FRENCH FDI REGIME: MANAGING RISKS OF NON-COMPLIANCE

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Around two years after the overhaul of the French foreign direct and indirect investments ("FDI") control regime and more than a year after the launch of a European cooperation mechanism, French Ministry of Economy has significantly increased scrutiny of foreign investments. However, it has adopted a pragmatic and investor friendly approach. Therefore, there are little available precedents of the French Ministry of Economy imposing fines, refusing to approve a transaction or submitting it to conditions. Nonetheless, this does not mean that risks in the case of non-compliance should be underestimated by foreign investors seeking to invest in France, as sanctions are extremely heavy. And filing is key to avoid any such risks.

Following the adoption in 2019 of the law "Pacte", the scope of the French FDI control regime has been considerably widened and direct and indirect foreign investments in sensitive sectors must, under certain conditions, be authorized by the French Minister of Economy ("**MoE**"). In practice, tThe Multicom 4 office of the 'Direction Générale du Trésor' ("**DG Trésor**") is responsible for exercising this control.

FDI regime is being refined and increased since 2019 and new rules relating to the filing (which impose more strin-

gent rules on the information to be filed) will enter into force on 1 January 2021.[1]

Foreign investors are increasingly aware of potential risks in the event of non-compliance with the French FDI regime and, even though there are to date only few examples of prohibition decisions or of sanctions in case of non-compliance with the FDI regime, it has become of core importance for foreign investors to mitigate these risks.

Identification of risks in the event of non-compliance with the French FDI regime

As a short reminder, pursuant to Articles L. 151-3 and seq. of the French Monetary and Financial Code ("**MFC**"), the FDI screening procedure is mandatory once a transaction meets the relevant thresholds[2]. The existence of such prior authorisation regime of these transactions implies that[3] :

- a transaction cannot be implemented until clearance is granted by the MoE (authorisation decision) or the MoE confirms that the transaction is out of the scope of review (informal letter) ("**standstill obligation**");
- investors must comply with the conditions set out by the MoE – if any – in its approval decision;
- parties cannot submit inexact or misleading information to the MoE to obtain an approval decision; and
- investors have to comply with injunctions from the MoE (e.g. injunctions to notify the transaction, injunction to unwind the transactions, etc.).

As a result, as soon as their transaction meets the relevant thresholds, investors face the risk of seeing the attractiveness of the intended investment reduced since the transaction may be prohibited by the MoE or the MoE may submit it to strict conditions that may reduce investors' business incentives.

This risk is strengthened by the fact that non-compliance with the French FDI regime is not an option for investors. Since 2019, the powers vested in the MoE in the event of non-compliance have been significantly increased. In particular, non-compliance with the standstill obligation may for instance result in the imposition of injunctions and sanctions:

- foreign investments completed without prior authorisation are in principle null and void, and the MoE may enjoin the investor to file for prior authorisation, unwind the transaction at this own expense or amend the investment made;
- even before reaching a final approval or prohibition decision, the MoE may pronounce interim measures in the event that the protection of public order, public security or national defence is compromised or likely to be compromised. These interim measures include the suspension of the investor's voting rights, the prohibition or limitation of the distribution of dividends to the investor, the temporary suspension of the free disposal of all of part of the assets related the sensitive activities carried out by the target and the appointment of a temporary representative within the company;
- the MoE may also impose monetary sanctions amounting to twice the value of the investment at stake, 10 per cent of the annual turnover achieved by the target company, €1 million for natural persons or €5 million for legal entities. Besides, the MoE may also subject any injunction or interim measures to a daily penalty that may not exceed €50,000; and
- in addition, pursuant to Articles 458 and 459 of the French Customs Code, infringement of the foreign investments control requirement may be subject to criminal penalties including up to five years' imprisonment, confiscation of the property and of the assets which are the proceeds of the offence; and a fine ranging from the amount in question to twice the sum to which the offence or attempted offence relates.

The abovementioned sanctions and measures can be imposed on investors including when they act in good faith. This is quite similar to the assessment made in the context of merger control by competition authorities where so-called "gun-jumping practices" (i.e. closing a transaction before it was formally approved by the competent competition authority(ies)) may be heavily sanctioned even when the parties in a M&A transaction have genuinely not realised that a prior clearance was required. A prudent approach is thus recommended, in particular considering

[1] Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France (Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France - Légifrance (legifrance.gouv.fr)).

[2] As a short reminder, the applicable cumulative thresholds are the following: the transaction (i) has to concern directly or indirectly a foreign investor, (ii) must consist in the acquisition of the control, an activity or a specific percentage of the voting rights of a French entity and (iii) concern a French legal entity which exercise one of the sensitive activities which have been listed out by governmental decree.

[3] This list of obligations is non-exhaustive.

that there is to date legal uncertainty as to the exact scope of the FDI regime, since the current texts lack precision and there is little available public guidance from the MoE to date.

In addition, once the clearance decision has been obtained, the parties to the transaction must strictly comply with the conditions that the MoE may have imposed as non-compliance may result in the imposition of injunctions (e.g. withdrawal of the clearance, compliance with the initial conditions, compliance with new conditions set out by the MoE) and of monetary sanctions.

The wide array of sanctions that can be imposed is designed to have a deterrent effect on investors and encourage them to duly notify their transactions or, at least, reach out informally to the MoE to determine whether their transaction falls within the scope of the French FDI regime.

Lessons learned from practice

Even though there have been hundreds of transactions reviewed by the DG Trésor in 2019, 2020, and 2021[4], there are to date little real-life examples of imposition of prohibition decisions or of sanctions by the MoE due to several objective justifications.

First, the MoE does not publish clearance decisions or prohibition decisions issued in individual cases and the cases the public is aware of are the ones that have been reported in the press. For instance, in 2020, the press reported that the MoE issued an informal objection to Teledyne, a US company which contemplated investment in Photonis, a French company developing technology for night vision in defence and aerospace applications as well as detection instruments directly related to nuclear deterrence. The French MoE is then reported to have prohibited the transaction in late 2020.

Second, businesses that anticipate that the MoE may not approve the intended investment or submit it to excessively heavy conditions may simply choose to withdraw their investments. Hence the importance of carrying out a preliminary foreign investment control analysis of the project at its outset, to avoid spending time and effort on a project that may later prove to be difficult to implement.

Third, additional considerations which are not strictly speaking part of the control procedure may enter into the equation. Notably, around early 2021, there were discussions as to the acquisition of Carrefour by the Canadian retailer Couche-Tard but the French Ministry of Economy publicly stated that the French government would not approve the transaction. Even though the DG Trésor did not in fact have the chance to conduct a FDI screening, Carrefour and Couche-Tard decided not to temporarily go forward with the transaction.

As a result, the low number of precedents available does not in itself mean that the MoE is inactive[5]. On the contrary, the French government has made it public that it would keen to intervene in investments in sensitive areas of the French economy.

Mitigating risks

In that context, mitigating risks of non-compliance with the French FDI regime is of core importance for investors. Immediate practical recommendations for businesses include conducting an early FDI preliminary analysis. When this analysis identifies potential concerns, the FDI screening procedure should be included in the transaction timeline, including by adapting the transaction documents (SpAs, LoIs, etc.) and the parties may decide to notify the transaction to the MoE, informally or formally, in order to clarify whether the transaction falls within the scope of the FDI regime and/or anticipate the conditions the MoE may impose to the transaction. Our personal experience shows that when a transaction does not raise important concerns, the DG Trésor is usually keen to answer investors' queries within a short timeframe.

[4] See : https://www.tresor.economie.gouv.fr/Articles/2022/03/17/publication-du-rapport-annuel-sur-le-controle-ief-en-2021

[5] A comparison can be made with the French merger control regime where there is only one example of a prohibition decision to date and only a few decisions sanctioning non-compliance with the standstill obligation, but which is commonly taken into account by companies engaging in M&A transactions.