



# FOREIGN DIRECT INVESTMENT REGULATION GUIDE

Editor  
Veronica Roberts

# Foreign Direct Investment Regulation Guide

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**Editor**

Veronica Roberts

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# Publisher's Note

Foreign direct investment is an area in flux, where the appetite – and necessity – for outside capital is running into growing national security concerns, as well as increasingly strict regulations on mergers. Although there were already controls in place before covid-19, the pandemic and a growing shift towards protectionist economic policies have crystallised these concerns more widely among governments around the world. As Veronica Roberts, Ruth Allen and Ali MacGregor point out in their introduction, there is increased scrutiny of deals in a number of jurisdictions, including the United States, Europe and Australia. At the same time, there is still a keen need for foreign investment in many Asian countries. Practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment is therefore critical.

The *Foreign Direct Investment Regulation Guide* – published by Global Competition Review – provides just such detailed analysis. It examines both the current state of law and the direction of travel for the most important jurisdictions in which foreign direct investment is possible. The Guide draws on the wisdom and expertise of distinguished practitioners globally, and brings together unparalleled proficiency in the field to provide essential guidance on subjects as diverse as the evolving perspective on deals with China to the changing face of national security – for all competition professionals.

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## Analysis of Key Foreign Investment Jurisdictions

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# France

Emily Xueref-Poviac and Katrin Schallenberg<sup>1</sup>

### Overview of regime

For many years, foreign direct investment (FDI) in certain sensitive sectors relating to French national interests has been subject to prior clearance. The French foreign investment regime currently relies on Decree No. 2019-1590<sup>2</sup> and the Order of 31 December 2019,<sup>3</sup> as modified by the Order of 27 April 2020,<sup>4</sup> relating to foreign investments in France, and notifications under these regulations have to be made to the French Minister of the Economy, Finance and Recovery<sup>5</sup> (the Ministry of Economy).

### Concept of 'investment' under French FDI controls

Prior approval from the Ministry of Economy is required under Articles L.151-1 and R.151-1 of the French Monetary and Financial Code for foreign investments occurring in 'sensitive' or 'strategic' sectors if they result in either:

- an acquisition of control of any legal entity governed by French law;<sup>6</sup>

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1 Emily Xueref-Poviac is a counsel and Katrin Schallenberg is a partner at Clifford Chance Europe LLP.

2 Décret No. 2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000039727443/>.

3 Arrêté du 31 décembre 2019 relatif aux investissements étrangers en France, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000039727569/>.

4 Arrêté du 27 avril 2020 relatif aux investissements étrangers en France, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041835304/>.

5 Website of the ministry is at <https://www.tresor.economie.gouv.fr/services-aux-entreprises/investissements-etranagers-en-france>.

6 Control is defined under French law as either (1) holding directly or indirectly a majority of the voting rights in the general meetings of the company, possibly through an agreement concluded with other members or shareholders, (2) determining the decisions in the

- an acquisition of all or part of any business division operated by a legal entity governed by French law; or
- for investors from outside the European Union (EU) and European Economic Area (EEA) only, the acquisition, directly or indirectly, solely or in concert, of more than 25 per cent of the voting rights in an entity governed by French law. This threshold has been lowered temporarily to 10 per cent until 31 December 2021 for investments in French companies in strategic sectors by non-EU/EEA investors where the French target's shares are listed on a regulated market. Prior to 1 April 2020, the 25 per cent threshold was 33.33 per cent.

### Concept of 'foreign investor' under French FDI controls

The foreign investment regulations apply to any foreign investment transaction made by a non-French investor in a French entity active in one of the sensitive sectors or activities.<sup>7</sup>

It should be noted that each entity or person in a chain of control will be considered a 'foreign investor'. A foreign investor in a chain of control controlling a target legal entity governed by French law will be subject to a filing request provided the target entity is active in a strategic sector. The focus will be on the investment decision-making power of the shareholder over the target and not solely on the status of the ultimate shareholder.

In the case of an investment fund, any person who is able to exercise legal or practical control over the fund would be considered to be within the chain of control, regardless of the legal structure.

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general meetings, even without a majority (e.g., through a blocking minority), or (3) having the power to appoint or dismiss the majority of the members of the administrative, management or supervisory bodies of the company. Joint control is possible where two or more persons act in concert. Control is furthermore presumed where one holds more than 40 per cent of the voting rights, and no other member or shareholder holds a fraction greater than its own. See French Commercial Code, Article L.233-3.

7 Article R.151-1 of the French Monetary and Financial Code defines a foreign investor as either (1) an individual of foreign nationality, (2) an individual holding French nationality, but who is not domiciled in France within the meaning of Article 4B of the French General Tax Code, (3) any entity governed by foreign law, or (4) an entity governed by French law that is controlled by one or more of the persons or entities referred to in points (1), (2) and (3).

## Concept of 'strategic sector' under French FDI controls

Although the list of strategic sectors used to be shorter for EU/EEA investors, the Decree of 2019 removes this distinction, such that the sectors regulated by the foreign investment control mechanism are the same regardless of whether the investor is EU/EEA or non-EU/EEA. This has significantly expanded the list of strategic sectors for EU/EEA investors. In addition, the overall list of strategic sectors has been expanded (for both EU/EEA and non-EU/EEA investors) to include additional industries.

The list of sensitive activities in strategic sectors covered by the foreign investment control prior approval mechanism includes the following:

- Activities likely to jeopardise national defence interests participating in the exercise of public authority or likely to jeopardise public order and public safety, including:
  - 1 activities mentioned in Article L.2332-1 of the Defence Code relating to weapons, ammunition, powders and explosive substances intended for military purposes, or war materials and assimilated materials;
  - 2 activities relating to dual-use goods and technologies;
  - 3 activities carried out by entities privy to national defence secrets;
  - 4 activities in the sector of security of information systems carried out for a public or private operator (including as a subcontractor to these operators) that manages or uses critical facilities as mentioned in Article L.2332-1 of the Defence Code;
  - 5 activities carried out by companies that have entered into an agreement with the Ministry of Defence, either directly or through a subcontractor, for the design, provision of services or supply of equipment with respect to goods or services within the scope of the industry sectors listed in points 1 to 3 above and 6 below;
  - 6 activities relating to cryptology resources and services;
  - 7 activities relating to equipment or technical devices permitting the interception of correspondence or designed for the remote detection of conversations or the capture of information technology data;
  - 8 service activities relating to the auditing and certification of security provided by information technology products and systems;
  - 9 activities within the gambling industry (except for casinos);
  - 10 research, development and production activities aimed at dealing with the illegal use, in the context of terrorist activities, of pathogens or toxic substances and preventing the public health consequences of that use; and

- 11 data processing, transmission or storage activities, the compromise or disclosure of which is such that it interferes with the exercise of the activities mentioned in points 1 to 10 above and in the following list.
- Activities likely to jeopardise national defence interests participating in the exercise of public authority or likely to jeopardise public order and public safety, where they concern essential infrastructure, goods or services, to ensure:
    - 1 integrity, security and continuity of supply of energy sources;
    - 2 integrity, security and continuity of the supply of water;
    - 3 integrity, security and continuity of the operation of networks and transportation services;
    - 4 integrity, security and continuity of space operations;
    - 5 integrity, security and continuity of the operation of electronic communication networks and services;
    - 6 performance of the objectives of the national police, the national gendarmerie and the civil protection services, and of the public security objectives of customs and of licensed private security companies;
    - 7 integrity, security and continuity of the operation of any facility, installation or structure of vital importance within the meaning of Articles L.1332-1 and L.1332-2 of the Defence Code;
    - 8 protection of public health;
    - 9 the production, transformation and distribution of agricultural products as far as they contribute to national food security objectives (aiming to ensure access to safe, healthy, diversified, good-quality food in sufficient quantity, to protect and enhance agricultural land and to support the protein supply autonomy of France and the European Union); and
    - 10 the editing, printing, distribution of political and general information through print and online press services.
  - Activities likely to jeopardise national defence interests participating in the exercise of public authority or public order and public safety, where they concern essential infrastructure, goods or services to ensure research and development activities relating to:
    - 1 to critical technologies, namely:
      - cybersecurity;
      - artificial intelligence;
      - robotics;
      - additive manufacturing;
      - semiconductors;

- quantum technologies (technologies using the interactions of molecules, atoms and even smaller particles to create practical applications for building computers, telecommunications, satellite navigation, smartphones and medical diagnostics); and
  - energy storage, biotechnologies and technologies involved in the production of renewable energy; and
- 2 dual-use items and technologies listed in Annex I to Council Regulation (EC) No. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

## **Review process – procedure and substantive assessment**

### **Notification and review process of French FDI**

The request for approval (for which there is no fee payable) from the Ministry of Economy is mandatory, suspensory and must be made prior to the closing of the transaction. The Order of 31 December 2019 formally sets out the information required in the filing application.

It is possible for a French entity to ask the Ministry of Economy to confirm whether its activities fall within the scope of the French foreign investment regulations. The Ministry of Economy usually responds to requests within two months. This is not a formal review but a mere preliminary request.

In the case of a formal review, the Ministry of Economy will have 30 working days to confirm the investment is not covered by the French foreign investment regulations, to approve the investment unconditionally or to launch an additional examination.

This Phase I formal review starts when the Ministry of Economy has confirmed receipt of all required documents.

In the case of further investigation, or a Phase II review, the Ministry of Economy will then have an additional 45 working days from issuance of the initial decision to the applicant to complete the additional examination. The two-phase procedure bears some parallels with the merger control review procedure.

The Ministry of Economy has the right to amend or set new conditions (commitments) attached to an authorisation. The Ministry can, on its own initiative, amend existing conditions in the event of a change in the ownership of the target entity of the investment or in the composition of the control chain. The Ministry can also set new conditions if the investor acquires control after having obtained an authorisation under the French foreign investment regulation.

If the Ministry of Economy fails to issue a decision within the initial 30 working days or the subsequent 45 working days, as applicable, the application will be deemed to have been rejected.<sup>8</sup> This is a shift in approach, since, under the previous regime, if no decision had been issued by the deadline, the application was deemed to have been approved by default.

Appeals have to be lodged within 30 days of the explicit or implied rejection. These can be either (1) an administrative appeal, sent to the Ministry of Economy or (2) a contentious appeal before the Administrative Court of Paris.

In accordance with Article L.411-2 of the French Code of Relations between the Public and the Administration, the 30-day limit for a contentious appeal is extended by the exercise of an administrative appeal and only starts running again from the date of rejection.

### Risks under French FDI

An investor who fails to notify is liable to a fine of the higher of:

- twice the amount of the defaulting investment;
- 10 per cent of the annual turnover (excluding tax) of the target company; or
- €1 million for individuals, or €5 million for corporate entities.

The investor may also face possible criminal sanctions, including imprisonment for up to five years.

The Ministry of Economy also has the power to issue orders and injunctions if an investment has been carried out without any prior requisite authorisation. The Ministry can now ask an investor to (1) submit a request for authorisation, (2) revise the investment or (3) unwind the transaction at its own expense.

In the event of a breach of the commitments made by an investor, the Ministry of Economy can ask the infringing investor to comply (within a specified time frame) with (1) the commitments or (2) new conditions (including unwinding the investment or selling the sensitive activity). The Ministry may also withdraw the previously granted approval, in which case the investor will need to file a new approval request, unless it decides to unwind its investment.

If the protection of public order, public security or national defence is compromised or likely to be threatened, the Ministry of Economy has the power to impose interim measures to remedy the situation quickly. These measures include suspending the investor's voting rights in the target company, preventing

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8 French Monetary and Financial Code, Article R.151-9.

or limiting the distribution of dividends to the foreign investor, or appointing a temporary representative to ensure the preservation of national interests within the target company.

## Remedies

Given the aim of governments to preserve domestic capacities and prevent what they consider to be predatory acquisitions, investors should consider early in the process whether there are specific assurances or commitments that they might be willing to offer in appropriate circumstances. These might, for instance, include maintaining domestic production capacity, protecting domestic research and development (R&D), or maintaining domestic jobs.

## Impact of the covid-19 pandemic

The covid-19 pandemic has highlighted, in a dramatic way, the issues that a country may face if it loses control over certain strategic sectors of its economy to foreign interests.

The economic impact of the pandemic led to the expansion of the existing French regulation:

- The Order of 27 April 2020 relating to foreign investments in France<sup>9</sup> added R&D-related activities in the biotechnology sector to the list of strategic activities, which would be most likely to protect French companies working on a covid-19 vaccine. This follows the 25 March 2020 guidance of the European Commission.<sup>10</sup>
- Decree No. 2020-892 of 22 July 2020<sup>11</sup> introduces a simplified control procedure for acquisitions of at least 10 per cent by non-EU/EEA investors in the voting rights of a French company carrying out a strategic activity and whose shares are traded on a regulated market. In such a case, the investor must give

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9 Arrêté du 27 avril 2020 relatif aux investissements étrangers en France, available at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041835304/>.

10 Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) 2020/C 99 I/01, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.CI.2020.099.01.0001.01.ENG&toc=OJ%3AC%3A2020%3A099I%3AFULL>.

11 Décret No. 2020-892 du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé, available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042138111>.



prior notice of the transaction to the Ministry of Economy, which may then object within 10 business days. If no objection is raised, the transaction is authorised and the investor has up to six months to complete it. However, if an objection is raised, the investor may file a formal application for authorisation.

- Decree No. 2020-1729 of 28 December 2020<sup>12</sup> extended this temporary ‘fast-track’ framework until at least 31 December 2021. It may well be that this temporary change continues well beyond the end of the year.<sup>13</sup>

### **Insights into recent enforcement practice and current trends**

It is apparent that the Minister of the Economy reviews requests for prior authorisations in an increasingly detailed manner and has imposed additional conditions on investors.

Even though formal vetoes remain extremely rare, the Ministry of Economy publicly tightened its position when it issued two high-profile refusals in the past year that made headlines. First, following the interest shown by US company Teledyne in the French company Photonis, which specialises in night vision systems, the French Ministry verbally announced its opposition to the transaction, although discussions continued throughout summer 2020. The discussions then reached a point where the following conditions were imposed by the Ministry:

- the requirement for the French sovereign investment fund Bpifrance to take a 10 per cent minority stake in Photonis, accompanied by a veto right regarding the operations and management of Photonis’ European businesses in France and the Netherlands; and
- the establishment of an internal security committee to include representatives of the French Ministry of the Armed Forces and the Ministry of Economy, who would not only have veto rights but would also filter information to limit the transfer of strategic data to Teledyne.

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12 Décret No. 2020-1729 du 28 décembre 2020 modifiant le décret no. 2020-892 du 22 juillet 2020 relatif à l’abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé, available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042754696>.

13 Press Release No. 517 (of 18 December 2020) quotes Bruno Le Maire, French Minister of the Economy, saying, ‘In these times of economic crisis, we must guarantee the protection of our strategic companies. We will therefore maintain the threshold for controlling foreign investment in France at 10%’, available at <https://www.tresor.economie.gouv.fr/Articles/4e404461-21e3-403f-b765-943442285fa6/files/5413f909-2a53-4087-ab2d-28369e8d1c64>.

However, the discussions ultimately came to an end with a formal prohibition on the transaction issued by the French state at the end of 2020 – an unprecedented event.

The second prohibition was issued in January 2021. The Ministry of Economy vetoed Canadian retailer Couche-Tard's acquisition of French supermarket chain Carrefour in the name of French food sovereignty, illustrating the topicality of control by foreign investors.

For the business world, these vetoes set a high water mark in the rising tide of protectionism and are a signal of stronger protection of French companies from non-European investors, implicating even close economic partners of France such as the United States and Canada.

These cases reflect the French government's increased sensitivity to national interests and more aggressive approach to enforcement. Foreign investors need to be prepared for tighter scrutiny and the potential imposition of conditions (and, in certain cases, prohibition decisions).

### **Practical insights and strategic guidance for investors**

Just a few years ago, FDI screening had limited implications for merger and acquisition (M&A) transactions as its impact was generally limited to investments in the defence sector or in critical infrastructure. However, French foreign investment control has now become a major issue in M&A transactions, introducing a new dynamic of negotiation with investors. As with merger control, the risk of a foreign investment control review is no longer an exception to the rule and must be taken into account in terms of both the certainty of a transaction and the timing of its completion. In this respect, the due diligence stage is now a key part of the resolution of foreign investment issues, as even low or minority shareholdings can trigger the application of FDI rules, as can contractual arrangements, other rights and acquisitions of assets.

When planning an M&A transaction, French FDI filings need to be considered alongside competition-based merger control rules. In addition, parties should bear in mind that the French government has a large degree of discretion under the French FDI regime. Under the French system, FDI filing precedents are not publicly available and a previous clearance decision issued by the French ministry stating that a particular target's activities fall outside the scope of the French FDI regulation cannot be used as a precedent to avoid subsequent filings in the same sector. The result is a degree of uncertainty that needs to be factored into the overall transaction risk.

As with other regulatory approval requirements, when a transaction falls under the French FDI regime, there will be implications for the deal timetable. Reviews can take a number of months. The Bureau Multicom 4 within the Ministry of Economy's Treasury Department is formally in charge of the review. When reviewing a foreign investment, the Ministry conducts inter-ministerial consultations with other ministries, government agencies or regulators competent depending on the relevant sectors concerned by the foreign investment under review, such as the Ministry of Defence, the Ministry of Transportation or the Ministry of Health. This inter-ministerial consultation allows the ministries concerned to raise questions about the investor, the target or the transaction dynamics and can undoubtedly affect the overall timetable. In practice, the Ministry may take the view that, for as long as any questions remain unanswered, the clock is not ticking.

Finally, the EU's foreign investment screening mechanism, which was put in place in late 2020, must be taken into account. National authorities communicate between themselves when a filing occurs<sup>14</sup> and the European Commission or other Member States may submit comments and questions to the parties. These additional steps could affect the estimated review timeline and should not be ignored.

## Reform proposals

The scope of the French FDI screening mechanism has been extended via the 10 September 2021 Order regarding foreign investments in France,<sup>15</sup> officially published on 22 September 2021. The aim of the Order is to adapt the French system of control of foreign investments to the current developments and challenges in the renewable energy sector by amending the Order of 31 December 2019. As a result, R&D activities relating to 'technologies involved in the production of renewable energy' will fall within the scope of control within a few months.

The Order also provides for changes to the content of an authorisation or a prior review of application filings and, in particular, adds to the list of documents to be provided when submitting an authorisation application. These changes are

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14 A template notification form is publicly accessible and has the aim of streamlining the assessment by the European Commission and Member States under the cooperation mechanism of whether a foreign direct investment undergoing screening is likely to affect security or public order in at least one other Member State - see [https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc\\_157945.pdf](https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf).

15 Arrêté du 10 septembre 2021 relatif aux investissements étrangers en France, available at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044082732>.

in line with the information requested under the European cooperation mechanism set up under Regulation (EU) 2019/452,<sup>16</sup> and take into account documents that, in practice, were routinely requested by the Ministry of Economy after an initial filing.

These changes will come into force on 1 January 2022.

In respect of reform proposals, we understand from the Ministry's services that guidelines are being drafted to provide guidance on the French FDI regulation and the FDI assessment process. These guidelines are expected to be published in early 2022.

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16 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, available at <https://eur-lex.europa.eu/eli/reg/2019/452/oj>.

## **APPENDIX 1**

# About the Authors

### **Emily Xueref-Poviac**

Clifford Chance Europe LLP

Emily Xueref-Poviac's practice encompasses all fields of competition law, both in advice and litigation. Emily advises French and international clients in a wide variety of industrial sectors on EU and French competition law matters.

Emily has developed a strong and recognised expertise in foreign investment matters, which has been essential for a number of transactions in the rapidly evolving foreign investment review landscape. Emily has advised on complex cases involving unique legal developments and is regularly consulted by the French authorities to offer opinions on reform proposals.

Emily has experience in a wide range of industries, including infrastructure, defence, energy, telecommunications, transportation, pharmaceuticals, semi-conductors, banking and finance.

### **Katrin Schallenberg**

Clifford Chance Europe LLP

Katrin Schallenberg's practice focuses on European and French competition law. She regularly assists clients in large antitrust investigations by the European Commission and the French competition authority, both for abuse of dominance and cartel infringements.

Katrin splits her time between Paris and Brussels and has been involved in high-profile investigations in the banking, industrial, energy and information technology sectors. She also has extensive experience in handling complex merger control cases.

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While the appetite – and necessity – for outside capital remains unabated, increasingly this is running into national security concerns, as well as stricter regulations on mergers. Although controls on foreign direct investment were already in place before covid-19, the pandemic and a growing shift towards protectionist economic policies have brought these concerns into sharper focus for governments. The *Foreign Direct Investment Regulation Guide* – edited by Veronica Roberts – provides practical and timely guidance for both practitioners and enforcers trying to navigate this fast-moving environment. The Guide draws on the wisdom and expertise of distinguished practitioners globally to provide essential guidance on subjects as diverse as the evolving perspective on deals with China to the changing face of national security.

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