

Insights

WILL THE RECENTLY UPDATED FRENCH FDI REGULATION IMPACT YOUR NEXT DEAL?

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SUMMARY

Updated foreign direct investment (FDI) regulation around the world, including in France, requires, more than ever, advance planning and strategy. Playing it well will enhance deal certainty, mitigate risks and keep timing on track. Investors can also gain efficiency in global transactions with assets in several countries by putting the right due diligence process in place as early as possible in the transaction process. Finally, sellers can also facilitate divestitures by taking the initiative of clearing the target at early stage.

Christian Sauer and Roland Montfort consider the French perspective and implications for M&A practice below based on their deep experience and impressive track record in the space.

FDI screening regimes have continued to expand in Europe (and around the world) in the past 3 years with 18 EU Member States now fully operational and eight working on a new system. FDI regulation is a delicate balance between promoting the opening of the market to foreign investments while ensuring the protection of public security, public order and national defense interests.

FRANCE IS NO EXCEPTION

France introduced investment controls as early as 2005, subjecting certain investments to prior approval by the French Ministry of the Economy (MOE).

FDI is generally encouraged by the State and perceived as an opportunity, for example with President Emmanuel Macron's "Choose France" program, which aims to attract foreign investments to France.

In recent years, the French market has become increasingly interesting for foreign investors (both from Europe and from outside Europe).

In 2021, a new record was set with 1,600 foreign investments made in France including 328 applications for investment control, 31% more than in 2020.

Recent indicators show that the investment slowdown linked to Covid is gradually recovering although the economic and political climate bring new shadow on the remaining part of 2022 and beyond.

2019 REFORMS

The law of May 22, 2019 concerning the growth and transformation of enterprises (Loi Pacte) and the Implementing Decree of December 31, 2019 have made far-reaching changes to investment control, in particular significantly expanding the scope of the approval requirement and changing the approval procedure. This revised FDI regime was incorporated into the French *Code monétaire et financier* (CMF). In September 2022, MOE released guidelines, which they will update regularly, to clarify the interpretation of certain provisions of the French FDI regulation as well as application templates.

SUMMARY OF LATEST CHANGES TO FDI SCREENING REGULATION IN FRANCE

The list of strategic sectors subject to the prior approval from the French Ministry of the Economy (MOE) has been extended to (i) the R&D activities in the biotechnology sector in April 2020 and (ii) technologies relating to renewable energy production in September 2021.

As a consequence of the Corona crisis, FDI control procedure was extended to the crossing of the threshold of 10% – directly or indirectly, alone or in “concert” – of the voting rights in a French listed company. This was originally set to expire on December 31, 2020 but was repeatedly extended and now is currently set to expire in December 31, 2022. This measure only applies to non-EU and non-EEA investors.

The approval process begins with the submission of the request to the MOE and is then divided into two phases (Article R.151-6 of the French Code monétaire et financier – CMF): a first 30 working days phase followed, as the case may be, by a second 45 working days phase when extensive review is ordered.

Prior to the entry into force of the Loi Pacte, the procedure went through only one phase with a time limit of two months and the time limit did not start to run until the MOE confirmed the completeness of the application, which, in practice, regularly gave the MOE the opportunity to delay the start of the time limit. This is a clear shift in approach towards a more structured regime.

The 2019 reform clarified that, in most of the cases, the MOE's silence or lack of response within the deadlines is deemed a rejection at any stage of the procedure or a preliminary inquiry.

FDI screening, as well as merger control clearance and information consultation of the social and economic committee, is a standard condition precedent in M&A transactions when the activity of

the target, the transaction and the investor are expected to be within the scope of the French FDI screening regulation.

IMPACT ON M&A PRACTICE

Reform in 2019 made French FDI control more transparent in terms of procedure, deadlines and documents to be submitted, and incorporated the previous practice of granting conditional approvals into the *Code monétaire et financier* (CMF). FAQ, sample applications and guidelines have since been published.

Nonetheless, in practice, it remains difficult to determine whether a particular target is active in one of the critical sectors, since the sectors are openly defined and, unlike in merger control, decisions are not made public.

Note in that respect that, even targets with minor part of turnover in a sensitive sector (e.g.: one defense contract), shall be subject to FDI screening and prior approval from the MOE.

The existence of a past French FDI clearance would likely push towards considering that the sector concerned will be deemed sensitive today. By contrast, the absence of such prior clearance will have no meaning at all.

In practice, the question of whether a transaction requires approval should be included in the considerations and planning at an early stage and, if necessary, an informal exchange with the MOE should be sought.

Following recent developments, both investor and target / seller may seek a formal comfort letter from French MOE before the transaction has reached sufficient deal certainty to allow for a formal application process.

PREPARATORY ACTIONS/STEPS

In order to limit delays in the closing of a transaction potentially subject to a FDI screening, both the target / seller and the investor may take the following preparatory actions:

- **Target / seller side:**
 - Prepare information memoranda, vendor due diligence report, data room and include information requested by French MOE such as market share of the target, main competitors
 - Contact MOE for an informal answer
 - Obtain a comfort letter from the MOE under the new preliminary inquiry process

- **Investor side:**

- Make an information request list and include the information requested by French MOE
- Obtain a comfort letter from the MOE under the new preliminary inquiry process
- Factor into the business plan potential divestitures that may be requested by the MOE

In the case of transactions potentially requiring prior clearance, the investor should also consider the extent of possible conditions acceptable to them and include these early in their analysis of the transaction.

Since MOE clearance is a condition precedent in most M&A transactions falling within the scope of the French FDI regulation, French MOE clearance may hold up a global transaction closing unless other conditions precedent have to be fulfilled in the same timescales. It may be possible to envisage carving out the French assets from the global perimeter and deal with them at a later stage post-completion.

Transaction documentation will need to reflect clearly the distribution of risk for foreign investment control and determine the degree of conditionality that the investor has to accept in order for the condition precedent to be considered fulfilled or not fulfilled, similar to merger control. The seller will push for a “hell- or high water” covenant in its favor. This is critical for the purchaser since the obligation to comply with the French FDI regulation rests on the investor – i.e., the candidate purchaser and not on the seller.

Finally, multi country filings may be required for any given global transaction and within the EU, part of the national filing application will be intended to trigger an intra-EU information exchange, which will not extend the national investigation timeline summarized above for France but will allow a consultation amongst all national and EU authorities concerned.

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