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Developments in Germany

Lex Mundi European Antitrust and Competition Meeting
Digitization Discussion
2 December 2020

Till Steinvorth

Alicante
Berlin
Bratislava
Brüssel
Budapest
Bukarest
Dresden
Düsseldorf
Frankfurt/M.
Hamburg
London
Moskau
München
New York
Prag
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Upcoming amendment of German competition law

- "**Competition Law Digitisation Bill**" for a "focused, proactive and digital competition law 4.0"
  - Expected to enter into force in (early) 2021
- **New tool to intervene against large platforms** (Section 19a)
  - FCO may designate an undertaking as having "superior cross-market importance for competition"
  - Once an undertaking has been designated in this way, the FCO may prohibit it from engaging in the specific types of conduct listed in the law (*e.g.*: self-preferencing, limiting the interoperability of products or the portability of data)
  - The specific prohibitions apply only after the FCO has issued a (second) decision specifying which conduct is covered
- **Update of the essential facilities doctrine to include access to data**
  - Applies to digital and non-digital economy
  - Access must be granted if: (i) data objectively necessary for competition in upstream or downstream market, (ii) without data competition would be eliminated, (iii) there is no objective justification for refusing access
  - Access against "fair consideration" and only where compliant with data protection laws (GDPR)
- Other changes include:
  - Access to data is a factor to be considered in establishing the dominant market position of a company
  - Intermediation power as a new type of dominance (to address, in particular, the "gatekeeping" power of platforms)

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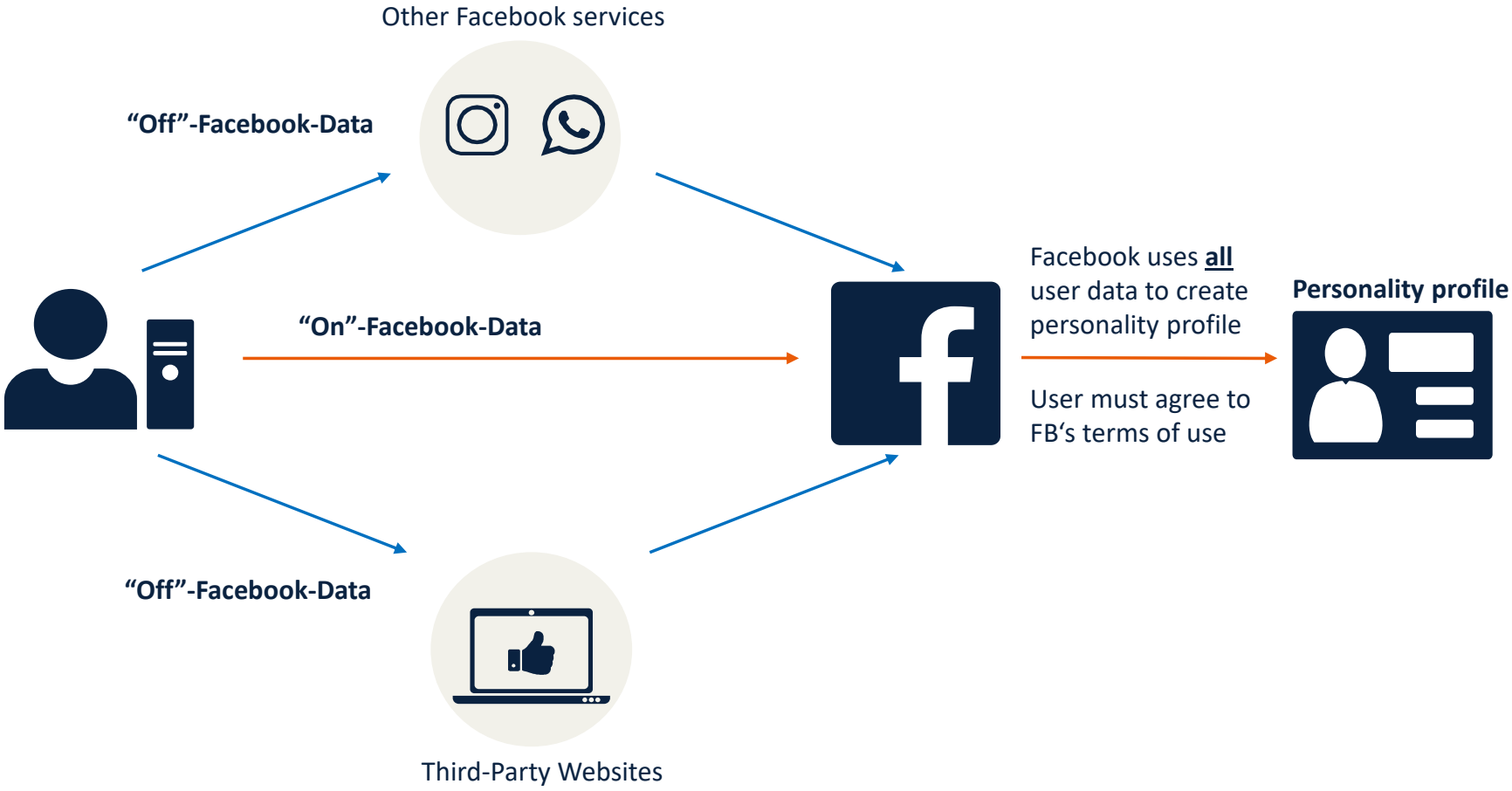
The Facebook case (1)



The Facebook case (2)

- **Federal Cartel Office** (FCO), Decision of 6 February 2019
  - Facebook's terms of use constitute abuse of a dominant position
  - Collection of “Off-Facebook Data” requires explicit and voluntary user consent
  - Prohibition on Facebook to use such data without user consent and obligation to modify its service in Germany
  - Meant as a signal to big tech: “*We are in the business of establishing guard rails for the internet economy*”
- **Higher Regional Court of Düsseldorf**, Decision of 26 August 2019
  - Facebook files appeal (pending)
  - Facebook also applies for interim legal protection to suspend enforcement of FCO decision
  - Court grants interim protection: “serious” doubts regarding legality of FCO decision
- **German Supreme Court**, Decision of 23 June 2020
  - Overrules order of Higher Regional Court
  - Facebook has to follow – until the main proceedings are decided – the Federal Cartel Office’s decision

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The Facebook case (3)

- **Regarding definition of relevant market and dominance**
  - Facebook is platform with two market-sides: users + advertisers
  - Relevant here is the user market because that is where the alleged abuse occurs, not the advertising market
  - Facebook is dominant because it is the relevant provider for “personalised virtual space” in Germany (> 97% user share)
  - Facebook’s position vis-à-vis users is not mitigated by competition in the advertising market because network effects between the two market sides are asymmetrical (more users translate into more advertising revenue, but not *vice versa*)
- **Regarding abuse**
  - FCO: terms & conditions are abusive because they infringed GDPR and users lose “control over their data”
  - Higher Regional Court: no abuse because there is no link of causality between Facebook’s dominance and the alleged abuse
  - Supreme Court develops a novel argument:
    - Facebook uses the additional data for an expanded service (“more personalised user experience”)
    - But this expanded service is imposed on users whether they like it or not (similar to tying and bundling)
    - The abuse lies in the users’ loss of choice; in a competitive market, firms would be expected to improve their services and respond to the wishes of their users, who would like this choice

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CERHA HEMPEL

The New Competition Tool - What's in Store?

2020 Lex Mundi European Antitrust and Competition Meeting – Digitization Panel

Vienna, 2 December 2020

Overview of topics

1. What is happening?
2. NCT – 4 options
3. Why is there a need for an NCT?
4. Overlap with other planned legislative initiatives – DSA
5. Procedure, procedural rights and legal certainty

What is happening?

NCT and DSA	• On 2.7.2020, the Commission published the Inception Impact Assessment (***IIA***) on the New Competition Tool (***NCT***). IIAs aim to inform citizens and stakeholders about the Commission's plans and enable them to provide feedback on the intended initiative. • The indicative timeline foresees an update and next steps still in Q4/2020. • The NCT is part of a larger package that includes the Digital Services Act (***DSA***). The DSA is an *ex ante* regulatory instrument for large online platforms with significant network effects that act as gate-keepers in the EU internal market.
Paradigm shift	• NCT will enable the Commission to intervene against unilateral conduct of dominant companies beyond the scope of Article 102 TFEU. • Under the broadest proposed option (market structure based tool), the NCT will enable intervention against non-dominant market players to address structural competition problems. • Based on the NCT, the Commission will be able to impose structural or behavioral remedies and propose legislative action. However, the Commission would not make any finding of an infringement of EU competition rules, nor impose fines and thus not generate rights to launch damage claims.

NCT – 4 options

Option 1 – Dominance-based competition tool with a sectoral scope	• Necessitates a finding of dominance but no abusive practices as described under Article 102 TFEU; • Limited to certain sectors of the economy (most likely digital or digitally enabled markets); • Shall enable the Commission to identify competition problems and intervene before a dominant company successfully forecloses competitors or raises their costs.
Option 2 – Dominance-based competition tool with a horizontal scope	• Necessitates a finding of dominance but no abusive practices as described under Article 102 TFEU; • Not restricted to certain sectors of the economy (can be applied to "traditional" sectors).
Option 3 – Market structure-based competition tool with a sectoral scope	• No necessity to show dominance. • No necessity to show abusive behavior within the meaning of Art. 102 TFEU. • Limited to certain sectors of the economy (most likely digital and/or digitally enabled markets). • Intended to address *inter alia* tipping markets, monopolisation strategies by non-dominant companies with market power and risk of tacit collusion in oligopolistic markets with increased transparency due to use of algorithm-based solutions.
Option 4 – Market structure-based competition tool with a limited scope	• Similar to Option 3. • Not limited to specific sectors of the economy.

Why is there a need for an NCT?

The need for an NCT?	<u>Examples:</u> • Article 102 TFEU challenges tend to take too long until a (commitment / infringement) decision is issued and risks coming too late in fast-paced digital markets. • Monopolisation strategies of non-dominant companies with market power currently cannot be adequately addressed with the existing competition tools. • Digitisation has brought powerful, algorithm-based monitoring tools that increase the risk of tacit coordination in oligopolistic markets.
Critique	• Especially Options 3 and 4 (market structure-based tool) blur the distinction between competition law enforcement and regulation. • Conditions for intervention are currently unclear. • Imposition of structural / behavioural remedies constitutes a severe and costly intervention into the affairs of a company. Procedure will have to provide for adequate safeguards. It is unclear whether intervention based on the NCT will be faster than under Art. 102 TFEU, especially as intervention in digital and innovative markets risks deterring pro-competitive behaviour and future investments.

Overlap with other planned legislative initiatives – DSA

NCT and DSA	• The DSA supplements the proposal for an NCT.
Scenario 1	• Revision and extension of the Platform-to-Business Regulation (EU) 2019/1150, including the inclusion of new elements (e.g. certain forms of self-preferencing, data access policies, unfair contractual provisions) and increased transparency requirements.
Scenario 2	• Creation of a regulatory framework for the collection of information for large online platforms with gatekeeper function, e.g. by a newly created EU authority. • This new EU authority would not have the power to impose structural or behavioural remedies. However, it would have the power to sanction non-compliance with its information gathering orders.

Scenario 3	• Creation of an *ex-ante* regulatory framework for large online platforms with gatekeeper function:
	  • Framework would complement the Platform-to-Business Regulation;
	  • Large platform: Classification based on network effects, user base, ability to use data across markets, etc.;
	  • Introduction of a blacklist of unfair behaviours (e.g. certain forms of self-preferencing, unfair contractual provisions);
	  • Adoption of tailor-made remedies (structural or behavioural);
	  • Enforcement through dedicated EU authority.

Procedure, procedural rights and legal certainty

Drive towards regulation	• NCT and DSA are intended to enable greater scrutiny of large players in digital and digitally enabled markets (even though the NCT is not limited to digital or digitally enabled markets and would apply, in Options 3 and 4, across all sectors of the economy).
Clear legal requirements for intervention	• If one of the proposed options for an NCT is introduced, particular attention should be paid to the design of the procedure and legal requirements for intervention. Companies must be able to anticipate whether there is a threat of intervention by the Commission.
Equal procedural guarantees as in fine proceedings	• The procedure must give the investigated company the same guarantees as in Art. 102 TFEU investigations (appeal with suspensive effects; access to the case-file; statement setting out the concerns (similar to a statement of objections); ability to offer commitments and engage in negotiations, etc.). • Query: Is there a need for even broader procedural guarantees given that the company has not committed an infringmeent?
Duration	• Due to the complexity of the economic facts in digital markets and the fact that many types of behaviour, such as the preference of own services by internet platforms, have both pro- and anti-competitive impact, it seems unlikely, that a fair trial based on an NCT tool can be completed much faster than traditional abuse of dominance proceedings.

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Admission

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- Compliance & Investigations
- Mergers & Acquisitions
- Distribution Law

Languages

- German
- English
- French

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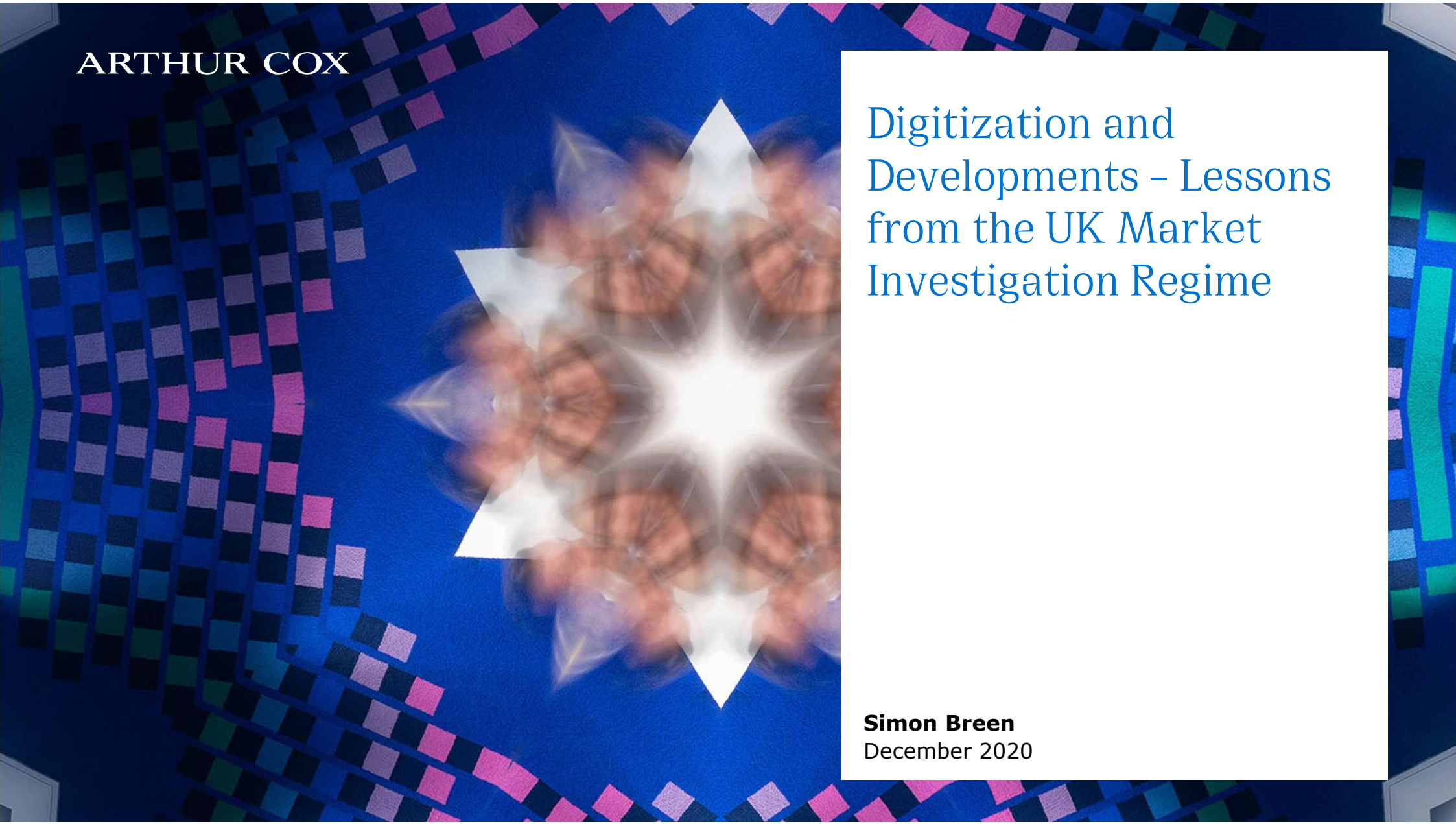
Thank you
for your attention



ARTHUR COX

Digitization and Developments – Lessons from the UK Market Investigation Regime

Simon Breen
December 2020

Overview of the UK MI Regime

- UK MI regime is similar in scope to the proposed Option 3 for the NCT (a market structure-based competition tool with a horizontal scope)

- Purpose of a market investigation is to discover whether any features of a market prevent, restrict or distort competition, and it is investigative rather than prosecutorial in nature

- Wide-ranging remedies available in the context of a market investigation, including for example divestments or directions not to acquire a business

Some lessons from the UK MI Experience

- Criteria for intervention:
  - UK CMA may initiate an investigation when there are “reasonable grounds for suspecting” that one or more features of a market prevent, restrict or distort competition
  - EC may look to base the NCT on similar intervention criteria

- Protection of fundamental rights:
  - UK MI regime is generally characterised by a high degree of interaction and transparency throughout the process
  - NCT may look to replicate a similar degree of participation under NCT

- Key lesson from the UK MI experience is in the limited flexibility to modify remedies
  - NCT may look to adopt a more dynamic approach to remedies

Key questions for the NCT

- How will the NCT interact with enforcement under Articles 101/102 TFEU?
- How will the NCT interact with sector-specific regulation/regulators?
- Procedural design and ensuring the protection of fundamental rights?
- Appropriate time limits to ensure effectiveness of the tool?
- Approach to remedies?

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Thank you

December 2020

U.S. Antitrust Developments in Digital Markets

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Majority Staff Report:

Investigation of Competition in Digital Markets

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Background

In June 2019, House Subcommittee on Antitrust, Commercial and Administrative Law began investigating digital markets, focusing on Amazon, Apple, Facebook, and Google

- Analyzed documents and information from these companies, other market participants, federal antitrust authorities, public interest groups, antitrust experts and academics, and practicing antirust lawyers
- Held seven oversight hearings – CEOs of all four companies testified before subcommittee

In October 2020, Subcommittee's Majority Staff issued 450 page report and recommendations on its "Investigation of Competition in Digital Markets"

- Finds that Amazon, Apple, Facebook, and Google are gatekeepers to key digital channels of distribution and use their gatekeeper positions to maintain and expand their market power
- Four Republicans issue response report "The Third Way" – agree that tech giants have acted anti-competitively but argue against Majority's recommendations

Overview of Report's Findings

Digital markets are highly-concentrated with a winner-take-all dynamic and high barriers to entry. Under these conditions, these tech companies:

- Use power as gatekeepers to extract high fees and dictate terms with trade partners that would not be agreed to in competitive markets
- Acquire nascent or potential competitors to expand dominance or to shut down threats
- Accumulate consumer, trade partner, and, in some instances, competitor data to entrench power
- Leverage dominance in one or more markets to advantage their other business lines

These companies "wield their dominance in ways that erode entrepreneurship, degrade Americans' privacy online, and undermine the vibrancy of the free and diverse press," resulting in "less innovation, fewer choices for consumers, and a weakened democracy"

Overview of Report's Findings - Company-Specific Examples

Amazon:

- Uses online retail market power to raise fees to third-party sellers on its platform
- Leverages data from third-party sellers to (1) replicate popular products to compete directly with sellers through AmazonBasics line or (2) source products directly from manufacturers to cut-out sellers
- Engages in predatory pricing by taking losses on certain products (Amazon Prime Membership) to drive growth on others (product sales to Prime Members)

Apple:

- Controls software distribution on its iOS and, thus, exerts monopoly power in its App Store, leading to supracompetitive prices charged to App developers and preferences given to own products
  - Referenced Epic's lawsuit
- Leverages control of App Store to collect competitively-sensitive information from App developers and copy popular Apps and/or App functionality

Overview of Report's Findings - Company-Specific Examples

Facebook:

- Acquired competitive threats (*e.g.*, Instragram and WhatsApp) to maintain and grow its social networking dominance, which has deteriorated product quality through worse privacy protections and the rise of misinformation

Google:

- Control of Play Store leads to high prices to App developers and preference given to own products
  - Referenced Epic's lawsuit
- Acts as gatekeeper to search platform to extort higher prices for advertisements and to preference its own products, while showing less relevant content to consumers
- Uses contractual provisions to ensure search platform monopoly expanded to mobile devices
- Acquired market power for mapping through acquisitions and now charges high prices for web developers to use interface

Overview of Report's Recommendations

Recommendations for Behavioral and Structural Changes to Dominant Firms:

- Implement structural separations or line of business restrictions so firms cannot use dominance in one market to advantage other lines of business
  - Minority response report refers to this recommendation as a "thinly veiled call to break up Big Tech firms"
- Establish non-discrimination rules that would require equal terms for equal service to prevent self-preferencing
- Mandate systems be interoperable and data portable
- Prohibit abuse of superior bargaining power by targeting anticompetitive contracts

Recommendations for Changes to Presumptions for Merger Reviews and Challenges:

- Create presumption that any acquisition by dominant platform is anticompetitive unless can show was necessary to serve public interest and that similar benefits could not be achieved through internal growth and expansion
- Establish presumption that mergers resulting in outsized market share (30% or more) or significant increase in concentration are presumptively unlawful – the burden falls on the parties to show merger does not reduce competition
- Codify presumption against acquisition of startups by dominant firms
- Create presumption that vertical mergers are anticompetitive when either party is a dominant firm

Overview of Report's Recommendations

Recommendations for Changes to Application of Antitrust Laws:

- Extend U.S. federal antitrust statute to prohibit abuses of dominance (as in Europe)
- Strengthen ability to bring monopoly leveraging claims by overriding requirement that leveraging actually monopolizes second market
- Override Supreme Court precedents that hold predatory pricing claims must prove recoupment
- Revitalize the essential facilities doctrine
- Make platform design changes that exclude competitors or otherwise undermine competition a violation of Sherman Act Section 2, regardless of whether the change can be justified as an improvement for consumers
- Override Supreme Court precedent by clarifying that cases involving platforms do not require plaintiffs establish harm to both sides of the platform
- Clarify that market definition is not required to prove an antitrust violation, especially in the presence of direct evidence of market power
- Strengthen private enforcement of antitrust laws by eliminating forced arbitration clauses and lowering pleading standards

Impact of the Report -- Legislative

Only Democrats signed onto the Report, and Republicans disagreed with numerous recommendations

- Biden has not adopted the Report as part of his agenda
- However, there is bipartisan agreement that these tech companies engage in anticompetitive behaviors
- Although likely a slow process, it is possible that more modest legislation to curb Big Tech will be enacted, or at the least, that Congress will provide more resources to federal enforcers
- Breakup of tech platform companies remains unlikely, particularly where less draconian measures could be used
- The Democratic majority was reduced in the last election and not all Democrats agreed with the Report and its recommendations, making it less likely that any major changes will be implemented in the short term
- On the other hand, digital markets might be an easier area than others for the more moderate wing of the Democratic party can give a win to the progressive wing of the Democratic party

Impact of the Report

U.S. Antitrust enforcers – both state and federal – are already investigating tech giants

- In July 2019, DOJ Antitrust Division announced that it was reviewing whether market-leading digital platforms have market power and are engaging in anticompetitive conduct, and on October 20, 2020, DOJ filed suit against Google alleging that Google has unlawfully monopolized the markets for general search services, search advertising, and general search text advertising
- In February 2020, the FTC publicized that it had issued special orders to Amazon, Apple, Facebook, Google, and Microsoft requesting documents and information on the terms, scope, structure, and purpose of smaller transactions that each company had engaged in over the past decade

Currently, Big Tech is in the antitrust hot seat – these firms face antitrust risk from private litigants, federal and state enforcers, and Congress

New State Proposed Legislation

Bills have been proposed to challenge single-firm conduct under state antitrust laws. These proposals would reach conduct not prohibited under federal law or include presumptions not provided in federal law.

Although proposed legislative amendments not limited to technology companies, the bill states as one of its justifications: "Powerful corporations, particularly in Big Tech, have engaged in practices such as temporary price reduction with the purpose of forcing competitors to sell their business to them."

New York's Proposed amendments to Donnelly Act

- Adds language virtually identical to Sherman Act Section 2's prohibition on monopolization and attempted monopolization
- Expands on the Sherman Act by including a prohibition on dominant firms engaging in abusive conduct
- Possible criminal penalties for violations for the abuse of dominance provision

U.S. v. Google

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DOJ Launches Google Lawsuit

On October 20, 2020, DOJ and eleven state attorneys general filed suit against Google, alleging that company unlawfully monopolized markets for general search services, search advertising, and general search text advertising in violation of Section 2 of the Sherman Act.

General Search Services Market

DOJ asserts that general search services give consumers the ability to locate responsive information by plugging keywords into a general search engine. These general search services are a "one stop shop" for consumers to access an extremely large universe of information and differ from offline information resources or specialized search engines like Yelp or Expedia.

Search Advertising Market

DOJ described the market as ads generated in response to search queries that enable advertisers to target consumers in real time

DOJ Launches Google Lawsuit

General Search Text Advertising Market

These advertisements are sold by general search engines and appear above search results typically with the word “Ad” or “Sponsored” next to them. General search text advertising differs from the specialized search advertising provided by companies such as Amazon or eBay because it has a broader coverage and is farther from the point of purchase. Indeed, Amazon and eBay purchase general search text ads to then drive consumers to their sites.

DOJ alleges that Google dominates these three markets

- nearly 90% share of general search services
- over 70% share of the search advertising
- over 70% share of the general search text advertising markets

DOJ Launches Google Lawsuit

High barriers to entry, especially scale, protect Google's monopoly positions.

According to DOJ complaint, scale is of "critical importance" to Google because its size improves the learning for its algorithms to deliver better search results. This is turn drives consumers to use Google as its search engine, which further builds Google's scale and search algorithm learning.

Google's large audience also makes advertisers willing to pay more to buy ads on Google.

DOJ contends that Google unlawfully maintained these monopolies by entering anticompetitive exclusionary distribution agreements with mobile device and computer manufacturers.

Google requires Android device manufacturers that pre-install Google propriety applications to enter anti-forking agreements. These agreements limit the manufacturers' ability to sell devices that do not conform with Google's design and technical standards.

DOJ Launches Google Lawsuit

Mobile Application Distribution Agreements with Android device manufacturers
Google gave manufacturers a license to sell products with its application program interfaces and proprietary applications, but in return, it required the manufacturers to take other Google apps in a bundle, make certain Google apps non-deletable, and provide Google apps prominent space on default home screen.

Revenue Sharing Agreements
Google agrees to give share of its search advertising revenue to device manufacturers, other browsers, mobile phone carriers, and Apple, and in return, these companies make Google preset default search engine on key search access points on their computers and mobile devices.

DOJ claims these types of exclusionary contracts account for 60 percent of search queries in U.S. and foreclose distribution to Google's competitor search engines, denying rivals the scale to effectively compete against for consumers and advertisers.

Google's Response to DOJ's Lawsuit

Google called the DOJ's complaint "deeply flawed"
Consumers are not forced to use Google's search engine; They prefer the search engine because its better.

Google argues that DOJ action will harm consumers by "artificially prop[ping] up lower-quality search alternatives" and raising phone prices.

Google's Answer to DOJ's complaint due late December.

Epic Games Inc. v. Apple Inc.
Epic Games Inc. v. Google LLC

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Epic’s Flagship Game - Fortnite

Newbie

Skins

troutman pepper

Background

Epic, a digital game developer, makes the popular game Fortnite

Can be played on iPhones, Android phones, video game consoles, and personal computer platforms

- Can be played across platforms as long as the same version

The game was available for free through the Apple App Store and through the Google Play Store

Epic obtains revenue by “in-app” purchases that players can make within the game

Both Apple and Google charge a 30% commission on such in-app purchases

In August, *without prior notice to Apple*, Epic announced a direct payment option for in-app purchases in Fortnite for both iPhones and Android phones, thereby circumventing the 30% commission

- Epic started offering players discounts based on the reduced charge under the direct payment option

Background

Immediately after Epic announced the direct payment option, Apple dropped Fortnite from the App Store and Google dropped Fortnite from the Play Store

Both companies stated that the direct payment option violated their developer license agreements and the terms and conditions for use of their Stores

Epic filed lawsuits against Apple and Google alleging violations of the antitrust laws

- Monopoly maintenance in iOS App Distribution and In-App Payment Processing Markets
- Denial of essential facility in iOS App Distribution Market
- Restraint of trade in iOS App Distribution and In-App Payment Processing Markets
- Tying App Store to In-App Purchases
- Similar claims under California Cartwright Act and California Unfair Competition Law

Background

After Epic sued Apple, Apple advised Epic that it would be cut off from development tools necessary to create software for Apple's platforms and that other Epic apps would be barred from the App Store

The loss of the development tools would prevent Epic from continuing to offer its graphics engine (known as Unreal Engine) to developers for use in developing a variety of products

On September 9, 2020, Apple filed an answer to Epic's complaint and asserted counterclaims

- Counterclaims for breach of contract, breach of the implied covenant of good faith and fair dealing, quasi-contract/unjust enrichment, intentional interference with prospective economic advantage, conversion, a declaratory judgment as to its License Agreement, and indemnification

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Background

On October 9, 2020 Judge Gonzalez Rogers ruled on Epic's motion for preliminary injunction, essentially confirming her TRO ruling

- Apple can keep Epic's Fortnite game out of its App Store but must allow Epic's affiliates access to developer tools for other applications ahead of trial

In November, Google filed a motion to dismiss Epic's claims. Google argued, among other things, that the claims brought by Epic and other "follow-on" plaintiffs cannot stand under U.S. law because Google does not have a duty to deal with rival app stores.

Google asserts that Epic and other rivals are not permitted to free-ride on its investments

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Market Definition

Market Definition – Epic's View

Epic identifies a market for the distribution of apps compatible with iOS to users of mobile devices - iOS App Distribution Market

- Market is alleged to be worldwide
- Claim that Apple is a complete monopolist since the only means of distribution of iOS Apps is through the App Store

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Market Definition – Epic's View

Epic identifies a market for the processing of payments for the purchase of in-app content on devices running iOS - iOS In-App Payment (IAP) Processing Market

- Market is alleged to be worldwide
- Apple's Developer Program License Agreement provides in-app content may not be provided outside of IAP
- Epic argues purchases outside an app (e.g., a distinct web site or telephone call) are not reasonable substitutes for in-app purchases of in-app content

Epic contends that the App Store and IAP are separate products in separate markets

Market Definition – Apple's View

Relevant market includes at least all other platforms on which Epiq distributes Fortnite

- Would include PCs, Android devices, Xbox, PlayStation, and Nintendo's Switch
- Within such a market, Apple has a market share of between 10 and 20 percent
  - Apple argues only a fraction of Epic's customers access Fortnite using an iPhone, and Epic's revenues from other platforms greatly exceed its revenues from iPhone players

Apple argues Epic's own conduct in developing and distributing Fortnite establishes that the iPhone is "reasonably interchangeable" with other mobile devices running non-iOS operating systems, with PCs and laptops, and with gaming consoles

- Apple notes that after Fortnite was removed from the App Store, Epic urged users to switch platforms, explaining that the "party continues on PlayStation 4, Xbox One, Nintendo Switch, PC, Mac, GeForce Now, and through both the Epic Games app at epicgames.com and the Samsung Galaxy Store"

The Essential Facilities Doctrine

The "essential facilities" doctrine is a variation on a "refusal to deal" claim. It can impose liability if a monopolist in control of an "essential facility" denies access "to an input that is deemed essential, or critical, to competition." *Aerotec International, Inc. v. Honeywell International, Inc.*, 836 F.3d 1171, 1184-85 (9th Cir. 2016) (citations omitted).

While the Supreme Court has cast doubt on whether "essential facilities" is a valid antitrust doctrine, the Ninth Circuit has "continued to treat it as having a basis in § 2 of the Sherman Act." *hiQ Labs, Inc. v. LinkedIn Corp.*, Case No. 17-cv-3301, 2020 WL 5408210, at *10 (N.D. Cal. Sept. 9, 2020) (citations omitted).

To succeed on an "essential facilities" based claim, a plaintiff must prove that: (1) the defendant is a monopolist in control of an essential facility; (2) that competitors are unable reasonably or practically to duplicate the facility; (3) that the monopolist has refused to provide access to the facility; and (4) that it is feasible for the monopolist to provide access. *MetroNet Services Corp. v. Qwest Corp.*, 383 F.3d 1124, 1128-29 (9th Cir. 2004).

What is an "Essential Facility"?

The Ninth Circuit has held that a facility can be classified as "essential" only if "control of the facility carries with it the power to *eliminate* competition in the downstream market." *Aerotec*, 836 F.3d at 1185 (citations omitted) (emphasis original).

Courts in the Ninth Circuit have held that a facility is only essential if: "(1) control of the facility carries with it the power to eliminate competition in the downstream market; (2) it is absolutely vital to the plaintiff competitor's survival in the market; and (3) court-ordered sharing of the facility will, in fact, remedy competitive harm to the downstream market." *United National Maintenance, Inc. v. San Diego Convention Center Corporation, Inc.*, Civil No. 07cv2172, 2012 WL 12845620, at *10 (S.D. Cal. Sept. 5, 2012) (citations omitted).

Determination of whether a facility is essential requires a "properly defined downstream market." *hiQ*, 2020 WL 5408210, at *10.

"[W]here access exists, the essential facilities doctrine serves no purpose." *Aerotec*, 836 F.3d at 1185 (citing *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

The Parties' Positions

Epic's View:

- Epic defines the downstream market as sales on Apple devices.
- It asserts that there is no reasonable way to make sales to Apple product users without access to Apple's iOS system, which Apple controls. Apple has barred access to the iOS system, according to Epic, by forbidding the use of other "app stores" on the iOS, thus eliminating Epic's ability to use or create a competitive app store that reaches Apple's iOS.

Apple's View:

- Apple attacks Epic's claim by asserting that its License Agreements provide access to the iOS, thus defeating the essential facilities claim under *Trinko*.
- Apple further claims that this is simply a recast "refusal to deal claim," which fails because Apple has not actually refused to deal with Epic through the License Agreements.

Product Definition – Epic's View

Epic argues that "iOS App Distribution" services are a separate and distinct product from "iOS In-App Payment Processing" services

It argues that Apple unlawfully ties iOS In-App Payment Processing services (the tied product) to iOS App Distribution services (the tying product)

A tie exists where a defendant improperly imposes conditions that explicitly or practically require buyers to take the second product if they want the first one

Product Definition – Apple's View

Apple argues that iOS App Distribution services are not a separate product from IAP services, but all part of an integrated business offering

- As a result, Epic cannot show a tie of "iOS App Distribution" services to "iOS In-App Payment Processing" services
- Apple argues that it does not force developers to use IAP in order to have an app distributed
  - Developers are free to adopt other business models that do not include in-app digital purchases on which they must pay Apple a commission, such as generating revenue through advertising, through the sale of physical goods and services, and through other ways that will result in no commission to Apple
  - If developers do charge for in-app purchases, then they must pay Apple's commission
- In Apple's business model, the commission is the return on Apple's investment in the App Store and the full suite of IP, tools, and services Apple offers to developers
  - It is what allows Apple to offer access to its platform to any developer for $99 and to offer free distribution for most apps on the App Store

Market Structure

Are Apple and Google duopolists?

- Both charge the same 30% commission
- Under economic theory in a game of 2 firms each firm assumes the other will not change prices in response to a price cut – leads to a Nash equilibrium
- Android cell phone share is 87% worldwide; iOS cell phone share is 13%

Thank you

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2020 Lex Mundi European Antitrust and Competition Meeting
December 2, 2020

An Overview of

Foreign Direct Investment and National Security Reviews in the United States

Matthew West

BAKER BOTTS

The FDI "Gate-Keeper" in the U.S.: The Committee on Foreign Investment in the U.S.

- Legal authority for national security-based reviews:
  - Statute: 2018 Foreign Investment Risk Review Modernization Act (FIRRMA), 2007 Foreign Investment & National Security Act (FINSA), Exon-Florio Amendment of 1988 to Section 721 to the Defense Production Act of 1950
  - Regulations: 31 CFR Part 800 (Covered Transactions) & Part 802 (Real Estate Transactions)

- Committee on Foreign Investment in the U.S. (CFIUS):
  - Interagency committee to review transactions that could result in control of a U.S. business by a foreign person, in order to determine the effect on the national security
  - CFIUS is composed of:
    - 9 Executive Branch members (Treasury-chair, State, Defense, Justice, Commerce, Energy, and Homeland Security) and White House Offices (USTR and OSTP)
    - 2 non-voting members (Office of the Director of National Intelligence and the Department of Labor)
    - 5 observer White House Offices (OMB, CEA, NEC, NSC, and HSC)

What is CFIUS's Jurisdiction for FDI Reviews?

- CFIUS has jurisdiction to review Covered Transactions and Covered Real Estate Transactions for national security considerations.
- **Covered Transactions (31 CFR Part 800):**
  - Covered Control Transaction: any acquisition, merger, or takeover that could result in "control" of a "U.S. business" by a "foreign person"
    - Can involve making a majority, dominant minority or controlling minority investment in a U.S. business
    - there is no formal de minimis rule with respect to the level of investment
  - Covered Investment: certain non-controlling investments in a U.S. business involving critical technologies, critical infrastructure, or sensitive personal data of U.S. citizens.
- **Covered Real Estate Transactions (31 CFR Part 802)**
  - The purchase or lease by, or concession to a foreign person of private or public real estate that is in the United States and is in close proximity to a U.S. military installation or other sensitive U.S. Government facility or property that is located within, or will function as part of, an air or maritime port.
  - Exceptions apply for certain real estate transactions, such as for housing, retail trade, accommodation, or food service establishments and transactions in urbanized areas.

Filing a Transaction with CFIUS

- Except in limited cases where notification to CFIUS is mandatory, the parties to a covered transaction must make a strategic decision as to whether they will voluntarily file a Declaration or Joint Voluntary Notification ("JVN") with CFIUS.
- The Declaration provides for an abbreviated filing process by filing a short-form declaration notifying CFIUS of a covered transaction; may still result in filing a JVN.
- The JVN provides detailed information to CFIUS concerning: (i) the nature and purpose of the transaction; (ii) the parties to the transaction, including the ownership of the foreign acquirer; and (iii) other information required under the CFIUS regulations.
- If the parties do not provide a Declaration or JVN to CFIUS, the Committee has the authority to initiate its own review of the transaction.
- There is no statute of limitations or time limit on CFIUS's authority to review a transaction.
- Additionally, CFIUS and Presidential decisions are subject to only limited review by a court or any other appeal process.

Timeframe for a Filing with CFIUS

- **Declaration Filing** (voluntary or mandatory): 30 days
  - If no risks identified, then no further action needed
  - If unresolved risks, then JVN filing will be requested/required
- **JVN Pre-filing:** 10 days for comments from CFIUS
- **Review of JVN**: 45 days
  - Identifies and reviews national security issues
  - Addresses possible mitigation agreements with parties
- **Investigation of JVN**: 45 days (with 15-day extension)
  - When unresolved national security concerns remain after Review period
  - Required for certain transactions involving foreign government-owned entities
- **Presidential decision**: Up to 15 days
- CFIUS filings and process are confidential

Information Required for a Filing With CFIUS

- **Summary of the proposed transaction**, including applicable documentation (e.g., purchase agreement, governance documents, etc.).
- **U.S. Business must provide**:
  - details on the structure and commercial activities of the U.S. business;
  - information on products and services provided by the U.S. business and potential national security concerns (e.g., export-controlled products, personal data).
- **Foreign Investors must provide**:
  - details on the structure and commercial activities of the foreign investor;
  - an explanation of any foreign government ownership or control over the foreign investor and any arrangements among foreign persons that will hold ownership or control over the foreign acquirer and any arrangements among foreign persons that will hold ownership interests in the U.S. business;
  - an explanation of how the foreign investor intends to fund the acquisition;
  - a description of the foreign investor's plans for the operation of the U.S. business;
  - certain personal identifier information for (a) each member of the board of directors and senior executives of the companies in the ownership chain, and (b) any shareholders with 5% or more equity in the foreign investor.
- Specific requirements for Declarations and JVNs are noted in 31 CFR Part 800 & Part 802, Subparts D & E.

What Criteria Does CFIUS use in Evaluating a Transaction?

- CFIUS will consider whether the covered transaction raises national security concerns. It will consider:
  - the ownership of the foreign party;
  - whether the U.S. company:
    - has access to classified data;
    - develops or produces sensitive products or technologies;
    - has contracts with U.S. government agencies; and
    - is involved with critical infrastructure or critical technologies.

- When conducting its national security risk analysis, CFIUS assesses whether:
  - a foreign person has the capability or intention to exploit or cause harm (i.e., whether there is a threat), and
  - the nature of the U.S. business, or its relationship to a weakness or shortcoming in a system, entity or structure, creates susceptibility to an impairment of U.S. national security (i.e., whether there is a vulnerability).

What are the Outcomes of a Filing with CFIUS?

Once a filing has been made with CFIUS there are five possible outcomes:

1. CFIUS notifies the parties that the transaction that is the subject of a Declaration or JVN is not a covered transaction.
2. CFIUS concludes action on a covered transaction when it has determined that there are no unresolved national security concerns with a transaction.
    - For a Declaration, CFIUS may conclude their action based on the information provided in the Declaration or may request a JVN be filed by the parties.
3. CFIUS concludes action on a covered transaction having negotiated a mitigation agreement to resolve national security concerns.
4. CFIUS cannot determine that there is no unresolved, unmitigated national security concern, and refers the matter for Presidential action:
    - Usually will include a recommendation that the President suspend or prohibit the transaction.
    - Only the President has this suspension and prohibition authority.
5. Parties withdraw the Declaration or JVN from CFIUS consideration.

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EUROPEAN FOREIGN INVESTMENT DISCUSSION

2020 Lex Mundi European Antitrust and Competition Virtual Client Seminar

2 December 2020

WHITE PAPER ON FOREIGN SUBSIDIES

Leveling the playing field (1/2)

- Subsidies granted by non-EU governments to companies in the EU appear to have an increasing impact on the Single Market.

- On 17 June 2020, the European Commission has published a **White Paper** on the distortive effects caused by foreign subsidies in the Single Market:

  - State aid control ensures that public support granted by EU Member States does not lead to competitive distortions in the Single Market

  - There is no international or EU instrument sufficiently addressing similar distortions caused by foreign subsidies

    - **EU State aid rules**, which ensure that subsidies are compatible with the internal market, only apply to subsidies granted by Member States

    - **Trade defence instruments** can only address subsidies related to the import of goods

    - **EU Foreign Direct Investment (FDI) Screening Regulation** enables Member States and the Commission to tackle only security and public order concerns

    - **EU public procurement rules** has no targeted provisions addressing the distorting effects of foreign subsidies in public procurement

  - The proposed new instrument will complement existing tools and fill the regulatory gap

  - Rules will apply equally to subsidies granted by all non-EU countries and will not be discriminatory towards any country

WHITE PAPER ON FOREIGN SUBSIDIES

Leveling the playing field (2/2)

- A **foreign subsidy** is any financial contribution by a government or public body of a non-EU State to an undertaking in the EU:

- The first three Modules aim at addressing the distortive effects caused by foreign subsidies, in the Single market generally (Module 1), in acquisitions of EU companies (Module 2) and during EU public procurement procedures (Module 3)
  - These Modules may be **complementary** to each other, rather than alternatives
- The White Paper also sets out a general approach to foreign subsidies in the context of EU funding

WHITE PAPER ON FOREIGN SUBSIDIES

Building blocks for new legal instruments tackling distortive foreign subsidies (1/3)

- **Module 1**: General market scrutiny instrument to capture distortive effects of foreign subsidies
  - Preliminary review
  - In-depth investigation if a market distortion is suspected
  - Redressive measures if, on balance, a market distortion is confirmed
    - If the existence of a foreign subsidy is established, the supervisory authority would then impose measures to remedy the likely distortive impact, such as **redressive payments** and **structural or behavioural remedies.**
    - **EU Interest Test**: the authority could also consider that the subsidised activty or investment has a positive impact, which outweighs the distortion and not pursue the investigation further
- **Module 2**: Foreign subsidies facilitating the acquisition of EU companies
  - Compulsory notification mechanism for subsidised acquisitions triggered by a threshold
    - Module 2 proposes to cover **acquisitions of control** (applying the same concept as under EU merger control) and also **– below the level of control** – acquisitions of a specified percentage (to be decided) or of “material influence”
    - The regime would apply to targets established in the EU which meet **specified financial thresholds**, set at a level to capture businesses with significant **actual or future activities** in the EU
  - Preliminary review
  - In-depth investigation if a market distortion is suspected
  - Redressive measures if, on balance, a market distortion is confirmed

WHITE PAPER ON FOREIGN SUBSIDIES

Building blocks for new legal instruments tackling distortive foreign subsidies (2/3)

- **Module 3**: Foreign subsidies in public procurement procedures
  - Compulsory notification mechanism of potential foreign subsidy for bidders
    - Foreign subsidies may enable bidders to gain an **unfair advantage**, for example by submitting bids below the market price or even below cost, allowing them to obtain public procurement contracts that they would otherwise not have obtained
  - Preliminary reviews and in-depth review where necessary to establish existence of foreign subsidy
  - Decision on potential distortion of procurement procedure
  - Redressive measures: exclusion from the procurement procedure and possibly from future procedures
    - The White Paper mentions that an exclusion of undertakings having received illegal EU State aid will need to be considered as well for **equal treatment** reasons (as this is not contained in the current public procurement framework)
- **General approach** to foreign subsidies in the context of access to EU funding
  - Foreign subsidies present the same challenges when EU money is being spent: new solutions should also apply here
  - EU funding indirectly managed by international financial institutions that implement projects supported by the EU budget, such as EIB or EBRD, should similarly mirror the approach to foreign subsidies

WHITE PAPER ON FOREIGN SUBSIDIES

Building blocks for new legal instruments tackling distortive foreign subsidies (3/3)

- Depending on the Module and circumstances, **enforcement** will be carried out by:
  - The European Commission
  - The Member State's authorities
  - Jointly by the European Commission and the Member State's authorities
- Next steps:
  - 14-week public consultation took place until 23 September 2020
  - Impact assessment, based on results of the public consultation, published in October 2021
  - Aim is to introduce a new legal instrument in 2021
    - Proposal for a regulation by the Commission planned for **second quarter 2021**

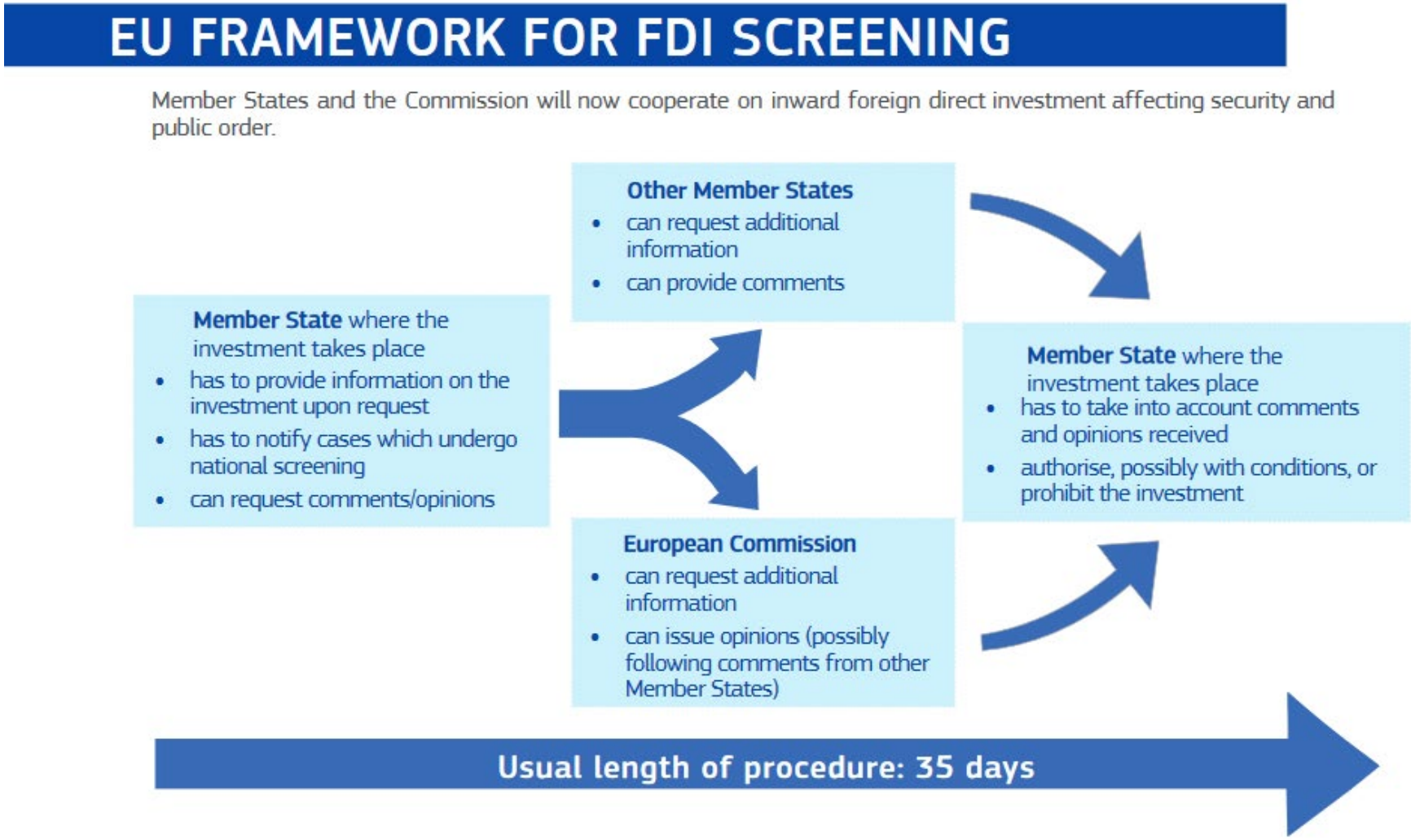
EU FOREIGN INVESTMENT SCREENING MECHANISM

EU FDI Screening Regulation (1/2)

- The FDI Screening Regulation adopted in March 2019 established an **EU-wide framework in which the European Commission and the Member States can coordinate their actions on foreign investments**
  - Created a **cooperation mechanism** for Member States and the Commission to exchange information and if necessary raise concerns related to specific investments
  - Allows the Commission to issue **opinions** when an investment poses a threat to the security or public order of more than one Member State, or when an investment could undermine a project or program of interest to the whole EU, such as Horizon 2020 or Galileo
  - Sets **deadlines for cooperation** between the Commission and Member States, and among Member States, observing non-discrimination and strong confidentiality requirements
  - Establishes certain **core requirements** for Member States who maintain or adopt a screening mechanism at national level on the grounds of security or public order
  - Encourages **international cooperation** on investment screening, including sharing of experience, best practices and information on issues of common concerns
- The EU framework for FDI screening became fully operational on **11 October 2020**, after the Commission and Member States have put in place an effective coordination framework
- On **25 March 2020**, the Commission issued guidance to the Member States, calling inter alia upon all Member States to set up a fully-fledged screening mechanism, and ensuring a strong EU-wide approach to foreign investment screening at a time of public health crisis and related economic vulnerability

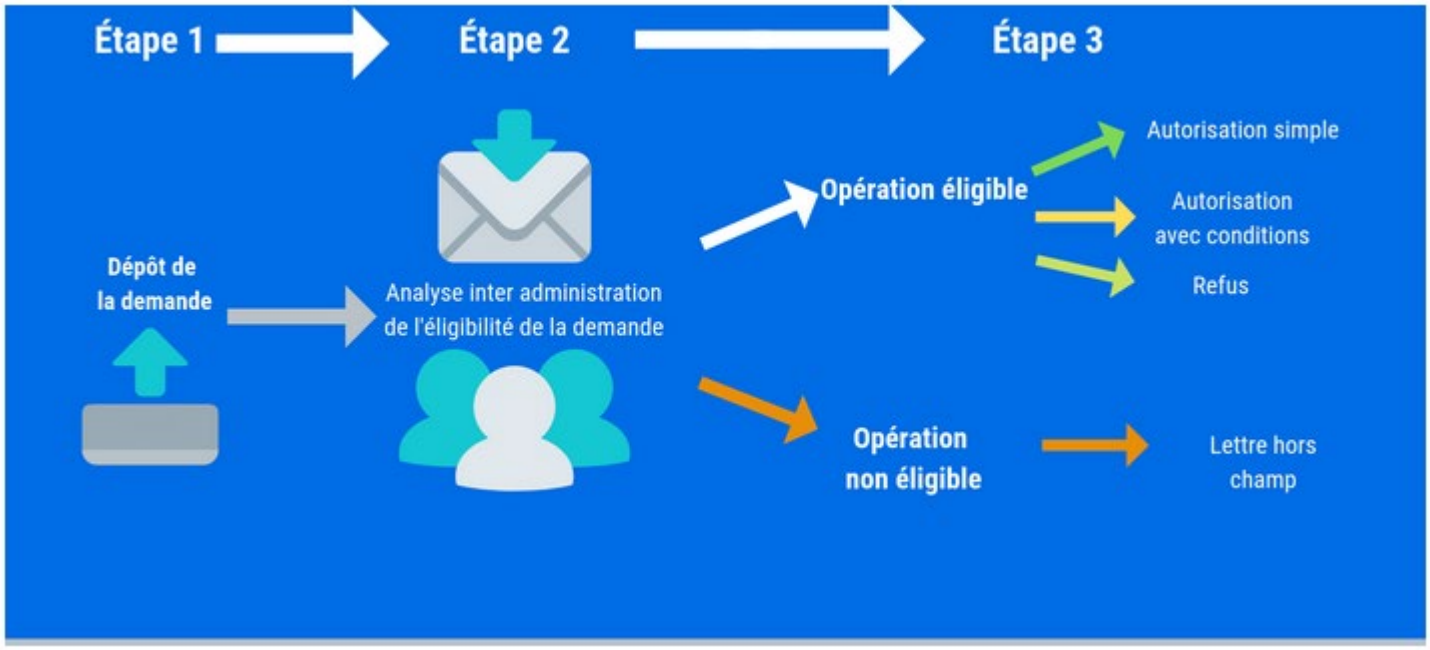
EU FOREIGN INVESTMENT SCREENING MECHANISM

EU FDI Screening Regulation (2/2)



EU FOREIGN INVESTMENT SCREENING MECHANISM

French FDI screening mechanism



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FOREIGN DIRECT INVESTMENT SCREENING IN ITALY

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Index

1. From ***golden shares*** to ***golden powers***
2. The ***golden powers*** **:** the original design
3. The extension of the ***golden powers*** in the **Covid Emergency**
4. The **administrative procedure**

L.D. 332/1994	**- Golden Shares** in privatized companies**.** Special company law tools. Quashed by EU Court of Justice judgments
L.D. 21/2012	- **Golden powers**, **originally limited** to the sectors of **defence and national security** (art. 1), **energy**, **transport** and **communications** (art. 2). Special administrative law tools.
L.D. 105/2019	Extension of the golden power system to… - 5G grid and technologies (special regime); - critical infrastructures, whether physical or virtual, including energy, transport, water, health, communications, media, data processing and storage, aerospace infrastructures, defense, electoral and financial infrastructures, sensitive infrastructure etc. - critical technologies and dual-use products (both military and civilian), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantistic and nuclear technologies, nanotechnology and biotechnology.
L.D. 23/2020 (the «Liquidity Decree»)	Urgent provisions adopted for the **Covid-19 emergency** which further extend the "golden power" to… - supply of critical production factors, including energy and raw materials, **food** security and the **agri-food** sector; - access to sensitive information, including **personal data**, or the faculty to control such data; - freedom and pluralism of the **media**; - financial sector, including **banking** and **insurance**.

	NATIONAL DEFENCE AND SECURITY **Art. 1, L.D. 21/2012**	**TRANSPORT, ENERGY, COMMUNICATIONS** **Art. 2, L.D. 21/2012**
To be notified (equity investments)	Purchase of shareholdings in companies that carry out activities of strategic importance for the national security and defense system	Purchase of shareholdings in strategic companies such as to determine the permanent establishment of the purchaser
Investors	**EU investors** (also Italians) and **non-EU investors**	**non-EU investors**
Thresholds	-Target company **listed** 3%, 5%, 10%, 20%, 25% e 50%; - Target company **non-listed** 5%, 10%, 20%, 25% e 50%	**Control** of the target
To be notified (corporate resolutions and other transactions)	Resolutions or transactions of the shareholders' meeting or the management bodies regarding the: • merger/demerger of the company • transfer of the company, branches or subsidiaries • transfer abroad of the registered office • modification of the corporate purpose • dissolution of the company • amendment of certain statutory clauses *etc.*	Resolutions or transactions leading to changes in the ownership, control or availability of the assets or the change of their destination, including resolutions of the shareholders' meeting or the management bodies regarding the: • merger/demerger of the company • transfer of the company, branches or subsidiaries • transfer of subsidiaries that hold strategic assets • transfer abroad of the registered office • modification of the corporate purpose • dissolution of the company

3. The extension of the *golden powers* in the **Covid Emergency**

	Law Decree 23/2020 (the «**Liquidity Decree**») extends the scope of the "golden power" in four directions	
1) Extension of the "Strategic Sectors"	DEFINITIVE	All strategic sectors listed in art. 4, para. 1of the Regulation (EU) 2019/452.
2) Lower notification thresholds	TEMPORARY (up to 31/12 2020)	Investments and transactions subject to **notification** in case of: i) acquisitions of voting rights or capital equal to 10% of the share capital of strategic companies **and** total value of the investment higher than € 1 million; **or** ii) acquisitions of shares in the capital of strategic companies exceeding 15%, 20%, 25% and 50%. The new regime applies to • **EU investors** in case of acquisitions of controlling shareholdings in strategic companies (notification from EU investors is no longer limited to investments in companies operating in defence and national security sector).
3) Extension to EU investors	TEMPORARY (up to 31/12/2020)	
4) *Ex officio* procedure of the Presidency of the Council of Ministers	DEFINITIVE	The new Liquidity Decree provides, in case of violation of notification obligation, that the Presidency of the Council of Ministers has the right to commence *ex officio* the screening of the relevant investments.

4. The **administrative procedure**

Notification of the acquisition	▷	Within 10 days from the signing
Notification of shareholders / management body's resolutions or transactions	▷	Within 10 days and in any case before the execution and implementation of the resolutions or corporate transactions
Screening by the Presidency of the Council of Ministers	▷	Maximum 45 days
Possible request for additional information to the investor / company	▷	Suspension of the 45 day term for a maximum of 10 days
Possible request for further information to third parties	▷	Suspension of the 45 day term for a maximum of 20 days

From October 2020…		
…EU Member States can provide comments	▷	Term of 45 days suspended until receipt of comments
…the EU Commission can provide comments		

The powers of the Presidency of the Council of Ministers and possible outcomes of the screening

Imposition of special conditions	Veto power	Opposition to the acquisition
Imposition of **special conditions** in case of: - purchase of shareholdings in companies carrying out activities in strategic sectors; - resolutions or extraordinary corporate transactions.	**Veto** against the adoption of shareholders / management body's resolutions or transactions.	**Opposition to the acquisition** of shareholdings in a company carrying out activities of strategic importance, in cases of exceptional risk for the protection of national interests, which cannot be averted through the imposition of special conditions.

Brief Introduction of China National Security Review

WEI, Yingling

December 3, 2020

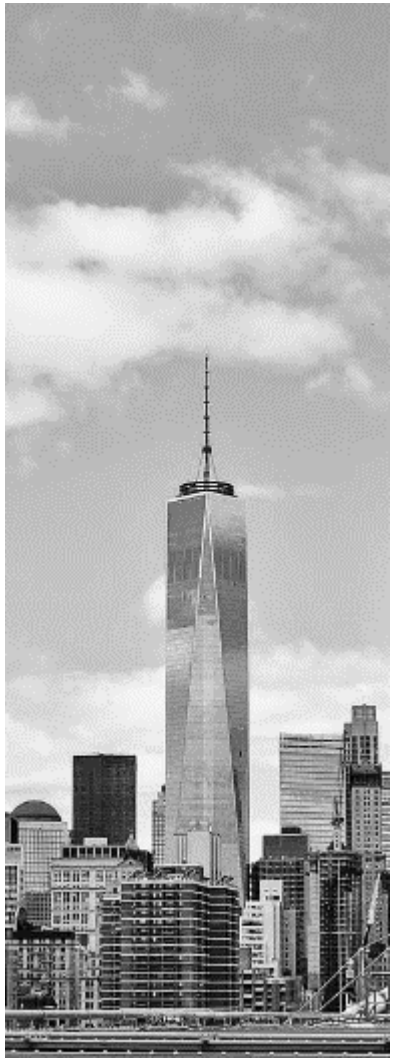
JUNHE | 君合律师事务所

Industries Subject to National Security Review

Category A - Involving Defense Security

- Military industrial & military industry accessory
- Entities adjacent to key or sensitive military facilities
- **Other** defense-related entities

Effective control is NOT required if transactions involving entities in these industries.



Category B - Involving non-defense security

- ***Important*** agricultural products
- ***Important*** energy and resources
- ***Important*** infrastructure
- ***Important*** transportation services
- ***Key*** technologies
- ***Significant*** equipment manufacturing
- Other industries having a bearing on national security
- ***Important*** products and services concerning culture and information technology (**Only applies in the pilot free trade zones**)

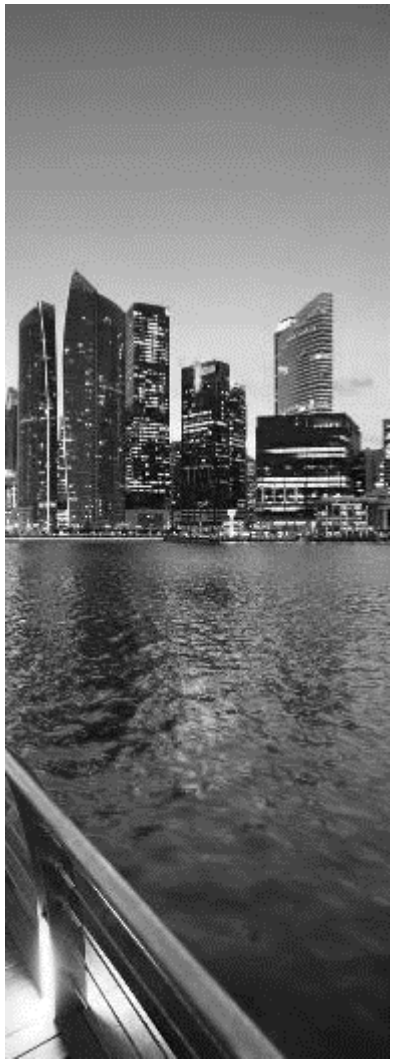
Effective control is required if transactions involving entities in these industries.

Types of Transactions and Effective Control

Types of Transactions

- Acquisition of shares in or subscription of the increased capital of a **non-foreign-invested enterprise** in China;
- Acquisition of shares in a **foreign-invested enterprise** from a Chinese shareholder or subscription of the increased capital of a **foreign-invested enterprise**;
- Purchase and operation of assets of an enterprise within China, or acquisition of shares in an enterprise within China, **through a set-up foreign-invested enterprise**;
- **Direct purchase of assets of an enterprise within China** to set up a foreign-invested enterprise for operation of such assets.

Note: The FTZ Notice covers all kinds of "foreign investment", either direct or indirect, for NSR purposes, including contractual control, beneficiary ownership, trust, reinvestment, overseas transactions, lease, subscription of convertible bonds, and so on.



Effective Control

- The aggregated shareholding percentage by **one foreign investor (including its ultimate controller and controlled subsidiaries)** in the domestic company **exceeds 50%;**
- The combined shareholding percentage by **two or more foreign investors exceeds 50%;**
- The shareholding percentage by one foreign investor is **less than 50%**, but **with voting right to exert a material impact on the resolutions** of the shareholders' meeting, or the board of directors of such company; and
- Other circumstances resulting in foreign investors **obtaining actual control of management decisions, financials, human resources, or technologies of the domestic company**.

National Security Review Process

NSR Initiation

- Foreign investor to submit the NSR filing voluntarily;
- Stakeholders (e.g., relevant departments, national industry association, any enterprise engaged in the same industry or upstream or downstream industries) to submit a proposal to NDRC for initiating NSR

NDRC

- Pre-docketing Examination - **15 working days** post complete documentation and in compliance with legal requirements
- **5 working days** to submit the case to Inter-Ministerial Joint Committee (**IJC**) for NSR

IJC

Regular Review

- IJC to solicit written opinions from stakeholders within **5 working days**;
- Stakeholders to reply in written within **15 working days**;
- IJC to make review decision within **5 working days**, if no impact on national security raised

Special Review

- IJC to initiate special review within **5 working days**, if possible impact on national security raised;
- IJC to make review decision within **60 working days**, if no differed opinions within IJC

The State Council

- IJC to submit the case to the State Council for decision, if material differed opinions within IJC;
- No time limit for the State Council to make review decision

Information/Documents Required for NSR Filing

Applicant-related Information

- Application form for security review;
- Notarized and authenticated COI;
- Creditworthiness certificate;
- Identity document of the legal representative, or identity document of the authorized representative & POA of the authorized representative;
- List of affiliated enterprises (including the ultimate controller and persons acting in concert);
- Explanations on the relationships between foreign investor (including the ultimate controller and persons acting in concert) and the governments of the relevant countries;

Transaction-related Information

- Explanations on the details of the transactions;
- Transaction documents, e.g., SPA, Capital Increase Agreement, Asset Purchase Agreement (including a list of assets to be purchased and the status thereof);
- Resolutions of shareholders' meeting;
- Corresponding asset evaluation reports;
- Explanations on the actual control enjoyed by the foreign investor on the domestic company;
- Organization charts of the domestic company after the transactions

Target-related Information

- Business description of the domestic enterprise;
- AOA, business license, audited financial statements in the previous year and organization charts after the transactions of the domestic enterprise;
- Contract, AOA or partnership agreement of the foreign-invested enterprises to be set up after the transactions;
- List of board members to be appointed and senior management personnel such as general managers to be employed or partners, etc.; and
- Other documents required by NDRC.

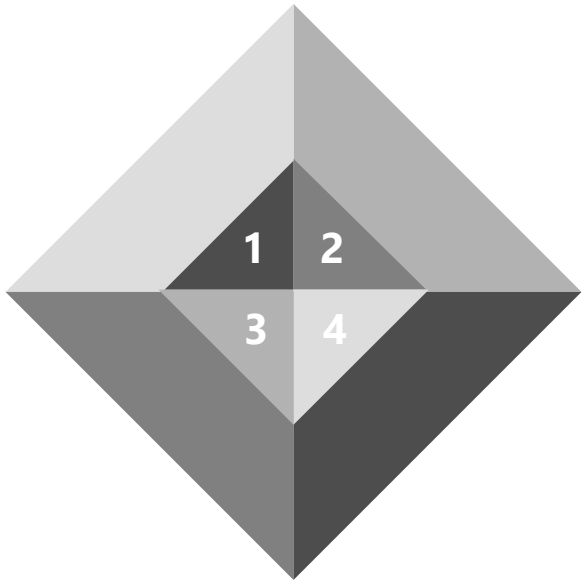
National Security Review Consequences

Without NSR Scope

For transactions not falling within the NSR scope, NDRC will inform the applicant and not submit the case to ICJ for NSR review.

Impact without implementation

For transactions which may have an impact on national security but not being implemented, the party concerned shall terminate the transactions. The applicant may not apply for and implement the transactions if no adjustments have been made for the transactions, the application document has not been amended and the application has not been reviewed again.

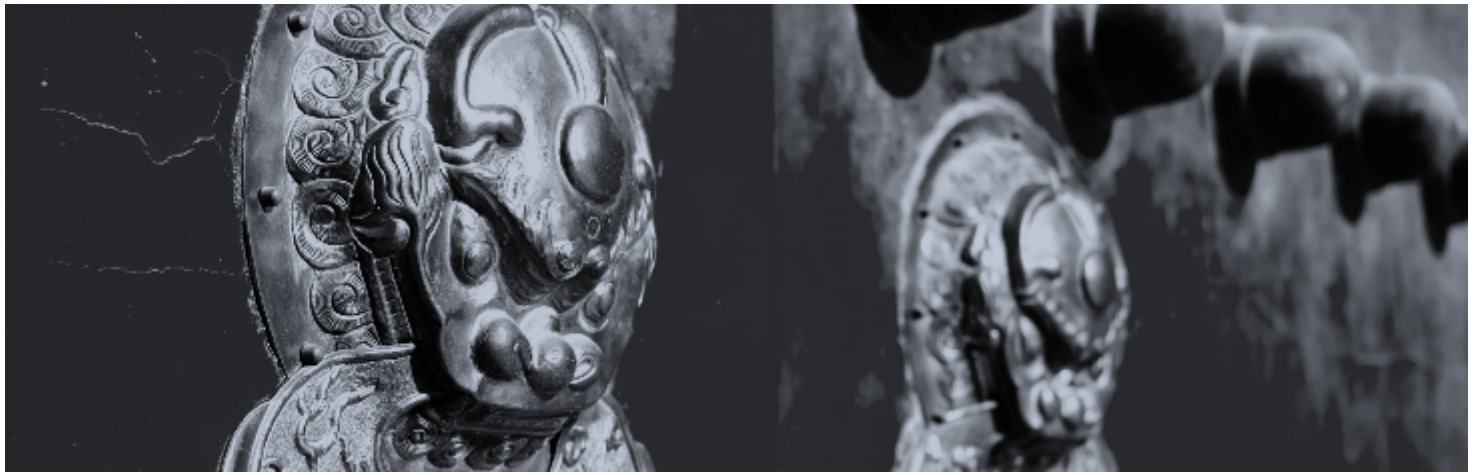


No Impact on National Security

For transactions which do not have an impact on national security, the applicant may complete the formalities for the transactions with the relevant authorities.

Material Impact Caused

For transactions having resulted in or may result in significant impact on national security, in accordance with the review decision of the IJC, NDRC shall, jointly with the relevant authorities, terminate the transactions or adopt effective measures such as transfer of relevant equity or asset, to eliminate the impact of such transactions on national security.



THANK YOU