

PRACTICAL ASPECTS OF FOREIGN INVESTMENT SCREENING IN FRANCE



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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, guidelines¹ 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](https://www.economie.gouv.fr/investissements-etranagers) | [Direction générale du Trésor \(economie.gouv.fr\)](https://www.economie.gouv.fr/direction-generale-du-tresor)

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 spe-

cialized 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 France³. 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, condi-

tions 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 prejudice 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 prin-

ciple 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 \(in English\)](#)