

Foreign Investment Due Diligence: Navigating Mandatory Reviews, Expanding Scope and Regulation, Mitigating Risk

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Foreign Investment Due Diligence: Navigating Mandatory Reviews, Expanding Scope and Regulation, Mitigating Risk

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Overview

- Foreign Direct Investment (“FDI”) review is not a new concept in cross-border deals, but it has become an increasingly critical consideration
- These reviews typically focus on national security and/or public interest
- Reviews of FDI into the United States have long been subject to review by the Committee on Foreign Investment in the United States (“CFIUS”) and various other countries also have well-established FDI review regimes, such as France, Germany, Canada, and Australia
- Other countries have been working in recent years to develop their FDI review regimes, including with strong encouragement from the United States
- In both countries with established FDI processes and those working to develop them, there is a consistent theme more aggressively seeking to assess and mitigate risks relating to FDI

CFIUS Overview

- CFIUS is a US government inter-agency committee that reviews certain foreign investment and real estate transactions for national security concerns
- Key changes under the Foreign Investment Risk Review Modernization Act (“FIRRMA”):
 - CFIUS has expanded jurisdiction
 - CFIUS filings are mandatory in certain cases (though still mostly voluntary)
 - Penalties for noncompliance may be up to the value of the transaction
 - Declarations offer a short-form, expedited filing option
 - Formal process for identifying non-notified transactions

CFIUS Jurisdiction

- “Covered control transaction”: a transaction that could result in control of a US business by a foreign person
 - “Control” is the power, direct or indirect, whether or not exercised, to determine, direct, or decide important matters of an entity
- “Covered investment”: certain non-passive, non-controlling investments in certain US businesses by a foreign person
 - Nature of US business: must be a “TID US business”
 - produces, designs, tests, manufactures, fabricates, or develops one or more “critical technologies”;
 - involved in certain specified ways with certain “critical infrastructure”; or
 - maintains or collects, directly or indirectly, “sensitive personal data” of US citizens

CFIUS Jurisdiction

- Nature of investment: must afford the foreign person:
 - member/observer on the board of the TID US business;
 - access to “material non-public technical information” in the possession of the TID US business; or
 - involvement in substantive decision-making of the TID US business regarding critical technologies, critical infrastructure, or sensitive personal data
- Certain real estate transactions, transactions structured to evade CFIUS, and changes in rights that could result in a covered control transaction or covered investment

White & Case CFIUS FIRRMA Tool

- ❑ The White & Case CFIUS FIRRMA Tool provides an online, step-by-step analysis of a contemplated transaction in order to assist users in determining whether the transaction could be subject to CFIUS's jurisdiction and if mandatory filing requirements would apply
- ❑ Go to whitecase.com/cfius-firrna-tool



Mandatory Filing Requirements

- Subject to any relevant exemptions, a declaration (or notice) must be filed at least 30 days before completing two categories of transactions involving TID US businesses:
 - *Substantial Government Interest*: Acquisition of 25% or more of the voting interests by a foreign person in which a foreign government owns, directly or indirectly, at least a 49% interest
 - *Critical Technologies*: Target produces, designs, tests, manufactures, fabricates, or develops one or more “critical technologies” that are subject to export authorizations with respect to the foreign investor or its substantial owners
- Historically, CFIUS was ostensibly a fully voluntary process; post-FIRRMA, CFIUS remains predominantly a voluntary process



CFIUS Trends

- ❑ Increased coordination between countries on FDI reviews of cross-border deals
- ❑ CFIUS is demonstrating more willingness to exercise broad jurisdiction, including to address activities outside of the United States
- ❑ Continued high scrutiny of Chinese investment and investment by foreign acquirers connected to China, particularly in sensitive areas
- ❑ CFIUS is aggressively pursuing non-notified transactions
- ❑ Even as Chinese investment has declined, mitigation continues to be a key issue that parties must consider and plan for
- ❑ Declarations are proving a useful tool for more benign transactions

Due Diligence Considerations

- Understand as soon as possible the target's global activities
 - Coordinate with the antitrust/merger control teams
- Develop a list of countries to address for initial FDI due diligence
- Coordinate with international colleagues and with local counsel as needed in relevant jurisdictions for preliminary assessment
 - Jurisdictional considerations
 - Potential mandatory filing requirements
 - Timing considerations



Practice Tips

- ❑ Consider asking both general questions applicable to multiple FDI regimes (e.g., the target's government business) as well as ones tailored to specific considerations for given countries
- ❑ Focus analysis on both process considerations and anticipating potential hurdles, and be proactive in managing the FDI strategy in relation to both
- ❑ Keep the deal rationale front of mind when assessing potential mitigation measures and negotiating risk allocation in deal documents
- ❑ Ensure close coordination among FDI counsel in applicable jurisdictions to best manage deal timeline and closing expectations

Expansion of FDI Control

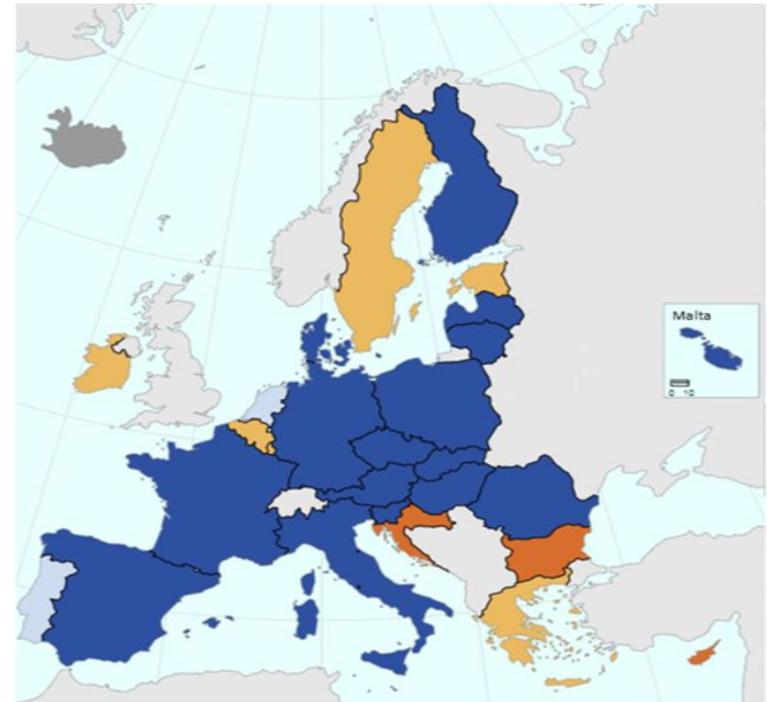
- Governments are **generally positive** toward FDI
 - Generally acknowledged that cross-border direct investments have an important impact on economic growth and productivity
- But investments in certain sensitive and strategic sectors can pose a **risk to national security or public order**
 - Telecommunications, technologies, infrastructure including energy and transport, defense, health care
 - Investors may gain access to important knowledge, sensitive data
- **Increased scrutiny** as a result of the financial crisis triggered by the pandemic
 - Change in investor profiles and investment patterns: non-OECD investors with government backing or direction
 - Call for action by Governments/EU: legislative measures to protect security, public order, and specific investment targets, e.g. critical infrastructure and inputs, including certain technologies, certain sectors such as the health sector
 - Increase in jurisdictions with a screening mechanism and broadening of the scope of existing mechanisms
 - List of potentially relevant critical target activities is getting longer and longer in most EU countries (infrastructure, technologies)
- **Chinese** (state-owned/controlled) investors remain main focus but—depending on criticality of target—“friendly” investors are scrutinized and may need to agree to commitments

FDI Control is an Important Part of Transactions

- FDI reviews are becoming more prevalent—and more stringent—in countries throughout the world, and can play a critical role in cross-border transactions involving the acquisition of assets in multiple countries. Understanding the rules and pitfalls of the applicable FDI regimes is quickly becoming critical
 - Lack of transparency of FDI regimes
 - Lack of harmonization of FDI regimes
- The expansion and enhancement of FDI review regimes globally—including an expansion of industries subject to review beyond traditional defense-related industries—underscores the need for effective FDI assessment
- Without a proper strategy at the start of a transaction, FDI reviews can become deal breakers or expose transactions to legal challenges and increased costs
 - Generally long review periods require advance preparation to obtain timely approvals to meet deal objectives
 - Avoid unexpected impacts on the target business's operations and restrictions on the investors' rights with respect to the target

Trends: EU

- Today, **18 EU Member States** have FDI regimes in place
 - Differing terms re: mandatory/voluntary filing, thresholds, industries, *etc.*
 - **Rapidly evolving area**, new regimes and amendments to widen existing regimes
 - In several Member States, **review duration will likely increase** – Germany expects around 200 cases to be notified from other Member States (on top of its own cases – 159 in 2020 alone and expected to increase)
 - **No Member State is required to introduce an FDI regime**, but the European Commission desires all 27 Member States put national FDI screening mechanisms in place
- The **EU FDI Screening Regulation** became applicable in **October 2020**
 - Establishes a **cooperation mechanism** between the Member States. Gives the European Commission a role in FDI screenings
 - Member States shall exchange information about ongoing FDI cases with the European Commission and Member States
 - The European Commission and Member States may raise concerns and issue opinions but not block any transactions – however informal cooperation between Member States is possible to block a transaction

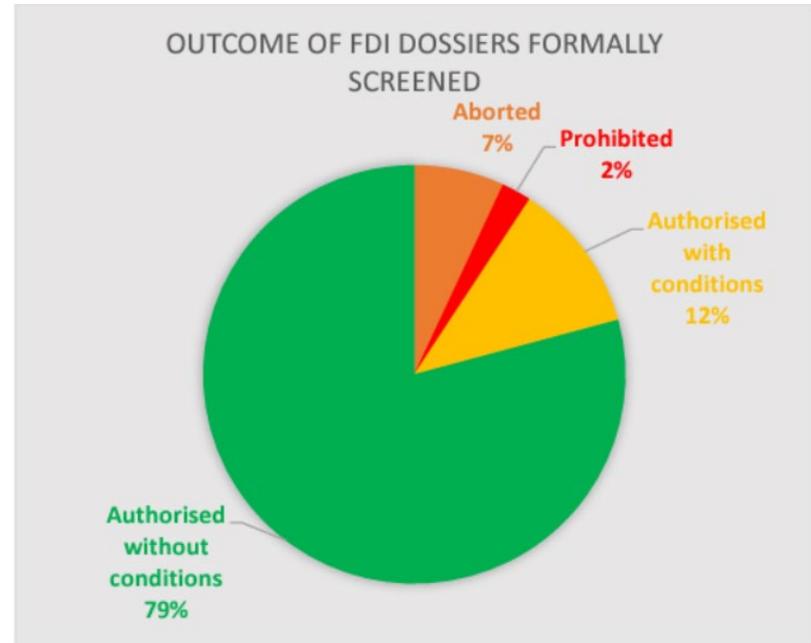
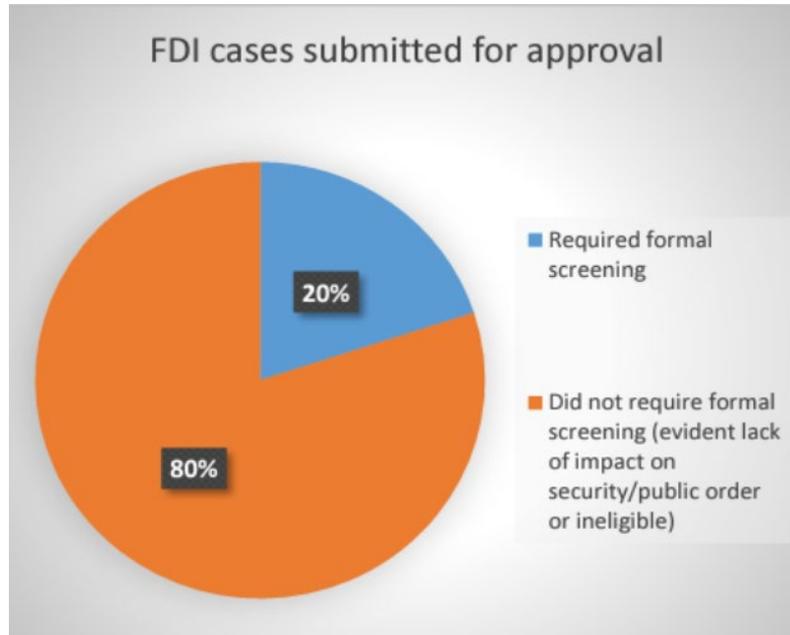


- EU MS with a screening mechanism.
- EU MS with a screening mechanism in the process of **updating the existing one**.
- EU MS without a screening mechanism considering, planning or **in the process of adopting a mechanism**.
- EU MS without a screening mechanism, and **without any legislative developments** aiming at setting up a mechanism.

Source: European Commission, *First Annual Report on the screening of foreign direct investments into the Union*, 23 November 2021.

Trends: EU

- Most National FDI Notifications in the EU are speedily approved or approved without conditions



Source: European Commission, First Annual Report on the screening of foreign direct investments into the Union, 23 November 2021.

Managing the Assessment

- FDI v. Non-FDI: FDI screening imposed on foreign investors should be differentiated from local regulatory restrictions applied to target
 - Duty to report change of control
 - **Sweden** has a pre-approval process imposed on the seller
 - **Canada** requires post-closing administrative filing for all transactions not captured by FDI regime
- General FDI regimes vs. sector-specific review
 - **Singapore, Bulgaria, and Netherlands** restrict FDI in certain sectors only (such as telecommunications, military products, or agriculture)
- Determining the local trigger
 - Local corporate presence, operations, contracts, or even sales
 - **France** regimes covers investments made in local “entities” (which is undefined)
 - **The UK’s** new regime covers sales and operations in the UK, not just legal entities
 - **Sweden’s** upcoming regime will likely cover contracts made in Sweden
 - Greenfield investments
 - **China** requires filings from investors in greenfield investments

Managing the Assessment

□ Determining the type of investors captured

- What is a “foreign” investor?
 - The concept can raise complexity
 - Differentiated treatment of certain investors because of their origin/nationality:
 - Many EU Member States (e.g. **Spain**, **Czech Republic**) will exempt EU investors, but not non-EU. (But see **France** that covers all non-French investors.)
 - **India’s** FDI regime focuses on certain investors from “hostile” countries (i.e. neighbors on its borders)
 - Other discrimination may occur (e.g., investors undergoing administrative/criminal proceedings; see, e.g. **Germany**)
 - **UK** regime applies equally to domestic investors
- Private investor vs. public investor:
 - **State-owned investors** can be subject to increased scrutiny.
 - **Australia’s** normal trigger threshold of A\$ 281 million drops to A\$ 0 for foreign government investors (as defined in the statute), with certain exceptions
 - **Spain** also requires filings from all state-owned investors, with certain exceptions

Managing the Assessment

- Determining the type of investments captured
 - Acquisition of controlling stakes, but the definition of “control” may vary.
 - **Canada** enforces a rebuttable presumption of control over 30%
 - Minority stakes acquisitions:
 - The standard threshold is 25%, but many countries have introduced lower thresholds for certain types of investments (e.g. **Italy** uses 5% for national security-related investments)
 - Direct vs. indirect acquisitions:
 - **Japan** and **South Korea** only capture direct acquisitions of shares in local subsidiary
 - **Canada** also disregards indirect investments in non-cultural businesses from investors in WHO nations
 - Asset deals are generally covered by FDI rules
 - Some regimes determine filing requirements based on additional factors
 - **Germany** – filing in healthcare sector for hospitals handling 30,000 or more cases/year, annual turnover in life-saving medical products over €9.068 million, *etc.*
 - **Canada, Australia, and Spain** have enterprise value thresholds that affect filing requirements

Managing the Assessment

□ Types of sectors/activities concerned

- Many regimes aim to protect certain **sensitive sectors**; however, **transaction size** or **real estate** can also be of concern.
 - See chart on right for sector examples from the **EU**
 - **Spain's** regime is triggered only if the transaction is € 1 million or more
 - **New Zealand's** regime includes investment in certain sensitive or heritage/cultural lands

Country	Defense	Healthcare	Energy	Telecom	Agriculture/ Food production	Transportation	Real estate	Other
Austria	□	□	□	□	□	□		Food, IT, water
Bulgaria	□		□				□	Finance
Croatia								Finance
Czech Republic**	□	□	□			□		Finance, data, critical technologies
Denmark	□		□					
Estonia			□		□		□	
Finland	□							
France	□	□	□	□	□	□	□	Data, media
Germany	□	□	□	□	□	□	□	Media, cloud computing, telematics, finance, dual-use goods
Hungary	□	□	□	□	□	□		
Italy	□	□	□	□	□	□	□	Finance, data, media, critical technologies
Latvia			□	□	□		□	Gambling
Lithuania	□		□	□		□		Finance
Malta	□	□	□	□		□	□	
Poland	□	□	□	□	□	□	□	
Romania	□		□	□		□	□	Finance
Russia	□		□	□		□		Media, insurance
Slovenia	□	□	□	□	□	□	□	Finance, insurance, data, critical technologies
Spain	□	□	□	□	□	□	□	Finance, data, media, critical technologies
Turkey			□	□		□	□	
United Kingdom*	□							Financial sector, media

*Activities most reviewed by the UK government (but not statutory)

**On the basis of a bill currently under discussion

Coordinating the Filings

- Diversity of reviewing authorities
 - Some jurisdictions maintain specific agencies for FDI, such as **New Zealand's** Overseas Investment Office (OIO)
 - Others house FDI responsibilities in general departments, like **France's** Ministry of the Economy
- Mandatory/voluntary filings/ex officio intervention rights of the government
 - Regimes vary greatly on what transactions will require a filing and not
 - Many include “call in” or “non-notified” functions, wherein the government can require a filing for a transaction not otherwise subject to one (such as the **UK** or **Canada**)
- Anticipating the standstill effect and potential exemptions from it
 - Certain jurisdictions (such as **Germany**) have standstill periods, which bar closing until the government has cleared the transaction
 - Usually such standstill periods are only relevant to transactions that require a filing

Coordinating the Filings

□ Duration and structure of the proceedings

- Each jurisdiction follows a different timeline and processes varying levels of case volume. The best practice is to start the FDI analysis early and file as soon as possible (if required)

□ Penalties/Enforcement

- Negative consequences can result for failing to abide by FDI rules in applicable jurisdictions—these include fines, criminal and civil charges, and even [divestment](#)

□ Mitigation/Remedies

- In keeping with sentiment that cross-border investment is economically smart, governments will often [require mitigation](#) to allow the transaction to go through while guarding against perceived risk
- Mitigation varies greatly. It can include terms and conditions such as:
 - maintaining sufficient local resources,
 - restrictions on IP rights,
 - board and governance requirements,
 - mandatory continuation of sensitive contracts,
 - appointing security officer, and
 - reporting obligations.

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FOREIGN INVESTMENT DUE DILIGENCE: NAVIGATING MANDATORY REVIEWS, EXPANDING SCOPE AND REGULATION, AND MITIGATING RISKS

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January 19, 2022



Cross-Border Transaction Overview

- ❖ Regardless of global tensions, cross-border investments continue at a robust pace
- ❖ Factors that impact investment continue to expand
 - More creative investment vehicles – *e.g.*, SPACs
 - Investment timing and milestones change
 - Nonmonetary investments have expanded – *e.g.*, provision of personnel, equipment, royalty-free license agreements, and educational opportunities
 - Expanded and more detailed national security investment regimes – *e.g.*, the United Kingdom, the European Union, Japan, the People's Republic of China, and Russia



Cross-Border Transaction Overview

- ❖ Increased regulatory focus on key areas continues
 - Technology interest
 - ◆ Emerging technologies
 - Definitions
 - Management of qualifying technologies
 - ◆ Export controls
 - Scope
 - Classifications
 - Licensing
 - Global coordination

TRANSACTIONS REVIEWED

PURCHASER	PURCHASER COUNTRY	TARGET	INDUSTRY	OUTCOME	DATE
SoftBank Corporation	Japan	Cruise	Self-driving vehicles	Cleared with conditions	2019
Atlas Copco AB	Sweden	Edwards Vacuum LLC	Semiconductor cryogenics	Cleared	2019
Beijing Kunlun Wanwei Technology Co. Ltd.	People's Republic of China ("China")	Grindr	Information services; personal data	Mitigation/divestiture: data access restrictions, governance obligations, to include 3 CFIUS-approved members of the Grindr board of directors and 1 independent director (US citizen) with mobile application technology experience; shares held by Kunlun must be sold before June 30, 2020 (or CFIUS can find a trustee to take ownership pending the sale)	2019
Brookfield Asset Management Inc.	Canada	TerraForm Power	Energy	Cleared	2019
Infineon Technologies AG	Germany	Cypress Semiconductor Corporation	Semiconductors	(Requires China FDI review)	2019
Safran SA	France	Zodiac Aerospace	Aerospace/aviation	Cleared	2019
Speedcast International, Ltd.	Australia	Globecom Systems, Inc.	Telecommunications; satellite	Cleared	2018
Renesas Electronics Corporation	Japan	Integrated Device Technology Inc.	Semiconductors	Cleared	2018
Voltabox AG	Germany	Navitas Systems, LLC	Energy; battery and electronic component manufacture	Withdrawn	2018
China Oceanwide Holdings Group Co., Ltd.	China	Genworth Financial Inc.	Financial services; insurance	Cleared with conditions (Third party service provider limits access to personal information)	2018
Renesas Electronics Corporation	Japan	Intersil Corporation	Semiconductor; electronics	Cleared with conditions (ITAR and consent agreement requirements)	2018

TRANSACTIONS REVIEWED

PURCHASER	PURCHASER COUNTRY	TARGET	INDUSTRY	OUTCOME	DATE
Reliance Industries Ltd.	India	Radisys Corporation	Telecommunications	Cleared	2018
CVC Capital Partners	UK	ConvergeOne Holdings Inc.	Technology services	Mandatory declaration	2018
Unic Capital Management, Ltd. and China Integrated Circuit Industry Investment Fund Co.	China	Xcerra Inc.	Semiconductors	Withdrawn and abandoned (CFIUS unwilling to approve)	2018
Wingtech Technology Co., Ltd.	China	Nexperia Holdco Netherlands BV	Semiconductors	Unlikely to clear (Nexperia is a manufacturer of discretes, logic devices and MOSFETS and the former Standard Products business of NXP Semiconductors NV, which was sold to a consortium of Chinese based investors in 2017, with CFIUS clearance)	2018
BlueFocus international Ltd	Hong Kong (a strategic administrative region of China)	Cogint, Inc.	Technology services; network and data solutions	Withdrawn and abandoned (CFIUS unwilling to approve)	2018
Creata Group Corporation and Tiancheng Pharmaceutical Holdings AG	China and German subsidiary of a Chinese company	Biotest AG	Healthcare; pharmaceutical	Cleared	2018
Melrose Industries PLC	UK	GKN PLC (UK)	Aerospace; automotive; engineering	Cleared with conditions (DSS approval and interim mitigation measures)	2018
Sonaca SA	Belgium	LMI Aerospace, Inc.	Aerospace	Cleared with conditions (ITAR, 60-day pre-notification and 5-day notice)	2018
Marvell Technology Group Ltd	Bermuda	Cavium Inc.	Semiconductors	Cleared	2018

TRANSACTIONS REVIEWED

PURCHASER	PURCHASER COUNTRY	TARGET	INDUSTRY	OUTCOME	DATE
China Heavy Duty Truck Group Co., Ltd.	China	UQM Technologies, Inc.	Electric Vehicles	Withdrawn and abandoned	2018
Orolia SA	France	Talen-X Inc.	Telecommunications; communications equipment manufacture	Cleared with conditions (DSS)	2018
Kuraray Co., Ltd.	Japan	Calgon Carbon Corporation	Chemicals	Cleared	2018
Harbin Pharmaceutical Group Holdings Ltd.	China	GNC Holdings, Inc.	Pharmaceutical; retail	Cleared	2018
TTM Technologies, Inc.	US (with Chinese board member)	Anaren Holding Corporation	Integrated circuits; technology services	Cleared with conditions	2018
Fujifilm Holding Corporation	Japan	Xerox Corporation	Technology; technology services; software	Abandoned (DSS, DOE approvals needed and shareholder litigation)	2018
SDIC Fund Management Co.	China	Maxwell Technologies, Inc.	Electronic component manufacture; battery manufacture	Abandoned	2018
SoftBank Group Corporation	Japan	Fortress Investment Group	Financial services	Cleared with conditions (ITAR 60-day notification)	2018
Ultra Electronics Holdings plc	England and Wales	Sparton Corporation	Integrated circuits; electronic engineering; electronic manufacture	Cleared with conditions (DSS and ITAR 60-day notification)	2018
Naura Technology Group Co., Ltd.	China	Akron Systems, LLC	Semiconductors	Cleared (with four (4) SOEs among the top 10 shareholders)	2018
Zhengshou Coal Mining Machinery Group Co., Ltd. and China Renaissance Capital Investment (China)	China	Robert Bosch Starter Motors Generators Holding GmbH	Automotive	Cleared	2018

TRANSACTIONS REVIEWED

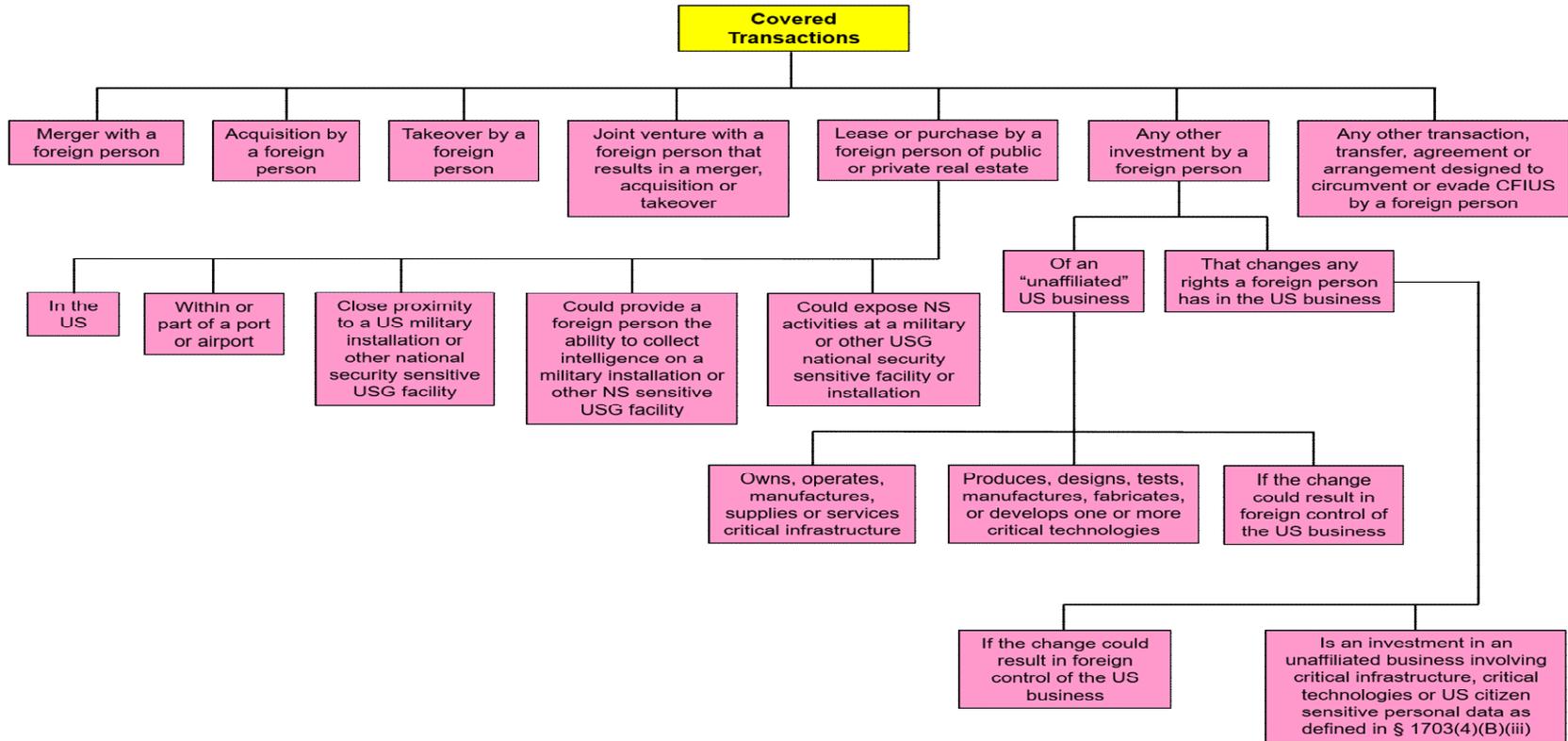
PURCHASER	PURCHASER COUNTRY	TARGET	INDUSTRY	OUTCOME	DATE
Orient Hontai Capital (China) and Orient Securities Limited (China)	China	AppLovin Corporation	e-Commerce; software	Abandoned; then refiled	2017
HNA Group (International) Co., Ltd.	China	Ness Technologies S.A.R.L. and Jersey Holdings Corporation	Software; technology services	Abandoned (Lawsuit filed against the Chinese purchaser alleging failure to exercise reasonable efforts to obtain CFIUS clearance and for allegedly providing misleading or incorrect information to CFIUS)	2017
HNA Group	China	OM Asset Management plc (England and Wales)	Financial services	Cleared	2017



RECENT SELECT FOREIGN DIRECT INVESTMENT CASE STUDIES

- ❖ Hubei Xinyan Equity Investment Partnership-Xcerra (2018)(US)(blocked)
- ❖ NAURA Technology Group-Akrion Systems LLC (2018)(US)(approved)
- ❖ Oceanwide-Genworth (2018)(US)(approved and subsequently blocked)
- ❖ Gardner Aerospace Holdings-Northern Aerospace(2018)(UK)(approved)
- ❖ Integrated Device Technology-Renasas Electronics Corporation (2018)(US)(approved)
- ❖ Sprint Corporation-T-Mobile USA (2018)(US)(approved)
- ❖ Aecon Group-CCCC International Holding (2018)(Canada)(blocked)
- ❖ Yantai-Leifeld (2018)(Germany)(blocked)
- ❖ HNA-AHG (2018) (Australia)(blocked)
- ❖ HNA-UDC Finance (2018)(New Zealand)(blocked)
- ❖ Sulzer-Simcro (2018)(New Zealand)(blocked)

FIRRMA § 1703(4)(A) and (B)





AREAS OF INTEREST TO CFIUS

- ❖ CFIUS areas of interest include
 - Export controlled technology, products, materials, equipment and software
 - Supply chain
 - The purchaser's or investor's relationships with China (including Hong Kong)
 - Cybersecurity
 - Access to big data – whether personal, business, technical or a combination
 - Sanctions compliance
 - Compliance with US laws and regulations generally (e.g., export controls, sanctions, government contracts, securities requirements, cybersecurity requirements)



EXPORT CONTROLLED TECHNOLOGIES AND RELATED ITEMS

- ❖ Technology applications
- ❖ Multilateral technology controls
- ❖ End user focus and sanctioned parties
- ❖ Made in China 2025 – the manner in which technology may be used
- ❖ Whether ‘foreign adversaries’ may use technology in a manner detrimental to US interests
- ❖ Updating US and multilateral technology lists
- ❖ Consideration of how ‘critical technologies’ are defined – see, e.g., the establishment of the Office of Critical Technologies as part of the Office of the President
- ❖ The tie between intellectual property, export controls, and “controlled unclassified information”



SUPPLY CHAIN

- ❖ Identifying the supply chain
 - For the US business
 - For the foreign purchaser/investor
- ❖ 1st, 2nd and 3rd tier supply chain identification is no longer adequate
- ❖ Understanding who within the supply chain is a **sole source** and from what country(ies)
- ❖ Understanding who within the supply chain is a **sole qualified source** and from what country(ies)
- ❖ NAICS codes and Defense Priorities and Allocations System (“DPAS”) ratings – still remain relevant from a diligence perspective
- ❖ Understanding the threat to the supply chain faced by the US business and the foreign purchaser/investor
- ❖ Supply chain consolidation



PURCHASER/INVESTOR RELATIONSHIP WITH CHINA

❖ Increased focus by CFIUS

- How long has the foreign purchaser/investor had relationships in China
- What kind of relationships – *e.g.*, joint ventures, research and development centers, marketing agreements, baseline supply chain agreements, employees from China on visas, collaborations with Chinese universities or universities in the US with relationships/funding from China, etc.
- What Chinese law requirements apply to the relationships
- What parties were involved (directly or indirectly) – *e.g.*, universities, research institutes, distributors, state owned enterprises, state directed enterprises, government laboratories, university professors or students, etc.
- What export licenses were obtained for the transfer of any technology from the United States to China – from whom and for how long
- Was any of the technology routed through third parties – *e.g.*, did the US company enter into an agreement with a third party who then forwarded the technology to China
- Were Chinese funds used to make the investment – *e.g.*, Chinese banks, Chinese venture capital funds, etc.



CYBERSECURITY

- ❖ What cybersecurity programs does the foreign purchaser/investor have
- ❖ What cybersecurity programs does the US business have
- ❖ How many cyber breaches has the foreign purchaser/investor experienced
 - How many have been reported
 - To which government agency (US or foreign) were they reported
 - How were they remediated
 - Do vulnerabilities remain
 - Did the vulnerabilities and cyber breaches result in the loss of data considered critical to US national security or other interests
 - Were there any foreign filings made regarding the breaches, vulnerabilities, consequences and remediation and to whom



ACCESS TO DATA

- ❖ Data – personal, technical or financial/business
 - What data does the US business possess
 - ◆ How is it protected
 - ◆ What agreements exist for the protection of data
 - ◆ Who has access and for what reason
 - ◆ How can access be terminated
 - ◆ How many breaches have occurred
 - ◆ To whom were they reported
 - ◆ How were they remediated
 - What data access is the foreign purchaser/investor requesting
 - ◆ How is data generally protected
 - ◆ What additional considerations apply to the foreign purchaser/investor's cyber requirements – *i.e.*, privacy, anti-foreign sanctions requirements



SANCTIONS COMPLIANCE

❖ Compliance with US sanctions

- How does the foreign purchaser/investor comply with US sanctions
- Does the foreign purchaser/investor have a sanctions compliance program
- Is the foreign purchaser/investor subject to blocking or other home country statutes that impede compliance with US sanctions programs
- How does the foreign purchaser/investor interpret CAATSA or other similarly broad statutes from a compliance perspective
- Does the foreign purchaser/investor home country abide by multilateral sanctions programs – *i.e.*, programs or policies agreed to at the United Nations
- Has the foreign purchaser/investor's home country government made public statements contrary to US sanctions policies or passed laws and regulations that create conflict with US sanctions compliance



COMPLIANCE POSTURE UNDER US LAWS AND REGULATIONS

- ❖ Compliance with US laws and regulations is an indication of reliability which can be important to clearing a CFIUS transaction
- ❖ FIRRTA expressly requires consideration of a foreign purchaser/investor's compliance with certain US laws and regulations, such as export control and sanctions laws
- ❖ Parties who experience difficulties or challenges with compliance may face increased scrutiny during a CFIUS review and may find their transactions subject to mitigation to address the view that the foreign purchaser/investor may be unable to handle compliance requirements as part of the CFIUS clearance
- ❖ Particular challenges arise with OFAC and the International Traffic in Arms Regulations ("ITAR"), where the agencies have expressly extended jurisdiction to foreign parties for violating the OFAC regulations and the ITAR



DUE DILIGENCE

- ❖ Updates to diligence checklists – expand the focus
 - Suppliers – *e.g.*, beyond the top 10 suppliers
 - Identify Title III critical or strategic materials
 - Financing – *e.g.*, who is providing financing for the transaction (delve into structures)
 - Understand who may replace investors – *e.g.*, is an investor ‘swap out’ permitted post-closing
 - Obtain details on NAICS codes, DPAS ratings, and other DPA designations – *e.g.*, representations may be inadequate
 - Obtain details and copies of export authorizations, classifications and enforcement actions (as they apply to both the US business and the foreign purchaser/investor)
 - Obtain details on technology licenses (from an IP perspective) – *e.g.*, on what basis can a foreign purchaser/investor terminate a technology license
 - Where does the foreign purchaser/investor sit in the supply chain – *e.g.*, with commercial customers and with government customers (whether US or foreign)
 - Are foreign direct investment filings required or recommended for other than the United States



QUESTIONS



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Giovanna M. Cinelli is the Firm's leader of the International Trade and National Security Practice. Throughout a career spanning over 30 years, she has represented and counseled defense, aerospace and high technology companies on a broad range of issues affecting national security, including export investigations (civil and criminal), due diligence, post-transaction cross-border compliance, Committee on Foreign Investment in the United States (CFIUS) reviews, government contracts, export policy, and licensing. She has conducted over 250 civil and criminal investigations (both unclassified and classified), addressed transactional due diligence matters in hundreds of investments, and counseled clients through the complexities of export control changes from 1992 through the present. She has negotiated complicated export enforcement settlements with the Department of State and successfully closed (without penalties) a range of directed and voluntary disclosures before the Departments of Commerce and Treasury (Office of Foreign Assets Control), as well as the Department of State. Congress considers her a subject matter expert on CFIUS and technology issues. She testified on April 12, 2018 before the House Financial Services Committee on regulatory issues related to cross-border investments, national security and critical concerns involving the implementation of FIRRMA by the US. She is a frequent participant at workshops and conferences hosted by the Center for Strategic and International Studies, the Council on Foreign Relations and the Parliamentary Intelligence Forum hosted by the US Congress under Congressman Robert Pittenger's leadership. She is a member of the Firm's CFIUS Working Group, a Chambers ranked attorney and a recognized thought leader in the national security, CFIUS and export control fields.

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