

Keys for Japanese Businesses to Obtain Foreign Direct Investment Approvals to Close Their Cross-border M&A Deals and Investments in the US, the UK and Europe

米・英・欧へのクロスボーダーM&A・投資案件に不可欠な外国直接投資承認-日本企業にとっての留意点

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2022年6月30日 午後4時(日本時間)



- August 2018, NDAA for Fiscal Year 2019 included companion legislation approaching national security concerns from different angles
 - Foreign Investment Risk Review Modernization Act (**FIRRMA**) – CFIUS reviews foreign investment in US
 - Export Controls Reform Act (**ECRA**) – BIS reviews exports, reexports and transfers (in country)
- FIRRMA
 - On November 10, 2018, CFIUS Pilot Program came into effect, implementing mandatory declaration filings
 - On February 13, 2020, comprehensive new regulations came into effect implementing FIRRMA (and ending the pilot program)
 - On October 15, 2020, new mandatory filing rules came into effect changing the test for a mandatory filing based on the use of critical technology at the US business
- ECRA
 - Several rules defining control parameters for certain emerging technologies and ANPRM for foundational technology

- US policy on foreign investment is driven by the geopolitical relationship with China and by sanctions on Russia and other countries
- Policy Objectives
 - Slowing down Chinese leadership in emerging technology
 - Not supporting civil/military fusion in China
 - Maintaining integrity of US supply chains
 - Favor trusted partners aligned with US national security and foreign policy interests
- Policy considerations impact the review process (i.e., Government due diligence) and the mitigation necessary to obtain government clearance

- EU FDI Regulation (2019)
 - Coordination and information exchange on national FDI regimes of EU member states, not a harmonised approach
 - Significant differences remain on scope, coverage, timescales etc between EU member state regimes
 - No requirement for member states to have FDI legislation
 - Other member states can comment on FDI screening in process
- UK National Security and Investment Act (2021)
 - Covers domestic as well as foreign transactions
 - Mandatory notification for certain areas of economic activity (17 schedules)
 - Voluntary notification possible if self-assessed risk to national security
 - Buyer notifies (and carries compliance risk)
 - Retrospective effect, power to annul transaction
 - Expected over 1,000 notifications / year, small proportion subject to conditions or blocked
 - Early stats (first 3 months) 222 notifications, 17 call in notices

- New Netherlands Investments, Mergers and Acquisitions Security Screening Bill published in Official Journal (June 2022)
 - Partially retroactive to September 2020
 - Covers vital suppliers, high tech campuses, and sensitive technology
 - Acquisition or increase of significant interest
 - Applies to transactions involving foreign and domestic investors
 - Specific FDI sector regimes (covering telecommunications, gas and electricity, with defence to come) remain in place
- New Belgian screening legislation announced (June 2022)
 - Agreement between Belgian governing entities to put in place FDI screening mechanism
 - Screening Commission to be put in place
 - Will cover critical infrastructure (energy, health, media, defence); strategically important technologies; food, energy and raw material supply; private security
 - Entry into force expected January 2023

- EU policy on foreign investment is driven by “strategic autonomy” and by sanctions on Russia, with China in the background
- EU Policy Objectives
 - Resilience and integrity of critical infrastructure and critical supply chains
 - Reduce reliance on potentially unreliable / hostile states
- EU FDI structures formally neutral as between third countries
- UK policy driven by similar considerations, slightly closer to US on China
- As with US, policy considerations impact the review processes, you may not be given a full account of the national security considerations at stake, and it is therefore harder to judge the mitigation necessary to obtain government clearance

Briefing Topics

- Policy Developments in the US and Europe Impacting the Government Review of Foreign Direct Investment (FDI)
- Deal Considerations to Address FDI Filing Requirements and Risks
- The US, UK and EU Government Review Processes, Timelines, Strategic Considerations and FDI Risk Mitigation
- Questions and Answers



FDI Deal Considerations: Assessing Risks Across Numerous Jurisdictions

- Many jurisdictions have mandatory pre-closing filing requirements
 - Transactions must not close before approval
 - In many ways similar to considerations re: merger control filings
 - Golden rule: “the earlier the better”
- First key difference to merger control: FDI regimes apply to **internal restructurings!**
 - FDI rules also apply to preparatory transactions
 - For instance, if a carve out is required prior to transfer to the Buyer, such carve-out may require separate prior approval
- Second key difference to merger control: Assessment takes longer
 - The application of rules depends on the products and the list of products is different in each jurisdiction
 - Unlike merger control where an assessment is made on the basis of sales every country has different list of products

FDI Deal Considerations: Due Diligence and Agreement Provisions

- Need to scrutinize past deals
 - In many jurisdictions authorities can look back and open investigations into past transactions
 - Even if there was no mandatory filing obligation.
- Need to assess export control licenses – they will become relevant in any FDI process
- Need to assess all steps of transaction.
- Need to assess political risk.
- Structure hell-or-high-water clauses with FDI in mind.

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US: Committee on Foreign Investment in the United States (CFIUS) after FIRRMA

- What is CFIUS?

- An inter-agency committee authorized to review transaction and investment by **foreign person** in **US business** or **US real estate interests** (i.e., a covered transaction) in order to determine the effect of such transaction or investment on the national security of the United States.

- Organization

- Voting Members

- | | |
|---------------------------------------|--|
| 1. Department of the Treasury (chair) | 6. Department of State |
| 2. Department of Justice | 7. Department of Energy |
| 3. Department of Homeland Security | 8. Office of the US Trade Representative |
| 4. Department of Commerce | 9. Office of Science & Technology Policy |
| 5. Department of Defense | |

- Observing Members

- | | |
|----------------------------------|------------------------------|
| 1. Office of Management & Budget | 4. National Economic Council |
| 2. Council of Economic Advisors | 5. Homeland Security Council |
| 3. National Security Council | |

- Non-Voting, Ex-Officio members

- | | |
|--------------------------------------|-----------------------|
| 1. Director of National Intelligence | 2. Secretary of Labor |
|--------------------------------------|-----------------------|

- Is the transaction a covered transaction?
- If so, is filing with CFIUS mandatory or voluntary?
- Should the parties submit a short form declaration or a long form notice?
- Or, if the filing is voluntary, should parties file or not file?
- How is this assessment impacted by characteristics of the buyer and U.S. business?

Notices Submitted to CFIUS from 2018-2020 (3 years)

	Finance, Information and Services	Manufacturing	Mining, Utilities and Construction	Wholesale Trade, Retail Trade and Transportation	Total
Japan	49	39	9	7	96
All	255	249	89	54	647

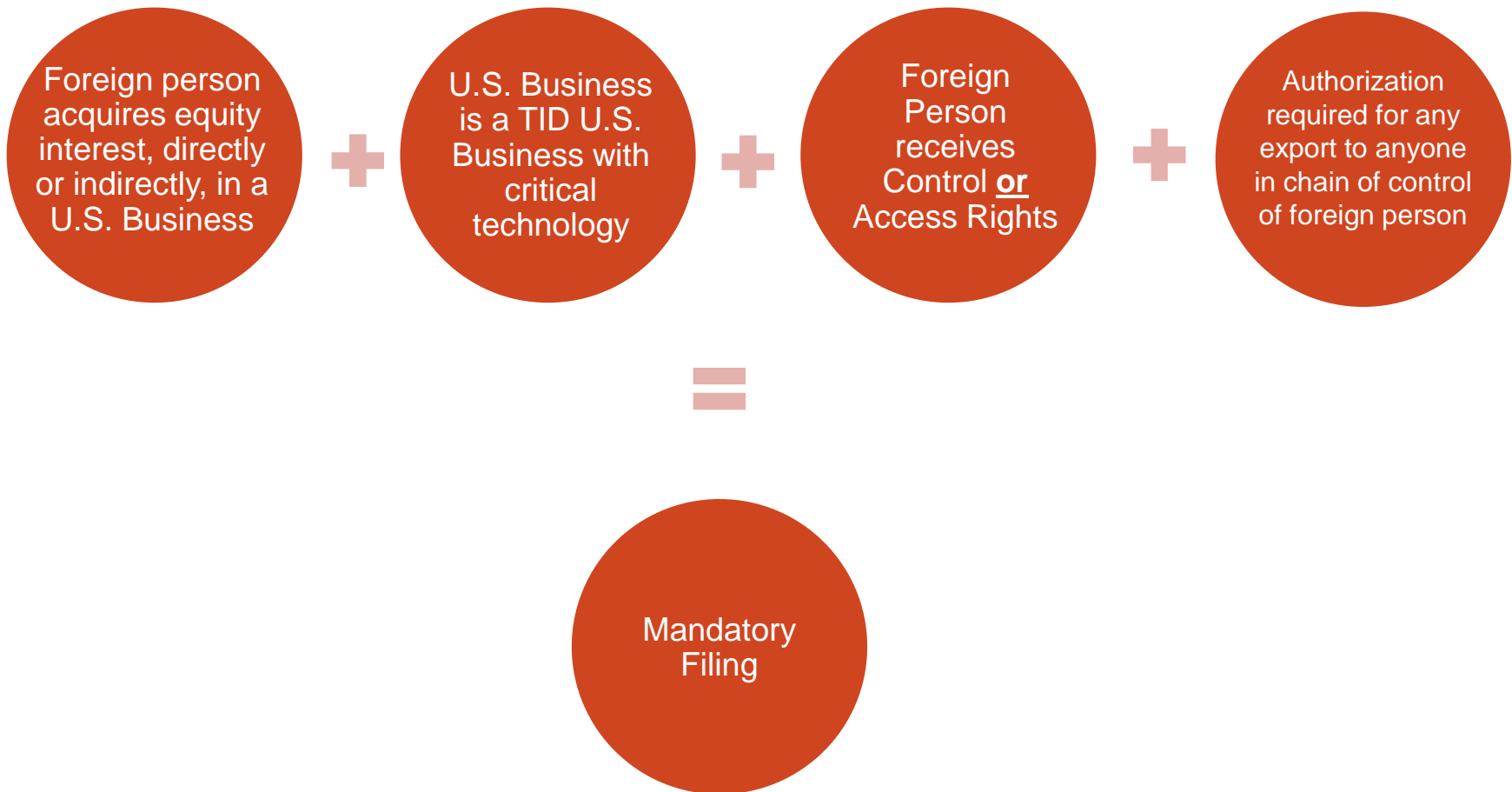
CFIUS Review Authority - takeovers or investments in United States

- **Control.** Acquisition of control (or change of control) of U.S. business by foreign person (pre-existing authority)
 - **Non-controlling Investment in U.S. Businesses of Specific Concern.** Equity investments with **access rights** in U.S. businesses that:
 - owns, operates, manufactures, supplies or services **critical infrastructure**
 - produces, designs, tests, manufactures, fabricates, or develops one or more **critical technologies** (including emerging and foundational technologies on CCL)
 - maintains or collects **sensitive personal data** of United States citizens
- Note: Defined in the regulations as a “**TID U.S. business**” – an abbreviation for critical technology, critical infrastructure, and personal data.
- **Real Estate.** Purchase or lease of real estate interest in in proximity to a national security interest

- Access to any material nonpublic technical information in the possession of the TID U.S. business
- Membership or observer rights on, or the right to nominate an individual to a position on, the board of directors or equivalent governing body of the TID U.S. business, or
- Any involvement, other than through voting of shares, in substantive decision-making of the TID U.S. business regarding
 - The use, development, acquisition, safekeeping, or release of sensitive personal data of U.S. citizens maintained or collected by the TID U.S. business;
 - The use, development, acquisition, or release of critical technologies; or
 - The management, operation, manufacture, or supply of covered investment critical infrastructure.

- **Foreign Government Substantial Interest.** A covered transaction that:
 - results in the acquisition of a substantial interest ($\geq 25\%$ voting) in a TID U.S. business by a foreign person
 - in which the national or subnational governments of a single foreign state (other than an excepted foreign state) have a substantial interest ($\geq 49\%$ voting)
- **Critical Technology US Business.** A covered transaction that
 - is a covered investment (with **access rights**) in, **or** that could result in foreign control of, a U.S. business that produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies, and
 - U.S. government authorizations would be required to export, reexport, transfer (in-country), or retransfer the critical technology or technologies produced, designed, tested, manufactured, fabricated, or developed by the U.S. business to foreign persons in the control chain of the foreign person investor

US: Elements of a Mandatory Filing for Critical Technology US Businesses



Long form notice

■ Pros

- Safe harbor for transaction

■ Cons

▪ Filing fee

Transaction Value	Fee
<\$500,000	no fee
≥\$500,000; <\$5M	\$750
≥\$5M; <\$50M	\$7,500
≥\$50M; <\$250M	\$75,000
≥\$250M; <\$750M	\$150,000
≥\$750M	\$300,000

- 45 day review plus 45 day investigation

Short form declaration

■ Pros

- 30 day review
- No filing fee
- Abbreviated data collections and form
 - No PII

■ Cons

- May not result in safe harbor
 - Clearance
 - No action
 - Require full notice

No filing (or no closing condition)

■ Pros

- No delay to closing

■ Cons

- CFIUS has authority to review transaction after closing, even years later
- Changes in business or geopolitical environment may create future risk to business

- Assess CFIUS authority and risk
- In appropriate cases, early engagement with member agencies
- Filing protection for the buyer (Japanese interests generally file)
- Other filings: Target is registered with DDTC (defense trade) or has a facility security clearance (common issue for our recent notices for Japanese interests)
- Common pitfalls
 - Supply chain insight – how important is the product
 - Export classification and compliance issues
 - Policy goals (e.g., trading aligned with US priorities)
 - Vulnerable significant relationships
- CFIUS can be a deal lever
 - Seller will discount “CFIUS problematic” buyers
 - Risk shifting

Jurisdictional trigger points of FDI laws (1)

- Typically covers minority acquisitions
 - UK: 25%
 - Germany: 10% in highly critical areas, 20% in other critical areas
 - France: 25% or 10% (listed companies) for non-EEA buyers.
- Often covers increases in shares/voting rights to over 75%
 - Even if the foreign entity already holds 50%
 - This applies in all UK and Germany.
- Intra-group acquisitions can be covered (UK, Germany, France)
 - E.g., a German subsidiary is held directly 100% by the Japanese parent company but due to restructuring a US subsidiary will hold the shares.
 - E.g., prior to a sale of a UK entity, parts of a business are carved-out to a new entity within the same corporate group

- Nationality of the ultimate owner is relevant
 - In most EU countries: general FDI rules apply only to non-EU buyers; for pure defense products where to all foreign buyers (e.g. Germany).
 - Exceptions in UK (law applies even to UK buyers) and France (all rules apply to non-French buyers).
 - An acquisition of a German company by an EU subsidiary of a Japanese parent company is considered a non-EU acquisition.
- Typically only acquisitions of companies or assets located in a country give rise to FDI control
- UK law has extraterritorial application (exception)
 - Even if no UK entity is purchased, UK law may require mandatory filing! It is sufficient that Target entity “*carries out activities in the UK*” or “*supplies goods or services to people in the UK*”
 - Also Italy has rules where certain contracts with Italian companies are considered Italian assets.

- 16. is a developer, manufacturer or processor of
 - a) micro- or nano-electronic non-optical switches (integrated switches) on a substrate and discrete semiconductors,
 - b) micro- or nano-structured optical switches on a substrate and discrete optical construction elements or
 - c) manufacturing or processing tools, here in particular crystal growing, photolithographic, mask-manufacturing, fibre draw or coating facilities, and grinding, etching, doping or cutting equipment or clean-room transport facilities, testing tools and masks for goods within the meaning of letters a or b.

- 21. is a developer or manufacturer of
 - a) goods with which components of metallic or ceramic materials for industrial applications are manufactured by means of additive manufacturing processes, here in particular powder-based manufacturing processes which have an inert gas atmosphere and use a laser or an electron beam as an energy source,
 - b) essential components of the goods cited under letter a or
 - c) powder material which is processed by the manufacturing processes cited under letter a,

- 22. develops or manufactures goods which specifically serve the operation of wireless or wired data networks, especially wired or lightwave-connected transmission technologies, network coupling elements, signal amplifiers, network surveillance, network management and network control products for this,

- Advanced Materials
- Advanced Robotics
- Artificial Intelligence
- Civil Nuclear
- Communications
- Computing Hardware
- Critical Suppliers to Government
- Cryptographic Authentication
- Data Infrastructure
- Defence
- Energy
- Military and Dual-Use
- Quantum Technologies
- Satellite and Space Technologies
- Suppliers to the Emergency Services
- Synthetic Biology
- Transport

- UK
 - First phase review : 30 working days (from an “accepted filing”)
 - Second phase review (rare – between 1 Jan-31 March 2022: <8%) : 30 working days (extendable by 45 working days).

- Germany
 - First phase review : 2 months
 - Second phase review (rare): additional 2 months (possibly extended by 3 months)

- France
 - First phase : 30 working days (from an “accepted filing”)
 - Second phase: 45 working days (frequent)
 - In > 50% of the cases the MoE will seek undertakings from the Buyer and the Parties in general should count at least 3 months to receive French FDI clearance
 - Undertakings usually include undertakings to supply French strategic customers (under commercial terms), maintain manufacturing/IP capabilities in France and annual reporting requirements

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Thank you for your participation

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