

Foreign Investment Screening

France

Over the past two years, France has significantly strengthened its foreign investment screening mechanism, and all acquisitions by foreign investors of a French entity active in a strategic sector are subject to prior authorization by the Ministry of Economy (MoE). A series of reforms has broadened its scope and allowed the MoE to impose severe sanctions. As a result, the French screening mechanism has become a burdensome regime in many ways similar to merger control.

An "acquisition" occurs when:

- a foreign investor acquires control within the general meaning under company law (Article L. 233-3 of the French Commercial Code) of a French entity, or a line of business held by a French entity; or
- a non-EU investor acquires more than 25% of the voting rights of a French entity (due to the Covid19 crisis and until 31 December 2021, this holding threshold is temporarily lowered to 10% for investments made in listed companies and is subject to a special accelerated procedure).

Strategic sectors include health, safety, press, food safety, and R&D in the areas of cybersecurity, artificial intelligence, biotechnologies, energy storage and, as from 1 January 2022, renewable energy production .

Like the merger control procedure, the investment prior authorization procedure now comprises two phases. In Phase 1, the MoE has 30 business days to determine whether to authorize proposed investment without conditions or to commence Phase 2 for further review. In Phase 2, the MoE has 45 business days to decide whether to authorize the investment with or without conditions or to prohibit it. However, unlike the merger control procedure, the absence of response by the MoE does not amount to a tacit authorization.

In the event that an investment is implemented without prior authorization, the MoE can order suspension of voting rights or limit the distribution of dividends. The MoE can also impose fines of up to the highest of the following:

- double the amount of the investment;
- 10% of the annual turnover (excluding taxes) of the target company; or
- EUR 5 million for a legal entity or EUR 1 million for an individual.

In December 2020, the MoE blocked the proposed takeover by the U.S. company Teledyne of the French company Photonis which specializes in night vision technologies, which are employed by the French army. This was the first time that France prohibited investment.

Similarly, in January 2021, Bruno Le Maire, the French Economy Minister, announced his intention to block the proposed takeover of Carrefour by the Canadian company Couche-Tard before any request for authorization was filed on the ground of preserving French food sovereignty.

The Photonis/Teledyne case reflects 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 potential imposition of conditions (and in certain cases, prohibition decisions).

Further, where a French merger control notification is required, foreign investors need to take a well-coordinated approach, particularly considering that, under French merger control rules, the MoE has the possibility to authorize or block a merger on national interests grounds, in spite of the contrary decision of the Competition Authority. Foreign investors should keep in mind this "double veto mechanism", particularly in terms of timing, considering that these procedures are overseen by different services within the MoE.