

Direct investment control: reinforcement and a new procedure in France



Dr. Iur., Antje Luke, Partner,

Avocat au Barreau de Paris, Rechtsanwältin (Freiburg)

Vincent Capelle, Avocat au Barreau de Paris

The Covid 19 crisis has prompted various European governments to hastily review their policies for foreign direct investment control.

On 25 March 2020, the President of the European Commission called on Member States to protect their security and economic sovereignty and to *"preserve EU companies and critical assets, notably in areas such as health, medical research, biotechnology and infrastructures that are essential for our security and public order, without undermining the EU's general openness to foreign investment."*

In 2019, France and Germany were the target of no less than 18.8% and 15.1%, respectively, of total foreign direct investment in Europe¹. In the light of the sanitary crisis, the French Minister for Economic Affairs on 29th April¹ and the German Federal Minister for Economic Affairs on 8th April¹ therefore proposed the extension of the respective national investment control schemes to the whole health sector and to introduce a - possibly provisional - reduced control threshold of 10% of the capital of a strategic company for non-EU investors. The extension of control in Germany to certain activities in the health sector has now been included in the Foreign Trade Payments Regulation¹.

- Press release, <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2124>
- How can Europe reset the investment agenda now to rebuild its future? Ernst & Young 2019, p. 4 https://www.ey.com/en_gl/attractiveness/20/how-can-europe-reset-the-investment-agenda-now-to-rebuild-its-future
- Audition of B. Lemaire by the NA Economic Affairs Committee, 29 April 2020; <https://www.tresor.economie.gouv.fr/Articles/2020/04/30/covid-19-adaptation-du-controle-des-investissements-etrangers-en-france-ief-pendant-la-crise-sanitaire>
- <https://www.bmwi.de/Redaktion/DE/Pressemittelungen/2020/20200408-altmaier-investitionen-in-sicherheitssensiblen-bereichen-koennen-umfassender-und-vorausschauender-geprueft-werden.html>
- Ordinance of 25 May 2020

These adjustments in the context of the exceptional health crisis are just one more step in the trend already underway to strengthen the control of direct investment from third countries by European and national authorities – in France even from Member States of the European Union!

After various changes to further strengthen the control of direct investment, new rules came into force in France on 1 April 2020. The main points of the reform are the extension of the scope of the authorisation requirement for foreign direct investment (I.) and clarification and streamlining of the procedure before the competent Directorate-General of the French Ministry of Economic Affairs (II.).

• Decree no. 2018-1057 of 29 November 2018 relating to foreign investments subjects to prior authorisation

• Decree no. 2019-1590 and Ministerial Order of 31 December 2019 on foreign direct investments in France

I. Who requires an authorisation?

Foreign investment in French companies is in principle free, with the exception of transactions in sensitive sectors, which may require the authorisation of the French authorities before they are carried out.

According to Art. L 151-3 Code Monétaire et Financier (hereinafter "CMF": French Banking and Capital Markets Code), specified by Art. R153-1 et seq. CMF (ordinance), prior authorisation from the French Ministry of the Economy is required for "*foreign investment*" in an activity in France which either takes part in the exercise of public authority or is part of activities which could endanger public order, public security or national defence interests, or activities with a specific reference to weapons.

• Article L 151-1 CMF

a) Extension of the definition of "foreign investment"

The rules for investors from EU and non-EU countries have now been unified and combined into one provision. In principle - as under the previous regulations - an investment from EU States can also be subject to the authorisation requirement. It is irrelevant whether the French company was previously under foreign control.

• Article L 151-2 CMF

An "investment" is defined as:

- Acquisition of control within the meaning of the French Commercial Code (Art. L 233-3) - i.e. the legal or de facto acquisition of a majority of the voting rights at the shareholder meeting or even of more than 40% of the votes, or
- Acquisition of a business or part of a business by a foreign investor through a company in France (Article R 151-2 CMF), or
- only for non-EU investors: exceeding a direct or indirect holding of 25% of the voting rights of a French company. This last threshold has been lowered with the reform (previously 33%).

It is therefore important to know whether the company actually investing is or not indirectly controlled by an investor from a non-EU country.

Art. R 151-3 para. I. CMF

It should also be noted that in response to the Covid-19 crisis, the French Ministry of Economic Affairs has announced a temporary reduction of this threshold to 10% by the end of 2020 (although the regulation has not yet been published). As Germany seems to intend to set the same 10% threshold for a non-permanent period at the legislative level, it cannot be ruled out that this lowered threshold will also lead to investment controls in France for a longer period of time.

Ministerial Order of 27 April 2020

b) Extension of the definition of the relevant target company

Authorisation is required only for investments in companies operating in sensitive sectors listed exhaustively. The catalogue of sensitive activities has been repeatedly expanded over the last few years - most recently, in response to the Covid-19 crisis, to include "biotechnologies". In addition to the classic areas of defence technology, or activities related to internal security or dual-use products, special mention should be made of companies that have contracts with utilities or companies that are of vital interest to the nation, and, since 2019, critical technologies such as cyber security,

artificial intelligence, robotics, additive manufacturing, semiconductors, quantum technologies, energy storage,

The list is therefore very extensive, even for EU investments! It may be necessary to check with the target company exactly in which areas it is active and with which companies it has entered into important contracts.

If there were doubts as to whether the scheme applied to a particular activity, the potential investor or, since the reform, the French target company, could submit a written request to the Ministry of Economic Affairs for clarification. The Ministry of Economic Affairs must reply within two months. However, the absence of a reply within this period does not constitute tacit authorisation.

• Art. R. 151-4 CMF

II. What's new in the procedure?

The new rules have substantially clarified the content of the application for authorisation and the documents to be submitted, but also considerably extended them. For example, in addition to detailed information on the investor, precise information on the activities of the target company, its competitors, its main contractual partners is required. The application must therefore be prepared carefully and with the involvement of the target company.

It is not clearly regulated when exactly the application has to be submitted. The recent reform has not clarified this question either. Since the investment may not be "carried out" without the authorisation, practice generally assumes that a purchase agreement may be signed with a condition precedent but may not be closed. A few authors recommend that even the relevant contracts should not be signed before approval.

The authorisation procedure has now been streamlined: within one month of receipt of the complete notification, the Ministry has to decide whether the investment is subject to control, is approved immediately, or requires further examination (e.g. to impose conditions). In the absence of a reply within the month, the notification is considered rejected. This is an important difference from the previous situation, where approval was deemed to have been granted after a period of two months from receipt of the notification. If the authority enters into the detailed examination, it must take a decision within 45 days of receipt of the first decision.

In practice, however, the Ministry of Economic Affairs has considerably prolonged the procedure by not considering the notification to be complete. One could hope that the authority will now restrict this practice.

Authorisation can in principle only be refused by reasoned decision (Art. R. 151-10 CMF), but in practice it is regularly granted subject to conditions designed to safeguard national defence or public security interests. These must be strictly proportionate. Such conditions may, for example, relate to the continuation of important contracts, or the keeping of certain activities, assets or employees on the French territory.

Foreign direct investment authorisation requirements must be carefully assessed, even in the case of investments by EU companies, and well prepared if prior authorisation is required. The time element must be taken into account in the negotiations of the parties.