

Unclassified

English - Or. English

18 November 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**The Relationship between FDI Screening and Merger Control Reviews – Note by BIAC**

30 November 2022

This document reproduces a written contribution from BIAC submitted for Item 13 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

More documents related to this discussion can be found at  
[www.oecd.org/competition/the-relationship-between-fdi-screening-and-merger-control-reviews.htm](http://www.oecd.org/competition/the-relationship-between-fdi-screening-and-merger-control-reviews.htm)

Mr Antonio CAPOBIANCO  
[Email: Antonio.CAPOBIANCO@oecd.org]

**JT03507998**

## *BIAC*

### 1. Introduction

1. *Business at OECD* (BIAC) is pleased to submit this paper to assist in the Competition Committee's discussion on the important issue of the relationship between foreign investment screening reviews and merger control reviews. This paper builds on BIAC's prior contributions on related topics, including the December 2014 roundtable on changes in institutional design of competition authorities<sup>1</sup> and the June 2016 roundtable on public interest considerations in merger control.<sup>2</sup>

2. Foreign investment screening reviews are on the rise globally, driven by developments such as the economic effects of the COVID-19 pandemic, heightened geopolitical tensions, increased protectionism, and the intensification of state-sponsored economic and electronic warfare. These factors have encouraged countries around the world to develop stricter foreign investment rules.<sup>3</sup> At the same time, governments have been strengthening their merger control rules to better protect against anticompetitive mergers and acquisitions.<sup>4</sup> Combined, the increasing relevance of foreign investment reviews and the enhanced scrutiny of transactions more generally have resulted in more interactions between the merger control and foreign investment screening regimes.

3. As interactions between investment review mechanisms increase, so does the complexity of the regulatory process. Foreign investment screening reviews can take different institutional forms, with most countries having specific agencies responsible for these reviews, and some delegating them to the existing competition authority as an additional responsibility. Foreign investment screening reviews can also have different substantive foci. While foreign investment screening regimes are often designed to address threats to national security, national interest considerations have also been increasing as focal points of foreign screening regimes. These broad considerations generally stand in contrast to the more normative considerations that lie at the heart of merger control reviews, such as competitive pricing and supply, efficiency, and innovation.

4. In light of the rise of foreign investment screening reviews and the trend towards the broadening of issues which may raise national security concerns, businesses increasingly face multiple reviews of transactions both within and across separate

---

<sup>1</sup> OECD, Roundtable On Changes In Institutional Design Of Competition Authorities—Note by BIAC, DAF/COMP/WD(2014)126 (Dec. 10, 2014), [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)126&docLanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)126&docLanguage=en).

<sup>2</sup> OECD, Public Interest Considerations in Merger Control—Note by BIAC, DAF/COMP/WP3/WD(2016)33 (June 6, 2016), [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD\(2016\)33&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2016)33&docLanguage=En).

<sup>3</sup> OECD, Investment Screening in Times of COVID-19 and Beyond (July 7, 2020), [www.oecd.org/coronavirus/policy-responses/investment-screening-in-times-of-covid-19-and-beyond-aa60af47](http://www.oecd.org/coronavirus/policy-responses/investment-screening-in-times-of-covid-19-and-beyond-aa60af47).

<sup>4</sup> Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), [www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers](http://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers).

jurisdictions. These multiple reviews present significant challenges to the interests of legal certainty, transparency, and predictability, which are essential for business planning and growth. The large number of potential reviews and the increasing interface of the two regulatory reviews may also affect the competitive position of a bidder in a competitive process, further complicate transactions, and slow the functioning of bureaucratic processes that international enterprises rely on to conduct business.<sup>5</sup>

5. In light of the evolving foreign investment screening review landscape, BIAC recommends that these foreign investment reviews be conducted: (a) by an agency separate from that responsible for merger control reviews, (b) based on a set of objective criteria clearly articulated in legislation or guidance, and (c) to the greatest extent possible, in a coordinated fashion with merger control reviews, from the perspectives of timing, procedural transparency, remedies, and overall government accountability.

## 2. Proliferation of Foreign Investment Screening Reviews and Expanding Considerations

6. In recent years, governments have grown increasingly concerned with the national security implications of foreign investments. This trend has been evidenced by reforms of existing foreign investment screening regimes, and the creation of entirely new ones. In 2020 alone, fifteen OECD member countries carried out reforms of their existing policies, and twelve OECD member countries introduced new acquisition- and ownership-related policies.<sup>6</sup> Further, in only the first four months of 2021, several OECD member countries adopted or brought into effect new policies relating to their foreign investment review processes, including Canada, Czech Republic, Slovakia, Sweden, and the United Kingdom.<sup>7</sup> The trend has continued in 2022, notably with the coming into force of the United Kingdom's more expansive regime.<sup>8</sup>

7. Understanding the reasons behind the proliferation of foreign investment screening reviews is essential to understanding the transforming concept of national security. The changing geopolitical environment, economic disruption resulting from the COVID-19 pandemic, rising protectionism, and technological advances, among other factors, are contributing to the broadening of factors considered in foreign investment reviews. These factors are generally less transparent and less norms-based than competition grounds in merger reviews, which explains why foreign investment reviews have the potential to significantly extend and upstage the regulatory process.

---

<sup>5</sup> OECD, Acquisition- and Ownership-Related Policies to Safeguard Essential Security Interests: Current and Emerging Trends, Observed Designs, and Policy Practice in 62 Economies 12 (May 2020), [www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf](http://www.oecd.org/investment/OECD-Acquisition-ownership-policies-security-May2020.pdf).

<sup>6</sup> OECD, Transparency, Predictability and Accountability for Investment Screening Mechanisms 6 (May 27, 2021), [www.oecd.org/daf/inv/investment-policy/2009-Guidelines-webinar-May-2021-background-note.pdf](http://www.oecd.org/daf/inv/investment-policy/2009-Guidelines-webinar-May-2021-background-note.pdf).

<sup>7</sup> *Id.*

<sup>8</sup> Dep't for Bus., Energy & Indus. Strategy, National Security and Investment Act: Details of the 17 Types of Notifiable Acquisitions (last updated July 20, 2022), [www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions](http://www.gov.uk/government/publications/national-security-and-investment-act-guidance-on-notifiable-acquisitions/national-security-and-investment-act-guidance-on-notifiable-acquisitions).

## 2.1. Rising Protectionism

8. The rise in foreign investment screening reviews can be explained in part by rising economic protectionism. This protectionist trend was exacerbated by the COVID-19 pandemic, but its roots can be traced back to the collapse of the Doha Development Round of trade-negotiation of the World Trade Organization in July 2008, after failure to reach a compromise on agricultural import rules. This failure came at the same time as the global financial crisis—the worst since the Great Depression—that affected the world economy.<sup>9</sup> Increasing indirect investment of certain countries or state-owned funds through global investors also triggered a more intensive review of foreign investments.

9. More recently, countries' decisions to establish or reform foreign investment review policies can be linked to the economic impact of COVID-19, which saw countries adopt protectionist strategies to ensure national supplies satisfied domestic needs above all. For example, in Canada, the federal government issued a policy statement on April 18, 2020, stating that it would scrutinize foreign investments of any value related to public health or the supply of critical goods and services to Canadians or the Canadian government.<sup>10</sup> Further, in France, the government added biotechnology to its list of critical technologies subject to foreign investment screening to give French authorities wider discretion to monitor operations in this sector.<sup>11</sup>

10. The economic impact of COVID-19 has also encouraged government agencies responsible for foreign investment screening to adopt a protectionist stance in their decisions. In 2021, for example, the French Ministry of the Economy, Finance and Recovery blocked the Canadian convenience store chain Couche-Tard's proposed acquisition of French supermarket chain Carrefour. As affirmed by France's Finance Minister Bruno Le Maire, French food security and sovereignty were key considerations in this decision.<sup>12</sup>

## 2.2. Heightened Focus on Preserving Supply Chain Integrity

11. Supply chain vulnerabilities have been exposed across the globe over the past decade. Most notably, the COVID-19 pandemic caused decreased production, container shortages, bottlenecks at key ports, shipping delays, high shipping costs, and border closures.<sup>13</sup> Other recent events have also highlighted the weaknesses in global supply

---

<sup>9</sup> Calvin S. Goldman, Q.C. & Michael S. Koch, *The Interface Between Competition Law and Foreign Investment Merger Reviews: Flying Blind or with Radar*, in INT'L ANTITRUST L. & POL'Y: FORDHAM COMPETITION LAW 2014 (Barry E. Hawk ed., 2015).

<sup>10</sup> Gov't of Canada, Policy Statement on Foreign Investment Review and COVID-19 (Apr. 18, 2020), <https://ised-isde.canada.ca/site/investment-canada-act/en/ministerial-statements/policy-statement-foreign-investment-review-and-covid-19>.

<sup>11</sup> Dep't of the Treasury, Covid-19 | Update of the Foreign Direct Investment Screening Procedure in France (Apr. 30, 2020), [www.tresor.economie.gouv.fr/Articles/2020/04/30/covid-19-update-of-the-foreign-direct-investment-screening-procedure-in-france](http://www.tresor.economie.gouv.fr/Articles/2020/04/30/covid-19-update-of-the-foreign-direct-investment-screening-procedure-in-france).

<sup>12</sup> French 'No' to Canada's Couche-Tard regarding Carrefour is 'Final' – Minister, REUTERS (Jan. 15, 2021), [www.reuters.com/world/americas/french-no-canadas-couche-tard-regarding-carrefour-is-final-minister-2021-01-15](http://www.reuters.com/world/americas/french-no-canadas-couche-tard-regarding-carrefour-is-final-minister-2021-01-15).

<sup>13</sup> Simon Richards, Bashar Abu Taleb & Offah Obale, *The COVID-19 Pandemic, Global Supply Chains and Addressing Vulnerabilities*, HILLNOTES: QUICK READS ON CANADIAN TOPICS (Dec. 15, 2021), <https://hillnotes.ca/2021/12/15/the-covid-19-pandemic-global-supply-chains-and-addressing-vulnerabilities/>.

chains, including the aftermath of Britain's formal exit from the United Kingdom, the impact of Hurricane Ida in the Americas, and rising inflation and energy shortages resulting from the war in Ukraine.<sup>14</sup> Understandably, governments are becoming increasingly concerned with preserving supply chain integrity.

12. In the Canadian context, foreign multinational enterprises account for over 60% of trade in goods and services, thereby contributing significantly to Canada's role in global supply chains and international trade.<sup>15</sup> The potential impact of foreign investment on the supply of goods and services to Canadians and on critical mineral supply chains are therefore newly added relevant factors in the Guidelines on the National Security Review of Investments (Guidelines), that explain the national security review process set out in Part IV.1 of the *Investment Canada Act* (ICA).<sup>16</sup>

13. In the American context, President Joe Biden recently ordered the Committee on Foreign Investment in the United States (CFIUS) to consider the effect of foreign investments on the resilience of critical supply chains given their potential national security implications.<sup>17</sup> As stated in the Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States released on September 15, 2022 (Executive Order), certain types of foreign investment may undermine national security in the context of supply chains.<sup>18</sup> As a result, CFIUS shall consider, among other factors, the United States' degree of diversification through alternative suppliers across the supply chain, the targeted businesses' relationships with the United States government, and the concentration of ownership or control by the foreign person in a given supply chain.<sup>19</sup>

### 2.3. Focus on State-Owned Enterprises and Specific Countries of Origin

14. National security concerns are being intensified by accelerating investment from state-owned enterprises and companies from non-OECD countries,<sup>20</sup> notably Russia and China. In some cases, the investment motivations of these enterprises are not purely

---

<sup>14</sup> Viola Caon, *FDI Drivers in 2022: Supply Chains*, INVESTMENT MONITOR (June 17, 2022), [www.investmentmonitor.ai/analysis/fdi-drivers-in-2022-supply-chains](http://www.investmentmonitor.ai/analysis/fdi-drivers-in-2022-supply-chains).

<sup>15</sup> Global Affairs Canada, Office of the Chief Economist, *Canada's State of Trade 2021 – A Closer Look at Foreign Direct Investment* (2021), [www.international.gc.ca/transparency-transparence/state-trade-commerce-international/2021.aspx?lang=eng](http://www.international.gc.ca/transparency-transparence/state-trade-commerce-international/2021.aspx?lang=eng).

<sup>16</sup> Gov't of Canada, Guidelines on the National Security Review of Investments (Mar. 24, 2021), <https://ised-isde.canada.ca/site/investment-canada-act/en/guidelines/guidelines-national-security-review-investments>.

<sup>17</sup> Exec. Order No. 14083, Executive Order on Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States, 87 Fed. Reg. 57,369 (Sept. 15, 2022), available at [www.whitehouse.gov/briefing-room/presidential-actions/2022/09/15/executive-order-on-ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states](http://www.whitehouse.gov/briefing-room/presidential-actions/2022/09/15/executive-order-on-ensuring-robust-consideration-of-evolving-national-security-risks-by-the-committee-on-foreign-investment-in-the-united-states) [hereinafter Executive Order].

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Report from the Commission to the European Parliament and the Council: First Annual Report on the Screening of Foreign Direct Investments into the Union*, at 1, COM(2021) 714 final (Nov. 23, 2021), [https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc\\_159935.pdf](https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf).

commercial and may be harmful to national security, particularly in an unstable geopolitical environment where certain countries may be seeking a competitive advantage over others.

15. Recent measures taken by the Canadian government demonstrate just how seriously the risks posed by state-owned enterprises are being taken. In its updated Guidelines, the Government of Canada stated that all foreign investments by state-owned entities, or private investors with close ties to governments, will be subject to enhanced scrutiny.<sup>21</sup> An example of this added scrutiny occurred in December 2020, when the Government of Canada blocked the C\$230 million acquisition of TMAC Resources Inc. (owner of its Hope Bay gold mine in its Nunavut territory) by Shandong Gold Mining Co. (a state-owned Chinese mining company). The prohibition of this acquisition clearly outlined a heightened Canadian scrutiny of inbound state-owned or state-influenced investment from China. The result was not surprising given that it occurred during a period of deteriorating relations and trade tensions following the detention of two Canadian citizens in China, as retaliation for Canada's arrest of Huawei executive Meng Wanzhou at the request of the United States government.<sup>22</sup>

16. In the European Union, concerns from member states about the risks of investments by state-owned enterprises contributed to the adoption of the EU framework for the screening of foreign direct investment into the European Union, which entered into force in April 2019 and became fully applicable in October 2020 (the EU Regulation). Under the EU Regulation, member states are expected to evaluate whether the foreign investor is directly or indirectly controlled by the government of a third country.<sup>23</sup> While the EU Regulation affirms that screening mechanisms shall be transparent and not discriminate between third countries,<sup>24</sup> state-owned investors from non-European Union and non-NATO countries, notably Russia and China, typically face the most scrutiny. For example, in response to the Russian invasion of Ukraine in early 2022 and the heightened risk that foreign investment by Russian and Belarusian investors may pose a risk to the security and public order of member states, the European Commission issued guidance recommending that such investments be scrutinized very closely.<sup>25</sup> On June 30, 2022, the EU also reached political agreement on a new regulation which will allow the European Commission to control non-EU government subsidies given to businesses active in the EU.<sup>26</sup>

17. The EU Regulation also broadened the scope of sectors that individual member states extend its screening regime to. Semi-conductor production, pharmaceuticals, food supply, energy storage are only some of the sectors which are representative for the global trend. Some member States also extended their notification obligations even to EU based foreign investors. Similar to the US, the governing legislation does not define "national security" in many European jurisdictions. This extension to many additional industry

---

<sup>21</sup> Guidelines on the National Security Review of Investments, *supra* note 16.

<sup>22</sup> *China frees Canadians Michael Spavor and Michael Kovrig after Huawei boss released*, BBC NEWS (Sept. 25, 2021), [www.bbc.com/news/world-us-canada-58687071](http://www.bbc.com/news/world-us-canada-58687071).

<sup>23</sup> Regulation (EU) 2019/452 of the European Parliament and of the Council, 2019 O.J. (L179) 1, art. 4(2).

<sup>24</sup> *Id.*, art. 3(2).

<sup>25</sup> *Guidance to the Member States Concerning Foreign Direct Investment from Russia and Belarus in View of the Military Aggression against Ukraine and the Restrictive Measures Laid Down in Recent Council Regulations on Sanctions*, 2022 O.J. (C151) 1.

<sup>26</sup> Once such a regulation takes effect (expected by mid-2023) the proposed regulation would establish mandatory notification regimes for businesses that have received financial contributions from a non-EU government, when participating in certain large mergers or public tenders.



sectors in combination with newly established screening units or authorities on federal levels as well as broad and undefined criteria for the assessment of threats to national security or public order have led to delays and financial risks for companies entering into transactions with non-EU partners.

18. In 2018, the United States enacted the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA).<sup>27</sup> The legislation, which became effective on November 11, 2018, was prompted by growing concerns over Chinese and other foreign investment in American technology companies.<sup>28</sup> Contrary to the EU Regulation, FIRMMA explicitly allows CFIUS to address foreign investors by reference to their country of origin by labelling certain countries as “a country of special concern”—that is, a country having the strategic goal of acquiring critical technologies or infrastructure that could affect United States leadership with respect to national security areas.<sup>29</sup>

#### 2.4. Concern Regarding Cybersecurity and Electronic Warfare

19. In today’s digital economy, electronic security is becoming an increasingly large part of the national security focus of governments, both nationally and internationally. This focus on electronic security has played and is continuing to play an ever more prominent role in foreign investment reviews. In the United Kingdom, for example, the National Security and Investment Act (NSIA) requires that foreign investors notify the government about acquisitions of certain entities in 17 sensitive areas of the economy, including artificial intelligence, which have inherent national security risks.<sup>30</sup> Artificial intelligence is an important tool that can optimize the efficiency and performance of many technologies. However, foreign actors may seek to deploy artificial intelligence applications for malicious and harmful uses.<sup>31</sup> As a result, foreign investments in target companies involved in artificial intelligence or cyber security will be subject to enhanced security in the United Kingdom.

20. In the Canadian context, the federal government explicitly states in its Guidelines that the potential of the investment to enable access to sensitive personal data is a factor that may be considered in the foreign investment review process.<sup>32</sup> This enhanced scrutiny was seen in the Canadian Government’s decision in August 2021 to require state-owned China Mobile International (Canada) Inc., a Canadian subsidiary of Chinese state-owned enterprise, China Mobile Communications Group Co., Ltd., to close or divest its Canadian business.<sup>33</sup> The national security concerns in this case were that the subsidiary might be subject to the demands of a foreign government, which could compromise critical

---

<sup>27</sup> Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), Pub. L. No. 115-232, 132 Stat. 1653.

<sup>28</sup> JAMES K JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 2 (Feb. 26, 2020), <https://crsreports.congress.gov/product/pdf/RL/RL33388>.

<sup>29</sup> *Id.*

<sup>30</sup> National Security and Investment Act: Details of the 17 Types of Notifiable Acquisitions, *supra* note 8.

<sup>31</sup> *Id.*

<sup>32</sup> Guidelines on the National Security Review of Investments, *supra* note 16.

<sup>33</sup> Alexandre Posadzki & Steven Chase, *Ottawa says China Mobile Must Divest Telecom Business*, THE GLOBE & MAIL (Sept. 14, 2021), [www.theglobeandmail.com/business/article-ottawa-says-china-mobile-must-divest-telecom-business](http://www.theglobeandmail.com/business/article-ottawa-says-china-mobile-must-divest-telecom-business).

telecommunications infrastructure, and allow a foreign government to possibly gain access to sensitive data for non-commercial purposes.

21. Governments are also responding to growing concerns regarding electronic warfare. Germany, for example, which uses asset-related parameters in its foreign investment review process, expanded the scope of “war weapons” in 2017 to include non-traditional sensor and electronic warfare products in an effort to adapt to evolving forms of military operations.<sup>34</sup>

### 3. Institutional Forms of Foreign Investment Screening Regimes

22. Many countries have established specific agencies or government ministries to conduct foreign investment reviews so that merger control reviews and foreign investment screening operate separately. While coordination between the two regimes is beneficial for predictability and transparency, BIAC believes the best practice is to have a separate agency responsible for foreign investment reviews.

23. In addition to the very different substantive goals of foreign investment screening reviews and merger control reviews, there are many institutional drawbacks associated with vesting a single competition authority with responsibility for foreign investment screening. These include sometimes conflicting policy goals, lack of focused enforcement, and compromised accountability. In light of these drawbacks, most countries carry out foreign investment reviews as a distinct process with its own rules and dedicated authorities. The United Kingdom’s recent reform to create a new, separate agency responsible for foreign investment reviews is illustrative of the preference for separate agencies.

#### 3.1. Overview of Jurisdictions with Two Separate Regimes

##### 3.1.1. France

24. In France, merger control is governed by the Commercial Code (*Code de commerce*) and the merger control guidelines adopted by the French Competition Authority (*Autorité de la concurrence*), which were updated in July 2020.<sup>35</sup> The French Competition Authority is the independent administrative authority responsible for merger control. However, the Minister of Economy, who previously held this role until 2009, maintains certain residual powers allowing it to request additional investigations or to overturn a French Competition Authority decision in exceptional circumstances for public interest reasons.<sup>36</sup> These reasons include industrial development, the preservation of competitiveness, and the protection of employment.<sup>37</sup> However, since 2009, there has only been one case—Financière Cofigeo’s proposed acquisition of Agripole Group in 2018 –

---

<sup>34</sup> OECD, *supra* note 5, at 46–47.

<sup>35</sup> Press Release, Autorité de la concurrence, The Autorité de la concurrence publishes its new guidelines regarding merger control (July 23, 2020), [www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-publishes-its-new-guidelines-regarding-merger-control](https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-publishes-its-new-guidelines-regarding-merger-control).

<sup>36</sup> Sergio Sorinas & Marie Louvet, *Merger Control in France: Overview*, PRACTICAL LAW (May 1, 2022), <https://uk.practicallaw.thomsonreuters.com/7-500-4886>.

<sup>37</sup> *Id.*



where the Minister of Economy overturned a French Competition Authority decision for reasons of public interest, citing employment protection.<sup>38</sup>

25. The Minister of Economy is the sole authority responsible for foreign investment reviews in France. While there is some level of institutional overlap between merger control and foreign investment review given the Minister's residual powers within the merger control regime, these processes remain otherwise independent. The foreign investment regime relies on Decree No. 2019-1590<sup>39</sup> and the Order of December 31, 2019,<sup>40</sup> as modified by the Order of April 27, 2020.<sup>41</sup> There are specific rules for foreign investments in "sensitive" or "strategic" sectors, as prior approval from the Ministry of Economy will be required pursuant to the *French Monetary and Financial Code*.<sup>42</sup>

### 3.1.2. Germany

26. In Germany, merger control is governed by the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*). German merger control rules under this act are implemented by the Federal Cartel Office (*Bundeskartellamt*), an independent federal authority reporting to the Federal Ministry for Economic Affairs and Climate Action.<sup>43</sup> The Federal Cartel Office remains entirely independent in its handling of cases and in its decision making, and is not bound by external instructions.<sup>44</sup> Its primary objective is to protect competition in Germany, which it accomplishes through bans on cartels, merger control, and consumer protection.<sup>45</sup>

27. Foreign investment reviews in Germany follow the rules set out in the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*), which is based on the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz*).<sup>46</sup> These pieces of legislation set out the rules governing the review of foreign investments, which apply regardless of the applicability of Germany's merger control rules, and were revised to comply with the EU Regulation.<sup>47</sup> The competent authority is the Federal Ministry for Economic Affairs and Climate Action, who will consider whether a proposed acquisition poses a threat to the

---

<sup>38</sup> *Id.*

<sup>39</sup> République Française, "Décret n° 2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France" (Dec. 31, 2019), [www.legifrance.gouv.fr/loda/id/JORFTEXT000039727443](http://www.legifrance.gouv.fr/loda/id/JORFTEXT000039727443).

<sup>40</sup> République Française, "Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France" (Dec. 31, 2019), [www.legifrance.gouv.fr/loda/id/JORFTEXT000039727569](http://www.legifrance.gouv.fr/loda/id/JORFTEXT000039727569).

<sup>41</sup> République Française, "Arrêté du 27 avril 2020 relatif aux investissements étrangers en France" (Apr. 30, 2020), [www.legifrance.gouv.fr/loda/id/JORFTEXT000041835304](http://www.legifrance.gouv.fr/loda/id/JORFTEXT000041835304).

<sup>42</sup> Emily Xueref-Poviac & Katrin Schallenberg, *France*, in FOREIGN DIRECT INVESTMENT REGULATION GUIDE—FIRST EDITION (Dec. 10, 2021), <https://globalcompetitionreview.com/guide/foreign-direct-investment-regulation-guide/first-edition/article/france>.

<sup>43</sup> Torsten Uhlig & Konstantin Putzier, *Merger Control in Germany: Overview*, PRACTICAL LAW (Dec. 1, 2021), <https://ca.practicallaw.thomsonreuters.com/8-500-5324>.

<sup>44</sup> *The Bundeskartellamt*, BUNDESKARTELLAMT, [www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt\\_node.html](http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html).

<sup>45</sup> *Id.*

<sup>46</sup> Uhlig & Putzier, *supra* note 43.

<sup>47</sup> Philipp Cotta, Patrick Alois Huebner & Christian von Wistinghausen, *Germany*, in FOREIGN DIRECT INVESTMENT REGIMES 2022, <https://iclg.com/practice-areas/foreign-direct-investment-regimes-laws-and-regulations/germany>.

public order or security of Germany.<sup>48</sup> Special rules apply to the acquisition of German companies operating in sensitive security areas, including manufacturers of military weapons and technologies, and developers of products with information technology security features used to process classified government information.<sup>49</sup>

### 3.1.3. Canada

28. In Canada, merger control is governed by the Competition Act (CA), a federal statute that applies across Canada and contains both criminal and civil provisions aimed at preventing harmful anti-competitive practices in the marketplace. The CA empowers Canada's Commissioner of Competition to challenge mergers that are likely to prevent or lessen competition substantially in a relevant market.<sup>50</sup> The Competition Bureau is an independent body headed by the Commissioner, which investigates complaints and decides whether to proceed with the filing of an application to the Competition Tribunal to challenge a proposed merger.

29. The foreign investment screening review process in Canada is regulated by the ICA and (except as it applies to cultural industries) is administered by the Minister of Innovation, Science, and Industry. It operates separately from the country's merger control process. The ICA's stated purpose is both to review "significant investments" by non-Canadians with a view to encouraging investment and economic growth, as well as to review investments by non-Canadians that "could be injurious to national security."<sup>51</sup> The ICA applies to acquisitions of existing Canadian businesses by non-Canadians and cases where non-Canadians establish new Canadian businesses. The statutory test is one of "net benefit" to Canada, which considers national interest factors. Competition considerations are one of the statutory factors used to assess net benefit to Canada and constitute the only explicit overlap between the Minister's net benefit analysis and the Competition Bureau's merger control review.

30. The national security review process under the ICA operates separately from the net benefit review process and may take an extended period of time. The recently updated Guidelines published by the Government of Canada confirm that the Investment Review Division of Innovation, Science and Economic Development Canada (IRD) may consider factors beyond traditional national security areas such as defence or terrorism, notably the potential impact of the investment on critical minerals and critical mineral supply chains.

31. In early March 2021, the Government of Canada published a list of thirty-one critical minerals, including minerals such as aluminium, cobalt, nickel, zinc, and uranium.<sup>52</sup> The federal government defines these minerals as essential to Canada's economic security and required for Canada's transition to a low-carbon economy, noting that they are also important for Canada's partners. On October 28, 2022, the government issued a new policy related to the treatment of foreign state-owned enterprise (SOE) investments in these critical minerals. The policy allows the IRD to examine any investment, allows the IRD to clear investments of this nature only on an "exceptional basis". The policy also further

---

<sup>48</sup> *Investment Screening*, FOREIGN MINISTRY OF ECONOMIC AFFAIRS, [www.bmwk.de/Redaktion/EN/Artikel/Foreign-Trade/investment-screening.html](http://www.bmwk.de/Redaktion/EN/Artikel/Foreign-Trade/investment-screening.html).

<sup>49</sup> *Id.*

<sup>50</sup> *Competition Act*, RSC 1985, c C-34.

<sup>51</sup> *Investment Canada Act*, RSC 1985, c 28 (1st Supp), s 2.

<sup>52</sup> The list is largely consistent with a similar U.S. government list of thirty-five critical mineral resources.

states that all foreign SOE investments in the critical minerals sector, no matter the size, be subject to enhanced scrutiny under the national security review provisions of the ICA. Within a week of the issuance of this policy, the government announced that it had ordered the divestiture of three separate investments in Canadian critical mineral companies on a national security basis by the Chinese companies: Sinomine (Hong Kong) Rare Metals Resources Co. Ltd., Chengze Lithium International Ltd., and Zangge Mining Investment (Chengdu) Co., Ltd.<sup>53</sup>

### 3.1.4. United States

32. In the United States, the Federal Trade Commission (FTC) and the Antitrust Division of the United States Department of Justice (DOJ) are responsible for merger control under section 7A of the Clayton Act, also known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976.<sup>54</sup> This legislation requires parties to non-exempt proposed mergers to notify the FTC and DOJ of their transaction prior to closing. Either the FTC or the DOJ may legally block the transaction if the agency finds the deal would “substantially lessen competition.”<sup>55</sup> Given that the two agencies share jurisdiction over merger control, transactions requiring further review are assigned to either the FTC or the DOJ on a case-by-case basis according to which agency has more expertise in the relevant industry.<sup>56</sup>

33. Foreign investment reviews are conducted separately from merger control reviews by CFIUS, an interagency committee responsible for determining the effect of transactions involving foreign investment on the national security of the United States.<sup>57</sup> CFIUS operates under section 721 of the Defence Production Act of 1950, as amended, most recently by the adoption of FIRRMA.<sup>58</sup> The governing legislation does not define “national security”, though it sets out a list of factors that may be considered. These factors include, among other things, the potential effects of the transaction on critical technologies, critical resources, critical infrastructure, and national defense requirements. However, the concept of national security is continuously expanding. CFIUS has become more active in recent years as a result of increasing globalization, increasing digitalisation and concerns over domestic sourcing, infrastructure, and capabilities. In addition to broadening the factors that may be considered under foreign investment reviews, FIRRMA significantly expanded CFIUS’ jurisdiction, updated various processes, and strengthened CFIUS’ authorities,

---

<sup>53</sup> Press Release, Gov’t of Canada, Government of Canada Orders the Divestiture of Investments by Foreign Companies in Canadian Critical Minerals Companies (Nov. 2, 2022), <https://www.canada.ca/en/innovation-science-economic-development/news/2022/10/government-of-canada-orders-the-divestiture-of-investments-by-foreign-companies-in-canadian-critical-mineral-companies.html>.

<sup>54</sup> 15 U.S.C. § 18a.

<sup>55</sup> *Merger Review*, FED. TRADE COMM’N, [www.ftc.gov/news-events/topics/competition-enforcement/merger-review](http://www.ftc.gov/news-events/topics/competition-enforcement/merger-review).

<sup>56</sup> *Id.*

<sup>57</sup> *CFIUS Overview*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview>.

<sup>58</sup> *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius>.

including the authority to share information with foreign governments, mandate filings, enforce divestments and mitigation, and fund operations.<sup>59</sup>

34. Although CFIUS focuses exclusively on national security concerns, repeated legislative proposals to broaden foreign direct investment considerations in the United States appear to be pushing CFIUS in new directions. First, there is a general trend towards tightening regulations against Russia and China. This is evidenced in President Biden's recent Executive Order.<sup>60</sup> Although Russia and China are not explicitly mentioned in the order, the order makes frequent reference to the threat of investments by foreign persons with "relevant third-party ties" that may impair United States national security. Given the current geopolitical context, one can safely assume Russia and China fall within the scope of relevant third parties.<sup>61</sup> Second, cybersecurity and espionage are now at the forefront of the United States' national security concerns. President Biden's executive order lists a series of factors relating to cybersecurity risks that CFIUS may consider in its reviews, notably the foreign investor's capability and intent to conduct cyber intrusions or other malicious cyber-enabled activity.

### 3.2. Changing Tides Towards Two Separate Regimes

35. On January 4, 2022, the NSIA came into force in the United Kingdom, representing the most significant change in the country's national security regime in twenty years.<sup>62</sup> The new regime was introduced to bring the country's foreign investment review process "into the twenty-first century" and allow the Government of the United Kingdom to better respond to the new threats it faces today.<sup>63</sup>

36. Historically, merger control and foreign investment review in the United Kingdom were closely linked. The Competition and Markets Authority (CMA) was responsible for both types of reviews under the Enterprise Act 2002.<sup>64</sup> The CMA would apply a public interest test to merger control reviews, and a national security test to foreign investment reviews. With the coming into force of the NSIA, the public interest provisions of the Enterprise Act 2002 will remain in force, but the national security considerations under that legislation will be replaced by the NSIA.<sup>65</sup> In other words, merger control in the United

---

<sup>59</sup> Aimen Mir, Christine Laciak & Sarah Melanson, *United States: CFIUS Review*, in AMERICAS ANTITRUST REVIEW 2020, <https://globalcompetitionreview.com/review/the-antitrust-review-of-the-americas/2020/article/united-states-cfius-review>.

<sup>60</sup> Executive Order, *supra*, note 17

<sup>61</sup> Rising geopolitical tensions are further reflected in the fact that no Western Government attended the Winter Olympics earlier this year in Beijing.

<sup>62</sup> Press Release, Dep't for Bus., Energy & Indus. Strategy, New and Improved National Security and Investment Act Set to be Up and Running, (July 20, 2021), [www.gov.uk/government/news/new-and-improved-national-security-and-investment-act-set-to-be-up-and-running](http://www.gov.uk/government/news/new-and-improved-national-security-and-investment-act-set-to-be-up-and-running).

<sup>63</sup> Press Release, Dep't for Bus., Energy & Indus. Strategy, New Powers to Protect UK from Malicious Investment and Strengthen Economic Resilience, (Nov. 11, 2020), [www.gov.uk/government/news/new-powers-to-protect-uk-from-malicious-investment-and-strengthen-economic-resilience](http://www.gov.uk/government/news/new-powers-to-protect-uk-from-malicious-investment-and-strengthen-economic-resilience).

<sup>64</sup> Enterprise Act 2002 (UK).

<sup>65</sup> Dep't for Bus., Energy & Indus. Strategy, The National Security and Investment Act Alongside Regulatory Requirements, (Jan. 4, 2022), [www.gov.uk/government/publications/the-national-security-and-investment-act-alongside-regulatory-requirements/the-national-security-and-investment-act-alongside-regulatory-requirements](http://www.gov.uk/government/publications/the-national-security-and-investment-act-alongside-regulatory-requirements/the-national-security-and-investment-act-alongside-regulatory-requirements).

Kingdom will continue to be governed by the Enterprise Act 2002 and the NSIA will hereafter govern foreign investment reviews in the country.<sup>66</sup>

37. The NSIA creates a standalone foreign investment screening regime. If an investment falls within the scope of the NSIA, the parties involved will be required to notify the Government of the United Kingdom of any acquisition of entities operating within a prescribed list of seventeen sensitive areas, including defence, energy, critical supplies to government, communications, and data infrastructure.<sup>67</sup> The newly formed Investment Security Unit is the operation unit within the Department for Business, Enterprise and Industrial Strategy responsible for the administration of the screening regime under the NSIA and is separate from the CMA.<sup>68</sup> The ultimate decision-maker is the Secretary of State.<sup>69</sup>

38. The NSIA and the creation of a government unit dedicated only to foreign investment reviews is the result of many years of discussion about the country's approach to national security. In a 2018 White Paper, the Secretary of State for Business, Energy, and Industrial Strategy recognized that the powers under the Enterprise Act, 2002 were no longer sufficient to address the changing national security threats to the United Kingdom.<sup>70</sup> The creation of a separate, distinct agency responsible for foreign investment reviews was the method adopted by the Government of the United Kingdom to address these concerns.

#### 4. Certainty and Transparency in Navigating Parallel Foreign Investment Screening

39. Foreign investment is an integral part of many countries' economies. It provides capital to finance new industries, enhance existing industries, increase and improve infrastructure, and create employment opportunities.<sup>71</sup> Foreign investment has other benefits too, including but not limited to increasing tax revenues for governments, bringing in new business, opening up additional export opportunities, encouraging competition, and inspiring innovation.<sup>72</sup>

40. Foreign investment screening allows countries to reap the benefits of foreign investment while also ensuring their essential interests are protected. However, with the rise in foreign investment reviews, businesses face significant challenges in navigating parallel merger control reviews and foreign investment reviews. These challenges affect the interests of certainty, transparency, and predictability, all of which are essential to business planning. As a result, merger control reviews and foreign investment reviews

---

<sup>66</sup> *Id.*

<sup>67</sup> National Security and Investment Act: Details of the 17 Types of Notifiable Acquisitions, *supra* note 8.

<sup>68</sup> Dep't for Bus., Energy & Indus. Strategy, Overview of the Investment Security Unit Factsheet, (Mar. 3, 2021), [www.gov.uk/government/publications/national-security-and-investment-bill-2020-factsheets/overview-of-the-investment-security-unit-factsheet](https://www.gov.uk/government/publications/national-security-and-investment-bill-2020-factsheets/overview-of-the-investment-security-unit-factsheet).

<sup>69</sup> National Security and Investment Act 2021 (UK), s 13.

<sup>70</sup> Sec. of State for Bus., Energy & Indus. Strategy, National Security and Investment: A Consultation on Proposed Legislative Reforms 22 (July 2018), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728310/20180723 - National security and investment - final version for printing 1 .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728310/20180723_-_National_security_and_investment_-_final_version_for_printing_1_.pdf).

<sup>71</sup> *The Benefits of Foreign Investment*, DEP'T OF FOREIGN AFFAIRS & TRADE, [www.dfat.gov.au/trade/investment/the-benefits-of-foreign-investment](http://www.dfat.gov.au/trade/investment/the-benefits-of-foreign-investment).

<sup>72</sup> *Id.*

should not be entirely “siloes”—they require careful coordination both in terms of timing and message. Still, parties may find that the agencies involved are less than coordinated.

41. Businesses face challenges when navigating parallel investment reviews, including dealing with the different thresholds for review, the contrasting timelines under each review, the varying level of transparency of each type of review, the risk of contradictory outcomes, and the increased complexity of multi-jurisdictional and cross-border transactions. Where there are parallel regimes, it would be useful for there to be mandatory time limits for initiation and completion of the parallel review in order to allow businesses to better plan their transactions. The discretion for foreign investment screening authorities to arbitrarily extend deadlines should also be eliminated.

#### 4.1. Differing Thresholds for Review

42. The first challenge in navigating parallel foreign investment screening reviews and merger control reviews is that each review generally has a different threshold. Although attributable to the different objectives being pursued under the two regimes, this can become problematic in situations where no application for review or notification is required under the merger control legislation, but a transaction may nonetheless be subject to a foreign investment review due to the nature of the foreign investor or of the target company.

43. In the United States, there are two thresholds for merger control reviews. First, there is a size-of-transaction threshold of US\$101 million.<sup>73</sup> If the foreign investor will hold securities, non-corporate interests, or assets above that amount as a result of the transaction, the transaction may be reportable if it also meets the size-of-party threshold. The size-of-party threshold will generally be met when one party to the transaction has sales or assets of at least US\$202 million and one party has sales or assets of at least US\$20.2 million.<sup>74</sup> In contrast, CFIUS has an extremely broad mandate and can review any transaction it deems to be a “covered transaction”, which the applicable regulations define as any transaction with any foreign person which could result in control of a United States business by such foreign person.<sup>75</sup>

44. In the United Kingdom, recent reforms to the merger control regime announced in 2022 will affect existing notification thresholds once they enter into force. First, the United Kingdom target turnover threshold will be increased from £70 million to £100 million to account for inflation.<sup>76</sup> Second, a new share of supply threshold will be introduced to enable the review of “killer acquisitions” and other mergers where the parties are not direct competitors.<sup>77</sup> This new threshold will operate alongside the existing threshold where notification is required for mergers leading to at least a 25% share supply in the United

---

<sup>73</sup> Press Release, Fed. Trade Comm’n, FTC Announces Annual Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates, (Jan. 24, 2022), [www.ftc.gov/news-events/news/press-releases/2022/01/ftc-announces-annual-update-size-transaction-thresholds-premerger-notification-filings-interlocking](http://www.ftc.gov/news-events/news/press-releases/2022/01/ftc-announces-annual-update-size-transaction-thresholds-premerger-notification-filings-interlocking).

<sup>74</sup> Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 340 (Jan. 24, 2022).

<sup>75</sup> 31 C.F.R. § 800.207.

<sup>76</sup> Dep’t for Bus., Energy & Indus. Strategy, Reforming Competition and Consumer Policy: Government Response (Apr. 20, 2022), [www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response#ministerial-foreword](http://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response#ministerial-foreword).

<sup>77</sup> *Id.*



Kingdom.<sup>78</sup> The thresholds under the United Kingdom’s foreign investment review process will vary according to the sensitive sector involved and are set out in guidance released by the Department for Business, Energy & Industrial Strategy’s. For example, a transaction will fall under the scope of communications if the entity being acquired has a turnover of at least £50 million.<sup>79</sup> While certain types of sensitive sectors require mandatory notifications, the Government of the United Kingdom has wide discretion and may investigate transactions within the 17 sensitive sectors even if they are not subject to the mandatory notification requirements.

45. In Canada, pre-merger notification filings are required under the CA when proposed transactions exceed two thresholds: the size of the parties and the size of the transaction.<sup>80</sup> The party-size threshold is met where the parties to the transaction (together with their affiliates) have aggregate Canadian assets that exceed C\$400 million, or gross revenues from sales in, from, or into Canada that exceed C\$400 million in aggregate.<sup>81</sup> In order for the pre-merger notification requirement to be triggered, the size of the transaction must also exceed C\$93 million.<sup>82</sup> Under the ICA, transactions being evaluated for their “net benefit” to Canada must meet a certain threshold, which will vary depending on the type of investment in question. For example, the thresholds for investments in cultural businesses are C\$5 million for direct investments and C\$50 million for indirect investments.<sup>83</sup> On the other hand, a national security review may be invoked in any transaction involving a non-Canadian investor, irrespective of the size of the transaction and, arguably, irrespective of the extent of the interest being acquired by the foreign investor.

46. Interaction between the two regimes in practice can also affect the legal standard for triggering a review. In Australia, for example, the foreign investment screening regime is mandatory for transactions meeting certain monetary thresholds whereas there is a voluntary merger notification regime with recommended thresholds.<sup>84</sup> However, where a foreign investment filing is required and regardless of whether the recommended monetary threshold is met for voluntary merger notification, the Australian Foreign Investment Review Board (FIRB) will not sign off on a merger unless it has also received approval from the competition authority, the ACCC. Effectively, therefore, the lack of harmonization between thresholds results in a mandatory merger notification in all cases where a foreign investment review is required.

---

<sup>78</sup> *Id.*

<sup>79</sup> National Security and Investment Act: Details of the 17 Types of Notifiable Acquisitions, *supra* note 8.

<sup>80</sup> Competition Bureau Canada, Procedures Guide for Notifiable Transactions Certificates Under the Competition Act (June 23, 2022), [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03302.html).

<sup>81</sup> *Id.*

<sup>82</sup> Press Release, Competition Bureau Canada, Pre-merger notification transaction-size threshold to remain at \$93M in 2022 (Feb. 8, 2022), [www.canada.ca/en/competition-bureau/news/2022/02/pre-merger-notification-transaction-size-threshold-to-remain-at-93m-in-2022.html](http://www.canada.ca/en/competition-bureau/news/2022/02/pre-merger-notification-transaction-size-threshold-to-remain-at-93m-in-2022.html).

<sup>83</sup> *Thresholds for Review*, GOV’T OF CANADA, <https://ised-isde.canada.ca/site/investment-canada-act/en/thresholds>.

<sup>84</sup> AUSTL. COMPETITION & CONS. COMM’N, MERGER GUIDELINES (Nov. 2008, amended Nov. 2017), <https://www.accc.gov.au/system/files/Merger%20guidelines%20-%20Final.PDF>.

47. While different thresholds are perhaps understandable given the different scope of these regimes, BIAC recommends close coordination between the regimes to avoid and address any conflicting objectives and unnecessary burdens.

## 4.2. Differing Timelines under Each Review

48. The second challenge in navigating parallel reviews is that each form of review typically follows a different timeline. Merger control reviews of transborder transactions have traditionally proceeded on relatively predictable timelines, applying well-established rules for merger control and involving international coordination between competition authorities in different jurisdictions. These normative timelines are subject to significant extensions in exceptional cases where a proposed merger is subject to contested merger proceedings. A recent rise in denials or delays of transactions on foreign investment grounds, however, has altered this normative landscape where there are concurrent competition and foreign investment reviews, ushering in a new, evolving regulatory paradigm both within and between jurisdictions.

49. In the United States, for example, there are essentially two phases to the merger control review process. First, both buyer and seller must file notice of a proposed deal providing information about the industry and their respective businesses. Once this filing is complete, the parties must wait thirty days (fifteen days in the case of a bankruptcy or cash tender offer) or until either the FTC or DOJ grants early termination of the waiting period.<sup>85</sup> Second, if the FTC or DOJ sends the parties a second request for information, the FTC or DOJ will have an additional thirty days (ten days in the case of a bankruptcy or cash tender offer) to take action once the parties have substantially complied with the request.<sup>86</sup> Timelines under foreign investment reviews will typically take longer. Notices to CFIUS are reviewed within a forty-five-day period (thirty days for declarations), investigated within an additional forty-five-day period as needed, and may also be subject to a fifteen-day presidential review period.<sup>87</sup> Given the varying timelines, parties with urgent transactions subject to both a merger control review and a foreign investment review may find that the transaction cannot close on the intended date. While in many cases a change to the closing date can be effectively managed, there are some cases where such a change can be detrimental.

50. A recent example from Germany is also illustrative of the types of timing issues that can arise due to parallel reviews. In this case, GlobalWafers, a Taiwanese technology manufacturing company, proposed to acquire the majority shares and control in Siltronic, a Munich-based microchip supplier.<sup>88</sup> In February 2021, the German Federal Cartel Office conditionally approved the transaction under Germany's merger control review. Although a notification was not mandatory at the time, GlobalWafers voluntarily applied for a certificate of no-objection to obtain legal certainty its transaction would not be blocked under the foreign investment review process. However, Germany's Federal Ministry for Economic Affairs and Climate Protection did not decide on the certificate of no-objection

---

<sup>85</sup> *Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, [www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process](http://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process).

<sup>86</sup> *Id.*

<sup>87</sup> *U.S. CFIUS Overview*, *supra* note 57.

<sup>88</sup> Ludwig Burger & Andreas Rinke, GlobalWafers' Siltronic Deal Fails as Germany Misses Deadline, REUTERS (Feb. 1, 2022), [www.reuters.com/business/globalwafers-siltronic-deal-fails-german-govt-approval-misses-deadline-2022-01-31/](http://www.reuters.com/business/globalwafers-siltronic-deal-fails-german-govt-approval-misses-deadline-2022-01-31/).

before the deadline set by the acquirer to obtain all regulatory approvals. As a result, the deal failed. GlobalWafers applied for a court ruling that the no-objection was deemed to have been issued, but this application was denied by both the Administrative Court of Berlin and the Higher Administrative Court of Berlin.<sup>89</sup>

### 4.3. Differing Considerations Regarding Transparency

51. The differing levels of transparency between foreign investment reviews and merger control reviews constitutes an additional challenge. Providing information to the public about how laws are enforced and administered is in the public interest. However, given the more sensitive nature of foreign investment screening reviews, particularly in cases pertaining to national security, the level of transparency between the two forms of reviews generally differs. While a certain level of confidentiality is justified in the context of foreign investment reviews, especially with respect to national security, efforts should be made to ensure that the process remains transparent to the extent reasonably possible. Otherwise, there is a risk that foreign investment review decisions will appear arbitrary to the public.

52. In the Canadian context, the Competition Bureau places an emphasis on transparency and “best practices” in the merger review process, which can be contrasted with the lack of transparency in the foreign investment review process. Indeed, prior to the release of the first set of Guidelines in 2016, which were updated in 2021, national security reviews in Canada were very much a black box. While the Guidelines provide much-needed guidance, the factors remain broad. For example, “the potential impact of the investment on Canada’s international interests, including foreign relationships”<sup>90</sup> is open to interpretation. In practice, a foreign investor cannot predict how the Canadian government will apply this factor in any given circumstance.

53. The same “secrecy” exists in the United States as all CFIUS reviews are confidential, including the outcome and reasoning.<sup>91</sup> Pursuant to section 721 of the *Defense Production Act of 1950*, CFIUS does not publicly confirm or deny that a transaction has been notified to CFIUS, with certain exceptions for when the parties themselves publicly disclose documentary material or information filed with CFIUS.<sup>92</sup> To many members of the business community, this lack of transparency makes it difficult to predict whether a transaction will be subject to a foreign investment screening review by CFIUS and if so, what factors will be evaluated.

### 4.4. Potential Tensions Between Results of Each Review

54. An additional challenge of parallel reviews is that the policy objectives underlying each type of review may result in different outcomes. While oftentimes these goals can be complementary,<sup>93</sup> there are circumstances where a merger control review and a foreign

---

<sup>89</sup> Michael Masling et al, *FDI Screening Alert: Challenges for Sensitive Technology Deals in Germany and United Kingdom*, MORGAN LEWIS (Mar. 1, 2022), [www.morganlewis.com/pubs/2022/03/fdi-screening-alert-challenges-for-sensitive-technology-deals-in-germany-and-united-kingdom](http://www.morganlewis.com/pubs/2022/03/fdi-screening-alert-challenges-for-sensitive-technology-deals-in-germany-and-united-kingdom).

<sup>90</sup> Guidelines on the National Security Review of Investments, *supra* note 16.

<sup>91</sup> *U.S. CFIUS Overview*, *supra* note 57.

<sup>92</sup> *Id.*

<sup>93</sup> In the Canadian context, for example, the overall purpose of the CA is to maintain and encourage competition in Canada. On the other hand, the purpose of the ICA is to ensure that significant foreign

investment screening review can lead to different outcomes. Examples from Germany and Australia illustrates the type of tensions that may arise.

55. In Germany in 2016, this tension forced its monopoly commissioner, Daniel Zimmer, to quit in protest after German economics minister Sigmar Gabriel approved the takeover of supermarket chain Kaiser's Tengelmann by rival Edeka. The commissioner was adamant that the detrimental impact of the merger on competition would not be offset by "benefits to the public welfare."<sup>94</sup> The commissioner wrote a lengthy report advising against the merger, stating that it would hamper competition in big cities such as Berlin and Munich and could fuel rising prices (at the time Edeka was Germany's biggest grocer, with a 24% share of the market). Although Minister Gabriel attached conditions maintenance of labor conditions to his approval, this was not enough to dissuade the commissioner from tendering his resignation.

56. In 2013, the Australian Federal Treasurer who led the investigation under Australia's FIRB rejected Archer Daniels Midland Company's \$2.55 billion bid for Graincorp on the basis that it was contrary to Australia's national interest.<sup>95</sup> This decision was made even after the Australian Competition and Consumer Commission (ACCC) had announced it would not block the merger on competition grounds. Despite the Australian Prime Minister's statement that Australia was once again "open for business,"<sup>96</sup> the concerns of farmers were attributed as a primary motivator in the government's decision to reject the bid. Although competition is admittedly only one of the factors that the FIRB considers when reviewing a proposed foreign investment, the lack of consensus between the FIRB and the ACCC on this ground sent an unclear and potentially discouraging signal to prospective investors. The Australian Graincorp rejection reflects the reality that foreign investment reviews, more often than not, require governments to balance political and stakeholder interests.

#### 4.5. Complexity of Multi-jurisdictional and Cross-Border Mergers

57. The challenges described above are multiplied in the context of mergers involving several jurisdictions. Indeed, a lack of coordination between competition authorities from different jurisdictions can prove fatal for a transborder merger, as demonstrated by the Honeywell transaction which saw major differences between the United States Department of Justice and the Canadian Competition Bureau on the one hand, and the European Commission on the other.<sup>97</sup> That case served as a "wake-up" call which was a catalyst for the growth of the International Competition Network. It has also led to greater information

---

investments in Canada encourage investment, economic growth and employment opportunities, and that investments by non-Canadians are not injurious to national security.

<sup>94</sup> *Germany: Watchdog quits amid supermarket takeover row*, COMPETITION POLICY INT'L (Mar. 20, 2016), [www.competitionpolicyinternational.com/germany-watchdog-quits-amid-supermarket-takeover-row/](http://www.competitionpolicyinternational.com/germany-watchdog-quits-amid-supermarket-takeover-row/).

<sup>95</sup> Adam Rollason, *Timeline | How the GrainCorp Takeover Has Played Out*, FIN. REV. (Nov. 29, 2013), [www.afr.com/companies/agriculture/timeline-how-the-graincorp-takeover-has-played-out-20131129-iyrb](http://www.afr.com/companies/agriculture/timeline-how-the-graincorp-takeover-has-played-out-20131129-iyrb).

<sup>96</sup> Sid Maher & Ben Packham, *Tony Abbott Claims Victory and Says Australia is Open for Business*, THE AUSTRALIAN (Sept. 8, 2013), available at [www.theaustralian.com.au](http://www.theaustralian.com.au).

<sup>97</sup> See generally Jeremy Grant & Damien J Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1:3 J. OF COMPETITION L. & ECON. 695 (2005).

sharing among competition authorities and consequently less risk of friction in decision-making in transborder merger cases.

58. Although the past decade has seen greater information sharing, challenges still arise. A recent example from the European Union is illustrative of this. In late 2020, the Dutch insurer AEGON proposed to sell a number of subsidiaries to a single buyer, with a focus on operations in Hungary. Following legislative amendments which expanded the jurisdiction of the Hungarian authority responsible for foreign investment review, the Government of Hungary issued a veto on April 6, 2021, rejecting the transaction on the basis of national security.<sup>98</sup> However, only four months later, the European Commission unconditionally cleared the transaction under the European Union's Merger Regulation. Following an investigation into Hungary's decision, the European Commission ordered that Hungary withdraw its veto by March 18, 2022.<sup>99</sup> While ultimately the transaction succeeded, this case demonstrates the complexities of dealing with competition authorities across multiple jurisdictions.

## 5. Conclusion

59. The broadening scope, timelines, and potential regulatory consequences need to be factored into business planning and government accountability. In an increasing array of more complex cases, these reviews may become a source of significant deal and timing risk, which may affect a broadening range of industries. Foreign investment reviews can also present coordination challenges with merger control reviews both within and between jurisdictions. These challenges threaten the interests of legal certainty, transparency, and predictability. In order to protect these interests, BIAC strongly recommends that foreign investment screening reviews in all jurisdictions be conducted: (a) by an agency separate from that responsible for merger control reviews; (b) based on a set of objective criteria clearly articulated in legislation or guidance; and (c) in a coordinated fashion, to the greatest extent possible, with merger control reviews, from the perspectives of timing, procedural transparency, remedies, and overall government accountability. The importance of the interface between foreign investment screening and merger control reviews is likely to continue to grow as geopolitical tensions between the major economic global powers continue to show no signs of lessening, but rather are becoming even more complex.

---

<sup>98</sup> Press Release, Eur. Comm'n, Mergers: Commission Finds that Hungary's Veto over the Acquisition of AEGON's Hungarian Subsidiaries by VIG Breached Article 21 of the Merger Regulation, (Feb. 21, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1258](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1258).

<sup>99</sup> *Id.*