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Annual Compliance  
Conference 2022

# **Export Controls, Sanctions and Foreign Investment**

Key Takeaways from the Annual Compliance  
Conference 2022

## In Brief

Against a backdrop of shifting trade patterns and major geopolitical events over the past 12-18 months, global attention has naturally been focused on Russia. However, beyond Russia there have been a number of important developments in the export control and sanctions space. In particular, regulators and intelligence services in the UK and US have been hyper-focused on potential threats from China. In anticipation of a future suite of measures, companies can prepare by conducting a holistic risk mapping exercise across multiple functions.

Meanwhile, new legal frameworks and regimes in the area of national security and foreign investment have been established and the more mature regimes are evolving. Whilst COVID-19 was a driver for a renewed focus on foreign investment controls, there has been huge post-pandemic growth in cross-border foreign investment, and it is clear that maintaining effective controls will continue to be a priority for governments worldwide in the medium-to-long term.

This week's sessions focus on recent developments in relation to export controls, sanctions and foreign investment, including:

- Export controls and sanctions related to China, Iran, Myanmar, and Cuba
- Thematic sanctions related to cyber and human rights
- Export controls and emerging technology
- Enforcement trends
- The UK National Security and Investment Act 2021
- Foreign investment controls in the United States, Australia and the European Union

## Session 2: National Security and Foreign Investment Review Developments

This is a period of great interest for foreign investment review. Current major geo-political events, together with major legal frameworks that are constantly evolving and developing, mean that there is a great deal of activity in the foreign investment space. Post-COVID, there has been a spike in deal activity and huge cross border foreign investment, especially in the tech sector. COVID was undoubtedly a renewed driver for foreign investment controls, which are here to stay.

Reflections on the last 12 months

### UK developments

- **The National Security and Investment Act 2021 came into force on 4 January 2022:** Mandatory notification is now required for transactions that fall within one of 17 sectors including AI, energy and transportation. Voluntary filings may also be made for other transactions that may have an impact on national security e.g., because they are closely connected to one of the mandatory sectors. For an initial period of time, we did not see much action coming out of the UK government in the first few months of the regime. There were no reports of any transactions being blocked or having conditions imposed during the first quarter.
- **The UK government published its first report on the operation of the regime during its first quarter on 16 June 2022:** In the first quarter of this year, over 200 mandatory notifications were made and 25 voluntary notifications. The average time to accept a notification is 3-4 days, which is promising. Whilst the statistics indicate that the system is working efficiently, the report points to some filings being rejected as a result of insufficient information regarding the acquisition or the acquirer, and others for failure to submit separate notification forms where there are multiple qualifying acquisitions.
- **Between July and September 2022, two transactions were blocked and four had conditions imposed:** These cases related to the technology, defense and energy sectors and were called in by the UK government for review, a sign that the government is becoming more active. Although both cases that were completely blocked involved Chinese acquirers, other cases demonstrated that action will not be limited to China e.g., other cases called in have involved European and UAE investors. We cannot assume that action will only be taken in relation to Chinese investors. Interestingly, one case involved the grant of a license, illustrating that the regime extends beyond transactions to encompass a broader range of agreements, such as IP transactions.
- **The conditions imposed to date indicate that the government is concerned with protecting sensitive information and maintaining UK strategic capabilities:** Conditions included restrictions around the information that is shared with the acquirer, reporting requirements and ensuring that certain capabilities continued to be provided and maintained in the UK. For example, in one case there was a requirement to ensure that servicing of the emergency services network would continue to be maintained.
- **Notifications are made to, and the review is undertaken by, the Investment Security Unit (ISU), but the decision maker is the Secretary of State:** The contents of a Request for Information from the ISU can give clues as to their recommendation, but the decision will ultimately be made by the Secretary of State. When considering the appropriateness of proposed remedies, engaging a communications firm may assist in understanding the likely concerns of the Secretary of State.

- **Competing bidders are making tactical use of the UK process by alerting the ISU in cases where other bidders may need to make a notification:** This is a strategy that has been frequently employed elsewhere such as in the US in an attempt to disadvantage other bidders —although the outcome is rarely successful there are some notable exceptions.

## US developments

There are 3 key trends: priorities; extensiveness of CFIUS engagement; and tools and outcomes of CFIUS review.

### Priorities:

- **On 15 September 2022, President Biden issued an Executive Order directing the Committee on Foreign Investment in the United States (CFIUS) to prioritize certain factors in its assessment of risks associated with a foreign investment:** The Executive Order essentially codifies the Biden administration's approach to CFIUS reviews, providing some insight into how CFIUS will analyze transactions. Reviews focus on both the threat presented by the foreign investor and any vulnerabilities presented by the US business in question. Businesses can expect a focus on technology transfer, security of supply and more attention on supply chains, data; and third-party ties of investors (especially in China). Third party connections are in particular being probed by CFIUS, which could cause concern amongst businesses with highly diversified portfolios.

### Extensiveness of CFIUS engagement:

- **There has been a trend towards a more searching review of transactions in recent years:** The staff of CFIUS was quadrupled 4-5 years ago, leading to the calling in of many transactions that had not been notified (135 last year).
- **A rigorous CFIUS risk assessment should be conducted as early as possible in the transaction cycle:** This can result in the efficient resolution of any issues at an early stage, preventing them from becoming a roadblock in terms of substantive concerns and timelines. A risk assessment will also assist businesses to make an informed decision on whether to make a voluntary filing where a mandatory prior approval requirement has not been triggered.

### Tools and outcomes of CFIUS reviews:

- **Certain transactions may trigger a mandatory prior approval:** The criteria for triggering a legal compliance obligation to seek prior approval are fully targeted and narrow, however they are not limited to particular industry sectors, and may include sectors which do not, broadly speaking, lend themselves to national security concerns.
- **Mitigation agreements are on the rise:** Previously, mitigation was confined to instances where there was a real concern about a foreign investor. We are now seeing an uptick in mitigation where the investor is an allied country but the US business in question has national security vulnerabilities. This has come as a surprise to some investors.

## Australian developments

- **The Foreign Investment Review Board (FIRB) reviews foreign investment proposals on a case-by-case basis to ensure investment is not contrary to the national interest or national security:** Key focus areas are the supply to military or intelligence agencies and data. Conditions imposed around data generally require any sensitive data to be held in or accessed from Australia.
- **The definition of "Critical Infrastructure Asset" (CIA) was significantly expanded in December 2021:** Approval is generally required to acquire an interest of 10% or more in a national security business, including critical infrastructure assets. Prior to December 2021, CIAs were confined to large ports, water, electricity generation, and gas assets. Following the amendments, a wide range of assets now constitute CIAs, including telecommunications, broadcasting, data storage or processing, banking assets and financial market infrastructure, education, food and grocery, aviation and defense. Around the same time certain other regulations were amended, reducing the thresholds for assets to be captured.
- **Application fees have doubled from 29 July 2022:** Fees vary depending on the amount of consideration and type of interest being acquired, but can now exceed AUD 1 million. Fees are payable at the point of application, which can be problematic in the context of an option process where multiple bidders are paying fees. FIRB has issued guidance confirming that fee credits will be granted where a bidder has been unsuccessful as part of a competitive option process.
- **Improved processing times:** During 2020/21, we saw the longest processing times ever seen, as long as 5 or 6 months. This has much improved - transactions are now approved in 2 - 2.5 months if not sensitive. A transaction that raises sensitive issues can expect a processing time of around 3 - 4 months.
- **Regulators have been vocal about non-compliance with approval conditions:** Historically only quite sensitive assets had audit conditions attached, but these are now standard. Businesses will generally be required to engage an accounting firm to conduct an audit in relation to their compliance with approval conditions. If non-compliance is identified a work plan will need to be agreed to address the issues.

## EU developments

- **There is no EU-wide screening regime.** The EU FDI Regulation creates a framework for cooperation between Member States. This system has been in place since October 2020.

- **Recent annual report shows that the manufacturing, IT and financial services sectors account for over 75% of cases that have reached a more detailed "Phase 2" level of review:** There has been a dramatic rise in IT and technology sector notifications, partly due to government attention on high tech industries and their associated supply chains, but also because the deal flow has been greater in this area. There has been a particular focus on semiconductors and telecommunications. These industries present difficult issues to reconcile — authorities recognize that investment in cutting edge technology may be beneficial for national security and are trying to identify those areas where scrutiny is needed and put the right safeguards in place.
- **Review is generally swift across Member States** - usually within 15-20 calendar days in most jurisdictions. There has been an increase in the number of formally reviewed cases - this could be because authorities are increasingly aware of what might be a critical infrastructure asset. A number of transactions are notified in more than one Member State, so it is important to have a joined up approach/strategy.

## Annual Compliance Conference 2022

Our popular Annual Compliance Conference, which attracts over 6,000 in-house senior legal and compliance professionals from across the world, took place across five weeks from 6 September - 6 October 2022. These sessions virtually delivered our cutting-edge insights and guidance on key global compliance, investigations and ethics issues.

The sessions provided practical insights and analysis on significant developments across:

- Anti-bribery, corruption and economic crime
- Customs and FTAs
- Export controls, sanctions and foreign investment
- Antitrust and competition
- ESG, supply chain and product compliance



Watch these sessions on demand at our Annual Compliance Conference hub.

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