大成 DENTONS

DENTONS' PICK OF GLOBAL REGULATORY TRENDS TO WATCH IN 2018

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PUBLIC AFFAIRS

Public affairs: Canada

NAFTA in 2018

As 2018 begins, the most important public policy issue facing Canadian business is, without question, the continued renegotiation of the North American Free Trade Agreement (NAFTA). The renegotiations were originally scheduled to endure through seven rounds, beginning in mid-August 2017, and concluding by the end of December 2017. The timeline has now been pushed back to early 2018, with the sixth round taking place in Montréal at the end of January.

Thus far, progress has been made on smaller, easier areas of NAFTA – a new small business chapter, telecommunications and some regulatory cooperation, for example. But what has emerged with greater clarity is the steadfastness of the Trump Administration's commitment to proposals for NAFTA reform that threaten the future of the Agreement and risk creating broad uncertainty in the North American economy for years to come.

Specifically, the American proposal to enact a five-year sunset clause on NAFTA is a non-starter for both Canada and Mexico. With a time-limited NAFTA there would be a chill on long-term investment – particularly in Canada and Mexico – by firms perhaps hoping to take advantage of US market access, coupled with Mexican labour, Canadian tax rates or a weaker relative Canadian dollar, for example. Further, with a six-month termination clause already embedded in the Agreement if Mexico, Canada or the US wish to exit, having a forced sunset of NAFTA is an unneeded tool for those wishing to end the Agreement.

On another front, from the beginning, the Trump Administration has made combatting trade imbalance with Mexico in particular a focal point of their rhetoric. While Canada and the US now have an effective trade balance, Commerce Secretary Wilbur Ross has been quick to point out that while that may be true now, over the course of the past 23 years of the Agreement, Canada has persistently had a trade surplus with the US. While the economics of suggesting trade imbalances are bad is entirely dubious at best, the politics of exploiting anti-Mexican and anti-Canadian sentiment on this front has been easy politics for decades. As such, the automotive Rules of Origin (ROO) provisions of NAFTA and Government Procurement policies have become the remedy to this alleged problem. To wit, the Trump Administration has proposed dramatically increasing the American-based content of vehicles. Specifically, they propose requiring that a vehicle be composed of 50 percent American content to avoid tariffs, whereas under NAFTA today there is only a requirement that a car include 62.5 percent content from North America as a whole.

While the auto sector has deemed the proposed policies to be counter-productive to a globally-competitive North American-rooted auto sector, this is a critical point of negotiation for the US. The politics behind the proposal are easy to understand when one considers the Electoral College support in key auto-producing Midwest states that propelled Donald Trump to victory in 2016. States like Michigan, Ohio, Pennsylvania and Wisconsin would be enthusiastic audiences for this kind of proposal – at least rhetorically. In the end, however, the soundness of its implementation and net-positive impact of job creation in those regions are difficult to imagine.

Other issues, such as Canada's supply management policies, dispute settlement chapters and government procurement policies, remain unresolved, with large policy gaps between the negotiators.

What to watch

Beyond the divisions at the negotiating table, there are four things to watch that will influence, and perhaps drive, the negotiations to their ultimate outcome.

Montréal – Round Six

The sixth round of negotiations at the end of January could well be the tipping point for President Trump's decision about whether to trigger the official American withdrawal from NAFTA. If substantive movement is not seen, and further rounds are not agreed to, there is a strong likelihood that President Trump will begin the six-month formal withdrawal process in order to pressure Mexico and Canada to buckle to his demands.

Mexican election

The July election and the preceding campaign of the next Mexican President will be charged with antagonistic anti-Trump, and perhaps anti-American, rhetoric that will challenge the US-Mexico relationship, and therefore the NAFTA relationship, for years to come. It is hard to imagine Mexican negotiators not paying keen attention to (and being influenced by) the rhetoric and commitments of the two leading candidates to be the next President of Mexico: Andrés Manuel López Obrador and José Antonio Meade.

Reaction to President Trump's anti-Mexican rhetoric, his anti-NAFTA rhetoric and his proposal to build a border wall on the US-Mexico border loom large as Mexican voters search for their own tough leader to defend Mexican interests and challenge President Trump. This dynamic will, without question, have an impact on the substance and style of Mexican negotiators of the incumbent administration and could prove enormously challenging in achieving a tripartite agreement on NAFTA 2.0.

US midterm elections

While the President is responsible for the renegotiation of NAFTA on behalf of the US, it is Congress that holds the power over whether a new NAFTA is legislatively enacted, or, whether the existing NAFTA is repealed. With Democrats entirely opposed to President Trump's agenda, and more and more Republicans breaking with President Trump, the dynamic of Congressional influence over the negotiations will grow in importance. Add to this, President Trump's sagging poll numbers and the fact that 23 Republican Members of Congress are seeking re-election in districts that voted for Hillary Clinton in 2016, and the necessary recipe for Republicans to retain control of the House, Senate and White House in 2018 looks increasingly tough. The pre-midterm posturing on NAFTA by all players and the post-midterms power dynamic will be critical in implementing a renegotiated agreement, or triaging the way forward post withdrawal.

Trump Administration stability

Whether it is the ongoing investigation by special counsel Robert Mueller into the 2016 election campaign and foreign influence, or President Trump's Twitter musings, or the drama of White House staffing challenges, there is no shortage of instability within the Trump Administration. These challenges diminish the President's ability to deliver on his agenda and shrink public confidence in President Trump to lead, which in turn feeds both stakeholder and Congressional opposition to NAFTA management and, perhaps, withdrawal.

Conclusion

NAFTA has been the most prosperous and successful trading partnership in the history of the world. Its renegotiation will, rightly, dominate public policy discussions, investment decisions and observations of political commentators. While five of seven negotiation rounds have been completed, very little has been concluded and 2018 will be a watershed year for NAFTA and the Canada-US-Mexico relationship.

The various Bills which will be working their way through Parliament over the next couple of years will be focused on adapting EU law to a post-Brexit UK, rather than on any substantive amendment.

Public affairs: UK

June 2018 will mark the second anniversary of the UK's vote to leave the European Union (EU). March 2018 will mark the half-way point in the two-year period which EU law provides for the EU and UK to agree on the terms of the UK's departure. That period is extendable with unanimous consent of all 28 Member States. With the clock ticking and much to do to prepare the UK statute book for the transition away from reliance on the direct effect of EU law, the UK Government has little capacity to deal with any subject matter other than Brexit. This effect is likely to intensify in 2018, with even subordinate legislation, which requires Parliamentary time, likely to be kept to a minimum.

The various Bills which will be working their way through Parliament over the next couple of years will be focused on adapting EU law to a post-Brexit UK, rather than on any substantive amendment. The UK Government has indicated that it views most EU regulation (for example, on agriculture, food safety and workers' rights) as a floor rather than a ceiling. This indicates that there is unlikely to be a "bonfire of red tape" on or after Brexit.

The main legislation to be passed is the European Union (Withdrawal) Bill, which is, at the time of writing, at Committee stage. This will still need the support of the House of Lords, where the Government cannot pass it without cross-party support, and also the devolved legislatures, in particular the Scottish Parliament, following the UK Government's commitment to seeking a Legislative Consent Motion (under the "Sewel Convention") to avoid further constitutional uproar.

The current programme of government, set out in the Queen's Speech in 2017, will cover a two-year Parliamentary term which will not expire until mid-2019. The reliance of Prime Minister Theresa May's minority Conservative government on the support of the 10 MPs from Northern Ireland's Democratic Unionist Party (DUP) limits her government's room for manoeuvre on Brexit issues. Equally, a nationalist government in Scotland, a Labour government in Wales and various groups of Conservative backbenchers of varying wings of the party (but consistent rebelliousness) will hold the government back from pursuing anything controversial. Labour politicians also hold the two elected mayoral roles with the most significant devolved powers, in London (Sadiq Khan) and Manchester (Andy Burnham), and will press for further devolution of powers and money to their city regions.

Many Conservatives view a government led by current Labour leader Jeremy Corbyn as the worst possible outcome.

There may yet be another General Election if May's control of her own party continues to wither away, but two things stand against this happening. First, the *F*ixed Term Parliaments Act 2011 (which the Conservative Party would have abolished had it achieved its desired majority in 2017) means an early General Election can only be called if two-thirds of MPs vote for one. This prevents the Prime Minister from unilaterally going to the country. Secondly (and connected to her ability to secure a two-thirds vote in the House of Commons), it is unlikely that May's own backbenchers would allow her to do so after her setback in June 2017 and Labour's consistent small lead in the polls since then. Many Conservatives view a government led by current Labour leader Jeremy Corbyn as the worst possible outcome. Ironically this possibility is all the more threatening post-Brexit, without EU strictures to hold back a radical Labour government.

A second referendum on Scottish independence looks a little further away following the result of the 2017 election, where it might be suggested the only real "winners", anywhere in the UK, were the Scottish Conservatives, who increased their headcount above one for the first time in more than 20 years (to 13). The Scottish group of Conservative MPs, like the DUP, now exerts considerable influence over the UK Government. Meanwhile, the Northern Irish Assembly remains in abeyance pending an agreement on a new power-sharing government between Northern Ireland's political parties.

Public affairs: US

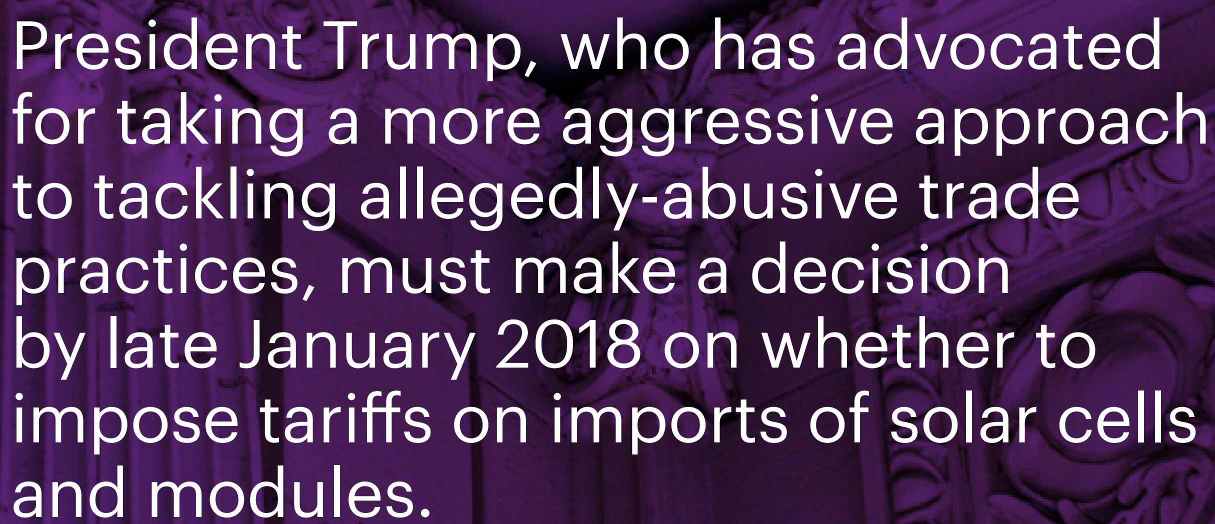
Republicans in Washington enter the new year with the wind at their back—the party just managed the first major overhaul of the United States' tax code in some 30 years—but lacking consensus on a governing agenda. With their first major legislative win behind them and the legislative midterm elections before them, the city's power axis can't agree.

Paul Ryan, the young Speaker of the House who's rumored to be eyeing an exit from Congress, is pining for conservative, transformative reform of the social safety net, while his Senate counterpart, Mitch McConnell, has endorsed taking a less contentious approach, and is pushing possible two-party deals on immigration and Dodd-Frank, the 2010 Wall Street reform package. President Donald Trump, meanwhile, favors a major infrastructure package.

The question is: whose approach will win out when the House Speaker wants entitlement reform, the Senate leader wants bipartisanship, and the President wants big, beautiful roads? Because of the delicate political waters into which Republicans are wading, and the procedurally-taxing reconciliation process that allows a skirting of the normal 60-vote filibuster threshold in the Senate (over which McConnell will exert the defining influence), it's probably easier to advise whose approach will likely lose - Ryan's.

Bowing to the political realities of the moment, the President and his midterms-sensitive allies in Congress will likely balance infrastructure spending with bipartisan deals on the Obama-era Deferred Action for Childhood Arrivals (DACA) program and Dodd-Frank.

Because both the pace and scope of President Trump's regulatory erasure have grown as a consequence of elusive legislative victories, the new year's ambiguous legislative agenda will likely mean a redoubling of the Trump Administration's deregulatory campaign. At this time last year, the *F*ederal Register was around 68,000 pages long. Today, it's fallen to just 45,000, and the President recently signaled his eagerness to continue shedding rules.



President Trump, who has advocated for taking a more aggressive approach to tackling allegedly-abusive trade practices, must make a decision by late January 2018 on whether to impose tariffs on imports of solar cells and modules.

Infrastructure

The Trump Administration has indicated that it will release its long-awaited infrastructure plan this month. The plan is expected to lay out principles intended to spur US$1 trillion in infrastructure investment from US$200 billion in federal funding. Early indications are that the Administration has a four-pronged strategy for dividing up the US$200 billion: (i) a program for states and cities, with a focus on local matching funds, (ii) block grants for rural America, (iii) existing federal loan programs, and (iv) what is being described as "transformational" projects.

Immigration

An ad hoc House GOP working group has finished a list of the immigration reforms that Republicans would want in exchange for allowing people who were illegally brought into the US as children to remain here. The proposal has three components: reform of legal immigration policies, such as ending chain migration and creating a guest worker program; border security, specifically securing funding for Trump's border wall; and interior enforcement, by requiring all employers to use the federal E-Verify system and cracking down on so-called sanctuary cities that refuse to enforce federal immigration law.

Energy

Early 2018 could see executive branch actions that could have significant impacts on the energy sector. The Federal Energy Regulation Commission (FERC) faces an early-year deadline to respond to the Department of Energy's notice of proposed rulemaking on grid resiliency pricing, which would allow certain coal and nuclear power plants to recover their costs of service. In addition, President Trump, who has advocated for taking a more aggressive approach to tackling allegedly-abusive trade practices, must make a decision by late January 2018 on whether to impose tariffs on imports of solar cells and modules. Meanwhile, his Administration is expected to forge ahead with lease sales that would open up additional offshore and onshore areas for oil and gas development. On the legislative side, Congress could consider an infrastructure package that could include energy provisions, such as reforms of permitting processes for pipelines, transmissions lines and hydropower projects.

Financial services

The Senate Banking Committee advanced S. 2155, the Economic Growth, Regulatory Relief and Consumer Protection Act. This regulatory relief bill, which has long been sought by community banks and credit unions, would "right-size" regulations that were imposed on smaller financial institutions as a consequence of the Dodd-Frank reforms.

Telecom

The Federal Communications Commission's (FCC) repeal of net neutrality will undoubtedly land in Congress's lap, as will other items on Chairman Ajit Pai's deregulatory agenda in 2018 as they face challenges in the courts. These challenges will leave the affected unsure about the rules of the road and the calls for congressional involvement will grow louder. Aside from net neutrality, we expect the FCC's relaxation of media ownership rules to also fight for congressional attention.

Climate

The Trump Administration will continue its efforts to unwind the Obama-era climate change regulations, and begin a formal process of reviewing, critiquing and possibly debunking the underlying science of man-made climate change. EPA Administrator Scott Pruitt recently told Congress that the agency would be introducing a rule to replace the Clean Power Plan, an Obama Administration policy aimed at reducing carbon dioxide emissions and the centerpiece of that Administration's climate-change efforts.

COMPETITION/ ANTITRUST LAW

Competition/antitrust law: Canada

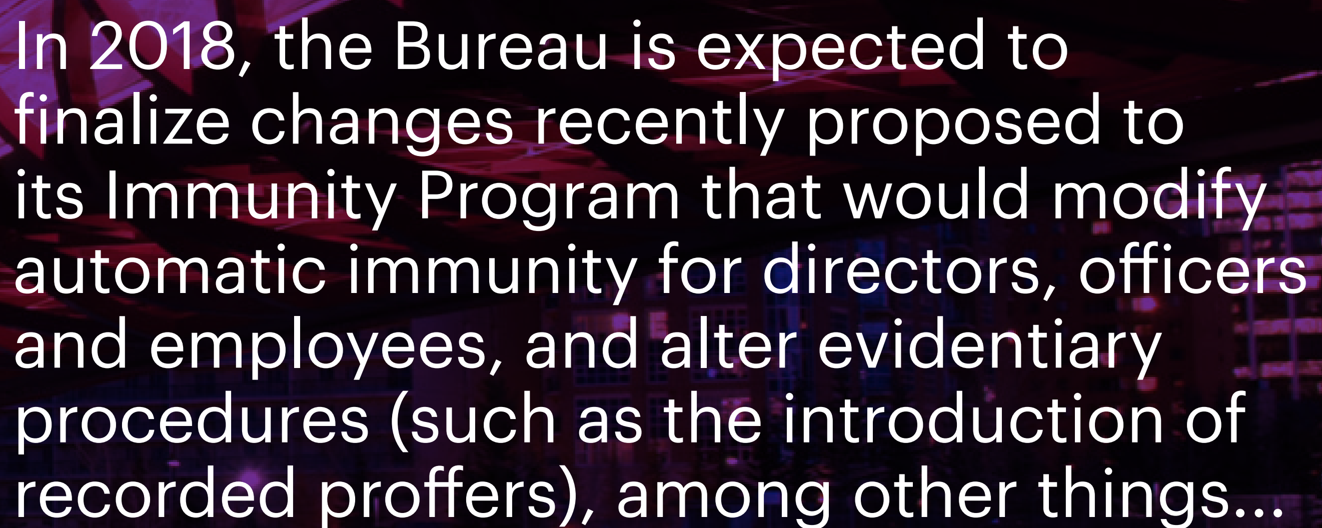
Overview

2018 will likely see Canada's Competition Bureau (Bureau) continue its recent emphasis on innovation and technology as its Commissioner of Competition, Jon Pecman, enters the final months of his five-year term. In 2017, the Bureau published significant papers on "big data" and technology-led innovation in Canada's financial sector (FinTech). In December, the Bureau's pursuit of data restrictions imposed by the Toronto Real Estate Board under the Competition Act's abuse of dominance provisions was vindicated by the Federal Court of Appeal. In 2018, the Bureau will try to replicate that victory in an ongoing abuse of dominance case concerning the Vancouver Airport Authority's in-flight catering policies. As with prior years, the Bureau was able to extract a number of significant criminal cartel fines and merger divestitures in 2017. Revisions to the Bureau's immunity and leniency policy are expected in 2018, and a significant domestic bread cartel unveiled late in 2017 may generate further Bureau enforcement action.

Merger review

The Bureau was able to secure divestitures in six transactions in 2017, notably in the cross-border Dow-DuPont, Abbott-Alere, Sherwin-Williams–Valspar and Couche-Tard–CST transactions. As of early 2018, however, the Bureau continued to review Calgary-based Pembina Pipeline Corporation's acquisition of Veresen Inc. in the midstream oil and gas sector. The Bureau's approach to that transaction will be closely watched in light of significant developments in that sector in 2017—notably the combination entered into between Enbridge Inc. and Spectra Energy Corp. to form an energy infrastructure business with an enterprise value at announcement of approximately CA$166 billion.

In March 2017, the Bureau cleared Canexus Corporation's acquisition by Chemtrade Logistics Income Fund. That approval followed a prior Bureau-approved Canexus takeover in 2016 that was aborted after the US Federal Trade Commission commenced a challenge. In both Canexus cases, the Bureau applied Canada's statutory "efficiencies defence" permitting an otherwise anti-competitive merger to be approved on the basis of offsetting efficiency gains. The application of that defence will be of continuing interest in 2018.



In 2018, the Bureau is expected to finalize changes recently proposed to its Immunity Program that would modify automatic immunity for directors, officers and employees, and alter evidentiary procedures (such as the introduction of recorded proffers), among other things...

Cartel enforcement

While fewer Canadian cartel developments transpired in 2017 than in previous years, a number of fines and penalties were imposed in relation to condominium and municipal contract bid-rigging schemes in the province of Québec, and a CA$13.4 million penalty was imposed on Mitsubishi Electric in the Bureau's ongoing auto parts cartel investigation. In late 2017, a domestic bread cartel was revealed spanning the years from 2001 to 2015. George Weston Ltd. and Loblaw Companies Ltd. (Loblaw), which operate the Loblaw grocery chain in Canada, were the immunity applicants in respect of the cartel, and 2018 may see the Bureau take further action against other possible cartel participants following the execution of search warrants in late 2017.

In 2018, the Bureau is expected to finalize changes recently proposed to its Immunity Program that would modify automatic immunity for directors, officers and employees, and alter evidentiary procedures (such as the introduction of recorded proffers), among other things, which will see Canada's programs diverge in certain aspects from the practice in the US and Europe.

Abuse of dominance and civil reviewable practices

As 2018 begins, the Bureau is litigating a single civil reviewable case before the Competition Tribunal: an abuse of dominance proceeding concerning the Vancouver Airport Authority's refusal to permit new entrants in the market for in-flight catering at Vancouver International Airport.

In January 2018, the Bureau settled its Competition Tribunal litigation with HarperCollins in respect of an "Agency Model" restricting retail price competition in the North American e-books market. HarperCollins was the last e-book publisher to enter into a consent agreement with the Bureau, although the Federal Court will in 2018 also rule on a challenge to existing agreements by e-reader manufacturer Rakuten Kobo Inc.

The Bureau closed three significant civil investigations in 2017 in respect of Apple's iPhone marketing contracts, Northern Canadian air passenger and cargo services, and abuse of dominance allegations against Loblaw.

Court decisions

2017 was an active year for private litigation in Canada. The Supreme Court of Canada held that Crown immunity precluded the plaintiffs in a retail gas cartel class action from examining the Bureau's chief investigator. The Court of Appeal for Ontario ruled that the courts of Ontario had jurisdiction over absent foreign class members in the air cargo class action, overturning a lower court decision that excluded them. The Ontario Divisional Court and the British Columbia Court of Appeal were divided on the question of whether umbrella purchasers (who purchased not from alleged cartelists, but from third parties) had a cause of action.

In December 2017, the Federal Court of Appeal released a long-awaited decision in the Bureau's abuse of dominance case against the Toronto Real Estate Board (TREB). That case relates to TREB rules that restrict its access to real estate information on TREB's data feed for virtual office websites of agents, which rules (the Commissioner claimed) impeded the introduction of innovative broker models. Going into 2018, the Court's affirmation of a Competition Tribunal decision in the Commissioner's favour is a welcome ruling for the Bureau, as it litigates a dominance case against the Vancouver Airport Authority that similarly involves alleged anti-competitive acts taken not against a competitor, but a supplier.

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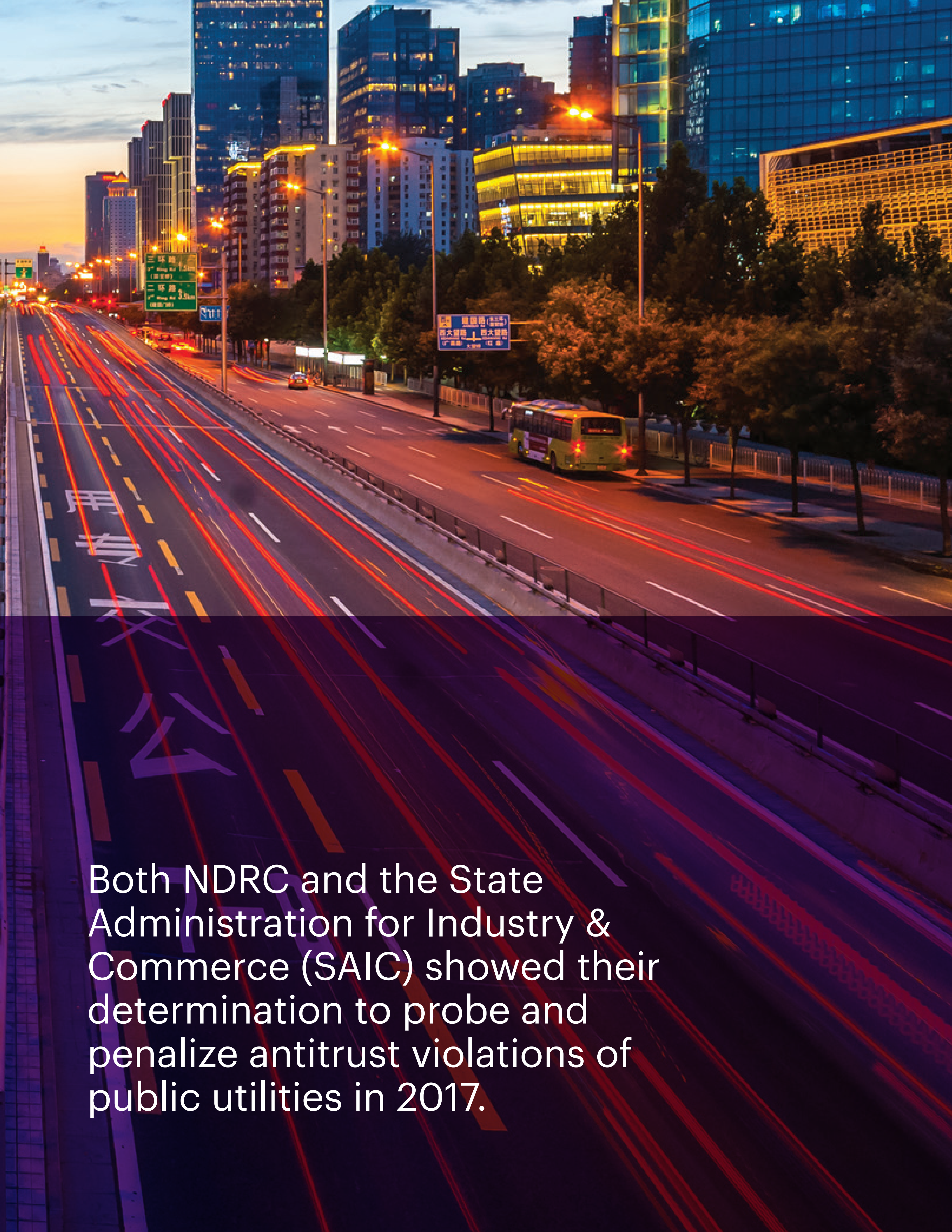

Both NDRC and the State Administration for Industry & Commerce (SAIC) showed their determination to probe and penalize antitrust violations of public utilities in 2017.

Competition/antitrust law: China

The Anti-Monopoly Law proposed to be revised at its 10th anniversary

The Anti-Monopoly Law (AML) is under revision for the first time since it took effect 10 years ago. The Anti-Monopoly Commission of the State Council has held several seminars to discuss the amendment to the AML, with participants including officers from the three Chinese antitrust enforcement authorities and the Supreme People's Court, experts from universities and law firms, and representatives from Chinese and foreign enterprises. The fair competition review system is expected to be included in the new law. To date, however, no formal amendment has been released to the public.

Healthcare sector and public utilities continue to be the enforcement targets

On July 31, 2017, the National Development and Reform Commission (NDRC) issued its penalty decision against two pharmaceutical companies for abuse of dominance in relation to isoniazid active pharmaceutical ingredients.

On November 23, 2017, NDRC issued the Guidelines for Operators' Pricing Conduct of the Drug in Shortage and API. The Guidelines provide clear guidance on the definition of the relevant market, forms of monopolistic agreement, conditions of leniency and factors to be considered of dominance abuse. Enforcement in the healthcare sector is expected to continue in 2018.

Both NDRC and the State Administration for Industry & Commerce (SAIC) showed their determination to probe and penalize antitrust violations of public utilities in 2017. On October 23, 2017, NDRC issued the Notice of NDRC on Conducting Price-related Key Inspections in Sectors of Water Supply, Gasoline Supply, Heating and Telecommunication of Cities. Inspections began on November 1, 2017, and will end on June 30, 2018. SAIC and its provincial counterparts investigated several antitrust cases against public utilities in 2017.

Strengthening the fair competition review system

On October 27, 2017, the State Council of China released the Notice on the Promulgation of Implementation Rules for the Fair Competition Review System (for Trial Implementation) (Notice). The Notice is aimed at resolving problems which occurred in the implementation of the Opinions of the State Council on Establishing the Fair Competition Review System in the Development of Market System, and guaranteeing the effect of the fair competition review system through specifying the review mechanism and procedure, detailing the review standard, strengthening policy guidance, and reinforcing supervision and accountability.

Revised measures for merger filing review

On September 8, 2017, the Ministry of Commerce (MOFCOM) issued the revised draft of the Measure for the Review of Concentration of Undertakings (Revised Draft) to solicit public opinion.

The Revised Draft makes it clear that the establishment of a new joint venture controlled by more than two undertakings may constitute a "concentration" and therefore be subject to a merger notification requirement; clarifies the definition of the acquisition of control and decisive influence over other undertakings; provides standards for the determination of the undertakings participating in transactions; specifies that a partial acquisition may also constitute a concentration; and further elaborates on the calculation of turnover.

It is expected that the newly-revised measures for merger filings might be formally promulgated in 2018.

The forthcoming new Anti-Unfair Competition Law

The new Anti-Unfair Competition Law (New AUCL) was approved and published on November 4, 2017, and came into force on January 1, 2018.

The New AUCL redefines "business operator" by removing the requirement of profit-making; expands the application of the New AUCL to unfair competition through technical measures; prohibits false trading, such as click farming; excludes giving gifts or preference to commercial trading counterparties from the category of bribery; amends the rules relating to forging and counterfeiting, and facilitates the connection between the New AUCL and Trademark Law; increases liability for unfair competition; and enhances investigative measures by giving authorities the right to seal and seize assets related to allegedly unfair competition.

Chinese courts on unfair competition on the internet

On August 30, 2017, the IP Court of Shanghai released its final decision on the dispute between Dianping and Baidu. Baidu is alleged to have scraped, without authorization, information from Dianping.com (owned by Hantao), an internet platform providing reviews of local services such as restaurants. The court held that while customers might benefit from the availability of such information on Baidu, Hantao's interests were damaged by the volume taken and its incentives to collect such information were reduced.The court also clarified that Article 2 of the AUCL—which states that in commercial transactions, businesses must adhere to the principles of willingness, equality, fairness and good faith, and must comply with generally recognized commercial ethics—should be applied when: 1) there is no specific legal provision condemning such conduct; 2) other business operators suffer actual damage due to such conduct; 3) the conduct is unfair and should be restrained due to its violation of the principles of good faith and generally recognized business ethics.

Competition/antitrust law: Europe

Vertical restrictions under increased scrutiny by EU competition authorities

Unlike in other jurisdictions like the US and Canada, vertical restrictions, such as retail price maintenance (RPM) and online-related sales bans continue to be scrutinized closely by competition authorities in the EU. After many years of inactivity, the European Commission (Commission) has opened several new proceedings in 2017 following its e-commerce sector inquiry. Among the national competition authorities, the German Federal Cartel Office (FCO) secures its pole position in this area after publishing extensive guidance on RPM that has attracted much attention all over Europe. The most important development of this year, the Coty judgment of the Court of Justice of the European Union (CJEU) on third-party internet platform bans, also has its roots in Germany.

Commission's final report on its e-commerce sector inquiry and new investigations

In May 2017, the Commission published a final 300-page report on its e-commerce sector inquiry launched in 2015. During the inquiry, the Commission gathered evidence from nearly 1,900 companies operating in e-commerce of consumer goods and digital content, and reviewed around 8,000 distribution agreements.

What were the results of the study? The Commission considered that, among others, the following restrictions may have negative effects on competition:

- Contractual restrictions on selling and advertising online: pricing restrictions and pricing recommendations of manufacturers, dual pricing, cross-border sales and advertising restrictions, such as minimum advertised prices (MAP).
- Data collection and usage when they are used to exchange competitively-sensitive information between competitors. For example, the Commission points to e-commerce marketplaces where the operator of the platform also offers its own products via the platform.
- Territorial restrictions and geo-blocking: contractual and technical means to secure territorial exclusivity has led the Commission to consider a geo-blocking regulation.

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In 2017, after not having investigated verticals for more than 10 years, the Commission initiated several investigations:

- Consumer electronics manufacturers: an investigation into whether four manufacturers have breached competition rules by imposing price restrictions on online retailers.
- Video games: an investigation of bilateral geo-blocking arrangements between an owner of a game distribution platform and five PC video game publishers.
- Hotels: an investigation into agreements between four tour operators and hotels that may result in discrimination against customers based on their location.
- Beer distribution: an investigation of a beer brewer for allegedly preventing dealers for importing cheaper beer into Belgium.

German competition authority particularly focused on vertical restrictions

In Germany, the FCO remained particularly focused on RPM and other vertical restrictions. Highlights in 2017 in this regard were guidance on RPM in the retail food sector; an RPM fine of €10.9 million imposed on a supplier and a retailer in the clothing industry; and a court decision confirming the FCO's prohibition of Asics' ban on dealers' use of price comparison websites. Another widely-disputed restriction of online sales concerns the prohibition against using third-party platforms, such as eBay, in a selective distribution system. While the FCO and some courts took the view that such a prohibition is per se illegal, other courts were in doubt and one court referred the question to the CJEU.

CJEU rules in favor of selective distribution

In its long-awaited Coty ruling, the CJEU confirmed that luxury brands might restrict distributors in a selective distribution network from selling their goods through third-party online platforms, if this is necessary to preserve the luxury image of their goods.

Coty is a perfume producer which sells its products via a selective distribution system. It prohibits its authorized distributors from reselling Coty perfumes via third-party online platforms (while online sales via dealer-owned web shops are possible). One authorized distributor refused to comply with this requirement and Coty took the case to court. The CJEU decided, first, that selective distribution systems that serve to protect the luxury image of certain products are permissible. Second, manufacturers may, under certain conditions, ban their selective dealers from selling through third-party platforms. While the first aspect seems to be particularly focused on the luxury segment, it is clear from the ruling that a ban of third-party platforms is not illegal, per se, but must be assessed in detail for the particular product.

Main takeaways for 2018

Competition authorities in Europe have reconfirmed their rather strict approach regarding vertical restrictions as compared to other jurisdictions, such as the US and Canada. One of the drivers is to keep the internet space open to everyone and, in particular, accessible to smaller dealers. Continued care must, therefore, be taken with regard to RPM and internet restrictions in Europe. Outright prohibitions of internet sales or indirect discriminatory means are considered "no-gos". Selective distribution provides some leeway, as brand manufacturers may require their dealers to fulfill certain quality criteria and may also – as confirmed in the Coty judgement – ban the use of third-party platforms under certain conditions.

Competition/antitrust law: UK

Brexit continues to be the looming change on the horizon, and is likely to have a considerable impact on UK competition/antitrust law. The Competition and Markets Authority (CMA) has begun planning for an increased workload, as it will require taking over responsibility for the UK element of pan-EU cases, which currently fall under the remit of the European Commission. The CMA is anticipating some additional funding from the central government, but much of the additional cost will probably have to be recouped from higher fines and higher merger filing fees. The CMA has estimated that it will have to grapple with an additional five to seven large antitrust cases at any one time, according to one government minister.

The European Union (Withdrawal) Bill currently proceeding through Parliament will adopt all directly-effective EU competition law (including the obligations under Articles 101 and 102) into UK law with effect from the day of exit. Much EU competition law is already contained in domestic law anyway. Existing EU block exemptions, which give rise to parallel exemptions under the Competition Act 1998 (CA98) are also likely to be transposed. EU competition law will also continue to apply to any agreement or conduct of UK businesses with an effect within the EU, though the European Commission will no longer have the power to carry out dawn raids in the UK, or to ask the CMA to do so, and will be limited to making requests for information. Secondary legislation is currently being drafted to provide for the effective operation of competition law after the day on which the UK exits the EU, presumably under powers provided by the EU Withdrawal Bill.

However, some divergence will inevitably emerge over time between EU and UK competition law. The current obligation in the CA98 to interpret UK rules consistently with the case law of the CJEU will almost certainly be removed, and UK courts will no longer be able to make preliminary references to the CJEU to obtain rulings on the interpretation of EU law. The Government has suggested that there will need to be potential changes to UK law to bridge gaps, such as on new leniency rules, but we understand that this is not considered a domestic legislative priority. Changes to competition law based on substantive policy decisions—for example changes to the existing block exemptions—are also unlikely to be a priority.

One area that is likely to be discussed in the current UK-EU negotiations is information sharing between UK and EU competition authorities, including the CMA's current participation in the European Competition Network. The CMA can already share certain confidential information with authorities in third countries in some circumstances. However, the legal framework for this is less smooth than the current intra-EU arrangements the CMA enjoys. The CMA wants to ensure that the European Commission and authorities in other Member States can continue to share information with UK authorities after Brexit: this will have to be negotiated.

The degree of cooperation between the UK and EU agencies will be crucial for consistent outcomes and certainty for business.

...most mergers involving UK businesses will be unaffected and will continue to be subject to the same UK rules.

Any agreement between the UK and EU which covers the sharing of such information may also include an agreement on which authority has priority (for example, regarding leniency agreements) in the event of parallel investigations. Otherwise, businesses will have to be aware of the increased potential for double jeopardy in cartel investigations. The CMA will no longer be barred from initiating its own action where the European Commission has already opened a formal investigation, and UK civil or criminal investigations could parallel EU competition investigations, with the potential for the UK's approach to become more focused on criminal prosecutions in future.

Merger control

Many of the same issues arise in relation to merger control post-Brexit. The most obvious is the loss of the "one stop shop" provided by the European Commission under EU merger control rules for mergers meeting both EU and UK merger thresholds. The possibility of parallel notifications in the EU and UK for certain larger transactions will increase. The CMA will, therefore, see an increase in its merger caseload: it has suggested that the number of mergers under CMA scrutiny could increase by 40 or 50 percent. The CMA currently reviews a relatively small number of mergers - the voluntary regime in the UK allows the CMA to focus its resources on mergers most likely to raise substantive issues in the UK. The nature of the cases scrutinized by the CMA is also likely to change, with a greater number of large international deals having to be considered by the UK's CMA, in contrast with the current focus on mergers with mainly UK effects. The corollary effect will be the removal of the UK turnover from calculations when looking at the EU's mandatory notification thresholds.

Some fear an increased burden on business. In often time-pressured and intensive environments, dealing with as few merger control authorities as possible is generally considered to be desirable. However, dealing with multi-jurisdictional merger control is not uncommon and the legal issues involved are well known. An increase of costs and complexity of obtaining clearance is inevitable. In addition, the relatively unique features of the UK merger regime, such as the ability to scrutinize the acquisition of material influence and (at least in theory) voluntary nature of the regime may add further complexity to assessing risks and navigating merger filings. There is also the risk of divergent outcomes between the UK and the EU in the more contentious cases. The degree of cooperation between the UK and EU agencies will be crucial for consistent outcomes and certainty for business. However, the impact in the UK should perhaps not be overstated; most mergers involving UK businesses will be unaffected and will continue to be subject to the same UK rules.

Competition/antitrust law: US

Now that the new "antitrust guard" at the US Department of Justice (DOJ) is in place and some of the new members of the Federal Trade Commission (FTC) have been named, antitrust policy of the Trump Administration is taking shape. While the repeal of "net neutrality" and ongoing health care and industry debates continue, neither has yet found its way into new antitrust policies or cases. However, both are likely to be hot areas for antitrust in 2018. Other likely hot areas are:

Pharmaceutical pricing

Pharmaceutical pricing and marketing will continue to be under heavy fire in 2018, as investigations by both the DOJ and FTC, and private lawsuits in this area continue to explode. The attack on the industry is bipartisan, and the DOJ's ongoing probes of generic drug pricing include virtually the entire industry. The FTC, state attorneys general, and private plaintiffs are all expected to continue to aggressively litigate conduct of certain pharmaceutical companies, particularly at the expiration of patent life. "Reverse payment" challenges based on the US Supreme Court's FTC v. Actavis decision and on the lower court decisions that antitrust challenges can reach more than cash payments, including other forms of consideration, will continue to encourage government and private suits.

The FTC, state attorneys general, and private plaintiffs are all expected to continue to aggressively litigate conduct of certain pharmaceutical companies...

Merger enforcement activity

Walt Disney Co.'s US$52.4 billion proposed acquisition of a substantial part of 21st Century Fox Inc. will certainly receive scrutiny, along with the other large media industry proposed mergers and acquisitions. The DOJ's lawsuit to stop AT&T Inc. from merging with Time Warner Inc., and Sinclair Broadcast Group Inc.'s effort to buy Tribune Media Co. are also on the agenda. Congress has threatened to hold hearings on these media transactions, making the regulatory and court proceedings likely to become part of the political theater. CVS Health Corp.'s proposed acquisition of Aetna Inc. for US$67.5 billion will also draw scrutiny. All of these matters may well give us insight as to whether the Trump Administration will follow current antitrust law or try to forge new ground in economic theory, policy or thinking. AT&T Inc.'s US$85.4 billion bid to take over Time Warner Inc. was the largest transaction announced in 2016 and was the subject of one of Donald Trump's presidential campaign promises: he vowed to block the deal if he was elected. The trial on whether the deal may go forward is set for the spring of 2018. The deal involves the combination of a content distributor (AT&T owns DIRECTTV) and a creator (Time Warner also owns CNN, Warner Brothers studios and other broadcast and cable channels). The deal is a vertical one, and the US has not challenged a vertical deal in decades. The DOJ allowed COMCAST to purchase NBC UNIVERSAL with behavioral remedies put in place. Whether the DOJ's thinking on vertical issues and integration in the telecommunications industry has changed in any way will be interesting to see.

Continued stiff criminal fines and jail time against price-fixers

The DOJ continues to seek and obtain large criminal penalties for cartel activities. Billions of dollars in fines sought and obtained against companies, coupled with significant jail time for the individuals involved, will continue. Any company without a vigorous antitrust compliance program in effect, and regularly updated and enforced, is playing with fire.

FOREIGN INVESTMENT REVIEW AND NATIONAL SECURITY

Foreign investment review and national security: Canada

2017 saw a number of developments in Canada's foreign investment review law, the Investment Canada Act, that will affect foreign investors in 2018. Foreign buyers of Canadian businesses are less likely to require approval from the Minister of Innovation, Science and Economic Development under the "net benefit to Canada" test as a result of increases in the review thresholds this year. This is a very positive change for foreign investors, especially those from certain countries as outlined below. At the same time, foreign investors looking to acquire Canadian businesses that may be engaged in the defence, telecommunications or otherwise technologically-sensitive sectors need to be aware of the potential for lengthy and rigorous national security reviews. There is no threshold for such reviews so that acquisitions of even small Canadian businesses—including minority investments—can be subject to national security review. While the Canadian Government's August 31, 2017 Annual Report on the Investment Canada Act (the Report) highlights the relative infrequency of such reviews, the consequences of such a review can be draconian (e.g., divestiture of a completed transaction).

"Net benefit" review streamlined

The review of foreign investments into Canada under the "net benefit to Canada" test has been significantly streamlined this year for private sector investors— i.e., those that are not controlled or influenced by foreign governments—from certain countries. As of September 21, 2017, the new review threshold under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) came into effect, significantly increasing the threshold for EU investors to CA$1.5 billion in enterprise value of the Canadian target. This means that fewer transactions will be subject to the "net benefit to Canada" test which typically requires investors to provide commitments to the Government relating to, among other factors, levels of employment, participation of Canadians in senior management, maintaining head office functions in Canada and capital expenditures.

The increase in the review threshold is good news for foreign investors and not just those from the EU. Private sector investors from countries with which Canada has a free trade agreement also benefit from the higher review threshold. These "trade agreement countries" are: Chile, Colombia, Honduras, Mexico, Panama, Peru, South Korea and the US.

In addition to the higher threshold applicable to investors from the EU and the "trade agreement countries", the Canadian Government has accelerated the increase in the "net benefit to Canada" threshold applicable to investors from other World Trade Organization countries from CA$800 million to CA$1 billion - two years ahead of schedule.

The most common factors in national security review were: the potential for transfer of sensitive dual-use technology or know-how outside of Canada; the potential to negatively impact the supply of critical services to Canadians or the Government; and the potential to enable foreign surveillance or espionage.

National security review

Five full-fledged national security reviews were conducted in 2016-17. Four of those were the result of Cabinet Orders, while one review was pursuant to a November 2016 Federal Court Order, which set aside a 2015 Cabinet Order (under the previous Government) for divestiture, and remitted the matter back to the Minister for a "fresh" review (the O-Net case). A final Cabinet Order was issued in all five cases in which reviews were conducted. In three cases, the non-Canadian was ordered to divest itself of control of the Canadian business. In two cases, the investment was authorized with the imposition of conditions that mitigated the identified national security risks to a degree that allowed the investment to proceed.

These results highlight two points for foreign investors. First, if there is any doubt whether national security could be a concern in a transaction, investors should make the appropriate filing (a notification or application for review) more than 45 days prior to closing to receive comfort that a review will not be ordered nor a divestiture remedy sought. Second, mitigation of the national security risk now appears to be a remedy that has become more accepted by the Government in certain circumstances.

The Report also notes that the most common factors in national security review were: the potential for transfer of sensitive dual-use technology or know-how outside of Canada; the potential to negatively impact the supply of critical services to Canadians or the Government; and the potential to enable foreign surveillance or espionage.

Finally, the Report also underlines the lengthy potential duration of the review process – more than 200 days if each stage of the national security process is fully engaged.

Conclusion

The Canadian Government's efforts to reduce the number of "net benefit to Canada" reviews should be welcome news to investors looking to buy Canadian businesses. However, this streamlining leaves behind investors who are state-owned enterprises (SOEs), which continue to be subject to a lower review threshold (CA$379 million in the book value of the Canadian target's assets). In addition, there has been no formal renunciation by this Government of the previous Government's policy banning SOE acquisitions of control of Canadian oil sands businesses.

The Government's provision of more guidance regarding national security review with the release of its guidelines late in 2016 and its enhanced communication relating to national security review in the Report are helpful to foreign investors and their advisors. At the same time, as a result of a few investments that have captured media attention in 2017, there is a perception in some quarters that national security reviews may be more subjective, politically motivated, and therefore, unpredictable than previously thought. Whether this view has merit is difficult to ascertain given that, despite the Government's efforts to increase transparency, the national security review process in Canada remains largely opaque.

Foreign investment review and national security: China

The most substantial development for foreign investment in China came on June 28, 2017, as the National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM) jointly released the 2017 Catalogue for the Guidance of Foreign Investment. This updated version of the Catalogue introduces a simplified Negative List and removes 30 restrictive measures for foreign investors. The Negative List allows foreign investors ease of access to Chinese sectors and assists in determining whether potential investments will fall under the scope of the traditional MOFCOM procedures or the new Foreign Investment Enterprises (FIE) record filing system.

Introduction of the Negative List

The new Negative List is the first nationwide resource available as a guide to market access for foreign investors and outlines industries which are classified as 'encouraged', 'permitted', 'restricted' or 'prohibited' from foreign investment. Investments categorized as "restricted" (i.e., sectors that have excess capacity, or are over-invested or politically sensitive) will require approval from MOFCOM and may be conditional on certain restrictions. Industries deemed to be in the "prohibited" category are wholly closed to foreign investors. For those industries not listed on the Negative List, foreign investors are treated in the same manner as domestic investors.

Opportunities for investment

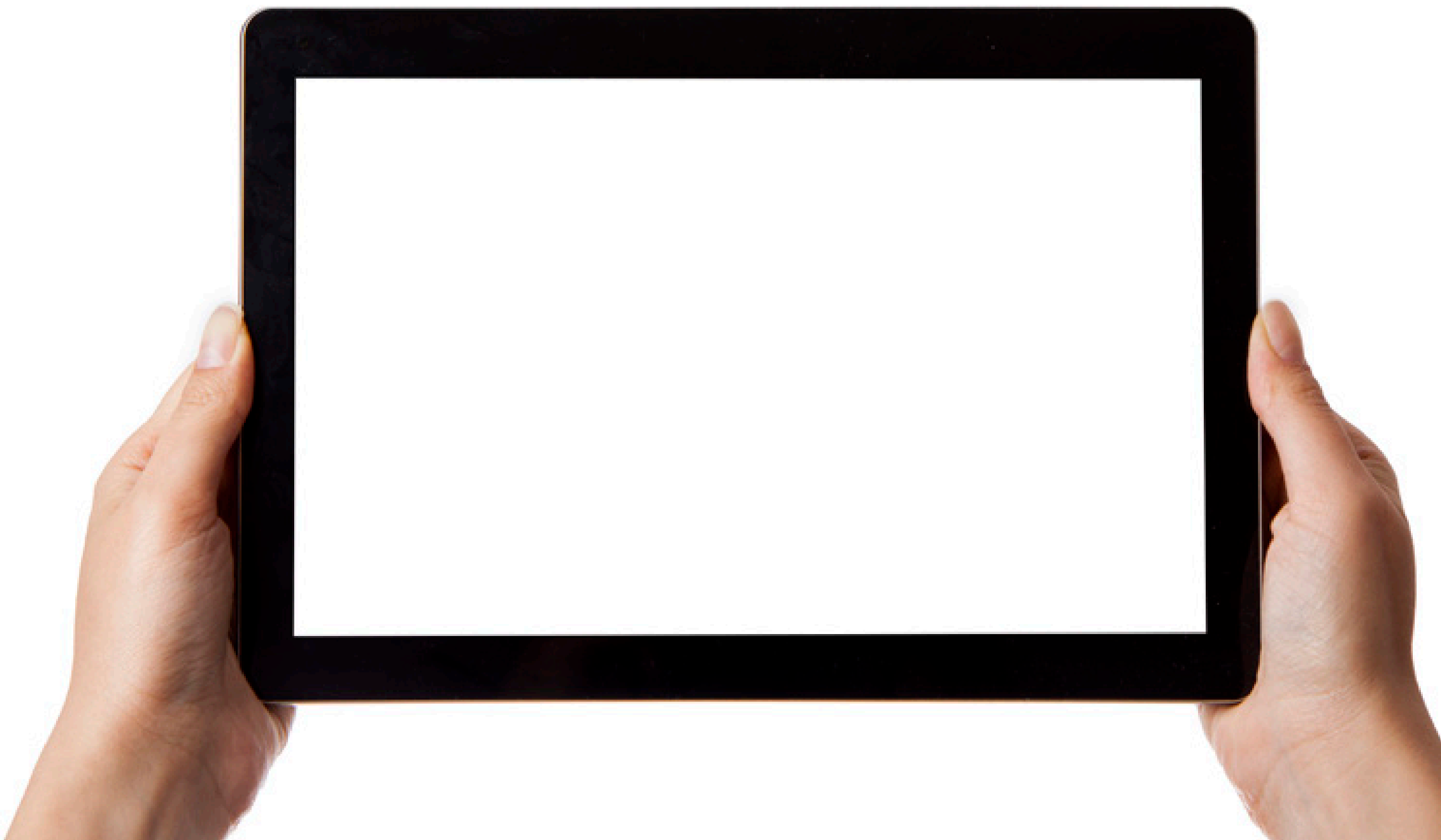
Under the new 2017 Catalogue, foreign investment is supported through the expansion of industries falling within the "encouraged" category and the reduction of the number of restrictive measures applied to foreign investors. The "encouraged" category aims to drive foreign investment and those investing in these industries may receive special incentives. In addition to those sectors previously listed in the 2015 Catalogue, the 2017 Catalogue has expanded the "encouraged" category to include industries such as the development of virtual and augmented reality devices and the development of intelligent emergency medical devices. Together with the expansion of the "encouraged" category, the 2017 Catalogue has also resulted in special administrative measures in a range of industries being removed, including areas within the manufacturing and mining industries, further expanding the opportunities for investment by foreign entities. Foreign investors may take advantage of the ongoing government support of investment in developing technological industries.

Registration reform

In April 2017, the State Administration for Industry and Commerce (SAIC) released an opinion to streamline the process a company must go through to become registered. Guidelines have been proposed to create an entirely online registration system, different from the current one that is both online and in-person. In allowing companies to register for an account online, upload scanned documents and authorize e-signatures, SAIC is seeking to produce faster turnaround times, greater transparency and ease of registration. SAIC foresees an entirely uniform national system for generating electronic business licenses, but will still allow for in-person registration if requested.

National security updates in 2017

Following a two year process, China implemented its official Cybersecurity Law on June 1, 2017. This was a turning point for national security as the law aims to protect citizens, public interest and organizations while also promoting the development of a healthy economy. The government is responsible for monitoring and defending the country's cyber borders while enhancing data security and individual privacy protection. Under Article 31 of the Cybersecurity Law, priority is given to industries related to finance, energy, transportation, water conservation and governance. While avoiding barriers for international trade and foreign businesses that are investing in China, this law seek to protect the security of any business data that leaves the country.



Foreign investment review and national security: Europe

Proposed EU measures to screen foreign direct investments

Traditionally, the protection of security interests and public order has been reserved for the Member States, and the EU Treaties did not give such explicit powers to the EU. However, the 2009 Treaty on the Functioning of the EU explicitly provided for the possibility for extending implicit powers to the EU, in cases where such powers are necessary to implement new EU legislation, approved by the Member States. The same Treaty also provided the EU with new powers in the area of foreign direct investment, which the European Commission (Commission) is keen to exercise on its behalf.

The EU Merger Regulation (EUMR) permits EU Member States to take appropriate measures to protect legitimate interests other than the effect of mergers on competition, and defines these legitimate interests as public security, plurality of the media and prudential rules. Currently, 12 of the 28 Member States have legislation providing for some form of screening of foreign investment. The strictest rules are in Germany and France.

Proposed EU regulation on the screening of foreign direct investment

On September 13, 2017, the Commission published a proposal for a new EU regulation that would give it wide-ranging powers to screen foreign acquisitions that may affect security or the public order in the EU. In announcing the proposal, the President of the Commission, Jean-Claude Juncker, stated that "... we are not naïve free traders. Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening. If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate. It is a political responsibility to know what is going on in our own backyard so that we can protect our collective security if needed."

The principal features of this proposed legislation are as follows:

1. The proposed regulation encourages, but does not require, EU Member States to adopt measures to screen foreign acquisitions involving sensitive sectors, and provides for reporting and coordination between the Member States, and between them and the Commission concerning such proposed acquisitions.
2. The proposal identifies the following critical sectors:
   (a) Critical infrastructure, including energy, transport, communications, data storage, space, financial infrastructure and sensitive facilities;

   (b) Critical technologies, including artificial intelligence, robotics, semiconductors, dual-use technologies, cybersecurity, space or nuclear technology;

   (c) Security of supply of critical inputs; and

   (d) Access to or ability to control sensitive information.

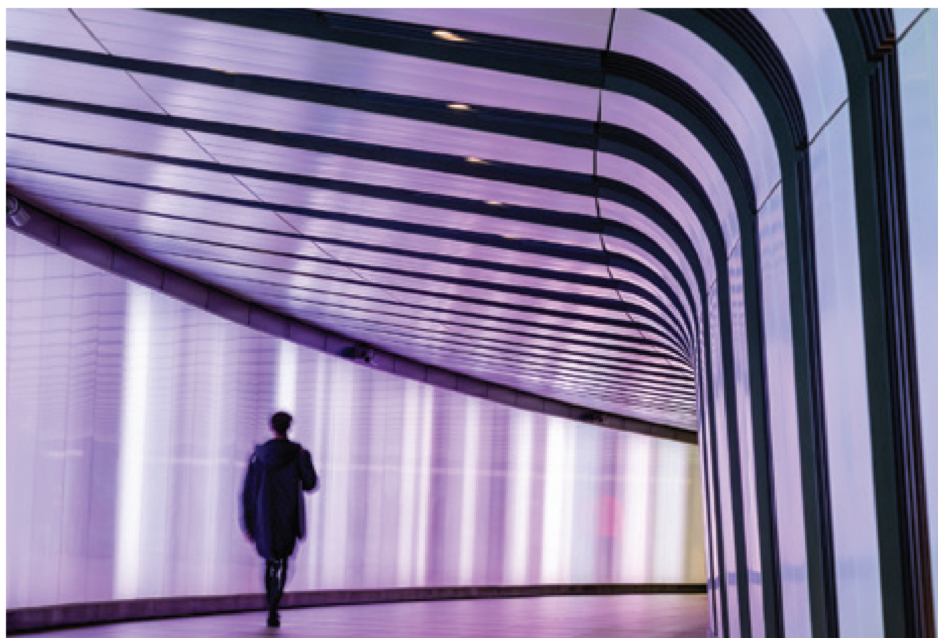
3. The proposal would give the EU and the Commission jurisdiction to screen foreign direct investments involving projects of EU Interest, i.e., investments involving projects in the above-mentioned sectors that either receive substantial EU funding or are subject to EU legislation. Since most, if not all, critical infrastructure, notably cross-border projects, is subject to EU legislation and there is significant EU funding for many critical technologies, the Commission will in effect have the power to review or even influence the prohibition of a wide range of foreign acquisitions. Once it has received any information it has requested from the Member State, the Commission would have a maximum of 25 working days to submit its recommendation. At the conclusion of its review, the Commission would issue a recommendation to the Member State in which the investment is to occur. Although the proposal states that the final decision rests with the Member State concerned, the Member State must "take utmost account" of the Commission's recommendation and must justify any decision not to follow the issued recommendation.

The proposal would give the EU and the Commission jurisdiction to screen foreign direct investments involving projects of EU Interest...

4. In a provision of great relevance to Chinese firms, the proposal provides that state ownership or funding of the acquiring entity is an important factor for assessing the proposed acquisition.
5. The proposed regulation also provides for a "cooperation mechanism" between the Commission and the Member States in national review procedures. In such cases, the Commission will also be promptly informed and empowered to issue an opinion to the Member State which the latter must give "due consideration".
6. The proposal requires Member State laws for screening foreign investment to be non-discriminatory in their treatment of third countries, transparent and subject to judicial review.
7. The Commission (or Member State) review would be conducted in parallel to review under the EUMR and coherence would be required where the same concerns occur under both the EUMR and the investment screening.

Next steps

The proposed regulation will now be considered, and perhaps amended, by the European Parliament and the Council of the EU, which would require the approval of all Member States within the Council. Adoption is foreseen in some 18-24 months, but may also be delayed if there are political disagreements among the Commission and some of the Member States.



Foreign investment review and national security: Germany

2017 witnessed some significant developments in German foreign investment review.

In Germany, foreign investment is regulated by the Foreign Trade Ordinance (AWV), a ministerial ordinance of the German Federal Ministry of Economic Affairs and Energy (the Ministry). Under these rules, the Ministry can review whether the acquisition of at least 25 percent of the voting rights in a German company (or in a German subsidiary of a company) by foreign investors jeopardizes the public order or security of the Federal Republic of Germany. The rules distinguish between sector-specific reviews and cross-sector reviews.

The cross-sector review applies to any acquisition of a German company by investors located outside the territory of the EU or the European Free Trade Association (EFTA) region. The review considers whether the acquisition represents a sufficiently serious and present threat affecting the fundamental interests of society.

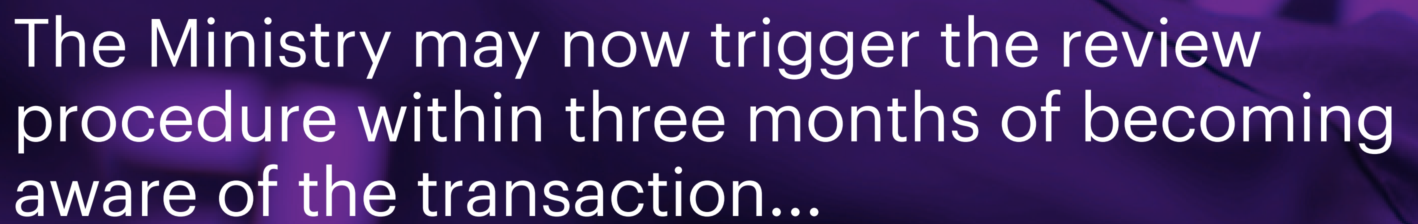
The sector-specific rules only apply to certain sensitive industries, and they apply even if the acquirer is located within the territory of the EU or EFTA. Sensitive industries are, for example, manufacturers and developers of military weapons and products with IT security features.

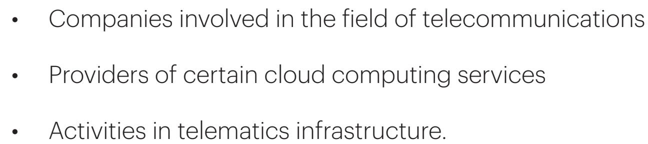
On July 18, 2017, Germany passed an amendment to its foreign investment regime that makes acquisitions of German companies by foreign acquirers considerably more time consuming and potentially more complex. Chinese takeovers of German companies have increasingly come under scrutiny after Chinese electrical appliance manufacturer Midea acquired German robotics producer KUKA. While the Minister of Economic Affairs insists that Germany remains one of the most open economies in the world, German investment control had already grown more restrictive in practice over the past years. The new rules reflect this increasingly-cautious approach to foreign investment. The most important changes can be summarized briefly as follows:

Cross-sector review: obligation to notify acquisitions

The new rules introduce, to some extent, more legal certainty. They list examples of targets whose acquisition can constitute a threat for the public order or security:

- Operators of so-called 'critical infrastructures' (facilities in a range of sectors, including energy, water supply, information technology and telecommunications, finance and insurance, health, transport and traffic, as well as food, provided they reach a certain scale)
- Developers of software for the operation of such 'critical infrastructures'


The Ministry may now trigger the review procedure within three months of becoming aware of the transaction...



- Companies involved in the field of telecommunications
- Providers of certain cloud computing services
- Activities in telematics infrastructure.

The amendment introduces an obligation to notify the Ministry of any proposed acquisition of German companies that fall into the above categories. Such an obligation previously only existed for sector-specific review. The new catalogue of industries of concern is not exhaustive. The Ministry has the right to initiate investigations into other industries as well.

Sector-specific review: expanded scope of review

The list of sensitive industries has been expanded, widening the scope of the Ministry's powers of review. The new rules focus in greater detail on key military technology, e.g., simulators and specialized imaging equipment for military purposes.

Expansion of review periods

The period for the review procedure has been extended from two to four months for the cross-sector review, and from one month to three months for the sector-specific review, in each case starting when the Ministry receives complete documentation. Another new regulation is that the time period for the review process is suspended for as long as the Ministry is negotiating contractual provisions to ensure public order or security, or essential security interests of Germany with the parties. While under the old regime, if an application for certificate of non-objection (Clearance Certificate) was made, it was deemed to have been granted if the Ministry did not open an examination procedure within one month after receipt of the application, the new rules extend this period to two months.

The Ministry may now trigger the review procedure within three months of becoming aware of the transaction (under the old regime, the time limit for triggering the review procedure was three months from the conclusion of the deal). If a transaction is not notified to the Ministry and the Ministry claims not to have been aware of it, it may review the transaction and retroactively prohibit it for up to five years after signing.

Effects on foreign M&A transactions / outlook

- Although Germany continues to be open to investments from other countries, strategic industry sectors are now scrutinized more carefully. Accordingly, acquisitions of companies in these sectors require more thorough preparation and planning.
- The longer review periods have to be considered and parties may decide to apply for a Clearance Certificate more frequently than in the past in order to avoid uncertainty.
- The acquisition agreement should include a closing condition that the Ministry has not prohibited the transaction.

Foreign investment review and national security: UK

2018 may see the UK Government take further steps towards tightening control over foreign investment in cases which raise national security concerns. This is in line with similar developments at EU level in relation to the screening of foreign investments by third country governments to protect strategic sectors and critical infrastructure.

This follows a number of controversial foreign investments in UK companies, most recently Chinese-backed Canyon Bridge's acquisition of Imagination, which designs graphics chips for smartphones. The same purchaser was blocked by the Trump Administration from acquiring a US chipmaker on national security grounds.

UK proposals would apply initially to investments in the defence, dual-use or high tech sectors, even where quite small businesses are involved. The Government is also consulting on potentially wider changes to the UK's merger control system.

Currently, the ability of the UK Government to intervene in mergers is limited to one of three public interest grounds: national security, media plurality and financial stability. National security issues generally relate to defence. The most recent intervention on national security grounds was in April 2017. This concerned the proposed purchase of the digital radio manufacturer, Sepura by Hytera Communications Corporation, a Chinese company. The national security concerns identified by the Secretary of State were dealt with through commitments agreed by the parties and ultimately the merger was cleared by the Competition and Markets Authority.

The Government is also consulting on potentially wider changes to the UK's merger control system.

2018 may see the UK Government take further steps towards tightening control over foreign investment in cases which raise national security concerns.

The Government's proposals seek to address these perceived gaps through a staged approach.

In the short term, the Government proposes to lower the turnover test from £70 million to £1 million, and remove the share of supply test in the following two sectors:

(i) The dual-use and military use sector - covering the design and production of military items (such as arms, military and paramilitary equipment) and so-called dual-use items which could have both military and civilian applications; and

(ii) Segments of the advanced technology sector - focusing on multi-purpose computing hardware and quantum-based technology.

This is quite a departure for UK merger control rules and would lead to acquisitions with comparatively low UK turnover being subject to scrutiny, as well as deals involving buyers with no current presence in that market, or indeed any market, in the UK.

In the longer term, the Government intends to revise the way in which it scrutinizes the national security implications of foreign investment. There are a number of options as to how this might be implemented. One option would enable the Secretary of State to make a special "national security intervention" where he or she reasonably believed that national security risks were raised by the acquisition of "significant influence or control" over any UK business entity by any investor (either domestic or foreign). The Government proposes to define this as either the acquisition of more than 25 percent of a company's shares or voting rights, or any other transaction giving (directly or indirectly) significant influence or control over that company, or over its assets or businesses in the UK.

Alternatively a mandatory notification requirement could be introduced in key sectors, such as civil nuclear, defence, energy, telecommunications and transport, as well as the manufacture of military and dual-use items and advanced technology.

While the Prime Minister says the UK will remain "open for business: open to investment in our companies, infrastructure, universities and entrepreneurs", the UK government's proposals would impose more controls on such investment. The challenge will be to define clearly when Government intervention can occur, and to ensure that any such intervention and decisions are based on objective analysis.

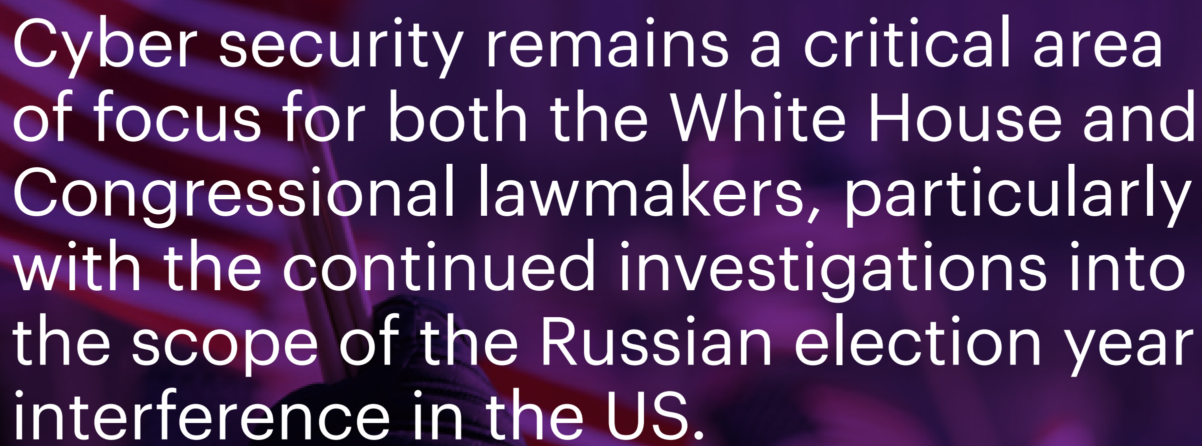
Foreign investment review and national security: US

At the close of his first year in office, President Donald Trump released a lengthy National Security Strategy, focused on reshaping America's approach to threats and global conflict, and also emphasizing economic security and an "America First" approach to setting US defense priorities. This comes on the heels of signing the most recent National Defense Authorization Act (NDAA), which sets the funding priorities and authorities for the US military for the fiscal year that runs through September 30, 2018.

The National Security Strategy comes at a time of growing influence from China and Russia, a concern over transnational terror organizations, and an intense focus on the nuclear threat posed by North Korea. In addition, some within the US national security community believe that the US must move to reinforce influence in the Western Hemisphere to prevent countries such as Russia and China from securing increased economic influence through foreign investment, petroleum development and trade, and direct lending to countries in Central and South America.

Among the core priorities of the Trump Administration for the coming year are the following:

- Enhanced immigration enforcement and restrictions as a tool for domestic security;
- Increased defense spending, including on missile defense systems and force projection; and
- Building on the successful military efforts to defeat ISIS in Iraq by continuing funding for programs and resources to take military action against terrorist safe havens.



Cyber security remains a critical area of focus for both the White House and Congressional lawmakers, particularly with the continued investigations into the scope of the Russian election year interference in the US.

Cyber security remains a critical area of focus for both the White House and Congressional lawmakers, particularly with the continued investigations into the scope of the Russian election year interference in the US. Innovative technologies, as well as funding for modernization of both procurement and new technology deployment, remain high priorities in the US national security context.

Foreign direct investment will likely see policy changes in 2018. Support and momentum for further changes to the scope and influence of the Committee on Foreign Investment in the United States (CFIUS) continue to build, with a growing consensus that additional clarity is needed, along with a broader scope of review than national security and critical infrastructure. In 2018, legislation sponsored by Senator John Cornyn and backed by the Trump Administration, is likely to be considered by Congress. Coming on the heels of yet another year in which the volume of transactions reviewed by CFIUS increased, and with even greater scrutiny of foreign investment, the outcome of the debate over the Foreign Investment Risk Review Modernization Act (FIRRMA) will have meaningful national security and economic consequences. Among the changes proposed in FIRRMA are the following:

- Expanding the scope of covered transactions to include real estate in close proximity to government installations, acquisitions of "innovative technologies," and joint ventures and licensing arrangements that involve technology transfer;
- Expanding the timeframe for CFIUS reviews to up to 120 days, from the current 75 days;
- Creating mandatory filing circumstances, rather than solely voluntary proceedings;
- Creating an expedited review process that allows CFIUS to review an overview of a transaction and the parties to it, rather than requiring a full Notice; and
- Expanding the factors that CFIUS must consider in evaluating foreign acquisitions and investments.

TRADE AND ECONOMIC SANCTIONS

Trade and economic sanctions: Canada

Trade agreements

The single most important trade issue to face Canada in 2018 will be the renegotiation of the NAFTA. Given the drama associated with the NAFTA negotiations, other momentous trade agreement developments in the past year have received less than their fair share of attention. Notably, comparatively less attention has been given to the long-delayed implementation of the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the reboot of the Trans-Pacific Partnership (TPP) following the withdrawal of the US in the early days of the Trump Administration.

Looking ahead, the implementation of the CETA in September of 2017 will continue in 2018 to have a profound impact on Canada-EU trade and investment. Businesses are now starting to feel the concrete effects of the tariff reductions and other trade promoting measures of the agreement. The momentum of trans-Atlantic Canada-EU activity is accelerating, with more EU businesses looking at export and investment opportunities in Canada, notwithstanding uncertainties related to the NAFTA. We expect that this growth in activity will continue and that businesses in Canada and the EU will increasingly look for opportunities across the Atlantic and feel the competitive pressures of new entrants into established markets, including in government procurement, infrastructure, manufacturing, construction, financial and consulting services, IT, software and health care, among others.

When President Trump pulled out of the TPP (one of his very first acts in office), it was expected that this would spell the end of the agreement. Soon after the US withdrawal, however, the concept of a "TPP minus 1" (TPP11) started to gain momentum among the remaining participants in the agreement (including Australia, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam). In May 2017, at a TPP Ministerial Meeting, the TPP was reborn as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The new name is largely the result of Canadian pressure but, ironically, Canada is now one of the last stumbling blocks in finalizing the agreement.

...businesses in Canada and the EU will increasingly look for opportunities across the Atlantic and feel the competitive pressures of new entrants into established markets...

In November 2017, at an APEC Trade Ministerial Meeting, the remaining 11 parties agreed to the "core elements" of the CPTPP but several news outlets blamed Canada for delaying the finalization of a deal. At press time, negotiations to finalize the CPTPP continue in earnest but concerns have emerged that unless a deal is concluded very soon, the political window for a deal may close. One of the remaining concerns for Canada involves rules of origin for automobiles. The original deal provided for duty free treatment if 45 percent of the vehicle's value originated in the TPP region (by contrast, the same threshold is 62.5 percent in the NAFTA). This has raised concerns that the CPTPP will dampen Japanese car-makers' incentive to invest in the Canadian auto sector.

Reports now suggest that Japan is pushing hard for a deal to be signed at an upcoming APEC Ministerial meeting in Chile in March. If a deal can be concluded, it will have significant implications for Canadian businesses across a wide cross-section of industries, notably the agri-food sector, forestry products and the auto industry.

As Canadian trade with and investment in Iran continues to expand, sanctions compliance issues will continue to be of significant concern in 2018.

Sanctions

On the sanctions front, there continue to be significant differences between Canadian and US sanctions, notably on Iran and Cuba. As Iran has opened up to greater economic exchanges with the West, Canadian companies have taken advantage of opportunities not available to US competitors. However, given remaining sanctions on Iran both in Canada and the US, compliance concerns persist. To control risks, Canadian companies need to proceed very carefully and have in place a strong suite of due diligence, contractual protections and other safeguards to ensure remaining sanctions are complied with. As Canadian trade with and investment in Iran continues to expand, sanctions compliance issues will continue to be of significant concern in 2018.

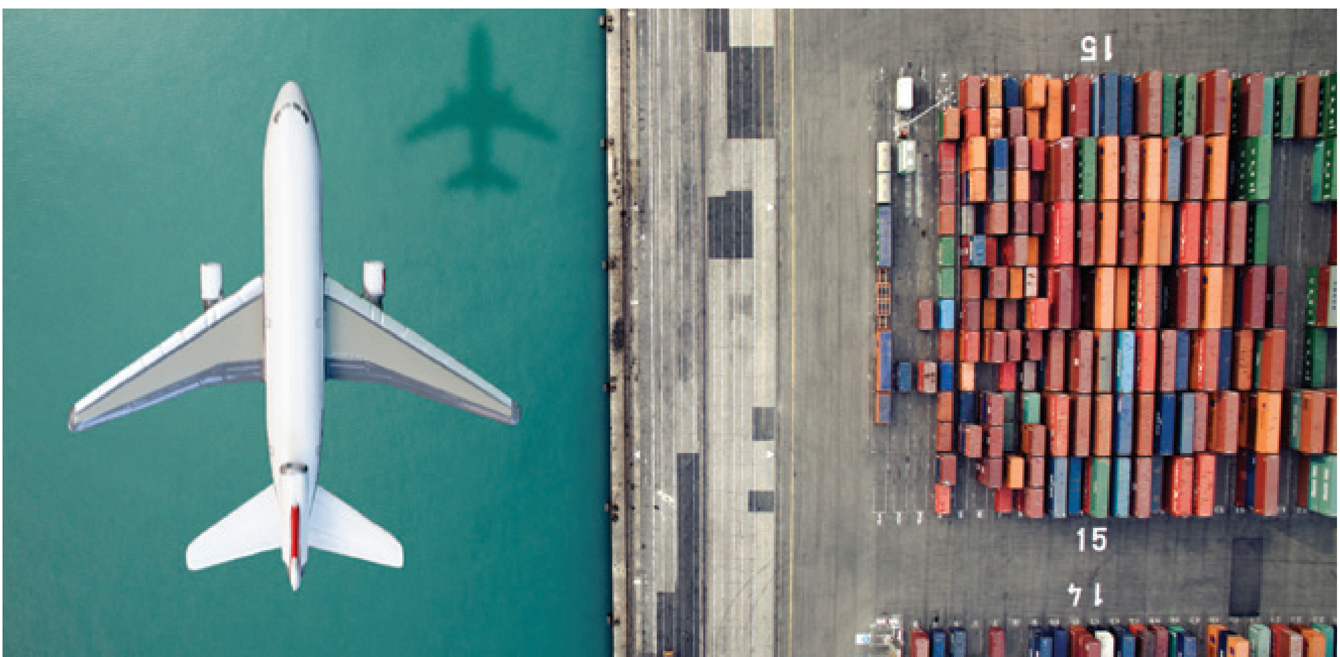
In 2017, Canada also adopted a so-called "Magnitsky Act". The law's formal title is the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) (S.C. 2017, c. 21). This law and its accompanying regulations impose targeted measures against foreign nationals who are, in the opinion of Canada, responsible for or complicit in gross violations of human rights, or are public officials involved in acts of significant corruption. The regulations prohibit anyone in Canada, or Canadians outside Canada, from, among other things, dealing in any property, wherever situated, of a listed person. So far, the Schedule to the regulations lists 52 foreign nationals from South Sudan, Russia and Venezuela. This new sanctions regime imposes on Canadian companies' added obligations to screen counterparties against yet another list. This continues to be a cumbersome process as the Government of Canada does not publish a consolidated list of sanctions entities and individuals.

Trade disputes

As predicted in our Denton's Pick of Global Regulatory Trends to Watch last year, the Canada-US softwood lumber anti-dumping and countervailing duty (AD/CVD) dispute continued to work its way through the US AD/CVD investigation process throughout 2017, without a settlement of the case being reached. The outcome so far has been very high punitive AD and CVD duties being imposed on Canadian exports of softwood lumber to the US. Canada has launched several legal challenges against the duties, which will continue to grind their way through the various processes, including the WTO Dispute Settlement Body and NAFTA Chapter 19 panels. Historically, Canada has had some significant litigation successes in relation to previous softwood lumber investigations and is banking on being able to have the duties reduced again. In the meantime, we expect that the dispute will not be settled in 2018 and that US importers of Canadian softwood will continue to pay heavy duties. We also expect that alternative sources of lumber supply (such as Scandinavia and Russia) will continue to increase their market share in the US.

Canada itself has continued to use AD/CVD duties to target imports, particularly from China. In 2017, five new investigations were launched against imports of silicon metal, line pipe, PT resin, copper pipe fittings and pasta. For 2018, we anticipate continued AD/CVD activity as the remaining 2017 cases conclude and other findings come up for "sunset review" and new cases are initiated.

Canada has also been active at the WTO, notably launching in late 2017 (publicly disclosed in early 2018) a massive broadside complaint against numerous aspects of the US anti-dumping and countervailing duty system. This case comes on the heels of numerous US investigations that have targeted Canada, including on softwood lumber, newsprint and aircraft. Canada's frustration with US AD/CVD duties has been building for years and the complaint seeks the elimination of numerous aspects of US trade remedies that Canada considers unfair. This huge case will continue to work its way through the WTO dispute settlement process in 2018 and may have a significant impact on trade agreement negotiations, including the ongoing negotiations on the renewal of the NAFTA and to settle the softwood lumber dispute.



Trade and economic sanctions: UK

Developing trading relationships with the wider world post-Brexit will need to be balanced against foreign policy objectives. Currently, the UK wields significant influence in relation to the development and imposition of sanctions (arms embargoes, asset freezes, visa or travel bans and trade embargoes) both as an EU Member State and a member of the UN Security Council. The applicable sanctions are implemented by unanimous agreement at the EU level, either following UN action or as a result of autonomous measures by the EU.

Leaving the EU raises a number of questions about how the UK can maintain its influence in this important area. The EU External Affairs Sub-Committee of the House of Lords has undertaken an inquiry into UK sanctions policy after Brexit and published its report on December 17, 2017. It concluded that the effectiveness of UK sanctions will be undermined unless the UK can quickly agree on arrangements for future sanctions policy co-operation with the EU. Without this, the UK could be left with the choice of imposing less effective unilateral sanctions or aligning with EU sanctions over which it will have no influence.

In particular, there are concerns the Government's proposed "tailored" and "unprecedented" approach to UK-EU collaboration on sanctions policy is untested. Informal engagement with the EU is not regarded as a substitute for the force of joint decision-making at the EU level. A political forum has been suggested for regular discussion and coordination of sanctions policy. This would seem to be an area where there is political will on both sides to reach agreement quickly.

Meanwhile, the EU (Withdrawal) Bill will freeze current sanctions regimes and designations in effect on the date of the UK's withdrawal from the EU. Further, the Sanctions and Anti-Money Laundering Bill, introduced to the House of Lords on 18 October 2017, proposes a legislative framework to "enable the UK to continue to implement United Nations (UN) sanctions regimes and to use sanctions to meet national security and foreign policy objectives". If adjustments are required to the retained EU sanctions regimes, the Bill provides for temporary powers to make the necessary changes. Legal jurisdiction for matters relating to the post-Brexit sanctions regime will rest with the UK courts. However, it is unlikely that the UK will pursue a completely independent and divergent strategy. Instead, alignment with the EU and its other key trading partners, in particular the US, will be the likely outcome.

...the Trump Administration National Security Strategy states that the US "will no longer turn a blind eye to violations, cheating, or economic aggression," and that the Trump administration may take further action against Chinese trading practices...

Trade and economic sanctions: US

2018 will likely be a challenging year for trade compliance around the world. From macro-challenges surrounding the status of long standing trade agreements such as the North American Free Trade Agreement (NAFTA), Britain's post-BREXIT trading regimes, and the global trade rules under the WTO, to granular enforcement and regulatory actions at borders such as increased use of antidumping and countervailing duty mechanisms, supply chain issues around forced/slave labor and intellectual property enforcement, to name just a few, trade compliance professionals will have to keep a keen eye open to operational and compliance challenges.

Enforcement actions are a high priority in the US and other countries too. In the US, the trend towards high profile antidumping and countervailing duty investigations (such as cases involving newsprint, large civil aircraft and aluminum sheet) will likely continue in 2018. The enforcement agenda also includes novel cases including Section 232 national security investigations on aluminum and steel imports and safeguard investigations on solar products and washing machines. These cases may result in significant additional duties and increased friction with US trading partners. For example, the Trump Administration National Security Strategy states that the US "will no longer turn a blind eye to violations, cheating, or economic aggression," and that the Trump administration may take further action against Chinese trading practices, as well as other countries viewed as threats to US economic and/or national security.

NAFTA 2.0 is still being renegotiated, with Round Six scheduled for the end of January in Montreal. The prospects of modernizing this 24 year old agreement have mobilized various sectors in the economy who are seeking amendments to existing elements of NAFTA and entirely new chapters to reflect digital commerce, new practices in agriculture and regulatory cohesion, to name just three. The Trump Administration has stated that the three countries need to reach an agreement on an updated NAFTA by March, well ahead of the July 2018 Mexican Presidential election, the November 2018 US mid-term elections, and next year's Canadian provincial elections. However, it is increasingly likely that the negotiations will extend deeper into 2018. Many businesses are now developing contingencies plans for a post-NAFTA world.

Multilateral trade agreements with the US are unlikely to move forward, as withdrawal from the Trans-Pacific Partnership shows. The post-BREXIT trade regime is also far from certain as the UK has yet to secure a final deal with the EU.

A regulatory trend that is likely to continue is the use of trade to address broader supply chain issues. The United States has begun to actively enforce prohibitions on the importation of goods produced from forced/slave labor. The EU has recently spearheaded a global Alliance for Torture-Free Trade to ban trade in goods that could be used for torture.

For more information about any of the above subjects, please reach out to one of our Key Contacts.

Many businesses are now developing contingencies plans for a post-NAFTA world.

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