vertical integration). Although the maximum period for review is 330 days, fast-track review takes approximately 30 days for clearance, while the standard review takes 90 to 120 days.

In this context, CADE regulation sets forth two different procedures for analysis: (i) the ordinary (standard) procedure; and (ii) the fast-track procedure. According to CADE’s Resolution No. 2/2012, the following transactions may be subject to the fast-track procedure: (i) classical joint-ventures or cooperatives (association of two or more companies to explore new markets); (ii) consolidation of corporate control; (iii) substitution of economic agent (the acquiring party is not active in the markets involved in the transaction); (iv) low market share (resultant horizontal concentration below 20%); (v) irrelevant vertical integration (the acquiring party or its economic group does not have, before the transaction, 20% or more of market share in the markets with vertical integration); and (vi) other cases not included in the abovementioned hypothesis and that do not present any potential antitrust harm. The fast-track procedure requires substantially less information to be provided to CADE and therefore is less costly and time-consuming than the ordinary procedure.
CADE may impose restrictions in order to approve a transaction. Such restrictions include: (i) sale of assets; (ii) spin-off of a company; (iii) sale of corporate control; (iv) legal or accounting segregation of activities; (v) compulsory licensing of intellectual property rights; and (vi) any other necessary restrictions.

Finally, it should be noted that CADE has a number of cooperation agreements in effect with other Brazilian regulatory agencies to exchange relevant information for merger review and behavioral prosecution, including:

(i) National Agency of Petroleum, Natural Gas and Biofuels;
(ii) National Agency for Sanitary Surveillance;
(iii) National Agency of Supplementary Health;
(iv) Brazilian Electricity Regulatory Agency;
(v) Brazilian Civil Aviation Agency;
(vi) National Agency of Petroleum, Natural Gas and Biofuels;
(vii) Brazilian Central Bank;
(viii) Brazilian Securities and Exchange Commission;
(ix) National Agency of Terrestrial Transportation; and
(x) National Agency of Waterway Transportation.

**CANADA**

**Competition Act Merger Reviews**

Canada’s competition law is governed by the *Competition Act*, a federal statute that contains both criminal and civil provisions aimed at preventing harmful anti-competitive practices in the marketplace. The *Competition Act’s* purpose is to “maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy”, while simultaneously ensuring small and medium-sized enterprises have an equitable opportunity to participate in the economy and that consumers are provided with competitive prices and product choices.\(^{207}\) The *Competition Act* empowers Canada’s Commissioner of Competition (the “Commissioner”) to challenge mergers that are likely to prevent or lessen competition

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substantially in a relevant market. Subject to certain exceptions, the Commissioner may challenge a proposed merger that raises competition concerns before the Competition Tribunal (the “Tribunal”) within one year after the merger’s substantial completion. The Tribunal, an independent adjudicative body, is distinguished from the Competition Bureau (the “Bureau”), headed by the Commissioner, which investigates complaints and decides whether to file applications before the Tribunal. The Bureau is part of the Department of Industry, which is headed by Canada’s Minister of Industry.

**Standards of Merger Review**

The competitive impact of a proposed merger is assessed under the *Competition Act* on the basis of whether it prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market. The *Competition Act* includes a non-exhaustive list of factors that the Tribunal and the Bureau may consider in evaluating whether a merger would substantially lessen competition. These factors include: (a) the extent of foreign competition in the market; (b) the availability of substitute products in the market; (c) barriers to entry into the market; (d) the effect of the transaction on barriers to entry into the market; (e) the extent to which effective competition would remain in the market after the merger; (f) any removal of effective competitors in the market; and (g) the extent of innovation in the market. It must be emphasized that even if the Tribunal determines that a proposed merger will result or likely result in substantial anti-competitive effects, it may still allow the transaction to proceed. Specifically, if the Tribunal finds that the transaction will bring or is likely to bring about gains in efficiency that will offset the transaction’s anti-competitive effects, the Tribunal is prohibited from making an order that frustrates the merger.

If the Bureau determines that a merger has prevented or lessened competition substantially, or is likely to do so, it will generally allow the parties to the transaction an opportunity to negotiate a consent agreement that addresses the anti-competitive effects of the transaction. Once registered with the Tribunal, this consent agreement has the same force and effect as a Tribunal order. If

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208 *CA*, § 92.
209 A merger is defined broadly in the *CA* as the acquisition in any manner of control over, or of a significant interest in, the whole or part of a business (*CA*, § 91). With respect to corporations, “control” is defined as the acquisition of a majority voting interest in an the corporation, while “control” with respect to partnerships means an interest in the partnership that entitles the person to receive more than 50 percent of the profits of the partnership or its assets on dissolution. (*CA*, § 2(4)) The *CA* does not define “significant interest”, but the Bureau’s *Merger Enforcement Guidelines* (6 Oct 2011, at p 2) interpret the term to mean the ability to materially influence the economic behaviour of the target business.
210 *CA*, § 97.
211 *Competition Act*, § 92(1).
212 *Competition Act*, § 90.1(2).
213 *Competition Act*, § 90.1(4).
214 For example, In July of this year, the Bureau approved the C $12.4 billion merger between Loblaw, Canada’s largest grocery retailer, and Shoppers Drug Mart Corporation (“Shoppers”), Canada’s largest drugstore retailer. Loblaw’s entrance into a consent agreement required the divestiture of 27 stores and operations as well as
a negotiated resolution cannot be achieved between the Bureau and the parties to the transaction, the Commissioner may then file an application for remedial relief with the Tribunal. The Tribunal may order a range of remedies if it determines that a proposed transaction will have, or is likely to have, an anti-competitive impact on relevant markets, including the prohibition of a proposed merger or an order requiring a party to divest all or part of the acquired business.

**Pre-Merger Notification**

Under the *Competition Act*, certain proposed acquisitions and business combinations trigger advance notification requirements. Specifically, the *Competition Act* establishes a two-stage merger review process whereby parties to a transaction must provide the Commissioner with pre-merger notification filings if the proposed transaction exceeds specified monetary and shareholding thresholds. Transactions subject to the thresholds in Part IX of the *Competition Act* cannot be closed until the expiration of a 30-day statutory waiting period. This waiting period, which commences once parties have submitted completed filings, is extended if the Commissioner issues a supplementary information request (“SIR”) for more information about the proposed transaction. The issuance of a SIR restarts a new 30-day waiting period that commences when the SIR is certified as complete. The waiting period may be terminated earlier if the Commissioner does not intend to make an application to the Tribunal. However, in the majority of cases, compliance with a SIR may take 60-90 days, which coupled with the initial 30-day waiting period, means many merger reviews may take approximately 4-5 months to complete. Some cases certainly take longer.

Pre-merger notification filings are required when proposed transactions exceed both of the two statutory thresholds set forth in Part IX of the *Competition Act*: (a) the size of the parties, and (b) behavioural restrictions vis-à-vis its suppliers. This consent agreement was seen to mitigate the Bureau’s concern that the merger would result in substantial lessening of competition in 27 local markets for the retail sale of pharmacy products and drugstore-type merchandise.

The *Competition Act* includes various exemptions from the obligation to provide pre-merger notification. Firstly, the Commissioner may issue an advance ruling certificate (“ARC”), which represents that the Commissioner will not challenge the proposed merger based on the facts in the parties’ ARC application. In addition to providing an exemption from the notification filing requirements and the mandated 30-day waiting period, an ARC also prevents the Commissioner from challenging the merger after the transaction is complete (*CA*, § 103). If the Commissioner denies an ARC application, the Commissioner may still issue a no-action letter, stating that she or he has no current intention to challenge the transaction. Parties regularly close their transactions in reliance on this letter. However, the Commissioner retains his or her right to challenge the transaction within one year of closing. A no-action letter does not automatically exempt parties from the pre-merger notification obligation, but the Commissioner usually waives this obligation if the information provided in the ARC request is substantially similar to the information required in the notification filing.

In addition to the ARC exemption to pre-merger notification, certain types of transactions are also exempted from the early notification system. For example, exempt transactions include: a transaction where all parties are affiliates, an acquisition of real property or goods in the ordinary course of business, an acquisition of shares or interest for the purpose of writing, and an acquisition of a Canadian resource property (*CA*, § 111).

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215 The *Competition Act* includes various exemptions from the obligation to provide pre-merger notification. In addition to providing an exemption from the notification filing requirements and the mandated 30-day waiting period, an ARC also prevents the Commissioner from challenging the merger after the transaction is complete (*CA*, § 103). If the Commissioner denies an ARC application, the Commissioner may still issue a no-action letter, stating that she or he has no current intention to challenge the transaction. Parties regularly close their transactions in reliance on this letter. However, the Commissioner retains his or her right to challenge the transaction within one year of closing. A no-action letter does not automatically exempt parties from the pre-merger notification obligation, but the Commissioner usually waives this obligation if the information provided in the ARC request is substantially similar to the information required in the notification filing.

216 *Competition Act*, § 123(1).
the size of the transaction. The former threshold is met where the parties to a transaction (together with their affiliates) have Canadian assets that exceed C$400 million in aggregate book value or annual gross revenues from sales in, from, or into Canada that exceed C$400 million in aggregate book value. The latter threshold is met when the size of the transaction in respect of the acquired, continued, or combined business exceeds C$82 million (e.g., a share or asset acquisition, or an amalgamation). This threshold value is determined annually according to an indexing mechanism set out in the *Competition Act* that is tied to the Canadian GDP.

**Cross-border coordination**

The Bureau places importance on cooperating with foreign counterparts in cross-border merger review and other competition matters. In particular, Canada and the US have a long history of information exchange and cooperation in the review of mergers that affect both countries, as evidenced by the 1995 Canada-U.S. Cooperation Agreement on competition law enforcement. In March of 2014, the Bureau, the US Federal Trade Commission and the US Department of Justice Antitrust Division issued a best practices outline (the “Outline”) on cooperation in merger investigations. The Outline sets forth the best practices related to inter-agency communication, the coordination of review timetables, the collection and evaluation of evidence, as well as the consideration and implementation of remedies. It also provides guidance to merging parties on how to facilitate cooperation between the agencies.

The Bureau’s commitment to international cooperation extends beyond coordination with the US. Canada currently has international cooperation agreements relating to competition law with Australia, Brazil, Chile, Costa Rica, Japan, Korea, Mexico, New Zealand, the United Kingdom and the countries in the European Union. Such cooperation in cross-border merger cases is

220. The size of transaction threshold is applied differently depending on whether the merger is structured as an asset acquisition, an acquisition of shares, an amalgamation, the formation of a combination, or the acquisition of an interest in a combination.
222. Id.
224. In addition to these formal agreements, the Bureau has increased international cooperation and trust with agencies of other countries through face-to-face interactions. In January of 2014, Canada’s Competition Commissioner led a Bureau delegation to Beijing to meet with senior officials of China’s three competition authorities. See Competition Bureau, *Competition Bureau meets with Chinese Competition Authorities*, (16 Jan 2014) [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03644.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03644.html). In April of the same year,
protected by waivers that the parties to a transaction generally provide early on in the process, and the Bureau takes the position that under Section 29 of the Competition Act it does not formally require a waiver to exchange information (although waivers are generally confirmed in any event).

**CHINA**

China’s merger control regime is set out in Chapter IV (“Concentration of Undertakings”) of the Anti-Monopoly Law (“AML”). Article 20 of the AML lists three forms of “concentration of undertakings” covered by the AML: (i) mergers; (ii) acquisitions of control through acquisition of equity or assets; and (iii) acquisitions of control, or of the capacity to exercise decisive influence, by contract or other means. The AML expressly excludes from the definition of “concentration” internal group consolidations in which one party to the transaction owns more than 50% of the voting shares or assets of all other parties, or where more than 50% of the voting shares or the assets of every party are owned by an undertaking that is not a party to the concentration.

**Which agency is responsible?**

China’s Ministry of Commerce (“MOFCOM”) is responsible for merger and other transaction-related aspects of the AML. Under the AML, MOFCOM’s Anti-Monopoly Bureau (“AMB”) is responsible for reviewing proposed “concentrations” – i.e., mergers, acquisitions, and the formation of joint ventures. Parties to transactions that satisfy certain thresholds must notify MOFCOM of their transaction and observe a waiting period prior to consummation, during which MOFCOM may conduct an investigation to determine whether the transaction “will result in or may result in the effect of eliminating or restricting market competition.”

MOFCOM’s Notification Rule states that the parties to a merger shall jointly be responsible for filing, while for other types of concentrations the party gaining control or decisive influence shall be responsible for filing. In the latter situation, all other parties are required to cooperate with the notifying party and, if the notifying party fails to file, may file their own notification.

Under article 48 of the AML, the available sanctions for unauthorized concentrations—i.e., transactions that have been consummated without making any required filings or observing any applicable waiting periods—include reversal of the transaction, disposal of any acquired shares or assets within a specified time limit, and a fine of up to RMB 500k. MOFCOM has established an Enforcement Supervision Division to investigate suspected cases of non-compliance.

In addition, in April 2014, MOFCOM released its Guidelines on the Filing of Simple Transactions (Trial), together with a shortened Filing Form for Simple Transactions and a Public

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Commissioner Pecman and other Bureau officials met with senior officials from China’s State-owned Assets Supervision and Administration Commission in Ottawa.
Disclosure Form. According to the Guidelines, MOFCOM will determine whether a transaction is a “simple” transaction before it accepts the filing. In a simple transaction, MOFCOM may not need to consult with other Chinese agencies during the review process. Further practice under the simple transaction process will be needed to see whether it shortens the time needed for clearance decisions.

In addition to MOFCOM, two other Anti-Monopoly Law Enforcement Authorities (“AMEAs”), the National Development and Reform Commission (“NDRC”) and the State Administration for Industry and Commerce (“SAIC”), also have responsibilities related to enforcing the AML. NDRC conducts most non-merger-related investigations. SAIC has a role similar to NDRC’s, and its personnel, including at the subnational level, may investigate violations of consumer protection and unfair competition laws and regulations, including under the AML.

Factors considered

Prior notification and approval is required in China for “concentrations of undertakings” that meet either of the following thresholds:

1. the combined worldwide turnover of all undertakings involved in the transaction exceeded RMB 10 billion in the last fiscal year, and the China-wide turnover of each of at least two undertakings involved in the transaction exceeded RMB 400 million; or

2. the combined China-wide turnover of all undertakings involved in the transaction exceeded RMB 2 billion in the last fiscal year, and the China-wide turnover of each of at least two undertakings exceeded RMB 400 million.

Like its US counterparts, MOFCOM also has jurisdiction to review any transaction that it has reason to believe is likely to result in the elimination or restriction of competition, regardless of whether the deal is reportable. Unlike the US HSR process, however, the AML does not allow any exceptions under which transactions that meet the filing thresholds can be exempted from the obligation to file.

Neither transaction size nor whether the transaction will be consummated within China is relevant to the reporting thresholds, which are based on worldwide and China-wide turnover of the parties. Thus, transactions that have little or nothing to do with China may still require an AML filing if the parties have substantial presences in China — even if unrelated to the proposed transaction. Therefore, a company with worldwide and China turnover that exceeds the AML filing thresholds should examine potential AML pre-merger requirements whenever considering a transaction with an entity that has China-wide turnover in excess of RMB 400 million.

The substantive standard for pre-merger review under the AML is provided by Article 28 of the law – whether the proposed concentration “will result in or may result in the effect of eliminating or restricting market competition.” However, under the AML, the authority “may decide not to
prohibit a concentration if the undertakings involved can prove either that the positive effect of the concentration on competition obviously outweighs the negative effect, or that the concentration is in the public interest.” Article 27 of the AML lists some factors to be considered during substantive review:

- the market share of the undertakings involved in the relevant market and their ability to control the market;
- the degree of market concentration in the relevant market;
- the effect of the concentration on market entry and technological progress;
- the effect of the concentration on consumers and other undertakings;
- the effect of the concentration on national economic development; and
- other factors affecting market competition as determined by the authority.

MOFCOM’s standard of review is thus not strictly limited to competition concerns, consumer welfare, etc. Although the extent to which other factors influence its merger clearance decisions and remedies is not clear, MOFCOM enforcement activity suggests that the line between what is good for competition and customers and what is good “for China” — two goals which are not necessarily coterminous — is sometimes blurred. To that end, during its review, MOFCOM regularly seeks opinions of other government ministries, trade associations, major competitors, upstream suppliers and downstream customers.

Other reviews conducted by same agency
Refer to the discussion of MOFCOM’s role in China’s National Security Review process below.

Timetable for review

When to File
The parties to a reportable transaction in China may file at any time. However, as with the HSR process in the US, if the transaction meets the filing thresholds, a pre-merger filing is mandatory and the parties may not close until the filing has been made with MOFCOM and any applicable waiting periods have been observed. Thus, parties are encouraged to file as soon as practicable. MOFCOM typically requires executed copies of the transaction documents before it will accept a filing as “complete.”

Waiting Period(s)
Once an AML pre-merger filing has been accepted as “complete” by MOFCOM (see below), the initial Phase I waiting period is 30 days. At the end of Phase I, MOFCOM must either issue a written decision to clear the transaction or issue a written notice of further review. If the parties
do not receive either such notification at the end of Phase 1, the deal is deemed to have been cleared and the parties are free to move forward. If MOFCOM elects to conduct a more extensive Phase II review it may extend the waiting period for a further 90 days. The review phases and potential extensions can thus last up to 180 days (30+90+60), based on a 60 day pre-acceptance phase (as described below). MOFCOM’s practice has been to count the waiting periods using calendar days.

In practice, transactions that raise no competition issues may not be cleared until well into Phase II, and MOFCOM has been known in some cases to encourage parties to withdraw applications and re-file so that the clock can be re-started. Thus, parties to simple transactions should not assume rapid clearance (although new “simple” transaction processes may reduce clearance times), and parties to more complex transactions that raise competition concerns may experience a lengthy review lasting longer than 180 days.

“Pre-Acceptance” Phase

The determination of when an AML pre-merger filing is “complete,” and thus when the initial Phase I 30-day waiting period begins, is left to MOFCOM’s sole discretion. MOFCOM has encouraged parties to consult with the agency before formally presenting their filing. Parties to reportable transactions therefore should build in additional time for this “pre-acceptance” phase of the review, which can require several weeks or even months to complete, depending upon factors such as the complexity of the case, the speed with which the parties respond to any information requests received from MOFCOM, and MOFCOM’s own scheduling issues.

Coordination with other agencies

As explained above, during its review, MOFCOM regularly seeks opinions of other government ministries, in addition to the options of trade associations, major competitors, upstream suppliers and downstream customers.

Coordination with other jurisdictions

MOFCOM may coordinate with antitrust authorities in other jurisdictions on a case-by-case basis.

EUROPEAN UNION

Which agency is responsible

The EU merger control regime is based on Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (the “EUMR”). The EUMR applies to the 28 members of the European Union—Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia,
Spain, Sweden, and the United Kingdom (collectively, the “EU Member States”). It also applies to three members of the European Free Trade Association (“EFTA”), Iceland, Liechtenstein, and Norway. These three EFTA Member States, together with the 28 EU Member States, form the European Economic Area (“EEA”).

The EUMR applies to “concentrations” (mergers, acquisitions of control, and so-called full function joint ventures) that surpass certain turnover-based thresholds. In principle, concentrations that meet the turnover-based thresholds of the EUMR (“concentrations with Community dimension”) are not subject to the merger control laws of the 31 EEA Member States (under the so-called “one-stop-shop” principle). Concentrations with Community dimension are subject to a merger control filing obligation.

The EUMR is enforced by the European Commission’s Directorate-General for Competition (“DG COMP”), to which concentrations with Community dimension must be notified. The European Commissioner for competition heads DG COMP. However, decisions under the EUMR are taken by the 28 European Commissioners (“College of Commissioners”).

**Factors considered**

Concentrations that significantly impede effective competition in the European Union, or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, are prohibited under the EUMR. The European Commission applies this test by using competition-related criteria.

**Other reviews conducted by same agency**

DG COMP is responsible for the enforcement of EU competition law, including State aid law, in the European Union. It does not conduct reviews outside the area of EU competition law.

**Timetable for review**

The standard waiting period is 25 working days (“Phase I”). Phase I can be extended by ten working days under certain circumstances. A Phase I review may be followed by an in-depth investigation (“Phase II”), if DG COMP has serious doubts regarding the compatibility of a concentration with EU competition law. In Phase II, a decision must generally be taken within 90 working days. Under certain circumstances, however, Phase II can be extended to a maximum of 125 working days.

Merger control filings are preceded by informal “pre-notification” contacts between the parties to a concentration and DG COMP. These contacts usually take at least two weeks but in complex cases they may take several weeks.

The European Commission’s merger control review imposes a standstill obligation on the parties and transactions may not close prior to clearance.
Coordination with other agencies

In complex cases, DG COMP also involves in the decision-making process the European Commission’s Legal Service, and, if relevant to the subject matter of the case at hand, other Directorates-General, such as the Directorates-General for Mobility and Transport (“DG MOVE”), Energy (“DG ENERGY”), Communications Networks, Content & Technology (“DG CONNECT”), Health and Consumers (“DG SANCO”). Finally, as already mentioned, the final decision is adopted by the full College of Commissioners (i.e., not by the Commissioner for competition alone). The involvement of other Directorates-General and Commissioners in the decision-making process does not, however, mean that the final decision may be based on criteria that are not competition-related (for example, industrial policy, employment, etc.).

Coordination with other jurisdictions

The European Commission’s decision-making process actively involves the national competition authorities of the EU Member States (“NCAs”). All merger control notifications to DG COMP are forwarded to the NCAs so that the latter can express their views. In Phase II investigations, DG COMP must take into account the opinion of the NCAs on the draft decision and on the remedy proposals, if any, before issuing a final decision. NCA’s express their views in Phase II investigations through the Advisory Committee on Concentrations. The opinion of the Advisory Committee is published together with the final decision.

Furthermore, the European Commission cooperates with the NCAs through the so-called referral mechanisms. The referral mechanisms allow under certain circumstances for the referral of the review of a concentration with a Community dimension from the European Commission to one or more NCAs or vice-versa (i.e., the referral of a concentration without Community dimension from one or more NCA’s to the European Commission).

Also, the European Commission actively engages in cooperation with competition authorities of many countries outside the European Union. Cooperation with some countries is based on bilateral agreements dedicated entirely to competition (the so-called “dedicated agreements”). In other cases, competition provisions are included as part of wider general agreements such as Free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements, etc.

For example, the European Commission routinely cooperates with the US Department of Justice and the Federal Trade Commission. The cooperation is primarily based on the 1991 EU-U.S. Competition Cooperation Agreement, the 1998 EU-U.S. Positive Comity Agreement, and the 2011 EU-U.S. Best Practices on Cooperation in Merger Investigations.

Pursuant to the 1991 Competition Cooperation Agreement, the parties should keep each other informed of cases that may concern important interests in each other’s jurisdictions. The agreement also provides for exchange of information on matters relating to competition enforcement. Under the rules of the 1998 Positive Comity Agreement, one party may request the
other party to remedy anticompetitive behavior which originates in its jurisdiction but affects the jurisdiction of the requesting party. The 2011 Best Practices on Cooperation in Merger Investigations offer merging parties the possibility of meeting at an early stage with the agencies on both sides of the Atlantic to discuss timing issues. Merging parties also are encouraged to permit the agencies to exchange information submitted during the course of an investigation and, where appropriate, to allow joint EU/US interviews of the companies concerned. The Best Practices designate key points in the respective EU and US merger investigations when direct contacts between senior officials on both sides should take place.

Finally, the European Commission participates actively in the competition-related activities of a number of multilateral organizations such as the International Competition Network (“ICN”), the Organization for Economic Cooperation and Development (“OECD”), UNCTAD, and the World Trade Organization (“WTO”). The main emphasis lies on the promotion of convergence and the exchange of views on broader policy and enforcement issues through dialogue and the adoption of best practices.

FRANCE

Pursuant to the Law on the Modernisation of the Economy (August 4, 2008), competition review is now carried out by the Autorité de la concurrence (Competition Authority). The Authority is an independent agency under the Ministry of Economy, Finance and Employment (Ministry of Finance). Previously, competition review was split between two agencies: the DGCCRF, a department in the Ministry of Finance, and the Conseil de la concurrence, an independent agency in the Ministry of Finance. The purpose of merging the two agencies, and formally separating competition matters from the Ministry of Finance, was to create more independence in competition investigations and enforcement.

The Competition Authority is statutorily required to focus on consumer welfare, namely harm to competition. The Guidelines on Merger Control states that the test applied requires the Authority to examine if the combination “may harm competition, notably through the creation or strengthening of a dominant position or through the creation or strengthening of purchasing power that places suppliers in a situation of economic dependency.” The Guidelines further note that “merger control pursues an objective of general interest which consists of protecting competition and its positive effects on welfare and on the purchasing power of consumers.”

The Competition Authority carries out all activities related to competition regulation. It does not participate in national interest review.

Thresholds

Under French law, a concentration arises when (1) two or more previously separate undertakings merge together; or (2) when one or more person(s) with control of at least one undertaking acquires, or when several undertakings acquire, control of the whole or part of another
undertaking. A concentration falls under the jurisdiction of the French Competition Authority if (1) the total worldwide net of tax turnover of all of the firms or groups of natural or legal persons taking part in the merger is more than 150 million euros; (2) the total pre-tax turnover generated in France by at least two of the firms or groups of individuals or legal persons involved is more than 50 million euros; and (3) the concentration does not fall into the European Commission’s jurisdiction.

There are lower thresholds, however, for concentrations in the retail trade sector. The thresholds for a concentration where at least two of parties involved operate one or more retail stores are: (1) the total worldwide net of tax turnover of all the undertakings or groups of natural or legal persons taking part in the merger is more than 75 million euros; (2) the total pre-tax turnover generated in the retail trade sector in France by at least two of the undertakings or groups of natural or legal persons involved is more than 15 million euros; and (3) the concentration does not fall into the European Commission’s jurisdiction.

**Procedure**

Phase 1 review begins on the working day after the Competition Authority receives a complete notification file and lasts for 25 working days. The Phase 1 timetable is automatically extended by 15 working days if the merging parties submit commitments to the Authority.

Phase 2 in-depth review lasts for 65 working days. If the merging parties propose commitments less than 20 working days before the end of the 65-day time limit, the time limit will expire 20 working days after the receipt date of the commitments. In special needs cases, the parties can request a time extension of up to 20 working days. Time limits may be suspended by the Authority in the event that the merging parties fail to inform the Authority of a new fact as of its occurrence, the parties failed to provide all or part of the information requested by the Authority or third parties fail to provide all or part of the information requested by the Authority for reasons attributable to the notifying parties.

Decisions by the Competition Authority are appealable to the French Administrative Supreme Court (Conseil d’État), typically for annulment of the decision. The Guidelines provide that parties challenging an Authority decision can seek interim injunctions pending the Court’s decision.

As a member of the European Union, transactions reportable to the French Competition Authority may fall under the jurisdiction of the EU’s competition authority, the European Commission. The European Commission has exclusive jurisdiction in reviewing mergers that fall within the thresholds set out in the EC Merger Regulation (“ECMR”). The Competition Authority, as France’s national competition authority, has the power to refer a transaction to the EC under Article 9 of the ECMR or to consent to a referral of an ECMR case from the EC to France under Article 4(4) of the ECMR. Parties can also request that a case falling under France’s competition laws be referred to the EC under Article 4(5) of the ECMR.
GERMANY

Which agency is responsible?

The German merger control regime is based on the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, “GWB”). The GWB applies to “concentrations”. Concentrations include mergers, acquisition of control, creation of joint ventures, and acquisition of minority shareholdings or of a competitively significant influence below the level of control. The GWB applies to concentrations that meet certain turnover-based thresholds and that at the same time do not meet the turnover-based thresholds of the EUMR. If the EUMR thresholds are met, the European Commission has sole competence to review the transaction irrespective of whether the GWB thresholds are met. If the EUMR thresholds are met but the transaction does not constitute a concentration within the meaning of the EUMR but it does within the meaning of the GWB, then the GWB applies to the transaction. Concentrations that fall under the scope of the GWB are subject to a merger control filing obligation.

The GWB is enforced by the Federal Cartel Office (“Bundeskartellamt”), to which concentrations that fall under the scope of the GWB must be notified. The Federal Cartel Office is an independent higher federal authority which is assigned to the Ministry of Economic Affairs and Energy. As of June 3, 2013, Andreas Mundt was President of the Federal Cartel Office.

Factors considered

Concentrations that significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, are prohibited under the GWB. The Federal Cartel Office applies this test by using competition-related criteria. That said, the Federal Minister of Economic Affairs and Energy may, upon application, authorize a concentration prohibited by the Federal Cartel Office, if the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest. Prior to the Federal Minister’s decision, an opinion of the Monopolies Commission must be obtained, and the supreme Land authorities in whose territory the parties have their registered seat must be given an opportunity to comment. Less than ten authorizations have been granted since the introduction of German merger control law in 1973.

Other reviews conducted by same agency

The Federal Cartel Office is responsible for the enforcement of competition law in the Federal Republic of Germany. It does not conduct reviews outside the area of competition law.
**Timetable for review**

The standard waiting period is one month (first phase). In-depth investigations (second phase) may take up to four months from notification. Under certain circumstances, the four-month period may be further extended. Concentrations that are subject to merger control review cannot close prior to clearance.

**Coordination with other agencies**

The Federal Cartel Office cooperates formally or informally with other government agencies, particularly in complex cases. For example, under the German Telecommunications Act the Federal Cartel Office and the German telecoms regulator, the Federal Network Agency (*Bundesnetzagentur*), must consult each other in cases that may overlap, inform each other of all observations and decisions of possible relevance to the performance of their duties, and agree to a consistent interpretation of the GWB and the Telecommunications Act.

**Coordination with other jurisdictions**

The Federal Cartel Office cooperates closely with the European Commission. A general overview of the framework of cooperation between the European Commission and the NCAs is provided in the chapter on the European Union.

The Federal Cartel Office also cooperates closely with the NCAs (and the European Commission) through the European Competition Network (“ECN”). In the merger control area, ECN members cooperate and exchange best practices through the EU Merger Working Group. The EU Merger Working Group, established in Brussels in 2010, consists of representatives of the European Commission and the national competition authorities of the European Union. Representatives of the competition authorities of Iceland, Liechtenstein and Norway also participate in the ECN as observers. The objective of the EU Merger Working Group is to foster consistency, convergence and cooperation among EU jurisdictions. The Group’s mandate is to identify areas of possible improvement in issues relating to mergers with cross-border impact and explore possible solutions within the existing legal frameworks.

In addition, the Federal Cartel Office regularly cooperates with competition authorities outside the European Union, particularly with the US Department of Justice and the Federal Trade Commission.

Finally, the Federal Cartel Office participates actively in the competition-related activities of a number of multilateral organizations, such as the International Competition Network (“ICN”), the Organization for Economic Cooperation and Development (“OECD”), and the World Trade Organization (“WTO”). The main emphasis lies on the promotion of convergence and the exchange of views on broader policy and enforcement issues through dialogue and the adoption of best practices.
JAPAN

The Japan Fair Trade Commission (JFTC) has primary jurisdiction over the enforcement of merger control under the Anti-Monopoly Act (AMA). The AMA provides two types of regulations for business combination: (i) a formalistic regulation which requires a prior notification for transactions that satisfy the relevant thresholds; and (ii) a substantial regulation which prohibits a business combination that will result in restraint of trade in a particular field of trade (relevant market).

Mergers, business transfers, corporate splits (or demergers) and stock acquisitions (M&A transactions) are subject to prior notification under the AMA. The transfer of the whole of the business and the transfer of a substantial part of the business or the whole or a substantial part of the fixed assets used for the business are subject to different sets of filing thresholds.

Share acquisition

A company acquiring shares in another company (where both are above a certain size, as described below) must file a notification with the FTC prior to the transaction, when all of the following thresholds are met:

- the ratio of voting rights held by an acquiring company in an issuing company exceeds either of the 20 or 50 per cent thresholds;
- the acquiring party as a group has Japanese turnover of more than ¥20 billion; and
- the target as a group (the target entities and subsidiaries, not including the entities staying with the seller) has Japanese turnover of more than ¥5 billion.

When calculating Japanese turnover, in principle both direct and indirect sales in and into Japan made by the company group during the most recent financial year should be included except for intra-group captured sales.

There are separate rules for collective share transfer, which is a transaction form available under Japanese corporate law that allows more than two companies to create a common holding company. For this form of transaction, when one of the parties as a group has Japanese turnover of more than ¥20 billion and the other (or another) party has Japanese turnover of more than ¥5 billion, the JFTC filing is triggered.

Statutory merger or demerger

In respect of statutory mergers, a filing must be made with the FTC when both of the following thresholds are met:

- one of the parties as a group has Japanese turnover of more than ¥20 billion; and
- the other party as a group has Japanese turnover of more than ¥5 billion.
There are more detailed rules for statutory demergers.

**Business asset transfer**

Regarding business or business-related fixed-asset transfers, a filing must be made with the FTC when the following thresholds are met:

- the transferee company as a group has Japanese turnover of more than ¥20 billion and the target business or business-related assets satisfy any of the following:
  - whole business of another company with Japanese turnover of more than ¥3 billion;
  - key business of another company with corresponding Japanese turnover of more than ¥3 billion; or
  - whole or key part of another company’s business-related fixed assets with corresponding Japanese turnover of more than ¥3 billion.

Even if a transaction does not meet the thresholds, it is still subject to the substantive test. According to the Merger Guidelines, the substantive test will catch non-notifiable transactions if the anti-competitive impact is material. In such a case, parties are advised to engage in prior consultation with the JFTC. When a transaction is subject to merger control in other jurisdictions (especially US and EC) and the anti-competitive impact is expected to be substantial, the JFTC tends to obtain in-formation via inter-governmental channels and sometimes contacts the parties, even in the absence of prior consultation or a filing.

M&A transactions are subject to a standard 30-day waiting period (or if such period is shortened, within the shortened period). The JFTC may request additional information during such period. If the JFTC considers that the contemplated M&A transaction has an anti-competitive effect and therefore intends to order certain necessary measures be taken, it will notify the party within the 30-day waiting period, or if the JFTC requested additional information, within the longer period of either 120 days from the date of receipt of the initial notification or 90 days from the date of the receipt of all of the additional information. If the JFTC considers that the contemplated M&A transaction does not have an anti-competitive effect, it will provide a clearance letter to the party within the above mentioned period. In addition to the statutory waiting period, it takes some time (i) for the parties to prepare a draft notification by collecting market data, etc.; and (ii) for the JFTC to check the draft and to formally accept the notification. If the M&A transaction has any anti-competitive effect, the period necessary to consult with the JFTC prior to the notification also needs to be taken into consideration. In practice, it normally takes one to two months for such preparation even where the M&A transaction does not have any anti-competitive effect. If the M&A transaction has any anti-competitive effect, the preparation takes longer, i.e., approximately two to six months.
UNITED KINGDOM

On April 1, 2014, the Competition and Markets Authority (“CMA”), a non-ministerial department, became responsible for competition review in the United Kingdom. Previously, competition review was performed by two agencies, the Office of Fair Trade (“OFT”), a non-ministerial government department which was responsible for first-level competition review, and the Competition Commission (“CC”), which performed in-depth investigations upon a referral from the OFT or another regulator (and, in public interest cases, the Secretary of State).

In merger review, the CMA is focused on determining whether a proposed merger results in a “substantial lessening of competition” by identifying relevant markets, assessing the effects on those markets and assessing countervailing factors that might mitigate the harmful effects on the relevant markets. The CMA defines competition as “the process of rivalry over time between businesses seeking to win customers’ business by offering a better deal.” Public interest determinations are made by the Secretary of State (see below).

The CMA is responsible for all competition and consumer protection investigations and enforcement. The CMA also plays a role in public interest merger investigations by the Secretary of State.

The UK does not require pre-merger notification. However, if merging parties decide to submit a voluntary notification to the CMA, the Guidelines state that pre-notification discussions typically last a minimum of two weeks before notification.

Whether on its own initiative or following a voluntary notification, the CMA’s Phase 1 investigation lasts up to 40 working days. At the end of that period, the CMA determines whether a duty to refer the merger to Phase 2 notification applies. If so, the parties have up to 5 working days to offer undertakings in lieu of a reference (“UILs”). If no UILs are offered, the transaction is referred to Phase 2. If UILs are offered, the CMA has 10 working days to determine whether the UILs are acceptable in principle or refers the transaction to Phase 2. The CMA has 50 working days, extendable by up to 40 working days, to consider and consult on the proposed UILs before making a final decision to accept the UILs (and clear the transaction) or refer the transaction to Phase 2. Prior to Phase 2 review, there is a possible 3 week suspension of the process if the parties may abandon the transaction.

Upon referral, the independent Phase 2 Inquiry Group has up to 24 weeks, extendable by up to 8 weeks, to make a decision regarding the SLC finding and determine what, if any, remedies are necessary. If the Inquiry Group does not find an SLC, the transaction is cleared. If it does find an SLC, the implementation of remedies lasts up to 12 weeks, extendable by up to 6 weeks.

The CMA is charged with carrying out all investigations and enforcement actions related to competition regulation. Moreover, the CMA plays a role in public interest mergers. By law, final determinations regarding public interest considerations are within the exclusive jurisdiction
of the Secretary of State, although the SoS is required to accepted the CMA’s decisions as to whether a relevant merger situation exists and competition matters. The CMA is permitted to provide advice and recommendations regarding public interest considerations to the SoS, but the CMA’s merger guidance documents notes that it would be uncommon for such advice to be given during Phase 1 review. However, “following a reference on public interest grounds the independent Phase 2 Inquiry Group will report to the Secretary of State about whether the merger operates or may be expected to operate against the public interest.”

The European Commission has exclusive jurisdiction in reviewing mergers that fall within the thresholds set out in the EC Merger Regulation (“ECMR”). The CMA, as the UK’s national competition authority, has the power to refer a transaction to the EC under Article 9 of the ECMR or to consent to a referral of an ECMR case from the EC to the UK under Article 4(4) of the ECMR. Parties can also request that a case falling under the UK Enterprise Act be referred to the EC under Article 4(5) of the ECMR.
Issues Arising Between Agencies and Between Jurisdictions

The preceding discussions reveal that many differences exist among the foreign investment reviews conducted from one jurisdiction to the next, and even from one agency to the next within the same jurisdiction. These differences fall into two categories: (1) differences in timing and procedure, and (2) differences in substance. The following sections review some of the chief issues that have emerged in each of these categories.

The first three discussions that follow address issues concerning timing and procedure. The next three address issues of substance.
Timing/Procedure Issues Arising Between Agencies Within the Same Jurisdiction

Types of reviewing authorities

Foreign investment and merger control filings often are reviewed by more than one government body or authority within a given jurisdiction. The body responsible for the review of foreign investment filings is often characterized by a much higher degree of government dependence (in some jurisdictions the authority rests within the executive branch or even the head of state) than antitrust authorities, which in many jurisdictions are administrative bodies that are more independent from the country’s government. In France, Germany and Japan, for example, government ministers are responsible for reviewing foreign investments, while all three countries have more independent antitrust authorities. To a certain extent, China departs from this pattern with the Chinese Ministry of Commerce (Mofcom) and the National Development and Reform Commission (NDRC) playing roles in both foreign investment and merger control filings.

Different authorities mean different review periods and procedures. The parties to a transaction thus need to examine in advance and take into account the particularities of each relevant review procedure in order to ensure a successful outcome on all fronts.

Notification obligation

The fact that merger control filings are mandatory in a certain jurisdiction does not necessarily mean that foreign investment filings are also mandatory, and vice versa. For example, in the United States, transactions that meet certain thresholds and criteria are subject to a merger control filing obligation. CFIUS filings, however, are voluntary. In contrast, foreign investments meeting certain thresholds and criteria are subject to a foreign investment filing obligation in Australia, merger control filings are voluntary. In Japan, both merger control and foreign investment filings are mandatory if the respective thresholds and criteria are met. In the United Kingdom however, merger control and foreign investment filings are both voluntary.

The parties to a transaction thus need to decide in advance their filing strategy in jurisdictions with voluntary filing regimes. A question that may arise in certain jurisdictions, for example, such as the United States and Germany, is whether to voluntarily file a foreign investment that is subject to a merger control filing obligation. The question is particularly important in jurisdictions with voluntary foreign investment regimes where the reviewing body or authority
may initiate a review procedure on its own initiative and retains the power to block or unwind a transaction that falls under its jurisdiction. CFIUS, for example, has initiated post-closing foreign investment reviews. Under these circumstances, the President has the authority to unwind a closed transaction if the President finds that the covered transaction threatens to impair the national security based upon a finding that the foreign interest exercising control might take action that threatens to impair the national security and laws other than Section 721 and the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect the national security. 50 U.S.C. app. §§ 2170(d)(4)(A)-(B).

Waiting periods and standstill obligation

Parties to transactions that are subject to merger control and foreign investment filing obligations in the same jurisdiction may be confronted with separate procedures before different government bodies with different waiting periods. For example, in France, the national antitrust authority clears non-complex transactions that do not raise antitrust issues within 25 working days from filing. Foreign investment applications before the Ministry of Finance, however, are subject to a waiting period of two months. In Canada, the standard waiting period for non-complex merger control filings is 30 days from the day the filing is certified as complete. The standard waiting period for foreign investment filings in Canada is 45 days from the day the filing is certified as complete. The waiting periods for in-depth merger control and foreign investment filings also are not aligned.

In other jurisdictions, the waiting periods for merger control and foreign investment filings may be more similar. In Germany, for example, the statutory deadline for non-complex merger control clearance is one month. Foreign investment filings that do not raise public order or national security issues are also subject to a one month waiting period from the submission of the notification. Issues may arise in jurisdictions where waiting periods for foreign investment filings are not subject to time limitations. For example, while merger control procedures are subject to statutory deadlines in Brazil, the foreign investment procedure is relatively non-transparent and without limitations. Also, unlike the US merger control procedure, the US Foreign ownership, control or influence (“FOCI”) review/mitigation procedure generally lacks legal deadlines.

Furthermore, issues may arise due to the fact that in some jurisdictions merger control procedures impose a standstill obligation on the parties while foreign investment procedures do not, or vice versa. In the United States for example, the CFIUS review does not impose a standstill obligation on the parties. The parties may thus consider the pros and cons of closing a transaction subject to a CFIUS review following a HSR clearance. In contrast, in Australia, where merger control filings are voluntary and therefore the parties may decide to close the transaction without filing, foreign investment procedures do impose a standstill obligation on the parties.
Pre-notification contacts

Foreign investment reviewing authorities usually provide parties the opportunity to engage in pre-filing consultations regarding sensitive matters in preparation of a formal foreign investment filing. This seems to be the case in Brazil, Germany, the United Kingdom, and the United States. Such pre-filing consultations are usually not institutionalized and their duration and intensity depend on the relevant jurisdiction and the specific case at hand. Usually, nothing prevents parties from proceeding with a formal foreign investment filing without pre-consultations with the reviewing authority. Such pre-filing contacts serve the same purpose as pre-notification contacts within the framework of merger control procedures and give parties the opportunity to get a sense of possible concerns the reviewing authority may have and discuss possible remedies, where applicable.

Third-party rights

While customers, suppliers and competitors usually play an important role in merger control procedures, particularly for in-depth merger control investigations, their direct involvement may be very limited or non-existent in foreign investment procedures in a number of jurisdictions. In Brazil and Japan for example, foreign investment procedures do not foresee any involvement for third parties while the respective merger control procedures actively engage third parties. In Germany, although third parties have no formal standing in foreign investment procedures, third party views may be taken into account by the reviewing authorities when exercising their discretionary investigative power.

Third parties may play a more active role in foreign investment procedures in jurisdictions where merger control and foreign investment procedures are intertwined, (e.g., in the United Kingdom). Finally, it is important to note that foreign investment reviewing bodies are usually dependent on national governments or parliaments. Such dependence may allow third parties in certain jurisdictions to get involved indirectly in foreign investment review procedures via ministers, elected representatives and opposition groups.

Confidentiality

Merger control and foreign investment procedures within the same jurisdiction may be subject to different confidentiality rules. Since foreign investment procedures often deal with national security issues and third parties have no formal role, confidentiality restrictions may be stricter in a foreign investment procedure than in a merger control procedure. For example, CFIUS reviews in the United States and foreign investment reviews in Germany are confidential. In the United States, except under very limited circumstances, no information or documentary material filed with CFIUS may be made public, nor will CFIUS acknowledge its review of any specific transaction. 50 U.S.C. app. § 2170(c); see also 31 C.F.R § 800.702. A Presidential decision to take action to suspend or prohibit a covered transaction, however, is made public. Id. §
In Australia, the Treasurer issues official statements explaining his or her decisions to prohibit or conditionally approve foreign investment applications.

**Rights to challenge a negative decision**

Although negative merger control decisions are in principle subject to judicial review, this may not be the case when it comes to decisions rejecting foreign investment applications. For example, in the United States, the President’s decision to take action to suspend or prohibit a covered transaction and the findings required to support such a decision are not subject to judicial review, although due process challenges are possible. 50 U.S.C. app. § 2170(e). See also *Ralls Corp. v. Comm. on Foreign Inv. in the United States*, 926 F. Supp. 2d 71 (D.D.C. 2013) at 94. In Canada, a challenge to a negative foreign investment decision would have to proceed by way of judicial review, with a very high threshold for successfully overturning what is a Ministerial decision. In France and Germany, a negative decision regarding a foreign investment application may however be challenged before the French and German administrative courts, respectively.
Timing/Procedure Issues Arising Between Competition Agencies in Different Jurisdictions

The procedures for notifying antitrust and competition authorities of foreign investment review vary from jurisdiction to jurisdiction, as do the timetables for review. The following is a summary of the notification procedures and timetables for review in the jurisdictions focused on in this Report.

UNITED STATES

As previously described, in most situations, the HSR Act provides for an initial thirty (30) day waiting period that commences when both parties file their respective HSR Forms and the acquiring party pays the applicable filing fee. The thirty (30) day initial waiting period is shortened to fifteen (15) days when an acquisition is being made pursuant to certain bankruptcy statutes or the transaction is a cash tender offer. Where a transaction is reportable but clearly does not raise any antitrust concerns, the waiting period generally can be shortened through a procedure known as “early termination,” at the discretion of the agencies, when requested by at least one of the parties. Conversely, the waiting period can be extended significantly if either the FTC or the DOJ issues a Request for Additional Information, referred to in the vernacular as a “Second Request,” which is a comprehensive set of interrogatories (written questions) and document requests.

A Second Request generally extends the HSR waiting period until thirty (30) days after both parties have substantially complied with the Second Request (the waiting period is extended for ten (10) days when a bankruptcy or cash tender offer is involved). The time required to comply with the Second Request varies with, among other things, the scope of the Second Request, the number of potentially problematic relevant markets, the volume of documents to be searched, and the resources that the parties dedicate to the Second Request process. The agencies frequently seek to extend this Second Request period by agreement of the parties, using the threat of a lawsuit to enjoin the transaction as negotiating leverage.

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225 In the case of certain non-consensual transactions, such as tender offers, the waiting period commences when the acquiring person files its HSR Form.

AUSTRALIA

(a) Voluntary notification (with the exception of Australia, all others on this list are mandatory if the thresholds are met)

(b) Review Period: All review periods start from the receipt of a complete application. Incomplete applications (for formal clearance and for authorization) will be declared invalid and rejected within 5 business days of submission. Parties can proceed under formal or informal procedures.

(i) The informal clearance process may result in the ACCC issuing a non-binding letter stating that, on the basis of the information before it, the ACCC does not intend to take action to oppose a merger. The informal process does not benefit from statutory timeframes, but the ACCC has published its typical (indicative) timeframe for review in the Merger Review Process Guidelines. If the Commission decides during the initial review that no market inquiries are needed and the proposed transaction does not raise competition concerns, it will generally advise the parties of its conclusions within 1 to 2 weeks. If the Commission issues an informal clearance after its first round of market enquiries, the typical duration of this process (from the beginning of market enquiries to the issuance of a decision) is 8-10 weeks, with 8 weeks being a best case scenario. If a Statement of Issues (“SOI”) is issued, the ACCC will publish a secondary timeline for review and initiate public consultations about the issues raised in the SOI. Parties are given an opportunity to respond to the issues raised in the SOI. After review, the ACCC will issue a final decision typically within 8 weeks after the issuance of the SOI. Thus if a SOI is issued, the review process at best will be about 16 weeks, in some cases 20 weeks, from the beginning of the first market enquiries.

(ii) Applications for authorization are brought directly to the Competition Tribunal. The Tribunal may authorize a merger (with or without conditions) only if a public benefits test is satisfied. The Tribunal must reach a decision within 3 months from receipt of the application (with a maximum of 6 months for complex cases).

BRAZIL

(a) Prenotification: Pre-notification is not expected for non-complex cases, but for complex cases, it is expected that the filing will be discussed with CADE before filing.
(b) **Review Period:** There is no Phase I/Phase II distinction. The maximum review period is 240 calendar days from the date of filing (330 calendar days with extensions). In non-complex cases, the authority issues an approval decision in 30-60 calendar days from filing. There is an additional waiting period of 15 calendar days from the date of publication of the approval decision.

**CANADA**

(a) **Prenotification:** The Bureau strongly encourages parties to a proposed transaction to consult with the Bureau prior to, or as soon as possible after, submitting a notification or an ARC request.

(b) **Review Period:** Phase I: 30 calendar days from receipt of a complete notification from each party required to notify; Phase II: 30 calendar days from receipt of a complete response to all information requests set out in a Supplementary Information Request from each recipient.

**CHINA**

(a) **Prenotification:** Pre-acceptance review for completeness – ordinarily between 4-8 weeks (no statutory limit).

(b) **Review Period:** Phase I: 30 calendar days from the acceptance of the filing by the Ministry of Commerce (“MOFCOM”) as complete; Phase II: 30 calendar days from the acceptance of the filing by MOFCOM as complete; Extended Phase II: 60 additional calendar days. Even non-complex cases routinely enter into Phase II and sometimes Extended Phase II review. In particularly complex cases, MOFCOM may circumvent the maximum allowed statutory review period by compelling the parties to withdraw and re-file the notification, restarting the review period from Day 1. Simplified procedure introduced in 2014 – thus far, longer pre-acceptance periods, but after Phase I begins 90% of cases clear within 30 calendar days.

**EUROPEAN UNION**

(a) **Prenotification:** Prenotification required with the Commission – a minimum of two weeks for simple cases, which can stretch to three months or longer for complicated cases.
(b) **Review Periods:**

(i) Phase I: 25 working days from submission of a complete notification; possible extension to 35 working days if remedies are offered or a Member State requests a referral.

(ii) Phase II: 90 working days from the day that follows the decision to open a Phase II, possibly up to 125 working days.

**FRANCE**

(a) Filing pre-empted if the EU thresholds are met

(b) **Prenotification:** The new July 2013 Merger Guidelines emphasize the importance of informal pre-notification contacts between the parties and the Authority to minimize the risk that the filing be found incomplete and to try to accelerate the review. Pre-notification contacts begin with the submission by the parties of a letter to the Authority describing the transaction. Within 5 days, the Authority will inform the parties of the case handler assigned to the review.

(c) **Review Periods:** Phase I: 25 working days starting from receipt of the complete notification; Phase II: 65 working days from the date of the opening of the Phase II investigation.

**GERMANY**

(a) Filing pre-empted if the EU thresholds are met

(b) **Prenotification:** Not ordinarily used except in complex cases.

(c) **Review Period:** Phase I: one-month from date of complete notification; Phase II: Additional three months from the date of opening of the Phase II, for a total of four months from date of complete notification.

**JAPAN**

(a) **Prenotification:** Parties traditionally engage in pre-notification contacts with the JFTC.

(b) **Review Period:** Phase I: 30 days from formal acceptance of the filing; Phase II: 120 days from the date of formal acceptance of the initial notification or 90 days from the date of formal acceptance of the additional information requested, whichever is later.
UNITED KINGDOM

(a)  Filing pre-empted if the EU thresholds are met

(b)  Voluntary notification (with the exception of Australia, all others on this list are mandatory if the thresholds are met)

(c)  Review Period: Phase I: 30 working days for statutory pre-notification filings; no statutory review deadlines for informal written submissions, but the CMA’s policy is to reach a decision within 40 working days from receipt of the briefing paper. Phase II: 24 weeks from the date of referral.

As shown above, the timetables for conducting antitrust and competition reviews vary considerably from jurisdiction to jurisdiction. This can create difficulties for parties endeavoring to close transactions. The agencies generally are sensitive to these concerns, as is the International Competition Network, and progress has been made over the years to make these timetables more consistent with one another. Nevertheless, the individual needs of each jurisdiction sometimes require more time to be taken by some agencies than others in reviewing the same deal. Continued dialogue should continue to improve the situation.
Timing/Procedure Issues Arising Between National Interest/National Security Regulators In Different Jurisdictions

This section summarizes and compares key aspects of the national interest and/or national security-related review procedures in the United States, China, Canada, Japan, Brazil, the UK, France, Germany, and Australia. We then explore how the procedure and timing of these reviews can create conflicts for transaction parties and their counsel in cross-border transactions that fall within the jurisdiction of more than one of these review processes.

As the table below illustrates, the jurisdictions discussed in this report differ markedly from one another in their national interest/national security review procedures, including the timing of such reviews. The procedural differences include not only whether a national interest/national security filing by the acquiror is required but also the approach of each jurisdiction to negotiating or requiring mitigation measures; post-closing government powers; and industry-specific considerations. By understanding the applicable procedures and anticipated review timing, transaction parties and their counsel/advisors can consider whether and when certain filings or other engagement with host governments should be undertaken, although given the political, economic, and security sensitivities that may be raised by a transaction, there is likely some level of uncertainty that transaction parties will need to accept.

Voluntary or Required Nature of Notification/Review. In some of the jurisdictions surveyed, a filing or national interest/national security approval is voluntary. These jurisdictions include the United States (where a filing with CFIUS is technically voluntary, although CFIUS has the authority to request a filing) and the United Kingdom (where notification is voluntary). By contrast, in most of the jurisdictions – including Canada, China, and Brazil – a review and approval is required for at least transactions meeting certain criteria (including the industry involved, the size of the target, and/or the nature of the foreign investor).

Industry-Specific Considerations. Predictably, transactions involving certain sectors – such as defense and telecommunications – commonly require (and will raise) close government scrutiny. However, there are other industries – such as media, broadcasting, and publishing – that may

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227 This is the case in respect of national interest, *i.e.*, net benefit reviews. National security reviews are initiated by the Government and may arise regardless of whether a particular transaction is also subject to a mandatory net benefit review.
attract relatively significant attention in some jurisdictions (e.g., Canada, Japan, the UK, and Australia), but comparatively less attention and possibly shorter review periods in other jurisdictions (e.g., the United States).

**Value-Based Considerations.** Some jurisdictions clearly state the quantitative thresholds under which a national interest/national security review is required. For example, with respect to the acquisition of a 15% or greater interest in an Australian company, Australia focuses on targets valued at A$248 million or greater. By contrast, significantly smaller targets may raise the attention of other jurisdictions (e.g., the United States and Canada).

**Timing of Review Process.** Once a review has commenced, the law and practice in different jurisdictions provide different levels of predictability on timing. In the best case scenario, a jurisdiction (e.g., France) may treat the absence of a government response within a defined timeframe (e.g., 2 months) as deemed to be government approval. By contrast, in Brazil, the review process is relatively non-transparent and without time limitations. Similarly, the US FOCI review/mitigation process generally lacks legal deadlines. While other jurisdictions may set time limits in law (e.g., China), the legal rules often leave authorities with significant discretion to extend the review period as national security and other national interests require. Even in jurisdictions such as the United States, which imposes statutory limits on the time period for CFIUS review, the inability to reach agreement with government authorities within the statutory time limit can cause parties, with the concurrence of CFIUS, to choose to withdraw and re-file with CFIUS, thereby restarting the statutory review time periods.

In recent transactions that were subject to the national interest/national security review processes of multiple jurisdictions, the timing/process differences between those jurisdictions created complications for the transaction parties. For example, CNOOC Ltd.’s $15.1 billion acquisition of Nexen Inc. faced significant scrutiny under Canada’s national interest review process and CFIUS review in the United States (because of Nexen’s interests in the Gulf of Mexico). The deal was announced in July 2012; it gained approval from Canadian regulators in December 2012, and was approved by CFIUS in February 2013.

**Potential for Mitigation Measures.** All of the jurisdictions surveyed (except perhaps Brazil) have the potential for ordering or negotiating mitigation measures in order to gain approval. This prospect can be a double-edged sword. While in the United States it may be preferable for parties to obtain approval subject to acceptable mitigation measures rather than abandon a transaction, the process of negotiating mitigation measures can potentially extend the time required for obtaining final government approval due to the possibility that the transaction may need to be withdrawn and re-filed with CFIUS in order to finish mitigation discussions with the government. In sum, transaction parties and their advisors must understand whether and how a given jurisdiction’s national interest/national security review process does or may apply to their transaction, and carefully consider – to the extent possible – the length of time that should be allocated to engagement in the pre-filing and review phases. Given the sensitivities involved in
many transactions subject to these review regimes, however, parties can expect that reviewing governments may not act as quickly as they would hope.

**Comparison of Procedure and Timing Between National Interest/National Security Reviews**

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
<th>Industry Specific Considerations</th>
<th>Potential for Mitigation Agreement Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
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</thead>
<tbody>
<tr>
<td>United States</td>
<td>Voluntary filing with CFIUS</td>
<td>Encouraged 5-7 day “pre-filing”</td>
<td>Investigation (lasting up to 45 days after a 30-day initial review) is presumed for foreign government-controlled and critical infrastructure transactions</td>
<td>CFIUS may negotiate a National Security Agreement with the acquirer or impose mitigation measures</td>
<td>For cleared targets: FOCI mitigation (Proxy Agreement, Special Security Agreement, Security Control Agreement, or Board Resolution) may be required</td>
<td>Recent <em>Ralls</em> case illustrates potential to challenge CFIUS process that leads up to a Presidential determination in federal court</td>
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<td>CFIUS jurisdiction over any covered transaction</td>
<td>Initial 30-day review</td>
<td>Action to withdraw and refile by parties (if concurred with by CFIUS) starts a new review, with the potential for investigation</td>
<td>For transactions after August 23, 1988, CFIUS retains ability to review transactions that were not notified to CFIUS</td>
<td>For cleared targets: FOCI mitigation (Proxy Agreement, Special Security Agreement, Security Control Agreement, or Board Resolution) may be required</td>
<td>Recent <em>Ralls</em> case illustrates potential to challenge CFIUS process that leads up to a Presidential determination in federal court</td>
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<td>Under certain circumstances, CFIUS or a single CFIUS member-agency can initiate a review of a covered transaction for which a voluntary notice has not been submitted</td>
<td>Possible additional 45-day investigation</td>
<td>Target holding US facility security clearance: Requires separate FOCI review. No time limit for FOCI review</td>
<td>CFIUS or the President can initiate a review of a transaction CFIUS previously reviewed or investigated on which it concluded action if any party submitted false or misleading material information or intentionally materially breaches a mitigation agreement or condition, the breach is certified by the lead agency to CFIUS, and no other remedies or enforcement tools are available</td>
<td>CFIUS or the President can initiate a review of a transaction CFIUS previously reviewed or investigated on which it concluded action if any party submitted false or misleading material information or intentionally materially breaches a mitigation agreement or condition, the breach is certified by the lead agency to CFIUS, and no other remedies or enforcement tools are available</td>
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<td>Action to withdraw and refile by parties (if concurred with by CFIUS) starts a new review, with the potential for investigation</td>
<td>If proscribed categories of classified information are involved, NID(s) can require months for approval (although limited access may be permitted by the US Government during this period)</td>
<td>CFIUS may negotiate a National Security Agreement with the acquirer or impose mitigation measures</td>
<td>For cleared targets: FOCI mitigation (Proxy Agreement, Special Security Agreement, Security Control Agreement, or Board Resolution) may be required</td>
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<td>Unlikely but possible 15-day Presidential review</td>
<td>Target involved with export controlled articles/services: Requires separate ITAR notice for ITAR-registered entities; ITAR or EAR license requirements may limit access to controlled articles</td>
<td>For cleared targets: FOCI mitigation (Proxy Agreement, Special Security Agreement, Security Control Agreement, or Board Resolution) may be required</td>
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<td>FOCI review and negotiation of FOCI mitigation can take 4-6 months or more</td>
<td>Target in telecommunications: May require review by Team Telecom</td>
<td>CFIUS may negotiate a National Security Agreement with the acquirer or impose mitigation measures</td>
<td>For cleared targets: FOCI mitigation (Proxy Agreement, Special Security Agreement, Security Control Agreement, or Board Resolution) may be required</td>
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<td>Australia</td>
<td>• Approval must be sought for foreign investors meeting certain thresholds (e.g., acquisition of 15% or more of Australian company valued at A$248 million) • All foreign government investors must obtain approval regardless of the value of the investment in existing business or starting a new business</td>
<td>• 30 days to review foreign investment (plus possible extension up to 90 additional days) • 10 days to provide decision</td>
<td>• Approvals subject to conditions are most common in real estate sector • Special rules also apply to investments in commercial, rural, and/or residential real estate/land, including foreign government acquisitions of interests in prospecting, exploration, mining or production tenements • Separate restrictions on foreign investment in banking, Australian international airlines, ship registration, Telstra, and media sectors (newspaper, television, radio) • Investments in “prescribed sensitive sectors” – media, telecom, transport (including airports, ports, rail, shipping), military/defense goods and services, encryption technologies, uranium/plutonium extraction, and nuclear facility operations – also likely to be scrutinized</td>
<td>• Investments can be blocked or conditions imposed</td>
<td>• None identified</td>
<td>• None identified</td>
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<td>Brazil</td>
<td>• National security review required for certain activities taking place within 150 km of national borders</td>
<td>• No deadline for national security review • Difficult to predict timing because of lack of transparency or experience with the review process • Also no deadlines for separate review/approval for transactions resulting in control of companies involved in listed “dangerous” products</td>
<td>• Tight controls on foreign investment in financial services industry, and foreign investment largely prohibited in media and along national borders • Oil and gas exploration and production, electric energy, telecom, natural gas distribution, sanitation, and administration of highways, ports, and airports must be conducted under concession or permission regime, with transfer of concession rights or control of company operating under concession without</td>
<td>• Failure to obtain required prior approval will render relevant activity void and result in substantial fine</td>
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<td>Brazil</td>
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<td>applicable approval will result in revocation of concession rights</td>
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<td>• Foreign investment is permitted, subject to certain restrictions, in various sectors that operate under these concessions, including aviation, airports, telecom, petroleum, natural gas, biofuels, ground and water transportation, highway construction, ports, insurance, health insurance, electric power, mining, sanitation, and water supply, but not broadcasting, the press, or nuclear energy</td>
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<td>• Prohibition on certain national security, mining, and land promotion activities near border are prohibited by companies controlled by foreign persons and/or composed of more than 1/3 non-Brazilian employees</td>
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<td>• Transactions resulting in control of a company involved in listed “dangerous” products require separate approval</td>
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<td>• Different agencies involved under the ICA for investments related to Canada’s cultural industries (e.g., publishing, film, video and music)</td>
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<td>• Different regime involved for certain industries, e.g. telecoms and broadcasting industries where there are restrictions on foreign ownership and control.</td>
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<td>• In practice, undertakings (e.g., addressing future employment levels, CAPEX, R&amp;D, etc.) required in virtually all reviewable transactions</td>
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<td>• Governor in Council (federal Cabinet), after reviewing transaction on national security grounds, can block the investment, order divestiture, require undertakings, or stipulate terms and conditions</td>
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<td>• Where the investment is not also subject to net benefit provisions, the 45-day clock for commencement of a national security review does not begin to run until after closing and divestiture can be required. In addition, pre-clearance cannot be obtained under the national security provisions of the ICA</td>
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<td>• As stated, applicant can propose undertakings after provisional rejection</td>
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<td>• Judicial review of Government determination available only on narrow grounds applicable to Ministerial discretion</td>
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<td>• If ICA requirements not followed, Government can demand divestiture</td>
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<td>Canada</td>
<td>ICA applies both to acquisitions of existing Canadian businesses and establishment of new Canadian businesses by non-Canadians</td>
<td>Review and approval required for investment” based on whether investor is from WTO member state, is a foreign government or SOE; whether the investment is direct or indirect; and whether the investment is in a cultural business; and Investments not meeting the above thresholds only</td>
<td>Reviewable investments not raising national security concerns: 45-day initial review and potential 30-day extension</td>
<td>Applicant and Minister can extend review period for any period necessary to complete review</td>
<td>If provisionally rejected, applicant has 30 days to make representations and undertakings (thus permitting review longer than 75 days in complex cases)</td>
<td>Separate but parallel review on national security grounds (a)</td>
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<td>Canada</td>
<td>require filing a notification • The above refers to the “net benefit review” provisions of the ICA; in addition, a foreign investment not meeting these thresholds or not resulting in control is nonetheless reviewable if it could be injurious to national security</td>
<td>separate review process under the ICA statute that typically occurs concurrently with the net benefit review, if the transaction meets the thresholds for a net benefit review): 45-days to either initiate national security review, with entire review (including this period) lasting up to 200 days (or longer if extended).</td>
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<td>on net benefit to Canada grounds</td>
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<td>China</td>
<td>Required if foreign investor would gain “actual control” of Chinese enterprise in military, defense, and other sectors related to national security and/or in proximity to sensitive facilities • Government agencies and/or private parties (e.g., trade associations, competitors, etc.) may also propose that review be conducted</td>
<td>Can request pre-filing consultations with MOFCOM • 15-days for notification whether transaction is subject to NSR • 5-days to forward to Ministerial Panel, and approx. 30 working days for initial review / to determine if special review is needed • 60 working days or longer thereafter to approve, reject, or approve with conditions • Approvals required before later filings/registrations can proceed</td>
<td>National security review required where actual control obtained over Chinese companies in key technology, major equipment manufacturing, important agricultural products, energy/resources, infrastructure, and transportation services • “Project approval” generally required for investments in fixed assets, manufacturing, or specific energy or resource sectors; if opinion from industry regulator or “qualified consultation institution” is sought, time limit for such consultation is not specified</td>
<td>Changes to transaction terms and conditions to obtain approval can be required • Transaction may be unwound post-closing if determined to potentially have a significant impact on national security</td>
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<td>Can file application for administrative reconsideration within 60 days of notification of decision • Can file administrative lawsuit within 3 months of receiving administrative decision • Appeals may not be advisable for various reasons</td>
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<tr>
<td>European Union</td>
<td>No foreign investment review at EU level</td>
<td>Reviewable investments not raising national security concerns: 45-day initial review and potential 30-day extension • Applicant and Minister can extend review period for any period necessary to complete review • If provisionally rejected, applicant has 30 days to make representations and undertakings (thus permitting review longer than 75 days in complex cases) • Review on national</td>
<td>EU Member States allowed to take necessary measures for protection of essential security interests relating to production of or trade in arms, munitions and war materials</td>
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<td>European Union</td>
<td>• National security application/review required for certain transactions (meeting the stock transfer, asset transfer, or threshold test), whose rules may differ between EU and non-EU investors and whether sensitive or extra sensitive sector is involved</td>
<td>security grounds (a separate review process under the ICA statute that typically occurs concurrently with the net benefit review, if the transaction meets the thresholds for a net benefit review): 45-days to initiate national security review, with entire review lasting up to 130 days (or longer if extended). • Recent amendments not yet in force extends by 25 days the period for Minister to make “net benefit to Canada” determination</td>
<td>• 7 “sensitive” sectors (gambling; private security; R&amp;D and production related to terrorist use of pathogens or toxins; communication interception equipment; testing and certification of IT security; information system security; and dual-use items and technologies): Different rules for EU and non-EU investors • 10 “extra sensitive sectors” (relate to cryptology; national defense contractors; military equipment; oil, gas, electricity or other energy suppliers; water suppliers; transportation; electronic communications; critical infrastructure; and/or public health): Same rules for EU and non-EU investors</td>
<td>• Informal discussion with MoF may take place throughout review process to mitigate concerns • Investor can be ordered to desist from proceeding with transaction or restore the status quo • Financial penalties (up to double the amount of the investment) can be imposed for non-compliance with MoF order</td>
<td>• Closing without MoF approval or in contravention of agreed conditions may be enjoined or have new conditions attached • Investor may be required to return to status quo ante within 12 months at its own expense</td>
<td>• If transaction not approved, investor may appeal in French administrative courts or with European Court of Justice (if any EC Treaty provisions are violated)</td>
</tr>
<tr>
<td>France</td>
<td>• Transaction considered automatically approved if Ministry of Finance does not respond to completed application within 2 months • Ministry of Finance has power to revoke mergers that raise issues of fundamental interest (including industrial development and employment) other than competition within 25 days of competition review • If investor ordered to terminate transaction or restore status quo, investor has 15 days to make its observations known</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Notification Voluntary or Required?</td>
<td>General Timing</td>
<td>Industry Specific Considerations</td>
<td>Potential for Mitigation Agreement Measures</td>
<td>Post-Closing Government Powers</td>
<td>Ability to Appeal</td>
</tr>
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</tr>
<tr>
<td>Germany</td>
<td>• Mandatory notification only for transactions involving 25%+ acquisition of German company in certain sectors of the defense industry; otherwise notification is voluntary • Authority to review non-notified transactions on national security grounds</td>
<td>• No deadline for submitting the required notification for foreign investments in defense industry, although transaction cannot close prior to approval • For non-defense transactions, Ministry has 3 months from signing to learn of transaction and notify foreign investor that it will initiate a review 1 month for Ministry to clear investment or initiate examination procedure; if no response within the 1 month, approval deemed to be provided • If examination procedure initiated, need to submit additional documentation • 2 month[s] to clear, restrict, or prohibit the investment after additional documentation is provided • If Ministry does not react within the 2 months, approval deemed to be provided</td>
<td>• See details of defense sectors subject to mandatory notification in Part I</td>
<td>• Transaction may be prohibited or subjected to mitigation measures (as ordered or negotiated)</td>
<td>• Transaction can be unwound post-closing.</td>
<td>• None identified.</td>
</tr>
<tr>
<td>Japan</td>
<td>• Acquisitions and loans meeting certain criteria require notification pre-closing or a report post-closing, depending on the industry involved</td>
<td>• If applicable, prior notification must occur 6 months prior to planned investment; waiting period up to 30 days • If national security issues present: waiting period may be extended up to five months • Reportable investment must be reported within 15 days of completing investment</td>
<td>• Pre-closing notification required for investments in arms, airplanes, satellites, nuclear energy, agriculture, livestock, fishery, oil and gas, utilities, IT, postal services, banking, insurance, and certain other types of manufacturing • Post-closing report is acceptable in all other industries, unless governed by sector-specific regulations (e.g., air transport and mining)</td>
<td>• Transaction may be altered, prohibited, or terminated if likely to impair national security, disturb the maintenance of the public order, hinder public safety, or adversely affect the management of the Japanese economy</td>
<td>• Imprisonment or fine possible if foreign investor fails to notify or report when required or provides false information • No statutory post-closing powers granted to the authorities</td>
<td>• None identified</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Notification Voluntary or Required?</td>
<td>General Timing</td>
<td>Industry Specific Considerations</td>
<td>Potential for Mitigation Agreement Measures</td>
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<td>-------------------------------------------------------------------------------</td>
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<td>------------------</td>
</tr>
<tr>
<td><strong>Japan</strong></td>
<td></td>
<td></td>
<td>• National telephone, terrestrial and radio broadcasters, domestic airlines and other sectors have limits on foreign ownership &lt;br&gt; • Filing required in the energy sector</td>
<td></td>
<td></td>
<td>None identified.</td>
</tr>
</tbody>
</table>
Timing/Procedure Issues Arising Between Sector Regulators in Different Jurisdictions

This section summarizes and compares key aspects of the review procedures for certain key industry sectors in various countries. We then describe how the procedure and timing of these reviews can create conflicts for transaction parties and their counsel in cross-border transactions that fall within the jurisdiction of more than one of these review processes.

Banking and Finance

In the banking and financial sector, in half of the jurisdictions surveyed a filing is required for at least transactions meeting certain criteria (including the industry involved, the size of the target, and/or the nature of the foreign investor). Other jurisdictions either have no filing requirements or, as in the UK, a filing is voluntary. Some jurisdictions clearly state the quantitative thresholds under which a review is required. For example, in Canada, the Bank Act restricts ownership, by Canadians or non-Canadians alike, to 20% of voting shares and 30% of non-voting shares of Schedule I banks with over C$12 billion in equity, and 65% of voting shares of Schedule I banks with C$2 billion to C$12 billion in equity. Likewise, in Germany a filing is required when at least 10% of the capital of or the voting rights in a financial institution is acquired or when an investor is able to exert a significant influence on the management of a financial institution. Other jurisdictions have no thresholds (Japan and Brazil), thus necessitating filings in all transactions.

Once a review has commenced, the law and practice in different jurisdictions provides different levels of predictability on timing. In the best case scenario, a transaction in Japan may gain approval in as little as two weeks. By contrast, in Brazil, the review process is relatively non-transparent and without time limitations.

Some of the jurisdictions surveyed (Japan, UK and France) have the potential for ordering or negotiating mitigation measures in order to gain approval.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>• There has been longstanding dispute about whether BACEN has exclusive jurisdiction to review transactions in the financial sector or whether it shares jurisdiction with CADE. Until this dispute is resolved, most financial institutions file with both agencies.</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Canada</td>
<td>• Required approval from the Minister of Finance.</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>China</td>
<td>None required</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>France</td>
<td>None identified</td>
<td>None identified</td>
<td>• Mergers in the financial sector are subject to challenge by the Comité des Etablissements de Credit et des Entreprises d’Investissement (CECEI), which is chaired by the governor of the Bank of France. Additionally, France’s market regulator, Autorité de marchés financiers (AMF), can condition the opening of the acceptance period for takeovers on receipt of mandatory regulatory approvals, including foreign investment review.</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Germany</td>
<td>• Required. Investments in the banking and finance industry must be reviewed by the German Federal Bank (Deutsche Bundesbank, “Bundesbank”) and the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, “BaFin”).</td>
<td>• The BaFin has to review the envisaged transaction within an assessment period of 60 working days, starting from the day the authority confirms the receipt of a complete report (within two days from notification), and can be extended to no more than 90 working days.</td>
<td>None identified</td>
<td>• In case of closing prior to the expiration of the assessment period, the BaFin has the power to prohibit the holder of a qualified participation interest from exercising its voting rights or from disposing its interest without the BaFin’s prior approval.</td>
<td>None identified</td>
</tr>
<tr>
<td>Japan</td>
<td>Required</td>
<td>• The foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). • The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months. • The Ministers may order to change the content pertaining to the foreign companies’ investment to Japan or discontinue the investment when the investment is likely to cause National Security Issues. • Any person who made an inward direct investment without giving notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.</td>
<td>None identified</td>
<td></td>
<td>None identified</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Notification Voluntary or Required?</td>
<td>General Timing</td>
<td>Potential for Mitigation Agreement/Measures</td>
<td>Post-Closing Government Powers</td>
<td>Ability to Appeal</td>
</tr>
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<td>-------------------------------------</td>
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<td>------------------------------------------------------------------------------------------------------------</td>
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<td>------------------</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Voluntary</td>
<td>• None identified, but review by Secretary of State for Business, Innovation and Skills (&quot;SoS&quot;) can be protracted.</td>
<td>• Review by the SoS may lead to modification, delay or even abandonment of the transaction</td>
<td>None identified.</td>
<td>None identified</td>
</tr>
</tbody>
</table>
Telecom

In the telecom sector, a filing is not required in Japan and France since the laws specifically prohibit acquisitions above a certain level. In other jurisdictions, a filing may be required for at least transactions meeting certain criteria (including the industry involved, the size of the target, and/or the nature of the foreign investor).

Once a review has commenced, the law and practice in different jurisdictions provides different levels of predictability on timing. In the United States, the only jurisdiction surveyed with specific time requirements for review, those deadlines are often extended. In all other jurisdictions surveyed, there are no time limitations. Outside of the US, none of the jurisdictions surveyed identified specific mitigation measures that may be required.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
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<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>Required</td>
<td>180 days for review, but it is not unusual to take longer</td>
<td>Can block or require mitigation.</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Brazil</td>
<td>Required</td>
<td>There is no statutory timetable for review.</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Canada</td>
<td>Typically required under wireless licenses pursuant to Radiocommunication Act; for wireline carriers, notification is voluntary under Telecommunications Act.</td>
<td>Industry Canada has stated its goal of reviewing spectrum transfers (including mergers) within 12 weeks; in practice, however, the length of reviews vary depending on size, complexity of proposed transaction.</td>
<td>None identified</td>
<td>If no voluntary review under the Telecommunications Act, could be orders respecting ability to vote shares, etc.</td>
<td>None identified</td>
</tr>
<tr>
<td>China</td>
<td>None required</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
</tr>
<tr>
<td>France</td>
<td>None required; acquisitions are limited to 20%</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Japan</td>
<td>None required; acquisitions above a certain percentage are prohibited.</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>
Media

In the media sector, in some of the jurisdictions surveyed, a filing is not required because the laws specifically prohibit acquisitions above a certain level. Once a review has commenced, the law and practice in different jurisdictions provides different levels of predictability on timing. None of the jurisdictions surveyed identified specific mitigation measures that may be required.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>• None required; acquisitions above a certain percentage are prohibited.</td>
<td>None.</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Canada</td>
<td>• Required where notification thresholds are met. Note lower thresholds under the ICA for media companies that participate in “cultural industries” but are not subject to the Broadcasting Act. For those companies subject to the Broadcasting Act, the CRTC reviews transactions and the ICA does not apply since non-Canadians are no permitted to acquire control.</td>
<td>• CRTC review can vary depending on size, complexity of proposed transaction. • Larger, more controversial applications may take six to nine months. Less complex reviews may be completed in as a little as two months.</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>China</td>
<td>None required</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
</tr>
<tr>
<td>France</td>
<td>• None required; acquisitions above a certain percentage are prohibited.</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Germany</td>
<td>Required</td>
<td>None stipulated</td>
<td>• Either approved or not approved</td>
<td>• License can be revoked</td>
<td>None identified</td>
</tr>
<tr>
<td>Japan</td>
<td>• None required; acquisitions above a certain percentage are prohibited.</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Voluntary</td>
<td>No timetable</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
</tbody>
</table>
Energy

In the energy sector, in some of the jurisdictions surveyed, a filing is not required. For the remaining jurisdictions, a filing may be required for at least transactions meeting certain criteria (including the industry involved, the size of the target, and/or the nature of the foreign investor).

Once a review has commenced, the law and practice in different jurisdictions provides different levels of predictability on timing. In Japan, one of only a few countries requiring a filing, there are strict deadlines. In all other jurisdictions surveyed, there are no time limitations.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>None required</td>
<td>Not applicable</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Brazil</td>
<td>Required</td>
<td>No statutory deadline</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Canada</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>China</td>
<td>None required</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
</tr>
<tr>
<td>France</td>
<td>Required; prohibition on foreign investment</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Japan</td>
<td>Required</td>
<td>The foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months. The Ministers may order to change the content pertaining to the foreign companies’ investment to Japan or discontinue the investment when the investment is likely to cause the National Security Issues.</td>
<td>The Ministers may order to change the content pertaining to the foreign companies’ investment to Japan or discontinue the investment when the investment is likely to cause the National Security Issues. Any person who made an inward direct investment without giving notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.</td>
<td>None</td>
<td></td>
</tr>
</tbody>
</table>
# Transportation

In the transportation sector, several of the jurisdictions surveyed require a filing. Once a review has commenced, the law and practice in different jurisdictions provides different levels of predictability on timing. Brazil has no time limitations.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>Required</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Brazil</td>
<td>Required</td>
<td>• No statutory deadline</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
</tbody>
</table>
| Canada       | Required                             | • Minister of Transport informs the parties within 42 days of receiving notice if the transaction does not raise any public interest issues  
• if the Minister of Transport’s merger review raises issues with respect to the public interest, the transaction may undergo a public interest inquiry (which can last 150 days or longer) before being approved by the Governor in Council | None identified | None identified | None identified |
| China        | None required                        | None listed     | None listed                               | None listed                  | None listed       |
| France       | • None required; prohibition on foreign investment | None     | None                                       | None                         | None             |
| Germany      | None required                        | None identified | None identified                            | None identified              | None identified   |
| Japan        | Required                             | • The foreign investor must report to the Ministers by 15th day of following month of the Investment. The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security.  
• On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months. | None       | • Any person who has failed to make a report or has made a false report may be punished by imprisonment for not more than 6 months or a fine of not more than 5 hundred thousand yen (approximately 5 thousand dollars). | None             |
Food and Agriculture

In the food and agriculture sector, most of the jurisdictions surveyed require a filing. Once a review has commenced, the law and practice in different jurisdictions provides different levels of predictability on timing.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>Required</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Canada</td>
<td>Required</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>China</td>
<td>None required</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
<td>None listed</td>
</tr>
<tr>
<td>France</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
</tbody>
</table>
| Japan        | Required                          | • The foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”).
• The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months.
• The Ministers may order to change the content pertaining to the foreign companies’ investment to Japan or discontinue the investment when the investment is likely to cause the National Security Issues.
• Any person who made an inward direct investment without giving notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both. | None identified                           | None identified   |
Electric Power

In the electric power sector, most of the jurisdictions surveyed require a filing. Once a review has commenced, the law and practice in different jurisdictions provides different levels of predictability on timing.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>Required</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Brazil</td>
<td>Required</td>
<td>None identified</td>
<td>• ANEEL may impose restrictions, limits or conditions on the transfer or grant of concessions, permissions and authorizations in view of market concentration. Although the law does not specify criteria applicable to the review of transactions</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Canada</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>France</td>
<td>Required</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Japan</td>
<td>Required</td>
<td>• The foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”).&lt;br&gt;• The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months.&lt;br&gt;• The Ministers may order to change the content pertaining to the foreign companies’ investment to Japan or discontinue the investment when the investment is likely to cause the National Security Issues.&lt;br&gt;• Any person who made an inward direct investment without giving notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both.</td>
<td>None identified</td>
<td>None identified</td>
<td></td>
</tr>
<tr>
<td>United Kingdom</td>
<td>None required</td>
<td>Not applicable</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
</tbody>
</table>
### Land Use

In the land use sector, Japan and Brazil were the only jurisdictions surveyed where a filing is required. Once a review has commenced, Japan has specific time requirements for review while Brazil has no time limitations.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>• Required; foreign investment strictly limited</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Canada</td>
<td>None required</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Japan</td>
<td>Required</td>
<td>• The foreign investor must report to the Ministers by 15th day of following month of the Investment.</td>
<td>None</td>
<td>• Any person who has failed to make a report or has made a false report may be punished by imprisonment for not more than 6 months or a fine of not more than 5 hundred thousand yen (approximately 5 thousand dollars).</td>
<td>None</td>
</tr>
</tbody>
</table>
Insurance

As the above table illustrates, the jurisdictions discussed in this report differ markedly in their review procedures in various sectors, including the timing of such reviews. The procedural differences include not only whether a filing is required but also the jurisdictional approach to negotiating or requiring mitigation measures; post-closing government powers; and industry-specific considerations. By understanding the applicable procedures and anticipated review timing, transaction parties and their counsel/advisors can consider whether and when certain filings or other engagement with host governments should be undertaken, although given the political and economic sensitivities that may be raised by a transaction, there is likely some level of uncertainty that transaction parties will need to accept.

In sum, transaction parties and their advisors must understand whether and how a given jurisdiction’s sector review process does or may apply to their transaction, and carefully consider – to the extent possible – the length of time that should be allocated to engagement in the pre-filing and review phases. However, given the economic sensitivities involved in many transactions subject to these review regimes, parties can expect that reviewing governments may not act as quickly as they would hope.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Notification Voluntary or Required?</th>
<th>General Timing</th>
<th>Potential for Mitigation Agreement/Measures</th>
<th>Post-Closing Government Powers</th>
<th>Ability to Appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brazil</td>
<td>Required</td>
<td>No statutory time period</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Canada</td>
<td>Required</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
<td>None identified</td>
</tr>
<tr>
<td>Germany</td>
<td>Required</td>
<td>60 working days, with a possible extension of up to 90 working days</td>
<td>Prohibition allowed</td>
<td>None identified</td>
<td>None identified</td>
</tr>
</tbody>
</table>
| Japan        | Required                           | The foreign investor must notify within 6 months before the Investment and must wait for 30 days before the Investment (the “Waiting Period”). The Ministers may shorten the Waiting Period, usually to 2 weeks when the Investment has nothing to do with the national security. On the other hand, the Ministers may also extend the Waiting Period for maximum of 5 months. | The Ministers may order to change the content pertaining to the foreign companies’ investment to Japan or discontinue the investment when the investment is likely to cause the National Security Issues. | Any person who made an inward direct investment without giving notification or with giving a false notification may be punished by imprisonment for not more than three years or a fine of not more than 1 million yen (approximately 10 thousand dollars), or both. | None }
Substantive Issues Arising Between Agencies Within the Same Jurisdiction

Different agencies within a jurisdiction may reach different conclusions about a transaction because they apply different tests. For example, in certain instances, a country’s competition authority may conclude that a transaction does not pose a competition problem, but another authority will determine that the transaction poses a national interest problem and issue a prohibition. The degree of interface and the level of communication among interested agencies within jurisdictions vary considerably, and some agencies within a particular jurisdiction may maintain better communications (or better relations) with one another than with other agencies within that same jurisdiction. In other instances, agencies may have formal (statutory) or informal consultation requirements with other agencies with respect to specific issues.

Intra-jurisdictional conflicts are not unique to foreign investment. Industry-specific regulators may apply differing competitive reviews to the same transaction regardless of whether the acquiring party is foreign or domestic. For example, in the United States, the FERC decided not to adopt the higher HHI thresholds used by the DOJ and FTC for analyzing mergers. FERC was specifically concerned about the low demand elasticity of electricity markets, and concluded that market power could be exercised with a generation market share as low as 20%. Similarly, poor coordination between agencies within the same jurisdiction may plague domestic as well as foreign investors. For example, in Brazil, both domestic and foreign investors in the financial sector may find themselves caught up in the friction between the Brazilian Central Bank (“BACEN”) and the Administrative Council for Economic Defense (“CADE”).

In other cases, the intra-jurisdictional conflicts are specifically related to foreign investment. Transactions that are permissible on antitrust grounds may be prohibited because they involve “sensitive” sectors of the economy. In other cases, a transaction may pass a broad “national security” review but fall victim to specific statutes concerning foreign ownership. For example, many jurisdictions have limitations on the foreign ownership and control of media concerns. Limitations are also common in aviation, nuclear, defense, land ownership or leasing, and other areas considered sensitive for security or cultural reasons. Such areas of national concern may be

229 Id. at P 56. A 20% post-merger market share does not necessarily bar the transaction, but it triggers more a more rigorous review and possible mitigation measures. See Inquiry Concerning the Commission’s Merger Policy Under the Federal Power Act: Policy Statement, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996).
230 See Part One of this report.
country-specific, and may also be more political than formally legal in nature. For example, in both France and the United States, foreign investment in the food sector has met with political suspicion and hostility, but for different reasons. Summarized below are certain country-specific considerations relating to intra-jurisdictional coordination.

**UNITED STATES**

It is not uncommon for industry-specific reviews in the United States to apply different standards than those applied by the DOJ or the FTC in reviewing transactions. These standards also differ significantly from those applied by CFIUS and the National Industrial Security Program. Many US agencies have their own organic statutes, which set specific standards for merger review, and have their own body of precedent interpreting the statutory standards. The guidance of local counsel familiar with the agency in question is recommended.

By way of example, the purchase of a major utility that owns nuclear generation in the United States may involve substantive review by CFIUS, DOJ, FERC, SEC and the NRC at the federal level. Moreover, state antitrust agencies and public utility commissions may also weigh in on, and in some cases bar, a transaction. Generally speaking, outright conflicts on the same substantive issues are rare between federal agencies, although they may occur more frequently between state and federal agencies with the same jurisdiction (*i.e.*, FERC and the relevant state public utility commission), and the federal agency may not have the authority to overrule its state counterpart.

When substantive conflicts occur on the federal level, it is usually because the agencies are applying different standards to the same transaction. For example, both the FCC and either the DOJ or the FTC take competition into account when reviewing a transaction. But while reviews by the DOJ and the FTC are strictly bounded by antitrust statutes and case law, the FCC applies a broader, more flexible “public interest” test that also includes considerations beyond antitrust and competition. The FCC may therefore impose conditions that address other considerations — such as public telecommunications access, universal service, localism, and providing a diversity of voices — that may also have some competitive effect. For example, in the Comcast/NBC Universal merger, the conditions included by the FCC required Comcast/NBCU to ensure that its content would be available on a non-discriminatory basis to other video programming distributors. It was also required to increase access to local news coverage, expand children’s and Spanish-speaking programming, and offer broadband services to schools, libraries, and underserved communities, as well as offer internet service to the public.

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231 See Part One of this Report. Neither country has a food and agriculture specific regime for foreign investment review. However, in the United States a proposed transaction was subjected to rigorous national security review by CFIUS, and was also the subject of a Senate Agriculture Committee hearing before ultimately being approved. In France, negative political response lead to the termination of a proposed deal without a formal review.

232 Which antitrust agency reviews a given transaction depends on the communications sector involved.
independently from cable service. The DOJ and the FTC may well lack the authority to require most of these conditions – some of which may arguably have some pro-competitive impact even if they aren’t necessary to satisfy the antitrust merger standard – and may lack the relevant expertise.

However, despite occasional differences in standards among agencies, most United States reviews (with the partial exception of national security reviews) are transparent, subject to either statutory or regulatory deadlines, and are subject to appeal. Reviewing agencies often have either formal or informal coordination arrangements regarding which agency will take the lead on reviewing a transaction and seeking input from other agencies. Examples include “Team Telecom” reviews of foreign ownership in the telecommunications sector.

**Brazil**

Investment in the financial sector in Brazil is complicated by tension between BACEN and CADE. Additionally, there are many industry-specific regulatory reviews and limitations that may impact certain sectors, but such reviews are not always well coordinated and may not be subject to deadlines.

One somewhat unusual feature of Brazil is strict limitations on foreign investment in certain industries within 150 miles of its national borders. Another feature worth noting is military review of transactions (whether foreign or domestic) that involve “dangerous” items. The Brazilian military has considerable discretion in this review and is not subject to a deadline in making its decision.

**Canada**

Like many other nations, Canada pays particular attention to foreign investment in “cultural businesses.” Broadcasting licensees – like certain telecommunications carriers – are subject to restrictions on foreign ownership and control, and thus are exceptions to Canada’s foreign investment regime, and are subject to reviews that can be both lengthy and public. Print media and recorded music, film, and publishing are subject to the foreign investment regime under the ICA, but face lower thresholds and greater scrutiny than other businesses being acquired or established by non-Canadians.

Canada, like the United States, has a federal system that affords its provinces a fair amount of independent power. Therefore, provincial governments may have their own laws concerning investment. Provinces may also have their own political sensitivities concerning, in particular, natural resources and agriculture.
CHINA

In China, certain approvals may be prerequisites for other approvals, requiring approvals to be obtained in the correct sequence. Moreover, the process is highly specific to the sector and region in which the investment will take place. It is important to consult with the relevant authorities and local counsel to determine which requirements currently apply to a given investment.

FRANCE

Although France’s foreign investment review process is fairly structured, political considerations may play a major role. Foreign investment in culturally or historically important sectors may result in negative publicity that can, in turn, drive political pressure to abandon a deal.
Substantive Issues Arising Between Competition Agencies in Different Jurisdictions

Pre-merger competition review regimes have become the norm among emerging and mature jurisdictions today. At the same time, businesses are expanding across multiple jurisdictions, and often multiple continents. The confluence of these two trends creates an international business environment in which an increasing number of transactions are subject to review in multiple jurisdictions. The complexities are further compounded to the extent that authorities take an expansive view of their jurisdictional reach. Indeed, it is not unusual for a transaction involving multinational corporations to be subject to review by over a dozen separate competition authorities. The potential for inconsistent—or even contradictory—outcomes increases for so long as there are substantive differences between jurisdictions and uncoordinated enforcement actions undertaken by the reviewing authorities.

Former FTC Chairman Timothy Muris aptly described the “chilling” effect of such differences as follows:

> The ruling of the most restrictive jurisdiction with respect to a proposed merger ultimately will prevail. Consequently, disagreements among regulators may lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions. As a result, merger activity may fall to sub-optimal levels, as businesses are dissuaded from negotiating transactions that most jurisdictions would view as competitively benign, out of concern that the most restrictive jurisdiction would block those transactions.\(^{233}\)

As well as potentially “chilling” transactions, multiple reviews may provide opportunities for parties opposing a transaction (e.g., competitors, suppliers, customers, target companies in hostile bid transactions) to complain and engage in forum shopping and checker boarding among jurisdictions to impose additional delay and costs on the transaction parties.\(^{234}\) As additional jurisdictions, particularly in developing countries, become more zealous in their merger enforcement, the potential for divergent outcomes is likely to increase.

To a great extent—due to the efforts of international organizations such as the International Competition Network (“ICN”) and Organisation for Economic Cooperation and Development

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OECD”) and to interagency cooperation on particular matters – the likelihood that two or more jurisdictions facing the same facts will come to materially different outcomes is small. In addition, cooperation in some transactions has even allowed jurisdictions participating in the investigation to rely on the remedy obtained by another jurisdiction rather than imposing their own requirements.235 Even when jurisdictions cooperate on a particular transaction, however, there may be divergent outcomes or remedies among the reviewing agencies. Most of the time, however, such divergence in outcomes or remedies will be the consequence of market conditions in the jurisdictions being sufficiently different to merit different outcomes and remedies.236 Divergent outcomes do not raise concerns where they reflect the actual competitive impact of a transaction, for example, as a result of differences in market conditions, or the scope and scale of operations of the transaction parties in the respective markets.237 Rather, concerns may arise when the differences stem from non-competition oriented objectives, the different analyses applied by different authorities, or the imposition of conflicting remedies imposed as a condition for clearance. In addition, agencies should be careful to consider the reach of the remedies they impose since it is often difficult to limit that remedy’s impact to its jurisdictional boundaries.238 This section will discuss the underlying basis for these substantive differences and highlight some of the current differences in objectives and analysis.

235 See, e.g., Press Release, U.S. Dep’t of Justice, Justice Department Will Not Challenge Cisco’s Acquisition of Tandberg (Mar. 29, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/257173.htm. (DOJ participated in the investigation and took into account the commitments the parties were providing the EC to facilitate interoperability in deciding to close its investigation on the same day the EC announced its clearance–with conditions–decision). Similarly, in Agilent Technologies, Inc.’s acquisition of Varian, Inc., the Japan Fair Trade Commission closed its investigation after concluding the remedies obtained by the FTC and EC were sufficient to resolve any competitive concerns.

236 See, e.g., the Unilever/Alberto-Culver transaction in which the DOJ required hair product remedies and the UK OFK required a remedy in the bar soap category. The DOJ indicated that the differences in products affected by the merger, the product positioning, and the market structures in the different jurisdictions resulted in the different outcomes. Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestitures in Unilever’s Acquisition of Alberto-Culver Company (May 6, 2011), available at www.justice.gov/opa/pr/2011/May/11-at-580.html. See Rachel Brandenburger and Randy Tritell, Global Antitrust Policies: How Wide is the Gap?, 1-2012 CONCURRENCES (2012) 3,5.

237 For instance, in the proposed merger of Deutsche Börse and NYSE, the DOJ focused its inquiry on Deutsche Börse’s minority interest in Direct Edge, the fourth largest operator of stock exchanges in the US that competes with NYSE for US equities exchange products and services. The EC decided to prohibit the transaction despite the parties offering to make concessions on the basis that the concessions did not adequately address concerns over reduced competition on European financial derivatives traded globally on exchanges. The EC indicates that it had cooperated closely with the DOJ but the issues on which each focused were different. See European Commission, Mergers: Commission prohibits proposed merger between Deutsche Börse AG and NYSE Euronext frequently asked questions (1 Feb. 2012), available at http://europa.eu/rapid/press-release_MEMO-12-60_en.htm. In contrast, the DOJ initially brought a preliminary injunction challenge (later settled) to block the merger of US Airways Group, Inc. and AMR Corporation, while the EC approved the proposed merger conditions on the release of one daily slot pair between London Heathrow-Philadelphia airports and the parties offering further incentives to induce entry on the route.

238 For instance, in the Vivendi/EMI merger, the US determined that no remedy was needed in the US, but the remedy obtained by the EC to address the different market conditions in Europe impacted the US market as well.
Differences in objectives

A decade ago, R. Hewitt Pate, then the US Assistant Attorney General, noted that, “[Law] is still rooted in geography and national borders, while loyalties and constituencies on many topics—especially antitrust—are becoming global. This poses a significant problem for the civil laws.” Merger review statutes sometimes permit the agencies to consider factors that reflect industrial policy, including “potential failure of the target[,] adverse effects on competing domestic enterprises[,] employment consequences, preserving the separate identity of a leading local company and/or creating (or preserving) a ‘national champion,’ [and] enhancing the international competitiveness of domestic enterprises involved in the merger or threatened by it.” Moreover, the focus of any particular jurisdiction is to enhance domestic welfare, not the welfare of another jurisdiction’s consumers or the broader welfare of the international community.

In addition, in some jurisdictions a broad “public interest” standard is applied, in addition to the competition based test. For example, in South Africa, this includes the merger’s effect on employment and the promotion of historically disadvantaged peoples. In Distillers Corporation/Stellenbosch Farmers Winery Group, for example, the South African Competition Commission held that a merger can be prohibited (or be subject to remedies) on public interest grounds alone even if it does not substantially lessen competition, while a merger that does substantially lessen competition may be approved because of over-riding public interest concern. Also, South Africa conditioned approval of Harmony Gold Mining Company/Gold Fields upon a maximum level of job reductions, even though the transaction raised no competition issues.

Other jurisdictions impose these objectives in addition to competition-centric goals to, for instance, minimize regional dislocations or create new development opportunities within the country, or preserve domestic media or cultural diversity.

242 See Case No: 31/CAC/Sep03.
243 See Case No: 43/CAC/Nov04.
244 See Eleanor Fox, *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation?*, 48 *ANTITRUST BULL.* 355 (2003); John Fingleton, *Competing Interests*, GLOBAL AGENDA 164 (2005).
Differing in analysis

Divergence can arise from substantive tests that identify different forms of competitive detriment, as well as from the use of divergent merger investigation methodologies. Differences in the treatment of any of these six factors by a jurisdiction can potentially impact the ultimate decision of the enforcers: (1) market definition and concentration; (2) theories of harm; (3) barriers to entry and expansion; (4) efficiencies; (5) failing company and changing market conditions defenses; and (6) countervailing buying power. In addition, jurisdictions diverge in their treatment and analysis of vertical and conglomerate mergers as well as partial (i.e., minority) ownership interests. Indeed, perhaps the most noteworthy strife between the US and EU occurred in connection with the proposed GE/Honeywell merger, in which the EU blocked the merger on the basis of conglomerate theories.

In the last decade, it is rare that potential areas of substantive divergence among the mature jurisdictions have occurred, much less that the divergence is publicly disclosed other than through a comparison of the various agency decisions. The 2009 Oracle/Sun Microsystems Inc. transaction provides such a situation. At the time the deal was announced, Oracle offered databases and other software for large corporations; Sun made computer servers and owned the widely used Java technology platform, which was one of the key software building blocks used in Internet programs, and MySQL, an open source database program, that critics of the transaction said could someday evolve into a competitor of Oracle and/or Microsoft.

The DOJ issued a second request in June 2009, which focused on the way rights to Java are licensed. On August 20, 2009, the DOJ cleared the transaction. Meanwhile, the EC sent out a questionnaire to other software competitors concentrating on three potential areas of concerns: (1) Java software language made by Sun; (2) middleware software that “glues” separate programs together; and (3) database software. The EC opened an in-depth investigation in September 2009, noting that the initial market investigation indicated the combination would

245 For instance, in Boeing-McDonnell Douglas, the FTC and EU reached divergent outcomes, with the FTC decided to approve the transaction on the basis of McDonnell’s dim future and probable inability to compete for next generation sales, while the EU found serious competitive problems on the basis of increased dominance and threatened to prohibit the transaction even though there were no assets in the EU.


In a somewhat unusual move, the DOJ issued a statement that same day indicating the factors that led the DOJ to conclude the proposed transaction would not harm competition.\footnote{Press Release, Dep’t of Justice, Department of Justice Antitrust Division Issues Statement on the European Commission’s Decision Regarding the Proposed Transaction Between Oracle and Sun (Nov. 9, 2009), available at \url{http://www.justice.gov/atr/public/press_releases/2009/251782.htm}.} On November 11, 2009, then EC Commissioner Neelie Kroes responded that the DOJ statement was not in line with how the two bodies usually operate.\footnote{Aruna Viswanatha, EU’s Kroes Calls Antitrust Division Statement Unusual, Main Just. (Nov. 11, 2009) available at \url{http://www.mainjustice.com/2009/11/11/eus-kroes-calls-antitrust-division-statement-unusual/}.} On November 25, 2009, the EC held a public hearing. In December 2009, Oracle made a nonbinding pledge to continue to enhance MySQL.\footnote{Press Release, Oracle, Oracle Makes Commitments to Customers, Developers and Users of MySQL (Dec. 14, 2009), available at \url{http://www.oracle.com/us/corporate/press/042364}.} Finally, on January 21, 2010, the EC determined that the transaction did not raise a problem.\footnote{Press Release, Europa, Mergers: Commission Clears Oracle’s Proposed Acquisition of Sun Microsystems (Jan. 21, 2010), available at \url{http://europa.eu/rapid/press-release_IP-10-40_en.htm}.} The decision is noteworthy, however, in demonstrating the differences in approaches that can arise in situations in which the products of two companies are not directly competitive, but are either vertical or complementary in nature.

## Remedies

Jurisdictions can differ in their remedies’ policies, including: (1) timing and circumstances for considering remedies; (2) adequacy and appropriateness of behavioral remedies; and (3) factors to be considered in evaluating remedies. These differences can greatly affect the underlying value of a transaction and even whether the parties proceed with the transaction at all. Competition authorities vary as to the degree to which they will consider non-structural remedies and their flexibility in the implementation of remedies (e.g., up-front buyers) as well as penalties for failure to achieve the divestiture (e.g., crown jewels) or to comply with other terms of the agreed remedy (e.g., contempt of court, voidness of the approval). Some jurisdictions expressly recognize that the remedies imposed by the competition agencies must protect competition, but should be done in a manner that limits the costs of the remedy, including preserving, to the greatest extent possible, the efficiencies that otherwise would be derived from the transaction. As to the objectives of remedies, the ICN has noted: “Merger remedies are not tools of industrial
planning and are generally ill suited to achieve aims wider than addressing competitive detriment."254

As suggested above, the issue of remedies becomes more complex when a jurisdiction seeks to impose a remedy that extends beyond the boundaries of that jurisdiction. As Professor Fox recognized (in a context not limited to merger review):

In industrialized nations, competition law has largely succeeded in manoeuvring around the first problem—the practical limits of national law. With the United States as pioneer in this often controversial enterprise, nations have developed rules of extraterritorial reach of national law … Extraterritoriality of national law cannot, however, meet the challenge of globalization. … the extraterritorial solution creates other problems that arise from the enforcing nation’s intrusion into the domain of another nation—it provokes rather than militates against systems clashes … It may extend so far as to regulate what people do on their home territory by means totally inconsistent with their home regulation. Aggressive extraterritorial law may intrude upon another nation’s prerogatives … this usually means that the nation with the most prohibitory laws “wins.” … National agencies … look down at their bordered domain. In matters of pre-merger notification and clearance, for example, each national antitrust agency sees its own interest … typically, national enforcers ask: why should we look at harms beyond our national borders? Why should we count the costs (e.g., costs associated with … a United States merger) to the rest of the world? As a result of this orientation, national enforcers in industrialized countries tend to think of international problems as national, and solutions as horizontal, unilateral or reciprocal. Each nation/community acts in its own interest, usually formulated in the short-term. It may call on a neighbor to help it out—in discovery of evidence, in enforcement of law or in non-enforcement of a neighbor’s law that hurts “its” businesses. Perhaps the neighbor will return the favor. There is a failure of will and incentive to see the problems as overarching, to search for solutions in the interests of the common good of the greater community, and to appreciate the reality that we are members of the world community.255

The Western Digital Corporation/Viviti and Seagate Technology/Samsungs transaction in 2011, involving the desktop hard disk drives (HDDs) market, illustrate the potential divergence in remedies approaches among jurisdictions. Based on its finding that an independent Viviti was much more likely to be an effective competitive constraint in the desktop HDD market than would an independent Samsung, the FTC cleared the Seagate/Samsung transaction and conditioned the approval of the Western/Viviti transaction on Western’s divestiture of Viviti’s desktop HDD assets to Toshiba Corporation, an identified upfront buyer. Toshiba did not currently compete in the market but was well positions to replace competition that would be eliminated from the market as a result of the transaction.256 The EC also cleared the

Seagate/Samsung transaction without conditions and conditioned the Western/Viviti transaction on the divestiture of essential production assets for the same computer HDD market that the FTC focused on.257

In contrast to the FTC and EC, MOFCOM conditioned the approval of the Seagate/Samsung transaction on Samsung remaining an independent competitor. Specifically, MOFCOM imposed behavioural remedies on the firm, including (1) maintaining Samsung HDD as an independent subsidiary to price and market Samsung products, to independently produce, price and market the products, and imposed a firewall to prevent information exchanges; (2) requiring Samsung to increase its manufacturing capacity within six months of the decision; (3) barring Samsung from changing its current commercial practices or forcing customers to purchase exclusively from Seagate; (4) restricting Seagate from requiring TDK (China) to exclusively supply HDD heads to Seagate; and (5) requiring Seagate to invest at least US$800 million in each of the following three years to bring more innovated products and solutions to consumers. The decision allows Seagate to apply for a waiver of the first two requirements after one year.258

In Western/Viviti, MOFCOM required that: (1) Western divest Viviti’s computer HDD production assets to a third party within six months; (2) Viviti’s HDD business be operated as an independent competitor for a minimum of two years before Western could seek a waiver; (3) Western and Viviti could not change their current business models or force customers to buy products exclusively from them; and (4) Western and Viviti must maintain their current momentum of R&D investment. Also, in Western/Viviti, a monitoring trustee was appointed.259

Both of these transactions closed. It is not clear what, if anything, could have been done by the transaction parties to have avoided the delays or the substantive divergence in the Samsung/Seagate or Western/Viviti transaction given the jurisdictions involved. As a general proposition, however, transaction parties can help to avoid such divergence by permitting the staff of the various agencies to discuss the matter and their findings during the investigative stage, and even to participate in the same calls with the parties.260

Substantive Issues Arising Between National Interest/National Security Regulators in Different Jurisdictions

The chart and discussion below summarize, at a high level, various considerations affecting national security reviews of foreign acquisitions in given jurisdictions, including review thresholds and factors, other considerations that could influence the jurisdiction’s review process, and whether appeals are possible. Below, key issues in the United States, China, Canada, Japan, Brazil, the UK, France, Germany, and Australia, are highlighted. Following the chart, brief commentary is provided on each issue, including historical and recent examples.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Review Factors</th>
<th>Transparency</th>
<th>Political Influence</th>
<th>Reciprocity/Comity</th>
<th>Availability of Appeals Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>• CFUIS can review “any merger, acquisition, or takeover ... by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States.” 50 U.S.C. app. § 2170(a)(3). Review may extend to foreign acquisitions of foreign companies if the acquisition could result in control of a US business. • The regulations define “control” as the “power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity.” 31 C.F.R. § 800.204(a). A foreign person may be found to control a “U.S. business” in a number of ways, including not only • The US Court of Appeals for the D.C. Circuit held in Ralls Corp. v. Comm. on Foreign Inv. in the US, 758 F.3d 296 (D.C. Cir. 2014) that Constitutional due process requires “at the least” that the parties before CFUUS be afforded (1) notice of the official action, (2) access to the unclassified information “on which the official actor relied,” and (3) an opportunity to rebut that evidence. • Under FINSA, upon conclusion of action with respect to a particular transaction, a certified notice or report (signed by a senior official appointed by the President with the advice and consent of the Senate) is sent to certain members of Congress stating that there are no unresolved national security concerns. • The actions and findings of the President are not subject to judicial review (see column titled, “Availability of Appeals Process”). 50 U.S.C. app. § 2170(e). • “[I]t is the policy of the U.S. Government to allow foreign investment consistent with the national security interests of the United States.” NISPOM 2-300. • Members of Congress and others upon occasion have contacted CFUUS about transactions believed or known to be under review. High profile transactions have attracted attention from Members of Congress, state and local political • Confidentiality restrictions generally limit communication between CFUUS and foreign jurisdictions about any specific transaction filed with CFUUS. In foreign government-controlled transactions, the foreign government of the jurisdiction where the buyer is organized (in its capacity as an owner) has, in some instances, engaged with CFUUS regarding the transaction. In addition, in the course of conducting due diligence, and without disclosing the existence of a CFUUS filing, CFUUS member-agencies have in certain instances made inquiries of state and local governments in matters where a party to a transaction has contracts with state and local governments that may implicate national security. • FOCI: Although FOCI mitigation or negation is determined by the degree of FOCI, and the nature of the information at risk, and not by the • Under FINSA, there is no provision authorizing administrative appeal of a CFUUS determination. Further, FINSA bars judicial review of any action by the President to suspend or prohibit a transaction, a Presidential finding that there is credible evidence that the foreign acquirer might take action that threatens to impair the national security, or the finding by the President that provisions of law other than 50 U.S.C. app. § 2170 and the International Emergency Economic Powers Act do not provide adequate and appropriate authority to protect national security. 50 U.S.C. app. § 2170(e). • In Ralls, affirming the District Court, the US Court of Appeals for the DC Circuit held that a party before CFUUS could obtain judicial review as to whether it was accorded due process, as applicable, in conjunction with a Presidential order prohibiting the transaction. (See column titled, “Transparency”).</td>
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<td>• Under FINSA, upon conclusion of action with respect to a particular transaction, a certified notice or report (signed by a senior official appointed by the President with the advice and consent of the Senate) is sent to certain members of Congress stating that there are no unresolved national security concerns.</td>
<td>• Confidentiality restrictions generally limit communication between CFUUS and foreign jurisdictions about any specific transaction filed with CFUUS. In foreign government-controlled transactions, the foreign government of the jurisdiction where the buyer is organized (in its capacity as an owner) has, in some instances, engaged with CFUUS regarding the transaction. In addition, in the course of conducting due diligence, and without disclosing the existence of a CFUUS filing, CFUUS member-agencies have in certain instances made inquiries of state and local governments in matters where a party to a transaction has contracts with state and local governments that may implicate national security.</td>
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<td>United States</td>
<td>majority ownership, but also minority ownership when accompanied by board control or significant governance rights, including such rights as the power to direct or veto major decisions. See Id. § 800.204, Example 4.</td>
<td>leaders, news media, and advocacy groups. Confidentiality rules do not permit disclosure to the public of information or documentary material filed with CFIUS and preclude it (including member-agencies) from acknowledging the existence of specific transaction reviews. 50 U.S.C. app. § 2170(c); see also 31 C.F.R. § 800.702. (Note, however, that a Presidential decision about whether to suspend or prohibit a covered transaction is made public. 50 U.S.C. app. § 2170(d)(2).)</td>
<td>relationship between the United States and the country that is the source of FOCI, the government-to-government relationship is a factor in assessing the level of mitigation or negation.</td>
<td>• FOCI: The United States has entered into bilateral General Security Agreements (“GSAs”) and Industrial Security Agreements (“ISAs”) with a number of foreign jurisdictions to ensure the protection of foreign government-classified information held by the US Government or US contractors, as well as the protection of US classified information lawfully disclosed to foreign jurisdictions, according to standards mutually agreed to by the two governments. See NISPOM 10-102. The existence of bilateral agreements (or lack thereof) is a FOCI factor that may affect the assessment of a FOCI mitigation agreement. 32 C.F.R. § 117.56(b)(3)(i)(F).</td>
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<td>• Under the Foreign Investment and National Security Act of 2007 (“FINSA”), it is presumed that foreign government-controlled transactions, and acquisitions involving critical infrastructure, will merit an additional 45-day investigation after a 30-day review absent a joint determination by the Deputy Secretaries of the lead agencies for the review that the transaction “will not impair” US national security. 50 U.S.C. app. § 2170(b)(2)(D)(i); see also 31 C.F.R. 800.503(b), (c).</td>
<td>• FOCI: Foreign acquisition of a US contractor holding a facility security clearance (“FCL”) will trigger not only CFIUS review (assuming jurisdiction), but also industrial security review by the US Government agency with oversight responsibility for the FCL.</td>
<td>• FOCI: The United States has entered into bilateral General Security Agreements (“GSAs”) and Industrial Security Agreements (“ISAs”) with a number of foreign jurisdictions to ensure the protection of foreign government-classified information held by the US Government or US contractors, as well as the protection of US classified information lawfully disclosed to foreign jurisdictions, according to standards mutually agreed to by the two governments. See NISPOM 10-102. The existence of bilateral agreements (or lack thereof) is a FOCI factor that may affect the assessment of a FOCI mitigation agreement. 32 C.F.R. § 117.56(b)(3)(i)(F).</td>
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<td>• FOCI: FOCI factor (e.g., Proxy Agreement as opposed to Special Security Agreement) may be appealed, in writing, to the Director of DSS. 32 C.F.R. § 117.56(b)(3)(ii).</td>
<td>• FOCI: The United States has entered into bilateral General Security Agreements (“GSAs”) and Industrial Security Agreements (“ISAs”) with a number of foreign jurisdictions to ensure the protection of foreign government-classified information held by the US Government or US contractors, as well as the protection of US classified information lawfully disclosed to foreign jurisdictions, according to standards mutually agreed to by the two governments. See NISPOM 10-102. The existence of bilateral agreements (or lack thereof) is a FOCI factor that may affect the assessment of a FOCI mitigation agreement. 32 C.F.R. § 117.56(b)(3)(i)(F).</td>
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<td>• FOCl: The government will deem a contractor to</td>
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| United States | be under FOCI whenever a foreign interest has the ability, whether or not exercised or exercisable, “to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.” National Industrial Security Program Operating Manual (“NISPOM”) 2-300.a. FOCI is presumed in majority foreign ownership cases, and in any case where a foreign owner has the power (whether or not exercised) to secure representation on the board. NISPOM 2-301(d).  
- FOCI: In practice, the government initiates a FOCI review for any investment that equals or exceeds 5%, although not all minority investments require formal mitigation. | N/A          | N/A                 | N/A                | N/A                           |
| Australia     | - Under the Foreign Acquisitions and Takeovers Act 1975 (“FATA”), all foreign investors must seek ‘approval’ from the Foreign Investment Review Board (“FIRB”) for:  
  (a) acquisitions of 15% or more of the shares of an Australian company valued at A$248 million or more (or A$1,078 million for US and New Zealand investors);  
  (b) acquisitions of the assets of an Australian business valued at A$248 million or more (or A$1,078 million for US and New Zealand investors); and  
  (c) any acquisition of non-rural land (excluding certain exempt interests such as developed commercial property valued at less than $58 million). | N/A          | N/A                 | N/A                | N/A                           |
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| **Australia** | • Value thresholds are indexed annually according to inflation.  
  • In addition, all foreign government investors must notify the Treasurer (via FIRB) and get prior approval before making a direct investment in Australia, regardless of the value of the investment. Foreign government investors include:  
  (a) a body politic of a foreign country;  
  (b) entities in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15% or more;  
  (c) entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40% or more; and  
  (d) entities that are otherwise controlled by foreign governments, their agencies or related entities, and any associates, or could be controlled by them including as part of a controlling group.  
  • Foreign government investors must also notify the Treasurer and get prior approval to start a new business or to acquire an interest in land, including any interest in a prospecting, exploration, mining or production tenement (except when buying land for diplomatic or consular requirements).  
  • The Treasurer has the authority to block proposals that are contrary to the ‘national interest’, or can apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest (the majority of conditional... |  |  |  |  |
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| **Australia**| approvals are in the real estate sector). There are five national interest considerations that the Treasurer typically considers when assessing whether foreign investment proposals are contrary to the national interest:  
(a) national security;  
(b) competition;  
(c) other Australian Government policies, including tax;  
(d) impact on the economy and the community; and  
(e) the character of the investor.  
• Additional requirements and/or limits on foreign investments exist as follows:  
(a) foreign ownership in the banking sector must be consistent with the Banking Act 1959, the Financial Sector (Shareholdings) Act 1998 and banking policy;  
(b) aggregate foreign ownership in an Australian international airline is limited to 49%, and the Airports Act 1996 limits foreign ownership of some airports to 49%, with a 5% airline ownership limit; and cross-ownership limits between Sydney airport (together with Sydney West) and either Melbourne, Brisbane, or Perth airports;  
(c) the Shipping Registration Act 1981 requires a ship to be majority Australian-owned if it is to be registered in Australia, unless it is designated as chartered by an Australian operator;  
(d) aggregate foreign ownership of Telstra is limited to 35% and individual foreign investors are only allowed to own up to 5%; and  
(e) any investment of |
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<td>Australia</td>
<td>5% or more in the media sector must be notified (the media sector refers to daily newspapers, television and radio, including internet sites that broadcast or represent these forms of media). Investments in sensitive industries may also raise concerns. Under the Foreign Investment Policy, which supports the FATA, the ‘prescribed sensitive sectors’ are: (a) media; (b) telecommunications; (c) transport (including airports, port facilities, rail infrastructure, international and domestic aviation and shipping services provided within, or to and from, Australia); (d) the supply of training or human resources, or the manufacture or supply of military goods or equipment or technology, to the Australian Defence Force or other defence forces; (e) the manufacture or supply of goods, equipment or technology able to be used for a military purpose; (f) the development, manufacture or supply of, or the provision of services relating to, encryption and security technologies and communications systems; and (g) the extraction of (or the holding of rights to extract) uranium or plutonium or the operation of nuclear facilities. Foreign investors seeking to buy real estate in Australia face additional requirements, depending on whether the real estate is commercial, rural or residential land. For commercial land, foreign</td>
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<td>Australia</td>
<td>investors must apply to purchase and develop vacant commercial land regardless of value, and apply to purchase previously developed commercial real estate when valued at A$58 million or more. Investors must apply for an interest in rural land where a business’ primary production assets exceeds A$248 million. Exceptions apply to investors from New Zealand and the United States.</td>
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<td>Brazil</td>
<td>• Brazil requires prior review and approval by the National Security Council of the Presidency for activities that are conducted within 150 kilometers of Brazil’s borders with other countries. The review is applicable to the following activities if carried out in the borderline areas: (a) activities that may jeopardize “national security,” (b) mining activities, or (c) “colonization,” (i.e., activity with the purpose of promoting use of the land). • The Brazilian Constitution requires that certain economic activity affecting the national interest must be conducted under a concession or permission regime. • The transfer of concession rights or corporate control of a company operating under a concession without the prior approval of the applicable authority will result in the revocation of the concession rights. Accordingly, every concessionaire, regardless of which agency or authority oversees its activities, must submit any transfer of its concession rights or corporate control to the applicable authority for prior approval.</td>
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- There is no deadline for completing these reviews and it is difficult to predict how long such a review would take, since there is relatively little experience or transparency.
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<td>Brazil</td>
<td>• Such activities are flatly prohibited and may never be conducted by companies (a) controlled by foreign entities or individuals, (b) of which more than 1/3 of its employees are non-Brazilian, or (c) in which the majority of its management is not composed of Brazilians. • Accordingly, for foreign investors, this review process (and not the flat prohibition) will apply to acquisitions that do not confer control and do not result in non-Brazilians taking over more than a third of the jobs or a majority of the management. • “National security” is not defined in the law and there is no limitation on the meaning it may be given. • Control: 51% of the corporate capital of companies carrying out restricted activities in borderline areas must be held by Brazilians and foreign ownership in excess of 49% is prohibited. • Brazil also requires approval by the Controlled Products Surveillance Management of the Department of Logistics of the Brazilian Army for any transaction involving companies that produce and commercialize products classified as “dangerous” by the applicable regulation. There exists a list of 385 dangerous items, which may be changed at any time by the Department of Logistics. These are products that have destructive power or other features that create risk or require that they be restricted to individuals and companies demonstrating the technical, moral, and</td>
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<td>Brazil</td>
<td>psychological capability to ensure public safety. The factors taken into account in the review include (a) whether approval is in the national interest; (b) the nature of the product being produced; (c) the applicant’s moral, technical, and financial fitness; (d) the applicant’s compliance with prior agreements; and (e) the possibility of military use for the product. • There is no prohibition against foreign investors obtaining control over companies in this category. There also is no formal review process, but any change in control of a company producing or commercializing dangerous products would require a new authorization before that company would be permitted to engage in further transactions.</td>
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<td>• If the Minister provisionally rejects a proposed transaction, the applicant has an additional 30 days to make representations, in person or by a representative, and submit undertakings (i.e., contractual commitments from the investor). ICA, Section 23(1). • Although not mandatory under the ICA, in practice, the Minister requires undertakings in virtually all reviewable transactions. Undertakings regarding the acquired Canadian business might address, for example, future employment levels, future capital expenditures, research and development, or charitable contributions.</td>
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<td>Canada</td>
<td>• The Investment Canada Act (“ICA)”’s purpose is to provide for (a) the review of investments in Canada by non-Canadians in a manner that encourages investment, economic growth and employment in Canada, and (b) reviews on national security grounds. • An investment in Canada by a non-Canadian (i.e., a foreign investment) is either “reviewable,” meaning it is subject to a pre-closing approval process and reporting obligation, or “notifiable,” meaning it is subject only to a one-time notification that can be effected post-closing. • A foreign investment is generally reviewable when (a) any non-Canadian investor directly acquires control of a Canadian business, and (b) the total enterprise value of the</td>
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| Canada       | Canadian business exceeds C$600 million.  
               • The current financial threshold for triggering a review under the ICA varies depending on whether the target Canadian business is a cultural business (where the threshold is only C$5 million, based on book value) the transaction is a direct or indirect acquisition, and/or the investor is a “World Trade Organization investor.” Also, the enterprise value test with a financial threshold of C$600 million will increase to C$1 billion over four years.  
               • All foreign investments may be subject to possible national security review regardless of the Canadian business’ value; in other words, there is no minimum financial threshold for national security reviews.  
               • In conducting a review, the Minister will consider the following factors to determine whether the proposed foreign investment will be of “net benefit to Canada,” where relevant:  
                 (a) the effect on the level of economic activity in Canada, such as employment, resource processing, exports from Canada and the use of Canadian suppliers of goods and services;  
                 (b) degree of participation of Canadians in the Canadian business (such as participation in management and in the board of directors by Canadians);  
                 (c) effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety;  
                 (d) effect on the level of competition in |
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<td>Canada</td>
<td>Canada (where the Commissioner of Competition provides input); (e) compatibility of the investment with existing national, industrial, economic and cultural Canadian policies; and (f) contribution of the investment to Canada’s ability to compete in world markets.</td>
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| China        | • Purchasing shares of publicly traded companies may proceed without government approval provided purchases do not exceed the maximum limit of 10% of the shares of a publicly traded company in China. Acquiring more than 10% of public shares of a Chinese company will be deemed a “strategic investment” and require approval by government agencies.  
• In considering foreign investments in China, the first step is to determine if foreign investment is permitted in the target industry via the Catalogue of Industries for Guiding Foreign Investment (“Foreign Investment Catalogue” or “Catalogue”), maintained by the Ministry of Commerce (“MOFCOM”) and the National Development and Reform Commission (“NDRC”). The Foreign Investment Catalogue (a) divides industries into “encouraged,” “restricted,” and “prohibited” categories, and (b) may require that investment take certain forms and/or limit the foreign shareholder’s investment.  
• Investments in industries not specifically listed in the Catalogue are permitted by default.  
• The National Security Review (“NSR”) process applies to all transactions | N/A          | Note, in addition to a filing initiated by the foreign investor(s), other government agencies (including local commerce authorities) may also request an application for NSR. Chinese parties, including Chinese national industry associations, enterprises in the same industry as the transaction parties, or “upstream or downstream” enterprises, also may propose to MOFCOM that a NSR be conducted. | N/A               | Under Chinese law, parties that have been declined authorization for an investment or that are otherwise dissatisfied by an agency decision may file an application for administrative reconsideration either with the government agency or its supervising department within 60 days of the applicant’s knowledge of the decision.  
• The investor also may file an administrative lawsuit against the government agency within three (3) months of receiving the administrative decision. |
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| **China**    | in which a foreign investor would obtain “actual control” of a Chinese enterprise in the following sectors:  
  o Military and military support enterprises;  
  o Enterprises in the vicinity of key and/or sensitive military facilities;  
  o Other entities associated with national defense and security; and  
  o Domestic enterprises engaged in sectors that “relate to national security,” including key technologies, major equipment manufacturing industries, important agricultural products, energy and resources, infrastructure, and transportation services.  
  • “Actual control” is defined to include circumstances in which the foreign investor becomes the controlling shareholder or actual controller of the domestic enterprise through M&A, such as where:  
    o a foreign investor or its parent company or subsidiary holds a 50% or more stake in the domestic company;  
    o more than one foreign investor holds an aggregate 50% stake or more in the domestic company;  
    o a foreign investor holds less than a 50% stake in the domestic company, but the voting rights actually enjoyed by the foreign investor are sufficient to exert a major impact on the shareholders’ meeting or board of directors; or  
    o other circumstances that may result in the actual controlling right in business decision-making, financial affairs, human resources, technologies, etc., being transitioned to the foreign investor. | | | | |
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<td>France</td>
<td>The Monetary and Financial Code Article L. 151-3, as implemented by Decree No. 2005-1739, allows the Minister of Finance to block or alter a merger if it involves (a) activities likely to jeopardize public order, public safety or national defense interests; or (b) research in, and production or marketing of, arms, munitions, or explosive powders or substances. Decree No. 2012-691 further specified the scope of national security review and eliminated references to the notion of indirect control by an investor. Finally, following a bid by General Electric for the energy business of Alstom, a French conglomerate, the French government published a decree (nicknamed the “Alstom Decree”) on May 15, 2014 broadening the scope of national security review. • The result is a two-tiered national security review regime, in which 17 sectors are subject to national security review. Seven of the sectors are deemed “sensitive” and have different rules for EU and non-EU investors. Ten of the sectors are “extra sensitive” and have uniform rules for EU and non-EU investors. • The seven “sensitive” sectors are: - gambling - private security - equipment designed to</td>
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<td>• Foreign investors must be wary of the political climate when considering high-profile investment in France, especially if the proposed investment is in a culturally and historically important business or sector. • Foreign investors considering investing in France should consider developing relationships with the Ministry of Finance and political leaders well in advance to counteract any negative publicity that may surround an investment from a foreign investor. • Opposition to high-profile foreign investment can become politicized, leading to pressure on the foreign investor to abandon a deal. • While the Ministry of Finance’s national security review is supposed to be limited to consideration of threats to national security, it is clear that other considerations are often in play when a controversial foreign investment is announced. In particular, domestic employment is a large concern for the French government. • Some consider the government’s intervention in the GE bid for Alstom to be an exercise of economic nationalism. • In the Law on the Modernization of the Economy (August 4, 2008), the Ministry of Finance was given the</td>
<td>• The European Commission has challenged under Article 21(4) EUMR a number of measures adopted by EU Member States because, in the European Commission’s view, their objective was to favor local target companies at the expense of acquirers located in other EU Member States.</td>
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- The ten “extra sensitive” sectors are:
  1. cryptology equipment and services
  2. activities carried out by firms with national defense secrets, in particular, under the terms of national defense contracts or of security clauses
  3. research, production, or trade in weapons, ammunitions, powders, and explosives intended for military purposes or war materials
  4. activities carried out by firms holding a contract for the design or supply of equipment for the Ministry of Defense, either directly or as subcontractors, to produce an item or supply a service for one of the sectors referred to in points 1. through 3. above.
  5. activities relating to the provision of services, equipment or products essential to guarantee the continued supply of electricity, gas, oil or other energy resources
  6. activities relating to the provision of services, equipment or products essential to guarantee the continued supply of water in accordance with public health

- France

- France

- France
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<th>Jurisdiction</th>
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<th>Transparency</th>
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<th>Reciprocity/Comity</th>
<th>Availability of Appeals Process</th>
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<tr>
<td>France</td>
<td>standards 7. activities relating to the provision of services, equipment or products essential to guarantee the continued operation of transportation networks and services 8. activities relating to the provision of services, equipment or products essential to guarantee the continued operation of electronic communications networks and services 9. activities relating to the provision of services, equipment or products essential to guarantee the continued operation of facilities, installations or works of critical importance, as defined by the French Defense Code 10. activities relating to the provision of services, equipment or products essential to guarantee the protection of public health.</td>
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<td>• Reciprocity is evident in two of the three tests that determine whether a foreign investment review is triggered.  o The “stock transfer test.”  o The “threshold test.” This test only applies to non-EU investors and does not apply to foreign-controlled French investors.</td>
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| France       | of the voting rights above 40 percent and when no other shareholder holds, directly or indirectly, a percentage higher than its own.  
  o The second test, called the “asset transfer test,” looks at whether the transaction will involve the acquisition of all or part of a line of business of a company having its registered office in France. This test applies to all transactions involving foreign investors.  
  o The third test, called the “threshold test,” looks at whether the transaction involves an acquisition of more than 33.33 percent of the stock or voting rights of a company having its registered office in France.”  
  • The Minister of Finance must determine whether the investment will harm national interests.  
  Additionally, the Minister must determine whether there is a “serious presumption” that the investor will commit any of the following crimes: drug trafficking, criminal exploitation of a person’s weakness or ignorance, procurement and related crimes, money laundering, acts of terrorism or financing of terrorism, corruption and influence peddling, and acting in a conspiracy. | N/A | N/A | N/A |
| Germany      | • As a general rule, foreign investment laws apply to direct or indirect acquisitions by foreign investors of an interest of at least 25% in a German company. All kinds of transactions by which a foreign investor obtains, directly or indirectly, an interest of at least 25% in a German company are caught (e.g., share and asset transactions, joint ventures).  
  • Any investor not established in the Federal | Information on foreign investment notifications, approvals, or prohibitions is not published. | N/A | Any investor not established in the European Union or the European Free Trade Association is considered a foreign investor for investments in German companies that are not active in the defense industry.  
  • An investor established in the European Union or the European Free Trade Association that has a shareholder not established in the European Union or the |
|              |                |              |                     |                    | N/A |
|              |                |              |                     |                    | N/A |
### Jurisdiction: Germany

- **Republic of Germany is considered a foreign investor for investments in German companies that**
  - (a) manufacture war weapons;
  - (b) manufacture engines or gears for battle tanks or other armored military tracked vehicles;
  - (c) manufacture products with IT security functions to process classified state information or components essential to the IT security function of such products (or have manufactured such products in the past, licensed them to the Federal IT Security Agency, and still dispose of the relevant technology); or
  - (d) operate satellite systems (the four categories collectively, the “defense industry”).

  - The test for foreign investments in the defense industry is whether the investment would endanger essential security interests of the Federal Republic of Germany.
  - The test for foreign investments in all other industries is whether the investment would endanger the public order or security of the Federal Republic of Germany.

- Danger to the public order or security is an “actual and sufficiently serious danger to the fundamental interests of society.” Examples of such fundamental interests of society are ensuring the availability of supplies in times of crisis in the areas of telecommunications, water, energy and other services of strategic importance.

- The burden of proof that a foreign investment could endanger essential security interests of the Federal Republic of Germany lies with the Ministry.

- The burden of proof that a foreign investment could endanger the public order or security lies with the investor.

- There are no special rules governing foreign investments by state-owned enterprises or sovereign wealth funds.

### Review Factors

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<td><strong>Germany</strong></td>
<td>Republic of Germany is considered a foreign investor for investments in German companies that (a) manufacture war weapons; (b) manufacture engines or gears for battle tanks or other armored military tracked vehicles; (c) manufacture products with IT security functions to process classified state information or components essential to the IT security function of such products (or have manufactured such products in the past, licensed them to the Federal IT Security Agency, and still dispose of the relevant technology); or (d) operate satellite systems (the four categories collectively, the “defense industry”).</td>
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<td>European Free Trade Association and who owns at least 25% of it is also considered a foreign investor.</td>
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- There are no special rules governing foreign investments by state-owned enterprises or sovereign wealth funds.
Jurisdiction | Review Factors | Transparency | Political Influence | Reciprocity/Comity | Availability of Appeals Process
---|---|---|---|---|---
Germany | endanger the public order or security of the Federal Republic of Germany lies with the Ministry. | | | | |
Japan | • Enforcement power is generally triggered if the investment involves (a) an acquisition of 10% or more of the outstanding shares of a public company; (b) an acquisition of the shares of a private company; or (c) a loan exceeding ¥0.1 billion for a period of more than one year. If one of these thresholds is met, a foreign investor must then either notify the Minister of Finance in advance of making the investment or report to the Minister post-investment, depending on the industry involved.  
• Advanced notification is required in the following industries: weapon and arms, airplanes, satellites, nuclear energy, agriculture, live stocks, fishery, oil and gas, utilities, IT, postal services, banking, insurance, and certain types of manufacturing.  
• It is acceptable to report an investment post transaction in all other industries, unless they are governed by sector-specific regulations.  
• Under the Mining Act, only Japanese citizens or entities may hold mining rights.  
• With respect to foreign shareholdings in Japanese companies, there are some regulated industries where foreign ownership levels are limited by specific sectorial legislation. For example, NTT, a holding company of the dominant national telephone carrier, must be less than 33.3% foreign-owned. Also, foreign shareholdings must be less than 20% for terrestrial and radio broadcasters and less than 33.3% for domestic airlines. | N/A | N/A | N/A | N/A
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<td><strong>Japan</strong></td>
<td>• Under the Foreign Exchange and Foreign Trade Act, the Minister of Finance and the Minister having jurisdiction over the business may order a change in the foreign company’s investment to Japan or discontinue the investment if the investment is likely to cause the following issues (collectively, the “National Security Issues”):&lt;br&gt;  (a) National security is impaired, the maintenance of public order is disturbed, or the protection of public safety is hindered.&lt;br&gt;  (b) Significant adverse effect is brought to the smooth management of the Japanese economy.&lt;br&gt;• Generally, the types of the investment the foreign investor shall notify or report include:&lt;br&gt;  (a) acquisition of the shares of a listed company for not less than 10% of outstanding shares;&lt;br&gt;  (b) acquisition of the shares or equity of a no-listed company; or&lt;br&gt;  (c) loan of money aggregately exceeding 0.1 billion Yen, for which the period exceeds 1 year.</td>
<td>N/A</td>
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<td>• Appeals may be possible depending on the type of industry involved.</td>
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| **United Kingdom** | • Three Types of Public Interest Review Cases overseen by the Secretary of State for Business, Innovation and Skills (“SoS”)<br>  • **Public Interest Cases:** The Public Interest cases category is the broadest category that may be reviewed by the SoS. Under Section 58(1) and (2) of the Enterprise Act 2002, national security, newspaper and media mergers are specifically identified as public interest considerations. Section 58(3) provides that the SoS may add, remove or modify any consideration to or from Section 58. In 2008, in | N/A | • Review by the SoS can be a protracted and highly political process which may lead to modifications, delays or even abandonment of the transaction.<br>• In light of the controversies surrounding the News Corporation/BSkyB transaction, a House of Lords committee has recommended that U.K. Office of Communications (“Ofcom”) take a “leading role” in reviewing media mergers. Giving power to Ofcom, and taking power away from the SoS, “is intended to safeguard | N/A | }
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<td>United Kingdom</td>
<td>the context of the proposed Lloyds/HBOS merger, the SoS announced that “ensuring the stability of the UK financial system” was a public interest consideration and it was approved by Parliament.</td>
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<td>against the type of ‘messing political interference’ that most UK mergers are protected from.</td>
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- **Special Public Interest Cases:** The Special Public Interest cases category is limited to two types of transactions: (a) those in which at least one enterprise is a government contractor, and (b) those in which at least one enterprise supplied at least 25% of all newspapers or broadcasting in the UK.

- **“Community Dimension” Cases:** The “Community Dimension” cases category involves transactions that undergo competition review by the European Commission in which the SoS intervenes to protect “legitimate interests” as defined in the European Commission Merger Regulation (“ECMR”). This category encompasses national security and media mergers.

- A Public Interest case may result anytime there is a “relevant merger situation,” which means any reportable merger under the UK’s competition laws. The threshold for a relevant merger situation is (a) the value of the turnover in the UK of the enterprise being taken over exceeds £70 million; or (b) as a result of merger, in relation to the supply of goods and/or services of any description, at least one-quarter of the goods and/or services of that description which are supplied in the UK, or in a substantial part of the UK (i) are supplied by one and the same person or are supplied to one and the same person, or (ii) are supplied by persons by whom the enterprises
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| **United Kingdom** | Concerned are carried, or supplied for those persons.  
- In addition, to trigger review, two enterprises must be brought under common ownership or control. At a minimum, the acquirer must be able to exercise “material influence” over the target. An acquisition of 25% of voting rights is likely to be seen as presumptively conferring material influence. Acquisitions of 15% or more of the voting rights in a company may be examined.  
- Concentrations with a “Community Dimension” are transactions reviewed by the European Commission (“EC”). Under the ECMR, Member States are permitted to intervene to protect “legitimate interests.” Included in “legitimate interests” are the interests currently identified in Section 58 of the Enterprise Act 2002 (not including “ensuring the stability of the UK financial system,” which is not listed in Section 58).  
- The thresholds for merger review under the ECMR are as follows: (a) Aggregate worldwide turnover of all the parties exceeds €5 billion and the aggregate EU-wide turnover of each of at least two parties exceeds €250 million; or (b) Aggregate worldwide turnover of the parties exceeds €2.5 billion; the combined EU-wide turnover of each of at least two of the parties exceed €100 million; in each of at least three EU Member States, the combined aggregate turnover of all the parties exceed €100 million; and in each of the same three Member States the aggregate turnover of each of at least two of the parties concerned exceeds €25 million. |              |                    |                      |                           |
### Factors Triggering Notification/Review and Considered During Review

Reviews in most jurisdictions are triggered when a foreign acquirer crosses a threshold level of control in a transaction subject to national jurisdiction; in some cases review is triggered by the size of the transaction (e.g., Canada currently generally reviews transactions valued at or above C$600 million in enterprise value\(^\text{261}\) though in cases raising national security concerns, any transaction, regardless of size, may be reviewed). Further, in some jurisdictions, the nature of the industry affected by the transaction may trigger review or result in the transaction being blocked altogether. China, for example, divides industries into categories for which foreign investment is “encouraged,” “restricted,” or “prohibited.” France divides its industries into

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\(^{261}\) This threshold, which applies to investments from WTO member countries recently replaced an asset value test of C$369 million (except for cultural businesses or state-owned enterprises).
“sensitive” (providing higher thresholds to trigger review of transactions by EU investors than for transactions by non-EU investors) and “extra sensitive” (having uniform thresholds for reviews of transactions by EU and non-EU investors) industry sectors as part of the assessment of whether review is required. For example, wiretapping and mail interception equipment is considered a sensitive sector for non-EU investors and requires review, while investment by an EU investor in the same products does not trigger review (unless the equipment is necessary to fight terrorism and crime, in which case it requires national security review regardless of the acquirer’s EU membership status). The United States authorizes national security reviews of any transaction that could result in control (which is very broadly defined) of a US business (regardless of size) by a foreign person.

Factors considered by each jurisdiction vary and are often vague. Canada, for example, can review any foreign acquisition for national security purposes, as well as certain transactions that exceed the monetary threshold on the basis of whether the transaction presents a “net benefit” to Canada. Australia uses five national interest considerations in its assessment including, among others, impact on the economy and the community, and the character of the investor. In the United States, factors that may be considered in assessing national security risk are specified by statute, but “national security” is not defined by law, and the statutory list is not exhaustive.

**Transparency**

None of the jurisdictions demonstrates a high degree of transparency in foreign acquisition reviews. In the United States, the appeals court in *Ralls* held that Ralls Corporation was deprived of its property without due process and was entitled to notice of the decision, an accounting of the unclassified information upon which CFIUS had based its recommendation to the President, and an opportunity to rebut the information.262

**Political Influence**

Individual jurisdictions generally deny that political influence exists in the cross-border mergers and acquisitions review process, though it is widely believed to play a role in some jurisdictions. In some countries, the political implications of certain transactions argue for advance conversations with government representatives. In France, it is common for investors to enter into discussions with political leaders prior to any public knowledge of negotiations. The French government has, at times, been accused of promoting economic nationalism and intervening in certain transactions if domestic employment or cultural interests are implicated.263 In the United States, it can also make sense for parties to approach certain key government officials, including Congress, in advance of filing with CFIUS, particularly where a transaction is likely to be highly

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262 In subsequent proceedings before the District Court, CFIUS provided a number of unclassified documents to Ralls Corp., with the exception of certain items withheld on the basis of a protective order issued by the court at the joint request of the parties on December 12, 2014. The case remains in litigation at this writing.

263 See, for example, the discussion of the Alstom Decree, at pages 206 and 207.
visible. The 2006 acquisition by Dubai Ports World of the Peninsular and Oriental Steam Navigation Company, which operated several US ports, created a political controversy that resulted in a significant revision to the framework under which CFIUS operates. In that case, CFIUS reviewed and approved the purchase by Dubai Ports World. After it concluded action on the review, however, strong Congressional and public opposition forced Dubai Ports World to sell the US operations to a US buyer. While the controversy did not directly influence CFIUS during the pendency of its review, it subsequently proved to be a significant factor in encouraging reform of the CFIUS process. The revised statute and new regulations introduced a mandate to review acquisitions of critical infrastructure, and a new rigor to the review process, including heightened political accountability.

In China, local commerce authorities, industry associations, enterprises in the same industry as the transaction parties, and “upstream” or “downstream” enterprises may propose that national security reviews be conducted by the Ministry of Commerce.

**Reciprocity/Comity**

Few jurisdictions openly provide for reciprocity of determinations. EU nations do not have a central review function or guidelines, but instead permit members to design individual programs in line with EU Articles. Across EU members, some reciprocity and comity is provided. France imposes lesser restrictions on other EU nations in sensitive sectors. For example, France considers gambling a sensitive sector, but only for non-EU investors. In Germany, EU investors in entities that are not active in the defense industry are not considered foreign investors at all.

**Available Appeals Processes**

Some jurisdictions provide an appeals process, but most do not, indicating either that decisions are final or that remedies must be sought outside of the regulatory review process. In the UK and France, appeals may be pursued through the courts. In the United States, by statute, judicial review of a Presidential decision to take action to suspend or prohibit a covered transaction and the findings that support that decision are not available; however, judicial review of constitutionally-protected due process rights may be available pursuant to *Ralls.* In China, administrative lawsuits are available; also, requests for reconsideration can be made within 60 days of the applicant’s knowledge of the decision. In Canada, provisional rejections may be provided to the parties, in which case the applicants have 30 days to make additional representations. (In the United States, with the concurrence of CFIUS, parties may withdraw and re-file a notice in respect of a transaction to start a new review, effectively extending the time for review and investigation and allowing more time for negotiation of mitigation terms.)

The factors that trigger national security/national interest reviews are often defined by statute or regulation (*e.g.*, transaction value, market sector) but determinations of threats to national security or the “net benefit” of a given transaction are inherently subjective. The process itself is generally not transparent, but even if it were fully transparent, the decision-making process at
some point yields to subjective judgment. It would be a mistake to conclude that politics
controls the process, but it would also be a mistake to conclude that the process is immune to
political considerations. Acquisitions that are politically unpopular may, in fact, benefit from the
vetting process. At the same time, “friendly” acquisitions may still face tough reviews if the
acquired property is inherently sensitive, the acquirer has a lax record of compliance with
national security laws, or (where economic factors are taken into consideration) the deal is a “net
negative” for the economy. All of these considerations must be given attention.
Substantive Issues Arising Between Sector Regulators (Finance, Media, Energy, etc.) in Different Jurisdictions

When transactions that fall within the jurisdiction of sector regulators impact multiple jurisdictions, there is the possibility for issues of substance to arise among those sector-specific reviews, as described below.

Banking and Finance

Many jurisdictions recognize banking and finance sectors as uniquely important to the functioning of their economies and, therefore, treat investment in these sectors differently from investment in other sectors.

Domestic banking and finance sectors generally have a regulatory structure in place to oversee various aspects of the sectors, including investments in banking and finance companies. In Brazil, the central bank is charged with review of investments. Similarly, in France, the governor of the Bank of France chairs a committee (the CECEI) which has the power to review mergers and acquisitions. By contrast, in Canada and China, industry regulators, rather than central banks, review investments in the banking and finance sectors. In Germany, the central bank and financial regulator share authority in the review of investments into the banking and finance sectors. As central banks tend to exhibit some degree of independence from the government, one might expect reviews by central banks to have a greater degree of insulation from political interests compared to countries in which arms of the government control reviews. Indeed, in Canada the Minister of Finance has supervisory and approval authority over the reviews conducted by Canada’s bank regulator. Similarly, during the 2008 financial crisis, the UK imbued the SoS with the power to intervene in banking or financial sector transactions to “ensure the stability of the U.K. financial system” under the UK’s public interest review regime.

However, in Brazil, foreign investments into the banking and finance sectors must be approved by the President of the Republic – inserting perhaps a greater likelihood of political interference into the formal review process as compared with reviews conducted by banking and finance regulators. Outside formal procedures, a recent investment in the financial sector of France, the acquisition of NYSE Euronext by IntercontinentalExchange, engendered strong political backlash. While the Minister of Finance eventually approved the deal, he sought support from France’s largest banks and insurers to ensure that Paris remained a financial hub in Europe and
adopted a report by a former chief of France’s stock market regulator recommending that a group of shareholders be found to represent the interests of France, Belgium, the Netherlands and Portugal, and stressed the importance of protecting high-value jobs associated with France’s financial ecosystem. These examples show that, at least for foreign investment into the banking and finance sectors, review by a central bank does not ensure independence from political interests.

The unique importance of the banking and finance sectors sometimes pits disparate governmental entities against one another, which may lead to inconsistent standards of review and substantive results. For example, as described above, France has a committee that is charged with reviewing bank and finance industry transactions, but political actors from the executive and legislature may intervene in certain deals involving important political interests (e.g., high paying jobs). Nowhere is this intra-governmental tension more pronounced than in Brazil, where litigation has raged for decades between the Brazilian Central Bank and CADE (Brazil’s competition regulator) to determine which entity has the exclusive right to review transactions involving the financial system. While CADE believes the central bank’s role should be limited to issues regarding financial regulations, the central bank believes that a proper antitrust analysis requires a consideration of systemic risks and, thus, a decision based solely on CADE’s normal analysis could jeopardize the balance of the financial system. The central bank therefore claimed exclusive authority to review transactions in the financial sector and garnered support from the General Attorney’s Office in 2001 and Brazil’s Superior Court of Justice in 2010 (although CADE challenged that decision). The result is that, in Brazil, there are effectively two separate antitrust reviews a transaction in the financial sector must go through in order to close – the normal CADE analysis as well as an analysis governed by the competition guidelines adopted by Brazil’s central bank in 2012.

The incorporation of competition analyses in reviews conducted by banking and finance regulators is an interesting similarity between the Brazilian system and the French system. In France, the CECEI, has, in the past, reviewed banking mergers for competition issues and required remedies associated with merger reviews conducted by competition authorities. For example, in 2003 the CECEI investigated the mergers of Credit Agricole and Credit Lyonnais and required, as a condition for closing, divestitures in markets where the combined entity would have had a 45% market share.

In several countries, including Canada, Germany and China, there are no special rules for foreign (versus domestic) investors in the banking and finance industries. In Brazil, the general review of banking and financing investments is not dependent upon the identity of the investor except for the final step of presidential approval. This convergence suggests a recognition by disparate jurisdictions that unregulated investment in the banking and finance sectors poses systemic risks regardless of whether the controlling entity is a domestic or foreign investor.
Canada appears unique among the reviewed jurisdictions in that it has numerical caps on individual investors’ ownership interests in Canadian banks (regardless of the nationality of the investor). Specifically, investors are limited to 20% of voting shares and 30% of non-voting shares of Schedule I banks with over C$12 billion in equity, and 65% of voting shares of Schedule I banks with C$2 billion to C$12 billion in equity. Canada’s banking investment laws also contain a couple of other unique rules. First, foreign investors from countries that are not members of the WTO may only make investments into Canadian banks if the investor’s home jurisdiction provides a reciprocal right for Canadians to make significant investments in that jurisdiction’s banks. Second, governments that invest in Canadian banks are not permitted to vote their shares.

**Telecom**

In several jurisdictions, foreign investors into the telecom sector face special regulatory hurdles. France has, by far, the most stringent limits on foreign investment in the domestic telecom industry, limiting investment to 20% of the share capital or voting rights in any licensed telecom company. Canada’s laws restrict foreign investment to 46.7% of the voting securities of a telecom carrier and forbid foreign investors from exerting control over the carriers, *but only if* that carrier has 10% or more of the total Canadian telecom market. These numerical limits contrast with the approach taken in China, where foreign investment in the telecom industry can require additional regulatory review, but a foreign investor’s ownership in a telecom company is not capped. In China, the telecom industry regulator must pre-approve all investments in the telecom sector and, effectively, the telecom regulator decides whether to approve an FIE. Likewise, Brazil permits foreign investment the telecom industry, but investors require pre-approval from Brazil’s telecom regulator.

Substantive criteria for reviews of investments in the telecom sector differ between regulators in different jurisdictions. In Brazil, the telecom regulator reviews telecom investments to ensure that the transaction does not result in harm to competition or jeopardize the performance of the company’s concession contract for telecom services. In contrast, France’s regulator reviews telecom transactions for issues related to (1) public order, national defense, or public security; (2) technical constraints due to limited availability of frequencies; (3) the applicant’s lack of technical and financial capacity to meet obligations resulting from the conditions under which its activity is carried out; or (4) penalties levied against the applicant in the past. Thus, in Brazil, the telecom regulator performs a quasi-antitrust regulator role (similar to the review of finance sector mergers in Brazil), while in France the telecom regulator does not consider competition issues arising from a transaction.

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264 Note that a similar reciprocity requirement exists in US rules regarding investment in the energy sector.
France’s recent “Alstom Decree” also defines the telecom industry as a national security sector for foreign investment purposes and empowers the Minister of Finance to block foreign investments in the telecom industry, independent of the review from France’s telecom regulator. This is consistent with foreign investment review regimes in several jurisdictions including the United States, Canada, Germany, and Australia. Thus, investors must be ready to deal with overlapping intra-governmental reviews that may have conflicting substantive goals and criteria.

**Media**

Foreign investment in the media sector often is subject to strict restrictions on foreign investment. Canada allows foreign investors to own a relatively large portion, 46.7%, of voting shares in a Canadian broadcasting company. By contrast, in Brazil only Brazilian-born citizens and naturalized citizens of at least ten years, or legal entities with at least 70% of their corporate capital held by Brazilian-born citizens or naturalized citizens of at least ten years, may own press and broadcasting companies. However, foreign investors may own up to 30% of Brazilian cable television companies. Similarly, France and Germany restrict ownership in media companies by non-European investors. In France, non-EU media companies are restricted from acquiring more than 20% of French-language audiovisual communication companies. In Germany, licenses for nationwide broadcasting can only be granted to German or EEA Member State natural or legal persons. China similarly restricts foreign investment in media and advertising industries.

The UK has a different regime, discussed in greater detail in the UK Foreign Investment Review section above. Media mergers are one of three types of “public interest” mergers and one of two types of “special public interest” mergers subject to the SoS’s review. Ofcom, the independent regulator and competition authority for the UK communications sector, assumes an advisory role in the SoS’s review of media mergers. However, there is no absolute ban on foreign ownership of media companies or cap on ownership.

Substantively, diversity of opinions is a goal common to both the UK and Germany. In the UK, the CC adopted the “plurality test” in BSkyB/ITV to ensure the stated goal of the Enterprise Act 2002, which states that the goal in reviewing media merger is “the need, in relation to every different audience in the United Kingdom or a particular area or locality of the United Kingdom, for there to be a sufficiently plurality of persons with control of the media enterprises serving that audience.” In Germany, ensuring a diversity of public opinions is one of two criteria for the State Media Authority to consider when issuing a license.

Other substantive goals in the UK include “the need for the availability throughout the United Kingdom of a wide range of broadcasting which (taken as a whole) is both of high quality and

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265 It was reported that the Canadian government objected to Lenovo’s considered bid for Blackberry, allegedly due to national security concerns stemming from Blackberry’s integration into Canada’s telecom infrastructure.
calculated to appeal to a wide variety of tastes and interests; and the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the standards objectives set out in Section 319 of the Communications Act 2003.” In Germany, the State Media Authority can only grant a license when a transaction is considered harmless (or Unbedenklichkeitsbestätigung).

Finally, in both France and the UK, political influences can play a role in the media sector. The French government has long supported the so-called “cultural exception” to liberalization in trade negotiations and made clear that the audiovisual sector was off the table in the recent Transatlantic Trade and Investment Partnership talks by lobbying to remove the audiovisual sector from the EC’s mandate at the negotiations. In the UK, the troubled 2010 review of the News Corporation/BSkyB acquisition, in which the SoS was stripped of jurisdiction by Parliament following reports of unflattering comments by the SoS about News Corporation, led a House of Lords committee to propose giving Ofcom a “leading role” in reviewing media mergers in order to “safeguard against the type of ‘messing political interference’ that most UK mergers are protected from.” 266 Thus, investors must consider the political climate in addition to any defined review criteria in these jurisdictions.

Energy

Energy sector transactions are subject to special rules in several jurisdictions. In the US, a foreign investor can invest in the energy industry if the investor is from a country that affords reciprocal benefits to US companies. Such a foreign investor into the US energy industry cannot directly purchase mineral leases, but can acquire 100% of a domestic company that holds a lease. The Department of the Interior implements this law and is responsible for regulations such as health, safety and environmental regulations, but there is no specific law or body governing reviews of transactions in the energy sector. Thus, the FTC or DOJ generally carry out transactional reviews of investments in the energy sector without additional input from the Department of the Interior or other energy-specific regulators. Such transactions may also undergo a CFIUS review.267

This contrasts with Brazil where there is formal coordination between CADE and Brazil’s energy regulator, ANP. A transaction must be approved by ANP if the transaction will result in the assignment to anyone of rights and obligations under a concession contract for the exploration and production of hydrocarbons. The ANP reviews the transaction to ensure that the assignee meets the technical, financial, and legal criteria established by ANP, while relying on CADE to review the competition aspects of the transaction.

267 DOE is a voting member of CFIUS; also, other agency heads (e.g., Department of Interior) may be consulted as the CFIUS Chair determines appropriate as part of a review. 50 U.S.C. § app. 2170(k)(6).
In contrast to both the US and Brazil, France has a flat ban on foreign investment into domestic atomic energy and coal mine monopolies. Moreover, the recent “Alstom Decree” defined the energy sector as an extra sensitive national security sector, which empowers the Minister of Finance to block foreign investment into the energy sector.

**Transportation**

**Aviation Industry**

Within the transportation sector, many jurisdictions restrict foreign investment in the air travel industry. Indeed, the US, Canada, Brazil, Germany, France, and China all, to some extent, restrict foreign investment into domestic air travel. The ownership interest available to a foreign investor varies between each jurisdiction, but is in all cases below 50%. In the US and Canada foreign investors may own up to 25% of a domestic airline. The US also restricts foreign owners to appointing up to 1/3 of the directors of a domestic airline. In Germany, a majority of the ownership interest in a domestic airline must be in the hands of investors from EU Member States and at all times EU investors must control the operations of the airline. If the foreign ownership in a German airline ever reaches 40%, the Germany aviation regulator provides for capital measures to prevent a revocation of the operating license (the airline can buy back shares, issues new shares and request that foreign shareholders sell their stock). Brazil has the most stringent ownership rules, restricting foreign investors to 1/5 of the voting capital in domestic airlines and requiring foreign investors to receive approval from Brazil’s aviation regulator.

Regulation in the airline industry does not stop at foreign investment into domestic companies. In both the US and Brazil, operation of an airline within the country requires approval from the aviation regulator. This approval is difficult to obtain in both jurisdictions. In the US, new carriers must prove that foreign interests will not exert management influence on the airline – a requirement that required Virgin America to substantially revise its corporate structure before it received authorization to begin operations in the US. In Brazil, any airline operating within the country must receive authorization from the aviation regulation. Such authorization can only be given to companies that have (a) their head office in Brazil, (b) at least 4/5 of their voting capital held by Brazilians, and (c) management consisting entirely of Brazilians.

As suggested by the extensive regulation of the aviation industry in various jurisdictions, many governments consider air travel to be a national interest. In France, the government reserves the right to restrict foreign-controlled enterprises in the aerospace sector and the “Alstom Decree” provides the Minister of Finance the authority to block foreign investment into the transportation sector on national security grounds. Similarly, Brazil has classified the aviation market to be of national interest, resulting in strict supervision of the market by Brazil’s aviation regulator. Brazil’s regulator reviews all transfers of shares in the aviation industry under a regime that has no statutory deadline and is governed by a standard of review that lists the acceptable reasons for transaction as: “improvement of economic and technical performance, reduction of costs, public
patrimony and better service for customers.” Although not formally recognized, national interests also appear to influence matters in the US aviation sector. Recently political opposition to Norwegian Air International’s effort to expand service into the US led Congress to condition the Department of Transportation’s budget on denying Norwegian Air an operating license.

**Other Transportation Industries**

Other transportation industries are also subject to numerous restrictions on foreign investment. Foreign investment into Brazil’s ground and water transportation industries requires regulatory reviews whenever a transaction results in the assignment of ownership of a concession or permission to operate. These reviews are governed by a set of substantive goals: (a) to ensure the transportation of persons and goods, under adequate standards of quality, safety, comfort, regularity, punctuality, and reasonableness of prices and tariffs; and (b) to harmonize, preserving the public interest, the goals of users, companies, concessionaires, permitted and authorized entities, and of public entities, resolving conflicts of interests and avoiding situations that may cause imperfect competition and economic violations.

In contrast to this more subjective approach, the US imposes flat restrictions on foreign investment in the domestic shipping industry. Vessels must (1) be owned by US companies that are controlled by US citizens with at least 75% US ownership; (2) have crews that are at least 75% US citizens; (3) be built (or rebuilt) in the US; and (4) be registered domestically. Similarly, under French law the French railway passenger transport industry is a monopoly not open to foreign investment.

**Food and Agriculture**

The approach to reviews of transactions in the food and agriculture sectors varies from jurisdiction to jurisdiction.

In the US, foreign investors must file a report with the Department of Agriculture if a transaction involves a small amount of agricultural land (10 acres) or sales of agricultural products ($1,000 or more per year). The USDA’s review of a transaction is limited to assessing implications for food safety standards.

In China, by contrast, there are measures that may restrict foreign investment in the food and agriculture sectors that are primarily aimed at the modernization of China’s agricultural industry, with a focus on supporting domestic firms. However, the measures do contemplate potential benefits from foreign investment (for example, to provide modern techniques regarding breeding and germplasm resource gathering). Development goals appear to drive these measures rather than food safety. That said, the measures also recognize a need to monitor safety, including in mergers and acquisitions involving foreign investors. In addition, FIEs must acquire industry-specific licenses and permits related to food protection.
In contrast to both China and the US, France’s past review of foreign investment in the food sector appears to have been ad hoc and driven by a desire to protect national champions, rather than food safety or development goals. In 2006, the French government displayed strong opposition to rumors that PepsiCo was considering a hostile takeover of Danone, resulting in a change to France’s Takeover Code and an abandonment of the deal by PepsiCo.

The US has a formal review procedure involving the Department of Agriculture. CFIUS can also review food and agricultural transactions that fall within its jurisdiction. In Shuanghui International Holdings Limited’s acquisition of Smithfield Foods, Inc., CFIUS conducted its review in addition to the normal USDA review. Although the deal was ultimately approved by CFIUS, the acquisition garnered a great deal of political backlash. In addition to Smithfield’s role in troop feeding programs and defense commissaries, and the proximity of Smithfield’s farms to defense installations, the food supply chain can be viewed as “critical infrastructure” in the United States. The Senate Agriculture Committee held a hearing to address the impacts of the transaction, particularly regarding food safety and foreign ownership of the food supply. Thus, while in France politicians may worry about national champions in food and agriculture deals, US politicians appear to focus on national security issues. In at least these countries, investors must take into account these potential challenges from politicians when deciding to invest in food and agricultural companies.

Electric Power

Regulation of transactions in the electric power sector varies between jurisdictions.

In Brazil, while investment into the electric power sector is permitted, the Brazilian Electricity Regulatory Agency (ANEEL) has authority to review, block or impose restrictions on transactions that result in the assumption of rights and obligations of concession contracts. Brazil’s law governing this review does not specify substantive criteria for ANEEL to employ in reviewing such transactions, but ANEEL’s decisions must be competition-oriented in order to ensure compliance with Brazil’s competition legislation. As a result, ANEEL and CADE work together through a formal cooperation agreement. Similarly, in the UK, Ofgem advises the UK merger authorities on the potential impacts of a transaction in the electric power industry including on competition-related issues such as market share and loss of diversity. However, Ofgem does not have any formal power to stop or modify transactions in a manner akin to ANEEL.

In contrast, the United States strictly limits foreign investment into domestic electric power operations. The Federal Energy Regulatory Commission (FERC) issues licenses required to build or operate electric power operations or transmit power on federally controlled lands and water and can only issue such licenses to US citizens and domestic corporations. Mergers in the electric power sector must be pre-approved by the FERC, and may also require approval by state and local governments in their respective jurisdictions.
Past reviews in France have gone through a less formal system than these other jurisdictions, with political actors playing a large role. For example, in 2006, Enel, an Italian firm, expressed interest in acquiring Suez, a Franco-Belgian water and power company. In response, the French government, led by then-Prime Minister Dominique de Villepin, intervened to put together an alternative merger between Suez and GDR, a French public utility in which the government owned an 80% share. The plan by the French government led to an intense political battle in the legislature and ultimately a law privatizing GDR to make the transaction legal. In addition, the 2014 “Alstom Decree” brought the electric power sector under the purview of the Minister of Finance’s national security review as well. Thus, in France, political opposition, especially stemming from the foreign ownership of a national champion, can drive reviews of electric power sector deals more so than defined policy goals from an industry regulator.

**Land Use**

Brazil appears to be the only country reviewed in this report with regulations governing land use for foreign investors.

**Insurance**

In both Germany and Brazil, transactions in the insurance sector require pre-approval from an insurance industry regulator. In Germany, the regulator charged with reviewing transactions in the banking and finance sector is also responsible for reviewing insurance sector transactions, and the review is similar in both types of reviews. Brazil, by contrast, has a dedicated insurance regulator, the Superintendence of Private Insurance (SUSEP), that is charged with reviewing insurance industry transactions. The National Council of Private Insurance (CNSP), which is composed of the Minister of Finance, Minister of Justice, Minister of Social Security, Superintendent of SUSEP, a representative of the Brazilian Central Bank, and a representative of the Brazilian Securities Exchange Commission, oversees and has ultimate approval authority over SUSEP’s review of transactions. No statutory rules apply specifically to insurance sector transaction reviews, but several principles guide the reviews such as equality of conditions for foreign and national insurance companies, expansion of the insurance market, avoidance of tax evasion, improvement of insurance companies, protection of the insurance companies’ financial condition and coordination with the Federal Government’s economic policy. Antitrust issues are handled by CADE.

**Other**

**Culture**

Canada and China both have special rules regarding foreign investment into domestic cultural sectors. In Canada, foreign investments into cultural businesses (e.g., book publishing and distribution, magazine publishing and film) are subject to lower financial thresholds for review.
Moreover, the Minister of Canadian Heritage has the power to review indirect acquisitions and can order discretionary reviews regardless of the size of a transaction in order to ensure that transactions align with Canada’s cultural policy objectives. In contrast, opinions from China’s Ministry of Cultural and other administrative agencies related to cultural sectors, ban foreign investors from investing in various cultural business including the publication, general distribution and importation of books, newspapers and periodicals.

**Postal Services**

France and Germany both restrict foreign investment into domestic postal services. In France, there is an outright ban on foreign investment into postal service monopolies. By contrast, in Germany, acquiring a 10% interest in a postal service business triggers a review by the Federal Network Agency, which has no timeframe or execution prohibition. In practice, this review is done in close cooperation with the Federal Cartel Office.
Recommendations

The preceding sections illustrate the many forms of regulatory review that are applied to foreign investment around the world, and the issues arising as a result of review by multiple agencies, multiple jurisdictions, or both.

This section presents some recommendations for best practices and further initiatives to address these issues and ameliorate some of the hardships that inconsistencies in the review process can present.

Timetables

1. Agencies should be more transparent with regard to timetables. The survey of jurisdictions in the first part of this Report, though limited to only certain jurisdictions, shows that some agencies are considerably more transparent than others with regard to their timetables. These may be “administrative timetables,” which are published as targets and can be exceeded if there is good reason to do so. It is not always possible for agencies to adhere to their normal timetables, but establishment of internal deadlines—even deadlines that can be extended—makes it easier for parties to anticipate the schedules they typically can expect.

As described, some agencies are subject to relatively specific timetables, which are made public. Other agencies are constrained by no timetable at all and provide little guidance as to how long reviews are likely to take. There is considerable variation between these extremes.

Naturally, some reviews cannot be expected to be constrained by deadlines, and parties undertaking particularly sensitive and controversial investments should be prepared for an extended period of review. Parties undertaking routine investments, however, should be afforded as much predictability as possible.

Agencies can learn from one another how much time is reasonably necessary to complete the type of review they are responsible for conducting. Without labeling any one approach a “best practice,” the relative level of transparency in the timetables followed by the agencies in the jurisdictions examined above exhibit considerable variation. Without transparency, parties find it hard to predict the length of time agencies require to complete a review process, and it will be difficult to achieve greater consistency between and among agencies and jurisdictions.

2. Agencies within each jurisdiction should endeavor to make the timetables for reviews more consistent with one another. As described in the first part of this Report, different agencies within a single jurisdiction do not always take the same period of time to conduct their reviews of the same transaction. There can be many reasons for this disparity, including the
scope of review, the relative capacity of each agency, and mandatory statutory deadlines, if there are any.

As described in the second part of this Report, disparities in the length of time it takes each agency within a single jurisdiction to complete its review can create obstacles to completing mergers and acquisitions, particularly those involving foreign investment.

It may not be reasonable to expect every agency within a jurisdiction to complete its investigations on the shortest timetable, but it would be productive for each agency to examine how long it takes for other agencies to complete their reviews, and determine whether a longer wait is justified. In the process, agencies may learn from other agencies and help one another to shorten the length of time required to conduct a review.

Of course, consistency is impossible to achieve without transparency, and transparency must be considered a prerequisite to achieving consistency. Together, achievement of these two objectives should go a long way toward eliminating uncertainty and facilitating investment. In some cases, change will require amendment of applicable laws.

3. **Agencies in different jurisdictions should endeavor to make the timetables for reviews more consistent with one another.** As described in the first part of this Report, comparable agencies in different jurisdictions do not always take the same period of time to conduct their reviews of comparable transactions. There can be many reasons for this disparity, including the scope of review, the relative capacity of each agency, and the mandatory statutory deadlines, if any.

As described in the second part of this Report, disparities in the length of time it takes each jurisdiction to complete its review create some of the most vexing obstacles to completing mergers and acquisitions, particularly those involving foreign investment.

Agencies can learn from one another how much time is reasonably necessary to complete the type of review they are responsible for conducting. Without labeling any timetable a “best practice,” the timetables generally followed by the agencies in the jurisdictions examined above can provide benchmarks for one another.

It may not be reasonable to expect every jurisdiction to complete its investigations on the shortest timetable, but it would be productive for each jurisdiction to examine how long it takes for other jurisdictions to complete comparable reviews, and determine whether a longer wait is justified. In the process, agencies may learn from comparable agencies in other jurisdictions and help one another to shorten the length of time required to conduct a review.

As with reviews conducted by different agencies within the same jurisdiction, consistency is impossible to achieve without transparency, and transparency must be considered a prerequisite
to achieving consistency. Together, achievement of these two objectives should go a long way toward eliminating uncertainty and facilitating investment.

**Communication**

1. To the extent consistent with confidentiality obligations imposed by law, agencies within each jurisdiction should institutionalize communication with other jurisdictions that review foreign investment. In some of the jurisdictions examined in this Report, there are longstanding, efficient processes in place to coordinate regulatory reviews of the same transaction conducted by different agencies. In other jurisdictions, there is almost no such coordination at all. Jurisdictions can profit from engaging in some self-examination in this regard, benchmarking to some of the more successful protocols for streamlining the process of multi-agency review.

Practices that have served well include the designation of liaisons within each agency who are tasked with the responsibility of coordinating with other agencies when it appears that a transaction will be subject to review by more than one agency within the same jurisdiction. Another is the establishment of understandings as to division of responsibility between agencies, to avoid duplication of effort or turf wars. Reports on those practices that have proven most effective within particular countries could serve as guides to other countries.

2. To the extent consistent with confidentiality obligations imposed by law, agencies should institutionalize communication with comparable agencies in other jurisdictions that can be expected to review some of the same foreign investments. The International Competition Network provides a model for facilitating communication of this kind, encouraging competition agencies to communicate with other competition agencies. Likewise, mutual cooperation agreements between jurisdictions have facilitated coordination between competition agencies for years. Comparable communication protocols could be arranged for other types of regulatory review. Plainly, some types of review would be easier to communicate about than others, with national security being the hardest. Nevertheless, to the extent possible and consistent with law, agencies in different countries can develop protocols for communicating with one another, to avoid the need to rely on ad hoc lines of communication each time there is a need.

**Substantive Criteria**

1. Agencies should be more transparent with regard to the substantive criteria they apply. Recognizing that some criteria for reviews will remain classified, or at least confidential, agencies can endeavor to be more transparent with regard to the substantive criteria they apply to reviews.
2. Agencies should prepare guidelines to increase the transparency of their reviews and enable the measurement of the consistency with which those guidelines are being applied. An example of such guidelines are the South Africa Competition Commission’s draft Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998, released on January 23, 2015.

3. Assessment of National Interest should be discrete from assessment of the effect on competition. Whether such assessments are conducted by different agencies within a jurisdiction or by the same agency, such assessments should be made separately, regardless of whether there is balancing among such assessments or whether one assessment may result in disapproval of a transaction regardless of the outcome of other assessments.

Involvement of Other Entities

1. The ABA Antitrust Section should send copies of this Report to agencies responsible for foreign investment review, as well as to entities such as the OECD and ICN, to draw greater attention to the issues created by multi-agency foreign investment review. This Report surely will not be the last word on this topic, but, hopefully, it will encourage further analysis and dialogue. As a first step, the ABA Antitrust Section should provide copies to those agencies responsible for foreign investment review, to other governmental bodies with responsibility for overseeing such review, and to international bodies such as the OECD and ICN, all of which can play a role in furthering the exploration of the issues raised here.

2. Entities such as the OECD and ICN should consider playing a role in seeking greater harmonization of foreign investment review among different jurisdictions. International bodies such as the OECD and ICN can play an important role in augmenting and refining the kind of analysis begun in this Report. Some competition agencies already are responsible for national interest reviews and other types of review beyond competition law review, as described in an ICN report prepared by the Competition Commission of Turkey and presented at an annual meeting of ICN in Istanbul. Regardless of whether competition agencies or other agencies undertake such reviews, ICN could broaden its mission to include this topic. Of course, the competition agencies that belong to the ICN today are relatively similar in nature, while the types of agencies involved in foreign investment review are more diverse. Otherwise, a new ICN-type entity could be organized to facilitate the kind of coordination that the ICN has succeeded in achieving. Alternatively, the OECD already has a mandate that unquestionably is broad enough to encompass all types of foreign investment review. In the OECD’s 2015 (draft) Policy Framework for Investment, the following questions are posed to governments that screen foreign investment:

- Are the criteria for approval clear and measurable?
• How much discretion does the authority have? Are measures in place to prevent and detect bribery for the purpose of influencing such discretion?
• Do decisions have to be rendered within a specified time?
• Are the criteria within the competence of the agency to assess?
• Are the reasons for rejecting a project published?
• Can the investor appeal the decision before an independent administrative or judicial body?
• Are investor commitments monitored once the project is approved? If so, what is the sanctioning procedure when commitments are not met?
• Are screening policies subject to periodic review of their effectiveness and necessity?
• How does the government minimize the administrative burden for investors undergoing screening?
• How many projects are rejected or modified each year on average?
• Do pending screening processes suspend the investment?

Thus, it would fit comfortably with the work that OECD already has undertaken to address the issues raised in the ABA Antitrust Section’s Report.

3. The ABA Antitrust Section should present programs in collaboration with organizations such as the OECD, ICN, or WTO, to augment and refine the findings made in this Report. There is a great deal that the ABA Antitrust Section can accomplish in collaboration with other entities, such as the OECD, ICN, or WTO. By preparing and presenting programs together, these entities should be able to assemble a variety of experts to exchange experiences, expertise, and points of view. While the present Report can catalogue the reviews that take place around the world, identify issues, and offer some recommendations, a series of conversations among knowledgeable experts can amplify and expand the analysis, widening the circle with each seminar or program. The Antitrust Section should consider reaching out to other groups to develop seminars of this kind, or to add programs of this kind to broader conferences.

Further Work

1. The ABA Antitrust Section should undertake to examine jurisdictions not included in this Report and add them to the analysis. Limitations of time and resources prevented inclusion of every jurisdiction with foreign investment review in this Report, and many jurisdictions that conduct foreign investment review are omitted. The Section of Antitrust Law should consider means to augment this report with information on other jurisdictions, and to keep the information presented here current.
2. The ABA Antitrust Section should undertake further analysis of the regime for national security reviews by CFIUS in the United States. This could take the form of programs, presentations, and/or written analysis.

3. The ABA Antitrust Section should undertake programs, seminars, or other means to study the advantages and disadvantages – in practice – of including objectives other than the maximization of consumer welfare in reviews conducted by competition agencies. Some nations, including the United States, have firmly asserted that competition agency reviews should be confined to determining whether a transaction threatens competition, with any other objectives to be reviewed by other agencies. Other nations have charged their competition agencies with weighing together both competition considerations and other objectives, such as employment, promotion of small businesses, etc. (The draft guidelines from South Africa provide a good illustration.) The first approach is subject to criticism for affording multiple agencies veto power over a transaction without any of those agencies weighing all of the competing considerations. The latter approach is subject to criticism for blurring the focus of a competition inquiry and requiring competition authorities to weigh “apples and oranges” considerations that are not well suited to balance against one another. Both approaches are in use today in different parts of the world and although there has been some effort to survey which countries follow each approach, there has been no critical assessment of the advantages and shortcomings of each approach in practice. An examination of the experience developed under each approach could prove enlightening to both camps, as well as to the legal and business communities.

4. The ABA Antitrust Section should consider establishing a committee, a working group of experienced practitioners on foreign investment review, or a Task Force of practitioners drawn from different ABA Sections. The Long Range Planning Committee of the ABA Antitrust Section should consider whether the issues involving the interface of antitrust clearance of mergers and national interest and national security warrant the creation of a standing committee of the Section on foreign investment review. Reflecting the significance of foreign investment review and its interface with competition law, the National Competition Law Section of the Canadian Bar Association maintains a Foreign Investment Review Committee. Under its mandate, the committee deals with all issues relating to the Investment Canada Act and its application by the Minister of Industry and the Minister of Canadian Heritage. The committee organizes regular continuing legal education programs and advises on legislative initiatives in the area. Similarly, the Long Range Planning Committee of the ABA Section of Antitrust Law could consider designating a committee, continue to study the issues involved in the interface with antitrust law through a working group of experienced practitioners, or possibly establish a Task Force drawing members from more than one Section of the ABA – for example, from the Antitrust Law, International Law and Business Law Sections. Whichever vehicle is chosen, its members can continue to consider the issues raised in this Report and interface, as advisable, with other organizations such as the OECD.
Conclusion

The purpose of this Report is to begin a serious examination of foreign investment review beyond the realm of competition reviews. This report has described the review and approval process within several major jurisdictions. It identified similarities and differences among these jurisdictions, as well as issues arising between agencies within a single jurisdiction. It also addressed concerns raised by parties, governments, and other interested observers. Finally, it offered some recommendations for the future. Hopefully, this work will encourage further study, as well as implementation of measures to make foreign investment review more transparent, more consistent, and more efficient, facilitating more productive foreign investment everywhere.