

Rules governing foreign investments in France slightly amended

“Financial dealings between France and foreign countries are unrestricted”: this is the principle enacted in Article L.151-1 of the French Monetary and Financial Code (“FMFC”). There are, however, a number of exceptions to this principle, as per Article L.151-2 of the FMFC that stipulates that the French Government may subject certain transactions to a declaration, prior authorization or control procedure, in order to safeguard the defense of national interests.

The most important exception to the aforementioned principle lies in the so-called prior authorization procedure according to which certain foreign investments must be submitted to the Ministry of the Economy that can prohibit the contemplated transaction or authorize it under certain conditions^[1].

Rules applicable to foreign investments subject to the prior authorization procedure have been slightly amended by a Decree dated May 7, 2012^[2]. This provides a good opportunity to outline the applicable rules and to clarify the array of transactions that are subject to the prior authorization procedure.

The nature of the investment

Transactions considered as investments subject to the prior authorization procedure are defined in the FMFC.

The definition varies depending on whether the investment is made by an EU resident investor^[3] or by a non-EU resident investor^[4].

In both cases, shall be considered as an investment the action of:

- **Acquiring the control of a company**, the registered office of which is located in France; or
- **Acquiring all or part of a branch of activity** of a company, the registered office of which is located in France^[5].

Shall also be considered as an investment – but only for non-EU investments – the fact of **exceeding the threshold of 33.33% of ownership of equity or voting rights** of a company, the registered office of which is located in France^[6].

The explicit reference to the concept of **indirect control** by the investor has been deleted from the articles of

the FMFC following the publication of the May 7, 2012 Decree.

This wording is replaced by new provisions, much clearer and much more precise, applicable to investments made by a French company controlled by a foreign natural person or legal entity.

Consequently, **new Article R.153-5-2** of the FMFC stipulates that the investments made by a French company controlled (i) by a natural person who is a resident of a State other than France, (ii) by a company, the registered office of which is located outside France, or (iii) by a French natural person residing outside France shall be subject to the prior authorization procedure.

The activity subject-matter of the investment

The prior authorization procedure does not apply to all transactions that meet one of the aforementioned definitions of the nature of investment. The investment must also indeed concern an activity falling within a business sector considered as sensitive^[7]. These activities are enumerated in Article R.153-2 of the FMFC for non-EU investments, in Articles R.153-4 (that refers to Article R.153-2) and R.153-5 of the FMFC for UE investments. As a general rule, the relevant business sectors involve national defense of public order issues^[8].

Decree of May 7, 2012 expressly excludes casinos from the scope of the prior authorization procedure for non-EU investments and repealed the provision that explicitly referred to casinos for UE investments.

Transactions that are subject to the prior authorization procedure are more strictly defined for UE investments. As such, the activities that entail the application of the prior authorization procedure are more limited than for non-EU investments^[9]. In addition to the fact that the definition of investment is more restricted for EU investments^[10], it should be noted that most of the listed business sectors only entail the application of the prior authorization procedure if the investment consists in acquiring all or part of a company' branch of activity, not if it is limited to acquiring the control of a French company^[11].

Consequently, when the investor is a citizen of a Member State of the EU, the array of transactions that may be subject to the prior authorization procedure is further limited.

Potential investors must keep in mind that the prior authorization procedure must absolutely be followed when the contemplated transaction falls within its scope of application because non-compliance with such procedure can have significant adversarial consequences.

[1] Foreign investments that do not fall within the scope of the prior authorization procedure are subject to

mere declarations: declaration to the Ministry of the Economy and declaration to the French Central Bank for statistical purposes.

[2] Decree n°2012-691 of May 7, 2012 on foreign investments subject to the prior authorization procedure.

[3] For the purpose of this article, the expressions “*EU resident investor*” and “*EU investments*” shall mean investments made “*by a natural person who is a national of a Member State of the European Community or another State that is a member of the European Economic Area that has entered into an administrative assistance agreement with France, by a company, the registered office of which is located in one of the above-designated States, or by a French natural person who is a resident in such States*” (Article R.153-5 of the FMFC).

[4] These are investments made by “*a natural person who is not a national of a Member State of the European Community or a State that is a member of the European Economic Area that has entered into an administrative assistance agreement with France, by a company, the registered office of which is not located in one of the above-designated States or by a French natural person who is a not resident in such States*” (Article R.153-2 of the FMFC).

[5] Article R.153-1 of the FMFC on non-EU investments; Article R.153-3 of the FMFC on EU-investment.

[6] Aforementioned Article R.153-1 of the FMFC.

[7] Pursuant to Article L.151-3, I of the FMFC, are subject to prior authorization investments in (i) activities which, even occasionally, participate in the exercise of public authority, (ii) activities that may undermine public order, public safety or interests of national security and (iii) activities of research, production or marketing of weapons, ammunition, explosive powders and substances.

[8] Concerned business sectors are mainly:

- gambling;
- private security services;
- research, development or production related to pathogenic or toxic agents or the means implemented to prevent the illicit use of such agents;
- activities related to equipment designed to intercept communications and correspondence;
- approved evaluation and certification centers;
- dual-use items and technologies listed in Annex IV of Regulation 428/2009 (formerly 1334/2000);
- encryption/decryption technologies and services;
- activities exercised by businesses holding classified defense secrets;
- activities of research, production or trade of weapons, ammunitions, explosive powders and substances used for military applications or war equipment;
- businesses having entered into a research or supply contract with the Ministry of Defenses for the development/delivery of goods or services falling in any of the aforementioned 4 business sectors.

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For more detailed information on the concerned business sectors, please refer to Articles R.153-2, R.153-4 and R.153-5 of the FMFC.

[9] For instance, in case of EU investments, certain business sectors trigger the application of the prior approval procedure only when *“the control of the investments is required by the imperatives of combating terrorism and criminality”*: Article R.153-5 4° and 5° of the FMFC.

[10] In case of EU investments, the crossing of the threshold of 33.33% of ownership of equity or voting rights is not included in the definition of the investment.

[11] As such, Article R.153-4 of the FMFC that refers to certain business activities is applicable to both the control and acquisition of a branch of activity of a company. Conversely, Article R.153-5 of the FMFC only refers to the investments consisting in acquiring a branch of activity of a company.

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