Screening of Foreign Direct Investment Edition

Message from the Europe Committee

The Europe Committee is happy to present this edition of our Europe Committee Newsletter. In this edition we feature a series of articles concerning the increased screening of foreign direct investment (FDI) in many countries, including the United States. As discussed in this Newsletter, this increased screening is taking place also in many of the European Union Member State countries. The Co-Chairs would like to thank the authors for their contributions. We hope that you find the articles informative and helpful to your practice.

We welcome all Europe Committee members who are interested in serving as Guest Editors to volunteer to organize a future newsletter on a hot topic important to the Europe Committee.

Nancy Matos and Jörg Rehder, Europe Committee Co-Chairs

A Note from the Guest Editor

Protectionism. Made in China 2025. President Trump vs. U.S. Allies. Trade Wars. America First. Globalization. These are all terms that have been bantered about over the past few months. With this in mind, the Europe Committee has prepared this Special Edition Newsletter to examine the screening of foreign direct investment (FDI) in various jurisdictions. This Newsletter starts by looking at the screening of FDI from the Chinese perspective, and how Chinese investments are viewed in the United States and the European Union. This Newsletter continues by examining recent developments in the United States concerning CFIUS. Also, just on June 13, 2018, EU ambassadors agreed on the EU Council's stance on a Proposal concerning the screening of FDI in the European Union. Two articles in this Newsletter examine this E.U. Proposal. This Newsletter also discusses measures individual E.U. Member States have taken with respect to FDI, most notably, Germany, France, the United Kingdom, and Austria. Only about half of the E.U. Member States have an FDI screening mechanism in place. This Newsletter also takes a look at one E.U. Member State that does not have a rigid screening mechanism in place — the Netherlands. We hope you find the articles of interest.

Updates from the Committee

The recent YIR edition discusses select developments in European Law during 2017. Congratulations to James Bergeron and all of the other editors for a Year-in-Review well done! The YIR 2018 is available on the Section's website.

Finally, don’t forget to join us on our monthly calls on the first Tuesday of each month. The precise times and details are distributed through the Committee listserv.
Europe Update

About the Europe Committee

The Europe Committee seeks to engage lawyers conducting practices that touch Europe, including the various European countries, the European Union, and the institutions of the Council of Europe. It nurtures a community of lawyers sophisticated in cross-border matters, comparative law, and the continuously emerging transnational law of Europe, public and private. The Europe Committee's activities include the sponsorship of programs at the Section of International Law's seasonal meetings, hot topics teleconferences and newsletter presentations by experts on emerging developments of European law, exploration of legal policy and law reform topics, contribution to the Year in Review issue of The International Lawyer, and co-sponsorship of Section of International Law standalone and other programming.

The Europe Committee’s membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely suggestions and ideas.

Upcoming Events

The following are some of the upcoming Section events:

10th Animal Moscow Conference on the Resolution of International Business Disputes  
09/27/2018  
8:00 AM - 8:00 AM AT  
Conference  
The ABA Section of International Law is partnering with Russian Arbitration Association to host its 10th Annual Conference on The Resolution of CIS-Related Business Disputes.

The New Engine of Growth in Asia Conference: Investment and Technology  
10/17 - 10/19/2018  
Seoul, South Korea  
This conference will address hot topics and recent developments on Investment and Technology. The presentations will be relevant to practitioners who work in a global environment and to those who want to enhance their cross-border exposure, focusing on legal issues related to both investment and technology.

ABA International Conference on International Trade and Investment  
11/06-11/09/2018  
InterContinental Presidente  
Mexico City, Mexico  
This conference will address hot topics and recent developments on International Trade and Investments. The focus will be on cross-border transactions and international dispute resolution.

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Screening of Foreign Direct Investments by Chinese Investors - Recent Developments

by Nicholas Song* and Ethan Litwin**

Chinese Investors first became acutely aware of the role and authority of the Committee on Foreign Investments in the United States (CFIUS) in the context of China National Offshore Oil Corporation’s June 2005 bid to acquire the California energy firm Unocal Corp., which was withdrawn several weeks later amidst fierce political opposition and cries that the bid threatened national security. Recently, Chinese investors have perceived that the CFIUS review process is increasingly becoming an obstacle to, uniquely, Chinese investments in the United States. In contrast to the political climate in the United States, Chinese investors appear to be more sanguine about their investment opportunities in Europe, which stands to benefit from increased foreign investment.

United States and CFIUS

The U.S. President has authority under CFIUS legislation to block a foreign investment. While this power has been exercised only five times since 1990, three of these instances occurred in just the past two years. In each case, however, the President exercised his authority under CFIUS to either block Chinese investments (four times) or an investment that did not involve a Chinese investor, but which could result in competitive advantages for a Chinese company (one time).

Specifically, in 1990, President George H.W. Bush directed China National Aero-Technology Import and Export Corp. to divest its acquisition of MAMCO Manufacturing Inc., an aerospace and aircraft parts manufacturer. President Barack Obama subsequently exercised his power under CFIUS twice, in 2012 and 2016, to block, respectively, Chinese-owned Ralls Corp. from developing wind farm sites near a naval base in Oregon and Chinese-owned Grand Chip Investment from acquiring Aixtron, a German semiconductor equipment supplier with a significant U.S. subsidiary.

Since assuming the presidency in January 2017, President Donald Trump has exercised his authority under CFIUS twice already. First, in September 2017, he blocked Canyon Bridge Capital Partners Inc., backed by Chinese investors, from acquiring Lattice Semiconductor Corporation. Then, in March 2018, he blocked Singapore-based Broadcom Ltd.’s proposed takeover of Qualcomm Inc. over concerns that it would limit U.S. investments in chip and wireless technologies and allow Huawei Technologies Co. Ltd., a Chinese company, to take the lead in such technologies.

The chilling effect of CFIUS extends far beyond these exceptional cases that resulted in direct presidential action. Indeed, Chinese investors have abandoned many more...
proposed investments in U.S. businesses in the face of CFIUS’s expressed concerns, but well-before any presidential action was taken or even threatened. For example, just in the past year, Chinese investors are known to have abandoned the following proposed transactions due to CFIUS concerns:

- HNA Group’s proposed acquisition of SkyBridge Capital, a hedge fund investment company (terminated in April 2018);
- Jinzi Ham Co.’s proposed US$27 million acquisition of a 37% interest in NovaBay Pharmaceuticals Inc. (terminated in March 2018);
- Hubei Xiny an Equity Investment Partnership’s proposed US$580 million acquisition of Xcerra Corporation, a semiconductor testing company (terminated in February 2018);
- Ant Financial Services Group’s proposed US$1.2 billion acquisition of MoneyGram International Inc. (terminated in January 2018);
- Zhongwang’s proposed US$2.3 billion acquisition of Aleris Corporation, an aluminum maker (terminated in November 2017);

It is not only large investments that have drawn CFIUS concerns. In March 2018, at least two modest proposed investments by Chinese investors were terminated after they failed to obtain CFIUS clearance. China National Heavy Duty Truck Group Co. terminated a proposed increase in its interest in UQM Technologies Inc., a Colorado company developing motors for electric cars, from 9.9% to 34% for about US$12.4 million. And Beijing Dabeinong Technology Group Co. Ltd. terminated its proposed acquisition of Waldo Genetics, a Nebraska-based seller of breeding pigs, for US$16.5 million.

From the Chinese perspective, the above examples illustrate a growing trend of U.S. push-back against what some perceive as a wave of Chinese investments in U.S. businesses involved in high-tech industries and advanced technologies. In part, this resistance may be a reaction to China’s “Made in China 2025” initiative, which was announced by the Chinese Prime Minister, Mr. Li Keqiang, in 2015. The initiative focuses on ten key sectors, ranging from advanced information technology to aerospace and maritime engineering and technology to power to biopharmaceuticals and advanced medical devices, and calls on the Chinese government to invest resources to support domestic enterprises and to encourage Chinese companies to expand abroad and to acquire foreign-developed technologies and know-how. A key objective of this initiative is for at least 70% of materials and parts required in these sectors to be manufactured domestically in China by 2025.
China sees the “Made in China 2025” initiative as a critical strategy to achieve industrial modernization and to become a high-tech superpower. The United States, by comparison, may view this initiative as an attempt to supplant it as the global technology leader. Indeed, the stymieing of Chinese investments in U.S. high-tech businesses is only one manifestation of the U.S.’ anathema to China’s “Made in China 2025” initiative. The recent March 2018 announcement by the United States to impose US$60 billion of tariffs against China is yet another example of Washington’s attempt to blunt China’s rise as a global technology leader.

CFIUS, however, has not completely foreclosed Chinese investment in the United States. For example, even in the technology sector, at the end of 2017, Naura Microelectronics Equipment, a Beijing-based microchip company, was permitted to proceed with its US$15 million takeover of Pennsylvania-based Akrion Systems, a manufacturer of semiconductor devices. It remains to be seen whether this transaction proves to be an outlier or a precedent for future successful deals.

In response to more activist CFIUS reviews, Chinese investors have been seeking to structure their investments in ways that would avoid CFIUS entirely. In particular, since CFIUS applies only to transactions involving mergers, acquisitions, or takeovers, Chinese investors have recently sought to employ alternative transaction structures, such as technology licensing agreements, offshore joint ventures, and long-term contractual arrangements. These efforts have, to some extent, allowed Chinese investors to achieve their business objectives without incurring CFIUS risk.

These efforts have inspired swift Congressional action. In November 2017, both houses of Congress introduced draft legislation to strengthen CFIUS review of foreign investments, including, for example, expanding the scope of transactions subject to CFIUS review to include intellectual property licenses and joint ventures, requiring CFIUS to more closely scrutinize transactions involving countries of “special concern”, and requiring mandatory notifications to CFIUS in certain circumstances. This draft legislation, which enjoys bipartisan support, is widely viewed within China as directly targeted at future Chinese investments. If enacted, the enhanced CFIUS would likely have a significant chilling effect on Chinese investments in the United States.

The European Union

In contrast to the United States, Chinese investments have generally not faced similar obstacles in Europe. While certain recent investments, such as China General Nuclear Power Group’s investment in the United Kingdom’s Hinkley Point C nuclear power plant and China’s Midea Group’s US$5 billion acquisition of German robotics Company, Kuka, had faced similar national security scrutiny and review, they have largely been allowed to proceed. Indeed, only 12 of the 28
E.U. Member States have foreign investment review mechanisms (namely, Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom).

Nevertheless, there also appears to be growing concern within some Member States regarding the rising tide of Chinese investments and, in particular, the acquisition by Chinese investors of European high-tech businesses. For example, the 2016 Kuka transaction cited above inspired significant public concern about Chinese ambitions in Europe. To this end, in September 2017, the European Commission published the Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union on September 13, 2017 (the “Proposal”).

Unlike the proposed amendments to the existing CFIUS legislation, however, which will clearly increase CFIUS scrutiny over a wider range of Chinese investments in U.S. businesses, it is not clear how the Proposal would impact Chinese investments within the European Union. The Proposal does not seek to either establish a unified review process or to harmonize the screening of foreign investment. Instead, it seeks only to enhance cooperation and coordination among the Member States and the European Commission. Indeed, the Proposal does not require a Member State to establish its own screening mechanism and in any case, each Member State will still retain its own final decision-making power on foreign investments.

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Foreign Direct Investment in the United States Facing Greater National Security Hurdle

By Shawn Cooley* and Charles Ramsey**

The once obscure and always secretive Committee on Foreign Investment in the United States (“CFIUS”) is under increased scrutiny because of the growing regulatory uncertainty involved with obtaining CFIUS approval of transactions in a predictable and timely fashion. This article will provide a brief overview of recent developments in CFIUS’ approach to reviewing foreign investments into the United States, and how those developments represent a change from its past practices.

To fully appreciate the recent changes, we must first understand CFIUS’ origin and historical core mission. President Ford created CFIUS in 1975 by Executive Order to monitor foreign investment into the United States. After a decade of passive monitoring, Congress realized that CFIUS lacked the power to regulate a wave of in-bound Japanese investment, and in 1988, passed the Exon-Florio Amendment to the Defense Production Act of 1950. This legislation gave CFIUS the authority to refer a transaction to the U.S. President for remedial action if it was deemed to pose a threat to U.S. national security. Most recently, the Foreign Investment and National Security Act of 2007 (“FINSA”) codified CFIUS’ operating authorities, and made CFIUS more accountable by (i) mandating that certain decisions be made by politically appointed senior persons within the member agencies, and (ii) creating new congressional reporting requirements. The improved accountability was in response to the Dubai Ports World (“DPW”) transaction, which involved the proposed 2006 acquisition by DPW of the port management businesses at six major U.S. seaports, and pitted then President Bush, who supported the deal, against Congress, which wanted to block it.

CFIUS currently has nine voting members, including the Departments of Defense, Justice, Homeland Security, Energy, State, Commerce, and Treasury (“Treasury”), as well as the Office of the US Trade Representative (“USTR”) and the Office of Science & Technology Policy. Treasury serves as the Chair of the Committee. Five other Executive Branch bodies, the Office of Management and Budget, the Council of Economic Advisors, the National Security Council, the National Economic Council, and the Homeland Security Council observe and, as appropriate, participate in CFIUS’ activities. Finally, the Secretary of Labor and the Director of National Intelligence are non-voting, ex officio members of CFIUS. This structure has not changed in more than a decade.

CFIUS’ core mission has always been to ensure national security while promoting free and open foreign investment into the United States.

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States. Historically, CFIUS sought to accomplish this mission by finding an appropriate balance between often competing U.S. national security and trade interests. Recent CFIUS outcomes illustrate a subtle, but fundamental policy shift within the current administration: U.S. trade policy can no longer be separated from, and balanced against, U.S. national security policy. The merging of two historically separate policies is consistent with the growing global trend towards protectionism and skepticism of the benefits of a liberal global trading system. Given the rhetoric of the Trump administration on topics such as free trade in general, and the alleged unfair trade practices of China in particular, it should come as no surprise that CFIUS has not been immune to this trend. Rather, CFIUS has shifted towards a more skeptical view of foreign investment as a potential threat, at least when that investment implicates certain countries.

The starkest example of this shift was President Trump’s preemptive prohibition of Broadcom’s proposed takeover of Qualcomm. CFIUS and the President chose to exert jurisdiction and to take unprecedented action on what was an expiring technicality — i.e., that Broadcom technically was a “foreign person” because it was incorporated temporarily in Singapore. Broadcom’s top shareholders were American, the majority of its Board was U.S. citizens, and it was fewer than three weeks away from re-domiciling in the United States in accordance with a mitigation agreement entered into with CFIUS in connection with a prior transaction.\(^1\) While this was only the fifth transaction to be prohibited by official presidential action pursuant to Exon-Florio, it was the first such prohibition of a non-Chinese acquiring company. President Trump’s prior prohibition order blocked a China-backed private equity firm from acquiring a semiconductor manufacturer. These are not the only deals though to wither in the glare of CFIUS scrutiny during the Trump administration. In addition to the two transactions officially prohibited by President Trump, there have been at least 16 other publicly reported deals that have been abandoned due to CFIUS opposition — totaling more than U.S. $11 billion of lost investment.

Looking forward, this trend likely has not yet reached its apex. President Trump is considering options to further restrict foreign investment from China in light of the USTR’s negative report on China’s trade practices,\(^2\) and Congress is debating whether to further expand CFIUS’ jurisdiction to review even more types of foreign investment. The USTR concluded that China’s economic practices create an unfair playing field for U.S. companies. While the Trump Administration has already taken steps to respond to these unfair trade practices,\(^3\) further action could include the issuance of an Executive Order pursuant to the International Emergency Economic Powers Act (“IEEPA”) that could [...] This trend likely as not yet reached its apex.
effectively and immediately implement complete bans on Chinese investments into certain critical sectors of the U.S. economy and prohibit U.S. companies from transferring certain critical technologies to China. On top of all this, the Trump Administration has endorsed bipartisan proposed legislation, the Foreign Investment Risk Review Modernization Act (“FIRRMA”). Its main features include expanding CFIUS’ jurisdiction to include transactions involving technology transfers and acquisitions of non-controlling stakes, requiring mandatory notifications in certain circumstances, and lengthening the statutory review period, with a combined effect of turning the CFIUS review process into an even more effective deal-killing machine. Although the passage of FIRRMA is likely to be delayed due to the on-going Section 301 process and opposition from both industry and some Republicans, the cumulative effect of these two policy initiatives, combined with the overall attitude towards foreign investment, makes it unlikely that CFIUS will disaggregate trade policy from national security policy any time soon. This likely will result in a record number of abandoned transactions, most of which involving Chinese investors, in response to increased CFIUS opposition during the Trump Administration.

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3 Memorandum for the Secretary of the Treasury, the United States Trade Representative, the Senior Advisor for Policy, the Assistant to the President for Economic Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Homeland Security and Counterterrorism, 83 Federal Register 13099 (March 27, 2018).

4 S.2098, introduced by Senator John Cornyn (R-TX) on November 8, 2017.
Planning and Structuring Cross-Border M&A and Strategic Technology Transactions in the USA: CFIUS Meets Trump’s “America-First” Ideology

by William B. Bierce*

Implementing his “America First” campaign slogan, in March, 2018 President Trump blocked the proposed multi-billion dollar acquisition by Broadcom Corp. (of Singapore) of Qualcomm Inc. The order followed a technology-focused political screening, at the target’s request, by the inter-agency Committee on Foreign Investment in the United States (“CFIUS”) of national-security sensitive foreign direct investment (“FDI”). The Broadcom case signals that, administratively, CFIUS will define “national security” broadly, far beyond protecting government procurement, to include the tools of cyberwarfare.1

To provide greater flexibility in responding the threats from FDI, some key draft laws2 have been proposed since President Trump’s inauguration in January 2017. If enacted, such draft legislation would broadly extend CFIUS’ authority to react to mercantilist foreign governments (“countries of special concern”) that target acquisition of technologies and to any “state-owned enterprise” (“SOE”), whether owned, controlled or under the direction or influence of a foreign government. China has been targeted for its policies that nullify WTO principles of national treatment and non-discrimination3 and that have required foreign companies to partner 50-50 with local companies and to transfer foreign intellectual property and trade secrets to the local companies.

In this new environment, foreign businesses and their legal advisors need to understand the emerging U.S. framework for national security and economic impact review, with a new, expanded bureaucratic role for CFIUS. These changes will impact due diligence, deal structuring, risk allocation, execution and post-execution deal breakup scenarios.

The broadest of the pending bills, the Foreign Investment Risk Review Modernization Act of 2017 (“FIRRMA”) was introduced in November 2017 as a bipartisan proposal to update CFIUS’ role in cross-border investment and strategic alliance. Under FIRRMA, CFIUS’ authority would extend to virtually every cross-border “technology” transaction that is not a standard commercial license for consumer software. Even foreign Software as a Service (“SaaS”) companies and e-businesses could be blocked from gaining access to U.S. individuals’ personal information under the guise of protecting “national security.” Transactions involving U.S. “critical infrastructure” or potential foreign “malicious cyber-enabled activities” would likely be rejected.4

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New Penalties. Under FIRRMA, non-compliant submissions of information could be subject to penalties, not just invalidation.\(^5\) CFIUS could review and cancel in the future a transaction that had been approved earlier based on “false or misleading information” submitted earlier.\(^6\) Rather than merely responding to voluntary submissions by the acquirer or target, CFIUS would develop a mechanism for identifying “covered transactions” for which a notice has not been submitted.\(^7\)

Expanded Mitigation Agreements and Enforcement. Under draft laws, the CFIUS process would become even more of a factor on a mitigation agreement for partial divestment, prevention of abuse of sensitive data obtained during the deal process or otherwise, and impose civil penalties for breach.\(^8\) CFIUS could also negotiate with the parties a plan of action to remediate any lack of compliance. It could mandate a party to submit future covered transactions (within five years after non-compliance) for review, and seek injunctive relief.\(^9\)

New Risk Factors for Review. FIRRMA would add many new factors for CFIUS’ political review of cross-border FDI.\(^10\) These include whether the covered transaction is likely to: (i) result in the increased reliance by the United States on foreign suppliers to meet national defense requirements; (ii) contribute to the loss of, or other adverse effects on, technologies that provide a strategic national security advantage to the United States; (iii) increase the costs of U.S. government procurement of systems for defense; or (iv) create or exacerbate any cybersecurity vulnerabilities or allow a foreign government to engage in malicious cyber activities against the United States (such as election meddling).

New “Net Economic Benefit” Analysis. A new type of basis for rejection would apply under the draft Foreign Investment and Economic Security Act of 2017 (“FIESA”). Under FIESA, CFIUS review factors would also require a “net economic benefit” review that evaluates the impact of the proposed covered transaction on “productivity, industrial efficiency, technological development, technology transfers, and product innovation in the United States.”\(^11\) For foreign government-influenced transactions, “net economic benefit” review would also consider job displacement, sourcing patterns and capital investment levels necessary to keep a U.S. business “globally competitive.” Arguably, this new standard would be apolitical.

Risk Factor: Personally Identifiable Information. Under FIRRMA, CFIUS could recommend rejection of a covered transaction that enables a foreign person or government to access “personally identifiable information, genetic information or other sensitive data of U.S. citizens.”\(^12\) How ironic it is that U.S. federal laws on data privacy are not well developed (except for personal health information under HIPAA), while such privacy becomes a matter of national security in the context of cross-border acquisitions!
“Countries of Special Concern”. Under FIRRMA, FDI transactions would be subject to heightened CFIUS scrutiny where the “covered transaction” involves a “country of special concern” with a “demonstrated or declared strategic goal of acquiring a type of critical technology.” Not only would this new factor appear to exclude any country in the European Union, NATO, or other strategic security alliance with the United States, it would also promote coordinated multilateral FDI reviews jointly targeting “countries of special concern” (e.g., China) whose unprecedented industrial policies seek to “acquire U.S. technology.”

New “Covered Transactions”. Generally, FIRRMA would redefine broadly the types of transactions covered beyond “critical infrastructure” to include “critical technology” companies. FDI review would cover not just mergers, but also “partnership agreements, integration agreements, or other side agreements relating to the transaction, including any such agreements relating to the transfer of intellectual property.” This might include tech co-development, but would likely not cover standard commercial transactions under terms applicable to a broad customer base. Ordinary technology transfer transactions would be “covered” where they involve “the contribution (other than through an ordinary customer relationship) by a U.S. critical technology company of both intellectual property and associated support to a foreign person through any type of arrangement, such as a joint venture.” Similar to export control regulations, CFIUS would be authorized to issue regulations further defining covered transactions by particular “technology, sector, subsector, transaction type, or other characteristics of such transactions.” Even so-called vulture investigating in bankrupt tech companies would be covered.

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Broader Concept of Foreign “Control” of U.S. Enterprise. Under FIRRMA, a foreign investor would be deemed to have “control” of a U.S. enterprise if it has “the power to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed” by CFIUS. Under FIESA, the test would be the ability of a foreign government to influence the foreign investor.

Planning for Cross-Border Deals. Corporate counsel should manage several issues when engaged in cross-border transactions, including anticipating some legislative update or an administrative equivalent.

Focus on Technology, especially “critical technology” where Americans provide both intellectual property and tech services. Any “partnering” agreement could be caught in the CFIUS review. Technology-driven transactions will undoubtedly be closely scrutinized to ensure U.S. industrial competitiveness. Any deal involving Big Data in personally identifiable information,
semiconductors, cybersecurity, B2C e-businesses, and/or Internet of Things (“IOT”) transactions for remote control of U.S. “critical infrastructures” will likely be rejected or subject to “mitigation” requirements.

Plan. Planned transactions should include a pre-negotiation analysis of the suitability of the deal under CFIUS. Management needs to understand national security vulnerabilities and threat factors, SOE risk analysis, transparency, and disclosures by the acquirer and the costs, risks, and contractual allocation of risks in case the deal is blocked.

Avoiding Foreign “Control.” The legislative updates could imperil attempts by U.S. companies to expand their technology development abroad. There is a risk that mission-critical tech transactions such as outsourcing, joint tech development, or “gain-sharing” agreements could be recharacterized as a foreign acquisition, simply because such transactions involve licenses to foreigners of U.S. technology and delivery of U.S. tech support. Attorneys for U.S. tech companies can therefore insist on some exclusions of the “risk” of a CFIUS review, akin to export control clearances. And, like Qualcomm, U.S. tech companies can solicit CFIUS to block hostile takeovers.

Develop Links with Europeans and the Japanese. Any “America First” CFIUS program will respect acquisitions by European and Japanese companies due to common defense interests.

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Understand Timing Expectations. The parties should expect delays of up to four months, yet be able to respond to CFIUS information requests in three days, regardless of languages and time zones. Sensitivity to delays should be managed. If either buyer or seller is a publicly-traded company, investors will need to be informed under applicable securities disclosure laws.

Manage Foreign Financing Risks. Foreign buyers subject to foreign exchange control must ensure the timing of CFIUS review does not kill the financing.

Manage CFIUS-Based Risks. The parties should identify and manage the impact of CFIUS delays, mitigation and outright denials. Contractually, such risks should be defined and allocated to the foreign buyer in an enforceable manner. Sellers might insist on a reverse-breakup fee if CFIUS blocks the deal. To secure payment, an escrow could be imposed. To secure CFIUS consent, before negotiating any definitive agreement, the parties should negotiate conditions under which buyer would accept CFIUS-imposed mitigations to clear the transaction.

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1 In response, China could invest in a new fund of about $47 billion to spur development in the semiconductor industry to close the technology gap. Y. Kubota, “China governments co-invest with private venture funds, spurring a rush of VC activity for Chinese startups. Big Chinese tech Companies like Alibaba and Tencent feel governmental pressure to invest in certain technologies. P. Devorak and
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8 Id., Secs. 13 and 16.
9 Id., Sec. 16.
10 Id., Sec. 15, amending 50 USC 4565(f).
11 Id. Sec. 3. See also “Stop Outsourcing and Create American Jobs Act of 2017,” S. 3217, 115th Cong., which would target the laying of U.S. workers and the hiring or contracting for the same job to be performed in a foreign country.”
12 Id. Sec. 15. This approach might be inspired by the EU General Data Protection Regulation to protect “fundamental rights and freedoms” and to “develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data.” Art. 50. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L.2016.119.01.0001.01.ENG.

Draft FIRMA, Sec. 15, adding 50 U.S.C. 4565(f)(17)
13 Draft FIRMMA, Sec. 15, amending 50 USC 4565(f).
14 Id., Sec. 2(7).
15 Id., Sec. 4.
16 Id., Sec. 3.
17 Id., Sec. 3.
18 Id., Sec. 3.
19 Id., Sec. 3.

See WTO Agreements on Trade-Related Investment Measures (TRIMS) and Trade-Related Intellectual Property (TRIPS). For TRIMS, see https://www.wto.org/english/tratop_e/invest_e/trims_e.htm.

For TRIPS, see https://www.wto.org/english/docs_e/legal_e/27-trips03_e.htm.

Draft FIRMMA, Sec. 3.
4 Id., Sec. 3.
5 Id., Sec. 5.
6 Id., Sec. 7.
7 Id., Sec. 8.
EU Commission Proposal for an FDI Review Framework

By James Bergeron*

In response to the growing number of E.U. Member States that have adopted review procedures for foreign direct investment on national security, public order or critical state interest grounds (currently twelve countries), the E.U. Commission issued a Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union on September 13, 2017 (the “Proposal”).

The Proposal is the first attempt by the European Union to establish a review mechanism for non-EU FDI at the European level and to harmonize (although the Commission avoids this term) some procedural elements of national review systems. It is important to set out, however, what the new regime (if adopted as proposed) is not: No exclusive or even concurrent EU competencies in the FDI field would be created. The Commission would not have the power to issue binding decisions on commercial actors or Member States. The Proposal would not obligate Member States to create an FDI review mechanism. Finally, substantial latitude to prevent anti-circumvention by commercial actors is given to Member States, essentially authorizing deviations from the regime where justified on anti-circumvention grounds. It should be noted that the Proposal does not alter the more limited provisions of Article 21 of the EU Merger Regulation that allows mergers and acquisitions to be blocked on grounds of public security, media plurality, and prudential rules.

Nonetheless, the Proposal is a significant step for the European Union. Its provisions include those seeking to enhance cooperation and coordination among Member State practices and those giving the Commission some review competence where an E.U. dimension to the FDI exists. Member State FDI regimes differ widely in their scope and definition of national security or public order, the typical grounds for review. Some expand these grounds to include transport networks, energy critical infrastructure, agriculture, water supply and telecommunications; others are more limited to national security and defense.

The Proposal establishes a coordination mechanism between Member States and the Commission, requiring Member States to notify the Commission of any current review systems within 30 days of the Regulation’s entry into force, as well as subsequent amendments. Member States without FDI review would provide an annual FDI report to the Commission.

The Proposal tackles the issue of pan-European impact of FDI in two ways.

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mechanism is established whereby a Member State may provide comments to another Member State, forwarded to the Commission, of FDI in the second state that could have a negative impact on the first. Although states could do this anyway, having the EU FDI regime in place, and Commission eyes on the conversation, arguably strengthens inter-state dialogue. The second mechanism is more direct: the Commission would be empowered to review FDI that involves significant E.U. funding or in areas subject to E.U. legislation on critical infrastructure or technologies that have potential risks for E.U.-wide security and public order. The Commission’s review could lead to an opinion addressed to the Member State that is the subject of the FDI. The opinion is only a recommendation, but the Member State would be pressured to “take utmost account” of the Commission’s position and explain to the Commission if the Member State takes a different stance.

Perhaps most interesting is the Commission’s adaptation of a relatively wide interpretation of security and public order concerns. Member States and the Commission would consider the potential impact of non-E.U. FDI critical transport, communications and energy infrastructure, as well as advanced technologies like artificial intelligence and cybersecurity.

The European Parliament’s Committee on Foreign Trade approved the Proposal on May 29, 2017. It will now likely enter a period of negotiations between the Commission, the Parliament, and the Council as they try to hammer out a final text. France, Italy, and Germany have voiced support for an E.U. framework on FDI, making it likely that an E.U.-wide FDI review framework will indeed emerge in some form.

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Overview on Foreign Direct Investment Control in the European Union

By Jürgen Beninca*

The legal and factual issues of Foreign Direct Investment ("FDI") control in the European Union can be understood only if one realizes that Article 63 of the Treaty on the Functioning of the European Union ("TFEU") protects not only the free movement of capital in case of investments within the European Union, but also non-E.U. investments into European companies. As any FDI screening mechanism may, therefore, restrict the free movement of capital from outside the European Union into one Member State, such restriction is legal under Article 63 TFEU only if it is necessary and proportionate for the achievement of an objective of the TFEU, such as security or public order. The relevant case law of the European Court of Justice construes this exception narrowly. Member States may rely only on security and public order grounds if there is a serious threat to a fundamental interest of society. Purely economic ends do not suffice.

Within these limits, the European Member States enjoy discretion in determining security and public order requirements. About half of the European Member States have enacted FDI control mechanisms. Indeed, the support expressed by the Portuguese government for the European Member States have enacted FDI control mechanisms. Indeed, the support expressed by the Portuguese government for China’s China Three Gorges’ EUR 9.0 billion offer to take full control of EDP, the Portuguese utility, announced on May 11, 2018, shows the different approaches to FDI control in Europe.

In light of growing concerns about, in particular, Chinese investments in high-technology companies, the Commission published a Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union in September, 2017 (the “Proposal”), which is summarized below.

The Proposal establishes a framework for investment screening procedures only. It will continue to be in the Member States’ discretion whether to screen FDI. The Proposal empowers, however, the European Commission to issue an opinion on FDI that is likely to affect projects or programs of E.U. interest on the grounds of security and public order. In this context, the Proposal also includes a non-exhaustive list of factors that the Commission may consider when applying the security or public order test,

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which is designed mainly to provide additional arguments to block a transaction.

The Proposal requires the screening mechanisms of those Member States that choose to have one to be transparent and non-discriminatory. Further, the mechanisms need to have timeframes for screening decisions, protect confidential information, and provide the possibility of judicial redress.

The Proposal also requires all Member States to inform the Commission of their FDI screening mechanisms. Those Member States that do have a mechanism in place must provide an annual report to the Commission of the impact of the screening mechanisms on FDI, while those Member States that do not have such a mechanism in place, must inform the Commission of the FDI investments in their respective country.

The core of the Proposal contains a complex consultation mechanism requiring Member States to inform the Commission, and all other Member States, of any screening of FDI. If a Member State believes that an FDI in another Member State is likely to affect its security or public order, the Proposal allows the former to inform the latter of its concerns, which shall then also be forwarded to the Commission. If the Commission believes that an FDI is going to affect security or public order in one or more Member States, it may issue an opinion addressed to the screening Member State(s). The screening Member State(s) that receive(s) the comments from the other Member States, or the opinion from the Commission, must give due consideration to these documents when making its decision.

As mentioned above, the Proposal empowers the Commission to issue an opinion on FDI that it believes will affect projects or programs of E.U. interest vis-a-vis the Member State in which the FDI is planned or completed. The Commission will communicate its opinion to the other Member States. The receiving Member State must “take utmost account” of such Commission opinion, and if it does not follow the Commission’s opinion, it must provide the reasons therefor.

The European Parliament discussed the Proposal intensively and the Proposal is expected to be adopted in June, 2018. While the Commission’s ability to provide an opinion on FDI affecting an E.U. interest should apply only to limited fact patterns, it is clear that the new consulting mechanism is going to create significant delays and costs. In particular, it is unclear at this point in which language(s) the Commission and the Member States are going to communicate with each other (the German government, for instance, requires that all communication be provided in German). Even if the Parliament and the Council eventually sign off on the current Proposal, and the Parliament’s long wish-list does not become law, the Proposal will be a significant burden for non-EU investors and those European entities that are interested in selling their companies to such investors.

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M&A Transactions in Germany: New Requirements for Notifying Transactions from Non-EU Investors

By Jörg Rehder*

Though Germany has long had statutory provisions on its books allowing for the governmental review of foreign direct investment, these provisions -- found in the Foreign Trade Ordinance (Aussenwirtschaftsverordnung) -- lacked specificity. This changed, however, on July 18, 2017, when Germany amended this statute. The purpose of the recent amendments was to provide not only more extensive avenues for the German government to review investments from outside the European Union, but also to add some teeth to the statute.

Under the amended Foreign Trade Ordinance, Germany’s Federal Ministry for Economic Affairs and Energy may review foreign direct investment into Germany if the investment threatens Germany’s public order or national security. The German government may review two types of investments: the first is a “sector specific” review covered by Section 60 of the Foreign Trade Ordinance. This section covers primarily weapons and dual-use goods that may be used for conflict situations. The German legislature left these provisions intact for the most part except that, even if the investment is a domestic investment, the Germany Federal Ministry for Economic Affairs and Energy may now review the transaction if there are indications that the ultimate investor is non-German. This amendment is not the subject of this article. The second type of investment that the German Federal Ministry for Economic Affairs and Energy may review is covered by Section 55 of the Foreign Trade Ordinance, the “cross-sector” review. This brief article will focus on this type of investment and the amendments to Section 55.

One significant amendment to Section 55 is that this provision now includes a non-exhaustive list of sectors that are deemed to impact Germany’s “public order” or “national security”. Specifically, if a non-EU entity intends to acquire a German entity that (i) operates certain critical infrastructure, (ii) develops or modifies sector-specific software for the purpose of operating critical infrastructure (e.g., software used to control power plants, fuel, heating oil, food, or drinking water supplies, sewage disposal systems, hospital IT systems, to distribute prescription drugs, etc.), or (iii) provides cloud computing services, then the transaction may be subject to review by Germany’s Federal Ministry for Economic Affairs and Energy.

The above provision applies only if a non-EU buyer (including, of course, entities from the United States) acquires at least 25% of the target’s voting rights. It does not apply to greenfield investments. The value of the transaction is not relevant, meaning even smaller transactions (in terms of purchase

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price) may be subject to review.

In the past, the German government relied primarily on voluntary notifications by buyers and essentially hoped that buyers would report a transaction involving Germany’s public order or national security. The onus is now on buyers (or the target) to make a formal notification, or risk having the German government subsequently nullify the transaction.

What prompted these amendments to Germany’s Foreign Trade Ordinance? It is fair to say that there has been an increased concern about Chinese investment in Germany. In 2015, China invested U.S. $900 million for German acquisitions. This figure skyrocketed to almost U.S. $13 billion in 2016. Chinese investment in Germany did not reach this same level in 2017, but investments from China continue to garner great attention in Germany. Two of the most notable transactions, each occurring in 2016, were China’s acquisition of the German robot maker Kuka for EUR 4.4 billion. Also, Beijing Enterprises paid EUR 1.4 billion to acquire EEW Energy, a German waste incineration and power generation company; EEW produces heating and electricity for about 700,000 German households. Transactions such as these caused the German legislature to amend Section 55 of the Germany’s Foreign Trade Ordinance.

The amendments have already had an impact. State Grid Corporation of China (the second largest company in the world after Walmart), expressed interest in acquiring a 20% interest in 50Hertz earlier in 2018. 50Hertz owns a significant power line network in eastern Germany and around Hamburg. Though the intended acquisition was below the 25% threshold, it caused alarm among German politicians. The 20% interest became available after IFM, an Australian entity, announced that it was selling its 20% holding.

According to news reports, Germany’s Federal Ministry for Economic Affairs and Energy took the initiative of contacting Elia, a then 60% shareholder of 50Hertz. Elia is an E.U. entity as it is based in Belgium. IFM eventually sold its 20% interest to Elia rather than to State Grid Corporation of China. It is difficult to get a sense of what exactly happened “behind the scenes” with this transaction, but it is certainly apparent that Germany’s Federal Ministry for Economic Affairs and Energy favored a buyer from the European Union over a Chinese buyer.

The first transaction that garnered attention that was actually subject to Section 55 of the Foreign Trade Ordinance, as amended, was the recent acquisition of Cotesa GmbH by Changzhou QFAT Composite Material, a Chinese fund. Cotesa GmbH, based in Germany, is a manufacturer of components for the aviation industry, both military and commercial aircraft, as well as for the automotive industry. It has revenues of approximately EUR 65 million and more than 750 employees. Changzhou QFAT Composite Material desired to acquire a majority of the shares of Cotesa GmbH. The German Federal Ministry for Economic Affairs and Energy took the initiative of contacting Elia, a then 60% shareholder of 50Hertz. Elia is an E.U. entity as it is based in Belgium. IFM eventually sold its 20% interest to Elia rather than to State Grid Corporation of China. It is difficult to get a sense of what exactly happened “behind the scenes” with this transaction, but it is certainly apparent that Germany’s Federal Ministry for Economic Affairs and Energy favored a buyer from the European Union over a Chinese buyer.
Affairs and Energy reviewed this transaction for six months and finally gave its approval on the last day before the review period expired.

It is obvious that the German government, as well as the European Commission, intend to keep a much closer eye on foreign direct investment from outside the European Union than has been the case in the past. In this regard, in September 2017, the European Union put forth the Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union, which would cover foreign direct investment from non-EU entities into the European Union (see, EU Commission Proposal for an FDI Review Framework on page 15 and Overview on Foreign Direct Investment Control in the European Union on page 17 of this Newsletter). Regardless, a number of commentators are of the opinion that despite the 2017 amendments to the Foreign Trade Ordinance, German companies are attractive as targets now as those amendments are not as burdensome as the E.U.’s proposal, which may eventually enter into force.

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Foreign Direct Investment in France:
Current State, Recent Developments,
and Outlook

By Marc Weitz*

Beginning in the 1980’s, France loosened its restrictions on foreign direct investment (FDI) under a philosophy of openness, stemming from a desire for increased economic activity and job creation.¹ Recent worries about foreign entities investing in French companies to steal their intellectual property, or to gain a foothold in sectors critical to France’s national security, have led to a call for increased screening of FDI.

The Organisation for Economic Cooperation and Development (“OECD”) FDI Regulatory Restrictiveness Index rates France amongst the least-restrictive countries for FDI.² In 2017, France ranked ninth in the world as to FDI inflows.³ Recent FDI inflows amounted to U.S. $46 billion in 2015, U.S. $28 billion in 2016, and U.S. $50 billion in 2017.⁴

The laws governing FDI are found between articles L. 151-1 and R. 153-1 et seq. of the French Monetary and Financial Code.⁵ The first law regarding FDI was put into place in 1966, and has been updated several times in subsequent years.⁶ In general, FDI does not require government approval, but on December 30, 2005, the French government issued a decree that listed eleven sectors requiring prior approval of the French Ministry for the Economy and Finance (MINEFI) for FDI.⁷ On May 14, 2014, the Mountebourg Decree (Decree no. 2014-479) expanded this list to seventeen sectors.⁸ The sensitive areas include companies with activities related to gambling, private security, pathogens or toxic substances, wiretapping or communication interception, information systems, evaluation or certification services, dual-use technology, cryptology, classified information, military manufacturing, contracts with the French Defense Ministry, energy supply, water supply, transportation, electronic communication, and public health; along with companies acquiring a controlling stake in a French company’s stock or assets, or a stake in excess of 33% of voting rights shares.⁹

Within the last year, the European Union, including France, has seen the need for stronger rules and enforcement of already-existing rules. In February 2017, France, Germany, and Italy pushed the European Commission to review “politically motivated acquisitions” of European tech companies, especially by China.¹⁰ In June 2017, President Macron, at an E.U. Council meeting, urged his fellow E.U. leaders to restrict Chinese investment.¹¹

France is currently reviewing and potentially revising its rules on FDI.¹² The list of sensitive sectors that require prior approval by the MINEFI may further expand, with new rules possibly coming into effect as soon as

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It should also be expected that France will enforce the rules currently in place with greater force and scrutiny, including imposing new types of sanctions for investors who do not meet the criteria. Any changes in restrictions and screening of FDI in France should be looked at in conjunction with new E.U. restrictions (see, EU Commission Proposal for an FDI Review Framework on page 15 and Overview on Foreign Direct Investment Control in the European Union on page 17 of this Newsletter). Balancing the ease of investment and economic growth with the need for national security and intellectual property is a tricky path that the French government and the European Union must walk carefully.

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5 Supra, note 1.

6 Supra, note 4.


8 Supra, note 1

9 Supra, note 4.


11 Id.

12 Id.

13 Id.

14 Id

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UK Government to Implement New Powers for Reviewing Mergers in Key Strategic Sectors on National Security Grounds

by Mark Howard*, Paul Stone**, and Daniel Rosenberg***

The U.K. Government has decided to proceed with proposals to extend its powers to review mergers in certain key strategic sectors on national security grounds.¹

The proposals were set out in a green paper published in October last year, where the Government explained its concerns that its existing powers do not go far enough in light of the increased potential threats to national security in the United Kingdom, in particular in relation to foreign investment.

At this stage, the Government is proceeding with the short term reforms set out in the green paper, which involve amending the jurisdictional thresholds under the U.K. merger control rules. It is still considering responses to its consultation on possible longer term reforms, including the ability to review a wider range of transactions and a mandatory notification regime for foreign investment in certain sectors.

What are the Changes?

At present, the Government can intervene on national security grounds in mergers that qualify for review under the U.K. merger control rules² or the E.U. merger regulation,³ as well as mergers involving certain defence contractors that have been notified that they hold confidential information.

The changes involve the Government amending the jurisdictional thresholds under the U.K. merger control rules in relation to transactions in two areas: (i) the dual-use and military-use sector and (ii) parts of the advanced technology sector.

As regards the dual-use/military-use sector, the amended thresholds will apply to transactions where the target is active in the development or production of items on certain Strategic Export Control Lists (or holds related software and technology for such items). The relevant lists are the U.K. Military List, the U.K. Dual-Use List, the U.K. Radioactive Source List, and the E.U. Dual-Use Lists.

As regards the advanced technology sector, the amended thresholds will apply to transactions where the target is active in certain specified activities relating to:

- Computer processing units (“CPUs”); or
- Quantum Technology.

The specified activities include things such as:

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• Owning, creating or supplying intellectual property relating to the functional capability of CPUs, the instruction set architecture for CPUs and the computer code that provides low level control for CPUs;

• research into quantum computing or simulation as well as developing or producing anything designed for use in quantum computing or simulation.

The amended thresholds are that a transaction involving a target active in any of these areas will be caught if:

1. the U.K. revenue of the target exceeds GBP 1 million (the normal threshold is GBP 70 million); or

2. the target supplies or acquires goods or services in any of these areas that account for at least 25% of those goods or services supplied or acquired in the United Kingdom or a substantial part of it (the normal threshold, which the Government proposes would continue to apply as a separate threshold, is that the transaction must increase the share to 25% or more, meaning that both parties have to supply or acquire the same goods or services in order for the transaction to be caught).

What is the Impact of the Changes?

The effect of these changes is that, in the relevant dual-use/military-use and advanced technology sectors, a much greater number of transactions will qualify for review under the U.K. merger control rules than is currently the case — and therefore potentially be at risk of intervention both by the Competition and Markets Authority (“CMA”) on competition grounds and the Government on public interest grounds (including, but not only, national security).

That said, the CMA has issued draft guidance indicating that it does not expect the changes to bring about a material change in its approach to the assessment of mergers on competition grounds.

It is also worth noting that the changes will not only apply to transactions involving foreign investment — they will apply also to purely domestic transactions.

Where the Government decides to intervene on national security grounds, it can clear the merger (where it considers no concerns arise) or, if it considers that there are concerns, make clearance conditional on certain remedies being put in place or block the merger.

When Did the Changes Come into Effect?

The amendments took effect already on June 11, 2018.
2 See the U.K. Enterprise Act 2002
Foreign Investments in Austria

by Holger Bielesz* and Paul Krepil**

Through the Austrian Foreign Trade Act ("AFTA"; Aussenwirtschaftsgesetz), screening procedures for foreign investments (from non-E.U. or non-EEA Member States others than Switzerland), like inbound M&A transactions, were implemented in Austria in 2011. According to Section 25a of AFTA, foreign direct investments may be subject to mandatory authorization by the Austrian Federal Ministry for Digitalization and Business Location if such investments are likely to have an impact on Austria's security or public order.

Only investments in economic entities that lead to a “controlling influence” are, however, subject to Section 25a of AFTA. Further, only companies with a share capital and/or annual revenues above EUR 700,000, and whose field of activity lies within a sector of public order and security, fall within the scope of the provision. To facilitate the interpretation of the law, the Austrian legislature provided a non-exhaustive list of sectors that are considered "of public interest" e.g. defense industry, security services, energy supply, water supply, telecommunications, transportation, infrastructure facilities in the area of education, and infrastructure facilities in the area of healthcare.

By operation of law the authorization requirement pursuant to Section 25a of AFTA is subject to the superseding rules of international law and E.U. law. Hence, an authorization requirement established by the respective Austrian ministry must not contradict multilateral international obligations (e.g. GATS) or bilateral agreements with non-E.U./non-EEA Member States including agreements concluded by the European Union on behalf of its Member States. In addition, legal obligations of Austria towards the Organization for Economic Co-operation and Development (“OECD”) need to be taken into consideration.

Acquisition of Voting Shares

In case international agreements and/or E.U. laws do not provide otherwise, generally, foreign investments of 25% or higher in shares of votes are subject to authorization. In calculating the percentage of voting rights, the voting shares of other foreign entities/persons - that already own shares of the entity in question - must be added under the following circumstances:

- The potential investor owns at least 25% in voting shares of the other foreign entity/person (that already owns voting shares of the entity in question);
- The other foreign entity/person (that already owns voting shares of the entity in question) owns at least 25% in voting shares of the potential investor;
- An additional third-country person/entity owns at least 25% in voting shares of both the other foreign entity/person and the potential investor.

*Wolf Theiss in Vienna Austria
**Wolf Theiss in Vienna Austria
Syndicate agreements between either of the above-mentioned entities/persons also need to be taken into consideration as they may trigger the authorization requirement.

**Obtaining Controlling Influence**

Alternatively, foreign investments that procure controlling influence over the investor regarding the entity in question may be subject to authorization. In this regard, the Austrian legislature does not define "controlling influence", but it does provide a non-exhaustive list of examples:

- conclusion of a syndicate agreement among two or more persons or companies, which enable the investors to jointly exercise 25% in voting shares;

- termination of a syndicate agreement so that a foreign entity/person can exercise at least 25% in voting shares without being subject to the terminated syndicate agreement any longer.¹

**Authorization Requirement of the Ministry’s Own Motion**

The competent Austrian ministry may also, on its own initiative (i.e., without a formal request filed by an investor), impose an authorization requirement for certain foreign investments. Again, international agreements and E.U. law must not stand in the way of such conduct. This competence of the Austrian ministry most commonly serves to prevent the risk of circumvention of the aforementioned foreign investment provisions by a foreign entity/person in an Austrian entity through an intermediate entity that has its registered seat in the European Union. Again, the transaction must not be consummated before the ministry has granted the authorization.

Notwithstanding this, the Austrian ministry may also, by way of regulation, grant exceptions for foreign investments, which would otherwise be subject to authorization. Such exception must certainly not infringe interests of public order, as already indicated above.

**Procedure**

A party may not enter into the investment agreement prior to authorization. Breaches of AFTA lead to the avoidance of the agreement and are, depending on certain conditions, subject to criminal prosecution. The Austrian legislature was, however, keen on providing a fairly transparent procedural framework so that potential investors are informed in a timely manner whether the contemplated investment requires authorization at all and, if it does, whether it can be approved. For example, the ministry must decide within one month from the applicant’s request whether the contemplated transaction requires authorization and whether it is approved or whether the ministry will enter into an in-depth investigation. If the ministry fails to act within one month, then the transaction is deemed approved. In case of an in-depth investigation, the ministry must issue its decision within two months. Similarly, upon
expiry of this term without action on the ministry’s part, the transaction is deemed approved. The applicant then has the right to obtain written confirmation from the ministry that the transaction is deemed approved following expiry of the investigation term. Finally, the law foresees that the key elements of decisions based on AFTA shall be published in order to ensure transparency of the process.

**Bottom Line**

Supporters of restrictions on foreign investments as set forth in AFTA consider such legal frameworks desirable in case legitimate interests of public order and security are affected. By way of example, increased investment from China in key industry areas of the European Union may nourish this concern. A strict interpretation of the above-mentioned restrictions may, however, lead to a chilling effect on potential investors and may especially result in legal uncertainty. As mentioned above, the legislature sought to address this concern by way of a straightforward and accelerated procedure.

Against the backdrop of this development, in September 2017 the European Commission issued the Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union, which includes a cooperation mechanism between Member States and the Commission (see, EU Commission Proposal for an FDI Review Framework on page 15 and Overview on Foreign Direct Investment Control in the European Union on page 17 of this Newsletter). In parallel, the Commission set up a coordination group with Member States to help identify joint strategic concerns and solutions in the area of foreign direct investment. It was also announced that by the end of 2018, the Commission will carry out an in-depth analysis of foreign direct investment flows into the European Union, focusing on strategic sectors (such as energy, space, and transport) and assets (key technologies, critical infrastructure, and sensitive data) whose control may raise concerns for security or public order reasons. In this regard it remains to be seen whether there will be E.U. legislation (i.e. a regulation on restrictions on foreign investments at the European Union level) in the near future.

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1 The calculation of the voting shares is to be made according to the procedure as outlined under “Acquisition of Voting Shares”.

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Direct Finance Screening in the Netherlands? Not Really

by Michael Balistreri*

Most E.U. Member States and the United States acknowledge the perceived threat that mergers and acquisitions pursued by foreign investors within their borders can pose to key infrastructure and services, yet not all countries have the same solution. Germany and the United States, for example, both have robust safeguards and screening of direct foreign investment to help insulate their respective countries from foreign investors attempting to secure critical pieces of national security or key infrastructure and industry.¹ The Netherlands, however, one of the world’s largest recipients (and sources) of direct foreign investment, generates more than 60% of its GDP from foreign trade in goods and services and gives far more latitude to foreign direct investment than many countries within the top 20 economies of the world.²

While the United States has had in place the Committee on Foreign Investment in the United States since 1975,³ which is empowered to block foreign direct investment transactions in the United States, the Netherlands does not have a formal structure for screening foreign investments nor does it have, with few exceptions, quotas on foreign ownership.⁴

The Dutch have been skilled traders around the globe since the 17th century, and it is this heritage of leveraging trade and

*Robert Half in San Ramon, California

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foreign investment that has allowed the geographically small nation to have an enormous global business presence, both abroad, and within its borders. Binnenland (inside the Netherlands) is an attractive market and the Netherlands Foreign Investment Agency welcomes foreign business interests.⁵ There is no requirement that a company registered in the Netherlands must have a Dutch citizen as a shareholder.⁶ Except for certain strategic sectors, including the postal services and national security, whether a private company is operated or established by foreign or Dutch individuals is not a concern.⁷ The government has even voted to sell its ownership in some public utilities within the country.⁸

The Dutch have long had incredibly favorable treatment of Americans. American investments in the Netherlands were solidified through the 1956 Dutch American Friendship Treaty.⁹ While other non-E.U. citizens must demonstrate that the business they wish to establish within the Netherlands meets various innovative and differentiating entrepreneurial conditions, as well as a rigid, scored assessment of the proposed enterprise, Americans need only present proof of an investment of at least EUR 4,500¹⁰ and register with the Kamer van Koophandel (Dutch Chamber of Commerce).¹¹ Once that is secured, a residence permit valid for two years may be issued, and five additional years may be pursued thereafter.
The Netherlands remains a country with wide open doors and few barriers to foreign direct investment and continues to pursue its own investments beyond its borders, as it has done for at least 416 years when it chartered the *Vereenigde Oost-Indische Compagnie* (the Dutch East India Company) on March 20, 1602. However, this “ask few questions” approach to foreign investment scrutiny in the Netherlands is likely headed for a collision course in 2019 with the E.U. Commission’s Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union.\(^1\) (see, *EU Commission Proposal for an FDI Review Framework* on page 15 and *Overview on Foreign Direct Investment Control in the European Union* on page 17 of this Newsletter). Though the proposed Regulation does not mandate that those E.U. Member States that do not have a formal screening process in place (like the Netherlands), establish a screening system,\(^2\) the Commission is to have the ability to issue advisory opinions on potential foreign investments in the Netherlands.\(^3\) This will potentially bring the Commission at political odds with the Dutch government if the Dutch approve a specific foreign direct investment over the Commission’s concerns.

3. See Id. at Article VII.
5. See generally, Netherlands Foreign Investment Agency resources at www.investinholland.com/.
10. See Id. at Article VII.
13. See Id. at 3.
14. Id.
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