



JEANTET

**M&A IN FRANCE: FDI SCREENING
AN INTRODUCTION TO THE RULES
AND GUIDELINES**



Introduction

The French Ministry of the Economy recently published long-awaited guidelines relating to the operation of its foreign direct investment screening procedure. France is one of the very first jurisdictions in Europe to do so; this should encourage the others to follow its lead and may result in a harmonized practice across the EU.

The Ministry has been urged to publish practical guidelines for some time by foreign investors and their advisers. The Guidelines follow a series of consultations between market participants and the Ministry, and most recently of a public consultation undertaken in March 2022, in which Jeantet participated.

The Guidelines do not have the force of law. However, they provide a useful insight into the French FDI screening procedure.

An overview of the FDI screening regime is provided below and we have added some of the key points to note from the Guidelines.

October 2022



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1. Principle: Freedom of Investment in France

As a general rule, acquisitions of controlling interests in French companies and businesses by foreign acquirors are not subject to authorization or approval by the French government: France is an open economy.

As an exception to the general rule, prior authorization by the French Ministry of the Economy is required for certain foreign investments made in sectors which are categorized by law as “strategic” and “sensitive” or if the activities of the French company involve “public order, public safety or national defense interests.”

2. Scope of Screening Regime

Three cumulative conditions must be met for a transaction to fall within the scope of the screening regime and subject to the filing obligation:

(a) Definition of Foreign Investor

A foreign investor under the French FDI regime (a Foreign Investor) is:

- an individual of foreign nationality;
- an individual of French nationality who is not a French tax resident;
- a foreign legal entity, which the Guidelines explain includes a wide range of entities: companies, associations, trusts, investment vehicles, SPACs, foundations, groups of companies, states, local authorities and public or semi-public persons, etc. A European Company, governed by the provisions of Council Regulation (EC) No. 2157/2001 of 8 October 2001, which has its registered office in France, is not considered a foreign investor, provided that it is not itself controlled by a foreign investor; or
- a French legal entity, which is under the control of one or more individuals or entities listed above.

In addition, individuals or entities within a “chain of control”, i.e. the line of individuals/entities between the acquisition vehicle and the individuals/entities controlling such acquisition vehicle, directly or indirectly, are also deemed Foreign Investors.

If a “chain of control” includes one or several investment funds, the fund manager(s) and the entities or individuals controlling it/them must be identified in the application. The Guidelines confirm that this obligation does not imply that the identity of all limited partners or other investors owning interests in the fund be specified.

The Guidelines further explain that investment vehicles may be considered as Foreign Investors in their own right, independently of their management company – e.g. a Luxembourg investment fund will be considered as a Foreign Investor, even if it is managed by a French management company and the transaction carried out by a French holding company – and the analysis of the “chain of control” of investment funds will be carried out on a case-by-case basis: the French Ministry will look into the specificities of each legal entity within the “chain of control”, the rights and obligations of investors on the one hand and of the management company on the other, and will pay particular attention as to how the fund is managed (internally or externally) and its rules, if any.

(b) In-scope Investments

Investments within the scope of the French FDI regime are:

- the acquisition by the Foreign Investor of control¹ of a French company. According to the Guidelines, control may be exercised solely or jointly. The Ministry may consider that certain veto rights granted to a minority shareholder or provisions in the articles of association or in a shareholders' agreement providing for deadlock or temporary lockup provisions should be qualified as joint control. A transaction by which a Foreign Investor, who already has joint control of a French company, obtains exclusive control of that company (or vice versa) does not fall within the scope of the French FDI regime.
- the acquisition by the Foreign Investor in whole or in part of the business (*branche d'activité*) of a French company. There is no definition of business (*branche d'activité*) under the French FDI regime. The Guidelines refer to the definition provided by French and EU case law² and considers that the following may be deemed a business (*branche d'activité*), subject to a case-by-case analysis: (i) a portfolio of sensitive contracts; (ii) a significant number of intellectual property rights necessary to operate the business; (iii) a patent assignment or the granting of an exclusive or non-exclusive licence over a patent; (iv) equipment, vehicles, furniture and machinery used to operate the business; or (v) any one of the above-mentioned items if it is essential for the performance of the sensitive activity.
- the acquisition by non-EU/non-EEA investors, directly or indirectly, alone or in concert, of (i) 25% or more of the voting rights of a French company or (ii) until 31 December 2022, 10% or more of the voting rights of a French *listed* company³. If the crossing of the 10% threshold of the voting rights of a French listed company by a Foreign Investor has been authorized by the Ministry, a subsequent crossing of the 25% threshold by the same Foreign Investor will not be subject to FDI screening.

Neither "greenfield" investments, i.e. French entities newly created by Foreign Investors, nor investments in a branch in France of a foreign company come within the scope of the French FDI regime.

If a Foreign Investor enters into a long-term contractual undertaking, such as a shareholders' agreement or a call option agreement, pursuant to which it commits, subject to certain conditions, to acquire shares of a French company by a date in the future, then the FDI filing, if required, may only be carried out at the time of exercise of the right to acquire the shares and not at the time of signing of such agreement.

(c) In-Scope Sectors

The sectors within the scope of French foreign investment regime include defense, energy, transportation, public health, space and aircraft industries, telecommunications, storage of sensitive data, activities relating to certain key technologies, including R&D activities for semiconductors, artificial intelligence, cybersecurity, robotics, additive manufacturing, dual-use goods and technologies, print and online press services for political and general information, food safety, energy storage, and quantum technologies, biotechnologies (since 30 April 2020) and technologies involved in the production of renewable energy (since 1 January 2022).

The Guidelines do not provide any precision or clarification as to the scope of the "sensitive" sectors. The Ministry has stated that "sensitivity is determined on a case-by-case basis, depending on the characteristics of each transaction (sector concerned by the investment, market conditions, etc.)."

The Ministry also confirms that the value of the transaction or the turnover of the French target company are still not a criteria. In other words, the Guidelines confirm that there is no value-based materiality threshold for the application of the screening regime.

3. Preliminary Request

The French company (or, with the approval of the French company, the Foreign Investor) may file a preliminary request with the Ministry of the Economy to determine whether the French company falls within the scope of the regime and that a filing is accordingly required. The Ministry of the Economy has two months to reply to this request. This request may be filed as early as the start of negotiations or the signature of a non-disclosure agreement.

The Guidelines confirm that a Foreign Investor may not file, at the same time, a preliminary request and a request subject to the FDI screening procedure. A choice must be made between the two.

4. FDI Screening Procedure

The application may be filed by the investor, or any entity within its chain of control. If the investor's "chain of control" comprises several foreign entities, the filing of a single application for the same transaction by one of them is sufficient. If several foreign investors are jointly investing in the same transaction, each investor must file an application for its own investment; joint applications are not accepted.

The Guidelines are clear: the French Ministry will not be bound by any transaction timetable agreed between the parties. It is the parties' responsibility to allow enough time for the FDI screening procedure in their timetable. However, the French Ministry does show some flexibility and some willingness to help participants by stating that account is taken of duly justified specific constraints that may be attached to certain transactions (notably in the context of distressed M&A deals).

¹ within the meaning of Article L. 233-3 of the French Commercial Code.

² A business (*branche d'activité*) can be defined as a group of items necessary to carry out an autonomous operation, i.e. capable of functioning alone under normal conditions. A branch may be deemed a business (*branche d'activité*) as long as it constitutes a set of assets and persons capable of contributing to the performance of a specific activity.

³ i.e. listed on regulated markets in France and the European Union, as well as those of the States who are party to the European Economic Area Agreement, but not on non-regulated markets such as Euronext Growth or on non-EU markets. In this case, Foreign Investors benefit from a fast-track procedure: the Foreign Investor crossing the 10% threshold has to notify the proposed transaction to the French Ministry, who will have 10 days to decide whether the transaction requires further in-depth examination.

The FDI screening procedure is organized in two phases:

(a) Phase I review – maximum 30 business days – for all applications

The Ministry of the Economy has 30 business days following the date of receipt of the Foreign Investor's application for approval to indicate whether (i) the transaction falls within the scope of the French FDI regime (this step will not be required if a preliminary request for a determination of this point has been filed and the Ministry has confirmed it – see above), (ii) is authorized unconditionally or (iii) requires further in-depth examination.

This 30 business days period does not start until the application is formally accepted by the Ministry. The start of this 30 business days period will be postponed for as long as the application is deemed incomplete by the Ministry. The Ministry assesses the completeness of the application on the basis of the documents and elements submitted, but also on the quality and comprehensiveness of the information provided. For example, an application that does not describe the target company's activities – and only indicates the sector in which it operates and its corporate purpose, or which does not provide a detailed list of its clients and services, will be deemed incomplete.

The Ministry will in priority request the Foreign Investor to provide the information. However, if need be (and in particular if the French target does not want to share sensitive information, such as customer lists, with the Foreign Investor), the French Ministry may request that the French target company directly provide to it the requested information, which will not be shared with the Foreign Investor.

(b) Phase II review – maximum 45 business days – for applications in respect of which an in-depth examination is required

If further in-depth examination is required, the Ministry of the Economy has an additional period of 45 business days to provide the Foreign Investor with its final decision i.e., refusal of the transaction or clearance subject to conditions or the giving of undertakings by the Foreign Investor to ensure that the contemplated transaction will not adversely affect public policy (*ordre public*), public safety or national security (such undertakings might for example be to ensure that the French company continues to perform its obligations under certain contracts or to sell part of the shares acquired in the French company or sell, in whole or in part, strategic assets or activities, to a third party approved by the Ministry). No response from the Ministry of the Economy within the relevant time period means that the request for approval is rejected.

The conditions, if any, will be outlined in a separate letter, which may be shared with the French target company. The Minister's decision will clearly identify the entity or entities within the Foreign Investor's "chain of control" responsible for compliance. It should have decision-making powers, human, legal and financial resources to ensure and monitor compliance with the conditions and, where appropriate, to bear the consequences of a possible financial penalty in the event of non-compliance. In practice, this may not be, for example, the investment vehicle created for the purpose of the transaction. In some cases, it may be the ultimate controller.

The Guidelines state that even if every FDI filing is reviewed with the same care regardless of the nationality of the Foreign Investor, special attention will be given to applications filed by Foreign Investors who are related to a foreign government or institution or who invest via non-transparent or complex investment structures and arrangements.

The Guidelines include an observation by the Ministry to the effect that whilst its authorization decisions are not expressly limited in time (i.e. the parties are not bound to complete the transaction within a specific period of a decision being notified, failing which a renewed application for authorization has to be made), each decision is based upon the facts and circumstances known to the Ministry at the time it is made.

5. European notification

Since 1 January 2022, a so-called notification Form B6 required under the European cooperation mechanism set up under Regulation (EU) 2019/452, is to be submitted at the same time as the FDI filing. According to the Guidelines, this European procedure has no impact on the timeline of the FDI screening procedure.

6. Sanctions and Remedies

If a transaction is closed without obtaining an authorization where one was required, the Ministry of the Economy may order the Foreign Investor to file an application *a posteriori* or modify or unwind the transaction at the Foreign Investor's cost. The Ministry may also (i) suspend voting rights and dividend distributions with respect to a portion of the French company's shares held by a Foreign Investor, (ii) appoint a special trustee responsible for preserving the national interest at the French company level; and/or (iii) restrict the Foreign Investor's ability to dispose of sensitive French assets.

The Ministry of the Economy may also impose on the Foreign Investor daily penalties for non-compliance (*astreintes*), of a maximum amount of €50,000 per day and a fine of an amount equal to the higher of the following values: twice the value of the transaction, 10% of the annual turnover (excluding tax) of the French company, €1 million for individuals or €5 million for legal persons. In addition, any interested party can seek to have declared null and void a transaction completed without the prior authorization from the Ministry of the Economy in violation of French law. There are also potential criminal sanctions (imprisonment for up to five years and a fine of up to twice the value of the transaction) for breach.

A Foreign Investor acting in good faith may also contact the Ministry to submit for its review an application with respect to a transaction closed without FDI clearance where one was required. In such a case, the Ministry will review the filing on the basis of the legal and factual elements as of the date of closing of the transaction and not at the date of filing of the regularization request. Even if the transaction is cleared further to the regulation application, the Foreign Investor may still face criminal sanctions.

ABOUT JEANTET

Founded in 1924 and headquartered in Paris, Jeantet is amongst the longest established of the leading independent French law firms. We are a full service law firm, comprising 30 partners and a total of 200 professionals. Recognised in France and internationally for the exceptional quality and breadth of our legal practice, our clients include start-ups and entrepreneurs, family companies and SMEs, private equity and other investment funds and financial institutions, as well as the largest French and international corporate groups.

Dedicated to the provision of flawless and timely legal advice and counsel, we build strong and lasting relationships. To do so, we work hard to understand our clients' objectives and problems and to help provide optimal outcomes and solutions for them.

A third of our partners are dedicated to advising our clients on public and private M&A (including distressed transactions), private equity and capital markets transactions. Supported by our specialised debt finance, tax and merger control teams and with full scope legal due diligence capabilities, we advise on deals across a wide range of sectors, handling both small and mid-cap transactions as well as market-leading large cap deals. A very significant proportion of the transactions on which we advise require our clients to undertake the French FDI screening procedure.

For further information about our firm please contact your Jeantet relationship partner, the authors of this report or visit our website at www.jeantet.fr

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