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Is the Process of Merger Control Adequate to Consider Wider Public Interest Issues? Is it Now Time for CFIEU?

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Protectionism in Merger Control: Is the Process of Merger Control Adequate to Consider Wider Public Interest Issues? Is it Now Time for CFIEU?

Timothy R.W. Cowen[1]

I. INTRODUCTION

Whether a broader public interest test should apply to merger control has recently been discussed by Alex Chisholm, CEO of the U.K. Competition and Markets Authority ("CMA"), after being raised at Prime Minister's questions during Pfizer's attempt to acquire Astra Zeneca. Similar issues also arose this year in France regarding General Electric's bid for Alstom. They are not isolated incidents and follow cases in many other jurisdictions that have come up over the years. They remind us that merger control by competition authorities is not the only source of control over mergers, and that public policy issues on mergers, and grounds other than competition grounds, do not go away.[2]

At the outset it is important to note that EU merger control is currently designed to investigate and assess competition issues. The legal tests against which the mergers are judged are based on competition law concepts such as whether the proposed merger would strengthen dominance in a relevant market or significantly impede effective competition. The people who administer the system, and those who work for merging parties, complainants, and others affected by mergers, have developed considerable expertise in the law and economics used to assess and determine whether a merger meets these tests. As a one-stop shop, the Commission only has exclusive jurisdiction to decide on competition grounds. Non-economic public interests are carved out[3] and have no place in the substantive tests. However, other public interests do arise and there is a process, addressed in Article 21 of the Merger Regulation, for Member States to take "appropriate measures" to protect other "legitimate interests."

[1] This article is written in a private capacity and not as a partner of Sidley Austin, or as a Member of the Competition Appeal Tribunal. The opinions expressed in this article are entirely personal and do not represent the views of Sidley Austin LLP or of any of its clients or of any other organisation.

[2] Indeed, grounds for intervention that have recently been mentioned as affecting the competitive landscape include access to personal data as a raw material, (raised by FTC Commissioner Julie Brill and accepted as a basis for review by the EU Commission in relation to the Facebook's acquisition of WhatsApp).

[3] Preamble (19) states: "... the exclusive application of this Regulation is without prejudice to Article 296 of the Treaty, and does not prevent the Member States from taking appropriate measures to protect legitimate interests other than those pursued by this Regulation, provided that such measures are compatible with the general principles and other provisions of Community law." Contrast this to the language in Article 3.2 of Reg.1/2003, which provides for an exception to the Commission's exclusive jurisdiction to authorize agreements under Article 101, in the event national legislation may pursue "predominantly an objective" which is different from that of protecting competition on the market.

Article 21 refers to legitimate interests and lists a few. What may be a public interest that is legitimate is not a closed list, and is subject to Commission assessment. Legitimate public interests can be notified in advance and can be added to over time.[4]

This system means that national controls over media plurality, defense, or other legitimate public interests continue to exist at national levels. Such issues are addressed by national officials under separate national regimes (such as the recent News Corp/Sky merger in the United Kingdom).

Wider public interest issues do continue to arise, posing a question about greater coordination being needed on their assessment and determination. This article briefly reviews some of the cases and issues that have been, or are being, raised. It accepts that the current system of merger control is ill suited to considering a wider public interest investigation or adjudication and that a wide public interest test is undesirable. However, a case can be made for a more coordinated EU system of parallel oversight, similar to that which operates in the United States, to consider other non-competition related public interests on investment within a merger control timetable. The current debate is outlined below, followed by a modest suggestion of how the system could be reformed for the future, which might form the basis for a discussion of the mechanism.

II. PUBLIC DEBATE AND INCREASING PROTECTIONISM?

In the past, a wide variety of government laws and measures existed—such as local content rules and foreign exchange restrictions—which are examples of measures designed to secure investment but which distorted trade in violation of the GATT and WTO agreements. The OECD and WTO monitor such measures and report on them regularly. According to the June 16, 2014 joint report from the OECD, WTO, and Unctad:

> The vast majority of trade-restrictive measures taken by G-20 members since the onset of the global financial crisis remain in place. While 1,185 trade-restrictive measures have been recorded since October 2008, only 251, or roughly one-fifth, of these had been removed by mid-May 2014 making the total number of measures still in place 934—up by 78 from the end of the last reporting period. Around 21% of the measures introduced since October 2008 had been removed by mid-May 2014, compared with 19.8% at the time of the previous G-20 trade report in December 2013. Thus, when viewed against the background of this pace of removal of existing restrictions, it is clear that overall trade restrictions have continued to accumulate.[5]

The report singles out two EU Member States—France and Italy—which had amended existing policies related to mergers during the reporting period. The French amendment extends

[4] Article 21 of the ECMR.

[5] In addition it is noted that G-20 members put in place 112 new trade-restrictive measures during the period mid-November 2013 to mid-May 2014—slightly down from the 116 restrictive measures introduced in the previous period from mid-May to mid-November 2013. New import restrictive measures applied by G-20 members during the period under review affect 0.3 percent of G-20 merchandise imports or 0.2 percent of world merchandise imports. As in the past, the number of trade-restrictive measures applied by G-20 members during the period under review exceeds the number of liberalizing measures. However, the number of liberalizing measures taken during this period is larger than in the previous period, both in absolute and in relative terms.

the coverage of the existing review mechanism for inward foreign investment to six additional activities, including (i) energy supply (electricity, gas, hydrocarbons, or other sources of energy); (ii) water supply; (iii) transport networks and services; (iv) electronic communications networks and services; (v) operations for defense reasons; and (vi) protection of public health. It applies to safeguarding national interests in the areas of public order, public security, and national defense. As part of a security-related investment review mechanism created in 2012, the Italian measure establishes procedures for the exercise of special powers of the government in connection with investments in the defense and national security sector.

The statistics may imply a significant increase in trade restrictions and may indicate a growing protectionism, but they also may reflect other policy concerns that have the effect of restricting trade. Whether the restraints are expressions of legitimate public interests may in some cases be difficult to determine. The French government's decree[6] is listed by the OECD as potentially restrictive since it requires prior approval from the French Economy Minister for mergers or acquisitions, allowing it to block foreign takeovers of French companies in "strategic" industries; it was taken at a time intended to throw up a potential roadblock to General Electric's planned $16.9 billion bid for Alstom's energy assets.

Whether Alstom's energy assets truly are strategic is the central question. The European Commission warned France over the move:

> 'The objective of protecting essential strategic interests is clear when it involves security or public order and that is recognised in EU treaties,' said EU Commissioner Michel Barnier, 'But we also must check if this is applied in a proportionate fashion, otherwise it could amount to protectionism.'

By way of background, the recent French decree extended a pre-existing law from 2005. The French law itself was triggered following concerns in France about the way that the United States was using its defense legislation; in particular, following requests by members of the U.S. House of Representatives for a review of a proposed acquisition by China National Offshore Oil Company for Unocal Corp.

Whether a transaction is truly sensitive on strategic or security grounds also arose in the Dubai Ports case. In 2006 controversy erupted surrounding the attempt by Dubai Ports to purchase a number of major U.S. port management contracts from the British firm, P&O. In 2005 Dubai Ports approached the Committee on Foreign Investment in the United States ("CFIUS"), as part of a typical U.S. merger clearance process.[7] (CFIUS is the multi-agency U.S. federal panel that decides on deals involving non U.S. companies.) Some concerns had been raised by the U.S. Coast Guard during the CFIUS process. After assurances were provided by Dubai Ports concerning the security of port operations, CFIUS approval was provided, and the deal was completed.

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[6] Decree No 2005-1739 dated December 30, 2005 regulating foreign financial relationships, codified under Articles R153-1 *et seq.* of the French Monetary and Financial Code (the "CMF") and implementing Article L. 151-3 of the CMF.

[7] It should be noted that in certain industries such as telecommunications, CFIUS approval is a regular fact of life and has often resulted in conditions being imposed on the transaction.

Congress was then lobbied by a U.S. P&O partner, and congressional politicians questioned the approval and the terms of the assurances, raising concerns about the security of ports and risks from terrorism. A House Panel voted to block the deal. President Bush threatened to veto any legislation that attempted to delay the deal. Dubai Ports eventually avoided the issue by selling P&O's U.S. operations to an American business, AIG's asset management division, for an undisclosed sum.

Following the Dubai Ports case, Congress approved, and President Bush signed, a measure that was designated as P.L. 110-49 that alters the CFIUS process in order to provide greater oversight by Congress and increased reporting by the Committee on its decisions. In addition, P.L. 110-49 broadened the definition of national security and required greater scrutiny by CFIUS of critical national infrastructure.[8]

Since then, the CFIUS process has continued to operate, but not without criticism. In particular, concerns have been raised about its level of transparency and whether it adds an additional level of uncertainty to the outcome of transactions. Concerns have also been raised over acquisitions by foreign governments through sovereign wealth funds.[9,10]

One criticism is that the boundaries to the definitions of security and critical national infrastructure are not clear. For example, in the 2013 proposed acquisition of Smithfield Food by China's Shuanghui International holdings Ltd., questions were raised about the implications for U.S. critical infrastructure/key resources, about U.S. food security over the long-term, and whether such concerns were being addressed via a CFIUS investigation. Indeed, critical industries are defined very broadly.[11] These sectors include telecommunications, energy, financial services, water, transportation, and the "cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States." [12] This appears to allow CFIUS to investigate and recommend conditions on matters well beyond traditional defense and security sectors.

From Fujitsu's failed deal with Schlumberger in 1987, which was the spur for Exon-Florio, to the most recent changes, technology transactions have been center stage, and the importance of technology and research and development has been reviewed many times. Indeed, one important development was brought about in late 2006 as a result of Alcatel's acquisition of Lucent technologies, following the Dubai Ports case. CFIUS and President Bush approved the

[8] It is important to note that PL110-49 continues to use the same standard as the Exon-Flori amendment of 1988, namely that the President must conclude that other laws are inadequate or inappropriate to protect national security and that there must be credible evidence that foreign investment will impair national security.

[9] Reflecting worries that echo the U.K.'s Lilley doctrine of the late 1980's (*see* footnote 15 below); what was once called "back door nationalization" and might now be described as "back door nationalization affecting critical national infrastructure."

[10] *See* James K. Jackson, CFIUS report, Congressional Research Service 7-5700 (March 2014), *available at* www.crs.gov RL33388.

[11] "systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." P.L. 107-56, Title X, §1014, October 26, 2001; 42 U.S.C. §5195c(e).

[12] 42 U.S.C. §5195c(b)(2), and (3).

acquisition but made that approval the subject of a controversial "evergreen" condition. Alcatel-Lucent was required to agree to a national security arrangement, known as a Special Security Arrangement, that restricts Alcatel's access to sensitive work done by Lucent's research arm, Bell Labs. It is an evergreen condition in that CFIUS is allowed to review and reopen approval of the deal at any time in the event of material non-compliance with the terms of the arrangement.

Pfizer's bid for Astra Zeneca in the United Kingdom in May 2014 would appear at first sight to be a transaction of a different type altogether. Pfizer made repeated offers, all of which were repeatedly rebuffed by Astra Zeneca. The minister responsible, Vince Cable, referred to the fact that under merger control the government could only intervene in certain areas such as defense and with relation to media interests or banking, but had limited powers when considering the scientific research base in the United Kingdom. The deal provoked political commentary in the House of Commons. This involved the Labour leader Ed Miliband, who said at Prime Minister's Questions that there should be a broader public interest test for mergers and that the U.S. company should guarantee jobs.

Ed Miliband's statement was against a background where Pfizer had accepted there would be job cuts and Astra Zeneca had made statements about risks of disruption to U.K. research and development activity and critical skills if the merging entity were to consolidate its operations among locations in the United Kingdom, Germany, and the United States. The government had obtained "assurances" on investment and jobs, which were then criticized by the leader of the opposition for their weakness, lack of enforceability, and for being "worthless." Kraft's bid for Cadbury was contrasted where, under the previous Labour government, assurances were given only to be followed by plant closures. The Labour leader argued that as a company worth two percent of British exports, and an employer of 30,000 people, Astra Zeneca was of strategic national interest.

Questions were raised in the press about whether "Public Security" could be interpreted as including the protection of public health supplies. This may be the crux of the issue. Are these not similar concerns to the U.S. approach to critical infrastructure or French concerns over strategic industries?[13]

Following Pfizer's public offer, which was made together with statements of the company's intention to provide assurances, the U.K.'s Takeover Panel has recently published a consultation on post-offer undertakings and intention statements. This sets out new proposals for the regulation of statements, made by involved parties, regarding an offer for a public company relating to any course of action that they commit or intend to take after the end of the offer period. The consultation is seeking views on these proposals and their enforcement,

[13] Or indeed, British concerns about energy security e.g. by Lord Puttnam in 2008, House of Lords, in the context of a potential Gazprom bid for Centrica, resisted by the Labour government on the basis that where a merger posed "a genuine and serious threat to what is described as societal needs such as energy supply" it would be covered by the provision in the 2002 act regarding national security. *See* Antony Seely, *The Public Interest Test*, HOC library paper SN 5374, page 11 (May 7, 2014).

ultimately via the courts.[14] This also highlights the extent to which EU merger control is, or is not, a one-stop shop. The consultation period closes on October 24, 2014.[15]

III. THE CURRENT DEBATE AMONG COMPETITION AUTHORITIES

After referring to the recent cases, Alex Chisholm, the CMA's Chief Executive, raised the following question at the Fordham conference in September 2014:

> These and other large international merger cases have revived a lively debate on the perennial question of the balance between industrial policy and the application of antitrust laws. Should we stick with a competition-based assessment by independent authorities? Or should the State reserve for itself the right to intervene in global deal-making, for instance in order to protect domestic jobs or particular aspects of a country's infrastructure? The question of whether such state intervention is beneficial, and if so whether best achieved through a widening of public interest tests in merger control, or by virtue of other legislative tools, including foreign investment control, continues to arise.[16]

Alex Chisholm also suggested that in the post-crisis economic climate, European companies "could be attractive targets for foreign buyers, driven by tax considerations."[17] Competition Commissioner Almunia has referred to "protectionist signals" on the French approach to GE Alsthom, among other cases, while also suggesting that data protection issues do have a place in EU merger control in the context of the Facebook/WhatsApp merger. [18]

To date, the discussion among competition authorities appears to emphasize free markets and their benefits. The current advocacy of the benefits of free markets appears to assume that the motivation for other controls may be suspect and may be motivated by protectionist tendencies. While it is reasonable to be skeptical, such advocacy may be beside the point if the motivation for additional controls is recognized within the system of the EU's "control" of mergers, and may be motivated simply by other public policy goals.

Current discussion tends to be cautious. It is influenced by the failure of the wide public interest test and the uncertainties that were created when that test was the basis for the Fair Trading Act in the United Kingdom, which is entirely understandable. In 2010, in considering the potential legislative changes on the Kraft bid for Cadbury, the then Secretary of State for

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[14] *See* 15th September 2014 the Code Committee of the Takeover Panel PCP 2014/2.

[15] The consultation on amendment to the takeover code follows various parliamentary debates and previous amendments made in the light of Kraft's bid for Cadbury, and the BIS Review or the Report by Professor John Kay of UK Equity Markets, *see* HC 603 2013-14 25th July 2013 and Seely, *supra* note 13 at 17 and 22.

[16] Alex Chisholm speech, *Public Interest and Competition-Based Merger Control* (September 11, 2014), *available at* https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control).

[17] These concerns echo similar debates that have taken place in the past; for example, the Thatcher government's concern that its program of privatization could be undermined by foreign state-owned takeovers leading to "back door nationalization" was known at the time as the "Lilley doctrine" after the statements made by Peter Lilley, then Secretary of State for Trade and Industry.

[18] *See*, for example, statements of Commissioner Almunia (September 2014) on the Facebook/WhatsApp merger, the Commission's press release on that case on October 4, 2014, and the speech by the FTC's Julie Brill, *Weaving a Tapestry to Protect Privacy and Competition in the Age of Big Data* (June 2, 2014), *available at* http://www.ftc.gov/public-statements/2014/06/weaving-tapestry-protect-privacy-competition-age-big-data-address-european.

Trade and Industry, Peter Mandelson, was reported to have been "unconvinced of the merits of a broad public interest test because in those circumstances he thought a government's judgement and intervention could be too exposed to political lobbying and short-term populist pressures."[19] He added that such a move could lead to a loss of the transparency and predictability that made the current U.K. regime open to investors, from which the United Kingdom may well have benefited a great deal.

These are fair points but also may also miss the mark. Change has already taken place in the United Kingdom in recent times where non-competition grounds for intervention were considered to be paramount. For example, in 2008, in response to the financial crisis, Parliament approved intervention on a new public interest ground—the stability of the U.K. financial system—which was relied on to approve the Lloyds/HBOS banking mergers against the competition-based advice of the OFT. The case has been criticized and referred to as a response to exceptional events. It is based on one of the currently recognized additional legitimate grounds for review under Article 21, (prudential control) and, perhaps, should not be seen as part of a growing trend.

IV. DEFINITIONS AND PROCESSES FOR INFORMATION AND REVIEW WITHIN SENSIBLE MERGER CONTROL TIMEFRAMES, AND THE EMERGENCE OF SIFIS, NIS, AND CNI

Clearly, there is a need to ensure transparency and predictability within the system and to avoid protectionism. Independent oversight is needed to ensure that intervention only takes place on legitimate grounds, and that legitimate grounds are not being abused. To some extent this currently exists.

Article 21 of the Merger Regulation does provide a mechanism of oversight and review. Member States clearly can control mergers on grounds of public security, plurality of the media, and prudential rules. These are interests recognized as being legitimate ("recognised interests"). Measures genuinely aimed at protecting one of these recognised interests can be adopted without prior communication to (and approval by) the Commission, even if they are liable to hinder or prohibit a merger with a Community dimension, on condition that they are proportionate and non-discriminatory. Any other interest pursued by way of national measures liable to (i) prohibit, (ii) make subject to conditions, or (iii) prejudice a merger with a Community dimension must be communicated to the Commission before being implemented.

The requirement to obtain the Commission's prior approval applies whenever there are serious doubts that national measures are genuinely aimed at protecting a recognised interest and/or comply with the principles of proportionality and non-discrimination. The Commission must then decide, within 25 working days, whether the national measures are justified for the protection of an interest compatible with EU law.

Lack of clarity, and the prospect of real differences of views on whether a transaction is within the legitimate recognised interests grounds that can be dealt with at a Member State level,

[19] *See* speech of Alex Chisholm, *supra* note 16.

have been identified as issues by the Commission.[20] The timetable for notification may also be problematic. The Endesa saga is outlined below and is an example of deficiencies in the current system. In brief:

- In February 2006 E. ON announced its bid for Endesa. The bid was competing with a hostile bid that had previously been launched by Gas Natural, subject to national merger control.
- After the announcement of the E.ON bid, in late February 2006, the Spanish Council of Ministers adopted a new legislative measure increasing the supervisory powers of the CNE (Comision Nacional de Energia), the Spanish energy regulator.
- Under the new decree, E.ON's bid was subject to the CNE's prior approval. Previously, this authorization was not required as E.ON did not carry out regulated activities in Spain.[21] The CNE's decision made the proposed transaction subject to a number of conditions that may in part have been designed to protect and preserve the national infrastructure in Spain.[22]
- After examining these conditions and having invited the Spanish authorities to submit observations, on September 26, 2006 the Commission adopted a decision declaring that the Spanish authorities had breached Article 21, for failure to provide advance notification, declaring the conditions illegal under EU law.
- The Spanish Government took no action. The Commission was directed to take into account domestic proceedings and amendments to the conditions and, following a period of correspondence in early 2007, eventually took proceedings against Spain that were commenced at the European Court of Justice in April 2007.
- In March 2008, the European Court of Justice found that Spain had failed to comply with Article 21. E.ON had abandoned the public offer on April 10, 2007.

There is an emerging category of companies that may find they are subject to such special national treatment. Following the financial crisis in 2008 the U.S. administration designated certain entities, whose collapse would pose a serious risk to the economy, as systemically important financial institutions ("SIFIs"), and regulated them accordingly. The Basel committee on banking supervision in the European Union introduced new regulations, known as Basel III, that also specifically target SIFIs. The focus of these regulations requires increases in bank capital in an effort to ensure that they have a stronger financial basis for the future. The Commission has also proposed a further directive on network and information security ("NIS"), similarly based

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[20] In (COM/2006/0779 final) the Commission noted: "Uncertainties persist regarding the scope of Article 296 TEC, which allows Member States to derogate from Internal Market rules when their essential security interests are at stake. Since the dividing line between defence acquisitions which concern essential security interests and those which do not is vague, it is not always clear which rules should apply to which contracts. In consequence, the application of Article 296 TEC remains problematic and varies considerably between Member States."

[21] EU Commission competition policy newsletter Number 2 2008. Application of Article 21 of the Merger Regulation in the E.ON/ Endesa case *Lucrezia BUSA and Elisa ZAERA CUADRADO* (1).

[22] However, the obligation to maintain Endesa's headquarters in Spain would be questionable on any assessment.

on the idea that certain activity provides critical infrastructure and entities operating in energy transport, banking, communications, and healthcare should be subject to additional rules.

Policy toward critical national infrastructure in the European Union is rooted in the European Programme for Critical Infrastructure Protection.[23] The definition represents a consensus drawn from the inputs of Member States. The definition is broad such that a range of activities may fall within the boundary of Critical National Infrastructure ("CNI").[24]

V. IS IT NOW TIME FOR CFIEU?

Many entities that are already providers of critical national infrastructures operate on a cross border—if not a global—basis, and much of our infrastructure is already owned by multinationals. The freedom to invest, and the open approach to investment adopted by many countries, may allow important infrastructure to be provided at low cost and to benefit from global economies of scale in the wider public interest. This may be one of the many benefits of free and open markets.

The impulse behind these regulations appears to derive from a similar impulse to that in the United States. It may be uncomfortable to admit, but the free play of market forces subject to merger control on competition grounds did not save the world from the financial crisis, and it has to be recognized that the financial system, with its propensity to internalize profits and externalize losses, has significant social consequences. An argument can thus be advanced for pre-notification in a merger review type of process in relation to further consolidation among SIFIs, providers of NIS' or CNI's, or other defined entities that are considered to provide some part of critical national infrastructure.

The impulse to control mergers of players operating such infrastructure through current controls at the national level in the European Union, such as in cases cited here referring to the national controls in the United Kingdom, France, Italy, or Spain, may, however, stem from a common root—a concern to control mergers that affect the big industries and infrastructure that are important to society. This may not have been articulated well in the past but these concerns may, in many cases, be described as concerns about what we are beginning to describe as critical national infrastructure.

A revised and transparent mechanism for oversight of the interpretation of these additional controls and other investor protection regimes, such as those that operate in France and Italy, might be adopted. This might be a way of ensuring consistent interpretation and independent oversight and add predictability for those caught up in these systems.

Given that merger control at the EU level only addresses competition issues, would the further combination of such bodies by merger be possible under a competition analysis but unacceptable against the objectives of the critical national infrastructure regimes that have so recently been introduced? How would we know?

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[23] *See,* for example, EU COM(2006) 786.

[24] Lessons for merger control may be learned from the U.K.'s 2013 Intelligence and Security Select Committee, which revealed "something of a disconnect between the UK's inward investment policy and its national security policy" and commented that the processes were "far too haphazard an approach given what is at stake." On definitions, for example, *see* https://www.gov.uk/government/.../telecommunications-sector-intro.pdf.

VI. PROCESS CHANGES?

As Alex Chisholm has said:

> Foreign investment controls and competition law make for uneasy bedfellows, as the prime motivations are different and potentially conflicting"...and… "In so far as the future scope and weight of public interest considerations are concerned, it would appear desirable for both merger and foreign investment controls to move in parallel, rather than working against each other.

However, if nothing is done to ensure that the controls move in parallel, political concern will continue to be raised, and pressure will be brought to bear on transactions. An alternative to the range of national controls might be consideration of transactions at the EU level in a parallel procedure addressing transactions affecting critical national infrastructure, and possibly other legitimate public interest grounds, and the process might operate "in parallel" within merger control timetables and within defined processes.

The proposal would be to state that these non-economic public interest issues ought to be named, defined, and addressed in a publically accountable and transparent system. Protectionism may then be more readily avoided, and predictability improved for all concerned. Considering that the primary focus of merger control is currently on competition grounds, and the alternative will be ad hoc national intervention on a variety of grounds, perhaps there should be a Committee on Foreign Investment in the European Union? Perhaps this could be addressed in the current consultation on revisions to the EU Merger Regulation?