The views expressed herein are presented on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities.
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Calvin S. Goldman  Richard M. Steuer
Report of the Task Force on National Interest and Competition Law

INTRODUCTION

The inclusion of “national interest” or “public interest” considerations in the enforcement of competition laws, or in parallel with the enforcement of competition laws, has become the subject of considerable interest and debate around the world. Like it or not, national interest factors have been considered to some degree in a number of jurisdictions. Only a few of these jurisdictions have had significant experience with such considerations, however, and such experience has been subject to relatively little systematic study.

Over the years, this topic has attracted the greatest attention in the context of the review of mergers and acquisitions involving foreign investment. In 2015, the ABA Antitrust Section issued a Report on Foreign Investment Review, which is available at: http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/20150928_foreign_investment.authcheckdam.pdf

However, the inclusion of public interest considerations also has emerged in the context of merger review without any foreign investment component, and in challenges to non-merger activity. In each instance, the issue is whether factors beyond consumer welfare (i.e., whether or not prices to consumers would increase) should be considered in deciding whether to approve a deal or determining the legality of a practice. Factors that have been debated include job creation and preservation, ensuring domestic control over economically important industries, preserving small businesses, providing preferential treatment to national champions, limiting the political power of the business community, combating inequality, insulating the independence of competition authorities from political influence, and others. The impediments that some of these factors can pose to the business activities of companies trying to do business in different countries has made the inclusion of public interest considerations a prominent trade issue as well as a competition issue.

The Task Force that undertook this study was appointed in 2017 to examine the experience of selected jurisdictions and report its findings. Members of the task force communicated with knowledgeable agencies, individuals, and organizations in each jurisdiction in order to explore key developments, assess the success or shortcomings of public interest reviews, describe any proposals for legislation, and consider prospects for the future. In most jurisdictions, a case study of a leading matter was selected to serve as a vehicle for conducting the analysis.
Subsequently, members of the task force interviewed informed individuals to learn their views on the inclusion of public interest factors in competition reviews. Part II of this report describes and synthesizes the range of views that were expressed.

The purpose of this report is to (1) inform the legal and business communities of both the nature of public interest reviews in select jurisdictions, and the means for navigating reviews in those jurisdictions; (2) inform governments of the similarities and differences that exist among public interest reviews from one jurisdiction to the next, as well as the consequences (both intended and unintended) of nations conducting public interest reviews or choosing not to; and (3) survey views that have been presented by scholars and other informed individuals regarding the wisdom of including public interest considerations in competition reviews.

This report is organized as follows: In Part I, the first eight chapters explore the experience in Australia, Canada, China, France, Germany, South Africa, the United Kingdom, and the United States. The ninth chapter presents conclusions about what we learned from these jurisdictions. In Part II, we present the range of views that exist among interested individuals on the relationship between public interest factors and competition reviews.

Our hope is to facilitate the practice of international competition law and advance the quality of the policy debate over public interest considerations by providing a deeper study of actual events with greater insight into the performance of public interest reviews than has been undertaken anywhere before.
EXECUTIVE SUMMARY

The Task Force studied the inclusion of “national interest” or “public interest” considerations (including job creation and preservation, ensuring domestic control over key industries, preserving small businesses, providing preferential treatment to national champions, limiting the political power of the business community, combating inequality, etc.) in the review of mergers and competitive practices. We found that:

1. More and more countries are including the consideration of public interest factors in the review of foreign investment.

2. Most countries that conduct public interest reviews assign those reviews to an agency separate from their competition agencies. A few countries that conduct such reviews, however, assign a single agency to combine competition review with public interest review. Where there are separate agencies, each usually has the power to halt a transaction or practice but in some instances one agency has the power to overrule the other, including the power to approve a deal or practice that the other agency has disapproved.

3. In regulated industries, most countries task regulatory agencies to conduct public interest reviews, and in some instances combine those reviews with competition reviews.

4. Many countries assign oversight of public interest factors to other agencies, e.g., privacy to consumer protection agencies, jobs to labor agencies, income disparity to tax agencies, small business to small business agencies, and concentration of political power to legislative bodies.

5. The definition of “consumer welfare” sometimes is interpreted to include not only the impact on quality-adjusted consumer prices, but the impact on producer efficiency and the foreclosure of competition.

6. The definition of “national security” has been interpreted expansively in many countries, to include not only defense industries but critical infrastructure, including technology companies, transportation companies, banks, natural resources, and telecommunications. This has allowed public interest factors to be assessed as a matter of national security in those nations.

7. Some jurisdictions are contemplating the inclusion of national interest considerations in the review of domestic mergers, in instances where foreign competition or investment is perceived as a threat to the health of the domestic economy.

The following reflects a summary of the more detailed chapters in the Report.

Australia

In Australia, there are separate, well established, competition and foreign investment review regimes. There are two separate pieces of legislation with different decision makers and different
tests. Competition is regulated under the Competition and Consumer Act and the competition regulator is an independent statutory body, the Australian Competition and Consumer Commission. It applies a competition test to mergers or acquisitions that may have an effect in a market in Australia. Foreign investment is primarily regulated by the Foreign Acquisitions and Takeovers Act and decisions are made by the Treasurer, on advice from the Foreign Investment Review Board and a national interest test applies. It is possible for a transaction to be cleared or authorised by the competition regulator on competition grounds, but opposed by the Treasurer on national interest grounds, for example, the 2013 decision by the Treasurer to prohibit the proposed acquisition by ADM of GrainCorp and the 2018 decision by the Treasurer that a proposed acquisition of APA Group by a consortium led by CK Asset Holdings Limited would be contrary to the national interest.

**Canada**

Canada has separate parallel foreign investment and competition review regimes. Foreign investment is regulated primarily under the *Investment Canada Act* (the “ICA”). Foreign investments to acquire an existing Canadian business or establish a new Canadian business are either “reviewable” or “notifiable” under the ICA. An investment is reviewable if it involves the direct acquisition of a Canadian business where the value exceeds certain financial thresholds. Those financial thresholds differ based on the country in which the investor is established and whether the investor is a state-owned enterprise, as well as whether the Canadian business is a “cultural business”. If an investment is reviewable, the investor must make an application preclosing to the Federal Government, and the responsible Minister will then determine if the investment is of “net benefit” to Canada. Investments by state-owned enterprises and investments that may be “injurious to national security” are reviewed under the ICA.

Canada’s competition review regime is regulated under the *Competition Act*. Proposed acquisitions and business combinations where parties exceed certain financial thresholds must be notified preclosing to Canada’s Commissioner of Competition (the “Commissioner”).

Three foreign investment reviews that have attracted particular public attention provide good illustrations of the Canadian process in action. BHP Billiton’s attempted acquisition of Potash Corporation of Saskatchewan Inc., illustrates the net benefit and national interest issues. Chinese state-owned oil producer CNOOC Ltd.’s acquisition of Nexen Inc., illustrates state-owned enterprise issues. Hytera Communications Co. Ltd.’s acquisition of Norsat International Inc., illustrates preliminary screening related to national security reviews.

**China**

In the People’s Republic of China (PRC or China), the first comprehensive antitrust law, the Antimonopoly Law or AML, was enacted in 2008. One of the stated purposes of the AML is to protect public interests, though the law and regulations enacted under it to date provide little guidance as to
how public interest will be considered in competition investigations or enforcement decisions. While decisions by the competition enforcement authority, the State Administration for Market Regulation (SAMR) and its predecessor agencies, have sometimes referenced public interest considerations among the stated bases for published decisions related to matters involving mergers and acquisitions as well as to conduct violations, these decisions do not explain the role public interest played in such decisions except in a small number of instances, most of which involve no non-Chinese parties. Moreover, many decisions made by SAMR and its predecessors have not generated published decisions. The AML and regulations promulgated thereunder contain no reference to the concept of national security and no decisions under the AML have been explicitly been based on considerations of national security, as contrasted with public interest.

Prior to 2011, reviews of mergers and acquisitions involving non-Chinese entities were conducted as part of the Foreign M&A reviews undertaken by the Treaty and Law Department of MOFCOM. Those reviews included considerations of, among others, competitive effects and national security. After enactment of the AML, all reviewing of mergers and acquisitions were conducted by the Antimonopoly Bureau of MOFCOM pursuant to the AML, which contains no reference to a consideration of national security. On February 3, 2011, the China State Council issued the Circular on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises for Foreign Investors (Circular 6). Circular 6, which came into effect on March 4, 2011, created for the first time a stand-alone national security review process for such mergers and acquisitions in certain sensitive sectors of the Chinese market. It granted Chinese authorities broad discretion to review types of transactions not previously subject to review under the Foreign M&A Rules, and to prohibit transactions or to take effective measures to remedy the national security concerns before such transactions may be allowed to proceed. The Circular 6 national review process takes place separately from, and generally at the same time as, the review of potential competitive effects of a transaction pursuant to the AML.

**France**

In France, foreign investment in certain strategically important industries is subject to review by the Minister of the Economy, who may block a transaction or impose conditions to protect the

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1 On March, 17, 2018, the China National People’s Congress, approved a sweeping government restructuring plan that included the creation of SAMR, and transferred to SAMR the enforcement and investigation powers set forth in the AML and previously conducted by three separate entities: the Antimonopoly Bureau of the Ministry of Commerce (MOFCOM); the Price Supervision and Market Regulation Bureau of the National Development and Reform Commission (NDRC); and the Antimonopoly Bureau of the State Administration for Industry and Commerce (SAIC). Before the advent of SAMR, AML investigation and enforcement responsibilities for matters involving merger review, conduct involving price conduct, and conduct involving non-price conduct were allocated to the AML-related offices of MOFCOM, NDRC, and SAIC, respectively. SAMR also took over the responsibilities previously held by several other agencies, including the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), the Certification and Accreditation Administration (CAC), the Standardization Administration of China (SAC), and the China Food and Drug Administration (FDA).
public interest. In addition, the Minister may intervene in investigations by the Competition Authority to make a decision based on public interest considerations, including industrial development, international competitiveness, and job preservation.

In 2017, the French National Assembly launched a temporary “commission of inquiry” to investigate the foreign acquisitions of French companies. The commission was concerned by the foreign takeover of the country’s “industrial jewels,” including General Electric’s 2014 acquisition of Alstom’s energy business, Nokia’s 2015 acquisition of Alcatel-Lucent, Fincantieri’s 2017 acquisition of STX France, and Siemens’ attempted 2017 acquisition of Alstom’s rail transportation business. Although most of these mergers were ultimately cleared under the country’s foreign investment rules at the time, many French politicians expressed alarm at the loss of traditional French businesses and the prospect that these deals would lead to layoffs.


It remains to be seen what changes, if any, will result from the commission’s investigation.

**Germany**

In Germany, the Federal Cartel Office (or Bundeskartellamt) is tasked with reviewing mergers, competitive practices, and cartels, applying competition standards and public interest factors that are taken into account by the Federal Minister for Economic Affairs and Energy. Notably, the Minister has the authority to authorize a merger or acquisition that has been blocked by the Federal Cartel Office. There also exists a foreign direct investment regime, under which the Minister may block an acquisition that does not raise competition concerns, but may not permit an acquisition that has been disapproved by the Federal Cartel Office on competition grounds.

The example that has attracted the greatest attention involved the merger of two supermarket chains, Edeka and Tengelmann. The merger was rejected by the Federal Cartel Office but the Minister authorized it on the condition that several thousand jobs be preserved for a number of years. The authorization was held up by judicial review and ultimately the matter was resolved by settlement. Subsequently, legislation was adopted to shorten the applicable deadlines and narrow the ability to appeal a ministerial authorization.
South Africa

In South Africa, the competition authority is assigned responsibility, under the applicable legislation, to consider both competition considerations and public interest considerations. If it is determined that a merger is likely to substantially impede competition, the authorities are required to determine whether there are public interest considerations, as well as any efficiencies or other procompetitive effects, that offset the anticompetitive effects. A number of public interest effects are enumerated, including ameliorating geographic disparities, preserving jobs, fostering small business, and strengthening the ability to compete in international markets.

A leading example of the South African model in operation is the acquisition of SAB Miller by Anheuser-Busch InBev. That deal won approval based on a number of conditions agreed to by the parties, including job preservation as well as certain undertakings to protect competitors’ access to inputs and markets. Notably, the Minister of Economic Development played an active role in the approval process.

United Kingdom

In the United Kingdom, although the Competition and Markets Authority is the primary merger control enforcement agency, in very limited circumstances involving specified public interest considerations, the Secretary of State can intervene and assume the role of the final decision maker.

There is only limited published guidance on how public interest cases will be dealt with in practice, and the guidance available is limited to setting out the statutory framework without additional commentary or insights. However, recent cases have highlighted the need for parties to engage with government at an early stage, and to prepare for the fact that parts of the process will be opaque.

Although there have been relatively few matters raising public interest considerations in recent years, the number of cases is expected to increase. New legislation has been introduced, and further reforms have been proposed, which will significantly increase the number of cases caught by the UK public interest regime. In particular, changes have been introduced lowering the jurisdictional thresholds to capture smaller businesses active in the military and dual-use sectors, and the advanced technology (quantum technology and computing hardware) sector. Longer term proposals have also been put forward to allow for greater scrutiny of mergers that may raise national security concerns.

United States

In the United States, public interest factors are not part of the analysis applied by the competition agencies, which include the Antitrust Division of the U.S. Department of Justice, the Federal Trade Commission, and the antitrust bureaus of state attorney general offices. Public interest factors are considered by certain regulatory agencies as part of their administrative reviews. Public interest
factors also may be considered by the Committee on Foreign Investment in the United States (CFIUS), which is charged with review of foreign investments in strategically important industries. Depending on the definition of strategic industries, CFIUS may consider public interest factors in reviewing a range of acquisitions in which foreign investment is involved.

**Analysis**

Our study revealed that although a number of leading economies take public interest considerations into account in reviewing mergers and competitive practices, no two approaches are identical. This presents a clear opportunity for policymakers to contrast and compare the different approaches, and assess the strengths and weaknesses of each. This also presents a challenging dilemma for practitioners seeking to navigate a deal or practices through the requirements of each jurisdiction that may have an interest. Practitioners should be aided by a deeper understanding of the operation of each regime. Policymakers may gain additional insight from the views expressed in the second part of this report by a number of experts who have contributed their perspectives.

**PERSPECTIVES**

Our study of the eight jurisdictions raised three overarching questions:

1. Whether factors beyond “consumer welfare” (i.e., low prices, high output, high quality, and efficiency) should be included in assessments of mergers and anticompetitive practices (especially single-firm conduct);

2. If so, should these factors be assessed by competition authorities in a consolidated process (as occurs in China and South Africa) or by another arm of government (as with CFIUS or Investment Canada); and

3. Should there be different treatment for non-domestic firms, state-owned enterprises, or sovereign wealth funds and, if so, should such treatment depend on the treatment of non-domestic enterprises in those entities’ “home” countries?

To learn the views of individuals who have taken an interest in these questions, we surveyed the opinions of leading observers from various quarters, including scholars and enforcers, past and present. We learned that there exist a variety of views on each question.

1. Many observers strongly believe that competition reviews should be limited to assessment of effects on competition, applying the consumer welfare test. There is some difference of opinion on what properly is included in that test (price effects, producer welfare, efficiency, foreclosure, etc.) but these individuals feel that public interest factors like job creation have no place in competition reviews. Other observers believe just as strongly that competition reviews should
include some or all of the public interest factors that have been identified. Some of these observers maintain that public interest factors were intended to part of competition review from the beginning while others contend that inclusion of such factors is appropriate regardless of original intent. There also is some perception that it is easier to include public interest factors in jurisdictions where a political official is authorized to make the final decision.

2. There is a split between observers who believe that if public interest factors are considered, they should not be considered by a competition agency, and observers who believe that if public interest factors are considered, a competition agency should have authority to consider competition factors and public interest factors together. Many in the first group expressed the view that competition agencies are not equipped to assess public interest factors. Observers in the second group took the view that competition agencies are competent to conduct public interest reviews and would cede too much authority if decisions based on public interest factors are made regarding mergers and competitive practices by other arms of government.

3. As for whether there should be different treatment for domestic and non-domestic entities, fewer of the individuals we interviewed held strong views, or any views. Several observers took the view that all entities should be treated the same, regardless of nationality. Others agreed with the view that if non-domestic entities are discriminated against in a particular country, it would be appropriate for entities from that country to face stiffer treatment in other countries.

This task force makes no judgments about the relative merits of the approaches taken in the eight countries studied. Nor do we choose among the viewpoints that have been expressed. Rather, we hope that our report will help practitioners to navigate the maze of reviews that exist around the world, and help policymakers determine the best approach to take in each jurisdiction.
PART I
EXPERIENCE NATION BY NATION

AUSTRALIA

Australia has seen a number of widely reported public interest reviews, including one matter, examined in detail below, in which a noticeable period of time elapsed between a favorable competition review and an unfavorable public interest review.

1. Mergers and acquisitions in Australia: competition, public interest and national interest assessment

1.1 Description of the enforcement/regulatory structure in Australia

There are two key regimes relevant to mergers and acquisitions in Australia:

(a) The Competition and Consumer Act 2010 (Cth) (CCA) applies a competition test to mergers or acquisitions that may have an effect in a market in Australia.

(b) The Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) regulates foreign investment in Australia and applies a national interest test.

There are two separate pieces of legislation with different decision makers and different tests.

Each of those regimes is outlined below.

1.2 Competition and Consumer Act 2010 (Cth) (CCA) and Australian Competition and Consumer Commission (ACCC)

The object of the CCA is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.” It has a wide range of provisions which are used to achieve this objective. The principal regulator is the Australian Competition and Consumer Commission (ACCC). The scope of the CCA has made it one of the most frequently litigated pieces of legislation and has made the ACCC one of the most active and high-profile regulators in Australia.

Section 50 of the CCA prohibits any acquisition of assets or shares if the effect, or the likely effect, is to substantially lessen competition in any market in Australia as a whole, or in a State or Territory or region of Australia.
There is no compulsory pre-notification requirement for mergers or acquisitions in Australia. The ACCC has an informal clearance process, however, which enables merger parties to seek the ACCC’s view on whether it will seek an injunction to stop a merger from proceeding.

The ACCC encourages merger parties to notify the ACCC where both of the following apply:

(a) the products of the merger parties are either substitutes or complements; and
(b) the merged firm will have a post-merger market share of greater than 20% in the relevant market/s.

The ACCC’s Merger Guidelines 2008 outline the analytical and evaluative framework applied by the ACCC when reviewing mergers and acquisitions and provides guidance on the factors the ACCC considers relevant to its consideration.

In considering the effect of a merger, the ACCC will examine a range of factors including those set out in section 50:

(a) the level of actual and potential import competition;
(b) the height of barriers to entry;
(c) the level of concentration in the market;
(d) the degree of countervailing power in the market;
(e) the ability of the merged entity to effect a significant and sustainable price increase;
(f) the extent to which substitutes are available in the market;
(g) the extent to which the market is undergoing change in terms of technological innovation, growth or concentration, or product differentiation;
(h) the nature and extent of vertical integration in the market; and
(i) whether the acquisition would result in the removal of a vigorous and effective competitor.

It is common practice to make an approach to the ACCC seeking an informal clearance for a proposed merger. Such an approach can be made on a confidential basis. However, the ACCC will usually reserve the right to make market inquiries once the transaction becomes public, and any confidential clearance will be qualified at least to that extent.
The ACCC publishes Merger Guidelines and Merger Review Process Guidelines, which provide for a transparent process and the publication of timelines and statements of reasons for merger review decisions.

In addition, outright authorisation by the ACCC of a merger on public interest grounds is possible even if it is likely to have an anticompetitive effect. This is a statutory process (unlike the informal clearance process described above, which has no statutory force).

The ACCC may grant a merger authorisation if it is satisfied that conduct:

(a) will not (or is not likely to) substantially lessen competition; or

(b) is likely to result in a net public benefit.

A limited merits review by the Australian Competition Tribunal of first instance merger authorisation determinations by the ACCC is available, with little scope for fresh evidence. The Australian Competition Tribunal is a review body. A review by the Tribunal is a re-hearing or a re-consideration of a matter. The Tribunal may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. It can affirm, set aside or vary the original decision. The Tribunal has jurisdiction to hear a variety of applications, including reviews of determinations of the ACCC granting or refusing authorisation for company mergers and acquisitions.

1.3 Foreign investment legislation, Foreign Investment Review Board, Treasurer

Foreign investment in Australia is regulated by a framework that includes the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) (and the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (Regulations) and the Federal Government’s Foreign Investment Policy.

The Foreign Investment Review Board (FIRB) examines foreign investment proposals and makes recommendations to the Federal Government on those proposals. The Federal Government minister responsible for foreign investment decisions is the Australian Treasurer. FIRB is a non-statutory body that comprises of 6 part-time members appointed by the Treasurer, as well as the Division Head of the Foreign Investment Division of the Department of the Treasury.

The Treasurer reviews foreign investment proposals against the “national interest” on a case by case basis. The national interest is not defined and is given a flexible meaning having regard to all relevant circumstances. The Treasurer can block foreign investment proposals that are contrary to the national interest or apply conditions to the way these
proposals are implemented to ensure they are not contrary to the national interest. The Federal Government's Foreign Investment Policy outlines the Government's approach to administering the foreign investment framework, including national interest considerations.

The Australian Treasury is responsible for the day-to-day administration of the framework in relation to Australian businesses, agricultural land, and commercial land proposals. Compliance and enforcement of foreign investment rules in regards to residential real estate is administered by the Australian Taxation Office (ATO). The ATO now also keeps a record on the Agricultural Land Register of all foreign persons who holds agricultural land.

Australia’s foreign investment legislation applies to investment proposals by foreign persons. A foreign person means:

(a) an individual who is not ordinarily resident in Australia;

(b) a foreign government or foreign government investor; or

(c) any corporation, trustee of a trust or general partner of a limited partnership in which:

(i) a foreigner (i.e. an individual not ordinarily resident in Australia, a foreign corporation or a foreign government) has a 20 percent or more interest; or

(ii) two or more foreigners have a 40 percent or more interest in aggregate.

Whether notification of an investment by a foreign person is required is determined by reference to the type of investor, the type of investment, the industry sector in which the investment will be made and the value of the proposed investment.

A foreign person who proposes to take a notifiable action must notify and obtain approval from the Treasurer before that action can be taken. Parties may enter into agreements relating to that action prior to obtaining FIRB approval, however such agreements must be conditional upon approval being obtained.

Civil and criminal penalties may be imposed on foreign persons for failing to notify an investment that is subject to Australia’s foreign investment laws and for other breaches of these laws.
In most cases, a foreign person will only need to notify the Treasurer of their investment if the investment meets certain monetary thresholds. These thresholds depend on the type of investor and the action proposed to be taken by that investor. For example, the 2019 threshold for business acquisitions for investors from non FTA partner countries and for acquisitions in sensitive sectors by investors from certain FTA partner countries is $266 million, for acquisitions in non-sensitive businesses for investors from certain FTA partner countries is $1,154 million, and for foreign government investors is $0.2

The Federal Government determines national interest concerns on a case-by-case basis and typically considers the following factors (set out in the Federal Government's Foreign Investment Policy) when assessing foreign investment proposals:

(a) **national security**: the extent to which the investment affects Australia’s ability to protect its strategic and security interests;

(b) **competition**: whether the investment may result in an investor gaining control over market pricing and production of a good or service in Australia or allow an investor to control the global supply of a product or service;

(c) **Australian Government policies**: whether the investment may impact Australian Government tax revenue or other policies, such as environmental objectives;

(d) **impact on the Australian economy and community**: whether the investment (including any proposed post-investment restructure) may impact the Australian general economy and ensure a fair return for the Australian people; and

(e) **character of the investor**: whether the investor operates on a transparent commercial basis and is subject to adequate and transparent regulation and supervision, including consideration of the corporate governance practices of foreign investors.

The Federal Government considers the following additional factors when considering investments by foreign governments and foreign government investors:

(a) whether the foreign government investor is wholly or partly foreign government owned, and whether it operates on a fully arm’s length and commercial basis;

(b) whether the investment is commercial in nature or is the investor potentially pursuing broader political or strategic objectives that may be contrary to Australia’s national interest; and

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ADM GrainCorp case study (2013)

1.4 Description of matter

Archer Daniels Midland Company (ADM) held 19.85% of GrainCorp Limited and proposed to lift its shareholding to 100%.

The transaction was reviewed by the ACCC and FIRB.

The ACCC commenced its review of the proposed acquisition under the informal clearance process on May 3, 2013. The ACCC announced that it would not oppose the proposed acquisition on June 27, 2013.

ADM’s proposal was first lodged with the Foreign Investment Review Board (FIRB) in May 2013. ADM withdrew and re-submitted its application a number of times. On October 4, 2013, the Treasurer announced that he had signed an interim order under the Foreign Acquisitions and Takeovers Act 1975 to extend the statutory time period for a decision on ADMs’ proposed acquisition of GrainCorp. The interim order provided certainty to all parties by ensuring that a decision would be made by December 17, 2013.

On November 29, 2013, the Treasurer announced that he had made an order under the Foreign Acquisitions and Takeovers Act 1975 prohibiting the proposed acquisition by ADM of 100 per cent of the shareholding in GrainCorp. The Treasurer did, however, indicate approval of any proposal to increase ADM’s shareholding up to an interest of 24.9%.

The Treasurer noted “The proposed acquisition of GrainCorp by ADM has been one of the most complex cases to come before the FIRB and it is one of the most significant proposed acquisitions of an agricultural business in Australia’s history.”

The Treasurer also noted “In their response to my request for advice on the wider ramifications of this case, the members of the FIRB could not agree on a consensus recommendation in relation to the proposal.” (FIRB members are appointed by the Treasurer.)

1.5 ACCC review

The ACCC conducted its review in accordance with its published Informal Merger Review Guidelines:
(a) informal review commenced May 3, 2013

(b) submissions from interested parties by May 24, 2013

(c) ACCC announced it would not oppose the proposed acquisition on June 27, 2013

1.6 ACCC decision (http://registers.accc.gov.au/content/index.phtml/itemId/1119061)

The ACCC concluded that the proposed acquisition was unlikely to result in a substantial lessening of competition in any market.

The only horizontal overlap of any significance between GrainCorp and ADM was the trading and marketing of grain on the east coast of Australia. This involved the acquisition, marketing, and sale of grain to export and domestic grain customers. Given ADM’s limited involvement in grain trading in Australia, the proposed acquisition would result in only a relatively small increase in market share. Further, market inquiries indicated that the merged firm would continue to face competition from a number of viable alternative grain traders to which grain growers could turn should the merged firm seek to reduce the prices paid to growers (and to which grain customers could switch if the merged firm should seek to increase the price offered to customers).

GrainCorp had a significant presence at all levels of the grain supply chain on the east coast of Australia and provides grain traders with access to its up-country storage facilities, its contracted rail transport services, and its port terminal services. This access was important to competition between traders and marketers of grain. Despite its limited presence in Australia, ADM had a vertically integrated global structure. Given these factors, the ACCC considered whether the proposed acquisition would affect the merged firm’s incentive to foreclose rival grain traders’ access to these facilities and thereby have the effect or likely effect of substantially lessening competition in grain trading and marketing.

The ACCC concluded that there was unlikely to be any material change in the merged firm’s ability or incentive to foreclose access to its storage and transport supply chain services (whether through completely foreclosing access or otherwise frustrating third parties’ access) that would result in a substantial lessening of competition. In forming this view, the ACCC noted that:

(a) GrainCorp, like ADM, already had a vertically integrated structure and international operations; while the proposed acquisition would transfer ownership of a vertically integrated supply chain from GrainCorp to ADM, it would not provide the merged firm with increased market power in either grain storage or port terminals and hence any ability to foreclose rivals would remain unchanged.
Given ADM’s limited involvement in grain trading in Australia, the proposed acquisition would also not result in significant horizontal aggregation, which might be expected to increase ADM’s incentive to foreclose rivals’ access.

Post-acquisition, the merged entity would continue to face some competition from other providers of storage.

In relation to access to bulk-grain export terminals, GrainCorp was already the dominant provider of port terminal services on the east coast of Australia, while ADM has only an effective 8% interest in a single terminal (Queensland Bulk Terminal) through a shareholding in Wilmar International Pty Ltd. Accordingly the proposed acquisition would transfer this dominant position from GrainCorp to ADM, but it would not strengthen it.

1.7 FIRB review

FIRB and Treasurer considered the proposed transaction in accordance with FATA and the Government’s then current Foreign Investment Policy:

ADM’s proposal was first lodged with the Foreign Investment Review Board (FIRB) in May 2013. ADM withdrew and re-submitted its application a number of times. The matter was not resolved before entering into the caretaker period for the 2013 Federal Election.

After the election and upon the new Treasurer assuming the ministry, he reviewed all the available information relating to the application from ADM and formed the view that information on a wider range of issues was required. This included that the FIRB, when considering the national interest, specifically have regard to the impact the decision on this proposal would have on broader Australian support for foreign investment and the foreign investment regime into the future. Because of these considerations, additional time was required to assess the application. Accordingly, on October 4, 2013, the Treasurer signed an interim order under the Act to extend the statutory time period for a decision and undertook to make a decision by December 17, 2013.

The Treasurer also reviewed conditions proposed by ADM. The Act provides scope for the Treasurer to impose conditions when making foreign investment decisions. The Treasurer considered there were no appropriate conditions that would mitigate the national interest concerns associated with the proposed acquisition. Indeed, imposing conditions would have meant introducing additional regulation for one market participant, and this would not be in the interests of the Australian grains industry. Moreover, imposing enduring conditions on just one participant in a
changing industry would limit the capacity of that participant to respond to a changing environment.

### 1.8 Treasurer decision

On November 29, 2013 the Treasurer determined that the acquisition of GrainCorp by ADM would be contrary to the national interest.

*The Australian grains industry is an important export industry that has been transitioning through a significant deregulation process since the abolition of the wheat exports single desk in 2008. Since then, deregulation has brought benefits through a significant expansion in the number of bulk wheat exporters, an expansion in our overseas customer base and the construction of new infrastructure.*

*But, although a number of new players have entered the market and new infrastructure (such as the Newcastle Agri Terminal) is being built, it is still taking some time for increased competition to emerge. Owning over 280 up-country storage sites and seven of the ten grain port terminals in New South Wales, Queensland and Victoria, GrainCorp continues to account for a significant share of eastern Australian storage, distribution and marketing of grains. Approximately 85 per cent of eastern Australia’s bulk grain exports are handled through GrainCorp’s ports network.*

*Many industry participants, particularly growers in eastern Australia, have expressed concern that the proposed acquisition could reduce competition and impede growers’ ability to access the grain storage, logistics and distribution network. Given that the transition towards more robust competition continues and a more competitive network is still emerging, I consider that now is not the right time for a 100 per cent foreign acquisition of this key Australian business.*

*A further significant consideration was that this proposal has attracted a high level of concern from stakeholders and the broader community. I therefore judged that allowing it to proceed could risk undermining public support for the foreign investment regime and ongoing foreign investment more generally.*

*This would not be in our national interest.*

### 1.9 Outcome and reactions

The transaction did not proceed.

The Treasurer’s media release stated “*Many industry participants, particularly growers in eastern Australia, have expressed concern that the proposed acquisition could reduce competition and impede growers’ ability to access the grain storage, logistics and*
distribution network. Given that the transition towards more robust competition continues and a more competitive network is still emerging, I consider that now is not the right time for a 100 per cent foreign acquisition of this key Australian business.” - see http://jbh.ministers.treasury.gov.au/media-release/026-2013/.

The references to competition in the Treasurer’s media release raised some questions about the interaction between the ACCC and FIRB processes.

However, there are two different statutes and two different tests. The ACCC is the competition regulator and applies the tests set out in the CCA and noted in section 1.2 above and it applied those tests to the transaction. FIRB is an advisory board and decisions under FATA are made by the Treasurer, applying the broad national interest test set out in section 1.3 above. The Treasurer made his decision on a broad national interest basis in accordance with the FATA national interest test.

Following a number of high-profile recommendations made by FIRB and decisions made by the Treasurer in 2014-2015, the Senate referred an examination of the foreign investment review framework to the Senate Economics References Committee for inquiry and report in November 2015.

In particular, the terms of reference required the Committee to inquire and report on an examination of the foreign investment review framework, including the powers and processes of the FIRB, in relation to Australian assets of strategic or national significance being subject to lease or purchase by foreign owned interests, and whether there ought to be any legislative or regulatory changes to that framework to ensure Australia’s national interest is being adequately considered, with particular reference to:

(a) the decision by the Northern Territory Government (in to grant a 99-year lease over the Port of Darwin to Landbridge Group;

(b) the planned lease by the New South Wales Government of TransGrid;

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(c) the decision by the Treasurer to block the sale of S Kidman and Co on national interest grounds; and

(d) any other related matters.

The Committee issued its report in April 2016, with recommendations that focused on the lack of consistency and transparency in the foreign investment review process and its outcomes. The limited availability of public information and of reasoning for decisions were raised specifically as issues that required attention. In the Committee’s view, this lack of transparency in the process could serve as a disincentive to foreign investors, and damage public confidence in foreign investment into Australia.

On March 28, 2017, the Government tabled its response to the findings and recommendations of the Committee, setting out its approach to building confidence in the consistency and transparency of the FIRB approval process. A number of changes to Australia’s Foreign Investment Framework took effect from 1 July 2017. There was no change to the national interest test.

2. Subsequent matters

Examples of subsequent circumstances where the ACCC has cleared or had no concerns with an acquisition but the Treasurer later rejected it (largely on national security grounds):

(a) the Treasurer rejected an application by a Chinese company seeking to acquire land near an Australian defence facility. This was also rejected on grounds of national interest. [See http://sjm.ministers.treasury.gov.au/media-release/050-2016/ and http://sjm.ministers.treasury.gov.au/media-release/130-2016/]

(b) on August 19, 2016, the Treasurer made an order under the Foreign Acquisitions and Takeovers Act 1975 (the Act) prohibiting the proposed acquisition by foreign investors of the lease of 50.4 per cent of the Ausgrid, the New South Wales electricity distribution network, on the ground that it would be contrary to the national interest. The national interest concerns related to the proposed transaction’s structure and the nature of the assets.

(c) on 20 November 2018, the Treasurer decided that a proposed acquisition of APA Group by a consortium led by CK Asset Holdings Limited would be contrary to the

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national interest. On 12 September 2018, the ACCC had announced that it would not oppose the proposed acquisition of APA Group by the CK Consortium, after accepting a court-enforceable undertaking from the CK Consortium to divest significant gas assets in Western Australia.

3. Legislative changes

3.1 Changes to CCA in November 2017 - authorisation of mergers by ACCC on public interest grounds

As noted in section 1.2 above, the CCA was amended, with effect from November 7, 2017, to enable parties to apply to the ACCC to authorise a merger even if the merger will be likely to substantially lessen competition, if it can be demonstrated that the merger would lead to such a public benefit that it should be allowed.

Public interest test

The ACCC’s interim Merger Authorisation Guidelines, released in late 2017, provide that the ACCC will take into account “any benefits that would result from the proposed acquisition, regardless of the market in which that benefit occurs”. It goes on to say that “it may be appropriate for the ACCC to assess detriments that occur outside of the market or markets in which a lessening of competition has been identified”.

While encouraging applicants to quantify the size of claimed benefits and detriments, the ACCC recognises that this will not always be possible, and claims of this nature will usually be qualitatively assessed, leaving the door open for the ACCC to consider non-competition issues.

The public benefit test was recently considered by the Full Federal Court in ACCC v Australian Competition Tribunal [2017] FCAFC 150 (Tabcorp, a merger case) where the Court applied a broad concept of public benefit:

“... given the nature of [the relevant authorization power at that time] as a dispensation from s 50 – centrally concerned as it is with notions of competition – the benefits and detriments to be examined must include competitive benefits and detriments. The provision, however, is broader merely than this and also includes other benefits and detriments not necessarily related to competition.”

and

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“The inquiry thrown up by s 95AZH is concerned with all benefits and detriments resulting from the acquisition including, no doubt, competitive ones. But so far as the competitive factors are concerned, the focus is much broader than it is under s 50; it is not limited only to detriment in a market nor, even where markets are concerned, with competitive lessenings to which s 50 might otherwise apply.”

The hurdles that may need to be overcome in meeting the “public benefit” test are illustrated by a recent New Zealand High Court decision on a media merger, NZME Limited v Fairfax Media Limited [2017] NSHC 3186 (there are some similarities between the Australian and New Zealand regimes).

Both parties to the proposed merger were major media and news outlets in New Zealand involved in the production and dissemination of news, including through competing Sunday newspapers, community newspapers, and online news.

In their appeal to the High Court from the New Zealand Commerce Commission’s decision to reject both clearance and authorisation of the proposed merger, the appellants argued that the Commerce Commission had considered public detriments beyond the permissible scope and jurisdiction.

This issue was raised because the Commerce Commission gave weight to the fact that the proposed merger would reduce media plurality, which potentially could significantly impact democracy in New Zealand, and therefore New Zealand consumers generally.

The Commerce Commission argued that, although unable to be quantified, the merger would result in a level of media concentration unprecedented in a well-established liberal democracy.

The appellants sought to establish that such plurality and differences of opinion and reporting would be maintained internally within the merged business. In any case, it was argued by the appellants that the scope of anticompetitive detriments should be limited to economic factors arising only in the markets where there has been a finding of the likelihood of a loss of competition.

Supporting the appellants’ position, the Commerce Commission Authorisation Guidelines stated:

“In contrast, in assessing detriments we only consider anti-competitive detriments that arise in the market(s) where we find a lessening of competition (whether substantial or otherwise).”
The appellants also argued that the scope of the NZ Act meant that the scope of detriments relevant to an authorisation assessment were confined to economic detriments. It was argued that matters of media plurality were therefore beyond the scope of the Act and the Commerce Commission did not have jurisdiction to take this into account in assessing the net public benefit.

However, the Court agreed with the Commerce Commission, declaring that the statutory purpose of the Act to promote competition in markets for the long-term benefit of consumers would be frustrated if matters likely to be to the long-term benefit of consumers could only include effects in the markets in which anticompetitive conduct was an issue. The Court stated:

“it would be illogical to exclude consideration of identifiable detriments that affect an overall assessment of the benefits to the public merely because those detriments do not arise in the market in which the merged entity would operate.”

The Court construed the relevant provisions of the Act to confer upon the Commerce Commission a broad discretion as to the matters it could take into account in determining whether there was a net public benefit. A similar approach may be taken in Australia.

3.2 Security of Critical Infrastructure Act 2018

Under Australia's new Security of Critical Infrastructure Act 2018, there is greater scrutiny of the ownership and operations of assets classified as critical infrastructure. The Act implements a critical infrastructure assets register to build a clearer picture of critical infrastructure ownership and control in high-risk sectors, and support more proactive management of the risks these assets face.

The Act gives the relevant Minister the authority to direct specific risk mitigation actions, where security risks are present and all other risk management avenues to mitigate a risk have been exhausted.

The Critical Infrastructure Centre (CIC) has been established to safeguard Australia's critical infrastructure through advice to the Treasurer and to administer the Security of Critical Infrastructure Act 2018. Relevantly, the Act defines critical infrastructure to include water, electricity, port and gas assets and any other asset which is prescribed by the rules as a critical asset. The CIC brings together expertise and capability across the Australian Government to manage the potentially complex national security risks of sabotage, espionage and coercion posed by foreign involvement in Australia's critical infrastructure. It important to note that the CIC is not a part of FIRB and does not change the law on foreign investment approvals in Australia; instead it has a broad mandate that
includes assisting the foreign investment review process by providing clear, consolidated and early national security advice to inform the Treasurer's national interest decision on foreign investment proposals.

One of the CIC's key functions is to identify and manage national security risks affecting our critical infrastructure, with an immediate focus on the assets and sectors identified as the highest risk. In assessing the risks that may arise or increase from a change of ownership to Australia's critical infrastructure, the CIC will conduct a strategic risk assessment and simultaneously design proportionate mitigation strategies.

The CIC will conduct its assessment in close consultation with State and Territory Governments, regulators and private owners and operators to reduce the potential for malicious actors to gain access to, and control of, Australia's critical infrastructure through ownership, offshoring, outsourcing and supply chain arrangements.

4. Lessons/takeaways

4.1 There are two processes that are separate, with different statutes, tests and regulators/decision makers. The Treasurer can oppose a transaction on national interest grounds, notwithstanding that the ACCC does not oppose the transaction, following the separate processes and applying the separate tests.

However, the two processes interact. The interaction between the two processes and regulators is addressed in the ACCC’s Informal Merger Review Process Guidelines 2013 (ACCC Guidelines)\(^7\) and Australia’s Foreign Investment Policy (Policy)\(^8\).

The Policy states:

\[\textit{The Government favours diversity of ownership within Australian industries and sectors to promote healthy competition. The Government considers whether a proposed investment may result in an investor gaining control over market pricing and production of a good or service in Australia.\} \]

\[\textit{For example, the Government will consider a proposal that involves a customer of a product gaining control over an existing Australian producer of the product, particularly if it involves a significant producer.}\]

\[\textit{The Government may also consider the impact that a proposed investment has on the make-up of the relevant global industry, particularly where concentration could}\]

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lead to distortions to competitive market outcomes. A particular concern is the extent to which an investment may allow an investor to control the global supply of a product or service.

The Australian Competition and Consumer Commission also examines competition issues in accordance with Australia’s competition policy regime. Any such examination is independent of Australia’s foreign investment framework.


The Foreign Investment Regime Proposals by foreign persons to undertake investment in Australia that are subject to the Foreign Acquisitions and Takeovers Act 1975 or Australia’s Foreign Investment Policy are examined by the Foreign Investment Review Board (FIRB) to ensure that they are not contrary to the national interest.

The FIRB advises the Treasurer, who is responsible for making decisions on whether or not foreign investment proposals should be allowed to proceed.

Although the foreign investment regime is clearly distinct from the ACCC’s role in the assessment of mergers under Australian law, Australia’s Foreign Investment Policy states that the impact of the transaction on competition is a relevant factor when considering the national interest. Where competition considerations are relevant to a particular proposal, the FIRB will consult with the ACCC.

When the FIRB refers a matter to the ACCC for comment, the ACCC provides the FIRB with advice on the ACCC’s s. 50 assessment. Where a FIRB referral relates to a transaction that is the subject of a public review by the ACCC, the ACCC will advise the FIRB of this fact and provide details of the indicative timeline.

Where the ACCC requires further information about a proposal that the FIRB has notified to the ACCC, the ACCC will in most cases seek that information directly from the merger parties.

\section{4.2} The consultation between FIRB and the ACCC on competition matters in effect means that ACCC clearance is mandatory for transactions which require foreign investment approval, because in practice, foreign investment approval will not be granted if the ACCC has competition concerns. In that sense, FIRB defers to ACCC on competition assessment and the ACCC is the appropriate body to undertake that assessment.

\section{4.3} However, the opposite is not the case - foreign investment might be opposed by the Treasurer on national interest grounds, notwithstanding ACCC clearance has been secured.
CANADA'S FOREIGN INVESTMENT and COMPETITION/Antitrust review REGIMEs

Foreign investment review under the *Investment Canada Act*

Foreign investment in Canada, which has been regulated since the early 1970s, is governed primarily under the *Investment Canada Act* (the “ICA”).<sup>10</sup> 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 the review of foreign investments that “could be injurious to national security”.<sup>11</sup> The ICA applies to acquisitions of existing Canadian businesses by non-Canadian investors, as well as instances where non-Canadians establish new Canadian businesses. The Minister of Innovation, Science and Economic Development (the “Minister”)<sup>12</sup> has statutory authority over the majority of investments subject to the ICA.

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

In 2019, the reviewable threshold for direct, private sector investments involving World Trade Organization (“WTO”) investors was C$1.045 Billion in enterprise value. The 2019 threshold for investors from countries with which Canada has a trade agreement is an enterprise value of C$1.568 Billion. As of January 1, 2019, these thresholds will be adjusted annually, reflecting any change in Canada’s gross domestic product.<sup>13</sup>

The reviewable threshold for direct acquisitions either by non-WTO investors or of Canadian “cultural businesses” is C$5 Million.<sup>14</sup> For direct acquisitions by State-Owned Enterprises (“SOEs”) from WTO-member countries, the statutory threshold in 2019 for the book value of acquired assets is C$416 Million. 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

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<sup>10</sup> *Investment Canada Act*, R.S.C, 1985, c. 28 [ICA].
<sup>11</sup> ICA, supra note 10, § 2.
<sup>12</sup> Note, for investments in certain cultural industries, the Minister of Canadian Heritage has responsibility to enforce the net benefit provisions of the ICA.
include entities controlled or influenced directly or indirectly by a foreign government.\textsuperscript{15} The ICA allows the Minister to make factual determinations regarding SOE control. This allows for investments by Canadian-controlled investors that are “controlled in fact” by an SOE to be subject to review under the ICA.

Foreign investments to establish a new Canadian business or acquire control of an existing Canadian business falling below the reviewable thresholds are considered notifiable, and not subject to Ministerial review under the net benefit regime. In such cases, a foreign investor must only file a notice with the IRD up to 30 days following closing.

However, the Minister can review investments that “could be injurious to national security” regardless of the size of the transaction or whether the investment would result in the acquisition of control by a foreign investor. Following a national security review, the Minister can allow the investment to proceed or refer it to the Governor-in-Council. The Governor-in-Council can then block the investment (either by preventing closing for a proposed transaction or ordering a divestiture for a completed transaction) or require undertakings and/or stipulate terms and conditions necessary for allowing an investment to go forward.

\textit{Review Timeline}

The timeline for net benefit and national security reviews can add uncertainty to proposed transactions. Under the net benefit review, the Minister has 45 days to review investments, which period may, and typically is, unilaterally extended for a further 30-day period if required. Further extensions require the investor’s consent.

More problematic, however, is that the national security review process runs in parallel to the net benefit review, and can total up to 200 days if required, or longer (on consent). If the Minister believes an investment could be injurious to national security, the Governor-in-Council may, within 45 days following receipt of a notification or application for review under the net benefit provisions, order a formal national security review. Alternatively, the Minister may, within that same 45-day period, notify the investor that such a review may be commenced.\textsuperscript{16} If the transaction is not reviewable or notifiable, however (for example, where no acquisition of control occurs), this same 45-day period only begins to run after the closing of the transaction.\textsuperscript{17}

Where a formal national security review is ordered, such review may itself take 45 days to complete, which period may be unilaterally extended a further 45-day period. Following the review, unless the Minister sends a notice that no further action will be taken, he or she may refer

\textsuperscript{15} ICA, supra note 10, § 3.
\textsuperscript{16} Following which notice the Government has a further 45 day period in which to commence a review. ICA, supra note 10, § 25.3(1); National Security Review of Investments Regulations, supra note 6, § 4.
\textsuperscript{17} ICA, supra note 10, § 25.2(1); National Security Review of Investments Regulations, SOR/2009-271, § 2.
the matter to the Governor-in-Council, which then has 20 days in which to take any measures advisable to protect Canada’s national security.18

Net benefit to Canada

The ICA lists a number of factors used to determine whether a transaction is a “net benefit” to Canada, including:

I. the effect of the investment on the level and nature of economic activity in Canada;

II. the degree and significance of participation by Canadians in the business;

III. the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety;

IV. the effect of the investment on competition within any industry or between industries in Canada;

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.19

The broad language used in the ICA provides discretion to the Minister in his or her decision to approve or deny a transaction.20 In making a net benefit assessment, consideration is given to the investor’s plans for the Canadian business, proposed undertakings, and any representations made by other federal departments and agencies, any provinces likely to be significantly affected by the investment, and the Competition Bureau (the “Bureau”).21

Although not mandatory under the ICA, the Minister generally requires undertakings in reviewable transactions. These undertakings are legally enforceable commitments to the Government of Canada and usually have a term of three years. Undertakings often address matters such as employment levels in Canada, Canadian participation in a company’s management and its board of directors, capital expenditures, research and development and charitable contributions.22

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18 ICA, supra note 10, § 25.4(1); National Security Review of Investments Regulations, supra note 6, § 6.
19 ICA, supra note 10, § 3.
21 ICA, supra note 10, § 19.
State-Owned Enterprise guidelines

Within the net benefit assessment, investments by foreign SOEs must meet specific guidelines. As detailed above, the financial thresholds for review are lower for SOEs, increasing the likelihood of review of SOE transactions.

The SOE guidelines direct the Minister to prevent foreign states from using Canadian acquisitions to secure foreign state objectives and ensure that SOEs mirror private sector behaviour. In doing so, the Minister may consider both the SOE’s governance and its commercial orientation to determine whether an SOE acquisition provides a net benefit to Canada.\(^{23}\) SOEs may be required to satisfy the Minister that they are free from political influence and will adhere to Canadian laws, implement standards and practices that promote sound corporate governance and transparency, adopt free market principles, and make positive contributions to the productivity and industrial efficiency of the Canadian business.\(^{24}\) Accordingly, an SOE may be required to provide additional undertakings, such as those relating to the appointment of Canadians as independent directors on the entity’s board.\(^{25}\) Unlike most undertakings required by non-SOE investors, SOE undertakings can continue indefinitely or for as long as the investor is an SOE.\(^{26}\)

Investments injurious to national security

As mentioned, the national security review regime runs in parallel with the net benefit review. The national security review regime allows investments to be reviewed where the Minister, following consultation with the Minister of Public Safety and Emergency Preparedness, considers that the investment could be injurious to national security and the Governor-in-Council makes an order for review.\(^{27}\) A national security review may arise in relation to any transaction involving a foreign investor, which can raise issues in transactions that otherwise are not reviewable or notifiable. The national security regime does not provide for a formal pre-acquisition clearance procedure.

The government released guidelines in December 2016 as to when it will order, and what it will consider in, a national security review.\(^{28}\) While neither the ICA nor the guidelines provide a definition of “national security,” the guidelines list a number of factors that the Minister or the


\(^{27}\) ICA, supra note 10, § 25.3.

Governor-in-Council may consider under the national security provisions of the ICA. The factors include, among other things, the potential:

VII. effects of the investment on Canada’s defence capabilities and interests;

VIII. effects of the investment on the transfer of sensitive technology or know-how outside of Canada;

IX. impact of the investment on the security of Canada’s critical infrastructure;

X. impact of the investment on the supply of critical goods and services to Canadians or the Canadian government;

XI. for the investment to enable foreign surveillance or espionage, hinder current or future intelligence or law enforcement operations, and/or involve or facilitate the activities of terrorist organizations or organized crime; and

XII. impact of the investment on Canada’s international interests, including foreign relationships.

The guidelines encourage early engagement with the IRD when any of these factors may be present.

Enforcement

Where the Minister believes that a non-Canadian has breached the ICA, for example by implementing an investment that required prior approval without first obtaining such approval, or failing to comply with a written undertaking, the Minister may send a demand to the non-Canadian, requiring the non-Canadian to cease the contravention, to remedy the default, to show cause why there is no contravention, or to justify non-compliance with any undertakings provided.29

Where a non-Canadian fails to comply with such a demand, the ICA provides for an application to be made to a superior court. The court may make any order that it determines is required in the circumstances, including an order imposing a penalty not exceeding C$10,000 for each day on which the person or entity is in contravention. Such penalty is recoverable as a debt and any breach of a court order would constitute contempt of court. An appeal may be brought from any such order by the court.30

Cross-border coordination

While Canada has not expressly indicated the extent to which there is any coordination with other countries regarding foreign investment review either under the net benefit regime or on national

29 ICA, supra note 10, § 39.
30 ICA, supra note 10, § 40.
security grounds, a reasonable level of coordination can be anticipated between Canada and the United States with respect to national security reviews. In particular, the introduction in the guidelines cited above of the factor related to the “impact of the investment on Canada’s international interests, including foreign relationships,” provides a clear indication that a national security review will consider the implications that a particular transaction may have on Canada’s international partners. It follows that coordination and input between Canada and those partners in each other’s review processes is likely.

**Competition review under the Competition Act**

Canada’s competition law is governed by the Competition Act[^31], a federal statute that contains both criminal and civil provisions aimed at preventing harmful anticompetitive 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.[^32]

The Competition Act empowers Canada’s Commissioner of Competition (the “Commissioner”) to challenge mergers that are likely to prevent or lessen competition substantially in a relevant market.[^33] 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.[^34] The Tribunal, an independent adjudicative body, is distinguished from 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 Innovation, Science and Economic Development, which is headed by the Minister.

**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.[^35] The Competition Act includes a non-exhaustive list of factors that the Tribunal and the Bureau may consider in evaluating whether a merger is likely to prevent or lessen competition substantially. These factors include:

XIII. the extent of foreign competition in the market;

[^31]: R.S.C., 1985 c. C-34 [Competition Act].
[^32]: Competition Act, supra note 31, § 1.1.
[^33]: Competition Act, supra note 31, § 92.
[^34]: Competition Act, supra note 31, § 97.
[^35]: Competition Act, supra note 31, § 92(1).
XIV. the availability of substitute products in the market;
XV. barriers to entry into the market;
XVI. the effect of the transaction on barriers to entry into the market;
XVII. the extent to which effective competition would remain in the market after the merger;
XVIII. any removal of effective competitors in the market; and
XIX. the extent of innovation in the market.\textsuperscript{36}

Even if the Tribunal determines that a proposed merger will result or likely result in substantial anticompetitive 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 anticompetitive effects, the Tribunal is prohibited from making an order that frustrates the merger.\textsuperscript{37} Notably, the Competition Act does not include public interest or national interest concerns among the factors to be considered by the Bureau and the Tribunal.

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 anticompetitive effects of the transaction. Once registered with the Tribunal, this consent agreement has the same force and effect as a Tribunal order. If 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 anticompetitive 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.

\textit{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.\textsuperscript{38} Transactions subject to the thresholds in Part IX of the Competition

\begin{footnotesize}
36 Competition Act, \textit{supra} note 31, § 90.1(2).
37 Competition Act, \textit{supra} note 31, § 90.1(4).
38 The size of the parties threshold is met where the parties to the transaction (together with their affiliates) have aggregate Canadian assets that exceed C$400 Million or gross revenues from sales in, from, or into Canada that exceed C$400 Million in aggregate (Competition Act, \textit{supra} note 31, § 109(1)). In order for the pre-merger notification requirement to be triggered, the size of the transaction must also exceed a threshold, which is C$92 Million for 2018. This threshold value is determined annually according to an indexing mechanism set out in the Competition Act, which is tied to the Canadian gross domestic product.
\end{footnotesize}
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 an 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 an 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, with some very complex cases taking considerably more time.

CANADIAN CASES

With regard to foreign investment and competition/antitrust review in Canada, three cases that have attracted significant public attention are:

- BHP Billiton PLC (Australia) attempted acquisition of Potash Corporation of Saskatchewan Inc. (“BHP/Potash”), 2010;
- CNOOC Ltd. (China SOE) acquisition of Nexen Inc. (“CNOOC/Nexen”), 2012; and
- Hytera Communications Co. Ltd. (China) acquisition of Norsat International Inc. (“Hytera/Norsat”), 2017.

These three cases focus on three areas of the Investment Canada Act, namely, net benefit/national interest (BHP/Potash), state-owned enterprises (CNOOC/Nexen), and national security (Hytera/Norsat).

A. BHP/Potash

In August 2010, Australian mining company BHP Billiton Ltd. (“BHP”) launched a US$38.6 Billion hostile takeover bid for Canadian company Potash Corporation of Saskatchewan Inc. (“PCS”). PCS, a former crown corporation of the province of Saskatchewan, was the largest potash producer in the world and a major contributor to Saskatchewan’s tax base.

Counsel for PCS noted that the Bureau looked primarily at capacity and market share and found there was no overlap between the companies due to BHP’s historical lack of activity in the potash production industry. Counsel for PCS did not have the impression that the Bureau considered any broader public interest or national interest concerns in its review and ultimate no-action letter.

However, the acquisition raised a number of issues under the ICA. Procedurally, the initial 75-day review period under the ICA was extended to address a number of concerns. In particular, the highly political nature of the transaction attracted a significant amount of attention and

39 Competition Act, supra note 31, § 123(1).
involvement from the Prime Minister’s Office (“PMO”) and from the premier of Saskatchewan at the time. Counsel for PCS noted that the then upcoming Saskatchewan election likely played a significant role in the interest of the provincial government and corresponding attempts to preserve such an important local company, going as far as attempting to classify potash as a strategic industry.

From the perspective of the net benefit review, counsel for PCS noted that BHP agreed to a list of undertakings, which were made public, that was more extensive and interventionist than in any deal they had ever seen. Despite the undertakings, Industry Minister Tony Clement issued an “interim negative” decision, stating that the takeover would not provide a net benefit to Canada. This decision was followed two days later by the Competition Bureau’s no-action letter. In the weeks that followed, BHP withdrew its bid.

**CNOOC/Nexen**

In July 2012, Chinese state-owned oil producer CNOOC Ltd. (“CNOOC”) launched a US$15.1 Billion takeover bid for Canadian oil sands company Nexen Inc. (“Nexen”). The transaction raised concerns over both the protection of Canadian interests in the oil sands and the ownership and operation of companies in Canada more generally by foreign SOEs.

CNOOC’s takeover bid occurred amid an exceptional wave of SOE investment in Canada, which began in 2011 and featured four multi-billion-dollar transactions in the oil and gas industry. First, CNOOC acquired OPTI Canada, an oil sands producer, in July 2011. Soon after, in October 2011, Sinopec International Pretroleum Exploration and Production Corporation acquired Canadian oil and gas explorer Daylight Energy Ltd. A Malaysian SOE, PETRONAS, announced its acquisition of Progress Energy Resources Corp., a non-oil sands oil producer, in June 2012. This preceded CNOOC’s takeover bid for Nexen by only a month. Given the proximity of the bids, CNOOC’s and PETRONAS’ acquisitions of Canadian oil and gas companies were considered concurrently in the context of significant foreign investment in a vital Canadian industry.

Counsel for both CNOOC and Nexen noted that the Bureau did not raise any major concerns over the transaction. Counsel for Nexen further noted that the Bureau did not issue any formal decision but instead allowed the waiting period to expire. Counsel for both parties agreed that there was little consideration, if any, given by the Bureau to matters beyond the issue of substantial lessening of competition, such as national interest or public interest concerns.

In the ICA review process, the IRD focused on the SOE guidelines in its net benefit review. Counsel for CNOOC noted that the SOE element of the transaction was the primary focus of the IRD, particularly with respect to social and economic issues related to China. There was no formal review on the basis of national security, although there was a screening process to determine whether there were any national security issues in Canada. Counsel for Nexen highlighted three considerations that differed from standard transactions:
1. Clarifying the standard of review to be applied to SOE investment in Canada;

2. Limiting the degree of concentration of Canada’s oil and gas industry in the hands of SOEs; and

3. Ensuring that investments by SOEs in Canadian business met appropriate corporate governance and commercial orientation standards in Canada.

Of those issues, the concentration of SOE ownership of Canada’s oil and gas industry was a focal point of the Canadian Prime Minister at the time, Stephen Harper.

Procedurally, multiple extensions beyond the initial 75-day review period took place. Counsel for Nexen noted that there were multiple meetings at Investment Canada to negotiate the necessary undertakings; however counsel for CNOOC also noted that the list of undertakings themselves has not been published. Despite the exceptional ultimate involvement of the PMO in the announcement of the outcome of the ICA review, counsel for Nexen noted that all of the interactions throughout the review process were with the IRD.\footnote{Ian Austen, “Canada Clears $15 Billion Chinese Takeover of an Energy Corporation” \textit{The New York Times} (8 December 2012), 1-2; Nathan Vanderklippe, Shawn McCarthy \& Jacquie McNish, “Harper’s line in the oil sands”, \textit{The Globe and Mail} (10 December 2012), 1, 4.}

As mentioned, the PMO took a relatively active role in the announcement of the ICA review decision. Counsel for Nexen noted that, concurrently with Industry Canada’s approval of the transaction, the Canadian government announced revised rules for SOE investments, which included the prohibition of acquisitions of control by SOEs of Canadian oil sands businesses except for in exceptional circumstances and the careful monitoring of acquisitions of control by SOEs in other sectors of the economy. Further, this transaction and other SOE investment in Canada also prompted a series of 2013 amendments to the ICA which, among other things (a) significantly broadened the definition of an SOE to include a foreign government or an entity that is controlled or influenced, directly or indirectly, by a foreign government; (b) provided the Minister with discretion to make determinations regarding control-in-fact and acquisitions of control in respect of SOEs; and (c) established a separate, and lower threshold for the review of acquisitions of control by SOEs.\footnote{‘Bill C-60: An Act to implement certain provisions of the budget tabled in Parliament on March 21, 2013 and other measures’, 1st Reading, 41st Parl., 1st Sess., [Ottawa]: Library of Parliament, 2013, online: www.parl.gc.ca.}

\textbf{Hytera/Norsat}

In March 2017, Canadian communications equipment manufacturer Norsat International Inc. (“Norsat”) announced that it had agreed to a purchase by Chinese firm Hytera Communications Co. Ltd. (“Hytera”). The total consideration ultimately paid was US$67 Million (C$85 Million). Notably, Hytera is not state-owned. Norsat’s products have military application. It makes
microwave components, portable satellite systems, maritime communications equipment and RF antenna products. In January 2017 Norsat announced that it had sold portable satellite terminals to the United States Department of Defense in a deal worth $3.3 Million.

Counsel for Hytera noted that due to the value of the transaction, it was non-notifiable under the Competition Act and subject only to post-closing notification under the ICA.

The Canadian government conducted a detailed review of the transaction. Counsel for Hytera noted that the government’s articulation of the national security guidelines in the ICA review process proved to be valuable in guiding the process. In this respect, the parties recognized that a number of factors in the national security guidelines were met by the transaction and, as the government encourages, engaged the IRD early in the transaction process, before the public announcement, in order to allow the IRD time to analyze the transaction and facilitate the national security screening process prior to the formal notification provided by Hytera in March 2017.

Procedurally, the early engagement of the IRD allowed the government to prepare questions with respect of the transaction, many of which counsel for Hytera noted came from security agencies, and addressed areas such as the ownership and control of Hytera, its connection to the Chinese State, and product-specific questions posed to Norsat. As mentioned, prior to the closing of the transaction, Hytera filed a formal notification with the IRD, triggering an initial 45-day period to determine if the transaction might be injurious to national security. The notification was supplemented by the parties’ answers to the government’s initial inquiries. The government extended the initial 45-day period by a further 45 days; however, at the completion of the extended period, no formal national security review was ordered. The transaction was cleared.

From a public interest perspective, counsel for Hytera noted that a cursory review of Norsat’s website reveals that its customer base included governments and public sector purchasers, such as police departments and militaries both in Canada and abroad.

From a national interest perspective, Norsat’s roots as a Canadian-born and developed company drew interest from the Canadian government and other parties; however, the transaction was not subject to net benefit review, and counsel for Hytera noted that the national security provisions of the ICA ultimately guided the process.

As mentioned, in clearing the transaction, the Canadian government did not order a formal national security review, a fact that attracted some criticism from opposition politicians and retired security officials within Canada, as well as U.S. legislators. 42 The government responded by making clear

that a detailed review, albeit one undertaken as part of the screening process, had indeed been conducted, which included consultation with the security apparatus in the U.S.

Counsel for Hytera further noted that the national security process, by design, is not transparent. The process necessarily consists of a one-way flow of information, with the IRD asking questions to the parties, but not providing feedback on the parties’ answers to those questions. There was no public reporting of the process until Norsat announced publicly that Hytera had received notice under the ICA that there would be no national security review and the transaction was permitted to close.43

LOOKING AHEAD – TAKEAWAYS FOR PRACTITIONERS AND POLICYMAKERS

Competition and foreign investment reviews in Canada require careful coordination both in terms of timing and message. It is important for the parties to the transaction to provide consistent information to each of the authorities. The IRD is likely to consult the Bureau with respect to the net benefit factor related to the effect of the investment on competition within any industry or between industries in Canada.

That said, with respect to the Bureau, the practitioners we interviewed were of the view that there is little-to-no substantive overlap between the Bureau and the IRD in transaction review processes, to the extent that the Bureau reviews any competition-related issues in a particular transaction. While there may be procedural overlap and communication between branches, any public interest and national interest concerns, based on our review of the above transactions, are dealt with under the ICA.

Reviews under the Competition Act and the ICA also have timing implications for a proposed transaction. For example, where there are considerable competition issues in a transaction, the Minister might not issue a clearance until the Bureau has completed its review. While in our experience it is not the Bureau’s usual practice, there also is a possibility that the Bureau may not complete its assessment until the ICA review process is concluded, especially where there are significant foreign investment issues at play.

It follows from the recently increased financial thresholds that, generally speaking, only the largest transactions will be subject to a net benefit review. Because of the high-profile nature of these transactions, foreign investors must take into account considerations beyond procedural and

43 Following our study, the Canadian government blocked a proposed US$1.5 Billion acquisition of Aecon Group Inc., a Canadian construction firm, by a Chinese SOE. That decision was made in May 2018 on the basis that it would be injurious to national security, following a formal national security review launched under the ICA. That decision has been the subject of newspaper articles (see Robert Fife & Steven Chase, “Ottawa blocks Chinese takeover of Aecon after security review”, The Globe and Mail (24 May 2018), A1, A6; and Jesse Snyder, “Ottawa Blocks Aecon Takeover”, The National Post (24 May 2018) A1, A8). A detailed review of that decision is beyond the scope of this study.
substantive legal issues. In some cases there may be a substantial political element, including public interest considerations, to the net benefit review process and it is important to engage professionals in the public relations and government relations sectors to help position the messaging to both the government and the Canadian public regarding the benefits of the investment to Canada.

While Canada 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 potentially parallel considerations of economic protectionism and national security, which can influence the approval of foreign investment in Canada.

Those undertaking major investments in sensitive economic areas, such as Canada’s oil and gas sectors, or any investments that touch on the enumerated national security factors, should engage the IRD early in the investment process to identify and narrow the focus of any policy concerns that may be raised in the reviews.

In addition to engaging the IRD early in the planning stages of a transaction, it is useful to have conversations with clients regarding the publicly-available guidelines in order to help clients understand the expectations of the Canadian government when an issue arises under one or more of the enumerated factors in the guidelines. Any apprehension that clients might have had historically to engaging in a voluntary process has become much easier to overcome in an environment where it is possible to point to guidelines that publicly recommend parties approach the IRD early on.

Throughout the screening and review processes, it is helpful to be cooperative with the IRD by providing as much disclosure as possible, to present a full picture of the facts and allow the screening process to focus on areas of significant public interest and possible national security considerations. This allows for more efficient use of the IRD’s time and potential to narrow the scope of any concerns more expeditiously. That being said, some issues may arise during a screening process that will elevate the likelihood of a full national security review; that risk should be discussed with a client.

While Ministerial decisions approving a proposed transaction are published and, where they are not commercially sensitive, a summary of the undertakings is generally given, the Minister is under no obligation to publicize his or her reasons for rejecting reviewable investments. Commentators have suggested that the IRD “create a ‘jurisprudence’ of decisions that could inform future

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44 Note, the Minister must provide reasons for rejecting a proposed investment to the non-Canadian investor – ICA supra note 6, § 23.1.
investors of the commitments that are likely to be required.\textsuperscript{45} However, the federal government has not indicated any interest in changing this process at this point in time.

\textsuperscript{45} Facey & Krane, supra note 20 at xiv.
In 2008, the People’s Republic of China (PRC or China) enacted its first comprehensive antitrust law, the Antimonopoly Law or AML.\(^{46}\) One of the stated purposes of the AML is to protect public interests, though the law and regulations enacted under it to date provide little guidance as to how public interest will be considered in competition investigations or enforcement decisions. While decisions by the competition enforcement authority, the State Administration for Market Regulation (SAMR) and its predecessor agencies,\(^{47}\) have sometimes referenced public interest considerations among the stated bases for published decisions related to matters involving mergers and acquisitions as well as to conduct violations, these decisions do not explain the role public interest played in such decisions except in a small number of instances, most of which involve no non-Chinese parties. Moreover, many decisions made by SAMR and its predecessors have not generated published decisions. The AML and regulations promulgated thereunder contain no reference to the concept of national security and no decisions under the AML have been explicitly been based on considerations of national security, as contrasted with public interest.

Prior to 2011, reviews of mergers and acquisitions involving non-Chinese entities were conducted as part of the Foreign M&A reviews undertaken by the Treaty and Law Department of MOFCOM. Those reviews included considerations of, among others, competitive effects and national security. After enactment of the AML, all reviewing of mergers and acquisitions were conducted by the Antimonopoly Bureau of MOFCOM pursuant to the AML, which contains no reference to a consideration of national security. On Feb. 3, 2011, the China State Council issued the Circular on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises for Foreign Investors (Circular 6).\(^{48}\) Circular 6, which came into effect on March 4, 2011, created for the first time a stand-

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\(^{46}\) An unofficial English translation of the AML is available at the site of the China Ministry of Commerce (MOFCOM) at http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml

\(^{47}\) On March, 17, 2018, the China National People’s Congress, approved a sweeping government restructuring plan that included the creation of SAMR, and transferred to SAMR the enforcement and investigation powers set forth in the AML and previously conducted by three separate entities: the Antimonopoly Bureau of the Ministry of Commerce (MOFCOM); the Price Supervision and Market Regulation Bureau of the National Development and Reform Commission (NDRC); and the Antimonopoly Bureau of the State Administration for Industry and Commerce (SAIC). Before the advent of SAMR, AML investigation and enforcement responsibilities for matters involving merger review, conduct involving price conduct, and conduct involving non-price conduct were allocated to the AML-related offices of MOFCOM, NDRC, and SAIC, respectively. SAMR also took over the responsibilities previously held by several other agencies, including the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), the Certification and Accreditation Administration (CAC), the Standardization Administration of China (SAC), and the China Food and Drug Administration (FDA).

\(^{48}\) For the original Chinese text, and an unofficial English translation, of Circular 6, seehttps://www.jonesday.com/files/upload/PRC%20State%20Council%20NSR%20Notice.pdf
alone national security review process for such mergers and acquisitions in certain sensitive sectors of the Chinese market. It granted Chinese authorities broad discretion to review types of transactions not previously subject to review under the Foreign M&A Rules, and to prohibit transactions or to take effective measures to remedy the national security concerns before such transactions may be allowed to proceed. The Circular 6 national review process takes place separately from, and generally at the same time as, the review of potential competitive effects of a transaction pursuant to the AML.
I. Consideration of Public Interest in Competition Investigations and Enforcement Actions Under the AML

(a) Article I of the Antimonopoly Law (AML) states that the AML is enacted for the purpose (among others) of protecting the public interest. This purpose applies to all other provisions of the AML, including those related to the review of mergers and acquisitions, as well as concerted or unilateral competitive conduct.

(b) Article I of the AML reads as follows: “This law is enacted for the purposes of preventing and prohibiting monopolistic conduct, safeguarding fair market competition, improving efficiency of economic operation, protecting the consumer and public interest, and promoting the healthy development of the socialist market economy.”

(c) The only other provision of the AML addressing a concept related to the public interest is a reference to “public welfare” in Article 15(4), which provides an exemption from the provisions of Articles 13 and 14 that prohibit as anticompetitive certain horizontal and vertical agreements, if it is proven that such an agreement “realiz[es] public welfare, such as conserving energy, protecting the environment, and providing disaster relief.”

(d) Numerous rules, regulations and guidance promulgated by the predecessors of SAMR, many of which have been adopted as SAMR rules, regulations, and guidance, without substantive revisions, include references to protection of the public interest as one of the general purposes of AML enforcement, consistent with the text of Article I, quoted above. None of these, however, provide any additional guidance on how public interest is or should be analyzed in the context of any particular type of AML violation or investigation.

(e) The AML and regulations promulgated under the AML contain no references to the concept of national security and no published decisions under the AML, whether by agency or court, refer to the concept. However, as discussed below, at least one decision by the Antimonopoly Bureau of the Ministry of Commerce involving non-Chinese parties was expressly based on public interest considerations in a market generally viewed by the Chinese government as a market as broadly related to the national security of the PRC.

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49 Unofficial translation, from Harris, et al., Anti-Monopoly Law and Practice in China at 373 (Oxford Univ. Press).

50 Id.
(f) In the *Maersk/MSC/CMA CGM (P3 Alliance)* merger decision in 2014, MOFCOM announced its decision in an AML review of a proposed shipping consortium (the P3 Alliance) among Danish, French and Swiss shipping companies (the Transaction Parties). Under the proposed alliance, the parties would form a network center in the U.K. responsible for the operational affairs of the parties international liner shipping business logistics on certain international trade routes. Focusing its review on Asia-Europe trade routes as the primary relevant market, MOF COM found that the three parties combined had a combined market share of 46.7 percent, that the consortium would create increased barriers to entry and adverse impacts on competitors and “other industry players.” The decision did not include much information regarding the competitive analysis and some commentators at the time noted that ocean shipping, particularly in Asian waters, is viewed as activity that China regards as highly important to China’s public interests, including national security. Though the decision in *Maersk* that prohibited this transaction does not refer to national security, it did base its decision on the finding that “[the participating undertakings have failed to prove that the beneficial effects of the concentration would comply with the public interest. Therefore, [MOFCOM] has decided to prohibit the concentration of undertakings by the Transaction Parties.”

(g) Though neither national security nor public interest was referred by in MOFCOM’s decision to block the proposed acquisition by the Coca-Cola Company of the Huiyuan Fruit Juice Company Ltd. in 2009, it was suspected by some that national security concerns may have played a role in the decision. Though the decision itself did not mention national security, and some experts such as Wang Xiaoye dismissed this suspicion, others concluded that public interest, or national interest, considerations lay behind MOFCOM’s apparent desire to protect the Huiyuan brand as a “Chinese national brand,” as discussed by some MOFCOM staffers in their publicized presentations.


II. Consideration of National Security Mergers and Acquisitions Involving One or More Non-Chinese Entities

(a) Proceedings under the Circular on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises for Foreign Investors (Circular 6) that has been in effect since 2011 are not public, and no decisions under Circular 6 are published officially.

(b) M&A security reviews under Circular 6 are conducted by an Inter-Ministerial Panel on Security Review of M&A of Domestic Enterprises by Foreign Investors (the “Inter-Ministerial Panel”), which was established pursuant to Article III of Circular 6. Article III provides that “[t]he Inter-Ministerial Panel, led by the [NDRC] and [MOFCOM] under the leadership of the State Council, will work with relevant government agencies to carry out M&A security review, in accordance with industries and sectors where the foreign investors’ M&A takes place.”

(c) Article III also provides that “[t]he main responsibilities of the Inter-Ministerial Panel are as follows: analyzing the impact of foreign investors’ mergers and acquisitions of domestic enterprises on national security; studying and coordinating key issues in security reviews of foreign investors’ mergers and acquisitions of domestic enterprises that are subject to security review; conduct security review of mergers and acquisitions covered by this Circular, and render decisions.” Because of the multiagency nature of the review, the Circular 6 review has sometimes been compared to the processes of the Committee on Foreign Investment in the United States (CFIUS) under U.S. law.\[55\]

(d) In March of 2019, the National People’s Congress enacted a new Foreign Investment Law of the People’s Republic of China\[56\] which will come into effect as of January 1, 2020. Article 35 of that law states that “The State establishes a system of security review for foreign investment to review the foreign investment that affects or may affect national security. The security review decision made in accordance with the law is final.” To date, there have been no indications that the enactment of the law will result in the repeal, replacement, or amendment of Circular 6, or in any changes to the procedures currently used for reviews under Circular 6, though such changes are possible.

\[55\] See generally the discussion of CFIUS on the U.S. Department of the Treasury website at https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius

\[56\] See http://language.chinadaily.com.cn/a/201903/22/WS5c94798ca3104842260b205f.html
Commission of Inquiry into State Decisions on Industrial Policy

In late 2017, the French National Assembly launched a temporary “commission of inquiry” to investigate the recent trend of foreign acquisitions of French companies. Particularly troubling to the commission was the French industrial policy that permitted the foreign takeover of the country’s “industrial jewels,” namely General Electric’s (GE’s) 2014 acquisition of Alstom’s energy business, Nokia’s 2015 acquisition of Alcatel-Lucent (Alcatel), Fincantieri’s 2017 acquisition of STX France, and Siemens’ attempted 2017 acquisition of Alstom’s rail transportation business. Although these mergers were ultimately cleared under the country’s foreign investment rules, many French politicians were alarmed at the loss of traditional French businesses and that these deals would lead to layoffs. These fears culminated in the formation of this six-month commission of inquiry, which concluded with the publication of a report in April 2018.

The commission’s report itself contains fifty discrete policy, regulatory, and legislative proposals organized across ten key themes. As the report is still new, the exact implications of the commission’s investigation are still unclear. It will be interesting to see how the recommendations from the commission are considered by the French Parliament and administrative bodies. Perhaps more significantly, some of the commission’s proposals call for sweeping competition policy changes at the European level. Since these developments could have wide-ranging effects on practitioners and investors doing business in France, it is important to continue to monitor how the commission’s proposals are adopted in the future.

This case study seeks to analyze the commission of inquiry and the events leading up to it. First, this case study provides an overview of the structure of government in France, with a particular focus on the National Assembly and the administrative bodies at the center of the commission’s investigation. Second, this case study addresses the French foreign investment rules and the industries that require prior approval by the Ministry of the Economy and Finance (Ministry of Economy). Second, this case study analyzes several recent foreign mergers that led to the

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57 Please note that all French translations in this case study were made by Google. While the authors made all efforts to maintain accuracy, the translations or interpretations may contain slight errors. As a result, the translations provided by Google may have been edited in order to improve comprehension or readability. Additionally, although originally in French, documents from the French National Assembly and Commission of Inquiry are only cited in English for the sake of brevity.


59 Id. at 1.
formation of the committee. As discussed above, these mergers include GE/Alstom, Nokia/Alcatel, Fincantieri/STX, and Siemens/Alstom, along with several smaller deals. Third, this case study discusses the actual proceedings of the commission of inquiry, including a summary of the different testimonies during these hearings. The case study then describes the findings and proposals published in its report. Finally, the case study concludes by providing several takeaways for stakeholders and practitioners, along with policymakers and politicians in France.

I. Overview of the Structure of Government

France is a unitary republic made up of executive, legislative, and judiciary branches. The President acts as the head of state and is elected by the French citizenry. The President appoints a Prime Minister, who serves as the head of government, and several ministers in his cabinet. Ministers lead their respective ministries and are responsible for supervising the government agencies contained within his or her ministry’s jurisdiction. For example, the Minister of the Economy and Finance (Minister of Economy) is currently Bruno Le Maire. The Ministry of Economy is responsible for managing the main fields of economic governance in France and includes a number of key agencies that operate under its jurisdiction, such as the State Investment Agency and Business France.

The Autorité de la concurrence, or the French Competition Authority (FCA), is an independent agency formed in 2009 to replace the previous system that divided powers among the Competition Council and the Ministry of Economy. The FCA’s President is appointed by the French President following parliamentary hearings. Although the FCA is an independent agency, the Ministry of Economy can request a phase II merger investigation. The Ministry can also intervene in a phase II investigation and make a decision based on public interest considerations, including industrial development, domestic competitiveness on the international level, and employment.


61 Id.


65 Id. at 2.
preservation. Nevertheless, the Ministry has yet to invoke these powers since the FCA’s creation.\textsuperscript{66}

The French Parliament is a bicameral legislature consisting of the Senate and the National Assembly. Senators are indirectly elected for six-terms, while members of the National Assembly, referred to as deputies, are directly elected by the public for five-year terms.\textsuperscript{67} France has a multi-party political system that has, until recently, been divided into two politically opposed groups.\textsuperscript{68} The recent rise of the centrist party La République En Marche!, described in further detail below, has substantially altered the political status quo in the Parliament. This shifting political climate in France, facilitated by a changing economy and rising unemployment, provides the backdrop for the commission of inquiry, discussed in further detail in Section IV below.

\textbf{II. Foreign Investment Rules in France}

France’s tradition of economic intervention is well-known and dates back to the 17th century doctrine of Colbertism. Briefly stated, Colbertism refers to France’s industrial policy of directing investment, taxation, and economic policy towards sectors it considers strategic.\textsuperscript{69} Over the years, this policy led to the nationalization of several sectors, including banks and industry. Although its Colbertist policies have faded over the last few decades, these traditions tend to flare up in the name of “economic patriotism” when the country feels threatened economically. For example, the French government remains a shareholder in a number of different sectors and has not shied away from nationalizing businesses when deemed necessary.\textsuperscript{70} It is this tradition of state protectionism that laid the foundation for the country’s interventionist approach to foreign acquisitions.

According to the country’s foreign investment rules, investments in French firms made by foreign companies are not restricted.\textsuperscript{71} However, the Ministry of Economy has laid out several strategic industries that it considers to be vital to the national interest and requires prior approval before a


\textsuperscript{71} CODE MONÉTAIRE ET FINANCIER (MONETARY & FINANCIAL CODE) art. 151-1 (Fr) ("Financial relations between France and abroad are free. This freedom is exercised in the manner provided for in this chapter, while respecting the international commitments entered into by France.")
merger can be completed. These industries, among others, include national defense and cybersecurity. Aside from blocking a transaction entirely, the Minister of Economy also has the power to impose conditions necessary to protect national interests. Although used infrequently, the Minister of Economy may approve the transaction subject to divestures. It should also be noted that transactions involving EU-based firms tend to be restricted less than those involving firms based outside of the EU.

Monitoring of the commitments made by foreign investors is not explicitly provided for in French legislation. Instead, the process of monitoring commitments has been set out in standard practice by the authorities. The authorities will often request foreign companies to submit annual reports detailing the extent that they have complied with their commitments. If the results of the report are a cause for concern, the relevant authorities will organize meetings and on-site visits with the company.

If the foreign company fails to comply with conditions or has not sought government approval of the transaction, the Minister of Economy may impose penalties. If the company did not seek approval, the investment is considered null and void. If the company does not comply with the agreed upon conditions, the Minister of Economy may impose administrative and criminal penalties.

In May 2014, the French government issued decree No. 2014-479, which greatly expanded the number of industries subject to review. This decree added businesses that are involved in the energy, water, transportation, electronic communications, and public health sectors. The decree, nicknamed the “Montebourg Decree” after then Minister of Economy Arnaud Montebourg, was enacted in response to GE’s bid to acquire Alstom’s power and grid businesses a few weeks earlier. Against a backdrop of rising economic patriotism in France, Montebourg described the decree as “a fundamental rearmament of [French] public authority” to encourage alliances with foreign companies and deter foreign acquisitions of French companies.

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72 Id.
73 Id. See Code monétaire et financier (Monetary & Financial Code) art. 151-9 (Fr) for a list of the type of conditions available to the Minister of Economy.
74 COMMISSION OF INQUIRY REPORT, supra note 58, at 141.
75 CODE MONÉTAIRE ET FINANCIER (MONETARY & FINANCIAL CODE) art. 151-1 to 5 (Fr).
76 COMMISSION OF INQUIRY REPORT, supra note 58, at 142.
77 Id. at 142; see also CODE MONÉTAIRE ET FINANCIER (MONETARY & FINANCIAL CODE) art. 151-3 (Fr).
foreign direct investment rules are distinct from its competition law, the Minister of Economy may still intervene in some competition investigations, as discussed above.

III. Recent Foreign Acquisitions Leading to the Formation of the Commission of Inquiry

As discussed above, the commission of inquiry was concerned with recent foreign mergers with a number of French “industrial jewels.” These firms employ thousands across the country and are important cultural symbols of French innovation. The mergers at the center of the commission’s investigation, discussed below in more detail, included GE/Alstom, Nokia/Alcatel, Fincantieri/STX France, and Siemens/Alstom. Additionally, the commission showed an interest in a few smaller foreign acquisitions, including Holcim/Lafarge, Advent International/Safran Identity, and FMC Tech/Technip.80

a. GE/Alstom (2014)

In early 2014, GE announced its intention to acquire Alstom’s thermal energy, renewable energy, and transmission grid businesses for approximately $13 billion.81 GE is one of the largest U.S. companies, with businesses across a variety of industries. Alstom is a prominent French industrial group specializing in energy and rail transportation, although much smaller than GE.82 Alstom, maker of the famed French high-speed train TGV, is often considered a symbol of French ingenuity and one of the country’s “crown jewels” of industry.83 At the time of the merger, Alstom employed 18,000 in France and 93,000 worldwide.84 The merger, the largest in GE’s history, gave its power turbine business a boost in Europe and emerging markets. The deal also gave GE manufacturing capacity in transmission grid equipment. The deal allowed Alstom to focus on its rail business, as its energy business was facing financial difficulties.85

Soon after the merger was announced, the French government raised considerable objections, including the loss of jobs and research & development (R&D) activities to an American rival. To thwart the merger, the government used a two-pronged approach. First, to keep Alstom in

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82 Id.

83 Id.

84 Id.

European hands, France sought counter-offers from German rival Siemens. By late April 2015, Siemens submitted an offer to Alstom’s board. Second, France enacted the Montebourg Decree, which required GE to obtain prior approval before closing the transaction.  

Simultaneously, GE and Alstom worked to assuage the French government’s concerns. For example, top executives from GE and Alstom met for weeks with French officials, including President Francois Hollande, to address their apprehensions. After several rounds of negotiations with France, GE and Alstom agreed upon a revised offer. The agreed upon offer required GE to maintain several commitments aimed at protecting employment and keeping R&D activity within the country. GE’s commitments included establishing four global headquarters in France: grid solutions, hydroelectricity, offshore, and steam turbines. GE also committed to creating 1,000 net jobs in France by the end of 2018. This included 250 employees for the creation of a Digital Foundry to work on software solutions; 200 employees for the creation of a center of excellence of shared services in Belfort; 200 leadership positions; and 310 employees under the GE2GE initiative to internalize component manufacturing in France. GE also committed to invest heavily in R&D in France; expand GE’s Belfort manufacturing site; create an offshore wind industry in France; and appoint a French member to its board.  

The revised deal resulted in the formation of joint ventures in grid technology, renewable energy, and nuclear power. To protect its national interests in the nuclear power joint venture, the French government received a preferred share granting it veto power and other corporate governance rights. Finally, in November 2015, GE closed on its acquisition of Alstom for approximately $10.6 billion.  


In April 2015, Nokia agreed to acquire Alcatel for $16.6 billion. Nokia is a multinational telecommunications company based in Finland. Alcatel was a rival French telecommunications firm, itself the product of a 2006 merger between French-based Alcatel and American-based

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86 Petit, supra note 81, at 3.  
88 COMMISSION OF INQUIRY REPORT, supra note 58, at 38-39.  
89 Id. at 39.  
90 Petit, supra note 81, at 3  
Lucent. Both Alcatel and Lucent have a rich history dating back to the 1800s. As a result, many in France consider Alcatel to be a symbol of French technology and innovation. Nevertheless, the combined firm had been facing financial difficulties since the merger. By combining with Alcatel, Nokia created the world’s second-largest mobile equipment manufacturer, with operations across the globe. The addition of Alcatel’s fixed, IP, optical, and applications and analytics technologies provided Nokia with the end-to-end portfolio it needed to compete on a global level.\footnote{Press Release, Nokia, Nokia Finalizes Its Acquisition of Alcatel-Lucent, Ready to Seize Global Connectivity Opportunities (Nov. 2, 2016), available at https://www.nokia.com/en_int/news/releases/2016/11/02/nokia-finalizes-its-acquisition-of-alcatel-lucent-ready-to-seize-global-connectivity-opportunities.} By joining forces, the combined firm positioned itself to contend with its Chinese and European rivals to provide the necessary hardware and software to the world’s largest wireless carriers.\footnote{Scott & Jolly, supra note 92.}

After the merger’s announcement, the French government and several labor unions raised concerns that redundancies would lead to significant layoffs across the country. In the coming weeks, representatives from Nokia, Alcatel and the French government met to address these concerns.\footnote{Id.} In order to gain French approval, Nokia agreed to commitments that would maintain the employment levels in several of Alcatel’s subsidiaries, especially in their R&D departments, at 4,200 employees for at least two years. Nokia also agreed to hiring an additional 500 engineers for R&D activity by the end of 2018. Additionally, Nokia agreed that, due to its strategic nature, France would retain a “right of scrutiny” if Alcatel Submarine Networks were to be sold. Finally, Nokia agreed to direct major research work on future technologies to offices in France.\footnote{COMMISSION OF INQUIRY REPORT, supra note 58, at 55-57.}

In contrast to the GE/Alstom merger, the French had a much more welcoming approach to the deal, seeing this as an opportunity to create a European telecommunications “champion” to fend off Chinese competition. This friendlier approach was largely attributed to the pro-business policies of Minister of Economy Emmanuel Macron, now President of France.\footnote{Scott & Jolly, supra note 92.} By January 2016, Nokia and Alcatel began operating as a combined entity and closed the deal later that year.\footnote{Press Release, Nokia, Nokia Finalizes Its Acquisition of Alcatel-Lucent, Ready to Seize Global Connectivity Opportunities (Nov. 2, 2016), available at https://www.nokia.com/en_int/news/releases/2016/11/02/nokia-finalizes-its-acquisition-of-alcatel-lucent-ready-to-seize-global-connectivity-opportunities.}

\section*{c. Fincantieri/STX (Chantiers de l’Atlantique) (2017)}

In May 2017, Italian shipbuilding company Fincantieri agreed to buy a majority stake in STX France, a shipyard along its Atlantic coast in Saint-Nazaire.\footnote{Press Release, Fincantieri, Fincantieri Signs an Agreement with the French State for the Acquisition of 50% of STX France (Feb. 2, 2018), available at https://www.fincantieri.com/globalassets/press-releases/price-} The shipyard was put up for sale

\begin{flushright}733053997.6\end{flushright}
after its Korean parent company went bankrupt. Fincantieri is the largest shipbuilder outside of Asia and operates shipyards across the globe. It builds a variety of ships, including cruise ships and naval vessels, and offers several maritime-related services. STX France is one of the largest shipyards in the world and has the capacity to build a wide range of commercial, naval, and passenger ships. Post-merger, the shipyard was renamed Chantiers de l’Atlantique, its name prior to its acquisition by STX.

Following the announcement of Fincantieri’s intention to take control of STX France, the French government decided to exercise its preemption rights and temporarily nationalize the shipyard. French Minister of Economy, Bruno Le Maire, explained that he had nationalized the shipyard in order to obtain better terms and that it was not intended to remain under permanent government control. According to the French government, it wanted to ensure that French workers would remain employed by the shipyard. Fincantieri’s announcement was also controversial because it would allow a significant strategic asset to fall into foreign hands; it is the country’s only shipyard large enough to build aircraft carriers.

In September 2017, the French and Italian governments came to an agreement to allow Fincantieri to gain control over STX France with certain commitments. These included guarantees to maintain French jobs, maintain R&D offices in Saint-Nazaire, and ensure that certain intellectual property would not be transferred. Under the revised deal, Fincantieri would own 50 percent of the shipyard, plus an additional 1 percent temporarily loaned by France. The deal gives Fincantieri operational control of the shipyard and a majority vote on its board. However, France maintained the right to recall the 1 percent loaned to Fincantieri if Fincantieri did not maintain its

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103 Michèle Valandina, STX France to be known again as Chantiers de l’Atlantique, SEATRADE CRUISE NEWS (June 15, 2018), available at http://www.seatrade-cruise.com/news/news-headlines/stx-france-to-be-known-again-as-chantiers-de-l-atlantique.html. Despite the name change, for simplicity this case study still refers to Chantiers de l’Atlantique as STX.


105 Id.

106 COMMISSION OF INQUIRY REPORT, supra note 58, at 65.
commitments.\textsuperscript{107} Significantly, the deal would create a “European champion” in the shipbuilding industry that would allow Fincantieri to compete against larger rivals in Asia.\textsuperscript{108}

In January 2019, upon the FCA’s request, the European Commission opened an investigation into the deal under the EU Merger Regulation.\textsuperscript{109} At the time this case study was written, the Commission had yet to reach a decision.

d. **Siemens/Alstom (2017)**

In September 2017, Alstom and German-based Siemens to unsuccessfully attempted to merge their rail businesses. Alstom’s rail business represented the remainder of its operations following GE’s 2014 acquisition of Alstom’s power and grid businesses, discussed above. The deal would have sent Siemens’ rail division, which manufactures trains and rail signaling equipment, to Alstom in exchange for a stake at just above 50 percent in the combined firm.\textsuperscript{110} Siemens, which employs thousands around the world, is an international manufacturing conglomerate and one of the largest companies in Germany.\textsuperscript{111} Alstom’s and Siemens’ rail businesses are largely complementary, and the combined firm would offer a large range of diversified rail products around the globe. This “European champion” would have created the world’s second-largest rail transportation business after the Chinese-owned CRRC Corp.\textsuperscript{112}

Despite German control of the entity, Minister of Economy Bruno Le Maire quickly approved of the transaction with several commitments. These included several commitments with regard to the geographical location and governance of the group. In particular, Siemens agreed to locate the group’s head office in France and that it would be managed by Alstom’s current Chairman and CEO. Siemens also agreed to maintain a significant number of independent French directors on its board. In addition, Siemens agree to protect Alstom’s manufacturing plants and engineering jobs in France for at least four years.\textsuperscript{113} Nevertheless, several French labor unions expressed their skepticism and anticipated that future restructuring would lead to layoffs at the conclusion of the four-year period. Finally, Siemens agreed to set up a committee to monitor the fulfillment of their commitments.\textsuperscript{114}

\begin{itemize}
  \item \textsuperscript{108} COMMISSION OF INQUIRY REPORT, supra note 58, at 64, 68.
  \item \textsuperscript{110} COMMISSION OF INQUIRY REPORT, supra note 58, at 46.
  \item \textsuperscript{111} About Siemens, SIEMENS, available at https://www.siemens.com/global/en/home/company/about.html.
  \item \textsuperscript{113} COMMISSION OF INQUIRY REPORT, supra note 58, at 49.
  \item \textsuperscript{114} Id.
\end{itemize}
Nevertheless, in February 2019 the European Commission blocked the proposed merger under the EU Merger Regulation. It found that the combination would have harmed competition in the markets for railway signaling systems and high-speed trains.115

### e. Other Deals of Concern

Although the mergers between GE/Alstom, Nokia/Alcatel, Fincantieri/STX, and Siemens/Alstom garnered the most attention in France, a number of other foreign acquisitions also gained the attention of the commission of inquiry—including Holcim/Lafarge, Advent International/Safran Identity, and FMC Technologies/Technip.116 In April 2014, France’s Lafarge and Switzerland’s Holcim, the world’s two largest cement makers, agreed to merge.117 Both companies had extensive overseas operations and created a “European champion” with the ability to compete on a global level. Although the merged firm is based in Switzerland, the group committed to maintain its manufacturing plants in France. The group also agreed to keep Lafarge’s research center in France open, with only a minimal impact on employment there.118 The merger closed in July 2015, creating the world’s largest cement maker valued at $46 billion, renamed LafargeHolcim.119

In May 2016, oil and gas companies FMC Technologies (FMC) and Technip agreed to merge. Technip, based in Paris, was twice the size of FMC, based in Houston. The complementary firms created TechnipFMC, valued at approximately $13 billion at the time. Technip is now based in London with operational headquarters in both Paris and Houston. TechnipFMC also maintains a global R&D center in France.120

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115 Press Release, European Commission, Commission Prohibits Siemens’ Proposed Acquisition of Alstom, (Feb. 6, 2019), http://europa.eu/rapid/press-release_IP-19-881_en.htm. Interestingly, the European Commission considered entry by potential Chinese rivals to be unlikely in the foreseeable future, which stands in contrast to prior statements made by some French politicians. See, e.g., COMMISSION OF INQUIRY REPORT, supra note 58, at 47.

116 National Assembly, supra note 68, at 3.


\subsection*{f. Reactions to the Foreign Acquisitions in France}

In light of the country’s record unemployment levels and declining industrial competitiveness globally, the recent trend of foreign acquisitions of French companies has garnered strong backlash. As a result, these deals have become a very politically sensitive issue, especially when they involved the “crown jewels” of French industry. For example, after GE announced its intent to acquire Alstom’s energy and grid business, President Hollande played an active role in the merger, even stating that the government’s “sole criterion” for choosing the successful bidder would be the one that was “best in creating more business and jobs.”\footnote{Ben McPartland, Battle for Alstom: Saving Jobs is Key for Hollande, LOCAL (Apr. 29, 2014), available at https://www.thelocal.fr/20140429/siemens-vs-ge-battle-for-alstom-heats-up.} Then Minister of Economy Montebourg also chastised Alstom CEO Patrick Kron for not informing the government of its negotiations with GE and accused him of deliberately concealing the merger.\footnote{Michael Stothard, How Paris Repelled General Electric from Alstom Takeover, FIN. TIMES (June 16, 2014), available at https://www.ft.com/content/7727582c-f0b6-11e3-9e26-00144feabdc0.}

The hostile reactions to GE’s offer are in stark contrast to the reactions after Siemens submitted its own offer for Alstom’s energy and grid businesses. The French government seemed much more willing to accept a Siemens takeover, even going as far as coordinating with company executives and German politicians.\footnote{Ben McPartland, Alstom Approves €12.35b Bid from General Electric, LOCAL (Apr. 30, 2014), available at https://www.thelocal.fr/20140430/alstom-board-accepts-1235-bn-from-general-electric.} It also exhibited a similar response to Siemens’ attempted
acquisition of Alstom’s rail business just a few years later. For example, Minister of Economy Bruno Le Maire defended his approval of Siemens’ acquisition and chastised his critics’ protectionist claims: “I have a little trouble understanding, except by xenophobia or barely concealed Germanophobia, the criticism of some . . . vis-à-vis Siemens.”

The contrasting responses to GE’s acquisition of Alstom in 2014 compared to Siemens’ attempted acquisition of Alstom in 2017 may have a number of reasons. Perhaps this is attributable to President Macron’s more business-friendly attitude than some of his predecessors. It could also be a signal that the French government is more willing to tolerate foreign investment from other European firms, rather than from rivals in China or the United States. This approach would be more in line with France’s vision of a “European champion” in a given sector.

IV. The National Assembly’s Commission of Inquiry into Foreign Acquisitions

In order to understand the formation of the National Assembly’s commission of inquiry, it is important to put it in context of the changing political climate in France. With the backdrop of rising unemployment, increased immigration, and recent security threats from terrorism, nationalist sentiment across the country became more popular. This attitude culminated in the May 2017 French presidential elections, which pitted centrist Emmanuel Macron against populist Marine Le Pen in a run-off. Macron, who won the election, ran on a neoliberal, pro-European agenda. Le Pen, on the other hand, ran on a platform espousing more nationalist, protectionist views. Despite Le Pen’s loss, her nationalist movement gained considerable momentum in domestic politics.

France held its parliamentary elections for the National Assembly soon after the presidential runoff in June 2017. La République En Marche!, Macron’s party, gained a significant portion of the seats to form a majority alliance. The Republicans, considered a mainstream conservative party, lost many of its seats but gained enough votes to be considered runner-up. Despite Le Pen’s popularity in the presidential election, her own party, the National Front, garnered less than 2 percent of the vote in the parliamentary election.

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134 Id.
In light of the changing economy and political climate in France, it will be necessary to monitor how these developments impact foreign investment law. If the commission’s proposals are followed, there could be substantial changes to the country’s industrial policy. As discussed below, many of these recommendations go beyond France’s foreign investment regulations and address competition policy generally, both within France and the European Union as a whole. Since the developments from the commission are still new, it will be necessary for practitioners and stakeholders alike to monitor how these changes evolve.

a. **Formation of the Commission of Inquiry**

Although Macron won the presidency and La République En Marche! emerged with a majority of seats in the National Assembly, it became clear in the following months that the economic concerns and protectionist attitudes of many politicians were still prevalent. Among these concerns included the recent trend of foreign acquisitions of the country’s industrial “national jewels.” Many were concerned that these mergers would lead to redundancy and that many French workers would lose their jobs in an economy facing record high unemployment levels. Several members of the National Assembly sought to address these concerns. Then, in September 2017, Alstom agreed to merge with Siemens, prompting several deputies to request a commission of inquiry to investigate these foreign acquisitions and the state’s role in approving them.¹³⁵

In October 2017, several Republican MPs filed a motion to create a commission of inquiry in order to “examine the decisions of the State in matters of industrial policy, with regard to the recent mergers of companies, in particular in the cases of Alstom, Alcatel and STX, as well as the means likely to protect our national industrial jewels in a globalized commercial context.”¹³⁶ In the National Assembly, commissions of inquiry are fact-gathering bodies with the goal of investigating issues of national concern.¹³⁷ Commissions of inquiry often call in witnesses to offer testimony and answer questions in front of a panel of deputies, much like they would before a U.S. Congressional committee. According to National Assembly procedure, opposition parties may create a commission of inquiry once per parliamentary session.¹³⁸ The commission became

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¹³⁵ National Assembly, *supra* note 80, at 3.


¹³⁷ Ordonnance 58-1100 du 17 novembre 1958 relative au fonctionnement des assemblées parlementaires Article 6 [Ordinance 58-1100 of November 17, 1958 Relative to the Functioning of the Parliamentary Assemblies] (Fr.).

operational at the end of October and was led by Olivier Marleix, a Republican deputy first elected in 2017. Although the commission was organized and led by the Republican Party, the commission consisted of almost thirty members from different parties across the political spectrum.

b. Discussion of the Commission of Inquiry’s Investigation

The commission of inquiry began meeting and conducting hearings at the end of November 2017. Over the course of its six-month investigation, the commission heard testimony from a variety of different industry representatives, lawyers, consultants, labor unions, journalists, politicians, and economists. Its goal in conducting these hearings was two-fold: 1) to retrospectively investigate the decisions of the French government that led to recent foreign acquisitions, and 2) to determine whether changes to industrial policy are necessary to protect the state going forward.

The commission conducted its first set of hearings with several labor union representatives from Alstom, Nokia, STX, and GE in late November and early December of 2017. During these hearings, the biggest concerns from the commission of inquiry members appeared to be whether the merged companies were keeping their prior commitments with the French government to maintain employment levels. Overwhelmingly, the labor union representatives were fearful that these commitments were unsustainable in the long-term. They also pointed out that some layoffs had already been implemented. The commission members were also concerned that the mergers would shift R&D activity outside of France, which would weaken French innovation and drain the country’s intellectual capital.

Next, the commission members heard testimony from two journalists, who gave some insight into the factors leading to the foreign acquisitions. They explained that France’s long-term industrial and economic policy decisions, combined with corporate mismanagement, had weakened French companies and decreased their ability to compete on the global market.

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141 See COMMISSION OF INQUIRY REPORT, supra note 58, at 237.

142 See id. at 21.


The commission then met with former Minister of Economy Montebourg, who provided a first-hand account of how the negotiations played out during the GE/Alstom and Siemens/Alstom deals. Montebourg had a very protectionist attitude, suggesting that France should be more cautious with foreign investment. Interestingly, Montebourg and several deputies alleged that the U.S. Department of Justice had purposely targeted Alstom by launching an investigation alleging violations of the Foreign Corrupt Practices Act (FCPA), which resulted in a $772 million criminal penalty in 2014, so that GE could then acquire a weakened Alstom.\footnote{Commission of Inquiry, Hearing of December 13, 2017, 5:00 p.m., Report No. 8, \url{available at http://www.assemblee-nationale.fr/15/cr-cepolind/17-18/c1718008.asp}.}


The commission of inquiry then interviewed two French economists, who testified about how the country’s industrial policy led to the foreign acquisitions discussed above. In particular, the economists explained that France’s Colbertist traditions have led to its decreased competitiveness on the global market. The deputies raised the possibility of adopting a foreign investment control mechanism modeled after the Committee on Foreign Investment in the United States (CFIUS). Interestingly, the deputies and economists briefly addressed the role of competition law in Europe and contemplated its detrimental effect on French companies.\footnote{Commission of Inquiry, Hearing of January 18, 2018, 9:30 a.m., Report No. 13, \url{available at http://www.assemblee-nationale.fr/15/cr-cepolind/17-18/c1718013.asp}.}

Next, the commission conducted a number of hearings with senior government officials. In a hearing with representatives from the Directorate General of the Treasury and the Ministry of Economy, the deputies were concerned with the implementation of France’s foreign investment rules and the administrative process of approving foreign acquisitions. The hearing also discussed the extraterritoriality of foreign laws imposed on French companies, in particular those targeted by the U.S. Department of Justice under its anti-corruption enforcement policies.\footnote{Commission of Inquiry, Hearing of January 24, 2018, 5:30 p.m., Report No. 14, \url{available at http://www.assemblee-nationale.fr/15/cr-cepolind/17-18/c1718014.asp}.} The commission then met with the former head of the State Investment Agency at the time that the GE/Alstom deal was finalized. The commission addressed the ability of the state to use its
investments in French businesses after a foreign acquisition in order to influence its business decisions, focusing on the GE/Alstom joint ventures. Then the commission met with the head of the Directorate General for Enterprise (DGE), a directorate in the Ministry of Economy responsible for implementing policies that promote business competitiveness and growth. The first portion of the hearing addressed the ability of DGE to intervene in foreign investments; the second portion, held in camera, addressed specific cases where DGE became involved.

In the next hearing in early February, the commission heard testimony from the General Manager of BPI France, a public investment bank owned by France. The hearing first addressed the role of the state as a shareholder and whether state ownership can be used to counter France’s declining economic competitiveness. It then discussed how to protect strategic companies from foreign acquisition. Finally, the hearing addressed the problem of undercapitalized French companies leading to investment by foreign entities.

The following hearing featured the former head of the Directorate General of the Treasury and addressed many of the same topics. Again, the commission seemed interested in the ability of the state to intervene as a shareholder in corporate matters. The commission then asked about whether the government’s ability to issue conditions when approving foreign acquisitions are adequate to protect national interests.

The commission then heard from a former Inter-ministerial Delegate for Economic Intelligence, which provides economic information relevant to French commerce to the French government. The deputies were mainly concerned with the ability of the French government to anticipate and analyze threats to French businesses, namely Alstom’s financial vulnerabilities and its FCPA investigation by the U.S. DOJ. Later in the day, the commission met with another former head of the State Investment Agency to discuss the role of the state as a corporate shareholder. The former official argued that the state should generally avoid an industrial policy premised on activist investing.

Next, the deputies interviewed two legal consultants about the general direction that reforming the country’s foreign direct investment policies should take. Much of the discussion involved

comparing the American and European Union’s regulatory frameworks to that within France.\textsuperscript{155} The following day the commission heard from a former Commissioner for Strategic Information and Economic Security, a position in the Ministry of Economy, who had also served as a Inter-ministerial Delegate for Economic Intelligence. This hearing addressed the ability of the French government to analyze issues of national economic interest and how the foreign investment rules are administered.\textsuperscript{156}

Later, the commission interviewed two private consultants hired by the French government to monitor the commitments made by GE when it acquired Alstom, specifically with regard to job creation.\textsuperscript{157} It then heard from two specialists dealing with French competitive intelligence, referred to as “economic intelligence” in France, to discuss competitive intelligence gathering activity, both within the government and among businesses.\textsuperscript{158} Additionally, the deputies interviewed two French attorneys. They were mainly concerned about the extraterritorial effects of foreign anti-corruption laws, specifically the FCPA, and what should be done in France to prevent future extraterritorial prosecutions.\textsuperscript{159} Next, the commission heard from the director of the French Anti-Corruption Agency in order to understand the country’s efforts in combating corruption among French companies.\textsuperscript{160}

In March, the commission met with a number of leaders to discuss the attractiveness of French industry abroad. These included officials from Business France and the Bank of France.\textsuperscript{161} Similarly, the commission heard from the French Minister for Europe and Foreign Affairs about his role in promoting French business abroad and the control of foreign investment within France.\textsuperscript{162} It also interviewed several executives from the Bouygues Group, a French company


with a substantial ownership stake in Alstom, about its participation in GE’s and Siemen’s acquisition of the company.163

The commission then continued to meet with several current and former government officials, consultants, and business executives to discuss the impact of GE’s acquisition of Alstom. For example, it met with the head of the State Investment Agency about its handling of France’s stake in the GE/Alstom deal.164 It then heard from two former Alstom executives to discuss its FCPA investigation and its impact on GE’s decision to acquire the company.165

Next, the commission interviewed several management consultants hired by the government to report on Alstom. This first hearing involved two consultants that issued a report just a few months before GE announced its intent to acquire Alstom.166 It later heard from two more consultants that had issued a report addressing Alstom’s financial health a few years before GE’s acquisition.167

The commission then interviewed a former Minister of Economy about his role in controlling foreign investment, fighting corruption, and the GE/Alstom deal.168 It then interviewed a former manager from GE about the company’s strategy toward corporate acquisitions generally, her role in GE’s acquisition of Alstom in particular, and her perspective of the deal after the fact.169 Later in the day, several executives from Rothschild & Co., one of the investment banks advising Alstom in its deal with GE, came in to discuss the implementation of France’s foreign investment rules from a practitioner’s perspective, their views of foreign investment control theoretically, and their own roles in the deal.170 Next, the commission heard from the Interdepartmental Minister for Corporate Restructuring about corporate restructuring generally and the commitments made by GE in its acquisition of Alstom.171

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In a deviation from its normally hearing format, the commission held a roundtable featuring various leaders from French businesses and associations to discuss entrepreneurship and the ability of businesses to access financing. The commission then went back to its standard format to interview the former Legal Director for Alstom at the time of its FCPA prosecution. The deputies were primarily concerned with the details surrounding the investigation.

As the commission started to wrap up its investigation in April, the deputies interviewed two more significant figures. The first was with the former President and CEO of Alstom, Patrick Kron. In his hearing, Kron provided more details into Alstom’s acquisition by GE and the preceding FCPA investigation. Kron also played a video by Alstom’s U.S. attorney denying the rumor that the U.S. Department of Justice pressured Alstom into selling to GE in return for their agreement not to prosecute Alstom’s executives. The commission then interviewed the current French Minister of Economy, Bruno Le Maire, about the status of the commitments made during the GE/Alstom and Siemens/Alstom deals. It then discussed the possibility of expanding France’s foreign investment rules and privatizing the group Aéroports de Paris. Finally, the commission asked about coordination between French government entities in response to extraterritorial anti-corruption investigations.

Finally, the commission of inquiry wrapped up its investigation in mid-April and met for a final time. The rapporteur summarized the group’s findings contained within the report, while other deputies added their own comments showing their support or opposition and provided lingering questions from their investigation.

V. Commission of Inquiry’s Report and Recommendations

In April 2018, the commission of inquiry published a report summarizing its findings. At almost 300 pages, the commission’s report provides a detailed look into the commissions perspectives into French industrial policy. The stated goals of the commission and its investigation were two-fold: First, to review the French industrial policy that led to the foreign acquisitions and the

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conditions agreed to by the state in order to approve them.\footnote{177}{COMMISSION OF INQUIRY REPORT, supra note 58, at 23-24.} Second, to consider future industrial policy, including the tools used by France to control foreign investment.\footnote{178}{Id. at 24-25.}

The report is divided into two parts. The first section consists of a short summary of the key foreign acquisitions of interest by the commission, which are addressed independently in \textbf{Section III} above. The second section provides a detailed analysis of the issues facing French industrial policy, organized into ten key themes with a series of fifty discrete proposals. Below is a brief summary of the commission’s findings and its recommendations.

\textbf{Theme 1: Rehabilitating Industry’s Image}

The commission found that the French economy has shifted away from manufacturing-based industries and, as a result, the number of those jobs have declined from historical levels.\footnote{179}{Id. at 69-74.} Furthermore, industrial trades are often viewed negatively and are difficult to recruit for, making the manufacturing jobs that are available difficult to fill.\footnote{180}{Id. at 75-76.}

\begin{itemize}
  \item \textbf{Proposal No. 1:} Continue the initiative #FiersDeNosIndustries (Proud of Our Industries).\footnote{181}{Id. at 80.}
  \item \textbf{Proposal No. 2:} Empower the boards of directors and supervisors of industrial companies to develop social and environmental responsibility strategies.\footnote{182}{Id. at 81.}
  \item \textbf{Proposal No. 3:} Provide trade unions with information on their company’s future strategy.\footnote{183}{Id.}
  \item \textbf{Proposal No. 4:} Promote apprenticeship courses for industrial trades in trouble.\footnote{184}{Id. at 82.}
  \item \textbf{Proposal No. 5:} Better articulate vocational training and the needs of industries in each employment area.\footnote{185}{Id.}
  \item \textbf{Proposal No. 6:} Precisely define the employment skills needed to adapt in industries that are engaged in sustainable development.\footnote{186}{Id. at 83.}
\end{itemize}
Theme 2: Attracting Foreign Investors and Strengthening France’s Attractiveness

The commission found that foreign direct investment in France indicates that the economy is both attractive to foreign investors and is also strong enough for French companies to invest internationally. In addition, French industrial policy has shifted away from a vertical industrial policy, which tends to favor national champions, toward a more horizontal industrial policy, which aims to create a favorable economic environment. This emphasis on horizontal industrial policy has created an attractive economic ecosystem for foreign investors.

- **Proposal No. 7:** Continue to make use of France’s industrial potential during summits organized between investors, foreign business leaders, and the government.

- **Proposal No. 8:** Communicate more about the foreign investor support programs implemented by the government agency, Business France.

- **Proposal No. 9:** Simplify the administrative management of companies.

Theme 3: Grow Our Industries

The report found that French businesses have trouble growing because they are often undercapitalized, in part due to the lack of available venture capital. This was attributed to the less developed private investment system in France and the perception by foreign venture capital groups of anti-business interventionism.

- **Proposal No. 10:** Orienting French savings to businesses.

- **Proposal No. 11:** Consolidate company capital through employee share ownership.

- **Proposal No. 12:** Simplify the regulatory requirements for small and medium-sized enterprises.

- **Proposal No. 13:** Adapt a legal framework, inspired by that of Nordic countries, to facilitate setting up shareholder foundations in France.
• **Proposal No. 14:** Call on economic and financial actors to offer, as far as possible, comprehensive and clear financing support for companies.\(^\text{197}\)

**Theme 4: Refocus Public Shareholding**

The report found that, in the face of under-capitalization of France’s companies, government intervention through public shareholding is not necessarily the best industrial policy.\(^\text{198}\) Instead, the government should strategically refocus its investments in companies that are considered vital to the economy.\(^\text{199}\)

• **Proposal No. 15:** Establish “target levels” for holding public capital in each state intervention.\(^\text{200}\)

• **Proposal No. 16:** Expand, in compliance with European law, the opportunities creating “golden shares” in strategic companies to increase the possibility of state shareholder control.\(^\text{201}\)

• **Proposal No. 17:** Clarify Bpifrance’s, a state-owned investment bank, intervention procedures.\(^\text{202}\)

**Theme 5: Preparing for Future Technological, Environmental, and Economic Advances**

According to the report, current technological advances have a high potential for job creation, innovation, and growth. France must adopt policies that allow it to be on the forefront of these emerging technologies.\(^\text{203}\)

• **Proposal No. 18:** Establish public-private “sectoral pooling platforms” so that entities have access to computing power and relevant data, particularly to develop artificial intelligence (AI) solutions.\(^\text{204}\)

• **Proposal No. 19:** Increase French university training and supervision at the masters or Ph.D. level in the field of AI.\(^\text{205}\)

\(^{197}\) *Id.*  
\(^{198}\) *Id.* at 113  
\(^{199}\) *Id.* at 122.  
\(^{200}\) *Id.* at 123-24.  
\(^{201}\) *Id.* at 124.  
\(^{202}\) *Id.*  
\(^{203}\) *Id.* at 125.  
\(^{204}\) *Id.* at 133-34.  
\(^{205}\) *Id.* at 134.
• **Proposal No. 20:** Establish regulatory “sandboxes” to streamline innovation (e.g., temporary reduction of legal constraints, means of experimentation in real situations).\(^{206}\)

• **Proposal No. 21:** Target a portion of the Innovation and Industry Fund to support companies active in AI.\(^{207}\)

• **Proposal No. 22:** Encourage the development, on a European scale, of a strategic plan on batteries.\(^{208}\)

• **Proposal No. 23:** Accelerate the process of standardization and frequency allocation in Europe so as not to lag behind other major world economic blocs in the deployment of 5G technology.\(^{209}\)

**Theme 6: Improving the Process of Controlling Foreign Direct Investment**

In this section, the commission recognized the need to protect France’s strategic interests while also maintaining the freedom of investment. The report compared a number of different countries’ foreign direct investment control regimes, with a particular focus on the structure of CFIUS. The commission found that the key challenge of foreign direct investment control consists of maintaining a balance between these two issues while also ensuring that the process remains efficient and transparent in order to avoid deterring foreign entities from making investments.\(^{210}\)

• **Proposal No. 24:** Expand the list of investments that fall under the prior authorization procedure to include investments in companies using certain technologies, such as artificial intelligence, space, data storage, and semiconductors.\(^{211}\)

• **Proposal No. 25:** Expand the list of investments subject to the prior authorization procedure to investments relating to how the technology is used, including when there is a:
  - Risk to the security of the supply of raw materials;
  - Risk of the immediate transfer of technology, components, or patents;
  - Risk of military use or the proximity to a military installation;
  - Direct or indirect presence of a foreign state;

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\(^{206}\) *Id.*

\(^{207}\) *Id.* at 135.

\(^{208}\) *Id.* at 136.

\(^{209}\) *Id.* at 137.

\(^{210}\) *Id.* at 137-160.

\(^{211}\) *Id.* at 155.
- Risk of global monopoly or an excessive concentration of assets;
- Absence of reciprocity in the way in which a breach of national security is defined;
- Risk to the environment.

- **Proposal No. 26:** Develop predictive tools to improve competitive intelligence for businesses.
- **Proposal No. 27:** Organize meetings with the Defense & National Security Council for specialized training on prior authorization proposals.
- **Proposal No. 28:** Amend Articles R. 153-7 and R. 153-8 of the Monetary and Financial Code to provide for new processing periods under the prior authorization procedure.
- **Proposal No. 29:** Extend to target companies the possibility of using the rescript procedure.
- **Proposal No. 30:** Explain the different steps of the prior authorization procedure on the website of the Ministry of Economy.
- **Proposal No. 31:** Publish statistics annually on the prior authorization procedure.
- **Proposal No. 32:** Provide for the annual submission of a confidential report to the French Parliament on the filtering of foreign investments.
- **Proposal No. 33:** Publish and make available to the public an unclassified version of the report submitted to the French Parliament.
- **Proposal No. 34:** Create a committee in the French Parliament responsible for monitoring the control of strategic investments.

**Theme 7: Use Legal and Regulatory Levers to Promote French Industrial Interests**

Although France’s industrial policy has become less Colbertist in recent decades, the commission recognized that the state still maintains a substantial number of options to regulate

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212 Id. at 156.
213 Id. at 157.
214 Id.
215 Id. at 159.
216 Id.
217 Id.
218 Id.
219 Id. at 160.
220 Id.
221 Id.
businesses. As the commission put it, “Although it no longer seeks to be a strategist, the state still plays a key role in industrial policy, as a customer, regulator and public policy maker.”222 This includes better enforcement of the commitments made by foreign investors and expanding the types of commitments used by regulators.223

- **Proposal No. 35**: Modify Article R. 143-9 of the Monetary and Financial Code to clarify and extend the list of categories of conditions authorized by the Minister of Economy.224

- **Proposal No. 36**: Explicitly state in regulations the monitoring of commitments made by investors.225

- **Proposal No. 37**: Use independent third parties to monitor commitments.226

- **Proposal No. 38**: Fully implement the sanctions provided for in Article L. 151-3 of the Monetary and Financial Code in case of non-compliance by the investor or supplement the list of penalties.

**Theme 8: Being in the Top of the Moralization of Economic Life**

One of the key areas of weakness identified by the commission was France’s approach toward complying with anti-corruption laws around the world. In the wake of Alstom’s crippling FCPA investigation, the commission saw anti-corruption compliance as a significant area of economic vulnerability. By gaining a stronger reputation for fighting corruption, not only would French companies become less of a target for extraterritorial prosecution but France would also become a more attractive partner for foreign investment.227

- **Proposal No. 39**: Increase the role of the French anti-corruption agency (AFA) by amending article 17 of the Sapin 2 law to allow AFA to control foreign entities even if the head office of the parent company is not located in France.

- **Proposal No. 40**: Increase the means of investigation to enable France to be credible as a prosecutorial authority on anti-corruption.228

222 Id. at 162.
223 Id. at 161-168.
224 Id. at 167.
225 Id. at 168.
226 Id.
227 Id. at 169-170.
228 Id. at 179.
• **Proposal No. 41:** Expand the definition of the representative interest in Article 1 of Decree 2017-867, in accordance with Article 25 of the Sapin 2 law and without prejudice to the freedom of trade and industry.²²⁹

• **Proposal No. 42:** Strengthen cooperation with other judicial authorities, especially in the United States, in the fight against corruption.²³⁰

• **Proposal No. 43:** Channel the transmission of economic, technical, and financial information to foreign authorities within the framework of existing international conventions, namely the Hague Convention or mutual assistance conventions in criminal matters.²³¹

• **Proposal No. 44:** Clearly identify the highly sensitive information whose transmission to foreign authorities should be excluded or restricted as part of a reform of the 1968 blocking law restricting the dissemination of sensitive information to foreign authorities.²³²

**Theme 9: Strengthen Competitive Intelligence**

Another area of weakness identified in the report is the lack of or poor use of competitive intelligence in France. The commission found that both the national and regional governments had fallen behind in their abilities to assess the different risks to French industry. As a result, the commission suggested reforming the government’s system of gathering competitive intelligence to be more proactive. It also found that businesses should be more proactive in gathering business intelligence and that government should promote efforts to train executives in developing competitive intelligence.²³³

• **Proposal No. 45:** Adding competitive intelligence objectives to the National Intelligence Orientation Plan.²³⁴

• **Proposal No. 46:** Spread to the regions the positive results of the experimentation carried out in Normandy, where a system of competitive intelligence was introduced.²³⁵

• **Proposal No. 47:** Reinforce the offensive aspect of competitive intelligence by the national and territorial authorities.²³⁶

²²⁹ *Id.* at 181.
²³⁰ *Id.* at 182.
²³¹ *Id.* at 183.
²³² *Id.* at 185.
²³³ *Id.* at 185-197.
²³⁴ *Id.* at 194.
²³⁵ *Id.* at 195.
²³⁶ *Id.* at 196.
• Proposal No. 48: Relaunch training efforts in competitive intelligence for business executives.  

Theme 10: Promoting a More Offensive Industrial Policy at the European Union Level

Finally, the commission claimed that the European Union has failed to protect its companies. The report recognizes two weaknesses in the European Union’s protection of companies based within the continent. First, there is weak protection of Europe’s interests due to the lack of foreign investment protections at the EU level. Second, the European Commission’s competition policies with regard to state aid and the abuse of dominance limits the concentration of companies that could lead to European and national champions. At the same time, according to the report, foreign businesses that are not subject to the same competition laws are able to build large industrial champions without the same restrictions on concentration. In other words, EU competition policy allows for the emergence of world champions from foreign countries at the expense of building European and national champions.

• Proposal No. 49: Support a proposed European resolution establishing a regulatory framework for screening foreign direct investment and inviting the European Union to go further in protecting common interests.

• Proposal No. 50: Propose a European resolution inviting the European Commission to have a more offensive antitrust policy.

VI. Takeaways for Stakeholders and Practitioners

The recent trend of foreign acquisitions in France, namely those by GE, Nokia, Fincantieri, and Siemens, created a wave of negative reactions throughout the country. Although these mergers were eventually cleared, the approval process with the French state did not come without considerable negotiations and, eventually, concessions from the merging party. Foreign companies—and their attorneys—considering acquiring French firms would be wise to consider the lessons learned from these deals.

Perhaps the most sensitive issue in France arising from these acquisitions is the prospect of foreign investors restructuring or downsizing French businesses post-merger. In light of high unemployment, many are concerned that these mergers will lead to even higher levels of unemployment as factories close or jobs move overseas. As a result, French politicians have insisted on various commitments from foreign investors that current employment levels,

237 Id.
238 Id. at 199-204.
239 Id. at 204-214.
240 Id. at 224-227.
241 Id. at 228.
especially among factory workers, be maintained or even grown. Stakeholders seeking to acquire French firms should be ready to guarantee that employees will be retained for at least several years after the closing of the merger.

Another key issue facing foreign investors is the significance of innovation to France. Aside from the fear that factory jobs will be cut, French politicians have also shown concern that jobs involving highly technical skillsets and R&D departments will be relocated outside of France. The main concern here is that this will lead to a loss of intellectual capital as those with highly sought-after engineering skills leave the country. In addition to losing its competitive edge, French politicians have also expressed national security concerns. Those seeking to acquire French firms, especially in high tech industries, should be willing to maintain R&D activity in France.

Although perhaps obvious, practitioners should also pay special attention to France’s foreign investment rules and the different sectors that require prior approval by the Ministry of Economy. As evidenced by the Montebourg Decree, which added several sectors that require prior approval in response to the GE/Alstom merger, France has indicated that it will change its foreign investment rules in order to capture a transaction as it sees necessary. In particular, the commission of inquiry proposed expanding the covered sectors to include AI, space, data storage, and semiconductors. As a result, practitioners should be mindful of the possibility that the list of sectors requiring approval may change. Practitioners should also be aware that a transaction otherwise not requiring prior approval may later need such approval after the deal is announced.

On a related note, foreign investors should also be careful when attempting to acquire companies that may be considered national champions or are otherwise culturally significant in France. Against the backdrop of its protectionist traditions, the French government will likely continue to try to protect its “industrial jewels” from future foreign acquisitions. That being said, France has taken a friendlier attitude when the acquiring company is European. Compare, for example, the hostile reactions to the GE/Alstom deal and the subsequent attempts by the French government to solicit a competing bid by Siemens. When faced with the prospect of foreign acquisition, it appears that the French government would much rather create a “European champion” than let a French business fall under the control of a company outside of the European bloc.

Stakeholders should also be cognizant of potential investigations. For instance, Deputy Olivier Marleix, who chaired the commission of inquiry, requested that the Paris prosecutor’s office open a criminal investigation into possible corruption surrounding the GE/Alstom deal. Marleix found the lack of an investigation by French authorities into Alstom’s business practices, when it faced numerous charges of bribery and corruption from other jurisdictions, to be suspicious. Marleix was also concerned with Emmanuel Macron’s involvement in the deal, who became Minister of Economy at the conclusion of the merger. The investigation was moved to the
French National Financial Prosecutor’s Office in July 2019 and, at the time this case study was written, is currently pending.242

Finally, the reactions to foreign acquisitions are largely dependent on the political climate in France and political affiliations of those in office at the time of the transaction. Parties on either the political right or left in France tend to be more economically interventionist than centrist parties. For example, Minister of Economy Montebourg, a member of the left-leaning Socialist Party, took a very interventionist approach during the 2014 GE/Alstom deal. The following year, his successor, Emmanuel Macron, took a more business-friendly attitude during the Nokia/Alcatel deal. In the wake of the 2017 elections, political reactions to a major foreign acquisition are likely to be unpredictable. While Macron’s government is known to be more business-friendly, the interventionist attitudes underscoring the commission of inquiry may be indicative of other politicians’ skepticism of foreign acquisitions. As a result, foreign stakeholders considering acquiring a French business should stay attuned to the prevailing political attitudes in France.

VII. Takeaways for Policymakers and Politicians

French policymakers and politicians play an important role in directing the foreign investment policies of the country. Their policies can have a massive impact on economic development and growth in the country, both immediately and in the future. As a result, policymakers and politicians should recognize the need to balance the competing interests involved in foreign acquisitions. While the significance of public interest factors cannot be entirely discounted, they may interfere with the efficiencies that make a transaction worth pursuing, stymying economic growth and innovation.

Policymakers should also seek to maintain consistency with regard to the sectors that require prior approval. Without consistency, parties negotiating a merger have difficulty anticipating that a foreign investment review will be required. In the case of GE/Alstom, the Ministry of Economy promulgated the Montebourg Decree immediately after the parties announced their intent to merge. As a result, they were required to seek approval under the foreign investment rules when the deal previously would not have been subject to review. Building consistency into the review process goes a long way in eliminating uncertainty in the private sector, encouraging investment, and stimulating economic growth.

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VIII. Conclusion

The purpose of this case study is to examine the French National Assembly’s recent commission of inquiry investigating recent foreign acquisitions of the country’s “industrial jewels.” Many of the proposals made by the commission have far-reaching implications for French industrial policy, foreign investment, and European competition law. As French policymakers and lawmakers consider the commission’s proposals in the near- and long-term future, it will be necessary to continue monitoring these developments going forward.
In Germany, public interest considerations in competition policy are applied in a specific manner which differs significantly from other jurisdictions. Public interest factors are taken into consideration in the so-called ministerial authorisation procedure. This instrument enables the Federal Minister for Economic Affairs and Energy (“Minister”) to authorise a merger or acquisition which has been blocked by the German Federal Cartel Office (“FCO”). Fundamental principles of this regime include the following:

- The assessment of public interest factors in competition policy is strictly separated from issues relating to foreign direct investment (FDI) even if the Minister is responsible in both cases. FDI procedures can only result in the prohibition of a merger or acquisition that does not raise competition concerns, whereas the objective of the ministerial authorisation is allowing a merger to be implemented that has been prohibited for competition policy reasons. Therefore, any overlap between the two regimes is excluded.\textsuperscript{243}

- The ministerial authorisation is of a clearly exceptional nature. There is a common understanding in Germany that the ministerial authorisation is not a “normal” tool of competition policy. Hence it should be limited to substantial public interest issues of a nation-wide character.

- The ministerial authorisation procedure is a formal administrative procedure, in all details governed by law, with some particularities. The most important variation from normal procedure is the responsibility of the Minister to decide the case in person; he is not allowed to delegate the decision to officials of the ministry or to another minister.

\textsuperscript{243} The regime of “national security” provisions (FDI) is strictly separated in German law from merger control in general and the assessment of public interest factors in competition policy issues in particular, even if the same Economic Minister is responsible in both cases. The objective of foreign direct investment (FDI) control is preventing a potential harm caused by a foreign company to national German security. Whereas the objective of the Ministerial Permission is allowing a merger to be implemented that has been prohibited for competition policy reasons, FDI procedures, can only result in the prohibition of a merger or acquisition that does not raise competition concerns. The outcome of FDI proceedings can be a full clearance decision, a prohibition or a clearance with conditions.

In 2019, the Federal Government adopted stricter rules for the acquisition of shares in German companies by foreign investors today by amending the Foreign Trade and Payments Ordinance (AWV). The threshold above which the federal government can examine an acquisition of shares by an investor outside the European Union has been lowered from 25 percent to 10 percent in security-relevant areas.

The participation of third parties in FDI is not governed by the more generous rules of antitrust law, but by the stricter general rules. Third parties can only be involved in FDI proceedings if their subjective rights are impaired. This will only apply in exceptional cases. The possibility of asserting one’s interests informally with the Minister remains unaffected, either as a company or (better) through an association. Such lobbying is common, but not legally regulated.
➢ An important characteristic of the procedure is the high, and newly increased, degree of transparency. The regulatory structure of the procedure is designed to allow and enhance a public debate on the pros and cons of the ministerial authorisation in the relevant case.

➢ Another particularity is the possibility for competitors or other interested organisations to be admitted to the administrative as well as the judicial procedure. Once admitted, these companies or associations are entitled to be heard on any argument put forward by the merging parties and to make written or oral statements. In the past, the right of the admitted parties to file a judicial complaint against the granting of a ministerial authorisation played an important role.

1. **Legal Background**

The ministerial authorisation was introduced into German law together with the merger control regime in 1973. At that time, merger control was a highly contentious topic at least in Europe, and Germany was one of the first jurisdictions to establish a formal merger control regime. The initiative of the German Economic Minister at that time met with fierce opposition not only from industry, but also from other parts of the government. The idea behind the ministerial authorisation was to alleviate fear and objections concerning the new merger control regulation.

This may explain the somehow unique structure of the German ministerial authorisation regime. It can only be exercised in favour of the merging parties and, although the merging parties are in no way competent for public interest issues, their application is a condition precedent for the procedure. The Minister himself cannot take the initiative on his own (*ipso iure*).

Right from the beginning the ministerial authorisation regime was regarded as being an exception in competition policy. Consequently, the merging parties in general respect the exceptional nature of the ministerial authorisation. This is confirmed by the relatively low number of applications and authorisations granted within the 45-year period since the regime was established.

In detail: 22 applications have been lodged since 1973, seven being later withdrawn. The Minister denied the authorisation in six cases. Nine ministerial authorisations have been granted, three of them without conditions and commitments. In the remaining six cases the permissions were granted on the basis of mostly far-reaching conditions and commitments.

In recent years the number of applications has further decreased. Over the last decade since 2008, only one application was made in the Edeka/Tengelmann case.

In only three cases the decision of the Minister was appealed at the Court. In the first case, the merging parties did not agree with the conditions and commitments imposed on them together with the ministerial authorisation. The action was defeated by Court. More important were the two actions filed by competitors against the ministerial authorisation asking for injunctions (E.ON/Ruhrgas and Edeka/Tengelmann cases). In both cases, the Higher Regional Court of
Düsseldorf ordered an injunction and blocked the merger. The two judicial disputes were finally resolved by an agreement between the merging parties and the competitors involved.

2. Procedure

The ministerial authorisation procedure is an administrative procedure which follows the general rules of administrative law. The starting point is the application by the merging parties following a prohibition by the FCO.

Once the FCO has prohibited a merger, parties have three alternatives how to react. They may appeal the decision at the court, based on competition policy grounds, they may request a ministerial authorisation by invoking public interest factors, or they may do both together. In practice, it is the ministerial authorisation procedure that is pursued first because it is time-limited (see below).

Immediately after an application has been lodged, the Minister must inform the Monopolies Commission and the governments of the Länder in whose territories the merging parties are located. The Monopolies Commission is an independent advisory body composed of five academics and industry representatives, served by highly qualified academic staff. It is bound to deliver a reasoned expert opinion whether the merger in its view is justified due to sufficient public interests. The report of the Monopolies Commission is published to allow well-grounded public debate. In most cases, the Monopolies Commission recommended denying the authorisation. The Länder Governments can submit comments on the merger but are not obliged to do so.

Competitors and other companies and associations whose interests might possibly be affected by the merger may ask the Minister for admittance to the administrative procedure. In general, the Minister is inclined to accept such a request. Therefore, in some proceedings up to 20 or even more companies or associations were admitted. The Minister may reject the request if he feels that the admittance of further parties would render the procedure too burdensome. The admitted companies and associations are entitled to take part in the proceedings on an equal footing with the merging parties.

Once the Monopolies Commission has submitted its expert opinion, the next step is a public hearing directed by the Minister in person. Participants are the merging parties, the organisations admitted to the procedure as well as third party companies and associations who may presumably present additional interesting views, e.g. trade unions, industry associations and consumer organisations. The hearing is open to the public and the press is admitted but the minutes of the hearing are not published.

Under German law, the Minister “shall” take the final decision within a period of four months following the application. The Minister respected the timeline so far, except for the Edeka/Tengelmann case. However, this did not raise any legal problems.
The Minister can either decide to authorise or to prohibit the merger, or to authorise the transaction subject to conditions and commitments. The decision must be reasoned and is published soon after it is made.

If the Minister has refused the authorisation, the parties may file a judicial complaint. The Court is fully competent to review the case, except that it is not entitled to verify the Minister’s public interest considerations. Therefore, normally the judicial review focuses on the question whether the proceedings complied with the legal standards of administrative law. If the Minister has granted a permission, the competitors admitted to the procedure have the power to take legal action and to request an injunction. This right has however in practice been withdrawn by the 9th amendment of the German Competition Act in 2017 (cf. chapter 4).

3. **Substantive Assessment**

The Minister’s assessment differs significantly from the scope of review of the competition authority. Whereas the FCO only considers competition policy reasons, the Minister is legally bound to respect the competitive assessment of the FCO. He is neither entitled to review the FCO decision nor to deviate from its considerations. The ministerial decision consists of two phases. Firstly, the Minister must determine any public interest factors that may be considered in favour of the merger. Secondly, he must balance conflicting interests by ascertaining whether the public interest factors equalize or prevail over the competitive objections expressed by the FCO. This “separation of powers” is regarded as an essential precondition for guaranteeing the independence and competences of the FCO.

Public interest factors that may justify a ministerial authorisation are manifold and vary from case to case. In the vast majority of proceedings, the parties defended their request by arguing that the merger would, at least in the long term, safeguard existing and even create new jobs in the industry. With the sole exception of the Edeka/Tengelmann case, the Minister has always rejected the jobs argument. All Ministers took the view that, according to long-standing experience and reliable economic theory, the short-term synergy effects of mergers materialise in cost savings, especially in job reductions. Therefore, the parties must present clear and robust evidence showing how the relevant merger would produce, contrary to the general rule, positive longer lasting effects for jobs.

It is commonly accepted that the benefits for the merging parties alone do not justify a ministerial authorisation. The argument that the merger might serve as a last resort to save a company of nation-wide importance and in financial crisis has sometimes been presented but this was not accepted either, probably because in that case the FCO would have been able to authorise the merger based on the failing company defence.

Public interest factors that have been accepted in ministerial authorisations are e.g.: ensuring the international competitiveness of important industries; safeguarding the technical know-how of
companies experiencing financial or industrial difficulties; and protecting the long-term energy supply, especially in the oil and gas sectors where Germany depends on large imports.

4. Case Study: Edeka/Tengelmann

The start of the merger review already deviated from normal procedure. Once the FCO had learned that Edeka und Tengelmann had signed a sales contract and intended to take preparatory activities, it did not wait for the notification of the parties and initiated the merger control procedure ex officio. By a separate decision, the FCO vetoed all preparatory measures, in particular, a joint purchasing agreement aimed at preserving the viability of the Kaiser’s retail supermarkets (Tengelmann) during the merger control proceedings.

The merger control was closed by a prohibition decision of the FCO. For the first time, the FCO did not base its assessment on a market dominant position in specific regional retail markets, but on the European SIEC test (“Substantial Impediment to Effective Competition”). Edeka and its main competitor, Rewe, held a strong position in nearly all supply and demand food retail markets in Germany. The FCO said that this position would be further strengthened by the acquisition of Kaiser’s (Tengelmann), the last remaining independent food retail supermarket chain. The prohibition decision was later confirmed by the Higher Regional Court of Düsseldorf which – in contrast to the FCO – based its decision on a market dominant position of Edeka in one of the districts in Berlin.

The merging parties appealed the FCO’s prohibition decision and, at the same time, applied for a ministerial authorisation. The main competitor, Rewe, and several other companies and associations were admitted to the ministerial proceedings. Minister Sigmar Gabriel took the view that the jobs of Kaiser’s (Tengelmann) retail supermarkets would be at risk if the acquisition of Edeka failed. He indicated that a ministerial authorisation could preserve the 5,000 jobs of the Kaiser’s supermarkets for a long-lasting period. The Monopolies Commission voted against a ministerial authorisation. It did not see any guarantee that the Kaiser’s jobs would be saved in their entirety by the acquirer Edeka. Minister Gabriel entered into negotiations with the merging parties and asked them to submit binding commitments that the Kaiser’s jobs in total would be maintained after the merger.

The negotiations extended over several months, resulting in a prolongation of the administrative procedure over the legal four-month-period. After the merging parties had presented their consent to the requested warranties, the Minister granted the ministerial authorisation, together with a long list of binding commitments. Edeka thereby had to, for a period of five years, guarantee until 2022 the entirety of the Kaiser’s jobs and the working conditions of the Kaiser’s employees not being impaired after the merger.

Rewe and some other companies and associations appealed the ministerial authorisation and requested an injunction. The Higher Regional Court of Düsseldorf ordered the injunction and
blocked the implementation of the merger until the end of the judicial proceedings. To save time, Edeka entered into bilateral negotiations especially with Rewe, with a view to reaching an amicable settlement which would bring the judicial dispute to a close. However, the parties insisted on their reciprocal positions, and the negotiations failed. Tengelmann suffered from the increasing losses of the Kaiser’s supermarkets and declared to no longer have the necessary resources to wait for the unforeseeable outcome of the current lawsuit. Tengelmann asked for an immediate solution that allowed the Kaiser’s supermarkets to be acquired by Edeka or a third party company in the near term. On a proposal of the Rewe CEO, an extrajudicial mediation under the chairmanship of former chancellor Gerhard Schröder was arranged. After difficult discussions, Edeka and Rewe finally agreed on a compromise, the most important part of which was the transfer of some of the Kaiser supermarkets in Berlin from Edeka to Rewe. Consequently, Rewe and the other claimants withdrew their action, so that the ministerial authorisation became legally binding.

The administrative proceedings in the Edeka/Tengelmann case corresponded to the usual standards of the ministerial authorisation procedure in earlier cases. The only exception was the fact that the proceedings up to the ministerial decision significantly exceeded the legal deadline of four months. This had no consequences for the administrative legality of the decision but aggravated the financial problems of Tengelmann because of the rapidly increasing losses of the Kaiser’s supermarkets. Likewise, the significant number of companies and associations admitted to the proceedings did not adversely affect the administrative procedure.

Instead, the judicial dispute was exceptional. In the same way it did in the E.ON/Ruhrgas case, the Court declared the ministerial authorisation to be unlawful and therefore blocked the implementation of the merger. The Court criticised several procedural and substantial elements of the ministerial decision. This came as a surprise as the procedure in this case did not deviate from the common practice in earlier cases. The conclusion for future cases is that the Court’s decision exposes the Minister as well as the merging parties to substantial legal uncertainty whether a ministerial authorisation, once granted by the Minister, will have legal effect. As judicial disputes, eventually moving up to the Supreme Court, may take an unforeseeable length of time, the merging parties have no choice but to aim for an out-of-court settlement to make use of the ministerial authorisation. Edeka as well as E.ON which had both chosen this alternative, had to offer substantial concessions in return for the amicable agreement. Filing a judicial action against a ministerial authorisation may thus be an effective instrument to negotiate financial or competitive compensations from the merging parties.

5. Subsequent Legislative Proposals

The vivid political discussion concerning the ministerial authorisation in the Edeka/Tengelmann case did not trigger formal legislative proposals. Only later, during the 9th amendment of the German Competition Act dealing mainly with the implementation of the EU cartel damages claims directive into national law, several amendments concerning the ministerial authorisation were
introduced. This was decided in internal debates of the Parliament, without any public discussion. The changes consist in imposing a maximum deadline for the ministerial decision of six months and requiring the Minister to explain the reasons in case he deviates from the expert opinion of the Monopolies Commission. The latter change has been established practice in all former ministerial authorisations and is now being confirmed by law.

By far the most important change in the law concerns the right to appeal a ministerial authorisation. Third parties admitted to the procedure, from now on, are only entitled to file an action if they can claim that their subjective rights, and not only their economic interests, are affected by the ministerial authorisation. This regulation has the effect that, in the future, claimants can attack a ministerial authorisation granted to a competitor only in rare exceptional cases. The official reason given by Parliament for this amendment was shortening the procedure of the ministerial authorisation. In substance, the main objective was probably preventing third parties from bargaining economic benefits in return for abandoning their judicial lawsuits.

A similar regulation had been included into the 7th amendment of the German Competition Act concerning merger control decisions of the FCO. Also, in this case, the objective of the legal provision was precluding the attempts of third parties to negotiate financial compensation in return for abandonment of their legal action against the FCO decision. The legislator, however, deemed it sufficient to exclude only injunctions at the request of third parties. Thereby, normal judicial actions against a merger control decision remain permitted by law. Such a lawsuit does not prevent the merging parties from implementing the merger either wholly or in part. In (the highly unlikely) case that the lawsuit should be successful, the merging parties are then obliged to unwind the merger and to disinvest the concentration. The amendment apparently fulfilled its objectives. Since then no case has become known that any competitor, following the FCO merger clearance, tried a bilateral bargaining with the merging parties in return for abandoning its lawsuit.

In the case of the ministerial authorisation, the German legislator went a step further. The new provision does not only exclude injunctions in favour of third parties admitted to the procedure but also prohibits normal legal action against a ministerial authorisation by third parties. The explanatory memorandum to the amendments does not provide any further details to justify the different treatment of legal actions against ministerial authorisations and FCO merger control decisions.
SOUTH AFRICA

South Africa provides an example of a jurisdiction in which the competition authority must consider public interest factors beyond consumer welfare. The merger of ABInBev and SAB Miller (including legacy South Africa Breweries) illustrates how public interest factors can shape a merger review and influence the remedies that are required. Part A below provides a general description of the South African enforcement and regulatory structure and process, while Part B uses a case study to illustrate the application of the Act to merger proceedings.

Part A

1. Description of the enforcement / regulatory structure and process

General legislative framework

1.1 Competition law in South Africa is governed by the Competition Act No. 89 of 1998 (as amended) (the Act) as well as the various regulations promulgated in terms of the Act. As explained in more detail below, the structure of the Act is such that as part of the competition law assessment, the competition authorities must also determine whether there are any substantial public interest considerations that could justify permitting or refusing the merger.

1.2 Presently, South Africa does not have a separate national security or national interest regime. However, the recently published revised Competition Amendment Bill has introduced a proposed new section into the Act titled “Intervention in merger proceedings involving foreign acquiring firm”. This amendment provides the President the powers to constitute a Committee comprised of Ministers and officials determined and appointed by the President with powers to intervene in respect to a merger where the acquiring firm is foreign, and the merger may adversely affect the country’s national security interests. The amendment also provides for the determination of national security interests as well as the issuing of regulations that will govern access to information, including confidential information, and the process, procedures and timeframes associated with the consideration of these kinds of mergers. The envisaged framework will require that parties to a merger with a foreign acquirer must obtain the approval of the Committee before they can notify the merger to the competition authorities in the ordinary course. While not yet in effect, and possibly still subject to change, it is clear that this proposed amendment will have a pronounced impact on the merger notification process in South Africa, including as to the

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time frame for merger clearance.\textsuperscript{245} It is understood that the Minister would like to see the legislation enacted by the end of 2018.

1.3 There are three bodies responsible for the enforcement of competition law in South Africa: the Competition Commission (\textit{Commission}), Competition Tribunal (\textit{Tribunal}) and the Competition Appeal Court (\textit{CAC}).\textsuperscript{246}

1.4 Mergers in South Africa are classified as small, intermediate or large depending on the merging parties’ turnover and/or asset values. Ordinarily, only intermediate and large mergers are notifiable to the Commission, with the Commission being the decision maker in respect of intermediate mergers, and the Tribunal being the decision maker in the case of large mergers (following an investigation and recommendation by the Commission). Decisions of the Commission in the case of intermediate mergers (and small mergers when applicable) can be appealed to the Tribunal, while decisions of the Tribunal in relation to all types of mergers can be appealed to the CAC. The CAC is the final court of appeal for competition law matters unless constitutional issues are raised, in which event the Constitutional Court will have jurisdiction as the final arbiter in the matter.

1.5 The Act requires that in relation to large mergers, once the Commission has received notice of a large merger, it must refer such notice to the Tribunal and the Minister of Economic Development (currently Mr. Ebrahim Patel). Once it has completed its investigation, the Commission must forward a copy of its written recommendation, with reasons, as to whether or not implementation of the merger should be approved, approved subject to any conditions, or prohibited.

1.6 In their assessment of any merger, the Commission and Tribunal are required initially to determine whether or not the merger is likely to substantially prevent or lessen competition, and if it appears that it will, then determine whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition that may result or is likely to result from the merger (which would not arise if the merger were prevented). They must also determine whether there are any substantial public interest considerations that could justify permitting or refusing the merger.

1.7 The question as to whether the merger will result in a substantial prevention or lessening of competition must involve an assessment of the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave

\textsuperscript{245} The proposed new section envisages a decision being made by the Committee within 60 days of receiving the notice, or such further period which the President may agree to, on good cause shown.\textsuperscript{246} In certain instances competition cases can be appealed to the Constitutional Court.
competitively or co-operatively, taking into account any factor that is relevant to competition in that market. These can include:

(a) the actual and potential level of import competition in the market;
(b) the ease of entry into the market, including tariff and regulatory barriers;
(c) the level and trends of concentration, and history of collusion, in the market;
(d) the degree of countervailing power in the market;
(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
(f) the nature and extent of vertical integration in the market;
(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
(h) whether the merger will result in the removal of an effective competitor.

1.8 Next, notwithstanding any conclusion reached in the competition assessment, the Commission or Tribunal must assess whether the merger can or cannot be justified on substantial public interest grounds by assessing the effect that the merger will have on:

(a) a particular industrial sector or region;
(b) employment;
(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
(d) the ability of national industries to compete in international markets.

1.9 There are thus two relevant lines of enquiry in the public interest assessment in South Africa. First, following a negative competition finding (i.e. that there is a substantial prevention or lessening of competition), the Commission must determine whether there are any substantial positive public interest grounds that could justify the approval of the anticompetitive merger. This essentially allows for the approval an anticompetitive merger where there are found to be substantial merger specific positive public interest grounds that justify the approval of the merger. Second, in circumstances where a merger is found not to result in a substantial prevention or lessening of competition, the merger may still be prohibited or approved conditionally where it is established that it raises substantial negative public interest effects.
1.10 The Act also makes provision for a number of different parties to participate in merger proceedings, including trade unions and employees as well as any person with a material interest in the relevant matter. Notably, the Minister has an automatic right to make representations on any of the public interest grounds listed above in any intermediate or large merger before the Commission, Tribunal or CAC. The current Minister regularly executes this right, particularly in high profile transactions.

Public interest guidelines

1.11 In June 2016, the Commission published Public Interest Guidelines (the Guidelines) for the assessment of public interest in merger proceedings. The Guidelines were published in accordance with the relevant section of the Act (which provides that the Commission may prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act). The Guidelines seek to provide guidance on the Commission’s approach to analysing mergers by indicating the approach that the Commission is likely to follow and the types of information that the Commission may require when evaluating public interest factors.

1.12 The Guidelines provide details of the Commission’s likely approach to the assessment of each of the factors listed in paragraph 1.8 above. In general, the Commission will first assess the merger’s likely impact on the relevant factor under consideration, determine whether this impact is merger specific, determine whether the effect is substantial, provide the merging parties with an opportunity to substantiate any positive (public interest) effects, and finally, consider possible remedies to address any negative public interest effect.

1.13 Importantly, the Guidelines only set out the Commission’s general methodology. The Commission is not forced to strictly adhere to the Guidelines and can deviate from its stated methodology should it feel necessary.

1.14 In trying to contextualise the public interest assessment in South Africa and its focus on certain factors, it is important to recall the history of South Africa and the need to address historic social issues. The Guidelines therefore refer to the preamble to the Act and highlight that “it is recognized that the South African economy must be open to greater ownership by a greater number of South Africans and that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers that is also focused on development, will benefit all South Africans.” The Guidelines also specifically highlight the high unemployment rate in South Africa and the state of the economy in general.

Part B

247 Guidelines, paragraph 3.1.
South Africa case study: ABInBev and SAB Miller

2. Description of the matter that is the basis of the case study and of what transpired

2.1 The relevant transaction involved the acquisition of SABMiller plc (SABMiller) by Anheuser-Busch InBev SA/NV (ABInBev) (the Transaction).

Background

2.2 The merger involved the acquisition of the world’s second largest beer producer by the world’s largest beer producer. The transaction was complex, involving notifications in 29 jurisdictions across the globe.

2.3 In South Africa, partly due to SABMiller’s dominance in the country, and partly due to its origins in South Africa dating back to 1895 and its status as a global giant, making it an iconic manufacturing firm, the transaction was subject to particular scrutiny and interest, not just by the competition authorities, but also by the public and government.

2.4 What is interesting about the case, as was noted by the Tribunal, is that despite the size of the merging parties, the large number of interested parties and consequently the large number of issues canvassed, the issues were resolved without the need for an unduly protracted and fraught merger process.

2.5 The Tribunal posited four reasons for this: (i) There was no significant overlap between the firms in South Africa; (ii) SABMiller’s position of dominance in South Africa pre-merger was so extensive that “it [was] difficult to conceive how even the added weight of ABInBev could make this position more compelling than it already is”; (iii) ABInBev adopted a pragmatic approach to the identified competition and public interest concerns and agreed to a number of undertakings to appease those that had taken issue with the transaction; and (iv) in order to have the Transaction approved in other jurisdictions where more significant overlaps did arise, the merging parties had agreed to a number of substantial divestitures, a number of which formed part of SABMiller’s South African product offering.

2.6 The merger was announced in the last quarter of 2015 and was notified to the Commission in December 2015 following a period of further negotiation between the merging parties and an improved offer by ABInBev. The Commission’s investigation of the transaction lasted until May 31, 2016, following which it made its recommendation to the Tribunal – this being conditional approval.

2.7 During the Commission’s investigation process, the merging parties opted to engage with three government departments, namely the Economic Development Department (which is headed by Minister Patel who has an automatic right to participate in proceedings), the
Department of Trade and Industry, and the Department of Agriculture, Forestry, Fisheries. As a result of this engagement with the government, ABInBev agreed to provide a number of undertakings. These undertakings were formalised in an agreement between the parties and the three government departments prior to the conclusion of the Commission’s investigation and its recommendation to the Tribunal.

2.8 The transaction presented a minimal horizontal overlap in South Africa with ABInBev’s market share in South Africa amounting to less than 0.1%. Moreover, as a result of the divestments that were being made on a global basis, SABMiller’s market share in South Africa would actually decrease by 1.5% as a result of the Transaction.

2.9 In relation to potential vertical concerns, the Tribunal assessed whether the Transaction could lead to import substitution at the expense of local South African industry. A second, and as noted by the Tribunal, “paradoxically contradictory” concern was that the merged firm could use its buyer power to source all available inputs from local industry to serve its international operations and thus force local competitors to source inputs from more expensive suppliers.

2.10 This second concern was considered by the Tribunal not to be a classic competition concern, but rather a public interest concern based on the behaviour of post-merger management. The reason for this was that prior to the Transaction, SABMiller had been prepared to make various concessions to smaller rivals in order to protect its reputation. Post-Transaction, it was not certain that an internationally based controller would do the same. Consequently, the transaction was found to raise certain public interest conditions in respect of the supply of key inputs.

The Public Interest Assessment

2.11 The Transaction was considered to raise several public interest concerns. However, the majority of these concerns were addressed in the agreement that was entered into with government. The agreement included measures that would protect small brewers, provide incentives to emerging farmers and result in skills development in the supply chain.

2.12 The approach that was adopted by the merging parties was to first reach agreement with the relevant government departments, and then have the contents of the agreement included in the conditions. Interestingly, the Tribunal noted in its decision that because of the process followed by the merging parties, and because the conditions were largely uncontroversial, it was not necessary for it to enquire whether the concessions ultimately made were necessary.
2.13 There was one exception to the above, where concessions offered by the merging parties were on their face considered by the Tribunal to be inappropriate or disproportionate; it intervened to prevent this.

The Fund

2.14 The undertaking that attracted the most attention was the creation by the merging parties of a fund which would invest R1 billion (approx. USD 66 million) over a period of five years. This was in addition to the R1.1 billion that SABMiller had already planned to spend on transformation and investment objectives. The Fund was to be aimed at three objectives: (i) agricultural development; (ii) enterprise development; and (iii) South African societal benefits, with specific amounts being allocated to each objective.

2.15 The societal benefits objective was not included in the conditions drafted by the Commission on the basis that it did not form one of the public interest objectives set out in the Act. The Tribunal noted that as a legal proposition the Commission was correct and that the jurisdiction of the competition authorities is limited to the grounds set out in the Act. In what would perhaps be considered an atypical approach, since they would be responsible for ensuring compliance with the conditions, the merging parties were prepared to accept that these conditions did fall within the ambit of the Act. The Tribunal however explicitly noted that while it would accept this for the purposes of this decision, this should not be construed as creating any precedent for future cases.

Employment

2.16 There were two concerns in respect of the Commission’s proposed conditions dealing with employment. The first related to a moratorium on merger specific retrenchments, the second related to a share ownership scheme. This report will not to go into detail regarding the second concern save to note that the condition regarding the employee share scheme was ultimately not included in the conditions and was left to be negotiated by the effected employees outside of the merger process. However, the moratorium of merger specific retrenchments is explored in further detail below.

2.17 The Commission’s recommended condition, based on the agreement reached between government and the merging parties, contained the following provision in respect of employment:

“8.1 The merged entity shall not retrench any employee in South Africa as a result of the merger. For the avoidance of doubt, it is recorded that this condition shall endure in perpetuity ([Tribunal’s] underlining)”
2.18 The Tribunal, following its review of the conditions, found this clause to be over broad and disproportionate and accordingly imposed certain amendments. Specifically, the Tribunal was concerned with the perpetual nature of the condition, and found it highly improbable that merger-related conditions could be possible in perpetuity. This problem was found to be further exacerbated by the existence of a presumption that any retrenchment would be merger specific unless the merged firm could prove otherwise.

2.19 The Tribunal highlighted the distinction between “merger specific” retrenchments and “operational” retrenchments, the former falling within the purview of the Act while the latter does not.

2.20 In light of the above, and due to concerns around the creation of an administrative burden for the competition authorities being left to arbitrate retrenchment disputes for an indefinite period, the Tribunal deleted the underlined text from the above condition and required that the onus to prove merger specificity (of lack thereof) reverse after five years. The final clause therefore provided that during the first five years following the transaction, the onus would be on the merged firm to demonstrate that any retrenchments were non-merger specific, while thereafter the onus to show merger specificity would shift to the employee.

**Minister’s issues**

2.21 As previously noted, ABInBev and the government had reached an agreement prior to the Commission recommending its conditions to the Tribunal. At the Tribunal hearing the Minister was therefore keen to ensure that the conditions capturing the agreement were not diluted in any manner. However, the Tribunal found that while parties are free to reach any agreement they see fit prior to the determination of the merger by the competition authorities, such an agreement “cannot bind [the Tribunal’s] discretion when it comes to the content of the conditions.”

2.22 A clause in the conditions which provided that there be no derogation from any provision of the Minister’s agreement was deemed to be inappropriate and removed from the Commission’s conditions. The Tribunal found that to allow for such a clause would in effect mean that the competition authorities had ceded their discretion to another party which would be a dereliction of their public function to regulate mergers.

**Competitive assessment**

2.23 As noted above, the Tribunal found that the overlap in the beer market was slight, with ABInBev’s share being less than 0.1%. Once regard was had to the brands that SABMiller had undertaken to divest, the Tribunal concluded that in the clear beer market the merger was unlikely to result in an increase in the market share for the merged entity and would not alter the market power that SABMiller enjoyed pre-transaction.
2.24 The merging parties also overlapped in the flavoured alcoholic beverages (FAB) market, which includes cider. Pre-merger, SABMiller produced its own brands of FAB and also held a minority interest in the largest player in the local market, Distell. ABInBev is the producer of the largest cider brand in the world, although at the time of the Transaction was not present in South Africa.

2.25 In terms of the divestment condition, SABMiller agreed to divest its interest in Distell, with the result being that it would only be present in the FAB market in South Africa through its own brands. The Tribunal therefore found that the merger would not lead to a substantial prevention or lessening of competition in the FAB market.

2.26 Notwithstanding the above, competitors of the merged firm in beer and cider, namely Heineken and Distell, both raised competition concerns. The merging parties made various concessions to Distell. In relation to inputs, Distell was concerned that if the merged firm increased its cider production, its procurement of apple concentrate would be in excess of what the local market could supply. The conditions therefore included protections for cider competitors from foreclosure of the local supply of apple concentrate by the merged entity. These were that for a period of 10 years, if the merged entity procures in excess of a certain target of local procurement, it will be required to procure the excess from imports or from incremental local production. In addition, where the merged entity supplies the only refrigerated coolers at an outlet, the owner of the outlet will be free to use up to 10% of the capacity of at least one cooler for rival South African owned and produced ciders. Interestingly, these concessions were not made for rival beer producers (with the exception of small beer producers). The Tribunal suggested and accepted that the likely reason for the concession was to protect the value of the Distell business for the purpose of the divestiture.

2.27 The merging parties also made concessions that would benefit rival beer manufacturers. In 2002 SABMiller had acquired a bottle crown manufacturer, Coleus. That transaction had been approved by the competition authorities subject to conditions which guaranteed supply of crowns to rivals. These conditions were still in force at the time of the Transaction. Heineken and Distell were both reliant on Coleus for supply. The merging parties and Commission conditions had undertaken to continue to afford security of supply for a period of 5 years. However, concerns were raised as to what might happen post this period. The merging parties therefore undertook to guarantee security of supply for as long as they continue to control Coleus.

**Input concerns**

2.28 Pre-transaction, SABMiller was the dominant buyer of certain inputs into beer production. This led to two concerns: first, that providers of these inputs could be terminated if the merged entity switched to sourcing these inputs from ABInBev’s international suppliers,
and second, given the very large volumes procured by SABMiller, any switch to imports over local suppliers could threaten local input producers, particularly those that sell primarily to SABMiller. To address these concerns, the merged firm gave undertakings to source inputs at least at the same level as it did at the time of the merger, expressed as a ratio of procurement rather than a fixed quantity.

2.29 One of the inputs that the Tribunal gave special mention to in its decision was that of barley. Pre-merger, SABMiller was the sole buyer of barley in South Africa – even rival beer producers bought their barley from SABMiller. Given that ABInBev is the largest procurer of barley in the world (including from countries where barley is subsidised), South African farmers were concerned that they would be squeezed on pricing and that therefore it would be appropriate to address this with a condition. Unlike many other agricultural commodities, barley does not have a market through which prices are determined. The industry therefore relied on a formula underpinned by the wheat price and developed by the University of Pretoria to determine price. At the time of the Transaction, there was ongoing debate between farmers and SABMiller regarding the application of the formula and how it should be impacted by a tariff imposed on wheat.

2.30 The Tribunal found that it would not be appropriate to impose a pricing condition since the formula was still subject to bargaining between the parties and imposing one version of the formula would unfairly favour one of the parties. With regard to purchasing ratio, the Tribunal was of the view that the condition on inputs provides that the merged firm must adhere to purchasing from domestic suppliers at the same ratio to total purchases that it did on the approval date. To eliminate distortions caused by the wheat tariff, the Tribunal required that that ratio should be determined not at the 2016 level, but rather as the highest level taken over a three year period including 2016.

Outlets

2.31 Access to market for products was a major competition and public interest issue in this case. The merging parties were prepared to give undertakings to lower barriers to entry in outlets. These undertakings included the following:

(a) The acknowledgement by the merging parties of the freedom of outlet owners to allocate space;

(b) An undertaking not to offer inducements to proprietors of outlets; and

(c) The reservation of capacity in coolers in outlets to cider rivals and small beer producers.

2.32 During the hearing, a lengthy debate ensued regarding the definition of an ‘outlet’. Ultimately the Tribunal left the precise definition of an outlet open.
Exclusionary behaviour concerns

2.33 Heineken alleged that SABMiller had pre-merger engaged in certain exclusionary practices by virtue of its dominant position in the clear beer market which, it argued, would intensify post-merger. Heineken argued that the merged firm would have over 200 brands and would seek to exploit the value of these brands through aggressive expansion to secure market share. The Tribunal noted that Heineken had failed to explain how the merger would increase SABMiller’s existing position of dominance (it had a market share between 85 and 90%) and thus increase the risk that it would engage in exclusionary conduct. Given that ABInBev’s market share in South Africa was miniscule, the Tribunal was not persuaded that the merger would make any difference to SABMiller’s existing leverage.

2.34 In relation to the question of cooler access, the Tribunal noted that the access granted to small beer producers was provided on public interest grounds and not on the basis of a competition concern. Heineken, unlike small beer producers, would be able to sponsor its own entry into outlets.

Conclusion of review and decision

2.35 The Tribunal ultimately conditionally approved the merger having found that the extensive conditions offered by the merging parties, as modified by the Tribunal, adequately remedied any competition and public interest concerns raised by the merger.

2.36 The Tribunal also specifically commended the merging parties for the constructive response to concerns that were raised regarding their Transaction, which the Tribunal cited, resulting in a far shorter and more efficient process than might otherwise have been the case.

3. Lessons learned from the Transaction –South African views

3.1 In discussions with a range of South African practitioners (both lawyers and economists), journalists, academics, representatives from the authorities and the judiciary, a number of themes were identified flowing from the Transaction and the approach to public interest in South Africa.

3.2 One of the most striking of these is the extent to which the interventionist nature of the regime on public interest grounds has been developed by the current Minister of Economic Development. A number of different practitioners, academics and members of the judiciary remarked on Minister Patel’s “hands-on” approach, as well as his desire to get into the details and engage in thorough intellectual debate on merger issues. Previous Ministers did not engage in the process to the same degree, and there are questions as to the extent to which a future Minister of the Economic Development Department may similarly engage
and participate in the process. It was also noted that a different Minister may take a different approach to public interest.

3.3 Interestingly, some practitioners noted potential downsides to this increased level of intervention from the Minister, with one practitioner suggesting that the involvement of the Minister has made the Commission “less proactive.” While it was noted that the Commission is active on issues related to employment, concerns have been raised that once the Minister becomes involved in a case, the Commission tends to defer to the Minister (which is questionable in terms of its role and functions as set out in the Act). Similarly, some practitioners observed that in their view, the Tribunal is too deferential to the Commission. However, this can be contrasted with a view of another practitioner who was reluctant to conclude that the Minister’s process has overtaken the Commission and instead considered that the Commission and Minister work well together.

3.4 A number of practitioners noted that engagements with the Minister can “add a further public interest cost to a deal.” It was thought that the view taken by the Minister was that large multi-national businesses can afford this cost. However, there are concerns that not enough work has been done to consider the impact that this might have on the marginal cases where transactions simply do not proceed due to the potential imposition of onerous public interest conditions. It was pointed out that the cases in which the Minister has intervened often involve high-profile multi-nationals (e.g. Walmart and ABInBev).

3.5 It was observed that during the drafting of the Act there were discussions on what the Minister’s role ought to be in the competition process. It was thought by some at the time that the Minister should be excluded from the process completely and to have the public interest considerations fall under the remit of the Commission; the drafters wanted to remove ministerial discretion in order to avoid decisions based on politics and not economics.

3.6 A concern was also expressed regarding the agreement of conditions through what were described as “backroom negotiations” as opposed to through an open and transparent process. This concern was not shared by all though, with some academics and practitioners indicating that it is the parties that elect to negotiate in this way with the Minister. A comparison was also drawn with the negotiation of a plea bargain in criminal law where the outcomes are negotiated in private and only the result is made public.

3.7 While a number of commentators were of the view that the public interest assessment needs to be constrained, one practitioner commented that the list of specific public interest issues in the Act could be improved through expansion. For example, a factor that would allow for the consideration of a national champion might be a useful addition.
3.8 It was observed that the adversarial process run by the Tribunal can cause the review of transactions to take a long time. This can drive parties to seek out the Minister in search of a “quick fix”.

3.9 The Commission highlighted that it is grappling with how to proceed in a manner that preserves the sanctity of the system provided for in the Act in circumstances where merging parties are engaging with various stakeholders in bi-lateral negotiations.

3.10 One academic highlighted how they would like to see the Tribunal intervene more frequently to restrict the imposition of conditions agreed with the Minister or Commission that go beyond concerns that are merger specific.

3.11 A representative from one of the authorities highlighted the broad scope of the public interest considerations in South Africa, citing the ‘impact on an industrial sector or region’ ground as an example.

3.12 The inconsistency in the Tribunal’s approach to matters of public interest was also flagged, the Commission noting that its recently published Guidelines attempt to limit the issues under consideration to those related to the merger.

3.13 A number of practitioners observed that even though the Act provides for public interest to “save” an otherwise anticompetitive transaction, public interest tends to factor more frequently in transactions that are either neutral or pro-competitive.

3.14 Practitioners and journalists also highlighted that any foreign entity engaging in the merger process in South Africa must not only be aware of the unique public interest regime in effect in South Africa, but also try to understand its necessity in light of South Africa’s complex history and the legacy of apartheid. However, it was also observed that the government should not engage in excessive interference, and that it can sometimes seem as though conditions are simply extracted from merging parties even though they bear no connection to the merger. In this regard it was highlighted that large, sometimes multinational firms are better able to absorb the costs of these types of conditions, but for smaller firms they can be particularly burdensome. For example, one academic noted that there are further issues in South Africa which may not be appreciated internationally and which are legitimate issues, including the role of small and black owned businesses. It was noted that these types of considerations may fit more appropriately under a market inquiry assessment but are nevertheless being considered in merger reviews (where they have unfortunately not been well developed in the decisions).

3.15 It was noted by another practitioner that the domestic economic policy considerations in a developing economy will differ hugely from developed economies. In this regard, the current Minister was said to have certain outcomes that he seeks to achieve:
reindustrialization, job growth, new manufacturing capacity and whether there is an organised labour component. It was felt that if a merger tracks any of these issues, it will get on the Minister’s radar.

3.16 Concerns were raised by some that there are potential unintended consequences with public interest commitments. For example, there could be a potential negative impact on investor sentiments when public interest issues arise, given the weight they have been given in past mergers. It was suggested that the requirement of a causal link between the public interest remedy imposed and the section of the Act setting out the particular public interest ground should be more strictly adhered to.

3.17 Concerns were raised regarding the duration for which conditions are imposed given the volatility within the South African economy.

3.18 Looking to the future, it was observed that South Africa might see an enhancement of the weight placed on public interest and the introduction of multi-factoral considerations. It was noted that a virtue of the current system is that the list of public interest factors that can be considered is limited. An expansion of these factors could make the process “ungovernable” since it is difficult for adjudicators to decide on matters of industrial policy.

3.19 It was also suggested that the Commission should do more work to conduct impact studies to assess the impact and effectiveness of conditions that have been imposed in past mergers. In relation to the establishment of funds or similarly structured conditions, some practitioners and economists had the view that the end goals of the authorities are not always clear and there is no evidence that the conditions that are imposed cure the identified harm and thereby further the public interest.

4. Takeaways for practitioners

4.1 As will be apparent, the public interest component of the merger review process in South Africa plays a very prominent role. The obligation to assess public interest is enshrined in the Act, and in most cases there are a number of interested parties who will seek to engage actively in the process to ensure that their rights are protected. These include employees (usually represented through their trade unions), competitors, customers, suppliers and any other party that can show a legitimate interest. For example, in the case of ABInBev/SAB Miller farmers made submissions through Grain SA.

4.2 It is also clear that given South Africa’s unique past and its stated need to redress the imbalances and societal issues that exist in the country it will take into account public interest considerations that would not necessarily play a role in other countries, particularly developed economies.
4.3 It may be that major international transactions between large companies that impact South Africa will attract more attention in terms of the public interest outcome than others. The remedy package in the ABInBev / SABMiller case was extensive and a number of practitioners were anxiously following the decision on the expectation that the approach adopted in this case would become the new norm and would set the precedent for engagement with the Minister.

4.4 Therefore, when contemplating a transaction in South Africa, firms should consider very carefully whether public interest issues may arise, and should give these concerns equal weight to traditional competition law concerns.

4.5 Adopting a pragmatic approach can also yield favourable results in terms of timing and process. Opting to challenge public interest conditions can result in protracted and costly litigation, often delaying the implementation of the transaction with perhaps limited potential upside in terms of lessening the impact of the public interest condition.

4.6 In the ABInBev / SABMiller case, the parties opted to negotiate with the Minister early in the process and reached an agreement which ultimately formed the basis of the conditions attached to the transaction. They also arranged for a senior representative of the acquiring firm to come to South Africa to engage with the Minister, keeping stakeholders aligned throughout the process. While this approach resulted in a relatively speedy and acceptable outcome for the merging parties, this will not always be the best approach.

4.7 When approaching the Minister, parties should acknowledge fully the Commission’s authority and engage with the Commission in the ordinary course and only if the Minister has expressed an interest, or if it is clear that he or she will seek to engage.
UNITED KINGDOM

In the United Kingdom there have been relatively few matters raising public interest considerations in recent years. However, new legislation has been introduced, and further reforms have been proposed, which will significantly increase the number of cases caught by the UK public interest regime.

1. DESCRIPTION OF THE ENFORCEMENT/REGULATORY STRUCTURE AND PROCESS IN THE JURISDICTION

General legislative framework

1.1 The primary merger control enforcement agency in the UK is the Competition and Markets Authority (“CMA”), a non-ministerial government department that is governed by an independent board. The current framework for the review of mergers in the UK was introduced by Part 3 of the Enterprise 2002 (“EA2002”):

(a) The CMA has jurisdiction to review a transaction where the target’s UK turnover exceeds £70 million and/or the transaction creates or enhances a share of supply or purchase of at least 25% of any goods or services in the UK (or in a substantial part of it). Recent changes have significantly reduced these thresholds in certain cases (see Section 4 below).

(b) The UK operates a voluntary merger review regime, and parties have the option of whether or not to notify a transaction meeting the jurisdictional thresholds. However, this is subject to the CMA’s power to “call-in” un-notified transactions, and to refer such transactions for an in-depth Phase II review within four months of completion becoming public.

1.2 In most cases:

(a) the CMA is the review body and decision maker at both Phase I and Phase II, although there is a formal separation of powers within the CMA between the two phases; and

(b) the substantive assessment is limited to the impact of the transaction on competition – specifically whether the transaction may result in a substantial lessening of competition.
1.3 However, in very limited circumstances involving specified public interest considerations, the Secretary of State can intervene and assume the role of the final decision maker.\(^\text{248}\)

**Public interest interventions - legislative framework**

1.4 Interventions by the Secretary of State can be made in three ways:

(a) By issuing a public interest intervention notice\(^\text{249}\) (“PIIN”), which can be made where the UK jurisdictional thresholds have been met.

(b) By issuing a special public interest intervention notice\(^\text{250}\) (“SPIIN”), which can be made where the transaction does not meet the UK or EU jurisdictional thresholds in respect of defence industry mergers (where at least one of the enterprises concerned is carried on in the UK or under the control of a UK company and where at least one of the enterprises concerned is a government contractor) and in media mergers (where one of the parties is a supplier of at least 25% of any newspaper or broadcasting in the UK).

(c) By issuing a European intervention notice\(^\text{251}\) (“EIN”), which can be made where the transaction meets the EU jurisdictional thresholds, but the Secretary of State considers it necessary to intervene to protect legitimate interests under Article 21(3) of the EU Merger Regulation.

1.5 The specified public interest considerations that can provide the basis for an intervention are:

(a) National security, including public security\(^\text{252}\);

(b) The need for the accurate presentation of news, free expression of opinion and media plurality\(^\text{253}\); and

(c) In relation to PIINs and SPIINs, the stability of the UK financial system.\(^\text{254}\)

1.6 There is only limited published guidance on how public interest cases will be dealt with in practice, and the guidance available is limited to setting out the statutory framework

\(^{248}\) In most cases, this will be the Secretary of State for Business, Energy and Industrial Strategy (“BEIS”). However, in media plurality cases, the decision makers will be the Secretary of State for Media, Culture and Sport.

\(^{249}\) Section 42 EA2002.

\(^{250}\) Section 59 EA2002.

\(^{251}\) Section 67 EA2002.

\(^{252}\) Sections 58(1) and (2) EA2002.

\(^{253}\) Sections 58(2A-C) EA2002. However, in practical terms, the stability of the UK financial system is unlikely to be of relevance in the case of a SPIIN, unless a transaction in the defence industry or a media merger gave rise to concerns about the stability of the UK financial system.

\(^{254}\) Section 58(2D) EA2002.
without additional commentary or insights. There have been only 14 intervention notices issued since EA2002 came into force.

Public interest interventions - procedure

1.7 Where the Secretary of State believes that one or more public interest consideration is relevant, s/he can intervene by issuing an intervention notice. There are no formal procedures that must be followed before issuing an intervention notice, even though by doing so the Secretary of State assumes a quasi-judicial decision making role. A decision to issue an intervention notice is judicially reviewable, subject to permission for a judicial review being granted by the Administrative Division of the High Court. However, there have been no such challenges to date.

1.8 In PIIN cases:

(a) In the context of a Phase I review, the CMA is required to:

(i) establish jurisdiction;

(ii) investigate the competition aspects of the merger; and

(iii) gather representations on the public interest aspects.

The CMA is then required to report to the Secretary of State, who makes the decision on whether or not to refer the relevant transaction for a detailed Phase II review (on either competition or public interest grounds). The Secretary of State can, instead of making a reference, accept undertakings from the parties to remedy any competition or public interest concerns (“undertakings in lieu”).

(b) In the event of a Phase II reference, the CMA conducts a detailed review, and reports its findings and recommendations to the Secretary of State.

The Secretary of State takes the final decision on whether the merger is expected to operate against the public interest, and has the power to take any remedial steps required to address the competition and public interest concerns. The Secretary of State is required to accept the CMA’s competition findings (although the Secretary of State is not bound on any remedies recommended by the CMA to address competition or public interest issues identified). If undertakings are proposed to remedy any concerns, the Secretary of State is required to consult on these (unless there are special reasons for dispensing with a consultation), before making a final decision.

1.9 In reaching a decision the Secretary of State will look at both the competition and public interest aspects of the transaction. Whether those aspects are balanced against each other, and the extent of that exercise, will depend on the nature of the case:
(a) The Secretary of State will not explicitly balance competition benefits against possible public interest concerns. Although such a balancing exercise may be conducted unconsciously or implicitly, it is unlikely that the Secretary of State would allow competition benefits to trump genuine public interest concerns.

(b) However, if the CMA has concluded that transaction would result in a substantial lessening of competition, the Secretary of State may conclude that any anti-competitive effects are outweighed by the public interest in allowing the transaction to go ahead.\(^{255}\)

1.10 In SPIIN and EIN cases, the CMA is not required to carry out a competition assessment. In SPIIN no competition assessment is required, and in the context of EIN cases the competition assessment is carried out by the European Commission. However, the CMA retains the other obligations outlined above, including determining the jurisdictional aspects of the merger and collating representations on the public interest aspects.

1.11 A decision by the Secretary of State at Phase I or Phase II can be challenged before the Competition Appeal Tribunal under section 120 EA2002. However, that is not a full appeal on the merits, but instead review based on judicial review grounds (i.e., illegality or unlawfulness, procedural unfairness or procedural impropriety, irrationality or unreasonableness).

2. **CASE STUDY: HYTERA/SEPURA**

2.1 The relevant transaction involved the takeover of Sepura plc by Hytera Communications Corporation Limited (the “Transaction”).

*Background – The Transaction*

2.2 Sepura is a global provider of secure mobile communications devices to public sector and commercial customers. In particular, Sepura focuses on users of the terrestrial trunked radio technology within professional mobile radio (“PMR”) communication solutions. It is a supplier of technology used by emergency services in many countries including Germany and the UK. Prior to the acquisition, Sepura was listed on the London Stock Exchange.

2.3 The acquirer was Hytera, a Chinese company which operates in the same sector as Sepura. Hytera is a global provider of PMR communication solutions to clients in government,

\(^{255}\) See, for example, the Secretary of State’s decided to clear the *Lloyds/HBOS* transaction at Phase I (avoiding a Phase II review), on the basis that the competition concerns raised by the Office of Fair Trading (the CMA’s predecessor) were outweighed by the public interest in allowing the transaction to go ahead for the purposes of maintaining the stability of the UK financial system.
public security, utility, transportation and enterprise sectors. Hytera is listed on the Shenzhen Stock Exchange in China.

2.4 In the autumn of 2016, Sepura faced challenging financial conditions and decided to look for a buyer. Hytera emerged as a potential buyer in late 2016, with a deal announced in December 2016. The presence of a Chinese buyer sparked concern among regulators across Europe given the importance of Sepura to several public security organisations. This included reviews in Germany and Spain.

UK review - Summary

2.5 The Transaction was the subject of a PIIN issued by the Secretary of State on April 10, 2017, following public interest issues raised by the Home Office. The CMA conducted a Phase I review on a very short timetable. Although the CMA concluded that the Transaction did not give rise to any competition concerns, the Secretary of State considered that, given the public interest issues identified, he had the power to refer the Transaction to the CMA for a detailed Phase II review. However, instead of doing so, the Secretary of State accepted undertakings (including repair and security certification and control obligations) in lieu of a reference,

2.6 The review of the Transaction in the UK is instructive for parties to transactions that potentially give rise to public interest issues. In particular, it highlights the need for parties to engage with government at an early stage, and to prepare for the fact that parts of the process will be opaque.

Initial contact with the CMA

2.7 The parties to the Transaction originally informed the CMA about the Transaction in January 2017, expressing the view that it would not give rise to any competition or public interest concerns. Without giving a view on either issue, the CMA indicated that it did not require any further information. As a result, the parties did not make a formal notification to the CMA.

Concerns raised within the UK Government

2.8 The UK Government became aware of the Transaction through the Home Office’s ongoing contacts with Sepura. Those contacts took place in the absence of a current direct contractual relationship between the Home Office and Sepura. A previous framework agreement (between Septura and the Police Information Technology Organisation) had expired some time before.

2.9 In considering the Transaction, the Home Office identified a number of potential public security issues raised by the Transaction (particularly given the nationality of Hytera, and
the absence of direct contractual arrangements). These issues were flagged with BEIS, and were subsequently summarised by the CMA as follows:

“Sepura’s devices use sensitive technology and are used by the UK’s emergency services and other UK authorities to transmit and store sensitive information. In the Home Office’s view, unauthorised access to this technology and information … or insufficient security controls on access could directly prejudice the operations and security of the emergency services and other authorities, and have wider implications for national security.

Areas of concern for the Home Office arising as a result of the new ownership… include physical security in relation to company processes and premises, system security in IT systems, and personnel security in relation to employees and company management. The Home Office therefore considers that it would be necessary under any new ownership arrangements to ensure that such information and technology is protected and access limited.”

2.10 This was the first occasion on which the Home Office has become directly involved in raising public interest issues of this type. As there was no pre-existing protocol in place, officials within the Home Office took the initiative and contacted individuals within BEIS to establish whether the public interest intervention powers could appropriately be used to assess (and potentially remedy) any public interest concerns arising from the Transaction. Following this initial contact, the Home Office, BEIS and other interested government agencies worked together in a pro-active and positive way.

The PIIN

2.11 On March 27 and 28, 2017 (i.e., two months after the parties had made the CMA aware of the Transaction, and a few days following the withdrawal of the German notification), the Secretary of State contacted Sepura and Hytera to inform them that he was minded to intervene on national security and public interest grounds. This was the first time that the parties were aware of the possibility of an intervention in this case.

2.12 The Secretary of State invited the parties to make representations on the potential public interest issues identified within 4 working days, and those representations were made in writing and in person. The representations were not successful, and the PIIN was issued on April 10, 2017.\textsuperscript{257} The PIIN required the CMA to carry out a competition assessment, collate representations on the public interest issues, and report back to the Secretary of

\textsuperscript{256} CMA, Hytera-Sepura: A report to the Secretary of State for Business, Energy and Industrial Strategy on the anticipated acquisition by Hytera Communications Corporation Limited of Sepura PLC, paragraphs 99-101.

State within an expedited timetable of only 15 working days. The unusually tight timetable was set because of concerns concerning Sepura’s solvency.

*The CMA’s Review*

2.13 The CMA was prepared to begin its review of the competition and public interest aspects of the Transaction immediately. Given the tight timetable, the CMA’s review did not involve a formal notification. Instead, the CMA sent requests for information to the parties which were followed by an issues note and a call to discuss unresolved issues. The parties then followed up with further information where necessary.

2.14 In relation to the CMA’s competition and public interest reviews:

(a) **The CMA’s competition review**

The CMA conducted a normal, albeit expedited, competition review of the Transaction. It considered possible theories of harm, and the extent of actual or potential competition in those markets where the parties overlapped. Consistent with its earlier lack of interest in the Transaction, the CMA concluded that it did not believe that the Transaction “may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom”.

(b) **The CMA – Public interest review**

In relation to the public interest aspects of the Transaction, the CMA’s approach reflected the statement it made in its report to the Secretary of State that it “is not an expert in national security matters and therefore, in Phase 1, it only summarises representations made to it, in this case primarily by the Home Office”.

2.15 The CMA’s role was limited to collating the representations from the Home Office (who in turn brought together its views and those of several other defence and security services and agencies), and two unnamed third parties.

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258 Ibid, paragraph 94.
259 Ibid, paragraph 97.
260 In addition to the Home Office and BEIS, the agencies involved in the review of the deal were GCHQ, the Shareholder Executive, National Cyber Security Centre, National Police Chiefs’ Council and Centre for the Protection of National Infrastructure.
Engagement outside of the CMA review

2.16 At the same time, there was significant engagement between the various stakeholders on public interest issues outside of the CMA’s review, which resulted in the eventual resolution of the case.

2.17 In particular, the Home Office provided advice to the Secretary of State directly, including advice on the public interest issues and possible undertakings in lieu of a reference. In providing that advice, the Home Office received and channelled representations from third parties concerning national security, including government departments and agencies and law enforcement bodies in the UK and internationally. These representations were not seen by the parties, and were not provided to the CMA.

2.18 The parties also engaged with BEIS, the Home Office and other government departments directly throughout the CMA review process to understand the specific national security concerns and identify solutions to remedy those concerns (see below).

Parallel negotiations – undertakings in lieu of a reference

2.19 As stated above, in parallel with the CMA review, the parties and Home Office negotiated undertakings to remedy the public interest concerns, and to avoid a reference to a detailed Phase II review.

2.20 The negotiations took place between the parties and the Home Office (in consultation with other UK Government stakeholders). However, the CMA provided some guidance to the Home Office on the form that undertakings could take, and the importance of building compliance obligations and future reviews into the undertakings.\(^{261}\)

2.21 The undertakings negotiated were relatively straightforward, and included:

(a) An obligation to continue to provide repair services for the relevance devices, including a requirement that repair services be controlled by a company incorporated in England, and a commitment to a seven day repair turnaround.

(b) Obligations to comply with security certification and controls, including holding sensitive material within a secure area to be accessed by limited personnel with the appropriate level of UK national security clearance.

2.22 The undertakings reflected concerns that the Home Office had expressed throughout the process, but also concerns it had before the Transaction (particularly in terms of continuity of repair services). Although there was some initial concern that the Home Office could

\(^{261}\) Ibid, paragraph 111.
use negotiations as part of a wider commercial negotiation, the negotiations were considered to be straightforward and constructive.

2.23 Given the nature of the undertakings, and the sensitivity of the information concerned, Sepura took the lead in negotiating the undertakings with the UK Government. As a result, Hytera was not aware of the details of the undertakings until they were finalised.

2.24 As stated above, the Home Office provided advice on the public interest consideration to the Secretary of State directly. As part of that advice, the Home Office advised the Secretary of State to accept the draft public interest undertakings in lieu of a further detailed Phase II assessment by the CMA.

The outcome – undertakings in lieu of a reference

2.25 In its report dated May 4, 2017, the CMA advised to the Secretary of State that it did not believe that the Transaction would be expected to result in a substantial lessening of competition, and reported on the submissions made to the CMA by the Home Office. A copy of the CMA’s advice to the Secretary of State was made available to the parties, and a non-confidential version was subsequently published.262

2.26 At the same time, as stated above, the Home Office submitted its own advice to the Secretary of State on the public interest issues and the proposed undertakings in lieu. That advice was outside of the statutory framework, and was not disclosed to the parties, but it appears to have been determinative of the Secretary of State’s position.

2.27 Following the CMA’s report, on May 8, 2017, the Secretary of State announced that:

(a) given the public interest concerns identified, he considered that he had the power to refer the Transaction to the CMA for an in-depth Phase II investigation; but that 

(b) he was proposing to accept the undertakings in lieu of a reference to Phase II, in line with the Home Office’s advice.

2.28 The Secretary of State consulted on the draft undertakings,263 with a short consultation period of 2 working days. During the consultation, the Secretary of State received representations from a number of respondents, although these were not made public or disclosed to the parties.


2.29 Following consideration of the responses to the consultation, the Secretary of State accepted the undertakings on 12 May 2017\textsuperscript{264}, and signed versions of the undertakings were published.\textsuperscript{265}

*What was the public reaction?*

2.30 The Transaction was reported in the UK press, but not extensively so. In this case, the reporting appeared to be factual and objective. Most articles focussed on the changes in the share price of Sepura, with sharp falls in share price following each announcement of regulatory intervention and a rise following the conclusion of the reviews.

2.31 The only substantive commentary reported came from Sir Gerald Howarth, chairman of the all-party parliamentary group on defence and security issues, who stated that the decision to intervene was a "prudent decision by the government," and that "it’s a mistake to cosy up too close to the Chinese ... It is sensible to have good relations but it is difficult to have good relations with people who are a threat to your intellectual property and worse".\textsuperscript{266}

3. **Description of what happened thereafter, both in public/press discussion/debate (if any) and in subsequent matters involving both competition and public interest considerations**

3.1 One immediate practical consequence of this case was that the UK Government, with Cabinet Office involvement, conducted a "lessons learned" exercise, with a view to producing a protocol for UK Government and agencies to follow in future cases.

3.2 The Transaction also informed proposed reforms to the public interest regime in the UK (see below).

3.3 However, the practical impact of the Transaction and the associated review has not yet been felt in practice. There have only been three subsequent transactions subject to public interest interventions, only one of which raised substantive issue.\textsuperscript{267}


\textsuperscript{266} “Security fear over Chinese 999 deal”, The Times (London), 12 April 2017.

\textsuperscript{267} The proposed acquisition of Sky by 21st Century Fox), was referred by the Secretary of State for an in-depth review by the CMA following an EIN issued on March 16, 2017. The issues in that case related to the plurality ownership of newspapers and other media (with the CMA concluding that the transaction may be expected to operate the public interest), as well as to broadcasting standards (with the CMA concluding that, on that ground, the transaction may not be expected to operate against the public interest).
4. **DESCRIPTION OF ANY SUBSEQUENT LEGISLATION THAT HAS BEEN ENACTED, RULES THAT HAVE BEEN ADOPTED, OR PROPOSALS TO CHANGE THE LAW OR THE PROCESS, AND PREDICTIONS FOR FUTURE CHANGES**

4.1 In October 2017, the UK Government published a Green Paper ("National Security and Infrastructure Investment Review") containing proposals to significantly expand its ability to review, and potentially veto, foreign investments and transactions that raise national security concerns.

4.2 The UK Government’s proposals had been under consideration for some time, and were not a direct response to the Transaction or its outcome. However, the experience in relation to the Transaction contributed to the content of the Green Paper. The proposals included:

(a) Short-term changes lowering the CMA’s jurisdictional thresholds to capture smaller businesses active in the military and dual-use sectors, and the advanced technology (quantum technology and computing hardware) sector. In those sectors, the turnover thresholds have been reduced from £70 million to £1 million and, although the share of supply test remains, it is no longer be necessary for there to be an increase in the share of supply in order for the test to be met. The statutory instruments implementing these changes (The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 and the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018) came into force on 11 June 2018.

(b) Longer term proposals have also been put forward to allow for greater scrutiny of mergers that may raise national security concerns. A White Paper setting out the proposals was published in July 2018.\(^{268}\) The proposals are directed transactions that may pose a potential threat to national security. The range of transactions (or “trigger events”) that are potentially caught is very extensive, and the concept of “national security” is very broadly defined (including military/dual use products, essential national infrastructure, advanced IT and biosynthesis technologies, and direct suppliers relating to the emergency services). Although the White Paper proposes a voluntary notification system, and the Government has stated that it will actively encourage notifications, the Government will have the power to “call-in” relevant transactions where no notification is made (potentially up to six months after the relevant “trigger event”).

4.3 Although the consultation period for the White Paper ended in October 2018, the timing of the implementation of the long-term proposals remains unclear.

5. **TAKEAWAYS FOR PRACTITIONERS**

5.1 For practitioners, the key takeaways from this case are that:

(a) Identifying potential public interest issues to the CMA is not sufficient to ensure that those issues will be raised with the relevant government departments (particularly if the CMA does not consider there to be any competition concerns).

(b) Parties cannot rely on an apparent lack of interest from the CMA as an indicator that potential public interest concerns will not be raised at a later stage. Early engagement with all relevant government stakeholders is therefore advisable.

(c) Where there are public interest concerns, parties should at an early stage:

(i) consider how those concerns could be remedied;

(ii) take a proactive approach to proposing those remedies to the relevant stakeholders.

(d) In terms of negotiations to resolve the concerns identified, parties should expect the relevant UK Government stakeholders, rather than the Secretary of State, to lead negotiations on undertakings in lieu of a reference.

(e) Significant aspects of the process will not be transparent.

5.2 Other takeaways from this, and other cases, include:

(a) It is important to have a press strategy in place at an early stage, and be prepared to react to / pre-empt the likely press strategy of the relevant UK Government stakeholders.

(b) As a sole decision-maker, the Secretary of State could be said to be more susceptible to lobbying efforts and political pressures (including pressure from other government departments).

6. **TAKEAWAYS FOR POLICYMAKERS**

6.1 For the UK Government and policy-makers, the key takeaways from this case are as follows.

(a) A coordinated approach between relevant UK Government departments and agencies, and making those departments and agencies aware of the possibility of intervention, is key to ensuring that:

(i) All cases that may involve public interest cases are identified.
(ii) All relevant public interest issues, and potential remedies, are fully considered in a timely and comprehensive way.

(b) The efficiency of the internal processes within UK Government would benefit from the establishment of a protocol to ensure that:

(i) The procedures to be followed once a potential public interest issue has been identified are clear.

(ii) All relevant parts of the UK Government are aware of the public interest intervention regime, and the procedures that should be followed.

(c) Early engagement by the UK Government on public interest issues, and potential undertakings or commitments to remedy potential public interest concerns, is as important as early engagement by the parties.

(d) In terms of the wider objectives of the relevant UK Government departments or agencies, seeking to resolve public interest issues within contractual frameworks can be an effective way of dealing with those issues.
UNITED STATES

There is no national interest standard of general applicability in the United States. However, all foreign investment is subject to a review under a national security standard by the Committee on Foreign Investment in the United States ("CFIUS") and also is subject to U.S. law governing international trade, particularly Section 301 of the Trade Act of 1974, 19 U.S.C. § 2411. Proposals have been advanced to broaden the definition of “national security” and for other changes to the statute governing CFIUS review, which may alter the process if adopted by Congress. Consideration also has been given to using the trade laws to reach certain national interest concerns.

On the competition side, there are two federal competition agencies and fifty state attorney general offices enforcing federal and state antitrust laws, but none of these agencies is tasked with applying a public interest standard in enforcing those laws. Proposals have been made from time to time to expand the scope of review by antitrust authorities, but such proposals repeatedly have been rejected by enforcers from both major political parties.

In certain sectors of the American economy, including communications, banking, energy, transportation, and agriculture, regulatory agencies enforce sector-specific laws that require assessment of not only harm to competition, but a variety of public interest considerations.

CFIUS

The Exon-Florio amendments to the Defense Production Act of 1950 (50 U.S.C. § 4565) and their implementing regulations (31 C.F.R. part 800) (together, “Exon-Florio”) authorize the President to suspend or prohibit foreign acquisitions, mergers, or takeovers of U.S. businesses that threaten to impair the national security of the United States.269 To exercise this authority, the President must find that (1) there is credible evidence that the foreign interest exercising control “might take action that threatens to impair the national security” of the United States and (2) other laws do not, in the President’s judgment, provide “adequate and appropriate authority” to protect the national security. If the transaction has closed prior to a presidential finding, the President may order divestiture.

269 Executive Order 11,858 (May 7, 1975) implements the President’s authority under Exon-Florio and has been periodically amended, most recently by Executive Order 13,456 (Jan. 23, 2008). The Exon-Florio amendments, which were themselves most recently amended by the Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (“FINSA”) and the Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, Title XVII (FIRRMA), are implemented and clarified by regulations promulgated by the Department of the Treasury under the President’s authority. The current regulations, which implemented substantial changes flowing from FINSA, became effective on December 22, 2008. 73 Fed. Reg. 70,702 (Nov. 21, 2008) (subsequently codified at 31 C.F.R. pt. 800). Regulations implementing FIRRMA were pending as of the date of writing. These documents and other materials related to Exon-Florio are available on the website of the Department of the Treasury at http://www.treas.gov/offices/international-affairs/cfius/.
Description & Process

Exon-Florio establishes the Committee on Foreign Investment in the United States ("CFIUS") to review acquisitions by foreign persons of control over businesses operating in the United States and to determine the effect of such acquisitions on national security. CFIUS is a committee comprised of representatives from various U.S. government agencies and offices and is chaired by the Secretary of the Treasury. Exon-Florio sets forth a procedure under which parties to an acquisition that could raise national security issues can file a notification of the transaction to CFIUS, thereby triggering a national security review.

Notification to CFIUS of an acquisition is formally voluntary in most instances. However, CFIUS has jurisdiction to review any transaction in which a foreign person acquires direct or indirect "control" (in practice, closer to "substantial influence") of a "U.S. business," which includes the operations of foreign companies located in the United States. FIRRMA expanded CFIUS’s jurisdiction to include any non-passive investment by a foreign person in a U.S. business involving "critical infrastructure," "critical technology," or "sensitive personal data." If no notification is made, CFIUS retains the right to review the acquisition in the future, before or after it closes. In addition, Exon-Florio permits any CFIUS committee member to submit a notice of a proposed or completed acquisition for a national security review (i.e., “self-initiate” a review), and CFIUS has subpoena authority. Thus, although there is no general requirement to notify transactions, as a practical matter the U.S. government has the ability to investigate a particular case if it chooses to do so. Notification and clearance also provides certainty to the parties that a transaction will not be challenged in the future.

Acceptance by CFIUS of the confidential formal filing triggers an initial 45-day review period. At the conclusion of this initial review, if CFIUS determines that the transaction raises no issues of U.S. national security or does not involve an acquisition of control of a U.S. business by a foreign person, no further investigation will occur, and the statute can no longer be used to block or undo the transaction unless the parties made material misrepresentations.

If any Committee member decides that a full investigation is necessary, CFIUS has 45 additional days (with one 15-day extension possible) to conduct the investigation. At the end of the investigation period, CFIUS can clear the transaction, clear it with conditions (which are typically negotiated but may be imposed unilaterally), or submit a report to the President recommending a prohibition or stating that the Committee cannot reach a consensus. CFIUS may also request that the parties “voluntarily” withdraw and re-file their notification to restart the review process.

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271FIRRMA § 1703.
review periods and give the Committee more time. If a transaction is referred to the White House, the President then has 15 days to announce a decision concerning the transaction. If the President concludes that the transaction threatens to impair national security, he has broad discretion to act to block or unwind the transaction.

Focused on National Security, Broadly Understood

CFIUS is only concerned with transactions that threaten to impair the “national security” of the United States. “National security” deliberately is not defined anywhere in the Exon-Florio statute or regulations (other than by a brief indication that it includes homeland security and control of critical infrastructure), and CFIUS is left with considerable discretion to determine what may threaten national security. Since the original CFIUS regulations were issued in 1991, the concept of “national security” has expanded significantly beyond the defense sector to include homeland security, critical infrastructure, high technology generally, and data. The Exon-Florio provisions now explicitly provide that “national security” includes such concepts and define “critical infrastructure” as “systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems or assets would have a debilitating impact on national security.”

Some additional insight regarding the nature of “national security” can be gleaned from the statutory provisions in Exon-Florio whereby Congress directs the President (and therefore CFIUS) to consider certain factors when reviewing the requirements of national security in the context of a particular transaction. The factors specified are: (1) domestic production needed for projected national defense requirements; (2) the capability of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services; (3) the effect of foreign control of domestic industries and commercial activity on the capability of the United States to meet the requirements of national security; (4) potential effects of the proposed transaction on sales of military goods, equipment, or technology to any country (A) identified by the Secretary of State as supporting terrorism or as a country of concern regarding missile proliferation or proliferation of chemical and biological weapons, (B) identified by the Secretary of Defense as posing a potential regional military threat to U.S. interests, or (C) listed on the “Nuclear Nonproliferation – Special Country List”; (5) the potential effects of the transaction on U.S. international technological leadership in areas affecting U.S. national security; (6) the potential national security-related effects on U.S. critical infrastructure, including major energy assets; (7) the potential national security-related effects on U.S. critical technologies; (8) whether the covered transaction is a foreign government-controlled transaction and, if so, (A) the adherence of the subject country to nonproliferation control regimes, (B) the relationship of such country with the United States, specifically on its record of cooperating in counter-terrorism efforts, and (C) the potential for transshipment or diversion of technologies.

272 31 C.F.R. § 800.208.
with military applications, including an analysis of national export control laws and regulations; and (9) the long-term projection of U.S. requirements for sources of energy and other critical resources and material.

CFIUS has always had wide discretion to interpret “national security,” but historically it determined potential threats to national security most often when a target U.S. company provided goods or services to defense or security agencies (directly or as a subcontractor), especially if a contract involved access to classified information or sensitive technologies. As the definition of “national security” has broadened, however, so has the range of industries and sectors scrutinized by CFIUS. According to guidance issued by CFIUS shortly after the implementation of Exon Florio, this list includes U.S. businesses (1) that provide products and services to agencies of the U.S. Government and state and local authorities, including businesses in the “defense, security, and national security-related law enforcement sectors”; (2) focused on weapons and munitions manufacturing, aerospace, and radar systems; (3) involved in critical infrastructure; (4) in the “energy sector at various stages of the value chain” or involving “major energy assets” (e.g., exploitation, transportation, and conversion of natural resources, as well as power production); (5) related to the national transportation system (e.g., maritime shipping, port terminal operations, aviation maintenance); (6) that could “significantly and directly affect the U.S. financial system”; (7) engaged in the “production of certain types of advanced technologies that may be useful in defending, or in seeking to impair, U.S. national security” or certain information technologies that could leave a U.S. Government agency vulnerable to sabotage or espionage (e.g., semiconductors, cryptography, data protection, internet security, network intrusion detection); and (8) involving technology, goods, software, or services that are subject to U.S. export controls.

In recent years, CFIUS has been closely examining acquisitions, particularly in the microelectronics industry, involving products that have no apparent direct connection to military or other uses. In informal conversations, CFIUS officials have indicated that they are concerned with “portfolio effects,” in which a foreign power may engage in a concerted strategy to acquire

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274 Exon-Florio directs the President to consider these three factors in all transactions “as appropriate” but “particularly” with respect to foreign government-controlled transactions. 50 U.S.C. § 4565(f)(9).


one commercial technology from one business, another from a different, apparently unrelated business, and so on, and eventually combine these technologies to increase national military capabilities. CFIUS has also increasingly been focusing on the physical location of the target’s facilities and considering whether they create an espionage risk. Finally, CFIUS has focused “supply chain integrity,” attempting to ensure that even low-technology products incorporated into military or other critical applications come from reliable suppliers. However, CFIUS has provided little explicit guidance regarding its concerns or criteria, and reading the tea leaves remains a matter of judgment and experience.

**No Overt Economic Benefit or National Interest Tests**

Even as it broadly interprets national security, CFIUS has consistently affirmed that national security does not entail an economic interest or national interest test. Guidance published by the U.S. Department of the Treasury shortly after the passage of FINSA states that “CFIUS focuses solely on any genuine national security concerns raised by a covered transaction, not on other national interests. The requirements, described [in the guidance], that CFIUS or the President must satisfy in order to take action . . ., demonstrate this narrow focus on national security alone.” Consistent with his predecessors from both major U.S. political parties, U.S. Treasury Secretary Steven Mnuchin has repeatedly affirmed that “the CFIUS process focuses exclusively on identifying and addressing national security concerns.” Addressing potential CFIUS reform, Secretary Mnuchin noted that United States intends to “keep CFIUS as a national security review and . . . want[s] to deal with economic issues separately. We don’t want to confuse those issues.” This sentiment has been echoed by the U.S. Treasury’s Assistant Secretary for International Markets and Investment Policy, Heath Tarbert, whose portfolio includes CFIUS. In recent testimony, Assistant Secretary Tarbert reaffirmed that “national security is based ultimately on a national security threat assessment by the intelligence community . . . it’s certainly not any kind of economic benefits test or anything of that nature.” Finally, in the most recent revisions

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to the CFIUS statute in FIRRMA, economic “net benefit” criteria were not included despite proposals from senior legislators to do so.283

CFIUS also has not previously been active in sectors where other countries typical impose protectionist measures under the broad ambit of national interest, such as in the steel and agricultural sectors. For example, in July 2010, a bipartisan group of 50 members of Congress representing steel producing districts heavily lobbied then-U.S. Treasury Secretary Tim Geithner in response to the proposed investment by Chinese metals company Anshan Iron & Steel in a steel plant in Amory, Mississippi. U.S. national security and the loss of American jobs were the two primary bases for the objection to the investment expressed by the caucus.284 Tim Geithner’s response to the Congressmen’s letter merely confirmed CFIUS was aware of the transaction and that it “takes very seriously its obligation to protect national security while maintaining an open investment environment.”285 CFIUS did not take any action, and the joint venture was finalized in September 2010.286

Likewise, in the agricultural sector, objections were made when Shuanghui International agreed to acquire the largest pork packer and producer in the United States, Smithfield Foods, in the largest acquisition of a U.S. company by a Chinese entity. Then-Chairwoman of the Senate Agricultural Committee, Debbie Stabenow, equated both food security and economic security to national security and noted that the United States, unlike other countries, does not undertake a review of the former two—a position she sought to rectify.287 In addition to food security concerns, a letter from various industry associations to the heads of permanent member-agencies of CFIUS asserted traditional national-security concerns.288 CFIUS cleared this transaction following a

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288 Letter from Campaign for Contract Agriculture Reform, et al., to Jacob Lew, Sec’y, Dep’t of the Treasury, et al. (July 9, 2013), available at https://chinaustradelawblog.lexblogplatformthree.com/wp-content/uploads/sites/164/2013/07/farm-letter-on-cfius.pdf (noting, e.g., that Smithfield was the largest pork...
review.\textsuperscript{289} Food security and agricultural concerns were also highlighted as potential national security concerns by third parties in the acquisition of Monsanto by Bayer, a German company—a transaction that CFIUS approved in December 2017.\textsuperscript{290}

In general, nakedly protectionist appeals to CFIUS fail—even in politically powerful sectors such as agriculture and steel with a colorable connection to national security.

**Can CFIUS Be Used for Protectionist Purposes?**

There remains, however, residual suspicion that CFIUS may be used as a protectionist tool, particularly in the Trump Administration. Commentary from Xinhua, the official press agency of the People’s Republic of China, has long questioned whether protectionism, and not national security, is the true touchstone for CFIUS.\textsuperscript{291} Earlier commentary by Xinhua noted that “[s]ecurity reviews of investments in sensitive sectors are the legitimate rights of all countries, but that power should not be used as a tool to implement protectionism.”\textsuperscript{292} Even non-Chinese sources portray CFIUS as opaque. In early 2018, an article in the New York Times described CFIUS as “a little-known committee of top administration officials who meet in secret, wielding power to kill the biggest multibillion-dollar global deals,”\textsuperscript{293} and another article published shortly thereafter was titled “Trump’s Killing of Chip Deal Pushes Protectionism as It Invokes Security.”\textsuperscript{294}

So far, although the Trump Administration has invoked national security to justify tariffs on steel and aluminum,\textsuperscript{295} signs of overt protectionism have not appeared in CFIUS cases. There are strong institutional reasons that it would be difficult to convert CFIUS into a protectionist tool; for example, it would be bureaucratically difficult to instruct mid-level Pentagon security analysts that their task no longer is to assess the impact of a transaction on national security but to determine


\textsuperscript{291} See, e.g., Commentary: The U.S. should get over its allergy to Chinese investment, XINHUA (Jan. 19, 2018 5:51 PM), http://www.xinhuanet.com/english/2018-01/19/c_136908692.htm (“For some time the U.S. government has blocked possible Chinese investment deals allegedly over national security concerns . . . . Protectionism in the guise of ‘national security’ will eventually devastate [America’s] interests.”)(emphasis added).


its effect on jobs—no matter what the statute might say. This bureaucratic caution is reinforced by a long tradition of acceptance of CFIUS’s recommendations by the White House. Of course CFIUS – like any other part of any administration – is aware of shifts in the political winds, but it is easy to overstate the likelihood of a fundamental shift of purpose.

That said, recent CFIUS decisions still give serious cause for concern. The proposed $117 billion acquisition of Qualcomm Incorporated, a U.S. chipmaker with significant offshore operations, by Broadcom Limited, a company incorporated in Singapore with functional headquarters in California, was blocked in March 2018. The blocking order was extraordinary both for its procedural aggressiveness – Broadcom may have been incorporated in Singapore, but that does not render it a foreign acquiror for CFIUS purposes unless its primary stock exchange listing is outside the United States (clearly not true) or its principal place of business is outside the United States (at best true in the most formalistic of senses)\(^\text{296}\) – and for its reasoning.

The parties released a letter, dated March 5, 2018, from the U.S. Treasury’s Deputy Assistant Secretary for Investment Security, Aimen Mir, presenting the unclassified national-security concerns. The letter stated that those were: “Broadcom’s relationship with third party foreign entities and the national security effects of Broadcom’s business intentions with respect to Qualcomm.”\(^\text{297}\) After noting Qualcomm’s leadership in technology and standard setting, including as the “current leading company in 5G technology development and standard setting,” Mr. Mir stated that a “[r]eduction in Qualcomm’s long-term competitiveness and influence in standard setting would significantly impact U.S. national security” because such reduction “would leave an opening for China to expand its influence on the 5G standard-setting process.”\(^\text{298}\) The expressed concern was that “Broadcom’s statements indicate to CFIUS that it is looking to take a ‘private-equity’-style direction if it acquires Qualcomm,” which CFIUS understood to mean “reducing long-term investment, such as R&D, and focusing on short term profitability” and, as a result, the potential “weakening of Qualcomm’s technological leadership in a manner that is detrimental to U.S. national security.”\(^\text{299}\)

The letter is extraordinary. Although there is an unexplained reference to “Broadcom’s relationship with third party foreign entities,” the articulated rationale has nothing to do with Broadcom’s passing information to or taking direction from hostile powers. Rather, the U.S. government quite explicitly took the position that Broadcom’s “private equity-style” business plan was less likely to produce a vigorous U.S. competitor in the 5G space than was Qualcomm’s

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296 31 C.F.R. § 800.212(a).
298 Id. (noting that “Chinese companies, including Huawei, have increased their engagement in 5G standardization working groups as part of their efforts to build out a 5G technology” and “well-known security concerns about Huawei and other Chinese telecommunications companies”).
299 Id. at 3.
incumbent management (which was notably unsuccessful and, indeed, promptly resulted in a shareholder lawsuit claiming that management used the CFIUS process to entrench itself). Although the letter recites historically familiar national security concerns, such as the ability of U.S. Government agencies to continue to rely on Qualcomm products in the context of both unclassified and sole-source, classified prime contracts, the rationale underlying the letter – that it is not a question of the good faith or loyalty of corporate management, but rather whether management’s business plan is likely to be successful – comes closer to an industrial policy of backing business strategies than prior U.S. administrations have traditionally embraced.

**Conclusion**

CFIUS is, as originally conceived and historically implemented, fundamentally a process rooted in national security rather than economic protectionism. Even under the Trump Administration, which has implemented a much more avowedly nationalist approach than its predecessors, “national interest,” “net benefit,” “reciprocity,” and similar concepts play little or no role in CFIUS review. Although the breadth of legislative responses to recent events makes it impossible to say that CFIUS is fully insulated from any protectionist impulses, it is fair to say that, so far, any such impulses are making themselves felt only at the margins of the debate.

**Trade Law**

While it is not an antitrust law, Section 301 of the Trade Act of 1974 provides a pathway for an administration to impose limitations on foreign investment in the United States, potentially in combination with the President’s authority to respond to an “extraordinary threat” to the economy or “national emergency” under the International Emergency Economic Powers Act (IEEPA).

Section 301 is a provision of U.S. trade law that grants the U.S. Trade Representative (USTR) authority to investigate unfair trading practices by U.S. trading partners. The statute sets out three categories of conduct by foreign countries that may warrant USTR enforcement action: (i) trade agreement violations, (ii) acts, policies or practices of a foreign country that are unjustifiable, i.e., inconsistent with U.S. international legal rights, and that burden or restrict U.S.
commerce, and (iii) acts, policies or practices of a foreign country that are unreasonable or discriminatory and that burden or restrict U.S. commerce. Section 301 investigations can be initiated by USTR itself, at the direction of the President, or as the result of a petition filed by an interested party.

Under Section 301, an act, policy or practice is “discriminatory” if it “denies national or most-favored nation treatment to United States goods, service, or investment.” An act, policy or practice is “unreasonable” if, “while not necessarily in violation of, or inconsistent with, the international legal rights of the United States is otherwise unfair and inequitable.” This includes, but is not limited to, practices that deny fair and equitable opportunities to establish an enterprise, to protect intellectual property rights, and to access markets. In determining whether an act, policy or practice is unreasonable, USTR considers whether there are reciprocal opportunities in the United States for foreign nationals and firms.

If USTR determines that the act, policy, or practice in question falls within any of the three categories of conduct under Section 301, it must then determine whether to take enforcement action. USTR has broad authority to determine a response, and may take any actions at the direction of the President that are “within the President’s power with respect to trade in goods or services, or with respect to any other area of pertinent relations with the foreign country.”

Section 301 had largely fallen into disuse in the years since the establishment of the World Trade Organization (WTO) in 1995. However, the Trump Administration resurrected the statute as part of its efforts to address trade issues with China, which have included consideration of restrictions on Chinese investment transactions in the United States.

Recent Developments

On August 18, 2017, President Trump directed the USTR to initiate a Section 301 investigation into the Chinese government’s policies, practices, and actions related to intellectual property, innovation, and technology. After a seven-month investigation, the USTR concluded that the Chinese measures in question were unreasonable and discriminatory, and that they burden

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305 Id.
306 Section 301(c) specifically authorizes USTR to: (i) suspend, withdraw or prevent the application of benefits of trade agreement concessions; (ii) impose duties, fees, or other import restrictions; (iii) withdraw or suspend preferential duty treatment under a preference program; (iv) enter into binding agreements that commit the foreign country to eliminate or phase out the offending conduct, or to provide compensatory trade benefits; or (v) restrict or deny service sector authorizations (i.e., federal permits or other authorizations needed to supply services in some sectors in the United States.
and restrict U.S. commerce.\textsuperscript{308} Notably, the USTR concluded that China uses joint venture requirements, restrictions on foreign investments, and other administrative and licensing review processes to pressure technology transfers from American companies.\textsuperscript{309} The USTR also found that China directs and facilitates investments and acquisitions that generate large-scale technology transfers.\textsuperscript{310}

Following the USTR’s findings, the Trump Administration announced its intention to restrict certain Chinese investment in the United States.\textsuperscript{311} President Trump directed the Treasury Department to propose new investment restrictions on China “in industries or technologies deemed important to the United States,” using “any available statutory authority.”\textsuperscript{312} As part of this assessment, the Administration seriously considered using IEEPA for this purpose, in conjunction with Section 301.

Ultimately, however, the Administration decided not to take this route. While it has used Section 301 authorities to impose 25 percent tariffs on $250 billion worth of Chinese goods,\textsuperscript{313} it has decided to rely on CFIUS’ expanded authorities under the 2018 Foreign Investment Risk Review Modernization Act to address the Administration’s concerns with respect to Chinese investments in the United States identified in the Section 301 investigation.

**COMPETITION REVIEW**

There are no national interest considerations written into the U.S. antitrust statutes and neither the antitrust enforcers nor the courts have applied such considerations for decades, adhering instead to the “consumer welfare” test.

The federal antitrust laws (the Sherman Act, Clayton Act, Federal Trade Commission Act, and Robinson-Patman Act) were enacted with a range of goals articulated by various Senate and


\textsuperscript{309} Id.

\textsuperscript{310} Id.

\textsuperscript{311} See Presidential Mem. on the Actions by the United States Related to the Section 301 Investigation, Mar. 22, 2018. The Administration also announced its intention to impose trade penalties on Chinese imports, and on April 3, 2018 the Office of the United States Trade Representative (USTR) proposed a list of Chinese products to penalize with 25 percent tariffs. USTR is accepting comments on the proposed list, and will hold a public hearing before reaching a final decision on what products will be subjected to the additional tariffs.

\textsuperscript{312} Id.

House reports, and by various senators and members of Congress. These goals, which sometimes appeared to be at odds with one another, included such objectives as the protection of small businesses. As “Chicago School” economics-based principles increasingly began to be adopted in the 1970s, federal antitrust authorities (the Federal Trade Commission (“FTC”) and the Antitrust Division of the U.S. Department of Justice (“DOJ”)) concluded that the promotion of competition should be recognized as the only goal of antitrust enforcement.

Accordingly, for at least the last three decades, the federal agencies have argued, and the courts have held, that a “consumer welfare” standard should determine whether a transaction or practice will result in a substantial lessening of competition in any relevant market. Under this standard, a merger or practice is not illegal unless it can be demonstrated, market by market, that it will make consumers worse off than they would have been if it did not occur. This standard is to be applied in an objective manner. The burden of proof is on the enforcement agency or other plaintiff to show in a court of law that the transaction or practice will have the stated illegal effect. Critics argue for the application of a broader standard but neither the enforcers (of both parties) nor the courts have been receptive to this position in years.

**Sectoral Review**

Outside of the antitrust enforcement realm, there are some specific areas where the transaction parties bear the burden of proof of showing that the transaction should be approved and/or that a standard other than “consumer welfare” should be applied, which may have as its objective the promotion of other values. Typically, these considerations arise in the merger context in regulated industries in which the regulator has authority to review the transaction as well. Discussed below is a brief description of the standards applied to transactions in the communications, banking, energy, transportation, and agriculture sectors.

**Communications**

The Federal Communications Commission (“FCC”), 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 or authorizations of those licenses. This may involve satellite, broadcast, wireless or wireline services, including submarine cable landing licenses. The FCC applies a “public interest” test. This standard typically includes a series of factors tailored to the type of request. Moreover, the transaction parties have the burden of proving that the public interest standard has been met.

One factor that is typically included in the public interest test is competition. 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 behavioral conditions, may be needed). Facilitating this coordination, the FCC and the DOJ often employ staff who have worked at both agencies.

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. To address such concerns, the FCC seeks input from a group within the Executive Branch 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 United States Trade Representative on trade policy, and the State Department on foreign policy, again, with other agencies sometimes contributing.

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.

The FCC has the authority required to address issues of foreign investment or ownership. It applies the public interest test when 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.

314 Certain of these criteria could possibly apply to applications without foreign ownership or investment. For example, Section 6004 of the Middle Class Tax Relief and Job Creation Act of 2012 precludes participation by anyone (whether U.S. 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.”


316 See Report on FCC Process Reform, GN Dkt. No. 14-25 (FCC Staff Working Group led by Diane Cornell of the Office of the Chairman, Feb. 14, 2014) at Recommendation 1.15 (hereinafter “FCC Process Reform Report”). See also 47 U.S.C. § 214(a); 47 U.S.C. § 310(b)(4); Cable Landing Licensing Act of 1921, Executive Order 10530 and application requirements, 47 C.F.R. § 1.767 (under which the President delegates responsibility to the FCC to make determinations concerning permission to land international cables in the United States and under which application procedures are established). The FCC must coordinate all cable landing applications with the State Department and the State Department must notify the FCC within 30 days whether it has concerns. As with other types of applications, the FCC has a streamlined process available, but it will not be followed if there are concerns and the period in which the FCC must act will be extended.
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 locations), usually characterized as common carrier services, and when common carrier wireless licenses are involved, those authorizations must also satisfy the provisions of Section 310 that pertain to foreign ownership and investment. Under Section 214(a), applicants must obtain a certificate from the FTC 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 214 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.

Section 310(b)(4) allows investment in the U.S. 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 FCC 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. In instances where waivers have been granted, factors have included World Trade Organization commitments and effective competition opportunities (i.e., national reciprocity and a host of other considerations). Although waivers of the 25% foreign ownership threshold have not generally been granted to broadcasters, which are considered to have editorial discretion, the FCC recently announced that it will review on a case-by-case basis applications for approval of foreign investment above 25% in the controlling U.S. parent of a broadcast licensee.

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317 The FCC is required to provide notice of certain applications made under Section 214 and an opportunity to be heard to the Secretary of Defense and Secretary (and to certain Governors). See 47 U.S.C. § 214(b).
319 Section 310(b)(3) has a 20% limit on certain direct investments. The FCC forbears from applying the 20% limit to foreign equity and voting interests held in a common carrier licensee through U.S.-organized entities that do not “control” the licensee. Instead, the FCC assesses on a case-by-case basis 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 that used in analysis under Section 310(b)(4).
321 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 Dkt. No. 13-50 (Nov. 14, 2013). The FCC did not determine that historical concerns concerning foreign influence over broadcast stations has
As a practical matter, if concerns arise that cannot be satisfactorily addressed by a mitigation agreement or other commitment, the applicant may 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. Judicial review may also be available.

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. 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 foreign. These limitations derive from statutes and rules and are intended to advance policies, such as the promotion of diversity of ownership and content, including expansion into underserved communities. For example, Congress limited the number of radio stations that may be owned in a single market varying by the size of such 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.

Some of the conditions that have recently been required in order to obtain a finding that a merger was in the public interest include agreeing to (1) provide access to content on a non-discriminatory basis, (2) provide free Internet broadband interconnection, (3) not degrade service to rivals, and (4) commit to build out and/or upgrade networks and/or to provide benefit to certain classes of subscribers.

Banking

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 to whether new sources of capital may create greater ownership diversity or advance other FCC goals.

322 47 U.S.C. §§ 308, 309(e) and 310(d).
325 Charter Cmnc’ns., supra (ban on using data cap or usage-based pricing).
326 See, e.g., Application of AT&T and Atlantic Tele-Network, Inc., 28 FCC Rcd. 13,566 (2013) (committed to upgrade ATN’s networks to 4G technology); Application of Cricket License Co., 29 FCC Rcd. 2735 (2014) (deployment of LTE technology within one year and expansion of service within one year, and __ rate plans for value-conscious consumers); AT&T/DirecTV, supra (required expansion of fiber optic networks and discounts to low-income subscribers); Charter Cmnc’ns., supra (high-speed broadband build-out and low-income broadband program); Comcast/NBCU, supra (make high-speed internet available to low-income households, maintain local broadcast networks, increase children’s and Spanish-language programming).
Banking is another industry that can have specific additional criteria applied to it by federal authorities. In addition to the DOJ, three federal agencies—the Federal Reserve Board (“FRB”), the Federal Deposit Insurance Corporation (“FDIC”), and the Office of the Comptroller of the Currency (“OCC”)—have statutory authority to review the competitive effects of proposed bank mergers and acquisitions under applicable banking laws. If the merger falls within the jurisdiction of one or more of these banking regulators, then merging banks must submit an Interagency Bank Merger Act Application\textsuperscript{327} to all of the relevant banking agencies in the banking district where their headquarter offices are located.\textsuperscript{328}

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. Two published guidance documents outline the frameworks that are to be used in making this determination: the DOJ’s 1995 Bank Merger Guidelines\textsuperscript{329} (developed in consultation with the FRB) and the FDIC’s Statement of Policy on Bank Merger Transactions.\textsuperscript{330} All of the agencies’ merger reviews involve defining product and geographic markets of competition. The FRB and the other reviewing agencies typically adopt product markets limited to the “cluster” of commercial banking products and services provided to most households and small businesses.\textsuperscript{331} Occasionally, the FRB will investigate the competitive effects in other, more specific, product markets, such as credit card issuance or mortgage lending.\textsuperscript{332} 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{333}

The DOJ will start with the “cluster” market definition applied by the other reviewing agencies, but will also focus on narrower product markets. For instance, the DOJ analyzes bank mergers to see how they will impact competition in small business lending. Thus, while the FRB will include all banks and thrift institutions in its analysis, the DOJ might exclude any depository institution that is not a significant competitor in small business lending. In that way, the FRB and

\begin{footnotes}
\footnote{327}{See, e.g., OFFICE OF MGMT. & BUDGET, Interagency Bank Merger Act Application, OMB No. 3064-0015 for FDIC (Form), available at https://www.fdic.gov/formsdocuments/bma-fapp.pdf.}
\footnote{328}{Unless a part of the merger is subject to review under the HSR Act, there is no separate application that must be submitted to the DOJ. Instead, the parties provide the DOJ with a copy of their application that is submitted to the reviewing agencies.}
\footnote{332}{Id.}
\footnote{333}{FDIC Policy Statement at III.2.}
\end{footnotes}
DOJ can on occasion reach different results in their analysis of whether a divestiture may be required.

Both the FRB and the FDIC typically define geographic markets by Metropolitan Statistical Area\(^{334}\) or by similar predefined banking markets.\(^{335}\) The banking regulators do not define geographic markets that are specific to each application for the sake of efficiency and predictability.\(^{336}\) The DOJ, on the other hand, does not bind itself to predefined banking markets and, instead, determines geographic markets on a case-by-case basis.\(^{337}\) It will start its analysis using the FRB- or FDIC-defined markets, but will look at narrower or larger geographic markets depending upon the factors in the merger.

The bank-merger reviewing agencies use the same Herfindahl-Hirschman Index (“HHI”) used by the FTC and the DOJ to analyze the competitive effects of mergers in all other industries,\(^{338}\) but the HHI analysis for bank mergers is unique in a number of ways, including the presumptions applicable to the HHI thresholds and post-merger market structure. Generally, under a traditional analysis, an acquisition will not raise competitive problems unless the post-merger HHI is above 1800 and the increase in the HHI resulting from the acquisition is more than 200 points.\(^{339}\)

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; and

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\(^{334}\) Metropolitan Statistical Areas (MSAs) are defined by the U.S. Census Bureau and cover a city and adjoining suburban areas, \textit{e.g.}, New York City and its suburbs in the states of New York, Connecticut, and New Jersey.

\(^{335}\) FAQs at 7; FDIC Policy Statement at III.3.

\(^{336}\) FAQs at 12.

\(^{337}\) \textit{Id.} at 29.


\(^{339}\) Compare Horizontal Merger Guidelines at § 5.3.
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 yet in the market.\textsuperscript{340}

The FDIC will consider evidence:

- regarding 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 or 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.\textsuperscript{341}

Because the statutory analysis includes a public interest component, mergers that exceed the screens, even fairly substantially, may be approved by the banking reviewing agencies.\textsuperscript{342} The agencies may consider factors such as the “convenience and needs” of the community or the financial condition of the bank to be acquired. 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.\textsuperscript{343}

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 the Bank Holding Company Act (“BHCA”). These provisions were enacted largely “to assure the foreign banks meet prudential standards that apply to U.S. banking organizations.”\textsuperscript{344}

The IBA, as amended by the FBSEA, generally precludes U.S. branches of foreign banks from engaging in domestic retail deposit-taking, except for those branches that were already FDIC-

\textsuperscript{340} Bank Merger Guidelines, Section 2.
\textsuperscript{341} FDIC Policy Statement at III.3.
\textsuperscript{342} 12 U.S.C. § 1842(c); see also Sulphur Springs Bankshares, FRB Release, Dec. 16, 1998 (FRB approval of a merger where the HHI increased by 411 to 3150 because of the financial condition of the acquired institution) available at https://www.federalreserve.gov/boarddocs/press/bhc/1998/19981216/#fn3;
\textsuperscript{343} Id. at III.4; see also Centennial Bank, FRB Order at 3 (Nov. 19, 2010) (No concentration analysis providing in view of the fact that the FDIC had selected the buyer based on its “least cost” procedures), available at https://www.federalreserve.gov/newsevents/pressreleases/files/20101119a.pdf.

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insured in 1991, when the FBSEA was enacted.\textsuperscript{345} Thus, to engage in full deposit-taking, a foreign entity must establish one or more domestic bank subsidiaries.

With limited exceptions, foreign banks are required under the BHCA to receive FRB approval before acquiring ownership or control of a bank in the United States, and before acquiring 25\% or more or otherwise acquiring control of a U.S. bank\textsuperscript{346} or commercial lending company.\textsuperscript{347} Additionally, a foreign bank must generally be subject to comprehensive supervision on a consolidated basis by appropriate authorities in its home country or—at the very least—the appropriate authorities must be actively working to establish supervision.\textsuperscript{348}

After the initial transaction, banks are required to notify the FRB of changes in ownership that constitute a change in bank control. In addition, by virtue of acquiring a U.S. 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 exceptions are made for foreign bank holding companies.\textsuperscript{349}

A foreign bank must submit an application to, and obtain approval from, the OCC before acquiring control of the operations of a U.S. federal branch or agency that is open and conducting business.\textsuperscript{350} 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 U.S. federal branch or agency;\textsuperscript{351}
- the convenience and needs of the community to be served;\textsuperscript{352} and
- whether adequate controls for the detection of money laundering are in place at the foreign bank.\textsuperscript{353}

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 the OCC.\textsuperscript{354} The applicant can seek after-the-fact approval from the establishment by providing reasonable advance written notice of the transaction, committing to comply with the OCC’s after-the-fact application procedures and to

\begin{itemize}
  \item the financial and managerial resources and future prospects of the applicant foreign bank and the proposed U.S. federal branch or agency;\textsuperscript{351}
  \item the convenience and needs of the community to be served;\textsuperscript{352} and
  \item whether adequate controls for the detection of money laundering are in place at the foreign bank.\textsuperscript{353}
\end{itemize}

\textsuperscript{345} GAO Foreign Investment Report at Appendix II.
\textsuperscript{347} 12 U.S.C. § 1842(a).
\textsuperscript{349} \textit{Id}.
\textsuperscript{350} 12 C.F.R. §§ 28.12(a), 28.11(f)(2).
\textsuperscript{351} 12 C.F.R. § 28.12(b)(1).
\textsuperscript{352} 12 C.F.R. § 28.12(b)(4).
\textsuperscript{354} \textit{Id.} at 34.
abide by the OCC’s decision. A foreign bank may provide after-the-fact notice to the OCC if it does not accept FDIC-insured deposits and meets the criterion of being an “eligible bank.”

Generally speaking, the resulting bank is “eligible” if every U.S. branch (1) has a composite ROCA rating of 1 or 2, (2) has a CRA rating of “outstanding” or “satisfactory,” and (3) is not subject to a cease-and-desist order, consent order, formal written agreement or prompt corrective action directive.

**ENERGY**

The Federal Energy Regulatory Commission (“FERC”) reviews transfers of ownership or control of public utilities subject to its jurisdiction, including electricity generation and transmission facilities. Under Section 203 of the Federal Power Act (“FPA”), the FERC is required to approve a merger if it determines that the merger “will be consistent with the public interest,” although a positive benefit is not necessary. When evaluating mergers, the FERC considers the effect of the transaction on competition, rates, and regulations.

The FERC issued a Merger Policy Statement in 1996 that adopted the analytical framework used by the FTC and the DOJ at that time to assess the competitive effects of horizontal mergers. The FERC has expressly declined to adopt the subsequent FTC/DOJ-issued Guidelines, preferring to retain the more conservative competitive analysis HHI screens of the 1992 FTC/DOJ Guidelines.

Under Section 203(b) of the FPA, the FERC may condition its approval on “such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the FTC.” Such conditions have included the waiver of transmission priorities, joining a regional transmission organization, retaining an independent market monitor, excluding merger-related costs from filed transmission-revenue requirements, or accepting standards of conduct governing the sharing of certain kinds of information.

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355 *Id.*
356 *Id.*
357 “ROCA” stands for “risk management, operational controls, compliance, and asset quality” and banks are scored out of a possible 5 points.
358 If applicable.
Air Transportation

Although the Department of Justice has antitrust authority over airlines, under 49 USC §§ 41308-309 the Secretary of Transportation may exempt international airline alliances from the antitrust laws. The exemption applies when the Secretary finds that the agreement is not adverse to the public interest. Approval is to be denied if the agreement substantially eliminates or reduces competition unless the Secretary finds that the agreement “is necessary to meet a serious transportation need or to achieve important public benefits (including international comity and foreign policy considerations)” and the transportation need or benefits cannot be met or achieved by “reasonably available alternatives that are materially less anticompetitive.”

Maritime Transportation

The Federal Maritime Commission (“FMC”) administers a separate antitrust regime for the liner shipping industry, pursuant to the Shipping Act of 1916. Under Sections 4 and 5 of the Shipping Act, the FMC reviews conference agreements – i.e., agreements among shipping lines serving the same route – including agreements that fix prices and allocate capacity. Once a conference agreement is effective, the parties are immunized from antitrust liability.

The FMC’s mission is to ensure “competitive and efficient ocean transportation services” and “protect the shipping public from unlawful, unfair and deceptive ocean transportation practices and resolve shipping disputes.” The Commission has authority to challenge an agreement in federal district court if it determines that “the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost.” In 2016, the Commission received over 250 agreement filings; however, since its inception, the Commission has never challenged an agreement in court.

Leadership from the Antitrust Division have twice testified before Congress regarding the antitrust exemption for ocean carriers, arguing that the exemption harms competition. Charles James, an Assistant Attorney General for the Antitrust Division, argued that the exemption leaves carriers “free to engage in very explicit price-fixing agreements” under the faulty rationale that carriers would otherwise “engage in a form of ruinous competition.” John Nannes, a Deputy Assistant Attorney General for the Antitrust Division, raised similar concerns, explaining on behalf

366 46 U.S.C. § 1706. Any agreement filed with the Commission becomes effective 45 days from filing or from the submission of additional information requested by the Commission. 46 U.S.C. §§ 1705(c).
369 Id. at 10.
370 Statement of Charles James, Ass’t Atty Gen., before the H. Comm. on the Judiciary, concerning H.R. 1253, the Free Market Antitrust Immunity Reform Act of 2001 (June 5, 2002).
of the Division that “[w]e do not believe that the ocean shipping industry has extraordinary characteristics that warrant departure from normal competition policy.”

The Division has also sent letters to the FMC to highlight significant competition concerns regarding recent alliances. In 2016, Acting Assistant Attorney General Renata Hesse sent a letter to the FMC Secretary addressing the OCEAN Alliance Agreement, which allows four liners controlling approximately 25% of worldwide capacity to cooperate extensively on service and capacity, and to exchange competitively sensitive information. Hesse warned that the OCEAN Alliance was likely to reduce competition and urged the FMC to sue to enjoin the agreement. Several months later, Hesse wrote to the FMC Secretary to raise concerns about another new alliance, the Transport High-Efficiency (THE) Alliance. The letter argued that ocean alliances had significantly increased concentration in the industry, a step that would “likely facilitate coordination in an industry that is already prone to collusion.” Hesse warned that “extreme caution was warranted” in light of the extensive cooperation among members to the agreement forming the THE Alliance.

Although conference agreements provide antitrust immunity for a subset of conduct in the maritime sector, other conduct is still subject to the antitrust laws. The DOJ has an ongoing investigation into price fixing, bid rigging, and market allocation in international ocean shipping services for roll-on, roll-off cargo. Four companies have pled guilty, resulting in total fines of over $230 million, and four executives have pled guilty and been sentenced to prison terms of 14-18 months. An additional four executives have been indicted and became fugitives. Immunity under the Shipping Act also does not extend to mergers and acquisition, which remain subject to the antitrust laws.

Agriculture

Agriculture also is subject to some special legislation in the United States. The Packers and Stockyards Act, 7 USC § 208, prohibits any stockyard owner, market agency, or dealer from engaging in unfair or unjust discriminatory practices in connection with, inter alia, the handling of livestock. The provision is enforced by the Secretary of Agriculture.

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372 Letter from Renata B. Hesse, Acting Ass’t Atty Gen, to the Fed. Maritime Comm’n Secretary (Sept. 19, 2016).
373 Id.
374 Id.
375 Id.
376 Id.
378 Id.
379 Id.
The Agriculture Marketing Agreement Act, 7 USC §§ 601-627, 671-674 - authorizes the Secretary of Agriculture to enter into marketing agreements with “processors, producers, associations of producers, and others.” Such agreements are exempt from the antitrust laws.
SUMMARY

The case studies described above reveal that although a number of leading economies take public interest considerations into account in reviewing mergers and competitive practices, no two approaches are identical and debate over the inclusion of public interest factors in the review of mergers and competitive practices continues. However, several things already are clear:

1. More and more countries are including the consideration of public interest factors in the review of foreign investment.

2. Most countries that conduct public interest reviews assign those reviews to an agency separate from their competition agencies. A few countries that conduct such reviews assign a single agency to combine competition review with public interest review. Where there are separate agencies, each usually has the power to halt a transaction or practice but in some instances one agency has the power to overrule the other, including the power to approve a deal or practice that the other agency has disapproved.

3. In regulated industries, most countries task regulatory agencies to conduct public interest reviews, and in some instances combine those reviews with competition reviews.

4. Many countries assign oversight of public interest factors to other agencies, e.g., privacy to consumer protection agencies, jobs to labor agencies, income disparity to tax agencies, small business to small business agencies, and concentration of political power to legislative bodies.

5. The definition of “consumer welfare” sometimes is interpreted to include not only the impact on quality-adjusted consumer prices, but the impact on producer efficiency and the foreclosure of competition.

6. The definition of “national security” has been interpreted expansively in many countries, to include not only defense industries but critical infrastructure, including technology companies, transportation companies, banks, natural resources, and telecommunications. This has allowed public interest factors to be assessed as a matter of national security in those nations.

7. Some jurisdictions are contemplating the inclusion of national interest considerations in the review of domestic mergers, in instances where foreign competition or investment is perceived as a threat to the health of the domestic economy.

This presents a clear opportunity for policymakers to contrast and compare the different approaches, and assess the strengths and weaknesses of each. This also presents a challenging dilemma for practitioners seeking to navigate a deal or practice through the requirements of each jurisdiction that may have an interest. Practitioners should be aided by a deeper understanding of
the operation of each regime. Policymakers may gain additional insight from the views expressed in the second part of this report by a number of experts who have contributed their perspectives.
PART II

PERSPECTIVES

The findings in Part I raise three key questions:

1. Whether factors beyond “consumer welfare” (i.e., low prices, high output, high quality, and efficiency) should be included in assessments of mergers and anticompetitive practices (especially single-firm conduct);

2. If so, should these factors be assessed by competition authorities in a consolidated process (as occurs in China and South Africa) or by another arm of government (as with CFIUS or Investment Canada); and

3. Should there be different treatment for non-domestic firms, state-owned enterprises, or sovereign wealth funds and, if so, should such treatment depend on the treatment of non-domestic enterprises in those entities’ “home” countries?

To address these questions, the Task Force canvassed the views of informed individuals around the world for their perceptions and opinions. With these individuals’ insights, and the lessons learned from the case studies presented in the first part of this report, the Task Force reached several findings that may be of value to practitioners, enforcers, and policymakers. These findings are responsive to the three questions posed above. They are discussed in relation to each of the questions we posed.

I. SHOULD FACTORS BEYOND “CONSUMER WELFARE” BE INCLUDED IN ASSESSMENTS OF MERGERS AND ANTICOMPETITIVE PRACTICES?

There is a range of opinion on this question. Many believe that there are limits to the practicality of combining assessment of effects on competition and assessment of effects on concerns such as jobs, political power, income disparity, privacy, and the environment.

A number of specific reservations have been expressed:

1. Public interest effects are hard to measure. Although the impact on employment, the environment, and safety might be expressed in dollars by certain measures, the impact on such concerns as privacy, inequality, and concentration of political power are harder to quantify.

2. Balancing public interest effects against consumer effects is not easy. Regulatory bodies routinely balance price and quality effects against effects on such concerns as health, safety, diversity, and environmental impact, but these bodies, unlike competition commissions, are meant to have special expertise with regard to a particular sector of the economy.
3. There is a perception that assessment of public interest factors is more likely to be affected by politics than assessment of the likely impact on consumer prices. While price and quality effects can be evaluated by economic experts applying recognized tools, public interest effects more often are subject to evaluation by industry representatives, labor representatives, political leaders, and representatives of advocacy groups.

4. There can be less predictability of the outcome of reviews that include public interest factors as well as consumer factors. This may discourage investment in jurisdictions in which the outcomes of merger reviews and reviews of business practices are harder to predict. Even if there is considerable transparency in the review process, the perception of unpredictability may be a disincentive to potential investors.

At the same time, others believe that public interest factors, or at least some of them, belong in the review of mergers and competitive practices. In some jurisdictions, these factors are considered as important to the public good as guarding against price increases to consumers. In certain jurisdictions, these factors are considered as important to national security as low prices. In the United States, some argue that many of these factors were intended by Congress to be inherent in the antitrust laws themselves. In these views, evaluation of public interest factors alongside consumer welfare is possible, and should be included. A number of reasons for including public interest considerations have been expressed:

1. Public interest factors should not be ignored simply because they are hard to measure. It is the job of the agencies and the courts to make difficult decisions. Moreover, the impact on employment, public safety, public health, the environment, small business, and even privacy can be predicted and the costs estimated in dollars.

2. Even when costs are impossible to measure, they still can be balanced against the impact on consumer prices. The U.S. Federal Communications Commission has long been charged with evaluating the impact of media mergers on diversity of opinions available in a community, for example, and has been able to fill that role.

3. Legislatures expect public interest factors to be included. In some countries, public interest factors are written into the competition statutes. In the United States, the legislative history of the antitrust laws includes indications that Congress was concerned not only with consumers, but with workers, farmers, and small businesses.

4. Public interest factors are no more subject to manipulation than consumer welfare factors. Price effects evaluated in investigations and litigation routinely are subject to conflicting appraisals by dueling economists. More than that, the evaluation of quality effects can be more subjective than objective, and is not necessarily the province of economists.

We examined each of these contentions in our interviews, as described below.
a. Reasons to Exclude Public Interest Factors in the Review of Mergers and Competitive Practices

i. Public interest effects are hard to measure. Although the impact on employment, the environment, and safety might be expressed in dollars by certain measures, the impact on such concerns as privacy, inequality, and concentration of political power are harder to quantify.

Several respondents expressed the view that it is not possible to measure or quantify public interest effects with any accuracy. For example, Tad Lipsky, a former Deputy Assistant Attorney General in the U.S. Department of Justice, observed that public interest factors do not lend themselves to the formulation of objective standards and consequently cannot be administered by judicial means, which require the application of a defined legal standard to a specific factual record. The result of attempting to incorporate public interest factors, in Mr. Lipsky’s view, would be to lose the benefits of a consumer welfare orientation.

Furthermore, several respondents observed that the “consumer welfare” standard is not as narrow as it sometimes is characterized. Makin Delrahim, Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice, points out that a “consumer welfare” framework is not exclusively focused on short-term prices to consumers, as some critics of the standard have argued. For example, if competition among buyers is harmed by a merger through increased monopsony power and thereby pushes down wages paid to labor (or the prices paid to other input sellers), that is a proper focus of competition law enforcement. Moreover, antitrust enforcement can address competition to improve the quality of a product or service which, in some markets, might involve certain aspects of privacy protection. Competition to improve quality also may take the form of successive leaps in innovative breakthroughs, with short-term pricing power for the winner of the dynamic competition. But taking such a situation-specific approach does not transform the competition law inquiry into a broader “public interest” analysis in Mr. Delrahim’s view.

ii. Balancing public interest effects against consumer effects is not easy. Regulatory bodies routinely balance price and quality effects against effects on such concerns as health, safety, diversity, and environmental impact, but these bodies, unlike competition commissions, are meant to have special expertise with regard to a particular sector of the economy.

Several respondents expressed this concern. For example, Professor William Kovacic, former Chairman of the U.S. Federal Trade Commission and Non-Executive Director of the UK’s Competition and Markets Authority, finds the public interest agenda fiendishly difficult to apply, and subject to variations that distort the quality of enforcement. He recognizes that a handful of countries such as South Africa would not have had a competition law without it but adds that at least the South African government has undertaken to provide guidelines describing what they are
doing. His principal concern is with administrability, a concern that is found in the writings of Professors Areeda and Turner, and Justice Breyer.

Professor Kovacic points to a question posed by Areeda & Turner: How are you going to set loose the entire federal judiciary and individual enforcement officials to apply public interest factors in practice? There is no methodology that keeps this from becoming impressionistic. For that reason, Professor Kovacic encourages that these ends be accomplished through other devices.

Professor Kovacic believes that if a nation finds it necessary to incorporate public interest factors as the essential condition for passing a competition law, it should have a responsibility to be forthcoming about what it has done and how it did it – i.e., to spell out how it made trade-offs. And if some say those are hard to spell out, then perhaps they should rethink whether to do this in the first place. There is a special obligation to explain what the hierarchy of factors were and how the specific considerations affected the analysis. If this were a math exam, you would have to show your work. Otherwise, this process succumbs to exactly the difficulty that Areeda, Turner, and Breyer have pointed out for years, which is that you end up with a very impressionistic system subject to artificial manipulation in ways that no one can predict. It becomes unprincipled.

Professor Kovacic points out that Professors Areeda and Turner directly confronted the difficult question: What about the stark statements in the legislative history of the Celler-Kefauver Act? What about the references at the time that Act was adopted to Stalin and Hitler, and the concerns that economic power coalesces with political power to support totalitarian regimes that are unconstrained? What about Brown Shoe’s statement about how we can’t ignore the intent of Congress to suppress efficiency for the purpose of the egalitarian agenda of competition law? Professor Kovacic reads Areeda and Turner to answer that these should be ignored for two reasons. First, they said U.S. competition law becomes faintly unconstitutional if you do not provide a more rigorous framework; it becomes a mandate to do almost anything you want in an individual case. Second, assuming it is not unconstitutional, they said it is so open ended that you will have results that resemble impressionism. And judges and enforcement agencies will not feel the discipline to explain what is happening. Areeda and Turner explained how a framework not based on consumer well-being can come to resemble impressionism. One can argue about what consumer well-being encompasses – but it is not a narrow caricature that includes only price and output. It includes a range of other considerations.

To Professor Kovacic, “administrability” is a concept that can be applied in the routine decision of cases by judges, in the routine decision to prosecute by enforcement agencies, and in the routine counseling decision by business managers and their advisors about “what can I do?” Professor Kovacic questions whether anyone has offered a convincing explanation of how a public interest standard would be applied. He recalls seeing Professor Areeda on several occasions have a Socratic dialogue with someone in the audience: “But professor, isn’t it laid out here in the sacred text? This is heresy!” He said, “Fine, I know it’s there. Tell me how you would apply that. Here are your
six values. Tell me how you know that a merger has the adverse effect on the democratic process? Just give me an idea of the analytical process you’re going to use to get there – or is it just the general assumption that if you go beyond some structural threshold that danger is present? It would have to be that. So tell me now where we set the presumption.”

You could instead let another body conduct a public interest review in Professor Kovavic’s view, such as a ministry subject to direct executive control. If they do it, they should have the obligation to provide the complete explanation. You have to issue a text that says why; you cannot simply wave your hands and say “we allow it to proceed because of other considerations.” There, again, the instructor in the classroom setting would say: “Show your work. Tell me how you got there. You can do it, but you have to put in the text the explanation for how you got there.”

Mr. Lipsky strongly opposes inclusion of public interest factors in antitrust analysis on the ground that antitrust analysis is difficult enough, focusing only on consumer welfare (construed as the preservation of dynamic competition in order to maximize the economic output that can be produced from available resources). If the antitrust community—agencies, courts, legal counsel and market participants—adheres to that analytical framework, it can provide coherence to the entire law-enforcement process, directing which evidence to seek, what analysis to make, and what conclusions to reach in any particular case. The problem with public interest factors, in Mr. Lipsky’s view, is that the connection between those factors and consumer welfare maximization is highly debatable and in most cases not even positively correlated.

Bill Baer, a former Assistant Attorney General for the Antitrust Division, believes that injecting public interest factors into the consumer welfare standard poses a real risk. In addition to the question of whether antitrust agencies have the competency to assess these factors (e.g., an antitrust enforcer trying to decide whether an increase of 600 jobs in Texas is more important than a loss of 722 jobs somewhere in the Northeast), public interest factors may not implicate competition values. Mr. Baer would prefer to be transparent about the fact that another agency wants other values or variables to be assessed and considered, but believes that these factors are outside the scope of what a competition authority itself ought to be doing.

Jeanne Pratt, Senior Deputy Commissioner of the Canadian Competition Bureau commented that “public interest” factors such as privacy or diversity of views should be considered only if they are aspects upon which firms try to distinguish themselves from rivals by offering product or service differentiation. The Competition Bureau applies a consumer welfare standard and only if elements such as privacy or diversity of voices become an aspect of competition, could they be considered in a consumer welfare analysis.

Lawyers active in national-security reviews of mergers are familiar with the challenges of addressing complex and often subjective standards. Aimen Mir, a former Deputy Assistant Secretary for Investment Security at the U.S. Department of the Treasury, which oversees CFIUS, highlighted the difficulty that exists in even characterizing “national security,” which he noted
could be “defined by way of a non-exclusive illustrative list of factors, an exclusive list of factors, or by a negative list.” Another lawyer with extensive public-sector experience reflected that the definition had morphed considerably since the creation of CFIUS and today could include, e.g., looking four or five levels down the supply chain of the defense-industrial base.

Critics of the present competition law standards do not necessarily advocate including public interest considerations in competition reviews. Sandeep Vaheeson of the Open Markets Institute, for example, believes that it would be a mistake to try to balance public interest factors against traditional competitive effects. This would open the door for too subjective an analysis. In his view, however, a better approach would be to apply a simpler test than is used today, based on market share and market concentration. The objectives should be to simplify the rules and create a stronger structural presumption. A good model, he finds, is the analysis applied by the Supreme Court in the Philadelphia National Bank case, 374 U.S. 321 (1963). Another good model is found in the 1968 Merger Guidelines. Also, the burden shifting proposal in the legislation introduced in the 115th Congress and reintroduced as S. 307 in the 116th Congress merits serious consideration in his view.

Michael Kades of the Equitable Growth Institute also disfavors balancing public interest factors against more traditional antitrust factors. However, he too maintains that the current standard of review needs to be refined. The Sherman Act, Clayton Act, and FTC Act all are concerned with preventing excessive market power. Thus, by definition, if a factor is not tied to market power it is not properly part of the analysis in his view. He notes that it would be hard to instruct courts to weigh public interest factors like jobs, etc. How would a court go about weighing jobs against price increases? (In contrast, if an increase in market power resulted in wage stagnation, this would be an appropriate consideration for an antitrust analysis.) Likewise, a factor like increased political power does not belong in an antitrust analysis—how would it be included in a merger review? At the same time, if too many mergers are approved, market power can translate into political power. All of this indicates that there are benefits other than price effects to be achieved by robust antitrust enforcement, which points in favor of being less lenient in conducting merger reviews.

The important issue, to Mr. Kades, is the relative risk of under-enforcement versus over-enforcement. Under-enforcement can have multiple effects, just like over-enforcement. Where Mr. Kades parts company with some observers is that, in his estimation, the most serious problem today is not with the legal standard (consumer welfare versus something else) but with the amount of proof being required for the government to win cases. Proving price effects has proven to be the surest way to convince a court that a merger or practice is illegal, yet the amount of proof being required to accomplish this has posed the greatest obstacle to success in court. Shifting the burden of proof above a certain market share threshold is one way to address this problem. In cases involving the largest mergers, we should not adopt the position that uncertainty should favor non-enforcement in Mr. Kades’ view.
iii. There is a perception that assessment of public interest factors is more likely to be affected by politics than assessment of the likely impact on consumer prices. While price and quality effects can be evaluated by economic experts applying recognized tools, public interest effects more often are subject to evaluation by industry representatives, labor representatives, political leaders, and representatives of advocacy groups.

Several respondents expressed this concern, with Carl Shapiro, Professor, University of California at Berkeley, noting that one of the strengths of competition policy is that it works best when it is not politicized.

To Mr. Lipsky, there is a public choice issue presented whenever one tries to introduce public interest factors to antitrust analysis. It is hard enough to get any agency or court to develop objective, predictable standards and to measure and hold that institution accountable for the quality of its decisions. To do one thing well is not easy in a field like antitrust, even when the enforcement institutions have only one fundamental objective. But to throw in additional (and largely inconsistent) objectives would go a long way toward destroying whatever accountability an agency could otherwise achieve. How do you tell whether an agency properly sacrificed the right amount of economic value to enhance the performance of a national champion or to redistribute income? In Mr. Lipsky’s view, there is no consensus on the appropriate tradeoff between these distinct objectives, and therefore no specific standards to assess how well an entity or court has accomplished the tradeoff.

Sir John Vickers, a former head of the United Kingdom’s Office of Fair Trading, observed that if a competition commission participates in public interest reviews, there is a risk that the commission will be perceived as merely providing a fig leaf for political decisions, even if its role is confined to gathering information. The risk of politicization exists even for the most independent competition agencies, and these risks are only compounded when public interest factors come into play. Such risks are of less magnitude at earlier stages of review, however, than at the later stages.

iv. There can be less predictability of the outcome of reviews that include public interest factors as well as consumer factors. This may discourage investment in jurisdictions in which the outcome of merger reviews and reviews of business practices are harder to predict. Even if there is considerable transparency in the review process, the perception of unpredictability may be a disincentive to potential investors.

This concern was widely expressed. In Mr. Lipsky’s view, the introduction of public interest considerations into competition review may seriously degrade the rationality and predictability of enforcement, and the capacity to hold accountable the prosecutors, courts, and other decision makers. It would render compliance difficult and invite arbitrary and politically motivated enforcement. Part of the analysis, in Mr. Lipsky’s view, has to be that when a jurisdiction decides to impose public interest criteria, what does that do to the willingness of private parties to make direct investments – even if the direct investment does not assume a form that is going to be subject
to tax or adjustment? These jurisdictions might find themselves in a situation where investors want to bail out of their investment. Investors and businesses will form a rational opinion of the likelihood of this kind of interference in the competitive process and in the ordinary give and take of trading assets, such as expanding an acquisition. These effects would be very damaging to the jurisdiction’s reputation for the rationality and the impartiality of its rule of law.

Mr. Lipsky cites several illustrations. There once were some powerful federal administrative agencies in the United States – most of which no longer exist, like the Interstate Commerce Commission and the Civil Aeronautics Board – that regulated major sectors of the economy (railroads, motor carriers, air transportation) applying a “public interest” standard. Under this standard the agency considered a variety of objectives, such as maintaining service to small communities or allowing all transport modes to participate in various specific markets. In Mr. Lipsky’s view, these agencies never developed a coherent methodology for determining when and how to pursue public interest objectives, including in circumstances where that might have required the agency to reduce competition. Absent such a methodology, the agency became an engine of abuse favoring various interest groups within the industry.

An example described by Mr. Lipsky is the Civil Aeronautics Board’s so-called “route moratorium,” publicly exposed by an investigation led by Senator Edward Kennedy in the 1970’s. Under the statute and regulations of the time, advance permission by the CAB was required for any new air carrier to begin service, or for any incumbent air carrier to provide service on additional routes. Such new entry or expansion by incumbents would generally benefit consumers by enhancing competition. The heart of the route moratorium, as the name suggests, is that the CAB blocked all new entry and expansion for a number of years. Despite the variety of route applications and the shifting CAB methodology, the result was always the same: new route requests were uniformly denied over a period of years, regardless of competitive merits or any other discernible standard. By emphasizing one factor or another in particular cases without ever specifying rules for weighting the various public-interest objectives, the CAB was able to escape accountability and implement a veritable prohibition on new entry. It appeared that the CAB’s prime motivation for the route moratorium was to protect the economic interests of key industry players, largely at the expense of air travelers, who were forced to pay higher fares. Once Congress and the public recognized these abuses of the system of comprehensive economic regulation, the CAB’s authority was substantially reduced in 1978 and the agency itself was disbanded in 1985.

Mr. Baer also values predictability, while believing that the consumer welfare concept captures a lot of what would be considered public interest factors. Consumer welfare is a subset of what goes into a public interest assessment. In his experience, an agreed upon standard, like the consumer welfare standard, provides enormous benefits in terms of helping parties to assess whether a possible merger is a good idea; it helps to facilitate dialogue between competition authorities and the merger parties. The consumer welfare standard has the potential to do these things, and makes it easier for international cooperation to occur. Mr. Baer believes that including additional, discrete
public interest factors in the analysis would complicate the entire process in a way that is likely to dramatically increase the likelihood of inconsistent outcomes.

b. Reasons to Include Public Interest Factors in the Review of Mergers and Competitive Practices

As noted earlier, some of the individuals who were interviewed believe that public interest factors, or at least some of them, belong in the review of mergers and competitive practices for the following reasons.

i. Public interest factors should not be ignored simply because they are hard to measure. It is the job of the agencies and the courts to make difficult decisions. Moreover, the impact on employment, public safety, public health, the environment, small business, and even privacy can be predicted and the costs estimated in dollars.

Professor Maurice Stucke of the University of Tennessee College of Law takes the view that public interest factors like privacy, jobs, income disparity, and concentration of political power are important concerns and notes that, as pointed out by Nobel laureate Friedrich Hayek, economic effects that are readily measurable are not the only economic effects that merit consideration.

Sandeep Vaheeson of the Open Markets Institute takes the view that the consumer welfare standard is “inadequate.” He believes that Congress had “broader aims” in mind when enacting the antitrust laws, including assuring opportunities for small business and combating concentration of power. Against this background, the consumer welfare standard is “ahistorical” and measurement challenges should not prevent broadening the standard.

Professor Sanjukta Paul of Wayne State University Law School would not characterize additional factors as separate “public interest” factors at all. Instead, she believes that many of these factors properly are included within the statutory intent behind the Sherman Act. Congress, she believes, cared as much about workers as consumers in enacting the antitrust laws. In fact, Senator Sherman himself said at the time the new act was introduced that it would be a “double-edged sword,” benefitting both farmers and consumers.

The lawyers involved in national-security reviews who were interviewed all believe that a substantive assessment of national security can be conducted by CFIUS, and should be, despite the fact that “national security” is not subject to a fixed, quantifiable assessment. They also note that a broad view of the “public interest” is necessary, in the words of Stewart Baker, a former General Counsel of the National Security Agency and Assistant Secretary for Policy at the Department of Homeland Security, “in light of the policy problems that the United States faces today.”

ii. Even when costs are impossible to measure, they still can be balanced against the impact on consumer prices. The U.S. Federal Communications Commission has long been
charged with evaluating the impact of media mergers on diversity of opinions available in a community, for example, and has been able to fill that role.

A wide variety of agencies, from zoning commissions to school boards, have discharged responsibility to balance fiscal and societal costs and have found ways to estimate and balance those costs in reaching their decisions. As some respondents observed, if regulatory agencies can balance price effects against other societal effects, so can competition authorities.

iii. **Legislatures expect public interest factors to be included.** In some countries, public interest factors are written into the competition statutes. In the United States, the legislative history of the antitrust laws includes indications that Congress was concerned not only with consumers, but with workers, farmers, and small businesses.

Professor Stucke observed that certain “public interest” factors always have been included in antitrust analysis, as described in Professor Robert Pitofsky’s well-known article, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979). In Professor Stucke’s view, the narrow reading of a “consumer welfare” standard sometimes expressed within the Justice Department and elsewhere has never accurately reflected the applicable standard under U.S. antitrust law and has limited the freedom that courts exercise in applying that law.

Professor Stucke believes that certain factors that might be categorized as “public interest” factors, such as privacy and jobs, are not so easily classified. Either can be considered a “competition issue” without being a “competition law issue.” For example, in a zero-price market, competition over privacy protection (“do not track”) could bear on product “quality” and thereby create an antitrust issue. (In contrast, other privacy concerns, such as identity theft, do not raise antitrust issues at all.) Likewise, if a merger creates a monopsony in the employment market, this becomes a jobs issue that also is an antitrust law issue.

And Professor Paul believes that public interest factors were included in the intent of Congress from the beginning, as noted above.

iv. **Public interest factors are no more subject to manipulation than consumer welfare factors.** Price effects evaluated in investigations and litigation routinely are subject to conflicting appraisals by dueling economists. The evaluation of quality effects can be more subjective than objective, and is not necessarily the province of economists.

Sir John Vickers and John Fingleton, two former heads of the UK’s Office of Fair Trading, both expressed the view that a competition agency can be fully competent to conduct an objective investigation into both price effects and public interest considerations (although both expressed the view that the competition agency may not be the appropriate decision maker on public interest considerations). Other respondents agreed that it is possible to evaluate the relative weight of price and public interest considerations and assess the relative weight of each.
Pulling all of this together, it is clear that there is sharp disagreement as to whether public interest factors should be included in the review of mergers and competitive practices. The factors informing these divergent opinions vary from jurisdiction to jurisdiction, but even within a jurisdiction there can be distinctly different points of view. Each jurisdiction must decide, based on the arguments collected above, whether or not public interest factors should have a place in the review of mergers and competitive practices within its borders.

II. IF FACTORS BEYOND CONSUMER WELFARE ARE INCLUDED IN ASSESSMENTS OF Mergers AND ANTICOMPETITIVE PRACTICES, SHOULD THESE FACTORS BE ASSESSED BY COMPETITION AUTHORITIES IN A CONSOLIDATED PROCESS OR BY ANOTHER ARM OF GOVERNMENT?

Although some counties task a single agency with assessing both competition factors and public interest factors, many observers believe that competition agencies are ill-equipped to assess public interest factors and even less able to weigh those factors against competition factors. At the same time, most observers are satisfied that specialized regulatory agencies are capable of assessing both competition factors and public interest factors within the industries they regulate, and balance all of those considerations in reaching a determination. And some believe that if public interest factors are included in the review of mergers and practices, generalist competition agencies are capable enough to evaluate consumer impact and public interest factors together in a single, integrated process, and that it is preferable to empower them to do so.

Opponents of combining public interest reviews with consumer welfare reviews argue that competition agencies are well equipped to evaluate the potential effects of a merger or competitive practice on prices, output, and quality, as well as efficiency and the foreclosure of competitors. That capability would be compromised, in their view, by combining that evaluation with the assessment of public interest factors. Assessments that are limited to price, output, quality, efficiency, and foreclosure can be expected to be more precise than assessments that also take other factors into account.

Further, assessments by competition agencies that are limited to price, output, quality, efficiency, and foreclosure are easier to compare from one agency to another. Where a single merger or practice is being evaluated by multiple competition agencies, it is easier to compare one agency’s evaluation with another’s if they both are evaluating the same factors.

Supporters of combining public interest reviews with consumer welfare reviews argue that such an approach is preferable to tasking different agencies with evaluating consumer welfare factors and public interest factors, with the possibility of such agencies reaching different outcomes. If both public interest factors and consumer welfare factors are included in the analysis, they believe, a single agency can do a better job by weighing the importance of each factor against the others than could multiple agencies, each limited to evaluating only some of these factors.
Supporters of combining consumer welfare and public interest reviews also argue that competition agencies give up too much authority if they surrender responsibility for evaluating public interest factors to another agency or agencies.

Moreover, if different agencies evaluate consumer welfare and public interest factors and reach different outcomes, there are different views as to whether each agency should have the authority to stop the deal or the practice, or whether one agency may permit it over the objection of the other agency.

In Mr. Delrahim’s view, public interest factors probably are best addressed by industry-specific regulators, if at all, rather than competition enforcers. Competition is best protected when the competition laws, and the agencies that enforce them, focus on a single standard that is based on whether competition, and thereby economic efficiency and consumers, are harmed by the practice in question. This focus draws on the strengths of competition lawyers and economists, and it thereby brings the greatest benefit to consumers. Moreover, because the concept of “public interest” is not specific, Mr. Delrahim suggests that any such factors be clearly defined by the legislative branch, so that businesses and consumers have certainty and predictability as to the goals of a public interest test. If the legislature delegates a distinct public interest analysis to a sector-specific regulatory body, it should also keep in place concurrent review by a competition agency, rather than give parties immunity from competition law simply because industry regulators have jurisdiction to approve a transaction under a delegated public interest standard. Competition factors, Mr. Delrahim believes, should be left to the competition agencies.

To Mr. Lipsky, this question presents an issue of accountability. His strong preference is to keep antitrust analysis “in its own lane,” so that one can assess whether the reasoning accords with best practices and is consistent with available economic analysis. The danger of mixing in other factors is that it would result in the agency citing some vague “public interest” factor as the basis of its decision: after all, “a prince will always have a reason for his actions.” Mr. Lipsky believes that there is a tremendous benefit to keeping the consumer welfare analysis separate, so that by comparison with other precedents in the same jurisdiction and comparable precedents in other jurisdictions, all the regulators and those involved in the enforcement system can benefit from a common experience. Once you start mixing in other considerations, particularly the more political, redistributive types of considerations, you take a competition system out of the mainstream and render it incapable of benefiting from the learning and the analysis that takes place all around the world with similar issues, whether theoretical issues or issues of how certain industries work.

Professor Shapiro is of the view that public interest reviews should be conducted by regulatory agencies separate from competition agencies. Antitrust agencies should have the authority to address issues related to competition. If an issue arises that is not related to competition, the antitrust agencies may not have the expertise required to analyze the issue or the public interest factors.
Maureen Ohlhausen, a former FTC Commissioner and former Acting Chairman, believes that antitrust agencies should focus on the “consumer welfare” standard because it appropriately centers the analysis on the consumer rather than on competitors or non-competition factors. The analysis asks, what does the consumer value in terms of price, quality, or other attributes in his or her market choices? Incorporating a public interest standard or non-competition values in competition review assumes that the antitrust enforcer would have superior knowledge of those particular issues, such as labor policy or privacy impacts, instead of an industry-specific regulator in those areas. If public interests factors are to be considered as well, regulators with expertise in those particular sectors should focus on those issues.

Senior Deputy Commissioner Pratt points out that in Canada the Competition Bureau provides competition advice to other regulatory bodies, such as the Minister of Transport, but assessment of public interest factors properly is left to those other bodies. If the Competition Bureau were to analyze public interest factors, it would have to expand its competencies in order to conduct broader analyses.

Rod Sims, head of the Australian Competition and Consumer Commission, takes the view that it is inadvisable and counterproductive to import public interest considerations into the core of competition law. Competition law is enforced by an independent authority, not by elected officials, so the objectives must be clear. Competition law and policy should be first and foremost about protecting and promoting competition for the welfare of consumers. This gets back to the Tinbergen Rule; if you have two targets you want to achieve in public policy, you generally need two instruments. Competition, income inequality, media diversity and environmental protection are all legitimate public policy objectives, but they each require their own particular policy instrument (environmental laws, for example). It is bad public policy to attempt to achieve these goals with the single instrument of competition or consumer policy.

Lawyers with experience in the U.S. CFIUS process also advocate keeping public interest, national security, and competition evaluators separate. Mr. Mir thinks it “best to separate consumer welfare reviews, from general public interest reviews, from national security reviews” because “[d]oing so ensures clarity of mission, increases predictability for private parties, and better facilitates separation of technical analysis from political considerations.” According to Mr. Mir, “public interest reviews [are] often most directly reflective of political calculation. . . . [K]eeping these analyses separate [from antitrust or CFIUS reviews] better enables the parties and the public to discern the basis for any given decision and instill some confidence, in the case of antitrust reviews and CFIUS reviews, that the decisions are not politically driven. From a national-security perspective, Mr. Mir is skeptical that a single agency would be well-positioned to address disparate substantive issues ranging from competition to public interest. According to Mr. Mir, “[d]ifferent missions require different competencies and giving any one agency multiple missions may dilute its ability to fully serve each of those missions.” He adds, “[c]ombining missions into a single agency means that it will be more difficult to interpret the actions taken by the agency, potentially
weakening its credibility. There may be overlapping considerations, but this will not always be the case.”

A CFIUS practitioner with significant public-sector experience also notes that “separate agencies can keep their respective, exclusive focus on their respective reviews, which likely means more independence and maybe more objectivity.”

CFIUS lawyers point out that certain “public interest” considerations are national security concerns. Mr. Baker describes “global platforms with an ability to suppress a disfavored but constitutional speech without disclosing what they are doing and how much they are doing it,” as a “consumer welfare problem, at least from the point of view of the minority speaker.” His views are echoed by another lawyer with significant public-sector experience who, while contending that the concentration of political power may not be appropriate for merger or competition reviews, was concerned about “having a giant media company” because “having a more diverse group of voices fosters independent media and provides more perspectives,” notwithstanding that neither diversity of voices or perspectives is readily amenable to measurement.

Stewart Baker, the former General Counsel of the NSA and Assistant Secretary at DHS, takes a different view. After acknowledging that considering public interest involved “deviating from a relatively easily understood and justified approach to competition,” Mr. Baker noted his preference, at least in the U.S. context, “that this deviation be performed by people who will—at a minimum—feel a little guilty about it and who will try to minimize the extent of the distortion to a purely microeconomic analysis of the impacts on price competition.”

Professor Paul believes that it would be better to expand the mission of the current antitrust agencies than to assign the assessment of factors beyond “consumer welfare” to other agencies. Assessment of the other factors should not be regarded as a discrete “national interest” analysis but more properly should be regarded as restoring the antitrust laws to the original intent of Congress. (This intent also is reflected in the FTC Act, in Professor Paul’s view.)

Professor Paul noted that critics of including factors beyond “consumer welfare” in antitrust reviews commonly cite the danger of the process being corrupted as a reason to limit antitrust reviews to “consumer welfare.” However, people are not motivated only by so-called “corruption” and there is something deeper happening. There has been a shift in thinking about the purpose of the antitrust laws, which is not a reflection of any bad faith but a reflection of concerns beyond short-term consumer prices.

Furthermore, the very definition applied to “consumer welfare” has been notably inconsistent. In Professor Paul’s view, there has been no analytically coherent explanation as to what the “consumer welfare” standard actually means. The focus has been on examination of consumer prices today rather than tracking genuine economic efficiency. The resulting problem is that the current standard does not lead to reasonably administrable and neutral results. This causes people
import other normative standards. For this reason, many economists today are questioning the “consumer welfare” standard. Professor Paul points out that Robert Bork himself stated in his book that the “consumer welfare” standard is “useless” as a tool for deciding cases. Instead, it is useful only to measure how to produce more output at a minimal cost. It measures “operational efficiency,” and has nothing to do with economic efficiency for the economy as a whole. Ultimately, Professor Paul believes, antitrust should be about allocating “coordination rights.” Sometimes it is desirable for firms to collaborate. We should not be afraid of making frank judgments about coordinating economic rights, in her view, and this may require competition agencies to examine much more than consumer price effects.

John Fingleton, former head of the UK’s Office of Fair Trading, believes that the competition authority should conduct as much of the inquiry as possible, including any consideration of public interest factors, because competition regulators are adept at sifting through and weighing evidence. Although they may not have specialized expertise in every industry, they are fully capable of reaching the conclusions that are required. Furthermore, whenever new agencies are created, they tend to evaluate their performance based on how many reviews they perform. If the competition agency conducts the entire review, there is far less danger of such overreaching. Also, if the ultimate decision rests with a minister or other official, it becomes difficult for the minister to diverge from the findings of a detailed, independent investigation conducted by the competition authorities. In such jurisdictions, it is preferable to have the competition agency conduct the entire investigation and the minister make the final decision, after considering any pertinent trade-offs. Mr. Fingleton points out that invoking public interest concerns to block a merger or acquisition that would have resulted in lower prices to consumers amounts to a tax on those consumers for the sake of achieving other objectives, and this kind of decision should be left up to a minister or other official outside the competition authority. If both consumer welfare effects and public interest factors are being considered, the competition commission should conduct the inquiry but an official outside the commission should make the final decision.

Sir John Vickers, who preceded Mr. Fingleton as head of the OFT, agrees that the competition commission generally is well positioned to marshal the evidence required for a review, but notes that specialized agencies overseeing media, national security, and the financial sector might be better equipped to conduct investigations in those particular sectors.

Professor John Newman of the University of Memphis School of Law takes the view that it might be possible to have a single agency conduct an antitrust review that includes public interest considerations, although it is hard to imagine the U.S. antitrust agencies, as currently constituted, conducting a full-on “public interest” review. That would require a substantial overhaul of public guidance materials, training materials, and the like, as well as creating buy-in from (or replacing altogether) the generations of attorneys and economists who were trained and practice exclusively using the consumer welfare standard. At the same time, it is difficult to imagine a new public interest agency being created and wielding any type of real power, particularly in a manner that
would carry over from administration to administration. Professor Newman does not foresee anything like this happening in the United States in the near future.

Some observers are indifferent on this issue. Professor Stucke, for instance, is agnostic as to whether there should be one agency or two examining competition and public interest concerns. As illustrated by the oversight of banks after the adoption of Dodd-Frank, he notes, multiple agencies can successfully examine the same set of facts, each through its own prism. More important than the number of agencies involved is the adherence to standards that comply with the ideals of the rule of law.

Mr. Kades’ opinion is that if it is made clear how to balance “public interest” factors against competition factors, it would be acceptable to have either one agency or two making the determinations. The more difficult question is how to perform the balancing. Where possible, Mr. Kades believes, it might be best to have a specialized regulatory agency with industry expertise making such determinations.

Taking all of this together, it is clear that if public interest factors are included in the review of mergers and competitive practices, there is more than one view as to whether it is preferable for one agency to assess all of these factors together, or for separate agencies to assess consumer welfare and public interest factors separately.

**III. SHOULD THERE BE DIFFERENT TREATMENT FOR NON-DOMESTIC FIRMS, STATE-OWNED ENTERPRISES, OR SOVEREIGN WEALTH FUNDS, AND IF SO, SHOULD SUCH TREATMENT DEPEND ON THE TREATMENT OF NON-DOMESTIC ENTERPRISES IN THOSE ENTITIES’ “HOME” COUNTRIES?**

Based on the interviews conducted, there is no real consensus on this issue. Some observers believe that all firms should be treated the same, regardless of nationality and regardless of how non-domestic enterprises are treated in a firm’s “home” country. Other observers believe that this should be treated as a trade issue, and if a country discriminates against non-domestic enterprises, its own enterprises fairly may be subject to stricter treatment in other counties in which they might plan to operate or make acquisitions.

Proponents of treating all firms the same contend that if the right set of standards applies to the evaluation of mergers and competitive practices, those standards are appropriate for all firms, regardless of who owns or controls them. Competition law is meant to safeguard competition, and if a merger or practice is not anticompetitive, it should be permitted regardless of the ownership of the firms involved.

Proponents of treating non-domestic firms in the same manner that their home countries treat non-domestic firms contend that competition law can become a trade issue. Under this view, when countries treat non-domestic firms differently than domestic firms, they should expect to have their own firms, especially state-owned enterprises and firms controlled by sovereign wealth funds,
treated differently in other countries. Adherents to this view contend that it is only fair to apply different competition rules to firms from countries that use their own competition laws as an instrument of international trade.

Mr. Delrahim takes the view that if industry-specific regulators do undertake to analyze transactions under a public interest test, they should apply the same standards whether the parties are domestic or foreign. Such neutrality is an important aspect of due process, and it also ensures that competition is adequately protected rather than allowing enforcers to protect special, favored parties such as national champions. Of course, a nation should be concerned about foreign state-owned enterprises in Mr. Delrahim’s view, especially where they engage in commercial activity in competition with private entities. These circumstances may well raise special competition concerns. A limited exception to this principle occurs in the national security context, where foreign investment in certain strategically sensitive sectors might factor into a national-security risk analysis. In the Antitrust Division’s experience, the definition of “national security,” however, is best left to the national security experts.

Professor Kovacic also believes that the same test should apply regardless of nationality. He recognizes the rationale for having a CFIUS where national security concerns exists. Beyond that, if one country adopts a review process that is ill-advised, neither the United States nor any other jurisdiction needs to follow. But Professor Kovacic anticipates that Washington might become part of an effort to coax that country in a better direction, making this more of a trade issue.

Canada’s Jeanne Pratt notes that Canada’s Competition Bureau applies the same standards to all firms. While it may evaluate whether the incentives of a state-owned enterprise are different from a conventional economic actor, the inquiry always is evidence-based, focusing on the nature of commercial behavior through an economic lens.

Professor Stucke too maintains that the standard applied and the factors considered should not vary depending on the nationality of the parties. Professor Stucke notes that the experience under Dodd-Frank is instructive. When Citigroup wanted to merge with Travelers, the Justice Department was concerned that the deal would create an entity “too big to fail,” but DOJ considered this more a Fed concern than a competition law concern. The Fed, for its part, took the position that it had the tools necessary to address this issue. What is important is to have some government body that is aware of the risk associated with each transaction or practice and is prepared to apply the rule of law. In other words, there needs to be some regulatory “scaffolding.” To Professor Stucke, this is not properly a domestic versus foreign issue. Rather, it is a matter of identifying the risks of not having the necessary guardrails or scaffolding in place. The greater priority, he contends, should be to clean up excessive and outdated regulations and streamline the regulatory process.

Sandeep Vaheeson of the Open Markets Institute also believes that market structure tests should be fundamentally defensible regardless of the nationalities of the parties involved. At the same time, it is acceptable to him to distinguish among different categories of buyers, such as private
equity firms. In his view, what is most important with respect to foreign investment review is to assure that the criteria being applied are made public. He feels that there is relatively little transparency in the merger review process today and even less in the foreign investment review process, leaving substantial room for improvement.

Mr. Kades is of the view that whether or not to limit public interest reviews to non-domestic entities is a political question. Will a state-owned enterprise act differently? If so, this can become a competition issue. Also, if a state-owned enterprise owns stock in multiple competing companies, this could pose a traditional antitrust issue.

Professor Paul expressed the view that the same standards should apply across the board, regardless of the identities of the parties.

Ms. Ohlhausen expressed the view that the same standards should apply for domestic and foreign entities, and that antitrust review should not “play favorites.” This is especially true in the context of the EU, where multiple member states formed a single market.

Mr. Baer is of the view that there should be a level playing field except as foreign investment and foreign acquisitions relate to national security issues. For example, the issue of unemployment caused by the merger of two firms, and whether some of those costs will be borne by the merging parties, should not be subject to a distinction based on the identities of the merging firms. Outside of the national security realm, he believes that legitimate public interest factors ought to apply uniformly regardless of who the acquirer is or what entity engaged in the behavior under scrutiny.

Former OFT head Sir John Vickers believes that foreign ownership should be neither a plus factor nor a minus factor in merger reviews. Public interest reviews might be more frequent in the case of foreign acquisitions but only because national security issues arise more often in those instances. It also should make no difference whether or not another country itself conducts public interest reviews of foreign acquisitions. Just because one nation “puts rocks in its harbor” is no reason for other nations to do the same. Likewise, public interest factors should not be tied up with trade policy.

Another former OFT head, John Fingleton, observed that there can be some justification for taking a different approach to acquisitions by non-domestic entities, but believes that such an approach should be limited to the screening process rather than the substantive assessment, which should focus on the merits. Enhanced screening is reasonable, in his view, if foreign companies and especially state entities acquire domestic assets. However, such screening should not become a smokescreen for actually blocking foreign acquisitions more easily. Moreover, where a public interest factor is the basis for an inquiry, any remedy that may be required should be limited to addressing the specific public interest factor that triggered the concern and should not range beyond that.
Mr. Lipsky observes that nationality should matter when there is an industrial base issue. In other words, there may be a perfectly trustworthy foreign owner, but if it is buying a nation’s last facility for the production of something of strategic importance – ball bearings or some semiconductor chip, for example – there is a risk posed that, should a national emergency arise and that nation needs that particular input, it would not have that capacity to make it. It is a question of the least inefficient means of assuring that the objective is met. For example, in the U.S., the optimum in a welfare economics analysis would be for the Defense Department to go to Congress and say, “we need you to appropriate X dollars so that we can either purchase this facility ourselves or have a certain enforceable claim on the output of this facility in the event of a national emergency.” It may be less costly for the Defense Department to obtain an act of Congress that gives some agency the right to condition the acquisition by the foreign entity or the foreign sovereign wealth fund so that the government does not actually have to spend the money; they can externalize that cost to whomever is buying the facility.

National security lawyers agree that state influence is a factor to consider in national security reviews, and none believe the consideration should be limited to SOEs or sovereign wealth funds. However, the national security lawyers who were interviewed disagreed on the question of whether countries should engage in reciprocity when setting foreign-investment rules. A lawyer with significant public-sector experience believes the “United States should consider the way that the other country assesses whether a U.S. company could acquire one of it companies or how or whether the country engages in different competitive practices. There should be a level playing field.” By contrast, Mr. Mir maintains that “if you start from the premise that free markets will determine the best allocation of capital, then the government generally should not be involved in regulating investment decisions, except where an investment undermines the free market or where there is a public interest determination that the government is uniquely positioned to make. In a place like the United States, where free market principles are deeply engrained in the economy, only the strongest public interest factors would justify government intervention on a transaction-by-transaction basis (as opposed to generalized regulation).” But “other countries may see the threshold for government intervention to be lower and include a broader set of factors.”

Putting this together, it is clear that there is disagreement over whether public interest factors, if they apply at all, should apply differently to non-domestic firms from countries that apply such factors to domestic and non-domestic firms differently, or apply them to non-domestic firms without applying them to domestic firms at all.

**SUMMARY OF PERSPECTIVES**

There are strong opinions that public interest factors should play no role in the review of mergers or competitive practices and equally strong opinions that public interest factors can and must be included in such reviews.
There also are strong opinions that although competition agencies are capable of considering public interest factors, as demonstrated in those jurisdictions that have adopted such a procedure, there are better tools than antitrust available for addressing public interest issues (such as job creation, foreign influence, income disparity, privacy, preservation of small business, and concentration of political power) and therefore public interest review, if needed at all, should be confined to other agencies, such as (taking the U.S. as an example) the Labor Department, CFIUS, the IRS, the FTC, the Small Business Administration, and Congress – except in the case of regulated industries, where specialized agencies most often are considered capable of balancing competition factors against other priorities.

At the same time, there is significant support for the contrary view that public interest factors should be included in the review of mergers and competitive practices, and that competition agencies are capable of evaluating both.

There also is no consensus as to whether firms from countries that apply public interest standards differently to domestic and non-domestic firms should themselves be subject to different standards in countries that consider public interest factors in the review of mergers and competitive practices.

Whether the same standard can, or should, fit all jurisdictions reviewing mergers and competitive practices ultimately is a decision for each sovereign to make. We hope that the illustrations and viewpoints included in this report will help to advance the dialogue and facilitate those decisions going forward.
CONCLUSION

The treatment of public interest factors in connection with competition reviews has evoked strong views. Hopefully, this study can contribute a more detailed examination of public interest reviews in operation around the world, and a broader survey of the perspectives that exist, than ever before.

The task force makes no judgments about the relative merits of the approaches taken in the eight countries studied. Nor do we choose among the viewpoints that have been expressed. Rather, we hope that our report will help practitioners to navigate the maze of reviews that exist around the world, and help policymakers determine the best approach to take in each jurisdiction.