OPINION

New Changes to US CFIUS Law Will Affect "European" Transactions

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In summer 2007, the United States significantly expanded the scope of review by the US Government's Committee on Foreign Investment in the United States (CFIUS), establishing broader standards for review, providing Congress with a direct oversight role and allowing limited re-examination of reviewed transactions.

The Foreign Investment and National Security Act of 2007, which became law on July 26, 2007, will influence numerous transactions not just in the United States, but also in Europe and elsewhere when target companies happen to own US businesses. These changes have made it more important than ever for European companies to consider in advance whether CFIUS might review a transaction, and to think ahead about how best to present the transaction.

It is easy to overlook the fact that—notwithstanding its name—CFIUS reviews transactions that are *not* "investments in the United States". The broad sweep of CFIUS review covers mergers and acquisitions, private equity, strategic investment and joint venture transactions in which there is no US party, but where a non-US person would gain "control" over a company that itself "controls" a business in the United States. It is completely irrelevant that a US business may already be under non-US control, or that one foreign company is selling to another.

What is CFIUS?

The Exon-Florio amendment, enacted in 1988, authorised the President to review transactions that transfer "control" over a US business to non-US entities and to prohibit or restrict transactions that are deemed to threaten US "national security" interests. The President delegated this review function to CFIUS, an inter-agency committee chaired by the Treasury Department that includes the Departments of Defense, State, Justice, Commerce and Homeland Security and the FBI, as well as several other agencies.

CFIUS reviews are triggered when the parties to a transaction make a "voluntary" filing *or* when CFIUS itself decides to initiate a review. CFIUS has 30 days to review a transaction, at which point the review will terminate unless CFIUS pursues a more extensive 45-day investigation with an ultimate recommendation to the President on whether or not a transaction should be blocked or unwound.

CFIUS gained widespread attention in Europe in the early 1990s when outspoken Congressional opposition led Thales (then called Thomson-CSF) to abandon its acquisition of LTV Corporation. As a technical matter, however, the formal Exon-Florio mechanisms have been used only once to block an acquisition. Instead, foreign buyers in security-related industries now negotiate "mitigation agreements" with CFIUS member agencies. These agreements resolve US national security concerns by obligating the buyer to operate the US business

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in ways that address the questions raised by CFIUS member agencies. Mitigation agreements have become common not only with the Defense Department, but also in the post-9/11 environment with the Department of Homeland Security and law enforcement agencies in the Justice Department.

The law adopted last summer

The recent prospect of Dubai Ports World, a UAE company, acquiring control over ship terminal operations at several US ports generated an outcry from many political officials in the United States. The controversy led to widespread calls in Congress for stricter reviews by CFIUS, tighter "national security" standards, and increased Congressional "oversight".

These efforts resulted in adoption of the Foreign Investment and National Security Act of 2007, which changed the CFIUS review process in important ways, including the following:

- CFIUS now must consider not only US "national security", but also whether a transaction might affect US "critical infrastructure" (including physical and cyber-based systems that affect national economic security and public health or safety) and US requirements for energy and other critical resources and materials. If a transaction "could" affect critical infrastructure and no mitigation agreement has been reached, CFIUS must conduct a full 45-day investigation following the initial 30-day review.
- Where the buyer is a foreign government or a company "controlled" by a foreign government, CFIUS also must consider that government's compliance with arms control, non-proliferation and disarmament agreements, its co-operation in counter-terrorism efforts and the potential for transshipment or diversion of technology with military applications.
- Acquisitions by foreign governments or companies "controlled" by those governments will undergo greater scrutiny. Absent special action by certain senior government officials, CFIUS must conduct a full 45-day investigation of those transactions following the initial 30-day review.
- CFIUS also must consider the views of US intelligence agencies, with the Director of National Intelligence directed to prepare a national security threat analysis after consulting relevant intelligence agencies.
- CFIUS now must provide information to specific members of Congress on every reviewed transaction, and upon request CFIUS may need to provide Congress with a full report on the transaction. Nonetheless, Congress would be subject to the same confidentiality restrictions that apply to CFIUS with respect to information and documents.
- After a transaction has been reviewed and cleared, CFIUS would retain the power to reopen an investigation, and recommend unwinding a transaction, if the parties submitted false or misleading information during the review process or if the parties intentionally breached a mitigation agreement and the lead agency dealing with the matter determines that no other remedies are available.

Likely impact for European parties

While CFIUS filings continue to be "voluntary", CFIUS itself has the power to initiate a review on its own. As a practical matter, CFIUS staff members now routinely monitor corporate announcements to identify deals that affect US businesses, and the CFIUS staff now commonly contacts parties to ask if they plan to make a filing.

The new law may increase complications and delays, and the potential for CFIUS review should at least be considered when a transaction involves transferring "control" over a US business—even if none of the parties to the transaction is in the United States.

A critical issue, of course, is what constitutes "control" for these purposes. To date, CFIUS has adopted a broad concept of "control" that allows it to take into account all the facts of a particular transaction in determining whether foreign control exists. For example, CFIUS found that a German company would gain "control" over a US company by acquiring 12.25 per cent of the company's stock because the German company could veto actions such as adopting strategic plans, approving annual budgets and developing new product areas. Similarly, CFIUS found that foreign control would result if a British company acquired 20 per cent of a US company along with the right to veto certain acquisitions, joint ventures, asset sales and charter amendments adversely affecting the British company.

Given the reality that the CFIUS process now increasingly will take place in a political environment with active Congressional involvement, it is prudent to at least consider the possibility that ownership interests that are not passive could be viewed as "control", particularly if the foreign party (or foreign government) can participate in discussions regarding important issues and can veto important decisions.

In planning transactions that involve US businesses, European parties need to consider whether the CFIUS process might apply. If so, they also should be proactive in dealing with the CFIUS staff and affected US government agencies, evaluate whether a mitigation agreement might make sense, and in some cases even develop a political strategy. By considering and planning for these issues in advance, important transactions can be completed on time.