

France Issues Guidelines on Foreign Investment Control Regime

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On September 8, 2022, the French Ministry of the Economy's (MOE) General Treasury Department published its first set of guidelines on French foreign direct investment (FDI) control.

The purpose of the guidelines is to provide clarifications with respect to French FDI rules, key concepts and review processes. The document constitutes a comprehensive tool, and provides valuable guidance on the MOE's existing approaches on foreign investment control, which are important steps toward providing more transparency for foreign investors on French FDI matters since the decisions from the French minister of the economy on these matters are not publicly disclosed. We have summarized the key aspects of the guidelines below.

Concept of a Foreign Investor

Scope of Definition of Foreign-Registered Entities

Under French FDI rules, a foreign investor is defined¹ as (i) any individual of foreign nationality; (ii) any individual of French nationality who is not tax-domiciled in France (or Monaco); (iii) any foreign-registered entity; or (iv) any French entity that is under the control of one or more aforementioned persons in (i), (ii) and (iii) (together, a foreign investor).

Per the guidelines, the notion of a foreign-registered entity is broad and includes such entities organized under a foreign law and operating a business activity, whether or not such entity has legal personality. The guidelines cite examples of foreign-registered corporations, branches of companies, associations, trusts, investment vehicles, foundations and consortiums, as well as nation-level and local authorities, and other public or semi-public bodies. The guidelines also confirm that SPACs may qualify as foreign investors.

Chain of Control

The guidelines confirm the position expressed previously by the MOE's FDI office whereby the presence of any foreign investor in an investor's chain of control is sufficient to trigger French foreign investment control with respect to a covered investment, even if the relevant foreign investor is ultimately controlled by a French person or entity.

The existence of control is primarily assessed on the basis of French corporate law² and, accessorially, on the basis of the concept of "significant influence" under French competition law³. Therefore, the existence of a minority foreign investor in an investor's chain of control that has participation or veto rights on business and operational matters can be sufficient to trigger French FDI control.

Investment Funds

As stated in the guidelines, investment vehicles — regardless of their legal forms or domicile — are investors, and may qualify as foreign investors by themselves, independently of their management company. For example, if a covered investment is made by a French holding company that is controlled by a Luxembourg investment fund, which itself is managed by a French management company, the Luxembourg investment fund would be considered a foreign investor under French FDI rules.

¹ Article L. 151-3 et seq. and Article R. 151-1 et seq. of the French Monetary and Financial Code.

² Article L. 233-3 of the French commercial code.

³ Article L. 430-1(III) of the French commercial code.

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The guidelines state that in light of the various types of investment fund structures, the FDI office will assess the chain of control of investment funds on a case-by-case basis, taking into account the specificities of each structure and the respective rights and obligations of the fund's investors and management company. The FDI office will notably focus on the fund's management structure (internal versus external) and the provisions of its constitutional documents.

Under French FDI rules, when a foreign investor's chain of control includes one or more investment funds, the foreign investor must disclose in the FDI filing the identity of the fund manager(s) and the entities or individuals who control the fund. The guidelines confirm that this disclosure requirement does not extend to the fund's limited partners or investors (to the extent that they do not have any specific controlling rights and are passive investors).

Covered Investments

French FDI rules cover three types of foreign investments (each, a Covered Investment): (i) the acquisition of control over a French company (the Control Test), (ii) the acquisition, in whole or in part, of a branch of business of a French company (the Asset Test) and, for non-EU and non-EEA investors only, (iii) the acquisition of more than 25% of voting rights in a French company (the Threshold Test). The guidelines provide useful clarifications on each category of Covered Investments, as well as on the temporality of the investments.

The Acquisition of Control of a French Company (Control Test)

The guidelines confirm that the Control Test includes the acquisition of “deemed control,”⁴ “*de facto* control,”⁵ and “joint control,”⁶ as concepts that are defined under French corporate law.

Consistent with French corporate law, the guidelines state that a minority foreign investor can be considered as having *de facto* control over a French company if such foreign investor holds special voting rights or other controlling rights or powers under the company's articles of association or a shareholders' agreement enabling such investor to appoint a majority of the company's management or supervisory board members.

⁴ A legal or natural person is deemed to have control over a French company when such person holds, directly or indirectly, more than 40% of voting rights and no other shareholder holds, directly or indirectly, a greater portion of voting rights (Article L. 233-3, II, of the French commercial code).

⁵ A person is deemed to have *de facto* control over a French company when such person effectively determines decisions made at the company's general meetings through its voting rights (Article L. 233-3, I, 3^o, of the French commercial code).

⁶ Two or more persons acting in concert are deemed to exercise joint control over a French company when they effectively determine decisions made at the company's general meetings (Article L. 233-3, III, of the French commercial code).

The guidelines state that the determination of *de facto* control is made on a case-by-case basis, taking into account various criteria, including the share ownership structure, the allocation of shares and voting rights among shareholders, the attendance rate to shareholders' meetings, and the provisions of the articles of association and any applicable shareholders' agreement.

Also consistent with French corporate law, the guidelines state that joint control requires a legally binding agreement (*e.g.*, shareholders' agreement, articles of association) pursuant to which the investors sharing control intend to implement a common policy with respect to the relevant French company through decisions made at shareholders' meetings.

The determination of joint control also involves a case-by-case approach. The guidelines refer to the standard distinction under French corporate law between basic minority investor protection rights — including veto rights on significant strategic decisions — that are solely intended to protect the relevant investor's financial position and more extensive participation rights — including veto rights on management and operational matters — which may confer joint control to the relevant investor.

Lastly, the guidelines confirm that a transaction involving a change from joint control to sole control (or vice versa) does not fall within the scope of French FDI rules.

The Acquisition, in Whole or in Part, of a Branch of Business of a French Company (The Asset Test)

French FDI rules do not provide for any stand-alone definition of a branch of business. The guidelines refer to the concept of business branch as defined by French commercial courts (*i.e.*, all the elements necessary for carrying out an autonomous business operation or a whole of items capable of functioning by its own means under normal conditions).

The guidelines state that the acquisition of certain assets (versus a complete branch of business) may qualify as an acquisition of a partial branch of business under the Asset Test, if the relevant assets are essential for carrying out the relevant sensitive business activity. The guidelines provide certain examples of what may be deemed as sensitive assets: (i) a portfolio of sensitive business contracts, (ii) a patent or other material intellectual property rights or (iii) the equipment used to operate the sensitive business.

The guidelines confirm that the acquisition of a French business branch held by a foreign company and greenfield investments are outside of the scope of French FDI rules.

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The Acquisition of More Than 25% of Voting Rights in a French Company (the Threshold Test)

A covered investment under the Threshold Test⁷ arises when a non-EU or non-EEA foreign investor crosses the 25% threshold acting alone or in concert with other investor(s) (even if such foreign investor has no specific controlling rights). The guidelines refer to the concepts of “threshold crossing” and “acting in concert” (*action de concert*), which are defined and implemented under French corporate and securities law.

The guidelines confirm that if a foreign investor crosses the 25% threshold of voting rights in a non-French parent company, such foreign investor is deemed to have indirectly crossed the 25% threshold in any French subsidiary controlled by such parent company.

With respect to the notion of a concerted action, the guidelines recall that an agreement to act in concert need not necessarily be in writing, and may be express or tacit. If such an agreement is not in writing, the existence of a concerted action can be established on the basis of “serious, precise and concordant indicia.”

The guidelines state that when a Covered Investment has been authorized pursuant to the 25% Threshold Test, no additional French FDI authorization shall be required to be obtained if the relevant foreign investor subsequently crosses the 50%, 75% or 100% threshold in the French company (provided that there is no material change impacting the initial FDI authorization).

Similarly, a Covered Investment in a French listed company that is authorized pursuant to the 10% threshold interim rule does not require additional FDI authorization if the relevant foreign investor subsequently crosses the 25% threshold in such company.

Temporality of the Investment

The guidelines confirm that French FDI decisions shall only be rendered on the basis of the relevant legal and factual elements at the time of completion of the investment. A potential Covered Investment, taking the form of an option to acquire additional shares in a French company sometime in the future, may only trigger French FDI control if and when the investment becomes certain and the call option is exercised, and not at the time of entry into the agreement granting such call option.

⁷ Under an interim rule, if the relevant French company’s shares are admitted to trading on a regulated market, the applicable threshold under the Threshold Test is 10% of voting rights (until December 31, 2022. This date may be further extended by ministerial decree).

Covered Activities

French FDI rules include a list of business activities falling within the scope of French foreign investment control (Covered Activities). The guidelines do not provide any comments on the perimeter of those activities and French FDI authorities generally tend to maintain a minimum amount of discretionary powers to assess such activities on a case-by-case basis.

Instead the guidelines recall that Covered Activities include three different types of business activities:

- activities that are in-scope by their nature (*e.g.*, public order, public security and national defense activities);
- activities that are determined to be in-scope pursuant to a sensitivity test based on various criteria depending on the specificities of the relevant activities (*e.g.*, the target’s customers; the nature, specificity and use of the target’s products, services and solutions; market substitutability; dangerousness of target’s activities); and
- research and development (R&D) activities involving critical technology or dual-use goods and technology that may be used in connection with any of the activities referred to in item (i) or (ii).

With respect to item (iii), the guidelines state that the main objective is to cover early-stage R&D activities (*i.e.*, before such activities reach the industrialization phase) on the basis of potential future applications. This is an important consideration for foreign investors looking to provide seed capital or other forms of early stage venture capital to French tech companies.

The guidelines note that the applicability of French foreign investment control is a pure sensitivity test and is not conditioned upon any materiality threshold, such as the amount of the investment or the revenues generated by the French target company.

Additionally, the guidelines highly recommend that — in case of any doubt as to the sensitivity of the relevant target activity — the foreign investor submit a request for prior authorization or a ruling request (*i.e.*, a confirmation as to whether the target’s activities are Covered Activities).

French FDI Review Process

Filings

The guidelines outline that if a Covered Investment involves several foreign investors acting collectively, each investor must submit a request for authorization for its own portion of such investment. Relatedly, joint filings are not authorized.

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In addition, the guidelines state that a foreign investor may not submit a prior authorization request and a ruling request at the same time, and instead must choose which filing to submit to the FDI Office.

Request for Information; Confidentiality

Under French FDI rules, the FDI Office may request from a foreign investor any and all necessary information to fulfill their mission. Confidentiality rules cannot serve as grounds for refusal to provide such information.

The guidelines provide that the FDI Office also may request information directly from the French target company, an action that will not be disclosed to the foreign investor. The French target company may use this channel of communication to provide sensitive information (*e.g.*, a list of French customers) to the FDI Office.

Timeline

The French foreign investment regime has a two-step review process: a 30-business day phase I review and, when necessary, a 45-business day phase II review. As part of the phase I review, the minister of the economy may decide that (i) the proposed investment is out of scope (ii) that the proposed investment is in scope and is authorized without any conditions, or (iii) that further examination (*i.e.*, phase II review) is required in order to assess the transaction.

Per the guidelines, any request for information from the FDI office during the phase I review suspends the 30-business day deadline. If a phase II review is launched, requests for information during this phase do not suspend the 45-business day deadline.

Foreign States and Public Entities

As stated in the guidelines, the nationality of a foreign investor shall not affect the manner in which French FDI authorities review a request for authorization of a proposed Covered Investment. However, consistent with the principles set forth in the EU

regulation on the screening of foreign direct investments into the jurisdiction, a foreign investor's relationship with a foreign government or public entity is an element that the French FDI authorities may consider to assess potential risks relating to the proposed investment.

Conditional Authorizations; Commitments; Revisions of Binding Commitments

The issuance of the French FDI clearance can be subject to certain conditions, including the foreign investor making certain commitments to the French state. Per the MOE's 2021 [annual report](#) on foreign investment control, 67 of the 124 foreign investments that were authorized in 2021 required that the foreign investors enter into binding commitments.

The guidelines recall that the minister of the economy's decision shall specify the relevant entity or entities within the foreign investor's chain of control that will be responsible for ensuring compliance with such conditions. In practice, the designated entity or entities will be those that have decision-making powers for the relevant matters, and have the necessary human, financial and legal resources to comply with those conditions and to absorb the consequences in the event of noncompliance.

As stated in the guidelines, commitments required to be made by foreign investors in order to receive the French FDI authorization are not subject to negotiation during phase II. However, such commitments may be subsequently revised under certain conditions at the request of the minister of the economy or the relevant foreign investor.

Sanctions and Remedies

The minister of the economy has broad remedial powers to enforce compliance with French FDI rules and foreign investors' commitments to the French state, including the power to issue fines and injunctions, with the guidelines outlining that the minister's ability to apply financial sanctions and other remedies is not subject to any specific time limitation.