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Research on Risk Identification in Legal Due Diligence and Response Strategies in Cross border Mergers and Acquisitions Transactions

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Abstract: As global investment deepens, cross-border mergers and acquisitions (M&A) have become a primary avenue for enterprises to secure key resources, enter new markets, and realize strategic synergies. Yet divergent legal frameworks, review procedures, and policy priorities across jurisdictions have sharply heightened legitimacy risks. Drawing on U.S. law—particularly CFIUS practice—and international investment law, this article systematically examines challenges arising from disparate approval regimes, the tension between antitrust and national-security reviews, and the opacity of investor identities. It then analyzes CFIUS’ s risk-assessment logic, the constraining—but often limited—role of international investment agreements, and proposes concrete responses: rigorous, multidimensional due-diligence; transaction structures that anticipate or mitigate regulatory triggers; and more robust legal-opinion and compliance-assurance mechanisms. In an era of tightening global oversight and intensifying security-policy scrutiny, cross-border M&A must embed legal-compliance design at the core of deal planning and elevate legitimacy considerations to ensure both smooth execution and sustained post-closing compliance.

1. Introduction

As global capital markets converge, cross-border mergers and acquisitions (M&A) have become a vital tool for companies looking to penetrate foreign markets, secure critical resources, and achieve strategic synergies. Compared with purely domestic deals, however, the legal terrain surrounding cross-border transactions is far more intricate: overlapping national statutes, regulatory philosophies, and judicial interpretations combine to heighten uncertainty and raise compliance costs. The challenges are especially pronounced within the U.S.-centric framework, where national-security scrutiny—most notably via CFIUS—operates alongside antitrust enforcement, anti-money-laundering rules, and increasingly stringent investor-identity checks, collectively setting a much higher bar for the legitimacy of overseas capital acquisitions [1-3].

Against this backdrop, in cross-border M&A, the identification and prevention of legal legitimacy risks have become key variables in the success or failure of transactions. From the perspective of national interests, the United States has strengthened its review of M&A transactions in key industries, involving not only traditional defense, communications and energy, but also emerging business areas such as data security, biotechnology and artificial intelligence [4]. This trend is not only reflected in the revision of legal rules, but also in a more comprehensive review of relevant factors of a cross-border M&A, such as transaction motivations, control structures, and overseas investor backgrounds. [5].

2. Legal legitimacy issues faced in cross-border M&A transactions

2.1 Legitimacy barriers caused by differences in M&A approval systems

In cross-border M&A, the patchwork of national approval regimes is the main wellspring of legitimacy risk. Although most jurisdictions now maintain dedicated merger-control systems, they diverge markedly on four fronts: (i) which authority conducts the review, (ii) the thresholds that trigger it, (iii) the scope of notification duties, and (iv) the procedural timetable. The United States illustrates this complexity: a deal may require parallel scrutiny by the Federal Trade Commission or Department of Justice under the Hart–Scott–Rodino Act and, separately, by CFIUS for national-security concerns—two tracks with no single "one-stop" window. This fragmentation forces deal parties to navigate multiple approval channels, inflating compliance costs for disclosures, timelines, and transaction structuring. Compounding the problem, jurisdictions define "change of control" differently. Even a minority stake can be classed as controlling if it confers board representation, access to sensitive information, or influence over key decisions—automatically triggering a mandatory review. Such expansive interpretations magnify legal uncertainty and often compel parties to adopt burdensome mitigations—ranging from reorganizing deal structures to implementing information "clean teams"—all of which heighten execution risk [6].

2.2 Risk of conflict between antitrust and national security review at the legal level

In the US merger and acquisition regulatory system, antitrust and national security reviews differ in institutional logic and policy orientation. The potential contradiction between the two forms the second layer of obstacles to the judgment of the legality of transactions. Antitrust review is carried out in accordance with federal competition laws such as the Sherman Act and the Clayton Act, considering changes in market structure and competition effectiveness, and implementing predictions with the help of quantitative analysis models; the authorization of national security review is granted by Section 721 of the Defense Production Act and its subordinate FIRRMA Act, mainly paying attention to whether foreign investment will endanger the control of key national assets. Given that the two systems are led by different federal agencies and the lack of procedural connection, it is very easy to cause the standards to diverge from each other when the law is applied. A transaction has no anti-competitive effect at the level of market concentration may pass the FTC review, but if the target company has advanced technology developed in collaboration with the military, or processes large-scale data of American citizens, then CFIUS can intervene for security reasons and even recommend that the president does not approve the transaction. This "cross-approval" phenomenon has led to a fragmented compliance path, making it impossible for transaction parties to rely solely on traditional market analysis to infer the overall legality of the transaction. They must also assess technology spillovers, the evolution of control structures, and risks related to national interests [7]. As can be seen from Table 1, in 2023, the total amount of cross-border M&A transactions in the United States was approximately US$962 billion. The transaction amount in the industrial, energy and materials industries took the lead, accounting for 43% of the total transaction amount, followed by the technology industry, which accounted for 26%.

Table 1 : Distribution of US cross-border M&A transaction value by industry in 2025

Serial Number	Industry Category	Transaction Amount in 2025 (US$ billion)	Proportion (%)
1	Industry, Energy and Materials	448	41%
2	Technology	302	28%
3	Healthcare	164	15%
4	Financial Services	75	7%
5	Consumer Goods and Retail	46	4%
6	Other	54	5%

Table 1 shows that by 2025, based on industry growth trends and macroeconomic forecasts, significant growth is expected to be driven by the development of generative AI and biopharmaceuticals in the fields of technology and healthcare. Table 1 highlights where the next regulatory flashpoints are likely to emerge. The figures show that by 2025 a large share of inbound M&A value will concentrate in two sectors—technology (driven mainly by generative-AI applications) and healthcare (propelled by biopharmaceutical innovation). Both areas sit squarely within CFIUS's "critical-technology" and "biotech/health-data" mandates, meaning the very industries generating the most deal flow are also those most exposed to heightened national-security scrutiny. In other words, the growth trajectories captured in Table 1 foreshadow a corresponding rise in legitimacy risk, underscoring why transaction parties must treat compliance planning as a strategic imperative rather than a post-signing formality.

2.3 Difficulties in reviewing the legal identity of overseas investment entities and transaction motivations

In the context of the increasingly national security driven and politicized global governance environment, the identity of foreign investors and the purpose of the transaction have become key threshold factors for judging the legitimacy of cross-border mergers and acquisitions. The United States has strengthened the identification of the "actual control relationship" of investors in the implementation details of FIRRMA, especially focusing on whether the investment is directly or indirectly controlled by foreign governments, sovereign wealth funds, and entities with state-owned capital backgrounds. In the actual operation process, this judgment standard is no longer limited to the scope of equity ratio, but also extends to non-formal control means such as voting agreements, board arrangements, contractual authorizations and information access rights. In terms of transaction motivation, even if the investor claims that the transaction is "passive financial", if the target of its proposed merger and acquisition involves critical infrastructure, biotechnology, semiconductor manufacturing, defense contracting or a large amount of personal sensitive data processing business, it may also be considered to have strategic control risks. Since relevant assessments rely heavily on the policy direction and intelligence sources of the US administrative agencies, the transparency of the review operation is extremely limited. It is extremely difficult for investors to predict the legality conclusion in advance [8-11].

3 Institutional Analysis of Legal Legitimacy Risks

3.1 The review mechanism of the Committee on Foreign Investment in the United States (CFIUS) and its legitimacy determination criteria

The legal legitimacy of U.S. M&A transactions involving foreign investors hinges on the determination of the Committee on Foreign Investment in the United States (CFIUS). Acting under Section 721 of the Defense Production Act and its expansion, the Foreign Investment Risk Review Modernization Act (FIRRMA), CFIUS reviews deals in which foreign parties, directly or indirectly, gain control over U.S. businesses. Its mandate spans not only "critical technology" and key infrastructure but also biotechnology, semiconductor manufacturing, defense contracting, and any business that handles large volumes of sensitive U.S.-person data. Rather than applying a strictly codified test, CFIUS conducts a hybrid political–legal assessment centered on "national-security risk"—a flexible standard that allows broad discretion. Where it perceives a credible threat, CFIUS can recommend that the President block or unwind a deal, and that decision is final. This highly centralized mechanism is unique among major economies and sits at the nexus of U.S. national-security and economic policy. Reflecting heightened geopolitical sensitivities, CFIUS reviewed 342 transactions in 2023, with filings from Chinese investors comprising the largest single country share (about 14 percent), underscoring Washington's particular vigilance toward inbound capital from China.

Table 2 : Number of CFIUS-reviewed transactions and distribution by country of origin in 2025

Serial Number	Investor's Country/Region	Number of Applications Submitted in 2025	Proportion of Total Applications
1	China	38	13%
2	United Arab Emirates	26	9%
3	U.K.	21	7%
4	Singapore	20	7%
5	Canada	18	6%
6	Germany	16	6%
7	Japan	17	6%
8	France	12	4%
9	Israel	10	3%
10	India	8	3%

Table 2 shows that the overall number of reviews in 2025 has slightly increased compared to 2023, with a total of around 360 reviews, among which the review of Chinese investors continues to receive high attention; India's entry into the top ten reflects its accelerated pace of capital globalization.

3.2 Regulatory approaches to the legality of mergers and acquisitions in the framework of international investment law

From an international-law perspective, the legitimacy of cross-border M&A is shaped chiefly by investment-protection treaties and by general principles governing state conduct. Classic international investment law obliges host states to afford foreign investors, inter alia, fair and equitable treatment and protection against arbitrary, discriminatory, or indirect expropriation. These obligations do not supplant a state's sovereign right to police transactions for public-order or national-security reasons; rather, they set limits on how that power may be exercised. Instruments such as the UNCITRAL Model Law on Cross-Border Insolvency and the OECD Guidelines on Cross-Border M&A acknowledge a state's authority to intervene in sensitive sectors, yet stress that any intervention must satisfy the touchstones of reasonableness, proportionality, and transparency. Investor–state arbitration (ISDS) jurisprudence reinforces that point: when a host country screens foreign acquisitions, it must embed due-process safeguards and nondiscrimination into its review framework. Failure to articulate clear legal basis or to follow procedurally sound, even-handed processes can breach treaty obligations and expose the state to international liability. In short, while international investment law does not dictate the substantive outcomes of national-security or public-interest reviews, it constrains how those reviews are designed and applied, thereby providing a normative framework against which the legitimacy of cross-border M&A screening is ultimately assessed.

3.3The applicability and limitations of legitimacy clauses in bilateral and multilateral investment agreements

Bilateral investment treaties (BITs) and multilateral investment treaties (such as the USMCA) constitute the main carriers of international investment law. Most treaties provide a principled definition of the relationship between the host country's exercise of regulatory power and the protection of foreign investment rights. Especially in the field of national security, such treaties generally have "security exception clauses" that grant the host country the power to impose restrictions on foreign investment at specific times. Article 18 of the United States-Uruguay Bilateral Investment Treaty clearly states that the terms of the treaty shall not restrict the means taken by a party to safeguard national security. Similar clauses are also widely accepted in multilateral frameworks, with the aim of preventing national security from becoming an administrative channel for unrestrained expansion and protecting national sovereignty from excessive infringement. [12] The wording of such legitimate exception clauses is generally very broad and there is no unified judgment standard, resulting in significant ambiguity in their practical application period. The host country can use national security as an excuse to implement protectionist policies; if investors encounter discriminatory reviews and are forced to terminate transactions, it is generally difficult to obtain substantive relief through arbitration procedures. Even if there are ISDS-related clauses, given that national security issues are generally regarded as "non-arbitrable matters", the arbitral tribunal's power to review the legitimacy of a country is also limited. In bilateral and multilateral investment agreements, although investors are formally granted certain rights protections, in areas related to national security and public interests, legitimacy risks are mostly dominated by the laws of the host country and are not completely restricted by the rigid constraints of treaty law.

4 Strategies for dealing with legal legitimacy risks in cross-border M&A

4.1 Strengthening the legal compliance of pre-merger due diligence

In the context of cross-border M&A transactions, due diligence is not only a tool for identifying business risks, but also a pre-measure to consider legal legitimacy risks. Especially in the context of the US legal system, regulators are highly sensitive to an investor's background, source of funds, transaction purpose and the target company's business structure. If the preliminary investigation is insufficient, a M&A transaction may be susceptible to regulatory obstruction in the subsequent approval stage. Before the launch of M&A activities, it is necessary to conduct thorough legal compliance reviews involving national security, antitrust, anti-money laundering, data privacy, export control and other dimensions. Within the CFIUS review mechanism, if the target company is related to critical infrastructure and sensitive technology, it should be further verified whether it has any connection with government contracts, military supply chains, patent portfolios and data processing capabilities. Investors themselves also need to accept verification of their legal identity, including the traceability of the capital path, the transparency of the ultimate beneficiary structure, and whether they are subject to US sanctions or export restrictions. More and more M&A projects set up "compliance review working groups" before execution of the transaction, and lawyers, auditors and security consultants from multiple jurisdictions jointly conduct legal legitimacy risk assessments to build a solid foundation for compliance from the beginning and reduce the potential risks of approval failure and transaction termination.

4.2 Designing transaction structures to bypass or accommodate censorship

Legality risk is directly affected by the design of transaction structure. As the main technical means to deal with the review system, a proper transaction structure can significantly reduce the possibility of triggering CFIUS mandatory review, and can also preset buffer measures to deal with potential compliance restrictions. It can be designed to avoid directly seizing control by establishing a joint venture, adopt a passive investment structure (non-controlling minority interest), and purchase equity in stages, thereby avoiding the obligation of mandatory declaration. For sensitive assets and business modules, "negative covenants" can be clearly outlined in the transaction agreement, or a data isolation mechanism can be established to ensure that foreign investors cannot access specific technologies, information and management rights, thereby meeting the regulatory definition of "non-controlling investment".

The transaction structure must give full consideration to the "affiliation structure risk" and avoid using complex beneficiary planning or multi-layer holding models that make the identity of the ultimate controller opaque to regulators. Some M&A projects adopt a "split structure" to place sensitive assets in domestic U.S. trusts and independent entities, restricting foreign investors from exercising direct control, thereby increasing the probability of approval by CFIUS. Although the above-mentioned structural arrangements will increase the complexity of transaction design, in the current legal environment, it has become one of the core strategies to allow cross-border M&A transactions to proceed legally.

4.3 Strengthening the professional auxiliary functions of legal opinions and compliance reports

Legal opinions and compliance reports are pivotal in cross-border M&A. In a typical CFIUS submission, counsel will draft a single, comprehensive legal opinion explaining why the deal poses no material national-security threat, demonstrating that the investor is not controlled—directly or indirectly—by a foreign government, and confirming that the target's activities fall outside "critical-technology," defense, or other specially protected sectors. The opinion also addresses whether the transaction triggers a mandatory filing, qualifies for an exemption, and how post-closing compliance will be managed; its clarity and depth often shape regulators' initial view of the deal.

The compliance report distills the multi-jurisdictional due-diligence findings compiled by legal, technical, audit, and security specialists. It maps ultimate beneficial ownership and prior investment history, sets out existing and future compliance procedures, and details risk-mitigation measures for data protection, technology controls, and supply-chain security. Because U.S. agencies examine these sections closely, parties should treat the report as a strategic instrument rather than a formality: a well-constructed opinion-and-report package creates a coherent narrative of legality and materially raises the odds of a swift, favorable regulatory outcome.

5. Conclusion

Legal-legitimacy risk now sits at the fulcrum of cross-border M&A success. Heightened policy vigilance—exemplified by the United States' CFIUS-centric national-security review—and the competing pulls of international investment protections have pushed legitimacy analysis from a procedural afterthought to a board-level strategic concern. This article has traced how divergent approval regimes, overlapping antitrust and security mandates, and opaque investor-identity rules interact to shape today's risk landscape. To translate those insights into practice, we outline three mutually reinforcing responses: (i) rigorous, multi-jurisdictional compliance due-diligence plans; (ii) transaction structures that pre-empt or mitigate review triggers; and (iii) professionally crafted legal-opinion and compliance-report packages that present a coherent narrative of legality. Because the regulatory environment will continue to evolve, deal makers must cultivate a deep, forward-looking grasp of multi-jurisdictional rules if they hope to execute high-quality transactions amid accelerating global capital flows.

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