FOREIGN INVESTMENT CONTROL IN FRANCE: AN ANALYSIS OF THE COMPLEX AND SHIFTING ENVIRONMENT

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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 in-

volving 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.