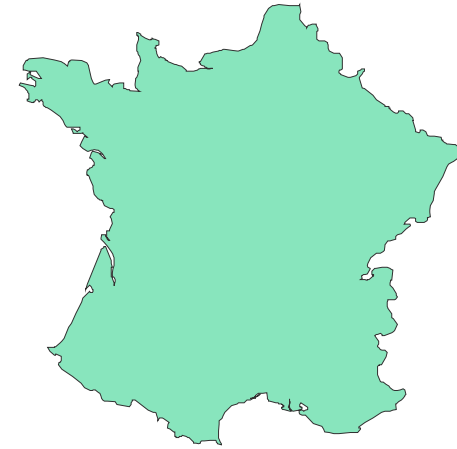


SIMMONS' COMPETITION/ANTITRUST PRACTICE

Foreign Direct Investment Regimes in Europe

France



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France

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Scope of FDI Regime: Transactions subject to review

The Minister of Economy and Finance is responsible for administering the regime. In practice, requests are handled by the General Directorate of the Treasury (*Direction générale du Trésor*). An acquisition/transaction is subject to the prior approval procedure if three conditions are met:

- The acquisition/transaction is carried out by a foreign legal or natural person, or by a French entity controlled by a foreign entity; and
- The acquisition/transaction must constitute an “investment” as defined by law, that is:
 - the acquisition of control of an entity governed by French law,
 - the acquisition of all or part of a branch of activity of an entity governed by French law, or
 - for non-EU and non-EEA investors only (see slide 6 for more details), exceeding, directly or indirectly, alone or in concert, the threshold of 25% of the voting rights of an entity governed by French law (as a temporary measure, since 22 July 2020 until 31 December 2023, the threshold has been lowered from 25% to 10% for listed companies); and
- The investment must relate to an activity in France which, even on an occasional basis, participates in the exercise of public authority or is an activity in a sensitive area, i.e. that could affect public policy, public security or the interests of national defence, and activities related to research, production or supply of weapons, ammunition, explosive powders and substances.

Scope of FDI Regime: Transactions subject to review

Can minority stakes be caught?

- Acquisitions of minority stakes are caught only if made by non-EU and non-EEA investors, and if these exceed 25% of the voting rights (or 10% of the voting rights of a listed company until 31 December 2023).
- This threshold of 25% applies to applications submitted as of 1 April 2020. Before this date, the threshold was 33.33%.

Does the law relate to acquisitions in only certain sectors or specific activities?

- The regime is not applicable across all sectors, and only foreign investments relating to certain sensitive activities are caught.

Scope of FDI Regime: Transactions subject to review

What types of sensitive activities are subject to review?

The sensitive activities are listed in a Decree which covers activities which are likely to prejudice the interests of national defence, likely to prejudice the exercise of official authority, or likely to prejudice public policy and public security. The Decree lists approximately 23 activities in total, including but are not limited to:

- Activities related to weapons, ammunition, explosive substance or other war materials for military use
- Activities related to dual-use items and technologies
- Activities related to security of information systems
- Activities related to transport networks and services
- Activities related to water and energy supply
- Activities related to electronic communications networks and services
- Protection of public health
- R&D activities related to critical technologies (cybersecurity, artificial intelligence, robotics, semiconductors, quantum technologies, energy storage, additive manufacturing, biotechnologies) and to dual-use items

The law provides limited exceptions to the obligation to obtain prior authorisation, such as for transactions between companies belonging to the same group of companies.

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Thresholds

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The French regime applies where the transaction constitutes an “investment”, which is:

- The acquisition of control of an entity governed by French law; or
- The acquisition of all or part of a branch of activity of an entity governed by French law; or
- Crossing, directly or indirectly, alone or in concert, a threshold of 25% of the voting rights of an entity governed by French law (such threshold is set at 10% of the voting rights for listed companies until 31 December 2023).

The last limb only applies only to:

- natural persons who do not have EU nationality or, if they have EU nationality, do not reside in an EU member state (an EEA country is assimilated to an EU member state provided that such country has entered into an administrative assistance agreement with France to fight tax fraud and tax evasion);
- entities which are not entirely controlled by entities governed by the laws of an EU member state (an EEA country is assimilated to an EU member state provided that such country has entered into an administrative assistance agreement with France to fight tax fraud and tax evasion) or by natural persons who are nationals of one of these states and reside in one of these states .

Besides this, there are no other turnover criteria or additional thresholds which need to be satisfied in relation to the transaction for it to be scrutinised under the French FDI regime.

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Procedure

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Is the regime mandatory (i.e. are parties obliged to notify of the transaction)?

- Yes, notification is mandatory provided that all of the conditions are met.
- Any commitment, agreement or contractual clause that directly or indirectly results in a foreign investment in one of the sensitive activities in France without having been previously authorized is null and void.

Is the regime suspensory (i.e. must parties wait for an approval decision before completing a transaction)?

- Yes, the regime is suspensory, in that any operation or transaction which directly or indirectly carries out a foreign investment subject to prior authorisation without having been authorised is null and void.
- Additional sanctions and penalties will be incurred if the parties complete such a transaction without prior approval.

Procedure

What is the timing between an approval decision being issued and the commencement of a review by the authority?

- **Phase 1:** the Minister of Economy has 30 working days from the date of receipt of an authorisation request to inform the investor:
 - (a) the investment does not fall under the regime and therefore does not require any prior authorisation; or
 - (b) the investment does fall under the regime and is approved (without conditions); or
 - (c) the investment falls under the regime but further investigation is necessary to determine whether the preservation of national interests can be guaranteed by subjecting the authorisation to conditions.
- In the absence of a reply within this 30 working day period, the application for authorisation is deemed to be rejected.
- **Phase 2:** in cases where further investigation is required; refusal or authorisation (with conditions where applicable) must be issued within 45 working days from the date of receipt by the investor who filed the request of the Minister's first decision.
- In the absence of a response within this additional 45 working day period, the application for approval is deemed to be rejected.

How long does the authority have to commence a review before it loses jurisdiction to do so?

- The administration does not lose jurisdiction after a certain period of time: in the absence of a reply within the time limit, the application for authorisation is deemed to be rejected.

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Procedure

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What action can the authority take to protect national interests?

- If the Minister of Economy finds that the acquisition/transaction could undermine certain national interests he may:
 - (a) Authorise the investment, subject to conditions intended to ensure that the proposed investment will not adversely affect the national interests; or
 - (b) Refuse to authorise the investment, in particular if the implementation of conditions is not sufficient to ensure the preservation of the national interests defined by the law.
- The conditions set by the Minister are mainly aimed at, subject to the principle of proportionality:
 - (a) Ensuring the continuity and security, in France's territory, of the sensitive activities carried out by the target;
 - (b) Ensuring the preservation of the target's knowledge and know-how and preventing their appropriation;
 - (c) Adapting the target's internal organization and governance; and
 - (d) Setting the terms of information of the administrative authority in charge of the control.
- For this purpose, the Minister may, in particular, make the authorisation conditional on the transfer of part of the shares or stocks acquired in the capital of the target to an entity that is separate from the investor and approved by the Minister.
- The conditions imposed by the Minister may be revised, at the request of the investor, under certain conditions.

Procedure

Are there penalties for failing to notify or failing to abide by the authority's ruling?

If a foreign investment has been made without prior authorisation, the Minister may take the following steps:

- **Injunctions:** the Minister can order the investor to: (1) file an application for authorisation, (2) restore the previous situation at his own expenses, and (3) modify the transaction. Injunctions may be combined with a penalty payment of up to EUR 50,000 per day of non-compliance.
- **Interim protective measures:** the Minister may take such precautionary measures as he considers necessary (such as suspending the investor's voting rights, appointing an agent, preventing the investor from disposing of assets or receiving dividends).

If the investor fails to comply with the conditions attached to the authorisation's decision, the Minister may take the following measures:

- Withdrawal of the authorisation
- Instruct the investor to comply with the initial conditions or with new conditions
- Take any appropriate interim protective measure

In circumstances (1) where a transaction has been completed without prior authorisation of the Minister, (2) of fraud, or (3) where the Minister's decision or injunction has been violated, the Minister may impose a fine of up to the highest of the following amounts (provided they are proportionate):

- Twice the amount of the irregular investment
- 10% of the annual turnover before tax of the target
- 5 million euros for legal entities, and 1 million euros for individuals.

Impact on M&A

In cases where an acquisition/transaction is subject to the prior approval procedure because the three aforementioned conditions are met, the parties should take into account the 30 and 45 working day period (for Phase 1 and Phase 2 review respectively) for the process of obtaining a decision from the Minister of Economy where prior approval is required, when planning the deal and timelines.

In addition, where the proposed acquisition/transaction does fall within within the French FDI regime, parties should understand that completion is by no means certain, as the Minister has the power to block the deal or to require conditions that would make the transaction unattractive to the parties.

Please note that under French law, the investor or the entity governed by French law may submit a prior request to the Minister of the Economy in order to **determine whether the proposed investment is within the scope of the applicable regulation and subject to the approval procedure**. The Minister shall reply within a two-month period.

It must also be noted that in addition to the prior approval process in the event of foreign investment in a French entity, there are several notification requirements in case of in-bound or out-bound payments from/to any foreign country. These can be dealt with post-closing in the context of an M&A transaction.

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Contacts

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Omblin Ancelin
Partner

+33 1 53 29 16 42

omblin.ancelin@simmons-simmons.com



Simonetta Giordano
Partner

+33 1 53 29 16 74

simonetta.giordano@simmons-simmons.com