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Foreign Direct Investment

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TABLE OF CONTENTS

04 Letter from the Editor

05 Summaries

07 What's Next?
Announcements

08 FDI SCREENING IN EUROPE: TIME FOR REVIEW?
By Peter Camesasca, Horst Henschen, Katherine Kingsbury & Martin Juhasz

16 FDI AND NATIONAL SECURITY: RISKS FROM A BIG TECH BREAKUP, AND CFIUS'S ROLE TO MITIGATE
By Benjamin Curley & Thomas Feddo

25 GLOBAL MERGER CONTROL AND FOREIGN DIRECT INVESTMENT CONSIDERATIONS ASSOCIATED WITH CROSS-BORDER TRANSACTIONS
By Daniel Culley, Chase Kaniecki, William Segal & William Dawley

30 BALANCING ANTITRUST AND NATIONAL SECURITY IMPACTS OF FOREIGN INVESTMENT IN THE U.S.
By Harry G. Broadman

35 IS IT STILL OK TO DO UK M&A? THE NATIONAL SECURITY AND INVESTMENT ACT 2021: THE FIRST FIVE MONTHS OF PRACTICAL EXPERIENCE
By Nicole Kar & Mark Daniel

41 AMID REGULATORY HEADACHES FOR M&A – UNDERSTANDING THE CURRENT ENFORCEMENT LANDSCAPE IS KEY TO GETTING DEALS DONE
By John R. Ingrassia

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LETTER FROM THE EDITOR

Dear Readers,

Foreign direct investment ("FDI") control is rapidly emerging as a key regulatory vector across the U.S, Europe, and worldwide. In the U.S., FDI control is primarily the responsibility of the Committee on Foreign Investment in the United States ("CFIUS"). In the EU, aside from the adoption of the EU FDI Regulation in 2019, national FDI screening procedures are established in 18 (soon to be 19) Member States. Similarly, the UK implemented its National Security and Investment Act ("NSIA") in early 2022.

The pieces in this Chronicle deal with the emerging field of FDI control as it evolves in jurisdictions around the world. As is evident from these perceptive articles, practitioners will need to be increasingly mindful of the FDI implications of cross-border transactions, both in terms of the substance of the FDI rules in various jurisdictions and the timing implications of FDI notification and clearance in terms of deal scheduling. Moreover, public authorities will continue to refine their policy priorities and notification regimes as their experience grows over time.

As regards Europe, **Peter Camesasca, Horst Henschen, Katherine Kingsbury & Martin Juhasz** note that as the European Commission and Member States begin to report on the implementation of their FDI regimes and as more decisional practice emerges, it is possible to reflect with greater clarity on their implications in practice. As the authors note, an overwhelming majority of FDI filings are cleared quickly, and the 'true' national security interest is much narrower than the scope of current filing requirements. This may indicate the need for a recalibration of these regimes in the months and years to come.

Turning to the U.S., articles by **John R. Ingrassia and Benjamin Curley & Thomas Feddo** draw out the implications of changing CFIUS policy. New theories of harm being advanced under both the antitrust and FDI regimes imply new risks, and procedural changes under both regimes means navigating new waters. This arises in particular for recent calls to break up "Big Tech" companies. The arguments for and against such breakup raise various considerations, but less-discussed potential national security risks lurk within the larger debate. In particular, such breakups could leave American intellectual property, data, technology, and know-how up for grabs by strategic competitors. CFIUS was created to protect against this kind of national security risk, but it has its limitations, particularly in terms of resourcing and the inherent opacity of venture capital and private investment. Given these risks, CFIUS and other national security authorities will need to be appropriately resourced and staffed in order to deal with the problem effectively.

These concerns are also reflected by **Harry G. Broadman**, who notes that global geopolitical shifts have altered the U.S. approach (which historically welcomed FDI as, inter alia, a potential solution to domestic antitrust concerns). We can expect more policy shifts to come, particularly in light of such developments as recent wars in Europe, and the growth of China as a global economic power.

Taking a global point of view, **Daniel Culley, Chase Kaniecki, William Segal & William Dawley** note that cross-border transactions are beset with more uncertainty and potential for delay than ever before, not only due to growing global competition enforcement but also new review regimes targeting FDI. These regimes empower governments, in some cases, to block or restrict cross-border transactions when these considerations conflict with often imprecisely defined national security, national interest, or other strategic concerns. The article usefully summarizes recent developments in global FDI review regimes and highlights the key issues raised by these regimes. It concludes by discussing the overlapping considerations created by the global merger control and FDI review regime analyses.

Finally, **Nicole Kar & Mark Daniel** draw out the implications of the UK approach under the NSIA of 2021, which took effect this year. This law radically overhauls the UK's approach to foreign investment screening. ushering in one of the most expansive investment screening regimes internationally. Importantly, there is now a mandatory notification review process for the most sensitive areas of the economy, and a broad power for the Government to call in non-notified transactions. This timely article sets out some key takeaways from the practical implementation of the NSIA thus far, and highlights some of the continuing areas of legal uncertainty that the authorities could consider clarifying going forward, in light of recent prominent cases.

As should be evident from the foregoing, the issue of FDI control is not going away. As with parallel developments in traditional merger control, these are early days. This set of articles provides invaluable insight into developments so far, and should be invaluable reading for anyone seeking to chart the way ahead.

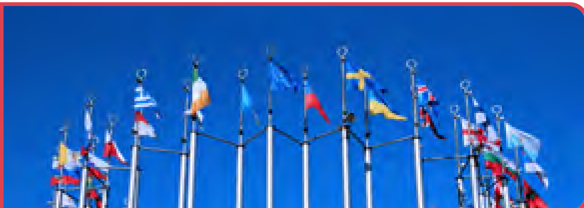
As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES

08



FDI SCREENING IN EUROPE: TIME FOR REVIEW?

By Peter Camesasca, Horst Henschen, Katherine Kingsbury & Martin Juhasz

After around two years (or more) of intense activity in the emergence and upgrading of national foreign direct investment ("FDI") regimes in Europe, certain of the competent FDI authorities and ministries are becoming more established in their approach. In particular, the implementation of FDI review powers and enforcement practices are beginning to be revealed in the first reported annual statistics, including a report published in November 2021 by the European Commission upon one year of full application of the EU FDI Regulation ((EU) 2019/452). The first judicial challenges to FDI laws are also being heard through the courts or other procedural and regulatory interactions. Alongside this, the refinement of FDI laws and the addition of new FDI regimes continues among the European Union ("EU") Member States, within in the European Economic Area and across the wider European continent. In an effort to take stock, this article reports on the key trends and considers where the boundaries of national security or interest might lie in the context of the EU treaties and law.

16

FDI AND NATIONAL SECURITY: RISKS FROM A BIG TECH BREAKUP, AND CFIUS'S ROLE TO MITIGATE

By Benjamin Curley & Thomas Feddo

Breaking up American "Big Tech" companies has in recent years been a topic of much discussion by policymakers and legislators across the political spectrum. Arguments for and against breakup offer various justifications and considerations, but less-discussed potential national security risks lurk within the larger debate — including that breaking up Big Tech could leave American intellectual property, data, technology, and know-how up for grabs by strategic competitors. The interagency U.S. Committee on Foreign Investment in the United States ("CFIUS") was created to protect against this kind of national security risk, but it has its limitations, particularly in terms of resourcing and the inherent opacity of venture capital and private investment. Given these limitations, policymakers who pursue the path of a Big Tech breakup should be aware of this risk and be prepared to address it; CFIUS and other national security authorities will need to be appropriately resourced and staffed.

25

GLOBAL MERGER CONTROL AND FOREIGN DIRECT INVESTMENT CONSIDERATIONS ASSOCIATED WITH CROSS-BORDER TRANSACTIONS

By Daniel Culley, Chase Kaniecki, William Segal & William Dawley

Recent developments regarding global competition enforcement and foreign direct investment, or FDI, review regimes have created uncertainty for cross-border transactions. Specifically, global merger control authorities have become increasingly aggressive in "calling in" transactions under so-called "voluntary" regimes and a number of FDI review regimes recently have been established or expanded. These developments have resulted in more complicated due diligence processes, global merger control and FDI filing analyses, and contract negotiations associated with cross-border transactions. To ensure that cross-border transactions can be successfully completed, this added complexity demands the exercise of judgment and close coordination between the parties and their respective antitrust and FDI teams. This article summarizes the recent developments regarding the global merger control environment and global FDI review regimes, highlights the practical implications of these developments for parties involved in cross-border transactions, and discusses the overlapping considerations created by the global merger control and global FDI review regime analyses.

30

BALANCING ANTITRUST AND NATIONAL SECURITY IMPACTS OF FOREIGN INVESTMENT IN THE U.S.

By Harry G. Broadman

We are in a world where U.S. pursuit of antitrust objectives through a policy of encouraging foreign direct investment is far more complex. On the one hand, public policy toward foreign direct investment increasingly must carefully balance significant tradeoffs: the potential benefits of greater competition with the heightened risks to national security. On the other hand, Washington has been moving in a direction where such tradeoffs are seen as illusory: some U.S. policy makers judge the loss of competition, itself, as constituting a threat to national security. This was largely the case in the 1980s when Japan was in the sights of U.S. international economic policy. Today, however, Washington is dealing with a far more combustible mixture: unlike Japan, a liberal democracy, China is neither liberal nor a democracy. The challenge now before U.S. policy makers is thus how to deal with foreign direct investment from a country that is viewed as presenting a combination of threats to competition and national security. Effectively confronting that challenge requires a new analytical framework that provides a decision-making calculus to maximize the chances of achieving a balance by distinguishing between new domestic entrants versus new foreign entrants.

SUMMARIES

35

IS IT STILL OK TO DO UK M&A? THE NATIONAL SECURITY AND INVESTMENT ACT 2021: THE FIRST FIVE MONTHS OF PRACTICAL EXPERIENCE

By Nicole Kar & Mark Daniel

Almost five months have passed since the UK's National Security and Investment Act 2021 ("NSIA") took effect, radically overhauling the UK's approach to foreign investment screening. Although hugely expansive in its scope and jurisdictional reach, generating a projected 1,000 - 1,830 filings per year, the UK Government's intention was to establish an efficient and proportionate screening regime to allow fast clearances of most non-problematic deals and thereby minimize the burden of the NSIA for business. We consider how effective the Investment Security Unit has been at delivering these goals, the key takeaways from our practical experience with the NSIA over the past five months, how transacting parties have been navigating the NSIA in practice, and highlights areas of uncertainty which could usefully benefit from market wide guidance. We also look at the Government's first calls ins under the new regime (namely China-backed Nexperia's acquisition of a stake in Newport Wafer Fab, and the increased stake in BT by Patrick Drahi, the French billionaire owner of Altice) and consider what light they can be expected to shed on the NSIA regime.

41

AMID REGULATORY HEADACHES FOR M&A – UNDERSTANDING THE CURRENT ENFORCEMENT LANDSCAPE IS KEY TO GETTING DEALS DONE

By John R. Ingrassia

Mergers and acquisitions are facing dual changing regulatory landscapes with respect to antitrust review and enforcement, and foreign investment into U.S. businesses under CFIUS. Both sets of changes represent aggressive tightening, make is more challenging to gain approval, and add costs and time to deals that ultimately do win clearance. New theories of harm being advanced under both regulatory regimes means having to evaluate new risks, and procedural changes under both regimes means navigating new waters. In this article we address what's happening at both agencies, how it is impacting M&A, what it means for getting deals done, and how to navigate the new norms.

WHAT'S NEXT?

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Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

FDI SCREENING IN EUROPE: TIME FOR REVIEW?

BY PETER CAMESASCA, HORST HENSCHEN, KATHERINE KINGSBURY & MARTIN JUHASZ[1]

1 Peter Camesasca is a partner based in the Brussels and London offices of Covington & Burling with a long-standing practice covering competition and merger control. He is the co-head of the firm's Foreign Investment Regulation initiative. Horst Henschen is Of Counsel in the Frankfurt office of Covington & Burling, working with Martin Juhasz (Associate, Frankfurt) on competition and foreign investment matters. Katherine Kingsbury is Special Counsel in the London office of Covington & Burling advising on corporate law and foreign investment matters.

I. INTRODUCTION

The emergence, at pace, and broadening of foreign direct investment ("FDI") regulation across Europe (and in other jurisdictions globally) is widely known. National FDI screening procedures are now established in 18[2] of the Member States of the EU. Similarly, the United Kingdom ("UK") implemented its National Security and Investment Act ("NSIA") as of January 4, 2022. Accordingly, the assessment of (and compliance with) FDI filing requirements have become a comparatively routine considerations for M&A and other transactions.

As the European Commission and Member States begin to report on the implementation of their FDI screening regimes and as more decisional practice emerges, it becomes possible to reflect with (hopefully) greater clarity on the implications of FDI screening in practice. One trend is clear – that is, that an overwhelming majority of FDI filings are cleared quickly, and the "true" national security interest is much narrower than the scope of current filing requirements.

A picture emerges of FDI laws as, among other important purposes, an information gathering tool for national governments and local competent authorities with regard to investment in key sectors of their economies.[3] The breadth of FDI filing requirements is clearly influenced by the range and complexity of potential national security risks within modern economies. In addition, FDI screening tools have an important function to best position national governments to act proactively to address national security concerns before they can manifest.

For many investors, in practice, FDI filing requirements frequently present a timing hurdle to their investment plans and a compliance requirement, but without many other consequences. Taking one viewpoint, FDI authorities could be described acting in a fairly targeted manner in the application of their FDI powers, while clearly also being willing to use the significant powers available in the limited number of cases in which they see cause to do so. At the same time, some challenge to the scope and application of FDI powers is revealed from recent FDI matters in the public domain and the locus of national security interest is beginning to be defined.

II. FDI REGULATION REMAINS DYNAMIC

The adoption of the EU FDI Regulation[4] in 2019, and which came into force in October 2020, was an important steppingstone in the renewal and further development of FDI laws across Europe. The EU FDI Regulation provided a framework of basic requirements for Member State FDI regimes to operate in compliance with EU law. It also introduced a mechanism for EU-level information sharing and coordination in FDI.

The European Commission, while holding few powers of its own to tackle FDI, has actively encouraged Member States to adopt and implement FDI screening measures. The Commission openly addressed Member States regarding the importance of FDI powers in March 2020 at the outbreak of the COVID-19 pandemic. More recently, the invasion of Ukraine by the Russian Federation has provided further impetus for FDI law-making.

Following these important communications from the Commission, Member States have heeded the call to action and new FDI laws were adopted in the Netherlands and Romania in April 2022, while France, Italy and Austria continue to evaluate the scope of their FDI regimes. With FDI laws in contemplation in Belgium, Sweden, Portugal, and Ireland (among other countries, including EU neighbour Switzerland), FDI regulation looks set to continue evolving for some time yet to come. The European Commission has also launched its own comprehensive study to ensure that the EU Member State FDI screening mechanisms are effective and efficient.

III. FDI REGULATION IN PRACTICE: DATA ON FDI SCREENING AND DECISIONMAKING

The introduction of the EU cooperation mechanism was intended to assist the European Commission with one of the main purposes of their FDI screening regime — information gathering. This objective is clear as the EU FDI Regulation imposes notification and information requirements

2 Most recently, the Netherlands adopted a new FDI screening bill, Investments, Mergers and Acquisitions Security Screening Bill (Wet veiligheidstoets investeringen, fusies en overnames), after the majority of MPs voted in favour of the proposed legislation on April 19, 2022 and the Dutch Senate added its approval on May 22, 2022. Upon implementation of the law, the Netherlands will have a general FDI screening regime, as well as pre-existing regime relating to telecommunications.

3 Gathering additional data on FDI in Europe was among the policy objectives supporting the case for the EU FDI Regulation. Study and Commission Staff Working Document (SWD(2019) 108 final), March 13, 2019: https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf.

4 Regulation (EU) 2019/452 of the European Parliament and of the Council of March 19, 2019 establishing a framework for the screening of foreign direct investments into the Union, Accessible here: https://eur-lex.europa.eu/eli/reg/2019/452/oj.

under the cooperation mechanism as well as annual reporting obligations on Member States.[5] In particular, the annual reports must provide aggregated information on all the foreign direct investments that took place within the Member States' territory, as well as the application of their FDI rules. This is subsequently consolidated by the European Commission and published by way of an annual FDI report.[6]

In line with this reporting obligation, on November 23, 2021, the European Commission published its first annual report on the implementation of the EU FDI Regulation[7] — this was shortly followed up with the publication of individual Member State reports. Ultimately, the collected information and reports will feed into an in-depth assessment on the effectiveness of the EU FDI Regulation.[8]

In practice, the data indicates clearly that the number of FDI filings continue to rise in many jurisdictions. In France, there was a 31 percent increase in transactions filed for FDI screening in 2021 compared to 2020.[9] The number of German FDI cases almost doubled from 160 cases in 2020 to 306 cases in 2021.[10] Further, in the first year since the introduction of the Austria FDI control regime in July 2020, the Austrian government has reviewed a total of 50 requests for FDI approval, with a further 20 pending applications. Prior to the implementation of a comprehensive FDI screening regime, the Austrian government reviewed only 25 proceedings in the previous eight years.[11]

At the EU level, since the implementation of the EU cooperation mechanism in October 2020, there have been a total of 265 transactions notified to the European Commission ("Commission") between October 11, 2020 to June 30, 2021.[12] EU Member States have also expressed support for EU cooperation in relation to FDI, describing the Regulation *"very useful instrument" and noting that "the exchange of information allows Member States to detect potential risks from an FDI transaction at an earlier stage."*[13] Similar themes and comments are mentioned in the French FDI Report for 2021.[14]

The imperative to submit FDI filings is driven by the serious penalties that can be imposed within many FDI regimes for a failure to meet mandatory filing requirements.[15] Accordingly, there are plentiful anecdotal reports of transaction parties submitting FDI filings on a voluntary or precautionary basis, e.g. to obtain legal certainty (through holding a clearance decision) or where the application of filing requirements (such as sector definitions) is unclear. Having filed, transaction parties then encounter FDI authorities that are generally on an inquisitive footing and prepared to request information to obtain a clear picture of a proposed transaction before rendering any decision.

Beyond these factors and temporal hurdles, however, the available data indicates that the vast majority of transactions are cleared by national FDI authorities at an early stage and usually during phase one of the review process. In Germany and for the year 2021, 87 percent of all FDI filings were cleared by the BMWK within an initial two-month period, and only 13 percent of FDI reviews lasted longer than two-months.[16] Similarly, as part of the EU cooperation mechanism, 80 percent of the total 265 notifications submitted to the Commission were closed in just 15

5 See e.g. Article 6 and 7 of the EU FDI Regulation with respect to the notification and information requirements required under the cooperation mechanism and Article 5 of the EU FDI Regulation for the annual reporting requirements.

6 Recital 32 and Art. 5, the EU FDI Regulation (2019/452).

7 European Commission, *First Annual Report on the screening of foreign direct investments into the Union* (COM(2021) 714), November 23, 2021, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

8 Recitals 34 and Art. 15, the EU FDI Regulation (2019/452): The evaluation will take place by October 12, 2023 and every five years thereafter.

9 French Ministry of Economy, *Le contrôle des investissements étrangers en France en 2021*, 17 March 2022, Accessible in French here: https://www.tresor.economie.gouv.fr/Articles/9aa76183-24a8-49ba-9466-179c5b29f99c/files/47b9b032-3d2b-4779-8327-15d3400045ab.

10 German Federal Ministry for Economic Affairs and Climate Action ("BMWK"), Investment Screening in Germany: Facts & Figures, March 28, 2022, p. 9, Accessible here: https://www.bmwk.de/Redaktion/EN/Publikationen/Aussenwirtschaft/investment-screening-in-germany-facts-figures.pdf?__blob=publicationFile&v=6.

11 Federal Ministry Republic of Austria ("BMDW"), *Erster Tätigkeitsbericht der Investitionskontrolle*, February 10, 2022, Accessible in German here: https://www.bmdw.gv.at/dam/jcr:ae3779c1-76dd-442f-a3a0-1427649953ff/Investitionskontrolle_T%C3%A4tigkeitsbericht 2020_barrierefrei_v2.pdf.

12 European Commission, *First Annual Report on the screening of foreign direct investments into the Union* (COM(2021) 714), November 23, 2021, p. 12, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

13 *Ibid*. p. 16.

14 French Ministry of Economy, *Le contrôle des investissements étrangers en France en 2021*, March 17, 2022, Accessible in French here: https://www.tresor.economie.gouv.fr/Articles/9aa76183-24a8-49ba-9466-179c5b29f99c/files/47b9b032-3d2b-4779-8327-15d3400045ab.

15 For example, under the UK NSIA, a business that fails to comply with mandatory filing requirements could be subject to the higher of 5 percent of the total value of the turnover of the business or £10 million.

16 BMWK, Investment Screening in Germany: Facts & Figures, March 28, 2022, p. 7, Accessible here: https://www.bmwk.de/Redaktion/EN/Publikationen/Aussenwirtschaft/investment-screening-in-germany-facts-figures.pdf?__blob=publicationFile&v=6.

days, within the first phase of its review process.[17] Since the introduction of the FDI control regime in Austria in July 2020, only two transactions were found to have raised national security issues that were subsequently addressed with remedies — no transactions have been blocked.[18] In Germany, measures, including prohibitions, conditions, public contracts and administrative requirements, were only taken in 2 percent of the FDI transactions reviewed in 2021 (although certain transactions subject to filings submitted during 2021 have been prohibited or the review period has elapsed during 2022, suggesting that the proportion of conditioned transactions may be higher overall).

At the same time, however it must be acknowledged that recently published FDI filing statistics for France stand a degree apart. The French Ministry of Economy approved 124 transactions for which FDI filings were submitted in 2021, however, in 67 of those transactions conditions were attached to the clearance decision.[19] More particularly, half of the FDI decisions relating to biotechnology sector provided for conditional clearance.[20] While the French FDI report remains silent on the reasons for its interventionist manner, there may be factors influencing this approach.

Not least, that France offers a filing pathway through which investors can seek guidance and request confirmation of whether their transaction is subject to FDI laws. As such, there is a procedural filter for filings that are out of scope of FDI laws, and the remainder of filings reviewed on substantive basis for FDI concerns are perhaps proportionately more likely to attach national security considerations.

In addition, there are reports that the mitigation requested by the French FDI authority may be comparatively light in some instances, for example, requiring to commitments for the maintenance of supply and requirements to notify any future changes of control or in business activities. Other countries may be achieving the later objective but by other means. For example, in Romania and Italy, FDI laws are being expanded to require notice and FDI clearance for a range of business developments (e.g. expansion into new activities/business units) relating to sensitive entities, and not just M&A events.[21]

IV. WHAT DOES NATIONAL SECURITY (AND OTHER NATIONAL/PUBLIC INTEREST) MEAN IN THE FDI CONTEXT?

Against this background, FDI filing requirements can be regarded as having fairly broad capture and from which FDI authorities must then discern the transactions, targets and investors of most interest. Many FDI cases will continue to turn on their own facts and circumstances — relevant to targets big and small and to investors allied and foreign (and sometimes even domestic)[22] — and it remains challenging to transfer precedents, which are also usually confidential, from one transaction to another. Nonetheless, it appears timely to reflect upon the overall legal landscape in which FDI laws exist, especially in Europe, and to consider the cases in which the scope of FDI review is being questioned.

A. "Legitimate Interest" and FDI Screening

The Treaty on the Functioning of the European Union ("TFEU" or "Treaty") establishes a number of fundamental freedoms underpinning the European project. Article 63 TFEU provides for the free movement of capital within the EU and extends this freedom to movements of capital from within the EU to third countries, and from third countries into the EU. Article 49 TFEU also protects the freedom of establishment of nationals of a Member State in another Member State.

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17 European Commission, *First Annual Report on the screening of foreign direct investments into the Union*, November 23, 2021, p. 12, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

18 BMDW, *Erster Tätigkeitsbericht der Investitionskontrolle*, February 10, 2022, Accessible in German here: https://www.bmdw.gv.at/dam/jcr:ae3779c1-76dd-442f-a3a0-1427649953ff/Investitionskontrolle_T%C3%A4tigkeitsbericht 2020_barrierefrei_v2.pdf.

19 French Ministry of Economy, *Le contrôle des investissements étrangers en France en 2021*, March 17, 2022, Accessible in French here: https://www.tresor.economie.gouv.fr/Articles/9aa76183-24a8-49ba-9466-179c5b29f99c/files/47b9b032-3d2b-4779-8327-15d3400045ab.

20 *Ibid.*

21 For example, in Italy, in addition to M&A events, the following transactions would also fall within the scope of the FDI rules: Resolutions or transactions that lead to changes in the ownership, control or availability of the assets e.g. expansion, dissolution, modification of the company's purpose, transfer of subsidiaries or registered offices abroad, transfer of rights of use to assets etc.

22 The UK NSIA applies to all investors, including those from the UK. The new general FDI law in the Netherlands is understood to have similar scope of application (i.e. applicable to domestic investors).

The circumstances in which Member States can derogate from these fundamental freedoms are limited and have been subject to judicial scrutiny over time, including in the context of the EU Merger Regulation ("EUMR").[23] Specifically, EU Member States are permitted to take *"appropriate measures"* to protect their *"legitimate interests,"* only if these measures are compatible with EU law.[24] In relation to the EUMR, this means that Member States do not have to defer entirely to the competence of the European Commission to review the competition aspects of an investment or transaction with an EU dimension (Article 21, EUMR) if there are *"legitimate interests"* of the Member State at stake that create an overriding national interest.

The Court of Justice of the European Union ("ECJ") has set the bar high, applying narrow interpretation of what constitutes *"legitimate interests"* albeit alongside a broader interpretation of *"appropriate measures."*[25] For example, the grounds of national security or public order can be relied on to curtail free movement of capital if there is a genuine and sufficiently serious threat to a fundamental interest of society, but the restriction of freedom(s) will be closely circumscribed (e.g. to ensure a minimum supply or continuity of services in the public interest or for strategic services such as post, petroleum, electricity and telecommunications[26]). Even in cases involving these key sectors, any legislation relied upon must set out objective and non-discriminatory criteria for the application of the restrictive measure, ensuring legal certainty.[27] The ECJ has also determined that legitimate interests should not be purely economic.[28]

The Commission has previously stipulated four conditions for measures that restrict fundamental Treaty freedoms such as the free movement of capital and the freedom of establishment.[29] Measures such as prior administrative approval or authorisation procedures must: (1) be applied in a non-arbitrary and non-discriminatory manner; (2) be suitable and proportionate (justified by imperative requirements) to the objective pursued; (3) provide legal certainty, by being based on objective, non-discriminatory criteria known in advance to the undertakings concerned, with access to a legal remedy; and (4) follow transparent procedures, giving clear indication of specific, objective circumstances in which approval will be granted or withheld.[30]

Member State FDI laws and the framework established by the EU FDI Regulation are to be interpreted against this backdrop and pre-existing EU law, including case law. In particular, Recital 36 of the EU FDI Regulation provides that while the screening of foreign investment on the grounds of national security and public order is to be permitted, *"the notion of legitimate interests within the meaning of [the EUMR] should be interpreted in a coherent manner, without prejudice to the assessment of the compatibility of the national measures aimed at protecting those interests with the general principles and other provisions of Union law."* The EU FDI Regulation also supports the principle of legal certainty for investors, by requiring (similar to the EUMR) that Member States to notify the Commission of their existing, newly adopted and/or amended FDI screening measures within 30 days of implementation.[31]

B. Testing the Boundaries of FDI screening and Decision-making

1. FDI Screening and the EUMR

The recent case of *VIG/Aegon*[32] has added to our understanding of legitimate national security and public policy interests, and has allowed the Commission an opportunity to comment on the application of the Treaty principles and of the EUMR, for the first time in the era of the EU FDI Regulation. The case is also illuminating in terms of dynamics between Member States and the Commission in relation to FDI matters, particularly where these intersect with the application of the EUMR.

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23 Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24/1, Accessible here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139.

24 Article 21(4), EUMR and as cross-referenced in Recital 36, the EU FDI Regulation (2019/452).

25 See e.g. Case C-503/99, Commission v. Belgium, 4 June 2002; Case C-54/99, Église de Scientologie, March 14, 2000.

26 See e.g. Case 367/98, Commission v. Portugal, June 4, 2002.

27 Case 483/99, Commission v. France, June 5, 2002.

28 Case C-463/00, Commission v. Spain, May 13, 2003.

29 See e.g. Commission Communication, *Intra-EU investment in the financial services' sector* (2005/C 293/02), November 25, 2005, Accessible here: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:293:0002:0007:EN:PDF.

30 European Commission, *Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)* (2020/C 99 I/01), March 26, 2020, Accessible here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52020XC0326%2803%29.

31 Article 3(7), the EU FDI Regulation (2019/452).

32 Case M.10494, *VIG / Aegon*.

Aegon, a Dutch insurance company, had agreed in October 2020 to acquire certain insurance, pension fund and asset management businesses of Vienna Insurance Group ("VIG"), including in Hungary. While the European Commission had, in August 2021, unconditionally cleared the transaction on competition grounds under the EUMR, the transaction stalled for several months due to a Hungarian government veto made pursuant to temporary FDI rules. The Minister of the Interior considered that the transaction threatened Hungary's legitimate interest as set out in FDI rules introduced in connection with the COVID-19 pandemic and recently expanded to cover transactions in the insurance sector. The European Commission opened an investigation in October 2021 to consider whether Hungary's decision constituted a breach of the EUMR.

Having reviewed the case and in findings published earlier this year,[33] the Commission reasoned that Hungary's veto restricted, without sufficient cause, VIG's right to engage in a cross-border transaction and Hungary had failed to show that the restriction was *"justified, suitable and proportionate."*[34] As such, the Commission deemed the decision to also be incompatible with EU rules on the freedom of establishment (Articles 49-55, TFEU). The Commission expressed *"reasonable doubts"* about whether the veto had been properly aimed at protection Hungary's legitimate interests.[35] In addition, the temporary FDI rules should have been notified to the Commission prior to being implemented. The Commission was also "unclear" how the acquisition could pose a threat to a *"fundamental interest of society,"* given that the transaction parties were both *"well-established EU insurance companies with an existing presence in Hungary."*[36]

Following the publication of the Commission's conclusions, Hungary withdrew its FDI veto on March 18, 2022.[37] Notably, upon closing of the transaction, Hungary acquired a 45 percent interest in the combined business of the Hungarian subsidiaries of VIG and Aegon for consideration of close to €350 million.[38] The revised transaction structure and deal terms had been agreed in the interim and as compromise arrangement between VIG and the Hungarian government.

Leaving aside those eventualities, a key takeaway from the Commission's intervention in *VIG/Aegon*, is that it does not appear necessarily to depart from precedent relating to TFEU, the EUMR and Member States' foreign investment screening rules. In *BSCH/A. Champalimaud*, decided in 1999, Portugal prohibited a transaction with an EU dimension on the basis of a domestic law restricting foreign firms from acquiring more than 20 percent in domestic insurance firms, citing protection of national interests and strategic sectors but without notifying the Commission. The Commission found that Portugal had misapplied predecessor rules to EUMR and ordered suspension of the measures taken.[39] Similar outcomes (and in some cases infringement proceedings) have been taken in other cases brought by the Commission against Portugal,[40] Poland,[41] Italy,[42] and Spain.[43]

What Member States and investors will want to know is that the EU FDI Regulation has not changed the interplay of these different legislative measures and that, despite the extant concerns of the COVID-19 pandemic and the rapid emergence of new or expanded FDI legislation in many Member States, the underlying principles are unchanged. Restrictions on FDI are only permitted where a *"legitimate interest"* is at stake.

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33 European Commission Press Release, *Mergers: Commission preliminarily concludes Hungary breached Article 21 of the EU Merger Regulation by vetoing the acquisition of AEGON's Hungarian subsidiaries by VIG*, January 20, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/mex_22_442; European Commission Press release, *Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation*, February 21, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1258.

34 European Commission Press release, *Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation*, February 21, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_1258.

35 *Ibid.*

36 *Ibid.*

37 VIG Press Release, *Vienna Insurance Group closes acquisition of Aegon companies in Hungar*y, March 23, 2022, Accessible here: https://www.vig.com/en/press/press-releases/detail/vienna-insurance-group-closes-acquisition-of-aegon-companies-in-hungary.html.

38 Aegon Press Release, *VIG reaches agreement with Hungarian state holding Corvinus*, February 16, 2022, Accessible here: https://www.aegon.com/investors/press-releases/2022/vig-reaches-agreement-with-hungarian-state-holding-corvinus/.

39 Case No IV/M.1616, Commission Decision of BSCH / A. Champalimaud, July 20, 1999.

40 Case-42/01, Portugal v. Commission, June 22, 2004.

41 European Commission Press Release, *Mergers: Commission launches procedure against Poland for preventing Unicredit/HVB merger* (IP/06/277), March 8, 2006, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_06_277; Case M.4125, Unicredit / HVB.

42 European Commission Press Release, *Mergers: Commission welcomes Italy's move to clarify authorisation procedures in toll motorway sector* (IP/07/1119), July 18, 2007, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1119.

43 Case M.4197, *E.on / Endesa*.

The Commission's investigation in the VIG/Aegon transaction shows that it is willing to test the boundaries of national FDI screening. In its published comments, the Commission emphasised that *VIG/Aegon "affirms the Commission's exclusive competence to examine concentrations with a Union dimension."*[44] As such, the Commission's decision serves as precedent to invoke Article 21 of the EUMR for overturning national FDI measures that it considers at odds with EU law, with the potential to simultaneously curtail the reach of national FDI regimes.

2. FDI Enforcement and Challenges from Investors

Investors at the forefront of FDI screening and facing the increased scope of FDI laws and a significant increase in their filing obligations (as outlined above) have also begun to question and challenge the application of FDI legislation in practice. Companies too are becoming aware of the additional challenges to securing investment and new ownership where FDI laws may apply to their activities. In particular — and while many FDI procedures remain confidential — in Italy, three recent court cases concerning the Italian government's use of its "golden power" rules can be noted in the public domain.

First, the acquisition of Verisem, a vegetable seed producer, by Chinese investor Syngenta, was blocked in October 2021 pursuant to Italy's "golden power" FDI rules. It was suggested that the transaction posed a national security risk and would have shifted the global balance in the control of seeds for the production of vegetables and aromatic herbs to Asia.[45] The parties disagreed. According to Syngenta, which acknowledged a degree of national security risk in connection with the transaction, its proposed undertakings would have been sufficient to ensure that the Italian national strategic interest in Verisem would be protected. As a result, Syngenta launched administrative court proceedings to challenge the decision made by the Italian government. Nonetheless, the Italian court determined that the Italian government's prohibition decision was properly reasoned.[46]

In two other instances, the Italian target companies are understood to have objected to the application of FDI laws to block planned investments or acquisitions. In 2021, LPE, a Milan-based producer of semi-conductor equipment, is understood to have appealed after Rome prevented it from being acquired by Chinese company Shenzhen Invenland Holdings Co Ltd.[47] More recently, Calvi Holdings was determined by FDI authorities to be unique in the steel sector in Italy such that an acquisition by Swiss company Montanstahl was blocked.[48] The Italian courts are reported to have declined to review an appeal by Calvi Holdings on the basis of inadmissibility for lack of interest after Montanstahl walked away from the transaction.[49]

V. LEGAL CERTAINTY IN FDI

It is to be expected that FDI laws will continue to develop, and transaction parties will be well advised to remain alive to monitoring and assessing the potential application of FDI screening to their proposed transactions. FDI rule making has continued in early 2022 (as mentioned) and the GlobalWafers takeover of Siltronic AG[50] is just one indication of the need to plan carefully after the transaction failed to receive FDI clearance in Germany prior to the contractual long-stop deadline for the transaction on January 31, 2022.

For parties looking for additional legal certainty concerning FDI activities, there are mixed signals but there have been some promising signs. Foremostly, for many investors and transactions – perhaps as great as 90 percent - compliance with FDI filing requirements is a matter

44 European Commission Press Release, *Mergers: Commission finds that Hungary's veto over the acquisition of AEGON's Hungarian subsidiaries by VIG breached Article 21 of the EU Merger Regulation*, February 21, 2022, Accessible here: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258.

45 Reuters, *Chinese-owned Syngenta appeals Italy's veto of seed producer deal*, January 7, 2022, Accessible here: https://www.reuters.com/markets/deals/chinese-owned-syngenta-appeals-italys-veto-seed-producer-deal-sources-2022-01-07/.

46 Reuters, *Italian court rules veto of Syngenta purchase of seed producer is valid*, April 13, 2022, Accessible here: https://www.reuters.com/business/italian-court-rules-veto-chinese-purchase-seed-producer-is-valid-sources-2022-04-13/.

47 Reuters, *Italy vetoes takeover of semiconductor firm by Chinese company Shenzhen*, April 9, 2021, Accessible here: https://www.reuters.com/article/china-italy-semiconductors-idUSL8N2M22LS; Reuters, *Italy may compensate firms hit by anti-takeover powers, sources say*, 10 December 2021, Accessible here: https://www.reuters.com/markets/europe/italy-may-compensate-firms-hit-by-anti-takeover-powers-sources-say-2021-12-10/.

48 Decree of the President of the Council of Ministers (Decreto del Presidente del Consiglio dei ministri), April 24, 2021, Accessible here in Italian: https://www.senato.it/leg/18/BGT/Schede/docnonleg/42426.htm.

49 Case No. 06531/2021, Tribunale Amministrativo Regionale per il Lazio.

50 DGAP, *Siltronic AG: Public tender offer by GlobalWafers will not be completed as offer conditions have not been fulfilled within the applicable deadline*, February 1, 2022, Accessible here: https://www.dgap.de/dgap/News/adhoc/siltronic-public-tender-offer-globalwafers-will-not-completed-offer-conditions-have-not-been-fulfilled-within-the-applicable-deadline/?companyID=487&newsID=1508658.

of timing and acceptance of a degree of disclosure. Although there may be some direct cost involved to deal-making to complete the FDI review process, parties may not necessarily consider this to hinder their transaction plans once weighed in the overall balance. A longer period is likely to be required to understand the overall impact of FDI screening on FDI trends in Europe, given the impact of COVID-19 on deal-making and other factors such as strengthening of merger control enforcement in Europe and elsewhere.[51] That said, a consideration for national FDI authorities and policy makers could be, in due course, to implement post-closing, rather than pre-closing, FDI filing requirement for certain transactions.[52] Legislators considering such changes would need to carefully balance their need to know about transactions (at some point), the need to be positioned to act ex ante (where necessary) and their obligations not to discriminate. However, a move toward greater post-closing filings could be achieved through more tailored and clearer definitions of the sectors most in focus for FDI screening and a range of thresholds and/or exemptions.

Undoubtedly, for now and whatever the filing requirements of the future, the remaining "true" FDI interest has the capacity to loom large and the statistics will matter less (and perhaps not at all) when applied to individual and more complex FDI cases. Investors and companies in that category may be able to take some comfort from recent challenges to FDI decision-making by national FDI authorities. The Commission's intervention in VIG/Aegon has importance in terms of continuity and setting the overall tone for FDI review in Europe, potentially challenging governments and national FDI authorities to go further in contemplating the *"legitimate interest"* at stake. Indeed, in connection with another matter, Hungary has now requested a ruling on the validity of its emergency FDI laws.[53] It is significant that the Commission, alongside calls to adopt and apply FDI laws, has signalled clearly a corresponding expectation that the application of FDI laws will be robust.

What is left in the most difficult FDI transactions is a degree of unpredictability. Precedent remains scarce, and FDI authorities continue to develop their expectations and experience. FDI screening remains a case-by-case assessment, taking into account the specific facts of each transaction. National FDI regimes therefore leave broad discretionary powers to screening authorities and clearly open the door for political considerations. In this context, the safeguards for investors that balance enforcement powers and shape the boundaries for FDI screening are yet to be further defined.

51 Figures on FDI trends reflect a range of complex factors. *See*, for example. European Commission, *First Annual Report on the screening of foreign direct investments into the Union*, November 23, 2021, p. 6, Accessible here: https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf.

52 Both the CFIUS regime in the United States and the Investment Canada Act in Canada can be considered as good examples of FDI regulations that place greater emphasis on investor risk-assessment and filing incentives, together with intervention powers and mandatory filing obligations for certain transactions.

53 See C-106/22, *Request for a preliminary ruling by Xella Magyarország*, February 15, 2022.

FDI AND NATIONAL SECURITY: RISKS FROM A BIG TECH BREAKUP, AND CFIUS'S ROLE TO MITIGATE

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The call to break up American "Big Tech" is one of the few policy proposals in Washington on which individuals across the political spectrum seem to agree, albeit for different reasons. Arguments for and against breakup often touch on antitrust law as well as geopolitics, and both camps have claims worthy of consideration. There may also be unintended consequences relating to national security, however, of breaking up large American technology companies. These consequences have not garnered a great deal of attention in the larger debate. The aftermath of a Big Tech breakup could push emerging technologies that are vital to national security into adversarial hands, and the interagency U.S. Committee on Foreign Investment in the United States ("CFIUS") will stand in the breach. Regulators and legislators who pursue the path of a Big Tech breakup should be aware of this risk and be prepared to mitigate it, lest they find out that they have walked us down a primrose path.

I. BIG TECH, ANTITRUST, AND GEOPOLITICS

American Big Tech can loosely be defined as the five largest information technology companies in the United States: Apple, Microsoft, Alphabet, Amazon, and Meta. Their combined revenues of over $1.4 trillion in 2021 would be the 14th-largest economy in the world by GDP, just behind Brazil — a country of over 200 million people — and their global reach and influence have raised uncomfortable questions about the survivability of the Westphalian system of nation-state power that has dominated since 1648.[2]

The expansion of the Big Tech companies and the immense power they have accrued has knit together a patchwork quilt of supporters and detractors. Both Senators Elizabeth Warren (MA) and Ted Cruz (TX) agree that Big Tech has too much power and that the government should reign it in. Senator Warren cites the way Big Tech has "bulldozed competition" through mergers and strong-arm tactics and used American's "private information" for profit as justification for breakup.[3] Senator Cruz has raised concerns about Big Tech's accumulation of "market power and monopoly power" and their censorship policies to advocate for greater regulation and potential breakup.[4] But those who oppose breakup are equally bipartisan.

Senators Mark Warner (VA) and Mike Lee (UT), for example, both have criticized Big Tech and called for greater oversight or regulation around censorship, but have tread lightly around the topic of dissolution. Senator Lee said "We are concerned about privacy, data misuse and bias, but that doesn't fall under the antitrust law. Big isn't necessarily bad."[5] Those cautious about breakup often cite antitrust law as focused on the consumer, and argue that Big Tech companies with their innovative methods and economies of scale have created more competition and lowered costs for consumers. Many opposed to breakup also lean on the geopolitical consequences of dissolution. Senator Warner pushed back against breakup in an interview with CNBC saying, "These are all global companies. Frankly, to have them replaced by Alibaba or Baidu or Tencent — Chinese companies may not be the better alternative."[6] At their peak, before the recent tech crackdown from the Chinese Communist Party ("CCP") Government, Alibaba, Baidu, and Tencent were respectively worth $842 billion, $113 billion, and $950 billion, and closing in on their American competitors.

But breakup advocates have also made justifications on broad geopolitical grounds. In a March 2020 Foreign Affairs article, Ganesh Sitaraman pushed back against views like Senator Warner's, noting that "market concentration in the technology sector . . . means less competition and therefore less innovation, which threatens to leave the United States in a worse position to compete with foreign rivals . . ." and therefore that "breaking up and regulating Big Tech is necessary to protect the United States' democratic freedoms and preserve its ability to compete with and defend against new great-power rivals."[7]

Whether the Big Tech companies violate antitrust laws is up for debate, as is whether fewer, larger, globetrotting tech companies or more of the smaller, nimbler tech companies is better for America's geopolitical interests. What is not up for debate is the research and development

2 Poletti, T., & Owens, J. C. (2022, February 6). *Opinion: $1.4 trillion? Big Tech's pandemic year produces mind-boggling financial results*. MarketWatch. Retrieved from https://www.marketwatch.com/story/1-4-trillion-big-techs-pandemic-year-produces-mind-boggling-financial-results-11644096594.

3 Warren Democrats. (2021). *Break up big tech*. Retrieved from https://2020.elizabethwarren.com/toolkit/break-up-big-tech.

4 *Sen. Cruz: ZERO accountability from Big Tech is dangerous*. Senator Ted Cruz. (2021, April 20). Retrieved from https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-zero-accountability-from-big-tech-is-dangerous.

5 Yahoo! (2019, September 27). *Big Tech companies look to an unlikely savior: The Republican Party*. Yahoo! Retrieved from https://www.yahoo.com/video/big-tech-companies-look-unlikely-192435789.html.

6 CNBC (2020, July 30). *Sen. Mark Warner opposes Big Tech Breakup – for now*. CNBC. Retrieved from https://www.cnbc.com/2020/07/30/sen-warner-against-big-tech-break-up-for-now-warns-chinese-companies-would-replace-them.html.

7 Sitaraman, G. (2020). *Too Big to Prevail*. Foreign Affairs. Retrieved from https://www.foreignaffairs.com/articles/2020-02-10/too-big-prevail.

("R&D") expenditure and acquisitions undertaken by Big Tech companies. These five companies spent a combined $155 billion on R&D in 2021.[8] [9] [10] [11] [12]By way of comparison, the five top U.S. defense contractors (Boeing, Lockheed Martin, Raytheon Technologies, Northrop Grumman, and General Dynamics) — the companies that traditionally have underpinned the United States and its allies in their military preeminence — spent less than $8 billion on R&D,[13] [14] [15] [16] [17]combined.

As the nature of geopolitical conflict evolves, the areas where Big Tech companies have spent their R&D dollars internally or on acquisitions — such as cloud computing, autonomy, artificial intelligence, and mobile applications — have become more relevant to protecting national security. Policymakers who are breakup advocates may be correct when they accuse Big Tech of acquiring companies to kill competition, and it is up to Congress and regulators to decide a course of action; but one result of Big Tech's acquisitions and capital injections has been that emerging technology and intellectual property have remained under the umbrella of a U.S.-domiciled company.

II. FDI AND NATIONAL SECURITY RISK

An unintended consequence of a government-directed Big Tech breakup could be the opposite: emerging technology and related intellectual property with national security applications being exploited by America's adversaries. As the character of technologies crucial to national security has expanded from traditional fields like aeronautics and munitions to less obvious sub-sectors such as autonomy, agriculture, and dating apps, the risk that these technologies fall into the wrong hands has become more complicated.

National security risk from a foreign acquisition or investment can manifest in a number of ways, including access to sensitive data like genetic or geolocation information or to critical infrastructure like the country's electric grid or SCADA systems; or compromising cybersecurity or supply chain integrity and resiliency in the defense industrial base; or providing proximity to sensitive government installations. And, perhaps most prominent in the context of forcing Big Tech to shed certain businesses, the risk may be transferring technology, know-how, and intellectual property underpinning cutting-edge innovations.

With what is essentially a "Fourth Industrial Revolution" well under way — including the rapidly expanding fields of space, robotics, nanotechnology, quantum computing, and energy, for example — the lines between these innovations' commercial applications and potential military uses are increasingly blurred.

Unlike in the past, when significant innovation came from the military industrial base, today much more tech advancement happens in the private sector. According to Dr. Will Roper, former Assistant Secretary of the Air Force for Acquisition, Technology, and Logistics, today the Defense Department represents about 20 percent of the nation's R&D, which is a "complete 180 flip" from the Cold War when 80 percent of American R&D came from the military industrial base.[18]

Most of the innovative private sector companies that make up the remaining 80 percent of the nation's R&D were created to meet the demands of consumers and companies, and often they are unaware that their technology might have a national security application. The fact

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8 Yahoo! (n.d.). *Apple Inc. (AAPL) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/AAPL/financials/.

9 Yahoo! (n.d.). *Alphabet Inc. (GOOGL) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/GOOGL/financials?p=GOOGL.

10 Yahoo! (n.d.). *Amazon.com, inc. (AMZN) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/AMZN/financials?p=AMZN.

11 Yahoo! (n.d.). *Microsoft Corporation (MSFT) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/MSFT/financials?p=MSFT.

12 Yahoo! (n.d.). *Meta Platforms, inc. (FB) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/FB/financials?p=FB.

13 Yahoo! (n.d.). *The Boeing Company (BA) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/BA/financials?p=BA.

14 Yahoo! (n.d.). *Lockheed Martin Corporation (LMT) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/LMT/financials?p=LMT.

15 Yahoo! (n.d.). *Raytheon Technologies Corporation (RTX) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/RTX/financials?p=RTX.

16 Yahoo! (n.d.). *Northrop Grumman Corporation (NOC) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/NOC/financials?p=NOC.

17 Yahoo! (n.d.). *General Dynamics Corporation (GD) income statement*. Yahoo! Finance. Retrieved from https://finance.yahoo.com/quote/GD/financials?p=GD.

18 "AFA's vASC 2020: Disruptive Agility for A Disruptive World - Dr. Will Roper." *YouTube*, uploaded by Air and Space Forces Association, 19 Oct. 2020, www.youtube.com/watch?v=kI5_LSI04vE.

is, however, these emerging technologies will be vital to the United States and its allies in maintaining their superiority on the battlefield. What's more, many emerging technologies — such as machine learning, autonomous driving, and biotechnology — rely on unique and extensive types of data that also create novel national security vulnerabilities, including with respect to U.S. citizens' personal data.

Many startup companies and their technology have thrived and matured under the umbrella of Big Tech, taking advantage of the funding stream and human capital across the organizations. To the extent these technologies were back on the market as a result of the government's prompting, some would certainly fail, and others would struggle to secure new capital resources. In the context of today's historic great power competition, America's adversaries would be watching and might attempt to step in as white knights — and not with purely capitalist and benign motives.

This kind of national security risk — resulting from a foreign person or entity acquiring or investing in a U.S. business — is what CFIUS is meant to prevent. CFIUS complements other national security authorities — export controls, the mitigation of foreign ownership, control, or influence ("FOCI"), and the "Team Telecom" committee among them — to protect against various national security risks, including the transfer of technology and know-how that has dual-use applications.

III. CONTEXT: A BRIEF CFIUS HISTORY

CFIUS was created through presidential Executive Order ("E.O.") 11,858, issued by President Ford on May 7, 1975. The E.O. assigned to CFIUS the mission of "monitoring the impact of foreign investment in the United States" and, among other things, "review[ing] investments in the United States which . . . might have major implications for United States national interests."[19] CFIUS could not intercede in a transaction — the authorities given to it were largely passive in nature, although it could make policy recommendations.

Because CFIUS initially had little impact on cross-border deals, policymakers grew concerned that the Committee needed more authority, particularly if U.S. national security was implicated by a foreign acquisition. The upshot was that in 1988 Congress passed the "Exon-Florio Amendment," which modified the Defense Production Act (DPA) of 1950. Under the DPA's new "Section 721," the President could "suspend or prohibit any acquisition, merger, or takeover, of a person engaged in interstate commerce in the United States" to ensure that the transaction did "not threaten to impair the national security."[20] Provided that certain findings were made and a report submitted to Congress, the President could block (or order divestment of) a foreign person's "control" of the U.S. company. Deals were voluntarily submitted to CFIUS, and within 30 days the Committee could initiate a second 45-day period to conduct a national security assessment.[21]

Under the "Byrd Amendment" in 1992, Congress made further changes to CFIUS, including explicitly directing the President to consider "the potential effects of the proposed or pending transaction on United States international technological leadership in areas affecting United States national security."[22] CFIUS was now charged to account for the national security impacts of a cross-border transaction as it related to the nation's technological leadership around the globe.

CFIUS's approval of Dubai Ports World's 2006 acquisition of Peninsular & Oriental Steam Navigation Company, a U.K. firm with U.S. port facilities, instigated even further legislative changes to the Committee's authorities and processes; in 2007 the Foreign Investment and National Security Act ("FINSA") was enacted. FINSA among other things codified CFIUS processes and structure and required that in each transaction the Intelligence Community produce a threat analysis of the foreign investor.[23] CFIUS was also directed to consider whether the acquisition implicated national security because the assets of the U.S. business included "critical technology." The impacts of technology transfer were becoming a growing concern.

In the years after FINSA's enactment, the national security risks from some sources of foreign investment became more stark. Rather than traditional mergers and acquisitions, business transactions increasingly grew in complexity, involved more parties, and included investment vehicles like private equity, venture capital, and SPACs. State-owned or state-directed entities were also more frequently investing in U.S. businesses, raising the risk that national interests rather than financial return might be at play. Finally, China was on the rise, developing into a

19 https://www.archives.gov/federal-register/codification/executive-order/11858.html.

20 Section 5021 of Public Law 100-418 of August 23, 1988 (https://www.congress.gov/100/statute/STATUTE-102/STATUTE-102-Pg1107.pdf).

21 *Id.*

22 Section 837 of Public Law 102-484 of October 23, 1992.

23 Public Law 110-49 of July 26, 2007.

highly consequential "strategic competitor" of the United States. The CCP embraced a philosophy of "civil-military fusion" — what the U.S. State Department has described as China's national strategy to develop military preeminence by "acquiring the intellectual property, key research, and technological advances" of private industry, and scholars and researchers, "systematically reorganizing the Chinese science and technology enterprise to ensure that new innovations simultaneously advance economic and military development."[24]

These factors, plus gaps in CFIUS's jurisdiction identified by policymakers, led to an urgent bipartisan call to overhaul the Committee. In a January 2018 hearing regarding CFIUS reform before the Senate Banking Committee, Senator John Cornyn distilled the challenge:

"It is not just that China poses a threat, though: it's that the kind of threat is unlike anything the U.S. has ever before faced – a powerful economy with coercive, state-driven industrial policies that distort and undermine the free market, married up with an aggressive military modernization and the intent to dominate its own region and potentially beyond.

To close the technology gap with the U.S. and leapfrog ahead of us, China uses both legal and illegal means. One of these tools is investment, which China has weaponized in order to vacuum up U.S. industrial capabilities from American companies that focus on dual-use technologies. China seeks to turn our own technology and know-how against us in an effort to erase our national security advantage."[25]

Senator Cornyn further stated: "China has also been able to exploit minority-position investments in early-stage technology companies in places like Silicon Valley, California, or the "Silicon Hills" in Central Texas to gain access to intellectual property ("IP"), trade secrets, and key personnel."[26]

In August 2018, with overwhelming bipartisan support in both houses of Congress, the Foreign Investment Risk Review Modernization Act ("FIRRMA") became law, initiating the most comprehensive overhaul of CFIUS in its more than 40-year history.[27] The law's preface reiterated congressional motivations, stating in part: "the national security landscape has shifted in recent years, and so has the nature of the investments that pose the greatest potential risk to national security, which warrants an appropriate modernization of the processes and authorities of the Committee on Foreign Investment in the United States . . . ."[28]

FIRRMA made extensive changes to the Committee's processes and jurisdiction. Perhaps most notably, it moved beyond traditional mergers and acquisitions, reaching minority investments that did not convey control over the U.S. business but nonetheless gave the foreign investor access to critical infrastructure, cutting edge technology, or sensitive data, or gave meaningful decision-making authority regarding them.

From its modest beginning in 1975, the Committee's mission has exclusively been to protect national security — while at the same time maintaining the United States' open-investment climate and refraining from interference in the free market. Some policymakers may view CFIUS as a means to address other issues such as impacts on market share in a key domestic industry, jobs, and economic growth — but doing so would shift to a question of national interest rather than one of national security. Decisions could be subject to more parochial and political motives. In FIRRMA's preamble Congress was unequivocal: CFIUS "should continue to review transactions for the purpose of protecting national security and should not consider issues of national interest absent a national security nexus."[29]

IV. BRIEF CFIUS CASE STUDIES

Public reporting in recent years about CFIUS actions — which are confidential by law — provides instructive context regarding how new technologies and the data economy can impact national security. The examples below illustrate the types of companies

24 U.S. Department of State Web site (https://2017-2021.state.gov/military-civil-fusion/index.html).

25 Testimony of Senator John Cornyn of Texas, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, *CFIUS Reform: Examining the Essential Elements* (January 18, 2018).

26 *Id.*

27 H.R. 5515 of August 13, 2018 at pp. 538-572. (https://home.treasury.gov/sites/default/files/2018-08/The-Foreign-Investment-Risk-Review-Modernization-Act-of-2018-FIRRMA_0.pdf).

28 *Id.* at Section 1702(b)(4)

29 *Id.* at Section 1702(b)(9)

and technologies under the Big Tech umbrella that could implicate national security if they were available for others to invest in or acquire.

A. Biotech and Health-related Tech

The Big Tech firms in recent years have acquired several companies related to biotech, health monitoring, and medical data. In 2016 Apple acquired Gliimpse, a personal health data platform that allows users to collect and share their health data.[30] In 2019 Amazon acquired a digital health startup called Health Navigator, which builds apps for digitized clinical health information for use in telemedicine.[31] In 2021 Alphabet purchased FitBit, a major manufacturer of wearable health and fitness tracking devices.[32]

These types of companies tend to manage some of the most sensitive data about individuals — their health and medical histories, genetic information, and in the case of health and fitness trackers, geolocation data. CFIUS has demonstrated its interest in protecting this data, both by FIRRMA's regulatory framework and by CFIUS's response to certain transactions. FIRRMA's regulations staked out that both health and geolocation data are considered "sensitive personal data" that could "be exploited in a manner that threatens to harm national security," for example, because it could relate to "sensitive U.S. Government personnel or contractors."[33]

In 2017, the Massachusetts healthcare startup, PatientsLikeMe Inc., received a $100 million investment from iCarbonX, a digital health startup backed by the Chinese company Tencent. PatientsLikeMe offered a means for users to submit patient-reported data and combine it with other patients' data to facilitate research and potentially solve diseases.[34] Media reporting explained that in 2019 PatientsLikeMe was "forced to find a buyer after the U.S. government has ordered its majority owner, a Chinese firm, to divest its stake," and noted similar concerns CFIUS had with a Chinese company's acquisition of gay dating app Grindr — i.e. that "China would use information about American officials' sexual orientation or dating habits *to blackmail or influence them*. . . . PatientsLikeMe potentially presents similar unease, because the company collects data on users who set up profiles so they can ask and answer questions about their conditions." (emphasis added)[35]

B. Autonomous Vehicles ("AVs")

Big Tech has dedicated significant attention and resources to autonomous driving and integrated technologies such as robotics. Amazon in 2020 acquired Zoox, a self-driving vehicle startup focused on building autonomous taxis;[36] and in 2017 it acquired the "urban delivery" robotics startup Dispatch.[37] Apple in 2018 acquired the startup Drive.ai, a maker of artificial intelligence for AVs;[38] in 2013 it had acquired PrimeSense, an Israeli startup that designed sensors and systems that could track objects and their movements in three dimensions.[39] [40] Alphabet has made

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30 Farr, C. (2016, September 26). *Apple Acquires Personal Health Data Startup Gliimpse*. Fast Company. Retrieved from https://www.fastcompany.com/3062865/apple-acquires-personal-health-data-startup-gliimpse.

31 *Amazon buys Health Navigator, founded by Chicago ER Doctor David Thompson*. Healthcare Weekly. (2019, November 18). Retrieved from https://healthcareweekly.com/amazon-health-navigator/.

32 *The 53 digital health mergers and acquisitions we covered in 2019*. MobiHealthNews. (2019, December 23). Retrieved from https://www.mobihealthnews.com/news/north-america/53-digital-health-mergers-and-acquisitions-we-covered-2019.

33 84 Fed Reg 50177-8 (https://www.govinfo.gov/content/pkg/FR-2019-09-24/pdf/2019-20099.pdf).

34 Squire Patton Boggs (US) LLP, *CFIUS Filing in Mitigation: iCarbonX and PatientsLikeMe Inc.*, The National Law Review, Volume IX, Number 192. Retrieved from https://www.natlawreview.com/article/cfius-filing-mitigation-icarbonx-and-patientslikeme-inc.

35 Christina Farr, A. L. (2019, April 4). *The trump administration is forcing this health start-up that took Chinese money into a fire sale*. CNBC. Retrieved from https://www.cnbc.com/2019/04/04/cfius-forces-patientslikeme-into-fire-sale-booting-chinese-investor.html.

36 NBCUniversal News Group. (2020, June 26). *Why did Amazon just buy autonomous driving start-up Zoox?* NBCNews.com. Retrieved from https://www.nbcnews.com/business/autos/amazon-closes-1-2b-deal-autonomous-driving-start-zoox-n1232295.

37 Harris, M. (2019, February 7). *Amazon quietly acquired Robotics Company Dispatch to build scout*. TechCrunch. Retrieved from https://techcrunch.com/2019/02/07/meet-the-tiny-startup-that-helped-build-amazons-scout-robot/.

38 Chaturvedi, A. (2019, June 27). *Apple's acquisition of Drive.AI to boost its Autonomous Vehicle program*. Geospatial World. Retrieved from https://www.geospatialworld.net/blogs/apple-acquisition-drive-ai/.

39 MIT Technology Review. (n.d.). *Primesense*. MIT Technology Review. Retrieved from http://www2.technologyreview.com/tr50/primesense/.

40 Tobe, F. (2021, July 7). *Apple, Amazon, and now google: An exciting time for robotics*. IEEE Spectrum. Retrieved from https://spectrum.ieee.org/apple-amazon-and-now-google-an-exciting-time-for-robotics.

extensive investments in the autonomous vehicle sector, primarily through its self-driving vehicle subsidiary Waymo,[41] and has been very active in the robotics sector, snapping up companies several years ago and then revitalizing its robotics efforts in recent years.[42]

Several national security risks underlie AV industry technology, ranging from technology transfer of cutting-edge integrated technologies like robotics, LiDAR mapping, and artificial intelligence, all of which could be utilized in developing sophisticated military AVs or other military equipment.[43] AVs rely "on software, computing, and connectivity, [and] could be a new vector for cybersecurity risks."[44] There could also be risks from external manipulation of systems, surveillance, espionage, and the compromise of massive data troves collected by operating these complex systems.[45]

CFIUS has frequently intervened in foreign investments in AV companies. In early 2021, the Committee requested that TuSimple Holdings Inc., an autonomous trucking company, file regarding its acquisition by a Cayman company that was held in part by a Chinese technology company.[46] In the end, the deal parties entered into a National Security Agreement with CFIUS promising "to keep U.S.-developed core technology out of China," remove two board members with connections to a Chinese technology company, abide by an equity standstill provision, and "limit access to certain data and adopt a technology control plan, appoint a security officer and a security director, and establish a board-level government security committee to be chaired by the security director. . . . Protecting U.S.-developed technology from China was a key issue."[47]

Similarly, in 2019 the Committee intervened in Japanese venture firm SoftBank's $2.25 billion investment in General Motor's majority-owned AV company Cruise.[48] "CFIUS approved the investment based on fresh assurances that Cruise's technology would be completely off limits to SoftBank, whose investments in Chinese mobility firms have rattled U.S. authorities."[49] And in 2018 CFIUS intervened in the investment by DD Global Holdings Limited into the startup Canoo Technologies, which was building "a new multipurpose electric vehicle aimed at last-mile deliveries and other small businesses."[50] One of the U.S. company's key investors led a "massive investment firm in China and is the son-in-law of Jia Qinglin who was the fourth-most senior leader in China before retiring in 2013."[51] The Committee imposed a national security agreement that required, among other things, limitations on DD Global's governance rights, data protections and restrictions, restrictions on voting rights, and a reduction of equity stake to less than 10 percent.[52]

CFIUS has also been active in the field of robotics according to public reporting,[53] Including in 2020 when it halted an investment into a joint venture between Chinese entities and the robotic exoskeleton company Ekso Bionics Holdings, Inc.[54] [55] Ultimately, CFIUS required the termination of the joint venture to prevent technology transfer.[56]

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41 Feiner, Lauren. (2021, June 16). *Alphabet's self-driving car company Waymo announces $2.5 billion investment round*. CNBC. Retrieved from https://www.cnbc.com/2021/06/16/alphabets-waymo-raises-2point5-billion-in-new-investment-round.html.

42 Metz, C., Dawson, B., & Felling, M. (2019, March 26). *Inside Google's rebooted Robotics Program*. The New York Times. Retrieved from https://www.nytimes.com/2019/03/26/technology/google-robotics-lab.html.

43 *National security implications of leadership in autonomous vehicles*. National Security Implications of Leadership in Autonomous Vehicles | Center for Strategic and International Studies. (2022, April 27). Retrieved from https://www.csis.org/analysis/national-security-implications-leadership-autonomous-vehicles.

44 *National security implications of leadership in autonomous vehicles*. National Security Implications of Leadership in Autonomous Vehicles | Center for Strategic and International Studies. (2022, April 27). Retrieved from https://www.csis.org/analysis/national-security-implications-leadership-autonomous-vehicles.

45 *National security implications of leadership in autonomous vehicles*. National Security Implications of Leadership in Autonomous Vehicles | Center for Strategic and International Studies. (2022, April 27). Retrieved from https://www.csis.org/analysis/national-security-implications-leadership-autonomous-vehicles.

46 Squire Patton Boggs (US) LLP, *The Trade Practitioner; CFIUS Investigation: Sina Corporation and TuSimple Holdings Inc.*, (2021, August 18). Retrieved from https://www.tradepractitioner.com/2021/08/cfius-sina-corporation-tusimple-holdings-inc/.

47 Adler, A. (February 22, 2022). US takes limited oversight of TuSimple as foreign investment probe ends. Freightwaves, Inc. Retrieved at https://www.freightwaves.com/news/us-takes-limited-oversight-of-tusimple-as-foreign-investment-probe-ends.

48 Alper, A., & Roumeliotis, G. (2019, July 6). *Exclusive-U.S. panel OKAYS Softbank's $2.25 BLN investment in GM-linked self-driving firm*. Reuters. Retrieved from https://www.reuters.com/article/cfius-softbank-gm-idUKL2N24700B.

49 *Id.*

50 https://www.theverge.com/2020/12/17/22179588/canoo-delivery-vehicle-nasdaq-spac-merger-listing-public.

51 *Id.*

52 Discussion of CFIUS mitigation of Canoo Transaction. *R/Canoo*. reddit. (n.d.). Retrieved from https://www.reddit.com/r/canoo/.

53 *See, e.g.*, SoftBank's acquisition of Boston Dynamics from Alphabet (https://www.ft.com/content/81f10306-b38c-11e7-a398-73d59db9e399).

54 https://www.globaltradelawblog.com/2020/05/29/biotech-ekso-case/.

55 https://www.globenewswire.com/news-release/2020/05/20/2036681/0/en/Ekso-Bionics-Announces-CFIUS-Determination-Regarding-China-Joint-Venture.html.

56 *Id.*

V. CFIUS: LEANING IN

As this essay sets forth, a number of arguments have been made for and against Big Tech. These examples of CFIUS transactions illustrate another consideration, one that implicates national security. CFIUS is designed to mitigate these risks, and FIRRMA gave it the authorities to face evolving threats — including jurisdiction over certain minority investments[57] and certain types of real estate transactions,[58] mandatory filings for certain types of technology-related investments, and substantial monetary penalties for failing to file or from circumventing CFIUS national security agreements.[59] FIRRMA also ensured the government has the resources — such as a dedicated funding stream for the first five years, the ability to rapidly hire new staff, and a filing fee regime to provide other funding support. But government bureaucracies do not have unlimited staff and resources.

The number of transactions submitted to the Committee steadily increased in the leadup to FIRRMA. In 2009, 65 notices were filed. By 2017 and 2018, the number of deals reviewed had swelled nearly four-fold to 237 and 249, respectively. Since FIRRMA's enactment, the Committee's caseload has reached all-time highs, with 324 total transactions reviewed in 2019 and 313 in 2020.

Definitive data on the annual number of mergers, acquisitions, and investments with any involvement of foreign capital is not easily discernible, but we know that foreign direct investment in the United States increased by $187.2 billion to a total stock of $4.63 trillion in 2020; and that there were over 17,000 venture deals in the United States in 2021, which does not include traditional private equity.[60] [61] From these numbers, we can reasonably conclude that CFIUS is only looking at a small fraction of the FDI transactions that are executed annually in the United States.[62]

This transaction magnitude, as well as limited transparency in parts of the investment ecosystem, versus the size and capacity of CFIUS, means that cases posing national security risk will inevitably slip through the cracks. There are also likely instances where a filing is mandatory because it involves critical technology but the parties nonetheless refrain from submitting it to CFIUS. Investments that aren't filed with the Committee, whether or not mandatory, but which pose national security risk are referred to as "non-notified" transactions. FIRRMA required that the Committee establish a process to identify this type of transaction and the risk that it might involve.[63]

Congress made clear in FIRRMA that appropriately resourcing the Committee so that it could face these challenges was an imperative, stating that CFIUS "plays a critical role in protecting the national security of the United States, and, therefore, it is essential that the member agencies of the Committee are adequately resourced and able to hire appropriately qualified individuals in a timely manner . . . ."[64] Divestment of businesses from a Big Tech company would necessitate even greater CFIUS vigilance and resources to identify and monitor subsequent acquisitions or investments. In fact, sufficient resourcing to find high-risk transactions will be essential for CFIUS to effectively execute its mission.

To ensure CFIUS implemented FIRRMA in the right way, Congress allocated the necessary funding in concert with the resourcing statement quoted above, authorizing funding of $20 million annually for five fiscal years (2019 to 2023).[65] The Treasury Department, which is the Chair of the Committee, received $40 million in its budget in 2020 and 2021 for CFIUS.[66] Part of Treasury's funding in 2019 and 2020 was

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57 Section 1703 of H.R. 5515 of August 13, 2018.

58 *Id.*

59 Section 1706 of H.R. 5515 of August 13, 2018.

60 *Direct Investment by Country and Industry, 2020.* Direct Investment by Country and Industry, 2020 | U.S. Bureau of Economic Analysis (BEA). (n.d.). Retrieved from https://www.bea.gov/news/2021/direct-investment-country-and-industry-2020.

61 Ceppos, R. (2022, January 13). *U.S. venture capital activity soars to new highs in 2021 as deal value exceeds $300 billion and fundraising tops $100 billion.* NVCA. Retrieved from https://nvca.org/pressreleases/u-s-venture-capital-soars-to-new-highs-in-2021/#:~:text=The%20top%2Dline%20figures%20for,2020's%20previous%20deal%20value%20high.

62 It should also be noted that as the number of cases CFIUS must review outpaces the resources as its disposal, the time to review each deal will likely increase. This has financial implications for each deal and over time, if not resolved, could disincentivize benign capital investments in certain areas of U.S. industry that the U.S. desires.

63 Section 1710 of H.R. 5515 of August 13, 2018.

64 *Id.* at Section 1702.

65 *Id.* at Section 1723.

66 Dow Jones & Company. (2021, January 31). *Government 'SWAT team' is reviewing past startup deals tied to Chinese investors.* The Wall Street Journal. Retrieved from https://www.wsj.com/articles/government-swat-team-is-reviewing-past-startup-deals-tied-to-chinese-investors-11612094401.

dedicated to the development of a “new enforcement arm of roughly two dozen people tasked with rooting out old investment deals that involve sensitive technologies and could pose a threat to national security . . . The team has its sights on venture-capital investments, even small-dollar deals, where the money can be traced back to China . . . Recent hires to its enforcement team include professionals from venture-capital firms, investment banks and technology backgrounds, according to people involved in the effort.”[67]

If regulators were to break up a Big Tech firm, the resulting new companies and their assets could provide prime targets for acquisition by foreign Big Tech or industry-leading foreign firms; and the U.S. technology and intellectual property — developed and cultivated through economies of scale and specialized human capital and know-how — could materially augment the foreign firms' technology and know-how, and might advantage a strategic competitor. In that event, CFIUS will need to be prepared.

VI. CONCLUSION

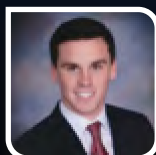
American antitrust laws designed to protect the consumer are not focused on national security considerations, nor should they be. Regulators and policymakers will decide whether and how to address Big Tech companies and their various impacts on the American consumer, including whether to break them up. But even as such decisions will not be made on national security grounds, it is vital that policymakers and regulators are aware of and understand the potential national security consequences so that the nation is prepared. A breakup of Big Tech could leave American intellectual property, data, technology, and know-how up for grabs. In this event, CFIUS and other national security authorities will need to be appropriately resourced and staffed, and be ready to step in.

For CFIUS to be prepared, Congress must remain committed to funding it and fully empowering its “non-notified” enforcement functions that allow CFIUS to seek out risky deals that may hide under the radar, and it should exercise continuing oversight of CFIUS's enforcement activities more generally.

67 *Id.*

GLOBAL MERGER CONTROL AND FOREIGN DIRECT INVESTMENT CONSIDERATIONS ASSOCIATED WITH CROSS-BORDER TRANSACTIONS

BY DANIEL CULLEY, CHASE KANIECKI, WILLIAM SEGAL & WILLIAM DAWLEY[1]



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I. INTRODUCTION

Cross-border transactions are beset with more uncertainty and potential for delay than ever before. Only a few decades ago, companies involved in cross-border transactions faced notifications to just a handful of competition authorities, triggered by relatively objective filing tests. As competition enforcement spread, so did filing jurisdictions and potential notification obligations, with the result being that it was no longer unusual for a major cross-border transaction to trigger upwards of 40 filings, based on less certain filing thresholds such as those depending on a target company's market share in a particular jurisdiction. As logistically difficult as that process was, managing it pales in comparison to the current wave of uncertainty crashing over companies involved in cross-border transactions.

This escalation in uncertainty is driven by two overlapping trends, one within global competition enforcement and the other stemming from new review regimes targeting foreign direct investment, or FDI. Within competition enforcement, so-called "voluntary" regimes, such as those in the United Kingdom, Australia, and New Zealand, are becoming increasingly aggressive in "calling in" transactions based on speculative theories of harm, while the relatively predictable consumer welfare standard is under attack. At the same time, a significant number of major jurisdictions have established, or have significantly expanded pre-existing, global FDI review regimes that scrutinize the nature and substance of a target company's business and activities undertaken in a particular country and the identity and nationality of the relevant foreign investor, and that empower governments, in some cases, to block or restrict cross-border transactions when these considerations conflict with often vaguely-defined national security, national interest, or other strategic concerns.

Now more than ever, then, managing notification requirements and strategy in cross-border transactions requires the serious exercise of judgment and the close coordination of the relevant parties to the transaction and those parties' antitrust or competition and FDI teams, as this article explains. Part II will provide a brief overview of the global merger control environment. Part III will provide a summary of the recent developments in global FDI review regimes and highlight three of the key issues in these FDI review regimes. Part IV will discuss the overlapping considerations created by the global merger control and FDI review regime analyses.

II. GLOBAL MERGER CONTROL

Merger control review seeks to prevent anticompetitive transactions from occurring. While the contours of what constitutes an anticompetitive transaction vary across jurisdictions (and over time), generally regulators purport to prevent transactions that would result in consumer harm from higher prices, reduced quality, less innovation, reduced product variety, or worse service. Antitrust and competition regulators will typically reject claims from parties that the regulator is seeking to stop a deal on a non-antitrust/competition basis.

Merger control regimes are often suspensory: parties cannot close until they file with the regulator and obtain clearance or waiting periods expire. Closing in the absence of those conditions can result in the closing have no legal effect in a jurisdiction, fines, or criminal penalties, depending on the jurisdictions. Regulators are increasingly reaching out to parties when a deal has not been filed in their jurisdiction to confirm that a filing was not required.

In suspensory regimes, there are rules setting forth when a deal must be notified to the regulator. In the U.S., the criteria is based on the size of the transaction and the size of the parties, but in most jurisdictions, the criteria depends on the Parties' local sales or assets in a jurisdiction. (Put differently, the criteria typically does not depend on an actual competitive assessment.) There are some jurisdictions where filings depend on market share screens. However, assessing market shares can be very difficult — "antitrust markets" may differ from the markets the business team uses in the ordinary course; there may be no precedent for the market's scope; and parties may not have market share data for a particular jurisdiction. In those situations, careful consideration is required to determine if a filing is required or if the parties have credible arguments for why they did not file.

Parties can sometimes be reluctant to file in certain jurisdictions. Even if there is no competitive concern, there is the possibility that a filing opens up the parties to a prolonged, baseless investigation that delays closing. This risk is a significant concern in nascent regimes where there is little precedent or insight into their procedures and approach.

More recently, the major development has been that nominally volunteer regimes cannot be treated as simply optional filings. Notable voluntary regimes include the United Kingdom, Australia, and New Zealand. Those regimes are increasingly demanding that parties make filings and delay closing while they conduct investigations. In the UK's case, this has extended to asserting jurisdiction over transactions that seemingly lack clear ties to the UK. For instance, the UK Competition and Markets Authority ("CMA") asserted jurisdiction over the proposed acquisition of

Farelogix Inc. by Sabre Corporation despite Farelogix Inc. having no direct sales in the UK or to UK customers. The UK CMA claimed that Farelogix supplied services in UK merely because it sold services to American Airlines, which, in turn, used those services to enable interline arrangements with British Airways, and Farelogix granted British Airways to those services for free.[2]

III. FDI REVIEW REGIMES

A. Recent Developments

As noted above, governments around the world, particularly in Europe, have recently amended their pre-existing FDI review regimes, or established new FDI review regimes, to accomplish some or all of the following: (1) provide relevant government authorities with jurisdiction to review transactions or expand existing jurisdiction to review additional transactions, (2) impose additional mandatory notification requirements, and (3) empower governments to impose conditions on, or block, FDI deemed contrary to a jurisdiction's national security, national interests, or other strategic or important considerations. While many developments in the FDI space started before the COVID-19 pandemic, they were turbocharged by strategic considerations created by the pandemic (i.e. protecting important healthcare-related supply chains, including, for example, personal protective equipment). In some cases, these FDI review regimes exist in parallel, or are connected, to other restrictions on foreign investment (i.e. "Negative List"-type restrictions that prohibit, or restrict to certain thresholds, foreign ownership in companies involved in certain industries or activities). New and enhanced FDI review measures continue to be proposed and considered, so the global FDI landscape remains very fluid.

In Europe, there have been significant developments at the European Union and EU member state levels. First, the European Union adopted a new FDI regulation that went into effect on October 11, 2020. The regulation does not provide the European Commission with the power to block or prohibit transactions, but instead lays out a common framework for FDI reviews by individual EU member states and increases cooperation among EU member states in the FDI review process, including, most notably, through the so-called "consultation" process pursuant to which all EU member states are made aware of transactions notified to an EU member state. Second, following the adoption of the EU FDI regulation and consistent with that regulation, a number of EU member states have enhanced pre-existing, or adopted new, FDI review regimes, including France, Germany, Italy, and Spain. Additionally, outside the European Union, the United Kingdom recently adopted a new FDI review regime that came into force in January 2022 and that subjects transactions in certain strategic sectors to a mandatory filing requirement.

A number of other key jurisdictions, including, for example, Australia, Canada, China, India, Japan, New Zealand, and South Korea, have well established FDI review regimes.

B. Key Elements of FDI Review Regimes

Although a comprehensive review of global FDI review regimes is beyond the scope of this article, this section will address three key elements of these regimes – the coverage or jurisdiction of the regimes, the scope of the applicable mandatory filing requirements under the regimes, and filing and review timelines under the regimes.

First, a jurisdiction's FDI review regime can apply if the target company has at least some presence or activity within the jurisdiction. The existence of a local subsidiary in a jurisdiction is generally sufficient to trigger that jurisdiction's FDI review regime, but different FDI review regimes take various approaches to whether the presence of local branch offices (without a local subsidiary), assets or operations, employees, or sales within a jurisdiction are sufficient to trigger the FDI review regime. Some FDI review regimes apply more broadly than others. Even when a transaction involves a target company with a local subsidiary in the relevant jurisdiction, some FDI review regimes only apply if there is a direct change in ownership of the relevant subsidiary (i.e. those regimes exclude from their jurisdictional scope transactions that involve a change in ownership at the upper-tier, foreign parent entity level without any direct change in ownership of the local subsidiary).

Additionally, some FDI review regimes include valuation or ownership percentage thresholds, meaning that a transaction would only fall within the scope of the FDI review regime if the value of the activities in a particular country or the value of the transaction in the relevant jurisdiction exceed a certain amount, or if the foreign investor is acquiring a certain ownership percentage (in addition to jurisdiction, such thresholds may apply in determining whether a mandatory filing requirement is triggered). Further, certain jurisdictions have different thresholds depending on the activities of the target (for example, Australia has lower value thresholds for so-called "national security businesses") or the nationality or type of the foreign investor (i.e. foreign government investor versus non-foreign government investor).

2 UK CMA, Anticipated acquisition by Sabre Corporation of Farelogix Inc., Final report, April 9, 2020, at 58, available at https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf.

Second, regarding mandatory FDI filing requirements, many FDI review regimes focus on similar kinds of transactions raising national security or national interest-related concerns. For example, subject to any applicable thresholds, a mandatory filing is triggered under many FDI review regimes when a transaction involves a target company involved with (1) defense-related or otherwise sensitive export controlled materials, (2) the production of material used in connection with, or the management of, essential public services, supply chains or critical or sensitive infrastructure, or (3) sensitive personal data or personal identifiable information. Additionally, in light of the COVID-19 pandemic, some jurisdictions expanded their mandatory filing requirements to cover medical- and medical supplies-related businesses, including businesses involved in the manufacturing and/or supply personal protective equipment.

However, there are not uniform definitions of these concepts across jurisdictions. The definitions that do exist populate a spectrum ranging from the very specific to the very opaque. For example, Germany has very specific definitions of data storage-related services that are potentially subject to a mandatory filing requirement. Other jurisdictions, meanwhile, define "national security" or "national interest," for example, incredibly broadly, giving their FDI review authorities significant discretion to decide what is, and what is not, subject to mandatory filing requirements, which can create significant uncertainty for parties involved in cross-border transactions. Further, the mandatory filing requirements in some jurisdictions apply to sectors and activities that would not traditionally be considered national security-related, including, for example, media or land acquisitions.

Third, filing and review timelines vary dramatically across FDI review regimes. Some filings must be made pre-closing, while other filings can be made post-closing. Under some FDI review regimes, the parties are not permitted to close a transaction until the relevant government approval is obtained. While some FDI review regimes, similar to the Committee on Foreign Investment in the United States ("CFIUS") regime, have clearly established and predictable timelines, the timeline for review in other jurisdictions can be unknown. Given these timing issues, it is important for parties to consider whether an FDI review analysis is required as early as possible in the deal timeline and factor any filing requirements into the commercial analysis of a potential deal.

IV. OVERLAPPING CONSIDERATIONS IN THE GLOBAL MERGER CONTROL AND FDI REVIEW REGIME ANALYSES

Although the merger control and FDI review regime analyses are distinct processes, they are often considered together in cross-border transactions. This section will address three primary ways in which the merger control and FDI review regime analyses overlap - specifically, due diligence considerations, filing decisions, and closing condition considerations.

First, merger control and FDI review regime due diligence is often conducted simultaneously. There is good reason for this overlap, as similar due diligence can be leveraged for both analyses. Most obviously, when starting the analyses, the first step is generally the same – determine the relevant universe of jurisdictions to be considered. Information about a target company's global presence (including the locations of its subsidiaries, branch offices, employees, sales, or intellectual property) can be relevant for both analyses. Conducting this due diligence together can create a more efficient deal process. However, it is important to keep in mind that there are differences in the type of information that is relevant to each analysis. For the merger control analysis, economic data on sales, revenue, and market share is typically most relevant. FDI review regime analysis is generally more focused on the nature of a target company's activities (for example, sales and marketing, research and development, and/or manufacturing), whether the target company is involved in a sensitive sector or activities for purposes of the applicable FDI review regime, and whether the target company has any government (particularly defense or security-related) dealings.

Parties need to make sure that they are thinking about what information is necessary for both analyses, drill down on unique issues presented by the specific deal (i.e. if a target company has government dealings, fully understanding the nature and extent of those dealings, including whether the target company is a unique or "sole source" provider of any products, materials, or services), and ensure that relevant antitrust and FDI review personnel are involved as early as possible. Since the level of detail required for the FDI review regime analysis can be significant, and different information may be required for the FDI review regime analysis for different jurisdictions, parties would be well served to initiate this due diligence as early in the deal timeline as possible.

Second, whether or not a merger control filing is being made can affect and influence the decision of whether to make an FDI filing. In some cases, the FDI filing decision will be clear – the transaction will clearly trigger a mandatory FDI filing or not. But more frequently, given the ambiguity of the FDI review regimes in some jurisdictions, the inconsistency between the letter of the applicable law and the operation of the FDI review regime in practice, the difficulty of clearly fitting transactions or the activities of a target company into the rigid language of the applicable regime, or the possibility of submitting a voluntary filing even when a mandatory filing is not triggered, the FDI filing decision is often more art than

science. In addition to the formal legal analysis, the decision often hinges on considerations such as the extent of a target company's activities in the relevant jurisdiction and how essential such activities are to the enterprise as a whole, whether there is any actual capital inflow to the relevant jurisdiction, and the risk tolerance of the relevant parties. Whether a merger control filing is being made is another relevant consideration. Indeed, parties should assume that there will be information sharing and consultation across government authorities within a jurisdiction. An FDI filing (even a voluntary one) is potentially more likely to be advisable where a parallel merger control filing is being made and the target company's activities potentially could be considered to be covered by that country's FDI review regime.

Third, to the extent that a merger control and/or FDI filing is determined to be required or advisable, parties should consider whether they need or want any necessary government approvals (or, expiration of any applicable waiting periods) to be conditions to closing the transaction. Similar to the filing decision discussed above, this decision will be impacted by a variety of considerations, including the requirements of the applicable FDI review regimes, the materiality of the relevant jurisdictions (i.e. how much of the transaction and/or target company value is associated with the relevant jurisdictions), and the risk tolerance of the parties. Since closing conditions often speak to regulatory approvals generally, parties should be conscious of whether any merger control filings and any FDI filings require different or unique treatment in the closing conditions. Including approval under an FDI review regime that has a more uncertain or unpredictable review timeline, for example, can creates closing risks.

V. CONCLUSION

FDI review regimes have matured and become a significant regulatory issue applicable to most cross-border transactions, joining competition review regimes that have become increasingly complicated by voluntary notification and call-in mechanisms, which jurisdictions are employing aggressively. Although frequently grouped (or perhaps tacked onto) global competition review, FDI analysis now exists as a truly standalone, parallel process that can independently complicate, and, in some cases, threaten, deal considerations. There is every indication that the global FDI review landscape will continue to be active and evolve going forward, with key jurisdictions continuing to reform and expand their FDI review regimes and actively using their authorities to scrutinize, and in some cases ultimately prevent, transactions they deem objectionable. This latter risk is not abstract or hypothetical. For example, in late 2020, the French government blocked the acquisition of a French photo-sensor imaging technologies company by a U.S. company, and in April 2021, the Italian government blocked a Chinese takeover of a semiconductor company.

Despite the independent challenges and risks created by global competition and FDI review, as discussed above, these regimes remain linked as a practical and substantive matter in most deal processes. This linkage creates its own challenges. Parties to cross-border transactions need to be aligned not only on process, including the due diligence and analysis investment each party is willing to make, but also, and perhaps even more importantly, in their strategic perspectives and risk tolerances when filing or notification decisions are, as they are increasingly tending to be, more art than science.

BALANCING ANTITRUST AND NATIONAL SECURITY IMPACTS OF FOREIGN INVESTMENT IN THE U.S.

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I. CHANGES IN THE ANTITRUST-FOREIGN INVESTMENT NEXUS

For decades, U.S. policy toward foreign direct investment was one of the most liberal in the world. Indeed, most Presidents, often soon after they took occupancy of the Oval Office, issued formal statements proclaiming America welcomes foreign direct investment. The raison d'être articulated in such proclamations was to not only assure investors abroad their capital was welcome in the U.S. but to also declare that investment of foreign capital boosts the growth of the U.S. economy, creates jobs for Americans and stimulates innovation on our shores.

The tenet underlying how such outcomes are engendered by U.S. receptivity to capital from abroad is that, in the aggregate, entry of foreign firms and inflows of other forms of cross-border investment enhance competition among businesses operating in the U.S., which in turn bolsters the global competitiveness of the U.S. economy. Conversely, a national policy that shields U.S. markets by erecting barriers to entry of foreign capital jeopardizes the ability of competitive forces to work, placing at risk economic growth, business ingenuity, and the dynamism of, and mobility within, U.S. labor markets.

We antitrust economists fully understand these arguments. We view inbound foreign direct investment flows as a twofer: providing a source of capital and stimulating competitive forces and thus a check on the exercise of market power by incumbent firms. In this latter sense, foreign direct investment can be seen as a powerful instrument of antitrust policy.

Of course, as in the case of domestic investors, the impact on market competition from foreign direct investment depends on the *mode of entry*. Foreign direct investment that establishes wholly new business operations (whether on the supply- or buy-side of a market) is, with relatively few exceptions, pro-competitive. Investment from abroad, however, that takes the form of acquisition or merger of *existing* domestic firms could be competitively neutral (generally if it results solely in change of ownership) or serve to reduce competition (if the transaction reduces the number of independent suppliers or buyers).

In the past two decades, however, U.S. public policy towards foreign direct investment has fundamentally changed. This has been driven in large part — though not exclusively — by the significant rise of China, whose Communist-led, state-dominated economy is second in size only to the U.S., and has rapidly become the "world's factory" — a well-deserved moniker in light of the global supply chain disruptions emanating from China over the course of the COVID pandemic.[2] At the same time, Beijing's global miliary and investment alliances — especially in East and South Asia, as well as in Africa, Latin America and the Middle East — have also grown substantially in recent years.

The result is that while foreign investment writ large is still welcome in the U.S., it now increasingly depends on *what is the source country* of such capital. In essence, not all foreign direct investment is the same. The principle of foreign investment's competition-inducing effects is still acknowledged. But of equal, if not greater, significance are the risks to national security that the US may be exposed to from foreign investment from certain geographies.

Symbolic of this shift is the fact that Barrack Obama was the last President to issue a formal statement on U.S. policy welcoming foreign investment — in 2011.[3,4] At the same time, as a result of Congress's bipartisan passage of the Foreign Investment Risk Review Modernization Act ("FIRRMA") in 2018, the authority of the executive branch's interagency Committee on Foreign Investment in the United States ("CFIUS") — the entity which reviews national security impacts of foreign investment — has been significantly enlarged.[5] (For full disclosure, I was a member of CFIUS during my tenure in the White House a number of years ago.)

We are now in a world where U.S. pursuit of antitrust objectives through a policy of encouraging foreign direct investment is far more complex. On the one hand, public policy toward foreign direct investment increasingly must carefully balance significant tradeoffs: the potential benefits of greater competition with the heightened risks to national security.

On the other hand, Washington has been moving in a direction where such tradeoffs are seen as illusory: that is, some U.S. policy makers judge the loss of competition, itself, as constituting a threat to national security. This was largely the case in the 1980s when Japan was in the sights of U.S. international economic policy.

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2 https://www.forbes.com/sites/harrybroadman/2021/10/31/wto-peer-review-of-chinas-trade-regime-should-rouse-biden-from-trumps-perverse-approach/?sh=7948ae4f7758.

3 https://obamawhitehouse.archives.gov/the-press-office/2011/06/20/statement-president-united-states-commitment-open-investment-policy.

4 https://www.forbes.com/sites/harrybroadman/2021/01/31/bidens-economic-policies-should-eclipse-trumps-in-style-and-substance/?sh=621319ed674b.

5 https://www.iflr.com/article/b1tw30h39pml78/cfius-annual-report-reveals-a-maturing-agency-with-increased-agility.

Today, however, Washington is dealing with a far more combustible mixture: unlike Japan, a liberal democracy, China is neither liberal nor a democracy. The challenge now before U.S. policy makers is thus how to deal with foreign direct investment from a country that is viewed as presenting a *combination* of threats to competition *and* national security.

Effectively confronting that challenge requires a new analytical framework that provides a decision-making calculus to maximize the chances of achieving a balance by distinguishing between new domestic entrants versus new foreign entrants.

II. TOWARD A DECISION-MAKING FRAMEWORK TO BALANCE FOREIGN INVESTMENT'S EFFECTS ON COMPETITION AND NATIONAL SECURITY

Domestic Entrants. Competition policy traditionally has taken a presumptive view that the entry of a new domestic seller or buyer into most product or service markets through greenfield investment in the U.S. is to be applauded.[6] All other things equal, the presence of such additional suppliers or purchasers should enhance the degree of inter-firm competition, which, in turn, is expected to result in lower prices and broaden consumer choice.

The competitive effects of greenfield entry by domestic firms are also assumed to include the stimulation of product or process innovation in the marketplace. Indeed, one of the factors that often enables new domestic enterprises to enter markets successfully — even if there are small in scale relative to incumbents — is the competitive advantage they possess arising from innovation they've undertaken. Such dynamic effects on competition by small upstarts are, of course, pronounced in advanced technology industries.

Of course, it is a wholly different matter when entry is not *de novo*, but rather takes the form of a domestic party (or parties) acquiring or merging with an established U.S. firm or a set of incumbent U.S. firms since the number of independent sellers or buyers in the market would be effectively reduced. Whether the result is an increase in the exercise of monopoly or monopsony power and/or a forestalling of innovation — and thus an erosion of economic welfare by consumers or buyers — is a matter of evidence-based judgments.

The principles and parameters that guide making such judgments by the U.S. antitrust authorities and courts stem from the nation's antitrust statutes, especially Section 7 of the Clayton Act, which prohibits mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly," as well as the Department of Justice's and Federal Trade Commission's "Merger Guidelines," issued periodically under the authority of the Hart-Scott-Rodino Act. The Biden Administration is currently reviewing the current version of these merger guidelines with an eye towards adopting a more aggressive approach to restraining anticompetitive horizontal and vertical mergers and acquisitions.[7]

Foreign Entrants. This stripped down stylized neoclassical model for assessing competitive impacts of market entry does not distinguish between whether greenfield firms or acquirers/merger partners are domestic or domiciled in foreign countries. In such a world, entry through foreign investment — whether in the form of non-controlling foreign portfolio investment or controlling foreign direct investment — is generally seen as salutary.

In practice, of course, assessing the extent to which the degree of "foreignness" of new entrants has a beneficial or deleterious impact on competition or economic welfare in a market, including whether such firms face higher or lower (implicit or explicit) barriers to entry — has long been a staple of empirical research by industrial organization economists.

With the risk of making sweeping generalizations, the bulk of such research points to the fact that the intangible asset of "foreignness" does play a role — sometimes a significant one — in the nature and magnitude of these impacts.

For example, the findings in the literature suggest that, historically, entry decisions through merger or acquisition by foreign firms tend to be more sensitive to the risk or uncertainty of host nations' various policies toward such forms of entry than are domestic firms, even when controlling for sectoral differences (inasmuch as sectors characterized by higher fixed costs entail greater risk exposure to new entrants since exit will be more costly).

6 The exception, of course, are markets that are generically characterized by large economies of scale and/or scope. In such sectors entry (and exit) are subject to some form of government regulation.

7 https://www.reuters.com/legal/transactional/back-drawing-board-ftc-doj-rethink-merger-guidelines-2022-03-07/.

In the case of foreign firms' greenfield entry, historically the results are less mixed. This is due to the fact that host country policymakers, all other things equal, place greater value on foreign investments that entail generating new productive capacity and jobs in local markets. Indeed, like other countries, in the U.S., individual states compete with one another to offer tax credits and other benefits to attract greenfield foreign investment.

Reconciling Antitrust and National Security Policies. While the policy tools at play assessing the economic welfare impacts of market entry matters were once the sole province of U.S. antitrust authorities — where the shades of "foreignness" were rarely decomposed based on nationality — that is no longer the case. CFIUS introduced gauging the effects on U.S. national security into the mix. Today, where foreign investments in the U.S. are concerned, the public policy assessments of such transactions are a product of the interaction between antitrust and national security policies.

Once a little-known agency, the authority of CFIUS, which dates back to 1975, underwent important embellishments with the enactment of the Exon-Florio Amendment in the Omnibus Trade Act of 1988, and even more so with the passage of FIRRMA in 2018.

CFIUS is chaired by the Treasury Department and its standing members include the other principal agencies involved in trade (Office of the U.S. Trade Representative), commerce (Department of Commerce), defense (Department of Defense), foreign policy (State Department) and science and technology matters (Office of Science and Technology Policy), as well as some sectoral agencies, such as the Department of Energy, are also standing members of CFIUS.[8]

Importantly, the Justice Department is a CFIUS standing member. This means the top U.S. federal authority that oversees antitrust policy, as well as many other criminal matters, including foreign corruption, is present for all CFIUS deliberations.

To this end, *some* of the balancing between national security and antitrust will take place within the confines of CFIUS deliberations. However, the current legal authority — FIRRMA — under which CFIUS operates and makes judgments about national security, including bringing to the President proposals to suspend or block a transaction if there is "credible evidence" that the transaction threatens to impair U.S. national security, does not explicitly specify assessing the impacts on competition in the U.S. economy.

By the same token, the statutes under which the Justice Department (and the Federal Trade Commission) are authorized to make decisions on antitrust policy do not specify that consideration of national security impacts are to be taken into account in coming to those judgments.

Yet at the heart of both policy regimes lies the criterion of "control."

In the case of antitrust, essentially the fundamental operative question turns on the extent to which an entity (or entities) by dint of its (their) scale or other structural elements within the "relevant market" has sufficient control to engage (or have engaged) in anticompetitive conduct. While this tends to mean firms of large market share are viewed as posing greater risk to competitive behavior, antitrust concerns can be voiced for smaller firms.

With respect to CFIUS's judgements, control is considered in more expansive terms: its focus is primarily on the extent to which a prospective transaction (between a domestic and foreign entity(ies)) has the ability to function in such a way that elevates national security risks. In fact, under FIRRMA, even minority shareholders could be seen as having sufficient authority cause such threats (or conversely have enough rights to block actions that would otherwise forestall diminution of such threats.

III. SKELETAL TAXONOMY FOR DECISION-MAKING.

Against this backdrop, it is useful to sketch out a rudimentary taxonomy that can help guide decision-making in assessing foreign investment's effects on competition and national security. We distinguish between foreign investment transactions involving (i) private enterprises vs state-owned enterprises and between entry on a (ii) *de novo* basis vs. by acquisition.

8 Beyond the departments that are standing CFIUS members, depending on the specific transaction under review by the Committee, other agencies participate in its decisions on an as needed basis.

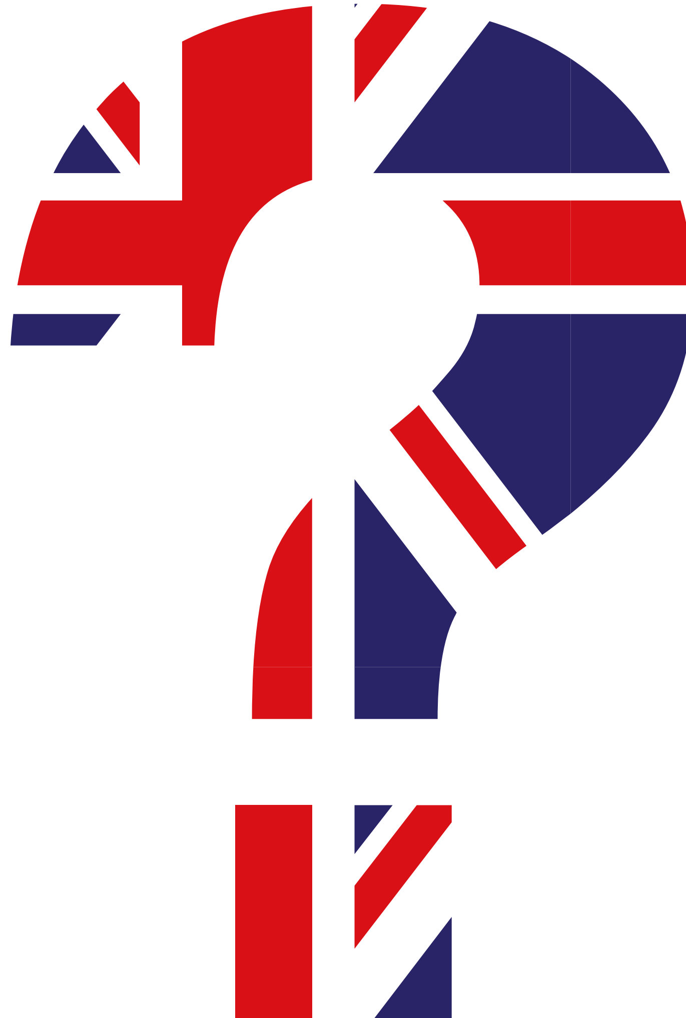
Type of Transaction	Criteria for Antitrust and CFIUS Assessments
Private Foreign Firm Entry Via Acquisition	Could raise *both* **antitrust** and **CFIUS** concerns. · **Antitrust** issues likely to arise since transaction may reduce number of otherwise independent sellers and/or buyers in the market. · Routine **CFIUS** assessment of inbound transactions, where outcome depends on (i) sector in question and (ii) resulting shareholding control.
Private Foreign Firm Entry on a De Novo Basis	**Antitrust** concerns likely *de minimis*; **CFIUS** concerns are toughening on greenfield investments · Rationale for **antitrust** intervention likely to bear burden of proof, insofar as transaction could well *enhance* competition due to increase in number of suppliers or buyers. · In the past, **CFIUS** risk was seen as relatively low. However, recent Congressional interest in potentially amending FIRRMA so as to cover even greenfield investments — depending on (i) sector (e.g., real estate) and (ii) nationality of investor (e.g., risk profile of private (non-state) Chinese firms are viewed differently than private Canadian firms
State-Owned Foreign Firm Entry Via Acquisition	Could raise *both* **antitrust** and **CFIUS** concerns. · **Antitrust** concerns will focus on reduction in number of buyers or sellers · **CFIUS** concern will likely be significant — perhaps both regardless of sector and regardless of share of ownership
State-owned Foreign Firm Entry on a De Novo Basis	**Antitrust** concerns could be limited, but may increase over time. **CFIUS** concerns regarding greenfield investments, particularly by foreign state-owned firms, are intensifying. · **Antitrust** authorities may have few concerns, since there would be new sellers or buyers. But if risk of state-fostered subsidization, especially if it leads to the exercise of market power, and at the extreme, predatory pricing, antitrust scrutiny likely. Such actions assumed to occur *ex post* of transaction consummation. However, will *ex ante* stipulations be made (or even set as a condition of the transaction)? · New Congressional initiatives are emerging to scrutinize national security risk of greenfield investments — especially those involving foreign state-owned enterprises. *Ex ante* **CFIUS** review likely to be triggered.

IV. CONCLUSION

The policy taxonomy sketched out above represents a static view — that is, it portends a set of parameters for a given point in time. Of course, changes in these parameters will come about either because of amendments to the antitrust statutes and/or to the law underlying CFIUS's authority (that is, FIRRMA). In fact, on both counts, such changes are afoot in Washington at the present time.

In addition, case precedents set in both areas could propel changes. Alteration of the globe's political economy environment (think Russia's war in Ukraine or China's conduct toward Taiwan), will also generate changes. Any of these factors could alter the decision-making calculus.

IS IT STILL OK TO DO UK M&A? THE NATIONAL SECURITY AND INVESTMENT ACT 2021: THE FIRST FIVE MONTHS OF PRACTICAL EXPERIENCE



BY NICOLE KAR & MARK DANIEL[1]

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I. INTRODUCTION

It has now been almost five months since the UK's National Security and Investment Act 2021 ("NSIA") took effect, radically overhauling the UK's approach to foreign investment screening. The introduction of the NSIA regime represented a step-change in the UK's approach to screening investments, ushering in one of the most expansive investment screening regimes internationally with a mandatory notification review process for the 17 most sensitive areas of the economy coupled with a broad power for the Government to call in non-notified transactions.

The past five months has provided some welcome clarity on many practical aspects of the operation of the NSIA and the Investment Security Unit ("ISU") - the newly established unit within the Department for Business, Energy & Industrial Strategy ("BEIS") responsible for the administration of the new regime. However, the past five months has equally highlighted some teething issues associated with the new regime and shown that important areas of legal uncertainty remain for transacting parties.

This article: (i) sets out some key takeaways from our practical experience with the NSIA over the past five months; (ii) explains some of the ways in which transacting parties have been navigating the NSIA in practice; and (iii) highlights some of the continuing areas of legal uncertainty that we understand the ISU will helpfully clarify going forward in a series of market guidance notes. The article also comments on enforcement practice in the first five months and, in particular, the recent announcement by the Secretary of State for BEIS, Kwasi Kwarteng that he has issued two "call-in" notices under the NSIA – the first with respect to the high-profile China-backed acquisition of the UK's largest semiconductor component manufacturer, Newport Wafer Fab ("NWF"), and, more recently, in relation to the increase in Altice's ownership stake in BT by a further 6 percent to an 18 percent shareholding.

II. A RECAP OF THE NSIA REGIME

The NSIA introduced a hybrid investment screening regime, consisting of a mandatory regime for 17 of the most sensitive sectors of the economy and a voluntary regime for all other sectors. We use the term "investment screening" very deliberately: to the surprise of many, the regime is not limited to foreign acquirers but enables the ISU to consider acquisitions by British companies. To the authors' knowledge, there is no other regime which takes a similar approach[2].

Under the **mandatory regime**, parties must submit a notification to the newly established Investment Security Unit ("ISU") at the Department for Business, Energy & Industrial Strategy ("BEIS") if they acquire more than 25, 50 or 75 percent of shares or votes (or the ability to block or pass resolutions governing the affairs) of a target entity active within a specified sector in the UK. Due to the suspensory nature of the mandatory regime, a transaction cannot close until it receives clearance. The NSIA has an extremely expansive jurisdiction: there are no turnover, transaction value or market share safe harbors and the UK nexus requirements have been satisfied in most transactions we have considered.[3]

The 17 sectors to which the mandatory regime apply are: advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to government, critical suppliers to the emergency services, cryptographic authentication, data infrastructure, defense, energy, military and dual-use, quantum technologies, satellite and space technologies, synthetic biology and transport.

The definitions of what specific activities fall within each mandatory sector are very technical and, in certain cases, can be difficult to interpret and apply in practice, so often require in-depth technical consideration and confirmation from the target as part of the due diligence process.

The **voluntary regime** applies to all sectors of the economy and parties are encouraged to voluntarily notify any "trigger events" which they consider may be of interest from a national security perspective. In addition to the thresholds under the mandatory regime, trigger events for the voluntary regime include the acquisition of "material influence" over a company (a well-established concept under UK merger control rules,[4] which may be deemed to exist in shareholdings as low as 10 or 15 percent) and acquisitions of a "right or interest" in a qualifying asset (such as land or intellectual property).

2 The Chinese NSR rules are sometimes said to enable review of Chinese domestic deals but if the direct acquirer and its ultimate controller are both Chinese, the NSR would not apply, whilst the NSIA could (at least in principle) to wholly domestic merger parties.

3 See BEIS Guidance on How the National Security and Investment Act could affect people or acquisitions outside the UK, January 2022. The Guidance states that a foreign entity can still be a qualifying entity for the purposes of the NSIA if it (i) carries on activities in the UK or (ii) supplies goods or services to people in the UK.

4 See CMA's Guidance on Jurisdiction and Procedure, January 2022, paras 4.17 – 4.32.

The UK Government also has extensive "call-in" powers to review qualifying transactions that have not been notified up to five years post-completion. However, if the Government has been made aware of the transaction, the call-in period is reduced to six months. This power is retroactive, enabling the Government to review transactions that closed as far back as November 12, 2020 (and has recently been exercised with respect to the NWF deal).

There are significant criminal and civil sanctions for non-compliance with a mandatory notification obligation. A fine of up to 5 percent of worldwide turnover – or £10 million – (whichever is higher) can be imposed on the acquirer and directors of the acquirer can also face up to five years' imprisonment. A transaction completed in contravention of the mandatory notification requirement will also be automatically void, which represents a shared risk for both buyer and seller.

III. PRACTICAL EXPERIENCE WITH THE NSIA TO DATE

A. There are Positive Signs that the ISU is Adopting a Proportionate Approach to Screening for Non-problematic Cases

The UK Government's intention was to establish an efficient and proportionate screening regime to quickly clear the majority of non-problematic deals and thereby minimize the burden of the NSIA for business.

Our experience to date is that the ISU has made positive steps in this direction. For transactions that do not raise substantive national security concerns, notifications have generally been "accepted" for review rapidly by the ISU (generally within a week). Similarly, information requests have generally been proportionate for no-issues cases. Our experience to date has been that non-problematic cases have ultimately been cleared comfortably within the initial 30-working-day NSIA review period. We have also seen willingness on the part of the ISU to engage with parties in advance of a signed transaction document, allowing parties to frontload the NSIA process in certain circumstances.

Both mandatory and voluntary NSIA filings must be submitted via an online portal, which requires parties to respond to a number of prescribed questions – principally relating to the transaction structure, the target company, and the acquirer. While the online portal itself can be difficult to navigate, and certain of these questions are geared towards simple corporate M&A and are not readily transferable to more complex fund structures, the scope of the information required is not as onerous as we have seen for certain foreign investment regimes internationally.

B. Second, the Expansive Scope of NSIA Jurisdiction has Driven Significant Numbers of Precautionary Notifications

It is also clear that the expansive scope of the NSIA regime, coupled with the breadth and ambiguity of certain of the mandatory notification sectors, has resulted in a considerable number of benign deals being notified (with associated costs for businesses).

In particular, it is notable that the mandatory notification requirement under the NSIA applies to internal re-organizations for in-scope companies, even where there is no change in the ultimate controlling entity. These filings have accounted for a material proportion of the filings that we have made to date, and we would expect this to be replicated across the market. Given that corporate restructurings do not, prima facie, raise any conceivable national security concerns, the requirement to make a mandatory notification in this scenario seems an unwarranted burden on both business and the ISU alike. Pending market guidance in this area is very welcome.

Some of the mandatory sector definitions (for example, communications, energy, AI, advanced materials, defense and synthetic biology) have also (despite some refinement during the consultation phase) been criticized for being too broad and difficult to interpret. This has led to a large number of benign deals being notified and transactions also being notified on a conservative basis (noting that the ISU is not always willing to provide guidance in advance of notification on whether a given target's activities fall within a mandatory sector). The definitions could benefit from more fulsome guidance to assist parties in identifying whether their transaction is one that should fall within the scope of the mandatory regime.

These may be areas where further guidance – or amendment of the NSIA – may be necessary. For example, additional safe harbors could be established to exclude internal group re-structuring and financing arrangements from the mandatory regime, and provide for those deals to be called in where appropriate.

C. Third, Concerns have been Raised Regarding the Opaque Nature of the ISU Review Process

In addition, the practical experience of the first five months of the NSIA's operation has led to some concerns about the transparency and accountability of the ISU process, especially during the initial review period.

Given the nature of the online portal through which filings are made, notifying parties are not allocated a named ISU case handler and the process is more anonymous than for example, CMA merger control reviews. Experience has also shown that the ISU can be reticent in providing the parties with information on either the status of the substantive appraisal of the case or the anticipated timing for the Secretary of State's clearance. While there are inevitably constraints on what can be disclosed when dealing with considerations of national security, the opaque nature of the ISU procedure has fostered concerns that the NSIA review is something of a "black box" and that transactions could be "called in" for a detailed review without the parties having had an adequate opportunity to exercise their rights of defense by responding to concerns.

IV. IMPORTANT AREAS OF LEGAL UNCERTAINTY REMAIN IN THE APPLICATION OF THE NSIA

There are a number of important areas where the application of the NSIA is not adequately clarified by existing guidance and where businesses and market participants could benefit from the market guidance anticipated from the ISU:

· **Financing transactions**. Financing arrangements (such as loan and security agreements, the issuing of some debt instruments or financing of underlying transactions) can also fall within the scope of the NSIA, including within the mandatory notification regime. This has led to considerable uncertainty among market participants regarding the application of the NSIA to the taking and enforcement of security and whether consequential changes are required to financing and security documents.

· **Contractual rights**. One of the trigger events for mandatory notification under the NSIA relates to the ability to block or pass a class of resolution regarding the affairs of an in-scope entity. Given that shareholders' agreements will typically contain minority protection rights or veto rights that cover many of the matters subject to a special resolution as a matter of English company law, the circumstances in which contractual rights could trigger a mandatory NSIA notification could be usefully clarified.

· **Minority acquisitions**. One of the trigger events for mandatory notification under the NSIA relates to acquisition of over 25 percent of shares or voting rights of an in-scope entity. While the application of this test is straightforward for the acquisition of a stake in excess of 25 percent in an in-scope entity directly, where the acquisition of an equivalent stake is structured via an intermediate holding company there has been uncertainty regarding whether this satisfies the "indirect" holding provisions at Schedule 1 of the NSIA.

V. HOW HAS THE NSIA BEEN REFLECTED IN DEAL TERMS?

Notwithstanding the uncertainty of dealing with a new and untested regime, investors have generally taken the NSIA in their stride, particularly for big ticket M&A deals. We have not, to date, (outside of investors from known high risk jurisdictions) witnessed any chilling effect on deal-making. We have seen several themes with respect to how transacting parties are navigating the NSIA in terms of deal conditionality:

· ***Transacting parties have a shared interest in ensuring that mandatory notification obligations are correctly identified***. If a transaction requires a mandatory NSIA notification, then the inclusion of a condition in the transaction documents allowing for such a filing is typically uncontroversial. Missing a mandatory NSIA filing results in transaction voidness, which represents a shared risk for buyer and seller (and finance parties). As such, it is in the mutual interest of transacting parties to correctly identify filing obligations and we have generally seen parties erring on the side of conservativism, especially where the mandatory notification definitions are less clear. Outside the mandatory regime, parties may consider including a voluntary notification condition to address the residual risk of the Secretary of State issuing a "call-in" notice to review the transaction; however, in auction processes this may well be resisted on the sell-side.

· ***Standard of performance and obligations with respect to remedies is often the main focus of negotiations***. In many cases, the main point of contention is the standard of performance to obtain NSIA clearance and, in particular, obligations with respect to remedies (mitigation in CFIUS parlance). A seller will typically want the buyer to take all steps necessary to obtain NSIA clearance (including offering whatever remedies are necessary to obtain clearance), whereas a buyer will generally want to limit the scope of this obligation. This tension is exacerbated in the case of the NSIA by the uncertainty over the nature of remedies that may be imposed by the ISU given that to date, no remedies decisions have been issued (although there are several in the pipeline). In the absence of NSIA decisional practice, expectations as to what remedies might be required are framed by pre-NSIA cases under the Enterprise Act 2002 (such as *Cobham/Advent* (2020) and *Bidco/Inmarsat* (2019)) which notably include "economic" commitments as well as remedies to address narrowly defined defense contractor related national security concerns. We can expect some further insight on what types of remedies and commitments the Government is likely to accept as more cases move through the national security review process – in particular in relation to Cobham Ltd.'s takeover of Ultra Electronics Holdings plc and Parker Hannifin's acquisition of Meggitt plc. While both cases are being

reviewed under the Enterprise Act 2002, media reports indicate that Cobham has recently agreed to a set of improved commitments to gain political backing for the transaction. Those commitments are likely to also inform future cases under the NSIA, and include granting the UK Government oversight of contracts, future asset sales and business relationships.

· ***Co-investments and risk allocation***. Where an acquisition is being made by a consortium of investors, there is a risk that some investors either directly (or via investors in funds they advise) may pose a greater risk from a national security perspective. Transacting parties (including consortium members themselves) are considering how consortium arrangements could be structured or re-negotiated to mitigate the risk posed by co-investors (e.g. by reducing governance rights or equity levels of particular co-investors in the event of national security concerns being identified). We have not, to date, seen UK assets or entities excluded from transaction perimeters (but carve outs are a feature in some other more established regimes).

VI. WHAT LESSONS CAN BE LEARNT FROM RECENT NSIA CALL-INS?

Last month, the Government publicly announced that two transactions would be called in under the NSIA, namely: (i) China-backed Nexperia's acquisition of a stake in NWF; and (ii) French billionaire, Patrick Drahi's increased stake in BT. The fact that the Government has chosen to publicly announce these "call-in" notices is enlightening in itself, as it was not previously apparent that "call-in" notices would be publicly announced. We have considered these two transactions, and the light that they shed on the NSIA regime, in further detail below.

A. Newport Wafer Fab

By way of background, the acquisition by China-backed Nexperia of the UK's largest silicon wafer manufacturer[5], NWF, was announced in July 2021. In response to concerns raised at that time, the UK Prime Minister announced a security review of the acquisition. However, nine months later, reports emerged that the Government had decided not to intervene. Despite Nexperia denying the accuracy of such reports, the reports nonetheless triggered a flurry of concerns and press coverage.

Soon after, a report on the takeover of NWF was published by the Foreign Affairs Committee, confirming that a review had not in fact been started, and expressing concerns about *"the Government's apparent lack of appetite to use the powers at its disposal to protect the British companies in this industry."*[6] Subsequently, BEIS confirmed that a review is, in fact, taking place and that the acquisition is *"being considered very closely."*[7]

The Government's decision to review NWF represents the first instance that we are aware of where the Government has used its retroactive powers under the NSIA to review a transaction that had closed before the NSIA took effect. It is also notable in that the Government publicized its intervention and that the "call in" of the Newport Wafer Fab transaction comes despite Stephen Lovegrove (the UK Government's national security adviser) previously concluding that there were insufficient reasons to block the deal on specific security grounds and following ongoing pressure from members of US congress in relation to the transaction. NWF is reported to have been (prior to the Nexperia transaction) transitioning to manufacture of compound semiconductors which use materials beside conventional silicon and are components for electric vehicle batteries (identified by US Secretary of State Antony Blinken, as a key sector of the 21st century economy that we cannot allow to become completely dependent on China"). CFIUS has previously blocked other deals in the compound semiconductor area, as far back as the President Obama era block of a Chinese purchasers' acquisition of Aixtron (which led to reconsideration of the transaction by the German foreign investment agency and ultimately collapse of the deal).

B. BT/Altice

In December 2021, Patrick Drahi's telecoms group Altice increased its ownership of the UK-headquartered BT to 18 percent from 12 percent. This subsequently fueled speculation about a takeover attempt – although Patrick Drahi has stated that he does not intend to make an imminent takeover bid- and triggered a six-month standstill obligation under the Takeover Code, the second of which expires in June 2022.

The Government's announcement in May 2022 that it would review the increased stake in BT demonstrates that the Government is

5 NWF is an open-access foundry, providing volume manufacturing services for the compound semiconductor on silicon, silicon chip manufacturing, and photonics markets. Its semiconductor technologies are used in EV engines.

6 https://committees.parliament.uk/publications/9581/documents/162217/default/.

7 https://hansard.parliament.uk/lords/2022-04-07/debates/A045984E-8BCD-4EF2-927E-A3172F54B8CE/NewportWaferFab.

prepared to carefully scrutinize acquisitions of comparatively small minority stakes (i.e. below the 25 percent level that give rise to a mandatory notification under the NSIA) for companies perceived as UK "national champions" – even where the acquirer is from a so-called friendly country, such as France.

While BT is clearly sensitive in terms of UK national security, the decision to review may also be in part driven by concerns that Altice may increase its stake (following the upcoming lapse of the Takeover Code restrictions in June), rather than solely by concerns that the incremental 6 percent stake in BT is of itself a threat to national security.

VII. WHAT'S NEXT?

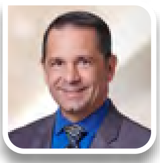
The Department of Business, Energy and Industrial Strategy has undertaken to do a review of the first six months of the NSIA and thereafter to do an annual report (as CFIUS does) setting out how many notifications and call ins there have been. It will be interesting to see whether the Government's projections for 1,000 to 1,830 filings per year in its original impact assessment was accurate in light of the prevalence of precautionary filings. In the meantime, investors appear to have taken the NSIA requirements in their stride and with the exception of Chinese outbound M&A (which statistics show has declined considerably in the UK but also elsewhere), the NSIA does not appear to have had a significant chilling effect on inbound UK M&A.

As explained in this article, there is, however, legal uncertainty regarding the interpretation of several important points under the NSIA. We therefore look forward to the anticipated market guidance notes from the ISU toprovide greater clarity for transacting parties and reduce the burden on investors and the ISU caused by the precautionary notification of transactions raising no conceivable national security concerns.

It will also be interesting to see how the reviews of the Ultra and Meggitt transactions play out, but also the NWF and BT deal call ins. These cases have the potential to showcase what types of remedies could be expected (particularly in a completed transaction such as NWF), how long a call in (as opposed to a proactively notified) process is likely to be, and what issues the UK Government is likely to focus on. The NWF case, in particular, is expected to be a "critical test case" of the UK Government's appetite to exercise its new powers in the face of considerable US congressional and Foreign Affairs Committee pressure.

AMID REGULATORY HEADACHES FOR M&A – UNDERSTANDING THE CURRENT ENFORCEMENT LANDSCAPE IS KEY TO GETTING DEALS DONE

BY JOHN R. INGRASSIA[1]



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I. ANTITRUST/HSR

We have seen a number of noteworthy developments with respect to Hart-Scott-Rodino ("HSR") reporting and merger review more generally under the new administration and under new agency leadership. With the surge in M&A activity reportedly "straining" the Federal Trade Commission's resources, several new tactics have come into play that impact not only merger review and clearance, but the way mergers are getting negotiated. While the heavy attention that all things antitrust is currently getting from Congress and the agencies will likely result in landscape shifts in enforcement policy and priorities for years to come, some of what's already been implemented and is already underway is having immediate impact. The general approach has been a doubling down on enforcement, stripping away of exemptions and interpretations that make review more streamlined, and investigations that are more intrusive and lengthy. Some highlights include:

- Elimination of HSR early termination grants – requiring observance of the full 30-day HSR waiting period in all filed transactions;
- Issuance of "Warning Letters" at the close of HSR waiting periods;
- Withdrawal of long-standing informal interpretations relating to HSR reporting, and public admonitions to the premerger office for issuance of so called "loophole" interpretations;
- Curtailing of parties' ability to exclude the value of outstanding debt from transaction value for HSR reporting obligation assessments;
- Withdrawal of long-standing informal interpretations relating to exclusion of copyright acquisitions from HSR reporting requirements;
- Withdrawal of the Vertical Merger Guidelines just only recently issued in 2020;
- Merger investigations that delve into historically off-limits areas, such as employee compensation, and issuance of "Second Requests" that are more broad reaching and invasive; and
- Consent decree provisions that are more onerous and restrictive;

Under the HSR Act, transactions that meet certain annually adjusted thresholds (currently a $101 million transaction size) are subject to notification and waiting period requirements. The FTC announced the new thresholds for 2022 effective February 23 – which increased from $92 million to $101million. The HSR Act enables antitrust regulators to review transactions, investigate and address potential competitive concerns prior to completion, and carries monetary penalties for failure to comply — also adjusted for 2022, to $46,517 per day.

Most transactions that meet the reporting requirements do not raise substantive antitrust concerns and are never investigated (typically around 90 percent), and the agency has historically terminated the statutory 30-day waiting period for most of those transactions in less than 30 days. Beginning in February of 2021, the FTC suspended the longstanding practice of granting parties 'early termination' of the 30-waiting period for transactions it does not intend to investigate.

More recently, the agency has begun issuing letters to parties in certain transactions the agency may intend to investigate even after expiration of the HSR waiting period.[2] Jurisdiction to conduct antitrust review of mergers and acquisition is independent of the HSR reporting requirements. This means the enforcement agencies can investigate any transaction before or after closing, whether subject to HSR reporting or not, and whether the HSR waiting period has expired or not. There are historical examples of the agencies using that authority to review non-reportable transactions, and even to open investigations of reportable transactions after expiration of the HSR waiting period – though these have been rare. The new practice of issuing waring letters to parties that an investigation may remain ongoing even post-HSR clearance has several important implications around certainty or finality of investigation practices, and around obligations under parties' merger agreements with respect to closing potentially over a pending or ongoing investigation.

While the letters being issued do not assert any new authority not already existing under law, they are not being issued in every transaction. This means that the transaction for which the letters are issued are selected as ones that potentially raise more significant antitrust issues, and ones that the agency is more likely to investigate post-HSR waiting period and even post-closing – effectively putting merger parties on notice that the acquisition may face meaningful risk of agency action post-closing.

This, in turn, raises potential questions as to whether closing conditions are sufficiently satisfied to require the parties to close. A skittish buyer trying to assert that they are not required to close over the (arguably) pending investigation may face an uphill battle depending on how the conditions to closing were drafted in the merger agreement – which typically point to the expiration of applicable waiting periods and not the absence of potential ongoing investigations. The FTC's new practice is already ushering a change in the way certain provisions are drafted, with careful buyers seeking provisions that no investigations are open or pending and that no such warnings or warning letters have been issued.

2 See https://www.ftc.gov/system/files/attachments/blog_posts/Adjusting%20merger%20review%20to%20deal%20with%20the%20surge%20in%20merger%20filings/sample_pre-consummation_warning_letter.pdf?utm_source=govdelivery.

Recent examples under the new policy include the *3D Systems Corporation/Oqton, In*c. transaction, where the parties' agreement provided the if the FTC or DOJ issues a warning letter that an investigation in pending beyond the expiration of the HSR waiting period expired, the investigation would be treated as closed only 30 days after receipt of such letter – if an active investigation is not pending. In the *Universal Corporation/Shank's Extracts, Inc.* transaction, the parties' agreement likewise provided for an extension of the closing date by 30 days where the buyer receives a warning letter before closing.

Section 8 of the Clayton Act prohibits certain overlaps in officers or directors between competing companies to guard against anti-competitive coordination and information exchanges that can arise from simultaneous board membership. Thus, as a general rule a person cannot serve on the boards of two competing companies, which can arise where installing board members of potentially competing portfolio companies. Under the statute, no person, or representative of the same person or entity, is permitted to serve simultaneously as a director or officer of competing companies, but there are carve-outs and exceptions. The prohibitions of Section 8 are limited to cases in which each of the companies has, under the revised thresholds for 2022, capital, surplus, and undivided profits of more than $41,034,000. Even where the threshold is met, however, the restrictions do not apply where the competitive sales of *either* company represents less than 2 percent of its total sales, or are less than $4,103,400; or where the competitive sales of *each* company represent less than 4 percent of its total sales.

With antitrust enforcement of the technology sector making news daily, and lawmakers, enforcers and regulators all finding new ways to attack an industry that arguably is responsible for one of the greatest eras of advancement in history, knowing where the pitfalls are is the order of the day. To protect against buying the next antitrust headline, new areas of inquiry are required – beyond assessment of the combination's market shares. In addition to debt ratios, cap tables and pending litigation, good diligence now includes a clear assessment of the parties' business, their offerings and the markets implicated. This is necessary to evaluate whether either or both are in areas currently subject to enhanced antitrust scrutiny. Such areas can include diverse businesses such as platforms, ecommerce, internet infrastructure, social media, search, online advertising, streaming content, and fintech.

Also consider whether the transaction would combine businesses that are in a vertical or vendor/vendee relationship. These can include, for instance, combinations of content producers or suppliers with content distributors. Transactions in this space can hit two areas that are presently the focus of what may be an undue level of agency attention – technology and vertical transactions. Vertical transactions can and do take place in all industries whenever two levels of a supply chain combine, such as manufacturer/distributor or distributor/retailer. While antitrust enforcement of *exceptional* vertical mergers that would lead to market foreclosure of inputs or distribution/sales channels has a long history, the trend now is to examine vertical mergers more closely as a matter of course. Add to this the Federal Trade Commission's withdrawal in September 2021 of the Vertical Merger Guidelines, issued and updated only recently in 2020 and criticized by the new Commission majority as based on "unsound economic theories that are unsupported by the law or market realities."

Historically, the FTC Premerger Notification Office has taken the view that the retirement of debt is not included in the calculation of whether a stock transaction meets the reporting threshold and is thus subject to the reporting and waiting period requirements of the HSR Act. That position was reversed in August 2021, reportedly on the basis that "as a result of developments in deal structures and financing, sometimes the retirement of debt is part of the consideration for a transaction in that it benefits the selling shareholder(s)." Accordingly, in "any instance where selling shareholder(s) benefit from the retirement" of debt, the debt is considered part of the transaction consideration for purposes of assessing the parties HSR reporting obligations. This is having immediate impact as we see reporting of transactions that historically would have not been subject to HSR filing requirements.

A number of changes have also been announced and implemented with respect to the FTC's merger investigation, or Second Request, process, including examination of how a proposed merger may impact labor markets, and "how the involvement of investment firms may affect market incentives to compete." Finally, in cases where merger parties settle with the agency on a challenge to the transaction rather than facing the agency in court, the consent decree process sets out the parties' obligations on a going forward basis. Historically, such consent decrees, among other things, required parties to notify the agency prior to certain future acquisitions implicating areas that are the subject of antitrust concern under the settlement.

Beginning in October, 2021, however, FTC consent decrees in such cases (beginning with its consent decree in the *DaVita Inc./Total Renal Care, Inc.* transaction) now requires <u>prior approval</u>. This is a significant policy change for the FTC and has the potential to chill, not only settlements, but also M&A transactions at the outset, where such provisions are commercially untenable.

II. CFIUS

The CFIUS landscape is likewise very different from how things looked only a short time ago, and CFIUS continues to be an important issue and consideration for investors both inside the U.S. and abroad. With the enactment of FIRMA's updates to CFIUS in 2018, and the 2020 implementation of the new rules, 2021 was the first full year under the new regime. Some of the newer features of CFIUS now include:

- mandatory filings for certain transactions (limited to certain transactions implicating critical technology, critical infrastructure, and sensitive personal data)
- short form Declaration filings (now available for all transactions following a limited Pilot Program availability)
- CFIUS filing fees ($750 to $300,000 depending on transaction value);
- electronic filings;
- coverage of certain real estate investments and acquisitions involving proximity to sensitive government facilities and installations;
- expanded scope of critical infrastructure coverage;
- coverage with respect to sensitive personal data;
- expanded coverage of emerging and foundational technologies (i.e. geospatial imagery software);
- expanded CFIUS identification and review of non-notified transactions
- "White List" exempted investors for certain investors from UK, Canada, Australia, and, as of January 5, 2022, New Zealand and;
- Country-specific application of certain rules related to critical technology.

For U.S. based fund investors, CFIUS is often implicated by the presence of non-U.S. partners – co-investors, joint managers, or, to a lesser extent, in the LP base. The extent and scope of CFIUS coverage and jurisdiction turns on the type of rights granted to non-U.S. person or non-U.S. controlled entities, such as investment management discretion; GP removal rights; LPAC representation, board or observer rights; and certain information rights such as rights to Material Non-Public Technical Information. Non-U.S. investors are more directly implicated in CFIUS coverage, though nationality matters to CFIUS and risk assessment is highly country-specific.

CFIUS's appetite for clearing investments originating in certain parts of the world continues to wane. The ensuing chill in the investment climate has led to a sharp downward trend in filings specifically relating to investment originating in China (sometimes by way of the Cayman Islands) – down approximately 90 percent from just several years ago. Notably, many of the filings that relate to inbound investment from China focus on critical technology, one of the more sensitive areas of CFIUS review and a particular focus for the U.S. national security establishment. Though we also continue to see Chinese investment in U.S. critical infrastructure and in industries implicating sensitive personal. CFIUS does not evaluate issues relating to other foreign access to U.S. critical technologies, such as licensing, contracting, or other arrangements that are not M&A related.

As the CFIUS and foreign investment review climate has not improved in the Biden administration from the prior administration, we expect to see continued lighter showing with respect to Chinese investment and continued chilly reception from the Committee. Consider the Biden administration's review of ByteDance's non-notified acquisition of Musical.ly (TikTok) initiated under the Trump administration. In October 2021, CFIUS also opened an investigation into China based Tencent's planned acquisition of Sumo Group, a UK based producer of video games, as announced by the parties. CFIUS dos not publicly announce investigations or enforcement actions. CFIUS likewise investigated China based Wise Road Capital's proposed acquisition of Magnachip Semiconductor – by way of a Cayman affiliate. The parties did not initially file with CFIUS, and according to the company, on May 26, 2021, "the CFIUS Staff Chairperson, acting on the recommendation of CFIUS, requested that the parties file a notice concerning the Merger and thereby undergo formal CFIUS review of the Merger." The review led to the parties abandoning the transaction in December 2021.

Though there is not public reporting with respect to specific transactions, filings or investigations, CFIUS identified 117 non-notified transactions the last reporting year for consideration (an all-time high), with 17 leading to formal filing and review. Such investigations can be costly and distracting for completed transactions, and at the margins can lead to undoing of completed deals. Thus, the better counselling under the current CFIUS climate is to file on a voluntary basis for transactions that are arguably likely to garner CFIUS's interest or attention. CFIUS also puts a high level of scrutiny on investors from Russia (even aside from current sanctions) and certain middle-eastern countries. Though, largely a function of investment flow, most of the filings still come from lower risk countries – Canada, UK, Japan, South Korea and Germany.

We continue to see sharp increases in short form Declaration filings, especially with respect to fund investors, as investors and practitioners become more comfortable with the newer process. The short form Declaration filings afford the added benefit of a shorter 30-day waiting and review period (versus 45 for the traditional Joint Voluntary notice long form filing), though is not always advisable for transactions likely to

result in more in-depth investigations. This, plus an overall increase in the number of CFIUS filings more generally given the expanded scope of coverage areas, has led also to a smaller percentage of transactions that ultimately are subjected to remedies (or mitigation measures in CFIUS parlance) – hovering at around 10 percent of all filed transactions.

In the last available public reporting year, CFIUS implemented mitigation measures in approximately 20 transactions. Such mitigation measures typically include one or more of: restrictions on certain intellectual property, trade secret, or technical knowledge transfers; limiting access to information related to certain technology to only U.S. persons; assurances of continuity of supply to the U.S. Government; exclusion of certain sensitive assets from the transaction; prior notification and approval of future increases in ownership or additional rights; or ultimately, divestiture of all or part of the U.S. business. CFIUS's expanded mission, and staffing, also means that today we see at least some level of investigation on almost half of all submissions, which remain largely voluntary submission with less than 20 percent of all filings falling into the mandatory filing requirement category.

The primary sectors subject to review continue to include utilities (such as power generation and infrastructure), computer system design (critical technology), software (especially encryption related software), financial services, transportation, aerospace, and industry (such as chemical manufacturing). Real estate investments remain a small minority of reported and reviewed transactions.

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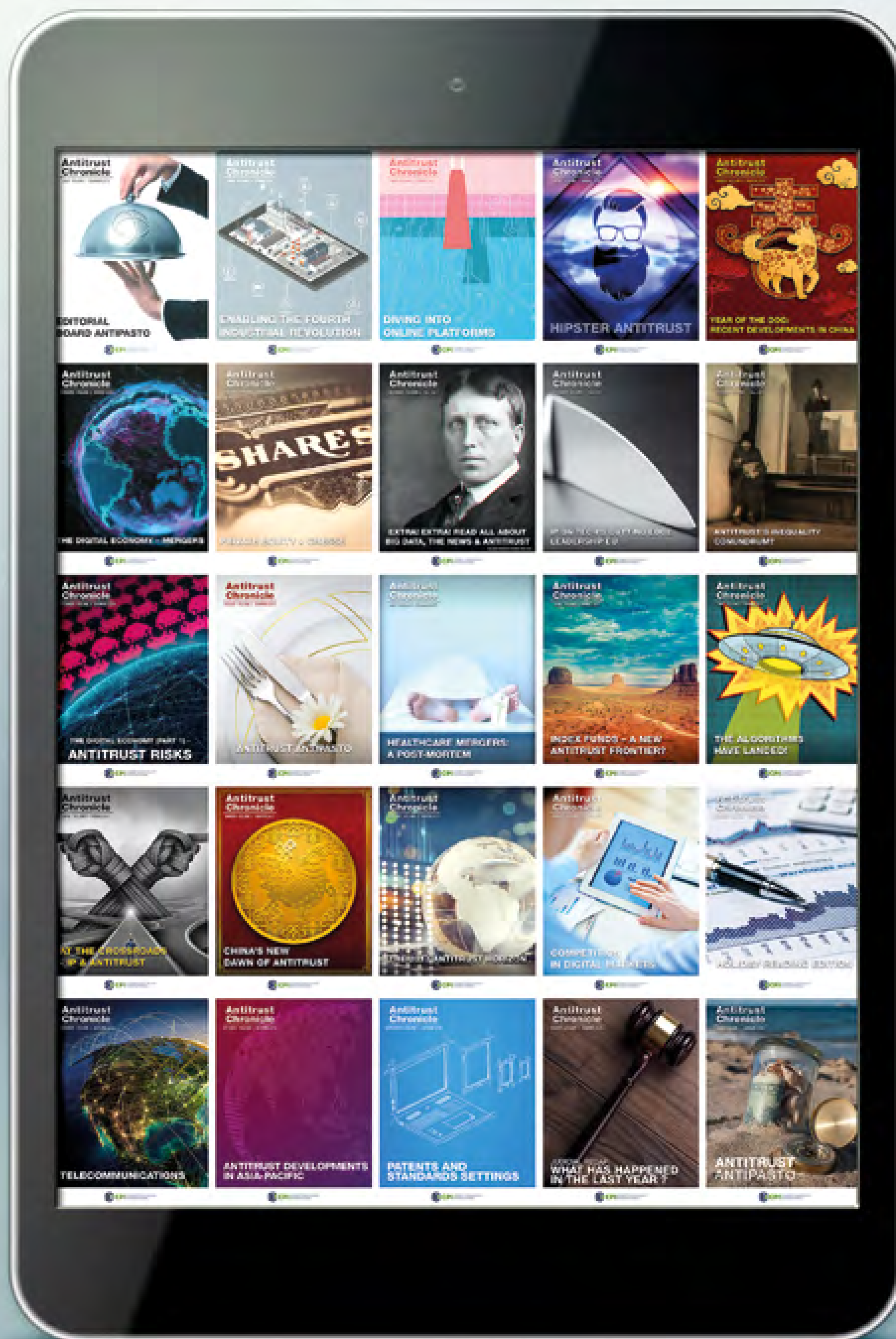

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