

administrations have long supported foreign capital contributing to the creation of US jobs.

In the current CFIUS, my impression is there has been perhaps a bit less energy directed toward that getting-to-yes effort. This is reflective of an ambivalence among some in the Trump Administration about whether inward investment from places like China is a good thing or a bad thing. On the one hand, you hear some in the Trump Administration talk about bringing in foreign investors that will create US jobs. But others in the Administration are allergic to the idea of Chinese companies buying assets in the US that will give them access to sensitive US technology or that will allow them to compete more successfully with US companies. My sense is these perspectives are in tension and result in not quite as much effort being applied by CFIUS into this getting-to-yes dynamic.

President Trump and Treasury Secretary Steven Mnuchin and Commerce Secretary Wilbur Ross have said things publicly that could be fairly understood as a reaffirmation of support of inward foreign investment. But they have also expressed support for legislation now pending in Congress

that would expand CFIUS's jurisdiction, and tighten up the standards by which it makes its judgments.

Another question that has been asked is whether CFIUS limits itself to national security issues. How susceptible is it to political pressure? The influence of Congress? The influence of trade groups or competitors or other kinds of judgments that might be seen as something other than a straight-up, merits-based judgment about the national security interests of the US?

Although the people who populate CFIUS are human beings who read the newspapers and are exposed to public discussion and public debate, the process is remarkably well-insulated from politics. CFIUS will not disclose – not to the public or even to Congress – that a transaction is pending before it. Sometimes deal parties will have put in their securities disclosure or in a public press release that they are seeking CFIUS approval, but CFIUS will not confirm or deny or comment on the question of whether a transaction is in fact pending before it. This confidentiality helps protect business-sensitive information, but it also helps insulate CFIUS from political pressure as it considers the national security implications of transactions.

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EUROPEAN COMPETITION COMMISSION: DO'S & DON'TS

EUROPE HAS BEEN DEVELOPING its competition (antitrust) policy since the 1950s. The European Commission is the institution responsible for investigating and deciding cases, subject to judicial oversight by the European Court of Justice. The European Union's merger regulation is only a quarter of a century old.

But in that time it has gained a reputation as a complex but efficiently run set of rules, administered in coordination with the competition authorities of the member states of the European Union. Globally, competition agencies often look to Brussels for a lead in international M&A cases.

So it would be useful to understand the structures and a few do's and don'ts for dealing with the European Commission. The political leader is the Competition Commissioner, currently Margrethe Vestager,



former Danish Minister of Economic Affairs and the Interior. The department is known as DG Comp (short for Directorate General for Competition).

In all cases, companies involved in or seeking to challenge a merger will need specialist advice on law, economics and

communications. Tell the truth and be prepared to provide compelling evidence.

DO demonstrate advantages for customers and final consumers; explain the expected positive impact on price, quality, innovation and employment; stress the competitive and expanding nature of the market; and present consistent legal, economic and communications cases across all jurisdictions.

DON'T forget that the EU is concerned to create or, where it exists, maintain a seamless single market across all its members. So don't present national or regional markets within the EU as separate without very good arguments and evidence.

Wherever possible, refer to previously decided cases and **DON'T** present your case as requiring or representing a new policy departure.

However strong the pressure or temptation, **DON'T** claim that some other public policy goal you think you meet is more important than competition.

DON'T underestimate or antagonize the Commissioner or DG Comp.

DON'T indulge in personal arguments; you are addressing political leaders, highly trained lawyers and economists.

DON'T rely on political connections or personal relations to influence or accelerate the regulatory process.

DON'T use the media to make your case, but **DO** respond to their questions with a coherent narrative about your business and its prospects.

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