

# Assessment of National Security Concerns in the Acquisition of U.S. and U.K. Assets

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## INTRODUCTION

Globalization and free trade principles are being overshadowed by a surge in regulatory or restrictive foreign investment measures. Foreign direct investments (FDIs) through merger and acquisitions are subject to the assessment process of jurisdictions’ competent competition authorities (the Competition and Markets

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Authority (“CMA”) in the United Kingdom and the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) in the United States). At the same time, such transactions can also be subject to national security frameworks that already exist in some countries (e.g., the United States) or that are being introduced in others (e.g., the United Kingdom). Such an assessment takes into account the risk that a transaction can pose to the jurisdiction’s national security.

A number of jurisdictions have introduced or are in the process of introducing national security frameworks. In general, there are two different structures: a dualist model and an integrated model. Under the dualist model, there are two separate bodies that assess transactions that can give rise to national security concerns: the competition authority has exclusive jurisdiction on assessing the impact of the transaction on competition (e.g., the FTC/DOJ in the United States and the CMA in the United Kingdom), and a separate agency (e.g., the United States’ Committee on Foreign Investment in the United States (CFIUS) and the United Kingdom’s Investment Security Unit (ISU)) assesses the impact of the transaction on the national security of the country. Alternatively, under an integrated model, the country’s competition authority makes both assessments. Under both models, as far as the national security assessment is concerned, the agency or a senior government official will decide the outcome. There is a slight divergence between the U.S. and the U.K. regimes in this respect, as the CFIUS can impose remedies to address the national security concerns and thus, not object to the transaction, while in the United Kingdom, the remedies recommended by the ISU will be adopted by the government.

This article will discuss the framework and the approach the U.S. and U.K. regimes follow in the assessment of national security concerns in transactions of domestic assets by foreign acquirers. First, the article will analyze the U.S. regime and discuss the legislative framework and enforcement record of CFIUS and the prohibition decisions on national security grounds of President Bush, President Obama, and President Trump. The paper will then turn to the U.K. national security regime and discuss the new framework for assessing national security concerns in the United Kingdom. The article will conclude with a few critical considerations for both the U.S. and U.K. regimes.

## I. THE FRAMEWORK FOR ASSESSING NATIONAL SECURITY CONCERNS IN M&As IN THE UNITED STATES

U.S. law generally does not restrict foreign ownership of, or investment in, U.S. companies.<sup>1</sup> However, such transactions could require not only an antitrust review, but also a review focusing on the impact of such transactions on national security. Transactions that have national security implications may require special notification and approval by the CFIUS. These specific provisions for merger

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1. Marvin Goldman, *United States: Doing Business In The USA: Regulation Of Foreign Investment*, MONDAQ (Dec. 20, 2006), <https://perma.cc/K4NJ-SR3L>.

assessment have been created as “a matter of the political and policy concerns of the time.”<sup>2</sup>

According to the Exon-Florio Amendment, “the term ‘national security’ shall be construed so as to include those issues relating to ‘homeland security,’ including its application to critical infrastructure,” the latter meaning “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.”<sup>3</sup> National security considerations are currently subject to different interpretations, even within Congress, and FIRRMA tried to provide more clarity in relation to the scope of the national security concept by outlining some examples of sectors that relate to national security concerns, such as critical technology (e.g., defense articles, defense services, and nuclear-related facilities), critical infrastructure (e.g., telecoms, power, oil and gas, water, and finance), and sensitive personal data.<sup>4</sup>

By assessing the CFIUS record, we can identify the main sectors that relate to enforcement on national security grounds. These include defense, law enforcement, intelligence, information technology, transportation, advanced technologies, semiconductors, data protection, internet security, telecommunications, and natural resources and energy.

#### A. *The CFIUS*

The CFIUS is an interagency body responsible for assessing all transactions that can lead to national security concerns.<sup>5</sup> As an interagency body, it is comprised of representatives from the Departments of Commerce, State, Defense, and Treasury (which acts as the chair of the Committee), as well as representatives from the U.S. Trade Representative Office and the Science & Technology Policy Office.<sup>6</sup> Finally, the Committee has two ex officio members: the Secretary of Labor and the Director of National Intelligence (DNI).<sup>7</sup>

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2. Harry First, Eleanor M. Fox & Daniel E. Hemli, *The United States: The Competition Law System and the Country's Norms*, in Eleanor M. Fox & Michael J. Trebilcock, *THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES* 332 (Oxford University Press ed., 2013).

3. The 1988 Exon-Florio Amendment added Section 721 to the Defense Production Act of 1950 (codified at 50 U.S.C. 4565), codifying the process CFIUS used to review foreign investment transactions. See *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEPT. OF TREASURY, <https://perma.cc/K34X-FZ2G>. The actual introduction of national security into the U.S. regime came a few years before, on May 7, 1975, when CFIUS was established by Executive Order 11858 (b), 40 F.R. 20263. See Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975), reprinted as amended in Exec. Order No. 13456, 73 Fed. Reg. 4677 (Jan. 23, 2008), <https://perma.cc/KB5Z-8CFR>.

4. H.R. 5515-538 Title XVII § 1701 (2018). See also Paul Marquardt, Chinyelu Lee & Nathanael Kurcab, *United States, GETTING THE DEAL THROUGH: FOREIGN INVESTMENT REVIEW* 2019, 2019, at 75 <https://perma.cc/2YXN-UYFG>.

5. Exec. Order No. 11858, 40 Fed. Reg. 20263 (May 7, 1975) (establishing CFIUS).

6. *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEPT. OF TREASURY, <https://perma.cc/K34X-FZ2G>.

7. See JAMES JACKSON, CONG. RSCH. SERV., RL33388, *THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES* 14 (2020) [hereinafter Jackson 2020].

The parties have the right to file a voluntary notice which initiates the official notification process.<sup>8</sup> The national security review must be completed within 30 days of the filing of the notice. Notably, most transactions are cleared at the initial stage. The assessment process by CFIUS takes 45 days and can be extended for another 15 days in certain circumstances<sup>9</sup> if:

- (i) CFIUS believes that the transaction threatens the national security and the threat has not been mitigated through an agreement with the parties;
- (ii) the lead CFIUS agency reviewing the transaction recommends that an investigation be conducted;
- (iii) the transaction is a “foreign government-controlled transaction”;  
or
- (iv) the transaction would result in foreign control of any “critical infrastructure” of the United States.<sup>10</sup>

Once CFIUS completes its assessment, it has the right to impose commitments on the parties if it believes that the transaction puts the national security of the USA at risk.<sup>11</sup> If CFIUS believes that the transaction must be prohibited, it refers the matter to the President of the United States for a decision. The president has 15 days to decide on the matter, and can agree or disagree with the assessment and the recommendation of CFIUS.

### B. *The CFIUS Enforcement Record*

CFIUS can review all “covered foreign investment transactions” in order to determine whether they threaten to impair U.S. national security, if the foreign entity involved is controlled by a foreign government or if the transaction would result in control of any “critical infrastructure that could impair national security.”<sup>12</sup> A “covered transaction” is any transaction that could result in foreign control of a person engaged in interstate commerce in the United States.<sup>13</sup> The following table illustrates the main sectors that covered transactions relate to.

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8. Gregory Husisian, *CFIUS and the New Trump Administration: Your Top Ten Questions Answered*, FOLEY & LARDNER LLP (Jan. 25, 2017), <https://perma.cc/FCW9-YHL5>.

9. H.R. 5515—538, 115th Cong. § 1709 (2018). What constitutes extraordinary circumstances will be defined by regulation. See § 1709(2)(C)(ii)(I). See also Harry Broadman, *U.S. Foreign Investment Policy Gets a Tougher but More Transparent CFIUS*, FORBES (Jan. 4, 2019), <https://perma.cc/W83J-87B8> (“FIRRMA revised the procedures and timetables governing filings with CFIUS. Under this new law, unless investors choose to file a formal “long-form” notice with CFIUS, they are obligated to file a “short-form” declaration 45 days before the transaction is completed.”).

10. 50 U.S.C. §4565(2)B(i)(ii); Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 2901; 50 U.S.C. app. § 2170. CFIUS will continue to consider all relevant facts and circumstances, rather than applying a bright-line test to determine whether a transaction results in foreign control. See *CFIUS Reform Overview*, U.S. DEP’T OF TREASURY (Nov. 14, 2008), <https://perma.cc/6TVS-E5EJ>.

11. Jackson 2020, *supra* note 7, at 13.

12. Jackson 2020, *supra* note 7, at 13.

13. Treas. Reg. § 800.103 (as amended 2008).

**Table 1: Covered Notices by Sector and Year, 2011-2020**

Year	Manufacturing	Finance, Information and Services	Mining, Utilities and Construction	Wholesale Trade, Retail Trade, and Transportation	Total
2011	49 (44%)	38 (34%)	16 (14%)	8 (7%)	111
2012	47 (41%)	36 (32%)	23 (20%)	8 (7%)	114
2013	35 (36%)	32 (33%)	20 (21%)	10 (10%)	97
2014	69 (47%)	38 (26%)	25 (17%)	15 (10%)	147
2015	68 (48%)	42 (29%)	21 (15%)	12 (8%)	143
2016	67 (39%)	68 (40%)	18 (10%)	19 (11%)	172
2017	82 (35%)	108 (46%)	28 (12%)	19 (8%)	237
2018	80 (35%)	86 (38%)	47 (21%)	16 (7%)	229
2019	102 (44%)	89 (39%)	21 (9%)	19 (8%)	231
2020	67 (36%)	80 (43%)	21 (11%)	19 (10%)	187
<b>Total</b>	<b>666 (40%)</b>	<b>617 (37%)</b>	<b>240 (14%)</b>	<b>145 (9%)</b>	<b>1668</b>

Source: CFIUS REPORT 2016–2017 and CFIUS REPORT 2020.<sup>14</sup>

The next table provides a more detailed perspective on the number of transactions that were submitted to CFIUS’s scrutiny by the sector of the economy as well as the home country or geographic economy of the acquirer.<sup>15</sup> Foreign acquirers’ investments most frequently fall under CFIUS scrutiny in the finance, IT, services, and manufacturing sectors.

14. U.S. DEP’T OF TREASURY, CFIUS ANNUAL REPORT TO CONGRESS 6 (2016–17), <https://perma.cc/3T25-2ZTG> [hereinafter CFIUS REPORT 2016–2017]; *see also* U.S. DEP’T OF TREASURY, CFIUS ANNUAL REPORT TO CONGRESS (2020), <https://perma.cc/UNX4-6E3A> [hereinafter CFIUS REPORT 2020].

15. U.S. DEP’T OF TREASURY, CFIUS ANNUAL REPORT TO CONGRESS 2 (2015), <https://perma.cc/LTZ8-ULLW> [hereinafter CFIUS REPORT 2015]; CFIUS REPORT 2016–2017, *supra* note 14.

**Table 2: Covered Transactions by Acquirer Home Country or Geographic Economy, by Target Sector (2018-2020)**

Country/ Economy	Finance, Information and Services	Manufacturing	Mining, Utilities and Construction	Wholesale Trade, Retail Trade, and Transportation	Total
Australia	16	2	4	3	25
Austria	1	4	0	0	5
Belgium	1	0	0	0	1
Bermuda	1	1	0	3	5
Brazil	0	1	0	1	2
British Virgin Islands	1	0	0	0	1
Canada	24	11	20	8	63
Cayman Islands	3	4	0	2	9
Chile	0	1	0	0	1
China	30	48	12	7	97
Colombia	0	0	1	0	1
Czech Republic	1	0	0	0	1
Denmark	1	2	3	1	7
Fiji	2	0	0	0	2
Finland	2	0	0	0	2
France	26	11	5	3	45
Germany	10	17	3	2	32
Guernsey	6	2	0	0	8
Hong Kong	0	6	0	1	7
India	7	6	0	0	13
Ireland	1	3	0	0	4

<b>Table 2 Continued</b>					
<b>Country/ Economy</b>	<b>Finance, Information and Services</b>	<b>Manufacturing</b>	<b>Mining, Utilities and Construction</b>	<b>Wholesale Trade, Retail Trade, and Transportation</b>	<b>Total</b>
Israel	4	7	2	0	13
Italy	3	5	0	1	9
Japan	41	39	9	7	96
Jersey	2	1	0	1	4
Kuwait	1	0	0	0	1
Lebanon	0	0	0	1	1
Luxembourg	1	4	0	1	6
Malaysia	1	1	0	0	2
Netherlands	3	7	7	0	17
Norway	0	1	0	0	1
Philippines	1	0	0	0	1
Portugal	0	0	5	0	5
Qatar	1	1	0	2	4
Russia	6	1	0	0	7
Saudi Arabia	0	4	0	0	4
Singapore	16	5	3	1	25
South Africa	1	1	0	0	2
South Korea	2	8	3	3	16
Spain	4	1	2	0	7
Sweden	14	9	1	2	26
Switzerland	0	5	3	0	8
Taiwan	1	9	0	2	12
Thailand	0	1	0	0	1

<b>Table 2 Continued</b>					
<b>Country/ Economy</b>	<b>Finance, Information and Services</b>	<b>Manufacturing</b>	<b>Mining, Utilities and Construction</b>	<b>Wholesale Trade, Retail Trade, and Transportation</b>	<b>Total</b>
The Bahamas	1	0	0	0	1
Turkey	0	3	2	0	5
UAE	6	1	2	0	9
United Kingdom	13	15	2	2	32
Vietnam	0	1	0	0	1
Total	255	249	89	54	647

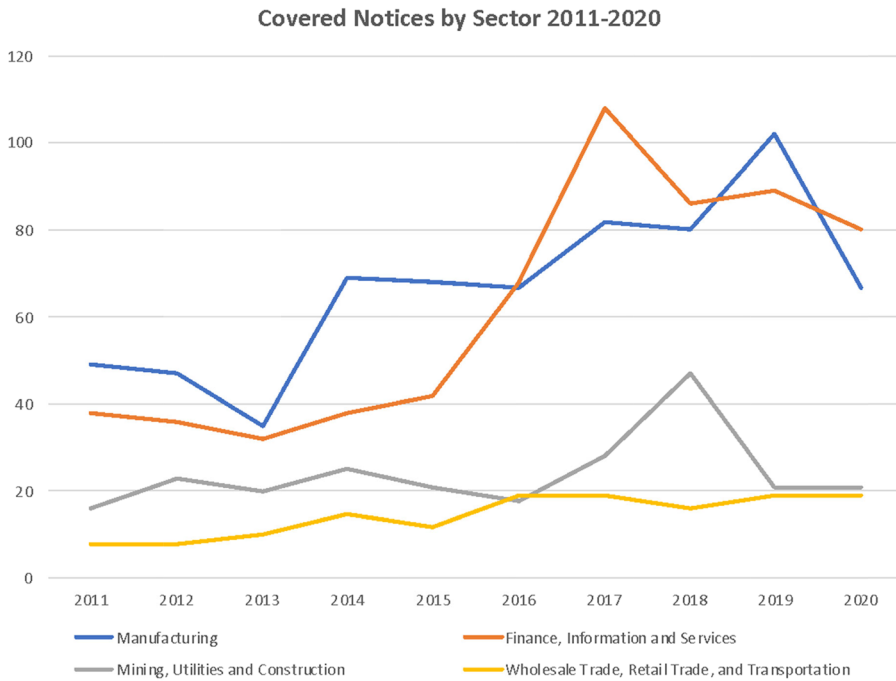
Source: CFIUS Report 2020.<sup>16</sup>

As the following graph illustrates, there was a constant increase in the number of cases that fell under the scrutiny of CFIUS between 2013 and 2017 in all sectors, with 2017 being a year of significant increase. Nonetheless, this trajectory changed in 2018, when the finance, information, and services sector drastically fell. In 2019, the same situation was observed in the mining, utilities, and construction sector, and in 2020, the most substantial drop took place in the wholesale trade, retail trade, and transportation sector.<sup>17</sup>

16. CFIUS REPORT 2020, *supra* note 14, at 21.

17. *CFIUS in 2017: A Momentous Year*, WILSON SONSINI GOODRICH & ROSATI PRO. CORP., 1 (2018), <https://perma.cc/E8QD-9MU8>.





Source: CFIUS Report 2020.<sup>18</sup>

### *C. Increasing CFIUS Scrutiny of Deals Involving China, Canada, Japan, and The United Kingdom*

As the graph above illustrates, the CFIUS enforcement record has shown an increasing trend in a few sensitive sectors for the US economy, albeit some fluctuations have been observed in recent years. It is noteworthy that there has been an increasing number of deals reviewed by CFIUS from parties whose domicile is different to the set of countries whose firms have historically had to request CFIUS review. As former Deputy U.S. Treasury Secretary Neal Wolin explains, “[p]reviously, there were many transactions from the U.K., from Canada and from other NATO allies. And increasingly there are now transactions that originate from other countries that have more complicated national security relationships with the US.”<sup>19</sup>

18. CFIUS REPORT 2020, *supra* note 14, at 21.

19. Neal Wolin, *Wolin on CFIUS*, 14 BRUNSWICK REV. 18, 18 (2018), <https://perma.cc/ZDU4-8LDV>.

The table below shows the various home countries/economies of acquirers involved in transactions that have been subject to CFIUS review. China, Japan, Canada, and the United Kingdom are the top four countries where acquirers of U. S. assets are domiciled, with China accounting for 24% of the reviews between 2013 and 2017 and 15% between 2018 and 2020.

**Table 3: Covered Transactions by Acquirer Home Country or Economy, 2013-2020**

Country/ Economy	2013	2014	2015	2016	2017	2018	2019	2020	Total
Australia	0	4	4	4	5	4	11	10	42
Austria			0	1	2	1	4	0	8
Belgium	0	0	1	0	3	1	0	0	5
Bermuda				1	0	2	2	1	6
Brazil	1	0	0	1	1	0	0	2	5
British Virgin Islands	0	1	0	6	4	0	0	1	12
Canada	12	15	22	22	22	29	23	11	156
Cayman Islands	1	3	8	5	8	2	2	5	34
Chile	1	0	0				0	1	2
China	21	24	29	54	60	55	25	17	285
Colombia	0	0	0	0	0	0	1	0	1
Czech Republic	0	0	0	0	0	0	0	1	1
Denmark	0	0	1	0	0	3	2	2	8
Fiji	0	0	0	0	0	2	0	0	2
Finland	0	1	2	3	0	0	0	2	8
France	7	6	8	8	14	21	13	11	88
Germany	4	9	1	6	7	12	13	7	59
Guernsey				0	1	1	4	3	9
Hong Kong	1	6	2	3	0	0	4	3	19
Hungary			0	0	1	0			1

Country/ Economy	2013	2014	2015	2016	2017	2018	2019	2020	Total
India	1	2	0	1	3	4	3	6	20
Indonesia	0	1	2	0	0				3
Ireland	1	1	2	3	3	1	1	2	14
Israel	1	5	3	3	4	5	2	6	29
Italy	0	0	2	0	2	3	3	3	13
Japan	18	10	12	13	20	31	46	19	169
Jersey			0	1	3	1	0	3	8
Korea			0	1	0	0			1
Kuwait			0	1	2	0	0	1	4
Lebanon			0	1	0	0		1	2
Liechtenstein	0	1	0	0	1	0			2
Luxembourg	1	0	2	5	2	0	1	5	16
Malaysia				0	0	1	0	1	2
Malta			0	1	0	0			1
Mexico	2	0	0	1	2	0			5
Netherlands	1	8	5	3	7	5	6	6	41
New Zealand	0	0	0						0
Norway	1	1	0	2	2	0	0	1	7
Papua New Guinea			0	0	1	0			1
Portugal	0	0	1	0	5	0	1	4	11
Qatar	0	1	0	0	0	1	1	2	5
Russian Federation	1	1	0	0	3	6	1	0	12
Saudi Arabia	2	1	1	0	1	1	3	0	9
Seychelles			0	1	0	0			1
Singapore	3	6	3	2	6	5	10	10	45

Table 3 Continued									
Country/ Economy	2013	2014	2015	2016	2017	2018	2019	2020	Total
South Africa	0	0	2	0	2	1	0	1	6
South Korea	1	7	1	6	6	4	10	2	37
Spain	1	2	2	1	1	2	2	3	14
Sweden	2	2	3	1	6	9	7	10	40
Switzerland	3	7	2	0	7	2	4	2	27
Taiwan	1	0	0	1	0	4	4	4	14
Thailand						0	1	0	1
The Bahamas						0	1	0	1
Turkey	0	0	2	2	0	2	2	2	10
United Arab Emirates	2	1	1	1	2	3	4	2	16
United Kingdom	7	21	19	7	18	5	13	14	104
Vietnam						0	1	0	1
Total	97	147	143	172	237	229	231	187	1443

Source: CFIUS Report 2015, CFIUS Report 2016-2017, and CFIUS Report 2020.<sup>20</sup>

#### D. Increasing Use of Mitigation Measures by CFIUS

An additional trend that can be observed in CFIUS's enforcement record is the increasing use of mitigation measures.<sup>21</sup> This trend has led to the criticism that CFIUS tries to mitigate national security issues and "get to a place where the deal can be approved with modifications."<sup>22</sup> In particular, Wolin firmly maintains that "[t]he basic policy judgment of the Obama Administration, and of many

20. CFIUS REPORT 2015, *supra* note 15, at 16-17; CFIUS REPORT 2016-2017, *supra* note 14, at 18-19; CFIUS REPORT 2020, *supra* note 14, at 35-36.

21. Such mitigation measures can comprise "conditions as restricting which persons can access certain technologies/information, establishing procedures regarding U.S. government contracting, establishing corporate security committees to oversee classified or export-controlled products or technical data, requiring divestments of critical business units, providing periodic monitoring reports to the U.S. government regarding national security issues, or giving the U.S. government the right to review future business decisions that implicate national security." Husisian, *supra* note 8, at 4.

22. Wolin, *supra* note 19, at 19.

administrations before it, was favorably disposed to inward foreign investment because it is good for the U.S. economy.”<sup>23</sup> The table below tests Wolin’s argument and shows the proportion of deals that were submitted to CFIUS’s scrutiny, and required CFIUS investigation and mitigation measures.

**Table 4: CFIUS’s scrutiny, investigations, mitigation measures, withdrawn notices and rejections of covered transactions, 2015-2019**

Year	Number of CFIUS’s reviews of covered transactions	Number of subsequent investigations conducted by CFIUS	Number of concluded actions after adopting mitigation measures pursuant to Section 721 to resolve security concerns	Number of withdrawn notices	Number of Rejections
2015	143	66	11	13	1
2016	172	79	17	27	1
2017	237	172	29	74	1
2018	229	158	29	66	2
2019	231	113	28	30	1
<b>Total</b>	<b>1012</b>	<b>588</b>	<b>114</b>	<b>210</b>	<b>6</b>

Source: CFIUS Report 2015, CFIUS Report 2016-2017 and CFIUS Report 2019.<sup>24</sup>

Given the growth in the implementation of the amount of mitigation measures, it is likely that “an increasingly stringent review process will result in more companies backing off of transactions that encounter resistance from the committee.”<sup>25</sup> The outcome of such a trend could lead to the diversion of foreign direct investments to include or exclude particular countries.<sup>26</sup>

Despite the number of investigations conducted by CFIUS, few lead to rejections. Between 2015 and 2019, where mitigation measures were imposed or withdrawn by the parties, only 6 were rejected (2 in 2018 and 1 every other year). No matter how intimidating the CFIUS review may seem, the low number of rejections is actually encouraging for foreign companies looking to invest in the United States.<sup>27</sup>

23. Wolin, *supra* note 19, at 19.

24. CFIUS REPORT 2015, *supra* note 15, at 2; CFIUS REPORT 2016–2017, *supra* note 14, at 2–3; U.S. DEP’T OF TREASURY, CFIUS ANNUAL REPORT TO CONGRESS, at 2 (2019), <https://perma.cc/5XZB-KY8Z> [hereinafter CFIUS REPORT 2019].

25. Husisian, *supra* note 8, at 4.

26. Additionally, the transactions reviewed by CFIUS in the past few years relate to “dual-use technologies or artificial intelligence or semiconductors or big sets of personal data . . . [a]nd those transactions have tended to raise greater national security sensitivity.” Wolin, *supra* note 19, at 18.

27. In the same FY 2015, 1,801 transactions were reported under the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”). The FTC brought 22 merger enforcement challenges, out of which only three initiated administrative litigation (less than 0.2 percent transactions where the competition

## II. THE BATTLE OF THE ENTITY LISTS: UNITED STATES AND CHINA

The strengthening of a protectionist approach to FDI by various countries is also exemplified by the introduction or expansion of lists of entities that must satisfy additional requirements (licensing or other) to invest in a country or may be prohibited altogether from investing in a country. In addition, domestic persons/entities may need to satisfy additional requirements or may be prohibited from investing in or collaborating with foreign entities. These lists have been expanding over time amongst various countries and at times have been used as tools to impose a “cloaked” industrial strategy.

We shall analyze below the U.S. and Chinese approaches to subjecting foreign entities to additional regulatory requirements for investing in each jurisdiction.

### A. *The U.S. Entity List (“U.S. List”)*

Among U.S. national security threats, one of the most upfront issues is the threat imposed by “the growing international presence and investment activity of firms that are owned or controlled by foreign governments,”<sup>28</sup> also known as state-owned enterprises (SOEs).<sup>29</sup> As opposed to ten years ago, where SOEs were found “at the top of the league table,” they now “account for over a fifth of the world’s largest enterprises.”<sup>30</sup>

The US government introduced the U.S. Entity List (“U.S. List”) in 1997 with the initial objective to mitigate the risks created by the propagation of weapons of mass destruction.<sup>31</sup> The U.S. List has gradually become an instrument used by the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce<sup>32</sup> to limit the export, re-export, deemed export, and transfer (in-country) of certain items, sensitive technologies, and components that are potentially “dual-use”<sup>33</sup>—subject to the Export Administration Regulations (EAR)<sup>34</sup>—to non-U.S. persons, individuals, organizations or companies who are involved, or likely to get involved, in activities that threaten the national security or foreign policy interests of the United States. Thus, once an entity is added to the list, companies wishing

authorities were against the deal occurring). See FEDERAL TRADE COMMISSION, HART-SCOTT-RODINO ANNUAL REPORT, at 2, 47 (2015), <https://perma.cc/V7HV-39MB>.

28. See JAMES JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 33 (2018) [hereinafter Jackson 2018].

29. The growing is such that, by 2010-2011, from the Forbes Global 2000 list of the world’s largest 2000 public companies, 204 have been identified as majority SOEs in that business year, with ownership spread across 37 different countries. China leads the list with 70 SOEs. See Przemyslaw Kowalski, Max Büge, Monika Sztajerowska & Matias Egeland, *State-Owned Enterprises: Trade Effects and Policy Implementations* 6 (OECD Trade Policy Papers, Working Paper No. 147, 2013) <https://perma.cc/FT6Z-B2M4>.

30. Organisation for Economic Co-operation and Development, *Ownership and Governance of State-Owned Enterprises: A Compendium of National Practices* 4 (2018), <https://perma.cc/ZEE5-PH2M>.

31. William A. Carter, *Understanding the Entities Listing in the Context of U.S.-China AI Competition*, CTR. FOR STRATEGIC & INT’L STUDS. (Oct. 15, 2019), <https://perma.cc/S9C8-STZE>.

32. 15 C.F.R. §§ 730–74 (2021).

33. *Id.* § 730.3 defining “dual-use” as usable for both civilian and military applications).

34. *Id.* § 744.16.

to do business with the listed entity are required to apply for a specific license from the government.<sup>35</sup>

The U.S. List applies to any person, individual, organization, or company that takes part in the following identified activities:

- (1) attempted diversion of controlled U.S.-origin aircraft parts to Iran; (2) contributions to unsafeguarded nuclear activities; (3) involvement in a scheme to falsify information submitted in support of BIS license applications in order to divert U.S.-origin items to Iran; (4) representing an unacceptable risk that U.S.-origin items exported, reexported, or transferred (in-country) to certain listed entities will be used in military end-use activities in China and/or in support of programs for the People's Liberation Army; (5) involvement with the Russian military and/or with Russia's biological weapons program; and (6) engaging in activities contrary to U.S. national security or foreign policy interests.<sup>36</sup>

On July 22, 2020, the BIS for the first time added 11 Chinese entities to the entity list due to their alleged involvement in human right abuses, mostly forced labor concerning Uyghurs and other Muslim minority groups in the Xinjiang Uyghur Autonomous Region (XUAR). This development denotes that the entity list is now used as a penalty tool against these types of exploitations.<sup>37</sup> One last case that clearly illustrates how the Chinese individuals and/or companies have been targeted by the U.S. government has been the recent, albeit not the first time, inclusion of Huawei and 38 of its non-U.S. affiliates across 21 countries in the entity list.<sup>38</sup> The Commerce Secretary, Wilbur Ross, explained that “[a]s we have restricted its access to U.S. technology, Huawei and its affiliates have worked through third parties to harness U.S. technology in a manner that undermines U.S. national security and foreign policy interests. This multi-pronged action demonstrates our continuing commitment to impede Huawei’s ability to do so.”<sup>39</sup> In addition, the list further restricted Huawei’s access to semiconductors produced from U.S. technology and software. The implication is that companies willing to trade with Huawei, or listed affiliated companies, need license requirements for products subject to the U.S. EAR.

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35. Michael J. Lowell, Dora Wang, Lizabeth Rodriguez-Johnson, Sarah S. Wronsky, Julianne K. Nowicki, Paula A. Salamoun, Cindy Shen & Courtney E. Fisher, *U.S. Department of Commerce Designates 33 Chinese Companies on the Entity List and Issues Related Supply Chain Business Advisory*, REED SMITH LLP (July 2, 2020), <https://perma.cc/896A-5NFE>.

36. Thompson Hine LLP, *Department of Commerce Adds 60 Companies to the Entity List, Including 24 Chinese Companies for Involvement in Militarizing the South China Sea*, SMARTRADE BLOG (Aug. 27, 2020), <https://perma.cc/T9E3-AGZL>.

37. Allison J. Stafford, John Foote & Andrea Tovar, *BIS Adds Eleven Entities Implicated in Human Right Abuses in Xinjiang to the Entity List*, SANCTIONS & EXP. CONTROLS UPDATE (Aug. 11, 2020), <https://perma.cc/8LWW-4P5D>.

38. Melanie Mingas, *Huawei and Affiliates in UK, Europe and Asia Added to US Entity List*, CAPACITY (Aug. 20, 2020), <https://perma.cc/3PS8-XLWV>.

39. *Id.*

According to the latest entity list version (Oct. 5, 2021), the list is currently topped by 436 Chinese and 352 Russian entities, followed by the United Arab Emirates with 152, Pakistan with 106, and Iran with 95. The remaining countries show a low number of entries.<sup>40</sup>

The U.S. List and the approach that has been taken into enforcement in relation to entities in this list indicates that individuals or companies supplying sensitive technologies and components to non-U.S. parties should adopt robust compliance controls seeking to: 1) identify the relevant export controls laws and regulations; and 2) screen customers, suppliers, end-users, and third parties to establish they are subject to the EAR, as well as to the respective products.

In addition to the necessary compliance with the U.S. List, compliance with U.S. sanctions and export control requirements necessitates the verification that a customer and other parties involved in a transaction are not constrained parties and that the transfer of a product is approved under the relevant export-control regulations.<sup>41</sup> The next part focuses on the enforcement approach to Chinese entities and the paper will then in turn discuss the Chinese foreign entity list.

### *B. MOFCOM's Unreliable Entity List*

As an additional sign of the tensions in the geopolitical balance and in response to the recent initiatives of “foreign entity targeting” (not only by the U.S. government in relation to Huawei), China’s Ministry of Commerce (“MOFCOM”) has also adopted a similar “foreign entities list”.<sup>42</sup> This law is aimed at ensuring that transactions that include foreign acquirers of domestic interests will not jeopardize China’s national security, sovereignty, and fair and free trade, as well as the interests of natural persons and legal entities.

The new law enables the Chinese government to take actions against “any foreign enterprise, organization, or individual (‘foreign entity’)” which engages in:

- (1) endangering national sovereignty, security or development interests of China; and/or

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40. Supplement No. 4 to Part 744 – Entity List, <https://perma.cc/KUV3-X8XR> (Dep’t of Com., Bureau of Indus. and Sec. Nov. 4, 2021).

41. Alexandre Lamy, *Supply Chain Risks Related to US Sanctions and Export Control Issues*, SANCTIONS & EXP. CONTROLS UPDATE (Feb. 27, 2019), <https://perma.cc/V6QH-XQP9>. If a non-U.S. company procures items from a US supplier for resale or to be integrated into a product manufactured abroad that contains controlled U.S. material in excess of 25%, or that have been produced using specially controlled US technology, the transaction must observe the export control rules. Failure to adhere to the U.S. export control laws and regulations can result in civil penalties for each violation, whose maximum levels are amended each year to account for inflation, suspension of a company’s export privileges by being included in one of the U.S. restricted parties lists (e.g., Entity List), fines of up to five times the export value, and imprisonment of up to five years. See Bryan Pereboom and Shuai Guo, *Chinese Acquisition of US Technology: Export Regulation and Foreign Investment Spotting*, CHINA LAW UPDATE BLOG (Nov. 18, 2013), <https://perma.cc/Y4JU-MB57>.

42. MOFCOM Order No. 4 of 2020 on Provisions on the Unreliable Entity List (promulgated by the Ministry of Commerce, Sept. 19, 2020, effective Sept. 19, 2020), <https://perma.cc/7TUE-JYLW> (China).



(2) suspending normal transactions with any enterprise, organization, or individual of China or applying discriminatory measures against any enterprise, organization, or individual of China, which violates normal market transaction principles and causes serious damage to the legitimate rights and interests of the enterprise, organization, or individual of China.<sup>43</sup>

MOFCOM can initiate an investigation into the suspected activities of foreign entities at its discretion, or upon suggestions and/or reports from third parties, and must make a public announcement to that effect.<sup>44</sup> The powers of MOFCOM are simultaneously wide and vague, as is the case with the United States' equivalent powers. The entities have the right to express their views and if the facts providing the basis for MOFCOM's decision change, then MOFCOM can resume the investigation.<sup>45</sup>

MOFCOM can request extensive information by the relevant entity and decide whether to include it in the list based on its analysis.<sup>46</sup> The factors that MOFCOM takes into account in its assessment include:

(a) the degree of danger to national sovereignty, security or development interests of China; (b) the degree of damage to the legitimate rights and interests of enterprises, organizations, or individuals of China; (c) whether being in compliance with internationally accepted economic and trade rules; and (d) other factors that shall be considered.

The sanctions that are at MOFCOM's disposal are quite extensive and include:

(a) restricting or prohibiting the foreign entity from engaging in China-related import or export activities; (b) restricting or prohibiting the foreign entity from investing in China; (c) restricting or prohibiting the foreign entity's relevant personnel or means of transportation from entering into China; (d) restricting or revoking the relevant personnel's work permit, status of stay or residence in China; (e) imposing a fine of the corresponding amount according to the severity of the circumstances; and (f) other necessary measures.<sup>47</sup>

MOFCOM will allow the foreign entity to take remedial measures in lieu of being included in the list. These measures are not prescribed in the law, and may vary depending on the entity and its respective market or sector of the economy. Provided measures are taken that address MOFCOM's concerns, the entity can be removed from the list upon a decision by MOFCOM.<sup>48</sup> Until the end of September 2020, MOFCOM had not made any public statement regarding the

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43. *Id.* art. 2.

44. *Id.* art. 4–5.

45. *Id.* art. 6.

46. *Id.* art. 7.

47. *Id.* art. 10.

48. *Id.* art. 13.

inclusion of a foreign entity on the list, but there is one additional option in the government's toolkit of subjecting foreign interests to significant scrutiny.

According to MOFCOM,<sup>49</sup> the aim of the *Unreliable Entity List* is not to target any specific country or entity. Companies will be included to the list if MOFCOM finds that their activities violate Chinese laws, endanger national sovereignty, security, and development interests of China, violate normal market transaction principles, and block, cut supply to, or impose other discriminatory measures on Chinese companies, other organizations, and individuals. This is not a surprising statement by a government ministry or agency. A similar approach has been adopted by both the U.S. and the U.K. governments in the similar measures they have taken towards subjecting foreign entities of acquisitions involving foreign entities to additional scrutiny. However, the concern is that such initiatives can be used as means of pursuing an industrial strategy while simultaneously engaging in trade wars, as they can operate as a façade in legitimising sanctions that governments can impose on foreign entities. We have already seen examples of both these approaches, specifically during the transactions of Qualcomm/Broadcom and NXP/Qualcomm, both of which fell victim to a tacit trade war between the United States and China.<sup>50</sup>

### III. THE ASSESSMENT OF NATIONAL SECURITY DURING THE BUSH, OBAMA, AND TRUMP ADMINISTRATIONS

As discussed above, parties involved in a transaction that can raise national security concerns may voluntarily notify CFIUS.<sup>51</sup> If a transaction raises national security concerns, CFIUS can impose mitigation measures or recommend that the president block or suspend the transaction.<sup>52</sup> We discuss below the only five cases of transactions that were blocked by U.S. presidents on national security grounds.

According to FINSA, there is a non-exhaustive list of 12 factors<sup>53</sup> that the President of the United States should take into account when considering to block foreign transactions, and which are also used by CFIUS as criteria to analyse such transactions. However, it should be noted that none of these factors has been actually invoked explicitly in any of the Executive Orders from the five deals that have been blocked by U.S. presidents so far. Instead, the factors that influence the

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49. Head of Department of Treaty and Law of MOFCOM on Regulations on the Unreliable Entity List (promulgated by the Ministry of Commerce, Sept. 22, 2020, effective Sept. 22, 2020), <https://perma.cc/95H3-LN2N> (China).

50. Tom Mitchell, Tim Bradshaw & Don Weinland, *China's Suffocation of Qualcomm-NXP Merger Signals New Era*, FIN. TIMES (July 26, 2018), <https://perma.cc/AA44-MPSP>; Cecilia Kang & Alan Rappeport, *Trump Blocks Broadcom's Bid for Qualcomm*, N.Y. TIMES (Mar. 12, 2018), <https://perma.cc/PP5H-JAN2>.

51. CFIUS has the power to review transactions regardless of whether they are notified. See Jackson 2018, *supra* note 28, at 7.

52. Organisation for Economic Co-operation and Development, *The United States: Public Interest Considerations in Merger Control*, OECD, at 6 (June 14–15, 2016).

53. See Jackson 2020, *supra* note 7, at 34 (outlining the 12 factors mandated by Congress through the Foreign Investment and National Security Act (FINSA) and six new factors in the Foreign Investment Risk Review Modernization Act of 2018).

decision on the transaction are on multiple occasions included in press releases related to the transactions.<sup>54</sup>

This paper discusses below the transactions that were prohibited by President George H. W. Bush, President Obama, and President Trump, and highlights the general approach towards national security concerns during their administrations.

#### *A. George H. W. Bush Administration*

President Bush stated in the March 1990's Report on National Security Strategy of the United States, his presidency coincided with an era where "the international landscape [was] marked by change that [was] breathtaking in its character, dimension, and pace."<sup>55</sup> He emphasized that an "enduring element" of the U.S. strategy "has been a commitment to a free and open international economic system" and added that the US should "never forget the vicious circle of protectionism that helped deepen the Great Depression and indirectly fostered the Second World War."<sup>56</sup> The Administration was committed to working with other countries to "promote the prosperity of the free market system" and to "reduce barriers that unfairly inhibit international commerce."<sup>57</sup> In this context, President Bush exercised for the first time the power that was granted to the head of state under the so-called 1989 Exon-Florio provision to block the foreign purchase of an American company. He ordered the China National Aero-Technology Import and Export Corp. (CATIC) to divest itself of the interest in MAMCO Manufacturing Company (MAMCO), which manufactured metal components for commercial aircraft, because there was credible evidence that led him to believe that, in exercising its control of MAMCO, CATIC might take action that would threaten to impair the national security of the United States.<sup>58</sup>

Being the very first instance of a President blocking a transaction in the United States on national security grounds, one would expect a detailed account of the reasoning behind the decision. The ambiguous language used by CFIUS, President Bush, and the Administration officials, alongside the secrecy that generally surrounds the decision-making process, did not provide sufficient clarity on the circumstances that comprised such "impair to the national security". What we can surmise is that there was a concern "that CATIC could use MAMCO as a base for intelligence activities in the US, getting access to Boeing plants" and that they might use the "purchase as a front to penetrate into other, more promising

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54. See, e.g., *President Trump Blocks Chinese Firms' Acquisition of U.S. Semiconductor Company*, HERBERT SMITH FREEHILLS (Sept. 19, 2017), <https://perma.cc/WM3L-PTXH> (including remarks from Treasury Secretary Mnuchin on the *Lattice Semiconductor* deal); *President Trump halts Broadcom takeover of Qualcomm*, REUTERS (Mar. 12, 2018), <https://perma.cc/SM22-2WB8> (referencing CFIUS statements regarding the *Qualcomm/Broadcom* deal).

55. HIST. OFF., OFF. OF THE SEC'Y OF DEF., *Preface* to NATIONAL SECURITY STRATEGY OF THE UNITED STATES (Mar. 1990), at v <https://perma.cc/LN75-UUEZ>.

56. *Id.* at 1.

57. *Id.*

58. Order of February 1, 1990, 55 Fed. Reg. 3,935 (Feb. 6, 1990).

areas of security.”<sup>59</sup> In addition, it was publicly known by that time that CATIC already violated U.S. export regulations in the past, when it purchased General Electric aircraft engines for the Chinese military.<sup>60</sup> Thus, it seems that the problem with the approach to national security concerns is, in principle, not the absence of in-depth review from the authorities, but rather the lack of clarity to the wider public about the rationale for the decision taken.

### B. Barack H. Obama Administration

The Obama administration decided to avoid the winding path of interfering with CFIUS’s approach and let most matters be resolved at the CFIUS level, even though the number of filings increased significantly during both of his terms.<sup>61</sup> Congress requested the U.S. Government Accountability Office (GAO) to prepare a report regarding the CFIUS process, where it specifically noted that the stance towards Chinese transactions should be seen as “a strategic rather than overt national security threat.”<sup>62</sup> As consequence of such attitude, one transaction was called off (the proposed takeover of Aixtron, a semiconductor company, by Chinese firm FGC)<sup>63</sup> and one required divestments (Chinese SOE Ralls Corp, which was required to divest wind farm assets located near a defense facility).<sup>64</sup>

Even though there was a surprising tendency during the Obama administration not to object to a number of transactions involving Chinese acquirers,<sup>65</sup> this changed by the end of the administration. From 2016 to 2017, the prospects for Chinese acquirers to obtain U.S. assets started to deteriorate: in 2016, the Commerce Department issued a report stating that the U.S. government was concerned about the focus of Chinese acquirers on closing the gap relative to the United States in their capabilities on semiconductors, and emphasizing that the United States should be more protective of its semiconductor technology, since they have significant importance for national security.<sup>66</sup> Within this context, in 2016, Obama prohibited the acquisition of Aixtron SE, a German semiconductor company with a U.S. subsidiary, by a Chinese SOE in Germany, Grand Chip Investment GmbH.<sup>67</sup> Moreover, CFIUS called off the sale of Philips NV’s Lumileds, a manufacturer of lighting components and LEDs (a form of

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59. Lawrence R. Fullerton & Christopher G. Griner, *Review of Foreign Acquisitions under the Exon-Florio Provision* in Am. Bar Ass’n Section of Antitrust L. Working Papers 152 (1992).

60. *Id.*

61. For instance, the 2015 CFIUS report indicated that between 2013 and 2015, China filed the highest number of notices (74) representing 19 percent of the total number of notices filed. See CFIUS REPORT 2015, *supra* note 15, at 16.

62. See Husisian, *supra* note 8, at 69.

63. Michael T. Gershberg & Dr. Tobias Caspary, *President Obama Blocks Chinese Acquisition of Semiconductor Manufacturer Aixtron*, FRIED FRANK INTERNATIONAL TRADE AND INVESTMENT ALERT (Dec. 8, 2016), <https://perma.cc/XM4Z-MFHC>.

64. Rachele Younglai, *Obama blocks Chinese wind farms in Oregon over security*, REUTERS (Sept. 29, 2012), <https://perma.cc/T82P-NHFG>.

65. Husisian, *supra* note 8, at 69.

66. *CFIUS in 2017: A Momentous Year*, *supra* note 17, at 1–4.

67. *CFIUS in 2017: A Momentous Year*, *supra* note 17, at 1–4.

semiconductor), to a consortium that included several Chinese firms.<sup>68</sup> In another case in the semiconductor sector, Xiamen San'an Integrated Circuit Co., Ltd. had to abandon the envisaged merger with GCS Holdings, which would have brought Global Communications Semiconductors, LLC (GCS Holdings' wholly owned subsidiary in the United States) into the San'an Group of companies. Finally, a U.S.-based semiconductor chip manufacturer, Fairchild Semiconductor International, had to reject an acquisition offer from two Chinese firms (China Resources Microelectronics Ltd. and Hua Capital Management Co., Ltd.) due to CFIUS concerns.<sup>69</sup>

### C. Donald J. Trump Administration

There seems to be a divergence between the Obama and Trump administrations regarding the national security concerns that Chinese acquirers of U.S. assets would induce. The Obama Administration was often reserved, giving "high priority to sustaining smooth relations with China despite growing differences."<sup>70, 71</sup> Such a disengaged approach provoked increasing levels of criticism.<sup>72</sup>

President Trump publicly argued the reaffirmation of support of inward foreign investment, all the while expressing support for FIRRMA, which expanded CFIUS's jurisdiction, and tightening up the standards that CFIUS applies in its assessment.<sup>73</sup> Wolin (2018) explains that "there has been further development of the idea that transactions that originate in certain geographies or that involve certain kinds of technology will be scrutinized very carefully [. . .] Those perspectives began during the Obama Administration."<sup>74</sup> Therefore, what President Trump proposes "is not a sea change. It is more of a movement further down that path."<sup>75</sup>

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68. *CFIUS in 2017: A Momentous Year*, *supra* note 17, at 1–4.

69. *CFIUS in 2017: A Momentous Year*, *supra* note 17, at 1–4.

70. Robert Sutter, *Barack Obama, Xi Jinping and Donald Trump—Pragmatism Fails as U.S.-China Differences Rise in Prominence*, 24 AM. J. OF CHINESE STUD. 69, 69 (2017).

71. *Id.* at 71.

72. See, e.g., Sen. Chuck Grassley, *Grassley Raises Concerns Over Obama Admin Approval Of U.S. Tech Company Joint Sale To Chinese Government And Investment Firm Linked To Biden, Kerry Families* (Aug. 15, 2019), <https://perma.cc/37AZ-KADT> (outlining Sen. Grassley's concerns about the approval of the acquisition of Henniges by "Chinese government entities and an investment firm linked to family members of then-Vice President Joe Biden and other Obama administration officials").

73. See Wolin, *supra* note 19, at 20.

74. Wolin, *supra* note 19, at 19 ("For example, the Obama Commerce Department put out a report in 2016 saying the US government was quite concerned about the extent to which the Chinese government was focused on closing the gap relative to the US in their basic set of capabilities around semiconductors, essentially saying the US ought to be more protective of its technology and manufacturing advantage in semiconductors, which can be relevant to national security. This line of thinking has to some extent further intensified, in terms of the range of sensitive technologies and capabilities that give the US pause.").

75. Wolin, *supra* note 19, at 19.

In a sector where the U.S. government has become increasingly wary of U.S. technology firms being acquired by Chinese entities,<sup>76</sup> President Trump blocked the Chinese private equity firm Canyon Bridge Capital Partners LLC from purchasing Lattice Semiconductor Corp., a U.S.-based company that manufactures programmable logic chips used in communications, computing, and industrial and military applications, on grounds of national security.<sup>77</sup> Regardless of Lattice's efforts to address any outstanding national security concerns, the Trump administration was not convinced.<sup>78</sup> In particular, Mnuchin highlighted four national security concerns related to the transaction: (i) the potential transfer of Lattice's intellectual property to Canyon Bridge; (ii) the role of the Chinese government in the transaction; (iii) the importance of the semiconductor supply chain to the U.S. government; and (iv) the U.S. government's use of Lattice products.<sup>79</sup> This decision, as the ones discussed above, illustrate the U.S. Government's concerns about Chinese investment in the United States, especially in the technology sector.<sup>80</sup>

In 2018, the \$1.2 billion sale of money transfer firm MoneyGram to China's Ant Financial, the digital payments arm of Alibaba,<sup>81</sup> was blocked on national security grounds. In addition, President Trump blocked a takeover of chipmaker Qualcomm by Singapore-based rival Broadcom<sup>82</sup> on grounds of national security.<sup>83</sup> As has been the common practice in Executive Orders, President Trump did not provide a detailed rationale for his decision. Despite the fact that his Executive Order invoked "credible evidence" that the proposed \$140 billion transaction would raise national security concerns, there were arguments that "there were concerns the takeover could have led to China pulling ahead in the development of 5G wireless technology [since] [t]he deal would have been the

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76. See PRESIDENT'S COUNCIL OF ADVISORS ON SCI. AND TECH., EXEC. OFF. OF THE PRESIDENT, ENSURING LONG-TERM U.S. LEADERSHIP IN SEMICONDUCTORS (Jan. 2017), at 2, 7–8 (warning that China's ambitious push to expand its domestic chip production could threaten the semiconductor industry in the U.S.).

77. Order of Sept. 13, 2017, 82 Fed. Reg. 43,665 (Sept. 18, 2017).

78. Ana Swanson, *Trump Blocks China-Backed Bid to Buy U.S. Chip Maker*, N.Y. TIMES (Sept. 13, 2017), <https://perma.cc/8RH4-2N3X>.

79. Michael Gershberg & Justin Schenck, *President Trump Blocks Chinese Acquisition of Lattice Semiconductor Corporation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 24, 2017), <https://perma.cc/DRX7-SRYQ>.

80. John B. Bellinger, III, Charles A. Blanchard, Ronald D. Lee, Nancy L. Perkins, Claire E. Reade & Yingxi Fu-Tomlinson, *New Presidential Order Blocking Chinese Acquisition of Semiconductor Firm Flags a Trend of Heightened CFIUS Review of Chinese Investments*, ARNOLD & PORTER (Sept. 22, 2017), <https://perma.cc/7EM8-CSUM>.

81. Press Release, MoneyGram, MoneyGram and Ant Financial Enter Into Amended Merger Agreement (Apr. 16, 2017), <https://perma.cc/8WPX-34W7>.

82. *Trump blocks Broadcom's bid for Qualcomm on security grounds*, BBC (Mar. 13, 2018), <https://perma.cc/9GF3-H2RE>.

83. Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11,631 (Mar. 12, 2018), <https://perma.cc/7H79-JNJ2>.



biggest technology sector takeover on record.<sup>84</sup> This case arises in a context where 5G is considered a crucial asset.<sup>85</sup>

From the above-mentioned analysis of the cases blocked by U.S. presidents, four conclusions can be drawn. First, the number of occasions where a U.S. president has exercised his right to block a transaction has been limited (just five so far). Second, a common theme is the lack of detailed rationale about the reasons that supported each of the prohibitions. Third, the second term of Obama's administration signaled an increase in the U.S. government's concerns about transactions that have a direct or indirect Chinese government nexus. Fourth, during the Trump administration, the national security concerns in relation to acquirers representing Chinese interests seemed to become more prevalent.

#### IV. THE FRAMEWORK FOR CONSIDERING NATIONAL SECURITY CONCERNS IN M&AS IN THE UNITED KINGDOM

Traditionally the United Kingdom had no standalone foreign investment screening regime. The government's powers to intervene in foreign investment are primarily founded upon the national merger control regime (Enterprise Act 2002).<sup>86</sup> The Competition and Markets Authority is an independent non-ministerial body responsible for assessing whether a transaction falls within the scope of the U.K. competition regime and whether it raises competition concerns that may require its intervention. The Enterprise Act<sup>87</sup> makes a clear distinction between competition law concerns and several public interest considerations where the Secretary of State may need to intervene: (a) national security (including public scrutiny)<sup>88</sup>;

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84. BBC, *supra* note 82.

85. BBC, *supra* note 82; *see* Letter from U.S. Dept. of Treasury to Broadcom Ltd. And Qualcomm Inc. (Mar. 5, 2018) *as reprinted in* WearHolic, <https://perma.cc/V643-FVMQ> (calling for a review of the transaction and explaining that the administration was concerned about Broadcom's relationships with other foreign companies; additionally highlighting that Broadcom has reduced spending on R&D at the businesses it acquires, a practice that would make Qualcomm less innovative; this envisaged scenario would in turn be beneficial to Chinese businesses in terms of the development of the technology for the next generation of mobile phones (i.e., 5G), which is expected to provide faster Internet access and generate great profits for the wireless industry in the years to come). *See also* The New York Times Editorial Board, *Trump Was Right to Block a Merger*, N.Y. TIMES (Mar. 14, 2018), <https://perma.cc/Z548-A5TC> ("The [Treasury Department] letter strongly hinted that those companies of interest are based in China.").

86. *See generally* Enterprise Act 2002 (2002) (Eng.), <https://perma.cc/L887-JGU8>.

87. *Id.* § 58.

88. Transactions reviewed by the Ministry of Defence on the basis of national security were mostly defense mergers with public security concerns often being dealt with through a range of undertakings, including the maintenance of strategic capabilities domestically and the protection of classified information and technology. *See General Dynamics/Alvis*, Gov.UK (May 20, 2004), <https://perma.cc/6CDY-SLDM>; *Lockheed Martin Corp./Staysis Ltd.*, Gov.UK (Jan. 28, 2005), <https://perma.cc/5BZK-SWW6>; *General Electric Company/Smiths Aerospace*, Gov.UK (Apr. 10, 2007), <https://perma.cc/PUK6-UUL5>; *Atlas Elektronik GmbH UK/Qinetiq's UWs Winfrith Division*, Gov.UK (June 25, 2009), <https://perma.cc/7D6H-ULAM>; *Proposed Acquisition of Northern Aerospace Limited by Gardner Aerospace Holdings Limited: Decision Notice*, Gov.UK (July 19, 2018), <https://perma.cc/F9SQ-5UKQ>.

(b) financial stability<sup>89</sup>; (c) media plurality<sup>90</sup>; (d) capability to combat and to mitigate the effects of public health emergencies.<sup>91</sup>

The CMA has a dual role to play in transactions raising national security concerns. It is the competent authority to assess the competition aspects of a transaction. It also compiles a report on the national security aspects of the transaction for the Secretary of State to decide on the approval of the transaction. Utilizing the integrated model, one authority oversees the investigation phase of both the competition and national security assessment. As the paper illustrates above, in the U.S. regime, two separate authorities are bestowed with the competition and the national security assessment. Under this dualist model, the FTC and DOJ are responsible for the competition assessment of the transaction, whereas CFIUS decides on the measures that must be implemented to address any national security concerns or refers the case to the president, who can block the transaction.

#### V. THE NEW REGIME NATIONAL SECURITY ASSESSMENT IN THE UNITED KINGDOM

The U.K. government brought before the U.K. Parliament the Bill on National Security and Investment Strategy (hereinafter the NSI Bill) in November 2020. On May 5, 2021, the National Security and Investment Act 2021 (hereinafter the NSI Act) was published, after receiving Royal Assent on April 29, 2021. The NSI Act launches the first U.K. investment screening regime based on national security criteria, separate from the existing merger screening under the auspices of the CMA. The existing regime under the Enterprise Act 2002 will continue to run in parallel with the CMA, which remains the competent authority for competition-based review only. Therefore, when the new regime is implemented, the national security considerations will effectively be removed from the public interest and special public interest regimes under the Enterprise Act 2002. However, the government's statutory powers to intervene in investments for the purposes of protecting media plurality, financial stability, and public health emergency will be preserved.

While the scope of the Enterprise Act 2002 is largely defined by the size of the transaction (through the turnover and share of supply thresholds pursuant to the

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89. Enterprise Act, *supra* note 86, § 58(2D) (classifying “the interest of maintaining the stability of the U.K. financial system” as a new public interest consideration. The need for this addition became apparent when, in September 2008, the Secretary of State decided to intervene in the proposed acquisition by Lloyds TSB of HBOs on the basis that they believed that the stability of the U.K. financial system ought to be specified as a public interest consideration in Section 58 of the Enterprise Act and that the stability of the U.K. financial system may be relevant to the consideration of the merger).

90. See The Communications Act of 2003 (2003), §§ 375–77 (Eng.) (introducing new media public interest considerations, involving consideration of the need to ensure plurality of ownership of broadcasting companies and the need for high quality and diversified broadcasting in media mergers, as well as considerations relating to the need for accurate presentation of news and free expression in newspaper mergers).

91. Enterprise Act, *supra* note 86, § 58(2E) (amending the Act on June 23, 2020, to allow for a further public interest consideration: “[t]he need to maintain in the U.K. the capability to combat, and to mitigate the effects, of public health emergencies”).



Enterprise Act),<sup>92</sup> the new screening system rather centers its attention in establishing how a foreign acquirer could undermine the United Kingdom's national security. To this end, the U.K. government will have the power to review, impose measures, and prohibit a transaction if it is thought to pose a risk to the United Kingdom's national security. The main features of the new regime include:

- the establishment of a dedicated governmental unit,
- a mandatory notification and pre-approval system for transactions in specific sectors of the economy,
- a voluntary notification system available to investors,
- 'call-in powers' of the Secretary of State for unnotified investments,
- a specific time limit for intervention
- the application of remedies to address risks to national security and sanctions for non-compliance with the regime, and
- a mechanism for legal challenge of governmental decisions.<sup>93</sup>

A new operational unit will be established within the Department for Business, Energy and Industrial Strategy (BEIS), namely the Investment Security Unit (ISU). The ISU will be responsible for identifying, assessing, and mitigating national security risks arising when a person gains control of a qualifying asset or qualifying entity as set out in the Act.<sup>94</sup> Under the auspices of ISU, a digital portal will operate, which investors and businesses will use to notify of their proposals.

For the first time in the United Kingdom's history, the government has introduced a mandatory notification system, under which certain business acquisitions must obtain government clearance before they can take place. These acquisitions are known as "notifiable acquisitions" under the NSI Act. The mandatory notification system, however, only applies to proposed transactions that meet all the following necessary criteria:

- (a) the acquirer obtains control in the target company in excess of defined thresholds ("trigger events"),
- (b) they relate to companies and other entities undertaking specified activities in the UK ("qualifying entities"),
- (c) the target entities are operating in the most sensitive sectors of the economy.<sup>95</sup>

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92. Enterprise Act, *supra* note 86, § 23.

93. National Security and Investment Act 2021 (2021) (Eng.), <https://perma.cc/5YU2-9ZV6> [hereinafter NSI Act 2021].

94. Dep't for Bus., Energy & Indus. Strategy, *Overview of the Investment Security Unit factsheet*, Gov.UK (Mar. 3, 2021).

95. NSI Act 2021, *supra* note 93, §§ 14, ¶ 1; 6, ¶ 2.

According to Chapter 4, Section 14 of the NSI Act, it is the acquirer's responsibility to notify of the proposed transaction. Transactions that fall under the mandatory regime cannot be completed until clearance is granted, and transactions that take place without clearance will be void.<sup>96</sup> In addition, when parties fail to notify the ISU of a notifiable acquisition, the Secretary of State could use its call-in powers to initiate an investigation.<sup>97</sup> Furthermore, alongside the mandatory notification requirement of the regime, a voluntary notification system is also introduced to encourage notification from parties who consider that their proposed transaction may have implications for national security.

## VI. ARE THE UNITED STATES AND UNITED KINGDOM'S NATIONAL SECURITY REGIMES WORKING?

### A. CFIUS in the Limelight and Its Strengthened Role

Republicans in the U.S. Congress have demanded that GAO determines whether CFIUS reviews "have effectively kept pace with the growing scope of foreign acquisitions in strategically important sectors in the US,"<sup>98</sup> while specifically singling out Chinese and Russian SOEs investments as causes of concern.<sup>99</sup>

There have been additional criticisms that CFIUS used to operate "in the shadows", far from the public eye<sup>100</sup> and its "reviews have always been something of a black box."<sup>101</sup> Following the September 11, 2001 terrorist attacks, the proposed acquisition of commercial operations at six U.S. ports by Dubai Ports World in 2006 received considerable scrutiny and CFIUS procedures began to attract the attention of members of Congress and the public.<sup>102</sup> In the last few years such concerns have led to calls for a strengthening of the CFIUS regime. These concerns have included: "(1) an increase in foreign investment activity by Chinese state-owned companies; (2) the perception that such investment is part of a government-coordinated approach that serves official strategic purposes; rather than purely commercial interests; and (3) that investments from Chinese companies are receiving government support, which entitles them of an "unfair" competitive advantage over other private investors."<sup>103</sup> In its 2015 Annual Report, CFIUS identified three additional national security concerns that were not included in past practice, namely: (i) the potential disclosure of substantial pools of personal information (including the financial, healthcare, and insurance sectors); (ii) the

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96. NSI Act 2021, *supra* note 93, § 13, ¶ 1.

97. NSI Act 2021, *supra* note 93, § 15, ¶ 2(a).

98. Husisian, *supra* note 8, at 6.

99. See Edward Wong, *Chinese Purchases of U.S. Companies Have Some in Congress Raising Eyebrows*, N.Y. TIME (Sep. 30, 2016), <https://perma.cc/39GU-85P9> (discussing the letter from Robert Pittenger et al., Member of Cong., to Hon. Gene L. Dodaro, Comptroller General, U.S. Gov't Accountability Off.).

100. Jeanne Archibald & Jeremy Zucker, *Exon-Florio "Safe Harbour" Threatened*, 68 EURO. L. 14, 14 (May 2007), <https://perma.cc/872E-APQ7>.

101. Husisian, *supra* note 8, at 1.

102. See Jackson 2018, *supra* note 28.

103. Jackson 2020, *supra* note 7, at 39.

potential loss of one of only a few U.S. suppliers (risks of maintenance of U.S. supply chains); and (iii) the potential loss of U.S. technological advantages.<sup>104</sup> The first concern relates to the acquisition of a U.S. business, which comprises extensive private information, and may pose a national security risk (including in the financial, healthcare, and insurance sectors of the economy). The second one pertains to deals where there are few alternative suppliers operating, and evidences the relevance awarded by the U.S. government to U.S. supply chains. The third concern, which relates to the loss of U.S. technological advantages to foreign acquirers, seemed to be the key to pass FIRRMA, where CFIUS's authority to review transactions was expanded, by adding "the loss of emerging technologies" and "personal information" to the list of national security threats.

Consequently, there are several changes to the CFIUS regime, namely: a broadening of the scope of its review and also of its mandate to adopt a more holistic approach; a shift in its current review process to a mandatory one; and discrimination among foreign investors based on country of origin.<sup>105</sup> However, "the most substantial changes to CFIUS have come with the Congress and the White House working in unison,"<sup>106</sup> where President Trump enacted into law the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA),<sup>107</sup> which broadened the scope of CFIUS by explicitly adding four new types of "covered transactions."<sup>108</sup>

It is worth noting that amidst the COVID-19 crisis, two U.S. senators initiated legislative changes. They were concerned about Chinese acquirers taking advantage of falling U.S. asset prices, and the need for capital for U.S. companies that are vital to national security. Representative Jim Banks introduced a new bill in the House of Representatives with the aim to expand the scope of CFIUS in an attempt to protect U.S. companies from "predatory investment by the Chinese Government" during the coronavirus outbreak.<sup>109</sup> The bill includes a number of measures aimed at curtailing the ability of Chinese interests acquiring U.S. assets that are sensitive for U.S. national security.<sup>110</sup> Representative Banks stated that it "does not represent the first CFIUS-related action taken to try and combat the

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104. CFIUS REPORT 2015, *supra* note 15, at 23–25.

105. Jackson 2020, *supra* note 7, at 11–12.

106. *See* Broadman, *supra* note 9.

107. John S. McCain National Defense Authorization Act for Fiscal Year 2019, P.L. 115-232, § 1701, 132 Stat. 1636, 2174 (2018) (effective since Aug. 13, 2018).

108. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (defining a covered transaction as "any merger, acquisition, or takeover [...] by or with any foreign person which could result in foreign control of any person engaged in interstate commerce in the United States").

109. Benjamin Horney, *Bill Aims to Block China From US M&A During Coronavirus*, LAW 360 (May 5, 2020), <https://perma.cc/8SWP-QQTU>.

110. *Id.* The following three measures are included in the bill: (1) companies affiliated with the CCP would be prevented from acquiring a shareholding in excess of 51% of a U.S. company, whereas currently CFIUS can assess the transaction and decide on its merits on issues of national security, (2) the U.S. President maintains the right to approve the transaction, and (3) media outlets and new organizations would be added to the list of transactions that would trigger CFIUS jurisdiction.

threat of predatory investment in U.S. companies as the country deals with fallout from the global pandemic.<sup>111</sup> Additionally, Representative Mark Green introduced a bill,<sup>112</sup> the Secure Our Systems Against China's Tactics Act (SOS ACT), pursuant to which the government will dedicate \$10 billion from the virus-related relief package (CARES ACT<sup>113</sup>) to encourage U.S. investors to spend their capital in weak U.S. companies that are crucial for national security.<sup>114</sup> Representative Green mentioned that China is looking to take advantage of the impact of COVID-19 on the U.S. economy by purchasing troubled businesses in need of capital that are vital to national defense.<sup>115</sup> He stressed the need for securing these U.S. businesses, explicitly stating that "we cannot let this happen."<sup>116</sup>

In light of the recent expansion of CFIUS's scrutiny, it seems that almost any foreign person or entity is potentially within its regulatory reach. Given the explosion in the CFIUS reviews, the recent strengthening of the CFIUS regime and the increasing use of mitigation measures, it is likely that "an increasingly stringent review process will result in more companies backing off of transactions that encounter resistance from the committee."<sup>117</sup>

### *B. Assessment of the UK National Security Regime*

From an institutional point of view, national security issues have not been analyzed in-depth by the United Kingdom's CMA to date. Arguably, this was because there were no effective mechanisms to catch these types of mergers as compared to FDI laws in other countries. As stated above, while there are concerns associated with sole political decision-making with respect to national security issues, this is not any different from the institutional setting as it is now. While it could be argued that the CMA's appointment provides a certain degree of transparency for the decision-making process, the same level of transparency could also be achieved within the sole-ministerial decisionmaking with the benefit of completing such reviews in shorter time periods.

Indeed, transparency and effective judicial review were given prominence in the United Kingdom's White Paper and are part of the new national security

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111. *Id.*

112. Cathy He, *Lawmaker to Introduce Bill to Help US Manufacturers Move Out Of China*, EPOCH TIMES (May 5, 2020), <https://perma.cc/Q2N8-FTAB>.

113. The Coronavirus Aid, Relief, and Economic Security Act (CARES ACT) consists of a \$2.2 trillion economic recovery package to provide economic relief for Americans and businesses affected by the pandemic. *See* Coronavirus Aid, Relief, and Economic Security Act of 2020, 15 U.S.C. § 9001.

114. Frank Fang, *Lawmaker to Introduce Bill Blocking Chinese Takeovers of US Companies Amid Pandemic*, EPOCH TIMES (Apr. 23, 2020), <https://perma.cc/46ZV-QX4Q>.

115. *Id.*

116. Fang, *supra* note 114. Representative Green mentioned the recent transaction where United Airlines sold and leased back 22 planes to the Bank of China (BOC) Aviation. *See* He, *supra* note 112; *see also* Scott Murdoch, *United Sells 22 Planes to Bank of China Aviation*, REUTERS (Apr. 19, 2020), <https://perma.cc/5V8K-32TW>. Concerns were intensified after a report provided in March by an U.S.-based independent consultancy concluded that after analyzing the recent policies and notices announced by the Chinese government, the objective of China was to use the outbreak to progress its economic ambitions. *See* Fang, *supra* note 114.

117. Husisian, *supra* note 8, at 4.

regime.<sup>118</sup> Furthermore, the CMA is removed from the process to “ensure that the new assessment process interacts in a way that is as efficient as possible for parties that are subject to these, and any other statutory and regulatory, processes.”<sup>119</sup>

As the United Kingdom has exited the European Union (“EU”), several changes to the public interest regime are expected to materialize. First, the concentrations with EU dimension will be falling under the sole jurisdiction of the relevant U.K. authorities. In that regard, any procedural requirement to communicate the cases with the EU would cease to exist. Furthermore, as the EUMR will not be applicable anymore, adopting of public interest considerations other than national security, financial stability, and media plurality will be possible, as was the case with the addition of public health during the COVID-19 pandemic.<sup>120</sup> Thirdly, it will be possible for the Secretary of State to allow mergers which have anti-competitive effects but also balancing benefits to public interest, since the EU will not have the sole jurisdiction over these mergers. Brexit has also direct implications for FDIs.<sup>121</sup> Whilst it is often stressed that the United Kingdom will remain an investment-friendly environment for FDIs, there is a strong possibility that mergers in a broader range of industries compared to the current situation will be subject to national security checks.

Regarding the balancing exercise between national security concerns and that of competition law, it seems apparent that these concerns prevail vis-à-vis competition law concerns. Therefore, it is unlikely for a balancing exercise with respect to these aspects to take place, as national security would always dominate. The challenge then lies in defining the procedural and substantive rules that will ensure a legally certain environment for the assessment of national security concerns. The new U.K. regime goes a long way towards this direction, but it will all depend on how enforcement will take place, and whether it will lead to an environment that will be business friendly and legally certain, while at the same time safeguarding the United Kingdom’s national interests when it comes to national security.

#### CONCLUSION

This paper focused on the national security assessment in the United States and the United Kingdom and discussed how U.S. and U.K. authorities have addressed national security concerns in the assessment of transactions.

The U.S. government has shown its determination to mitigate threats to national security brought about by foreign acquirers investing in U.S. assets in

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118. DEPT. FOR BUS., ENERGY & INDUS. STRATEGY, NATIONAL SECURITY & INVESTMENT: A CONSULTATION ON PROPOSED LEGISLATIVE REFORMS 104 (2018).

119. *Id.* at 16.

120. Leigh M. Davison, *Envisaging the Post-Brexit Landscape: An Articulation of the Likely Changes to the EU–UK Competition Policy Relationship*, 39 LIVERPOOL L. REV. 99, 110 (2018).

121. Andrew Hockley & Sonja Hainsworth, *Hinkley, Golden Shares and Protectionist Time Travel?* BRYAN CAVE LEIGHTON PAISNER (Sept. 16, 2016), <https://perma.cc/S37Z-4SJV>.

various industries, including telecommunications, food, financial, defense, and technology. In doing so, some transactions have been blocked, while others have been withdrawn by the parties after clear signs of opposition combined with long waiting periods. The assessment of CFIUS's operation indicates that the review of this body has expanded to the point where now almost any foreign person or entity is potentially within its regulatory reach. Despite its increased powers, the transparency of the process appears to remain restricted—a shortfall that has been open to criticism among the transacting parties and the scholars, due to the lack of predictability it amounts to. This article has evidenced that even if the number of mergers that have been blocked remains low, as well as the number of occasions where U.S. presidents have decided to intervene, the process would be enriched if the parties and the public were provided with a more detailed account of the rationale behind the decision taken.

The recent reforms in the United Kingdom have provided much needed clarity to the assessment regime of national security in the United Kingdom. The United Kingdom followed a similar approach to the United States, by clarifying the type of transactions, the relevant sectors of the economy, and the specific procedure pursuant to which transactions that can raise national security concerns will be assessed under the new rules. This paper has established in relation to the extent of the reasoning when deciding on national security concerns, the Secretary of State in the United Kingdom and CFIUS, as well as the U.S. president, seem to enjoy significant discretion (in the case of CFIUS) or unlimited discretion (in the case of the U.K. Secretary of State and the U.S. President).

What is of paramount importance is that both regimes provide certainty to the investment as well as the legal community on the transparency and clarity of their approach to transactions that can raise national security concerns. Otherwise, such regimes run the risk of providing excuses for the adoption and furtherance of industrial strategies, which will be an unwelcome outcome.