A Comparative Analysis of Team Telecom Review

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I. Introduction

This report examines the interagency review of foreign investment in the U.S. telecommunications sector. Based on our extensive experience representing telecommunications companies before national and international regulators across the globe, we provide a comparative analysis of the U.S. and European regulatory clearance processes for telecommunications transactions.

U.S. telecommunications providers depend on foreign capital to finance and deploy next-generation networks, and the U.S. Federal Communications Commission ("FCC" or "Commission") has recognized accelerating foreign investment in the telecommunications sector as a key national priority.[2] Unfortunately, foreign ownership reviews inflict significant and unnecessary costs on the U.S. economy by hindering beneficial investment in the telecommunications sector. The interagency "Team Telecom" review process is slow, costly, opaque, and one-sided. It is also out of step with the processes for reviewing foreign ownership in Europe. Recognizing the need to streamline regulatory clearance, the National Telecommunications and Information Administration ("NTIA") and the FCC have initiated further reform of the process through a Notice of Proposed Rulemaking ("NPRM").[3]

This report focuses on a fundamental problem plaguing Team Telecom that has received little attention by commentators—namely, the duplication of effort that occurs among U.S. government agencies during the review process. As a general matter, administrative agencies tend to have an institutional interest in increasing the scope of their authority and, as a result, may stray from their original statutory mandates through "bureaucratic drift." Concerns can multiply when multiple agencies combine the scope of their authority or occupy overlapping substantive fields without explicit congressional approval. However well-intentioned at the outset, these practices have the potential to unsettle legislative design,[4] disturb core principles

[1] The views expressed in this paper are solely those of the authors and do not necessarily represent the views of Hogan Lovells US LLP or any of its clients.

[2] *Review of Foreign Ownership Policies for Broadcast, Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 30 FCC Rcd 11830 ¶ 1 (2015) (acknowledging the need to "facilitate investment from new sources of capital at a time of growing need for capital investment in this important sector of our nation's economy"); *Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 301(b)(4) of the Communications Act of 1934, as Amended*, Notice of Proposed Rulemaking, 26 FCC Rcd 11703 ¶ 2 (2011) ("an important source of equity financing for U.S. telecommunications companies" that fosters "technological innovation, economic growth, and job creation."); Michael O'Rielly, *Affirmatively Expand Permissible Foreign Ownership*, FCC Blog (Mar. 3, 2015, 4:03 PM), http://fcc.us/2bgbTQz (smaller or struggling companies particularly need foreign investment "as life blood keeping the doors open."); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 ¶ 50 (1997) ("*Foreign Participation Order*") (finding that foreign investment from WTO member states presumptively serve the "public interest").

[3] *Process Reform for Executive Branch Review of Certain FCC Applications and Petitions Involving Foreign Ownership*, Notice of Proposed Rulemaking, IB Docket No. 16-155 (June 24, 2016) ("*2016 NPRM*").

[4] *See* Daphna Renan, *Pooling Powers*, 115 Colum. L. Rev. 211, 257-58 (2015).

of administrative law,[5] permit an end-run around statutory restrictions,[6] and inflict real costs on regulated entities.[7]

That is precisely the case here. Many transactions referred to Team Telecom already undergo extensive review by the same administrative agencies through the Committee on Foreign Investment in the United States ("CFIUS"). In contrast to Team Telecom, CFIUS reflects the input and oversight of a diverse set of stakeholders, draws its express authority from federal statute, and protects the parties' investment-backed expectations through clear and predictable timelines. European countries generally do not rely on their telecommunications regulators to oversee duplicative foreign investment reviews. Neither should the United States. By withholding referral to Team Telecom of deals already subject to CFIUS, the FCC can streamline regulatory clearance, expedite deal closings, and align its review process with those in Europe while meeting national-security and law-enforcement objectives.

II. The Team Telecom Approval Process Is Opaque and Burdensome

The Communications Act of 1934 imposes foreign ownership limits on U.S. telecommunications companies. Section 310(b) caps direct foreign ownership of a U.S. common carrier spectrum licensee at 20 percent and indirect foreign ownership at 25 percent, unless the FCC finds foreign control promotes the "public interest."[8] Any transaction surpassing these thresholds automatically triggers a thorough, case-by-case "public interest" review. As part of its review, the FCC refers the transaction to "Team Telecom," a multi-agency entity comprised primarily of officials from the law-enforcement and national-security agencies: the Department of Justice, the Federal Bureau of Investigation, the Department of Defense, and the Department of Homeland Security.[9] The FCC also refers to Team Telecom applications for the grant or transfer of submarine cable licenses and international telecommunications licenses involving foreign ownership of greater than 10 percent.[10] This additional layer of scrutiny is intended to identify and mitigate national-security, law-enforcement, and other issues raised by the deal. The FCC makes its regulatory clearance contingent on Team Telecom's approval.

Team Telecom is problematic because it involves the redistribution and consolidation of agency power without a clear legal basis. Team Telecom is not required by law. It has no enabling statute. It does not promulgate, nor is it governed by, written rules and regulations. It draws its power solely from the FCC's statutory authority to review certain applications involving foreign ownership for the "public interest." Despite this lack of legislative authority or regulatory jurisdiction, the Commission defers to Team Telecom's analysis and recommendations.[11] The

[5] *See id.* at 259.
[6] *See id.* at 255.
[7] *See, e.g.*, William J. Rinner, III, *Optimizing Dual Agency Review of Telecommunications Mergers*, 118 Yale L. J. 1571, 1576-77 (2009) (noting the costs of overlapping merger review in the antitrust context).
[8] 47 U.S.C. § 310(b).
[9] *See Foreign Participation Order* ¶¶ 61-63. Although Team Telecom also includes officials from the U.S. Trade Representative and U.S. Department of State, it is our understanding that these agencies do not play as prominent role as the others in Team Telecom.
[10] *See* 31 C.F.R. §§ 800.204 (Note), 800.302(b); *2016 NPRM* ¶ 6.
[11] *See Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Second Report and Order, 28 FCC Rcd 5741 ¶ 34 (2013) ("While the Commission has exercised its discretion to rely substantially on the views of Executive Branch agencies for their expertise on matters of national security, law enforcement, foreign policy and trade policy in cases involving foreign investment in U.S. common carrier and aeronautical licensees, we do not believe it would be appropriate for us essentially to delegate this statutory responsibility to such agencies.").

procedural and substantive details of Team Telecom review are nonpublic.[12] By pooling their powers through Team Telecom and leveraging the FCC's licensing process, law-enforcement and national-security agencies gain the "power effectively to regulate private actors without judicial oversight."[13] And without effective oversight or transparency, the process has become what one FCC Commissioner has called an "inextricable black hole."[14]

Once the FCC refers a transaction to Team Telecom, the FCC's regulatory approval of the transaction remains indefinitely on hold, regardless of the merits of the transaction, while Team Telecom gathers facts from the applicant through a series of detailed questions. No deadlines currently exist to submit questions to the applicants or complete the factual inquiry. And responses to questions frequently elicit an additional round of questions from the Team Telecom agencies. Once Team Telecom completes an indefinite round of questioning and the applicant responds to each set of questions, the applicant waits again for an indeterminate amount of time as Team Telecom conducts an internal assessment. Moreover, at the request of Team Telecom, the FCC will defer starting its own review of the transaction for competition and other telecommunications issues as it waits for Team Telecom to finish.[15]

Delays are therefore the norm—the average Team Telecom clearance takes 250 days.[16] Transactions referred to Team Telecom reportedly take three to four times longer to clear than those that are not referred to Team Telecom.[17] The time necessary to obtain Team Telecom's approval often dwarfs the FCC's own prescribed deadlines to resolve an application or petition.[18] And over time regulatory delays associated with the process have grown so pronounced that they have attracted attention from Congress.[19]

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[12] Only a few details about the Team Telecom process have emerged. *See, e.g.*, Letter from Tim Cowen, General Counsel, Global Services, British Telecommunications plc, to Laura H. Parsky, Deputy Assistant Attorney General, U.S. Department of Justice, et al. (Jan. 12, 2005), http://fcc.us/2b8wTcL (British Telecommunications commitment letter regarding the acquisition of Infonet Services Corporation); Agreement regarding the transfer of licenses held by VoiceStream Wireless Corporation and Omnipoint Corporation to VoiceStream Wireless Holding Corporation signed between VoiceStream Wireless Corporation and VoiceStream Wireless Holding Corporation (collectively "VoiceStream") and the U.S. Department of Justice and the Federal Bureau of Investigation, Jan. 26, 2000, http://fcc.us/2bgwHZb; Agreement regarding the transfer of Tyco cable landing licenses signed between VSNL America Inc., VSNL US, and Videsh Sanchar Nigam Limited (VSNL) and the U.S. Department of Homeland Security, U.S. Department of Justice and Federal Bureau of Investigation, April 11, 2005, *available at* http://bit.ly/2b02aiV.

[13] *See* Renan, *supra*, at 272.

[14] *See 2016 NPRM*, Statement of Commissioner O'Rielly, http://bit.ly/2b47tsq ("O'Rielly statement"); *see also* Testimony of Stewart A. Baker, Hearing on "Cybersecurity: An Examination of Communications Supply Chain" before the Committee on Energy and Commerce, U.S. House of Representatives (May 21, 2013) (noting that "Team Telecom has no explicit authority in law").

[15] Joshua W. Abbott, *Network security agreements: communications technology governance by other means*, *in* Innovative Governance Models for Emerging Technologies 222 (Gary Marchant et al., ed. 2013).

[16] *See 2016 NPRM*, Statement of Tom Wheeler, http://bit.ly/2aGTw2O.

[17] Comments of Telecommunications Companies, IB Docket No. 16-555, at 4 (May 23, 2016) ("FCC applications requiring referral to Team Telecom (or applications with accompanying section 310 petitions that are referred to Team Telecom) take three to four times longer to receive approval than applications not subject to this review.") ("Comments of Telecommunications Companies").

[18] *See*, *e.g.*, 47 C.F.R. § 1.767(i) (providing 45 days for streamlined review of a cable landing license, 90 days for non-streamlined review, and an extra 90-day period when an "application raises questions of extraordinary complexity"); 47 C.F.R. § 1.948(j)(1) ("No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or determine to subject the application to further review. . . If the Bureau determines to subject the application to further review, it will issue a public notice so indicating. Within 90 days following the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.").

[19] *Oversight of the Federal Communications Commission: Hearing Before the Subcommittee on Communications and Technology of the H. Comm. On Energy and Commerce*, 114th Cong. 40 (2015) (statement of Commissioner

As a condition of approval, Team Telecom—and by extension, the FCC—require the parties to agree to and comply with a "Network Security Agreement." Network Security Agreements, which are not so much negotiated as imposed as a condition of Team Telecom's approval, are now routine, despite the FCC's initial expectation that "national security, law enforcement, and foreign policy and trade policy concerns … be raised *only in very rare circumstances*."[20] The terms and conditions of publicly-known Network Security Agreements have grown more invasive over time[21] and arguably permit Executive Branch agencies to do by agreement what they cannot do under statute.[22] Network Security Agreements have:

- required "access to all domestic communications, by setting up a U.S.-based facility from which electronic surveillance could be conducted,"[23] including the ability to promptly interrupt traffic to and from the U.S. on company submarine cable systems;[24]
- reserved the right of the U.S. government to approve members of the company's board of directors and imposed citizenship requirements for certain employees;[25]
- required the applicant to provide a "comprehensive description" of its network and telecommunications architecture in the U.S. as well as a list of "principal network equipment, including routers, switches, base stations and servers, as well as manufacturer and model numbers for hardware and software";[26]
- required notice, pre-approval, or rescission of certain equipment purchases (such as Sprint's commitment to remove all Huawei equipment from its network at a cost of nearly $1 billion);[27]
- granted inspection rights to the U.S. government and imposed ongoing auditing and reporting requirements; and
- restricted the location of network infrastructure, call data, and customer information.

O'Rielly) ("At the same time, fixing the process at the Commission will do nothing to alleviate the problems inherent in the opaque and lengthy 'Team Telecom' review process. I respectfully request this this body to consider ways to work across committee jurisdiction to craft an oversight function for Team Telecom that is grounded in fact and legitimacy rather than the whims of any Federal department at any given moment."); Statement of Rep. Eshoo, Foreign Government Ownership of American Telecomm. Companies, Hearing Before the Subcomm. On Telecomm., Trade and Consumer Protection, 106th Cong. 2d. Sess 31 (2000) ("I share the concerns of some of my colleagues with the FCC merger review process."); *see also* Statement of Chairman Tom Wheeler, Federal Communications Commission, Hearing on the FCC's Fiscal Year 2017 Budget Request, Before the Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives, at 2 (March 15, 2016) (noting the need for "enhanced transparency, greater public access, streamlined processes," and "more efficient use of . . . resources").

[20] *Foreign Participation Order* ¶ 61 (emphasis added).

[21] Spencer E. Ante et al., *U.S. Tightens Grip on Telecom*, Wall St. J., Aug. 27, 2013, http://on.wsj.com/2aGIhr6 ("Each agreement seems to become more restrictive as the government recognizes the benefits of access to networks and databases and as threats to national security increase.") ("*U.S. Tightens Grip*").

[22] *See, e.g.,* Theodore H. Moran, *US Surveillance Regulations for IT Company Networks: Towards A Global Framework* 7 (2014) (noting that Team Telecom's mandates exceed what is required under CALEA), http://bit.ly/2bdGnDo; Neil King Jr. et al., *Global Phone Deals Face Scrutiny from a New Source: The FBI*, Wall Street Journal, Aug. 24, 2000, http://on.wsj.com/2aSGa73 ("The FBI feared it would have no legal or practical way to wiretap a phone service operated entirely outside the U.S.").

[23] *U.S. Tightens Grip*, *supra*.

[24] *Id.*

[25] *See, e.g., Applications Filed by Global Crossing Ltd. & Level 3 Commc'ns, Inc. for Consent to Transfer Control*, Memorandum Opinion and Order and Declaratory Ruling, 26 FCC Rcd 14056 (2011) (terms of agreement between Level 3 Communications and Team Telecom); *see also* Craig Timberg et al., *Agreements with Private Companies Protect U.S. Access to Cables' Data for Surveillance*, Wash. Post, Jul. 6, 2013, http://wapo.st/2b1Opjz.

[26] *See* Timberg et al., *supra.*

[27] *See* P. Goldstein, *Report: Sprint could pay $1B to rip out Huawei's kit from Clearwire's network*, FierceWireless, May 23, 2013, http://bit.ly/2b2NFFv.

These burdens and delays are the result of a one-sided process. Although the government has blamed applicants for delaying clearance by seeking more modest concessions,[28] in reality, applicants have little leverage to negotiate. Because past agreements are typically not public, applicants have minimal prior guidance when structuring a deal or negotiating with the government.[29] There is no realistic possibility for judicial review of an agreement entered into "voluntarily."[30]

In addition, applicants face tremendous pressure to agree to any set of terms that would finalize a deal because even a short delay causes significant financial loss. Uncertainty accompanying such delays may hurt an applicant's stock price or raise its cost of financing.[31] The acquirer may incur the direct costs of delay in the form of increased merger consideration, reflected through a price premium or contractual provisions like ticking fees, reverse termination fees, or ticking dividends that penalize the acquirer for delays in closing. There are also opportunity costs for each day the synergies of a transaction are not realized. And regulatory delay can drain the transaction of its strategic value by giving rivals more time to anticipate and respond to a new competitive threat. Although difficult to measure, the uncertainties and specter of delay associated with Team Telecom have likely chilled foreign investment in U.S. providers.[32]

By contrast, Team Telecom has no reason to act quickly or limit its demands to conditions that have an evidentiary or logical relationship to purported national-security and law-enforcement objectives. Agencies tend to have institutional incentives to increase their budgets and regulatory authority.[33] Through collaboration, multiple agencies can do collectively what each could not do alone. Here, the members of Team Telecom—primarily drawn from the nation's defense, security and law-enforcement agencies—have little or no stake in encouraging foreign investment or network deployment. The only agency that could exercise control over the conditions of Team Telecom clearance—the FCC—has taken a hands-off approach in overseeing the process. Team Telecom is left effectively unchecked to pursue the interests of its constituent agencies, which largely have an institutional interest in obtaining surveillance and law-enforcement capabilities that they do not otherwise possess under federal law through the most expansive possible Network Security Agreements.[34] The absence of countervailing incentives, checks, or controls creates a heightened risk that these agencies will use their power in a manner inconsistent with the FCC's objective to promote investment in network infrastructure.[35]

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[28] *E.g.*, King et al., *supra* ("The FBI has its own version of the story, asserting that TMI prolonged the process by refusing to negotiate on key issues").
[29] *See* O'Rielly Statement.
[30] *See* Brent Skorup et al., *The FCC's Transaction Reviews and First Amendment Risks*, 39 Harv. J.L.& Pub. Pol'y 675, 700 (2015); Abbott, *supra*, at 229.
[31] *See generally* Robert B. Ekelund Jr. et al., *The Cost of Merger Delay in Restructuring Industries*, Heartland Policy Study No. 90 (1999), http://bit.ly/2b0acFU.
[32] Comments of Telecommunications Companies at 5-6 (noting that delays by Team Telecom have caused transactions to be abandoned); *see also* Roger Yu et al., *How Comcast, Time Warner Cable deal unraveled*, USA Today (Apr. 25, 2015) (noting that "the threat of delay" by the FCC "had doomed many deals in the past" and "spooked the executives"), http://usat.ly/2b4deWB.
[33] *See* Skorup et al., *supra*, at 684.
[34] *See* O'Rielly Statement.
[35] *See* Skorup et al., *supra*, at 685 ("If the goal of the agency is to increase its jurisdiction, public reputation, patronage, and output, while also balancing a desire for ease of rulemaking and management, the FCC's reliance on its amorphous public interest standard to create rules through its transaction reviews rather than through its formal rulemaking is the most effective tool at the agency's disposal.").

III. Team Telecom Frequently Duplicates CFIUS Review

In evaluating Team Telecom, it is instructive to examine CFIUS, an interagency group comprised of representatives from over a dozen federal agencies, including constituent members of Team Telecom—the Department of Justice, FBI, the Department of Defense, and the Department of Homeland Security. Many transactions referred to Team Telecom must also receive clearance from CFIUS.[36] In particular, CFIUS is authorized under statute to review any merger, acquisition, or takeover involving foreign control if (a) the transaction threatens to impair national security, (b) if the foreign entity is controlled by a foreign government, or (c) the transaction would result in foreign control of any "critical infrastructure that could impair the national security."[37] Foreign investment in telecommunications, which are deemed to fall within the broad category of "critical infrastructure,"[38] invariably undergoes CFIUS review.[39]

To be sure, CFIUS review suffers from some of the same defects that plague Team Telecom review. Commentators have complained, in particular, about overbreadth, secrecy, and burden.[40] But despite these flaws, CFIUS has a number of advantages over Team Telecom.

CFIUS is the product of Congress' concerted and repeated efforts to regulate and coordinate the national-security activities of Executive Branch agencies.[41] Congress designed CFIUS to pool diverse sources of expertise and institutional interests through representation from agencies that touch national security (*e.g.*, U.S. Department of Homeland Security), law enforcement (*e.g.*, Department of Justice), economic policy (*e.g.*, U.S. Department of Treasury), trade policy (*e.g.*, Office of the U.S. Trade Representative), and foreign policy (*e.g.*, U.S. Department of State). These stakeholders generate more balanced incentives that ensure CFIUS meets its jurisdictional mandate to consider "national security" without overstepping its bounds.

Team Telecom undermines this legislative design by intruding into a space where Congress has repeatedly spoken. In contrast to CFIUS, Team Telecom is comprised almost entirely of security and law enforcement-related agencies that the FCC—not Congress—unilaterally selected. Although these agencies nominally answer to the FCC, Team Telecom actually has a free-floating mandate, rooted in the FCC's authority to consider the "public interest," that arguably covers issues unrelated to national security and law enforcement and falls outside the expertise of Team Telecom's constituent agencies.

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[36] Exceptions include transactions that do not involve foreign control of an existing U.S. business, which fall outside CFIUS' jurisdiction. One example is a "greenfield investment"—a transaction where a foreign company creates a U.S.-based operation. Team Telecom may review transactions like greenfield investments even if CFIUS cannot. *See, e.g.*, *SatCom Sys., Inc.*, Order and Authorization, 14 FCC Rcd 20798 (1999) (granting application to provide mobile satellite service via Canadian-licensed satellite).

[37] 50 U.S.C. § 4565(b)(2). As a practical matter, transactions in which foreign investors propose to hold at least 10 percent of a target's voting equity have been submitted for CFIUS review because of the broad manner in which the CFIUS regulations define "control." *See* 13 CFR § 800.204.

[38] 42 U.S.C. § 5195c(b)(2).

[39] As a technical matter, the parties to a merger, acquisition, or takeover are not obligated to notify CFIUS of the transaction. Nevertheless, CFIUS may review a "covered transaction" at any time and seek remedial measures (*e.g.*, divestiture) long after closing. Accordingly, where a transaction is likely "covered" (*e.g.*, involving foreign control of "critical infrastructure"), the parties will, as a practical matter, choose to notify CFIUS in the first instance so as to avoid future uncertainty.

[40] *See, e.g.*, Derek Scissors, *A Better Committee on Foreign Investment in the United States*, Heritage Foundation Issue Brief (Jan. 28, 2013), http://bit.ly/2boeZmB.

[41] *See generally* David Zaring, *CFIUS As A Congressional Notification Service*, 83 S. Cal. L. Rev. 81 (2009).

CFIUS is at least minimally accountable to the three branches of government. It answers to Congress through regular reporting and other requirements.[42] Presidential approval is necessary to block a transaction.[43] And judicial review has been available in exceptional circumstances.[44] In contrast, Team Telecom derives no express authority from statute and is not subject to Congressional or Executive oversight.

Unlike Team Telecom, CFIUS is governed by statutory deadlines. Within 30 days of receiving notification by the parties, CFIUS must determine the extent to which the transaction implicates national security, critical infrastructure, or foreign government control. If it identifies national-security issues, CFIUS has an additional 45 days to investigate further. Following the 45-day period, CFIUS may require the acquirer to enter into a "mitigation agreement"—typically through a "Letter of Assurance" or "National Security Agreement"—to allay national-security concerns. Alternatively, CFIUS may take no action or refer the matter to the President, who has 15 days to suspend or prohibit the transaction.[45] These deadlines are clear and provide certainty. CFIUS must make a determination within 75 days. Unlike Team Telecom, CFIUS is not permitted to delay a transaction indefinitely.

When a transaction falls under the ambit of both Team Telecom and CFIUS, the review processes frequently operate on parallel tracks and with limited, if any, coordination. The CFIUS process typically concludes within 75 days, whereas Team Telecom review averages 250 days.[46] Details remain sparse due to the opaque nature of the process, but, during SoftBank's acquisition of Sprint, the transaction reportedly awaited further approval by the FCC and Team Telecom even after CFIUS review had been completed.[47] The National Security Agreement resulting from CFIUS review contained many of the provisions that would typically exist in a Network Security Agreement negotiated by Team Telecom.[48] And yet the delay between CFIUS and FCC approval lasted over a month, during which competitors and unsuccessful bidders collaterally attacked the National Security Agreement and lobbied the FCC and Team Telecom to block the acquisition or impose additional conditions.[49] Although the FCC and Team Telecom ultimately concurred with CFIUS' mitigation measures,[50] the example illustrates how regulatory overlap engenders a lack of finality that could imperil a major transaction.

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[42] *See, e.g.*, 50 U.S.C. § 4565(b)(3).
[43] 50 U.S.C. § 4565(d).
[44] *See, e.g.*, *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).
[45] 50 U.S.C. § 4565(d).
[46] *See 2016 NPRM*, Statement of Tom Wheeler, http://bit.ly/2aGTw2O.
[47] Alina Selyukh, *Sprint, SoftBank agree to U.S. national security deal*, Reuters, May 29, 2013, http://reut.rs/2bjesyc (noting that Softbank's acquisition of Sprint continued to be delayed by Team Telecom and the FCC even after CFIUS had already cleared the transaction and required a National Security Agreement).
[48] Sprint Nextel Corp., Report (Form 8-K) (May 29, 2013), http://bit.ly/2aGGYZn (noting that the National Security Agreement contains board membership criteria and requires government approval of network equipment and vendors).
[49] *See, e.g.*, Selyukh, *surpa*; Letter from Dish Network Corp., IB Docket No. 12-343 (Jun. 14, 2013). *See also* Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 34 (1984) (discussing the "attractiveness of antitrust as a method of raising rivals' costs" in the merger context).
[50] *Applications of Softbank Corp., Starburst II, Inc., Sprint Nextel Corporation, and Clearwire Corporation For Consent to Transfer Control of Licenses and Authorizations Petitions for Reconsideration of Applications of Clearwire Corporation for Pro Forma Transfer of Control*, Memorandum Opinion & Order, Declaratory Ruling, and Order on Reconsideration, 28 FCC Rcd 9642 ¶ 133 (2013).

IV. Telecommunications Regulators In Europe Generally Do Not Review Transactions for National-Security Concerns

A. Generally

The clearance processes in European nations also provide a helpful contrast to Team Telecom. Since at least 2002, every Member State of the European Union has delegated the responsibility for economic regulation of its telecommunications sector to an independent national regulatory authority ("NRA"). Prior to these liberalization reforms, a ministry within the government—generally the Ministry of Telecommunications—regulated the sector. Regulatory oversight shifted to NRAs in order to avoid conflicts of interest the government faced in its dual roles as regulator and shareholder of major operators. NRAs occupy a regulatory role equivalent to that of the FCC.

The NRA's role in reviewing a deal is limited to ensuring that it does not jeopardize the economic conditions underpinning the original license. An NRA may consider, for instance, whether a deal results in an overconcentration of spectrum holdings.[51] But an NRA has no role in reviewing the national-security aspects of foreign investment.

This makes sense from an institutional standpoint. In Europe, NRAs are *independent* from the government, and their powers are strictly limited by their enabling legislation. Enabling legislation generally tracks the European Framework Directive 2002/21,[52] which defines the roles and responsibilities of independent regulatory authorities in the telecommunications sector in Europe. And those roles and responsibilities are limited to regulating the market, ensuring fair competition, allocating scarce resources efficiently, and protecting consumers. The FCC has traditionally served a similar function within the patchwork of U.S. regulatory agencies.

No EU Member State, to our knowledge, has delegated to an independent regulatory authority questions relating to national security, and it is unclear whether such a delegation would be constitutionally permitted. Because national security represents a fundamental element of territorial sovereignty, most European constitutions exclusively vest that power in the government—generally the Prime Minister's office, the Ministry of Defense, and Ministry of Interior. These responsibilities cannot be delegated to an independent regulatory authority. For this reason, the role of NRAs in reviewing telecommunications transactions is limited to examining the economic effects of the transaction on the market, generally in cooperation with the national competition authority or the European Commission, whichever is in charge of the antitrust review.

Despite the limited role of NRAs, cross-border telecommunications transactions nonetheless undergo national-security review. A deal in so-called "strategic" industries and involving a foreign investor typically must be presented to a ministry in charge of reviewing foreign investments. Because large telecommunications operators are almost always considered "strategic" in Europe, these foreign investment transactions are generally reviewed under national-security rules. Such procedures are often managed by the Ministry of Economy, which consults other relevant ministries, including the Ministry of Defense and Ministry of Interior. As

[51] When Germany's Federal Network Agency reviewed the mobile network merger of Telefonica and E-Plus, for example, it was primarily concerned with the use of frequencies. *See* Bundesnetzagentur, *Annual Report 2014: Expanding networks. Securing the future. Infrastructure development in Germany* 95-96 (2015), http://bit.ly/2b40uz2.

[52] Council Directive 2002/21, On a Common Regulatory Framework for Electronic Communications Networks and Services, 2002 O.J. (L 108) 33 (EC).

a result of the review, the investor may be required to agree to undertakings as a condition of obtaining approval. This type of industry-agnostic clearance process bears more resemblance to CFIUS than Team Telecom. In the unlikely event that a country's NRA is consulted during this process, its input is limited to technical issues. As noted above, however, NRAs have no legitimacy whatsoever to address national-security issues.

These principles are illustrated below through an analysis of three of the EU's largest Member States: France, Germany, and the United Kingdom ("UK"). These three countries are a representative cross-section of European foreign investment regimes—France being on the more restrictive side, the UK on the more open side, and Germany in between.

B. France

In France, certain foreign investments in "strategic" sectors—energy, transport, water, public health, and telecommunications—require approval by the Minister of Finance.[53] The foreign investor must submit a formal application for prior authorization to the Minister, which then has two months to render a decision. If the Minister fails to render a decision, authorization is deemed to have been granted. The Minister is responsible for conducting the formal review process and communicating with the foreign investor. It also coordinates with other domestic agencies depending on the strategic sector involved. As a prerequisite to clearance, the Minister may impose certain conditions on the foreign investor to ensure that the contemplated transaction will not adversely affect public policy, public safety, or national security. The conditions will involve a signature of undertakings, the contents of which are not public. Alternatively, the Minister may block a transaction that cannot be remedied.

When conditions are imposed on a transaction, the French government generally tries to ensure that there is no interruption in services provided to the Ministries of Defense or Interior. For example, the parties may be required to keep critical elements of the services, including technology teams necessary to maintain them, on French soil. We are not aware of any other conditions imposed on foreign investment operations in France similar to those mandated by Team Telecom.

Independent from foreign investment rules, large French telecommunications operators must follow generally-applicable security obligations, some of which resemble the measures required by CFIUS or Team Telecom. Under French cybersecurity legislation, major telecommunications operators may be required to submit to the government security plans and open their networks to government audit. The government may also restrict operators' choices of cyber-defense technologies. These obligations apply, however, to all "operators of vital importance", and they are unrelated to French foreign investment procedures.

C. Germany

Section 55 of the German Foreign Trade and Payments Regulation entitles the Federal Ministry of Economics ("BMWi") to determine whether the foreign[54] acquisition of a domestic company endangers the public order or security of Germany. Such a review may be initiated by the

[53] *See* American Bar Ass'n, Report of the Task Force on Foreign Investment Review 46-50 (Sep. 28, 2015) ("ABA Report"), http://bit.ly/2aRmj7A.

[54] German law specifically scrutinizes transactions by an entity that is not a member of the EU or the European Free Trade Area ("EFTA").

BMWi or through a voluntary notification by the acquirer, in a direct or indirect acquisition of at least 25 percent of the voting rights of a German entity.

As with CFIUS, neither review by the BMWi nor notification by the acquirer is mandatory. If, however, a transaction falls within the scope of the BMWi's review scheme, the BMWi has the option to initiate proceedings and the parties cannot achieve legal certainty unless either the time for review has lapsed or the Ministry has—upon request—cleared the transaction through a certificate of non-objection. The BMWi must initiate review of a deal within three months of its consummation. If the BMWi decides to conduct a review, it will request information about the transaction through a series of questions directed to the parties. The BMWi then has two months to determine whether the transaction will endanger the public order or security of Germany.

The terms "public order" and "security" are understood to be interpreted according to EU law. Public security may be affected if the target is active in the area of telecommunications, electricity, and gas and petrol. Furthermore, the German government has identified certain industry sectors as "critical infrastructure"—transport and traffic (airports, railways, ports); energy; water and waste; hazardous materials; IT; finance; monetary system; insurance; health care; emergency and disaster control; and telecommunications and media—that could trigger a review. Although these "critical infrastructure" industries do not automatically trigger legally distinct treatment, transactions in these sectors are more likely to invoke the BMWi's interest.

If the BMWi concludes that a transaction endangers the public order or security, it may prohibit the transaction or issue instructions to ensure the public order or security (*e.g.*, unwind the deal). The BMWi can seek other remedies as well (*e.g.*, divestiture of critical assets).

Since the foreign investment review process was implemented in 2009, the BMWi has not formally blocked or imposed remedies on any transaction (although it is unknown whether parties may have voluntarily withdrawn from a proposed transaction for public order or security reasons). Of the 100 foreign investments reviewed on national-security grounds between 2010 and 2015, none were denied, and we are not aware of national-security conditions imposed on a transaction similar to those required by Team Telecom.[55] This holds true even for transactions involving controversial foreign acquirers.[56] These outcomes are in line with underlying German public policy, which stresses that the government will block a transaction only in rare and extraordinary circumstances.

Although Germany has never reviewed the acquisition of a major telecommunications network by a foreign investor, any conditions arising from such a review would likely be limited to ensuring the network's operability and availability to German consumers. Moreover, Germany would likely implement national-security and law-enforcement restrictions on foreign

[55] *See* ABA Report at 8, 50-52.

[56] In 2014, for instance, the BMWi unconditionally approved the acquisition of the RWE Dea gas storage facilities by Letter One, a Luxembourg-based company whose ultimate controlling shareholder was Russian oligarch Michail Fridman. The BMWi held that there are "very high hurdles" to impose conditions or prohibit the transaction. *See* Response of the Federal Ministry of Economics of 30 October 2014 to a minor interpellation, Federal Parliament register 18/2828 at 4. In a more recent case, the BMWi announced on August 17, 2016 that it would not prohibit or impose conditions on the acquisition of German robot maker Kuka AG by Chinese home-appliance maker Midea Group. While certain Members of Parliament advocated blocking the transfer of cutting-edge technology to a Chinese entity, the BMWi held that the products in question—robots for the automotive production—were not of sufficient strategic interest with respect to national security.

telecommunications providers through generally-applicable laws instead of merger-specific conditions.[57]

D. United Kingdom

In the United Kingdom, the Competition and Markets Authority ("CMA") performs a competition review of certain foreign transactions. The Secretary of State for Business, Innovation and Skills ("SoS") may conduct an additional merger review for the "public interest."[58] Mergers warrant a "public interest" review by the SoS when they involve national security, media, or finance. In addition, the SoS will conduct "public interest" review based on the amount of turnover or concentration in the relevant market.

The SoS may also intervene in "special public interest" cases. These involve transactions that fall below the jurisdictional thresholds for competition-based merger control but nonetheless raise wider public interest concerns. To date, there have been two such "special public interest" reviews, both of which were in the defense industry.[59] OfCom, the national telecommunications regulator, may advise the SoS on issues relating to viewpoint diversity in the context of telecommunications and media mergers, but it does not have an advisory role on national-security issues.

We are not aware of any conditions imposed on a foreign investment transaction in the telecommunications sector similar to those required by Team Telecom.

V. Conclusion

The burdens and delays associated with Team Telecom review are even worse than they appear because they are often unnecessary. A comparative review of CFIUS and European law suggests that Team Telecom often duplicates the work of CFIUS and increases the burden on applicants.

Instead of lifting this burden, the NPRM's proposals would exacerbate it through mandates that categorically apply to all transactions. The NPRM proposes that *all* applicants, *at minimum*, comply with a standardized set of questions and law-enforcement conditions, some of which may be intrusive or unnecessary.[60] The NPRM also proposes extending the universe of transactions subject to Team Telecom review to *all* "applicants and petitioners"—regardless of foreign ownership—that seek "international section 214 authorizations and transfers, section

[57] The BMWi's statement in the gas storage facilities case supports this conclusion. The Ministry justified its non-intervention by citing to generally-applicable provisions of the German Energy Act, which were deemed sufficient to allay transaction-specific concerns. *See* Response of the Federal Ministry of Economics of 30 October 2014 to a minor interpellation, Federal Parliament register 18/2828 at 5.

[58] *See* ABA Report at 55-62.

[59] Global Legal Group, *The International Comparative Legal Guide to Merger Control* 399 (12th ed. 2016).

[60] The FCC's NPRM promises to introduce more redundancy by proposing that Team Telecom collect information about an applicant's "financial condition and circumstances" and "compliance with applicable laws and regulations." Letter from The Honorable Lawrence E. Strickling, Assistant Secretary for Communications & Information, U.S. Department of Commerce, to Marlene H. Dortch, Secretary, FCC (May 10, 2016) at 3 ("NTIA Letter"); *see* Comments of T-Mobile USA, Inc., IB Docket No. 16-155, at 9 (May 23, 2016) ("Both of these areas relate directly to the applicant's financial and character qualifications, which Congress clearly granted the FCC authority to review and which the agency has gained expertise in reviewing since its inception. Given that the FCC is the expert agency for such matters, there appears to be no reason for the imposition of additional information requirements so that Team Telecom can conduct a parallel, duplicative review.").

310 rulings, submarine cable landing licenses, and satellite earth station authorizations."[61] These measures, which would inflict more costs and may not address particularized national-security concerns, would entrench Team Telecom's power and continue its trend of mission creep.

Nor does the NPRM address the issue of redundancy. Because it is not bound by FCC rulemaking, CFIUS will continue to be free to ask its own questions and negotiate its own mitigation conditions irrespective of any reforms to Team Telecom. Delays would also continue. Under the Commission's proposed rule, Team Telecom would have up to 180 days to complete its review. Although this represents a modest improvement over the average delay of 250 days, there is no good reason why Team Telecom requires more than twice as much time as CFIUS to complete substantially the same review.

To be sure, many of the proposed reforms (*e.g.*, the "shot clock" and advance notice of process) represent genuine improvements compared to the status quo when Team Telecom is the only entity examining national-security issues. But these reforms have limited utility in transactions that must pass through CFIUS. Meaningful reform of Team Telecom must start with the premise that it should be limited to transactions that would not otherwise receive national-security review. The FCC should deem it in the "public interest" to withhold referral to Team Telecom of any transaction that undergoes CFIUS review.

[61] NTIA Letter at 1; *see 2016 NPRM* at ¶14 ("We seek comment on this and whether there are situations where we should refer a domestic-only section 214 authority transfer of control application to the Executive Branch.").