

THE SPECIFICITIES OF MERGERS AND ACQUISITIONS ARISING FROM FOREIGN INVESTMENT CONTROL IN FRANCE

Interview with Henri Savoie and Marcus Billam, Partners,

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Henri Savoie

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Marcus Billam

I - THE PRELIMINARY PHASE

What are the different modes of acquisition and investment encountered?

Henri Savoie: There are two main types of transactions: (i) investments by strategic in the relevant sector or (ii) investments by private equity funds.

Marcus Billam: Foreign investment control applies to all types of acquisitions, whether they are tender offers or pri-

vate sales. The procedure will also apply to De-SPACing transactions on which we are beginning to accompany our clients.

How, in the absence of a normalized doctrine and clear guidelines, can one determine the risk that a transaction falls within the sensitive sector and prepare the procedure?

Henri Savoie: The regulations determine the sensitive sectors of activity falling within the scope of the applicable

foreign investment control procedure. We know that the administration has an extensive reading of these sectors of activity. We leverage our experience to determine whether a transaction is likely to require a clearance application in France.

Marcus Billam: When we are involved for the target - or once discussions with the target have started - the general counsel and his teams are valuable allies in this analysis, as he often has the most detailed knowledge of how the company's activities may be perceived by the authorities.

The reform allows investors to liaise with the Authorities well in advance of the transaction. Does this approach limit the number of refusals?

Henri Savoie: For the most sensitive transactions, either because of the sector in question, or because of the nationality of the investor, or because of the size and reputation of the French company involved, we always advise investors to reach out to the public authorities before the transaction to discuss the feasibility of the transaction with them.

Why and how should communication, reputation and public affairs issues be anticipated?

Henri Savoie: As indicated immediately above, for transactions of a certain sensitivity, contact with the French public authorities at a preliminary stage is useful. In certain very sensitive cases, it is advisable to ensure very early on, that the French state is in line with this type of investment. Otherwise, the procedure does not require any particular communication action. It is a confidential procedure and the French administration plays the confidentiality game perfectly.

Does the risk influence the choice of procedure (one to one negotiation/open bid)?

Henri Savoie: When a transaction is sensitive, the choice of the best-placed candidates and then of the final candidate must include the foreign investment dimension. Price is not the only factor to consider. The deal certainty takes precedence and the execution risks naturally come into consideration. These risks may include the control procedure for foreign investments in France as well as the control by the merger-control authorities.

Marcus Billam: The possibility of being subject to a foreign investment control procedure in France does not, in and on itself, prevent the implementation of an open bid process. From this point of view, it is a parameter to be taken into account in the design of the procedure and the legal documentation - as can be, for example, merger control. Some strategic transactions have failed because

of foreign investments control in France despite the implementation of a one to one negotiation, but there is no reason to see this as a cause and effect relationship. I would rather say that the same causes result in the same consequences, that is to say strategic transactions often both entail a strong politicisation and a preference for one to one negotiations.

II - NEGOTIATIONS

Should control risk be taken into account in due diligence and how to do so? If so, what role can VDDs play in securing the deal?

Henri Savoie: In the context of the due diligence, the investor should identify whether French companies are comprised within the scope of the transaction and, if so, determine with the help of advisors whether the transaction is subject to the French foreign investment control procedure taking into account the activities of the French companies.

Marcus Billam: Again, the experience of the general counsel can be instrumental because of the authorities' flexible interpretation of this regulation.

How to engage with the relevant authorities?

Henri Savoie: The procedure for controlling foreign investments in France falls within the remit of the Treasury Department, with which a high-quality dialogue can easily be established.

What is the impact of the procedure on the timetable of transactions?

Henri Savoie: It takes between 3 and 5 months to obtain a clearance depending on the complexity and sensitivity of the transaction. Obtaining this clearance is a condition for the completion of the transaction and the timetable for the transaction must therefore take this period into account.

How to manage the procedure when it may require applications for clearance in several jurisdictions?

Henri Savoie: Since November 2020, a European Union procedure allows the sharing of information between the relevant Member States and the European Commission on transactions giving rise to a foreign investment control procedure in several EU Member States.

Marcus Billam: From this point of view, the Brexit could hinder the implementation of certain French-British transactions, even if we do not have enough hindsight at this stage to fully assess such consequences.

How can offer letters or term sheets anticipate risks?

Henri Savoie: In order to correctly anticipate the risk, it is necessary to know with sufficient accuracy the French companies involved in the transaction and their activities. This knowledge makes it possible to assess the risk correctly at the stage of the offer letter and the term sheet of contractual documentation.

III - SIGNATURE AND INTERIM PERIOD*How to integrate possible MINEFI decisions in the structuring of the transaction?*

Henri Savoie: If the transaction appears to be subject to foreign investments clearance in France, it should be a condition precedent to closing.

What is the impact of the control procedure on the provisions of the acquisition/investment agreement (how to anticipate the conditions that may be imposed by MINEFI or the risk of a refusal)?

Marcus Billam: The most stringent provision is a legal one, as an unauthorised foreign investment is legally void. Obtaining the authorisation is therefore de facto a condition precedent. The buyer will most often seek to limit the changes that could be made to the target by inserting a "No Substantial Detriment" clause referring to an agreement of the parties before implementing any steps required by the MINEFI which would have an impact on the target's value or the possible synergies. On the other hand, the seller will seek to secure the transaction as much as possible and to ensure that the foreign investor undertakes to

acquire the target even if MINEFI has demanded that it first divests certain assets.

Should sensitive sector risk and merger-control risk be articulated and how to do so?

Henri Savoie: These are risks of a very different nature, but the interplay of the merger-control and foreign investment control timelines is possible. Notification can actually be carried out in parallel.

IV- CLOSING AND POST CLOSING*What is the influence of control on ancillary commitments and post-signing agreements?*

Marcus Billam: If the control of foreign investments has resulted in the divestment of assets before the implementation of the transaction, the customary issues of adhesion will arise and are to be settled with transitional service agreements: TSA, SLA...

Are integration transactions influenced and if so how?

Henri Savoie: If, after closing, a restructuring of the group is planned that will have an impact on the French companies, this restructuring will have to comply with the terms of the letter of commitment that is generally requested by the administration from the investor before the issuance of the clearance. At the very least, the French administration will have to be informed. The constraints may be much more important depending on the sensitivity of the activities of the French companies involved.