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FOREIGN DIRECT INVESTMENT SCREENING IN FRANCE

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Fusions & Acquisitions
19, parc Vatonne,
91190 Gif-sur-Yvette France
Tel. : + 33 (0)1 69 31 07 23
www.fusions-acquisitions.fr
contact@fusions-acquisitions.fr

Chief editor
Marina Guérassimova
mguera@fusions-acquisitions.fr

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Scientific advisors
Jean-Pierre Bertrel, David Chekroun et Gilles Pillet
Professeurs, ESCP Business School

ESCP BUSINESS SCHOOL

Commercial direction
abonnement@fusions-acquisitions.fr

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FOREIGN DIRECT INVESTMENT (FDI) SCREENING IN FRANCE: TODAY'S SOLUTIONS, TOMORROW'S REQUIREMENTS!

David Chekroun

Marina Guérassimova

Gilles Pillet

The turbulence experienced by globalisation in recent years, the COVID-19 pandemic, and geopolitical developments such as Russia's invasion of Ukraine have prompted countries to rethink the balance between attracting foreign investment and economic sovereignty. In some cases, this has led to sudden and structural changes in the way they support foreign investment in sensitive sectors, and in how they assess and prevent the threats posed by foreign investment to their national security and public order.

Governments from China to the United States and from the United Kingdom to Germany, including France, have recently reformed and strengthened their foreign investment control mechanisms.

This drive to tighten controls for reasons of national defence, industrial sovereignty and economic security around the world has a very real and direct impact on cross-border mergers and acquisitions.

The questions raised by this return to economic sovereignty, and by the self-invitation of government officials to the negotiating table, are exactly the kind of issues that call for collaboration between practitioners and academics.

This is still a fledgling field and one that a host of operators are slowly shaping in the wake of successful cross-border transactions.

It is therefore essential that the work involved in these transactions and in the FDI screening be made as clear as possible and that it be shared, with the help of academic work to define the concepts, existing rules and present solutions.

It is also wise to involve future stakeholders as early as possible in supporting this new expertise and to integrate this knowledge into their training. This is why we thought it would be valuable to form a partnership between F&A Magazine and ESCP BS.

An entire ecosystem is developing around the issue of foreign direct investment screening. Cross-border M&A transactions are at the nexus of politics, geopolitics, economics, finance, strategy and law. It involves a wide range of professionals, including law firms, investment banks, auditors, strategy consultants, lobbyists, economic intelligence specialists, communication agencies, French and European public authorities, and various ministries and members of Parliament. These stakeholders all operate under the watchful gaze of a demanding public, informed by the work of journalists.

To reflect this breadth, in this special issue we give a voice to all these stakeholders and balance their words with reasoned accounts of how foreign investment control regimes have developed in France, the European Union, China, the United States and elsewhere.

The authors would like to thank Nathalie El-Bazzal, Graduate of ESCP Business School with a MSc in Financial Management, Drew Shagrin, Permanent Affiliate Professor of Business Law at ESCP Business School, and Jean-Pierre Bertrel, Emeritus Professor of Business Law at ESCP Business School, for their contributions to this special issue. The authors would also like to thank the KPMG Professorship in New Generation Management at ESCP Business School for their generous support.

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INTRODUCTION TO THE SPECIAL ISSUE THE MECHANISM FOR FOREIGN DIRECT INVESTMENT SCREENING IN FRANCE

By David Chekroun[1], Gilles Pillet[2] and Marina Guérassimova

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

David Chekroun

Gilles Pillet

Marina Guérassimova

The last three years have been affected by totally unprecedented health, geopolitical, environmental and economic crises, causing an upheaval in the volume and nature of foreign direct investment in the world.[3] Due to these different crises, many companies have become vulnerable targets for predatory practices by foreign investors. These various factors are linked to a more structural trend that ends a period of so-called happy globalization, and have led national governments to rethink the balance between attracting foreign investments and economic sovereignty, and sometimes to make sudden changes to their support for foreign investments and transnational mergers and acquisitions in sensitive sectors.

Indeed, with the entry into force of the first European screening mechanism and substantial changes to the Chinese, American, British, German and French mechanisms, foreign direct investments screening is currently more than ever considered by national governments and States as an essential shield for protecting their strategic assets and a vital tool for dealing with predatory economic practices.

[1] Professor of business law, director of the Law & Business option at ESCP Business School and director of the Institute of Corporate Governance.
[2] Professor of business law and director of the specialised master's degree in Law & International Management at ESCP Business School.
[3] World investment report 2022: https://worldinvestmentreport.unctad.org/world-investment-report-2022/#key-messages

As a result, use of these control mechanisms enables the public authorities to oppose, sometimes publicly, investments that were easily accepted previously, on the grounds of national defence, industrial sovereignty and economic security.[4]

In France, the right balance between accepting and rejecting these investments is linked to changes in the economic structure, with foreign investments acting as a real or supposed catalyst for economic growth by creating jobs, technology transfers and an improvement in the financing and competitiveness of French companies. For these reasons, players in the French ecosystem go to great lengths to implement a policy favourable to foreign investments and to highlight indicators of the attractiveness of the French economy: 1,607 investment decisions in 2021[5] representing over 2 million jobs, more than 20% of revenue, over 14% of companies' investments and almost a third of exports.

Nevertheless, the return to prioritizing economic sovereignty in France and the greater presence of the State at the negotiating table in mergers and acquisitions in sensitive sectors do not date from the health crisis, but from 2014[6] and the debate on the controversial sale of Alstom Énergie to General Electric which, it should be remembered, sent shock waves through the country.

However it was not until 2019, with the Action Plan for the Growth and Transformation of Companies (PACTE) law,[7] and the decree[8] and order of 31 December 2019, that the control mechanism for foreign direct investment screening in France was really created, extending the list of sectors concerned and ending the multiplication of confusing texts.

The system for controlling foreign investments in France is now complete, more coherent and stabilised. The system is structured around defensive and offensive tools made available to the finance minister and a smaller team, the Multicom 4 Office of the French Treasury Department responsible for examining requests for authorisation, as well as managing relations with interministerial authorities and the European Commission.

The public authorities responsible for control in France use the defensive tools to ensure the integrity of essential activities related to national defence, public security and economic sovereignty by controlling foreign investments that affect the organisation of production and supply chains.

They use the offensive tools to control flows of capital in sensitive sectors. Prior to transnational mergers and acquisitions, the finance minister informs the foreign investor and the target French company of the criticality of their planned deal. Following the operations, the public authorities have a wide range of tools to make adjustments and impose penalties to ensure the permanence of sensitive activities in France, protect companies' expertise and jobs, secure sensitive data and keep the authorities informed of the running of the activities after the investment.

This mechanism is seen as more intelligible by French and foreign players, but it would be better if the decisions under this new mechanism were more predictable, as this would give French companies and foreign investors the legal certainty they sometimes lack and that they still call for.

It is true that the transparency and intelligibility of controls have been increased by the organisation of symposiums, seminars and conferences, by and with all of the players involved in controlling foreign investment. The publication of an annual report on the foreign direct investment screening in France[9], articles, books and the proceedings of symposiums, as well as templates of applications for controls also help the stakeholders to better understand the mechanism.

But the screening mechanism has been made really predictable by the drawing up and publication[10] on 9 Septem-

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[4] This list is not exhaustive and may include the following terminology: national and industrial independence, industrial champions, industrial policy etc.

[5] Annual Report 2021: Foreign investment in France, https://investinfrance.fr/wp-content/uploads/2017/08/Bilan_IDE_2021_UK.pdf

[6] So-called Montebourg Decree of 14 May 2014, which is both a legal act and a strong political statement.

[7] Law No. 2019-486 of 22 May 2019 on growth and the transformation of companies.

[8] Decree 2019-1590, of 31 December 2019 on foreign investments in France.

[9] French Treasury Department, Publication of the annual report on the control of foreign investments in France in 2021. https://www.tresor.economie.gouv.fr/Articles/9aa76183-24a8-49ba-9466-179c5b29f99c/files/47b9b032-3d2b-4779-8327-15d3400045ab

[10] French Treasury Department, Control of foreign investments in France: publication of the guidelines on 9 September 2022: https://www.tresor.economie.gouv.fr/Articles/314615b9-70b9-417f-bb94-5dd1437e7418/files/a81a841b-dc55-4685-af34-213bb0bd88cc

ber 2022 of guidelines on the control of foreign direct investment screening in France.

These guidelines are the result of a public consultation in 2022, and provide stakeholders with a didactic and practical presentation of the scope of the rules on controls, the course of the control procedure, and monitoring of the authorisations issued by the finance minister.

Lessons learned and case studies also show how the effectiveness of the mechanism can be improved. For this purpose they make use, in more or less detail, of the cases of GE/Alstom Energie, Holcim/Lafarge, Nokia/Alcatel Lucent, Rio Tinto/Pechiney, PepsiCo/Danone, Pechiney/Alcan, Searchlight / Latécoère, Carrefour/Couche Tard, Teledyne/Photonis, Dailymotion/Yahoo! and Volkswagen/MAN Energy Solutions.

However, it may be necessary to clarify the notion of the completeness of the application. This notion is crucial since the duration of the preliminary inquiry for an application for authorisation of a foreign investment cannot exceed 30 working days, once completeness has been notified.[11] But for certain applications, the public authorities delay the completeness of the application and therefore the examination of the application, by asking questions over a period of time.

The challenge in the future will most certainly relate to the different practices in terms of transactions and controls, and the significant increase in the number of applications made. In 2021, no fewer than 328 operations were subject to control of foreign investments in France, compared with 275 in 2020 and 216 in 2019.

This special issue is the result of a successful collaboration between all of the stakeholders, and in the space of about forty articles and interviews. This special issue aims to present the trends, the current mechanism, the players involved and the characteristics of the control of foreign investments in France, that a vast number of private and public, French and foreign players are shaping as a result of successive mergers and acquisitions in sensitive sectors.

Part 1 deals with the political, geopolitical, economic, geoeconomic, European and international environment of foreign investments in France, by reviewing the new paradigm of attracting these investments but refusing industrial and economic predatory practices.

Part 2 explores the current mechanism for control of foreign investments in France with the Head of the Office in charge of the control of foreign inv estments in France at the French Treasury Department, and the Deputy Director-General of the Directorate-General for Trade at the European Commission.

Part 3 analyses the practices of companies, investment funds, law firms, merchant banks, strategy consultancies, lobbyists, specialists in economic intelligence, communications agencies, public authorities, Bpifrance, Business France, Banque de France, the various ministries, members of Parliament, unions, local players and journalists involved in the control of foreign investments in France.

Part 4 provides a review of recent developments and the emerging outlook for selected matters relating to transnational mergers and acquisitions and control of them. To explain their distinctive features, we had to hand over to the key actors. We also put the words of the key actors into perspective according to their sector (health, defence, new technologies), and the legal and financial engineering, in comparison with other mechanisms such as competition and compliance. Last but not least, we analysed the landmark cases of Teledyne/Photonis, Volkswagen/MAN Energy Solutions, Dubai Ports World in the United States and Carrefour/Couche Tard.

[11] Article R.151-5 of the French Monetary and Financial Code.

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David Chekroun, Professor of business law, director of the Law & Business option at ESCP Business School and director of the Institute of Corporate Governance

Gilles Pillet, Professor of business law and director of the specialised master's degree in Law & International Management at ESCP Business School

Marina Guérassimova,
Chief editor
Fusions & Acquisitions Magazine,
Guide@lines

Adriana Cristiani, student of the Specialised Master in International Business Law and Management

Marie Ghérardi Lévêque, student of the Specialised Master in International Business Law and Management

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Nicolas Aratimos, student of the Specialised Master in International Business Law and Management

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Luidgy Belair, student of the Law & Business major

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Sabrina Lagrange, student of the Specialised Master in International Business Law and Management

Sami Ayadi, student of the Specialised Master in International Business Law and Management

Doha Fassi Fehri, student of the Specialised Master in International Business Law and Management

PART I: THE POLITICAL, GEOPOLITICAL, ECONOMIC, EUROPEAN AND INTERNATIONAL ENVIRONMENT OF FDI SCREENING IN FRANCE

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THREE QUESTIONS TO BRUNO LE MAIRE : « FRANCE'S CONTINUED ATTRACTIVENESS IS ALSO THE RESULT OF THE VERY PROTECTIVE MEASURES ADOPTED DURING THE COVID CRISIS »

Interview with Bruno Le Maire,
Minister of Economy, Finance and Industrial and Digital Sovereignty

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MINISTÈRE
DE L'ECONOMIE,
DES FINANCES
ET DE LA SOUVERAINETÉ
INDUSTRIELLE ET NUMÉRIQUE
Liberté
Égalité
Fraternité

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

In today's uncertain geopolitical, economic and health context, what message is France sending to international investors?

Bruno Le Maire: Now, more than ever, we want to offer you the best conditions to invest in our economy. For the third consecutive year, France remains the leading place in Europe for foreign investments, with 1,222 international investment projects identified in 2021 (+24% compared to 2020). This is excellent news.

France benefits from the presence of nearly 16,800 foreign companies on its territory. Although they account for less than 1% of the companies operating in France, it represents 2.2 million jobs (nearly 13% of salaried jobs), more than 20% of the total revenue and nearly a third of French exports.

It is not a coincidence but the result of a programme of structural reforms, tax cuts and administrative simplification conducted by the Government. France's continued attractiveness is also the result of the very protective measures adopted during the Covid crisis. Finally, it reflects its well-known assets: high-quality infrastructures, a skilled workforce and a culture of innovation.

But today's unstable environment reminds us that France must increase its economic attractiveness. After having deployed the €100 billion "France Relance" recovery plan in 2020, we launched the €54 billion "France 2030" investment plan in 2021. It seeks to transform France's economy and support the development and production of leading-edge technologies in key sectors, such as health, renewable energies, food and electronics.

The results are there. On July, President Emmanuel Macron gathered more than 180 foreign business leaders for the annual "Choose France Summit": 14 new foreign investment projects were announced, totalling €6.7 billion and creating 4,000 permanent jobs.

How can we reconcile openness to foreign investment with control of foreign investment, particularly in terms of economic security and industrial and digital sovereignty?

Bruno Le Maire: We are not naïve. In the global competition, major players such as China and the United States do not hesitate to defend their interests. Similarly, Europe must play its own partition, and the crises we have been going through since 2020 have made this very clear. It is even more urgent after the outbreak of the conflict in Ukraine, notably regarding energy supply.

The strengthening of controls on foreign investment is now effective in protecting our strategic companies. We have chosen to protect sectors such as agri-food, energy storage technologies, biotechnologies, artificial intelligence, and semi-conductors, which are all essential to ensure France's industrial and digital sovereignty. Our control system has major qualities: it is robust, flexible and transparent.

What prospects do you see for foreign investment control in France?

Bruno Le Maire: France has solid resources to protect its companies. The agility of our control system allows us to face the emergence of new risks and threats. This necessarily leads to frequent controls in order to filter a greater number of investments. Of course, the increase in these controls must not turn into an excessive administrative burden on our companies.

We will continue to protect our sensitive companies while maintaining the attractiveness of our territory, which is the reason for the continuing success of our economy.

AN OVERVIEW OF THE HISTORY OF FOREIGN DIRECT INVESTMENT SCREENING IN FRANCE: THE BALANCE BETWEEN FREEDOM AND STATE PROTECTIONISM

By Gilles Pillet[1], David Chekroun[2], Adriana Cristiani[3] and Nicolas Aratimos[4]

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)


Gilles Pillet


David Chekroun


Adriana Cristiani


Nicolas Aratimos

1. The European Union (EU): the need for protection in keeping with its attractiveness.

Prior to the health crisis, the EU attracted the most foreign direct investment (FDI) in the world. At the end of 2017, assets held by non-EU investors totalled €6.295 billion. The constant increase in these investments has prompted foreign investors to take an increasingly large share in key sectors, such as oil refining, pharmaceuticals, electronics and optical products.[5] But when the Covid-19 crisis hit, FDI plummeted by 42% globally in 2020 to around $859 billion, before returning to pre-2019 levels: volume amounting to around $1,600 billion in 2021, according to a report by the United Nations Conference on Trade and Development (UNCTAD),[6] and the same UN agency established that the increase in flows into Europe in 2021 is linked to large swings in conduit economies.[7]

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[1] Professor of Business Law and Director of the Specialised Master's in International Law and Management at ESCP Business School.
[2] Professor of business law, director of the Law & Business option at ESCP Business School and director of the Institute of Corporate Governance.
[3] Student in the Specialised Master's in International Law and Management at ESCP Business School.
[4] Student in the Specialised Master's in International Law and Management at ESCP Business School.
[5] Commission staff working document, Following up on the Commission communication "Welcoming foreign direct investment while protecting essential interests", p. 1 and 2 https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf.
[6] World investment report 2022: https://unctad.org/webflyer/world-investment-report-2022
[7] UNCTAD 19/01/2022 - Global foreign direct investment rebounded strongly in 2021, but the recovery is highly uneven: https://unctad.org/news/global-foreign-direct-investment-rebounded-strongly-2021-recovery-highly-uneven

Among Member States and within the European Union (EU), FDI flows have increased but have remained at pre-pandemic levels, and are expected to take a downward trajectory due to the war in Ukraine.[8]

This attractiveness, which is key to doing well in a highly competitive global economy, can lead to hostile or simply harmful investments for national ecosystems or for the Union itself. Furthermore, after having essentially devoted itself to enshrining the principle of freedom of investment and having perhaps acted in naivety for a time, the European Union saw the need to find an internal agreement to protect the interests of Member States, while maintaining a European framework that would encourage foreign investment. To understand the dynamics at work, we need to take a look at evolution that led to the establishment of the freedom of investment principle, and then to its regulation through measures designed to defend States' economic sovereignty.

2. Origins of the European principle of freedom of investment: the development of a fully competitive common market. With the signing of the Treaty of Rome in 1957, which, along with the Atomic Energy Community, also established the European Economic Community, the Member States set out to form a large competitive common market. It is also worth noting that this goal was achieved sooner than others. Prior to 1st January, 1970, Member States had successfully imposed the free movement of goods within a customs Union protected by a common external customs tariff.

This policy has paid off, as evidenced by the considerable development of intra-Community trade, including in Business to Consumer relations. Quality and price now take precedence over the geographical origin of products, which has gradually made the European Community a homogeneous consumption zone.

It became clear very early on that we needed to take things further. To avoid distortions of competition, it was considered that other production factors should also be freed. Freedom of movement for workers, establishment, provision of services and movement of capital, however, took longer to come into effect. The movement had to be steered towards a truly integrated market, which is what the Single European Act achieved in 1986. A new Article 8 A paragraph 2 of the EEC treaty set Member States a goal to be met before 1992, namely the establishment of an internal market that it defined as "*an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties*".

It was not until the Maastricht Treaty, in 1994, that any restrictions on cross-border capital movements and payments were banned by the treaties themselves. It is worth noting, however, that from 1957 to 1992, the treaties only addressed the notion of "investment" indirectly, as one of many aspects of capital movements.

3. Enshrinement of the free movement of capital: the cornerstone of the European Single Market. The free movement of capital was a major objective, as it was seen as the cornerstone of the single market. In addition to the growth gains it was expected to induce through the optimal allocation of capital, this freedom was a prerequisite for the establishment of the Economic and Monetary Union and the Euro.

Movement in this direction initially came from secondary legislation. The 1957 treaty lifted restrictions on the movement of capital, only when necessary for the European market. From 1960 onwards, subsequent directives gradually put an end to restrictions for an increasing number of types of capital movements, until the founding directive adopted by the Council on 24 June 1988.[9]

This expressly stated that the capital movements regime was not limited to transfers of funds, but also included underlying transactions, such as direct investments. These were defined in a broad sense,[10] thereby covering equity interests in a company and placing under freedom of movement the possibility to participate effectively in the management of the company, based on the stake held. The European Court of Justice garnered support in opposition of the "golden shares"[11] that States had devised to extend the exercise of their sovereign power to within private companies.

With the Maastricht Treaty, primary law caught up with secondary law. Article 63 of the TFEU reversed the

[8] Rebeca Grynspan, Secretary-General of UNCTAD, World investment report 2022: https://unctad.org/webflyer/world-investment-report-2022

[9] Council Directive 88/361/ EEC of 24 June 1988 for the implementation of Article 67 of the Treaty Official Journal, no. L178 of 08/07/1988.

[10] Direct investments are "*Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity*", above-cited directive, Annex I.

[11] See, in particular, ECJ 4 June 2002, Commission v. Portugal, case C-367/98; Commission v. France, case C-483/99.

original principle and now prohibits all restrictions, subjecting those in breach of the principle to the infringement procedure of Articles 258 to 260.

For companies, the liberalisation of direct investment means the possibility of investing in other European companies, becoming owners of such companies and raising funds with maximum profitability. This is the result of a European initiative beginning with the Treaty of Rome, which sought to set up integrated, open and efficient European financial markets by freeing the circulation of capital.

Any step backwards in this area now looked particularly difficult. Article 64 of the TFEU makes this possibility conditional on a unanimous decision of the Council. Moreover, while the Maastricht Treaty provided that national provisions prior to its entry into force would not be affected, the Lisbon Treaty, which came into effect on 1 December 2009, enshrined in the TFEU the principle of phasing out restrictions on FDI.[12]

Meanwhile, Member States were given limited room for manoeuvre. They maintained the ability to prevent breaches of their tax and prudential supervision laws, but could theoretically only impose reporting measures for information or statistical purposes. Finally, any restriction must be justified on the grounds of public policy or public safety.

4. The origins of the European control system: the diverging evolution of standards in certain Member States, particularly France.

In France, the first major French law that dealt with the subject was the Law of 28 December 1966,[13] adopted under the presidency of Charles de Gaulle. This law was then fully in line with European primary law resulting from the 1957 Treaty. On the one hand, it was based on the principle that "financial relations between France and foreign countries are free".[14] On the other, it authorised the government to subject capital movements to declaration or authorization in order to ensure the defence of national interests,[15] at a time in European history when primary law had not yet sought to remove national restrictions. But it reflected awareness of a risk that it was difficult to guard against effectively, without running afoul of European principles as they were later understood and reinforced. By holding its course, France has therefore gradually fallen out of step with the European trend outlined above.

The prior authorisation system revised by Decree of 29 December 1989[16] did not yet address this head-on. But Member States' assessment of the room for manoeuvre provided by grounds relating to public policy or public security was a source of tension. As such, in a decision dated 14 March 2000, the CJEU considered that the right of Member States to take "*measures which are justified on grounds of public policy or public security*" did not allow them to establish a principle of prior authorisation, without an adequate definition of the investments subject to control. The French system, although approved by the Council of State,[17] was then deemed "*contrary to the principle of legal certainty*".[18]

France was not the only Member State aware of the need to protect itself from certain investments, at the risk of appearing to hinder the opening of the European market. The number of initiatives in this regard increased to the point where, in 2017, the Commission noted[19] that almost half of the Member States had set up a control mechanism to protect their strategic companies.[20] However, it was difficult to do so without running afoul of EU principles and rules. Control procedures were often seen as barriers to the free movement of capital[21] or establishments.[22]

However, French regulations have continued to evolve. Such evolution has often taken the form of reactions to threats affecting large French companies more or less directly.

A little over ten years after the signing of the Maastricht Treaty, in response to rumours of a hostile takeover bid by PepsiCo over Danone, a 2005 decree[23] took two sets of

[12] Articles 206 and 207 of the Treaty on the Functioning of the European Union (TFEU) (version resulting from the Lisbon Treaty).
[13] Law no. 66-1008 of 28 December 1966, on foreign financial relations.
[14] Art. 1 of Law no. 66-1008 of 28 December 1966, on foreign financial relations.
[15] Art. 3, 1 of Law no. 66-1008 of 28 December 1966, on foreign financial relations.
[16] Amended by Decrees No. 90-58 of 15 January 1990 and No. 92-134 of 11 February 1992.
[17] Council of State, 15 April 1996, no.160550, Pathé France Holding case, published in the Recueil Lebon.
[18] ECJ, 14 March 2000, Association *Eglise de Scientologie de Paris* and Scientology International Reserves Trust v. Prime Minister, case C-54/99.
[19] See below, no. 12.
[20] These countries include Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain and the UK.
[21] See, in particular, ECJ, 1 June 1999, No. C-302/97, Konle v. Austria, pt 39, requiring the absence of discrimination and compliance with a principle of proportionality. CJEU, 17 July 2008, no. C-207/07, Commission v. Spain.
[22] CJEU, 8 Nov. 2012, no. C-244/11, Commission v. Greece, on the grounds that the discretion left to the national authorities was too broad.
[23] Decree no. 2005-1739 of 30 December 2005.

measures. Firstly, it strengthened anti-takeover mechanisms. Secondly, it redefined the scope of foreign investment control. For both EU and non-EU investors, acquiring a company or holding over one third of the share capital[24] was likely to trigger controls, if the transaction involved activities quite naturally considered to be sensitive. These included gambling, private security, anti-terrorism, IT, and in particular encryption, techniques for intercepting conversations and companies that possess national defence secrets.[25]

The broadening of controls to include activities that are less readily perceived as strategic began in 2014, with the "Montebourg" decree,[26] presented by its initiator as "*a choice of economic patriotism*" and a "*rearmament of public power*". The announcement of ongoing negotiations for the takeover of Alstom Energie by General Electric sent shockwaves through the government and prompted it to speed up the implementation of the decree.

Six additional sectors were added to the previous list, namely water, healthcare, energy, transport, telecommunications and sites of vital importance. Furthermore, the decree also extended the list of conditions and undertakings that the Minister of the Economy may attach to his or her authorisation by including, in particular, the transfer of a sensitive business to an entity independent of the investor (R153-9 CMF).

Implemented 10 days before the European elections, this decree was also presented as a political message. Message well received, as this extension of controls earned France a reminder from the European Commission that restrictions imposed by Member States on the free movement of capital should be strictly proportionate to the protection of national interests.[27]

This did not prevent a decree issued 29 November 2018[28] from further extending the list of sensitive activities to include a whole group of research and development activities, relating to techniques such as cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, data storage or dual-use goods and technologies.[29] Some questioned the legal validity of the updated mechanism. Aside from the potential infringement of the rights of associated investors, it was asked whether the regime applicable to investors from EU Member States could be so similar to that of investors from third countries without unduly restricting the principle of free movement of capital.[30]

5. Time for clarification: the European framework and the Pacte Law. Recognising the risks which, in the context of a trade war, go hand in hand with its attractiveness to investors, the EU belatedly yet substantially changed its approach. Foreign investment control suddenly became a central concern for the Union. As part of a series of studies on the future of Europe, a 2017 reflection paper was dedicated to harnessing globalisation.[31] The Commission stressed the need for the EU to take action to restore a level playing field. As such, it recognised the need to address Member States' desire to protect their key technologies from potentially predatory investment from outside the EU.[32] One result was a Commission Communication entitled "Welcoming foreign direct investment while protecting essential interests".[33] The paper further recalled the EU's open policy in this area and the importance of maintaining it, as well as the risks that come with foreign investment. Noting that, like the EU's partners, almost half of Member States already had a foreign investment control mechanism in place, it proposed a regulation for the screening of foreign direct investment in the EU.[34]

This proposal had three objectives. First, it provided that national control mechanisms should be developed to include guarantees of transparency, appeal and non-discrimination. Second, the proposal provided for a mechanism for cooperation between Member States. Finally, it aimed to provide the Commission with the means to screen investments that pose risks for European programmes or projects.[35]

[24] Art. R153-1 and R153-4 of the CMF in their version resulting from the 2005 decree.
[25] Art. R153-2 and R153-5 of the CMF in their version resulting from the 2005 decree.
[26] Decree no. 2014-479 of 14 May 2014.
[27] Letter dated 19 June 2014 from the European Commission to the French authorities.
[28] Decree No. 2018-1057 of 29 Nov. 2018.
[29] As defined in Annex I to Reg. (EC) no. 428/2009 of 5 May 2009.
[30] E. Schlumberger, *Du renforcement du contrôle des investissements étrangers*, BJS 2019, no. 2, p. 1. 31 Reflection paper on harnessing globalisation, European Commission, 2 May 2017, https://ec.europa.eu/info/sites/default/files/reflection-paper-globalisation_en.pdf
[32] *Ibid*, p. 15.
[33] Communication of 13 September 2017 from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2017:0494:FIN:FR:PDF.
[34] *Ibid,* p. 12.
[35] *Ibid,* p. 12.

Together with a Commission working document including a precise overview of FDI in the EU,[36] European regulation of 19 March 2019,[37] applicable since 11 October 2020,[38] responded point by point to the proposal. The scheme, which only covers investments from non-EU countries, therefore leaves investments within the EU to national mechanisms, which must simply be compatible with the fundamental principles governing the common market. The regulation is innovative in that it does not impose a uniform regime. Rather like a directive, it offers Member States a non-exhaustive list of sensitive sectors and factors to which legislators can refer.[39] More conventionally, it establishes a single mechanism for cooperation between Member States and the Commission[40] and sets up a separate screening mechanism at Commission level in cases where investments affect the interests of the Union itself.[41]

It is in this thoroughly updated context that the Pacte Law,[42] followed by the Decree of 31 December 2019,[43] came into effect to both clarify and further strengthen the French system.

In addition to clarification, the scope of control has also been broadened. As a result of the redefinition of what constitutes an investor, an investment and a target's business, more transactions fall within the scope of potential control.[44] Firstly, because the essential distinction between European and non-European investors disappears. Secondly, because the notion of foreign investor encompasses any "entity" controlled by a foreign individual or legal entity and, for a non-EU investor, exceeding the 25% ownership threshold may be enough to constitute control.[45] Finally, because the decree continues to extend the list of sensitive activities by integrating a new "critical technologies"[46] category. In order to facilitate understanding of the French system and therefore the investor's pathway, the decree also established the possibility of making a prior request to examine an activity[47] and specified the information to be provided.

The Pacte Law also strengthened the coercive powers of the Minister of the Economy and Finance. They can now issue protective measures that affect the rights attached to the securities held by the investor. Voting rights, the right to receive dividends or the freedom to dispose of the underlying assets may be challenged.[48] In general, penalties have been increased,[49] and will differ depending on whether the investment was made without authorisation or without complying with applicable conditions. Conditional authorisation,[50] the criteria for which are set out in Article R. 153-9 of the French Monetary and Financial Code (CMF) to give investors greater visibility, must comply with a proportionality principle,[51] and the conditions may change at the request of the investor or Minister.[52]

The importance of commitments made by the investor and monitoring by the State are illustrated perfectly by a recent case. Volkswagen had bought German group Man Energy Solutions in 2011, whose French subsidiary happened to be the manufacturer of diesel engines that power French nuclear submarines. As part of an overall restructuring plan, Volkswagen had announced a streamlining of its sites, which would lead to a halt in the production of spare engines used by French submarines. The State therefore had to remind Volkswagen of the commitments made upon the change of control and, thanks to the foreign investment mechanism, was able to obtain a guarantee for the delivery of this sensitive equipment until 2030.

6. A system put to the test by the health crisis. It very quickly became apparent that the global health crisis was going to worsen for purely cyclical reasons, with a large

[36] Commission staff working document, Following up on the Commission communication "Welcoming foreign direct investment while protecting essential interests", https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf
[37] Regulation (EU) No. 2019/452, 19 March 2019.
[38] Art. 17, Regulation (EU) No 2019/452, 19 March 2019.
[39] Art. 4.1 and 4.2, Regulation (EU) No 2019/452, 19 March 2019.
[40] Arts. 6 and 7, Regulation (EU) No 2019/452, 19 March 2019.
[41] Art. 8, Regulation (EU) No 2019/452, 19 March 2019.
[42] Law No. 2019-486 of 22 May 2019 on the growth and transformation of companies.
[43] Decree 2019-1590 of 31 December 2019 on foreign investment in France.
[44] Art. R151-1 of the CMF as amended by decree of 31 December 2019.
[45] Art. R151-2 of the CMF as amended by decree of 31 December 2019.
[46] Art. R151-3, III, 1 CMF.
[47] Art. R151-4 CMF.
[48] Art. L. 151-3-1 of the CMF.
[49] Art. L. 151-3-2 of the CMF.
[50] Art. L.151-3, II of the CMF.
[51] Art. L. 151-8 of the CMF.
[52] Art. L. 151-9 of the CMF.

number of companies likely to appear as opportunities for potentially predatory investors.

It was therefore only natural for France to ramp up its controls. The State's increased vigilance resulted in 275 operations in 2020 and 328 operations in 2021 being examined under foreign investment regulations, without resulting in an increase in the number of refusals. It is also perfectly understandable that France should also opt to strengthen an already revised normative framework in 2019.

The effects of this were twofold. Firstly, control has become more sensitive, as the threshold that triggers it has been provisionally[53] yet significantly lowered[54] when the investor is a non-EU member, nor a member of a State that is a signatory to the European Economic Area Agreement. It is now enough to hold 10% of the voting rights of a strategic French company, the shares of which are admitted to trading on a regulated market. Secondly, as of April 2020, the list of strategic activities has been extended to include research and development activities in the biotechnology sectors, in order to protect companies that produce vaccines.[55]

However, the health crisis led to more than the constant strengthening of the French system and an increase in controls. It also drew public attention to an issue no longer seen as purely technical, and which can rightly be referred to as economic patriotism. Public awareness of a transaction can be amplified due to the target company's profile, which can make it a genuine symbol.

As such, no one was particularly surprised that the strict conditions set by the French government for the takeover of Photonis by US-based Teledyne saw the deal fall through at the end of 2020. The business sector was clearly defence-related. On the other hand, the Minister of the Economy's refusal of Canadian company Couche-Tard's acquisition of Carrefour at the beginning of 2021, even before an authorisation application had been submitted, may have seemed less rational. The issue of food security and protection of agricultural sectors failed to convince observers as easily. However, there is one notable fact that couldn't be ignored. Despite the broadening and intensification of foreign investment controls, refusals are only very rarely reported in the press, suggesting that the balance sought between attractiveness and security, while fragile, is not impossible.

7. Transparency and predictability of foreign investment control in France.

Until September 2022, the foreign direct investment screening regime in France was strengthened and stabilised around defensive and offensive tools at the disposal of the Minister of the Economy and a streamlined team, the "Multicom 4" office of the French Treasury, tasked with assessing authorisation requests and managing relations with interministerial authorities and the European Commission.[56]

However, while recognised by both French and foreign stakeholders as clear, this system is not without its critics. It has been noted that the system would benefit from being more predictable, thereby offering French companies and foreign investors the legal certainty they occasionally lack. It has also been proposed that guidelines, general principles, best practices and a practical guide for foreign investors be drawn up. The lack of transparency has also been raised, in particular due to the use of concepts that are not clearly defined. It is worth noting that the examination period for a foreign investment authorisation application may not exceed 30 working days once completeness has been notified. However, in some cases, the public authorities delay such notification and therefore the examination of the application by asking questions over an extended period of time.

The publication of guidelines on foreign direct investment screening in France[57] on 9 September 2022, drawn up by the French Treasury, is an effective response to this lack of predictability and clarity.

The 49-page guideline, which is the result of public consultation carried out throughout 2022, provide stakeholders with a practical and instructive overview of the scope of application of rules relating to control, the implementation of the control procedure and the monitoring of authorisations issued by the Minister of the Economy.

May these guidelines serve as a useful tool to assist companies, advisors and other stakeholders in the implementation of foreign investment control regulations in France!

[53] Lowering of the threshold applicable until 31 December 2021, Decree No. 2020-1729 of 28 Dec. 2020, Art. 1 was extended by decree until 31 December 2022, Decree No. 2021-1758 of 22 December 2021.
[54] Decree no. 2020-892 of 22 July 2020, art. 1.
[55] French Official Journal (JORF) no. 0105 of 30 April 2020.
[56] See Part 2 of this text, which covers the current foreign investment control system in France with the Head of foreign investment control in France at the Treasury.
[57] French Treasury, Foreign investment control in France: publication of guidelines 9 September 2022:
https://www.tresor.economie.gouv.fr/Articles/314615b9-70b9-417f-bb94-5dd1437e7418/files/a81a841b-dc55-4685-af34-213bb0bd88cc

FRANCE, A PROMISED LAND FOR FOREIGN INVESTORS: WALKING A FINE LINE BETWEEN ECONOMIC ATTRACTIVENESS AND PROTECTING STRATEGIC INTERESTS

Interview with Grégory Mailly,
M&A Executive Director, J.P. Morgan

J.P.Morgan

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)
Interview conducted with the assistance of Marie Ghérardi Lévêque and Céline Glas, students of the Specialised Master in International Business Law and Management at ESCP Business School

Despite a series of events in recent years that have impacted its economic growth, France remains one of the leading countries for foreign investments. What do you think are the main reasons for this attractiveness?

Grégory Mailly: Since 2019, France has topped the European league table for foreign investments (by volume), and has recorded its highest level of jobs created in relation to these investments. This trend was maintained in 2020 and 2021, despite the COVID-19 impact. France's attractiveness remains paramount for investors looking notably for high-quality or even iconic assets. They find in France the major development projects undertaken, and the quality of the infrastructure networks connecting our regions, equally attractive. Both accommodate substantial flows of people and goods, while developing wealth for the entire ecosystem that depends on them.

Certain sectors are also bolstered by numerous powerful brands benefiting from worldwide recognition, as in the tourism, fashion and cosmetics industries, for example. This brand image is engraved in the minds of foreign investors and, in their eyes, justifies their enthusiasm or even their willingness to pay a premium on certain iconic assets.

The development of other sectors of our economy has accelerated more recently, withstanding the impacts of the pandemic, or even taking advantage of opportunities created by the health crisis. For example, R&D and engineering activities increased to 12% of foreign investments in France in 2021. Better still, the defence/security sector attracted 38% of these foreign investments in the same year. Healthcare, logistics, and digital companies are the other sectors buoyed by the current context and popular with investors in the M&A market, which is reflected in the significant inflation of multiples paid in recent transactions for the leaders in these sectors.

One consequence of crises is that they often act as clear indicators of pre-existing trends. As we move from one crisis to the next, which sectors do you think remain attractive and which, conversely, seem to be losing ground?

Grégory Mailly: The health crisis proved to be more of an accelerator of trends than a factor triggering a sudden change of trajectory. First and foremost, the rapid shift of tertiary working methods towards digital tools since the first confinement (and subsequently progressively towards "phygital" methods) was facilitated by high-quality telecommunications networks, the "French-Tech" ecosystem of entrepreneurs, and applications already in gestation that were just waiting to find their purpose. These solutions immediately won over a new captive audience and changed many industries' ways of working forever.

As an example, it has been astonishing to witness the changes to the model adopted by the major banks in response to the competition they face from the numerous FinTech players that have introduced new solutions and content. The major national banks must therefore remain attentive, both to possible consolidation among the major players in the sector and to the development of FinTech start-ups, which they must acquire and then integrate on an autonomous basis before they become unaffordable unicorns.

At the same time, France has reaped certain benefits from Brexit, with many head offices returning to the European continent, and several to France (Nissan and Airbus, for example). France must step on this momentum by maintaining a sustainable business framework that ensures regulatory and fiscal competitiveness for foreign investment, and includes a recovery plan that clearly defines the sources of leverage and the beneficiaries, provides social shock-absorbing mechanisms in the post-crisis period, and facilitates the relocation of talents.

To be balanced, however, it should be mentioned that several sectors have suffered a significant slowdown since COVID: 66% of French companies' investments were down in 2020 compared to 2019, and 15% were postponed for more than 12 months. In terms of mergers and acquisitions in the airport and hotel sectors, for example, regardless of the quality of French assets, new transactions have literally been put on hold in 2020/2021 due to the inability to predict the market outlook for these sectors and the lack of credible benchmarks in valuation levels. Generally speaking, investors (even opportunistic ones) will not return to invest heavily in these hardly-hit sectors until an upturn in operations is clearly apparent.

France is engaged in an energy transition movement that has led to changes in the law applicable to companies. What impacts do you think this may have on foreign investors' appetite for French targets?

Grégory Mailly: For several years, the French authorities have chosen to promote "green" investments by establishing favourable regulatory and fiscal conditions, which have generated an impetus for the development of green energy, electric vehicles, recycling and waste recovery, and the creation of bond issues and investment funds dedicated to this green economy. According to the latest Business France report, 89% of foreign investors consider that French initiatives promoting this ecological transition enhance the country's attractiveness.

France is therefore facilitating the rapid development of clean energy sources, with a 13% increase in investments in this sector this year. The capacity to generate high-quality new projects is therefore the main problem encountered in this field, rather than finding the capital to finance them.

Now let's talk about foreign investors. How would you describe their plans, their fears and their expectations when it comes to targeting France? France's difficult image in the eyes of foreign investors is often blamed on social conflicts and taxation (its burden and instability). Do you think that in light of these preconceptions, the French investment control system is a negligible constraint?

Grégory Mailly: To be able to advise investors properly, not only do you need to determine the opportunities offered by our country, you must also, and above all, start by developing a detailed understanding of foreign investors, in terms of their diversity and in light of their aspirations. This is just as applicable to financial consultants as it is to the French State, in order to determine the acceptable degree of convergence between foreign investors, on the one hand, and the guarantor of national sovereignty on the other.

It should be noted that 64% of foreign investors in France are European, followed by 20% from North America and only 10% from Asia. There is a manifest need to encourage these investments as they contribute to the growth and success of our companies, while organising their control in strict compliance with the principle of proportionality.

With regard to France's poor image as perceived by foreign investors, we must bear in mind the deleterious effect of a few negative cases on the general attractiveness of our country, especially when they are caricatured abroad. In recent years, however, the government has focused on defining a clearer and more sustainable tax framework for investors, and on limiting the administrative burden on companies while strengthening legislation on the control of foreign investments in France (PACTE Law of 2019 combined with the ASAP Law of 2020). Furthermore, the measures in the €100 billion recovery plan put in place to combat the effects of the pandemic have been welcomed by foreign investors, who saw as both a boost and a social buffer should the difficulties continue with the energy crisis.

Turning to the control of foreign investments, how do you think investors perceive the control mechanism established by the "Multicom 4" foreign investment control office at the French Ministry of Finance?

Grégory Mailly: In a world in crisis that needs to be reorganised, and in which several companies are (re-)locating some of their production activities in France, it is also perfectly natural for the public authority to engage in the simultaneous control of foreign investments in certain assets (identified on a list that was extended in April 2020, i.e. at the beginning of the health crisis). In 2020, 275 transaction projects were subject to foreign investment control. These figures show that the State has further increased its vigilance concerning these various transactions, notably by broadening the scope of "strategic" areas, but without introducing barriers that could deter these investments. The vast majority of operations were approved either conditionally or unconditionally.

The veto should continue to be used on an exceptional basis, and justified by a combination of criteria related to the investment (strategic asset or takeover), and to the investor's profile. However, the government's increasing sensitivity to foreign investors' desires to take over iconic assets should be noted. The target's prominence, or its symbolic dimension in the public opinion, may occasionally lead the State to use foreign investment control as a preventive screening tool in order to extinguish nascent controversies.

Finally, the existence of the control mechanism itself – now clearly identified by investors and their advisers – is increasingly being used as a deterrent or even a filter to weed out certain investors who ultimately discover the State's reticence on certain subjects and/or in their regard. Few parties embark on such an uncertain process without seeking the advice of the Multicom 4 office in the French Treasury Department at the Ministry of Finance, at a relatively early stage of the proceedings.

What changes have the strengthening of the control mechanism made to your provision of support for foreign investors? Do you think that, as it stands, this system hinders foreign investment?

Grégory Mailly: Since 2019, the Ministry of the Economy and Finance has introduced several reforms designed to strengthen control over foreign investments in France (such as lowering the control thresholds and stipulating that it applies as soon as there is a single foreign entity in the chain of control), but also to encourage the anticipation of these controls by establishing a simplified and accelerated dialogue between the parties involved in the transaction and government agencies, in order to avoid any embarrassement when the transaction is announced. In this way, by developing a better understanding of the different stakeholders, on the one hand, and of the government's expectations, on the other, it is possible to find common ground for striking a deal. And even if an agreement is not reached, at the very least, this saves time and avoids going up to the veto. The maintenance (demonstrated so far) of the confidentiality required for the smooth conduct of discussions by the Multicom 4 office means that this dialogue can be engaged in freely, without fear of disclosure, even when the terms of a transaction have not yet been finalised.

These early discussions do not generally lead to a detailed advance ruling, but the signals are usually clear and any conditions required for the proper performance of the transaction are explicitly stated. Experience in this field shows that it is extremely rare for an investor's project to be rejected outright at the end of the comprehensive vetting process (with the exception of the proposed takeover of Photonis – the world leader in night vision – by the US company Teledyne). In the vast majority of cases under review, an agreement is reached with terms and commitments that have been discussed in advance between the parties and the State. For example, one of the conditions may consist in either relinquishing the acquisition of certain sensitive activities or accepting the obligation to integrate a French player into the investor group.

Is all this a question of controlling foreign investments or foreign investors in France?

Grégory Mailly: It should be clearly understood that this is a question of both economic and geopolitical concerns. Each government therefore lays down its own terms and special conditions, and demonstrates that it can use its soft power (as in the Couche-Tard / Carrefour case) to refuse an investor or, on the contrary, publicly encourage it. This control mechanism should be interpreted as a shield designed to protect the authorities from any embarrassment in private matters that are sufficiently important to affect the public sphere. In this respect, the timely consultation and notification of the political authorities is an integral part of the advising bank's expertise.

The initial phases of the control carried out by the authorities at a very early stage consist in discovering and gauging the investors' reputations by paying particular attention to their compliance with the commitments made in their previous transactions (especially on the social level: jobs, relocation/reshoring). In this respect, some foreign investors cultivate a reputation for dependability and respect for the parties to a transaction. Attracting these investors to France then becomes a competition with other neighbouring nations as they provide an opportunity to ensure the continued viability of our economic fabric.

THE GEOPOLITICAL IMPLICATIONS OF FOREIGN DIRECT INVESTMENT SCREENING

By Maxime Lefebvre[1], Diplomat, former ambassador, professor affiliated to ESCP

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Since the turn of the century, the world has slipped back into turbulent waters. Afghanistan, Iraq, Libya and Syria have all in turn burned and bled. The relationship between Russia and the West has steadily deteriorated to a point that culminated in a major conflict over Ukraine from 2014 onwards, prompting the first round of Western sanctions against Moscow. Since February 2022, the situation has degenerated into open warfare as a result of Vladimir Putin's aggression, leading to a near complete breakdown in economic ties between Russia and the West. The United States and China have entered a major battle for global supremacy, described by the American political scientist Graham Allison as "Thucydides's Trap",[2] which has implications for the future of global strategic relations and the course of globalisation. Since Biden took office in 2021, his administration's ambition has been to unite the Western camp against the threats posed by Russia and China to the liberal international order. Military spending is on the rise everywhere. A new cold war is looming.

This geopolitical shift has brought to a close a period of "happy globalisation" that supposedly reflected and supported the "end of history" that Francis Fukuyama dreamed of at the end of the Cold War. Instead, the Covid-19 pandemic since 2020 has accelerated this shift: this health crisis has emphasised the strategic importance of public health (for the production of drugs, medical devices and vaccines, for example) and put the State and border controls back at the centre of the economic, healthcare and political game.

One of the cornerstones of globalisation is the freedom of capital movements. This is not a new principle, having surged significantly with the first flush of globalisation that came to an end with the start of the First World War. In 1914, assets invested abroad stood at 20% of world GDP compared with 30% today. In the European Union, this freedom is enshrined in Article 63 of the Treaty on

[1] Diplomat, former ambassador, professor affiliated to ESCP, author of La politique étrangère européenne ("Que sais-je?", 2016) and La politique étrangère de la France ("Que sais-je?", 2019). The comments made in this article are wholly personal.
[2] G. Allison; *Destined for War: Can America and China Escape Thucydides's Trap?*; Houghton Mifflin Harcourt (2017).

the Functioning of the European Union (TFEU) and applies both within the single market and in relation to third countries. Is it now being challenged?

Investment control as a national security issue

Geopolitical tensions primarily affect investments in countries in crisis or in countries placed under sanctions such as Russia and Iran. In the case of sanctioned countries, French and European (and more broadly Western) economic operators are prevented from investing as they would wish, sometimes even having to withdraw or abandon their investments. The problem in the opposite direction – investment into Europe – mainly (but not exclusively) revolves around the financial and technological abilities of China, which accounts for only 3% of investments in the European Union but is suspected of wanting to gain control of key economic assets. China is already the world's second largest economy, the largest in terms of purchasing power parity since 2014. It launched the "new silk roads" (*One Belt One Road*) project in 2013 to develop land and sea trade routes with Africa, the Middle East and Europe. It also launched the "17+1" initiative in 2012 to increase its influence over the countries of Central, Eastern and Balkan Europe. The lead taken by Huawei in 5G technology and the takeovers of the Greek port of Piraeus and the German robot manufacturer Kuka (2016) have highlighted the need to control Chinese strategic investments. Moreover, the European Commission used unprecedented language in a 2019 communication to describe China as a "negotiating partner, economic competitor and systemic rival".[3]

Within the European Union, investment control is regarded as a measure derogating from the principle of freedom of capital movements (implemented in 1988) and is essentially a national responsibility. In France, it is based on a prior authorisation procedure that must only target investments affecting public order and security, according to the principles laid down by European law. Against this background, France has gradually expanded the sectors covered by this principle of prior authorisation, which applies not only to non-EU investors but also to European investors (the nationality criterion being assessed very broadly according to the company's headquarters, the origin of the capital and its holders, the investor's link with the country of origin, and so on). The system was expanded in particular by the Villepin Decree of 2005, the Montebourg Decree of 2014 (after the takeover of Alstom Énergie by General Electric) and the PACTE Law of 2019.

The purpose of these procedures, which exist in all major developed countries, is twofold: to prevent the "predatory" takeover of companies or sensitive technologies by foreign companies and to enable the government to negotiate compensatory measures with investors who might be tempted to "relocate" or cease certain activities. Approximately 20% of investment projects in France are subject to these prior authorisations (just under 300 in 2020). These procedures do not only target China, which accounts for barely 4% of foreign investment in France (the same level as Belgium). The French government blocked the US takeover of a company specialising in defence optronics (Photonis/Teledyne) at the end of 2020. In 2011, it authorised, subject to certain conditions, Volkswagen's acquisition of the German group MAN Energy Solutions, whose French subsidiary manufactures diesel engines for nuclear submarines.

Of course, the issue of foreign investment is not just about controlling it. Hosting foreign investment is a key factor in the prosperity and attractiveness of the European Union and its Member States. The EU remains the leading destination for foreign direct investment in the world (including investment within the EU), and France, which ranks first in the EU for hosting foreign investment, has quite rightly worked hard to improve its attractiveness, as evidenced by the launch of the "Choose France" summits in 2018 with the heads of major global groups, who were welcomed to the palace of Versailles by President Macron. Foreign investment control goes hand in hand with attractiveness policies, rather than conflicting with them, and should therefore remain a derogating measure.

The growing role of the European Union in investment regulation

Although foreign investment control, particularly with regard to countries outside the EU, remains in principle a national prerogative because it is supposed to protect the heart of national sovereignty (public security, public order, defence, critical activities and technologies), this issue has taken on a truly European dimension at three levels.

Firstly, the EU, through the development of its Common Security and Defence Policy, is continuously strengthening European coordination in security and defence matters. A good example is arms exports: the European Union adopted a "code of conduct" in 1998, which became legally binding in 2008, requiring Member States to comply with a common set of criteria for their arms exports and to provide justification when some agree to export and

[3] European Commission and HRVP, "EU-China – A strategic outlook", 12 March 2019.

others refuse. This control does not undermine the freedom of each Member State to export according to its own rules, but it does provide a basis for harmonisation and transparency. We shall see that the EU is taking a similar path in setting up European control of foreign investments from third countries.

Secondly, investment came within the scope of EU trade policy with the Lisbon Treaty, which was adopted in 2007 and entered into force in 2009 (TFEU Articles 3 and 207). This means that bilateral investment treaties (protecting Member States' mutual investments with third countries) are gradually being replaced by a uniform EU policy. The agreements negotiated by the European Union in the area of investment are designed to ensure conditions of reciprocity, transparency and legal certainty with third countries. For example, in 2016 the EU concluded a very ambitious economic and trade agreement with Canada (CETA) that also covers investment and includes a specific arbitration mechanism to settle disputes that may serve as a precursor to a Multilateral Investment Court under the United Nations. More recently (late 2020), the EU and China signed a special agreement on investment that also included a dispute settlement mechanism (although this agreement has not been ratified by the EU due to growing tensions with China).

The investment issue is thus increasingly forming part of an overall trade policy that the EU wants to be based on the principle of reciprocity. Through the negotiation of trade agreements, the use of the World Trade Organization's dispute settlement mechanism, the application of so-called "trade defence" instruments (to apply retaliatory measures), the development of new instruments against unfair foreign subsidies, on access to international public contracts or against forms of foreign economic coercion (the first two instruments agreed under the French Presidency of the European Union in the first half of 2022 and intended to rebalance the EU's economic relations with its foreign partners in these areas, the third in the process of being adopted), the EU is making every effort to assert itself as a more "sovereign" trading power, one that can command respect for its actions and stand up for its own interests as a united front.

Thirdly, the EU has established a principle of "strategic autonomy". Initially applied to defence, it was extended in 2020 (in light of the Covid-19 pandemic) to a series of economic sectors deemed strategic for the EU (space, digital, healthcare, energy, raw materials, agriculture and electronics). In several of these sectors, the EU has developed an active industrial policy by launching joint projects in areas such as batteries, semiconductors, hydrogen, healthcare and cloud computing. The principle of strategic autonomy applied to the economy is, however, intended to be "open": the idea is not to make the EU autarkic or protectionist, but to better combine openness and protections to strengthen the EU's autonomy and sovereignty, including by hosting foreign investment. The shift in the relationship with Russia since the war in Ukraine (sanctions and the need to move away entirely from buying Russian hydrocarbons) reinforces this trend at least in the field of energy and raw materials.

The EU's investment policy is therefore part of a broader policy to make the EU more "geopolitical", more "sovereign" and more "strategically autonomous", not by turning its back on free trade principles but by encouraging more reciprocal economic relations that are less naive. Foreign investment control, insofar as it aims to prevent foreign economic operators from taking control of strategic assets in the EU, is an important aspect of this policy. It applies to investments from outside the EU and not to internal EU investments, which fall within the scope of the rules of the internal market and its possible exemptions and continue to be regulated at the national level under EU supervision.

EU Regulation on the monitoring of foreign direct investment

In 2017, the European Commission proposed a regulation on the monitoring of strategic investments (known as "screening"), which was adopted in 2019. It is still a light-touch mechanism: EU Member States must inform the Commission of their national control mechanisms and notify foreign investment projects subject to these controls, which allows other Member States to react if necessary. The Commission can even issue a negative opinion (although this is not binding on Member States) if it considers that these projects undermine an EU interest on public order or security grounds.

The challenge now is to move towards a more binding approach that provides real European control of strategic investments that goes beyond the current monitoring mechanism. This new approach must also consider European lists of strategic assets and critical technologies to be protected, and a possible European blocking mechanism on a recommendation from the European Commission.[4]

[4] European Council on Foreign Relations, "Strategic sovereignty: how Europe can regain the capacity to act", 2019 (https://ecfr.eu/archive/page/-/ecfr_strategic_sovereignty.pdf, page 34).

This would be the second stage of the rocket and would bring foreign investment fully under the competences of the EU (not only offensively, as part of its trade policy, but also defensively, to protect the interests of the EU). However, it is more likely that harmonised European control will remain elusive, in the same way that there is no completely harmonised arms export policy in the EU, because prerogatives related to public order, public security and defence are, and will remain, at the heart of the sovereignty of the EU's Member States, which are primarily responsible for their security ("national security remains the sole responsibility of each Member State", TEU Article 4-2).

The European Commission's reports on the implementation of the regulation show that a process of harmonisation of European policy on foreign investment control is already under way. There are now 18 EU countries (out of 27) that have a national control system, compared with 11 at the time of the Commission's proposal for the regulation, and almost all of them are planning to have one. According to the data collected by the Commission from Member States for the first year the regulation was in force, in an overall climate of reduced investment flows due to the Covid-19 pandemic, national authorities were notified of almost 1,800 investment projects (as we have seen, around 300 were in France) but these authorities formally examined only 400 of these: 2% were refused, 12% were authorised subject to conditions, and the vast majority were approved without conditions. Of the 285 projects examined by the European Commission, mainly from five countries (US, UK, China, Canada and UAE), 14% (relating to the manufacturing, finance and information and communication technology sectors in particular) underwent careful examination, and only 3% (about 15) resulted in a formal opinion from the Commission (the discussions and observations relating to each project remaining confidential). As the Commission emphasises in its report, it must also take into account the interests of the EU as a whole. The mechanism therefore focuses on investments that affect several countries at the same time and require all parties to cooperate in assessing their impact on public order and security.

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As we have seen, foreign investment control is not incompatible with policies to attract investment but is one aspect of the gradual assertion, in a world with rising geopolitical tensions, of a less naive, more autonomous and more sovereign Europe that intends to think in strategic terms, to equip itself with the will and the means to play a leading role in international relations and to protect and develop its technologies and critical capabilities. While this policy is increasingly part of Western solidarity in the face of the "systemic challenges" posed by China and Russia, it also strives to assert the European Union's own interests vis-à-vis all its partners.

[5] First Annual Report on the screening of foreign direct investments into the Union, 23.11.2021 (https://trade.ec.europa.eu/doclib/docs/2021/november/tradoc_159935.pdf).

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INVESTMENT, CONTROL, SOVEREIGNTY, ATTRACTIVENESS: SQUARING THE CIRCLE?

Interview with Mathias Audit, Partner, Audit-Duprey-Fekl,
Law Professor, Sorbonne School of Law,
and Matthias Fekl, Partner, Audit-Duprey-Fekl, Former Minister

Audit Duprey Fekl

Special issue compiled and edited by Marina Guérassimova and
Professors David Chekroun, Gilles Pillet (ESCP Business School)

Mathias Audit

Matthias Fekl

What retrospective or historical view can be taken on the French rules regarding investment control in France?

The legislative framework is based on rather old sources, as the first significant text on the subject is a law of December 28, 1966, adopted under Charles de Gaulle's presidency, known as the law on "financial relations with foreign countries". Some of its provisions now appear in what has become, with the movement toward codification, the Monetary and Financial Code.

This is especially the case for the structuring principle that French law intends to uphold, namely that "financial relations between France and foreign countries shall be free" (article L.151-1 of the Monetary and Financial Code).

In other words, French law, which has been in line with the logic of opening up national markets since the 1960s, has from the outset considered the control of foreign investments as an exception to this principle. It is also noteworthy that these rules have not been subject to debate for a long time, for several reasons of a rather different nature.

First of all, from an economic point of view, a large part of France's strategic sectors were more or less under the State's direct or indirect control, which, in law and in practice, protected them from untimely entry of foreign capital and from hostile or friendly investments or takeovers. It was only after their transfer to the private sector, in the context of successive privatization movements, that the issue of foreign control started to arise significantly in the public debate.

Second, from an institutional standpoint, it should be noted that parliamentary intervention in the area of foreign investment control has been regular but rare. There were certainly a few texts after 1966, such as the February 14, 1996 law on financial relations with foreign countries regarding foreign investment in France. However, it is essentially the intervention of the regulatory power that has progressively developed the legal framework. This is at the same time a paradox for matters supposedly governed by national sovereignty and a feature of the Fifth Republic: national representation has too often played a fairly marginal role in this field, including in the major decree of May 14, 2014, known as the "Montebourg Decree", which is at once a legal act and a strong political statement, intended to restore the concept of economic patriotism. Through the PACTE law, on the other hand, Parliament did intervene to substantially reform the legislative framework applicable to foreign investments.

What is the current state of the law regarding investment control in France?

Prior to the reforms introduced by the 2019 PACTE law and its subsequent decrees, the subject matter was characterized by two dominant features: its predominantly regulatory nature, since it was governed by decrees incorporated into the Monetary and Financial Code; and its highly evolving nature, given that these texts were subject to frequent amendments, especially as of the early 2000s.

Yet, these repeated changes of rules had not created a complete and coherent system, but rather a pile of texts that was somewhat illegible and very difficult to handle, even for experienced lawyers. For such control to be both effective and compatible with the targeted overall investment attractiveness of the French market, it must be accessible and easy to understand. The PACTE law, the decree and the December 31, 2019, order, amended by the orders of April 27, 2020, and September 10, 2021, which specified the areas in which foreign investments are subject to prior authorization and the list of documents and information that must accompany the request for authorization, have made the main mechanisms in place more coherent and the general organization of the texts more readable.

Furthermore, this new regime clearly demonstrates the importance that is now attributed to the issue of foreign investment control, and the sensitiveness in domestic politics that has become proper to it.

Moreover, it is worth noting that one of the most important contributions of the PACTE law is the strengthening of sanctions. If a foreign investment takes place without prior authorization, the Minister of Economy may, among other things, enjoin the investor not to proceed with the transaction, to modify it or to restore the previous situation at its own expense, eventually under penalty. In case of non-compliance, the Minister may impose a financial penalty on the investor, which may amount to twice the value of the irregular investment or 10% of the annual revenue before tax. Additionally, from a contractual perspective, any contract that directly or indirectly implements a foreign investment in violation of the prior authorization requirement is null and void.

How should we assess the French rules in the European context?

For a long time, Europe was rather naive when faced with competitors, which, in the East as much as in the West, pursued their interests on the world stage in a much more determined and offensive manner. In Brussels, just like in the European capitals and, besides, in Geneva, the idea that free trade almost automatically brought peace and democracy prevailed for a long time in a somewhat blissful way. We are now witnessing a fundamental movement in the opposite direction – which may well be just as excessive in its scope as the previous movement – which consists in a powerful return to sovereignty claims.

For the time being, despite initial assertions of European sovereignty on the political level, EU law mainly provides a framework for States to act. However, there is still no European sovereignty on this issue at the legal level.

This is the case with the adoption of the March 19, 2019, European regulation on the screening of foreign investments, the annex to which containing a list of projects and programs of Union interest was amended by the regulation 2020/1298 of July 13, 2020. We know that the regulation of March 19, 2019, is only meant to apply to investments from countries outside the European Union, but that is not the main point. What is striking is that this instrument essentially relies on the States. This is a far cry from the CFIUS that exists within the federal government of the United States. This European regulation does not introduce a real mechanism of European control of third country investments; the national laws of the Members States remain the linchpins of this new text, thus being in line with their own national contingencies and imperatives… Defining the contours and precise content of the notion of European interest in this context remains a challenge for the future.

The new French legal framework arising from the PACTE law strengthens this same trend. Indeed, while the previous regime clearly distinguished between the regime applicable to European investors, which was far less burdensome, and the one applicable to non-European investors, the December 21, 2019, decree has, very significantly, put an end to this difference in regime. From now on, apart from a threshold issue, the control mechanisms apply according to the same criteria to the internal market and to investments outside of it. It will be worth observing whether, in practice, European investments will be treated differently from non-European investments by State services, including to ensure that these mechanisms are considered to be in compliance with European law by the Court of Justice of the European Union.

Does the current health and economic crisis affect the implementation of investment control in France?

As globalization has become more brutal and Europe has often been criticized for a certain naivety, these issues, which used to be at best technical and at worst frankly obscure, have turned into very sensitive topics in internal political debates, long before the COVID-19 pandemic: deindustrialization, weakening of middle classes, territorial inequalities due to globalization, rise of extremism… all those phenomena are obviously linked. This crisis brings up in an unprecedented and powerful way the question of the right balance between the reinstatement of border and the desire for openness, the protection (and proper definition) of strategic interests and the integration into the world economy.

The Couche-Tard case can be partly interpreted in this context: would the executive's refusal have been as immediate and unquestionable if we had not been in the midst of a pandemic, with cashiers and other supermarket employees on the front lines for months? Would an investment proposal from a large and friendly country, with apparently strong guarantees in terms of development and employment, have been rejected in the same way if the government had not anticipated, rightly or wrongly, polemics about a sale of distribution networks to foreign investors that had been in the spotlight throughout the pandemic?

What prospects do you see for the control of foreign investments in France?

First and foremost, when assessing foreign investment projects, the right balance between openness and closure, as well as the preservation of rational and rigorous criteria, remain necessary, in times of crisis more than ever. The current general climate creates the risk of a too narrow approach to the long-term economic interests of our country and of Europe. Although numerous defensive considerations are entirely legitimate, we must not forget that external partnerships and financing may be essential to the maintenance, regeneration, dynamism and attractiveness of the French economic environment. As one might say: beware of the Maginot Line syndrome!

Then, with regard to foreign investors, it is crucial for the French market to remain attractive and therefore, legally understandable and predictable. The existing mechanism is relatively new; it would be even more useful to be able to quickly have access to the most detailed administrative doctrine possible, such as, for instance, the publication of guidelines or general principles, together with relevant case studies. The implementation of the control system could thus be better anticipated. There is no doubt that many of the contributions you have complied in this Cahier will contribute to this objective in a very valuable way.

THE EUROPEAN FOREIGN INVESTMENT SCREENING MECHANISM

By Gilles Pillet[1], David Chekroun[2], Sarah Louifi[3] and Kassio Akel da Silva[4]

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

David Chekroun

Gilles Pillet

Sarah Louifi

Kassio Akel da Silva

Free trade is central to the construction of the European market. For a very long time, this cornerstone of European commercial policy led the European Union (EU) to deal with the issue of foreign direct investment (FDI) solely in the light of the principles of the free movement of capital and freedom of establishment. The risk that some of these investments could be predatory or more generally would weaken the strategic sectors of Member States only appeared to have been seen by the States and national governments. The development of globalisation, marked politically and commercially by more competitive or aggressive relations, led the EU to completely rethink the issue (1). To maintain the attractiveness of its assets while preserving the key interests of Member States and the EU, an original mechanism was put in place by the Regulation of 13 March 2019,[5] which gave Member States considerable leeway while encouraging them to standardise their practices (2). The EU is now taking the initiative in this field, and intends to actively manage the development of national

[1] Professor of business law and director of the specialised master's degree in Law & International Management at ESCP Business School.

[2] Professor of business law, director of the Law & Business option at ESCP Business School and director of the Institute of Corporate Governance.

[3] Student in the specialised master's degree in Law & International Management at ESCP Business School.

[4] Student in the specialised master's degree in Law & International Management at ESCP Business School.

[5] Regulation 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJEU, 21 March 2019, L. 791/1.

mechanisms, put to the test by the health crisis and the war in Ukraine (3).

1. Origins of the European foreign direct investment screening system

The issue of foreign direct investment (FDI) is absent from the founding treaties of the EU, and for a very long time was merely treated as one method, among others, of movement of capital. And yet the priority of the institutions of what was to become the EU was precisely to give the greatest scope and the greatest strength to the principle of the free movement of capital, alongside the other fundamental economic freedoms.

Faced with direct investments throughout what came to be known as a period of happy globalisation, mainly from private companies established in countries that were traditional partners, such as Canada, the USA and Japan, the EU mainly saw the benefits of their development.

The striking attractiveness of Europe and its great openness made it the top FDI destination worldwide. According to the OECD, Europe is in fact one of the most open markets for investors.[6] For a long time this openness was mainly due to its effects on the growth of the beneficiaries, and job creation.

Member States, some of which, such as France, had a mechanism from the outset that enabled them to oppose investments liable to undermine their security, were the first to assess the risks that this openness and attractiveness involved. An increasing number of States introduced screening mechanisms which they constantly strengthened, the only point of reference and limit being the EU principles of free movement of capital and freedom of establishment.

After having shown for a long time, if not hostility, at least a certain mistrust towards this trend, the EU has in turn very recently realised the dangers that the wholesale opening up of European economies would lead to in a disrupted global context.

"Happy globalisation" has been replaced by globalisation that is more competitive than ever, in which certain States are conducting what is now referred to as a genuine trade war. Within this context, investors can be threats or predators for other States and national governments. Certain takeovers provide a prime example of how a country could lose the expertise it had acquired in strategic sectors. More generally, the idea has become accepted that States need to protect their key interests at all times, and not just in the defence and security sectors.

In connection with a series of studies on the future of Europe, a Reflection Paper on Harnessing Globalisation was published in May 2017.[7] Although it stated once again that direct investments are an essential tool for financing and technology transfer,[8] and that opening up economies enables an ever-increasing number of people to escape poverty, the document marked the end of the naivety of which some people accused Europe. For the first time it clearly emphasised the need for the EU to take steps to restore fair conditions of competition. In particular, the Commission recognised that as such it was necessary to meet the desire of Member States to protect their key technologies against potential predatory investments from non-EU States.[9]

The review that was drawn up after this announcement revealed the reasons for this change of policy. In a communication with a title which speaks for itself "*Welcoming Foreign Direct Investment while Protecting Essential Interests*",[10] the Commission stated that at the end of 2015 "*the stock of inward foreign direct investment in the EU stood at over EUR 5.7 trillion while it reached EUR 5.1 trillion in the US and EUR 1.1 trillion in China*".[11] Above all, it noted that the share of our traditional partners was decreasing, while that of emerging countries such as Brazil or China was increasing.[12] Especially, it was emphasised that public enterprises, or those simply influenced by a non-EU State, were actively attempting to take control of strategic assets or acquire influence over them.[13]

We know that Chinese companies and those whose head office is in Hong Kong receive highly flexible financing from Chinese banks and the numerous State subsidies at their disposal. Since 2010, many European ports (Piraeus,

[6] Foreign direct investment restrictions in OECD countries, OECD.
[7] Reflection Paper on Harnessing Globalisation, European Commission, 2 May 2017,
https://ec.europa.eu/info/sites/default/files/reflection-paper-globalisation_fr.pdf
[8] *Ibid*., p. 8.
[9] *Ibid*., p. 15.
[10] Communication of 13 September 2017 from the Commission to the European Parliament, the European Council, the European Economic and Social Committee and the Committee of the Regions
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2017:0494:FIN:FR:PDF.
[11] *Ibid*., p. 3.
[12] *Ibid*., p. 3.
[13] *Ibid*., p. 5.

Antwerp, Rotterdam etc.) have been taken over by entities linked to China, with the takeover partly financed by the Chinese policy to develop trade routes launched in 2013 by President Xi Jinping.[14] Similarly, the takeover of the German robotics giant Kuka in 2016 by the Chinese group Midea made a big impression.[15]

Screening was therefore essential, and moreover it was noted at the time that it was used by Europe's main partners, such as the United States.[16] Finally, the Communication noted that half of the Member States had introduced control mechanisms, and that their markets were not all equally open, which compelled the EU to support this trend in order to favour the compatibility of the national mechanisms with European principles. As a result, the European Commission stated that the freedom given to States to limit the free movement of capital could only be exercised for overriding reasons in the general interest and in a way that does not cause any discrimination and respects the principles of proportionality and legal certainty.[17] Finally, the document presented what the action of the EU in this field should be in the future, and proposed in particular the introduction of a European regulation to control the screening of foreign direct investment in the EU.[18]

Beyond compliance with the stated basic principles, the proposal recommended firstly the development of co-operation between Member States and with the Commission, and secondly the possibility for the Commission to screen investments involving risks for European programmes or projects.[19]

2. The European framework for the screening of foreign direct investments

The European Regulation of 19 March 2019[20] provided a very accurate response to the Commission's invitation, and was accompanied by a Commission working document[21] which provided a review of FDI, extending that of its previous Communication.

From then on it allowed, and even encouraged, what it had previously opposed. Article 3.1 of the Regulation states that "*Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order*".[22]

The scope of the European mechanism is clearly limited to investments made by investors who are natural or legal persons, from a non-EU State, to the exclusion of intra-Community investments. This priority does not mean that intra-Community investments are not subject to any rules, or that Member States are entirely free to impose the rules they want. Any restrictions on the free movement of capital must comply with the basic principles of the common market and cannot be arbitrary. Consequently, they must at least be proportionate and allow for the possibility of a judicial/legal remedy.[23]

Within this context, the notion of investment is interpreted in the broad sense. It means investments "*of any kind aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity*".[24]

The European mechanism, applicable since 11 October 2020[25] appears highly original on more than one account. Firstly, the Regulation completes the principles of European primary legislation and the case law that interprets them, which alone could not control the phenomenon.

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[14] Keith Johnson, Pourquoi la Chine achète-t-elle compulsivement les ports d'Europe, Slate, 8 February 2018, http://www.slate.fr/story/157396/chine-ports-europe.

[15] Pauline Houédé, La Chine décapite la direction du géant allemand Kuka, 27 November 2018, Les Echos, https://www.lesechos.fr/industrie-services/automobile/la-chine-decapite-la-direction-du-geant-allemand-kuka-150573.

[16] *Ibid*., p. 6.

[17] *Ibid*., p. 8.

[18] *Ibid*., p. 12.

[19] *Ibid*., p. 12.

[20] Commission staff working document, Following up on the Commission communication "Welcoming foreign direct investment while protecting essential interests", https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf.

[21] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

[22] Article 3.1, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*

[23] B. Lecourt, Contrôle des investissements étrangers opérés par des personnes extérieures à l'Union européenne: l'Europe établit un cadre, Revue des sociétés 2019, p. 364.

[24] Article 2.1, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*

[25] Article 17, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*

Nevertheless, it does not impose the standardisation usually linked to that type of regulation.

It does not in itself oblige Member States to introduce a control mechanism. And those that intend to do so do not have to follow the same regime. Similarly of a directive, it provides a framework within which Member States are called upon to act.

Consequently, the Regulation proposes a non-exhaustive list of sensitive sectors and factors that national legislators can use.[26] To assess the risk that security or public order is likely to be affected by a foreign direct investment, they can therefore take into account the "potential effects" on infrastructure in fields that are very clearly linked with the security of States or their sovereignty. It therefore mentions energy, water, health, communications, aerospace, defence, critical technologies, dual use items, artificial intelligence and biotechnologies etc.[27] Some fields, such as electoral or financial infrastructure and real estate crucial for the use of such infrastructure, and personal data, are more original.

Regardless of the sector concerned, and thereby responding directly to the findings in the previous documents, the Regulation states that national legislators can also take into account the fact that the investor is controlled by the government of a third country or draw conclusions from the fact that in the past an investor has already been involved in activities affecting security or public order or is suspected of engaging in criminal activities.[28]

In addition, States are free to put in place a general or sector-specific mechanism, or introduce prior or on the contrary ex post checking. They simply have to respect a few basic principles. The national mechanism must offer a minimum level of transparency, in the sense that it must allow investors to know the procedure applicable, and in particular the time limits, as well as the trigger criteria and grounds for control. The rules must also give investors the possibility to seek recourse, and not prove to be discriminatory.[29]

The originality of the Regulation is shown by the fact that the unitary scheme that it introduces only concerns the required cooperation between Member States and in their relations with the European Commission.[30]

This cooperation must be understood in two complementary ways. Firstly, a genuine alert mechanism is thereby put in place. Each Member State is obliged to notify the Commission and the other Member States of any FDI subject to control in its territory, where appropriate accompanied by a list of the Member States likely to be affected.[31] This makes it possible to reveal transactions that do not only have a national dimension. Furthermore, in this case the other Member States concerned can send comments to the Member State that undertook the screening and simultaneously to the Commission.[32] The Commission can also issue a purely advisory opinion addressed to the Member State undertaking the screening when it considers that an FDI undergoing screening is likely to affect security or public order in more than one Member State, or has relevant information in relation to that FDI. It must issue an opinion whenever one third of Member States consider that an FDI represents a risk for their security or public order. Above all, this enables the Commission to respond to any investment that may affect projects or programmes of the same nature as those listed in the Annex to the Regulation, that are of the European Union's interest.[33] These investments can then be examined in greater detail, after which the Commission can issue an opinion addressed to the Member State in which the FDI is planned or has been completed. In this case, if the Member State receiving the investment does not follow that opinion it must provide an explanation to the Commission. This applies the principle of "comply or explain" that exists in the field of corporate governance.

In any case, it is striking that the decision remains ultimately the responsibility of each Member State. The Member States have sovereign power to decide how to protect their interests.

The second aim of the European mechanism for cooperation is to favour standardisation of the control mechanisms already adopted by Member States. All those that have introduced a control mechanism must notify the Commission of it, and any amendments to it.[34] Because it

[26] Article 4.1 and 4.2, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[27] Article 4, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[28] Article 4, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[29] Article 3.2, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[30] Articles 6 and 7, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[31] Article 6, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[32] Articles 6 and 7, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[33] Article 8, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*
[34] Article 3.7 *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019.*

publishes a list of these mechanisms, the Commission encourages comparison, which may lead to the mechanisms being brought into line with the best ones. The comparison envisaged can be easily clarified by the annual report that Member States must also submit regarding the investments made in their territory, and the requests for information received from other Member States.[35] In general, by favouring cooperation and communication between Member States and enabling them to share their experience, the Regulation asks them to consider the problem as collective and European and therefore to standardise their mechanisms.[36]

3. The European mechanism and policy put to the test by the health crisis and the war in Ukraine

One of the most visible consequences of the health crisis and the economic crisis caused by Covid-19 is that it weakened a large number of companies for purely financial reasons. In this context it is quite legitimate to fear that this will favour a windfall effect, i.e. the takeover of a large number of assets at very low, undervalued prices. Moreover, it may also suggest that we cannot be so selective with regard to potential investors while there is a substantial need for financing.

The European Commission was aware of the risks to the strategic assets of its Member States, in particular in the health sector, and reacted quickly by endeavouring to coordinate a comprehensive response to preserve companies' resilience. Less than a week after the Communication regarding the relaxing of State aid measures,[37] the Commission therefore published another Communication on 26 March 2020[38] in which it proposed a series of guidelines for Member States concerning the control of foreign direct investments, and in particular the protection of Europe's strategic assets, ahead of the application of the Regulation of 19 March 2019.

In this Communication, the Commission no longer confined itself to allowing Member States to introduce a control mechanism, or even to asking them to do so, it literally "urges" vigilance, including for SMEs and simple startups. The strategic nature of a company cannot depend on its value or its level of maturity.

Similarly, in response to the war in Ukraine on 5 April 2022, the Commission published guidelines for EU Member States on assessing and preventing the threats that Russian and Belarusian investments pose for the Union's security and public order. More precisely, it emphasised the increased risk linked to investments subject to the influence of the Russian or Belarusian government in the context of the armed conflict. These guidelines call for increased cooperation between the authorities involved in screening investments and those responsible for applying sanctions. Finally, Member States are asked to ensure the strength of their anti-money laundering rules to prevent any improper use of the Union's financial system by Russian or Belarusian investors.

These two major developments showed the resilience of the European screening mechanism for foreign investments. Above all, the Commission showed exceptional agility by giving Member States the tools (guidelines) to make it easier for the Union to adapt to an ever changing environment, as soon as circumstances made this necessary.

In general, the publication of an annual report, the first of which was adopted on 23 November 2021, sanctions the whole of this control mechanism. The report emphasises in particular the fact that the Commission examined 265 operations. As 80% of them did not require extensive analysis, the operations selected were assessed by the Commission in only 15 days. The second annual report will cover 2021.

The Commission's priority, after barely two years of experience, is still the effective implementation of the screening mechanism, in constant and close collaboration with the Member States.

[35] Article 5.1 and 5.2, *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019. In addition, the Commission submits a report to the European Parliament on the application of the Regulation, Article 5.3.*
[36] B. Lecourt, aforementioned article.
[37] Communication 2020/C 91 I/01, OJEU 20 March 2020.
[38] Communication 2020/C 99 I/01, OJEU 26 March 2020.

THE EUROPEAN UNION: A BATTLEGROUND FOR COORDINATING SCREENING MECHANISMS

Interview with Paul Lignières, Doctor of Law, Vice-Chancellor of the Catholic University of Paris, honorary lawyer

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Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)
Interview conducted with the assistance of Sarah Louifi, and Kassio Akel da Silva, students of the Specialised Master in International Business Law and Management at ESCP Business School

Three years after the introduction of the European mechanism, what are your thoughts on its philosophy? Has it achieved its objective?

Paul Lignières: Over the last few years, the European Union has radically changed its approach to foreign investment. In the past, the European Commission had always been against national controls on foreign investment. This is why France was condemned by the then European Court of Justice (ECJ), now the Court of Justice of the European Union (CJEU) in 2000 for requiring the Church of Scientology to obtain prior authorisation for foreign investment. And when, in 2006 during the merger between GDF and Suez, the French Prime Minister announced that the French government would use the golden share mechanism to retain strategic assets, the European Commission made it clear that it was not in favour. It considered that golden shares were not compatible with EU law and that they had no place in the single market. However, golden shares can be compatible with EU law, and the Commission later admitted this.

Things began to change following a series of opportunistic and unplanned national initiatives in around 10 Member States. In France, this included the Montebourg Decree in 2014 when GE took control of Alstom's energy division. At the time this decree was adopted, it was described by the vast majority of French legal doctrine as pure heresy with regard to EU law. It is therefore particularly remarkable that today this mechanism is not only accepted but also promoted by the Commission, which sees it as a model, and that it is accepted by almost all legal experts.

The EU had three objectives in making this turnaround: (1) to provide a framework and consistency to all national regulations; (2) to encourage Member States to take action against the predatory behaviour of certain countries with regard to investments in strategic sectors; and (3) to impose reciprocity, particularly with regard to China, whose market is not really open.

The first objective has been a real success because national regulations are now more consistent. The second objective has also been achieved, even if this defence against the predatory behaviour of certain countries needs to be permanent. Member States have taken action, and naivety has often been replaced by a more watchful eye on companies from certain countries. An increasing number of EU countries are setting up control mechanisms.

However, the third objective has not been achieved. Reciprocity has been overlooked in the EU's response, and it remains a totally taboo subject at EU level. Without explicitly stating why, the EU systematically blocks attempts to introduce reciprocity into its legislation, even though WTO law allows it. In France, the issue remains unresolved. The matter was originally raised during parliamentary debates on the PACTE Law, but was refused by the government on the grounds of France's "international commitments". China and the EU have opened the debate within the framework of their investment agreement. Progress has been made in the area of international trade transactions, but nothing has been achieved in the area of public procurement. Lastly, if the reciprocity mechanism had been introduced for foreign investments, France could have given certain foreign investors the same sometimes hostile treatment that French investors receive in foreign countries. In practice, this could have led to investments being refused where there was no reciprocity. There remains a real gap here between political declarations and actions. This is unfortunately a perfect illustration of some of the criticisms levelled at the EU, which lacks transparency and is too far removed from the needs of the people.

Has the EU struck a satisfactory balance yet between respect for the sovereignty of member states and the necessary protection of the Union and its principles?

Paul Lignières: Without any hesitation, the answer is yes. The European Commission's work in this area is exemplary. It has found the right balance in its regulation (Regulation (EU) 2019/452), its approach has been very measured and highly intelligent. The Commission has been exemplary in the way the European regulation has been adopted. It had previously pointed out that the many national initiatives were not always the best ones, that these often led to inconsistent results and that there was a risk that some Member States could go too far. The Commission's preference was therefore to intervene and establish a framework, with the consent of all Member States. This is a good example of a successful "bottom-up" approach: a European regulation that was in fact born out of national initiatives and that did not give the impression that the EU was imposing something that was unrelated to the needs of the people. This type of intervention by the EU is naturally much better received than initiatives that challenge national legislation.

This approach could inspire a reform of EU competition law. It is well known that this law does not currently take sufficient account of the issues surrounding the industrial sovereignty of Member States. It is possible that in the future the EU will follow the same line of thinking as it has with investment control. In other words, faced with a proliferation of national initiatives, it will introduce a reform that leads to harmonisation. In this scenario, the reform and development of European foreign investment law would be a form of best practice for other areas.

Coming back to foreign investment, to what extent does the Commission's own responsibility dovetail with national responsibilities?

Paul Lignières: The Commission has assumed the responsibility of coordinating Member State initiatives. It is a rather light-touch mechanism, in the sense that Member States have to consider the questions posed by the Commission, but they remain sovereign. They retain their decision-making power. So State sovereignty is not infringed. The Commission applies the principle of subsidiarity, which has sometimes been neglected in the construction of Europe: it only intervenes to regulate trade between Member States and to promote coordination among their actions. In actual fact, it encourages each country to exercise its national economic sovereignty, thereby protecting European economic sovereignty.

Does French foreign investment law protect investors? Is it compatible with EU law?

Paul Lignières: We need to keep in mind that the mechanism includes a part that remains under State control. It will always, in my opinion, retain a part that is not covered by law, where the ultimate freedom of the Member State to exercise its sovereignty is tucked away.

The role of the State is always represented, from several angles. Firstly, the State will always try to delay the triggering of deadlines in certain cases. This is the usual approach with regard to the completeness of the file (if the file is incomplete, the deadline does not start running). Secondly, if you ask the State to comply with the deadline set, it can still issue an authorisation with unacceptable conditions that need to be negotiated. The State will then explain that it has not met the deadline because you did not accept the conditions!

Do you think that there is also an overriding political issue that might influence how certain transactions are handled without making it clear, for example the takeover of Carrefour by Couche-Tard in France?

Paul Lignières: The instrumentalisation of foreign investment control cannot be ruled out. It is quite natural to use FDI control to defend against a hostile takeover, which is certainly what Carrefour did. Having used investment control and related arguments as a defence to hostile takeovers myself, I can see that some ideas that seemed unacceptable a few years ago are becoming common practice today. Political sensitivities have changed and with them the direction of control. For example, 15 years ago, the very idea of amending the Foreign Investment Decree to include the drinking water sector caused such an uproar within the company it was protecting and among its legal counsel that the idea was immediately withdrawn. Today, a legal counsel would be blamed for not thinking of such a possibility in such a case.

The intuition of politicians, who are answerable to their constituents and in touch with the real world, can carry more weight than a purely intellectual and technical approach in Brussels. This is why I do not think we should try to exclude the political aspect of these issues altogether. These approaches lead us to the conclusion today that not all foreign investment is necessarily good. Financial resources are not that scarce. It is therefore right to be wary of certain investors, and sometimes it is necessary.

Despite the fact that these transactions are now highly regulated, investors have a good image of France. France is seen as a country that is very open to foreign investment, and in practice it is. Nevertheless, there are still rules in certain sectors that can be explained more by corporatism than by the defence of sovereignty. I am thinking of the health sector in particular (laboratories, pharmacies, veterinarians, and so on) but also the legal sector (notaries, lawyers and certain rules concerning the legal profession). Similarly, in the infrastructure or energy sector, some investors may rightly think that pricing issues, which are still very political in France (despite the existence of regulatory authorities), may favour French investors over foreign investors (the former being more comfortable bearing political risk than the latter). Moreover, the jurisdictional framework of State decisions is not regarded as a sufficient guarantee, in particular because foreign investors tend not to trust the French Council of State, perceived as a judge close to the State and more political than legal. The French government has not relinquished strategic decisions in regulated sectors, which automatically leads to a lack of legal security. Here again, there is a question of State control and the law is not the be-all and end-all.

However, this political and sovereignty is limited, intermittent and not systematic. If it were, it could lead to a risk of loss of reputation for the French government and its word. The loss of investor confidence in the word of the French government would undoubtedly be immediately reflected in the cost of public debt.

Despite the relatively strong influence of politics, the European and French investment regulations are considered to be very well developed. International investors are generally not particularly worried about this when it comes to implementing a sound economic venture. In fact, my foreign clients never understood why, prior to the 2014 regulations, France was so lax on investment control. The current control mechanism is relatively inexpensive and can be implemented with limited documentation and within a reasonable timeframe. Overall, such a mechanism is more reassuring for the foreign investor than no mechanism at all, which would open the door to politicking and suspicion. I remember an Asian investor who insisted on obtaining authorisation from the French government for his investment even though it did not fall within the scope of the law on foreign investment control.

Can the sharing of information between Member States, as recommended by the European mechanism, be misused by some of them (being less demanding so as to position themselves strategically in relation to other States)?

Paul Lignières: In practice, the mechanism is not particularly binding on Member States and few if any sanctions will be imposed as a result. The suggestion that a Member State may not fully comply with its duty to share information may ultimately be a case of it exercising its autonomy and sovereign will. It would therefore be wrong to say that Member States are hijacking the European information sharing system.

It is possible to argue that if States do not always find all the information they might want, it is because some of the missing information is confidential.

Again, however, this logic has its limits. The argument of the sovereignty of the State and its constitutional powers to keep certain information secret cannot be invoked indefinitely. The weakness of this justification for exempting the State from its duties is obvious when we consider the loss of credit incurred if it were to resort to it too often.

Moreover, in France, for example, this sovereignty logic may be limited by the fact that the French Ministry of Finance and the relevant supervisory ministry have an opposing view of the issues. Finance ministers may be happy to welcome a foreign investor that another ministry would prefer to reject to preserve some kind of sovereignty.

This also helps to explain why it is essential to centralise control at the French Treasury, to prevent decision-making centres from being spread too thinly, thereby encouraging the influence of "evening visitors".

Conversely, we might also ask whether a Member State could play the minimum requirement card to attract foreign investors. This could happen, but we must not lose sight of the fact that today this right is not seen as a significant constraint for foreign investors, and some are even reassured that it exists. Therefore, it seems to me that a State could not use the argument of its flexibility or freedom from rules to attract investors.

Is the principle of non-discrimination between foreign investors fully followed in practice?

Paul Lignières: This question is linked to that of reciprocity.

There is no principle of reciprocity in relations with certain States, but the fact remains that the French government may occasionally have a legitimate interest for treating investors differently depending on their country of origin.

As regards the principle of reciprocity, European law has taken away Member States' sovereign powers without giving them the necessary means to protect themselves against certain investments. To compensate for this vacuum, Member States have to interpret the rules as flexibly as possible in order to exercise their sovereign powers.

The different treatment afforded to investors by non-EU States requires the EU and its Member States to be particularly vigilant. The response from EU States must be pragmatic, effective and compatible with EU law, which is not easy. But, as I explained above, the French government – like all EU Member States – has the practical means to restrain an investor who is not wanted because of their nationality. Does the French government use these means? Whether it does or not is a matter of professional secrecy, but it is reasonable to assume that the mere fact they are available may be sufficient to dissuade the unwanted investor.

How does the EU mechanism compare with the one in the United States?

Paul Lignières: The French and EU control mechanism is much simpler than that in the United States. How they are used is also different. In the United States, it is customary to prepare an extensive file in conjunction with an expert in the foreign investor procedure, whereas in France, the files are very simple and experts are not always necessary. The EU is therefore more welcoming to US investors than the other way round.

To what extent is the strengthening of FDI control necessary in times of crisis?

Paul Lignières: There are two aspects to my conclusion on the role of foreign investment control in times of crisis.

Firstly, the crisis highlights what is vital; it acts as a revealing factor. We discover new sensitive sectors that we were not previously aware of. Certain activities, products or services become essential for the continuity of economic and social life. I realised four years ago that it was essential to protect sectors such as agri-food or certain parts of the property sector, given what they contribute to the French economy. It may also be appropriate to protect new sectors such as education. The risk of waiting to extend State protection to these sectors is that we may be forced to do so in response to major takeovers.

Secondly, the crisis inevitably turns certain activities into easy prey. Foreign investors see companies weakened by the crisis as creating a windfall effect against which it is only natural to seek protection. The European Commission is well aware of this idea and is trying to promote State aid in such cases.

So, yes, there is no doubt that crises are times when it may be essential to strengthen foreign investment control and this is what the French government did during the Covid pandemic.

To what extent does the disparity of national systems pose a risk for France?

Paul Lignières: I have never seen a French investment blocked at the intra-European level by these mechanisms, nor a foreign investment switch to a country outside France because of French investment control regulations. Consequently, I don't see why the differences between the mechanisms at the EU level would be a problem.

What improvements would you have suggested for the EU mechanism?

Paul Lignières: The rules and recommendations put in place at the EU level are highly relevant, but they also need to be highly flexible because the market and practices change. In my opinion, strengthening control of the mechanisms put in place would provide real added value, in particular by expanding the scope to new sectors such as property or education. It would be valuable to set up a body to continually and regularly evaluate the effectiveness of these mechanisms, taking into account recent developments in practice and the needs of Member States. Furthermore, it is important to be able to react very quickly in the event of a crisis and to ensure that EU rules have not blocked any country. Lastly, it is absolutely necessary to allow Member States to introduce the principle of reciprocity into their laws to block investments by companies from countries that do not welcome European investors.

THE GERMAN FDI REGIME: MAIN FEATURES AND PRACTICAL EXPERIENCE

By Daniel von Brevern and Maximilian-Philipp Schöps, Eversheds Sutherland, Düsseldorf

EVERSHEDS SUTHERLAND

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Daniel von Brevern

Maximilian-Philipp Schöps

Foreign investment control in Germany is governed by the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz,* "AWG") and the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*, "AWV"), with the AWG setting out the legal framework and general principles, and the AWV specifying the details of the relevant sectors as well as the procedure.

During the course of 2020, the AWG and AWV have been significantly amended following the adoption of the European Union's Foreign Direct Investment ("FDI") Screening Regulation in March 2019. The AWV underwent another substantial reform in May 2021, which significantly increased the number of sectors subject to screening.

Apart from the FDI Screening Regulation, two cases that were covered broadly by German media may have accelerated these reforms. In 2018, a state-controlled Chinese company attempted to acquire 50Hertz, an electricity grid operator. And in March 2020, at the start of the COVID-19 pandemic, the then US-President Donald Trump is reported to have suggested the acquisition of "CureVac," a German biopharmaceutical company specializing in vaccine development.

The new rules significantly expand the scope of FDI control in Germany and strengthen the powers of the competent authority, the Federal Ministry for Economic Affairs and Climate Action (*Bundesministerium für Wirtschaft und Klimaschutz*, "BMWK"). In essence, the regime is now both broader and stricter.

TYPES OF TRANSACTIONS SUBJECT TO GERMAN FOREIGN INVESTMENT CONTROL

Sector-specific assessment

The "sector-specific assessment" applies to acquisitions by non-German investors (including EU investors) who acquire at least 10% of the voting rights in a German company operating in one of the sectors considered particularly sensitive. These include, inter alia, the manufacture of weapons, military equipment and encryption technology. The transaction parties must notify the BMWK of the transaction, and the closing is subject to the BMWK's approval. In the review process, the BMWK assesses whether the foreign investment "*is likely to impair essential security interests*" of Germany. In 2021, the BMWK reviewed 42 cases (14% of all cases reviewed by the BMWK) under the sector-specific regime.

Cross-sectoral assessment

The "cross-sectoral assessment" applies to any acquisition of voting rights in a German company above a certain threshold by non-EU and non-EFTA residents. Three different categories need to be distinguished:

- In seven sectors, such as critical infrastructure operators, critical infrastructure software developers, cloud computing providers and media and telecom companies, the acquisition of at least 10% of voting rights, or the increase of voting rights to at least 20%, 25%, 40%, 50% or 75%, has to be notified to and approved by the BMWK.

- In 19 sectors, such as manufacture of certain pharmaceuticals and medical products and advanced technologies (satellites, tracking, IT security, artificial intelligence, quantum computing, vehicles capable of autonomous driving, robots, microchip production and additive manufacturing processes), the acquisition of at least 20% of voting rights, or the increase of voting rights to at least 20%, 25%, 40%, 50% or 75%, has to be notified to and approved by the BMWK.

- In all other sectors, the acquisition of 25% or more of voting rights does not require a notification or prior approval, but the BMWK may decide "ex officio" to initiate a review. If the parties want to ensure that the BMWK will not initiate such ex-officio proceedings, they can request the BMWK to issue a "confirmation of non-objection" (*Unbedenklichkeitsbescheinigung*).

In its investigation following the notification of an investment, the BMWK assesses whether the investment is "*likely to affect public order or security*" in Germany or any other EU member state. In 2021, the BMWK reviewed 264 cases (86% of all cases reviewed) under the cross-sectoral regime.

PROCEDURE

Within two months after having received the notification (or, absent a notification, two month after becoming aware of the transaction), the BMWK must decide whether to open a formal assessment ("Phase 2"). If the BMWK opens Phase 2, it has to take a final decision within four months after receiving all the required information. Any request for additional information made by the BMWK suspends the four-month period. The BMWK may also extend the deadline by another three months for especially complex assessments. In the recent *Siltronic*-case, the BMWK's review was ongoing for more than twelve month when the parties decided to abandon the transaction.

STANDSTILL OBLIGATION

The parties to an acquisition that has to be notified to the BMWK may not implement the transaction. In addition, the acquirer is not allowed to exercise the voting rights subject to the transaction, and the acquirer may not be granted access to certain sensitive information, violations may be may be punishable by imprisonment for up to five years or a fine (together the "Standstill obligation"). The Standstill obligation is of significant practical relevance, as it can have a significant impact on the parties transaction timetable. In addition, violations of the Standstill obligation will affect the validity of the legal act by which the acquisition is implemented.

FINAL DECISION BY THE BMWK

The BMWK can approve or prohibit transactions. Approval decisions are either unconditional approvals, or the approval is subject to conditions. By far most cases are unconditionally approved by the BMWK (98% in 2021). In practice, the BMWK prefers, instead of adopting conditional approval decisions, to enter into "public law contracts" with the acquirer. The public law contracts govern the conditions (and reporting requirements) which the acquirer is required to satisfy. If the BMWK prohibits a transaction, the underlying purchase agreement or other legal transactions becomes automatically and retroactively null and void.

KEY ISSUES IN PRACTICE

As a result of the recent reforms, Germany is experiencing a sharp increase in transactions subject to FDI control. The number of notifications increased from 66 in 2017 to 306 in 2021. As in many other jurisdictions, FDI control is now a key issue to be taken into account by any investor directly or indirectly investing in German companies.

The experience during the first months under the new German FDI regime shows that transaction parties often encounter a number of practical difficulties:

- While the legislator significantly increased the number of sensitive sectors, it did not provide much guidance as to what specifically is covered by these sectors. In many cases, investors, target companies and their advisors find it difficult to clearly establish whether a German target company operates in a sensitive sector or not. It does not help that the BMWK does not publish its decision, and that transaction parties therefore do not have any case law they can rely on.
- The BMWK has been adopting a very broad understanding of transactions covered by the German FDI regime. This has an impact notably on transactions involving indirect acquisitions of German companies or shares in German companies. For example, a 10% shareholding in a German company by the (non-German) target company may trigger a German FDI filing- even if the commercial relevance of the minority shareholding is negligible. Even some intragroup restructurings can be subject to the German FDI regime.
- The main issue in practice is timing of the process. It is very difficult to assess and predict in advance whether the BMWK will initiate Phase 2 proceedings (which significantly extend the length of the proceedings). Experience shows that even transactions that appear to be straightforward cases not raising potential issues from a German FDI perspective may end up in Phase 2.

Overall, all parties involved in the German FDI process – notably the BMWK as regulator and the transaction parties – are still on a steep learning curve. We expect that, with more time passing and cases being dealt with, the process will become more established and predictable. It remains then to be seen whether additional resharpening by the legislator will be required.

UK REGULATION OF INWARD INVESTMENT – AN ONGOING PROCESS OF CHANGE

By Vincent Smith, Assistant Professor, ESCP Business School, solicitor

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School) with the assistance of Adriana Cristiani and Nicolas Aratimos, students of the Specialised Master in International Business Law and Management at ESCP Business School

The United Kingdom has traditionally seen itself as open to foreign investment – until recently controls on foreign inward investment were limited. The Enterprise Act 2002, which sets out the basis of UK merger control (on economic grounds) provides that the Competition and Markets Authority (CMA) will take its decision only based on economic criteria – i.e. does this merger lead to a substantial impediment to effective competition on one or several UK markets?

Until January 2022, other grounds for intervening were limited to the protection of defence and national security or maintaining the plurality of the media. However, since then , the National Security and Investment Act 2021 has allowed the Secretary of State to intervene on a wider set of grounds. The CMA continues to be able to intervene in foreign acquisitions of businesses based in the UK on economic grounds under the 2002 Act.

The UK now has stronger mechanisms for strategic sectors

The National Security and Investment Act is intended to fill the perceived gaps in in the British system of protection of 'national' assets said to be of a 'strategic' character. The Minister's power of intervention in the 2002 Act are now replaced with reinforced powers of intervention on national security grounds:

- the Minister may now issue so-called 'call-in' notices on a wider range of criteria;
- a notice may now be issued not only where a strategic business located in the UK is being acquired, but also in relation to the acquisition of strategic assets not amounting to a business;
- the acquirer of a business or asset in a strategic sector is required to notify the merger or acquisition to the Ministry – this notification is separate from any notifica-

tion which might be needed for 'traditional' merger control to the CMA;

- the 17 economic sectors in which the 'call in' power under the 2021 Act can be used are set out in a statutory instrument (secondary legislation). In addition to defence technologies (already covered by the 2002 Act), new sectors covered by the call-in power include space, cryptography, energy, data infrastructure and synthetic biology technologies;
- the statutory instrument may of course be changed in the future if the need to protect other strategic UK sectors arises;
- a merger can also be examined as soon as the acquirer holds 25% or more of the voting rights in the target company (a lower threshhold than under the 2002 Act);
- the acquisition of an asset can occur when the acquirer obtains greater rights to use the asset than before the transaction;
- the Secretary of State must respond to the notification within 30 days – which can be extended by another 45 days in certain cases;
- if a call-in notice is issued within this timescale, the transaction may not close without approval from the Secretary of State;
- it is a criminal offence to close a notifiable acquisition without having notified it;
- the sale and purchase agreement will be void.

This revised legislative framework will allow the UK government to investigate in depth not only sensitive business acquisitions by foreign companies, but also (for example) the acquisition and installation of foreign components into the UK telecommunications infrastructure. Following the visit of the then US Secretary of State, Mike Pompeo, in 2020, the UK government announced that the installation of components sourced from the Chinese firm Huawei would be prohibited in the UK and that all existing Huawei components will need to be removed from the network by 2027.

Merger control on economic grounds still run the by the CMA

The existing regime under the Enterprise Act will continue to apply where there may be concerns about the economic effects of (foreign) acquisitions in UK markets. Unlike many countries, the UK does not make prior notification of mergers / acquisitions of UK based businesses or companies mandatory. However, the CMA has the power to intervene to require a deal to be 'frozen' while it makes enquiries - it has the power to ask for information not only from the parties to the transaction, but also from third parties. This intervention can take place up to four months from when the deal becomes public or when it closes, whichever is later.

A new regime with wider scope has been criticised

The new regime has been criticised, particularly during the Parliamentary process. The statutory consultation on the delegated legislation defining the sectors to be subject to control forced the government to limit somewhat the scope of its initial proposals. Now 'only' 17 sectors will be included. The new regime, which came fully into force at the beginning of 2022, has already thrown up some headline grabbing issues. In particular, the UK government (along with its US counterparts) has objected to the acquisition of the UK based semi-conductor manufacturer ARM by its US competitor Nvidia. The interventions were primarily on economic rather than security grounds – ARM is already wholly owned by the Japanese company SoftBank, which acquired it without regulatory difficulty in 2016 – but have led to the deal being abandoned. There are rumours of an initial public offering of ARM shares by SoftBank instead.

Thawing a possible chilling effect on FDI

What will the longer-term impact of the new regime be? Foreign investors into the UK could become more cautious in the light of the penalties for non-compliance with the new system. The maximum penalties for failing to comply with the National Security and Investment Act notification requirements are a fine of up to £10 million or 5% of the world-wide turnover of the acquirer, whichever is the greater. Executives who have tried to avoid the requirements of the Act can also be prosecuted, with a maximum penalty of 12 month imprisonment.

The wide margin of discretion given to the Secretary of State by the Act may also give rise to difficulties. For example, it is unlikely that an Anglo-French joint venture to build a new nuclear power station in the UK would be prevented under the Act – although notification would still likely be required. But if the joint venture included a Chinese partner, as was the case with at least one proposed project, the UK government is likely to intervene.

Clearly the chilling effect of this regime could harm the UK by discouraging inward investment in the future. Accordingly, the UK regime has included a system of (voluntary) pre-notification. The parties to a potentially sensitive transaction can approach the Ministry in advance of concluding their deal to see if the proposal is likely to raise any concerns under the National Security and Investment Act. Although a voluntary submission might increase the risk of the UK government examining the transaction in depth, the view given (in confidence) by the Ministry will allow the transaction to proceed with minimal regulatory risk, provided full disclosure has been made.

The UK regime compared to France and the EU

The UK regime under the National Security and Investment Act 2021 now resembles more closely than previously the French legislation dealing with the same issues. The French 'loi Pacte' of 2019 also allows the Minster to examine (and if necessary) block acquisitions in France on national security grounds. The timescales for action and the penalties for non-compliance are comparable and the scope of the minister's power to act also covers similar sectors.

Whether this growing tendency for European countries to give themselves new powers to prevent unwelcome (or even hostile) acquisitions in strategic sectors will mark the beginning of a general move towards more protectionism in international trade between Europe and the rest of the world remains to be seen.

CFIUS/FIRRMA

By Alexander Blumrosen,
Attorney at Law at the Paris and New York Bars,
Polaris Law, Paris

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

The United States prides itself on its openness to investment by foreigners, and in principle its laws accord foreign investors the same treatment as domestic economic actors. There is, however, one important exception for foreign investments that may affect U.S. national security. The Committee on Foreign Investment in the United States (“CFIUS” or "Committee") is responsible for managing the political tension in US economic policy between broad access to open markets on the one hand, and the U.S. national security risks that certain foreign investments may raise on the other.

CFIUS is an interdepartmental committee of the U.S. government created in 1975 and charged with monitoring foreign investments in the United States to assess their possible effects on the country's national security. The organization is overseen by the Treasury Department, which has become the main interlocutor for investing parties when declaring a transaction. CFIUS is composed of representatives from nine US government departments, five representatives of the President and two non-voting *ex-officio* members. Decisions of the Committee are made by unanimous vote.

Powers of CFIUS

CFIUS has the authority to review the national security impact of investments that fall within the scope of the Act, i.e., any investment transaction that may transfer control of a U.S. business, in any industry, to a foreign person or entity.

Over the years, CFIUS' authority has been expanded by new regulations. The most notable change occurred in 1988 with the "Exon-Florio" amendment, by which the U.S. Congress authorized the President of the United States to block the acquisition by foreign interests of a U.S. business.

More recently, in 2018 the Foreign Investment Risk Review Modernization Act (“FIRRMA”) strengthened CFIUS's powers through a further expansion of its jurisdiction and made certain previously optional filings mandatory.

In addition, FIRRMA allowed for the monitoring of foreign investments and other transactions that do not involve a foreign takeover of a U.S. business, which was the only factor considered prior to 2018.

FIRRMA confirms the continued CFIUS jurisdiction over such transactions (called "covered transactions") and additionally gives CFIUS two new bases of jurisdiction over: (1) investments without a change in control in certain U.S. companies involved in "critical technology," "critical infrastructure," or "sensitive personal data" (called "U.S. TID companies" for technology, infrastructure, and data), and (2) certain real estate transactions in sensitive geographic areas, such as near military bases.

FIRRMA does not change CFIUS's basic risk-based analysis of each transaction; assessing the "threat" posed by the foreign investor, the "vulnerability" to which the U.S. company is exposed, and the national security implications of the combination of that threat and vulnerability. Each case is different and requires a thorough investigation in order to assess the risk presented.

The declaration of an investment transaction

When the parties engage in a transaction that falls within the scope of the regulations, they must decide whether a declaration of their transaction to CFIUS is necessary. Notification is only required in certain circumstances defined by FIRRMA, including, as noted, if the investment allows the foreign investor to control the company's use of "critical technology", "critical infrastructure", or the "dissemination of sensitive personal data".

The process of notifying CFIUS of an investment is initiated by a joint statement from the foreign investor and its U.S. partner, the content of which is prescribed by the CFIUS regulations and which require a full description of the transaction, the parties involved and information on their respective business activities.

Importantly, even in the absence of a notification, CFIUS has the authority to initiate a review of a transaction under its jurisdiction at any time, even after the transaction has closed.

The fact that a declaration is not mandatory is not necessarily a sign of investment liberalization insofar as CFIUS may initiate an investigation at any time on its own initiative. Also, parties are strongly encouraged to declare their investment to ensure that their transaction cannot later be undone by the government. Accordingly, it is often in an investor's best interest to voluntarily submit to CFIUS scrutiny if there is uncertainty as to whether the transaction falls within the scope of the regulations.

However, some investors under the new FIRRMA regime are exempt from reporting requirements, particularly if they fit the "white list" of investors with sufficient links to "exempt foreign states". The first exempted foreign states - Australia, Canada and the United Kingdom - are close allies of the United States with which they have deep and long-standing partnerships in the areas of defense, intelligence sharing and trade policy. It is anticipated that the list of exempted countries may evolve as diplomatic negotiations proceed.

The assessment of an investment transaction

CFIUS has 45 days from the notification of a declaration by an investor to review the file. If CFIUS identifies problems during the initial investigation period, it may conduct a full 45-day investigation and temporarily impose sanctions or even suspensions pending the outcome of the investigation. Once the investigation is complete, and based on a final recommendation from CFIUS, the U.S. President either approves, denies, or conditionally approves the transaction within 15 days of the completion of the investigation.

However, despite the relatively short deadlines referred to in the texts, in practice the investigation conducted by CFIUS can last more than 105 days. The obvious benefit of filing a declaration, and submitting to a thorough CFIUS investigation, is that passing CFIUS scrutiny confers safe harbor immunity from any subsequent challenge or review by the government unless it turns out that information relevant to the investigation had not been submitted.

Factors Considered

CFIUS considers the following factors when evaluating a transaction:

- Whether the U.S. company has contracts with U.S. government agencies with national security responsibilities;
- Whether the U.S. company possesses "critical technologies," including technologies controlled by U.S. export control laws;
- Whether the transaction will give a foreign national control of a "critical infrastructure"; and
- Whether the U.S. company has offices or facilities near sensitive government facilities (e.g., military bases, national laboratories, etc.).

While the CFIUS declaration is jointly notified by the foreign investor and its U.S. partner, in practice, these two parties face enormously different risks with respect to CFIUS review. As a general rule, the foreign investor is more exposed than the U.S. target because the U.S. President could require divestiture or impose other burdensome conditions even after the transaction has been completed, i.e., at a time when the former owners of the U.S. company have left or retain only a small stake. Even if the former owners remain as shareholders in the target US company, CFIUS approval may be subject to conditions that have a disproportionate impact on the foreign investor (e.g., limiting the foreign investor's access to information held by the company, or the ability of the foreign investor to influence certain important corporate decisions).

CFIUS in practice

In practice, the CFIUS regulation has been far from a dead letter. The President has in recent years blocked several investments in U.S. companies:

- In September 2017, the President opposed the acquisition of the American semiconductor manufacturer "Lattice" by the investment fund "Canyon Bridge" on the grounds that this fund is majority-owned by a Chinese state-owned group, which posed a risk to the national security of the United States.
- In March 2018, the President opposed the merger between U.S.-based Qualcomm and Broadcom, a U.S. microprocessor manufacturer based in Singapore. According to CFIUS, the merger would have made Qualcomm less competitive in the 5G telecoms market compared to Chinese competitors because of Qualcomm's increased debt load and changes to long-term R&D investment plans.

More recently, the President attempted to block the Tik Tok social media platform from the U.S. in 2020, following the acquisition by its Chinese parent company ByteDance of the U.S. company "Musical.ly", which had access to the personal data of its 100 million users in the United States, on the ground that this personal data could be transferred overseas. Despite a CFIUS review and announced sanctions by President Trump, the possible divestment of Tik Tok was still pending in the US courts after the 2020 presidential election, and in June 2021 the Biden administration announced that CFIUS would engage a new, "fact-based", investigation into Tik Tok while removing the executive order sanctions of the previous administration.

Importantly, these examples do not include transactions withdrawn by investors after filing, due to reservations and conditions imposed by CFIUS. In 2019, eight transactions were withdrawn and not refiled due to CFIUS action alone.

The Treasury Department regularly informs the U.S. Congress of CFIUS activities. These reports show a steady increase in the number of filings made by parties from 2008 to the present, as well as the number of cases investigated by CFIUS.

According to the published data, from 2011 to 2020, there were a total of six Presidential blocking decisions.

In 2021, CFIUS received 272 filings, 130 of which were investigated; 74 of these were withdrawn by filers during the course of the investigation, though a majority of these were refiled in 2021 or 2022. No notices were rejected in 2021 ; neither were there any presidential decisions.

The sectors most concerned by the declarations made to CFIUS between 2012 and 2021, during which a total of 1,823 notices were filed, are the following

- manufacturing: 38%
- the financial, IT and services sector: 40%
- mining and construction: 14%; and
- the trade and transportation sector: 8%.

It is possible, even likely, that the nativist impulses that underpinned economic and trade policy under the previous administration will diminish under the Biden administration. However, the administrative apparatus in charge of investment control will continue to operate with significantly expanded powers and will continue to scrutinize closely investments from countries not on the exempt "white list". Accordingly, it is more important than ever for foreign investors to conduct due diligence on the potential impact of CFIUS regulations on their investment, regardless of which political party is in power.

UNITED STATES: INCREASED RISK OF POST-ACQUISITION CFIUS REVIEW

Interview with Jason Chipman, Partner at the law firm of WilmerHale, Washington, D.C., USA

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Interview conducted with the assistance of Alexander Blumrosen, Nour El Ghadban of Polaris Law, Sarah Louifi, student of the Specialised Master in International Business Law and Management, and Adriano Bobo-Fantoli, student of the Law & Business major at ESCP Business School

Jason Chipman is a leading attorney in matters related to data security, Committee on Foreign Investment in the United States (CFIUS) and related regulatory issues.

It's not obvious to foreign investors what CFIUS is. How do you approach the issue so that they are well informed?

Jason Chipman: CFIUS, the Committee on Foreign Investment in the United States, is a U.S. Executive Branch committee that has the power to review (i) investments where a foreign person acquires "control" of a U.S. business, (ii) investments that do not constitute control but provide a foreign investor with special rights or access to U.S. businesses associated with certain sensitive industries, or (iii) certain types of real estate investments where the property at issue is in proximity to sensitive government facilities.

It is also important for investors to understand that some foreign investments into companies associated with sensitive technologies, critical infrastructure, or large amounts of personal U.S. citizen information, may trigger a mandatory CFIUS notice requirement. In such a case, both parties (i.e., the target company and the foreign company) must notify prior to closing their intention to complete the transaction. If a transaction does not fall under the mandatory regime but otherwise triggers CFIUS jurisdiction, it is subject to the voluntary regime of CFIUS.

When CFIUS reviews a transaction, the Committee has substantial power over the transaction. Essentially, CFIUS can do one of three things. First, CFIUS can clear a transaction. Once a transaction is cleared, the transaction parties generally have safe harbor from further review by the Committee. Second, CFIUS can clear subject to the parties entering into a mitigation agreement with the U.S. government to address some perceived national security risk. Third, CFIUS can recommend that the President of the United States block or prohibit the transaction.

Most often transactions subject to CFIUS trigger the voluntary regime. In that situation, the question for foreign investors is often whether they want to proceed with a CFIUS closing condition or no closing condition. As a practical matter, that question is analyzed by evaluating whether there is a serious risk that CFIUS could demand a review of the investor (if there is no voluntary filing) and, in doing so, potentially do something that is disruptive to the perceived economic value of the deal. Put another way, when a French company wishes to acquire an American company manufacturing ice cream cones, the risk of a review by CFIUS - if the transaction is carried out without prior consultation - is very likely to be low. If, on the other hand, a foreign investor wishes to acquire an American defense company or a company making advanced semiconductor technology, such a transaction would be hard to pursue without prior consultation with the committee.

You mention the condition precedent in the investment contract; what are the most appropriate legal tools to limit the regulatory risk associated with CFIUS?

Jason Chipman: It is often very important for a foreign investor to get comfortable that an investment does not trigger a mandatory filing requirement. The CFIUS mandatory reporting regime generally is triggered when the target company develops or designs sensitive technology subject to U.S. export controls (or for certain targets if the investor is controlled by a foreign state). Often foreign investors seek representations in deal documents as to the status of the target company technology to try to rule out a mandatory filing requirement. If the transaction is subject to the mandatory regime and the parties fail to comply with their prior declaration obligations, then the committee has the power to review the transaction and impose a fine that may be equal to the amount of the transaction, or even terminate it.

In practice, it is true that the parties sometimes wish to obtain a legal opinion on a particular investment. If the transaction is subject to the voluntary regime, practitioners will approach the subject in terms of risk, as there can be no certainty as to the assessment of a case by CFIUS. Historically, CFIUS has focused on transactions involving companies operating in sensitive economic sectors (e.g., telecommunications, defense, aerospace, energy). Over the past 15 years, CFIUS has broadened its scope of work. Today, any transaction involving a company in the technology sector can attract CFIUS' attention (e.g., artificial intelligence, personal data protection). When there is uncertainty as to the assessment of the transaction by CFIUS, it is necessary to verify whether the transaction requires a contractual condition precedent imposing prior consultation of the committee.

The notion of risk is at the heart of the review, i.e., a risk on the feasibility of the transaction, on the timeline of the transaction, on the type of investor and investment, but also on the reputation of the foreign investor in the United States (i.e., the committee has always validated the investor's previous projects).

The more sensitive a transaction is, such as semiconductor technology, the more practitioners will advise the investor of the risk that CFIUS may take an interest in the transaction.

Do the new rules that went into effect in October 2020, mandating CFIUS reporting of transactions that involve export-controlled technology, simplify this CFIUS risk assessment for the investor?

Jason Chipman: The mandatory regime makes CFIUS an important issue to evaluate for nearly all foreign investment in the United States. In this regard, the new regime complicates M&A activity and fund raising. With that said, it is also true that the new rules provide a degree of technical clarity about what does and does not trigger a mandatory filing as compared to the rules that existed previously.

For U.S. businesses, however, this regime often creates real challenges because this mandatory export technology control regime requires U.S. companies to evaluate their technology under the export control regime even if they never had the opportunity to sell their products abroad. This regime is quite complicated from a regulatory standpoint.

Who is consulted by the committee? Who takes the initiative? How involved is the White House?

Jason Chipman: The CFIUS process can seem opaque. However, lines of communication are always maintained between the agencies involved and with the parties to the investment in the CFIUS reporting process.

It should be remembered that the committee is a true committee of different agencies, each with its own mission and resources. The Treasury Department is the entity that communicates most with stakeholders and remains at all times the entity responsible for implementing the review of the proposed transaction. There will always be a second department designated as co-lead by the committee, depending on the issue being addressed. For example, when the transaction involves semiconductor technology, then the agency co-responsible for oversight will likely be the Department of Defense or the Department of Energy. When the transaction involves the telecommunications sector, the designated co-lead department will be either the Department of Justice or the Department of Homeland Security.

The committee must decide by consensus whether the transaction presents a risk to national security. The process can be quite lengthy because of the involvement of several departments in the decision-making process ("interagency process"), giving the impression of a black box of bureaucratic inertia.

In general, throughout the process, the Committee members will discuss with the parties and may even invite them to meet to discuss possible risks and issues arising from the operation. It is not uncommon for the parties to meet with the committee if the transaction presents complicated issues. The Committee then informs the parties of its final decision and may, if necessary, impose conditions on the transaction that are designed to limit the identified risks ("mitigation conditions").

What were the consequences of the health crisis? What about the supply chain issues raised by the pandemic?

Jason Chipman: In the US, the pandemic has highlighted supply chain issues in some key sectors. The government realized that some key elements of the supply chain were not properly subject to review at the national level. The pandemic has also highlighted that some health sectors, such as pharmaceuticals (i.e. Vaccination), biotechnology, are generating increased interest by the committee. Thus, the risk of CFIUS review of a transaction related to supply chain issues is now higher than it was in the past.

While there has been an expansion of CFIUS' powers as a result of FIRRMA and the pandemic, does CFIUS have the resources to implement the policy it advocates?

Jason Chipman: One of the first things we talk to our clients about is whether or not CFIUS is interested in the transaction at issue. CFIUS' oversight and areas of expertise are expanding, but can the committee keep up? The FIRRMA Act expanded CFIUS' jurisdiction and, in turn, allocated new financial resources to the committee. New offices were created to monitor transactions that should have been reported. Likewise, existing offices were able to hire staff to facilitate their monitoring efforts. As a result, the likelihood that CFIUS will come in ex post and analyze the transaction and say that it should have been reported has, without a doubt, increased since 2018.

Do you think that the sale of a national "champion" that does not a priori fall under the purview of CFIUS can be blocked by the committee? Can the committee take on all cases, especially those that are political in nature?

Jason Chipman: CFIUS is run by career professionals. It can, though, be influenced by politics. Thus, it is necessary for an investor to think about possible political difficulties and not to be satisfied with purely legal aspects or a deal, especially for transactions involving national "champions". A deal involving a flagship company can be exposed to political pressure in several ways. A member of Congress or a state congress may criticize the operation in public, opponents (often competitors) may try to influence public opinion by criticizing CFIUS procedures and policies and, by extension, the occupant of the White House. The most obvious example is the planned investment by Dubai Ports World (DPW) in the Port of New York in 2006. The deal had to be transformed by the investors following public and insistent opposition, including in Congress, even though it had previously been approved by CFIUS.

GENERAL TRENDS OF FOREIGN INVESTMENT CONTROL IN CHINA: SOFTENING AND NEW CONSTRAINTS

By Hubert Bazin and Henrick Emeriau, LPA-CGR avocats Shanghai

LPA-CGR avocats

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Hubert Bazin

Henrick Emeriau

China maintained a positive growth in 2020 and 2021 and succeeded in attracting a domestic record 179 billion USD in foreign investments in 2021[1], an increase of 20% from 2020. Until the beginning of the war in Ukraine, followed by a strict lockdown applied to Shanghai inhabitants during almost three months in the spring of 2022, foreign enterprises, especially from Europe and North America, have continued to invest in China to benefit from what has become a huge consumer market and an unrivaled industrial base. A key driver of this trend, the softening of Chinese laws and regulations governing foreign investment over the past few years illustrates the will of China to open up to foreign economies.

However, the persistent trade war between China and the US, and more generally the commercial and political tensions with Western countries as well as the growing nationalist political stances of the Chinese regime, have fed discussions over a decoupling of China and the outside world. Albeit relaxing its control over low profile projects in the service and industry sectors, China has implemented various measures to better control foreign investments in strategic fields, following a path initiated by both the US and the European Union. New priorities and con-

[1] Investment Trends Monitor, UNCTAD, 19 January 2022

cerns, especially regarding environmental and climatic issues, also lead to the necessity to reassess investment models and related risks. At a time when globalization seems to recede, what lessons are there to take from these opposite movements?

Further opening up of the Chinese market

Since its accession to the WTO in 2001, China has been under a constant pressure from its trade partners to further open its markets and relax its control over foreign investments, which resulted in a progressive simplification and harmonization of its foreign investment regime over the past two decades.

This process accelerated in 2016, when China cancelled the requirement for a prior administrative approval of foreign investment projects, except for certain sectors identified in a Negative List. Since that date and subject to the foresaid exception, the establishment of a foreign-invested enterprise (FIE), the increase of the registered capital of an existing FIE and the assignment of equity participations in a FIE are no longer subject to prior approval and must only be filed with the relevant administrations. Such filing can usually be completed online.

As regards sectors where foreign investments are restricted or prohibited, there exist two separate Negative Lists which are regularly updated by the National Development Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM): one applies to projects all over China, while the other applies specifically to investments in China's free trade zones (such as the Waigaoqiao free trade zone in Shanghai). The last versions of both Negative Lists, which are effective since January 1st, 2022, include respectively 31 (national list) and 27 (free trade zones list) sectors where foreign investment is either restricted or prohibited, a significant decrease from the 2017 national Negative List (63 sectors). Recent changes in the national Negative List include the removal of the cap on equity ratio that can be held by a foreign passenger car manufacturer (although it must be noted that investments in thermic motors vehicles projects are prohibited pursuant to special regulations) and generally a free access to almost all traditional industrial activities, while market research and survey activities have been allowed in the free trade zones. For those sectors which are not prohibited but merely restricted (for instance, social surveys) – the restriction consisting of a limited equity ratio applicable to foreign shareholders, the prior approval of the relevant administration is required. Depending on the amount of the investment, the approval may be granted at a municipal level or national level; for instance, in Shanghai projects in the restricted sectors are approved by the municipal NDRC below 300 million USD and by the State NDRC above that threshold.

Apart from the Negative Lists, further opening-up measures (usually coming with certain tax and social incentives) have been implemented to promote certain areas, notably the Great Bay Area in Southern China and Hainan island. The latter is designed to become a gigantic commercial and touristic hub and a policy released in April 2021 announced future relaxations of market access conditions for activities such as health (online sale of drugs, clinical trials, R&D, esthetical surgery, transplants of organs), auctions, online videogaming, vocational training and civil aviation, which remain restricted or prohibited at the national level.

Harmonization of the legal framework

Since the entry into force of the new Foreign Investment Law on January 1st, 2020, the special laws and regulations that previously governed foreign invested enterprises have been cancelled and all companies, irrespective of the nationality of their shareholders, are subject to the PRC Company Law. As a result, severe legal constraints that applied to the governance of Sino-foreign joint ventures have been lifted, such as the requirement for unanimous decision at the board of directors for all important matters (including any revision to the Articles of Association, assignment of equity participations, capital increase and dissolution or liquidation of the company). Henceforth, a qualified majority of two-thirds of the voting rights is legally required for the making by the shareholders of material decisions (revision to the Articles of Association, increase or reduction of the registered capital, combination, division, dissolution or transformation of the company), all other decisions being subject to simple majority rules unless otherwise provided for in the Articles of Association or shareholder's agreement. Meanwhile, a relaxation of the constraints applying to the cash payment of capital contributions or of equity transfer prices has been observed. Foreign investors have thus greater leeway to negotiate and adapt share purchase agreements and shareholders agreements to their needs, especially in terms of governance (for instance by providing for a representation of the shareholders at the board of directors and profit-sharing schemes that do not reflect their equity ratio), and implement more creative solutions, such as elaborate earn-out mechanisms or vesting clauses.

One may wonder, given the easing of market access conditions and the alleged full compliance by China with the principle of national treatment required under WTO rules that it claims to have achieved through legislation harmonization, why foreign companies still extensively complain about the difficulties to do business in China and the fact that they cannot operate in China as Chinese companies operate in their own jurisdictions?

Remaining controls and constraints

The non-convertibility of the Chinese currency, except for daily transactions, remains one of the major constraints faced by foreign investors in China, due to the strict foreign exchange control implemented by the banks upon delegation by the powerful State Administration of Foreign Exchange (SAFE). The remittance abroad of dividends or salaries paid to foreign nationals residing in China usually does not raise issues. However, advancing funds or invoicing services or technical assistance fees to Chinese subsidiaries, arranging bank financing from abroad or structuring share premiums within the frame of capital increases are generally confronted with numerous legal obstacles and practical challenges (strict thin capitalization rules capping the amount of foreign loans or advances, unreasonable requirements in terms of documentary evidences, etc.).

Besides, the implementation of new regulations (such as the opening up of new sectors) by the Chinese local authorities is sometimes far below expectation, while old practices are perpetuated: for instance, it is not uncommon that local administrative bureaus require the use of their own template of Articles of Associations or delay or refuse to issue necessary administrative licenses without which one cannot operate in certain industries, not to mention a protectionist or nationalistic stance in favor state-owned companies in oligopolistic sectors (such as telecoms, for which market access had been reluctantly conceded during the long negotiation of China's accession to the WTO, but which was in practice never opened to foreign investors) and certain advantages being given to state-owned companies in public procurements which discourage foreign companies to develop their activities in certain industries.

Meanwhile, one can also observe recent and rapid changes in the challenges and risks faced by foreign investors. Since the protection of the environment and the control of carbon emissions became a priority of the Chinese government, industrial investments are subject to administrative approvals which, in numerous provinces, require to go through lengthy discussions with local officials often resulting in refusal or stringent conditions being imposed. Controls are frequent and thorough, and non-compliance (even formal ones) may lead to heavy sanctions such as the administrative suspension or closing of factories. China is no longer the "world's workshop" that it was at the dawn of this century!

A new National Security Review

More recently, China has established new regulations mirroring defensive measures put in place by the US and the European Union, namely the 2018 US FIRRMA and the 2019 EU FDI Regulation. Effective as from January 18, 2021, Chinese authorities implement a national security review process before approving any foreign investment in certain industries deemed sensitive: military, "critical" agricultural products, energy and resources, equipment manufacturing, infrastructure, transportation services, cultural products and services, information technology and Internet products and services, financial services, key technologies and "other critical areas". The list is broad and the condition of "criticality" is vague and subjective, depending entirely on the assessment made by the Chinese administrative authorities, without foreign investors having effective recourses in case of investment refusal. This results, de facto, in numerous business activities being closed to foreign companies in China although they are opened to Chinese investment in Europe or North America.

In September 2020, China also adopted a new regulation aiming to sanction foreign companies which would have suspended business relationships with or imposed discriminatory measures to Chinese companies based on foreign legislations or sanctions decided by a foreign government, in an effort to curb the so-called "unjustified extraterritorial application of foreign laws and measures", as do the US. This might trigger huge challenges for foreign companies which are required to comply with contradictory legal obligations in different countries.

In March 2021, the National People's Congress adopted the 14th five-year plan which outlines Chinese high ambitions and its willingness to have champions in the most advanced industries: AI, quantum mechanics, electrical vehicles, microchips, biotech, genetics, etc. These ambitions are supported by huge investments in innovation and R&D activities, but also the promotion of foreign investments (most cities and municipality-level districts having KPI related to foreign investments), especially in fields where China lags behind its foreign competitors. This may explain why foreign companies remain so keen to develop their business in China, despite regulatory constraints and significant obstacles to effective market access. The lasting "zero cases" Covid policy resulting in severe lockdowns and the growing tensions over the Taiwan issue in 2022 have however led numerous foreigners to leave China and some western companies to scale down their business activities, which will certainly impact the future trend of foreign investment in this country.

A PERSPECTIVE ON THE PROLIFERATION OF FDI SCREENING REGIMES ACROSS JURISDICTIONS

By Professor Ioannis Kokkoris,
Chair in Competition Law and Economics and Dean (International) at Queen Mary University of London

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

The UNCTAD's World Investment Report 2021 indicated that in 2020, 67 countries adopted policy measures related to foreign investment, most of which took place in developed economies, largely as a response to the pandemic and mainly restrictive.[1] The report noted that the number of restrictive policy measures in reaction to the pandemic superseded those that were adopted during the financial crisis 2007-2009.[2] It also outlined that even if the vast majority of FDI measures have been generally adopted by developed economies (81 per cent), an important number of developing and emerging economies are mirroring the movement.[3] The types of measures vary from country to country: some are temporary and others are permanent, some have lowered the thresholds that trigger intervention, some have expanded the prior approval requirements for FDI, and others have established strategic sectors where the special power regime is applied strictly.[4]

This paper will concisely present the FDI screening regime in the UK as well as discuss the respective regimes in South Africa, India, Russia and Japan.

The FDI screening regime in the UK

In the UK, traditionally there was no standalone foreign investment screening regime but the powers to assess national security considerations were provided for in the

* Chair in Competition Law and Economics, Queen Mary University London. This research draws from the forthcoming publication: Kokkoris I., National Security, FDI screening regimes and Merger Control, Oxford University Press, 2023.

[1] United Nations Conference on Trade and Development – UNCTAD, "World Investment Report 2021," p. 109, available at https://unctad.org/system/files/official-document/wir2021_en.pdf (Last visited 8 April 2022).

[2] United Nations Conference on Trade and Development – UNCTAD, "World Investment Report 2021," p. 109, available at https://unctad.org/system/files/official-document/wir2021_en.pdf (Last visited 8 April 2022).

[3] United Nations Conference on Trade and Development – UNCTAD, "World Investment Report 2021," p. 109 and 111, available at https://unctad.org/system/files/official-document/wir2021_en.pdf (Last visited 8 April 2022).

[4] Please see the summary of the measures in United Nations Conference on Trade and Development – UNCTAD, "World Investment Report 2021," p. 111-113, available at https://unctad.org/system/files/official-document/wir2021_en.pdf (Last visited 8 April 2022).

public interest test of the Enterprise Act 2002. The Government's powers to intervene in foreign investment are primarily founded upon the national merger control regime and supplemented by specific sector regulations. In October 2017, the Government published the National Security and Infrastructure Investment Green Paper ("Green Paper"), reviewing the national security implications arising from foreign investment and control. The Green Paper introduced a set of short and long-term proposals to reform and strengthen its powers to scrutinise these national security implications of foreign investment.[5]

The first consultation focused on the short-term proposals that resulted in the first significant amendments to the UK merger control regime since the Enterprise Act 2002 came into force.[6] The second consultation set out broad options for longer-term, more far-reaching reforms. This was followed by the National Security and Investment White Paper in July 2018, which set out even more detailed proposals. These far-reaching reforms were later brought forward by the National Security and Investment Bill, which will be discussed in detail below. Additional short-term measures were later added by way of two statutory instruments[7] as a way of mitigating urgent risks pending the implementation of more comprehensive powers in the forthcoming new FDI regime in the UK.[8]

The UK National Security and Investment Act

The UK Government brought the Bill on National Security and Investment Strategy ("NSI Bill") before the UK Parliament in November 2020. On 5 May 2021, the National Security and Investment Act 2021 ("NSI Act") was published, after receiving Royal Asset on 29 April 2021. The NSI Act is expected to enter into force towards the end of 2021, while parts of the regime, such as the Secretary of State's "call-in powers" will be applicable to transactions that are completed even before that time.

The NSI Act launches an investment screening regime based on national security criteria, separate from the existing merger screening by the CMA. The existing regime under the Enterprise Act 2002 will continue to run in parallel, with the CMA remaining the competent authority for competition law purposes only. Therefore, when the new regime is implemented, the national security considerations will effectively be removed from the public interest and special public interest regimes under the Enterprise Act 2002. However, the Government's statutory powers to intervene in investments for the purposes of protecting media plurality, financial stability and public health emergency will be preserved.

Whereas the scope of the Enterprise Act 2002 is largely defined by the size of the transaction (through the turnover and share of supply thresholds), the new national security screening system rather focuses on the means by which an investor could acquire the ability to undermine national security. The UK Government will be able to scrutinise, impose conditions on or, as a last resort, block a deal if it is concluded that there is an unacceptable risk to Britain's national security.

Principal features of the new regime include:

i. the establishment of a dedicated governmental unit,

ii. a mandatory notification and pre-approval system for transactions in specific sectors of the economy,

iii. a voluntary notification system available to investors,

iv. "call-in powers" of the Secretary of State for unnotified investments,

v. a specific time limit for intervention

vi. the application of remedies to address risks to national security and sanctions for non-compliance with the regime and

vii. a mechanism for legal challenge of governmental decisions.

The Act provided that mandatory notification will only be required for certain types of transactions in seventeen (17) key sectors, which are regarded as being the most sensitive areas of the economy based on their susceptibility to national security threats.

[5] National Security and Infrastructure Review: The Government's review of national security implications of foreign ownership or control, October 2017 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf

[6] The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018, which came into force on 11 June 2018.

[7] Enterprise Act 2002 by the Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2020 and the Enterprise Act 2002 (Turnover Test) (Amendment) Order 2020.

[8] See Press release from the Department for Business, Energy & Industrial Strategy and The Rt Hon Alok Sharma MP, titled "New protections for UK businesses key to national security and fight against coronavirus" and published on 21 June 2020, available at https://www.gov.uk/government/news/new-protections-for-uk-businesses-key-to-national-security-and-fight-against-coronavirus.

These sectors are as follows:

- advanced materials
- advanced robotics
- artificial intelligence
- civil nuclear
- communications
- computing hardware
- critical suppliers to Government
- critical suppliers to the emergency services
- cryptographic authentication
- data infrastructure
- defence
- energy
- synthetic biology
- military and dual use
- quantum technologies
- satellite and space technologies
- and transport.

If a transaction falls within one of the specified sectors, it will be subject to a mandatory notification obligation, if it involves one of the specified 'trigger events':

a. the acquirer gains or increases its interest in the entity by virtue of the percentage of the voting rights or shares that the acquirer holds increasing:

- from 25% or less to more than 25%;[9]
- from 50% or less to more than 50%; or
- from less than 75% to 75% or more.[10]

b. the acquirer obtains voting rights in the entity that, whether alone or together with other voting rights held by it, enables it to secure or prevent the passing of any corporate resolution.

Some recent data on the UK regime

A recent Report[11] on the FDI screening regime shows that there were 222 notifications received in the period 4th January 2022 – 31st March 2022. This number is indicative of the number of notifications BEIS expects on an annual basis, between 1200-1800.

The total number of mandatory notifications received	196
The total number of voluntary notifications received	25
The total number of retrospective validation applications received	1

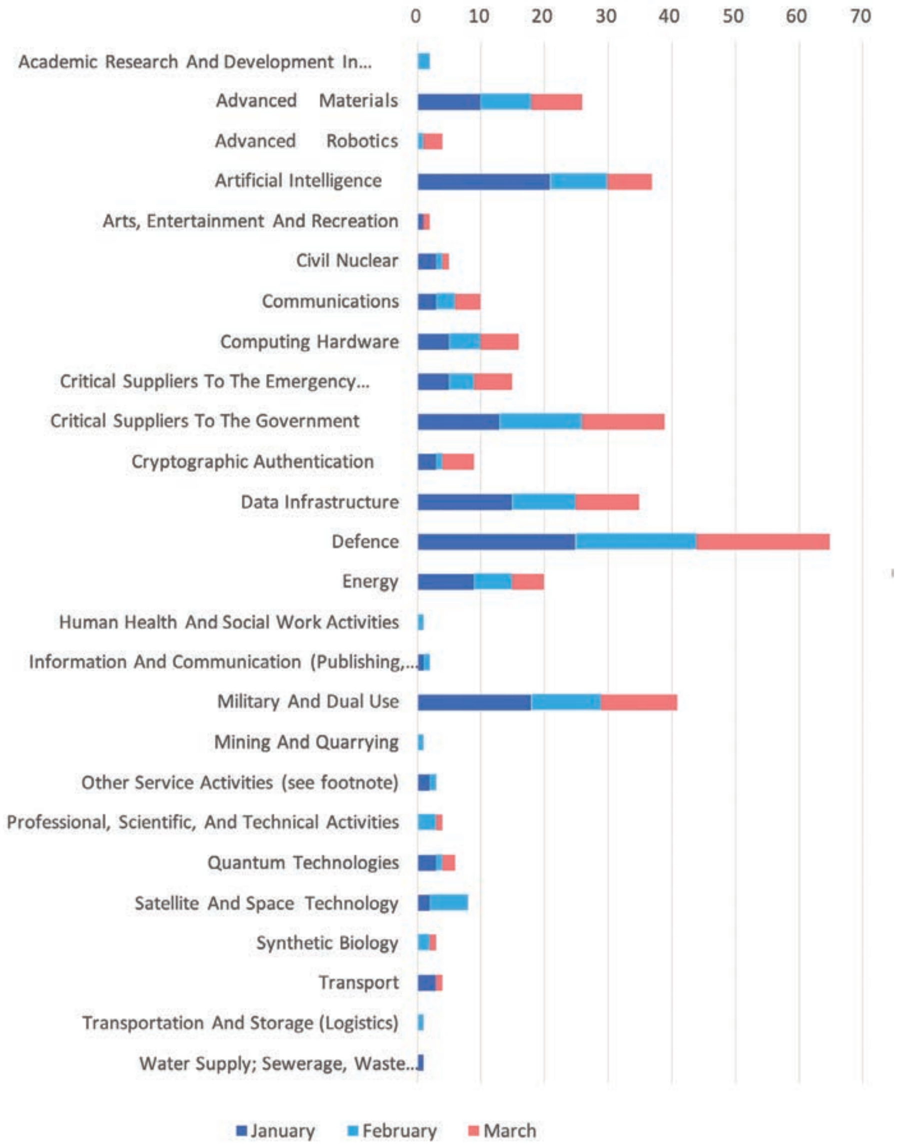
The number of notifications received is slightly less than the number of qualifying acquisitions that have been notified. This is because in rare cases the Government has accepted a single notification to cover multiple qualifying acquisitions.

A total of 209 notifications have been accepted or rejected in the reporting period, of the total 222 notifications received in the same period. The difference is because 13 notifications were still being evaluated at the end of the reporting period.

The number of mandatory notifications accepted	178
The number of voluntary notifications accepted	22
The number of mandatory notifications rejected	7
The number of voluntary notifications rejected	1
The number of retrospective validation applications accepted	1
The number of retrospective validation applications rejected	0

[9] In an earlier iteration of the Bill, before it became an Act, the acquisition of a right or interest crossing a threshold of 15% in a qualifying entity would be a "notifiable acquisition" – not a "trigger event" in itself, but one which must be notified so that an assessment could be made of whether there was a trigger event. However, this 15% threshold was removed from the Bill shortly before it received Royal Assent, so transactions at this level do not require mandatory notification under the Act. It has been commented that this change was prompted by a concern that the threshold was disproportionate, noting that similar mandatory notification systems, for example under the US CFIUS regime, use the threshold of 25% as a starting point.
[10] Notably, this is in line with the figures used by the CMA when assessing whether a merger may raise competition concerns.
[11] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1083295/E02757792-nsi-annual-report-2022.pdf.

The following figure shows the areas of the economy in which notifications were accepted and rejected (including both mandatory and voluntary) each month. Each notification can be associated with more than one area, hence the total number of notifications associated with each area is higher than the total number of notifications.



It is noteworthy that so far, no transactions have been blocked under the new FDI screening regime.

The FDI screening regimes in South Africa, India, Russia and Japan

As part of the global proliferation of FDI screening regimes, we will briefly discuss the measures that have been adopted in Russia, Japan, India, and South Africa.

In Russia, the adoption of extensive FDI rules has been crucial to protect not just its commanding position in the strategic natural resources industry, Russian's main source of hard currency, but in any other sector. The economic sanctions imposed on Russia after its invasion to Ukraine have elicited the adoption of stricter FDI rules targeting those countries who have deployed them.

Like Russia, India has also developed new foreign rules to target land border countries more precisely. The threat posed by opportunistic takeovers during the COVID-19 pandemic induced the adoption of some measures aimed at protecting the domestic industries from the intervention of geopolitical rivals, including the dominant Chinese. Unlike Russia, since India adopted its "Open door Policy" in 1991, foreign participation has been welcomed and the government has portrayed as comfortable with globalisation, at least in theory. In practice, this notion is overshadowed by a sense of disappointment once firms need to navigate a set of complex specific-sector restrictions and multiple authorities with shared jurisdiction. In its efforts to encourage foreign investments, the Indian government has created a screening mechanism. In fact, the opposite is more likely. Under the new screening mechanism, the government enjoys full discretion to decide, it applies national security or national interest considerations ill-defined, applicants are not involved in the review process and, if a proposal is rejected, they Government will not inform the reasons.

Japan also adopted FDI measures to counteract the COVID-19 pandemic. It lowered the threshold for pre-transaction approval from 10% to 1%, designated business sectors as core (e.g., weapons) or non-core (e.g., electricity) according to the degree they affect national security and exempted some from mandatory notification. Although such an exemption is welcome amidst the business community, some concerns persist. Investors need to keep in mind strict filing times and be ready to accept recommendations aimed at addressing national security, public order, public safety, or smooth management of the Japanese economy issues raised by their proposals or abandon them. Nevertheless, the meaning of these issues is uncertain and the whole review process as a result. More worryingly, the adoption of spurious national security concerns without proper oversight can reinforce the resistance that for decades Japan has shown towards foreign investors. In this context, the strategy introduced by the Prime Minister of Japan Abe Shinzo in 2013, and the subsequent reforms seeking to remove the barriers that have impeded high levels of inward FDI, have been put to the test.

The strengthening of FDI rules echoed across South Africa. This is a paradoxical decision considering that after decades of great efforts South Africa has failed to attract investors. Contrary to what we have seen in Russia, India and Japan, whose interventions in foreign takeovers have been crafted to protect their national security, in South Africa the high levels of crime have deterred foreign investors. Now that the pandemic seems to have receded, South African is facing a precarious economic situation with pressing social problems on the rise. Therefore, it comes with no surprise that the South African government has not yet implemented the reform sought to intervene in foreign takeovers on national security grounds in 2018. It seems that the real question for the government now is not whether they can control inward FDI, but at what price. A further question is how to reconcile two policies that clash each other: on one hand, the protection of the legal rights of foreign investors and, on the other, the special protection of the non-white population in the South Africa economy. An extricated complex relationship.

These jurisdictions are pertinent case studies as their unique characteristics offer us the opportunity to provide some reflections. The Russian regime has seen in the FDI rules a right tool to advance it. Like other countries, Japan has expanded the scope of review by lowering the thresholds from 10 per cent to 1 per cent and by including more than 500 companies in 12 industries as relevant to national security. Unlike most jurisdictions, Japan has incorporated some foreign investment screening exemptions. India has crafted its national security measures grounded on land borders. This tactic was devised to protect its companies from opportunistic takeovers during the pandemic. In South Africa, a screening mechanism of foreign investments was introduced in 2018 but is not yet in force. In this context, this chapter suggests that for the business community it is difficult to navigate all these distinctive rules, that foreign investment rules have proven to be reciprocal tools and if applied without sufficient caution, governments are putting the benefits of free markets in peril.

INVESTMENT SCREENING: EVOLVING POLICIES FOR A WORLD IN CHANGE

By Joachim Pohl and Nicolás Rosselot[1]

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Joachim Pohl

Nicolás Rosselot

Open economies – principally OECD countries – have for decades benefitted from foreign direct investment (FDI), and have progressively reduced restrictions on foreign investment among themselves and with third countries.

Dramatic geopolitical and geo-economic developments in recent years are now leading these open economies to revisit many policies, including their investment policies. The shift of economic weight away from a community of open and liberal countries, the assertive if not hostile stance that some countries occasionally take in economic and traditional security domains, and new vulnerabilities resulting from the diffusion of advanced technologies and sensitive information all fuel concerns about the impact of some foreign investment on essential security interests.[2]

For now, these changes in the global economic and security landscape have not led to a change in OECD Members' stance on openness to international investment in

[1] OECD Investment Division in the Directorate for Financial and Enterprise Affairs. The opinions expressed and arguments employed are those of the authors and may not represent the official views of the OECD or of its member countries.
[2] See for a broader analysis of the drivers of this trend OECD (2020), "*Acquisition- and ownership-related policies to safeguard essential security interests – current and emerging trends, observed designs, and policy practice in 62 economies*", https://oe.cd/natsec2020.

general – these countries remain committed to the benefits that such investment brings in most cases. The policy changes are concentrated on a limited subset of transactions.

Investors are concerned about swift developments in this area, about uncertainties that result from new, often broad concepts, and about the application of new rules that cannot always be anticipated.

A bird's eye perspective on policy developments in this area suggests that most of the recent developments should not be surprising. Significant parallels exist across countries, and while developments may be fast-paced, they are relatively similar across countries and follow a predictable path.

This contribution seeks to document these communalities and trends in a broad set of advanced economies; points out the drivers of the new policies; and proposes an outlook on likely future developments in this area based on current trends. This contribution is based on longstanding work by advanced economies at the OECD on this policy area and factual information generated in this context.[3]

New policies to manage new threats

For the great part of the last decades, only a small number of OECD countries had mechanisms in place that allowed their governments to review the inward investment proposals for essential security implications. Most countries did not see a need for such reviews as international investment took place essentially among allies, and most had not experienced cases in which such powers were needed. Where mechanisms existed, they were typically limited to defence production and sensitive real estate such as border areas – and were rarely used.

Awareness of vulnerabilities grew in certain countries in the early 2000s. Acquisitions of sensitive assets such as critical infrastructure by less-than-transparent investors such as Sovereign Wealth Funds, as well as the experience of international terrorism and occasional, isolated acquisition proposals by investors from non-allied countries led to the reconsideration of the potential impact of foreign acquisitions and ownership on host-countries' essential security interests. A limited number of countries began to introduce the possibility for investment reviews or strengthened existing mechanisms, but continued to use these possibilities rarely.

As a global standard-setter in international investment policy, the OECD developed guidelines for the design of investment policies related to essential security concerns in 2009. The then 30 OECD Members adopted the *OECD Guidelines for Recipient Country Investment Policies relating to National Security*[4] that contain guidance on how to reconcile openness with needs to protect essential security. The Guidelines call for policies to be transparent, predictable, proportionate and implementing governments to be accountable and recommend detailed design features that are now widely reflected in newer policies across OECD countries.

The Global Financial Crisis of 2008 temporarily disrupted international investment activity, but as of 2016, concerns about essential security in the context of international investment returned to the agenda. This time, the concerns were mainly associated with strategic, state-guided and state-subsidised investment from China, which sought to acquire companies in high-tech sectors.

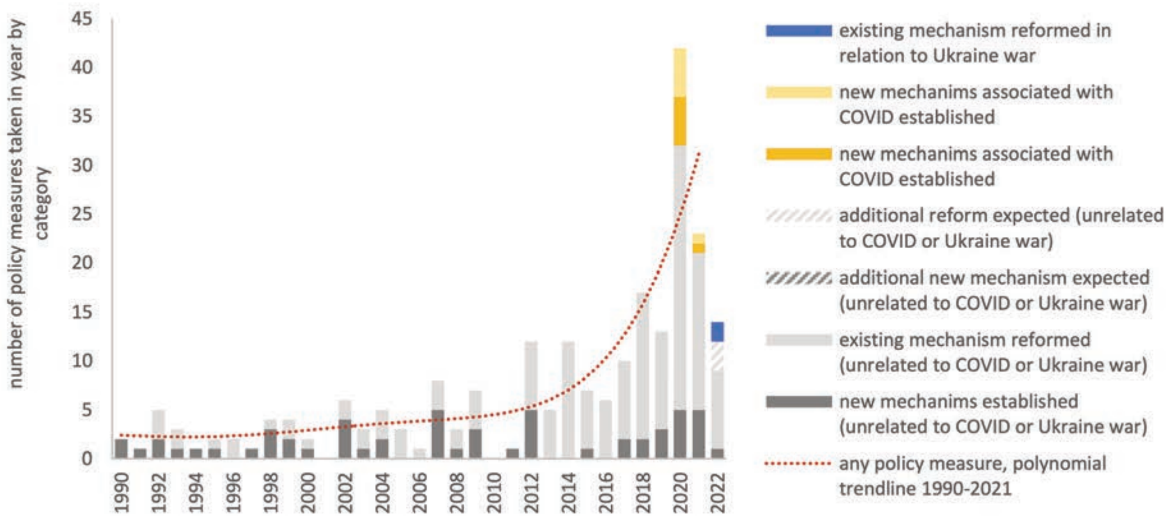
These concerns were shared broadly. As a result, a large and growing number of advanced economies began to introduce mechanisms to review foreign investment projects. Repeated reforms in quick succession transformed the initial rudimentary rules into operational mechanisms, established bureaucratic infrastructure, and led to the emergence of a new administrative discipline within only a few years.

The scope of application of investment reviews evolved in line with newly identified threats. The exceptional circumstances arising from the COVID-19 pandemic and, shortly after, the Russian invasion of Ukraine, have further accelerated reforms. Figure 1 documents policy-making activity across the now 38 OECD Members between 1990 and mid-2022.

[3] OECD work on this area is documented at https://oe.cd/natsec.

[4] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0372

Figure 1: Introduction or reform of mechanisms to review foreign investment projects for essential security implications in OECD Members 1990-2022

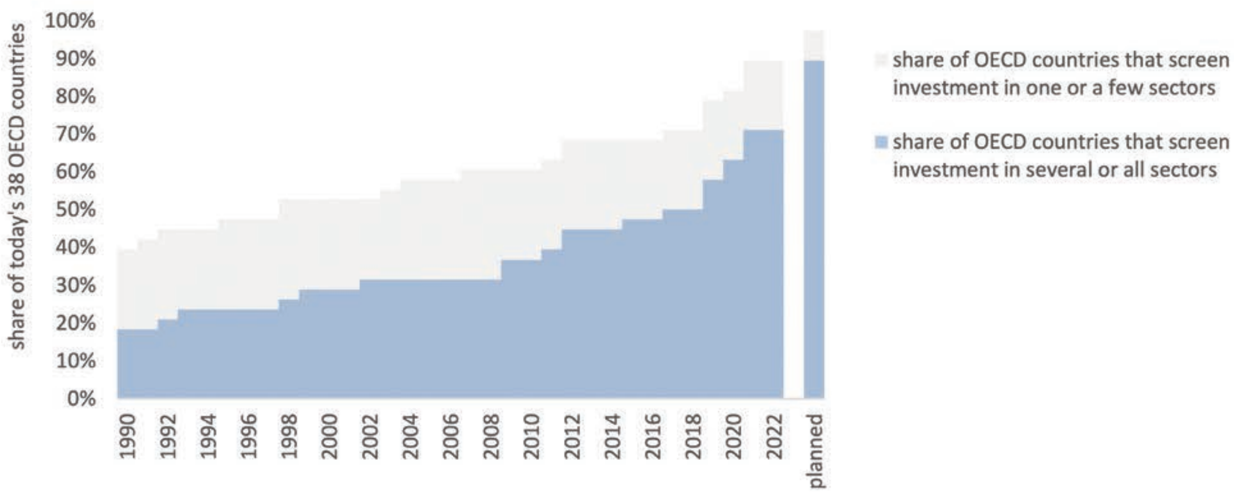


Source: OECD.

As a result of this policy-making dynamic, most OECD countries now have operational investment review mechanisms or will do in the near future.

In some countries, reviews can only be carried out for acquisitions in a narrow scope of sectors, while in others they can be carried out in multiple sectors (as in France for example) or across the entire economy. Broadly applicable investment review mechanisms have become the norm and replace or complement pre-existing sector specific mechanisms in some countries. By 2023, 34 of today's 38 OECD countries will have the possibility to intervene in foreign investment projects that threaten their essential security. Figure 2 documents how the share of OECD countries that operate such mechanisms has been growing over time.

Figure 2: Presence of narrowly or broadly applicable foreign investment review mechanisms in today's 38 OECD Members (1990-2022)



Source: OECD.

The establishment of investment review mechanisms in a growing number of countries that are important recipients of FDI and the broadening scope of mechanisms overall increases the likelihood that a given FDI transaction into an OECD country will be subject to screening. Many transactions may be subject to reviews in more than one jurisdiction if the target enterprise has subsidiaries in more than one country.

Security concerns evolve

Security concerns associated with foreign investment evolve as geopolitical and geo-economic parameters change, business practices develop, and investors adapt to new regulatory environments. All these factors have undergone rapid evolutions in the past years and investment review mechanisms are following suit.

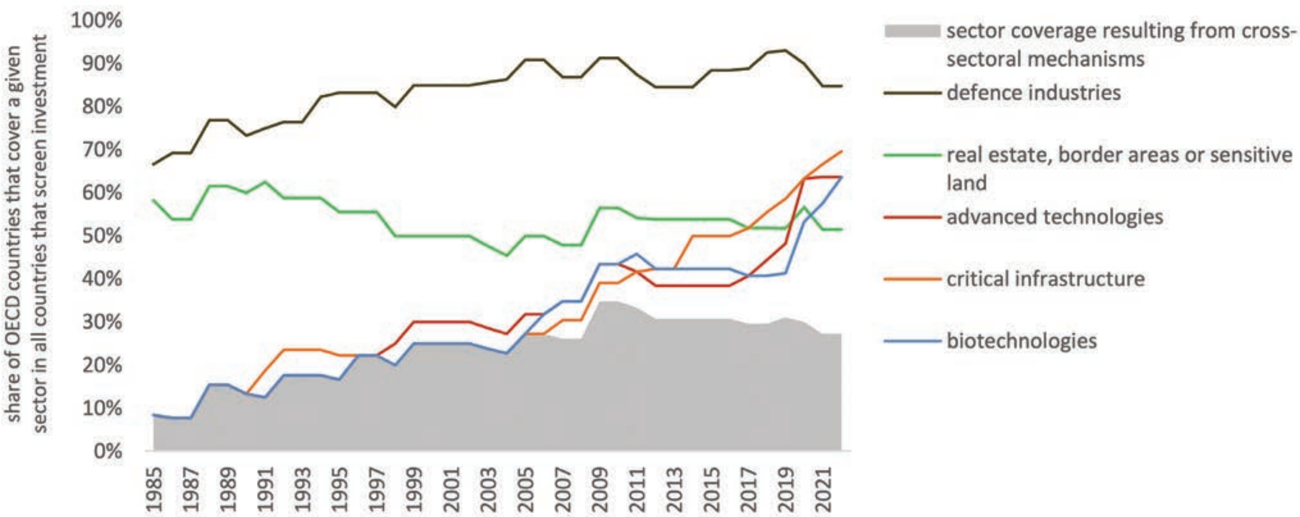
The sectoral scope of investment review mechanisms in the second half of the 20th century reflects a defence-mindset that saw espionage and sabotage as being the main concerns along with the risk that military capabilities of potential adversaries be furthered. Correspondingly, defence industries and sensitive real estate were the focus of review mechanisms and other restrictions on foreign ownership in most countries.

A number of factors have broadened the understanding of "essential security interests" significantly and are reflected in the evolving scope of investment review mechanisms: First, the privatisation of critical infrastructure such as telecommunications in the 1980s and 1990s opened these sectors to foreign capital. Second, technological developments created new vulnerabilities that malicious actors may try to exploit. Third, these technological advances also expanded the scope of industries that supply defence applications, and fourth, data on individuals now has a central role for essential functions of our societies.

Unexpected shortages of essential goods and services in the context of the COVID-19 pandemic have opened governments' eyes to vulnerabilities that they had hitherto ignored or accepted. These new insights led to the swift broadening of review mechanisms to include health-related industries and infrastructure.

Figure 3 documents these evolutions in OECD countries over time. It shows, for each year between 1980 and 2022, the share of OECD countries that applied investment screening to selected sectors from among those countries that had any investment screening mechanism in the same year. As such, it reveals the relative priorities among sectors in which foreign investment raises concerns and the growing diversification of these sectors.

Figure 3: Sector coverage of foreign investment review mechanisms in OECD Members as share of OECD Members that carry out investment screening in any sector (1985-2022)



Source: OECD.

More particularly, Figure 3 reveals that defence industries and sensitive real estate dominated concerns in the 1980s as almost the only sectors in which foreign investment was subject to security-related restrictions. Critical infrastructure and advanced technologies emerged in the scope of investment screening mechanisms in the 1990s. Biotechnologies first emerged as subject to investment screening in their own right in 2005, and their prominence rose extraordinarily swiftly in 2020 and 2021 with the spread of the COVID-19 pandemic.

Evolutions in this area are unlikely to come to a halt any time soon

The dissemination and substantive developments of investment policies related to essential security interests respond to an evolving economic and security environment. This environment will continue to evolve, and, judging from most recent events, this evolution will rather accelerate. The Russian invasion of Ukraine, the energy crisis, and the build-up of military tensions elsewhere; the climate crisis and its impact on food and water security; and the competition for increasingly scarce resources are all likely to weigh on international economic relations and on risk perceptions, and will consequently shape international investment policies and in particular investment screening policies.

Three main developments are expected in the near and medium term:

First, attempts to acquire advanced technologies, not least to boost defence capabilities, will rely on avenues other than acquisitions of mature companies. International research funding and inward and outward researcher exchange are likely developed as a means to transfer know-how across borders and to countries that are lagging behind technologically and a means to circumvent investment reviews.[5]

Second, strategic international investment in resource-rich or strategically located developing countries may be used to exclude open economies from these essential inputs and thus threaten their security. Such investment is not always intended to generate economic benefits for the investor – rather, the purpose may be to exclude other countries and their investors from use or access. This often state-directed behaviour is out of reach of traditional investment review mechanisms as it takes place in other, sovereign states.

Third, the dissemination and growing scope of investment review mechanisms could make beneficial international investment more difficult and onerous. To counter this effect, it is likely that governments will further refine their policies to minimise the impact on beneficial investment and establish transparency and predictability about policies and their implementation.

It is also likely that like-minded governments will increasingly co-ordinate their reviews, and they may ultimately even strive to co-ordinate mitigation measures. Many countries now include an explicit opening for international co-operation in their screening mechanisms, and the EU has spearheaded co-operation among EU Members based on EU Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union. It is likely that co-ordination of investment screening will be expanded in the future.

In this complex and constantly evolving context, the OECD provides evidence and comparable data to policy makers and offers a forum for co-operation and exchange on good policy practice across borders.

[5] See for a more detailed analysis Joachim POHL and Nicolás Rosselot (2021), "*Managing access to AI advances to safeguard countries' essential security interests*", OECD publishing, https://oe.cd/il/natsecbfo21.

PART II: THE FDI SCREENING IN FRANCE AND IN THE EUROPEAN UNION

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2021 CONFIRMED THE TREND INITIATED IN 2020 REGARDING FOREIGN INVESTMENT SCREENING IN FRANCE

By Marie-Anne Lavergne,
Head of Unit for Foreign Investment Screening at France's Directorate General of the Treasury

MINISTÈRE DE L'ÉCONOMIE, DES FINANCES ET DE LA SOUVERAINETÉ INDUSTRIELLE ET NUMÉRIQUE
Liberté Égalité Fraternité
Direction générale du Trésor

As a matter of principle, financial dealings with foreign countries are unrestricted. An open French market, coupled with a favourable geographical position and the efficiency of the nation's infrastructure, contributes to France's attractiveness on the world stage. This global reach is reflected in the significant contribution that foreign companies make to economic growth and job creation in France. France is home to 16,800 subsidiaries of foreign companies, equating to 2.2 million jobs, 20,1% of the economy's total revenue[1].

Although the pandemic triggered a collapse in global foreign direct investment in 2020, a strong rebound was observed in 2021, up 77% to an estimated $1.65 trillion, from $929 billion in 2020[2]. In this context, according to the EY 2021 Attractiveness Survey, France has retained the position it acquired in 2019 as the leading European host country for foreign investment. Still, it is essential for countries to establish safeguards to protect their national interests. For this reason, the Government may screen foreign investments in sectors or activities deemed essential for public order, public safety or national defence interests. Many countries around the world have thus strengthened and expanded their foreign direct investments (FDI) screening systems since 2018. France's system is characterized by a transparent, efficient and predictable legal framework, which contributes to its appeal for investors.

While 2020 and 2021 were years in which France retained its attractiveness on the global stage, they were also ones in which it displayed heightened vigilance vis-à-vis certain foreign investment transactions liable to jeopardise or threaten national security, particularly amidst the ongoing pandemic and its economic fallout.

The implementation of a stronger foreign investment screening system for France since 2020

The 22 May 2019 "PACTE law"[3], which entered into force in April of 2020, significantly strengthened the pow-

[1] Bilan des investissements internationaux en France 2021, Business France
[2] CNUCED, Global Investment Trend Monitor, No. 40.
[3] Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises

ers of French authorities to screen foreign investments. In particular, the law expanded France's screening system by extending the scope of covered investments and of covered sectors requiring screening, to include for example food safety as well as print and digital press. The PACTE law also granted the Minister for the Economy greater powers to impose sanctions for non-compliance with the rules.

In addition to the legislative and regulatory reforms, the Minister for the Economy made changes to France's system for screening foreign investment in response to the economic implications of the COVID-19 pandemic. The pandemic has considerably weakened France's economic fabric and, as a result, some of the country's more vulnerable strategic companies. Businesses are facing increased need for capital, including foreign capital, as well as industry backing critical to their survival. It follows that investments made by foreign entities in French companies whose activities are considered essential for national security may present risks. These risks call for closer scrutiny from the Government.

It is against this backdrop that the foreign investment screening system has played, and continues to play, a full part in protecting sensitive assets. In practice, this protection translates into measures aimed at preserving France's autonomy, in particular by keeping production capacity, know-how and critical skills on French soil. These safeguards, which have proven to be vital during the COVID-19 pandemic, are the very purpose and function of France's foreign investment screening system.

The Minister for the Economy maintains a constant vigilance which could lead to adapt the foreign direct investment system to new risks. For example, to best preserve national interests potentially threatened by the pandemic, France – like other European Union Member States including Italy, Spain and Germany – has taken specific measures to strengthen its screening procedures for foreign investment in its territory. Specifically, France followed the European Commission's recommendations to Member States that they make full use of their foreign investment screening systems.

Accordingly, a temporary measure was adopted in July 2020 to lower the threshold that triggers screening from 25% to 10% for investments by non-EU investors in publicly listed companies. This measure is designed to protect companies with dispersed ownership, in which a minority stake could give the shareholder significant influence over the company and its sensitive activities. As the economic crisis continued into 2021 and 2022, the provision, which was initially scheduled to expire on 31 December 2020, has been extended until 31 December 2022.

In addition, the list of critical technologies subject to screening was expanded twice since 2020 in order to cope with new risks identified for the public security. Foreign investments in R&D activities in biotechnologies are now submitted to the foreign investment screening system. As a result, investments in upstream, forward-looking activities deemed essential to public health protection, such as vaccine research and development, are now subject to screening. This measure has proven its efficiency. Between 2020 and 2021, applications for prior authorisation in the healthcare sector have doubled. More specifically, in 2021, applications in the biotechnologies sector accounted for about 26% of filings related to public health protection. Among applications related to biotechnologies, half of the transactions presented significant risks to public safety and required conditional authorisations by the Minister.

Moreover, to adapt to ongoing developments and challenges in the energy sector, R&D activities in technologies involved in the production of renewable energy were also added to the list of the sectors screened since January 1st 2022.

Furthermore, a European regulation on investment screening entered into force on 11 October 2020, something France had been calling for since September 2017. The regulation highlights the importance of foreign investment screening systems at EU level and encourages better cooperation between Member States and the European Commission to protect the EU against foreign investments that could potentially threaten public safety or public order. The French Treasury was closely involved in the rapid build-up and was very active in driving the cooperation and in sharing its best screening practices with other Member States. The Treasury notified 108 foreign investment transactions on behalf of France in the regulation's first year of application, from 11 October 2020 to 11 October 2021. France was among the five Member States accounting for 90% of all notifications made between 11 October 2020 and 31 June 2021.

2021 confirmed the tighter screening of foreign investment in France

The number of cases reviewed by the French government rose significantly during the year, from 216 in 2019 to 275 in 2020 and 328 in 2021. The increase is mainly due to the expanded scope of transactions and sectors subject to foreign investment screening in France, alongside with M&A market developments.

The main figures of FDI screening in France in 2021 illustrates the constant caution France exercised in 2021 to mitigate risks for public security. In 2021, 124 transactions screened by the French Treasury were found to pose potential risks to public order, public safety or national defence interests. In 54% of those cases, the Minister for the Economy tied specific conditions to investment authorisations in order to safeguard France's national interests.

There was little change from 2020 in the geographic origin of the ultimate investors whose transactions were subject to foreign investment screening. In 2021, most screened investments were made by non-European (non-EU/EEA) ultimate investors, accounting for 58.8% of investments. These investors were mainly out of the United Kingdom, the United States and Canada. Within the European Union (EU) and European Economic Area (EEA), investments were mostly made by ultimate investors located in Germany, Luxembourg and Ireland.. Finally, 2021 confirms the trend observed in 2020 regarding the sectoral distribution of screened FDI: foreign investments in non-defence sectors are still growing, mirroring the gradual extension of the scope of screening from the original defence and security sectors to non-defence sectors since 2014.

In 2021, 13.7% of investments screened fell under the defence and security sectors (e.g. activities relating to war material production, dual-use technology, cryptology activities or R&D activities in such activities[4]), down from 31.5% in 2020.

This figure is up to 56.9 % for investments in strictly non-defence sectors (e.g. activities relating to infrastructure, goods and services that are essential to safeguard the integrity, security and continuity of energy supply, public health, research and development in those activities), compared to 50.5% in 2020.

Some foreign investments fall under both categories (for example, investments in companies that have both civil and military aviation activities). These investments are classified in the "mixed" sector. This is the sector that experienced the strongest growth in 2021, accounting for 29.4% of screened investments compared to 18% in 2020.

Thus, already equipped with one of the most advanced screening systems in the EU, France further strengthened its screening system these past couple of years.

[4] Such as cybersecurity, biotechnology, semiconductors…

THE MAIN PURPOSE OF FRANCE'S FOREIGN INVESTMENT SCREENING POLICY

By Marie-Anne Lavergne,
Head of Unit for Foreign Investment Screening at France's Directorate General of the Treasury

MINISTÈRE DE L'ÉCONOMIE, DES FINANCES ET DE LA SOUVERAINETÉ INDUSTRIELLE ET NUMÉRIQUE
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The French market is characterised by its openness to foreign investors. This principle is enshrined in Article 63 of the Treaty on the Functioning of the European Union and, at national level, in Article L.151 1 of the French Monetary and Financial Code, according to which "financial dealings between France and foreign countries are unrestricted. This freedom is exercised subject to the procedures described in the present Chapter, in compliance with the international commitments made by France". By way of exception to this principle of freedom, certain foreign investments require prior authorisation from the Minister for the Economy, and Government control over these investments is strictly governed by law. This exception may only be applied if the proposed transaction meets three cumulative conditions, relating to the investor's nationality, the nature of the transaction and the sector of activity of the targeted French company.

Foreign investment screening as a defensive national security instrument

France's foreign investment screening system is designed to protect activities deemed essential to safeguard national interests in terms of public order, public safety and national defence. For example, this can mean ensuring autonomy of production and continuity in the supply of critical inputs across the French territory. In this light, foreign investment rules in France can thus be seen as a defensive instrument against investments that risk impacting production and supply chains across the country.

The Minister for the Economy may therefore attach a wide range of conditions to an investment authorisation, aimed at protecting strategic national interests and mitigating risks posed by the foreign investment, in particular the risk that sensitive assets or production capacity could be sent offshore and the French market no longer served. Such conditions can require that sensitive assets, whether relating to the defence sector or the non-defence sector (energy, critical technologies, transportation, food safety, communication networks, etc.), be kept or domiciled in France. In addition, these conditions may remain applicable either for a limited period of time or, if the risk is deemed to be long-term, for as long as control is exercised by the foreign investor.

Once an investment has been made, the Interministerial Committee on Foreign Investment in France, headed by the Directorate General of the Treasury and composed of 30 or so officials from different ministries, follows up the transaction and monitors the investor's compliance with any conditions set by the Minister for the Economy for the authorisation of the investment. In the event of a violation of the conditions tied to an investment authorisation, the Minister for the Economy may impose sanctions on the investor, in proportion to the nature and severity of the breach.

The Minister for the Economy may also refuse to authorise a foreign investment. Such a decision, which is the outcome of a strictly regulated process, is used as a last resort, particularly if the national interests at stake are so high that they cannot be protected by imposing conditions. Accordingly, pursuant to the EU regulation on the screening of foreign investments into the Union,[1] the Minister for the Economy is entitled to take into consideration any ties that a foreign investor may have to a foreign government or foreign public entity. The Minister for the Economy may also refuse to grant authorisation if there is a strong presumption that the investor is likely to commit an offence (e.g. a criminal or tax offence), has been convicted of such an offence, or has violated France's rules on foreign investment screening in the five preceding years.

Foreign investment screening as an offensive national security instrument

France's foreign investment screening rules are a tool for supervising the market and investment flows. The system gives the central government the power to intervene when a foreign investment is made in a company that carries out sensitive activities.

Before a foreign investment is made, a French target company, or a potential foreign investor, can seek an opinion from the Minister for the Economy as to whether the company's France-based activities fall within the scope for screening. By disclosing the level of sensitivity of the French company's activities while negotiations are still at an early stage the Minister for the Economy indicates how much vigilance he would exercise over a foreign investment in the company. In certain cases, this procedure can allow the Minister to prevent a merger or acquisition that could threaten public order, public safety and national defence interests. Indeed, if the transaction was executed without the prior requisite authorisation, the Minister for the Economy may either take corrective action to put the transaction in order, if the investor is deemed to be in good faith, or impose sanctions.

Detecting unauthorised investments is performed using both national and European tools. At national level, the central government relies on a multidisciplinary network of ministerial departments and government agencies located in France or abroad. At European level, the regulation on the screening of foreign investments complements national systems by providing a very unique framework for Member States to share intelligence. In particular, information on a specific investment that may affect other Member States can be cross-checked, and transactions that should have been subject to screening in France can be identified.

As a result, France has a range of tools and measures at its disposal to effectively protect its companies and assets that are essential to the country's national security.

[1] Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union.

PRACTICAL ASPECTS OF FOREIGN INVESTMENT SCREENING IN FRANCE

By Marie-Anne Lavergne,
Head of Unit for Foreign Investment Screening at France's Directorate General of the Treasury

MINISTÈRE DE L'ÉCONOMIE, DES FINANCES ET DE LA SOUVERAINETÉ INDUSTRIELLE ET NUMÉRIQUE
Liberté Égalité Fraternité
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A reform of France's foreign investment screening system was launched under the PACTE law, along with regulatory reforms, culminating in the publication of Decree No. 2019-1590 of 31 December 2019 and the Order of 31 December 2019 relating to foreign investment in France. They entered into force on 1 April 2020. Foreign investment screening occurs in the strict observance of the legal and regulatory framework, with the sole objective to protect public security, public order and the interests of national defence.

After this reform, in an effort towards further transparency and predictability, guidelines[1] were published in September 2022 in order to explain the rules and the process of the French FDI screening system and to increase legal certainty for investment stakeholders.

Principles governing the screening, enforcement and sanctioning powers of the Minister for the Economy

The principle of confidentiality inherent to trade secrets and national defence secrets applies to France's foreign investment screening procedures. Accordingly, decisions made by the Minister for the Economy and the substance of discussions between the government and parties to a foreign investment subject to screening are not made public.

Any decision made by the Minister for the Economy under this system is also governed by the principle of proportionality. In order to ensure that decisions are well founded, the Minister for the Economy relies on (i) the technical expertise of the members of the Interministerial Committee on Foreign Investment in France (e.g. to determine the level of sensitivity of a French company's activities, the nature and extent of any events of non-compliance, etc.) and (ii) regular dialogue with both parties of a transaction, in compliance with the principle that both sides be heard.

Any decision taken by the Minister for the Economy is subject to full judicial appeal.

The government's actions in the area of foreign investment screening are also governed by a principle of transparency, which, by virtue of Article L.151-6 of the Monetary and Financial Code, requires the State to issue to the public, on an annual basis, key statistics on its foreign investment screening. These disclosures must be made within the limits of the provisions relating to national defence secrecy and in a manner that guarantees the anonymity of the entities and individuals concerned. The first public annual report on the foreign investment screening in France was also published in 2021, putting altogether the recent po-

[1] Available on : Investissements étrangers en France | Direction générale du Trésor (economie.gouv.fr)

litical changes in the screening scope and the key figures and trends of the screening.

Finally, Article L.151-7 of the Monetary and Financial Code establishes a framework for the central government and Parliament to share detailed information pertaining to foreign investment screening. This may take the form of an annual report prepared by the government containing detailed information on screening procedures (which is not public), closed-door hearings with certain members of the administration, or parliamentary investigations (review of records or on-site inspections).

Material scope of application for foreign investment screening

Foreign investments in France are subject to screening if three cumulative conditions are satisfied, namely the investor's nationality, the nature of the transaction and the activity sector of the targeted French company.

First, all foreign investors, irrespective of nationality, are subject to foreign investment rules (Article R.151-1 of the Monetary and Financial Code). Consequently, investors from both EU and non-EU countries may be subject to screening. The investor's nationality is determined by considering the entire ownership chain of the direct acquirer. In other words, the presence of one foreign link in the chain is enough for the investor to be considered foreign. This was introduced with the PACTE Act reform in order to prevent screening rules from being circumvented.

Second, an investment is subject to foreign investment screening rules (pursuant to Article R.151-2 of the Monetary and Financial Code) if an investor (i) acquires control of a company within the meaning of Article L.233-3 of the French Commercial Code, (ii) acquires all or part of a business line or (iii) crosses the 25% threshold of voting rights of a company (this last category does not apply to investors from the EU or European Economic Area).

Last, only investments made in at least one of the sectors specifically listed by regulation (Article R.151-3 of the Monetary and Financial Code) and liable to jeopardise public order, public safety or national defence interests are subject to screening. The degree of sensitivity of the targeted French entity's activities is determined on a very comprehensive case-by-case investigation led and coordinated by the Directorate General of the Treasury, tapping into the sector-specific expertise of the Interministerial Committee on Foreign Investment in France. This Committee gathers ministries and public agencies specialized in the sectors falling within the scope of FDI screening.

The comprehensive list of sectors is defined in Article R. 151-3 of the Monetary and Financial Code. They can be grouped into three categories.

First, there are inherently sensitive activities that fall within the defence and security sectors, such as activities relating to weapons, munitions, explosive powders and substances intended for military use or relating to war material, dual-use items and technology, gambling activities (except for casinos) and activities relating to cryptology resources and services.

Next are activities relating to infrastructure, goods and services that are essential to guarantee the integrity, security and continuity of energy and water supplies, transportation networks and services, public health, and food safety. Unlike defence activities, these activities are not considered inherently sensitive.

Last are research and development activities carried out in the sectors mentioned above that relate to certain critical technologies listed by Order1 or to dual-use items and technologies listed in Annex I of the Council Regulation (EC) of 5 May 2009.

The last two categories are evaluated based on a set of indicators specific to the sector and the transaction at hand, including the immediate market availability of products and services of equivalent quality, the degree to which the products are critical and the nature of the market served.

Types of filings with the Minister for the Economy

Two types of filings are provided for by law: applications for authorisation and requests for opinion.

To begin with, an application for authorisation of a foreign investment (Article R.151-5 of the Monetary and Financial Code) can only be filed with the French Treasury by the investor and must concern the entire transaction: the nature of the investment, the sensitivity of the French target company's activity and the nationality of the investor are thus examined. The proposed investment must be at a sufficiently advanced stage (negotiations and discussions between the stakeholders, execution of a sale agreement, etc.) and its parameters must already be defined (amount, final shareholder structure, etc.).

Per the regulations, the Ministry for the Economy has an initial period of 30 business days from the date a complete application for authorisation has been filed to decide if the investment is subject to foreign investment screening and

[2] Order of 31 December 2019 relating to foreign investment in France

can proceed on the basis of a simple authorisation. The set of documents that must be attached to the application for authorisation is specified in the Order of 31 December 2019 relating to foreign investment in France[3]. A second period of 45 business days may then begin if the Minister for the Economy estimates that further investigation is needed and in particular if conditions are required to protect national interests. If no response is given within these time frames, the application is deemed to have been rejected.

If the investment falls within the material scope of application for screening, there are two types of decisions that the Minister for the Economy may issue.

The Minister for the Economy may authorise the investment, either in the form of a simple authorisation or a conditional authorisation, according to the activity's degree of sensitivity. Any such conditions, which are spelled out in Article R.151-8 of the Monetary and Financial Code, must be proportionate to the specific characteristics and related risk of the investment and are divided into four categories.

The first category of possible conditions concerns the long-term survival and continuity of sensitive activities and safekeeping of sensitive information on French territory. The second relates to the protection of know-how and skills of the French company. The third pertains to the preservation of national interests in the target company's legal structure by requiring adjustments to the target company's internal organisational and governance procedures, as well as the way the investor's rights in the target company are exercised. The fourth concerns the sharing of information between the parties to the investment and the government, in particular to monitor the investor's compliance with the conditions.

The Minister for the Economy may also refuse to authorise an investment (Article R.151-10 of the Monetary and Financial Code) if (i) it is not possible to attach sufficient conditions to an authorisation to maintain public order and public safety or to protect national defence interests, or (ii) there are compelling grounds for doubting the investor's character owing to recent criminal convictions or a track record of violating France's foreign investments rules.

The decision to grant authorisation is at the unilateral discretion of the Minister for the Economy, and this extends to any conditions that may be imposed. However, conditions are defined by way of discussions with the investor and its legal counsel, particularly to ensure that the investor understands the conditions and is able to comply with them.

Furthermore, a temporary filing procedure was set up by Decree No. 2020-892 of 22 July 2020 on the temporary lowering of the threshold for the screening of foreign investments in French companies whose shares are admitted to trading on a regulated market. It aims at further protecting listed companies from opportunistic and malicious minority share acquisitions at a time when the listed markets could face financial turbulence due to economic fragility. Originally in effect through 31 December 2020, this provision was extended in 2021 and until 31 December 2022 by Decree No. 2021-1758 of 22 December 2021.

This procedure does not apply to European investors and only relates to investments in publicly listed companies. The investigation procedure for this type of request is streamlined. The file that accompanies the request is shorter and the list of documents to be provided is specified in the Order of 22 July 2020 on the temporary lowering of the threshold for the screening of foreign investments in French companies whose shares are admitted to trading on a regulated market. Its application is even processed under an accelerated procedure based on a notification to the Directorate General of the Treasury. The Minister for the Economy has 10 business days to decide whether the transaction should be authorised (no response indicates tacit approval) or be subject to further examination. In the latter case, the foreign investor will have to file a full application for prior authorisation under a standard authorisation procedure.

Some exemptions to this authorisation procedure exist. An investor is exempt from obtaining such an authorisation under Article R. 151-7 of the Monetary and Financial Code if the investment is made between entities all belonging to the same group, if the investor crosses the 25% threshold of voting rights of an entity in which it had previously acquired control by virtue of an authorisation from the Minister for the Economy, or if the investor acquires control of an entity in which it had previously crossed the 25% threshold of voting rights by virtue of an authorisation issued by the Minister for the Economy. However, these exemptions do not apply to foreign investors

[3] The Order of 10 September 2021 broadened the list of documents to be submitted when filing an application for authorisation or a request for opinion in order to cover the points of concerns usually raised during the investigation, and to reflect the European cooperation system. Applications must now include additional information, particularly relating to intellectual property rights as well as how French customer data is accessed and managed. Investors must also include the European notification form in their application, as well as describe their business activities, competitive environment and strategy in the European Union.

wanting to make an investment in a French company that had previously been reviewed under France's foreign investment screening procedures, as the risks to national security may evolve over time.

Moreover, following the reform that entered into force on 1 April 2020, both the investor and the target company are now able to refer a matter to the Minister for the Economy before the investment process is initiated (decision taken at a shareholders' meeting, decision to raise capital or investor decision taken by the board of directors, etc.), in order to confirm whether the company's France-based activities are sensitive and thus fall within the scope of screening. The objective of this request for opinion (Article R.151-4 of the Monetary and Financial Code) is to provide clearance for the transaction or the French company involved, from the moment negotiations between the French company and a foreign investor begin or as soon as the French company considers raising capital. The Minister for the Economy will issue an opinion within two months based on the activities carried out by the French company on the date of its request. This opinion does not prejudge the sensitivity of the company's activities in the event the scope of these activities changes or the market in which the company operates undergoes a major change.

This procedure offers several advantages for the target company, the investor and the government. The target company can confirm whether it needs to obtain prior authorisation for a foreign investment. As a result, it can more effectively pursue new investors and anticipate the suspension clause for an investment. It also helps informing the potential foreign investors of the need for authorisation prior to the submission of their offers. The investor can more accurately value its investment by factoring into the negotiations the requirement to obtain an authorisation, including any consequences (still unknown at this point in time) that a conditional authorisation could have for its strategy towards the company, so that it can reflect this in its strategic plan. It also allows the government to anticipate and alert very early to possible points of concern on the risks that the foreign investment might present.

Enforcement actions applicable to the foreign investment screening procedure

The Minister for the Economy has enforcement and sanctioning powers (Articles R.151-12 to R.151-15 of the Monetary and Financial Code), which were enhanced under the PACTE Act. These powers are exercised in accordance with the principle of proportionality and principle that both sides be heard. As such, when a breach is suspected or observed, the Minister for the Economy gives the investor notice to submit its comments within 15 days (which may be reduced to five days in some cases) and could engage a contradictory process, before ordering it to comply with certain obligations based on the nature and severity of the breach.

If a foreign investment transaction in a sensitive company is executed without authorisation, the Minister for the Economy may order the investor to do one or more of the following: (i) apply for authorisation to put the transaction in order, (ii) amend the transaction, (iii) return to the status quo ante at the investor's expense. It is not a given that an investment transaction will be put in order.

If an investor has obtained authorisation for the investment from the Minister for the Economy but has failed to comply with the conditions tied to the authorisation, the Minister for the Economy may do one or more of the following: (i) withdraw the authorisation, (ii) enforce compliance with the initial conditions, (iii) enforce compliance with new conditions, requiring for example that the investor divest certain activities or return to the status quo ante.

Enforcement orders may be cumulatively accompanied by a daily penalty payment, precautionary measures to protect public order, public security or national defence (such as suspending the investor's voting rights, assigning an agent, or preventing the investor from disposing of assets or receiving dividends) and a fine that can be up to twice the amount of the unauthorised investment, 10% of the target company's annual turnover, or €1m for an individual and €5m for an entity. Such a fine may also be imposed if the investor obtained authorisation in a fraudulent manner or failed to comply with an enforcement order.

Finally, criminal measures can be imposed to anyone who violates the regulation, in accordance with Article 459 of the Customs Code (fine, imprisonment, etc.), upon complaint by the Minister for the Economy.

France has a robust and strictly framed system for foreign investment screening that provides the Minister for the Economy with a range of tools to protect sensitive national assets while allowing it to remain a top destination for foreign investment.

To learn more about FDI screening in France, visit: Investissements étrangers en France | Direction générale du Trésor (economie.gouv.fr)

Frequently asked questions (in English)

EUROPEAN CONTROL OF FOREIGN INVESTMENT AT THE EU LEVEL

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By Denis Redonnet,
Deputy Director General and
Chief Trade Enforcement Officer

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

The EU framework for foreign direct investment (FDI) came into force in October 2020. It creates a "cooperation mechanism" that allows all Member States and the Commission to jointly assess potential threats to security and public order from FDI. This system builds on and complements existing control mechanisms in Member States. The regulation allows the Commission to issue opinions on specific foreign direct investments if it considers that they are likely to affect the security and public order of more than one Member State or are likely to adversely affect projects or programmes of interest to the EU on security or public order grounds. The final decision to reject, authorise or require mitigation measures rests with Member States. This new mechanism reflects a new assertiveness in EU trade policy that lies at the crossroads between economic and security considerations.

Strategic monitoring of trade and investment

One of the primary objectives of EU trade policy is that the bloc remains open to trade and investment without jeopardising its security. The EU has created stand-alone tools – two separate regulations – that address both sides of the same coin. Looking inwards, FDI control prevents the acquisition of sensitive technologies and other critical infrastructure or inputs within the EU. Looking outwards, export controls restrict the export of sensitive goods, technology, information and services that could be used for military purposes and violate human rights in the destination countries. The EU has established a new regulation that includes provisions on dual-use items to reflect technological advances. It has been in force since September 2021.

These are two sides of the same coin: it would be inconsistent to have strict rules restricting access to key technologies in dangerous destinations while leaving the door open for investors based in those destinations to avoid export controls by buying production capacity in Europe.

The road travelled so far

The EU investment screening framework provides us with a clearer picture of the impact of FDI in other Member States or on important European projects. FDI screening controls the acquisition of sensitive technologies and other critical infrastructure or inputs within the EU. Cooperation on this issue within the EU is increasing.

The Commission receives a growing number of notifications every week: more than 400 cases were examined in 2021. This mechanism works extremely quickly, avoiding delays in investments as much as possible. More than 80% of all cases examined are closed very quickly within just 15 calendar days, without the need for in-depth assessments. Despite this speed, the Commission does scrutinise cases and transactions that are clearly sensitive. There have been very few cases where the Commission has issued a formal opinion (less than 3%). Member States have welcomed those that have been issued, however. Lastly, although the mechanism focuses on security, it does not hinder the EU's openness to FDI. Member States – which have the final say on each investment – block less than 3% of transactions.

The Commission covers the European aspects, where FDI has an impact on more than one Member State and/or projects or programmes relevant or beneficial to the EU (Galileo and Horizon Europe, for example). EU cooperation complements Member States' screening mechanisms; it does not replace them.

An initial assessment: the annual report

The regulation requires the Commission to report annually to the European Parliament and the Council on its implementation. The Commission's first report on screening foreign direct investment in the EU was approved on 23 November 2021. The report covers the following: FDI figures and trends in the EU; legislative developments in Member States; screening activities by Member States; and an assessment of how EU cooperation on FDI screening has worked since 11 October 2020, the date on which the EU FDI Screening Regulation came into force.

Turning to the main findings, the report highlights that the Commission reviewed 265 transactions notified by Member States up to the end of June 2021. A full 80% of transactions did not warrant further analysis and were therefore assessed by the Commission within just 15 days. Most screening notifications from Member States were linked to the manufacturing, information and communication technology, wholesale and retail sectors. Among those FDI cases notified to the Commission, the US, the UK, China, Canada and the UAE were the top five source countries for foreign companies seeking to invest in the EU. The Commission issued an opinion in less than 3% of the 265 cases examined. The first annual report showed that the EU remains open to foreign investment while protecting its security and maintaining public order, and that the cooperation mechanism works effectively and does not cause unnecessary delays to transactions.

The second annual report will cover 2021.

Responding to an ever-changing environment

By providing regular guidance to Member States, the Commission is trying to make it easier for the EU to adapt to changing environments. It is doing this in two ways.

Firstly, it has improved transparency and has made it easier for Member States to cooperate by providing a platform for sharing information.

Secondly, the Commission has provided policy guidance to assist Member States in developing national screening regulations and has supported them through a challenging period. The COVID-19 crisis has shown how FDI screening can be a valuable tool in mitigating the risks associated with certain foreign investments in Europe's critical healthcare assets. It can also protect other critical assets from volatility or undervaluation. In its March 2020 guidance, the Commission encouraged all EU Member States to adopt and use national screening mechanisms. On 5 April 2022, the Commission issued guidance to EU Member States on assessing and preventing threats to EU security and public order from Russian and Belarusian investments. The guidance highlights the increased risk of investments being controlled by the Russian or Belarusian government following the Russian invasion of Ukraine. It calls for close cooperation between the authorities involved in investment screening and those responsible for implementing sanctions. If they have not already done so, Member States are urged to put in place comprehensive investment screening mechanisms as a matter of urgency. They are also advised to enforce anti-money laundering rules to prevent the abuse of the EU financial system by Russian and Belarusian investors.

An increasing number of Member States have introduced their own screening mechanism: 18 now have a mechanism in place.

The international aspects of investment control

The Commission also plays a key role in the international aspects of foreign investment control. The EU-US Trade and Technology Council (TTC) has a specific working group on investment control. Russia's military aggression against Ukraine has focused EU and US attention on the importance of putting in place robust foreign investment control mechanisms. This working group provides an opportunity to improve understanding of each other's regimes and to share information and best practices. It also provides a clearer picture of the evolving threat landscape for certain foreign investments. The EU and the US recognise the security risks associated with certain investments but have repeatedly stressed their commitment to remaining open to foreign investment, seeing it as a key driver of economic growth and innovation.

This EU-US cooperation has resulted in a joint work programme, and to date the investment control working group has held two meetings and a stakeholder awareness event. At the first meeting, the working group discussed investment trends with a bearing on security. Our discussions focused on general trends in foreign direct investment, investment trends and strategies of selected investor countries – including Russia – and trends in transaction structures of special interest. We also presented an overview of the implementation of FDI control regimes based on the consolidated information available in our respective publicly available reports. The working group's second meeting provided an opportunity to share best practices, with a focus on sensitive technologies and sensitive data issues, and present case studies supporting a more targeted discussion on risk analysis and risk mitigation measures.

The purpose of these meetings is not only to share information, but also to gain a better understanding of our similarities and differences, to deepen the group's understanding of shared and individual risks, to emphasise the importance of investment control as an essential tool for dealing with security and public order risks, and to explore possibilities for further technical discussions to make future collaboration even more effective.

Next steps: continuing implementation and tackling the weak link

With just under two years of experience, the Commission's priority at this stage is still the successful implementation of the EU cooperation mechanism, working closely with Member States.

A chain is only as strong as its weakest link, so the Commission will continue to encourage all Member States to adopt a screening mechanism to strengthen the bloc's security. Right now, nine Member States have not yet implemented a screening mechanism, although many of them are in the process of doing so. Screening mechanisms also differ from one member state to another. We will continue to strive for greater convergence, for example through sharing best practices and working systematically with Member States.

PART III - KEY ACTORS

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THE FRENCH INVESTMENTS AGENCY PROTECTS COMPANIES IN STRATEGIC SECTORS

Interview with Martin Vial, Commissioner for French Government Investments, Director of the French Investments Agency (2015-2021), published in May 2021

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Sovereignty

How does the French government ensure it has sufficient control over structurally strategic companies such as nuclear and defence-related businesses?

Martin Vial: The State shareholder investment policy means that we invest or continue to invest in companies that are important to France's sovereignty – defence companies and civil and military nuclear power companies.

In the civil and military defence sectors, the State holds a majority or 100% control over the major players: EDF, Orano, Areva and TechnicAtome. In these sectors, the government also has specific and very extensive powers to authorise the operation of nuclear installations and exports. Lastly, the safety of nuclear facilities is monitored by an independent authority, the French Nuclear Safety Authority.

In the defence sector, the State shareholder has two complementary levers:

- Firstly, it has significant holdings in the capital of the main companies in the French defence industry or those with defence divisions in which it is generally the main shareholder or joint shareholder (100% of SNPE/Eurenco, 65% of Naval Group, 50.3% of TechnicAtome, 50% of KNDS, 26% of Thales, 11% of Safran and 11% of Airbus).
- Secondly, it holds special shares (known as "golden" shares) that give it certain powers over a company's capital over and above the generally applicable rules of law in situations where protecting the country's vital interests in matters of public order, public health, public security or national defence is at stake. The State currently holds a golden share in Thales, Nexter Systems and Safran Ceramics.

This golden share regime was strengthened by the PACTE Law, which extended the scope of the mechanism while maintaining its compliance with the principles of European law.

Lastly, the government may use other mechanisms in addition to golden shares to secure certain strategic assets, such as special agreements with certain companies or the French foreign direct investment control mechanism.

Strategic sectors and industries

What approach does the government take in providing support for the development of domestic companies in sectors that are essential for the growth of the French economy? What will happen in the post-Covid world?

Martin Vial: In 2017, we simplified the State shareholder investment policy. The government's aim is to be a shareholder in three types of companies: strategic companies that contribute to our country's sovereignty (defence and nuclear), companies with public service remits or of national or local general interest and for which regulation would be inadequate to protect public interests and fulfil public service remits, and lastly, companies in difficulty whose disappearance might lead to a systemic risk.

The Covid pandemic has changed our portfolio management priorities significantly. This hypercrisis has prompted us to revise our guidelines, at least for the time being. Our first priority is to rescue or safeguard large companies. Many of the companies in our portfolio are enduring unparalleled disruption to their business models because they have no idea when their sectors – transport, aeronautics, automotive – will return to pre-crisis levels of activity. For some of them, we have already intervened; for others, we will undoubtedly have to support them in the future.

The second priority of the State as a shareholder is to support those companies in our portfolio that are only slightly or not at all affected by the pandemic and that should seize opportunities for acquisitions and mergers or to refocus their activities. We are currently engaged in a shareholder dialogue with some of these companies' management and governance teams to this end.

Our interventions will also be disrupted into the future because the crisis marks a shift in the defence of French sovereignty and the protection of French economic interests. The crisis has not only weakened the financial situation of French and European companies, especially in the most exposed sectors, but has also highlighted how fragmented the capital of some of them is, exposing them to unfriendly and unwanted takeovers. France's Minister for the Economy, Finance and Recovery, Bruno Le Maire, recently spoke of the importance of economic sovereignty for our country. This is why the government may have to intervene to prevent takeovers that jeopardise decision-making powers or research and technology assets in France. This happened recently with Photonis and Carrefour. The French Investments Agency may also have to intervene to secure the capital of certain large French companies.

Lastly, the pandemic has strengthened environmental requirements and accelerated implementation.

Rather than pushing environmental issues into the background, the hypercrisis has actually strengthened them. The French Parliament – like most parliaments in EU countries – has increased environmental requirements for companies that the State supports and has made eco-conditionality a benchmark for controlling this support. We must increasingly align our portfolio management with this approach.

Rescue

How does the State intervene to save a company whose disappearance would pose a systemic risk for France? What about in the post-Covid world?

Martin Vial: The French Investments Agency's special allocation account received €20 billion from an emergency budget in 2020 to provide financial support to strategic companies weakened by the health crisis. It has already used almost €9 billion of this: Air France-KLM (€3.6 billion), SNCF (€4 billion), EDF (€1 billion).

The aviation and aeronautics sector is a good illustration of government intervention in a sector stricken by the shutdown of air traffic. The pandemic has had a profound effect on air traffic worldwide, with repercussions for the entire French aeronautics industry of nearly 1,300 industrial companies employing more than 300,000 people. Production output for manufacturers' main programmes decreased by between 35% and 40%, affecting all companies, both prime contractors and subcontractors. To support the industry through the crisis, but also to prepare it to meet the unavoidable future challenge of the green transition, Bruno Le Maire decided in spring 2020 to put in place a support plan of more than €15 billion in aid, investments, loans and guarantees, which was approved by the government in June 2020. This support plan was closely coordinated with the French Aerospace Industries Association and prime contractors such as Airbus, Safran and Thales, in which the French State is a shareholder. The plan also includes an industry support fund, designed to bolster the equity of aeronautical subcontractors affected by the crisis. This fund is managed by Ace Capital Partners, and is now fully up and running. The French government and Bpifrance have set aside €200 million in this fund, matching the money earmarked by all the industry's prime contractors (Airbus, Safran, Thales and Dassault Aviation).

Besides this plan for the aeronautics industry, the government's Recovery Plan included sector-specific plans to support the automotive, nuclear and rail industries. The State shareholder clearly has a major part to play in financing this support.

BPIFRANCE: THE LEADING PUBLIC INVESTOR AND ITS LAC1 FUND

Interview with José Gonzalo,
Executive Director Development Capital,
Bpifrance

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School) Interview conducted with the assistance of Marie Ghérardi Lévêque and Céline Glas, students of the Specialised Master in International Business Law and Management at ESCP Business School

During the Covid-19 pandemic, controlling certain companies with key know-how and managing supply chains was crucial. Do the pandemic and the Bpifrance LAC1 fund mark turning points for foreign investment control in France? Can we talk about a change in philosophy?

José Gonzalo: The initiative for this project came about because we noticed the lack of a "French core" in our companies and the significant involvement of investors from the English-speaking world. There are no pension funds in France, unlike in English-speaking countries, and yet such funds hold on average between 3 and 6% of the capital of French listed companies. Although French companies are attractive, they lack a stable French shareholder base ready to support them over the long term. Bpifrance aims to remedy this, primarily through the creation of the LAC1 fund. Bpifrance has also used its own equity to become a shareholder in some 600 French companies of all sizes, 25 of which are listed, including Stellantis, Orange and Valéo, but our resources are limited.

This is why we set out to raise a dedicated fund and attract French and foreign investors by drawing on our professionalism and our experience in creating value for the companies we support.

We have a good track record, a team whose professionalism is widely recognised, and a name in the market that no longer needs introduction. The LAC1 fund was launched in May 2020 with the goal of acquiring significant minority stakes in CAC 40 and SBF 120 companies, and thereby becoming one of the top three investors. Our objective is always to create long-term value in the companies whose development we support through a stable shareholder base. To achieve this, we make our shareholding conditional on having a seat in the company's governance structure.

We have raised nearly €5 billion, despite the Covid pandemic which stalled prospecting, particularly abroad.

The starting point was French institutional shareholders, around 15 of whom were impressed by our investment proposition and past successes. Together, they subscribed to €1 billion. French family offices make up our second group of investors: the Dassault family, for example. Armed with this solid French base, we turned to foreign investors such as the Mubadala sovereign wealth fund in Abu Dhabi.

To date, we have made five investments in ARKEMA, EssilorLuxottica, Exclusive Network, SPIE, and Seb.

Do you have a specific investment policy for the growth of LAC1? Are you targeting any particular sectors?

José Gonzalo: The fund is not intended to target particular sectors. On the contrary, it is a multi-sector fund focused primarily on creating sustainable value by taking environmental and social criteria into consideration.

Bpifrance adjusts to these companies' issues and growth phases on a case-by-case basis. To do this, we have a variety of tools for investing, including LAC1 and our own equity, depending on the specific issues. For example, we invested in NEXANS, a French submarine cable and information carrier, using our own funds. This is a sector that we have identified as strategic.

Our vision of the key sectors of the French economy and heritage is broad, and we are prepared to use all the means at our disposal to support their growth and play a part in consolidating an important French base.

How do you approach your search for value creation? Do you have a think tank and how do you identify strategic sectors?

José Gonzalo: Bpifrance has no intention of getting involved in sectors of key importance to national sovereignty, such as defence or national transport (Air France, SNCF).

However, we do work in partnership with the French government in supporting these key sectors through various sale and purchase operations. For example, when we sold our stake in ERAMET – a mining company in New Caledonia – to the State, it made sense for the State to become a shareholder in this company with a public service vision. By contrast, when a company has a purely commercial purpose, we can buy out the State's holding, as was the case with PSA, which became Stellantis. Each case is different, and we work closely with the government to determine the most appropriate shareholder. Bpifrance's vision of strategic sectors is also broader and includes education, health and renewable energy.

For our investments using our own equity, we present and validate them in an investment committee made up of representatives from the French Investments Agency and the Caisse des Dépôts together with independent experts, chaired by Frédéric Saint Geours. The French Investments Agency is therefore aware of our projects, but it does not choose our investment sectors. Our vision is broad and we collaborate with many public-sector stakeholders, but our choices are our own. Our investments are very diverse and varied and may involve an energy engineering company, such as TECHNIP Energie, or companies in the education sector, such as GALILEO and IPESUP, or in the audiovisual production sector, such as MEDIAWAN.

We are a public shareholder that behaves and operates like a private-sector operator. This is what makes Bpifrance – and LAC1 in particular – unique. It also explains its success.

What are your criteria for selecting a company eligible for LAC1 funds? Are regular follow-up activities carried out after a company has received funds? How do you ensure you are involved in a company's governance strategy?

José Gonzalo: This is a question at the heart of the debate, because we ask the companies we invest in through LAC1 to follow the same governance practices as all our investments. The basic philosophy is to apply the private equity method to listed companies: a lot of work is done up front during the due diligence phases and then, once the investment has been made, a dedicated team carries out a lot of follow-up work.

To ensure that each transaction is properly followed up, five or six of our team members work closely with each company on a weekly basis. This ensures that board meetings are prepared thoroughly in advance and that we are kept fully informed of all the company's issues and projects. This diligent preparation gives us credibility and means that other board members listen to what we have to say.

The reports prepared in advance during due diligence include strategic studies, business plans and analyses of financial questions and concerns. Environmental, social and governance (ESG) criteria also receive special attention. ESG assessments are carried out using multi-criteria ratings incorporating the environmental criterion measuring carbon emissions, greenhouse gas emissions, local sourcing of raw materials and so on, and the governance criterion measuring gender equality within the management bodies and management team. The three ESG components undergo in-depth studies, and the areas in which they are applied are closely examined. Changes to the parameters are tracked, and if our teams notice that the expected performance is not being achieved, it is their professional responsibility to make this known.

In terms of governance involvement, we are represented on the board by a team member with extensive experience, chosen by us for their skills and knowledge of the company. This person receives no attendance allowance, thereby guaranteeing their independence.

Our professional backgrounds qualify us to build consensus within the boards of directors.

Who do you work with on a daily basis? How do you coordinate your work with directors and other stakeholders?

José Gonzalo: We work mainly with the company's management team.

From a governance perspective, as well as sitting on the board of directors, we sit on the various committees, particularly those we consider to be key. These are typically the remuneration, appointments, audit and Corporate Social Responsibility (CSR) committees. If there is no CSR committee, we urge the management team to create one.

Concerning our dealings with other directors and stakeholders, we justify our voting recommendations based on a great deal of data analysis and studies. This enables us to make objective arguments as rationally as possible.

Our dialogues with managers are transparent and constructive, sometimes acting as an intermediary between the CEO and the people involved.

Our aim is not to be an activist shareholder, but to play a constructive role. Bpifrance is a supportive but demanding shareholder.

The Emirati fund Mubadala is involved in financing the LAC1 fund. Does this not contradict the goal of protecting French companies from international investors?

José Gonzalo: LAC1 is regulated by the AMF and therefore benefits from its framework as a traditional asset management company. This means that only members of the asset management company can make decisions.

Within this framework, the investment made by the Mubadala sovereign wealth fund was defined in advance in the same way as for other subscribers to the fund. As for the investments, they are chosen freely by asset management company Bpifrance Investissement, without compromising its independence.

In addition to the quarterly reports sent to subscribers, the fund follows strict information rules to justify the trust they place in us. They trust us with their investment choices as long as Bpifrance Investissement adheres to the fund's investment proposition.

One of the subscribers to the LAC1 fund is Bpifrance itself, which invested €1 billion of its own equity. This is an important point, because it shows that the majority of investors are French, backed by French institutional partners together with French family offices. Moreover, if the fund grows in size, Bpifrance has committed to reinvest up to €2 billion, which means that it will still be the largest shareholder when the second round of fundraising closes, thereby ensuring its continued decision-making authority.

How does Bpifrance interact with other investors in these sectors?

José Gonzalo: We work closely with regional funds, which provide a solid institutional framework and allow us to leverage their regional knowledge and recognition. The larger national French funds, such as Ardian or Tikehau, are also a way for us to build up our French base, and we decide on a case-by-case basis whether or not to work with them.

We may be asked by major foreign funds to be partners in large-scale deals in French companies. In this case, we agree to work alongside them, but we do so as part of a constructive relationship for both parties and for the benefit of the target company. Our involvement with them is then well received by the market and market participants. However, we are particularly careful about the governance rights we secure with them.

THE FRENCH ECONOMY'S STRONG ATTRACTIVENESS IS PARTICULARLY EVIDENT IN STRATEGIC SECTORS FOR THE RECOVERY, REINDUSTRIALISATION AND DECARBONISATION OF INDUSTRY

Interview with Marie-Cécile Tardieu, Deputy CEO of Business France

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

In July 2022, President Macron announced 14 new foreign investments in France worth more than €6,7 billion. Has the French government put new policies in place to attract these investments? If so, what are they?

Marie-Cécile Tardieu: At a time of strong international competition, these 14 investment projects are a powerful reminder that France continues to attract foreign companies and major projects that boost our economy. These announcements will create more than 4,000 jobs throughout the country.

While our structural strengths and dynamic domesticmarket remain among the primary factors driving interest in France as an investment destination, these achievements are also the result of a renewed attractiveness policy that is firmly pro-business. The reforms implemented in recent years have helped France win on many fronts, and I will come back to this in more detail.

Business France Invest is at the forefront of internationally-oriented public policy efforts to encourage foreign investment in France and support foreign investment projects that create jobs and add value. The task force, consisting of 140 employees, 80 of whom are located outside France, has held more than 5,000 meetings with new investors and those already operating in France.

These projects are supported by the whole of **Team France Invest (TFI)**, which brings together all the public partners involved in attracting investment, including regional development agencies and central and decentralised government agencies. With new investment strategies since the Covid-19 pandemic, we have to be able to move quickly and combine our strengths to win over new investors. Working closely with the ministerial offices, the most strategic projects are monitored by a dedicated team that is supported by a recently created secure **collaborative digital platform**.

We also take part in implementing policies aimed at **attracting international talent**, which is an increasingly important factor for foreign investors when choosing a new location. Since 2017, foreign investors have received targeted support from Business France to **recruit the skills they need in France**. This support is provided by a team of international mobility specialists and a dedicated resource centre, the Welcome to France website, which in just five years has provided information and guidance to more than 4 million visitors, international talent and future executive managers in France.

More generally, what structural reforms and economic policies have been implemented to attract foreign investors?

Marie-Cécile Tardieu: Foreign investors who choose France are now operating in a **rejuvenated business environment** resulting from a series of structural reforms that have been implemented since 2017 to transform the economy and business life.

To give an example, **a reduced tax burden is now a reality for all companies in France** thanks to the large-scale combined reduction in corporation tax, production taxes and capital taxes. The 2017 **Labour Ordinances** also introduced new flexibility and predictability tools to the dialogue between management and employees within companies. The efforts made to **simplify administrative procedures**, in particular through the PACTE (2019) and ASAP (2020) laws, have made it easier to set up businesses and industrial facilities. For the past two years, more than around 100 "turnkey" industrial sites have been ready to host new investors. France is also clearly committed to the **green transition**, with several far-reaching laws and significant financial packages set in the new France 2030 investment plan. France's image is changing, and it is now recognised as a country leading the way in this area.

Most of these structural changes took place before the pandemic started, and they helped make the French economy and businesses more resilient at the height of the crisis. In 2021, France posted one of the most buoyant growth rates in Europe (7%) and the lowest unemployment rate in over ten years (8%). In 2022, while unemployment rate remains below 8%, growth forecasts reach 2.7%.

The new **France 2030 investment plan** launched last October 2021 rounds off this cycle of reforms by looking ahead to France over the longer term. This €54 billion plan will support the creation of future industries through investments targeted at accelerating disruptive innovation, from fundamental research to industrial-scale production and from start-ups to large groups. The first calls for projects have been issued, offering exciting opportunities in fields as varied as digital healthcare, sustainable mobility and the green transition, not forgetting education and training.

This positive attractiveness barometer shows that there is once again a high level of confidence in France as an investment destination. However, we must not forget that the ever-increasing competition between our economies to attract foreign investment requires continuous adaptation to "stay ahead of the game" as we emerge from the pandemic.

Has the Covid-19 pandemic brought new international investors to France?

Marie-Cécile Tardieu: On the ground, Business France's teams noticed a clear upturn in the number of foreign companies considering investing in France in 2021. This positive performance can be explained in part by the implementation of recovery plans and government policies, which went down very well with foreign investors, promoting an economy that is more self-sufficient (agri-food), and more environmentally friendly (sustainable energy, bioeconomy). The second part of the equation includes the change in consumption patterns (logistics and e-commerce), favouring online experiences and short supply chains, and the development of new forms of mobility, particularly in urban areas (such as electric cars and vans).

With France 2030 and the increasing awareness of the environmental emergency, France has a trump card to play in attracting foreign investors who share its ambitions and are concerned about the environmental and societal issues raised by the pandemic.

To what extent does France differ from its European neighbours in terms of attractiveness and foreign investment?

Marie-Cécile Tardieu: France has been the leading host country for international investment in Europe since 2019, according to EY and the Choose France announcements of 11 July show that France continues to become increasingly attractive.

France stands out in Europe because of the importance of industry in the investments it receives: a quarter of all investment projects undertaken in France involve opening or extending a production facility. These projects are the main contributors to employment from international investment in France creating an average of around 15,000 industrial jobs in France in 2021. France is the European country that plays host to the largest number of industrial projects, and it has been doing so for several years. This position illustrates the confidence that foreign investors have in French expertise and their recognition of the quality that Made in France stands for. This high level of attractiveness of our economy is particularly evident in strategic sectors such as healthcare and energy transition, where France is the European leader for international investments. Moreover, it is worth noting that four French regions - Auvergne-Rhône-Alpes, Grand Est, Bourgogne-Franche-Comté and Hauts-de-France - are ranked among the 6 largest European regions for manufacturing investment projects in 2021.

Our country also stands out in Europe for projects in innovative spheres, which are vital for supporting the future competitiveness of our economy. France is committed to a wide range of measures to support innovative companies (R&D Tax Credit, Young & Innovative Company status, and so on). It is one of the leading OECD countries in terms of public funding and tax incentives for business R&D. France's commitment to innovation meant that it ranked second in Europe for the number of patent applications filed in 2021. This commitment explains why it is now the European leader in hosting innovative international projects. The record fundraising by French Tech companies in 2021 is testimony to the extraordinary vibrancy of France's innovative business ecosystem.

Which French regions attract the most foreign investors?

Marie-Cécile Tardieu: Foreign-controlled companies are operating all over France and are creating jobs. They play a pivotal role in our country's economy, employing more than two million people in France and generating more than €173 billion in added value. Their choice of location depends on many factors and will change considerably from project to project: an industrial project will adopt a different approach to an R&D project, for example. The nationality of the investor and the sector in which they operate will also have a bearing, as will the specific characteristics of the regions in which the company is located.

Although Paris attracts a significant share of international investment projects, they are mainly concentrated in smaller cities: according to the survey carried out by Business France, between 2014 and 2021, 71% of international projects took place in municipalities with fewer than 200,000 inhabitants. Other regions do not therefore lose out to the attractiveness of large metropolitan areas. Moreover, this geographical distribution will vary significantly depending on the type of activity targeted by the investment. Industrial projects are mainly located in municipalities with fewer than 20,000 inhabitants, whereas innovation projects are mainly located in large cities.

The French regions have many advantages and unique expertise that they draw on to attract international investment projects, and their attractiveness varies depending on the investment sector. Over the last five years, the leading host regions of foreign projects have been Ile de France (Paris region), Auvergne-Rhône-Alpes and Occitanie.

Over the last five years, the leading host regions of foreign projects have been Ile de France (Paris region), Auvergne-Rhône-Alpes and Occitanie. Elsewhere, the regions in the north and east of France, Bourgogne-Franche-Comté, Grand Est, and Hauts de France, display a high degree of specialization in the FDI that they receive in the automotive industry and metalworking sector. Centre-Val de Loire in healthcare and Brittany in agri-food.

The increase in France's attractiveness is therefore beneficial to all French regions, and the establishment of foreign companies in France is a major source of economic growth right across the country.

PRIVATE EQUITY AND THE CONTROL OF FOREIGN INVESTMENTS IN FRANCE

Interview with Claire Chabrier, President, and Alexis Dupont, General Manager,

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Has the French foreign investment control system been able to strike the right balance between attracting foreign investment and economic sovereignty?

First, it should be recalled that the French system of foreign investment control is not new. The successor to exchange controls, the control of foreign investment in France (FIF) was strengthened by the PACTE Law of 22 May 2019 while ensuring greater system transparency.

One might add that it is now the norm for many countries to have similar tools for controlling foreign investments, and that no one disputes the legitimacy of the use of such sovereignty tools. More often, what is at stake is the legibility and fluidity of the processes.

Foreign investment in France has reached new heights in recent years, which seems to illustrate the absence of major regulatory constraints on investment control.

If one looks at the figures, the 2021 report on foreign investment control published by the Ministry of the Economy shows that foreign investment control activity in France was significant in 2021. This report indicates that 328 dossiers were submitted, an increase of 31% compared to 2020. This increase in the number of dossiers can be explained by several reasons:

- first, by the lowering of the threshold from 25% to 10% of the voting rights that triggers controls in listed companies (a threshold that has been extended until 31 December 2022);
- second, by stronger public health protection through FIF control in biotechnology, a sector in which half of the operations entailed risks to public safety in 2021;
- and, finally, by the record number of acquisition operations carried out during 2021 due to a catch-up effect compared to 2020.

The report states, however, that in 2021, of the total dossiers examined, the activities in question were ineligible for FIF control in 76% of cases. It should be noted that, in such cases, a foreign investment in the French company carrying on activities not eligible for FIF control will not have to be previously authorised by the minister for the economy.

The report adds that 124 foreign investment operations were authorised in 2021, and the authorisations were subject to conditions in just over half of the cases.

In terms of the distribution of foreign investors, the 2021 report notes that 48.6% of ultimate investors in 2021 were financial investors, 42.5% were industrial investors and 8.9% were individuals.

In terms of geographical origin, the 2021 report shows that most of the investments monitored were made by non-EU/EEA end-investors, accounting for 58.8% of investments. They came mainly from the UK, the US and Canada. Within the European Union and the European Economic Area, most of the investments came from ultimate investors located in Germany, Luxembourg, and Ireland.

Thus, in our view, although there is always room for improvement, the FIF mechanism has struck a balance between attracting foreign investment and economic sovereignty.

In your opinion, do investment funds receive the same treatment in connection with the control of foreign investments in France as foreign industrial investors? If there are differences in treatment, could you elaborate on them?

Like foreign industrial investors, private equity vehicles (hereinafter Private Equity Funds) may be subject to FIF control, regardless of their legal form or domicile, when a stake is acquired in a French company whose activity is subject to FIF control (Articles L. 151-3 and R. 151-3 of the Monetary and Financial Code).

The PACTE Law stipulates that the origin of the "ultimate controller" must no longer be looked at alone. Henceforth, all the links in the chain of control (control within the meaning of Article L. 233-3 of the Commercial Code and L. 430-1 of the Commercial Code) of the entity must be examined. As a result, if an interest is acquired in a French company whose activity falls within the scope of FIF control, the presence of a foreign "intermediate controller" in the chain of control of the entity is sufficient for the application of the regulations on the control of foreign investments in France.

In the case of funds, the level of control of the holding chain will not necessarily be that of the holders of units or shares of the Private Equity Fund. Indeed, the entity exercising the investment decision-making power of an AIF, regardless of its domicile within the EU, is the asset management company that manages it. It is therefore the management company that has the power to make investment decisions and exercise the voting rights attached to the holding. There is therefore no need to determine the identity or origin of the subscribers (i.e. the investors) of the Private Equity Fund. In the specific case of Private Equity Funds, the criterion used with regard to the investments made by investment funds is the control of the shareholding of the fund manager, i.e. the person who exercises decision-making power.

It should be noted that in a decision of 3 April 2020 (CE, 6th-5th chambers combined, no. 422580, JurisData no. 2020-004683) the Conseil d'Etat (Council of State) ruled that the Paris Administrative Court of Appeal had not committed an error of law in considering that "for a transaction carried out by an investment fund, it is incumbent on the applicant to indicate the identity of the fund manager and, when this manager is itself a legal entity, the identity of the natural persons or public bodies controlling it, and noting that no provision requires that the identity of all the investors participating in this fund be specified".

Therefore, all links in the chain of control of the asset management company will have to be examined in order to ascertain whether there is a foreign intermediate controller in the chain of control of the asset management company. In the case of a Private Equity Fund, the chain of control will be established at the level of each link in the chain of control of the asset management company to determine whether the decision-making power ultimately lies with a foreign natural person.

It is in this respect that the approach adopted may differ between a foreign industrial investor and a Private Equity Fund established in another Member State of the European Union or the European Economic Area. If the shareholding (ultimate investor) of the manager is French, then the acquisition transaction carried out by the Private Equity Fund it manages will not be subject to the prior authorisation procedure.

Foreign industrial investors are sometimes seen as a promise of a long-term relationship, as opposed to investment funds, whose objective is to sell the company in the short to medium term. Do these differences explain the specificity of foreign investment controls in France in the context of fund acquisitions?

In our view, from a legal point of view, the holding period is not a relevant element in the analysis of the acquisition transaction. Specific conditions may, if necessary, be imposed in the context of the Minister's control of foreign investment in France. As stated in the above-mentioned FAQ, these conditions are discussed with the investor, who signs them prior to notification of the Minister's decision. The investor must comply with them <u>for the entire duration of its control over the French target entity or for a specified period</u>. In addition, they may be revised at the request of the investor or at the initiative of the minister for the economy in certain cases and in accordance with the procedures set out in Article R. 151-9 of the Monetary and Financial Code.

STATISTICAL REPORTING TO THE BANQUE DE FRANCE ON FOREIGN INVESTMENTS IN FRANCE

By Marie Michel Verron, Professional Support Lawyer, Herbert Smith Freehills

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Separately from the prior authorisation of foreign investment, the French Monetary and Financial Code established the principle that certain foreign investments must be declared to the Banque de France for statistical purposes. Article L.141-6 of the Monetary and Financial Code empowers the Banque de France to require the communication of any information necessary to establish the balance of payments and net international investment position. This gives the bank real investigative authority over cross-border financial flows.

Article R.152-3 of the Monetary and Financial Code stipulates that foreign direct investments in France involving more than €15 million (subject to certain criteria) must be declared no more than twenty working days after they are effectively completed.

Conversely, under certain conditions, statistical reporting is also required for liquidations of certain foreign direct investments in France, or where an individual or entity domiciled in France makes an investment abroad, but these cases will not be addressed below.

A non-resident (A) making certain investments in France (B) must file a statistical report (C) or face possible penalties under criminal law (D).

A. Definition of "non-residents"

The rules for statistical reporting to the Banque de France are based on the concept of a "non-resident", rather than a "foreign investor" as defined under the regulations for the prior authorisation of investments.

Article R.152-11 of the Monetary and Financial Code (paragraph 3) defines "non-residents" as individuals whose centre of main interests is located abroad, foreign civil servants and other public officials posted in France as soon as they take up their duties, and French or foreign legal entities with regards to their establishments abroad.

In contrast with the system for prior authorisation, the investor's nationality is not a decisive factor when implementing these rules, nor is the investor's tax residence within the meaning of Article 4B of the French Tax Code.

B. Covered investments

Statistical reporting is required for the following investments **when they exceed a value of €15 million**:

Direct foreign investment in France (Article R.152-3-1) as defined in paragraph 4 of article R.152-11 of the Monetary and Financial Code, namely:

- **Transactions in which non-residents acquire at least 10% of share capital or voting rights, or cross the 10% ownership threshold of an enterprise not domiciled in France.**

The main transactions concerned here are: company creations, subscriptions for an issue of new shares, securities acquisitions, securities acquisitions through an exchange (e.g. contribution or merger) including within the same group.

The investment (whether an initial or later acquisition) must result in the holder owning at least 10% of share capital or voting rights in the resident company.

These rules are aimed at investments in shares or voting rights but do not seem to cover asset acquisitions (businesses as a going concern or isolated assets).

- **All transactions of any kind between related undertakings: lending, borrowing, or deposits**

This can involve lending, borrowing, trade credit, capital investments, and reinvested earnings or shareholder loans.

- **Property investments**

Article R.152-3-3° also covers "acquisitions of French real estate assets by non-residents".

In practice, the Banque de France seems to consider that a direct investment is made when the investing entity acquires or holds at least 10% of the investee's share capital or voting rights. Once the direct investment relationship has been formed, all cross-border financial interactions (lending, borrowing, trade credit, capital investment, reinvested earnings) between the investor, the companies it controls, the investee and the companies that it controls are also considered as direct investments and booked in the accounts accordingly. Statistical reporting to establish the balance of payments is necessary whenever a direct investment involves over €15 million.

The definition of foreign direct investment set out in Article R.152-3 of the Monetary and Financial Code only seems to pertain to direct investments involving cross-border financial flows.

C. Process

No more than twenty working days after the direct investment in question has been realised, a report must be sent to the Banque de France.

The report is sent by post or email to the department of statistics (balance of payments division) of the Banque de France (LOV-2513 DGSEI - DESS – SIETE - 75049 PARIS CEDEX 01 - invest.direct@banque-france.fr) via form B1, the "*report on foreign direct investment in France including real property*", available online at the website of the Banque de France (see https://www.banque-france.fr/statistiques/balance-des-paiements-et-statistiques-bancaires-internationales/les-investissements-directs/declarer).

In practical terms, the following information must be stated on the form: the resident company receiving the direct investment or the real property in which the investment is made, the non-resident direct investor, the seller (if any), the terms of the direct investment, the shareholding structure of the resident company (and investee) after the transaction, financing for the transaction, the ultimate goal of the transaction, the complete financial package, and its legal structure.

In contrast with the rules for prior investment authorisation, the timelines for statistical reporting to the Banque de France are calculated in working days (excepting only Sundays and bank holidays) rather than in business days (Monday-Friday, excepting bank holidays).

D. Penalties

Penalties for non-compliance with the statistical reporting obligation are not trivial. Under Articles 459 of the Customs Code and R.165-1 and L.165-1 of the Monetary and Financial Code, any violation of the rules on statistical reporting qualifies as a criminal offence punishable by a fine that can be as high as twice the investment amount, and a maximum prison sentence of 5 years. The maximum fine for legal entities is five times this amount (Article 131-38 of the Criminal Code). Legal entities also risk additional penalties including forfeiture (Article 131-39 of the Criminal Code).

To conclude, statistical reporting to the Banque de France is covered by a standalone set of rules that may apply even if the investment in question is not caught by the rules on the screening of foreign investments in France. Likewise, statistical reporting may not be required for a sensitive foreign investment, especially if it involves less than €15 million.

« I DON'T VIEW FOREIGN INVESTMENT REVIEW AS A NEW CENTER OF GRAVITY, BUT RATHER AS AN ENDURING FEATURE OF M&A »

Interview with Laurent Cohen-Tanugi,
Member of the Paris and New-York Bars,
Managing Partner, Laurent Cohen-Tanugi Avocats

LAURENT COHEN-TANUGI AVOCATS

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School) with the assistance of Paul Agard, student of the Specialised Master in International Business Law and Management, and Luidgy Belair, student of the Law & Business major at ESCP Business School

Is the review of foreign investment the new center of gravity of M&A, the third pillar alongside with merger control and compliance? Or is it only a relatively temporary phenomenon for the time needed to resolve crises (health and geopolitics)?

Laurent Cohen-Tanugi: Neither. I don't view foreign investment review as a new center of gravity, but rather as an enduring feature of M&A, like merger control. Not all transactions are strategic.

The rise of foreign investment review in strategic sectors dates back fifteen years ago, first in the United States, then in Europe and in new emerging powers.

It can be explained by the return of geopolitics in the globalized economy at the turn of the century due to a twofold reason. First, growing conflicts in international relations. Then, the massive transfer of wealth to Asia, notably China, as well as the Gulf States and Russia, which are neither allies of the West, nor democracies and market economies. The risk of having European or American strategic companies falling under the direct or indirect control of these States and their emanations cannot be taken lightly.

It is more important today for a State to protect its independence and its economy than its attractiveness.

Is the French system's philosophy based on economic sovereignty, protectionism, economic patriotism, the need for foreign investment, or a specific strategic vision? Considering the French system of foreign investment review in light of France's position in the global competition, which changes could be made?

Laurent Cohen-Tanugi: The French regime has been strengthened in the spirit of what I have just recalled. But in practice, there is always a mix of legitimate national security or strategic independence concerns, and economic and social considerations, which can sometimes be close to protectionism or conversely favor foreign investment to promote employment or France's attractiveness.

In my view, this mix is confusing. A more rigorous implementation of the French regime is desirable. Greater clarity is required on what should be protected.

In comparison, in the U.S., the rationale for protection, which is national security, can be more easily identified. The aborted Emirati acquisition of the Port of New York a few years ago is a good example.

The reason for the rejection was essentially based on national security considerations. Although political and economic concerns may have been involved, there is no doubt that national security was at stake.

Besides, in the U.S., the political nature of the decision is obvious since the decision ultimately belongs to the President. Yet, the procedure in place is duly followed. I cannot recall any example of cases reflecting pure economic or social opportunism.

How is the French system perceived by foreign investors: a welcoming and professional counter, a repellent one compared to more transparent systems, or the right balance between the two?

Laurent Cohen-Tanugi: France is known for its state interventionism and for the tendency of its governments, whether right or left, to interfere in major M&A transactions, even Franco-French ones, through non-legal channels. Remember Nicolas Sarkozy's intervention in the conclusion of Sanofi's hostile takeover bid on Aventis in 2004, which I personally witnessed, or the Veolia-Suez deal last year. The blocking of Danone's acquisition in the name of strategic interests in the 2000's has also left its mark... But France is still an attractive destination for foreign investors. The key is to find the right balance between promoting the attractiveness of the French economy and the protection of strategic interests.

Does the EU regime represent a step towards a potential unification, or at least a convergence?

Laurent Cohen-Tanugi: Yes, it is a first step towards a European level review of strategic investments within the European Single Market. This is a goal that I had explored and defended in my 2008 report "Beyond Lisbon: A European Strategy for globalization" during the French presidency of the European Union (Odile Jacob/La documentation française), because the EU dimension is as relevant there as in the area of competition.

But European political integration is not sufficient yet for this. The common external policy is still nascent. Institutionally speaking, there is no equivalent to the U.S. President. The road is long, but it is the right path to follow. The EU dimension is the right one. Deeper European integration is even more necessary in a world of continental empires and rising nationalism.

With the Teledyne/Photnis and Carrefour/Couche Tard cases, is the political dimension of the transactions overestimated, or rather systematic, relegating the technical dimension to a mere window-dressing for decisions? Is the technical dimension relevant for the method of examination or the communication? Or, is it only about signaling the government's vigilance on these transactions?

Laurent Cohen-Tanugi: Governmental positions in a country as interventionist as France sometimes carry a greater dissuasive effect than a legal veto. It would be risky to be satisfied with this. Once again, it is rather detrimental to France's image with foreign investors. An increased professionalization of controls is desirable, even if, in the last resort, the decision is political and litigation is ineffective.

Considering the French economy's need for financing, what place can geostrategic concerns have? What should they be today?

Laurent Cohen-Tanugi: National security and strategic independence concerns are paramount, at least at the European level. The global economy has become considerably more geopolitical. Whether cybersecurity or the safeguarding of a national airline during the health crisis, the issue of strategic independence is at stake one way or another. The fields should not be mixed up, and a clear review regime should be applied. But it is also necessary to maintain some agility to counteract any hostile bid from a foreign investor acting in its own interests or in the interests of its government.

Does it seem to you that the treatment differs if the purchaser is an investment fund, an industrial or according to the nationality? Industrials are sometimes seen as more predatory but allows more durable relationships; funds are often less predatory but more volatile, with the risk of being destined to be sold on without it being possible to predict to whom? What is your vision? Does the solution lie in the letter of undertaking?

Laurent Cohen-Tanugi: Letters of undertaking only have a relative legal value. Evolving circumstances following their execution can make them rapidly obsolete and allow investors to free themselves from them. The interventionist State often appeared in the past as the fall guy. Moreover, not everything is controllable. Finally, the lack of fluidity between the public and private sectors sometimes deprives the government of civil servants who are sufficiently aware of the business world.

In the end, however, no one can risk ignoring the State. For national or European security, the investor's nationality, its ties to his home State and the assets at stake are the most important criteria. In the case of investment funds, a case-by-case examination is required. It is important to distinguish between traditional investment funds and sovereign wealth funds.

Is the health crisis a turning point? Is its impact quantitative (widening the scope of sensitive areas) or qualitative (improvement in approach)? Can we say there is a change in the philosophy of the system?

Laurent Cohen-Tanugi: I don't believe so. As in other areas, the health crisis has only accelerated trends that had already been at work for ten or fifteen years. We now have a broader vision of strategic independence and a more realistic view of competition between States, even within Europe, and the risks to supply chains in case of global disruptions. This does not justify autarky or deglobalization, but rather calls for renewed international cooperation.

FOREIGN DIRECT INVESTMENT SCREENING IN FRANCE: THE KEY ROLE PLAYED BY LAWYERS

Interview with Frédéric Bouvet, Managing Partner, Herbert Smith Freehills

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Frédéric Bouvet, Managing Partner at Herbert Smith Freehills in Paris, sheds light on the key role played by lawyers in the foreign direct investment screening process in France.

What is at stake in the screening of foreign investments in France?

Foreign investment, an issue that has only intensified during the pandemic, is now attracting a great deal of attention. According to the latest figures published on the Ministry of the Economy website, in 2020 France was the leading European country in terms of screening foreign investment on its territory.

Despite the health crisis and the significant drop in foreign investment in France (down 17% in 2020), 275 investments were screened in 2020, versus 216 in 2019. In 2021, 328 foreign investment projects were instructed by the French Bureau of Foreign Investment, i.e. a rise of 31.2% compared to 2020. These figures can be attributed to the reform of the system for foreign investment screening that came into force in April 2020, which expanded the sectors affected. The redefined concepts of an investor and an investment operation certainly had something to do with this change as well.

The impact of screening on an operation is hardly trivial: longer time frames to completion, consequences of a prolonged interval between signing and closing for management, risks of having the transaction invalidated or of hefty financial penalties for failing to comply with regulations, effects on the deal and the parties if prior authorisation is not granted, impact on structuring and profitability of the transaction if the French Bureau of Foreign Investment imposes restrictive conditions on the purchaser, etc.

This is why it has become vital to analyse the situation ahead of time, so the procedure can be taken into account as much as possible if it applies.

Why is the lawyer's role so important in the foreign investment process in France?

First, we must remember that, for the time being, there are no doctrines or guidelines that explain the details of screening by the Bureau of Foreign Investment. Moreover since the process is confidential, the Bureau's decisions are not published. And lastly, case law on this topic is relatively rare.

Unlike France, several countries around the world that engage in strict screening have chosen to publish guidelines for foreign investors. Russia, the US, Australia and the UAE have all taken this approach.

In England as well, lawmakers have taken care to hold a public consultation and provide affected business sectors with more precise definitions. A guidance has been published by the UK Government giving further details on the 17 types of notifiable acquisitions under the UK's new National Security and Investment (NSI) Act.

Foreign investors interested in France, however, can only rely on the experience and know-how of their French legal advisors.

Our firm has been developing this practice for many years. An international group of more than 200 lawyers at HSF regularly exchanges information on the latest trends in foreign investment screening, devising and regularly updating an interactive guide to help investors understand the major principles behind different national systems at a glance.

How do you prepare a request for prior authorisation?

Because so much is at stake with foreign investment screening, our clients are consulting us earlier and earlier in the process, while they are structuring the project. There are several stages involved in preparing a request for prior authorisation.

The first is always to weigh up the French investment target against the list of sensitive sectors and applicable law.

This means identifying the affected French assets or businesses in order to determine whether they are strategic. A good understanding of the business sector, technologies, raw materials involved, client base and business partners (especially those in the public sector) is essential. Yet this understanding is not always easy to come by due to the confidentiality of the investment project. The work is complex because the French screening procedure is not triggered by any material threshold. In other words, screening may apply even though only a tiny fraction of the investment is actually strategic. The size, revenue, or profits of the business are not taken into account, nor is the value of the transaction.

The analysis is even more complex because the strategic nature of a business is a very fluid concept, to say the least, especially in times of crisis. Recent events have proved that the Minister of the Economy employs a very broad notion of what counts as a sensitive business sector. As we can see from the Carrefour/Couche Tard case, a mass retailer can now be considered as sensitive for reasons of food security.

The second stage requires a very detailed analysis of the features of the investment operation.

As a reminder, the law covers any type of investment – whether direct or indirect – in which control is acquired over a French corporate entity or branch thereof. For investors from non-EU countries, screening is triggered when they cross a notification threshold of 25% of voting rights – or 10% for French companies listed on a regulated market until 31 December 2022 (please note however that this specific regulation for listed companies may be further extended).

In certain situations, it may be difficult to identify a foreign investment at first sight. This is particularly true of reverse triangular mergers, a common practice in the UK and the US in which a subsidiary of the purchaser is merged into the target. This is also true of certain transactions using securities entitling their holders to future equity in a French company (issuing share equivalents such as convertible bonds, convertible bonds for foreign bearers, put or call options for foreign investors, etc.). In the same vein, the concept of a "business line", which is not defined in any text of law, may raise questions in certain transactions. Is it an autonomous set of assets, a standalone asset, or even a group of employees?

Lastly, the identity and nationality of the investor who is the ultimate beneficiary of the transaction must be determined.

This is often difficult to do for listed companies or for non-European foreign shareholders, as one needs to go back up the chain of control as far as possible. With the reform passed in December 2019, it has also been important to verify that the investor, even if not controlled within the meaning of article L.233-3 of the Commercial Code, is not under the decisive economic, operational or political influence of other, unrelated entities.

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As a result, when dealing with any cross-border transaction, it is now essential to consider from the outset whether foreign investment screening might apply.

MANAGING THE INSTITUTIONAL HAZARD: THE PRICE OF CAPITAL GAINS

By Pascal Dupeyrat,
lobbyist specialized in strategic sectors,
RELIANS

INSTITUTIONAL ARCHITECTURE
OF STRATEGIC OPERATIONS

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

What is the value of an asset that cannot be sold or that can no longer be bought? This is the question raised by the presence of the State in mergers and acquisitions (M&A) involving strategic sectors. This question is particularly relevant in cross-border transactions subject to the control of foreign investments in France (FDI screening), i.e. areas where the State has the power to approve, modify or refuse a transaction.

By taking a seat at the negotiating table of M&A transactions, the State has made the issue of screening foreign investments as important, if not more important, than merger control or compliance. Indeed, whereas practitioners used to be mainly concerned with obtaining the approval of merger control (antitrust) authorities for third-party agreements, deals that fall under the scope of national security now require the approval of public authorities. Especially since the State wants to be involved as early as possible in all the options envisaged by the seller or the target, and thus to be part of the operation.

INSTITUTIONAL RISK AFFECTS THE VALUE OF THE STRATEGIC ASSET

When the State takes a seat at the negotiating table, the parties to a foreign investment in a strategic sector will encounter an institutional hazard that affects the value of the asset in question. This risk is threefold.

First of all, there is a regulatory risk, as the government can change its regulations quickly, for example by simply issuing a ministerial order to classify a sensitive technology as belonging to a strategic sector. This is what the government did on April 28, 2020, when it brought biotechnologies within the scope of FDI screening overnight. It can also modify the thresholds for triggering the screening process, as it did with its decision in July 2020 to lower the threshold from 25% to 10% for listed companies. In a way, the State can increase the size of the net while narrowing the mesh. These regulatory uncertainties are likely to impact a transaction, both during its structuring and its completion.

Secondly, there is an interministerial hazard. While the Ministry of the Economy is the gateway for authorization requests, the approval process also involves other administrative departments and/or ministries. This interministerial interaction involves a number of power relationships and negotiations that need to be understood. This was the case in the now **emblematic sale of Photonis in 2020**, where the negotiations with the Ministry of the Economy did not reveal the reality of the opposition expressed by the Ministry of the Armed Forces. For the sellers, this situation closed the market to competition and thwarted their valuation strategy. The difference between the price offered by Teledyne and that of the buyer finally authorized by the State amounted to a loss for the seller of 130 million euros. **It is therefore quite possible to measure the impact of this hazard on the valuation of an operation.**

Finally, a political hazard. It is undeniable that the protection of strategic assets has become a key issue for public authorities. The French Parliament took up the issue in 2018 with the Parliamentary Commission of Inquiry into the protection of industrial flagships. It has since called, on numerous occasions, for stricter control of authorizations issued and commitments made by the investor. Regarding the takeover of Carrefour by Couche-Tard, the Ministry of the Economy did not even pretend to give the agreement a chance when it announced that it would be refused on food safety grounds. Just a year before a presidential election and in the midst of a health crisis, the Ministry conveniently got rid of an eminently symbolic operation. Because of the profile of the buyer, an asset can be made non-purchasable due to the intervention of the State, thus making it illiquid. In the end, however, it is the value of the strategic asset that is at stake.

Nonetheless, the institutional hazard does not only result in a loss of value for the parties. It can be reversed to their advantage and offer an opportunity to increase the value of the asset in question. For example, in a bid involving several competitors, it is possible that the value of the asset will increase because it is in a strategic sector and may encourage the search for alliances where the State would be a stakeholder, facilitator or intermediary. Having the State at the table is therefore not in itself always a problem. For a highly sought after strategic asset, the State's reluctance to sell it could cause an increase in its market value. In these circumstances, the unavailability of the asset could be used as leverage.

In a transaction subject to foreign investment screening, the target asset is subject to an additional liquidity risk; pricing thus becomes an additional difficulty. The market value of the asset will therefore depend directly on the parties' understanding of the institutional dimension and on negotiations with government.

DEMANDS OF THE STATE AFFECT THE END-TO-END OPERATION

The question of the State being at the table is now central, but the question of how to deal with it is even more critical. At what point, and above all in what way, should the institutional hazard be managed?

Ideally, the institutional hazard will be treated during the structuring of the operation with the same degree of importance as the financial, legal and operational construction of the transaction. This "institutional due diligence", in the near and long terms, must be fully addressed so that the transaction will be acceptable to all, especially to the government. This strategic and institutional analysis must also be carried out in order to structure the transaction when the time comes for the foreign investor to sell the strategic asset or company. It should therefore be carried out as far in advance of the transaction as possible, so as not to explore disposal options that may or may not be acceptable to the State.

Institutional risk is also addressed during negotiations with government. In the foreign investment screening procedure, these negotiations are encouraged to get advice before the application is filed and even more so during the approval phase. Such negotiations are essential to ensure not only the success of the transaction, but above all to preserve the value of the asset, technology or business in question. It is important to avoid any request from the State that would distort the transaction itself. It requires specific and tactical expertise, in consultation with other boards. Close dialogue with public authorities (or government, as it were) is the only way to ensure the security and durability of the operation.

The institutional hazard is also dealt with in parallel to the operation itself. As soon as the operation brings the State to the table, it brings with it all the rules relating to the functioning of public authorities, including interministerial and parliamentary control. Just because the State is present does not mean that it has a single face. In the foreign investment screening procedure, the State is represented by the foreign investment office (Multicom 4), but in reality it is more a reflection of the positions of the various ministerial departments whose positions it coordinates. It is therefore necessary to deal with the smallest player in the decision chain that will lead to the final position of the State in the negotiations. In the case of Photonis, it should be remembered for future transactions that despite the conditions set by Bercy (the French finance ministry) for the takeover by Teledyne, it was the position of the competent sectoral ministry that prevailed, in this case the Ministry of the Armed Forces.

The institutional risk is also dealt with at a later stage, once the authorization has been issued and the foreign investor's commitments have been fulfilled. These commitments are increasingly scrutinized by Parliament, which — independently of the powers of control provided for in the FDI screening procedure and in article L.151-7 of the CMF (French monetary and financial law)— exercises certain powers of control over the ministry and the government that made them, as constitutionally devolved to the legislative power. It is therefore not uncommon to see a transaction being subjected a posteriori to supervision by a fact-finding commission, or even a parliamentary commission of inquiry, as was the case for the most emblematic transactions involving an FDI screening procedure (Alstom-GE, Alcatel-Nokia, etc.). Logic dictates that future commitments made by the foreign investor to public authorities (or government) should be the subject of particular attention. Not to mention the risk that a political changeover may call into question the decision of the government that previously authorized an operation.

LOBBYING TO SECURE THE STRATEGIC ASSET TRANSACTION

In reality, once the parties to the transaction understand that the State is at the negotiating table, the institutional hazard poses a risk not only to the feasibility of the transaction, but more broadly to its security.

By managing the institutional risk and dealing with it appropriately at each stage, the operation is made secure. This aims in particular to ensure that the operation is sustainable, i.e. that it offers all the necessary guarantees so that the State cannot consider that circumvention manoeuvres have been used to undermine the essential interests of the State. Such a situation would inevitably lead to the revision of the operation, or even to it being reversed.

In this respect, one of the challenges is also to comply with the legislation on transparency in public affairs and the obligation to make a declaration to the HATVP (French authority for transparency in public affairs). Many players avoid their transparency obligations by hiding behind legal texts, pretending to forget that such practices are perceived as circumvention manoeuvres. These are all arguments that will be used against the investor and the reputation of their advisors in the event of an audit after the fact.

The institutional hazard thus encumbers the target with the risk of an increase or decrease in the gap between enterprise value and market value. Managing this risk is therefore no longer a simple theoretical question or even a mere source of irritation for those who have to part ways with a thirty-year-old practice; it is now a key aspect of M&A in strategic sectors. It is at the heart of structuring the transaction as well as the valuation of the asset.

Gone are the days when public authorities endorsed transactions that were put together in a way that saw them approved, complained about or tolerated. For players in M&A transactions, institutional risk must now be integrated right from the due diligence stage, and dealt with both before and during the transaction, without overlooking the smallest stakeholder, whether in government, the administration or parliament.

M&A players who have lost the habit of talking to public authorities in their transactions will have to integrate this essential institutional dimension or watch their operations fail. This is a major turning point in the practice of mergers and acquisitions in strategic sectors for the coming decade.

INTERNATIONAL INVESTORS: PROCEED WITH CAUTION TO SUCCESSFULLY NAVIGATE THROUGH THE FRENCH PR MINEFIELD!

By Guillaume Granier, Senior Managing Director, Cosme Julien Madoni, Senior Director, & Mathilde Jean, Director, FTI Consulting

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)
Article edited with the assistance of Céline Glas, student of the Specialised Master in International Business Law and Management, and Alix Stephann, student of the Law & Business major at ESCP Business School


Guillaume Granier


Cosme Julien Madoni


Mathilde Jean

Foreign investments in French companies are the subject of numerous and fierce debates in the media, politics and on social networks. Thinking about the reputational dimension of an operation from its outset is the best way to avoid a controversy that could slow it down or even cause it to fail and harm its initiator reputation.

By its very nature, the control of foreign investments touches on the domain of sovereignty and therefore of politics and the debates that accompany it in a democratic society. **As a foreign player, it is crucial to analyze the reputation risk posed by a potential project that involves the take over of a French asset as soon as you conceive it.** During this analysis, the planned operation will be examined under the microscope of public debates and 'myths' specific to France, but also the perceptions, issues, and agendas specific to the numerous stakeholders involved: employees, elected officials, unions, minority shareholders, etc. Every new operation is unique, however, a review of French past transactions sheds light on the issues to be anticipated to avoid setbacks.

A political and media debate driven by the 'symbolic dimension' and the territorial anchoring of target companies

According to EY's France Attractiveness Survey[1], in 2020, France retained the coveted top spot on the European podium for foreign investment, ahead of the UK and Germany, with nearly 985 foreign investment projects announced. Of these deals, 275 were monitored by the French Ministry of the Economy that year[2]. **However, only a handful of operations have been the subject of public debate and controversy in the media.**

Among the criteria that explain the irruption of public debate in an operation, the symbolic or 'iconic' character of a company is a determining factor. This cultural dimension covers very broad and varied aspects: a 'legendary' company in French industrial history (even if the economic footprint is small today), a company whose products and services are used daily by French people, CAC40 listed companies, a major French employer, etc. Political voluntarism in the field of foreign investment control began in France in 2005 when the press reported the rumour of a takeover bid by the American PepsiCo on Danone, an emblematic group associated with food and agriculture and with a rich history at the heart of the French economy. Although the M&A was only a rumour, the French political body immediately asserted via interviews that the very idea of a foreign firm taking control of this emblematic group seemed unacceptable, creating a huge media controversy. PepsiCo eventually confirmed to the French financial markets' regulator, AMF, that it had no intention of launching a bid for Danone.

Despite the current existence of a strict legal control framework, this cultural dimension of the target company's identity remains to be examined with close attention. Early 2021, the French government did not hesitate to block (outside of any formal procedure that could have been carried out by MULTICOM 4) the attempted takeover of the emblematic company Carrefour by the Canadian convenience store chain Couche-Tard. From the very first discussions on a friendly takeover, the government reaction was categorical. Bruno Le Maire, French Minister of the Economy, stated "*My position is a courteous, but clear and definitive no,*" explaining that "*we are not giving up one of the major French retailers*".[3]

The controversy sparked by an operation can also result from the strong local presence of the target company. Regional elected officials and media might seek to bring the debate to the national stage. For example, when the American fund Searchlight announced in 2019 that it wanted to launch a takeover bid for the Toulouse aerospace manufacturer Latécoère, opposition to the operation mobilised several local representatives for whom the company is symbolic of the aeronautical and industrial history of the Occitanic region: the President of the Regional Economic, Social and Environmental Council CESER ("*Latécoère needs time. Leaving the field open to a North American fund would be a mistake*"[4]), the Mayor of Toulouse Jean-Luc Moudenc, and the Departmental Council of Haute-Garonne[5].

A political and media debate centred on the 'honourability' of the buyer, a subjective norm that changes with contemporary geopolitical battles

From a media point of view, the respectability of a foreign investor and the acceptance of their takeover of a French company will be primarily assessed in terms of their nationality. Ten years ago, it was Qatar's all-out acquisition of stakes in French emblematic companies that caused controversy in the French media (Qatar Sports Investment becoming the majority shareholder of PSG, the Qatar Holding fund taking a 1.03% stake in the capital of the French luxury group LVMH, Katara Hospitality acquiring the Martinez Hotel in Cannes, the Palais de la Méditerranée in Nice, the Concorde Lafayette at Porte Maillot in Paris, and the Louvre hotel, etc.)[6]. Still marked by the emblematic GE/Alstom case, **the French remain wary of any American player**. In 2020, the Latécoère-Searchlight and Photonis-Teledyne operations made the headlines, with most media pointing to the American nationality of the potential buyers[7]. In the case of Latécoère,

[1] https://www.ey.com/fr_fr/attractiveness/barometre-de-l-attractivite-de-la-france-2021/la-france-dans-la-course
[2] https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etrangers-en-france/les-chiffres-cles-des-ief-en-2020
[3] Les Echos, Carrefour : pourquoi le gouvernement s'oppose à l'offre de Couche-Tard, 14 January 2021
[4] La Dépêche, Latécoère : l'OPA américaine suscite des inquiétudes à Toulouse, 17 September 2019
[5] La Tribune, Aéronautique : l'OPA sur Latécoère inquiète à tous les niveaux, 20 December 2019
[6] Some examples:
L'Express, Le Qatar investit en France : « C'est quoi, le problème ? », 7 November 2012
Slate, Comment le Qatar a acheté la France (et s'est payé sa classe politique), 6 June 2011
[7] Some examples:
L'Usine Nouvelle, Le fonds américain Searchlight vise une OPA sur Latécoère, 1 July 2019
Challenges, Incroyable, l'américain Teledyne repart à l'assaut de la pépite française Photonis, 27 October 2020

some elected representatives, trade union representatives and commentators questioned the proposed operation, contrasting the natural interests that would exist between '*a historic equipment manufacturer whose headquarters are in Toulouse*' and '*an American investment fund*'[8].

The more discreet French takeovers of companies from Chinese investors have been publicly questioned throughout the last decade. This is notably the case for the arrival of Dongfeng in the capital of the 'national jewel' of the automobile industry, PSA, in 2014, but also for the heckled takeover bid of Fosun on the holiday specialist Club Med in 2015. The latter was strongly criticised by the Vice-President of French far-right party *Front National*, Florian Philippot, who indicated that "*in recent months, the number of French flagships and other strategic companies that have come under Chinese control is countless*".[9] Today, in a context of a 'commercial cold war' with China and marked by scandals linked to bad management by Chinese players of French companies (e.g., Baccarat, Toulouse Airport, etc.), **the takeovers in Europe of companies from the Middle Kingdom are increasingly coming to the forefront of public debate.**[10]

In France, **the involvement of investment funds (vs. an industrial company) is always questioned by a part of public opinion**, which is very vocal. In the eyes of the French public, the investment fund is very often a 'vulture fund' that has come to acquire French technology and expertise, at the cost of heavy redundancy plans destroying many jobs, and by injecting a debt whose weight very quickly becomes unsustainable for the company. The KKR fund was even nicknamed "the barbarians" by the French press in the 2010s.[11] This French fantasy makes operations more complex for all foreign funds wishing to acquire French companies. In 2021, American fund Bain attempted to buy services unit of French energy group Engie, Equans. In the end, as the 2022 presidential elections approach, the French government has announced that the bid of the French telecoms group Bouygues would prevail, despite Bain's presentation of a development project being deemed concrete and solid for Equans, its partnership French firm Fimalac, and an initial offer that was higher than all its competitors.[11]

A public debate influenced by multiple actors with diverging interests

Political figures in office have always become the 'heralds' of economic sovereignty, whether it be former economy ministers Dominique de Villepin and Arnaud Montebourg yesterday, or Bruno Le Maire today. In these circumstances, **being able to anticipate political reactions is as important as decoding the existing legal frameworks**. To achieve this, it is necessary to analyse the public debate and its actors, to anticipate the agendas and interests of the various stakeholders and, above all, to adopt the right approach and explanation strategy, particularly with politicians who do not want to be presented with a *fait accompli*. This analysis must be carried out at several levels. In France, around the issues of relocation, '*Made in France*' and the protection of French flagship brands, several approaches coexist, combining '*economic patriotism*', dear to Arnaud Montebourg, or the desire to bring about the emergence of '*European industrial champions*', a voice currently echoed by Bruno Le Maire. At the European level, Commissioner Thierry Breton has taken a political stance on this issue of European sovereignty and the implementation of an industrial policy, in a position very much inspired by the French.

Other stakeholders are key relays in public opinion and are likely to shape the debates: trade union representatives, economists, activists, shareholders, etc. In the Danone - PepsiCo controversy, it was the French dairy industry that very quickly became a key player in the discussion. For example, Jean-Michel Lemétayer, the President of the Fédération nationale des syndicats d'exploitants agricoles (FNSEA), said that he "*thought it was a pity that Danone, a national flagship, was not keeping its autonomy*"[13] It is potentially the entire ecosystem of the company that is called upon to express itself directly (on social media, through letters and open letters, etc.) or by soliciting the media. The trade unions, with their contacts and expertise in the media and political spheres, will question the social practices of the foreign investor and their compatibility with the '*French social model*'. The question of employment will naturally be one of the major issues at stake in the discussions, but the trade union organisations

[8] 20 Minutes, Toulouse : l'OPA d'un fonds d'investissement américain sur l'équipementier aéronautique Latécoère inquiète la CGT, 3 October 2019

[9] La Tribune, Un Club Med sous pavillon chinois ? Le FN s'en offusque, d'autres s'en réjouissent, 3 January 2015

[10] Some examples:
Le Figaro, L'Allemagne bloque une offre chinoise sur un fabricant de télécommunications, 3 December 2020
Les Echos, L'Italie bloque le rachat d'une entreprise de semi-conducteurs par une société chinoise, 3 May 2021

[11] Le Monde, Les « Barbares » de KKR font leur entrée à la Bourse de New Yorkv, 14 July 2010

[12] Les Echos, Equans : Bain s'associé à Fimalac pour contrer Bouygues et Eiffage, 20 October 2021

[13] Les Echos, Face aux rumeurs, Danone met sa force de dissuasion à l'épreuve, 19 July 2005

will potentially take on all subjects and will not hesitate to raise questions regarding 'sovereignty'.

Lastly, economists and experts are frequently called upon by the media to provide their points of view, often on the theme of defending French companies or urging national or European industrial policies. On the occasion of the Carrefour Couche-Tard project, many experts such as Christian Saint-Etienne, professor at the CNAM and member of the Cercle des économistes, expressed themselves: "*As long as France does not deal with its deep-seated ills [weak corporate margins, absence of pension funds constituting stable shareholders, inability to transform massive savings into long-term investment instruments, the weight of social charges], our companies will remain easy targets for clever predators.*"[14]. More critical of the French position, Ferghane Azihari, General Delegate of the Free Academy of Human Sciences, criticises in a tribune a "*veto of France which risks vexing other foreign investors*" and denounces a "*demagogic posture*" of the government[15].

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On the eve of a new campaign for the French presidency, and at a time when the coronavirus epidemic has exacerbated the sensitivity linked to issues of economic sovereignty, only those players who have defined a holistic and preventive communication strategy for their acquisitions in France will be able to maximise the probability of success of their operations.

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[14] La Chronique du Cercle, Entreprises et souveraineté nationale, 17th February 2021
[15] Le Figaro, Le veto de la France au rachat de Carrefour risque de vexer d'autres investisseurs étrangers, 19th January 2021

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FLEXIBILITY AND OPENNESS FOR ECONOMIC SECURITY

Interview with Anne Drif,
Journalist, Les Echos

Les Echos

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)
Interview conducted with the assistance of Alix Stephann and Adriano Bobo-Fantoli, students of the Law & Business major at ESCP Business School

In foreign investment control procedures, which are eminently political and linked to questions of sovereignty, journalists are key actors in bringing information to the general public's attention. They come into play when the different details are revealed and enter the public domain. Journalists therefore play a crucial role by shedding light on what was previously unknown without jeopardising the anonymity of their sources, while guaranteeing the veracity of the information disclosed and, as far as possible, ensuring a balanced presentation of perspectives.

Anne Drif, you are an economic journalist at Les Echos, and one of the people most widely read by professionals on this topic. How would you describe your position and approach to the question of foreign direct investment control in France? How do you respond to all the issues: political, economic, legal and discretionary?

Anne Drif: First of all, we need to remember why the issue of foreign direct investment (FDI) in France has been at the centre of the debate. We have been hit by various cyclical factors, starting with the Covid-19 pandemic, which increased the sensitivity surrounding FDI and concerns about predatory behaviour in the public sphere. The 2022 Presidential elections have also been thrown into the mix, creating favourable conditions for advocates of economic patriotism and also for the political extremes in the opposition who can use any failings against the majority in power. Lastly, the major geopolitical tensions between the United States and China and those triggered by the war in Ukraine have forced European governments to send signals of strength to their electorate and avoid any signs of weakness to the outside world.

The question of FDI has always been a subject of public debate, in tandem with major mergers and acquisitions (GE, Danone). But the political momentum linked to a far-reaching economic crisis, now compounded by energy tensions, has brought this key issue to the fore.

There were times, such as after the 2008 financial crisis, when the question was not even asked: the country needed investment and the banks needed funds.

The balance between capital needs, the electoral situation in France and the geopolitical context is constantly being challenged. This is reflected in the perceived "risk" associated with the nationality of investors. For example, in 2015, people were upset that Qatar was buying Paris Saint-Germain and acquiring shares in LVMH and Vivendi. This is no longer a matter of public debate. The fact that Qatari fortunes are buying up luxury brands is no longer an issue. The opposite is true for Chinese buyers. No one expressed concern about the purchase of SGD Pharma, Sandro-Maje or Baccarat by Chinese investors, who could pay a high price and were even seen as saviours. The Baccarat story only reappeared in the press in 2020, when the crystalware factory was placed under temporary administration after the compulsory winding up of the Chinese investment fund Fortune Fountain Capital (FFC). The same thing happened to banks in Europe, with Libyan capital flowing into Italian banks and Chinese capital into British banks. And then there are US investors, who were the first to acquire companies in Europe and in France. After the GE/Alstom affair, US-based acquisitions, particularly of funds, no longer triggered controversy. With the Trump administration and the heightened awareness of economic warfare, sensitivities have been reignited. Following the Photonis veto, Elsan, the second largest French hospital group, was forced to accept having a French company at its core.

You describe a process in which the balance between cyclical factors is precarious and systematically challenged. But was there not a specific moment when a political tipping point was reached?

Anne Drif: Yes, it is cyclical, but there was a sudden shift with the Alstom case: in a highly competitive environment, involving nuclear power, extraterritorial sanctions and even the imprisonment of Alstom executives, the strategies of the key players became much clearer, their motives more transparent, in terms of their predatory behaviour. While the Montebourg decree had no effect on the GE takeover, the figures show that the number of French government controls increased fivefold afterwards.

The shift is therefore permanent and happens depending on the economic environment, the need for capital, electoral issues, the nationality of the investors, and so on.

Saviours can very quickly turn into predators and vice versa. This is especially true in France, where the French Ministry of Finance is constantly balancing attractiveness and control. But it is true that since the Alstom affair, the awareness of economic, social and especially political risks has continued.

At the European level, the shift took place in 2020. Trump and the Sino-American economic war against the backdrop of the pandemic – with the attempted US takeover of CureVac, the darling of the fight against Covid – precipitated this shift. Until now, freedom of investment was defended at all costs and foreign investment was in some cases encouraged in Europe to prevent monopolies from forming. Margrethe Vestager's announcement in March 2020, urging EU Member States to set up investment control mechanisms, was a watershed moment in European policy. There were repercussions within Member States, including France.

For many years, the discourse coming from the Ministry of Finance was that we could not go any further with our controls, that we could not get around or tighten the rules because there was a risk of being overruled by Brussels. Today, this type of statement is no longer valid and is clearly out of date. There is also the implementation of the new, rather unprecedented mechanism for cooperation between Member States.

When we ask foreign funds (American or Chinese in particular) about their view of controls in their home countries, they usually say they are more rigid and stricter. By contrast, haven't French controls been seen as a sieve for years?

Anne Drif: Definitely. But could it have been done differently? We have a capital deficit in France. There are no major French investment funds, with a few exceptions, and they are more European than Franco-French. They are not arms of the State.

In many cases, the French financial marketplace has no alternative to offer and does not have sufficient depth to be an alternative to foreign investors, or the entrepreneur instead requires a new foreign shareholder to be marketable outside France. The situation with cyber is striking even today.

There are therefore controls, admittedly increasingly strict, but the French market remains open.

And what about the alternative of golden shares, shareholdings by the French authorities, the French public investment bank BPI and so on? Are these real alternatives to these foreign shareholdings?

Anne Drif: The role of BPI as a public stopgap should no longer be seen as the ultimate solution. In the past, it may have had a stake in the capital, but it was a minority share and had no right of veto. From this perspective, it was therefore rather inefficient, except for the political message that it wanted to send. BPI invested in several companies, some of which were not always successful. With others, there were internal tensions with foreign investors.

For example, in the case of Verallia, the buyer fund Apollo Global Management wanted to add debt and increase the dividend. There was a heated exchange with the management team because the director was being held personally liable. However, BPI did not take sides, at least officially, and did not apply any counter-pressure. BPI appeared, perhaps wrongly, to be a fairly limited strategic lever.

Photonis was a textbook case. We do not know the exact strategy adopted by the public authorities, as it seemed to fluctuate considerably. But the idea, if it existed, of making the transaction economically unattractive to the US buyer, because it was not possible to set up a proxy board or have an effective means of veto, did not really bear fruit. The fact that BPI became a minority shareholder with a guaranteed rate of return was unlikely to dissuade the US investor, who subsequently went back to the buyer. Our business law does not allow us, rightly or wrongly, to go as far as the United States in setting up "black boxes". One thing is certain: we are not operating in the same legal environment because we simply do not have the same economic weight.

Clearly, if the intention is to use BPI to send a political message to stakeholders, it is a lever with rather limited scope, in my opinion. Incidentally, is this BPI's roadmap and does this not take it beyond its economic support-focused mandate? In this area, yes, its role is undisputed.

Is the approach to FDI control in France specific or comparable to merger control? Is there a different approach, linked to the issue of economic attractiveness, sovereignty or economic patriotism, which may – in some cases – appear irrational?

Anne Drif: It seems quite specific. Merger control involves fairly clear rules depending on the size of the market. As for FDI control in France, we are dealing with something rather vague that cannot be controlled with a binary frame of reference. It is not enough to simply "tick the box", because there is a geopolitical aspect. However, how this "risk" is perceived varies from country to country. For a long time in France, the political aspect was not taken on board. They wanted to treat this external control as a purely technical control, with rules. A public veto has always been an absolute taboo, and it still is today. But the electoral context seems to have pushed this reservation to one side, and the Minister did not hesitate to come out against it even before a transaction had begun.

In the Carrefour/Couche-Tard case, according to some specialists, the technical basis for the veto was rather weak. Consequently, FDI control in France takes on a more political dimension, even though it is portrayed as technical abroad, so as to stick to the crest line where we strive to remain attractive to foreign investment. Only time will tell whether there was a momentary magnifying glass effect or whether the political approach is now more accepted.

However, a convergence between the two types of control, competitive and FDI, cannot be ruled out. At the European level, since the rejection of the Alstom Siemens merger, a more political approach to merger control is developing, as the buyer's chain of control, especially one linked to a foreign State, may justify a rejection.

In France, there seems to have been an attempt at a more political approach to mergers, or at least one that is no longer purely economic but socially responsible, after the intervention of the Minister for the Economy against a decision of the Competition Authority. Some convergence seems to have taken place, but for the time being it is still quite subtle.

For merger control, there is litigation, appeals and very public discussions. By contrast, FDI control is completely discretionary. Given this situation, how do you manage to deal with these issues at an early stage? What type of stakeholders are you in touch with on these issues?

Anne Drif: There is no group of stakeholders in this area that should inherently always be sharing information. Interests differ widely. Some people have an interest in publicising, contradicting or opposing a decision. But even so, their policy is not to be seen. They have no certainty around the intended effect. In theory, the current political climate should encourage them to do so. But we also see the opposite.

Take Cerba Laboratories, for example, which is going to move from one fund to another (from a Swiss-Canadian to a Swedish fund). The media only found out about this once the exclusive negotiations had been finalised. Private equity deals are usually accepted with no problems, and in this case it was a change of control from non-EU to EU. But the sellers contacted a small number of buyers to deliberately stay under the radar, especially since the Couche-Tard/Carrefour case, because the public authorities could have opposed it, rightly or wrongly, given that Covid tests could be considered sensitive.

How do operators who have an interest in sharing information contact you?

Anne Drif: There is no specific communication channel or person responsible for information sources, which is why I try to talk about specific cases rather than generalise. It all depends on the type of company, its size and its desire to take part in the public debate.

Photonis, for example, could well have remained under the radar. The choice of US company Teledyne was fully supported and approved by all the stakeholders in the Executive and also visibly by some in the Ministry of Defence. But this is a shifting landscape where interests can vary greatly, including within the public sector.

On the face of it, operators are not always willing to volunteer information, except in exceptional cases. It is unpredictable.

Cases involving a change of control during financial restructurings are special. Vallourec and Europcar spring to mind. In many cases (hedge funds, for example), switching to foreign control does not affect anyone: there is no political manipulation, because sometimes – or very often – it is the only alternative to bankruptcy. The experts have no desire to share information, except in cases where there is a clear clash between the financial parties or other options may exist.

There are many stakeholders and each one pursues its own interests. In the midst of all these stakeholders, do you sometimes feel like you are being used? Have new stakeholders emerged on these issues, such as the trade unions in some sensitive cases?

Anne Drif: The trade unions are among the most frequent contacts I talk to. In cases of foreign acquisitions, they are the only party to highlight the employment-related risks involved, more so than the company's management. But I do not speak to them any more than I do to other stakeholders. And in my view, neither should I be doing so per se. As journalists, we are naturally aware of the constant attempts by those with different interests to manipulate us. It is our job and our objective to keep a balanced view.

The safeguard consists precisely in speaking to multiple stakeholders, to bring together these different possible interpretations and maintain a balance, especially on subjects as political as foreign investment. Depending on the configurations and types of companies involved, these interests can be positioned in radically different ways. Everyone tries to remain under the cover of the technical aspects and to conceal the political imperfections that are nevertheless at the heart of these issues. Even within politics, there can be different interpretations of these changes in control.

Getting the maximum amount of coverage ensures a certain degree of balance, but as a media outlet we are always exposed to the risk of bias, which often translates into highlighting the predatory aspects and threats to economic security, because it is easier and more profitable for a newspaper to go down that road.

From the outside, the legislative and regulatory provisions are poorly informed by the doctrinal literature and there is little data on how they are implemented. In your opinion, which approaches are appropriate for interpreting French foreign investment control? Can you compare the case of France with what is happening elsewhere?

Anne Drif: In my opinion, it is the political interpretation that takes precedence. The technical aspects are interpreted, manipulated and structured to fit in with what the original politician wants to do with them. Is it a sensitive issue or not, is there a particular electoral base, which ministries are involved? Interpretations can vary depending on the ministries involved (or even within a single ministry).

As far as foreign investors are concerned, the perception from here is of a more uniform, committed and non-technical political approach – as in the United States, China and other European countries – to the risks (or opportunities) associated with the nationality of the investor. But the same tensions within the State apparatus must of course be there.

How do you explain the refusal to share information? Is it for fear of revealing a strategy?

Anne Drif: Basically, I don't think there are any strategies. Unless there is an obvious or necessary alternative for the foreign investor, as long as the politician is not up against the wall in terms of the commitment to be made, it remains a blur of divergent interests without any real line being taken. As long as there is no political momentum, things remain in the technical sphere. I am not sure we can even say that there is a strategy within a ministry, within a government, and even less so within an executive and the State. Ultimately, this strategy only emerges when a decision is needed.

The Photonis case was quite revealing in this respect: it became a public issue even though the State had been associated with and approved the process from the outset. It was therefore supposed to have validated a "strategy".

How does foreign investment control in France differ from what is practised in the United States?

Anne Drif: In the United States, the world's largest economic and M&A market, control and its strategic role is so well accepted that it is clearly not a subject of debate. There is CFIUS, which provides a level of control that is probably as strong as that in China. Politicians accept this completely. This is not the case in France, which is certainly not in the same economic position and is not as sure of its attractiveness. We saw this with Couche-Tard and with Photonis. With Alstom, the position was not clear either. No one within the State clearly expressed the government's position on the transaction, if indeed it had only one. Whereas in the US, the position is clear, even towards China.

Do you think we can move towards greater harmonisation of foreign investment control within the EU, to have more leverage?

Anne Drif: We have seen a refocusing at the national level during the pandemic, with security being a matter for each Member State.

On the face of it, the subject is too politically sensitive to be managed at the European level. We are talking here about national sovereignty. In this area, it is difficult to detach management from responsibility.

The framework put in place by the EU initially encouraged Member States to act on their own behalf; it freed them up. However, we are now seeing a change of pace in European political discourse and a convergence of views among the various governments, even if they are not yet speaking with one voice.

Has Covid been a turning point in foreign investment control? Have certain areas that were not strategic become strategic?

Anne Drif: This turnaround went hand in hand with the weakening of the economic situation. Predatory strategies have been portrayed as easier and public authorities have become increasingly aware of this. There was also a fear linked to the possible decline in the value of target companies.

The issue of relocation is also closely related to this. Public authorities are now more sensitive to this.

And yes, new sectors and sub-segments have become strategic.

Some parts of the manufacturing chains, which were not previously considered to be sensitive sectors, now are. Public authorities are becoming more vigilant because the entire production process can fail when a link in the supply and manufacturing chain is missing. As a result, the range of strategic companies has grown out of all proportion with the pandemic.

From your point of view, are these changes, the emergence of certain sectors, long-term?

Anne Drif: The definition of a strategic company varies and must vary according to the economic and security environment, except perhaps in the very sovereign field of national defence. From food at the height of the Covid crisis, to energy, to rare metals, this rebalancing is ongoing.

Is it easier to make it onto this list than off it?

Anne Drif: It all depends on what you want to do with the list.

What matters most is the intention of the politician rather than the list itself. Politicians want to show that they are aware of the situation, but they are still willing to discuss it. Another important aspect here is the commitments that remain a secret. Perhaps they should be made public. On this point, this summer's court decision in the Nokia takeover of Alcatel opened up a significant loophole. We need to ask ourselves about the right to shareholder information, for example.

When we are told that a "flagship" of French industry should not change hands, it means nothing. There is no official economic definition.

In your opinion, do the stakeholders involved talk to each other?

Anne Drif: The way things are organised today is similar to the way M&A transactions are organised, where the lawyers work alongside the PR people. The scope of the whole thing has changed; they are more aware of the lobbyists.

To come back more broadly to your view of your role as a journalist working on foreign investment control, do you see an educational aspect to your job? Is your first step to make fairly technical topics more accessible to your readers?

Anne Drif: We write factual articles, others analyse transactions in greater depth.

At Les Echos, our target readership is already fairly well informed and non-partisan.

The best way to provide educational content is to increase your number of sources and remain neutral. We try to let our readers interpret the facts based on their position in the economic environment by reducing our personal and journalistic bias to a minimum.

This is quite a difficult task because we are the link that makes transactions public, so we could potentially turn them into a political issue. It is a complex task because our sources are scarce and do not like to be quoted.

Every journalist has their own national perspective. Do you think there is a French bias?

Anne Drif: You can never completely extricate yourself from this. You have to be responsible for what you write as an economic journalist for a national daily, while at the same time being part of an ecosystem: you can never completely detach yourself from French national interests. But you have to pay close attention to "French bias" and at the same time not fall into a kind of nationalism, which can also take completely opposite forms, depending on your position, in a transaction: is it better to save the company by accepting the offer from an unexpected foreign investor, even if their nationality is overly sensitive, or to let the company go under?

The best way to guarantee balance is to have multiple sources and an extensive investor history.

How would you describe French public opinion?

Anne Drif: I would say that there is not one public opinion but rather a variety of different opinions. For example, one tech entrepreneur would be delighted to be bought out by an American rather than eke out a living in France, while another would see it as a threat to national competitiveness. How people view FDI is usually closely related to how they view politics at the time.

« THE KEY TO DIFFERENTIATION LIES IN THE PARTNERSHIP WITH MANAGEMENT »

Interview with Alexandre Margoline, Partner and head of Permira's Paris office

PERMIRA

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School) Interview conducted with the assistance of Paul Agard, student of the Specialised Master in International Business Law and Management at ESCP Business School

The screening of foreign investment in France has emerged as a third pillar of M&A operations, alongside merger control and compliance. What is your view of this phenomenon? Are we witnessing the intensification of earlier trends or a fundamental shift (regarding the areas concerned or the spirit of FDI screening) ?

Alexandre Margoline: It is clear that the question of screening foreign investments in France is being scrutinized more closely today. I think that the prominence of this issue varies enormously from one industry to another, depending on their sensitivity. For example, screening is not the same if the operation involves the pharmaceutical industry as opposed to other industries. It is easy to understand this difference, which is due to the strategic nature of the target.

Do you think that in the area of foreign investment screening in France and elsewhere that there will be a before and after Covid? Do you think that such a crisis is likely to change the philosophy of screening?

Alexandre Margoline: Yes, I do think that the health crisis we have been living through is bringing about a change in the philosophy of FDI screening. Nowadays, screening takes into account the strategic interests and sovereignty of the State, and sometimes European sovereignty also. All investors are not viewed equally. Non-European investment funds, for example, may be less well perceived than European funds. There is an implicit favouritism towards French or European investors, despite the friendly relations between France and a non-European country.

In your view, how is the French system perceived by foreign investors? Is it seen as welcoming and professional, as a deterrent that pushes investors towards more welcoming or more transparent systems, or as a happy medium ?

Alexandre Margoline: Without getting into the content of the legal system, I think that unfortunately everything is a matter of perception, i.e. the perception that foreign investors have of our legal arsenal. In our profession as investors, perceptions very often become reality, regardless of the content of legislation, which is often misunderstood. And the perception is that in France a certain form of protectionism is used by the government in certain industries (e.g. automotive, tourism, health, etc.). I think that this perception is real and that any investor, whether a industrial corporation or an investment fund, will be aware that a barrier may be raised at any moment. To protect themselves and to mitigate the risk, foreign investors will seek to give the operation a French flavour, highlight their connections and roots in France – for example, through the Permira team based in France – or enter into a partnership with purely French entities like BPI or Ardian. There may also be clear agreements or contracts between the seller and buyer on future commitments regarding employment, maintaining business operations, R&D and other issues that "reassure" the State.

Have you already faced this type of issue in your career as an investor? Have you ever needed to make a pre-selection of industries that are less likely to come under the purview of such investment screening?

Alexandre Margoline: We do not tend to make our selections on the basis of the sensitivity of the industry. However, when we know that the industry in question is a sensitive one, we anticipate the situation by establishing a constructive dialogue with the relevant stakeholders to avoid any setbacks.

I remember a deal that was aborted in the tourism industry which was rather paradoxical in terms of the way the investment screening was done. On one hand, the French tourism company wanted to expand in Asia and had the clever idea to bring in Chinese investors. On the other hand, the French government sought to preserve French assets, but had nevertheless approved the operation, in spite of the increase in Chinese investors. Their goal then was to make sure that the Chinese investors would only hold a minority share and have virtually no control in terms of governance. I think that nowadays, in the context of a health crisis, that such a transaction would be much more complex, if not impossible, to implement.

Do you think that investment funds receive noticeably different treatment from industrial investors? If so, what are those differences?

Alexandre Margoline: I think that as an investment fund we are in a much more favourable position than a foreign strategic industrial actor regarding the seller, the government, and even the French population or media. A fund operates in a cold and unemotional way. Funds may therefore play the role of a trusted third party that will operate in a rational, expected and predictable way. Moreover, in the past five years there has been a real opening up to financial investors, for operations of every magnitude and at any level of maturity, which is truly encouraging for this type of investment and shareholding.

However, investment funds are not all the same. Their strategies may be very different, even in the world of large-cap companies. Each fund has its own positioning. Once this positioning has been verified, stakeholders will believe in the positioning and draw the corresponding conclusions. If we take the example of Permira, we do not do any company restructuring or any massive layoffs, but we do position ourselves with a view to supporting the growth of a company that is already in good shape. We get management and shareholders involved. Naturally, we are better perceived than other investors that might take a much more offensive approach. The investment thesis is extremely important, because it shapes the government's perception of the fund. The investment thesis is different depending on whether we are talking about a thriving company in the technology or pharmaceutical industries or a heavily industrialized company where questions of employment and outsourcing are the focus of attention.

Does the fact that an investment fund only holds its equity stake for a limited period of time, unlike a corporate investor, work against it in terms of the perception the government may have of the fund?

Alexandre Margoline: Not necessarily. But it has happened in the past that we had to agree not to resell the target to strategic rivals. Then we found ourselves in a partnership with the founding family and the agreement stipulated that we could not sell the company to foreign competitors, but could opt to sell to the family or to take the company public.

It is therefore possible to limit the scope of the exit strategy. But it is not always so easy, when we have control of the company, because the impact on prices and on the competitiveness of our offer is automatic. It is very hard to do in practice.

In order not to hinder its chances in a bidding process, what can a fund do? How can you work on the legibility of your approach? Does the fund have to bear the risk of investment screening alone or can it involve the seller?

Alexandre Margoline: Differentiation is achieved rather naturally because a fund has very clear and well delineated advantages and disadvantages. The advantage is that a fund behaves as a third party which has no interests beyond the investment in question. Therefore, there will be no question of synergies or strategic influence that would come with another company, only the investment thesis, which is that of the fund and which must be in line with the management of the target company. The choice is therefore known, rational, and aligned with management. On the other hand, the downside is that the identity of the fund may at times be less clear; there is a somewhat nebulous aspect.

The key to differentiation lies in the partnership with management. When both management and the seller are convinced of our positioning and the truth of our investment thesis and when the fund is aligned with their future strategy, the price may be slightly lower, but the parties will have avoided the central question of strategy.

In the case of a build-up, does being a fund change the circumstances by making you more of a strategic actor than a financial one ?

Alexandre Margoline: I will give you a nuanced answer to that question. While it is true that in such a case the fund appears to behave as a strategic actor would do, the fact remains that in the end we are an investment fund and we always have an exit timeframe.

In any case, the positioning is clear. It may require the implementation of an equity package.

The definition of foreign investors increasingly takes into account the chain of control, beyond the corporate headquarters. Does that change the way that funds are structured and how they approach their operations?

Alexandre Margoline: The advantage for the company of having an investment fund as a shareholder is that it can remain independent. The goal is not the absorption of the target, which will continue to function as a standalone. Wherever the funds are located, operations are not predatory and the French targets remain based in France. We adopt and pursue a purely financial approach and have no intention of building an empire here or there, in this or that jurisdiction !

« FRANCE IS A VERY ATTRACTIVE AND OPEN DESTINATION, WITH A MARKET THAT ACTIVELY WELCOMES INTERNATIONAL INVESTMENTS »

Interview with Marc Vincent, Global Head of M&A at Natixis

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)
Interview conducted with the assistance of Paul Agard, student of the Specialised Master in International Business Law and Management at ESCP Business School

How did Natixis develop its multi-boutique model and what is your role as Global Head of M&A at Natixis?

Marc Vincent : First of all, it is worth bearing in mind that Natixis developed its M&A business very recently. Let's go back to 2012, when we gradually started developing this business with a fairly innovative model – our multi-boutique approach. Rather than building up an in-house team, we decided to single out a number of companies in key countries with a view to working with them, and taking a unique approach whereby partners we work with can maintain their stakes in their businesses. Within our group – Groupe BPCE – we were able to leverage Natixis Investment Managers' expertise and draw on its past experience in developing its network of asset management affiliates.

Natixis began growing the M&A business in France with the acquisition of the French team of Leonardo & Co, which operates across France, Spain, Italy, Belgium, the Netherlands and Germany.

We set up Natixis Partners in France, which now houses around a hundred staff and is a significant LBO player on the French market. We subsequently pursued our strategy with the acquisition of 360 Corporate in Spain, which we rebranded Natixis Partners Iberia. We have always strongly believed that it is crucial to operate on the US market, so in 2016 we partnered with independent New York boutique, PJ Solomon, which kept its name as it has a strong brand image on this market. This acted as the foundations to build a platform with a view to developing business vertical activities. Over the past few years, PJ Solomon has notched up stellar growth, with revenues now close to $200 million. So we drew on this strong growth and the arrival of new partners to recently change the name to Solomon Partners.

We then launched a second series of acquisitions, taking a majority stake into Fenchurch Advisory in London, an independent boutique specialized in financial institutions, followed by a highly renowned tech boutique, Clipperton, which specializes in fund-raising as well as M&A. This provides an opportunity to engage with large manufacturing and commercial groups, which are extremely interested in innovative start-ups. China is also a major market for Natixis, so we decided to acquire Vermilion Partners, which boasts a solid local presence in the region. We then also bolstered our business in Asia-Pacific with the acquisition of Azure Capital in Australia, which specializes primarily in infrastructure and natural resources, and enjoys national coverage with offices in Perth and Sydney.

Our multi-boutique model brought in revenues of nearly €400 million in 2021 and is set to post sustained revenues in 2022. Our approach brings together a number of affiliates where Natixis is the main shareholder, while each boutique also maintains a degree of independence.

Our multi-boutique network has continued to expand throughout 2021 and 2022 as we have rolled out a range of initiatives. In September 2021, we launched two non-capitalistic and non-exclusive partnerships – one with bank LBBW in Germany and another with Tyndall in South America. Meanwhile, Solomon Partners continued to grow with the development of a new business vertical in the Business Services sector, and opened new offices in Chicago. In October 2021, Natixis Partners expanded its regional presence and ramped up its operations on the small-cap market with the development of an office in Lyon. In June 2022, Natixis Partners reinforced its M&A expertise in the buy-side market.

As Global Head of M&A at Natixis, my role is to ensure that all our boutiques run seamlessly and support them in coordinating with Natixis and with each other. My job is to ensure that these businesses grow, under the supervision of Nicolas Namias, Natixis' CEO, and in close cooperation with other business lines at Natixis, first and foremost our Corporate & Investment Banking arm.

What type of clients do you work with – public companies, manufacturing corporations, investment funds – and what are your priority sectors?

Marc Vincent : We have a global multi-boutique strategy, which means that we have a highly diversified range of clients, primarily comprising major manufacturing groups, financial institutions, private equity funds, not to mention mandates that we operate for public companies. Our clients are extremely diversified and work across a wide range of sectors.

How important is control of foreign investments in general in your current practices, and in France in particular?

Marc Vincent : There are a number of points worth remembering on the issue of control – or screening – of foreign investments in France. Firstly, France welcomes a huge amount of foreign investment, and the country remains a very attractive and open destination, with a market that actively welcomes foreign investment. By way of example, since I have been at Natixis, very, very few projects or deals have been halted by the French government.

We know right from the outset when any given transaction can turn out to be sensitive. So in our role as banker, and in cooperation with lawyers and the company in question, we are responsible for identifying the various aspects of the deal and discussing with public authorities ahead of time. These various dimensions must be ascertained upstream, and ultimately it is not surprising if there is a reduction in threshold or if public authorities are more attentive to aspects involving jobs or relocations: these are obvious aspects that it is natural to consider.

In practical terms, there is an informal phase where this sensitivity is discussed with the various parties involved. The groundwork is laid beforehand. If the public authorities conclude that the transaction is in a sensitive industry and refuse the transaction, so be it.

Our work involves supporting a client in an M&A deal and ensuring that the transaction proceeds as smoothly as possible. Every time we talk with the French authorities, our discussions are particularly constructive and thorough – their door is always open!

Ultimately, when national sovereignty is involved, it is perfectly natural that the French state would seek to protect a number of key industries. The majority of States also have a foreign investment control mechanism, which everyone finds totally normal.

The scope for control was initially confined to the arms and defense industry, but has widened considerably and now incorporates new sectors and asset types i.e. not just large industrial players but also SMEs, very small-sized firms and start-ups. How do you tackle this change? Is it just a natural extension in the approach or does it herald a paradigm change?

Marc Vincent : I do not think we are seeing a paradigm change. The Covid-19 crisis has obviously had an impact and forced the French government to look more closely at a certain number of issues. The environment has of course changed, but it is important to remember that the French government has considerably supported French companies and safeguarded the country's economic landscape throughout the crisis. So I see the investment control mechanism in some ways as the trade-off for State efforts in supporting companies, with programs like the state-guaranteed loan for example. It is also worth noting that the number of transactions controlled has increased considerably, but there is virtually no change in the number of refusals. Lastly it is important to remember that French companies draw part of their wealth and growth from international M&A transactions. So I see today's situation not so much as a paradigm change, but rather as a certain kind of pragmatism.

Most participants highlight varying degrees of ambiguity on the control scope in France and some aspects of the procedure. The precise details of banned sectors are sometimes fairly nebulous, do you think that French legislation is sufficiently clear?

Marc Vincent : I think that the existing body of legislation is consistent and clear. And in a constantly changing environment, I think it is understandable that the outlines of certain industries can also be changeable. Again, support from the French government for our industrial fabric, along with the State's constant efforts to adapt to the situation warrant these changing profiles.

Looking beyond the French system, it is interesting to note that the European Commission recently looked again at the subject of screening foreign investment and is keen to submit these acquisitions to European financing plans. These plans obviously concern a certain of number of areas deemed to be of sovereign importance by some countries i.e. space, innovation, energy, healthcare, etc.

What advice would you give to your clients internationally? In light of the eventuality of screening by the French government, do you prepare your clients for certain commitments? How do you take on board these difficulties when you work with foreign investors?

Marc Vincent : When a client wants to invest internationally, particularly in France, we have a duty to inform them of these aspects. Our advice is to never force the situation, but rather to embark on talks with the competent authorities well ahead of time. The approach is always the same: broach the issue of control well ahead of time and ensure constructive dialogue with the authorities. Meanwhile, commitments are inherent in any M&A deal and are discussed well ahead of time in the business plan: they make up the economic analysis of the investment, whether in terms of capex commitments, protecting jobs, pledges not to relocate, construction of an additional site, recruitment in a specific geographical region, or R&D for example. These commitments can also be discussed with local authorities. We therefore highlight all these aspects with our clients and all commitments must be taken into account in all work on assessing the target.

Do you adjust your approach depending on investors' countries, nationalities and profiles?

Marc Vincent : Some nationality aspects can raise additional questions. Generally speaking, it's a simple yes/no question as to whether the transaction has a chance of success. We take on board the client's nationality and focus analysis on the transaction's sensitivity. Fundamentally, I would say that that the investor's nationality is taken into account and is admittedly important in the analysis, but not decisive.

Do you draw on your worldwide presence to finetune your knowledge of investor quality – i.e. their reputation, past transactions and geographical origin – and anticipate how their projects will be met?

Marc Vincent : I like the expression "*act local, think global*", which accurately illustrates our M&A set-up. Our international presence obviously affords us clear insight into the local environment and helps us grasp its various dimensions. This helps us better understand our clients and finetune our approach. For example, with our team in Australia, we enjoy greater knowledge of the companies involved, their concerns, their local environment, their history and their reputation – this is absolutely crucial for us.

Our discussions with participants also highlighted the importance of dialogue between the various stakeholders – investors, lawyers, banks, regulators or agencies, investors' home States – in a foreign investment project. How do you work with them in practical terms?

Marc Vincent : We work with all stakeholders and always with a law firm, and also sometimes receive support from communications agencies. When an international investment may fall under the control or screening mechanism, we embark on dialogue with the State, either directly or via our lawyers.

The Covid-19 pandemic has had major repercussions for the M&A market in Europe and worldwide. How do you see the future for M&A against the backdrop of this crisis?

Marc Vincent : After a slight slowdown in activity in 2020 due to the Covid-19 crisis, 2021 was an exceptional year, with some impressive deals. There will not be the same kind of performance in 2022 – we have rarely seen two exceptional years in a row in the past.

The Covid-19 crisis has transformed our practices: more and more transactions are being conducted digitally and due diligence has even been carried out by drone, which would have been unimaginable several years ago. This suggests a very fundamental and wide-reaching change in the way we work. I am convinced that the pandemic has major implications for boards of directors, and it will offer a range of opportunities in terms of external growth and restructurings.

CHINESE INVESTMENTS IN FRANCE

By Bruno Bensaid,
co-founder, Shanghaivest

SHANGHAIVEST
灵 石 投 资

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

What is happening at the European level?

Since her inauguration in June 2019, European Commission President Ursula von der Leyen has railed relentlessly against China and its purported hegemonic behaviour, and has frequently portrayed the PRC as Europe's most significant economic threat.[1] These suspicions have gained further traction as China enjoys a renewed economic and diplomatic cooperation with Russia. However, such fears may be significantly exaggerated with regard to the evolution of Chinese investments in Europe in the past few years.

While Chinese outbound investment remained flat in 2021, growing by a modest 3% to a figure of $ 114 billion, Chinese outbound M&A transactions amounted to just €20 billion, down 22% from 2020. China's FDI in Europe (the 27 EU Member States and the UK) increased but remained disappointing. In 2021, Chinese FDI in Europe increased by 33% to €10.6 billion, from €7.9 billion in 2020, the second lowest figure since 2013.[2] The increase was driven mainly by a €3.8 billion acquisition of the electronics giant Philips by Chinese private equity firm Hillhouse Capital and some €3.3 billion worth of investment in greenfield projects such as electric vehicle batteries (EVBs), healthcare and biotech, IT and energy. While Germany, France and the UK accounted for 39% of total Chinese investment in Europe, this lagged significantly behind the Netherlands, due to the massive Philips acquisition.

In 2020,[3] Global Chinese outbound investments had fallen by 45% to $29 billion, its lowest since 2008 (vs $53 billion in 2019 and $80 billion in 2019, a far cry from the record $139 billion in 2017. In Europe in particular, Chinese investments dipped 45% to reach $7.2 billion, as compared to $13.4 billion in 2019. In 2020, The German hotel group Steigenberger was acquired by the Huazhu Group in a deal amounting to an equivalent of $780 million. Asteelflash in France was acquired by Universal Scientific Industrial (Shanghai) in a $422 million[4] transaction, while National Electric Vehicle Sweden (NEVS) was acquired by Evergrande, taking a majority stake in the company through a $380 million transaction (in addition to the $930 million already spent in 2019). In total, Chinese investments in Europe remained at an all-time low in 2020, with Germany and France receiving $1.8 billion each (equivalent to the 2018 figure in the case of France). If some very large transactions every year logically attract our attention (such as the €4.6 billion Amer Sports acquisition by Anta in Finland or the acquisition of Candy

[1] https://www.politico.eu/article/european-commission-ursula-von-der-leyen-state-union-2021-china-xi-jinping/
[2] Chinese FDI in Europe 2021 Update - Merics and The Rhodium Group, April 2022 report
[3] Baker McKenzie et Rhodium Group https://www.bakermckenzie.com/en/newsroom/2021/1/pandemic-slows-chinas-global-deal-making-in-2020
[4] https://www.asteelflash.com/about-us/ and https://evertiq.com/news/49230

by Haier in Italy for €475 million, both in 2019), most transactions in Europe involved SMEs with average transaction size of $132 million in 2019, significantly lower than the 2016 figure of $267 million or the $526 million invested in 2017. France was the poor parent of Europe in 2019, with Chinese investments amounting to a total of $100 million, significantly lower than both Sweden ($1.3 billion) and Italy ($700 million).

The different Chinese investment phases in Europe and overall outbound investment policy

China really started massively investing overseas in 1999 with the onset of the "China Go out"[5] policy in the wake of the Asian financial crisis in 1997-1998. This investment doctrine was consolidated after 2001 when China entered the WTO and embarked on the 10th Five-year Plan.

Since 2014, Chinese SOEs (state-owned enterprises) were encouraged by the "China Go Global" strategy[6] and carried a large number of overpriced investments, fueled by almost unlimited debt leverage provided by Chinese state-owned banks. In 2016, the Chinese Government sounded the end of the "all-you-can-eat buffet" and started cracking down on outbound capital flight, aiming to significantly slow or stop non-core and expensive investments (the Chinese had acquired a reputation for ignoring local business customs and ending up overpaying as a sole means of winning the prize). The goal was also to deleverage SOEs and prioritize BRI (Belt and Road) projects.

In 2019, Chinese state-driven investments represented just 11% of total Chinese investments in Europe, a result of 3 years of restrictions on SOEs compounded by recently introduced European restrictions.[7]

What are Chinese investors looking for in France?

From 2000 to 2019, France received the equivalent of $14.4 billion from Chinese investors, a far cry from the UK ($50.3 billion), Germany ($22.7 billion) or even Italy ($ 15.9 billion).[8] This ranking excludes the Swiss-based acquisition of Syngenta by ChemChina in 2016-2017 for $43 billion.

Tourism and Hospitality are key targets. In 2010, Fosun took a 7.1% stake in Club Med, in a transaction worth €22 million. In 2015, Fosun finally purchased a majority shareholding in Club Med (then valued at €939 million). Back in pre-Covid times, this represented a perfect combination of complimentary forces. Club Med had lost its luster and was crippled with debt, but held prestigious assets across the world. Fosun would make use of its financial, engineering and business network to help Club Med develop in China, a key market for tourism. Similarly, Chinese SOE, Jinjiang, a leader in hospitality, purchased the Louvre Hotels Group (featuring the Campanile and Kyriad brands) in 2014 from US-based Starwood Capital in a $1.3 billion transaction.

Food and agriculture-related acquisitions have also become strategic targets for Chinese investors. In 2011, Bright Food, Chinese leader in F&B, unsuccessfully tried to acquire the yogurt manufacturer Yoplait. Despite Bright Food's offer being 50% higher than its direct competitor, Private Equity fund PAI selected US-based General Mills to sell its stake in Yoplait for an equivalent of. $2.2 billion. In 2013, Shanghui, another leader in the sector, took indirect control of Aoste, Justin Bridou and Cochonou, through the purchase of US firm Smithfields Foods. In 2018, a consortium led by Fosun and Sanyuan acquired margarine producer Saint Hubert from investor Montagu. That same year, Chinese conglomerate Reward Group confirmed they had acquired approximately 3,000 hectares of arable land in two French regions, Indre and Allier, between 2014 and 2017. Because of the public outcry in response to these announcements, the French Government started imposing regulatory restrictions on the purchase of arable land by foreign entities. Visibly, this has not stopped Chinese investors from buying more than 165 vineyards and châteaux (of which 150 are located in the Bordeaux region).[9]

The luxury and cosmetics industries are magnets for Chinese investments. In 2005, Hutchinson Whampoa, the holding company of Hong Kong mogul Li Ka-Shing, acquired the Marionnaud cosmetics chain. Hong-Kong Li & Fung group purchased luxury shoe brand Clergerie in 2011 and iconic brand Sonia Rykiel in 2012. In 2016, Shandong Ruyi Technology took a controlling share in affordable luxury group SMCP owner of Sandro & Maje and Claudie Pierlot, among other prestige brands, for €1.3 billion. Shandong Ruyi have since relinquished their ma-

[5] https://www.diplomaticourier.com/posts/china-s-going-out-strategy
et http://www.gov.cn/node_11140/2006-03/15/content_227686.htm
[6] https://thediplomat.com/2014/12/china-urges-companies-to-go-global/
[7] https://eur-lex.europa.eu/eli/reg/2019/452/oj
[8] https://www.bakermckenzie.com/en/newsroom/2020/01/chinese-investment-in-europe-na
[9] Source : Trésor Public https://www.tresor.economie.gouv.fr/Pays/CN/investissements

jority share due to default on their debt. Sonya Rykiel failed to turn a profit and subsequently laid off 25% of its workforce. The group was later sold to a team of French entrepreneurs. As Bernstein Luxury analyst Luca Solca declared to SCMP in 2021 "often the Chinese companies taking these brands over have little experience of the industry and little value added to contribute". The article continues by stating that "European commentators have argued that Chinese companies are ill-equipped to steer traditional French and British brands through a retail crisis such as the pandemic or the shift to online purchasing"[10].

Yet a notable exception could well be Fosun, who have been trying their luck at European luxury brands for a number of years and have built local teams to administer these assets. In 2018, Fosun bought the iconic Lanvin brand, at the time in serious financial distress, and integrated it into a newly-founded luxury division aptly named "The Lanvin Group".[11] In 2020, Yuyuan Jewelry & Fashion Group, a Fosun subsidiary, acquired 55% of French jewelry brand Djula.[12] The new owner has announced they will invest up to €26 million to accelerate entry into the Chinese market and international business development. Last but not least: China cosmetics group Yatsen finalized the acquisition of skin treatment specialist Galenic in 2020 from owner Laboratoires Pierre Fabre - the latter will retain a 10% share in the company. According to the legal firm involved in the transaction, Yatsen is run by a team of young US-educated Chinese executives, well versed in Western business principles, M&A and sale auctions. They have also shown their ability to conduct transactions entirely remotely, especially useful during the Covid pandemic, while leveraging local teams of advisors.[13] Backed by Chinese private equity fund Hillhouse Capital, Yatsen was listed on the NASDAQ in November 2020, raising $100 million.[14]

French Industrial and tech companies have also attracted Chinese investors' interest for over 20 years. From 2003 to 2010, Consumer electronics giant TCL made a series of acquisitions in France or joint-venture companies with French companies, such as Thomson Electronics, Alcatel Mobile Phones and Sagem Mobile. Manoir Industries, specialized in metal transformation, with activities spanning the nuclear, defence and petrochemical industries, was acquired by the Yantai Tahai Group in 2013.[15] The two companies were already working together in Manoir Industries' China JV since 1994.[16] Considering the sensitive nature of the technology and the clients involved (Manoir was an Areva supplier, for example), the teams and management from the sensitive areas of the company were managed separately alongside the data flow with the rest of the company. The transaction thus included a carve-out of this team for the sale.[17] In 2017, BOE Technology, a Chinese group in LED and IOT, took a majority shareholding and control of SES-Imagotag,[18] a French leader in digital tags, founded in 1992. The transaction was for 56% of the company, with a €222 million ticket. Like so many of the targets acquired by Chinese companies, SES-Imagotag was also losing money at the time of the transaction, yet had extensive experience working with its Chinese supplier, BOE. The merger therefore made sense.[19] Microchip manufacturer Linxens was also acquired by Tsinghua Unigroup from the CVC Group for €2.2 billion.[20] The transaction was confirmed and upheld in September 2019[21] by the French Government. The grounds for this approval by the French state was that Linxens was not a strategic asset and only provided the passive components of semiconductors. The famous "Montebourg Decree" of 2014 was therefore not invoked in order to block the transaction. In 2020, Universal Scientific Industrial (Shanghai) acquired Asteelflash in a transaction valued at $422 million[22] and Wencan, a Chinese leader in supplying parts for the automotive industry, acquired Le Bélier end 2020 for €250 million. Le Belier is also a company specialized in supplying similar products for the

[10] https://www.scmp.com/lifestyle/fashion-beauty/article/3155285/why-western-luxury-brands-bought-chinese-investors-fail
[11] https://www.lanvin-group.com/
[12] https://wwd.com/accessories-news/jewelry/fosuns-jewelry-unit-yuyuan-buy-majority-stake-djula-1203548561/
[13] Source : Bernard Tézé, Managing Partner at DS Avocats
[14] https://www.nasdaq.com/articles/chinese-cosmetics-producer-yatsen-files-for-a-%24100-million-us-ipo-2020-10-30
[15] https://fr.wikipedia.org/wiki/Manoir_Industries
[16] https://www.manoir-industries.com/2017/04/manoir-goes-international-manoir-yantai/
[17] Source : Ghislain de Mareuil, lawyer and co-founder of Shanghaivest
[18] https://www.ses-imagotag.com/en/acquisition-of-boe-technology/
[19] Source : Didier Fornoni, Partner at Hoche Avocats (at Dentons when the transaction occurred)
[20] https://www.reuters.com/article/us-linxens-m-a-tsinghua-unigroup/chinese-chipmaker-tsinghua-unigroup-to-buy-frances-linxens-for-2-6-billion-sources-idUSKBN1KF0B1
[21] https://www.euronews.com/2018/07/26/france-not-objecting-to-sale-of-linxens-to-chinese-group
[22] https://www.asteelflash.com/about-us/ and https://evertiq.com/news/49230

automotive sector. Electric vehicles and batteries are also attractive sectors for Chinese investors in Europe and in France in particular. Back in June 2021, Envision AESC announced it would construct a €2-billion plant in the Hauts-de-France Region of northern France to supply the Renault Group with electric car batteries. It will be Envision's first EVB plant in Europe, and indeed in France. Yet it is wise to monitor progress up until the operational launch in 2024, as it is not uncommon for such large projects to be resized, abandoned or relocated before they reach finalization.

Chinese internet giants also have a keen interest in specific sectors of the French tech scene. Tencent first invested in Vivendi and Universal Music. And then took 5% of Ubisoft in 2018 for an estimated $460 million. They also acquired a minority share in Voodoo games in August 2020, valued at approximately €160 million. In fintech, Tencent led a $45-million round in mobile peer-to-peer payment platform Lydia with CNP Assurances, XAnge etc and in 2019 a $115-million round in online banking provider Qonto.[23] France also appears to be a magnet for gaming studios acquisitions. As of August 31, 2022, NetEase, a Nasdaq-listed Chinese technology giant and leading video games publisher announced they had acquired French video-game studio Quantic Dream, a company which currently has 200 employees. Netease acquired a minority stake in the company in 2019. This acquisition is the first for Netease in Europe and will help establish Netease European headquarters.

At last, certain well-known Chinese venture capital companies are finally investing in France, after focusing their activities mainly in the UK, Germany, Scandinavia and Israel since the 2010s. In 2021, Chinese VC investments in Europe more than doubled to reach €1.2 billion remained concentrated in the UK and Germany.[24] Back in July 2021, Paris-based Prophesee, a leading developer of neuromorphic vision solutions, received a series-C investment from 3 Chinese investors, among which were leading AI venture capital firm Sinovation Ventures, founded by the reputed AI and tech evangelist, Kai-Fu Lee. The round was completed with investments from the corporate investment arm of Xiaomi, a world-leading mobile device supplier, and Inno-Chip, a Chinese investment firm specialized in semiconductors. Prophesee raised $28 million in 2019 which brought the amount raised by the company at that time to $68 million, while it is believed the July 2021 round reached $30-35 million. The idea behind such minority investment is to help Prophesee expand its global footprint and strengthen its presence in the Chinese market.

What does the future hold for Chinese investors in France?

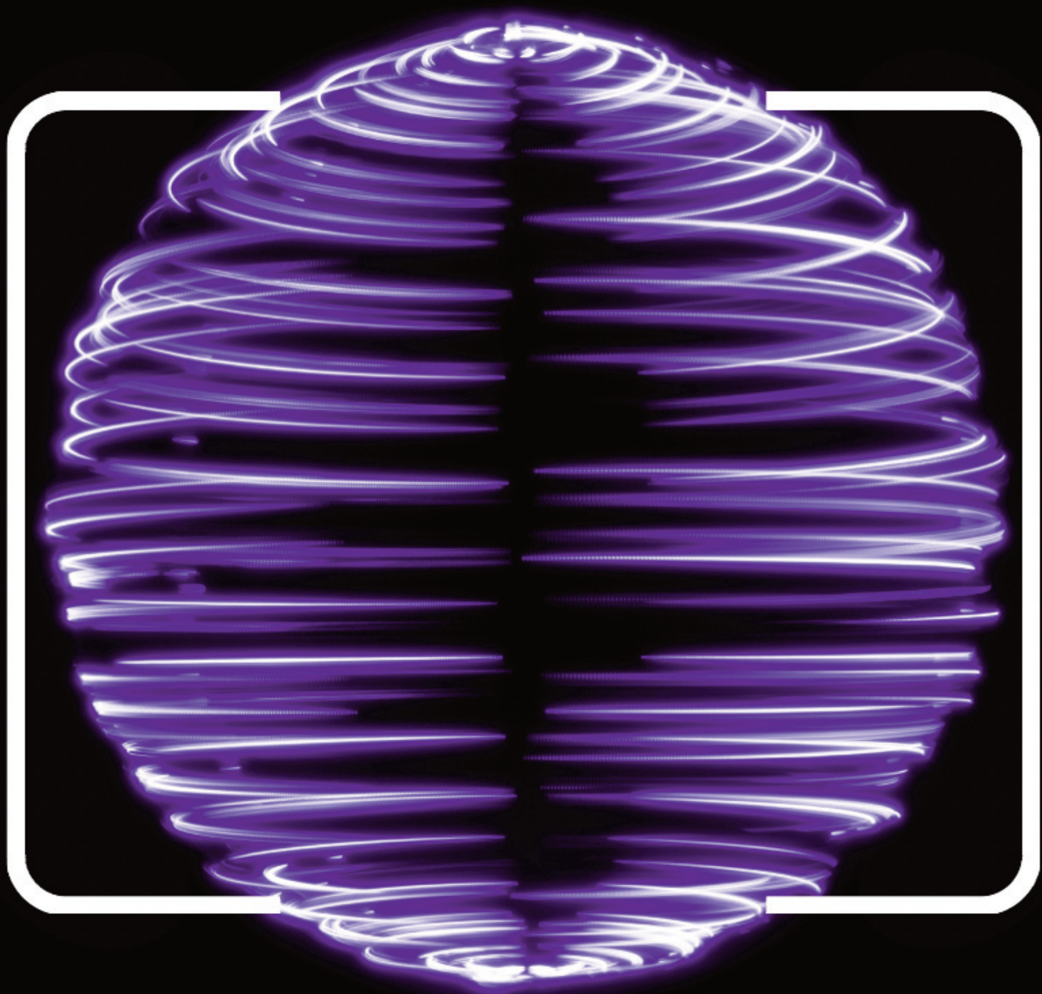
If Chinese strategic investments in large French enterprises raised eyebrows, in particular in the energy and infrastructure sectors, they remain however minority shareholdings with often little impact on the management of operations. In 2011, GDF Suez confirmed investment from Chinese sovereign wealth fund CIC to the tune of €2.3 billion. The deal was accompanied by the signature of a framework agreement with Chinese state-owned giant CNOOC to bolster Engie's presence in China and APAC.[25] In 2014, Dong Feng, a leader in the Chinese automotive sector and JV partner of Stellantis in China took a 14% share in the French manufacturer, investing €800 million as part of a rescue mission when Stellantis was in distress. In 2017, the state-owned China Eastern Airlines became a minority shareholder of Air France-KLM, acquiring a 10% stake for $440 million In 2021, China Eastern also got involved in a rescue plan totalling €4 billion for Air France-KLM. In 2015, an unknown Chinese consortium called Casil Europe acquired 49.99% of the Toulouse-Blagnac Airport Management Company. Casil Europe sold their shares in 2019 to the French consortium Eiffage, pocketing a €200 million profit in the process.[26]

2019-2020 saw increased capital outflow restrictions imposed by the Chinese Government. However, in 2021, a combination of the continued restrictions on outbound travel for Chinese tourists (which included the suspension of passport renewals and issuances, in addition to weeks of mandatory quarantine upon returning to China) and an early reboot of Chinese exports created a sizable trade surplus, thus representing a logical encouragement to overseas investment, especially in Europe. Yet Chinese investments in Europe, while increasing significantly from 2020 to 2021 (€10.6 billion in 2021 compared with €7.9 billion in 2020) have shifted from "M&A only" to a significant proportion of greenfield projects (representing €3.3 billion in 2021 and covering a broad range of sectors). Chinese investors such as Huawei or Microport have been

[23] https://supchina.com/2020/02/24/why-is-tencent-investing-in-european-fintechs/
[24] Rhodium Group - MERICS
[25] https://www.reuters.com/article/us-gdfsuez-china-idUSTRE79U1HQ20111031
[26] https://www.lemonde.fr/economie/article/2019/12/30/le-chinois-casil-vend-l-aeroport-de-toulouse-a-eiffage-et-realise-une-grosse-plus-value_6024419_3234.html

encouraged to pursue this more nuanced approach, developing cooperation instead of straight acquisition and boosting R&D and manufacturing, in order to circumvent increasing regulations and lower thresholds to controlling interests imposed by UE countries such as France. Strict capital controls, such as the "Montebourg Decree" in 2014 and the "PACTE Law" in 2019 were complemented by two additional decrees: in December 2019, through the broadening of the definition of strategic sectors and lowering the triggering mechanism for the Government authorization procedure from 25% to 10% ownership for investors outside of the EU/EEE. In April 2020, the scope of protected industries was broadened to include biotech and saw a lowering of the ownership triggering threshold to 10%, which also included French listed companies. Finally, China's growing financial woes compounded by catastrophic climate events in the Summer of 2022, the unabatingly painful Covid restrictions and disruptions to industrial output and the value chain will most likely exert a negative impact on investment projects in France and Europe for the remainder of the year and in 2023.

SS&C INTRALINKS



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« FDI CONTROL IN FRANCE: WE HAVE A LAW, BUT WE LACK A POLICY »

Interview with Olivier Marleix, Member of the French Parliament and Vice-President of the French political party Les Républicains

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)
Interview conducted with the assistance of Alexandre Bal, student of the Law & Business major at ESCP Business School

Is the thinking behind the French system based on economic sovereignty, protectionism, economic patriotism, the search for foreign investment, or a particular strategic vision?

Olivier Marleix: The parliamentary board of enquiry that I chaired into the sales of Alstom, Alcatel and Technip highlighted the fact that France had no specific policy. Our national legislation has provided an authorisation procedure for a very long time, but it has been rarely used, is considered to be rather formal, and is circumvented in most cases. The proof of this absence of policy is that we seem to have gone from one extreme to the other in the space of a few years. In 2014, we authorised the sale of Alstom Power, which involves considerable risks (our autonomy in civil nuclear power, the maintenance of the turbines of our 58 reactors and the equipment for our aircraft carrier and submarines). Then in 2021, we blocked the takeover of Carrefour by Couche-Tard even though, by definition, there is nothing that can be relocated, there is no monopoly and there is nothing to show that there is a clear breach of food safety. Yesterday we gave up everything for the sake of economic attractiveness, and today we block a transaction for an essentially political reason: fear of public opinion. This is rather unfortunate because, as much as I believe that countries are justified in protecting their strategic interests, investors need a minimum level of predictability. In any case, it speaks volumes about how much this issue has become part of our economic life.

We are no doubt moving away from a French exception, whereby we wanted to believe that investors did not carry passports. The United States, a truly liberal country, has never thought like this. And judging by the recent developments in legislation on foreign investment control around the world (including the British and Germans, who are more liberal than we are), this is a global trend. Just as we can no longer hide the dark side of certain free trade agreements that create unfair competition, the nationality of shareholders now seems less trivial. The progress made by the European Union in this area is also telling. In 2014 we had to do battle to have this or that sector included on the list of strategic sectors. Now the European Commission has brought a list to the table – a list that has been voted on, covering more than thirty sectors.

What is certain is that public opinion, in France as elsewhere, prohibits governments from settling for the usual linguistic devices like “marriage between equals” or “new Airbus”. If we really want to reassure both foreign investors and the public, we need to have a real, predictable policy.

What do you think the government's analysis criteria for defining the strategic interests to be protected should be?

Olivier Marleix: Some of these criteria are laid down in the law itself. First, there is the investor’s nationality. Our law has become more stringent in this area. Until the PACTE Law, an EU investor was more or less treated as a domestic investor, but this is no longer the case.

Second, there is the nature of the investment: it must involve a risk of taking control of the company. During the Covid crisis, the government even lowered this threshold from 25% to 10% of voting rights.

Lastly, there is the criterion relating to the sector in which the company operates. The European Regulation of 19 March 2019 and the Decree of 31 December 2019 now cover a broad spectrum; we go well beyond the traditional triptych of “national defence, public order and public security”. The European authorities’ change of heart is clearly meant to give Member States the tools to largely protect their companies by defining a substantive criterion that can be interpreted with some flexibility.

These three criteria define whether the investment transaction is eligible for the control mechanism, after determining the interests at stake in the investor’s target company. These evaluation criteria are not defined by Parliament. The Minister for the Economy has discretionary power to assess them. This is done in consultation with the relevant sectoral ministries, which assess, among other things, whether the company in question has unique expertise and whether there are alternative suppliers or products. More broadly, we should be considering whether the company plays a key role in leading an economic sector. As the French Finance Ministry has not published its policy, we can only assume that this evaluation is done in a very empirical way.

Given the importance of the French economy’s financing needs, what importance can geostrategic considerations have?

Olivier Marleix: I do not believe that these “geostrategic” considerations are extraneous to the company. Essentially, the only issue is protecting value creation in France. To give a widely recognised example, if a strategic company is bought by the Chinese, who take over the expertise, relocate to China and leave only an empty shell for domestic creditors (a scenario that is actually far from just theoretical!), you may have temporarily met a need for financing the French economy, but, in the end, you have destroyed any value.

You are right, the issue does relate to how France finances its large companies. We have an industrial sector that is both highly concentrated (just 80 companies produce 50% of the country’s industrial output) and poorly controlled (the largest shareholder in each of our CAC 40 companies holds an average of 28%). This creates structural fragility where the risk of a takeover is extremely high.

Without an alternative capital-based solution, the FDI control procedure or the use of golden shares by the State is largely a non-capital-based control tool. In such cases there is not necessarily a veto, but there are conditions imposed on the investor.

According to Article L. 151-3-1 of the Monetary and Financial Code, the Minister for the Economy can take precautionary measures including the suspension of voting rights, the distribution of dividends and the cessation of a company’s activity. With economic tensions rising and control intensifying, can the right balance be struck between economic attractiveness and increased control?

Olivier Marleix: The consequences of the FDI mechanism should not be exaggerated. The Finance Ministry takes two months to examine each file, which is nothing like the time it takes to go before the competition authorities. And it is certainly better to get the green light from the government authorities in a transparent way than to carry out a transaction on the sly, which if found out, as was the case with Alstom Power, leads to a board of inquiry and months, or even years, of political controversy. Once again, economic operators need predictability.

The sanctions you mention were rewritten in the PACTE Law. They have the advantage of being legally sound, which was not really the case before. They come into play in two cases: failure to obtain authorisation or failure to comply with commitments. These sanctions essentially play a deterrent role. The tool provided by the law is not only available to the government. It can also be used by French companies that believe a major customer has been acquired by a foreign company that relocates the production to which they contribute to another country.

As chairman of the board of enquiry into State decisions on industrial policy, what lessons can you take from foreign investment control in France?

Olivier Marleix: Our mechanism clearly lacks predictability. In the United States, no one is under any illusions. When you are a foreign investor, you know the hoops you have to jump through for the CFIUS and are well aware of the array of measures that may be imposed on you. This may even go as far as having a "proxy board" that creates total separation between your capacity as a shareholder and the company's management team.

France is not so brazen! In the sale of Alcatel to Nokia, we took fairly extensive precautions to ensure the integrity and security of Alcatel Submarine Networks (the submarine cables that carry 80% of the world's internet traffic) with "top secret" boundaries and even a managing director approved by the Ministry of Defence, but we are not always so careful.

How do you view parliamentary control over decisions taken by the executive on foreign investment, as introduced in the PACTE Law?

Olivier Marleix: There was disagreement on this subject between the National Assembly and the Senate. The National Assembly had voted unanimously for an ambitious parliamentary control mechanism, entrusted to a parliamentary delegation for economic security. The Senate rejected this, settling a right of evocation granted to the chairs of the Economic Affairs Committees and the general rapporteurs of the Finance Committees of both chambers. This provision is now part of the law, but it is totally ineffective since their control can only relate to "closed" transactions, in other words, those on which there is no longer an active protection measure.

This is a pity because, again, the power wielded by the Minister for the Economy over these cross-border M&A transactions in strategic sectors needs predictability and trust. The only way to defuse the risk of public opinion getting out of hand is through serious parliamentary oversight. This works very well in the United States, where the credibility of CFIUS is underpinned by bipartisan congressional oversight. As long as the French Finance Ministry refuses to allow Parliament to effectively defend national interests and act as guarantor, we will see controversial positions, as was the case, quite rightly, with Alstom, with the creation of boards of enquiry, or government vetoes for fear of controversy, as with Photonis and Carrefour. Our system lacks maturity.

During the Covid-19 pandemic, controlling certain companies/stakeholders with key know-how and managing supply chains was crucial. Does the pandemic mark a turning point for foreign investment control in France? Can we talk about a change in philosophy?

Olivier Marleix: There is no doubt that Covid-19 has made us reflect on what the French people may have felt was a loss of national industrial independence. We are probably coming within touching distance of the limits of globalisation. This is not an exclusively French phenomenon; it is one shared by all Western countries. Foreign investment control procedures are one way of guaranteeing to French people that the public authorities are paying attention to the conditions under which "their companies" are taken over. I also believe that our system will have to evolve further to provide a better definition, in the decree, of what the Minister for the Economy wants to protect, which is essentially the defence of our productive apparatus and earlier research and development efforts. Recent examples, such as the takeovers of Alcatel by Nokia and Alstom by GE, have shown us that we have not protected much! But make no mistake, FDI control procedures are the poor person's protection. They are certainly not the only way to ensure economic sovereignty. A foreign investor was not to blame for Sanofi not producing a French Covid-19 vaccine in early 2021.

PART IV - MERGERS & ACQUISITIONS: FROM STRATEGY TO FDI SCREENING

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LIFE SCIENCES IS A HOT TOPIC WHEN IT COMES TO FOREIGN DIRECT INVESTMENT CONTROL IN FRANCE

By Sophie Pelé, Partner, Dechert (Paris) LLP[1]

Dechert LLP

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Did the life sciences field became a strategic sector for the control of foreign direct investment following the COVID-19 pandemic?

Sophie Pelé : It is not new for public health to fall under the scope of foreign direct investment control.

In France, foreign direct investment started to be controlled in 1966. The scope of this control was significantly expanded in 2014 and public health became part of the expanded scope. In part, this was a consequence of the previous H1N1 flu pandemic which took place four years earlier.

France controls direct investments in "activities likely to affect public order and public security, relating to goods or services essential to guarantee the protection of public health"[2]. This definition has remained unchanged since 2014.

This particularly cumbersome wording has however revealed two main advantages:

First, it would be simplistic to consider that any and all activities in the life sciences field are deemed strategic. The life sciences field is very broad and encompasses, for instance, self-medication, dental practices, and food supplements. Therefore, only those goods and services that are deemed essential to ensure the protection of public health fall within the scope of control.

Second, the interpretation of what is deemed essential may vary across time and be adapted to fit different contexts. As such, it has undoubtedly been interpreted more and more broadly in recent years.

The main consequence is the difficulty to determine with certainty whether a given activity falls within the scope of control at any given moment or not. However, recent experience shows that the Ministry intends to give a reasoned interpretation for what is deemed strategic so as not to include all the activities related to the health sector within its scope of supervision. Even in this sector, which has proven to be particularly sensitive and under the spotlight recently, we have very recently seen certain areas of activity which have not been deemed strategic by the Ministry. For instance, in the field of medical insurance, which is compulsory for any healthcare professionals, intermediary services are not considered essential.

[1] The author would like to thank Clemens York, Partner in Germany, and Jeremy Zucker, Partner in Washington

[2] Article R. 151-3 II 8° of the French Monetary and Financial Code

Have there been significant changes recently?

Sophie Pelé : First of all, the pandemic revealed the conjunctural nature of French control of foreign direct investment.

It has been immediately adapted to the circumstances: as soon as the pandemic began, a Decree of 27 April 2020 added the biotechnologies to the list of critical technologies which fall within the scope.

Initially, the list almost mirrored the European regulation of 19 March 2019 which established a framework for the various national control tools, save for the field of biotechnologies. Despite this, I had never considered that biotechnologies were not strategic. In addition, medtechs (companies that produce medical devices, often in a particularly innovative way and using mechanical rather than biological processes) are not classed as biotechnologies. However, it would be premature to assume that they would be excluded from the scope of the control on foreign direct investment.

This highlights the limits of an overly political use of the tool: a more precise definition may remain incomplete and thus result in involuntary exclusions.

Other changes have occurred without being attributed to the pandemic: the life sciences field is, by its very nature, driven by innovation, and is therefore evolving very quickly. Interestingly, this results in a scrutiny exercised on it not only because the activities at stake are deemed likely to affect public order and public security, relating to goods or services essential to guarantee the protection of public health, but increasingly also because of its links to other strategic sectors, notably artificial intelligence, robotics (which is one way to categorise medtechs), and sensitive personal data.

What are the specificities of this sector in terms of FDI control?

Sophie Pelé : The life sciences field is unique in many aspects, all of which have consequences in terms of control of foreign direct investments.

First, the development of health products is particularly long and expensive. Development takes years and the outcome remains uncertain. To be authorised, a product must be proven to be safe and effective for humans through several clinical trials, which are extremely expensive.

From an investment point of view, this triggers a significant need for funding from a very early stage. Investors in the field should be ready to invest over the medium term and to take on the risk associated with drug development. Moreover, the French healthcare ecosystem heavily relies on commercial research projects incorporating the results of academic research, which may trigger protection from an FDI perspective.

It is therefore necessary to strike a balance between attracting investors that are essential for the development of this sector and activating control mechanisms for the protection of strategic national interests when necessary.

In addition, the sector is under the supervision of a large number of departments of state, which would each have a say: the Ministry of Health, of course, but also, quite often, the Ministry of Defense, the Ministry of Education and Research, the Ministry of Industry, and sometimes even the Ministry of Justice. Those various interests may misalign and it only takes one to come forward, even belatedly, to trigger the eligibility of a business for FDI control. This also leads to expanding the list of commitments.

Finally, another specificity of the sector, which was widely evidenced during the pandemic, is the multiplication of strategic partnerships, such as between Pfizer and BioNTech. These partnerships, which take place through licensing deals, usually do not trigger any change of control and are therefore not subject to foreign investment control.

Do you see any differences with the approach to the sector in other control jurisdictions, elsewhere in Europe or in the United States?

Sophie Pelé : The pandemic has increased the overall focus of foreign investment control authorities on health-related transactions. Nevertheless, life sciences are not included in the list of sensitive sectors in all member states.

In Germany, for example, it has switched from an optional to a mandatory notification system, but the scope of strategic activities remains quite restricted.

For example, prior authorisation is only required for investments of more than 25 percent in the area of infrastructure for the production of treatments for life-threatening or infectious diseases or protective equipment such as masks.

In the United States, the approach is different. The control committee (CFIUS) examines investments in critical technologies, critical infrastructures and sensitive personal data. Health sector controls have recently been carried out mainly on the basis of this last aspect, since life sciences companies hold sensitive health information. On several occasions, investors have been requested to divest this sensitive activity to a third party: this was the case with the health application "Patients like me", which was sold to United Health after an acquisition by a Chinese investor.

FOREIGN INVESTMENT CONTROL IN THE DEFENSE AND NEW TECHNOLOGIES SECTORS: FROM GEOPOLITICS TO GEOECONOMICS

Interview with Vincent Brenot and Julien Aucomte, Partners, August Debouzy

AUGUST DEBOUZY

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Vincent Brenot

Julien Aucomte

What substantive differences do you observe between the control of foreign investments in the defense sector and in the new technologies sector?

Vincent Brenot: The defense sector has naturally been an early focus of Foreign Investment Control. The production of the equipment required to meet national defense needs and thus ensure that French sovereignty is preserved is undisputedly a critical area of activity.

New technologies have been brought into the scope of foreign investment control in a pragmatic manner, through ad hoc additions that started with decree No. 2014-479 of 14 May 2019 on foreign investments subject to prior authorization, known as the “Montebourg Decree” (after the then Minister of Economy). Successive French governments have committed to identifying the sectors of activity that enable France to maintain its position in the concert of nations, not only on the military front, but also on the economic front, where innovation plays a decisive part.

This has been a global trend since the end of the Cold War. The major nations no longer compete to conquer territory nor, in a less clear-cut way, to extend their geographical spheres of political influence. Their rivalry is now being exercised through “soft power”, to quote Joseph Nye, in the economic field.

Therefore, Foreign Investment Control no longer targets States traditionally considered to be our “enemies”. It faces all international actors. Our military and diplomatic allies are at the same time our main economic rivals. Illustrating this development, the French authorities prevented in 2013 the proposed takeover of Dailymotion by the American Yahoo!. Dailymotion was owned by a French company at the time, and still is today (Vivendi).

The rise of the GAFAMs (Google, Apple, Facebook, Amazon and Microsoft) as entities with such financial strength that they can compete directly with States, even in certain areas traditionally considered as sovereign (see, for example, Facebook’s “Libra” project of a global digital currency or Jeff Bezos’ Blue Origin space shuttle), has made the new technologies an integral part of this global competition.

The GAFAMs and other tech champions are so often more advanced in the field of new technologies than States. On 23 April 2021, the French were rightly proud to see Thomas Pesquet take off for the ISS... still aboard a SpaceX rocket owned by Elon Musk.

States cannot compete with the GAFAMs and similar groups in terms of innovation and therefore need protect their homegrown tech startups. They do so by including the most innovative activities on the list of sectors where foreing investment is subject to screening. States thus use their regalian powers as a bulwark against the unprecedented financial power of these new private players; France is no exception to this underlying trend. It has, for instance, added biotechnologies to the list of sectors covered by Foreign Investment Control in 2020.

Screening foreign investments in the defense sector was a hallmark of the 20th century’s geopolitics. Screening foreign investments in the new technologies sector is a feature of the 21st century geoeconomics.

Last, defense and new technologies sometimes overlap. In such cases, national authorities are adamant; the American company Teledyne was made aware of this in December 2020 when the French Ministry of Finance vetoed its plans to acquire the French company Photonis, which specializes in optronics for defense.

What are the concrete implications of this trend on the screening of foreign investments in France?

Julien Aucomte: Historically, only M&A transactions, such as a 100% buyout by a foreign operator, or majority LBO transactions conducted by funds were screened. However, since decree No. 2019-1590 of 31 December 2019 came into force, any transaction causing a foreign investor to cross the threshold of 25% of voting rights in a French company engaged in sensitive activities is subject to screening. This threshold was even lowered to 10% for French companies whose shares are listed on a regulated market during the Covid 19 crisis (the mechanism was extended until 31 December 2022[1]).

This highly restrictive 10% threshold was introduced to protect listed French companies, whose share prices could be hurt by the economic consequences of the Covid 19 pandemic, from the covetousness of foreign investors wishing to make low cost acquisition. It is therefore a temporary measure.

The 25% threshold, which is a permanent one, particularly affects the projects of certain sovereign wealth funds that are familiar with taking minority stakes, sometimes in technology sectors likely to be regulated.

This is also true of venture capital operations. There is a significant movement of foreign funds, particularly from the US, into the new technologies sector towards French start-ups. With the amounts invested, the 25% threshold can easily be reached. Investors are now aware of this issue in the context of venture projects.

In addition, apart from equity participation, private equity and venture capital operations are characterized by shareholder agreements which sometimes give significant veto rights to a foreign minority shareholder, such as rights on the definition of the strategy and the business plan (which defines the company’s strategic policy over a three-to-five-year horizon).

Do you identify any differences in the way defense and new technologies cases are handled in terms of the relationship with the French authorities?

Vincent Brenot: Traditionally, in matters involving a militarily sensitive area, the issue of Foreign Investment Control is addressed early on. It determines whether talks with the potential foreign investor can proceed. French defense contractors maintain close contacts with military authorities and, when considering entering discussions with a foreign company, consult with them before engaging in talks on a possible transaction.

When the technology or the sector concerned is deemed excessively sensitive, the military authorities have a de facto veto power over the contemplated transaction, which it is pointless to try and circumvent. In practice, this type of request therefore never makes its way to the Foreign Investment Control office.

[1] Decree n° 2021-1758 of 22 December 2021.

The process is rather different where new technologies are concerned. First, with a few exceptions, there are no established relationship between companies, which are sometimes startups, and the French authorities. As a result, there are limited prior exchanges that would make it possible to anticipate their position on a given case. Moreover, there are not always clear security implications associated with investments in new technologies companies. The assessment of the critical nature of the activity under consideration will be somewhat subjective.

In practice, the French authorities generally show a certain degree of flexibility in examining cases involving new technologies. They most often do not oppose foreign investments, but make them conditional on strong commitments, particularly in terms of maintaining R&D in France and continuing to perform contracts with French customers considered to be sensitive (government agencies or companies of vital importance).

The objective is to avoid depriving French Tech start-ups of the foreign equity they need while preserving national interests; it is a delicate balance to strike.

Finally, in the case of transactions involving activities that may fall within a “grey zone”, decree No. 2019-1590 of 31 December 2019 opens up the possibility of asking the Foreign Investment Control office for guidance. This procedure has proven to be highly useful in determining whether a company’s activities fall within the scope of foreign investment screening. It can be done prior to any transaction, or even during a private auction process to select a buyer (e.g., even before receiving firm bids from potential buyers, some of whom are foreign).

What other issues are typically raised during discussions on the commitments required from foreign investors in the new technology sector?

Julien Aucomte: In addition to the question of R&D and contracts with sensitive French customers that we have already mentioned, the control of data, described by some as the new “black gold”, raises serious concerns due to the fear of it being transferred abroad and accessed by foreign companies, sometimes close to their governments.

Such fears explain, for example, the growing interest in the issue of the sovereign cloud and the reluctance of various States to allow a Chinese operator to participate in the deployment of the 5G network in Europe, for fear that China would have access to all the data that would pass through this network, some of which is highly strategic.

The issue of data control sometimes gives rise to very technical talks when discussing the commitments to be made by the foreign investor. So as to keep the negotiations as constructive as possible, the Foreign Investment Control office is now keen to involve the relevant departments in very open discussions with the investor and the target company.

While the office is always committed to protecting French interests, in accordance with its main purpose, it is no less pragmatic in finding solutions that make it possible to reconcile this protection with a capital input that is sometimes vital for the development of the company that benefits from it, within a timeframe that is consistent with the imperatives of the transactional calendar (the minister's authorization is always a condition precedent to the closing of the transaction).

Another issue that may arise is the communication of the company’s activities to the French authorities and the presence of French nationals in its governance bodies, which may act as a relay to the administration. If necessary, these individuals have “confidential defense” clearance.

These requirements are sometimes criticized by some investors as an attempt by the French administration to interfere in the running of a private company; however, they are not as stringent as some obligations imposed by other countries in this respect.

The American proxy board system, for instance, is far more demanding for foreign investors, who may be compelled by the US Department of Defense to set up the equivalent of a management committee composed entirely of American citizens. This committee is responsible for the day-to-day management of the company. This system is designed to prevent foreign shareholders from gaining access to any sensitive information passing through the company they own. The foreign investor is thus reduced to collecting dividends, like a mere “sleeping partner”, with the proxy board acting as a powerful “sleeping pill”.

FOREIGN INVESTMENT CONTROL IN FRANCE: AN ANALYSIS OF THE COMPLEX AND SHIFTING ENVIRONMENT

Interview with Jérôme Philippe, Partner, Petya Katsarska, Counsel, Antitrust & Regulatory, Pascal Cuche, Partner, and Tanguy Bardet, Counsel, Public Law & Regulatory, Freshfields Bruckhaus Deringer LLP

Freshfields Bruckhaus Deringer

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Jérôme Philippe

Petya Katsarska

Pascal Cuche

Tanguy Bardet

Is French foreign investment control becoming the new center of gravity of Mergers & Acquisitions, or a third pillar, next to merger control and compliance?

We clearly observe an increase in the number of cases giving rise to a foreign investment control in the last six to eight years.

From a quantitative point of view, the change is significant. It should, however, be noted that our viewpoint on this evolution could be influenced by the fact we are involved in huge transactions with many strategic investors.

That said, this very significant share must not obscure that the intensity of the control practiced is not comparable to the one known in merger control law. Foreign investments procedures are simpler than in merger control, and the requirements, such as engagement letters, are relatively standardized, so that case management remains easier with associated risks that are not as important. All the focus is on the commitment letter that often goes with the authorization. The public authorities' decisions remain rather predictable.

We notice similarities between both fields, but they do not have the same weight for investors and their counsels.

Regarding merger control, one of the first questions one might ask concerns "multi-filling"; how many countries will we notify? There is a European point of single contact, but beyond that, it is common to have to notify several countries, sometimes up to twenty notifications. That question can also be raised concerning foreign investment control, and we could theoretically compare the current situation in foreign investment control to the one in merger control thirty years ago, but intensity, i.e. number of countries concerned, remains lower.

We cannot yet state with certainty if this difference in complexity results from the foreign investment control not having yet reached its full maturity, or because the field itself makes it less complex than competition law cases involving economic analysis. We observe that in Germany, regarding activities involving the defense sector, the foreign investment review has become more restrictive and resembles more of what we know from mergers.

Furthermore, the difference in approach is also due to the control being essentially attached to the target, whereas merger control focuses both on the investor and on the target, and on their combination.

Finally, the consequences of foreign investment review on a transaction are not the same than that of merger control. Prohibitions are even more rare. Most importantly, the remedies to possible difficulties are much easier to design and implement than in the competition field, notably as they are nearly always behavioral. For example, it is much easier for an investor to agree to a "Hell or High Water clause" in relation to foreign investment than in relation to competition (on this point, see below) since the investor is reasonably entitled to expect that remedies are less likely to jeopardize its future activity than in merger control.

Is the lack of structured doctrine and official guidelines bothersome when accompanying investors?

No, at least not for moderately strategic targets. Experienced lawyers have no trouble giving predictability to their clients and can ensure there is no significant bad surprises. Investors are also usually rather comfortable with the engagements written in the engagement letters, which are, as previously said, relatively standardized and not very extensive (around five or six pages).

However, a structured doctrine is gradually developing. As regards France, the expected publishing of Foreign Investment guidelines will greatly help to develop such doctrine.

Additionally, the European Union Foreign Direct Investment Regulation, implemented in October 2020, added both a new layer to the review and a new field of Member State coordination, and it also provided essential elements of enforcement doctrine.

Contrary to popular belief, the development of the French mechanism has not in our experience significantly raised investors' concerns. The control has been reinforced several times over the last years, but it is also getting more and more professionalized. Foreign investors who come to Europe understand very well why such a mechanism exists, and in most cases a simple explanation is enough to lift any residual questions.

One must beware of the feeling fed by very few mediatized matters which are not representative of the overall reality. Moreover, since the decisions are not made public, no-one pays much attention to the large numbers of approvals, and everyone focuses on the very few negative cases that are reported by the press. Lastly, over fifty per cent of matters controlled do not concern the heart of what we naturally consider strategic. As the review is very far-reaching, catching many cases which are not ultra-strategic, this mechanically leads to a large number of authorizations accompanied by commitments and very few refusals.

Essentially, where we come to very strategic cases, the French mechanism has no other purpose but to provide the Minister of the economy with a seat at the negotiating table. The only actual risk arises where an investor tries to ignore this and starts sending wrong signals to the Ministry. As soon as this is taken into consideration in a normal way, Bercy (the informal name of the Ministry of economy) proves itself to be very pragmatic and professional. Bercy's services will not make fastidious industrial politics. For example, it is not just because an investment comes from China that it will not be well-received.

The law is essentially there as a safeguard so as to avoid a major issue with critical assets. Investors understand that very well.

Is it easy to know if a transaction will fall under French jurisdiction? What are the key components?

The assessment of what is strategic is variable and is highly dependent on the context. Only two years ago, nobody would have imagined hydroalcoholic solution production to one day be possibly seen as strategic.

Next to defense and security, we observe a rise in the health, telecommunications, data storage and management and AI (Artificial Intelligence) fields. The status of OVI (Operators of Vital Importance) brings in numerous activities or transactions into the control field, which is not always easy to determine, as whether a company has such status or not is never made public.

More specifically, the Treasury pursues two objectives. It wants to keep a number of activities in France (decision centers in order to guarantee the continuity of the relevant activity) and to be informed of the major evolutions affecting the company in question. When the company has sensitive information on a strategic point, it also ensures the confidentiality of that information is preserved.

In doing so, the Treasury gathers views of many ministries: at the end of the day, it is often another ministry that will make the call that such activity should be seen as strategic and that commitments should be given. It is clear that the development of foreign investment review has also pushed forward internal government communication as to what should be considered strategic or not. This has definitely developed a precise understanding within the Government as a whole of what is more or less strategic.

Additionally, one must keep in mind that the sensitive activities targeted by the review of the Ministry are actually often limited compared to all the company's activities. The commitments that may have to be taken will be linked to the strategic activities only, including the workforce, IP and resources which are attached to them (the "sensitive capacities"), which are necessary to keep on the national territory. The other activities will not be affected.

Moreover, the situation is considered at a given moment: only what already exists at the time of the completion of the investment. The control does not include the future. It is not possible, just as an example, to forbid investments in other countries in the future.

The situation is sometimes tricky when the sector is strategic and there is not much left of it in France. For example, it may happen that only a commercial function was left in place in France, with no decision-making power. Deindustrialization has created these kinds of situations. It is then necessary to demonstrate that the review should not apply given the effective nature of the activities that are currently present in France, even though in a strategic sector. This is an area where the European mechanism may change the game, since it could permit to address the situation where the assets that are really strategic for France are actually located in another EU Member State. The European mechanism, as it is, certainly helps to identify them, however it is not sure it currently gives tools to really deal with them. This might be a field of future evolution.

Information held by the target can be decisive and constitute an area of discussions. For example, if the target has information linked to contracts with the Ministry of Defense, there could be objections to see its information systems being integrated into the foreign investor's ones after the completion of the transaction. This risk is real when the investor is an industrial, but usually does not exist when the investor is an investment fund. It is one of the rare cases which can lead to a differentiated treatment between funds and industrial investors. Apart from this, there is usually no difference of treatment based on the investor's nature. Once again, Bercy's approach is pragmatic. All depends on the identified risk.

During the course of the preliminary phase, is it easy to anticipate the review? Does the advanced ruling procedure (Bercy's early consultation) answer to a real practical need?

Here, we should distinguish the views of sellers from those of buyers.

As a seller, we must distinguish again if the asset has already been sold or not in the past. If the asset has already been subject to a transaction, it is usually rather simple to know if it falls within the scope of the Foreign Investment review or not.

However, if it is an asset that was held by the seller for a long time, there is no history in relation to the asset and it may be more difficult to determine whether it falls in the scope or not. The difficulty is anticipated in the transaction documentation and is treated with suspensive conditions.

The possibility to consult the Minister of the economy beforehand (the advanced ruling procedure) exists, but it is not used very often in practice, mainly because its theoretical duration makes it less attractive (notwithstanding the fact that the response may sometimes be much faster than the theoretical duration). In theory, the response time by the administration is longer than that of an authorization request (in phase I). And if the consultation's output is that the asset falls in the scope, you then need to start the authorization process from the very beginning, thus adding up the durations of the two procedures. This does not make it very attractive, except in particular situations (e.g. before launching an auction process for the assets).

Furthermore, a systemization of ex-ante consultation requests could lead to an artificial expansion of the field of the review, as a cautious approach (prior to knowing who the investor is) might lead to indicate that a filing will be necessary. Administration could be tempted to put more and more in the control field.

In this respect, one should keep in mind that Bercy is mainly the point of contact, or the conductor of the orchestra, but then each ministry interested in the transaction will intervene and play a role. Difficulties can arise where such ministries have a very extensive vision on what needs to be protected. Here, Bercy may not always have the last word. At the very least, it leads to a conversation which makes things more uncertain, and which is hardly visible and understandable by the investor.

For the advanced ruling procedure to be interesting and attractive, it should give a procedural advantage, such as making the review faster in case it ends up with a formal review. Today, in reality, if there is a doubt as to the inclusion of the assets in the scope of the French review, it is usually simpler to request the authorization. This is to some extent confirmed by published figures: in 2021, there were 328 requests for authorization and only 124 approvals. the very high difference (204) between the two figures is made of two parts: transactions that were still under review at the end of 2021 (which are likely to be around 70 in view of the average monthly notification pace), and letters closing the proceedings by indicating that the investment is out of scope. Therefore, our assessment is that approximately 130 notifications were out of scope in 2021, to be compared to 124 approvals (and no formal refusal). This shows that a little more than 50% of the notifications seem to be out of scope of the regime.

Especially, the more Bercy proves itself to be pragmatic and professional over time, which we must say is the case, the more natural it is to prefer filing a request for authorization rather than going through long consultations. And the less authorities have to worry that investors might try to escape the control. That might seem contradictory, but in reality Bercy's pragmatism reinforces legal security, which is a conclusion somehow different from that we would draw in the merger control field. Bercy's services act as a moderator role and play a homogenization role.

What influence does the perspective of a control exert on the procedure?

We do not think that the existence of the foreign investment review influences the choice of selling procedure (auctions or bilateral negotiations). Of course, the review might theoretically reduce the likelihood of a candidate to be successful, but this remains a rather remote risk in most situations, as the procedure, as perceived by investors and external counsel, is more target-related than investor-related. It is only in cases involving very strategic assets, or in case the proposed investor has a very bad track record, that the investor's identity will play a big role in the proceedings. In this respect, the selection of buyer candidates is less sensitive than in relation to competition and merger control proceedings.

Even here, we must not judge the control mechanism under the light of the most publicized transactions, which represent a very small part of the controls. The very strategical and publicized cases represent no more than one or two cases per year (out of 275 notifications in 2020 and 328 in 2021 in France for example). In strategic cases, if it concerns an industry linked to defense for example (or a significant player in transports, water, healthcare, etc.), it is advised that the buyer anticipates the proceedings and puts in place a legal and communication strategy to pass its messages, explain its views and plans and demonstrate why there should be no difficulties. Public relations and communication advisors may play a role in addition to lawyers. An investor in such an activity would be expected to proactively engage with the State. In some sensitive cases, a foreign investment might attract political attention, and this is also something to take into account, as both the investor and the State will then have to deal with it. This is why openness and communication with the State is always a good ally for a sensitive investment, and the investor shall always take care to give notice to the Treasury and not put the authorities before a *fait accompli* (especially via the press).

The less strategic transactions usually do not face delay-related issues due to the review, as the merger control timeline will usually be longer than the foreign investment one. With however the notable exception of Germany, where the foreign investment review for a defence-related investment might be very long.

On whom bears the risk attached to foreign investments? Can and does the buyer try to facilitate the process?

Anticipating the control and possible requirements of the State is the responsibility of the investor. It is up to the investor to go beyond the public information, to push in due time its investigations in the framework of the data room and Q&A sessions by asking very precise questions, and to integrate the timeline of the reviews (possibly in several countries) in the transaction timeline, just as it is used to do in merger control. This might be tricky as the relevant information may be highly confidential and its communication may sometimes be restricted by the law. Of course, good pre-existing relations between the seller/target and the State may help expedite the review, and there may be cases where the target will have to discuss directly with the State about certain confidential matters in the absence of its (future) owner.

With very few exceptions, the seller does not have to anticipate the review risk, as (i) there is normally no risk of significant delay as indicated above, and (ii) the burden of possible remedies will entirely lie on the investor. Of course, the seller should protect itself in the transaction documentation by making sure that the investor will agree to take the necessary remedies if required by the State (e.g. with a "*Hell or High Water*" provision in the acquisition agreement). However, this is less of a problem than in merger control as remedies are normally not "structural" (i.e. divestments) but rather behavioural, and thus are less difficult to be accepted by investors.

Whatever the seller's analysis pre-transaction, it will be up to the investor to carry out its own analysis and assess and bear the entire risk and most of the costs in this respect. It is true this makes the task difficult because the sensitivity of the transaction is determined by elements of information, which are normally not public. The two exceptions to this are the case where the seller already obtained an official opinion of the Treasury specifying whether the target falls within the scope of the review or not, and the case where the seller is itself bound by a former commitment letter executed when it had previously bought the assets: in the latter case, most commitment letters include the obligation to inform the new investor that a foreign investment filing is required.

In addition, the risk and possible burden of the remedies will also depend on the level of integration of the target into the acquirer's group. The acquirer is obliged to be very vigilant regarding the integration of the target. Indeed, the commitment letter takes place after the signature of the acquisition agreement and before the closing, and its content can theoretically in some cases call into question part of the integration or of the conditions of the integration (e.g. need to ring-fence some information and/or some IT systems). Anticipation is therefore crucial. The commitments may also prohibit the closing or restructuring of a site, limit the transfers initially envisaged between the target and the rest of the acquiror's group, and may make post-closing management more rigid. This can indeed deprive the buyer of agility.

The position of the sellers is probably more comfortable than in relation to merger control, due to the fact that, as the possible commitments are easier to anticipate and less costly, it is easier to request and obtain a "Hell or High Water" clause from the prospective buyers. This clause, in terms of competition and merger control, gives rise to difficult discussion in merger control and is very discriminating between potential buyers, although it is less of an issue, and less discriminating, in foreign investment.

Apart from this, the conditions precedent relating to foreign investment are pretty classic. There is principally one point of attention: securing a full cooperation obligation from the target, because target cooperation is even more important than in merger control (the target will have in some cases to liaise directly with the Treasury or other ministries in the absence of the investor for confidentiality reasons).

Which attitude must the investor adopt when the transaction is likely to trigger controls in different countries?

In merger control law, there is a single point of contact at the European level (one-stop-shop) for large mergers or for mergers that would trigger many Member States notifications. However, on sensitive subjects, and even in the case of a point of single contact, it is not uncommon to directly consult the competition authorities of the concerned Member States in order to exchange views.

As regards foreign investment, there is no single point of contact. There is a EU form to fill in in some cases (when the investor, or any entity in the chain of control of the investor, is not located within a EU country), and it will be passed to the other relevant Member States, but it does not replace national notifications that are due, and contact will have to be made with each Member State concerned within the EU. And of course, with the non-EU agencies, such as the CFIUS in the USA or the BEIS (*Department of Business, Energy and Industrial Strategy*) in the UK. The main need is to make sure that, for what is common between the various Member States concerned, there is a full alignment of the information that is given, with as much as possible the same degree of detail. Consistency is key in order to secure good communication and cooperation with the national agencies. In some cases, it may be worth anticipating questions that can arise from Member States which still do not have a foreign investment review (currently 9 out of 27) or where that review is not legally triggered, as it is likely that such Member States will reach out to the Member States in charge.

What difficulties does the question of the file completion bring?

Counsel used to argue vigorously that their filings were complete, that the official start of the proceedings was triggered and that the clock was ticking, but this has dramatically changed since the law now provides that absence of response within the official deadline means refusal of the investment (instead of, previously, tacit approval). Therefore, the legal question as to whether the filing is complete is no longer a debate.

The debate with the Treasury has shifted to knowing and discussing whether the Treasury has the necessary information to render its decision, and trying to provide all information actually needed in order to expedite the process.

In some cases, a phase II may be opened just because work and coordination with the relevant ministries could not be completed in time, or because negotiation on remedies take more time than expected, or also because some information has taken longer than expected to be provided (irrespective of whether this information is needed or not for the file to be complete). In all such cases, the opening of phase II does not mean that the transaction will be delayed, as it is very common to receive approvals shortly after the opening of the phase II. In other words, phase II most often plays the role of a simple extension of phase I in order to continue the same process as in phase I, and it does not generate in itself new processes.

Are there activities that can get out of the field of application?

In theory, this is possible. Hydro-alcoholic solution, for example, should no longer be counted among the sensitive areas after the health crisis. But it is also reasonable to think there will be a certain ratchet effect. It is always difficult for an administration to turn back the clock.

In addition, the health crisis has served as an eye-opener in the minds of the public as well as decision-makers. More systematically than before, the question is raised: what would happen in case of a shortage? In case of doubt, one may be tempted to maintain the activity in the control field, as a precaution. The notion of strategic activity has become broader and more diffuse.

Is there a lot of litigation?

There is very little. There is one decision of the Conseil d'État (French higher administrative jurisdiction) resulting from a challenge against an authorization. But beyond this exception, there is almost no litigation. The judge's control is very limited, and this makes the litigation option unattractive.

How do you see the future of Foreign investment review?

There has been a clear trend towards reinforcement and extension of the review since 2017. Now the legal tools are in place, the Government has fully put in place its internal organization with respect to the review, and we are gradually reaching maturity stage.

It is likely that there will still be amendments, such as adding possible new sub-sectors, especially in the technology area, but it's likely that will be less dramatic than the previous changes and that most of the main amendments have been made.

The Treasury is about to publish guidelines of its practice, which will be very helpful and also a sign of maturity of the review.

At European level, 7 Member States are considering, planning or in the process of adopting a foreign investment review, in addition to the 18 Member States which already have one. Only Bulgaria and Malta are not considering any sort of adoption of such a review at the moment.

Apart from the extension, it is likely that cooperation between Member States has not reached its final stage yet. In most cases, a national review is triggered by the presence of assets, but not sales, in the Member States. This means that, in relation to exports, a Member State that is affected by an investment might not be the one that is in charge of the review. This creates a natural scope of cooperation. However, very few Member States are able and willing to deal with remedies that need to be implemented in other Member States. The current EU regulation, although it enables to detect such cases, does not provide the Member States with clear legal tools to deal with them. It is possible that, once the EU Commission and Member States have a better assessment of the situation, a second stage of the regulation is proposed. However, there exists also some natural limitations, especially in the scope of the defence activities, where sharing of information and cooperation may still be more difficult, even between Member States.

Finally, the EU Commission is now pushing very hard to complete the framework of regulation and address issues that are complementary to the foreign investment but were never considered in the past. In this respect, two new EU regulations are under adoption process: a *Regulation of Foreign Subsidies distorting the internal market, and a Regulation on the protection of the Union and its Member States from economic coercion by third parties*. Economic sanctions are also growing quickly due to the conflict situation having arise in Europe, and the EU Commission is also proposing a new anti money-laundering Directive.

All these moves show a strong trend towards an approach of market protection, which is relatively new at European level. Foreign Investment Review will definitely constitute a part of this new arsenal, and companies will have to deal with the review in coordination with the other parts, all this on an international basis and in a consistent way.

RECENT FOREIGN INVESTMENT REFORM: WHAT IMPACT WILL IT HAVE ON YOUR M&A TRANSACTIONS?

Interview with Emily Xueref-Poviac, Counsel, Clifford Chance LLP

CLIFFORD CHANCE

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School) Interview conducted with the assistance of Marie Ghérardi Lévêque and Paul Agard, students of the Specialised Master in International Business Law and Management at ESCP Business School

Will foreign investment control become, alongside competition law and compliance, the third pillar of M&A?

Emily Xueref-Poviac: Foreign investment control has become a key issue that investors need to consider when carrying out transactions in sectors falling within the scope of this new framework.

In the same way as for merger control, the risk of a foreign investment control review must be taken into account when considering both deal certainty and the timing of completion.

As such, a multi-jurisdictional analysis must be carried out to identify the jurisdictions in which foreign investment control is likely to apply, and competent authorities should be contacted as soon as possible to anticipate any potential commitments required of the parties.

With regard to the impact of foreign investment control on operations carried out in France, it is worth noting that France has one of the most elaborate control mechanisms, which is also the oldest in Europe. As early as 1966, France established a control regime and a pre-authorisation requirement (overseen by the Ministry of the Economy) for certain foreign direct investments, particularly in the defense sector.

Following the takeover of Alstom's energy division by the American group, General Electric, the so-called 2014 "Montebourg" decree expanded the scope of control of foreign investments to six new sectors. The aim was to target new activities beyond security and defense, such as water and energy supply, transport and electronic communications networks and services, and the health sector.

Since 2014, the legal arsenal for controlling foreign investment has expanded considerably, particularly following the latest major reform in 2019.

Thus, Decree No. 2019-1590 of 31 December 2019 (the "Decree") and the Order of 31 December 2019, supplementing the Loi Pacte, have strengthened, as of 1 April 2020, the foreign investment control regime insofar as an investment is made in a (listed or unlisted) French company operating in a so-called "sensitive" sector. Indeed, since the entry into force of the Decree, the number of sectors likely to fall within the scope of "sensitive activities" has continued to grow (aerospace and data hosting, press, food safety, quantum technologies, energy storage, biotechnologies, technologies involved in the production of renewable energy...).

In addition, the thresholds for triggering the review of equity investments in French companies operating in sensitive sectors have continually been lowered (from 25% to 10% of shares in listed companies until 31 December 2022).

Finally, some temporary measures, which were due to expire at the end of December 2020, have been extended.

In France, the Ministry of the Economy reviewed 328 transactions in 2021, a 31.2% increase when compared with 2020, thus demonstrating its enthusiastic rigour in applying its foreign investment control regime.

In addition, and more globally, foreign investment control has been strengthened at the European level, with the adoption of the Foreign Investment Screening Regulation in March 2019, which has only furthered the importance of looking at these regulations from a multi-jurisdictional perspective. This regulation, which came into force in October 2020, is intended to establish a European framework that enables the European Commission and Member States to coordinate their actions.

The European Commission had already urged Member States to put in place robust foreign investment control mechanisms and to make full use of such mechanisms to protect strategic European assets. In response, 19 of the 27 member states have now adopted foreign-investment regulations, with four member states planning to put regimes in place.

Can foreign investment control be anticipated early along the transaction pipeline? Do investors make use of the possibility of referring a transaction to the authorities at a very early stage?

Emily Xueref-Poviac: The growing importance of foreign investment control in the M&A landscape has been accompanied by a need for investors to be able to anticipate its impact.

For example, the 2019 reform adjusted the foreign investment review procedure to meet this need for deal certainty. In particular, the Decree provides that a French target entity may now make a request for an opinion as to whether all or part of the entity's business falls within the scope of the review to the Minister of the Economy. The Decree also authorises a foreign investor, with the agreement of the French target entity, to make the same request to the Minister of the Economy.

These mechanisms, even if their use has to-date been limited (because they are to be used at a time when the confidentiality of the transaction must be preserved), allow a French target to anticipate foreign investor-related issues upstream of transactions and thus reassure foreign investors about the nature of their activities.

Does this have an impact on the sale procedure or, where a sale is carried out by way of auction, the negotiating position of bidders?

Emily Xueref-Poviac: There are several points to consider when answering this question, as the reform of foreign investment control that came into effect on 31 December 2019 has significantly modified the notion of "foreign investor", which has had a direct impact on bidders.

Prior to the reform, the scope of control varied depending on whether or not the foreign investor was established in a Member State of the European Union or another State within the European Economic Area. The Decree abolished the distinction between European and non-European foreign investors. As of 31 December 2019, the list of sectors classified as sensitive under the foreign investment control regime applies indiscriminately to European and non-European investors – this effectively extends the scope of application of the sectors deemed sensitive to all non-French investors. As a result, bidders are no longer differentiated according to the sector concerned, and many more of them find themselves having to deal with foreign investment regulations.

In addition, the Decree has introduced the "chain-of-control" concept , meaning that the presence of a foreign-investor shareholder is now sufficient to trigger the control procedure, even if the investor is ultimately controlled by a French person or entity. This is an important point, in particular for French investment funds that interpose a foreign holding company in their acquisition structure. Once again, more bidders will have to comply with foreign-investment regulations, since investment funds, even those ultimately owned by a French structure, may now be subject to the same scrutiny as their non-French competitors.

With respect to bidders' respective negotiating positions, it is rare that the need to obtain this authorisation is a determining factor in the choice of a buyer, as sellers generally have good visibility on the assessment of each bidder carried out by the Minister of the Economy and impose obligations on buyers subject to this foreign-investment procedure to agree to any commitments requested by the Minister of the Economy.

Does communication play an important role? Do lawyers take part in these discussions?

Emily Xueref-Poviac: It has become clear that the Ministry will not hesitate to make statements regarding certain projects, as was the case with the proposed takeover of Carrefour by the Canadian company Couche-Tard, which Bruno Le Maire vetoed through the media.

It is, therefore, important to liaise with the Ministry to home in on key issues very early in the process, so as to anticipate potential remedies, or worse, vetoes from the Treasury Department.

Even if a small team, the "Multicom 4" office of the Treasury Department, which is responsible for analysing authorisation requests and managing relations with the inter-ministerial authorities involved and with the European Commission, is still very much available, and willing to listen to practitioners and share thoughts.

As regards communication, the Treasury General Directorate opened a public consultation in March 2022 to pull together stakeholders' views as to the areas where there needs to be clarification of the foreign investment control regulation. Following this consultation, guidelines should then be published to clarify the administrative doctrine of the regime and to help stakeholders better understand the regime from a procedural perspective.

Should, and how should, the risk of being subject to the regime be taken into consideration in the context of due diligence? If so, what role can VDD play in ensuring that a transaction is successful?

Emily Xueref-Poviac: Foreign investment control has become a major issue in M&A transactions, introducing a new dynamic to negotiations with investors. The due diligence stage now plays a key role in securing foreign investments by providing investors with the opportunity to raise questions about the target's business, to structure agreements and to anticipate the impact of the foreign investment control process on the transaction timeline. The questions asked by investors are increasingly sophisticated, their purpose being to establish a set of indicators to determine whether the activity of a target company is likely to fall within the scope of sensitive activities from the point of view of the Minister of the Economy.

How can the potential decisions of the Ministry of the Economy be integrated into the way a transaction is structured?

Emily Xueref-Poviac: As specifically concerns letters of commitment proposed by the Treasury Department, these are confidential and therefore cannot be communicated in full to the foreign investor in question.

As such, once again, the due diligence stage plays an important role in structuring the planned transaction and understanding the impact of previous commitments made, which will most often be transferred by the seller to the buyer.

A RECENT CASE STUDY OF REQUEST FOR PRIOR AUTHORISATION

Interview with Hubert Segain,
Partner, Herbert Smith Freehills

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Hubert Segain, partner and head of Herbert Smith Freehills' corporate practice in Paris, revisits a recent request for prior authorisation of a foreign investment, which his team successfully obtained in 2021.

The request, carried out in the midst of the pandemic, shows how much complexity has increased in this arena at a time when the media and political representatives are paying close attention to issues of economic sovereignty.

Can you describe the deal and the sector affected by the investment?

The foreign investor was a company in the health industry which we were assisting with an acquisition. It wanted to acquire control over a French company involved in producing medicines. There was no doubt whatsoever that the investment project would be subject to foreign investment screening.

How did the prior authorisation process unfold and how long did it take?

In practice, the Bureau of Foreign Investment (the BIE) has maintained its policy of "application completion", according to which the time frame for obtaining authorisation only starts to run once the BIE considers the application file as complete.

After the request for prior authorisation had been submitted, the BIE asked additional questions "for the sake of completeness", in particular questions related to COVID-19. Given the highly technical nature of the target business, the BIE then sought comments directly from the target.

Once the application had been deemed complete, the purchaser quickly sent the BIE a draft letter of commitments, and a back-and-forth exchange ensued. Then as soon as the purchaser had confirmed its agreement to the draft letter of commitments, the Ministry of the Economy authorised the investment.

The process ultimately lasted barely two calendar months, which in practice is much shorter than the maximum total of 75 business days – i.e. approximately three and half months – for the two verification phases according to the reform of the Decree of 31 December 2019.

Have you noticed any changes in recent months in how the procedure unfolds?

In situations involving a non-EU-investor, translating the entire authorisation request into English is recommended, although of course the request is always actually filed in French. This translation is very useful because now the non EU investor can expect to fill out a new form, the "Request for information from the investor" in addition to the French request. This form which reiterates certain parts of the French request, along with additional information, must be disclosed by the BIE to the other EU member states and to the European Commission, in keeping with the procedure established in the EU FDI Screening Regulation.

Also it goes without saying that since the pandemic, the BIE has been paying particularly close attention to investments affecting the health sector.

What practical recommendations would you give to investors or sellers?

Cases like Teledyne/Photonis or Couche Tard/Carrefour have shown that it is now vital for parties to include foreign investment screening in their calculations when assessing and negotiating a deal. Here are a few avenues for thought:

First, try to identify the political and institutional variables in play. For example, clearly a deal in the health sector will be examined more closely in the midst of a pandemic, and a sensitive matter that attracts considerable media attention may also attract more noticeable political intervention. This is especially true when a major election is on the horizon.

The impact of the screening process on the timetable for the transaction must be estimated, even though highly variable time frames from one case to another make this difficult to do in practice.

Any conditions unacceptable to the buyer that might be imposed by the BIE should be identified very early on, before moving forward. This is essential in order to conduct negotiations and attend to the drafting of the purchase agreement. In our recent request, we opted to insert in the SPA a list of conditions that were acceptable to the buyer and also a list of unacceptable conditions, under the heading of buyer undertakings with regard to conditions precedent.

On the side of the buyer, if the buyer is in a strong position – for example because there are other potential buyers – it may be opportune to include a "hell or high water" clause, typical in competition law, along with a break-up fee payable by the buyer if the regulatory risk appears to be justified.

What was once no more than a possible technical condition precedent in an SPA is now a strategic issue that is best addressed beforehand.

THE SPECIFICITIES OF MERGERS AND ACQUISITIONS ARISING FROM FOREIGN INVESTMENT CONTROL IN FRANCE

Interview with Henri Savoie and Marcus Billam, Partners,

DARROIS VILLEY MAILLOT BROCHIER

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School) Interview conducted with the assistance of Adriano Bobo-Fantoli, student of the Law & Business major at ESCP Business School

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Henri Savoie

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Marcus Billam

I - THE PRELIMINARY PHASE

What are the different modes of acquisition and investment encountered?

Henri Savoie: There are two main types of transactions: (i) investments by strategic in the relevant sector or (ii) investments by private equity funds.

Marcus Billam: Foreign investment control applies to all types of acquisitions, whether they are tender offers or private sales. The procedure will also apply to De-SPACing transactions on which we are beginning to accompany our clients.

How, in the absence of a normalized doctrine and clear guidelines, can one determine the risk that a transaction falls within the sensitive sector and prepare the procedure?

Henri Savoie: The regulations determine the sensitive sectors of activity falling within the scope of the applicable foreign investment control procedure. We know that the administration has an extensive reading of these sectors of activity. We leverage our experience to determine whether a transaction is likely to require a clearance application in France.

Marcus Billam: When we are involved for the target - or once discussions with the target have started - the general counsel and his teams are valuable allies in this analysis, as he often has the most detailed knowledge of how the company's activities may be perceived by the authorities.

The reform allows investors to liaise with the Authorities well in advance of the transaction. Does this approach limit the number of refusals?

Henri Savoie: For the most sensitive transactions, either because of the sector in question, or because of the nationality of the investor, or because of the size and reputation of the French company involved, we always advise investors to reach out to the public authorities before the transaction to discuss the feasibility of the transaction with them.

Why and how should communication, reputation and public affairs issues be anticipated?

Henri Savoie: As indicated immediately above, for transactions of a certain sensitivity, contact with the French public authorities at a preliminary stage is useful. In certain very sensitive cases, it is advisable to ensure very early on, that the French state is in line with this type of investment. Otherwise, the procedure does not require any particular communication action. It is a confidential procedure and the French administration plays the confidentiality game perfectly.

Does the risk influence the choice of procedure (one to one negotiation/open bid)?

Henri Savoie: When a transaction is sensitive, the choice of the best-placed candidates and then of the final candidate must include the foreign investment dimension. Price is not the only factor to consider. The deal certainty takes precedence and the execution risks naturally come into consideration. These risks may include the control procedure for foreign investments in France as well as the control by the merger-control authorities.

Marcus Billam: The possibility of being subject to a foreign investment control procedure in France does not, in and on itself, prevent the implementation of an open bid process. From this point of view, it is a parameter to be taken into account in the design of the procedure and the legal documentation - as can be, for example, merger control. Some strategic transactions have failed because of foreign investments control in France despite the implementation of a one to one negotiation, but there is no reason to see this as a cause and effect relationship. I would rather say that the same causes result in the same consequences, that is to say strategic transactions often both entail a strong politicisation and a preference for one to one negotiations.

II - NEGOTIATIONS

Should control risk be taken into account in due diligence and how to do so? If so, what role can VDDs play in securing the deal?

Henri Savoie: In the context of the due diligence, the investor should identify whether French companies are comprised within the scope of the transaction and, if so, determine with the help of advisors whether the transaction is subject to the French foreign investment control procedure taking into account the activities of the French companies.

Marcus Billam: Again, the experience of the general counsel can be instrumental because of the authorities' flexible interpretation of this regulation.

How to engage with the relevant authorities?

Henri Savoie: The procedure for controlling foreign investments in France falls within the remit of the Treasury Department, with which a highquality dialogue can easily be established.

What is the impact of the procedure on the timetable of transactions?

Henri Savoie: It takes between 3 and 5 months to obtain a clearance depending on the complexity and sensitivity of the transaction. Obtaining this clearance is a condition for the completion of the transaction and the timetable for the transaction must therefore take this period into account.

How to manage the procedure when it may require applications for clearance in several jurisdictions?

Henri Savoie: Since November 2020, a European Union procedure allows the sharing of information between the relevant Member States and the European Commission on transactions giving rise to a foreign investment control procedure in several EU Member States.

Marcus Billam: From this point of view, the Brexit could hinder the implementation of certain French-British transactions, even if we do not have enough hindsight at this stage to fully assess such consequences.

How can offer letters or term sheets anticipate risks?

Henri Savoie: In order to correctly anticipate the risk, it is necessary to know with sufficient accuracy the French companies involved in the transaction and their activities. This knowledge makes it possible to assess the risk correctly at the stage of the offer letter and the term sheet of contractual documentation.

III - SIGNATURE AND INTERIM PERIOD

How to integrate possible MINEFI decisions in the structuring of the transaction?

Henri Savoie: If the transaction appears to be subject to foreign investments clearance in France, it should be a condition precedent to closing.

What is the impact of the control procedure on the provisions of the acquisition/investment agreement (how to anticipate the conditions that may be imposed by MINEFI or the risk of a refusal)?

Marcus Billam: The most stringent provision is a legal one, as an unauthorised foreign investment is legally void. Obtaining the authorisation is therefore de facto a condition precedent. The buyer will most often seek to limit the changes that could be made to the target by inserting a "No Substantial Detriment" clause referring to an agreement of the parties before implementing any steps required by the MINEFI which would have an impact on the target's value or the possible synergies. On the other hand, the seller will seek to secure the transaction as much as possible and to ensure that the foreign investor undertakes to acquire the target even if MINEFI has demanded that it first divests certain assets.

Should sensitive sector risk and merger-controlrisk be articulated and how to do so?

Henri Savoie: These are risks of a very different nature, but the interplay of the merger-control and foreign investment control timelines is possible. Notification can actually be carried out in parallel.

IV- CLOSING AND POST CLOSING

What is the influence of control on ancillary commitments and post-signing agreements?

Marcus Billam: If the control of foreign investments has resulted in the divestment of assets before the implementation of the transaction, the customary issues of adhesion will arise and are to be settled with transitional service agreements: TSA, SLA...

Are integration transactions influenced and if so how?

Henri Savoie: If, after closing, a restructuring of the group is planned that will have an impact on the French companies, this restructuring will have to comply with the terms of the letter of commitment that is generally requested by the administration from the investor before the issuance of the clearance. At the very least, the French administration will have to be informed. The constraints may be much more important depending on the sensitivity of the activities of the French companies involved.

IN ANY M&A TRANSACTION, CONSIDERATION SHOULD BE GIVEN TO CERTAIN ADMINISTRATIVE PROCEDURES AND HOW TO MANAGE THEM

Interview with Franck Bernauer, Attorney – Partner, KPMG Avocats
Xavier Lemaréchal, Attorney – Director, KPMG Avocats
Emmanuel Tricot, Attorney – Partner, KPMG Avocats
Virginie Carvalho, Attorney – Senior Manager, KPMG Avocats

Special issue compiled and edited by Marina Guérassimova and
Professors David Chekroun, Gilles Pillet (ESCP Business School)

Franck Bernauer

Xavier Lemaréchal

Emmanuel Tricot

Virginie Carvalho

According to the United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2021, at least some 15 M&A deals worth more than $50 million failed for regulatory or policy reasons. Of these deals, three were rejected for national security reasons, four were not finalized for merger control reasons, and five were dropped owing to delays in obtaining host country approval of the transaction.

This highlights the importance of taking into account and managing administrative procedures in cross-border transactions.

In this area, did recent legislative or case-law developments have an impact on the way M&A transactions are being handled?

Yes indeed, and in particular as regards the control of foreign investments in France (IEF) and that of concentrations.

■ **Control of foreign investments in France (IEF):** over the years, regulations on the control of foreign investments in France have been amended from time to time in order to revisit or to extend to other sectors the procedures for controlling foreign investments in France. I am here referring to the 2018 decree extending such control to include the so-called sectors of the future, the PACTE law (Action Plan for the Growth and Transformation of Enterprises), or the measures taken in the light of the current global pandemic (measures which were recently extended until December 31, 2022). Obviously, this development has had an impact on practitioners, who are now systematically asking themselves how to apply these regulations whenever they contemplate an acquisition. This is also reflected in the figures published each year by the General Directorate of the Treasury: in 2021, 328 deals were reviewed by the Minister of the Economy, Finance and Recovery as compared to 137 deals in 2017. The stated objective of the reform of foreign investment control in France, according to the General Directorate of the Treasury, was to introduce a simpler, clearer and faster procedure. However, in practice, things have turned out to be slightly more complicated.

Merger Control: This extension of the scope of inspection is also illustrated by the recent reform of merger control, heralded by the publication on March 26, 2021 of the European Commission's guidance on the application of article 22 EUMR. The European Commission's stated objective - which was backed, in particular, by the French competition authority – is to investigate certain sensitive acquisition transactions such as those involving the digital economy where controllability thresholds (expressed in terms of turnover or market share in certain Member States) are not being met. Based on Article 22 of Regulation 139-2004 of January 20, 2004, any domestic competition authority will now be able to refer a transaction, even when small, (i.e. not exceeding national thresholds), to the European Commission for review, if it believes that the transaction overly affects the competitive situation on one or more markets. It is then up to the Commission to decide whether or not to investigate this state of affairs. Both the Member states and the Commission have been given much discretion to decide whether to refer cases or to accept referrals.

Reform of the "Article 22 referral" constitutes a major development.

The French competition authority is actively pressing for its implementation. On April 20, 2021, it announced that the Commission had initiated a procedure to investigate the acquisition of Grail by Illumina, following a referral request made by France to assert jurisdiction, which was subsequently joined by Belgium, Greece, Iceland, the Netherlands and Norway. This is the first time that the Commission has been investigating a concentration that is usually not subject to a notification obligation (being below domestic thresholds).

How do you address such procedures?

■ **IEF :** Unlike in merger control, in foreign investment control there is no threshold for assessing whether or not an investment transaction must be notified. Instead, three cumulative eligibility criteria must be met. These criteria relate to the kind of transaction being considered, the nationality of the investor and the business the target company is in. Generally speaking, and with some exceptions, the first two criteria are relatively easy to assess. The question of the target company's business is a more complex matter because the description of the activities mentioned in the Monetary and Financial Code is open to interpretation. Today, there is not as yet any case law likely to guide practitioners because the decisions taken by the Minister of the Economy, Finance and Recovery are not made public. When in doubt, it may be useful for the target company to request a ruling.

Things become even more complex when the target company also has equity interests or subsidiaries in other countries outside of France.

As a reminder, there exists no standard procedure across Europe, with each member state of the European Union retaining its freedom to enact regulations in this area, and the EU's foreign direct investment screening system, which came into effect in 2020, only establishing a mechanism for cooperation between Member states.

Where a group has foreign entities, it will be necessary to check whether or not local legislation on the control of foreign investments applies.

■ **Merger control:** Indeed, the procedure in terms of merger control is even more regulated. In particular, the recent reform of the French competition authority's guidelines aims to streamline the content of the notification dossier and to clarify the cases covered by the fast-track procedure (for example, cases where the combined market share of the companies involved is less than 25%). The goal is to speed up the review process for concentrations that do not pose specific difficulties. Thus, in the case of a fast-track procedure, the timeframe within which the Authority must render its decision is on average fifteen working days, whereas it usually takes twenty-five days for other transactions that do not give rise to difficulties (authorized in "phase 1").

However, this objective of simplification has its limits thanks to the "Article 22 referral" procedure, for which it can be tricky to anticipate the transactions likely to be affected by this procedure – a downside that echoes that of the foreign investment control procedure.

The legal uncertainty surrounding companies is further compounded by the fact that a domestic competition authority can request an "Article 22 referral" to the European Commission, even though the transaction has already been closed. In practice, the Commission considers that a referral is no longer appropriate when more than six months have elapsed since the concentration was implemented. However, in exceptional circumstances, the Commission might accept a referral beyond this six-month period. Another cause of unpredictability is the possibility that third parties (e.g., competitors) may inform competition authorities of the existence of a transaction eligible for "Article 22 referral".

■ **IEF :** The obligation to control foreign investments in France is still recent and will undoubtedly continue to evolve over the next few years with the publication, in the coming months, of guidelines aimed at better defining the activities concerned.

At what juncture in the acquisition process should one enquire about these controls?

■ **IEF :** as early as possible, given the above-mentioned difficulties and the lengthening of deadlines. For a company or a business that is up for sale in the short term, it may be advantageous for the target company to make a prior application for a business review (a ruling). This is bound to reassure prospective investors and, if necessary, to avoid delaying the timetable for carrying out the transaction. On the investor's side, this issue must now be incorporated into the due diligence process.

■ **Merger control:** As with the control of IEFs, anticipation is crucial in order to take into account the delays and costs generated by the procedure. From now on, two main situations are to be distinguished:

- if the acquisition is subject to consolidation control, deadlines are regulated, even if for complex transactions they may be extended or even suspended... In practice, involving the competition law experts, with whom we work at KPMG, as early as possible in the pre-notification procedure, will facilitate exchanges with the competition authorities and ensure that proposals which might raise possible concerns on their part are more relevant and feasible;

- if the transaction is not, presumably, subject to merger control because thresholds do not appear to have been exceeded, one must henceforth consider that an authority will implement the "Article 22 referral" procedure. Lacking developed decision-making practice in this area, the cases subject to IEF control could potentially feed into our analysis of the situation. The pros and cons of asking the Commission for an informal opinion on whether a transaction is eligible for "Article 22 referral" procedure must be carefully weighed.

What is the impact of these procedures on the timing of acquisition transactions?

■ **IEF :** since the 2019 reform, deadlines have been extended with the investigation period being increased from 2 months to a total of 75 working days, i.e. almost 3 months. This extension is due, on the one hand, to the need to be able to escalate certain transactions to the European level as part of the screening procedure and, on the other, to a change in the procedure for requesting authorization, which now comprises two discrete phases, a first phase of 30 working days and a second phase of 45 working days.

■ **Merger control:** if the transaction is subject to merger control, the timetable is tightly regulated, and the procedure must be monitored in parallel with the control of IEFs.

How do you handle this issue in the transaction documents?

■ **IEF :** If this issue has not been fully addressed in advance, it is usual to include a condition precedent in the transaction documents. This clause must be drafted with due care, because the authorization granted by the Minister of the Economy, Finance and Recovery may be a conditional one.

■ **Merger control:** as for the control of EFIs, it is essential to insert a condition precedent providing that the transaction must be validated by the competent competition authority or authorities, as well as a clause governing the exchange of information in the event of notification, or if the "Article 22 referral" procedure is triggered.

FRENCH FDI REGIME: MANAGING RISKS OF NON-COMPLIANCE

By Simonetta Giordano, Partner, Ombline Ancelin, Partner, & Florent Barbu, Managing Associate,

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)


Simonetta Giordano


Ombline Ancelin


Florent Barbu

Around two years after the overhaul of the French foreign direct and indirect investments ("FDI") control regime and more than a year after the launch of a European cooperation mechanism, French Ministry of Economy has significantly increased scrutiny of foreign investments. However, it has adopted a pragmatic and investor friendly approach. Therefore, there are little available precedents of the French Ministry of Economy imposing fines, refusing to approve a transaction or submitting it to conditions. Nonetheless, this does not mean that risks in the case of non-compliance should be underestimated by foreign investors seeking to invest in France, as sanctions are extremely heavy. And filing is key to avoid any such risks.

Following the adoption in 2019 of the law "Pacte", the scope of the French FDI control regime has been considerably widened and direct and indirect foreign investments in sensitive sectors must, under certain conditions, be authorized by the French Minister of Economy ("**MoE**"). In practice, tThe Multicom 4 office of the 'Direction Générale du Trésor' ("**DG Trésor**") is responsible for exercising this control.

FDI regime is being refined and increased since 2019 and new rules relating to the filing (which impose more stringent rules on the information to be filed) will enter into force on 1 January 2021.[1]

Foreign investors are increasingly aware of potential risks in the event of non-compliance with the French FDI regime and, even though there are to date only few examples of prohibition decisions or of sanctions in case of non-compliance with the FDI regime, it has become of core importance for foreign investors to mitigate these risks.

Identification of risks in the event of non-compliance with the French FDI regime

As a short reminder, pursuant to Articles L. 151-3 and seq. of the French Monetary and Financial Code ("**MFC**"), the FDI screening procedure is mandatory once a transaction meets the relevant thresholds[2]. The existence of such prior authorisation regime of these transactions implies that[3] :

- a transaction cannot be implemented until clearance is granted by the MoE (authorisation decision) or the MoE confirms that the transaction is out of the scope of review (informal letter) ("**standstill obligation**");
- investors must comply with the conditions set out by the MoE – if any – in its approval decision;
- parties cannot submit inexact or misleading information to the MoE to obtain an approval decision; and
- investors have to comply with injunctions from the MoE (e.g. injunctions to notify the transaction, injunction to unwind the transactions, etc.).

As a result, as soon as their transaction meets the relevant thresholds, investors face the risk of seeing the attractiveness of the intended investment reduced since the transaction may be prohibited by the MoE or the MoE may submit it to strict conditions that may reduce investors' business incentives.

This risk is strengthened by the fact that non-compliance with the French FDI regime is not an option for investors. Since 2019, the powers vested in the MoE in the event of non-compliance have been significantly increased. In particular, non-compliance with the standstill obligation may for instance result in the imposition of injunctions and sanctions:

- foreign investments completed without prior authorisation are in principle null and void, and the MoE may enjoin the investor to file for prior authorisation, unwind the transaction at this own expense or amend the investment made;
- even before reaching a final approval or prohibition decision, the MoE may pronounce interim measures in the event that the protection of public order, public security or national defence is compromised or likely to be compromised. These interim measures include the suspension of the investor's voting rights, the prohibition or limitation of the distribution of dividends to the investor, the temporary suspension of the free disposal of all of part of the assets related the sensitive activities carried out by the target and the appointment of a temporary representative within the company;
- the MoE may also impose monetary sanctions amounting to twice the value of the investment at stake, 10 per cent of the annual turnover achieved by the target company, €1 million for natural persons or €5 million for legal entities. Besides, the MoE may also subject any injunction or interim measures to a daily penalty that may not exceed €50,000; and
- in addition, pursuant to Articles 458 and 459 of the French Customs Code, infringement of the foreign investments control requirement may be subject to criminal penalties including up to five years' imprisonment, confiscation of the property and of the assets which are the proceeds of the offence; and a fine ranging from the amount in question to twice the sum to which the offence or attempted offence relates.

The abovementioned sanctions and measures can be imposed on investors including when they act in good faith. This is quite similar to the assessment made in the context of merger control by competition authorities where so-called "gun-jumping practices" (i.e. closing a transaction before it was formally approved by the competent competition authority(ies)) may be heavily sanctioned even when the parties in a M&A transaction have genuinely not realised that a prior clearance was required. A prudent approach is thus recommended, in particular considering

[1] Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France (Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France - Légifrance (legifrance.gouv.fr)).
[2] As a short reminder, the applicable cumulative thresholds are the following: the transaction (i) has to concern directly or indirectly a foreign investor, (ii) must consist in the acquisition of the control, an activity or a specific percentage of the voting rights of a French entity and (iii) concern a French legal entity which exercise one of the sensitive activities which have been listed out by governmental decree.
[3] This list of obligations is non-exhaustive.

that there is to date legal uncertainty as to the exact scope of the FDI regime, since the current texts lack precision and there is little available public guidance from the MoE to date.

In addition, once the clearance decision has been obtained, the parties to the transaction must strictly comply with the conditions that the MoE may have imposed as non-compliance may result in the imposition of injunctions (e.g. withdrawal of the clearance, compliance with the initial conditions, compliance with new conditions set out by the MoE) and of monetary sanctions.

The wide array of sanctions that can be imposed is designed to have a deterrent effect on investors and encourage them to duly notify their transactions or, at least, reach out informally to the MoE to determine whether their transaction falls within the scope of the French FDI regime.

Lessons learned from practice

Even though there have been hundreds of transactions reviewed by the DG Trésor in 2019, 2020, and 2021[4], there are to date little real-life examples of imposition of prohibition decisions or of sanctions by the MoE due to several objective justifications.

First, the MoE does not publish clearance decisions or prohibition decisions issued in individual cases and the cases the public is aware of are the ones that have been reported in the press. For instance, in 2020, the press reported that the MoE issued an informal objection to Teledyne, a US company which contemplated investment in Photonis, a French company developing technology for night vision in defence and aerospace applications as well as detection instruments directly related to nuclear deterrence. The French MoE is then reported to have prohibited the transaction in late 2020.

Second, businesses that anticipate that the MoE may not approve the intended investment or submit it to excessively heavy conditions may simply choose to withdraw their investments. Hence the importance of carrying out a preliminary foreign investment control analysis of the project at its outset, to avoid spending time and effort on a project that may later prove to be difficult to implement.

Third, additional considerations which are not strictly speaking part of the control procedure may enter into the equation. Notably, around early 2021, there were discussions as to the acquisition of Carrefour by the Canadian retailer Couche-Tard but the French Ministry of Economy publicly stated that the French government would not approve the transaction. Even though the DG Trésor did not in fact have the chance to conduct a FDI screening, Carrefour and Couche-Tard decided not to temporarily go forward with the transaction.

As a result, the low number of precedents available does not in itself mean that the MoE is inactive[5]. On the contrary, the French government has made it public that it would keen to intervene in investments in sensitive areas of the French economy.

Mitigating risks

In that context, mitigating risks of non-compliance with the French FDI regime is of core importance for investors. Immediate practical recommendations for businesses include conducting an early FDI preliminary analysis. When this analysis identifies potential concerns, the FDI screening procedure should be included in the transaction timeline, including by adapting the transaction documents (SpAs, LoIs, etc.) and the parties may decide to notify the transaction to the MoE, informally or formally, in order to clarify whether the transaction falls within the scope of the FDI regime and/or anticipate the conditions the MoE may impose to the transaction. Our personal experience shows that when a transaction does not raise important concerns, the DG Trésor is usually keen to answer investors' queries within a short timeframe.

[4] See : https://www.tresor.economie.gouv.fr/Articles/2022/03/17/publication-du-rapport-annuel-sur-le-controle-ief-en-2021
[5] A comparison can be made with the French merger control regime where there is only one example of a prohibition decision to date and only a few decisions sanctioning non-compliance with the standstill obligation, but which is commonly taken into account by companies engaging in M&A transactions.

PHOTONIS, CARREFOUR AND MAN ENERGY SOLUTIONS: A REVIEW OF RECENT KEY FOREIGN INVESTMENT CASES IN FRANCE

By Pascal Bine,
Partner, Skadden

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Much has been written about the Photonis/Teledyne and Carrefour/Couche-Tard matters. These cases show that the control of foreign investments in France can follow very different institutional logic: (i) the protection of national defense interests and public safety in the strictest sense, (ii) economic security interests (the protection of key technologies, strategic sectors, sensitive data, etc.), and (iii) economic patriotism (the protection of French domestic companies and the level of employment).

The Volkswagen/MAN Energy Solutions case is completely different. It shows the importance of ex-post monitoring of the undertakings toward the French State that foreign investors committed to as part of the French foreign investment control regime. This matter confirms, if proof were needed, that ex-post control is a key enforcement tool that the French Ministry of Economy has developed in recent years.

Photonis/Teledyne: the protection of national security interests

Photonis undoubtedly constitutes a sensitive asset from the perspective of French foreign investment rules. The company develops night vision solutions for the French army. It provides detection tools in the context of the Laser MegaJoule project, which is part of the French nuclear deterrence program. It has significant R&D capabilities in France, and has a very important patent portfolio.

Ardian, the former owner of Photonis, decided to sell the company in 2019 and subsequently entered into exclusive negotiations with Teledyne, a U.S. industrial conglomerate. Because it appeared that the proposed transaction would be subject to French foreign investment control, Teledyne submitted a request for authorization to the French authorities in February 2020. A complex and lengthy process then began. At first, Teledyne received an informal negative decision. Further discussions ensued between the services of the French Ministry of the Economy regarding certain undertakings that Teledyne would be required to commit to in order to obtain French foreign investment clearance. After agreeing to these conditions, Teledyne filed a new request for authorization on October 30, 2020, which was eventually vetoed by the French Minister of the Armed Forces.[1]

There are three takeaways from a French foreign investment standpoint.

First, this matter confirms the package of undertakings that are now imposed on any foreign investor considering an investment in a highly sensitive sector in France such as national defense: (1) the French public investment bank, BPI, will have a minority stake in the share capital of the French target entity, (ii) BPI will have veto rights with respect to certain management decisions, and (iii) a defense or security committee will be set up within the French target entity, comprised of one or several representatives of the French State whose main objective is to preserve the relevant sensitive activities and data in France.

Second, this matter raises the issue of the valuation of French companies operating in a sensitive sector. According to rumors, Teledyne negotiated a lower price with Ardian based on the conditions imposed by the French Ministry of the Economy, in particular with respect to the minority shareholding of BPI.

The same issue also arises for French domestic buyers. A French investment fund planning to acquire a French company operating in a sensitive sector must take into consideration the expected resale value of the company in its overall valuation in light of the potential restrictions that may be imposed in the context of a French foreign investment review process at the exit. Ardian eventually sold Photonis to HLD, an investment group, for a much lower price than that it had initially negotiated with Teledyne.

Lastly, this matter shows the need to fully understand the inner mechanism of the French foreign investment review process in order to anticipate any potential difficulties. While the decision to authorize a transaction is technically issued by the French Minister of the Economy, the role of the other relevant ministries should not be underestimated. The services of the French Ministry of the Economy are in charge of reviewing the proposed transaction, but the analysis of the risks associated with the transaction is mainly carried out by the relevant ministries overseeing the covered activities.

In the Photonis case, the transaction failed because the French Minister of the Armed Forces vetoed the authorization request. Moreover, the French Minister of the Economy did not issue an express refusal. It is the French Minister of the Armed Forces who made it official that Teledyne had ultimately not obtained the French foreign investment clearance.[2]

Carrefour/Couche-Tard: a political veto regarding a contemplated transaction at a very preliminary stage

When the Canadian company, Couche-Tard, announced its proposed acquisition of Carrefour on January 13, the French Minister of the Economy reacted immediately and issued a categorical veto. In order to do so, Bruno Le Maire wielded the enforcement hammer of the French foreign investment regime on grounds of food security.

Did this transaction fall within the scope of the French foreign investment rules? In principle, yes. The decree of 31 December 2019 extended the scope of such control to activities involving the "*distribution of agricultural products (...), when they contribute to the objectives of national food security*."[3]

In itself, the extension of the scope of the French foreign investment rules to food security is perfectly legitimate. The European regulation on screening of foreign direct investments within the European Union expressly provides for the possibility for Member States to extend the scope of control to food security.[4]

Various foreign investment control mechanisms refer to food security. Such is the case in the United States, where this notion is part of the U.S. concept of "national security." Moreover, the Committee on Foreign Investments in the United States (CFIUS) issued a very noteworthy decision on the basis of food security.[5]

In this instance, did the transaction constitute a threat to the country's food security? It is doubtful. The health crisis

[1] *See* Press release published by Teledyne on December 18, 2020.
[2] *See* Press release published by Florence Parly on December 18, 2020.
[3] Article R. 151-3, paragraph 9, of the French Financial and Monetary Code (*Code monétaire et financier*).
[4] Article 4.1, paragraph (c), of Regulation (EU) 2019/452 of 19 March 2019.
[5] Authorization of the acquisition of Smithfield Foods by Shuanghui International Holdings Limited by CFIUS on 11 September 2013.

has certainly revealed a need to secure supply chains for essential goods and services. But it is hard to see how a merger between Carrefour and Couche-Tard could have affected food security in France.

The French foreign investment control regime allows the Minister of the Economy to adopt a more nuanced position with respect to transactions under review. The Minister of the Economy may authorize an investment under certain conditions. In this instance, it appears that Couche-Tard was prepared to make significant commitments in terms of investments and also to keep employment at its present level in France.

Bruno Le Maire's reaction was mainly driven by political considerations: (1) to prevent France's leading private employer from ending up in foreign hands one year before the French presidential elections, and (2) to avoid being exposed to criticism regarding major French companies being brought under foreign control (GE/Alstom Energie, Holcim/Lafarge, Nokia/Alcatel Lucent, Rio Tinto/Pechiney, etc.).

Was Bruno Le Maire's reaction politically questionable? Maybe not. The proposed merger with Couche-Tard raised legitimate questions from an industrial perspective, in particular with respect to Carrefour. The synergies that could be generated from the merger of the two groups were far from obvious on paper.

Is such political reaction likely to call into question France's economic attractiveness? The argument has been put forward, but it is doubtful once again. When it comes to investing in France, foreign investors are more wary of tax issues and French labor law constraints.

The government's intervention in this project is in no way a French particularity. In the United States, known for its strong advocacy in favor of economic liberalism, there is a very elaborate foreign investment control regime, which is applied more strictly than in France. Over the past few years, many countries have adopted public policies focused on economic sovereignty and the protection of strategic domestic industries.

If Bruno Le Maire spoke publicly, it is because information relating to the proposed transaction had already leaked. He cannot be blamed for the leak at a stage where the proposed transaction remained largely incomplete.

This may ultimately be the main lesson to be learned from this matter: the need to ensure the confidentiality of the transaction while discussions have not been finalized (...).

The mere possibility that Photonis could be acquired by U.S. investor Teledyne without any opposition from the French government sparked a public outcry at the time. The fact that the French government publicly opposed the acquisition of Carrefour by Couche-Tard also caused an uproar. These are clearly two very different cases.

Volkswagen/MAN Energy Solutions: the importance of ex-post control of the undertakings entered into by foreign investors

The French subsidiary of the German group MAN Energy Solutions, which produces diesel engines for the navy, in particular emergency engines for French nuclear submarines was involved in this matter. The group was acquired by Volkswagen in 2011, and on this occasion, the latter made commitments towards the French State in the context of the French foreign investment review process, guaranteeing the continuity of the French business and the strategic autonomy of French nuclear submarines.

As a reminder, the issuance of a foreign investment clearance in France is generally subject to the foreign investor entering into binding commitments towards the French State in an effort to (1) ensure the sustainability of sensitive activities in France (maintaining industrial and R&D capabilities, continuity of ongoing contracts with sensitive customers, etc.), (2) protect the expertise and know-how of the target French entity, (3) secure sensitive data and information to which the French entity has access, and (4) ensure that the French authorities are kept informed about the conduct of the relevant sensitive activities in France after the transaction.

At the end of 2019, MAN Energy Solutions informed Paris of its intention to stop the production of emergency engines for submarines. An issue arose: the German multinational company had undertaken to deliver the emergency engines of Barracuda submarines, which must be delivered until 2030. It must also participate in the production of the new generation of ballistic missile submarines (*sous-marins nucléaires lanceurs d'engins, SNLE*) which support French nuclear deterrence.

After more than a year of unsuccessful negotiations, Bruno Le Maire finally addressed a letter to MAN Energy Solutions in January 2021 to formally notify the German manufacturer that it needed to comply with the undertakings that it agreed to in 2011, and to remind MAN Energy Solutions of the applicable sanctions if it does not comply with these undertakings.

The matter is very timely particularly because compliance with the undertakings made by foreign investors as part of the French foreign investment review process was one of the key components of the 2019 reform enacted by the PACTE Law with respect to foreign investment control in France. The PACTE Law significantly strengthened the applicable framework by extending the enforcement powers of the French Minister of the Economy and making financial penalties more dissuasive.

In the event that a foreign investor does not comply with its commitments, the French Minister of the Economy can now withdraw the foreign investment clearance (and therefore require the investor to unwind the transaction or request a new authorization), or order the investor to abide by the initial conditions of the authorization or new conditions set forth to remedy the non-compliance, including the sale of all or part of the French sensitive activities to a third party. The French Minister of the Economy may therefore decide whether or not to renegotiate with the defaulting investor and impose injunctions subject to daily penalties.

In order to prevent the risk of adverse effects on French national interests, the Minister of the Economy can also take provisional measures, including: (i) suspending voting rights or distributions of dividends with respect to the relevant portion of the shares held by the foreign investor in the French company, (ii) appointing a trustee who may block any decision by the board or other relevant corporate bodies that might be detrimental to French national interests, and (iii) prohibiting or limiting the sales of assets related to sensitive activities in France.

The purpose of the legal framework resulting from the PACTE Law is to allow the French Minister of the Economy to act in a more accurate and swift manner and take appropriate measures based on the gravity of the breach committed by the foreign investor and the level of urgency of the situation.

An injunction by the French Minister of the Economy intending to force a foreign investor in breach of its French foreign investment undertakings to sell the relevant French activities to a third party undeniably constitutes a nuclear weapon. One could imagine that a French industrial company supported by BPI could indeed constitute an alternative solution in certain cases. It appears that the situation eventually worked out in the Volkswagen/MAN Energy Solutions matter.

There is no doubt that if the French Minister of the Economy were to decide to resort to such a weapon in the future, it would lead to complex litigation proceedings before the French administrative courts. It being understood that, in the matter at hand, and contrary to litigation relating to a refusal to grant a French foreign investment clearance, the foreign investor would not be constrained by an M&A timetable.

CASE STUDY OF THE PORT OF NEW YORK OF DUBAI PORTS WORLD

By Alexander Blumrosen, Attorney at Law at the Paris and New York Bars, with the assistance of Nour El Ghadban, Polaris Law, Paris

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

In October 2005, a London-based company, Peninsular and Oriental Steam Navigation Company (P&O), agreed to be acquired by a Dubai-based port company called "*Dubai Ports World*" for US$6.85 billion. The potential sale was controversial in the U.S. because the transaction would have given the foreign investor operating rights to six major U.S. ports, including terminals in the New York and New Jersey area, raising national security concerns.

Dubai Ports World is owned by the government of Dubai. It was created in 2005 through the merger of the Dubai Ports Authority with another Dubai state-owned company. By 2006, Dubai Ports World had become the world's sixth largest port operator, present in China, Australia, Germany, the Dominican Republic and Venezuela, and with additional projects under development in India, Peru and South Korea.

While P&O had started as a leading ferry company in the United Kingdom, its port facilities operations had become so significant internationally, including the operating rights to the six major U.S. ports, that the proposed acquisition - if completed - would propel Dubai Ports World to become the world's fourth largest container port operator.

Both parties considered that the transaction might raise national security issues that would need to be reviewed by the U.S. government. Accordingly, in September 2005, they notified the Committee on Foreign Investment in the United States (CFIUS) of their intention to file a voluntary notification with the Committee. The parties also held a full briefing for CFIUS, as well as multiple pre-notification briefings for all CFIUS agencies. As a result, CFIUS requested an intelligence assessment of the foreign acquirer, Dubai Ports World, to assess any potential threat to the national security of the United States even before the transaction was formally declared.

CFIUS has the authority to review and assess all foreign investments that take place in the United States to ensure that acquisitions by foreign companies or states do not pose significant threats to U.S. national security. CFIUS operates on a consensus basis, with each member government agency conducting its own internal analysis of the national security effects of the proposed transaction, including a thorough analysis of the foreign investor.

The Treasury Department serves as the point of contact between the parties and the Committee as a whole and is responsible for leading and organizing each investigation. Federal regulations governing CFIUS operations provide for an initial 30-day investigation period, which may be followed by an additional 45-day period if necessary for further evaluation.

On December 16, 2005, the companies submitted their official statement with CFIUS, which started the initial 30-day investigation period. The agency that co-led this investigation with Treasury was the Department of Homeland Security, which is the CFIUS member agency with specific expertise in port security.

The CFIUS investigation found that the acquisition would not adversely affect U.S. national security because the foreign investor would not directly manage port security and would not own any of the ports it manages. Indeed, Dubai Ports World's role would be limited to the loading and unloading of cargo, as had previously been the case for P&O, with all security-sensitive operations being outsourced to U.S. contractors.

In addition, the UAE had been a strategic counterterrorism and nonproliferation partner of the United States, having allowed the pre-positioning of American military personnel and aircraft on its territory prior to the 2003 gulf war and generally supporting the presence of U.S. armed forces in the region. In addition, the UAE had been a U.S. partner since 2002 in the area of port security within the the Container Security Initiative (CSI), a multinational program to protect global trade from terrorism.

The U.S. Departments of Transportation and Energy were also involved in the CFIUS review. During the review period, the Department of Homeland Security negotiated letters of assurance with the investor that all facilities in the United States would be managed exclusively by U.S. nationals, that they would fully cooperate with the Department, and that they would designate an American business executive to serve as the point of contact with the Department of Homeland Security on all security matters.

CFIUS approved the transaction in January 2006, finding that there was no threat to U.S. national security.

The proposed sale quickly met with widely publicized political opposition in both state governments and the U.S. Congress, which led the parties themselves to request a more thorough 45-day investigation to address the concerns that had been raised. As a result, the commission began a more thorough investigation of the transaction in February 2006. President Bush, however, considered that the sale was harmless following the initial investigation and approval by CFIUS, leading him to state publicly, amidst political objections from Congress including members of his own political party, that he would veto any potential legislation to block the transaction.

In an attempt to address public concerns, Dubai Ports World announced in February 2006 that it would temporarily postpone the transaction pending the results of the in-depth CFIUS investigation, which they also believed would be favorable to the transaction. Nevertheless, in March 2006, during the 45-day investigation by CFIUS, the U.S. House of Representatives Finance Committee approved an amendment by a vote of 62 to 2 that would have blocked the transaction. Although the amendment never became law (having failed to pass the Senate), the investor nonetheless took this high-profile vote by the House Finance Committee as a sign that there would likely be continuing public opposition to the transaction even if it were approved by CFIUS. Shortly after the House Finance Committee vote, Dubai Ports World sold the controversial port management operations to a U.S. company, Global Investment Group.

Local port authorities that would have been affected by the acquisition took different approaches to the investment. The chief executive officer of the Port of New Orleans distanced himself from the debate, leaving the decision in the hands of the federal government. But, the

Governor of New Jersey and the Port Authority of New York and New Jersey filed several lawsuits against CFIUS and its federal agencies for failing to provide local authorities with adequate information, in alleged violation of the sovereignty of the various states involved: the courts ultimately dismissed these claims.

In addition, the Port Authority of New York and New Jersey filed another lawsuit claiming that the transfer of the contract with the Port of Newark violated a lease agreement entered into in 2000 because the Port Authority was not consulted. In other words, the lessee of the leased premises (the port) was alleged to have sublet the property without the owner's required prior approval. The Port Authority threatened to terminate the lease of the container terminal at the port of Newark in order to exclude the Dubai-based company from all port operations.

In response to the politicization of this case, CFIUS regulations were rewritten in 2007 as the Foreign Investment and National Security Act (FINSA), which was finalized in 2009. This law ensured the preeminence of CFIUS among U.S. government agencies in assessing national security threats that might result from foreign acquisitions of U.S. companies.

The new law was also designed to provide the Committee with a degree of insulation from congressional pressure. In particular, FINSA amends Section 271 of the Defense Production Act of 1950 to establish a new statutory basis for CFIUS, giving it explicit independent authority to negotiate mitigation agreements with companies, which had previously been only an administrative practice of CFIUS. FINSA also reduced the Committee's membership to six cabinet members, namely the Department of Homeland Security, the Department of Defense, the Department of Commerce, the Department of State, while adding the Department of Energy as a new member. The existing time limits for conducting safety investigations previously established by the 1988 Exon-Florio Amendment were maintained.

In addition, FINSA identified with greater specificity the responsibilities of officials within CFIUS, creating a new position assigned to the Assistant Secretary of the Department of the Treasury to oversee the CFIUS process and to report regularly to Congress. These reports are also provided to local elected representatives in affected jurisdictions in cases involving foreign investment in local critical infrastructure.

These reports describe the actions taken by CFIUS, identify the factors considered in the assessment of risk, and provide written assurance that the agreed-upon transaction does not threaten the national security of the United States. The written assurance is also required if mitigation agreements have been entered into with the foreign investor and must identify the concerns underlying those actions. Any member of Congress who has received such notice may request a briefing on the transaction or on the conditions contained in a mitigation agreement accepted by a foreign investor. These briefings may be classified, consistent with CFIUS' confidentiality obligation.

The *Dubai Ports World* case demonstrates both the level of scrutiny by U.S. agencies of foreign investment but also the responsiveness of the U.S. regulatory system to newly perceived risks and challenges from foreign investment in the United States.

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