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The Public Interest and Competition-Based Scrutiny of Mergers: Lessons from the Evolution of Merger Control in the United Kingdom

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The Public Interest and Competition-Based Scrutiny of Mergers: Lessons from the Evolution of Merger Control in the United Kingdom

Alex Chisholm & Nelson Jung[1]

I. INTRODUCTION

Developments over the past few months have been described as a "volcanic rise in protectionist sentiments from national governments."[2] General Electric's bid for Alstom as well as numerous recent takeover proposals in the pharmaceutical sector, in particular Pfizer's attempt to acquire AstraZeneca and AbbVie's proposed takeover of Shire,[3] have reinvigorated the long-running debate about greater state intervention in cross-border deal-making. There have been calls for a widening of public interest tests in merger control, or for the use of other legislative tools designed to protect vital sectors of the economy from certain foreign takeovers.[4]

It has been said that a new wave of "economic patriotism" and protectionist tendencies is sweeping across many EU Member States. For example, in a display of re-invigorated *dirigisme*, the then French Economy Minister Arnaud Montebourg described his Government's intervention in the General Electric/Alstom deal as a "political success for the return in force of the state in the economy."[5] He went even further by proclaiming that the EU competition rules should change "because we need to make champions."[6] The French Government has reacted similarly strongly not just to foreign takeovers in infrastructure sectors, but also in relation to the mooted takeover of Danone by PepsiCo.[7] While questions are being raised as to whether France may be "losing badly needed foreign investment as a result of such policies,"[8] France is not alone.

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[2] Harry Philips, *The European Champions League,* 17(8) GLOBAL COMPETITION REV., 5 (2014).

[3] *AbbVie CEO Tells Employees That Shire Deal is Going Through,* W.S.J. (September 30, 2014).

[4] The proposed changes to the Takeover Code include a framework to regulate statements made by the parties to an offer relating to any course of action they commit or intend to take/not take, after the end of the offer period. *See* Consultation Paper issued by the Code Committee of the Panel, *Post-Offer Undertakings and Intention Statements*, The Takeover Panel, PCP 2014/2 (15 September 2014) (http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/PCP201402.pdf).

[5] *See*, *GE deal "victory" for role of French state in economy'*, FINANCIAL TIMES (June 23, 2014).

[6] *France Feeds New European Economic Nationalism,* WSJ (June 27, 2014).

[7] *See*, *Danone: Not for Sale,* FORBES, (July 25, 2005) and *French fear eye of 'ogre' is on Danone,* N.Y. TIMES (July 21, 2005).

[8] *See*, *Blocking foreign takeovers – France fights back*, ECONOMIST (May 15, 2014).

Slow economic growth or stagnation and continuously high unemployment in many countries in the aftermath of the financial crisis provide what might at first sight appear to be a compelling justification to resort to interventionist industrial policies based on the belief that governments can "pick winners" by creating or protecting national champions.[9]

There also seems to be a wider perception that in the post-crisis climate European companies could be attractive targets for foreign investors, in particular in circumstances where U.S. companies appear to be driven by strong tax incentives to invest overseas. Apparently motivated by the desire to create stronger either national or European champions, the German chancellor Angela Merkel pronounced that consolidation in the mobile telecoms sector was necessary "so that we can score internationally."[10]

Even in the United Kingdom—traditionally a strong advocate in Europe of a competition-based regime, which only last year adopted the Enterprise and Regulatory Reform Act 2013 with a strong competition focus for its new Competition and Markets Authority ("CMA")—the debate in politics and the media about whether national interests need to be protected against foreign takeovers in special circumstances has been reinvigorated. This debate may now be gaining further momentum.[11]

At a global level, the recent breakdown of WTO talks has been interpreted as a further sign of protectionist tendencies prevailing over the liberal vision of a multilateral trading system that has guided the post-war era in the global economy since Bretton Woods.[12] There is also a growing concern that these developments may have a chilling effect on cross-border transactions that may be pro-competitive or welfare-enhancing.

Meanwhile, the European Commission ("EC") displays no signs of softening its resolve to defend the Internal Market freedoms and its exclusive jurisdiction to assess mergers with a Community dimension based on competition rather than industrial policy criteria. Outgoing EU Competition Commissioner Joaquín Almunia recently voiced concerns about a rising tide of protectionism in Europe, citing public debate over the handling of General Electric's bid for Alstom's energy business as only one example of "protectionist signals" in Europe.[13] Recent statements by his likely successor, Margrethe Vestager, suggest continuity in approach. She noted, "in the long run, and also in the short run, it is for everyone's best [interest] that we have a strong competition culture and that we keep protectionism at bay."[14] Vestager rejected the notion that competition rules should be relaxed to accommodate European Champions and stated, "We

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[9] Protectionist tendencies in EU Member States were also observed in the mid-noughties, *see* for instance Nourry & Jung, *EU State Measures against Foreign Takeovers: "Economic Patriotism" in All But Name,* 2(2) COMPETITION POL'Y INT'L. (2006).

[10] *Merkel backs EU telco consolidation,* FINANCIAL TIMES (May 8, 2014).

[11] *See*, for instance, Mark Field MP, *After Astra-Zeneca/Pfizer – Is Protectionism Part of the 'New Economics'?* (August 4, 2014).

[12] *See*, for instance: *WTO plunged into crisis as doubts grow over its future,* FINANCIAL TIMES (August 1, 2014).

[13] *Almunia voices concerns over rising protectionism*, MLEX (June 24, 2014).

[14] She also stated that competition can be an enabler for more jobs and prosperity in Europe, *see, Vestager vows to resist protectionism, antitrust politicization*, MLEX (September 29, 2014).

can compete better in big markets if companies have competed and succeeded in smaller markets as well."[15]

This article commences by briefly summarizing the evolution of merger control regimes, away from broad public interest tests and towards a competition-based assessment, in the United Kingdom and also internationally. In light of the recent, increasingly vocal demand for new or wider public interest considerations, it is time to take stock and explore what implications a shift or reversal in policy of this type may have. In order to do so, we set out to answer the question whether the U.K. merger control regime is in good health. One of the key tenets of medicine is the injunction that doctors should "first, do no harm;" any treatment required for a merger control regime must thus be based on a thorough diagnosis of its current state and the full potential implications of the medicine to be prescribed.

We will therefore examine the legal framework governing the current U.K. merger control regime insofar as public interest considerations are concerned, including its important interface with EU law. We then briefly move outside the confines of merger control to assess the extent to which public interest considerations can be invoked under foreign investment control rules in the United Kingdom and a number of other jurisdictions. Against this background, the article examines evidence relating to the economic impact of foreign investment, before it points to costs and risks that may arise if the United Kingdom or other jurisdictions were to broaden public interest tests in merger control. In the final section we will identify some hallmarks of what we regard as an economically efficient and durable regime.

We are not legislative policy makers. Instead, the CMA, as a statutory body and operator of the U.K. merger control machinery, applies the law as it is enacted. We are, however, mindful of the ongoing need to keep under review the working of the regime and how it is applied in light of new circumstances and observed shortcomings. It would be remiss not to point out costs and risks of potentially forfeiting the valuable progress made in recent years in clarifying and strengthening competition law regimes across the world—and with it the world trading system—and thereby greatly improving consumer welfare outcomes and easing tensions between nations. Any reversal of this progress would not be costless, in particular if examined in an international context.

II. THE EVOLUTION OF PUBLIC INTEREST TESTS IN U.K. MERGER CONTROL—TOWARDS GREATER PREDICTABILITY

Historically, prior to the entry into force of the Enterprise Act 2002 (the Enterprise Act), U.K. mergers were reviewed on a broad public interest test under the Fair Trading Act 1973.[16] Under this regime, the concept of public interest was carried over from the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. Guidance on the interpretation of public

[15] *Relaxed rules for EU 'champions' carry cost, Vestager says,* MLEX (October 2, 2014).

[16] Under s84 of the Fair Trading Act 1973, the Competition Commission, and its predecessor, the Monopolies & Mergers Commission, were required to take into account "all matters which appear to them in the particular circumstances to be relevant" with regard to the desirability of certain factors.

interest in that legislation has been described as being "expressed at such level of generality as to amount to an invitation to take into account anything that might seem relevant."[17]

The impact on competition as a key factor in the assessment of mergers was given more prominence in 1984 when the then Secretary of State, Norman Tebbit, announced that "references to the Monopolies and Mergers Commission (MMC) would be made primarily, but not exclusively, on competition grounds, taking into account the international dimension of competition."[18]

This "Tebbit doctrine" was given policy support in a Department of Trade and Industry ("DTI") paper that set out a strong case for a largely depoliticized merger control regime.[19] The issues considered by the DTI in 1988 bear a remarkable resemblance to those at the forefront of current debate. In its review, the DTI dealt with submissions arguing for a wide range of issues other than competition to justify intervention, including effects on employment, regional economic development, research on development spending by companies, the consequences of highly leveraged bids, and foreign takeovers.

In response to these submissions, the DTI posited that none of these matters is one where the public interest typically diverges from the interests of private sector decision makers, although it recognized that it may do so in exceptional cases. The DTI found that "normally, therefore, the decision should be left to the market" and went on to state that, "The Government sees no case for intervening on a regular basis to prevent private firms from carrying through their business decisions on the ground that those plans may have adverse immediate implications for such matters as employment or R&D."[20]

In shifting towards a competition-based assessment, successive British governments had taken on board years of concerns raised in connection with the lack of transparency and predictability of the public interest test, which risked deterring mergers that were beneficial to the economy. [21]

Despite the incremental move towards free market policies and the promotion of competition as the main feature of merger control, a considerable degree of political involvement remained part of the assessment process, manifesting itself most notably in the "Lilley doctrine:" In 1990 the then Secretary of State for Trade Peter Lilley announced a new approach to assessing

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[17] A. Scott, M. Hvvid, & B. Lyons, *Merger Control in the United Kingdom*, OUP 2006, page 5.

[18] First report: Takeovers and mergers, 27 November 1991 HC 1991-2 ¶ 223.

[19] DTI, *Mergers policy: a Department of Trade and Industry paper on the policy and procedures of merger control* (HMSO, 1988).

[20] DTI, *Mergers policy: a Department of Trade and Industry paper on the policy and procedures of merger control* (HMSO, 1988).

[21] *See* Andreas Stephan, *Did Lloyds/HBOS mark the failure of an enduring economics based system of merger regulation?,* NORTHERN IRELAND LEGAL Q., 4 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931007.

mergers designed to resist "nationalisation by the back door"[22] through the takeover of British companies by state-owned foreign companies.

One of the problematic aspects of the Lilley doctrine was that the Monopolies and Mergers Commission ("MMC", the forerunner of the Competition Commission) could not lawfully act on any presumption that acquisition by a state-controlled company (whether foreign or not) was contrary to the public interest.[23] However, the policy turned out to be short-lived:[24] In the few references Lilley made under his new policy no adverse effects were found on that basis and clearances were recommended. The Lilley doctrine was therefore considered unsustainable especially in the context of a general move towards an independent competition regulator.[25]

Even though only a small proportion of mergers were referred to the MMC on non-competition grounds, it remained difficult for firms to predict with certainty when a merger would be blocked.[26] In its 1991 report on takeover, the Trade and Industry Committee considered the impact of the Lilley doctrine and noted that "following a complaint to the European Commission that this policy discriminated against foreign companies, the Commission asked the Government to explain and justify its policy." The U.K. Government agreed with the Commission in October 1991 that, "the fact that a company is state-owned or directed by a state will not per se justify a referral to the MMC; unless, exceptionally, other public interest issues (such as security interests) arise, a referral would only be envisaged insofar as competition aspects were at stake."[27]

About ten years on, in 2002, the primacy of a competition-based test was codified in the Enterprise Act, which has been described as having put an end to "substantial room for the exercise of political preferences."[28] It is interesting to observe that, having experienced decades of merger control policies relying on a vague concept of public interest, and having drawn lessons from the Tebbit and Lilley doctrines, there was broad political consensus across all parties represented in Parliament to move towards a competition-based test when the Enterprise Act was adopted.[29] That said, the existence of such a consensus behind the principle that a

[22] HC Deb 26 July 1990 cc 415-6W. The statement was reproduced in Department for Trade and Industry press notice 90/457, Merger reference policy, 26 July 1990. *See* also Antony Seely, *Takeovers: the public interest*, House of Commons Library, 7 (June 3, 2014).

[23] *Id*.

[24] *See* McElwee, *Politics and the UK merger control process: the public interest exceptions and other collision point*, COMPETITION L., 80 (2010), and Seely, *Id*. at 7-8.

[25] *First report: Takeovers and mergers*, 27 November 1991 HC 90 1991-92 and summary in House of Commons and Seely, *Id*..

[26] *See* Stephan, *supra* note 20.

[27] *See* Seely, *supra* note 21 at 9

[28] S. Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission*, MUP, 228 (1999).

[29] The Enterprise Bill, as proposed by the Labour government to make the merger regime "more competition-focused," was generally welcomed. *See* for example, speaking for the Conservatives, John Whittingdale who said "There are several specific measures in the [Enterprise] Bill to which we are happy to give unqualified support. The first is the decision to remove Ministers from the decision-making process on the clearance of mergers." And for the Liberal Democrats, Dr. Vince Cable (now Secretary of State) noted at the time that "it is right that we should move away from the vague public interest test to a competition test." HC Deb 10 April 2002 c54-55 and c66. Vince Cable

competition test is the right one has not protected politicians from pressure to intervene in specific cases where particular interests are threatened.

The use of an economics-based competition assessment of mergers brought the United Kingdom in line with international evolution of merger control policy.[30] The trend towards narrower, economics-based criteria, a more technical assessment, and fuller reported analysis was observed across many jurisdictions. This development coincided with competition authorities responsible for merger control becoming more independent and the process as a whole becoming more transparent and predictable for businesses.

The accumulated learnings from the experience of different national regimes in handling merger cases, coupled with the desire of individual countries to make their markets attractive locations for business activity, can be seen as key drivers for these important trends.

III. MERGER CONTROL AND THE PUBLIC INTEREST—THE EXISTING LEGAL FRAMEWORK AND KEY PRECEDENTS

A. The Framework for Assessing Mergers Within the U.K.'s Jurisdiction

Today, merger control in the United Kingdom is performed primarily by the CMA[31] under the Enterprise Act 2002.[32] Where the relevant jurisdictional thresholds are met, and the transaction is not subject to the EU Merger Regulation, the CMA has the power to investigate mergers and acquisitions irrespective of the (corporate) nationality of the acquirer.[33] In examining mergers, the CMA conducts an economics-based competition assessment. The question before it is whether the merger has resulted, or may be expected to result, in a substantial lessening of competition ("SLC") within any market or markets in the United Kingdom for goods or services.[34]

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also suggested that the Enterprise Act would result in a higher proportion of mergers, in particular large mergers, being referred for examination. *See* Seely, *supra* note 21.

[30] The United States, for example, has long since relied on an economics-based competition assessment (*see* the Clayton Act 1914, as subsequently amended, among others, such as the 1992 Horizontal Merger Guidelines) and the EU had adopted its Merger Regulation in September 1989: Council regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ [1989] L 395/1. Note that the EU's test at the time was the "creation or strengthening of a dominant position," which has since been amended to a "significant impediment to competition" test.

[31] The CMA is responsible for merger control across all industries and has decision-making power, although certain sectoral regulators such as Ofcom or Monitor also have statutory roles in examining mergers. The CMA was established on October 1, 2013. By virtue of the Enterprise and Regulatory Reform Act 2013 and the Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order, No 416 of 2014, the OFT and CC's merger control functions were transferred to the CMA on April 1, 2014.

[32] As amended by the Enterprise and Regulatory Reform Act 2013.

[33] There is no separate body or process in the United Kingdom for the control of foreign investment. The CMA's primary duty is to seek to promote competition, both within and outside the United Kingdom, for the benefit of consumers, *see CMA Mergers: Guidance on the CMA's jurisdiction and procedure*, ¶ 2.5 (Jan. 2014).

[34] The decision at first phase is based on a "realistic prospect" threshold in determining whether it is or may be the case that a SLC will arise from the merger whereas the second phase decision is made on a "balance of probabilities" threshold.

B. The Role of the Secretary of State—Public Interest Grounds

Provision is made under the Enterprise Act allowing for intervention in mergers by the Secretary of State on certain specified public interest grounds.[35] The Secretary of State may, for instance, issue an "intervention notice" to the CMA if he or she considers one or more public interest considerations to be present in a particular merger.[36] Currently, in public interest cases, these considerations are specified in the Enterprise Act[37] as being (i) national security, (ii) media plurality, and (iii) the stability of the U.K. financial system. The majority of intervention notices in public interest cases have been issued in respect of national security considerations.[38]

The Enterprise Act recognizes the possibility that, exceptionally, these grounds for intervention could be supplemented. Any proposal to do so, however, is governed by a procedure ensuring careful scrutiny. The Secretary of State can only add a public interest consideration by way of adopting a statutory instrument if it is approved by Parliament through an affirmative procedure. [39]

C. Observations on the Operation of Public Interest Considerations in Practice

On several occasions there have been calls for an expansion of the list of public interest considerations or a greater reliance on such considerations to intervene.[40] However, in practice,

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[35] The Secretary of State may intervene where he or she considers that one or more so-called "specified considerations" is relevant to the merger in question. Under the Enterprise Act 2002, these specified considerations may apply to three types of mergers, namely public interest mergers, special public interest mergers, and European relevant merger situations. *See* J. Parker & A. Majumdar, *UK merger control*, 143 et seq. (2011).

[36] *See* section 42 of the Enterprise Act. In terms of process, the CMA must then make a report to the Secretary of State advising whether a relevant merger situation has been or will be created and whether that has resulted or may be expected to result in a substantial lessening of competition. The CMA's report also contains a summary of any representations received by the CMA relating to any public interest consideration mentioned in the intervention notice. It is then for the Secretary of State to take a decision on whether to refer the merger for a second-phase review. He may refer such cases where he believes that the merger operates or may be expected to operate against the public interest, taking account of a substantial lessening of competition identified by the CMA and the existence of one or more specified public interest considerations. Under the Enterprise Act, an anticompetitive outcome is to be treated as being adverse to the public interest unless it is justified by one or more public interest considerations. After receiving the Phase 2 report from the CMA, the Secretary of State makes a final decision as to whether the merger operates against the public interest and may take such enforcement action that he or she considers reasonable and practicable to remedy, mitigate, or prevent any of the adverse effects identified. This may extend to prohibiting the merger.

[37] *See* section 58 of the Enterprise Act.

[38] National security cases include Alvis Plc/General Dynamics Corporation, Finmeccanica/AgustaWestland 2004, Finmeccania/ BAE Systems 2005, Lockheed Martin UK Holdings Limited/Insys Group Limited 2005, General Electric/Smiths Aerospace Division 2007, and Atlas Elektronik/QinetiQ 2009. *See* further cases where intervention notices have been issued in respect of other considerations (media plurality and stability of U.K. financial system): BSkyB/ITV 2007, Global/GMG Radio 2012, Newscorp/BskyB 2010, Lloyds/HBOS 2008,

[39] Section 58 Enterprise Act 2002. *See* also http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/policies/business-law/competition-matters/mergers/mergers-with-a-public-interest.

[40] When a possible acquisition of Centrica by Gazprom was rumored in 2006, for instance, Tony Blair ruled out any possibility that U.K. ministers might actively seek to block a future bid by Russia's Gazprom for Centrica, the gas supplier. Mr. Blair reportedly considered that any Gazprom bid for Centrica could be dealt with satisfactorily by the

the only additional public interest consideration added since 2002 is the stability of the U.K. financial system, during the financial crisis and in the context of the Lloyds/HBOS merger. [41]In that case, the then Secretary of State issued an intervention notice based on a public interest consideration that had not yet been included in the Enterprise Act. On the same day the order introducing the new public interest consideration came into force,[42] the Office of Fair Trading ("OFT") issued its report on the transaction concluding that it may be expected to result in an SLC, meaning that the competition-based test for reference was met. However, the Secretary of State considered that the new public interest consideration—the stability of the U.K. financial system—overrode the concerns identified by the OFT and decided that the merger should not be referred for further investigation.[43]

Some expert commentators have since argued that the merger seriously damaged competition and suggested that HBOS should have perhaps instead been nationalized.[44] Even some of those skeptical about removing elected politicians from the process of merger control[45] noted that this case, and others such as BSkyB/ITV[46] and News International/BskyB,[47] "have been marked by disagreements amongst the authorities concerned, significant behind the scenes lobbying, a very drawn out process as regards the media mergers and, ultimately, controversial final decisions."[48] The experience, therefore, has been characterized as "a cautionary tale" for

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U.K.'s independent competition authorities. A newspaper quoted him as noting that Britain should face down the wave of "economic patriotism" shown by some EU states, *see, Blair rules out blocking Gazprom Centrica bid,* FINANCIAL TIMES (April 25, 2006).

[41] Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (SI 2008/2645).

[42] October 24, 2008.

[43] *Supra* notes 33-34.

[44] Sir John Vickers, former Chief of the OFT and later chairman of the Independent Commission on Banking noted in 2010 that it was a mistake to force the merger through on public interest grounds. *See*, *Sir John Vickers calls Lloyds takeover of HBOS a mistake*, GUARDIAN, (November 26, 2010).

[45] Graham, *Public interest mergers,* 4 (March 2013, to be published).

[46] In November 2008 BSkyB acquired a 17.9 percent stake in ITV. Both companies were active in television production and broadcasting. The Secretary of State issued a public interest intervention notice requesting the OFT and Ofcom examine whether the merger gave rise to competition and media plurality concerns. The OFT and Ofcom found the merger gave rise to concerns on both counts, and the merger was referred to the CC. The CC's report concluded that the merger did result in a substantial lessening of competition, but did not operate against the public interest of media plurality. The CC recommended undertakings to reduce the shareholding in ITV down to 7.5 percent. BSkyB appealed unsuccessfully to the CAT and then the Court of Appeal, and finally entered into the undertakings in 2010.

[47] In November 2010, Newscorp notified the European Commission of its intention to acquire the remaining 61 percent shareholding in BSkyB. Given that both companies were active in media in the United Kingdom, and Newscorp already owned 39 percent of BSkyB, the Secretary of State issued a European Intervention Notice citing media plurality concerns. The competition review remained with the Commission, and Ofcom was tasked with investigating the public interest concerns. The Commission cleared the merger on competition grounds but Ofcom found that it may operate against the public interest and recommended the Secretary of State refer it to the CC. Newscorp and the Secretary of State entered into discussions over undertakings in lieu, and two public consultations on the same were launched. Before the final consultation finished, news of the "phone hacking" scandal broke, embroiling Newscorp in controversy and leading it to close the News of the World newspaper. Shortly after, Newscorp withdrew its undertakings, and the Secretary of State referred the transaction to the CC. Two days later Newscorp announced it had abandoned the transaction.

[48] Graham, *supra* note 43.

those who see a bigger role for non-competition considerations within competition law and has been seen as encouraging lobbying by those who want to support particular interests.[49]

D. System "In Operation, Not Disarray"

It has also been argued, however, the Lloyds/HBOS case demonstrated that even such exceptional events did not require a disapplication of the U.K. merger control regime altogether, but could be dealt with on the basis of the existing legal structure under the Enterprise Act, which allows for narrowly defined public interest exceptions.[50] The then Chairman of the Competition Commission noted, "UK merger control procedures were in practice flexible enough to deal with a highly sensitive case of this kind. In providing a statutory mechanism for balancing competition against financial stability, albeit at ministerial level, and an opportunity for judicial review, the UK showed up better than those jurisdictions that simply disapplied merger control altogether from bank mergers as an emergency measure."[51]

Cases where public interest considerations have been invoked, including BSkyB/ITV, have also shown that the current system does provide for appropriate mechanisms allowing for good outcomes for consumers even if there are differences in opinion of the authorities involved.[52]

In summary, therefore, it seems fair to observe that the U.K.'s regime governing public interest considerations has been tried and tested for more than a decade and, despite the "cautionary tale" in Lloyds/HBOS, has proven capable of being able to deal even with extraordinary circumstances, such as in a global financial crisis. It has rightly been held to be "in operation, not disarray."[53]

E. The Interface Between U.K. and EU Law

From the perspective of the United Kingdom or any other EU Member State, the scope for intervention based on public interest considerations is subject to EU law requirements. If the transaction in question meets the relevant turnover thresholds, and is not referred back for examination at Member State level, it will be considered under the EU Merger Regulation ("EUMR") by the European Commission ("EC").[54] In such circumstances, the transaction falls within the EC's exclusive jurisdiction under Article 21 EUMR. Regardless of whether or not a

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[49] Graham, *supra* note 43.

[50] *See* also Martin McElwee, who contrasts the approach taken in Lloyds/HBOS with a statutory provision relating to the Bradford & Bingley case which, in effect, disapplied the U.K. merger control regime in its entirety, *Politics and the UK merger control process: the public interest exceptions and other collision points,* COMPETITION L., 82 (2010).

[51] Peter Freeman, *We are in a very melancholy situation: financial crisis and competition policy,* speech to David Hume Institute, (November 3, 2009).

[52] *See* notes 44 and 45, *supra*.

[53] Peter Freeman, *Merging is Such Sweet Sorrow*, Speech to the British Institute of International and Comparative Law (BIICL) Mergers Conference, (November 13, 2008).

[54] Under either Articles 4(5) or 9 of the EUMR.

transaction falls to be considered under the EUMR, measures preventing cross-border transactions in the European Union may be caught by the free movement rules.[55]

Prior to the first EUMR[56] entering into force in September 1990, Sir Leon Brittan commented that:

> the future of the major players in European business who are involved in mergers is now in [the Commission's] hands…They will benefit from a one stop shop, where there is one analysis by one authority on the basis of competition criteria which takes one month and is binding throughout the European Community. If there are serious doubts about a concentration compatibility with the Common Market, a further analysis becomes necessary…And, once again, subject to only two exceptions, the Commission's decision is final throughout the Community and is reviewable only by the Community's courts.[57]

In terms of the substantive assessment carried out by the EC, similar to the U.K.'s SLC test, the EC's significant impediment of effective competition ("SIEC") test under the EUMR is based on an economic assessment and allows for consideration of consumer benefits and efficiencies, but not considerations of industrial policy such as the protection of jobs. However, Article 21(4) EUMR specifically recognizes public security, plurality of the media, and prudential rules as legitimate public interests justifying intervention.[58] These three public interest exceptions enshrined in the EUMR reflect a delicate and hard-earned compromise that was 17 years in the making and the Commission has been strict and narrow in its interpretation.[59]

F. Member States Intervening on the Basis of Existing Exceptions

In the United Kingdom, if the Secretary of State is considering taking measures to protect certain legitimate interests outside of the scope of the EC's merger control review, he may issue a

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[55] In particular Article 63 (free movement of capital) and Article 49 (freedom of establishment) of the Treaty on the Functioning of the European Union.

[56] At that time it was Council Regulation 4064/89, referred to as the ECMR.

[57] SIR LEON BRITTAN, HERSCH LAUTERPACHT MEMORIAL LECTURES: COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET, 35, 38 (1991). Also *see* C. Bright, *The European Merger Control Regulation: Do Member States Still Have An Independent Role In Merger Control*? *Part 1*, 12 ECLR (1991) and J Galloway, *EC merger control: does the re-emergence of protectionism signal the death of the 'one stop shop?* University of East Anglia, Paper to the 3rd Annual CCP Summer Conference (June 2007).

[58] *See* discussion of cases involving the interpretation of these provisions in M. FURSE, THE LAW OF MERGER CONTROL IN THE EC AND THE UK, 58-61(2007) and C.M. Borges, *The Legitimate Interests of Member States in EC Merger Law*, 9 EUR. PUBLIC L. 345 (2003).

[59] There have been only a few cases in which Member States have intervened in transactions under Article 21(4) EUMR. Although Member States are not required to seek formal approval, there have been cases where the Commission has specifically stated that Article 21(4) applies. *See* for example: M.423 Newspaper Publishing, M.759 Sun Alliance/Royal Insurance, M.1858 Thomson/Racal (II). Any intervention on these grounds must be no more than is necessary and proportionate to achieve these goals. It is also worth noting that any intervention must be specifically justified on these grounds: thus, for example, an intervention cannot be made on one ground for a collateral reason, e.g. to preserve a media outlet because of the employment opportunities it offers.

European Intervention Notice.[60] The CMA then has the authority to review the merger and provide a report to the Secretary of State.[61]

Article 21(4) states that Member States are entitled to "take appropriate measures to protect legitimate interests other than those taken into consideration by [the EUMR] and compatible with the general principles and other provisions of Community law."[62] If the "legitimate interest" a Member State seeks to rely upon falls within the narrowly defined categories described above, no formal approval is required although the EC continues to assess the impact of the transaction on competition.

G. Member States Intervening on the Basis of New Exceptions

However, for any public interest considerations outside these narrowly construed three exceptions, authorization must be requested from the EC before taking any measures. Hence, when Member States wish to intervene in a transaction with a Community dimension, they should be prepared to either: a) argue that action is necessary, proportionate, and consistent with EC law in order to protect public security, plurality of the media, or prudential rules; or b) communicate the "public interest" rationale for action to the EC and request authorization to take action. The EC will then assess whether the proposal is "appropriate, proportional and non-discriminatory"[63] before reaching a decision.[64]

The EC will consider the wider effects of consenting to the proposal, which also involves an examination of the compatibility of the proposed measures with the free movement rules under the TFEU, including a proportionality assessment.[65] Given its role as guardian of the TFEU and its internal market, one can generally expect the EC to ensure that unduly interventionist national industrial policies do not override competition policy objectives and that it will be mindful of the "Pandora's Box effect" and the risk of copy-cat style industrial protection. Indeed, it is very rare for the Commission to approve interventions by Member States outside of the recognized legitimate interests.[66]

If the EC approves of a public interest intervention on specific grounds put forward by a Member State, it would appear that such intervention grounds should then in principle be

[60] Under section 67 of the Enterprise Act.

[61] The report will cover both the usual competition considerations as well as including advice and recommendations on any public interest considerations (*see* The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003). The Secretary of State may then make a decision on whether to refer the merger for a second phase investigation. The decision must be taken on the basis of the relevant public interest consideration only. The CMA must then report on whether a relevant merger situation has been created (that meets the EUMR thresholds) and whether that merger operates or may operate against the public interest (having regard only to the legitimate interests specified).

[62] Although Member States may intervene to prohibit a merger that is cleared by the Commission (on competition grounds), Member States are not permitted to "clear" a merger to overrule a prohibition decision by the Commission.

[63] *See*, for instance, the EC's reasoning in Case M.567 Lyonnaise des Eaux SA/Northumbrian Water Group.

[64] J. Galloway, *EC merger control: does the re-emergence of protectionism signal the death of the 'one stop shop?* University of East Anglia, Paper to the 3rd Annual CCP Summer Conference (June 2007).

[65] The EC has 25 working days within which to inform the Member State of its assessment.

[66] As far as we are aware, this has only happened on one occasion (M.*567 Lyonnaise des Eaux SA/Northumbrian Water Group* following the UK Water Industry Act 1995).

available to all other Member States, although each proposed Member State measure seeking to rely on such grounds would likely be subject to the same considerations of wider effects, including a proportionality assessment. If, however, the EC does not approve the application of a new public interest consideration, the EC (and possibly interested third parties) could challenge any attempt by a Member State to intervene on such grounds in the EU courts.

H. The European Commission Protecting its Exclusive Jurisdiction and Free Movement Rules

The EC has pursued Member States for a breach of its exclusive jurisdiction under Article 21 EUMR on several occasions and such proceedings have generally been brought in parallel with proceedings for acting in breach of the EU's free movement rules.[67] The Commission generally commences this process by way of "preliminary conclusions" addressed to the Member State for comments within a short period of time.[68] Following that, the Commission may then go on to adopt a final decision ordering the withdrawal of the measure in question.

It did so for the first time in the *BSCH/Champalimaud* case.[69] Portugal opposed a bank merger that had been notified to the EC. The EC issued a decision requiring Portugal to suspend (and then withdraw) its opposition to the transaction contrary to Article 21 EUMR, ultimately allowing the deal to proceed. In *Secil/Holderbank/Cimpor*,[70] Portugal was again subject to infringement proceedings when it obstructed the acquisition of a cement company without communicating with the EC in accordance with Article 21(4) EUMR. The parties withdrew their notification to the EC. Nevertheless the EC issued a decision finding Portugal in breach of Article 21(4) and requiring it to withdraw the offending measures. The EC's decision was upheld by the Court of Justice, but the deal finally collapsed.[71]

In *Unicredito/HVB*,[72] the EC cleared Unicredito's acquisition of HVB. Poland required that, in addition, Unicredito should divest itself of shares in a Polish bank. The EC informed

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[67] In addition, there are at least two other cases where the EC opened an investigation but did not formally intervene, *see* BBVA/ABN AMRO/BNL/Banco Antonveneta (IP/05/1595) and Suez / Gaz de France. It should also be noted that the Commission does not need to have completed its merger control assessment and cleared the transaction in order to start an Article 21 infringement procedure. *See* further Damien Gerard, *Protectionist threats against cross-border mergers: unexplored avenues to strengthen the effectiveness of Article 21 ECMR,* COMMON MARKET L. REV. (June 2008).

[68] *Id.*

[69] Commission Press Release IP/99/533, 20 July 1999; Commission Press Release IP/99/551, 20 July 1999; Case M 1616, decision of 3 August 1999, OJ [1999] C 306/37; Commission Press Release IP/99/610, 3 August 1999; Commission Press Release IP/99/669, 9 September 1999; Commission Press Release IP/99/773, 20 October 1999; Commission Press Release IP/99/774, 20 October 1999; Commission Press Release IP/99/818, 3 November 1999; Commission Press Release IP/20/296, 27 March 2000.

[70] Case M 2054 of 20 November 2000, but the notification was withdrawn by the parties on January 11, 2001 before the Commission had reached a decision. *See* further Commission Press Release IP/00/1338, 22 November 2000 and Case C-42/01 Portuguese Republic v European Commission [2004] ECR I-6079.

[71] Portugal appealed the decision but the ECJ dismissed Portugal's appeal. *See* Portuguese Republic v. European Commission, Case C-42/01.

[72] Case M.3894, decision of 18 October 2005, OJ [2005] C 278/8, *see* further the Commission Press Release IP/05/1299, 18 October 2005; Case M.4125, see Commission Press Release IP/06/277, 8 March 2006.

Poland that its measures violated Article 21 EUMR as well as the free movement of capital and freedom of establishment. Ultimately the transaction was allowed subject to some divestments.[73]

In *Albertis/Autostrade*,[74] the EC cleared Albertis' acquisition of Autostrade. Italy objected on the basis that the Spanish acquirer would not be able to make the necessary investment in Italian motorways. The deal subsequently fell through, but the EC issued a decision finding Italy in breach of article 21 EUMR and the free movement rules. The parties appealed, but the General Court dismissed the parties' appeal on the basis that they had voluntarily put an end to the deal. Eventually, Italy withdrew the obstacles to the merger and the EC closed the infringement proceedings.

The *E.ON/Endesa*[75] case is perhaps the most famous example of the EC pursuing infringement proceedings for violation of Article 21 EUMR and the free movement rules. The EC examined E.ON's bid to acquire Spanish energy company Endesa under the EUMR.[76] In the meantime, Spain passed a royal decree giving the Spanish energy regulator ("CNE") powers to assess and impose conditions on transactions in the energy sector.[77] Shortly after the EC decided to clear the transaction unconditionally, the CNE imposed several conditions on the transaction.[78] In response, the EC issued a decision finding that Spain had breached article 21 EUMR and made a formal request that Spain should comply. Spain reacted by amending, but not fully withdrawing the conditions. After some further iterations between Spain and the EC, the EC initiated infringement proceedings against Spain before the EU Court of Justice in March 2007.[79]

The Court agreed that the actions by the Spanish government violated EU Law, noting that arguments put forward by the Spanish government regarding security of supply of energy were not sufficient justification. Ultimately, E.ON withdrew its bid in exchange for a promise from rival bidders (Enel and Acciona) to sell it some of Endesa's assets.[80] However, the Court's

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[73] In 2005, the EC approved the acquisition of HVB (a German bank that indirectly controlled a Polish bank) by Unicredit (an Italian bank). When the Polish Treasury ordered the sale of the shares on the basis of a non-compete clause, the EC pursued the Polish state for a breach of Article 21. Ultimately the transaction was allowed (subject to some divestments). Both the Polish appeal against the clearance and the EC's proceedings against Poland for breaching Article 21 were ultimately dropped.

[74] Case M.4249, decision of 22 September 2006, OJ [2006] C 268/7; Commission Press Release IP/06/1244, 22 September 2006; Commission Press Release IP/06/1418, 18 October 2006; Commission Press Release MEMO/06/414, 7 November 2006; Commission Press Release IP/06/1561, 14 November 2006; Commission Press Release IP/07/117, 31 January 2007; Case T-58/09 Schemaventotto v Commission [2010] E.C.R. II-3863.

[75] Case M.4110, decision of 25 April 2006, OJ [2006] C 114/6; Commission Press Release IP/06/528, 25 April 2006; Commission Press Release IP/06/1265, 26 September 2006; Commission Press Release IP/06/1853, 20 December 2006; Commission Press Release IP/28 March 2007; C-196/07 Commission v Kingdom of Spain [2008] ECR I-41; Commission Press Release MEMO/08/147, 6 March 2008.

[76] A rival bid had been made by Gas Natural.

[77] This royal decree was also challenged before the Court of Justice: Commission v Kingdom of Spain, Case C-207/07.

[78] CNE approved the bid but subject to nineteen conditions, including: (i) an obligation to maintain Endesa's headquarters in Spain, (ii) an obligation to keep Endesa duly capitalised and not to exceed a certain debt ratio, and (iii) an obligation to divest Endesa's non-mainland assets.

[79] Case C-196/07 Commission v Spain

[80] While the EC was pursuing infringement proceedings against E.ON, the transaction itself changed course as E.ON agreed with Enel (an Italian company) and Acciona (a Spanish company) that upon their acquisition of

judgement confirms the EC's position that Member States cannot create unwarranted obstacles to mergers that fall under the EC's exclusive jurisdiction under Article 21 EUMR. The Court also clarified that the fact that E.ON had abandoned the public offer after the expiry of the deadline for the withdrawal of the illegal conditions does not render the proceedings devoid of purpose.

I. Practical Implications of Far-Reaching Effects of EUMR and Free Movement Rules for Member States

The vigorous stance the EC has taken in these cases illustrates its determination to ensure that free movement rules and the EC's exclusive jurisdiction under the EUMR are not obstructed by Member States measures designed to prevent foreign takeovers.[81] There is no sign that the EC has moved away from its policy position that "the EU's single market will descend into chaos" if Member States stand in the way of mergers falling within its exclusive jurisdiction.[82]

EU Member States are therefore likely to face significant scrutiny and possibly strong opposition from the EC where they seek to invoke public interest considerations in mergers with a Community dimension, whether on the basis that such measures may be (i) in breach of the EU's free movement rules, (ii) in breach of the EC's exclusive jurisdiction under Article 21 EUMR, or (iii) in breach of both.

The EU's free movement rules may be engaged and possibly violated by exercising public interest exceptions even if the merger is not subject to the EUMR and falls within the scope of domestic merger control legislation. This may even be the case where the acquirer is not established in the European Union: The free movement of capital provision under the TFEU[83] not only prohibits restrictive measures on capital movements between Member States but also applies to restrictions on capital movements between Member States and third countries.[84]

IV. FOREIGN INVESTMENT CONTROL—MERGER CONTROL'S UNEASY BEDFELLOW

Outside the framework of a competition-based merger control assessment, public or national interest considerations are also taken into account under foreign investment controls in many jurisdictions.

Endesa, E.ON would acquire some of its assets. The EC cleared this transaction on July 5, 2007, *see* Case M.4685, decision on December 5, 2007, OJ [2007] C 212/04 and Commission Press Release IP/07/1858, 5 December 2007. Again, the transaction was notified to the CNE. The CNE went on to impose a number of conditions on the transaction, which the EC considered to be unlawful. When the Spanish government refused to withdraw the conditions, the EC again initiated proceedings for the breach of Article 21 EUMR as well as the free movement rules against Spain. In April 2008, the General Court rejected the Spanish application for interim measures suspending the EC's decision. Finally, in 2010, the Spanish government dropped its appeal to this decision.

[81] Nevertheless, some commentators have argued that the EC's record in preventing Member States from interfering with cross-border transactions is "rather bleak" and that it "lacks teeth." *See* further Gerard, *supra* note 66 and Davies & Jones, *Merger control and the public interest: Balancing EU and national law in the protectionist debate,* (to be published).

[82] EC press release no 277, *Mergers: Commission launches procedure against Poland for preventing Unicredit/HVB merger* (2006).

[83] Article 63 TFEU

[84] Davies & Jones, *supra* note 79, also with regard to possible justification grounds that can be invoked in respect of restrictions on capital movements between Member States and third countries.

A. Function, Evolution, and Impact of Foreign Investment Control

Over 130 countries now have competition regimes and in most of these regimes foreign investment controls and competition law operate side-by-side. In some countries the two instruments are operated hand-in-hand by the same agency, such as MOFCOM in China. While foreign investment controls are particularly prominent in countries at an earlier stage in economic development and with relatively new competition regimes, they also feature in mature economies with long established competition regimes, such as the United States, Germany, and the United Kingdom.

Foreign investment controls ("FICs") and competition law make for uneasy bedfellows, as the prime motivations are different and potentially conflicting. Where competition law is motivated by the desire to promote consumer welfare by subjecting producers to effective rivalry, foreign investment controls are typically motivated by the desire to protect domestic producers from competitors based outside the territory or by considerations unrelated to the economics of markets. FICs allow governments to block transactions that do not have an adverse impact on competition. Foreign investment control legislation often lacks a clear definition or guidelines against which a "national interest" criterion could be measured, making it more difficult to predict whether or not a proposed transaction might be blocked. This resulting uncertainty has been said, in and of itself, to dissuade pro-competitive transactions that may enhance consumer welfare.

B. "Foreign" Acquirers in a Globalized Economy

In addition to the potential pitfalls in controls of foreign investment there is also an inherent difficulty in identifying what "foreign" means in this context. Regardless of whether the relevant legislation's label is "merger control" or "foreign investment control," policy makers may wish to ask themselves what it actually means for investments or acquirers to be "foreign" in an increasingly globalized economy with companies operating across multiple jurisdictions with multi-regional headquarters and multinational shareholders and employees.

From a legal certainty perspective, the answer to "What is foreign?" is important as companies must be able to establish, based on transparent criteria, whether any given proposed transaction is likely to be subject to foreign investment control.[85] Likewise, policy makers and enforcement agencies need to be able to identify which acquisitions they should target through such rules. In order to do so, what amounts to a foreign takeover or a foreign company must be identifiable on the basis of objective criteria.

The difficulty of defining what is "foreign" results from the well-known phenomena whereby many companies today are active in more than one country, producing goods and creating employment across a number of jurisdictions. This can create a slightly cloudy picture when trying to place a company into a box of one particular country. For example, Apple, considered by many as the quintessential American or even Californian company, manufactures the majority of its products in China, where it employs 700,000 people compared to a total

[85] The French Decree No. 2005-1739, for instance, provides that the regulations also apply to French investors investing through foreign investment vehicles. The place of residence of a corporate investor is, in turn, determined by the place of residence of its ultimate beneficial owners, without regard to place of incorporation.

307,250 U.S. jobs supported by Apple.[86] Further, it is also one of the top ten companies by revenue in Ireland.[87] With such a wide employment reach, what corporate nationality most appropriately reflects its operations?

Notwithstanding commercial and employment activity across numerous countries, the ownership structure of companies can create further uncertainty regarding their true national identity, especially in a world with large foreign investments moving across borders leaving companies with a diverse range of patriated investors. For example Volvo, headquartered in Sweden and long identified as a Swedish company, was sold by Ford to Chinese car company, Geely.[88]

Even the seemingly simple and compelling criterion of the location of a company's headquarters has its pitfalls, particularly in a global economy where companies can and do shift their headquarters from time to time, often motivated by tax considerations. For example, in 2013, WPP, the global advertising company, moved its headquarters back to London, having previously moved its headquarters from the United Kingdom to Dublin in 2008. [89]

A recent study by *The Economist*[90] further illustrates the inherent flaws in a simplified classification of companies as either foreign or domestic. Its "domestic density index" combines the origin of revenue, employees, shareholders, and the nationality of the CEO. On those measures, AstraZeneca is only 12 percent British. The study notes that AstraZeneca paid no British corporation tax last year, just a quarter of the company is domestically owned, and the CEO is French. Pfizer, on the other hand, has a British CEO and—despite being a notionally American company—is only 49 percent American under the "domestic density index," largely a reflection of significant staff being employed and revenue generated in Europe and the rest of the world. Other companies assessed against the "domestic density index" include Alstom, only just over 33 percent French, and Vodafone, only 15 percent British.

C. Foreign Investment Controls in Selected EU Member States

While foreign investment measures and public interest considerations vary among the Member States, they are significant because, if taken together, they represent a number of considerations that may impact the result of a merger differently.[91]

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[86] *See*, *Why Steve Jobs was Disappointed in Obama,* BUS. INSIDER, (October 24, 2011) and Analysis Group Study February 2012, *available at* https://www.apple.com/about/job-creation/. *See* further the recent investigation by the EC in regards to the alleged state aid given by Ireland to Apple. Interesting to note is that on page 6 of EC's letter, which sets out the corporate structure of Apple, only the ultimate parent is incorporated in the United States whereas all of the other companies are incorporated in Ireland. European Commission Letter, State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP)—Ireland Alleged aid to Apple, page 6.

[87] *Top 1000 Our Guide to Irish Business*, IRISH TIMES (Oct. 7 2014), *available at* http://www.top1000.ie/companies.

[88] *Ford closes deal with China's Geely to sell Volvo,* MARKET WATCH, (March 28, 2010).

[89] *See* http://www.wpp.com/wpp/about/whoweare/history/, *see also, WPP investors vote to move back to UK*, FINANCIAL TIMES (December 11, 2012).

[90] *See*, *Companies and nationality – flags of inconvenience,* ECONOMIST, (May 17, 2014), *available at* http://www.economist.com/news/business/21602237-flags-inconvenience.

[91] Davies & Jones, *supra* note 79.

1. France

France's foreign investment rules are set out in Decree No. 2005 -1739 which provides that foreign investments in "strategic"[92] sectors must receive prior approval from the French Ministry of Economy. The French Minister of Economy can also intervene at the end of a second-phase merger investigation to take decisions based on public interest factors.[93] The sectors to which the regulations apply were recently expanded to include foreign investments (whether by EU or non-EU entities) in the fields of energy, transport, water, public health, and telecommunications.[94] This decree extending sectors deemed "strategic" was introduced while the French government were opposing the merger between GE and Alstom because Alstom was of "strategic importance" to France.[95] The then French Economy Minister Mr. Montebourg stated that the decree was a "choice of economic patriotism" and that "we can now block sales and demand conditions. It is an essential rearmament of public power."[96] To date, however, the decree has not been relied upon as a basis for formal intervention.

2. Germany

In 2009 Germany enacted foreign investment legislation that would enable the Ministry of Economics and Technology to investigate and potentially prohibit or impose conditions on an acquisition in any sector by a non-EU, or in some cases by an EU investor, on the grounds of public policy or security.[97] There is no requirement to notify and the Ministry can initiate its own investigation within three months of signing. To date, the German Ministry has not imposed any restrictions on foreign investment under this legislation.[98] However, the German government

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[92] The strategic importance of some of these sectors is questioned by some, *see* further Gerard, *supra* note 65.

[93] Davies & Jones, *supra* note 79 at 10.

[94] Decree No. 2014-479, dated 14 May 2014 and published on 15 May 2014.

[95] France's foreign investment rules are set out in Decree No. 2005-1739, (*see* also Articles L151-1 to L152-6 of the French Monetary and Financial Code) which provides that foreign investments in "strategic" sectors must receive prior approval from the French Ministry of Economy. There are stricter requirements attaching to non-European investments where the thresholds for authorization are lower and more sectors are covered. The review procedure takes two months and is suspensory. Approval may be conditional on remedies aimed at protecting the relevant national interest. The regulations also apply to French investors investing through foreign investment vehicles. The context for the introduction of these new categories was the French government's opposition to the bid by General Electric to acquire Alstom over concerns regarding job losses and the loss of an industry of "strategic importance" to France. The government eventually confirmed that it would grant the foreign investment authorization subject to it taking a 20 percent share in Alstom. *See* also *GE deal 'victory' for role of French state in economy,* FINANCIAL TIMES (June 23, 2014); *All over but the shouting,* ECONOMIST, (June 20, 2014); *A lot of bull,* ECONOMIST, May 7, 2014); *GE extends bid deadline for Alstom unit;* FINANCIAL TIMES (May 23, 2014); *France boosts say on GE bid for Alstom with takeover law,* REUTERS, (May 15, 2014); *French Set Conditions for G.E. Takeover of Alstom,* N.Y. TIMES (May 6, 2014).

[96] *French 'nuclear weapon' against foreign takeovers sparks UK blast,* FINANCIAL TIMES, (May 15, 2014).

[97] *Getting the Deal Through*, GLOBAL COMPETITION REV. (2013).

[98] Under the 2009 legislation non-EU investors acquiring 25 percent or more of the shares in a German company may be subject to an investigation by the Ministry of Economics and Technology which may ultimately prohibit the acquisition or impose conditions on the grounds of public policy or security. Investments by EU entities may also be caught by the regulations if a 25 percent or more shareholder is from outside the European Union. All sectors are caught to the extent that there is a threat to national security or public order. Parties are not required to notify foreign investments but the Ministry may initiate its own investigation within three months of the signing of

had previously approved a merger on public interest grounds that was found by the Bundeskartellamt to raise competition concerns.[99]

3. The United Kingdom

In the United Kingdom, the Secretary of State, under Part 2 of the Industry Act 1975, may prohibit a change of control of an "important manufacturing undertaking" if the change is contrary to the interests of the United Kingdom and relates to public policy, security, or health.[100] To date, this legislation has not been invoked to prevent any change of control.[101]

D. Foreign Investment Control in EU Member States: A Different Label Does Not Suspend the Primacy of EU Law and the Commission's Exclusive Jurisdiction

From a legal perspective, foreign investment control legislation enacted by EU Member States cannot serve as a "get out of jail card" to be played in circumstances where reliance on public interest tests under domestic merger control regimes would be in breach of either free movement rules and/or the EC's exclusive jurisdiction. To the extent that the free movement rules are engaged (bearing in mind the potential applicability of the free movement of capital rules to countries outside the European Union)[102] or the turnover thresholds under the EUMR are met, invoking foreign investment control rules may still fall foul of EU law.

E. Overview of Selected Foreign Investment Controls Outside the European Union

As noted above, foreign investment controls are prevalent in countries with relatively new competition regimes, but also feature in economies with a long history of merger control.

1. The United States

In the United States, the Committee on Foreign Investment in the United States ("CFIUS") reviews transactions resulting in foreign control of any U.S. business in order to identify whether there are any national security risks.[103] While "national security" is not defined,

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the agreement. It then has another two months to approve, prohibit or impose conditions on the deal. To pre-empt such an investigation parties have the option of applying for a non-objection letter.

[99] E.ON/Ruhrgas 2002. The Federal Minister of Economics and Technology can under the Competition Act intervene and authorize a merger that has been prohibited by the Bundeskartellamt, *see* further Davies & Jones, *supra* note 79 at 9.

[100] Under Part 2 of the Industry Act 1975 the Secretary of State may prohibit a change of control of an "important manufacturing undertaking" if the change is deemed by him to be contrary to the interests of the United Kingdom. In this context interests means interests that relate to public policy, public security, or public health. *See* section 13 of the Industry Act 1975.

[101] The compatibility of the Industry Act with EU law has at least indirectly been questioned by some, *see* for instance Davies & Jones, *supra* note 79.

[102] Davies & Jones, *supra* note 79.

[103] CFIUS reviews the transaction to identify any national security risk. The process is based on voluntary notification by the parties; however, should no notification be made the transaction is at risk from un-winding if found to be a threat to national security. *See* further Gotts, *Caveat Emptor: Transaction Parties Need to Consider Foreign Investment Laws as Part of Pre-Deal Planning*, (2014, to be published).

the Foreign Investment and National Security Act of 2007 ("FINSA") has clarified the factors considered, which include any effects on critical infrastructure and technology. [104]

2. Canada

In Canada, the Investment Canada Act applies to direct or indirect acquisitions of control of Canadian businesses by non-Canadian investors.[105] All non-Canadian investors have to file an application for review or a post-closing notification of the investment. Foreign investments that are above the relevant threshold will be reviewed under the substantive test of "net benefit to Canada" by the Investment Review Division of the Department of Industry, or the Department of Heritage if they involve cultural activities.[106] While the majority of transactions reviewed have been cleared, there has been a marked increase in reviews focused on national security or national interest, which has been argued to have coincided with a rise of economic protectionism.[107] As a direct reaction to the CNOOC/Nexon merger, the Canadian government announced in 2012 that any future acquisitions of Canadian oil sands businesses by SOEs would only be approved in exceptional circumstances.

3. Australia

In Australia, the Foreign Acquisitions and Takeovers Act 1975 ("FATA") governs foreign investments in Australian businesses.[108] It is administered by the Foreign Investment Review

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[104] FINSA aimed at clarifying the factors to be considered in evaluating a transaction and include impacts on critical infrastructure and critical technologies that appears to be a less strict interpretation of national security. *See* further *Id*.

[105] *See* further, the Investment Canada Act, which also distinguishes between WTO and non-WTO investors, applying more preferential principles to the former, thereby recognizing the mutual relationship of trade between WTO membership countries, *supra* note 95 at 64.

[106] The Investment Canada Act applies to acquisitions of control of Canadian businesses by non-Canadians. All acquisitions of control, whether direct or indirect, by non-Canadians must be notified post-closing to the Investment Review Division of the Department of Industry. If the acquisition is found unlikely to be of a net benefit to Canada, the relevant minister has the power to prohibit the proposed investment or approve it subject to conditions. An example of an acquisition being rejected for failing to meet the net benefit to Canada test is the proposed bid by BHP Billiton for the Potash Corporation of Saskatchewan in 2010. Additional guidelines were issued in 2007 in respect of acquisitions of Canadian businesses by State-Owned-Enterprise ("SOEs") and subsequently updated in 2012 in the wake of the acquisitions by CNOOC (a Chinese SOE) of Nexon (a Canadian oil and gas producer, including an oil-sands business). This transaction was also cleared by CFIUS due to activities in the Gulf of Mexico. *See*, *CNOOC closes $15.1 billion acquisition of Canada's Nexen,* REUTERS, (February 25, 2014) and by Petronas (Malaysia's state owned oil and gas company) of Progress Energy. *See* further Goldman & Koch, *The Interface between Competition Law and Foreign Investment Merger Reviews: Flying Blind or with Radar? (*2014, to be published).

[107] "The last five years has seen more failed reviews in Canada than the preceding twenty," *see* Goldman & Koch, *id*.

[108] *See, Australia's foreign investment policy 2013,* Foreign Investment Review Board website. Amendments to the Foreign Acquisitions and Takeovers Act 1975 ("FATA") were made in 2009 intended to capture indirect acquisitions of control (or potential control) that may not be structured as a traditional share acquisition. If the relevant thresholds are met, the Treasurer (with advice from FIRB) then considers whether the acquisition is contrary to the national interest. The Archer Daniels/Graincorp decision (*see*, *Foreign investment application; Archer Daniels Midland company's proposed acquisition of GrainCorp Limited,* Press release by the Australian Treasury, 29 November 29, 2013) has been criticized in Australia for being made for political reasons and based on popular opinion rather than sound economic reasoning. A recent article analyzing the law in this area stated, "there is also little doubt that the National Party was hostile to the ADM bid." For example, the criticism of ADM by Deputy

Board, a non-statutory body that advises the Treasurer, who is the ultimate decision maker.[109] Transactions exceeding the relevant thresholds are subject to mandatory notification and can ultimately be prohibited or allowed with conditions if they are found contrary to the national interest. "National interest" is a wide concept and relevant factors include, but are not limited to, national security, competition, and certain Australian government policies such as taxes. In 2013, the proposed acquisition by Archer Daniels Midland Company of GrainCorp Limited was prohibited under FATA's national interest test even though it had previously been cleared on competition grounds by the Australian Competition and Consumer Commission.[110]

4. China

The Ministry of Commerce ("MOFCOM") is China's merger regulator and administers the merger control regime under the Anti-Monopoly Law. MOFCOM, or one of its local branches, is also responsible for granting approval for foreign investment in China. Foreign investment is also regulated on a sector-by-sector basis by MOFCOM as set out in the Foreign Investment Industrial Guidance Catalogue.[111] The Catalogue ensures that foreign investment is encouraged in some sectors, but is restricted or prohibited in other sectors.[112] Notably, in December 2013 MOFCOM initiated a process to revise China's three main foreign investment laws in order to reflect a system where some foreign investments require approval whereas others only require filing for record.[113]

5. Russia

The Russian foreign investment regime is primarily regulated by the Federal Law No 57-FZ, "On the Procedure of Making Foreign Investments in Companies of Strategic Importance for National Defense and State Security," which came into force on May 7, 2008, as amended in 2011.[114] The state will exercise prior control over any acquisition by a foreign investor of Russian companies that have strategic political interest for Russia and are active in sectors listed in the legislation.[115] Since the regime came into force, a substantial number of transactions are said to have involved a strategic political interest under the legislation.[116]

Legal advisers have commented that it has become more difficult in Russia for foreign investors to determine the scope of application of the law relating to foreign investment in

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Prime Minister and leader of the National Party Mr Warren Truss the night before Mr Hockey's announcement: "They haven't been offering anything to Australian growers other than higher charges and potentially even an environment which would make agriculture in this country the captive of overseas boardroom." Such criticism is summarized in *"Foreign Investment Law and Policy in Australia: A Critical Analysis,"* CLMR (February 2014).

[109] *See* further, http://www.firb.gov.au/content/who.asp?NavID=48.

[110] *See*, *ACCC to not oppose Archer Daniels Midland acquisition of Graincorp,* Australian Competition and Consumer Commission press release, (June 27, 2013).

[111] *Supra* note 95.

[112] US Department of State, 2014 Investment Climate Statement – China, 2014 http://www.state.gov/e/eb/rls/othr/ics/2014/228295.htm

[113] *Id.* Further, in September 2013, China established the Shanghai Pilot Free Trade Zone to test reforms to the investment registration regime and to open previously closed sectors to foreign investment and in November the Chinese Communist Party unveiled a reform agenda to broaden foreign investment access.

[114] Clifford Chance, *A Legal Overview of Foreign Investment in Russia's Strategic Sect*ors, (October 2012).

[115] *Supra* note 95.

[116] *Supra* note 112.

companies operating in strategic sectors. This is partly because a transaction may be subject to clearance even if the relevant entity's principal operations do not concern the strategic sectors, since ancillary involvement is sufficient to trigger the operation of that law. While very few transactions have been blocked by the clearing committee, the approval process and the delays caused by it are said to be a major concern for investors.[117]

V. WHAT EVIDENCE IS THERE OF FOREIGN INVESTMENT CONTRIBUTING TO ECONOMIC GROWTH AND CONSUMER WELFARE?

Turning back to the United Kingdom, what are the benefits of foreign investment to the United Kingdom? In considering possible legislative changes to the U.K. merger control regime in the aftermath of Kraft/Cadbury,[118] the Business, Innovation and Skills Committee noted, "any reform of takeovers in the United Kingdom has to that foreign direct investment is of great benefit to the UK economy."[119] But what evidence is there to support this assertion?

We have sought to summarize some of the literature surrounding the effects of mergers and acquisitions ("M&A") and foreign direct investment ("FDI"). The following provides a picture of some of the overall benefits that M&A and FDI might bring to the U.K. economy, based on the research of others. To do this, we assess the role of FDI in the United Kingdom and what effect this might have had on the economy. Finally, we consider recent literature on the effects of cross- border M&A, and of the effects of M&A activity more generally.

A. Foreign Direct Investment—Inbound

Globally, the United Kingdom has been one of the main beneficiaries of its traditional policy of "openness," attracting significant foreign investment. According to a recent report from U.K. Trade and Investment ("UKTI"), the United Kingdom attracts one of the world's highest amounts of FDI, second only to the United States.[120] Figures from the report show that mergers and acquisitions (including joint ventures), accounted for approximately 16 percent of all inward FDI in the United Kingdom for 2013/2014. This represents an increase from just over 13 percent last year and 10.5 percent the year before, with the overall level of investment on the rise over that period. This suggests that M&A activity is becoming an increasingly important avenue for FDI investment.

With a large amount of capital moving into the United Kingdom from abroad, there are several studies that have looked to assess the impact this has had on the U.K. economy. UKTI itself reports that an estimated 66,000 jobs were created by international companies investing in the United Kingdom in 2013/14, and 45,000 jobs safeguarded, based on recorded estimates at the

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[117] *See* Nourry & Jung, *Protectionism in the Age of Austerity – A Further Unlevelling of the Playing Field?*, 8(1) CPI ANTITRUST CHRON. 6 (August 2012).

[118] In January 2010, Kraft Foods launched a takeover bid for Cadbury. The takeover became front-page news and Cadbury actively resisted the takeover. The transaction was cleared by the EC subject to conditions. In the United Kingdom, however, the merger was critiqued by different commentators and there was talk of broadening the public interest test. In the end the public interest test was not broadened and the merger completed. *See* Seely, *supra* note 21.

[119] HC 234 2009-10 ¶¶ 74-5.

[120] UKTI (2014) Inward Investment Report 2013/14.

start of the project. These 111,000 jobs created by inward FDI highlight some of the positive effects that investment from outside the United Kingdom generates. [121]

An Economic and Social Research Council ("ESRC") survey of British businesses highlighted several overall positive effects from foreign ownership, although it also noted that these effects may vary by company and situation, with some individual communities experiencing both positive and negative consequences of foreign ownership.[122] The potential for some groups to be negatively affected by foreign investment will most likely increase their incentives to lobby against any individual transaction, irrespective of the overall potential gains of such a transaction to U.K. businesses and U.K. consumers.[123]

B. Outbound Investment

U.K. businesses are equally global in their investment outlook and are large investors in the outside world. The United Kingdom is one of the leading world economies for outwards investment, being second in the world in 2011, only to the United States.[124] According to recent studies, the United Kingdom owns £1.1 trillion in assets overseas, £300 billion more than the world owns in the United Kingdom.[125] A report by UKTI in 2014 reviewed the evidence on the effects of this and concluded that, on the whole, being one of the largest outward investors provides economic benefits, mostly through increased access to opportunities that would otherwise not be available, increasing productivity, profitability, and competitiveness.

Other evidence suggests that, on the whole, outward FDI also benefits the economy through effects on innovation and productivity. For example, a recent survey and empirical evidence by UKTI suggested that outward FDI provides overall productivity gains for the United Kingdom.[126] There is also some evidence of positive effects on employment within the United Kingdom itself through outward investment, although these are largely related to skilled workers, with the effect on low skilled works tending to be negative.

More generally, the available international evidence tends to suggest that overall employment effects from outward investment are neutral or even positive, suggesting that outward investment is not destroying jobs inside the country or region originating the investment as productivity and competitiveness gains outweigh any downscaling of domestic production.[127]

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[121] UKTI (2014) Inward Investment Report 2013/14.

[122] Economic and Social Research Council (ESRC) Evidence Briefing: Foreign ownership and consequences for British business, January 2011

[123] Although those companies benefiting from the deal will be incentivized to promote the potential gains, these are arguably often more difficult to communicate in an effective manner, as they threaten the status quo.

[124] HM Government, *Outward Investment—some economic proposals*, Trade and Investment Analytical Papers: Topic 15 of 18, (January 2014).

[125] Revised transcript of evidence taken before the Select Committee on Economic Affairs, *Foreign Takeovers and the Public Interest,* 8 (July 8, 2014).

[126] UKTI (2014) Inward Investment Report 2013/14

[127] *See*, for example, Copenhagen Economics (2010) Impacts of EU Outward FDI.

C. Cross-border M&A

UKTI figures show that around 16 percent of incoming FDI into the United Kingdom in 2013/2014 was through mergers and acquisitions, including joint ventures. Worldwide, cross-border M&A activity was valued at U.S. $349 billion in 2013, up from U.S. $332 billion in 2012.[128] Clearly then, M&A activity is significant.

Evidence[129] suggests that while there might be short-term difficulties for the target arising from a particular transaction, the overall effect is likely an increase in innovation—something that might well be expected to benefit consumers in the long-run (assuming effective competition in the markets involved).[130]

The British car industry offers a good example. Its glory days seemed all but over due to a lack of competitiveness until in the late 1980s. While other countries were seeking to shield their national car manufacturers from foreign acquirers, Britain adopted a different approach and openly welcomed investment by Japanese and other foreign investors. Some of these established new plants in green field sites, which began to introduce new practices and standards. Later, some British car marques were acquired by foreign companies including BMW (Mini and Rolls-Royce), SAIC (MG), TATA (Jaguar and Land Rover) and Volkswagen Group (Bentley). Some of these, with the new investment, experienced a remarkable turnaround. After observers had written off the chances of any auto manufacturer building substantial new facilities in the United Kingdom, Jaguar Land Rover is doing precisely that in Wolverhampton. Other "foreign" manufacturers, including BMW, Toyota, Nissan, Honda, and General Motors, are now building new generations of successful models in Britain. Recent reports suggest that this development is driving innovation: in hybrid and electric car technologies Britain is starting to gain some critical

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[128] *UNCTAD (2012) World Investment Report 2014: Investing in the SDGs: An Action Plan, page 18*

[129] *See* further: As well as the direct effects of cross-border acquisitions, M&A activity in its own right could produce benefits to the economy as a whole. Recent research by CASS business school showed that, in the short term, the effect of M&A activity significantly increased overall share value from combined firms. However, the long-term effect was more ambiguous, with the overall average effect suggesting an incre*ase in value for shareholders,* (Clare & Faelten*, Short term value creation from M&A in general, long term effects uncertain* (2014)). A similar, ambiguous story can generally be seen from the economic literature, with different studies yielding either similarly mixed or in some cases contradicting results. *See*, for example, Ravenscraft & Scherer, *The profitability of Mergers (1989)* compared to Ghosh, *Does operating performance really improve following corporate acquisitions* (2001). There is evidence to suggest that the effect of cross-border M&A is an overall increase in innovation as measured by patenting behavior, although this is appears to generally be based on innovative gains in the acquirer's country and may coincide with a reduction in the target country's innovation (Stiebale, *Cross-Border M&As and Innovative Activity of Acquiring and Target Firms* (2014)). Further, the research shows that the effect is largest when the pre-merger difference in innovation activities between target and acquirer is largest. The research also suggests that an increase in innovation is accompanied by growth in sales and productivity from the perspective of the merged entity. This is consistent with previous studies that have shown a benefit to the acquiring firm in innovation following cross-border M&A. *See*, for example, Bertrand & Zuniga, *R&D and M&A: Are cross-border M&A different An investigation on OECD countries* (2006).

[130] This research did not take into account potential effects arising from possible retaliation by other countries that might prevent innovation-enhancing deals taking place within their jurisdictions if their companies are denied investment opportunities.

mass, even a lead.[131] U.K. car production has risen to 1.6 million vehicles a year, with over 80 percent exported.[132]

D. Institutions and Trade Policy

One of the stated aims of the recent restructuring of the U.K.'s competition regime and authority was to increase business confidence through the predictability of the regime. [133]

It is widely recognized by international organizations that regimes facilitating cross-border mergers and FDI are important indicators of healthy economies. The OECD, as part of its monitoring of how regulation affects product markets in OECD and non-OECD countries, calculates indicators of market regulation. One of the negative indicators affecting a country's ranking covers restrictions to foreign investment.[134] Some recent research lends empirical support to the hypothesis that policy restrictiveness is a significant factor in determining bilateral M&A flows.[135] The same research highlights negative effects of policy restrictions on foreign investment.[136]

VI. COSTS AND RISKS OF DILUTING COMPETITION-BASED SCRUTINY OF MERGERS BY INTRODUCING OR BROADENING INDUSTRIAL POLICY-BASED PUBLIC INTEREST TESTS

In evaluating the merits of a potential (re-)introduction of wider or new public interest exceptions in the assessment of cross-border transactions, it is critical for policy makers not to lose sight of the potential costs and risks to U.K. consumers, businesses, and the overall economy such a shift in policy may give rise to. This section outlines some of these costs and risks.

A. Risk of Tit-For-Tat Closing of Markets—International Reputation And Relations

The evidence cited above suggests that the United Kingdom (even more so than other jurisdictions) benefits greatly from its open approach to foreign investment and an open market for corporate control.

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[131] *A resurgent British car industry offers lessons in how to improve other areas of our economic output,* INDEPENDENT (January 13, 2014).

[132] Department of Business, Innovation and Skills 2014 Growth Dashboard.

[133] BIS, *A competition regime for growth: A consultation on options for reform*, 2 (2011).

[134] *See*, for example, OECD, *Barriers to FDI: Restrictiveness of a country's FDI rules in 22 sectors in terms of foreign equity limitations, screening or approval mechanisms, restrictions on the employment of foreigners as key personnel and operational restrictions (e.g. restrictions on branching and on capital repatriation or on land ownership),* Economic Policy Reforms 2014 - Going For Growth Interim Report, Chapter 2 (2014) and *Reducing regulatory \barriers to competition: Progress since 2008 and scope for further reform*. The United Kingdom is one of the highest ranked countries in the 2013 rankings based on this Report.

[135] Barattieri et al., *Cross-Border Mergers and Acquisitions in Services, The Role of Policy and Industrial Structure*, The World Bank, Development Reasearch Group, Trade and International Integration Team (2014). Note that this research was limited to the services sector.

[136] However, the research also observes that this varies by state with high shares of manufacturing and, to a lesser extent, services in value added allowing the maintenance of restrictive policies while not necessarily deterring M&A.

Broadening the U.K. public interest tests may therefore damage the U.K.'s ability to attract investment from overseas, and damage the U.K.'s reputation internationally as an open, competitive place to do business. Even the perception of more interventionist tendencies may have a chilling effect on pro-competitive transactions. Ever more mobile capital and technology means that investors can pick and choose their activities globally, resulting in a greater need for countries to present themselves as attractive places for business to set up and expand within.

In addition, if policy makers were to introduce measures aimed at preventing politically sensitive takeovers on non-competition grounds, this may weaken considerably the ability of the United Kingdom to object to other jurisdictions contemplating similar measures. In fact, other states may be encouraged to use any legislative change re-politicizing merger control, for instance by introducing wider public interest tests, as a blueprint for their own legislative agenda. There could be a risk that such merger or foreign investment control would be applied on discriminatory grounds against U.K. companies seeking to do business in those states. U.K. companies conduct a significant amount of overseas investment and, therefore, stand to benefit from an open and efficient regime.[137]

B. Weakened Credibility of Regime and Damaged Business Confidence

Reintroducing political involvement in the assessment of mergers may encourage a belief that decisions on mergers could be influenced by political or lobbying considerations that could undermine the credibility of the regime and hurt business confidence.

In 2010, the then Secretary of State, Lord Mandelson, stated:

> Some have suggested that we should introduce some more open-ended public interest test that a government or arm's length authority should apply to takeovers. The reason I am unconvinced of the desirability of introducing such a test and equipping the Government with such powers is because I think that in those circumstances a government's judgment and intervention could be too exposed to political lobbying and short-term populist pressures which are unable to make an assessment of long-term growth and value that might come from the move. It might give rise to capricious decision-making of one sort or another, depending on the ministers and their official advisers, and it can lead to a loss of transparency and a loss of predictability which at the moment makes the current UK regime open to investors from which, I just underline, we benefit a great deal.[138]

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[137] HM Government, *Outward Investment – some economic proposals, Trade and Investment Analytical Papers: Topic 15 of 18* (January 2014). It has been argued that the resurgence of industrial policy has already manifested itself in a wide variety of financial incentives in industrial countries and in leading emerging markets and also in the growing resort to local content requirements in developing countries, *see* for instance the article by Prof. Simon J. Evenett commenting on the recent breakdown of WTO negotiations: *No one is willing to tie their own hands*, FINANCIAL TIMES, (August 4, 2014).

[138] The work of the Department for Business, Innovation and Skills: Evidence given by Rt Hon Lord Mandelson, First Secretary of State, 19 January 2010, 10 March 2010 HC 299-i 2009-10 Q13, *see* also Antony Seely, *supra* note 21 at 14.

C. Defining the Public Interest—Policy Challenges and Risk of Intervention Creep

From a practical perspective, one of the main risks of resorting to a greater reliance on public interest considerations is the difficulty in defining them. The observation has been made that the unpredictable circumstances in which a public interest intervention might be perceived as necessary make it impossible to provide a satisfactory definition of public interest.[139]

If one could readily identify in advance those mergers that would not work out, the economic world would be a better place. However, given the strong incentives on the part of the merging parties and their investors and advisers to get a merger right, and the resources available to these groups, one must fairly conclude that overall it is extremely difficult to pick the winners from the losers in advance. Adding to this difficulty is that many mergers can take years to deliver their full potential, which can be contrasted with the very much shorter term that characterizes the modern media-political axis. Also *ex post* evaluation suggests that while in aggregate the gains from successful mergers exceed the losses from unsuccessful ones, there are significant numbers of "turkeys."[140] Cumulatively, this argues for a policy stance of studied neutrality and for a focus on removing anticompetitive features rather than second-guessing the whole rationale underlying merger transactions.

Although the investors and corporations find it difficult to identify in advance "winning" mergers, it is legitimate to ask whether it is any easier to identify in advance welfare-enhancing mergers that are in the public interest. As a competition authority, we know this is very challenging because we have had decades of operating such a regime in the United Kingdom before the reforms of the last 30 years. As well as the difficulties experienced by the financial and corporate communities in predicting which mergers would be acceptable to the public authorities, those authorities themselves found it difficult to identify wherein precisely lay the public interest. The Fair Trading Act 1973 required "all matters which appear to them in the particular circumstances to be relevant" to be taken into account. Would we be more precise today? While that would likely be the intention, once exceptions have been added, the pressure to add more such exceptions tends to build over time.

The concept of public interest is inherently elusive—however it might be defined, it is unlikely to cover precisely the next situation where intervention is considered an option. As such, there is a risk of either (i) a very wide exemption, operating as a catch-all, completely undermining the overarching structure of the existing framework, or (ii) the piecemeal addition of exceptions, risking fragmentation of the regime. Whenever a new public interest consideration is added, this may encourage lobbying to add further considerations, giving rise to the risk of intervention creep. Further fragmentation of the U.K. merger control system could result in inconsistencies, less transparency, and uncertainty for businesses.[141]

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[139] *See* Stephan, citing the Lloyds/HBOS mergers as an example, *supra* note 20.

[140] Clare & Faelten, *M&A in the UK: a study of post-transaction shareholder wealth creation, company financial performance and employment*", (April 26, 2013).

[141] *See* Stephan, *supra* note 20 at 15.

The public interest definition problem is illustrated by a statement made by Brendan Barber, TUC general secretary, who argued for a "new balance" in merger regulation in the context of the Kraft/Cadbury takeover:

> At present, the only block on a takeover is whether it will work against the consumer. But we do not have to go back to the days when a vague public interest test allowed ministers to decide the fate of a takeover on a whim. Instead, we need a new kind of economic test handled by an independent mergers and takeovers commission. It would make bidders show that a takeover would be good for the target company. It would take into account the interests of the wider economy, employees, suppliers and local communities. Takeovers funded by unrealistic debt or driven by speculation would be unlikely to pass. Those that make industrial sense would.[142]

It is not clear which types of business models are preferable in the sense of being clearly more or less beneficial or detrimental from a consumer welfare perspective. Many questions arise that are relevant to the definition of public interest: What evidence is there to suggest that highly leveraged buy-outs are detrimental in the medium or long term? Is Government best placed to assess what level of capital expenditure under any given business model is preferable over another? Is Government best placed to assess the optimum level and location of R&D? Is what is good for the target company also necessarily good for consumer welfare?

Adding to the difficulty of a public interest test is that it is also unclear whether a hostile takeover is any more or less conductive to public interest than a non-hostile, friendlier, merger. In the case of a hostile takeover, the target company, which will by definition be against the transaction, will often influence the public debate by highlighting specific threats, which the acquirer might find difficult to counter, particularly if it is based abroad and has less influence over public opinion. In contrast, in the situation of a friendly merger the two involved parties, with all the necessary information available to them, will present an agreed front on the considerable benefits of the merger. This creates a potential information asymmetry between public opinion on hostile and non-hostile takeovers, not necessarily corresponding with the public interest. [143]

Highlighting further risks for protectionist tendencies in domestic economies, a recent paper on industrial policy and European merger control also reaches the conclusions that

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[142] *Cadbury shows takeovers need reform,* GUARDIAN (February 22, 2010).

[143] Note the difference in public noise regarding the AbbVie/Shire and AstraZeneca/Pfizer mergers. Flemming Ornskov, Shire's chief executive, in relation to AbbVie's bid approach for Shire, "Everybody can show up and bid for Shire…It's an open capitalist market. I'm an acquirer myself." In contrast, AstraZeneca's chief executive, Pascal Soriot commented in relation to the attempted hostile takeover by Pfizer, "This potential merger would create a certain worry for me. You can imagine that our people are very focussed right now and a merger of this magnitude would create a distraction that potentially would delay some of our projects…The drawbacks are exactly what I was getting at a minute ago: the disruption. What will we tell the person whose father died from lung cancer because one of our medicines was delayed because, essentially, in the meantime, our two companies were involved in saving taxes or saving costs?" *See, Osborne's northern 'super-city' looks like a cynical vote-grab – but I'm all for it,* SPECTATOR (June 28, 2014) and Business, Innovation and Skills Committee, *Oral evidence: The Future of AstraZeneca*, HC 1286-I, Tuesday (May 13, 2014).

industrial policies aimed at promoting national champions raise serious risks of government failure, in particular by creating local dominant positions.[144]

These considerations demonstrate the slipperiness of the concept of public interest and the immensely difficult choices underlying policy decisions. Arguably it would be very difficult to introduce a test of the type Mr Barber argued for without opening up considerable uncertainty in the merger process.

D. Implications for the Competition Assessment

In recent public debate, concern has been expressed about the implications of any merger between AstraZeneca and Pfizer with specific regard to their R&D activity being carried out in the United Kingdom. As a consequence of this, the possibility of the inclusion of the protection of R&D as a public interest has been raised.[145] However, it should not be assumed without assessment of the merger-specific facts that such implications would not be taken into account in any event by an economics-based competition assessment. We note, for example, that in Google/Waze[146] the OFT assessed whether the merger would dampen Google's incentives to innovate. Moreover, in GSK/Pfizer[147] the OFT assessed the merger, in part, on its effect on research and pipeline innovation. And in AkzoNobel/Metlac[148] the U.K.'s Competition Commission took account of evidence on the impact of the merger on R&D. The EC has also assessed mergers, in part, on the basis of their effect on clinical research.[149]

E. Legal Risks

From the perspective of EU Member States, given the limitations arising from the legal framework within which policy choices can be made, there is a risk of being embroiled in years of expensive and distracting proceedings if measures preventing foreign takeovers were to be found to contravene EU law. In that situation, there is also a further risk of affected parties bringing potentially costly damages claims against the relevant Member State given the direct effect of the free movement provisions.[150]

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[144] Girgenson Geradin, *Industrial Policy and European Merger Control – A Reassessment,* TILEC Discussion Paper No. 2011-053 (October 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937586.

[145] Seely, *supra* note 21 at 25-27.

[146]ME/6167/13 COMPLETED ACQUISITION BY MOTOROLA MOBILITY HOLDING (GOOGLE, INC.) OF WAZE MOBILE LIMITED, OFT decision published 12 December 2013, *see* in particular ¶¶ 26-28.

[147] ME/4136/09 Anticipated joint venture between GlaxoSmithKline plc and Pfizer Inc in relation to their respective HIV businesses, OFT decision published 21 July 2009.

[148] http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/akzo-nobel-metlac.

[149] Case M.5476 PFIZER/ WYETH, decision of 17 July 2009, OJ [2009] C262/1

[150] Difficulties in bringing such claims are set out in Davies & Jones, *supra* note 79.

VII. IN CONCLUSION, WHAT ARE THE MAIN HALLMARKS OF A SOUND, ECONOMICALLY EFFICIENT, AND DURABLE REGIME?

In summary, our analysis shows that the foundations of a sound merger control regime must, above all, consist of a rules-based system that (i) provides legal certainty; (ii) limits itself to minimal, economically justified distortions;[151] and (iii) thereby inspires business confidence.

The regime's credibility is enhanced by a technically competent, sufficiently resourced independent authority taking decisions on the basis of an economics-based competition assessment for which there is broad cross-party political support. Consistency and transparency in the decision-making process further strengthen investor confidence and minimize the risk of "tit for tat" closing of markets by trading partners.

Aside from attracting foreign investment for the benefit of the economy, a merger control regime that is based on sound competition economics can make companies, whether or not they are regarded as "national champions," more efficient and ultimately foster the creation of jobs and economic growth.[152]

There appear to us to be benefits for these considerations to equally be applied to foreign investment control rules such that merger and foreign investment control rules move in parallel. It would not appear desirable from a policy perspective for one legislative tool governing cross-border acquisitions to contradict or undermine another one. A re-introduction of criteria in foreign investment control that have previously been abandoned in merger control by successive governments would not only appear to be at odds with the lessons learned by those governments, but would also sit uncomfortably with the abovementioned business, consumer, and public confidence inspiring legal certainty and predictability.

We have sought to answer the question whether the U.K. merger control regime is in good health or requires treatment in the form of new or wider public interest considerations. The evidence suggests that the regime has evolved favorably and is capable of dealing even with extraordinary circumstances. The question for policy-makers, then, is whether any such increase in the use of public interest exemptions can bring benefits that would justify the potentially harmful side-effects.

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[151] The undoubted and often severe distortions of tax—both as regards specific national investment inducements, and the subsidizing of debt-finance by allowing tax deductibility of interest—were outside the scope of this article.

[152] *See* also Geradin, *supra* note 142; further side-benefits of a competition-focused regime have been highlighted by an OECD paper showing inverse relationship between competition and corruption, Tina Soreide, *Fighting Corruption and Promoting Competition,* Global Forum on Competition, OECD, (February 14, 2014).