



Increased Influence of US Agency CFIUS on German M&A Deals

I. Background

On 2 December US-President Obama prohibited the acquisition of the US-business of German special machinery manufacturer Aixtron AG by the Chinese purchaser Grand Chip Investment. He followed a recommendation of the Committee on Foreign Investment in the United States (CFIUS).

CFIUS determined that the envisaged transaction posed a threat for US-security interests, apparently due to the possible military/ dual use of gallium nitride semiconductors, and that the parties could not exclude or mitigate such risk. Due to the significance of Aixtron's US business, such prohibition resulted in the total failure of the transaction.

In January 2016 Phillips had to stop the envisaged sale of its business division Lumileds to the Chinese financial investor Go Scale Capital – also due to security concerns raised by CFIUS and regardless of the lack of a direct US-relation; in particular the target was no US company.

Also, in the case of the acquisition of German robotics specialist Kuka by the Chinese Midea group, CFIUS recommended a prohibition of the acquisition of the US business which led to the US business being carved-out from the transaction scope.

These recent cases show an increased influence of CFIUS on M&A transactions even if they are not directly related to the US.

II. Scope of CFIUS Review and Clearance Procedure

The authority to prohibit a transaction based on a CFIUS recommendation is formally limited to the “US-business”. However, the definition of US-business is rather broad and includes (i) US-subidiaries, (ii) all assets which are either traded within the US or could be of any advantage for such trade, and (iii) all US-patents and US-patent-applications.

Thus, a CFIUS review does not require a direct US relation; in particular it is not limited to US-based target companies.

The review of a transaction by CFIUS can be initiated voluntarily by the parties involved in the transaction (Exon-Florio-notice) or ex officio. Transactions conducted without Exon-Florio-notice can, even after closing, be reviewed and prohibited by CFIUS subsequently for an unlimited time. Potential sanctions to be imposed by the US government include fines, forced administration over US subsidiaries, US-businesses, and US-patents as well as the freezing of funds on US bank accounts. Therefore, in critical cases investors should apply for a CFIUS clearing.

III. Implications on German M&A Transactions

As German target companies are increasingly subject to CFIUS reviews, potential sellers and investors should keep the following in mind:

1. CFIUS Regulation as Standard Due Diligence and Transaction Structure Issue

Potential investors in German target companies, especially in the field of high-tech, big-data and military/ dual-use sectors, should be aware of the US-CFIUS regulation and include its potential application in their legal due diligence review. Coming to a thorough risk assessment usually requires the cooperation of the target company’s management. In addition, the parties should consider from the outset whether a carve-out of the US-business is technically and commercially feasible.

In case of critical public takeovers the takeover offer should be conditional, enabling the bidder to cancel it if either CFIUS-Clearance is refused or if the commercial basis of the offer is materially affected or modified due to mitigation measures requested by CFIUS. As regards critical private transactions, CFIUS approval should also be included as an additional closing condition, unless clearance can be obtained pre-signing.

2. Probable Effects on German Foreign Trade Law Practice

The extensive use of CFIUS legislation in the US will probably also lead to a stricter application of the existing German foreign trade legislation (AWG/AWV). German foreign trade law already allows German authorities to prohibit a transaction in case of a threat for the “public order and security” of the Federal Republic of Germany. If CFIUS has concluded that a certain transaction poses a threat for US security interests, it will be difficult for German authorities to argue that German security interests, in contrast, are not affected.

Moreover, as a reaction to the increased number of cross-border M&A technology transactions in Germany, the German government plans to tighten up the German foreign trade law which will further intensify the current protective trend.

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