

REVIEWING CROSS-BORDER MERGERS AND
ACQUISITIONS FOR COMPETITION AND NATIONAL
SECURITY:

A COMPARATIVE LOOK AT HOW THE UNITED STATES,
EUROPE, AND CHINA SEPARATE SECURITY CONCERNS
FROM COMPETITION CONCERNS IN REVIEWING
ACQUISITIONS BY FOREIGN ENTITIES

Kevin B. Goldstein

I. INTRODUCTION.....	218
II. THE UNITED STATES – THE PARALLEL-REVIEW SYSTEM	220
A. Competition Merger Review.....	220
B. National Security Merger Review	222
C. Defining National Security	224
III. THE EUROPE UNION – MANY COUNTRIES, ONE REVIEW.....	227
A. The European Commission – Directorate General for Competition.....	227
B. The United Kingdom	229
C. Further Defining National Security Under the EU	230
IV. CHINA – A SYSTEM RAPIDLY EMERGING	231
A. The Antimonopoly Law	232
B. New Provisions on National Security Review.....	235
C. National Security, Economic Security, and Cultural Security: China’s Broad and Informal Definition.....	237
V. CASE STUDIES	240
A. US Case Study: CNOOC and Unocal.....	241
B. Europe and the UK Case Study: BAE and Finmeccanica	244
C. Chinese Case Studies	246
1. Carlyle Group and Xugong.....	246
2. Coca-Cola and Huiyuan Juice	247
VI. NATIONAL SECURITY REVIEW AS A SOLUTION (PARTIALLY)	251
A. Power Vacuums Lead to Power Grabs	252
1. How MOFCOM’s Action Preempted SAIC.....	252

2. How MOFCOM's Action Preempted the NDRC.....	254
B. Political Pressure on MOFCOM.....	255
VII.CONCLUSION.....	256

REVIEWING CROSS-BORDER MERGERS AND ACQUISITIONS FOR COMPETITION AND NATIONAL SECURITY:

A COMPARATIVE LOOK AT HOW THE UNITED STATES, EUROPE, AND CHINA SEPARATE SECURITY CONCERNS FROM COMPETITION CONCERNS IN REVIEWING ACQUISITIONS BY FOREIGN ENTITIES

*Kevin B. Goldstein**

Abstract

This Article takes a comparative look at how governments review cross-border mergers for both competition and national security concerns. In particular, key factors are the institutional mechanisms through which these two reviews are separated or combined and how “national security” is defined in the context of economic activity. The focus is on the three major economic markets: the U.S., the EU (using the example of the UK as a member state), and China, with particular emphasis on China’s rapidly developing system.

In the U.S., antitrust review is wholly separate from the national security review conducted by the Committee on Foreign Investment in the United States (“CFIUS”). In Europe, large mergers are notified to the EC Directorate General for Competition, however, individual Member States may raise national security exceptions within the same competition review process. Though China has reviewed foreign investment for years, comprehensive competition review began when the Antimonopoly Law became effective in 2008. Recently, China’s State Council has implemented an interdepartmental national security review system for foreign mergers and acquisitions.

This Article examines the existent U.S. and EU systems alongside the emerging Chinese system of national security review. Examples demonstrate that national security review in the U.S. has often become politicized, though primarily by the U.S. Congress and not by CFIUS. Politicized mergers result in uncertainty for businesses and can harm diplomatic relations with key trading partners. The UK has had success avoiding the pitfalls of politicized reviews, however, the European system could not be successfully replicated by the U.S. or China due to their more centralized political systems.

Ultimately, the definition of “national security” will have the greatest impact on which cross-border mergers receive clearance. Though China has not explicitly defined national security, concerns about foreign investment relate to military defense, strategic economic security, and what has been called cultural security. The U.S. and EU have historically limited their definitions of national security to the defense arena. However, the Foreign Investment and National Security Act of 2007 significantly broadened the U.S.’s definition to include many sectors of the economy previously beyond CFIUS’s purview. This new definition and other changes make U.S. practice more likely to appeal to Chinese lawmakers and are likely to influence the emerging Chinese national security review committee.

Early merger reviews under the Antimonopoly Law, especially the Coca-Cola and Huiyuan case, have drawn criticism for apparently allowing factors other than competition to influence the Ministry of Commerce Antimonopoly Bureau’s decisions. China’s new national security

review is likely to have a positive impact on the internal politics that may have influence the Antimonopoly Bureau. While politicization of merger reviews is likely to continue in the future, adopting a CFIUS-type interdepartmental review system can act as a lightning rod, freeing the Antimonopoly Bureau from pressure to consider non-competition factors. This will enhance transparency and improve external perceptions by investors and trading partners.

This Article concludes that the CFIUS model, taking account of the great increase in authority since 2007, is a good fit for China's political climate. If properly implemented, creation of a national security review system will provide substantial, though limited, benefits to China.

I. INTRODUCTION

This paper takes a comparative look at how governments review cross-border mergers for both competition and national security concerns. In particular, this paper examines the structural and institutional mechanisms through which these two reviews are separated or combined and how “national security” is defined in the economic context. The focus is on the three major economic markets: the United States, the European Union (using the example of the United Kingdom as a Member State), and China.

Over the past decades, global competition law has been marked by a high degree of convergence in both substantive law and procedure. Indeed, multilateral institutions such as the International Competition Network and newly created international affairs offices of national enforcers have made convergence a top priority.¹ While significant differences still remain, there is remarkable similarity between the substance and procedure followed by the world's major antitrust enforcers.

Leading the efforts toward regulatory convergence have been the United States (“U.S.”) and the European Union (“EU”) as the world's most powerful and influential enforcers.² China is a

* Member of the New York Bar; former Visiting Lecturer, Tsinghua University School of Law, 2010; Tsinghua University School of Law, LL.M. 2010; Georgetown University Law Center, J.D. 2009; Dartmouth College, A.B. 2005. © 2011, Kevin B. Goldstein. The author thanks Tarrant Mahony for his many helpful comments on an earlier version of this Article, which received an award for Best Graduate Thesis at Tsinghua Law in 2010. Additional thanks are due to James Feinerman and Suat Eng Seah for their guidance on discrete research topics. The views expressed are the author's alone.

¹ See *About, INTERNATIONAL COMPETITION NETWORK*, <http://www.internationalcompetitionnetwork.org/about.aspx> (last visited Apr. 11, 2011); see also, e.g., *About the Office of International Affairs, FEDERAL TRADE COMMISSION*, <http://ftc.gov/oia/about.shtml> (last visited May 8, 2011) (“The FTC works with competition and consumer protection agencies around the world to promote cooperation and convergence toward best practices.”).

² As an example of U.S. and European leadership, the current Chair and Vice-Chair of the International Competition Network's leadership body are, respectively, John Fingleton, Chief Executive of the U.K.'s Office of Fair Trading, and William Kovacic, one of the five Commissioners of the U.S. Federal Trade Commission. *Steering Group Members, INTERNATIONAL COMPETITION NETWORK*, <http://www.internationalcompetitionnetwork.org/about/steering-group/members.aspx> (last visited Apr. 11, 2011).

newcomer, with its first comprehensive competition law, the Antimonopoly Law (“AML”), coming into effect in 2008.³ Following the trend of convergence, China’s AML reflects its lengthy study of U.S., EU, and other competition enforcement regimes. It is widely accepted that China, as its economy continues to expand, will gradually take its place as a major regulator who will exercise concurrent jurisdiction with the U.S. and EU over nearly all large transnational mergers. Many expect that securing approval from the triumvirate of the U.S., EU, and China will be absolutely essential to completing the most significant deals in the future.

Notwithstanding the large similarities in competition law between these three economies, there are, of course, notable differences in how they review mergers. The U.S. and EU have occasionally reached starkly different conclusions, most notably in the GE-Honeywell case.⁴ As the newest to the field, China’s enforcement practices are still developing and have been the subject of much speculation in government, business, and academic circles.

Amongst the remaining differences between the enforcers, there is a particularly notable lack of consensus on how to treat transnational mergers that raise questions of national security. The U.S. has a system of parallel merger reviews, using multiple agencies to keep examination of competition issues separate from national security review. The EU, lacking a formal unified conception of “European security,” must defer to the judgment of individual members states on their own national security. European Union Member States raise national security objections within the context of the same European Community (“EC”) review process that is focused almost entirely on competition concerns.

Alongside the U.S.’s dual processes and the EU’s single process, China has recently articulated a procedure for national security review. However, implementing regulations are still developing and China’s system is yet to issue any decisions. China’s national security review system may be welcome because there has been concern that some of the earliest decisions under China’s AML merger review system have been tainted by protectionism and

³ Fan Longduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 68 [hereinafter AML], original Chinese with inline translation by Weil, Gotshal & Manges LLP, available at <http://www.weil.com/news/pubdetail.aspx?pub=8016>.

⁴ See generally Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT’L ECON. L. 457 (2002); Jeremy Grant & Damien J. Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1 J. COMPETITION L. & ECON. 595 (2005) (U.K.).

concerns about what China calls “economic security.”⁵ Regardless of whether some degree of protectionism continues after the creation of a national security review system, the clear separation of competition reasons from other considerations will increase transparency and help the future development of Chinese competition law. Given that China is still deciding how to treat national security issues in the context of transnational mergers, lessons and recommendations can be drawn from the examples of the U.S. and EU.

Sections 2 through 4 of this paper examine, in turn, the existing competition and national security merger review frameworks in the U.S., EU, and China. Each section notes the existing laws and regulators, and then examines how “national security” is defined (formally or informally) in each jurisdiction and how that conception of national security impacts the legal regime surrounding merger review. Section 5 embarks on a series of case studies designed to show how politics often interferes with the legal regimes apparent from simply reading the statute books. Section 6 builds off a case study of the unpopular Chinese antimonopoly enforcement action in the Coca-Cola and Huiyuan merger and examines how a forthcoming national security review system is likely to resolve some of the issues that led to that decision. Section 7 concludes with a brief review of this paper’s main points.

II. THE UNITED STATES – THE PARALLEL-REVIEW SYSTEM

The United States has separate and distinct systems requiring mergers to be notified to one set of regulators who monitor antitrust concerns and to another set of regulators responsible for national security review. The U.S. competition system is discussed first and then the national security review system followed by a discussion of the evolving U.S. definition of national security.

A. *Competition Merger Review*

The basic framework for U.S. antitrust law as it relates to transnational mergers began with the Sherman Antitrust Act in 1890. Among its short seven sections, the Sherman Act prohibits all “combinations . . . in restraint of trade or commerce among the several States, or with foreign nations . . .”⁶ Yet this did not clearly apply to

⁵ See, e.g., Andrew McGinty & Kristie Nicholson, *Coca-Cola/Huiyuan: Ministry’s Prohibition Sparks Controversy*, Apr. 2, 2009, <http://www.internationallawoffice.com/newsletters/Detail.aspx?g=76ff3c8f-0c3c-48c0-84e6-feaaf11f863c>.

⁶ 15 U.S.C. § 1.

mergers and was clarified by the passage of two new laws in 1914 that explicitly granted the government merger enforcement authority: the Clayton Act and the Federal Trade Commission Act.⁷ While the 1914 acts address many antitrust issues, chiefly relevant here is section 7 of the Clayton Act, which is used by both U.S. antitrust enforcers as the basis for their jurisdiction to review mergers. Initially, authority under the Clayton Act did not provide for any sort of pre-merger notification. Enforcers had power to prevent or correct anti-competitive combinations, but they had to detect them on their own, usually based on publicly available information.

It was not until 1976 that the U.S. began to require premerger notification under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”).⁸ The HSR Act requires that large mergers meeting certain revenue thresholds be notified to the enforcers prior to consummation.⁹ The revenue thresholds are adjusted annually to reflect changes in the U.S. gross national product.¹⁰ The parties may not close the deal until the review time period has expired.¹¹

Antitrust merger enforcement in the U.S. is shared by two agencies. The Department of Justice (“DOJ”), through its Antitrust Division, is part of the executive branch and reviews mergers primarily under the authority of section 7 of the Clayton Act. The Federal Trade Commission (“FTC”) is an independent agency, which derives its existence from the eponymous act and also draws on section 7A of the Clayton Act for premerger review authority.¹² While there are many important differences between the DOJ and FTC, from the perspective of premerger review, their authority is basically coextensive. Both rely upon the Hart-Scott-Rodino Antitrust Improvements Act of 1976 for the framework of their premerger review.

For the purposes of this paper, it is not necessary to make a large distinction between the DOJ and the FTC. In practice, the DOJ and FTC divide responsibilities largely by specializing in certain industries. For example, the FTC has special groups devoted to

⁷ Clayton Act of 1914, 15 U.S.C. §§ 12-27; Federal Trade Commission Act of 1914 (as amended), 15 U.S.C. §§ 41-58.

⁸ 15 U.S.C. § 18a.

⁹ *Id.*

¹⁰ § 18a(2); *see also* FTC Revised Jurisdictional Thresholds For Section 7A of the Clayton Act, 75 Fed. Reg. 3468 (Jan. 21, 2010) (announcing new 2010 notification thresholds).

¹¹ *See Hart-Scott-Rodino*, FEDERAL TRADE COMMISSION, <http://www.ftc.gov/bc/hsr/index.shtm> (last visited Apr. 13, 2011).

¹² *See* Office of the General Counsel, *A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, FEDERAL TRADE COMMISSION (revised July, 2008), sec. I(B)(5), <http://ftc.gov/ogc/brfoprvtw.shtm>.

reviewing healthcare and pharmaceuticals mergers,¹³ while the DOJ has a specialist group for telecommunications mergers.¹⁴ However, both enforcers rely upon the same statutory authority to conduct merger reviews and are bound by the same case precedents.

More importantly, the FTC and DOJ have issued Joint Horizontal Merger Guidelines that provide all of the practical details omitted by the Clayton Act and HSR Act.¹⁵ It should be noted that the Joint Horizontal Guidelines are currently under review and revisions are expected.¹⁶ New draft guidelines were released for public comment on April 20, 2010.¹⁷ The horizontal guidelines are also joined by older, less important non-horizontal guidelines.¹⁸

Through their statutory authority and promulgated guidelines, the FTC and DOJ focus their merger reviews exclusively on antitrust concerns.

B. National Security Merger Review

The separate review of transnational mergers is conducted by the Committee on Foreign Investment in the United States (“CFIUS”).¹⁹ The beginning of CFIUS dates to an executive order by President Carter in 1975.²⁰ However, the modern framework for CFIUS’s power was established in 1988 with the Exon-Florio amendment to the Defense Production Act of 1950.²¹ The amendment authorizes the President to block “mergers, acquisitions, or takeovers” involving foreign entities if they threaten to impair national security.²² Such

¹³ See Federal Trade Commission, Bureau of Competition 2009 User’s Guide (Mar. 2009), at 6, 12, available at <http://ftc.gov/bc/BCUsersGuide.pdf> (explaining the responsibilities of the Mergers I Division and Healthcare Division).

¹⁴ See Department of Justice, Antitrust Division Manual (4th ed., Dec. 2008), I-7 (describing the Telecommunications and Media Enforcement Section); see also *id.* at VII-4 to -8 (explaining the clearance process to resolve whether the DOJ or FTC will conduct an investigation).

¹⁵ DOJ & FTC, HORIZONTAL MERGER GUIDELINES (issued Apr. 2, 1992, revised Apr. 8, 1997), available at <http://www.justice.gov/atr/public/guidelines/hmg.htm>; see also DOJ & FTC, Commentary on the Horizontal Merger Guidelines (Mar. 2006), available at <http://www.justice.gov/atr/public/guidelines/215247.htm>.

¹⁶ Press Release, Federal Trade Commission, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), available at <http://www.ftc.gov/opa/2009/09/mgr.shtm>.

¹⁷ Horizontal Merger Guidelines for Public Comment (April 20, 2010), <http://ftc.gov/os/2010/04/100420hmg.pdf>.

¹⁸ Non-Horizontal Merger Guidelines (June 14, 1984), available at <http://www.justice.gov/atr/public/guidelines/2614.htm>.

¹⁹ See generally JAMES K. JACKSON, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS), CRS Report for Congress RL 33388 (Nov. 6, 2009), available at <http://www.fas.org/srgp/crs/natsec/RL33388.pdf>.

²⁰ Foreign Investment in the United States, 40 Fed. Reg. 20263 (May 7, 1975).

²¹ 50 U.S.C. App. § 2170.

²² *Id.*; see JACKSON, *supra* note 19, at 3-4.

action is intended as a last resort, only exercisable after the President has concluded that other laws are inadequate to protect national security.²³

Subsequent treasury regulations, congressional amendments, and executive orders give further substance to the law.²⁴ Most importantly, CFIUS was significantly amended by the Foreign Investment and National Security Act of 2007, which increased congressional oversight, broadened the scope of factors for CFIUS to consider, and formalized CFIUS's practice of negotiating remedies with the parties.²⁵

Unlike with antitrust review, there is no equivalent of the HSR pre-notification requirement for CFIUS. Parties are not required to notify their transactions to the committee, but may notify CFIUS voluntarily.²⁶ However, this is not to be understood as a limit on CFIUS's jurisdiction; CFIUS may also review un-notified transactions. The reason that parties often choose to make a voluntary notification is to avoid the uncertainty of CFIUS interfering in a deal after consummation. Further, CFIUS encourages parties to engage in informal pre-notification consultation with the committee to discuss the transaction, filing documentation, and possible remedies.²⁷ Without securing CFIUS's blessing, transactions remain indefinitely subject to divestment or other action.²⁸

As an organization, CFIUS is constructed as an interagency committee chaired by the Treasury Department and consisting of 16 members drawn from departments and agencies including the Departments of State, Defense, Justice, Energy, Homeland Security, and the U.S. Trade Representative.²⁹ The intelligence community is also represented by the Director of National Intelligence as a non-voting, *ex-officio* member.³⁰ It is important to note the membership of the Department of Justice, which also serves as an antitrust regulator.

²³ JACKSON, *supra* note 19, at 3-4.

See, e.g., Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons. 31 C.F.R. § 800 (2009); Byrd Amendment, Pub. L. No. 102-484 H.R. 5006, 102d Cong. (1992) (repealed 2007); Amendment in Transfer of Certain Functions to the Secretary of Homeland Security, 68 Fed. Reg. 10619 (Feb. 28, 2003) (adding the Secretary of Homeland Security).

²⁵ Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (2007).

²⁶ Dep't Treas. Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 31 C.F.R. § 800 (2008).

²⁷ *Id.*

²⁸ JACKSON, *supra* note 19, at 5.

²⁹ *Composition of CFIUS*, U.S. DEPARTMENT OF THE TREASURY, <http://www.treasury.gov/resource-center/international/foreign-investment/Pages/cfius-members.aspx> (last visited Apr. 13, 2011).

³⁰ *Id.*

Though the Treasury heads CFIUS, each reviewed merger is assigned a “lead agency” that undertakes much of the review.³¹ The lead agency is likely to be the agency with the most obvious expertise in the area, such as the Defense Department reviewing an acquisition of a major arms supplier by a foreign entity. However, since the creation of the Department of Homeland Security (“DHS”) in the wake of the September 11, 2001 terrorist attack and DHS’s addition to CFIUS,³² the department has become an important force in the committee.

The lead agency and other committee member consider several factors in considering whether to recommend that the President block a transaction.

C. *Defining National Security*

The enumerated factors in CFIUS’s authorizing legislation amount to a functional legal definition of national security. Understanding of that definition is expanded by realizing that each CFIUS member has its own mandates, such as DHS’s broad mandate to protect “critical infrastructure,”³³ or the Treasury’s desire to reduce the national deficit by allowing foreign investment.³⁴

The mandate given to CFIUS by Exon-Florio was dramatically expanded by the Foreign Investment and National Security Act of 2007 (“FISIA”). The list of factors for CFIUS members to consider before approving a deal grew from five to twelve. The amended list includes the following:

- (1) domestic production needed for projected national defense requirements;
- (2) the capability and capacity of domestic industries to meet national defense requirements, including the availability of human resources, products, technology, materials, and other supplies and services;
- (3) the control of domestic industries and commercial activity by foreign citizens as it affects the capability and capacity of the U.S. to meet the requirements of national security;
- (4) the potential effects of the transactions on the sales of military goods, equipment, or technology to a country that supports terrorism or proliferates missile technology or chemical and biological

³¹ JACKSON, *supra* note 19, at 14.

³² DHS was added to CFIUS by Amendment in Transfer of Certain Functions to the Secretary of Homeland Security, 68 Fed. Reg. 10619 (Feb. 28, 2003).

³³ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

³⁴ See Joshua W. Casselman, *China’s Latest “Threat” to the United States: The Failed CNOOC-Unocal Merger and Its Implications for Exon-Florio and CFIUS*, 17 IND. INT’L & COMP. L. REV. 155, 181-82 (2007) (discussing proposals to remove the Treasury as CFIUS chair).

weapons; and transactions identified by the Secretary of Defense as “posing a regional military threat” to the interests of the United States;

(5) the potential effects of the transaction on U.S. technological leadership in areas affecting U.S. national security;

(6) whether the transaction has a security-related impact on critical infrastructure in the United States;

(7) the potential effects on United States critical infrastructure, including major energy assets;

(8) the potential effects on United States critical technologies;

(9) whether the transaction is a foreign government-controlled transaction;

(10) in those cases involving a government-controlled transaction, a review of (A) the adherence of the foreign country to nonproliferation control regimes, (B) the foreign country’s record on cooperating in counter-terrorism efforts, (C) the potential for transshipment or diversion of technologies with military applications,;

(11) the long-term projection of the United States requirements for sources of energy and other critical resources and materials; and

(12) such other factors as the President or the Committee determine to be appropriate.³⁵

Of that list, factors (6) through (12) were new additions due to FINSA.³⁶ The divergence from the traditional defense focus of the preexisting considerations is stark. Most notably, several of the new provisions refer to a new concept of “critical infrastructure” and others stress energy concerns.

The U.S. definition of national security was indeed meaningfully expanded by FINSA. To understand the full extent of that expansion, it is necessary to probe the subsumed concept of “critical infrastructure.”

Interestingly, the FINSA definition of critical infrastructure used by CFIUS does not exactly match the USA PATRIOT Act definition of critical infrastructure used by the Department of Homeland Security. FINSA defines the term as, “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on national security.”³⁷ But the statutory definition used by DHS is “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems

³⁵ 50 U.S.C. App. § 2170(f).

³⁶ JACKSON, *supra* note 19, at 13 n. 35.

³⁷ 50 U.S.C. App. § 2170(a)(6).

and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.”³⁸

The replication of the initial language and minor change indicates the FINSA drafters in 2007 made a deliberate decision to avoid referring to “national economic security.” So in legal terms, it can be argued that CFIUS’s mandate does not include national economic security and is significantly narrower than DHS’s focus.

However, in practice, DHS is an influential member of CFIUS and it is likely one more avenue where DHS can pursue its mission to protect critical infrastructure. As such, it is helpful to look to DHS’s definition of critical infrastructure, while bearing in mind that the actual authority of CFIUS should be construed as somewhat narrower.

According to a Presidential Directive to DHS, there are 17 sectors included in critical infrastructure and key resources including:³⁹ agriculture and food; banking and finance; chemical; commercial facilities; commercial nuclear reactors, including materials and waste; dams; defense industrial base; drinking water and water treatment systems; emergency services; energy; government facilities; information technology; national monuments and icons; postal and shipping; public health and healthcare; telecommunications; and transportation systems including mass transit, aviation, maritime, ground or surface, rail and pipeline systems.⁴⁰ While there have not been dramatic actions in all of these sectors there is some evidence that DHS’s presence in CFIUS has made the committee more active in non-traditional areas.

For example, at the behest of DHS, CFIUS has been notably active in the telecommunications sector since 2001.⁴¹ However, much of the national security justification for such actions was focused on the ability of the U.S. government to conduct covert wiretaps and other forms of signal interception.⁴² While the

³⁸ USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 1016(e), 115 Stat. 272 (2001); 42 U.S.C. § 5195c(e).

³⁹ “Critical infrastructure” and “key resources” are actually distinct legal terms of art, but DHS seems to lump them together when describing its mandate. *Compare id.* § 5195c(e) (defining critical infrastructure), *and* Homeland Security Act of 2002, 6 U.S.C. § 101(9) (defining key resources), *with* Press Release, Dep’t Homeland Sec., DHS Completes Key Framework for Critical Infrastructure Protection (May 21, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1179773665704.shtm.

⁴⁰ Homeland Security Presidential Directive 7, para. 15, Dec. 7, 2003, *available at* http://www.dhs.gov/xabout/laws/gc_1214597989952.shtm; *see also* Press Release, Dep’t Homeland Sec., DHS Completes Key Framework for Critical Infrastructure Protection (May 21, 2007), *available at* http://www.dhs.gov/xnews/releases/pr_1179773665704.shtm.

⁴¹ *See* James A. Lewis, *New Objectives for CFIUS: Foreign Ownership, Critical Infrastructure, and Communications Interception*, 57 FED. COMM. L.J. 457, 468-72 (2005).

⁴² *Cf. id.* at 470.

intensity of CFIUS scrutiny over telecoms increased, it can be argued that this was more a result of changing defense needs due to the “War on Terror,” rather than a true expansion of the definition of national security into economic security.

The changes in law and practice make evident that the U.S. definition of national security has substantively expanded since the 2001 terrorist attacks with the effects of FINSA and DHS’s presence broadening CFIUS’s mandate. However, the full extent to which CFIUS now considers itself to be charged with protecting “national economic security” in addition to tradition areas of defense-related national security is still emerging.

III. THE EUROPE UNION – MANY COUNTRIES, ONE REVIEW

Competition law in Europe implicates both the overarching laws of the European Union and the national laws of Member States. Consequently, it is necessary to use a specific Member State as an example in order to make a full discussion of the mechanics of the European system possible. For this paper, the United Kingdom (“UK”) will serve as the exemplar Member State.

Like the broader competition framework, to appreciate the role of national security related to merger reviews, we must look to both European and British law. The European Community is primarily an economic union and does not share a unified definition of “European security” or anything of that nature. Rather, decisions about national security are left to individual Member States. As a result of this feature, the definition of national security cannot be unwound from the competition law as neatly as can be done in the United States.

A. *The European Commission – Directorate General for Competition*

Notwithstanding the importance of national laws, the general framework for understanding European merger review, particularly for large deals, begins at the EC level. Articles 101 and 102 of the Consolidated Version of the Treaty on the Functioning of the European Union (“TFEU”), formerly Articles 81 and 82 of the Treaty Establishing the European Community, give very basic rules establishing competition law,⁴³ much like the first two sections of

⁴³ Consolidated Version of the Treaty on the Functioning of the European Union arts. 101, 102, Sep. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]. These articles were formerly Articles 81 and 82 of the EC Treaty. Treaty Establishing the European Community, Nov. 10, 1997, [1997] O.J. (C 340) 3. See also TFEU arts. 103-06 (providing more general guidance in support of the substantive provisions of Articles 101 and 102).

the U.S. Sherman Act. Article 101 prohibits a range of concerted action and agreements between competitors.⁴⁴ Article 102 prohibits what the Europeans prefer to call “abuse of dominance” (other terms are “unilateral conduct” or “monopolization”).⁴⁵ However, the TFEU does not set out a process for merger review.

The European merger review system was established by a European Council regulation, officially referred to as the “EC Merger Regulation.”⁴⁶ As has become the international standard, the EC requires pre-notification for mergers meeting certain thresholds for turnover.⁴⁷ At the EC level, enforcement is handled by the Directorate General for Competition (“DG-Comp”). Mergers not meeting EC thresholds may still be subject to review by the competition authorities of an individual Member State.

While the EC does not conduct its own national security review, several provisions in the TFEU and EC Merger Regulation contemplate Member States conducting such a review. Within the TFEU, Article 346 provides two blanket exceptions to all provisions of the treaty.⁴⁸ First, Member States cannot be made to disclose confidential information that, by the Member State’s own determination, bears on national security.⁴⁹ Second, Article 346(1)(b) of the TFEU provides:

any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.⁵⁰

The EC Merger Regulation confirms this exception and expands the scope of interests which enable Member States to raise an exception to EC action.

Rather than use the “essential interests” standard of the TFEU, the EC Merger Regulation adopts the language “legitimate interests.”⁵¹ It seems clear that an interest can be “legitimate” without in any way approaching the level of being “essential,” and

⁴⁴ TFEU art. 101.

⁴⁵ *Id.* art. 102; *see also* Sherman Act § 2 (using “monopolize”).

⁴⁶ Council Regulation 139/2004, of 20 January 2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation), arts. 1, 4, 2004 O.J. (L 24) 1.

⁴⁷ EC Merger Regulation arts. 1, 4.

⁴⁸ TFEU art. 346 (formerly EC Treaty art. 296).

⁴⁹ *Id.* art. 346(1)(a).

⁵⁰ *Id.* art. 346(1)(b). The remaining portion of Article 346 goes further toward defining the products and industries that fall under these provisions – but that will be discussed *infra* along with the definition of national security within the European system.

⁵¹ EC Merger Regulation pmb1.19, art. 21(4).

thus the Merger Regulation provides much more leeway than is required under the treaty. Further, the EC Merger Regulation enumerates “public security” as a legitimate interest, which again seems to be a relaxation of the strictly military terminology used in the TFEU.⁵²

Finally, Article 21 also provides a catchall provision that basically allows Member States to attempt to raise anything in the “public interest” as a reason to intervene in an EC merger clearance.⁵³ This is the most generous provision yet, because the public can certainly have a number of interests that do not even rise to the threshold of “legitimacy.” However, in the event that a Member State does raise an exception under the “public interest” catchall provision, the Commission has discretion to determine whether it is “compatib[le] with the general principles and other provisions of Community law” before allowing the Member State to take action on those grounds.⁵⁴

B. *The United Kingdom*

The right to raise a national exception to a merger control action by DG-Comp lies with each Member State. Accordingly, as in many areas, Member States have needed to incorporate provisions into their national laws to reflect the state of European law. The UK is a good example given its long history of competition enforcement.⁵⁵ Immediately prior to the establishment of EC merger control, the UK competition law framework was found in the Fair Trading Act of 1973.⁵⁶ However, the Enterprise Act 2002 replaced the old law and incorporates many provisions that reflect the interaction of UK and European law.⁵⁷

Directly reflecting the language of the TFEU and EC Merger Regulation, Sections 67 and 68 of the Enterprise Act 2002 authorizes measures to protect “legitimate interests” and “public interest considerations.”⁵⁸ In such circumstances, the relevant Secretary of

⁵² Compare *id.* art. 21(4), with TFEU art. 346(1)(b).

⁵³ EC Merger Regulation art. 21(4).

⁵⁴ *Id.* art. 21(4).

⁵⁵ See ERNEST GELLHORN ET AL., *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 12-13 (5th ed. 2004) (briefly discussing the origins of English common law and statutory prohibitions on monopoly in the Seventeenth Century).

⁵⁶ Fair Trading Act, 1973, c. 41 (U.K.).

⁵⁷ Enterprise Act, 2002, c. 40 (U.K.).

⁵⁸ *Id.* § 67.

State is the responsible authority.⁵⁹ If he believes that legitimate interests or public interests are endangered, the Secretary of State should file a “European intervention notice” with the Office of Fair Trading (“OFT”) and take necessary action to further investigate whether the proposed merger does endanger UK public interests.⁶⁰ Once a European intervention notice is filed, the Secretary of State can begin taking action to “remedy, mitigate or prevent effects adverse to the public interest.”⁶¹ Notably, the UK here has focused on the most generous standard available to it under the EC Merger Regulation, that of acting in the “public interest.”

In carrying out his charge, the Secretary of State should request a report from OFT and may make a reference to the UK’s Competition Commission.⁶² It is OFT who will do the bulk of the work in investigating the full implications of a proposed merger.

To date, the UK has filed European intervention notices citing national security concerns in seven instances.⁶³ All have had a fairly clear link to military technology, with particular concerns appearing over the aerospace sector, including deals involving Lockheed Martin UK Holdings Limited, Smiths Aerospace, and in two cases involving BAE Systems. As a typical case, the UK’s action in one of the BAE Systems mergers will be discussed *infra* in detail. As that example will show, in such circumstances the OFT will also engage in consultation with the Ministry of Defence and give great deference to the ministry’s recommendation.

C. Further Defining National Security Under the EU

As is evident from the above discussion of Europe’s competition review system, the definition of national security is largely built into the system. What is worth stressing is just how focused on traditional defense this definition is.

As discussed above, the TFEU allows Member States to “take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in

⁵⁹ The Secretary of State refers to a cabinet-level minister, however, a precise individual is not specified because the exact portfolio of cabinet members in the UK is not rigid, rather it fluctuates significantly with each new government and occasionally as a result of a Prime Minister reshuffling responsibilities within his cabinet.

⁶⁰ Enterprise Act, 2002, c. 40, § 67(2), (3), (6) (U.K.).

⁶¹ *Id.* § 68(1).

⁶² *Id.* § 68(4).

⁶³ See National Security Mergers, DEP’T FOR BUS. INNOVATION & SKILLS, <http://www.bis.gov.uk/policies/business-law/competition-matters/mergers/mergers-with-a-public-interest/national-security-mergers> (last visited May 8, 2011) (U.K.).

the common market regarding products which are not intended for specifically military purposes.”⁶⁴ In addition to the elaboration on the necessary connection to military purposes, the treaty also incorporates a list of products covered by the security exception.⁶⁵

The list of products includes automatic firearms, artillery, bombs, torpedoes, rockets and guided missiles, tanks, and warships.⁶⁶ The list is entirely focused on substantial products that are exclusively for military use.

Nonetheless, as discussed above, the UK has adopted the broad phrases of “legitimate interests” and “public interests” in its national law. While the UK has stuck closely to the traditional defense definition of national security when filing intervention notices, it has still left itself the flexibility to act in a future cases that are not so closely tied to defense. How such a situation would play out and at what point the EC would deny a Member State’s request to intervene in the name of national security is unknown.

IV. CHINA – A SYSTEM RAPIDLY EMERGING

The People’s Republic of China’s first comprehensive competition law, dubbed the Antimonopoly Law (“AML”), went into force on August 1, 2008.⁶⁷ As of that date, no related implementing regulations had been promulgated and little was known about how the law would be enforced. Over time, various regulations have been promulgated addressing specific, narrow issues.⁶⁸ However, much remains uncertain.

⁶⁴ TFEU art. 346(1)(b).

⁶⁵ *Id.* art. 346(2) (“The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.”).

⁶⁶ List of products covered by security exemption (Apr. 15 1958), *reprinted in* Official Journal of the European Communities, 2001/C364E/091 (May 4, 2001), *available at* http://aei.pitt.edu/935/01/Article_223_decision.pdf.

⁶⁷ Fan Longduan Fa (反垄断法) [Anti-Monopoly Law] (promulgated Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 68 [hereinafter AML], original Chinese with inline translation by Weil, Gotshal & Manges LLP, *available at* <http://www.weil.com/news/pubdetail.aspx?pub=8016>.

⁶⁸ *See, e.g.*, Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding (国务院关于经营者集中申报标准的规定) [State Council Provisions on Reporting Thresholds for Business Operator’s Concentration] (promulgated by St. Council, Aug. 3, 2008, effective Aug. 3, 2008) (Chinalawinfo); Jizhongzhe Jizhong Shenbao Banfa (经营者集中申报办法) [Measures on the Notification of Concentration of Business Operators] (promulgated by MOFCOM, Nov. 21, 2009, effective Jan. 1, 2010) (Chinalawinfo); Jingyingzhe Jizhong Shencha Banfa (经营者集中审查办法) [Measures on the Review of Concentrations of Business Operators] (promulgated by MOFCOM, Nov. 24, 2009, effective Jan. 1, 2010) (Chinalawinfo).

A. *The Antimonopoly Law*

As China has transitioned to a market economy, its legal needs have grown alongside its GDP. Hoping to avoid letting unbridled capitalism overtake the “socialist market economy,” China began to implement measures related to competition the early 1990s.⁶⁹ New laws and provisions touching on competition included: the Law Against Unfair Competition (1993), the Law on Foreign Trade (1994), the Pricing Law (1998), the Bid Invitation and Bidding Law (1999), Tentative Provision on Prohibition of Acts of Price Monopolization (2003), and the Regulations on Acquisitions of Domestic Enterprises by Foreign Investors (2006).⁷⁰ While these laws addressed many of the subjects covered in the AML, none of them was comprehensive. Notably, the 2006 Regulations on Acquisitions of Domestic Enterprises by Foreign Investors (“2006 Acquisition Regulations”) contained an antimonopoly examination that applied only to foreigners.⁷¹ This focus on foreign investors was a hallmark of Chinese regulation and omitted from scrutiny a huge number of domestic mergers that had a true impact on China’s economy from competition review.⁷²

Somewhere around 1995, drafting began on a comprehensive competition law that came to be known as the AML.⁷³ After a lengthy process, eventually the Ministry of Commerce (“MOFCOM”) took over lead drafting in 2003 and remained centrally involved in the process thereafter, ultimately becoming the primary merger enforcer through a new Antimonopoly Bureau.⁷⁴

⁶⁹ See, e.g., XIANFA art. 15. The 1993 amendment added “The State has put into practice a socialist market economy. The State strengthens formulating economic laws, improves macro adjustment and control and forbids according to law any units or individuals from interfering with the social economic order.”

⁷⁰ For a fuller history, see Salil K. Mehra & Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China’s Antimonopoly Law*, 49 VA. J. INT’L L. 379, 391-96 (2009). I also thank Prof. Meng for her helpful handout from a presentation in March 2008 at Georgetown University Law Center (on file with the author).

⁷¹ Regulations on Acquisitions of Domestic Enterprises by Foreign Investors arts. 51-54 (promulgated Aug. 8, 2006), translation by O’Melveny & Myers LLP.

⁷² Whether the AML marked a true shift in focus is debatable; since the AML’s enactment there have been five merger enforcement actions, none of which had a domestic enterprise as the acquirer. See Cleary Gottlieb Steen & Hamilton, LLP, ASIAN COMPETITION REPORT, Oct.-Dec. 2009, at 4, available at <http://www.cgsh.com/files/Publication/2f0c8d35-f200-4eeb-a9d7-3aed1041c188/Presentation/PublicationAttachment/73fa5600-dc7b-466a-b5f0-3b896a5a7d5e/Asia%20Competition%20Report%204Q%202009.pdf>.

⁷³ Cf. Mehra & Meng, *supra* note 70, at 380 (noting that it took “more than a dozen years of drafting”).

⁷⁴ See H. Stephen Harris, Jr. & Keith D. Shugarman, *Interview with Shang Ming, Director General of the Anti-Monopoly Bureau Under the Ministry of Commerce of the People’s Republic of China*, ANTITRUST SOURCE, Feb. 2009, at 2-3 [hereinafter Shang Ming Interview], available at <http://www.abanet.org/antitrust/at-source/09/02/Feb09-ShangIntrvw2-26f.pdf>.

After enduring the customary three readings before the National People's Congress, the AML was adopted in August 2007 and went into force nearly one year later on August 30, 2008.

Three types of business concentrations are regulated under the AML: mergers, acquisition of control through equity, and acquisition of control through contract or other means.⁷⁵ For the first time, the law provides for competition review of purely domestic mergers. Only mergers involving companies with certain minimum levels of revenue worldwide and within China need to be reported to MOFCOM for pre-consummation review.⁷⁶ Additionally, the government reserves the right to review even those concentrations that fall below these thresholds.⁷⁷ Such concentrations need not notify MOFCOM prior to completing the transaction, however, parties are permitted to voluntarily notify transactions in order to avoid subsequent unwinding.⁷⁸

The clock on MOFCOM's review does not begin to run until the required filing documents are submitted.⁷⁹ Exactly which documents are required is subject to MOFCOM's evolving discretion.⁸⁰ In practice, this essentially gives MOFCOM a free hand to indefinitely delay the technical beginning of the merger review process. Indeed, MOFCOM has taken full advantage of this provision.⁸¹

⁷⁵ AML, art. 20; Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding (国务院关于经营者集中申报标准的规定) [State Council Provisions on Reporting Thresholds for Business Operator's Concentration] (promulgated by St. Council, Aug. 3, 2008, effective Aug. 3, 2008) art. 2 (Chinalawinfo); Jizhongzhe Jizhong Shenbao Banfa (经营者集中申报办法) [Measures on the Notification of Concentration of Business Operators] (promulgated by MOFCOM, Nov. 21, 2009, effective Jan. 1, 2010) art. 2 (Chinalawinfo).

⁷⁶ See AML, art. 21; Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding (国务院关于经营者集中申报标准的规定) [State Council Provisions on Reporting Thresholds for Business Operator's Concentration] (promulgated by St. Council, Aug. 3, 2008, effective Aug. 3, 2008) art. 3 (Chinalawinfo).

⁷⁷ See Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding (国务院关于经营者集中申报标准的规定) [State Council Provisions on Reporting Thresholds for Business Operator's Concentration] (promulgated by St. Council, Aug. 3, 2008, effective Aug. 3, 2008) art. 4 (Chinalawinfo).

⁷⁸ Nathan Bush, et al., *MOFCOM Clarifies Chinese Merger Review Procedures*, O'MELVENY & MYERS ALERT (Dec. 3, 2009), <http://www.omm.com/newsroom/publication.aspx?pub=902>; Jizhongzhe Jizhong Shenbao Banfa (经营者集中申报办法) [Measures on the Notification of Concentration of Business Operators] (promulgated by MOFCOM, Nov. 21, 2009, effective Jan. 1, 2010) art. 11 (Chinalawinfo).

⁷⁹ The formal timeline for review under the AML is 120 days from start to finish, extendable to 180 days in limited circumstances. AML arts. 25, 26.

⁸⁰ *Id.* art. 23(5) (complete filings must include "other documents and materials required by the State Council Antimonopoly Enforcement Agency.").

⁸¹ The Coca-Cola/Huiyuan deal is an example. Coca-Cola first submitted materials to MOFCOM on September 18th. Shangwubu Guanyu Jinzhi Kekoukele Gongsu Shougou Zhongguo Huiyuan Gongsu Shencha Jueding de Gonggao (商务部关于禁止可口可乐公司收购中国汇源公司审查决定的公告)

As is done with numerous government filings in China, as well as CFIUS transactions in the U.S., it is recommended to engage in pre-filing consultations with MOFCOM in order to expedite the process and mitigate any delays attendant to gathering documents desired by MOFCOM.⁸² But even then, Director General Shang warns that “it is difficult to adopt a ‘one size fits all’ approach to setting a uniform requirement on notification materials for all cases.”⁸³ He indicates that the AML Bureau will continue to require specific notification materials for each merger it reviews.⁸⁴

MOFCOM is understandably still learning the ropes and figuring out what sorts of information it will need to review transactions. Presumably the filing process will become more predictable and standardized in the future. More important, pre-filing consultations will become increasingly productive as MOFCOM is able to anticipate which documents and materials will be essential to its review.

Evidenced in the implementation of the AML is the bureaucratic legacy of the numerous half-measure laws produced during the AML’s long drafting process. The AML itself does not specify which governmental organs will enforce the law. Rather, it creates an Antimonopoly Commission directly under the State Council, which is empowered to guide policy and coordinate enforcement of the AML by one or more agencies.⁸⁵ The historical roles of several agencies in enforcing the laws that preceded the AML, and the resultant interagency politics, led to a three-way division of AML enforcement power.⁸⁶ MOFCOM, as primary drafter of the AML and as the previously established reviewer of Sino-foreign mergers, maintained responsibility for merger review, newly codified at

[Announcement of the Ministry of Commerce Barring Acquisition of Huiyuan by Coca-Cola], § 1 (promulgated by MOFCOM, Mar. 18, 2009, effective Mar. 18, 2009) [hereinafter Coke Announcement], <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html>. MOFCOM required supplementary materials to be submitted four times over three months – on September 25th, October 9th, October 16th, and November 19th. *Id.* § 1. Only after all five rounds of document submission did MOFCOM declare the investigation open on November 20th. *Id.* § 1.

⁸² See Harris & Shugarman, *supra* note 74, at 4.

⁸³ *Id.* at 4.

⁸⁴ *Id.* at 4.

⁸⁵ AML arts. 9, 10.

⁸⁶ There does not seem to be an official pronouncement delineating the distribution of power, however, it is widely acknowledged in practice and some duties were delineated in various agency restructuring plans. See, e.g., Peter J. Wang et al, *Structure and Responsibilities of Enforcement Agencies Under China Anti-Monopoly Law Clarified*, JONES DAY (July 2008), at 2, <http://www.jonesday.com/files/Publication/d74085e3-0c9e-4c6c-8886-30ce91b29caa/Presentation/PublicationAttachment/63d181b9-bbc1-45cf-886b-f6e250060937/China%20AML%20Clarified.pdf>.

chapter 4 of the AML.⁸⁷ The National Development and Reform Commission (“NDRC”), historic price regulator, is responsible for preventing price fixing under articles 13 and 14 of the AML. The State Administration for Industry and Commerce (“SAIC”), enforcer of the earlier Anti-Unfair Competition Law, enforces chapter 3 and part of chapter 2 of the AML, regulating business conduct such as abuse of dominance and cartels (except to the extent that the NDRC regulates price fixing).⁸⁸

B. New Provisions on National Security Review

In its skeletal provisions, the AML does provide for the possibility of a national security review.⁸⁹ To date, numerous guidelines have been issued, particularly related to merger review under the AML.⁹⁰ However, a formal national security review system has only recently been created and detailed guidelines are yet to be implemented.

During the March 2010 meeting of the National People’s Congress, Premier Wen Jiabao stated in his Report on the Work of the Government that in the coming year, “We will encourage the use of foreign investment for restructuring, upgrading, merging, and reorganizing Chinese companies, and quickly establish a security review system for mergers and acquisitions involving foreign investment.”⁹¹ Shortly thereafter, the State Council issued *Several Opinions of the State Council on Further Doing a Good Job in the Utilization of Foreign Investment* which states “We shall implement antimonopoly review pursuant to law and accelerate the establishment of the security review system for mergers and acquisitions by foreign investors.”⁹²

⁸⁷ AML ch. 4 (“Concentration of Business Operators”).

⁸⁸ *Id.* chs. 2, 3 (“Monopoly Agreement” and “Abuse of Dominance”).

⁸⁹ *Id.* art. 31. In the event that foreign investors participate in concentration of business operators by way of acquisition of domestic enterprises or otherwise, which involves the national security, such concentration shall be subject to the national security examination in accordance with the relevant regulations of the State in addition to the review of concentration of business operators pursuant to this Law.

⁹⁰ See, e.g., Guidelines on Notification of Concentrations Between Undertakings (Jan. 2009); Guidelines on Notification Documents and Materials (Jan. 2009); Rules on the Notification of Concentrations Between Undertakings (promulgated by MOFCOM, Nov. 27, 2009, effective Jan. 1, 2010) (Chinalawinfo).

⁹¹ Wen Jiabo, Premier, Report on the Work of the Government, delivered to the Third Session of the Eleventh National People’s Congress, Mar. 5, 2010, *translated in* http://www.chinadaily.com.cn/china/2010npc/2010-03/15/content_9593380.htm (quoted material at page 13 of HTML document).

⁹² Guowuyuan Guanyu Jin Yibu Zuohao Liyong Waizi Gongzuo de Ruogan Yijian (国务院关于进一步做好利用外资工作的若干意见) [Several Opinions of the State Council on Further Doing a Good Job in the Utilization of Foreign Investment] sec. 12 (Promulgated by St. Council, Apr. 6, 2010, effective Apr. 6, 2010) (Chinalawinfo).

Almost one year after these high-level statements, on February 3, 2011, the State Council issued a new *State Council General Office Notice Regarding Establishment of a Security Review System for the Merger and Acquisition of Domestic Enterprises by Foreign Investors* (“Security Review System Notice”).⁹³ The new security review system became effective on March 5, 2011. The notice is a broad, high-level document that sets the basic framework for a new system whereby China will review domestic mergers and acquisitions by foreign investors for national security concerns. One set of interim implementing provisions was promulgated in early March and more detailed regulations and measures should be expected in the future.⁹⁴ However, past practice indicates that officials are likely to begin conducting security reviews even before detailed measures are issued.

The Security Review System Notice establishes an interdepartmental joint conference system to review foreign acquisitions of domestic enterprises (“Interdepartmental Conference”). The Interdepartmental Conference will be led day-to-day by the NDRC and MOFCOM, under the guidance of the State Council. It appears that additional government departments with an interest in a particular acquisition will be asked to participate in the Interdepartmental Conference on an *ad hoc* basis.

As expected, the system generally follows a model similar to CFIUS. As China’s system develops, it will be interesting to monitor whether, as with CFIUS, numerous governmental departments become regular, active members of the Interdepartmental Conference. Alternatively, the NDRC and MOFCOM may decide most matters within a more limited sphere, consulting other departments only as necessary for information or to build consensus within the government, but not inviting those departments to take active roles in the review process.

However, China has habitually made a thorough study of foreign law before committing itself to policy and will also have examined the national security review systems in Europe and elsewhere. Though China’s system is likely to depart from the CFIUS model in

⁹³ Most of this discussion of the State Council’s February 3 notice appeared in: Suat Eng Seah & Kevin B. Goldstein, *China Adopts National Security Review System for Foreign Investment*, ASIA ALERT (WEIL, GOTSHAL & MANGES LLP), Feb. 2011, available at <http://www.weil.com/news/pubdetail.aspx?pub=10190>.

⁹⁴ Shangwu Bu Shishi Waiguo Touzizhe Binggou Jingnei Qiye Anquan Shencha Zhidu Youguan Shixiang de Zanxing Guiding (商务部实施外国投资者并购境内企业安全审查制度有关事项的暂行规定) [Interim Provisions on Implementation Matters Related to the Security Review System for the Merger and Acquisition of Domestic Enterprises by Foreign Investors] (Promulgated by MOFCOM, Mar. 4, 2011, effective Mar. 4, 2011). These interim provisions were announced on March 4, one day before the Security Review System came into force, and are set to expire on August 31, 2011.

meaningful ways, the uniqueness of European political system means that the EU system is simply not a plausible option for China.

*C. National Security, Economic Security, and Cultural Security:
China's Broad and Informal Definition*

While discussing the antitrust and national security review frameworks gives a fairly complete picture of the foreign investment regulation in the U.S. and Europe, China's system is markedly different in the way that foreign investment is already subject to dramatic controls. Understanding what China considers part of its national security is impossible without understanding the many ways in which foreign investment is controlled.

To begin, all foreign mergers and acquisitions happen against the backdrop of the Catalog for Guidance of Foreign-Invested Industries (the "Catalog").⁹⁵ The Catalog splits all industries into four categories: encouraged, permitted, restricted, or prohibited. Several of the economic sectors listed as restricted or prohibited cover areas that might be regulated only by national security review in the U.S. or Europe. For example, foreign investment is prohibited in weapons and ammunition manufacturing or in projects that endanger the safety and performance of military installations.⁹⁶ However, the industries covered are much broader, including prohibiting foreign investment in publishing or processing traditional green tea.⁹⁷ These restrictions paint a fascinating picture of what China considers to be its essential industries and sheds much light on China's informal definition of national security.

Another telling source of law is the 2006 Regulations on Acquisitions of Domestic Enterprises by Foreign Investors, administer by MOFCOM. Article 12 of the regulations provides:

When an acquisition of a domestic enterprise by a foreign investor results in actual control by the foreign investor, or involves key industries, has factors imposing or possibly imposing material impact on the economic security of the State, or would result in transfer of actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands, the parties concerned shall report to and apply for approval from MOFCOM.⁹⁸

⁹⁵ Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Catalog for Guidance of Foreign-Invested Industries] (promulgated Oct. 31, 2007, effective Dec. 1, 2007), <http://www.ndrc.gov.cn/zcfb/zcfbl/2007ling/W020071107537750156652.pdf> (China).

⁹⁶ *Id.* Catalog of Prohibited Foreign Investment Industries, III(IV), XI.

⁹⁷ *Id.* Catalog of Prohibited Foreign Investment Industries, III(I), X.

⁹⁸ Guanyu Waiguo Touzizhe Binggou Jingnei Qiye Zanxing de Guiding (关于外国投资者并购境内企业的规定) [Regulations on Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by MOFCOM, State-owned Assets Supervision & Admin. Comm'n, St. Admin. Taxation,

These restrictions have been categorized as either economic security or “cultural security.”⁹⁹ While the provision of the Regulations on Acquisitions relating to antimonopoly review were replaced by the AML, these requirements for MOFCOM approval remain in force. “Key industries” and “economic security” are broad terms, remaining within the discretion of the authorities. Indeed, even if they are defined somewhere, such a document would likely be a State Secret guarded against public disclosure.

However, in 2006, the State Assets Supervision and Administration Commission did publicly announce that State capital must playing a leading role in seven sectors: 1) armaments; 2) power generation and distribution; 3) oil and petrochemicals; 4) telecommunications; 5) coal; 6) aviation; and 7) shipping.¹⁰⁰ The requirement that these sectors remain under State control is so strong that it is unlikely that a foreign acquisition of a major Chinese company operating in any of these sectors would ever even be proposed to regulators. These are similar to the outright prohibition on foreign investment into specific sectors listed in the Catalog. China’s national security review mechanism is only likely to be meaningful to foreign investors in the gray areas at the margins of these protected sectors. Nonetheless, the publication by the SASAC combined with the Catalog provides a basic framework for distilling China’s definition of “economic security.”

A key player to watch is the NDRC, which administers the Catalog and the list of old China brands that receive special protection, though it is MOFCOM’s job to do the day-to-day enforcement according to those lists.¹⁰¹ As a result of these roles, many expected the NDRC to lead merger review for national security concerns.¹⁰² Even before it became clear that the State Council would create a wholly new national security mechanism under the joint leadership of the NDRC and MOFCOM, commentators expected such a parallel system much like the U.S. model with those

St. Admin. for Industry and Commerce, Securities Regulatory Comm’n & St. Admin. Foreign Exch., Aug. 8, 2006, effective Sept. 8, 2006) art. 12, *translated in* LAWINFOCHINA.

⁹⁹ Tarrant M. Mahony, *Thirty Years of Reform and Opening: A Brief History of Foreign Investment in China*, 1 DONG-A J. INT’L BUS. TRANSACTIONS L. 1, 36-37 (2009) (S. Korea).

¹⁰⁰ See JERRY Z. LI, *INVEST IN CHINA: A PRACTICAL LEGAL GUIDE TO MERGERS AND ACQUISITIONS* 18 (2007); see also Lan Xinzheng, *State Seeks Control of Critical Industries*, BEIJING REV., Jan. 11, 2007, available at

http://www.bjreview.com.cn/print/txt/2007-01/09/content_52480.htm.

¹⁰¹ Waishang Touzi Chanye Zhidao Mulu (外商投资产业指导目录) [Catalog for Guidance of Foreign-Invested Industries] (promulgated Oct. 31, 2007, effective Dec. 1, 2007), <http://www.ndrc.gov.cn/zcfb/zcfbl/2007ling/W020071107537750156652.pdf> (China).

¹⁰² See *Anti-Monopoly Law*, BAKER BOTTS (Oct. 23, 2008), http://www.bakerbotts.com/file_upload/ChinaUpdateAntiMonopoly.htm.

departments conducting security analysis distinct from MOFCOM's competition review.¹⁰³

What this administrative legacy means for China's definition of national security is that the current NDRC conception, embodied in the Catalog and list of old China brands is likely to carry forward into the new national security review system to some extent. Whether and to what extent that will interact with new drives to relax the breadth of the Catalog remains to be seen.¹⁰⁴

The new Security Review System Notice lists several specific industries where M&A will be subject to scrutiny for national security concerns.¹⁰⁵ Traditional areas of the defense industry and supporting enterprises, enterprises surrounding sensitive military installations, and other areas related to national defense security are all included. The Notice also lists important agricultural products, important energy and resources, important infrastructure, important transportation services, key technologies, and major equipment manufacturing enterprises. This is a broad list that encompasses traditional ideas of national security alongside economic security and critical infrastructure concerns. The vagueness of an "important" enterprise is likely to give investors substantial anxiety until more is known about how the review will actually be conducted.

The types of investment subject to the security review defer in part to existing distinctions between wholly domestic enterprises and foreign-invested enterprises ("FIEs"). Review may be triggered by: any investment that turns a domestic enterprise into an FIE; any investment that increases the overall interest held by foreigners in a current FIE; and direct or indirect acquisitions of domestic enterprises, whether through equity or assets.

In almost all cases the threshold for security review will be that the foreign investor must acquire "actual control" of the enterprise. Actual control is defined to include situations where any foreign investor or combination of foreign investors will hold more than 50% of an enterprise's equity, or where voting rights give a foreign investor significant influence over shareholder meetings or board meetings. Additionally, actual control may be found in other circumstances where a foreign investor receives control over the

¹⁰³ See AML art. 31; see also *id.* (stating "it is altogether possible that the Committee could be intentionally modeled after CFIUS. . .").

¹⁰⁴ See Jasson Han & Hong Zhang, *China Reaffirms Its Openness to Foreign Investment*, ASIA ALERT (WEIL, GOTSHAL & MANGES LLP), Apr. 2010 (discussing plans to increase the number of encourages industries for foreign investment), available at http://www.weil.com/files/Publication/f89539e4-1797-4415-8840-9faebe099761/Presentation/PublicationAttachment/f85ef693-d5aa-43d0-a9bb-c60364b3e80f/Asia_Alert_Apr_2010.pdf.

¹⁰⁵ See Seah & Goldstein, *supra* note 93.

business decisions, finance, personnel, and technology of a domestic enterprise.

The exception to the actual control requirement may be for transactions impacting the defense sector. The Security Review System Notice leaves some ambiguity on this point. However, based upon a recent informal inquiry made to the NDRC, it appears that transactions affecting the defense sector will be reviewed regardless of whether the foreign investor acquires actual control.

In reviewing a transaction, Chinese regulators are given a broad mandate. The Interdepartmental Conference will look to a transaction's impact on: national defense security, including production capacity for defense-related products, services, and related equipment and facilities; national economic stability; basic societal order; and research and development capacity for key technology related to national security. How broadly national economic stability and basic societal order will be interpreted is certain to be watched closely as further details emerge and initial actions are taken.

Overall, it is clear that China's evolving national security review process will not limit itself to "national security" within the common Western definition, i.e. a focus on military technology and defense applications. Rather, China has adopted a broader definition of national security for the new Interdepartmental Conference. Such a definition more accurately reflects the wide scope that appears to be in actual use, encompassing many important industries beyond those explicitly tied to defense, such as natural resources, energy, and even national champion brands expected to grow into internationally competitive brands.¹⁰⁶

V. CASE STUDIES

In all three jurisdictions, the U.S., EU and China, discussing the legal framework can only reveal so much. National security is the most essential responsibility a government has to its citizens and practice can occasionally be more revealing than plain law in such a sensitive area. These case discussions demonstrate that national security can often become politicized, both domestically as politicians appeal to their varied constituencies and internationally as actions taken in the name of national security aggravate trading

¹⁰⁶ However, making famous brands an explicit part of the definition of national security would likely run afoul of WTO law. Cf. Press Release, U.S. Trade Rep., United States Wins End to China's "Famous Brand" Subsidies after Challenge at WTO; Agreement Levels Playing Field for American Workers in Every Manufacturing Sector, Dec. 18, 2009, available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/united-states-wins-end-china's-famous-brand>-sub.

partners. Both the U.S. and China have suffered from such politicization, remarkably the UK has remained relatively free of such problems.

A. US Case Study: CNOOC and Unocal

CFIUS has not had an easy run of things. In juggling its dueling mandates to approve beneficial foreign investment but deny mergers that harm national security, it has managed to maintain a relatively low profile in the United States. However, as the case discussed here demonstrates, CFIUS has rarely been able to please everyone. What is essential to observe here is that all of the media and political discussion in this case, as in others, centered around CFIUS. The FTC and DOJ as antitrust regulators have managed to keep out of the fray and avoid being pressured to expand their mandates beyond competition law.

In June 2005, China National Offshore Oil Company (CNOOC) endeavored to acquire Unocal, a U.S. petroleum company. The deal was ultimately withdrawn without waiting for a CFIUS decision. By most accounts, two factors killed the deal. First was the indication through consultation that a tough CFIUS review was likely. Second was widespread public and congressional opposition to the deal. By CNOOC's own account the political environment "creat[ed] a level of uncertainty that present[ed] an unacceptable risk to our ability to secure this transaction."¹⁰⁷

Though CFIUS did not take any formal action, its existence was at the heart of the dispute. Immediately after the proposed acquisition was announced, congressional leaders began to vocally oppose the deal and urge President Bush to block it, essentially pressuring CFIUS to recommend the same. This drive culminated only a week after the deal was announced with a House of Representatives resolution concluding:

(1) the Chinese state-owned China National Offshore Oil Corporation, through control of Unocal Corporation obtained by the proposed acquisition, merger, or takeover of Unocal Corporation, could take action that would threaten to impair the national security of the United States; and

(2) if Unocal Corporation enters into an agreement of acquisition, merger, or takeover of Unocal Corporation by the China National Offshore Oil Corporation, the President should initiate immediately a thorough review of the proposed acquisition, merger, or takeover.¹⁰⁸

¹⁰⁷ David Barboza, *China Backs Away from Unocal Bid*, N.Y. TIMES, Aug. 3, 2005, <http://www.nytimes.com/2005/08/02/business/worldbusiness/02iht-unocal.htm>.

¹⁰⁸ H.R. Res. 344, 109th Cong. (2005) (enacted).

The resolution passed with an overwhelming vote of 398-15. By August 2nd, the deal was dead.

In announcing the withdrawal of its offer, CNOOC noted that it had filed papers with CFIUS and was working to take remedial action to satisfy CFIUS concerns.¹⁰⁹ Further, it noted that the ultimate problem was not CFIUS itself, but rather political pressures that threatened to override the results of any favorable determination by CFIUS. The CNOOC statement says, "The unprecedented political opposition that followed the announcement of our proposed transaction, attempting to replace or amend the CFIUS process that has been successfully in operation for decades, was regrettable and unjustified."¹¹⁰ Such condemnation did not come only from CNOOC.

The Chinese government also denounced the interference of the U.S. Congress. After the House resolution was passed, the Chinese Ministry of Foreign Affairs issued a strongly worded statement saying:

We demand that the U.S. Congress correct its mistaken ways of politicizing economic and trade issues and stop interfering in the normal commercial exchanges between enterprises of the two countries, CNOOC's bid to take over the U.S. Unocal company is a normal commercial activity between enterprises and should not fall victim to political interference. The development of economic and trade cooperation between China and the United States conforms to the interests of both sides.¹¹¹

As direct as that statement is, it was rather mild compared to statements made by many U.S. Congressmen. The whole CNOOC and Unocal incident was ultimately a significant diplomatic row.

While it is hard to measure lingering sentiment, there is strong indication that the Chinese have not forgotten the way Chinese interests were slighted by American politicians. In 2005, CNOOC's acquisition would have been the largest ever outbound investment by a Chinese company. The interference by Congress appeared hugely hypocritical given the many ways that the U.S. has urged China to further open itself to foreign investment over the years. Of course, had the deal been flipped with Unocal attempting to acquire CNOOC, the odds of China approving it would seem laughable. In any event, China is unlikely to forget about the U.S. response to CNOOC's bid anytime soon. Further, it gives Chinese

¹⁰⁹ Press release, CNOOC, CNOOC Limited to Withdraw Unocal Bid Aug. 2, 2005, <http://www.cnooltd.com/encnooltd/newszx/news/2005/961.shtml>.

¹¹⁰ *Id.*

¹¹¹ See Peter S. Goodman, *China Tells Congress to Back Off Business*, WASH. POST (July 5, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/04/AR2005070400551.html>.

officials who oppose U.S. investment a strong card to play in any discussion.

Taking a look at the broader implications of the failed acquisition, it is important to stress that CFIUS did not block this deal, rather it was congressional opposition and the threat of overriding the CFIUS process. Under the state of the law in 2005, it seems unlikely that CFIUS would have had major problems with the acquisition because it did not have a very direct impact on defense. Nonetheless, Congress did raise national economic security issues given the U.S. dependence of accessibility to oil imports.

There is little doubt that the CNOOC bid provided some of the impetus for expanding the role of CFIUS in the Foreign Investment and National Security Act of 2007.¹¹² Under its new mandate, there is a much greater chance that CFIUS would recommend the President block a deal like this in the future.

The CNOOC case shows that the politicization of national security review is undesirable not just because of its unpredictable nature for business, but also because of the way that it can harm diplomatic relations with key trading partners. Though any blocked deal has the potential to harm foreign relations, when that decision is made by a bureaucracy with the perception of substantial professionalism and impartiality the impact is muted significantly. A dispassionate examination of national security is better in all aspects than a heated political denunciation of another nation and its enterprises as a threat. In this regard, to the extent that the Foreign Investment and National Security Act of 2007 takes some of Congress's legitimate concerns and incorporates them into the less passionate and politics-driven CFIUS process, it is commendable. However, none of that should lead us to believe that CFIUS will avoid future political furor as a result of the FINSA amendments.¹¹³

¹¹² See Casselman, *supra* note 34, at 170-77 (examining then-current proposals to amend Exon-Florio in the wake of the CNOOC-Unocal failure).

¹¹³ No discussion of CFIUS's political fiascos could be complete without at least a brief mention of the Dubai Ports World deal. When Dubai Ports World moved to acquire a British firm holding rights to manage cargo loading at major U.S. ports in 2005, CFIUS took some action, but ultimately found no threat from the deal after DHS, acting as lead agency, negotiated a letter of assurances resolving the few issues there were. See Ilene Knable Gotts et al., *Is Your Cross-Border Deal the Next National Security Lightning Rod?*, BUS. L., July/Aug. 2007, at 31, available at <http://www.abanet.org/buslaw/blt/2007-07-08/lange.shtml>. Appreciating the details here is less important than noting that this time when CFIUS actually did take some corrective action, the criticism of CFIUS still came because many in Congress did not think it was not strong enough. Ultimately, the deal died when popular and congressional uproar made it unattractive. *Id.*

B. Europe and the UK Case Study: BAE and Finmeccanica

In the European and UK context, there are no truly controversial deals to discuss. To a large extent, this is a credit to the way that the EC structure is effectively insulated from direct political meddling. The definition of national security for each Member State ends at its own border, with a broader concept of European security informal and relevant only to the extent that it impacts the individual Member State.

In joining the EU, each Member State knowingly gave up a significant measure of economic control within its own borders. No longer could it significantly restrict the flow of capital and labor amongst the European states. Along with that elevation of power to the European level went much of the power related to merger review. While Member States have the power to raise a “public interest” exception, the Commission can override an abuse of that has power if the invocation is not “compatib[le] with the general principles and other provisions of Community law.”¹¹⁴

This is not to say that the UK has never invoked its right to raise a national security exception to a proposed merger. However, it has raised exceptions only in cases that fall squarely within the defense sector and even then, it has allowed transactions after negotiating remedies.¹¹⁵

A typical example is the 2002 joint venture that the UK’s BAE Systems entered into with European Aeronautic Defence and Space Co. (Germany and France) and Finmeccanica (Italy).¹¹⁶ In the OFT report on the BAE Systems joint venture, the national security

¹¹⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation)[2004] OJ L 24/1, art. 21(4).

¹¹⁵ The UK has raised security concerns in several cases including: Alvis plc by General Dynamics Corporation; AgustaWestland N.V. by Finmeccanica S.p.A.; Anticipated acquisition of Insys Group Limited by Lockheed Martin UK Holdings Limited; Release and variation of undertakings given by BAE Systems relating to its acquisition of the Marconi Electronic Systems business of the General Electric Company Plc (March 2000); Acquisition of Smiths Aerospace by General Electric Company; acquisition of QinetiQ’s Under Water Systems Division by Atlas Elektronik UK. See National Security Mergers, DEP’T FOR BUS. INNOVATION & SKILLS, <http://www.bis.gov.uk/policies/business-law/competition-matters/mergers/mergers-with-a-public-interest/national-security-mergers> (last visited May 8, 2011) (U.K.).

¹¹⁶ While this deal is a fine example of the UK’s use of national security review, it is not ideal for purposes of this paper’s discussion first because it involves solely European entities and second because it slightly predates the effect of the Enterprise Act 2002. However, the example is still illustrative because the mechanism for raising national security exceptions is unaffected by whether the deal is entirely European or contains parties outside the EU. Further, the Enterprise Act primarily elaborated and formalized the EC practice for raising an exception that was already included in essence in the Fair Trading Act of 1973.

concerns are clearly separated out from competition concerns.¹¹⁷ Further, OFT states that it did not attempt to raise those concerns itself, rather they were raised by the Ministry of Defence (“MoD”) and brought to OFT’s attention.¹¹⁸ The Ministry of Defence was further responsible for negotiating a remedy to resolve its concerns with the parties.

The ultimate agreement negotiated by the MoD and endorsed by OFT contained several provisions to keep certain information and technology related to BAE’s guided weapons business within the control of UK persons.¹¹⁹ OFT fully deferred to MoD, stating “OFT is not expert in national security matter and must, therefore, rely heavily on the representations made by the MoD.”¹²⁰ In many ways this decision is a model. It clearly separates out national security from competition. It allowed the deal to clear using a narrowly tailored, publicly available remedy agreement.

On first impression, it is surprising that the European system, which combines national security review and competition review into a single process, seems to produce less drama than the U.S. system, which endeavors to use wholly separate dual processes. However, this can be attributed to the working definition of national security in Europe and the unique structure of the EU.

In terms of definition, the broadly phrased “public interest” could easily be expanded in practice, and perhaps will be in the future. But for the time being, the UK seems to have kept it focused within the traditional scope of national defense. Compared with a broad definition encompassing key infrastructure and economically crucial industries, there is relatively little gray area to define the limits of defense. Further, the companies operating in the defense industry are used to working closely with governments as major clients and are accustomed to navigating export-controlled areas, and the boundaries between sensitive government-proprietary technology and that which can be sold to the public. These factors make for a smoother process unlikely to result in the politicization and diplomatic unpleasantness that has resulted from merger reviews in the U.S. and China.

¹¹⁷ Office of Fair Trading, Completed JV: BAE Systems plc/European Aeronautic Defence and Space Company NV/Finmeccanica SPA, No. ME/1066/02, at 9, 12 (Mar. 26, 2002), *available at* http://www.offt.gov.uk/shared_offt/mergers/mbdaadvice.pdf (U.K.).

¹¹⁸ *Id.* at 9.

¹¹⁹ Office of Fair Trading, Merger of the Guided Weapon Businesses of BAE Systems plc, European Aeronautic, Defence and Space Company NV and Finmeccanica SpA, *available at* http://www.offt.gov.uk/shared_offt/mergers/mbdaundertakings.pdf (U.K.).

¹²⁰ Office of Fair Trading, *supra* note 116, at 12.

However, the other major factor that makes the European systems successful is attributable to the unique structure of the EU. As discussed above, the unusual confederation of European states means that attempts to expand the definition of national security can be overridden, or at least overshadowed, by having the primary review conducted by DG-Comp at the European level. While this system seems to work well, unfortunately it is not replicable for the U.S. or China which operate as single nations.

C. Chinese Case Studies

Because China's situation is still developing and a national security review system has only recently established, two cases studies are necessary to elaborate the conditions foreign investors and Chinese regulators face. The first case, Carlyle and Xugong, demonstrates the impact of national security on general approval of foreign acquisitions prior to the AML. The second and more central case for this paper's discussion, Coca-Cola and Huiyuan, supports the argument that AML enforcement has been politicized by national security concerns. Examining these cases is necessary to appreciate the breadth of national security's definition in China and also the ways that it can appear in somewhat unexpected places

1. Carlyle Group and Xugong

In October 2005, The Carlyle Group ("Carlyle") announced its intention to buy an 85% stake in Xugong Construction Machinery Group ("Xugong").¹²¹ Xugong was the largest construction machinery maker in the China and under the ownership of the Xuzhou local government.¹²² Carlyle is a U.S. private equity firm that, despite its private ownership, counts numerous former government officials among its past and present directors and officers; particularly notable are former U.S. President George H.W. Bush, former U.K. Prime Minister John Major, and former U.S. Secretary of Defense Frank Carlucci.¹²³

¹²¹ Press Release, Carlyle Group, The Carlyle Group Agrees to Acquire an 85% Stake in Xugong Group Construction Machinery Co., Ltd. for US\$375 million (RMB 3 billion); Transaction Will Help China's Leading Construction Machinery Producer Grow Domestically and Internationally, Oct. 25, 2005, <http://www.carlyle.com/media%20room/news%20archive/2005/item6742.html>.

¹²² See *Carlyle Abandons Xugong Dream*, CHINA DAILY, July 24, 2008, available at http://news.xinhuanet.com/english/2008-07/24/content_8760203.htm.

¹²³ See, e.g., Press Release, Carlyle Group, John Major Appointed European Chairman of The Carlyle Group, May 14, 2001, <http://www.carlyle.com/media%20room/news%20archive/2001/item6536.html> (also quoting Frank Carlucci, then The Carlyle Group's Chairman).

The deal immediately triggered “widespread concerns over national economic security in China.”¹²⁴ Though the deal was announced prior to the AML’s passage or the 2006 M&A provisions, it still required the ordinary foreign investment approval from MOFCOM.

After the deal was notified to MOFCOM, it languished there for three years. On two occasions Carlyle revised its offer to Xugong, significantly reducing its proposed stake – ultimately down to only 45%.¹²⁵ After three years of waiting and making additional concessions without securing MOFCOM approval, the deal was abandoned in July 2008.¹²⁶

The timing is notable. This deal was announced only a few months after the CNOOC/Unocal debacle in the United States. Whether this deal was sent to purgatory as retribution is difficult to analyze, but it is safe to say that the CNOOC deal was on the minds of many Chinese officials evaluating Carlyle’s proposed acquisition. While political retribution may be a partial factor, the stated concerns about national economic security were certainly significant.

2. Coca-Cola and Huiyuan Juice¹²⁷

In March 2009, MOFCOM’s Antimonopoly Bureau announced a decision to prohibit the acquisition of China Huiyuan Juice Company by Coca-Cola.¹²⁸ The decision was made under article 28 of the AML, which is the appropriate article authorizing prohibition of concentrations which would restrict competition.¹²⁹ This was the first prohibition under the AML and remains the only outright prohibition of a merger as of the time of this writing.

¹²⁴ *Carlyle’s Proposed Stake Acquisition in Xugong Falls Through*, CHINASTAKES.COM (July 23, 2008), <http://chinastakes.com/2008/7/carlyles-proposed-stake-acquisition-in-xugong-falls-through.html>.

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ My discussion of the Coca-Cola and Huiyuan deal is adapted in part from an earlier, unpublished paper I wrote in April 2009, while a student at Georgetown University Law Center.

¹²⁸ *See* Coke Announcement, *supra* note 81; *see also* Jun Wei et al, *MOFCOM Bars Coca Cola’s Proposed Acquisition of Huiyuan*, CHINA ANTITRUST UPDATE, Hogan & Hartson LLP (Mar. 19, 2009) at 2, available at http://www.hoganlovells.com/files/Publication/e756a633-5690-4a1f-8f38-ae53a5bd22ea/Presentation/PublicationAttachment/46ad14bc-0f83-4345-9a41-b9661f2f7412/ChinaAntitrust_Coca_Cola_March192009.pdf; Press Release, Shangwu Bu (商务部) [MOFCOM], Shangwu Bu Jiu Kekoukele Gongsi Shougou Zhonguo Huiyuan Gongsi An Fanlongduan Shencha Zuochu Caijue (商务部就可口可乐公司收购中国汇源公司案反垄断审查做出裁决) [MOFCOM’s Decision on Antimonopoly Review on Coca Cola’s Proposed Acquisition of Huiyuan] (Mar. 18, 2009), <http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html> [hereinafter Coke Press Release], translated in <http://blogs.wsj.com/chinarealtime/2009/03/18/china%e2%80%99s-statement-blocking-coca-cola-huiyuan-deal/>.

¹²⁹ The official announcement also mentioned Article 29 in reference to the failed attempt to negotiate restrictive conditions to appease competitive concerns. *See* Coke Announcement, *supra* note 81.

At first glance, there does not appear to be a “national security” element to this merger. Yet many perceived that the problem was not competition concerns, but that Huiyuan is a leading national brand with economic security importance.¹³⁰ Examination shows that competition alone could not have justified MOFCOM’s actions.

In blocking the transaction, MOFCOM issued two short statements giving only a glimpse of its reasoning.¹³¹ The statements offer three reasons why MOFCOM decided to prohibit the acquisition. First is that Coca-Cola would be able to extend its dominant position in the carbonated beverages market into the market for fruit juice.¹³² Second, the acquisition would concentrate two of China’s most famous juice brands – Huiyuan and Minute Maid – under the control of a single powerful company.¹³³ Third, the concentration would make it harder for small and medium-sized juice companies to survive.¹³⁴ Nowhere among the reasons does MOFCOM mention national economic security or the value of the Huiyuan brand to China’s development goals.

After widespread criticism for the ruling’s lack of a more thorough explanation, MOFCOM followed up one week later by posting the transcript of a Q&A session with an ministry spokesman online.¹³⁵ The Q&A session elaborates on some ambiguities in the initial statements and also tries to diffuse early criticism that the merger prohibition may have been motivated by nationalist protectionism. Not helping the matter were news reports that the enforcement decision went up to the State Council and may even have been decided directly by Premier Wen Jiabao.¹³⁶ However, even if it is true that the decision came from the highest level, that does not necessarily mean that the ruling was not based on competition grounds. And so we should actually look to

¹³⁰ The criticism was significant enough that China’s state-controlled Xinhua newspaper ran an editorial defending the Coca-Cola/Huiyuan decision stating that the rejection “is part of a proper antimonopoly review and it has nothing to do with protectionism.” See Ming Jinwei, *Commentary: It’s Antimonopoly Review, Not Protectionism*, XINHUA, Mar. 21, 2009, http://news.xinhuanet.com/english/2009-03/21/content_11045411.htm.

¹³¹ Coke Announcement, *supra* note 81; Coke Press Release, *supra* note 127.

¹³² Coke Announcement, *supra* note 81 para. 4(1).

¹³³ *Id.* para. 4(2).

¹³⁴ *Id.* para. 4(3).

¹³⁵ Shangwu Bu Xinwen Fayanren Yao Jian Jiu Kekoukele Gongsì Shougou Huiyuan Gongsì Fanlongduan Shencha Jueding Da Jizhe Wen (商务部新闻发言人姚坚就可口可乐公司收购汇源公司反垄壟审查决定答记者问) [MOFCOM Q&A Session] (Mar. 25, 2009), <http://www.mofcom.gov.cn/aarticle/zhengcejid/bj/200903/20090306124140.html>.

¹³⁶ See, e.g., Lisha Zhou & Takashi Toyokawa, *China Huiyuan Juice: Coca-Cola’s Bid May be Subject to Approval by State Council*, FIN. TIMES (Feb. 17, 2009), available at <http://www.ft.com/cms/s/2/311e7924-fcf5-11dd-a103-000077b07658.html>.

MOFCOM's stated reasons before dismissing the action as politically motivated.

The reasoning most firmly rooted in competition grounds is MOFCOM's first claim - that Coca-Cola could use the transaction to extend its dominant position in carbonated beverages into the fruit juice market. The idea is that through tying, bundling, or other exclusive contracts, Coca-Cola could force distributors and retailers to offer Coca-Cola fruit juices alongside its eponymous soda – in the process excluding competitors from retail shelf space and harming consumer through reduced variety and higher price.¹³⁷

As a threshold issue, MOFCOM would first need to show that Coca-Cola was indeed “dominant” in the carbonated beverages market. Article 19 of the AML gives a statutory definition of market dominance and indicates that a single business operator with more than a 50% market share will face a rebuttable presumption of dominance. The initial statements by MOFCOM did not discuss the relevant market or Coca-Cola's share; rather, they made a conclusory statement that Coca-Cola was dominant in the carbonated beverages market. In the subsequent Q&A session, a MOFCOM official identified Coca-Cola's carbonated beverage market share at 60.6% nationwide,¹³⁸ sufficient to create the statutory presumption of dominance. However, a full analysis should also have looked to the market share held by Coca-Cola's competitors and whether they acted as a constraint on Coca-Cola's pricing ability. There is no evidence that this was done.

Further, less restrictive alternatives were available to MOFCOM if the Antimonopoly Bureau's concern was the potential for Coca-Cola to bundle sales of juice with its carbonated beverages. A simple behavioral remedy would be to prohibit such bundling or tying contracts, though admittedly that provision might be hard to enforce. A structural remedy could have mandated separate sales teams for the juice and carbonated beverages divisions. Either of these remedies would have greatly mitigated the threat of Coca-Cola abusing its dominance post merger. China has not been afraid of substantial structural remedies in other mergers.

MOFCOM's second explanation for blocking the transaction, that Coca-Cola could not be allowed to control both the Minute Maid and Huiyuan brands, has drawn the most concern from observers. MOFCOM reasoned that allowing one company to control two leading brand names would create a significantly higher barrier to

¹³⁷ See Coke Press Release, *supra* note 128.

¹³⁸ MOFCOM Q&A Session, *supra* note 135.

entry for potential competitors.¹³⁹ Unfortunately, it did not flesh out this explanation. It is not particularly controversial to argue that incumbent brands with loyal consumers can indeed be a barrier to new market entrants. However, it is much harder to explain how two major brands in the hands of a single firm present any larger of a barrier to entry than did the same brands in the hands of two separate firms.

This has led to allegations of brand protectionism designed to help China's domestic champions.¹⁴⁰ This issue can be confusing because Huiyuan Juice is technically not a Chinese corporation – it is incorporated in the Cayman Islands and trades on the Hong Kong stock market (which is not part of China for purposes of the AML).¹⁴¹ Nonetheless, Huiyuan has a Chinese name and is a major player in the Chinese market, accounting for 32.6% of domestic fruit juice sales.¹⁴²

The final stated reason for blocking the acquisition was that it would not leave room for small- and medium-sized juice companies to survive. There are two ways to interpret this reasoning. One is that the merger would have raised the minimum viable scale necessary to survive in the juice industry and pushed toward monopoly, though there is no explanation offered for how it would do that. The second explanation is that MOFCOM is violating the famous American maxim that antitrust enforcement should be concerned with the “protection of competition, not competitors . . .”¹⁴³ That maxim would hold that the Antimonopoly Law should only be concerned with preserving competition for the benefit of consumer welfare. Absent a consumer welfare justification, it should not be protecting small businesses that cannot compete with the returns to scale and efficiencies of large producers.

In sum, while MOFCOM's decision to block the Coca-Cola/Huiyuan deal was couched somewhat in the language of

¹³⁹ Coke Announcement, *supra* note 81 para. 4(2).

¹⁴⁰ See, e.g., Andrew McGinty & Kristie Nicholson, *Coca-Cola/Huiyuan: Ministry's Prohibition Sparks Controversy*, Apr. 2, 2009, <http://www.internationallawoffice.com/newsletters/detail.aspx?g=76ff3c8f-0c3c-48c0-84e6-feaaf1f863c> (concluding that “[i]nternational companies seeking to acquire Chinese companies, particularly those with a famous brand, must consider the potential application of the law at an early stage”).

¹⁴¹ See Jingyingzhe Jizhong Shenbao Zanzing Banfa (Zhengqiu Yijian Gao) (经营者集中申报暂行办法(征求意见稿)) [Draft Provisional Measures on the Notification of Concentrations Between Undertakings] (issued by MOFCOM, Jan. 20, 2009) art. 4, <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090106011461.html>.

¹⁴² See Valerie Bauerlin & Gordon Fairclough, *Beijing Thwarts Coke's Takeover Bid*, WALL ST. J., Mar. 19, 2009, B1, available at <http://online.wsj.com/article/SB123735859467667801.html> (citing Euromonitor International for market share information).

¹⁴³ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

competition law, there is widespread skepticism as to whether the deal posed any legitimate concern. For one example from a leading authority, in response to MOFCOM's decision, Bill Blumenthal, former General Counsel of the U.S. Federal Trade Commission and an avid follower of Chinese competition law, stated simply that "serious competition issues [were] not apparent under current Western norms."¹⁴⁴

What this example shows is that China's broadly defined national security conception has crept into AML enforcement. Further, this "mission creep" has harmed perceptions of the Antimonopoly Bureau's professionalism and China's regulatory climate. The following section explains how the new national security review system may help prevent such problems in the future.

VI. NATIONAL SECURITY REVIEW AS A SOLUTION (PARTIALLY)

As the Coca-Cola example shows, AML enforcement has been politicized to some extent. This paper does not argue that a national security review is a panacea to resolve all politicization of foreign investment – far from it. As the Dubai Ports World and CNOOC examples shows, politicization continues in the U.S. despite the existence of CFIUS. Nonetheless, national security review can act as a lightning rod, freeing competition enforcers from outside pressures and providing other benefits by clearly delineated responsibility and power.

To date, only basic details of China's future national security review system have been publicly released. More significantly, no decisions have yet been taken under the new system. Regardless of the details, the very creation of a distinct system will likely provide substantial benefits to China.

In this section, several broad hypotheses are examined to explain MOFCOM's behavior in the Coca-Cola and Huiyuan merger. It can be assumed that, given MOFCOM's savvy and the international praise some of its officials have earned,¹⁴⁵ the Antimonopoly Bureau was aware that the competition issues with Coca-Cola were slight.

¹⁴⁴ William Blumenthal, Slides from speech to the ABA Antitrust Section Spring Meeting (Mar. 26, 2009), slide 6 (slides on file with the author); accord Carlos Tejada, *All Technique: How China Rejected the Coke-Huiyuan Deal*, WALL ST. J. – WSJ China Journal, Mar. 18, 2009 (citing Jones Day partner Peter Wang as saying that these arguments would not make a case in the U.S. and that size of the buyer alone may be a factor), available at <http://blogs.wsj.com/chinajournal/2009/03/18/all-technique-how-china-rejected-the-coke-huiyuan-deal/>.

¹⁴⁵ See, e.g., Gregory K. Leonard, *Dispatch from China*, ANTITRUST, Spring 2009, at 87, 88 (concluding after an ABA delegation visits that "[t]he individuals at MOFCOM in charge of merger review in China are energetic, dedicated to adopting best practices, and eager for interaction with other antitrust practitioners").

Thus, we must speculate why MOFCOM decided to prohibit the merger.

The two chief areas considered are first that MOFCOM was “stretching its wings” and eager to exercise its powers; second that MOFCOM was the recipient of political pressure from other branches of government to consider factors beyond competition. Whatever the true reasons for MOFCOM’s Coca-Cola decision, a clearly delineated national security review system would strongly curb any incentives, whether internal or external, to consider factors other than competition analysis in merger decisions.

A. *Power Vacuums Lead to Power Grabs*

With three ministry-level bodies sharing enforcement of the AML, any ambiguity as to the extent of each agency’s power is likely to result in some jostling for position as each agency tries to exercise the full range of its power. Indeed, one way of understanding the result in the Coca-Cola and Huiyuan Juice merger is to analyze it in terms of inter-ministry politics.

Given the initial uncertainty at the margins as to how MOFCOM, SAIC, and NDRC were to share enforcement responsibilities under the AML, one explanation for MOFCOM’s behavior in the Coke deal is that the ministry was trying to fill a vacuum before SAIC and NDRC had an opportunity to do so.

1. How MOFCOM’s Action Preempted SAIC

As discussed above, MOFCOM officially stated its primary concern with the acquisition of Huiyuan as that Coca-Cola might spread its dominant position in carbonated beverages into the fruit juice market.¹⁴⁶ For this section, we will suppose that MOFCOM was correct and this was precisely what Coca-Cola intended to do. In terms of antitrust theory, if MOFCOM had allowed the merger and Coca-Cola attempted to extend dominance of one market into dominance in another market through tying or bundling, it would be classified as “monopolization” (in U.S. terms),¹⁴⁷ or “abuse of dominance” (in European and Chinese terms).¹⁴⁸ Indeed, such conduct would violate article 17(5) of the AML.¹⁴⁹

¹⁴⁶ Coke Announcement, *supra* note 81, para. 4(1).

¹⁴⁷ See FTC Guide to the Antitrust Laws, *Exclusionary or Predatory Acts: Tying the Sale of Two Products*, http://ftc.gov/bc/antitrust/tying_sale.shtm (last accessed April 24, 2009) (“Illegal monopolization may include such things as exclusive supply agreements, tying the sale of two products, predatory pricing, and refusal to deal.”).

¹⁴⁸ TFEU art. 102(d) (“Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: . . . (d) making the conclusion of contracts subject to acceptance by the other parties of

Earlier, this paper suggested that MOFCOM might have ordered a structural remedy such as separate sales forces for juice and carbonated beverages – though there might be some difficulty policing this. Similarly, MOFCOM might just have permitted the merger and only taken action if Coca-Cola actually abused its dominance in carbonated beverages by tying-in juice sales. However, neither of these suggestions would be practical or appealing to MOFCOM.

Under the power sharing structure among MOFCOM, the SAIC, and the NDRC, abuse of dominance investigations fall under the jurisdiction of the SAIC.¹⁵⁰ By addressing concerns about abuse of dominance in the merger-review stage, MOFCOM not only flexes its muscles, it also prevents the SAIC from stealing the spotlight down the road. This may be one way of understanding the result in the Coca-Cola case.

If we want to be more charitable to MOFCOM and dismiss the idea that this might be a greedy power grab, we might attribute the outcome of the Coca-Cola case to the unfortunately limited scope of MOFCOM's enforcement authority. The statements announcing the decision to prohibit the merger indicate that Coca-Cola tried to negotiate a remedy to the acquisition that would satisfy MOFCOM. If the proposed remedy involved future limitations on distribution conduct, that might put MOFCOM in a tough position. Monitoring such behavior would properly fall within SAIC's purview. Perhaps MOFCOM worried that it would be unable to enforce such an ongoing behavioral remedy – at least unable to enforce it without stepping on toes at the SAIC.

As a last note on this point, there is also some indication that MOFCOM is simply better equipped to deal with the technicalities of competition law than is its sibling enforcers. And if this is true, maybe commentators should hold their tongues before complaining that MOFCOM overstepped its bounds. Notwithstanding the criticism lumped on MOFCOM following the Coca-Cola decision, U.S. enforcers and others acquainted with the MOFCOM AML team

supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”).

¹⁴⁹ AML art. 17(5) (“Business operators who have a market dominance are prohibited from taking any of the following actions abusing the market dominance: . . . (5) to make tie-in sales without any justification, or impose other unreasonable trading conditions in transactions. . .”).

¹⁵⁰ See Peter J. Wang et al., *Structure and Responsibilities of Enforcement Agencies Under China Anti-Monopoly Law Clarified*, JONES DAY (July 2008), available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5372 (citing the SAIC's State Council Restructuring Plan).

have generally been impressed with their savvy and competence.¹⁵¹ Even harsh critics would probably argue that the decision was a result of a politicized bureau – not an inept one. After all, MOFCOM was the lead drafter of the AML and deals with competition issues much more frequently than either the SAIC or NDRC. Thus, MOFCOM's action might have been the desirable result of exerting its institutional capacity in a way that forestalls future larger problems.

2. How MOFCOM's Action Preempted the NDRC

Further the possibility that brand protection may have been a motivating factor for the decision raises some issues related to the idea of national economic development.¹⁵² As was already discussed, the AML provides for the possibility of a parallel national security review and, at the early stage of AML implementation, many assumed it would be led by the NDRC.¹⁵³ However, the line is not clear as to what counts as a national security concern. Albeit in a tangential context, article 7 of the AML lumps together national economic lifeline industries and national security.¹⁵⁴ One might wonder whether under the new Security Review System the launch of a national security investigation by the Interdepartmental Conference might have been appropriate in the Coca-Cola case as a more direct way of considering the value of the Huiyuan brand to China.

If MOFCOM did encroach on national security concerns, this too could be understood in a political light. Just as monopolization is within the SAIC's bailiwick, national security, especially in the national economic security and cultural security arena, has traditionally been more within the core competencies of the NDRC. Indeed, the NDRC's leadership on the Catalog is the prime work evidencing NDRC's expertise in deciding which sectors of the Chinese economy will welcome foreign investment and acquisition.

¹⁵¹ See, e.g., Leonard, *supra* note 145, at 87, 88 (“[T]he individuals at MOFCOM in charge of merger review in China are energetic, dedicated to adopting best practices, and eager for interaction with other antitrust practitioners.”).

¹⁵² See AML art. 27(5); see also *MOFCOM Discloses Details Concerning Rejection of Coca-Cola/Huiyuan Transaction*, ANTITRUST UPDATE (Hogan & Hartson), Mar. 27, 2009, available at http://www.hoganlovells.com/files/Publication/d911d608-01a4-4494-b389-ca691179ee42/Presentation/PublicationAttachment/5cb9a041-88a2-4453-8da4-74823bea28a3/CA_Update_March2009.pdf (summarizing a MOFCOM Q&A and concluding that in the Coca-Cola transaction possible impact on national economic development and the AML's catchall was of particular importance).

¹⁵³ AML art. 31.

¹⁵⁴ *Id.* art. 7 (relating only to industries where state-owned businesses have a controlling position).

By implicitly addressing any national economic security concerns and protecting the Huiyuan brand name, MOFCOM eliminated the risk of it approving a transaction that may later have been blocked by the NDRC. Even if an NDRC block was highly unlikely, it might still be a subtle encroachment by MOFCOM onto the territory of the NDRC.

While we cannot know MOFCOM's motives or true reasoning, it is entirely reasonable that the Bureau's behavior might have been impacted by interagency politics. Jockeying for turf is entirely to be expected when three agencies share enforcement of a new and important law.

A major benefit of the new Security Review System will be that, just by its very existence, it resolves the ambiguity in the AML as to which enforcer is responsible for national security concerns. Though decision making by the Interdepartmental Conference may not resolve all uncertainty and it can still be argued that MOFCOM might attempt to dominate the conference, this argument seems weak in the face of a clear delineation of power to an Interdepartmental Conference constituted for the sole purpose of conducting national security reviews. At minimum, MOFCOM will have to get along with the NDRC, even if MOFCOM maintains a leading roll.

If MOFCOM has been "overreaching" in its analysis, the new national security guidelines should help to refocus the AML Bureau solely on competition concerns.

B. Political Pressure on MOFCOM

Regardless of the finer details of a national security review system, just the existence of such a separate process may have significant benefits for the development of Chinese competition law by deflecting political pressure away from MOFCOM. Now that a distinct "national security" review is established, the Interdepartmental Conference is likely to have greater leeway to consider a number of factors. Further it is unlikely to be expected to give the type of detailed, reasoned decisions that the international community expects from the MOFCOM Antimonopoly Bureau. Also, given that the definition of "national security" under the Security Review System Notice explicitly encompasses economic security along with traditional defense security, this new body is likely to draw much of the internal political pressure from constituencies that have an interest in protectionism.

Ultimately, the existence of a separate national security review process may free up MOFCOM to truly focus solely on competition grounds when enforcing the AML.

Further, because the national security review will be conducted by a multi-agency committee, much like CFIUS, many Chinese ministries and agencies will have a seat at the table. Some of these agencies may be precisely the same that were likely to try and influence MOFCOM's AML decision making in the past. By giving these constituencies an explicit means of voicing their opinions and attempting to block deals they find objectionable, those agencies may be less likely to lobby MOFCOM for a desired result cloaked in the guise of antitrust reasoning.

Of course, redirecting the pressure of protectionist tendencies and non-competition concerns will not make those pressures evaporate, just as they have not disappeared in the U.S. Foreign businesses may still wind up disappointed just as often, but only receive the result from another bureau within MOFCOM. However, it may free the AML Bureau to develop into a world-class competition enforcer that sticks to its narrow, but rigorous mandate. Separating out the political concerns from the legal concerns can be a major aid as China works to develop and deepen rule of law. One way to do that is to isolate political concerns within a few bodies and add a degree of transparency that identifies when political concerns have trumped strict enforcement of the law. Whether foreigners like the results coming from national security review or not, they will be more likely to gain respect for China's Anti-Monopoly Law and its enforcers.

VII. CONCLUSION

In dealing with national security concerns, reviewing cross-border acquisitions of domestic companies always has the potential to be politically sensitive. However, separating out national security concerns from competition and other merger review concerns has clear benefits.

The U.S. system is frequently politicized, but Congress and, to a lesser extent, CFIUS draw the fire, leaving bureaucratic agencies like the FTC and DOJ untainted. The EU system works remarkably well, but it is the product of a unique political system and unfortunately could not be replicated by the U.S. or China. China's system of merger review is still emerging. The national security review is unlikely to stop politicization of foreign investment, but it still has the potential to bring significant benefits.