



# ARTICLE

## 10 YEARS OF INCREASED CONTROL OVER FOREIGN DIRECT INVESTMENTS (FDIS) IN FRANCE



Public Law and Public Procurement Law | 26/06/24 | Vincent Brenot Nicolas Baverez

France, Europe's most attractive business location for the fifth year running, held its annual *Choose France* foreign investment summit in Versailles on May 13th. A large number of foreign companies, seduced by the economic and legal environment offered by our country, have decided to invest in French companies or to carry out their projects here, such as Microsoft's record investment to set up its datacenters.

While France is delighted to be attracting an ever-increasing number of foreign investors, in the past few years it has tightened its regulations on the control of foreign direct investment in France ("FDI") in order to preserve its sovereignty in sectors deemed strategic (defence, energy, health, aerospace, etc.).

It was within such context that Vincent Brenot and Nicolas Baverez, partners at August Debouzy, had the opportunity to meet Thomas Ernoult, Head of the FDI Bureau at the Treasury Directorate General of the Ministry of the Economy and Finance, who discussed the principles and procedures for exercising this control, as well as possible changes to the regulations.

### Some data

A file concerning an acquisition or investment operation submitted to the FDI Bureau may give rise to four decisions:

- the operation is deemed ineligible (i.e. outside the scope of control),
- a simple authorization is required,
- it is authorized subject to conditions, or
- it is refused.

In 2023, the FDI Bureau examined 309 applications<sup>[1]</sup> submitted by foreign investors related to acquisitions. **The FDI Bureau authorized more than half of the foreign investments subject to its control (53%), including 60 authorizations subject to conditions (44% of authorizations)**<sup>[2]</sup>. Almost half of the other transactions were declared ineligible, while a certain number were refused.

### Assessment of applications by the FDI Bureau

In practical terms, the bureau in charge of examining applications gives priority to assessing the sensitivity of the target's business, regardless of the investor. Respecting a **principle of non-discrimination**, the control is not based on any hierarchy of country risks and does not target any particular country, while remaining, of course, aware of the state of the world and diplomatic relations.

Then, beyond the investor's nationality, the departments examine the investor's strategy and profile with regard to the investor's reputation, particularly if the investor has been the subject of previous convictions, if there is a strong presumption that the investor is involved in risky activities or if, in the past, the investor has behaved in a questionable manner in implementing authorization decisions issued by the Minister of the Economy and Finance.

If the Minister considers that a refusal is necessary, two parameters must be taken into account. The first is whether the possible conditions are likely to reduce the risks identified. The second relates to the links that one or more investors may have with a foreign state. These links may be of a capital-intensive, institutional or sometimes more intangible nature, but the Ministry must always be able to justify their materiality. By definition, refusal decisions have a negative impact and can therefore be appealed.

### Priority treatment of urgent cases despite the absence of a fast track system

Regarding deadlines, the regulation<sup>[3]</sup> require the authorities to complete the first phase of the inspection within 30 working days, and to complete the second phase within 45 working days if the file requires further examination. Investors are reminded of the importance of filing an application as soon as possible if the transaction is likely to be subject to an FDI inspection, particularly in the case of takeovers of companies in difficulty that are already the subject of proceedings before the commercial court.

Despite the absence of a fast track procedure, even in the case of takeovers of companies in difficulty that are before the Commercial Court, Thomas Ernoult's team endeavours to process applications as quickly as possible. In general, the FDI Bureau manages to process applications within the deadlines imposed by the takeover timetable. It applies a principle of "good administration", in order to ensure that a case is not held up in the Commercial Court in the absence of an FDI decision.

### The benefits of prior review requests

It is also possible to **file a request for a prior examination in anticipation of** a transaction in order to give investors and targets some visibility, although the opinion issued is not valid for an unlimited period of time, since the factual and legal circumstances may change. The administration's knowledge of the target's business will be much better after examining a request for prior review than



without it. However, if an investment project is already almost certain, it is essential to file a real application. Otherwise, there will be an accumulation of delays.

Furthermore, if, after an initial review, the transaction proves to be complex and requires further examination during a second review phase, the latter may result in either a refusal or authorization subject to conditions. In the case of a sensitive business, for example, these conditions may include an obligation to retain industrial capacity and key skills in France, or to protect intellectual property rights.

On the other hand, since the purpose of controlling FDI is to protect public order, public security and the interests of national defence, in this context, commitments cannot require that **jobs be safeguarded in France**.

#### Conditions and monitoring of commitments

Monitoring investor compliance with the conditions is one of the major challenges of this "adult" phase of FDI monitoring, especially as the stock of commitment letters increases. The vast majority of conditions are imposed for an indefinite period, although the indefinite life of commitment letters is not automatic. Here again, the authorities try to take the most proportionate approach possible depending on the risks identified and their duration. If a condition were only valid for the duration of an investment program or contract, there would be no reason for it to continue.

To ensure the coherence of the entire system, the FDI Bureau delegates the operational monitoring of commitments to the Strategic Information and Economic Security Service ("**SISSE**") of the Ministry of the Economy and Finance. The latter draws on the expertise of the relevant government departments, such as the Directorate General for Armaments ("**DGA**") in the military sector.

Furthermore, this control is carried out in harmony with the European framework regulating FDI, formalised by the 2019 regulation<sup>[4]</sup>, which has been implemented since October 2020. The other Member States and the European Commission are notified of the cases that affect them and can issue an opinion on the transaction in the light of its impact on their own fundamental interests. They cannot, however, impose additional conditions, as the Member States remain sovereign in terms of controlling foreign investment.

There are also other informal discussions, notably within the OECD or the G7, but these exchanges focus on principles and never address individual requests.

#### Absence of authorization, non-compliance with commitments and regularization

In the event that an FDI is carried out without authorization, or if the undertakings attached to the authorization are not complied with, the Minister may impose a number of sanctions. These may include administrative police measures in the event of a **breach of the conditions imposed as part of the authorization**, or in the event of a transaction that has been carried out without prior authorization. The investor may be required to restore the situation that existed prior to the investment at his own expense (the most severe sanction), to modify the investment, or to apply for authorization. Other sanctions may include withdrawing authorization, depriving the investor of its voting rights in the governance of the target company, or substituting new conditions for those that have not been complied with.

**Regularization remains possible** when a foreign investment has been made without authorization. The Minister may, on his own initiative and using his police powers, order the investor to submit an application for authorization, which will no longer be a prerequisite but will serve to purge the civil nullity linked to the irregular completion of the transaction.

Investors may also request the FDI Bureau to regularize a transaction on their own initiative. This request is examined in the light of the factual and legal circumstances at the time the transaction was carried out. While regularization removes the civil nullity, it does not exonerate the investor from the possibility of being penalized. Although the tax authorities do not publish statistics on penalties imposed, the number is limited.

#### No plans to change the scope of FDI regulations

Although the scope of foreign investment transactions in France subject to the procedure was extended on 1er January 2024, with the lowering of the threshold for triggering control to the holding of 10% of voting rights in French companies, **no further changes to the regime are currently envisaged**. *Greenfield* transactions also remain outside the scope of control of FDI by the French authorities, and their integration is not a priority area for reform.

Nevertheless, under the authority of the Minister for the Economy, the French Treasury is closely monitoring developments in threats to France's economic sovereignty. It reserves the right to reassess the ability of our positive law to respond and to modify the regulatory framework for FDI accordingly.

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[1] 325 files examined in 2022.



[2] Between 1 January and 31 December 2023, 255 decisions were delivered on investment authorization applications. During this period, 135 foreign investments were authorized under FDI control.

[3] Article R. 151-6 of the French Monetary and Financial Code.

[4] Regulation 2019/452 of 19 March 2019 *establishing a framework for the screening of foreign direct investment in the Union*.

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