

CONTROL OF FOREIGN INVESTMENT IN FRANCE

December 2022

The political and economic climate in recent years has led to changes in the procedures for controlling foreign direct investment in France and throughout the world. A brief description of the procedure applicable today in France is proposed here.

At stake in controlling foreign investments: national interests and economic benefits

In 2021, France beat its 2019 record for inbound foreign investment (in number of transactions and related employment).

In the context of the Covid-19 health crisis, many States have reinforced their foreign investment control mechanisms, fearing the loss of industrial and R&D capacities in the health sector. In the long term, governments intend to protect numerous areas of activity (energy, agri-food, new technologies, to mention only the most publicized).

It is to be expected, therefore, that States will, if they have not already done so, apply strictly their regulations on foreign investments in order to protect their national interests. This is what the European Commission has encouraged Member States to do in March 2020.

The European Union (EU) also has mechanisms for cooperation between the European Commission and Member States (stemming from a March 2019 Regulation), which must now exchange information on planned or received foreign investments. This gives the EU the possibility, outside of existing national regulations (if any), to screen these investments.

Staying open and attractive while protecting national interests is the challenge facing States as foreign investment will play a key role in the coming years in recovering from the economic crisis created by Covid-19 and aggravated more recently by the war in Ukraine.

The application procedure for authorization of a foreign investment in France

In France, foreign investments in sectors that may affect "public order, public security or national defence" require the prior authorization of the Minister of the Economy.

In 2020 and 2021, France has added to the list of protected sectors (Article R151-3 of the Monetary and Financial Code), two R&D activities involving critical technologies: biotechnologies (indirectly targeting the health field) and technologies involved in the production of renewable energy.

The investments targeted are: the acquisition of control (acquisition, capital increase or incorporation), the acquisition of branches of activity, and, for non-EU investors, the crossing of a 25% ownership threshold of a French company. Again, in the context of the health crisis, this last threshold has been temporarily lowered to 10% for investments in listed companies.

The information to be provided in support of an application for authorization should include the identity of the ultimate beneficiaries of the investment, the existence of any financial links with a foreign government, the strategic assets involved, and the motivations of the investor.

If the Minister does not respond within 30 days of the application being filed, the application is deemed rejected. The Minister may also set a further 45-day review period. In practice, the investor and the French government exchange information outside of formal filings.

Authorizations may be subject to conditions, in particular in order to ensure protected activities remain in France or to prevent the loss of know-how (examples of conditions: maintaining the head office, production capacities and/or R&D centres in France, continuation of certain contracts, disposal of certain participations or assets by the target). The investor and the French State sign an engagement letter setting out the conditions of the authorization.

The decision to refuse an authorization or an authorization subject to conditions is an administrative decision which may be appealed to the administrative courts on grounds of abuse of power. The refusal must be justified by the impossibility of safeguarding national interests, even by imposing conditions, or by the fact that the investor does not meet the "good character test".

Of course, a whole battery of sanctions rounds off this system for those who might circumvent it:

- nullity of the contract governing the unauthorized investment,
- injunctions, if necessary, under penalty,
- protective measures (suspension of voting rights, prohibition on distributing dividends or disposing of assets, appointment of an administrator to monitor the target),
- financial penalties, and
- criminal sanctions (imprisonment, confiscation, fine).

Since 2019, the French target or the foreign investor (with the agreement of the target) may seek a prior review to determine whether the target's activity(ies) fall within one of the categories of protected activities and whether a prior authorization is required.

Finally, some figures for 2021:

- The Treasury's Directorate General examined 328 applications: 124 transactions were authorized (of which 67 were conditional), 41 applications concerned requests for prior review (of which 76% were ineligible).
- 26% of the applications examined related to the health sector (strong growth).
- 41% of the investors were from Europe (EU and EEA).
- Two thirds of the investment projects were by European investors, with Germany being the leading investor in terms of number of transactions, ahead of the United States.

Any investor wishing to invest in a sector of activity protected by France should therefore consider whether the investment is subject to the prior authorization and anticipate its impact on the transaction's timetable.

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Sources

Bilan des investissements internationaux en France – 2021 - Business France

Le contrôle des investissements étrangers en France en 2021 – Mars 2022 – Direction générale du Trésor

Lignes directrices relatives au contrôle des investissements étrangers en France – Septembre 2022 – Direction générale du Trésor