CFIUS Under President Trump: Opportunities and Challenges for German Companies

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CFIUS

- Members: Departments of Treasury, Defense, Homeland Security, Justice, State, Energy, Commerce, White House Office of Science and Technology Policy, and U.S. Trade Representative
- Can review a transaction in which a foreign person acquires control of an existing U.S. business; reviews 150 – 200 transactions annually
- Identifies potential threats to U.S. national security
- Can effectively prohibit a transaction or require divestiture of assets
- No statute of limitations on CFIUS action and no judicial review of decisions
- Filings generally are voluntary but can require filings if it has concerns about a "non-notified" transaction

KEY NATIONAL SECURITY GOALS

- Deny asset transfers — including process technology and know-how — that could augment military or intelligence capabilities of adversaries and/or erode U.S. technological and military superiority
- Protect integrity of defense and intelligence systems and supply chain against malware, spyware, backdoors, counterfeits and other threats
- Protect critical infrastructure (e.g., energy, water, telecommunications, financial, transportation)
- Preserve law enforcement access to communications (e.g., wiretaps)
- Protect sensitive data on government and corporate networks
- Protect supply chain of technologies and materials
- Protect sensitive defense training and testing (e.g., military bases)
- Protections extend to U.S. defense commercial industrial base/suppliers

Bad News for China may be Good News for Germany

- Concerns over Chinese industrial policy, intersection with M&A
  - U.S. government sees China as "weaponizing" business
- Chinese companies have been offering premiums for U.S. assets that often make German bids less competitive
  - Broad rejection and discouragement of Chinese transactions by CFIUS this year may signal an opening for German companies
  - Politically, German investment in the U.S. is more welcome
- Legislation introduced in Congress yesterday broadens CFIUS jurisdiction and adds new national security factors that may make it harder for Chinese to invest in the U.S.
- ***At the same time, CFIUS rejections of Aixtron and Infineon transactions signals potential challenges for German deals***

Challenge #1: German Investment in U.S. Assets

When investing directly or indirectly in a U.S. business or assets, German entities should expect:

1. **Close scrutiny and lengthy reviews**. Investments from allies are still being approved but are being examined more closely — and reviews are taking longer.
2. **Questions about investor's activities in sanctioned countries**. Focus is on business activities in Cuba, Iran, North Korea, Russia, Sudan and Syria.
3. **Concerns about investor's commitments in China**. Expect worries regarding research and development, manufacturing and other activities in China that may involve transfers of technology or technical know-how.
4. **Suspicion regarding Chinese or Russian ownership interests in investor**. Material Chinese or Russian shareholders, especially with board seats, will raise concerns. Same is true for co-investors in a consortium.
5. **Sensitivity of the assets will drive all of the above factors**. The more sensitive the U.S. assets are, the greater the scrutiny, suspicion and concern will be.

*Evaluate U.S. assets of non-U.S. M&A targets; CFIUS has jurisdiction over acquisition of control any U.S. business, **even if already foreign-owned**.*

CHALLENGE #2:
GERMAN SALES OF U.S. ASSETS

When selling a U.S. business or assets, either alone or as part of a larger deal, German entities should:

1. **Expect greater sensitivity regarding the U.S. assets than seems warranted**. The U.S. government may well identify national security considerations — technology, data, know-how or other aspects of the business — that surprise the German owner.

2. **Be prepared for extremely close scrutiny of potential Chinese or Russian buyers, either singly or in a consortium**. Perform diligence on such buyers to determine possible government ties, including particularly Chinese or Russian military, security or intelligence agencies.

3. **Consider keeping U.S. assets separate from assets that may later be sold**. The more tightly integrated U.S. assets are with other assets, the more challenging it will be to mitigate any U.S. government concerns by either ringfencing or divesting the U.S. assets in a subsequent sale.

4. **Anticipate direct and indirect pressure not to sell to Chinese or Russian buyers**. In addition to directly pressing a German company to find other buyers, the U.S. government also may reach out to the German government (e.g., the BMWi).

CHALLENGE #3
FOREIGN INVESTMENT IN GERMAN COMPANIES

When accepting investments from China or Russia, German entities should:

1. **Understand that a new Chinese or Russian shareholder may create a "covered transaction" with respect to the company's *existing* U.S. assets**. Even a private placement of just 10 percent (or less) of the company's shares with a Chinese or Russian shareholder may give rise to CFIUS jurisdiction to review the investment if the German entity already controls a U.S. business.

2. **Consider the potential impact on the German company's *future* investments in the United States**. A significant Chinese or Russian shareholder — especially where other relationships are present, such as a board seat or substantial commercial arrangements — may mean that a German company is deemed by the U.S. government as subject to Chinese or Russian control. Acquisitions and investments in the U.S. — including M&A of companies located in other countries but that have U.S. assets — thereafter may be evaluated by CFIUS as Chinese or Russian (as well as German).

3. **Not all Chinese or Russian investors are created equal**. For example, Chinese companies that are broadly traded on the Hong Kong Stock Exchange, with no concentrated Chinese shareholders, will be viewed very differently than a Chinese state-owned enterprise or government entity.

Bottom Line for Cross-Border M&A

- Parties must be thorough and proactive in anticipating and planning to address U.S. government concerns in the transactions, including through mitigation
- Anticipate CFIUS dimension early in the process and factor CFIUS considerations into transaction agreement and other deal documents
- Understand that CFIUS is not a transactional negotiation; member agencies must be viewed as real stakeholders with legitimate interests and equities that MUST be addressed
- Solve U.S. government's problems for it; do not wait for the government to attempt to solve them
- Monitor progress or deterioration in U.S./China and U.S./Russia relationships; look for outcomes from Trump visit to Beijing this week.

Contacts

Mark E. Plotkin

Covington & Burling LLP

One CityCenter

850 Tenth Street NW

Washington, DC 20001

T +1.202.662.5656

F +1.202.778.5656

mplotkin@cov.com

David N. Fagan

Covington & Burling LLP

One CityCenter

850 Tenth Street NW

Washington, DC 20001

T +1.202.662.5291

F +1.202.778.5291

dfagan@cov.com