

PRIVATE EQUITY AND THE CONTROL OF FOREIGN INVESTMENTS IN FRANCE

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Has the French foreign investment control system been able to strike the right balance between attracting foreign investment and economic sovereignty?

First, it should be recalled that the French system of foreign investment control is not new. The successor to exchange controls, the control of foreign investment in France (FIF) was strengthened by the PACTE Law of 22 May 2019 while ensuring greater system transparency.

One might add that it is now the norm for many countries to have similar tools for controlling foreign investments, and that no one disputes the legitimacy of the use of such

sovereignty tools. More often, what is at stake is the legibility and fluidity of the processes.

Foreign investment in France has reached new heights in recent years, which seems to illustrate the absence of major regulatory constraints on investment control.

If one looks at the figures, the [2021 report](#) on foreign investment control published by the Ministry of the Economy shows that foreign investment control activity in France was significant in 2021. This report indicates that 328 dossiers were submitted, an increase of 31% compared to 2020. This increase in the number of dossiers can be explained by several reasons:

- first, by the lowering of the threshold from 25% to 10% of the voting rights that triggers controls in listed companies (a threshold that has been extended until 31 December 2022);
- second, by stronger public health protection through FIF control in biotechnology, a sector in which half of the operations entailed risks to public safety in 2021;
- and, finally, by the record number of acquisition operations carried out during 2021 due to a catch-up effect compared to 2020.

The report states, however, that in 2021, of the total dossiers examined, the activities in question were ineligible for FIF control in 76% of cases. It should be noted that, in such cases, a foreign investment in the French company carrying on activities not eligible for FIF control will not have to be previously authorised by the minister for the economy.

The report adds that 124 foreign investment operations were authorised in 2021, and the authorisations were subject to conditions in just over half of the cases.

In terms of the distribution of foreign investors, the 2021 report notes that 48.6% of ultimate investors in 2021 were financial investors, 42.5% were industrial investors and 8.9% were individuals.

In terms of geographical origin, the 2021 report shows that most of the investments monitored were made by non-EU/EEA end-investors, accounting for 58.8% of investments. They came mainly from the UK, the US and Canada. Within the European Union and the European Economic Area, most of the investments came from ultimate investors located in Germany, Luxembourg, and Ireland.

Thus, in our view, although there is always room for improvement, the FIF mechanism has struck a balance between attracting foreign investment and economic sovereignty.

In your opinion, do investment funds receive the same treatment in connection with the control of foreign investments in France as foreign industrial investors? If there are differences in treatment, could you elaborate on them?

Like foreign industrial investors, private equity vehicles (hereinafter Private Equity Funds) may be subject to FIF control, regardless of their legal form or domicile, when a stake is acquired in a French company whose activity is subject to FIF control (Articles L. 151-3 and R. 151-3 of the Monetary and Financial Code).

The PACTE Law stipulates that the origin of the "ultimate controller" must no longer be looked at alone. Henceforth, all the links in the chain of control (control within the meaning of Article L. 233-3 of the Commercial Code and L. 430-1 of the Commercial Code) of the entity must be examined. As a result, if an interest is acquired in a French company whose activity falls within the scope of FIF control, the presence of a foreign "intermediate controller" in the chain of control of the entity is sufficient for the application of the regulations on the control of foreign investments in France.

In the case of funds, the level of control of the holding chain will not necessarily be that of the holders of units or shares of the Private Equity Fund. Indeed, the entity exercising the investment decision-making power of an AIF, regardless of its domicile within the EU, is the asset management company that manages it. It is therefore the management company that has the power to make investment decisions and exercise the voting rights attached to the holding. There is therefore no need to determine the identity or origin of the subscribers (i.e. the investors) of the Private Equity Fund. In the specific case of Private Equity Funds, the criterion used with regard to the investments made by investment funds is the control of the shareholding of the fund manager, i.e. the person who exercises decision-making power.

It should be noted that in a decision of 3 April 2020 (CE, 6th-5th chambers combined, no. 422580, JurisData no. 2020-004683) the Conseil d'Etat (Council of State) ruled that the Paris Administrative Court of Appeal had not committed an error of law in considering that "for a transaction carried out by an investment fund, it is incumbent on the applicant to indicate the identity of the fund manager and, when this manager is itself a legal entity, the identity of the natural persons or public bodies controlling it, and noting that no provision requires that the identity of all the investors participating in this fund be specified".

Therefore, all links in the chain of control of the asset management company will have to be examined in order to ascertain whether there is a foreign intermediate controller in the chain of control of the asset management company. In the case of a Private Equity Fund, the chain of control will be established at the level of each link in the chain of control of the asset management company to determine whether the decision-making power ultimately lies with a foreign natural person.

It is in this respect that the approach adopted may differ between a foreign industrial investor and a Private Equity Fund established in another Member State of the Euro-

pean Union or the European Economic Area. If the shareholding (ultimate investor) of the manager is French, then the acquisition transaction carried out by the Private Equity Fund it manages will not be subject to the prior authorisation procedure.

Foreign industrial investors are sometimes seen as a promise of a long-term relationship, as opposed to investment funds, whose objective is to sell the company in the short to medium term. Do these differences explain the specificity of foreign investment controls in France in the context of fund acquisitions?

In our view, from a legal point of view, the holding period is not a relevant element in the analysis of the ac-

quisition transaction. Specific conditions may, if necessary, be imposed in the context of the Minister's control of foreign investment in France. As stated in the above-mentioned FAQ, these conditions are discussed with the investor, who signs them prior to notification of the Minister's decision. The investor must comply with them for the entire duration of its control over the French target entity or for a specified period. In addition, they may be revised at the request of the investor or at the initiative of the minister for the economy in certain cases and in accordance with the procedures set out in Article R. 151-9 of the Monetary and Financial Code.