

# Foreign Direct Investments – Clearance in the United States and Europe

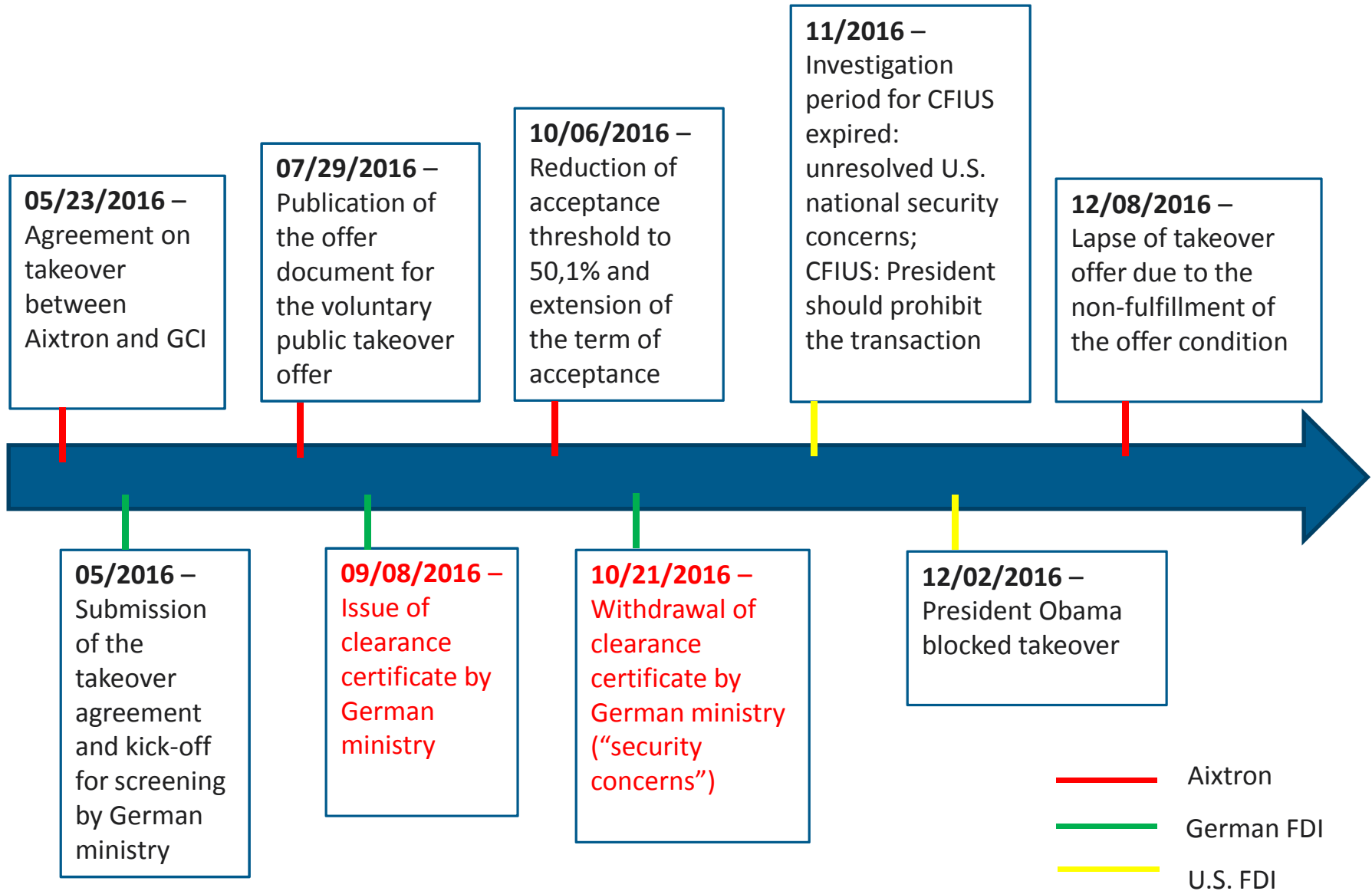
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Webinar 2 – 29 November 2017 – Focus: United States

# Agenda – Webinar 2

	Foreign Direct Investments - Clearance in the United States
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II.	Overview of CFIUS
III.	Considerations for CFIUS review
IV.	Recent Developments – Possible changes to CFIUS
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VI.	Some Conclusions

# Timeline – “Aixtron Case”



# Recent CFIUS Developments – “Aixtron Case”



- Only four transactions have been blocked by President following recommendation from the Committee on Foreign Investment in the United States (CFIUS)
  - In most other instances in which CFIUS will not approve a transaction, parties will usually withdraw prior to formal blocking
- Aixtron SE (Dec. 2016):
  - Controlling interest (approx. \$700 million) was to be acquired by Grand Chip Investment GmbH (German), which was owned by Fuijan Grand Chip Investment Fund LP (Chinese, some government ownership)
  - Aixtron SE: German; approx. 20% of its business in the U.S.
  - Enough for CFIUS to block that part of transaction
  - Concerns over transfer of semiconductor manufacturing equipment and technology – and overall know-how and body of knowledge

# Recent CFIUS Developments – “Aixtron Case”



- Aixtron SE (Oct. 2017):
  - CFIUS approves sale (approx. \$50 million) of Aixtron’s U.S. Chemical Vapor Deposition and Atomic Layer Deposition assets and business lines to Eugene Technology (South Korea)
- Differences from 2016:
  - Technology
  - Degree of government involvement
  - South Korea rather than China

# Recent CFIUS Developments



- Lattice Semiconductor (Sept. 2017):
  - \$1.3 billion acquisition of Lattice Semiconductor by Chinese venture capital fund Yitae Capital Limited and its state-owned parent blocked
  - Lattice makes field programmable gate arrays, which can be programmed by customers for specific needs
  - CFIUS cited the transfer of IP, the Chinese government's role, and the importance of the semiconductor supply chain
- Several other transactions under close scrutiny or abandoned altogether
  - Trump administration has pushed back against transactions involving China

# Overview of CFIUS

- CFIUS reviews “covered transactions” involving potential control of a U.S. business by a foreign person
- CFIUS reviews transactions to determine whether they pose a potential national security risk to the U.S.
- CFIUS review of transactions is technically voluntary
- But, CFIUS can initiate its own review of transactions – even those that have already been completed. CFIUS can require that these transactions be altered or even unwound after the fact
- Two safe harbors:
  - Not a covered transaction; or
  - CFIUS reviews and grants approval (no unresolved national security concerns)

# Overview of CFIUS – What is CFIUS?

- CFIUS Chair: Secretary of Treasury

- Also includes:

- Department of Commerce
- Department of Defense
- Department of Energy
- Department of Homeland Security
- Department of Justice
- Department of State
- Office of U.S. Trade Representative
- Office of Science and Technology Policy
- As Needed: Office of Management and Budget, Council of Economic Advisors, National Security Council, National Economic Council, Homeland Security Council





# Overview of CFIUS – Important Definitions

- Covered transaction: Any transaction that is proposed or pending after August 23, 1988, by or with any foreign person, which could result in control of a U.S. business by a foreign person
  - Exemption for “greenfield” investments
- Control: The power, direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means, to determine, direct, or decide important matters affecting an entity
  - Consideration given to whether there are formal or informal agreements between foreign persons to act in concert
  - Transactions resulting in a foreign person holding ten percent or less of the voting interest in a U.S. business are not covered, so long as the transaction is made for passive investment only

# Overview of CFIUS – Important Definitions

- Foreign person:
  - Any foreign national, foreign government, or foreign entity;
  - Any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity
- U.S. business: Any entity, irrespective of the nationality of the persons that control it, engaged in interstate commerce in the United States, but only to the extent of its activities in interstate commerce

# Overview of CFIUS – Process and Timelines

- Parties to a transaction may submit a draft notice to CFIUS for review and comment
- A significant amount of information is required, including personal information of board members of foreign person and its parent
- Once the parties submit a final notice of a transaction, CFIUS must declare it complete to start the review process
- 30-day review period; 45-day investigation (if necessary)
- Substantively, the 30-day review period and the 45-day investigation period are the same
- CFIUS and the parties may negotiate mitigation measures to address national security concerns

# Considerations for CFIUS Review – Factors

- Among others:
  - Effects on domestic production needed for national defense
  - Effects on U.S. technological leadership
  - National security-related effects on U.S. critical technologies
  - Effects on U.S. critical infrastructure
  - Effects on sales of military goods/equipment/technology to countries that present concerns
  - Potential control of a U.S. business by a foreign government
  - Foreign country's adherence to nonproliferation regimes

# Considerations for CFIUS Review – Sensitive Areas

- CFIUS gives transactions in some areas closer scrutiny than others
- Areas of particular sensitivity:
  - Control by persons from certain foreign countries (e.g., China, Russia, Middle East)
  - Sensitive technologies or sectors (e.g., government contractors, telecommunications, semiconductors, companies that possess personally identifiable information, companies located near military facilities, energy)

# Recent Developments – Possible Changes to CFIUS

- Foreign Investment Risk Review Modernization Act
- Introduced by Sen. John Cornyn (R-TX) in U.S. Senate and Rep. Robert Pittenger (R-NC-09) in U.S. House
- Bipartisan cosponsors in both House and Senate
- Intended to focus on concerted efforts by countries to try to acquire leading technologies
  - Does not mention China, but clearly aimed at Chinese efforts
- Would broaden CFIUS authority and allow it to examine additional types of transactions
  - Greenfield investments still exempted

# Recent Developments – Possible Changes to CFIUS

- New covered transactions:
- The purchase or lease by a foreign person of private or public real estate that:
  - is located in the United States and is in close proximity to a U.S. military installation or other sensitive government facility; and
  - meets additional criteria that CFIUS will prescribe through regulation
- Any other non-passive investment by a foreign person in any U.S. critical technology company or U.S. critical infrastructure company
- Any change in the rights that a foreign person has with respect to a U.S. business in which the foreign person has an investment if that change could result in
  - foreign control of the U.S. business; or
  - the type of investment in critical technology or critical infrastructure companies described above
- The contribution by a U.S. critical technology company (other than through an ordinary customer relationship) of both intellectual property and associated support to a foreign person through any type of arrangement, such as a joint venture

# Recent Developments – Possible Changes to CFIUS

- Other changes in the bill:
  - Voluntary declarations (5 pages max)
  - CFIUS could respond to a written declaration by requesting the filing of a written notice, unilaterally initiating a review of the transaction, or notifying the parties that no further action would be taken with respect to the transaction
- Additional factors to be considered, including:
  - The extent to which personally identifiable information or other sensitive data of US citizens would be exposed to foreign persons or governments
  - The effect of a transaction on new cybersecurity vulnerabilities or the exacerbation of existing ones



# EU/ International FDI coordination

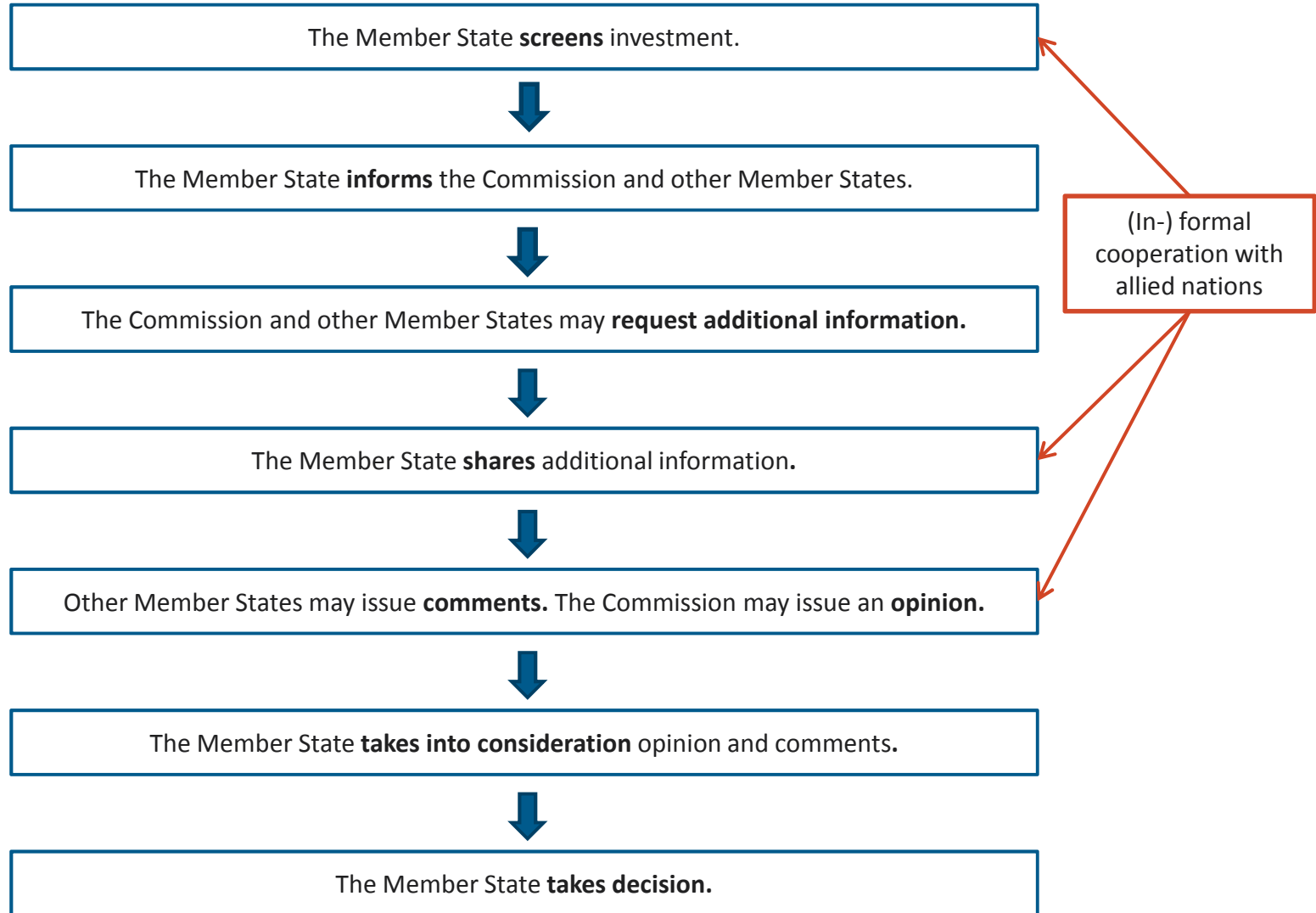
- Informal coordination between EU Member States and allied nations already in place
- EU Proposal: New coordination mechanisms between EU Member States and EU Com (i.a. information exchange system)

Recital no. 14 of the EU Proposal: “A mechanism which enables Member States to cooperate and assist each other where a foreign direct investment in one Member State may affect the security or public order of other Member States should be set up.”

- Confidentiality risks
  - Time implications
  - Path to cooperation on FDI with allied nations?
- EU Com’s coordination group evaluates the details and scope of the EU Proposal

Communication from the EC (COM 2017 494 final): Such coordination group can “discuss the opportunity of cooperation with third countries with shared interests and shared challenges in respect of the impact of foreign direct investment on security and public order.”

# Cooperation mechanism under the EU Proposal



# Coordination of International FDI Reviews

- Consider FDI in deal planning (carve-out? timing?)
- Consistent notifications recommended
  - Between FDI and merger control submissions and
  - Between FDI submissions worldwide (within EU, US-EU)
- National evaluation of “Public Security and Order” within national clearance procedures
  - Different screening mechanisms in place (12 member states have review proceedings; huge differences)
  - Aspects of reciprocity and state ownership are getting more importance
  - Focus on certain industries (example Germany: “critical infrastructure” is now part of the underlying FDI review rules)

# “Critical” infrastructure in U.S./GER/FR\*

Branch	U.S.	GER	FR
Energy & water	✓	✓	✓
Nutrition, food & agriculture	✓	✓	✓
IT & telecommunications	✓	✓	✓
Healthcare, public health and emergency services	✓	✓	✓
Finance & insurance	✓	✓	
Traffic & transportation systems	✓	✓	✓
Private security			✓
Research, development or production of goods that could be used illegally (e.g. for terrorism)			✓
Activities relating to the interception and detection of communication and conversations		✓	✓
Security certification of IT products and systems			✓
Defense & military (manufacturing, IT, services, and similar services)	✓	✓	✓
Research, production or sale of arms, ammunition or explosives	✓	✓	✓
Chemicals	✓		
Government facilities	✓		
Commercial facilities	✓		

\*Overview includes examples; interpretation of terms subject to national law

# Some Conclusions on CFIUS

- CFIUS scrutiny of transactions has increased dramatically in recent years and will continue to grow
- Possible legislative efforts to expand CFIUS jurisdiction would tighten the focus even further, if they become law
- Companies – even those from areas not considered “sensitive” (China, Russia, Middle East) – should carefully consider the effects CFIUS review could have on their transactions

# Your Experts



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