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October 2022

Foreign Investments in France
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The Ministry of Economy issues guidelines

Faced with the relative lack of transparency of the French foreign investment control regime, the French Ministry of Economy has recently published its first guidelines for a better understanding and predictability of how the foreign investment control (FIC) regime in France is enforced.

Foreign investments in business activities which are deemed "*sensitive*" in France are subject to control by the Ministry of the Economy and may require a specific governmental approval. The relevant regime is set out in the French Monetary and Financial Code (Articles L. 151-3 and R. 151-1 *et seq.*).

A few months after a public consultation and the publication of the first annual report on foreign investments in France, the French Ministry of Economy has sought to provide with its guidelines "*an educational and concrete presentation on the scope of the foreign investment control regime, the conduct of the control procedure and the follow-up of the authorisations issued by the French Minister of the Economy*"[1].

The guidelines provide welcome clarification on how the three cumulative criteria for FIC in France should be interpreted and applied. Those criteria are as follows: there must be (i) an investment, (ii) by one or several foreign investors (iii) in sensitive activities in France. As the implementation of such criteria is not always straightforward, the Ministry has made available to the investors a preliminary screening procedure.

Notion of investment

A foreign investment in France is subject to control if it is carried out in an entity governed by French law (by contrast, a French branch of a foreign company is not deemed an entity governed by French law and an investment related to such branch or its assets is not subject to foreign investment control).

Relevant transactions – the transactions targeted by the French FIC legislation are (i) the acquisition of a controlling stake in a French entity, (ii) the direct or indirect acquisition all or part of a business of a French entity and (iii) for non-EU or non-EEA investors only, the holding directly or indirectly, alone or in concert, of 25% of the voting rights in a French listed company.

With respect to acquisitions of shares or assets, the scope of FIC legislation is applied widely: it covers not only acquisitions in cash but also mergers, share contributions and other types of transfers. The

[1] Source: press release, 9 September 2022.

acquisition may also relate to all or part of a business, e.g., a portfolio of sensitive contracts, a significant number of intellectual property rights, a patent or an exclusive patent licence.

When it comes to the holding of 25% in a French listed company (a threshold which in the context of the sanitary crisis has been temporarily reduced to 10% until 31 December 2022), no prior approval is required for investments conducted by natural or legal persons residing or registered in a EU country, Iceland, Liechtenstein, or Norway[2]. By contrast, transactions with British stakeholders are subject to control. Finally, the approval regime only applies to investments in companies which are listed on a regulated market, so French companies listed on Euronext Growth (a non-regulated market) are not subject to this regime.

Greenfield investments – Only transactions in entities engaged in sensitive activities at the date of the transaction are subject to prior governmental approval. Therefore, the creation of entities in France by a foreign investor to develop a business in France – called "*greenfield investments*" – are not subject to control.

Notion of foreign investor

Natural person – An individual of French nationality is deemed a foreign investor if he/she has his/her tax residence abroad; an individual of foreign nationality is deemed a foreign investor regardless of his/her tax residence.

Legal person – Any entity incorporated under foreign law constitutes a foreign investor. This notion of entity covers both organized groups with legal personality (e.g., companies, SPACs, etc.) and those without (e.g., branches…).

Ownership chain – According to Article R. 151-1 of the French Monetary and Financial Code, all entities which are part of the same ownership chain are all deemed investors for the purposes of the FIC rules in France. Based on the guidelines, this gives rise to the two following consequences:

- any member of this ownership chain is entitled to file an application for foreign investment approval on behalf of all investors;
- it is only necessary for one member of the ownership chain to be considered as a foreign investor for the foreign investor criterion to be met (i.e., even if the ultimate shareholder of the group is a French entity or national).

In the same manner, investment funds may be considered as foreign investors, regardless of their management company. For instance, if an investment is carried out via a French holding company which is controlled by a Luxemburg investment fund which is itself managed by a French management company, the Luxemburg fund will be deemed a foreign investor for that matter.

Characterisation of sensitive sectors

The 30 or so "sensitive" business activities are listed in Article R. 151-3 of the French Monetary and Financial Code and Article 6 of the Decree of the French Minister of the Economy dated 31 December 2019 on foreign investments in France.

According to the guidelines, there are three types of eligibility for foreign investment control, depending on the nature of the activity carried out by the target entity:

[2] Iceland, Liechtenstein and Norway are countries belonging to the European Economic Area (EEA) who have entered into agreements with France on administrative cooperation to combat fraud and tax evasion.

1. **Objective eligibility**: the activity is eligible by nature and directly relates to the conduct of national or public security activities (e.g., weapons, explosive substances, dual use products, security of information systems for the defence sector, cryptology, gambling, etc.) ;

2. **Eligibility based on a set of indicators**: to determine whether an activity falls within the scope of foreign investment control, a "*sensitive test*" is applied to assess whether it has an "*essential*" nature for certain public national interests (such as the supply of energy or water, transport services, space operations, electronic communications networks, public health, national food security, etc.). The assessment must be based on various factors such as the clients of the target entity, the nature, the specificity and applications of the products/services provided and the know-how, the substitutability of the activities, or the dangerousness of the activities carried out;

3. **Eligibility for research and development activities**: this relates to activities involving critical technologies or dual-use goods and technologies if they are likely to be implemented in one of the activities mentioned in (1) or (2) above. The idea behind this eligibility is to target research and development activities at an early stage, i.e., before the industrialization phase, in the light of possible future applications of such activities.

The level of the turnover generated by the target entity or business is generally not a relevant indicator for the above assessment. In some complex industrial sectors, the main difficulty for a foreign investor is to determine at which level of the value chain the target company or business sits; for instance, a last-tier subcontractor may not necessarily be aware of the final use of its products or services (which may include, for instance, some military applications).

Screening of the target business by the Ministry

In view of the many uncertainties arising from the concept of "sensitive activities", the Ministry has made it possible for an interested investor or the target company to submit a request to the Ministry to have an activity screened to determine whether such activity falls within the scope of foreign investment control. This procedure is particularly useful where there are doubts about the fulfilment of the sensitivity criteria mentioned above. Provided the requesting party submits a complete file with a detailed description of the activities of the target company as well as the products/services sold to the customers, the investor or the target company may expect a position from the Ministry within two months. At the end (or in the course of) such screening procedure, the Ministry may either conclude that the relevant activity is indeed covered by foreign investment control (in which case the investor will be invited to submit a proper request for approval of its investment) or determine that it is not subject to such control. The request for a prior screening by the Ministry only requires the existence of ongoing discussions on a project (which can be reflected in a letter of intent or MOU), there is no need to provide the administration with a fully binding share purchase or asset purchase agreement. The silence kept by the administration at the end of the 2-month period does not mean that a request for approval is not required (in such case, based on risk assessment, the investor with the assistance of its advisors may determine whether it wishes to proceed with its investment and, if so, to file a request for approval with the Ministry of Economy to be on the safe side).

For further information on this topic or any assistance you may require, please do not hesitate to contact Raphaël Mellerio (mellerio@aramis-law.com), Alexis Chahid-Nouraï (chahidnourai@aramis-law.com) or Anne-Hélène Le Trocquer (letrocquer@aramis-law.com)