Although large M&A transactions have, for some time, required careful management to co-ordinate merger control review by competition agencies in multiple jurisdictions, the number of cross-border transactions that are now also attracting foreign investment or some kind of public interest review are mounting noticeably.

Indeed, cross-border M&A across the globe is attracting increased political and media attention, which imposes acute pressure on governments to act to protect national security, jobs and national industries of strategic importance, all quite apart from the competition issues the transaction may raise. This trend of greater suspicion towards foreign investment looks set to remain as countries struggle to recover from the financial and economic crisis and as anxiety about national, electronic and technology security heightens.

**US**

In the US, Members of Congress and other relevant stakeholders are increasingly calling upon the Committee on Foreign Investment in the United States (CFIUS) and the President to protect national defence, critical infrastructure and technology by reviewing extensively and possibly blocking foreign acquisitions where ‘there is credible evidence… that the foreign interest exercising control might take action that threatens to impair the national security’.

Although certain due process rights must be respected where the President intends to suspend or prohibit a transaction under this foreign investment legislation, the President’s decisions on the merits are not judicially reviewable. Further, legislation has recently been proposed to expand the types of investment subject to national security review and to subject certain foreign investment to a ‘net benefit’ test.

If adopted, a greater swathe of transactions will require assessment to determine whether the net effect of the transaction is positive, both over the short- and long-term. The proposed legislation would constitute a radical departure from the current generally applicable US national security and antitrust merger control regimes.
In May 2014, the French government enacted a new decree on foreign investments subject to prior governmental authorisation. Although the French regime remains governed by the principle of freedom of investment, the decree significantly extended the list of strategic sectors in relation to which the prior authorisation procedure applies.

Maria Trabucchi
Partner, Paris

In the EU there is currently debate as to whether the structure of the new Commission might encourage closer scrutiny of mergers with the potential to impact on EU policies other than competition policy.

John Davies, Partner
Brussels and London

**Europe**

In the EU, a number of governments have power to intervene in transactions which raise public interest considerations, and to override any competition law assessment conducted. Indeed, in 2014, there were some notable examples of backlash against foreign mergers within the member states. For example, the French government became so concerned about the risks created by General Electric’s proposed acquisition of French energy and transport company, Alstom, that it enacted a new decree on foreign investments expanding greatly the circumstances in which investments in specified strategic sectors require authorisation from the Ministry of Economy.

In addition, Pfizer’s proposed acquisition of UK pharmaceuticals company AstraZeneca triggered considerable debate in the UK and led to pleas for the government to intervene in, and to influence the outcome of, the case. In the end, however, the government did not have to decide whether it should, or could, take action as a number of factors combined to contribute to Pfizer’s bid failing.

Although at the EU level, the Commission has, to date, generally been welcoming of foreign investment and conducted merger analysis in a way that is free of ‘non-competition’ considerations, the current debate is whether this stance might change under the new Commission. A key issue for 2015 will be whether the new Commission structure, which places emphasis on co-operation and co-ordination between the Commissioners, might encourage closer scrutiny of mergers with potential impact on EU policies other than competition policy.
The proposed US legislation seeking to establish a ‘net benefit’ test raises at least worrying overtones of protectionism given the elastic nature of that test. Even if the legislation never becomes law, its mere proposal is quite significant: it underscores that acquiring (directly or indirectly) control of a US business that could implicate national security concerns – very broadly defined – must be planned for carefully with knowledge not only of the CFIUS filing and review process, but also of ways to interact successfully with all relevant stakeholders.

Bob Schlossberg
Partner, Washington DC

Interventions worldwide

In Canada, the Investment Canada Act confers broad powers on the government to review whether certain direct acquisitions of control by a non-Canadian of a significant Canadian business is likely to be of ‘net benefit’ to Canada. The criteria to be considered under the net benefit test are widely drawn and the Canadian government’s rejection, in 2010, of BHP Billiton’s hostile bid for Potash Corporation of Saskatchewan has been considered to reflect an extraordinary degree of national protectionism.

In Australia, the government has rejected bids found to be unproblematic on competition grounds, which it considered to be contrary to Australia’s national interest (for example, ADM’s bid for Graincorp in 2013).

In China, the nature and some recent outcomes of the merger review conducted under the Chinese Anti-Monopoly Law (AML) has also led to some concerns that the AML may be applied to protect domestic businesses from foreign control.
Looking ahead to 2015

These developments indicate that cross-border transactions need to be planned carefully as the risk of public interest or foreign investment review increases the difficulty of managing a transaction and of predicting its outcome.

- **Unpredictable timetables**
  First, the variety of foreign investment and public interest regimes makes it harder to co-ordinate the timing of a deal. Although competition agencies have become used to co-operating and co-ordinating their merger review processes, similar structures are not in place for foreign security and public interest reviews.

- **Uncertain outcomes**
  Second, review outcomes are becoming more uncertain and more vulnerable to the exercise of political preferences. The less transparent criteria make it more likely that deals, especially in sectors liable to trigger national sensitivities, may be derailed.