

Foreign Investment Matters

Key Facts and Figures on Foreign Direct Investment Control in France

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France is an attractive destination for foreign investment, ranking first in Europe in 2021.¹ Although foreign investment screening was introduced in 1966, the scope of sectors and transaction subject to foreign investment screening significantly increased following amendments to the regime in 2005, 2014 and 2019. Under current regulation, certain investments made by foreign investors, including the acquisition of equity interests in a French company operating in a sensitive sector, may require the prior authorization of the French Ministry of Economy (“**MINEFI**”). Such evolution resulted in a steady rise in the number of applications reviewed by the MINEFI from 137 in 2017² to 325 in 2021.³

The MINEFI has embarked on a transparency initiative regarding the application of the French Foreign Investment (“**FI**”) control rules. The MINEFI published FAQs, notification form template and guidelines.⁴ In addition, the MINEFI has started to publish annual reports on the application of the French FI control rules, the second of which was published on 9 May 2023.

¹ EY Attractiveness Survey Europe May 2023, [here](#).

² MINEFI, Foreign investment in France, 2017 key figures, [here](#).

³ Annual report on foreign investment control in 2022, available ([here](#)).

⁴ An English version of the guidelines is expected in 2023.

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This bulletin summarizes the regime and key facts and figures related to the MINEFI's recent enforcement practice. We are closely monitoring the application French FI control rules and will provide updates on key developments in the Foreign Investment Matters series.⁵

The French FI control rules in summary

The French FI control rules provide three cumulative criteria for determining whether a contemplated operation falls within its scope.

These criteria relate to (i) the origin of the investor, (ii) the type of transaction and (iii) the type of activity of the target company.

First, regarding the criterion relating to the origin of the investor, a foreign investor is (i) any natural person who is a foreign national, (ii) any natural person of French nationality who is not a resident for tax purposes in France, (iii) any entity governed by foreign law and (iv) any French entity controlled by one or several of the persons/entities referred to in (i), (ii) or (iii).

Note that any foreign entity within the chain of control is sufficient to qualify an investor as foreign. This is typically the case with corporate structures that include holdings located outside France for tax purposes, even if the ultimate controller is French.

Second, regarding the criterion relating to the type of transaction, French FI control rules applies to three kinds of operations: (i) the acquisition of control, under Article L. 233-3 of the French commercial code, of a legal entity governed by French law, (ii) the acquisition of all or part of an economic branch of a legal entity governed by French law and (iii) operations that result in ownership of voting rights in a legal entity governed by French law, whether direct or indirect, alone or in cooperation, surpassing a threshold of 25%. (Note that French FI control rules do not apply to operations described in (iii) for EU/EEA investors).

Note that if a foreign investor contemplates a takeover of a group of companies located in various countries, the indirect acquisition of a French subsidiary that operates in a sensitive sector may be subject to the French FI control rules. As a result, completion of the takeover could depend on receipt of the MINEFI's prior authorization.

It must also be stressed that pursuant to a temporary measure, the threshold of ownership of voting rights for extra EU/EEA investors is decreased to 10% if the target is a listed company.

Third, the criterion relating to the type of activity of the target company is met if the activity of the target company (i.e., the activity of the relevant legal entity which is governed by French law) is, even occasionally, part of the exercise of public

⁵ See Willkie's client alerts of February 24, 2023, March 1, 2023 and March 27, 2023, available [here](#), [here](#) and [here](#).

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authority or pertains to public order, public safety or national defense interests or is connected to research relating to, or the production, or marketing, of weapons, munitions or explosives.

The French FI control rules specifies the list of sensitive sectors and activities subject to the regulation, which continues to grow as it is modified. This list notably includes companies with activity in sectors where national defense is at stake (e.g., the sector of dual-use items and technologies) or with activity, for example in the energy, transport, water, public health, telecommunications, press, and food security sectors. Note that the list remains unclear and leaves room for interpretation as to whether the activity of a legal entity governed by French law falls within the scope of the French FI control rules.

A stable number of cases subject to French FI control in 2022

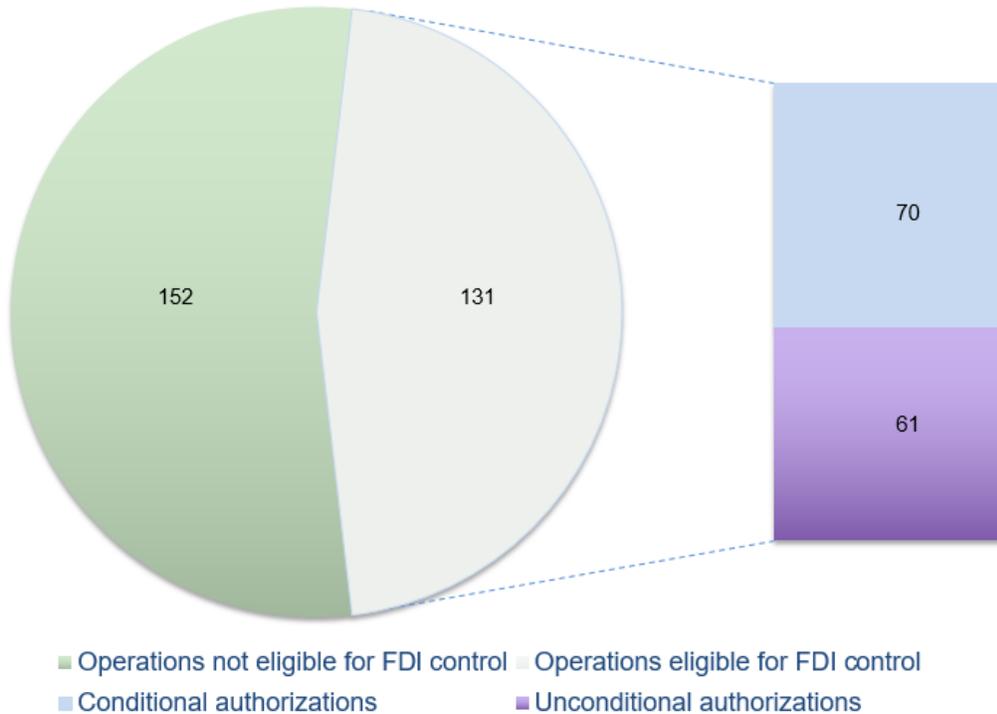
In 2022, the MINEFI reviewed 325 applications under the French FI control rules, compared with 328 in 2021. This includes 42 applications for prior examination of the activities of a French company.⁶ Applications for investment authorization may either be considered outside the scope of the French FI control rules, or be the subject of a decision (i.e., simple authorization, authorization subject to undertakings, or refusal).⁷

The MINEFI concluded in the majority of the cases that the investment or the French entity did not fall under the scope of the French FI control rules. This demonstrates the complexity of the application of the French FI control rules. Of the remaining cases, all were authorized, with 53% of the authorizations subject to undertakings. This proportion has remained stable; since in 2021, 54% of authorized investments have been subject to conditions.

⁶ Under French FI control rules, any French business or Foreign Investor may consult the French authorities in advance to understand whether or not the activities of a French entity fall within the French FI screening regime. This consultation process, subject to specific conditions, takes up to two months.

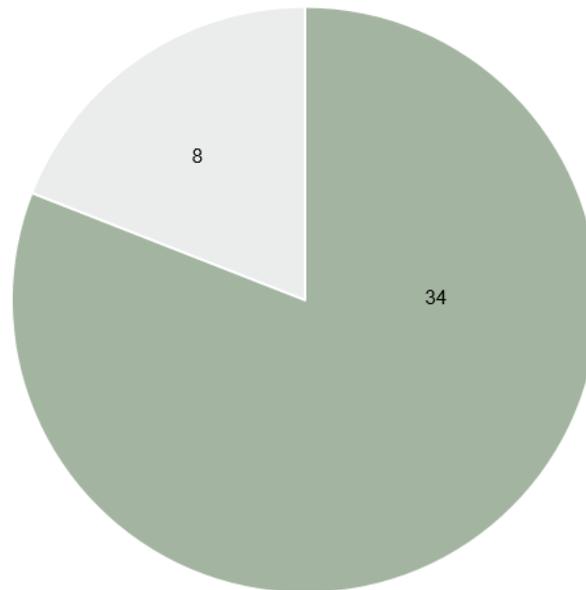
⁷ The absence of a decision at the expiration of the legal review period is deemed a refusal.

The number of operations authorized in relation to the files notified in France in 2022



Regarding the 42 requests for prior examination, 81% of screening request instructions concluded that activities were ineligible for FDI control. In these cases, a foreign investment in the French company carrying out these activities will not require prior authorization from the Minister for the Economy.

Applications for prior examination of the activities of a French company



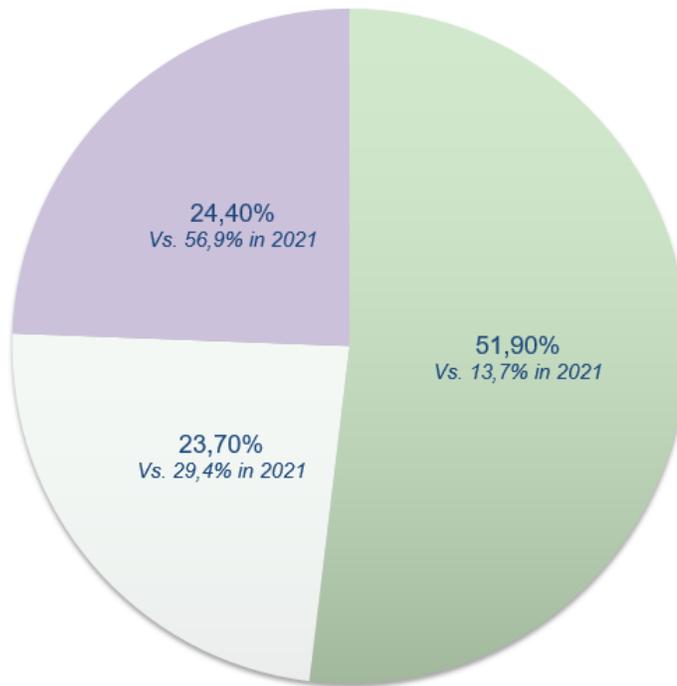
■ Activities outside the scope of the French FI control rules ■ Activities within the scope of the FI control rules

Finally, the MINEFI does not communicate on any potential prohibition decision.

Relevance of the French business activities

Most of the investments falling under the scope of the French FI control rules concerned investments in infrastructures goods or services that are essential to guarantee public security and public order. However, an increasing number of cases concerned investments in the defense and security sectors (23,7% of authorizations in 2022, up from 13,7% in 2021).

Applicable sectors of authorized investments in 2022



■ Infrastructure, goods or essential services ■ Sensitive activities by nature ■ Combined activities

The final investors of controlled transactions in 2022 were mainly non-European

The origin of the ultimate investors in controlled transactions has remained relatively stable from year to year, in terms of both geographical region (European Union/European Economic Area or non-EU countries) and country of origin.

In 2022, non-European ultimate controlling investors made most controlled investments: 65.8%. As in 2021, the main countries of origin of these ultimate investors were the United Kingdom, the United States and Canada. Within the European Union and the European Economic Area, end investors were located mainly in Germany, Luxembourg and Italy.

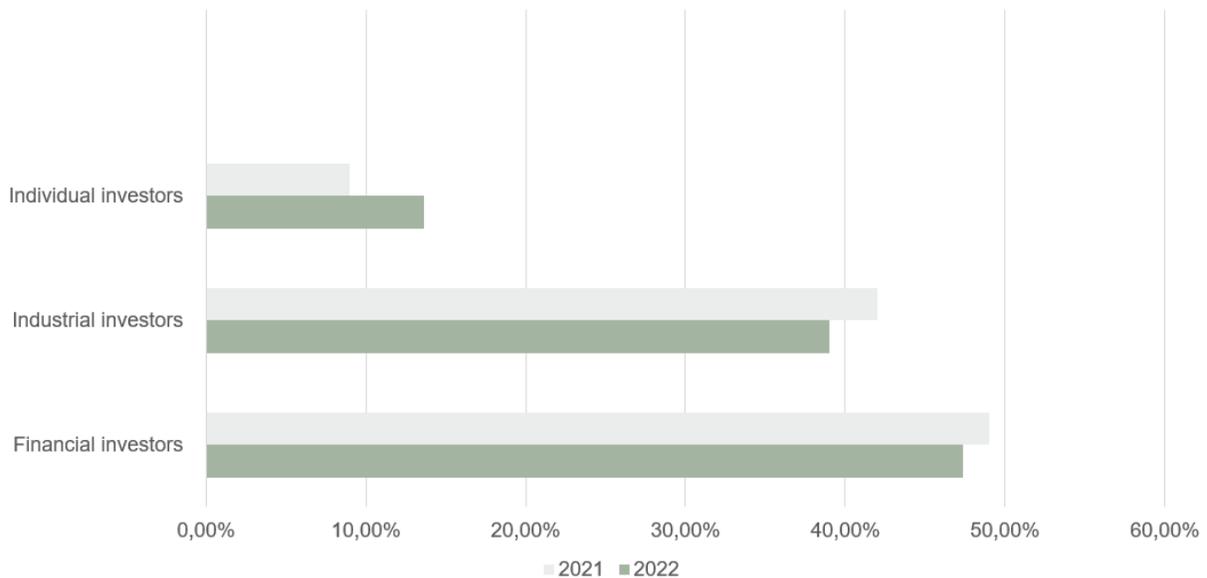
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Categories of investors subject to FDI controls in France in 2022



47.4% of ultimate investors in 2022 were financial investors (compared with 49% in 2021), 39.0% were industrial investors (compared with 42% in 2021) and 13.6% were individuals (compared with 9% in 2021).

Origin of ultimate investors in France FDI screening cases filed in 2022



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Undertakings agreed by the investor

As a condition for granting its authorization, the MINEFI may require that the investor agree to certain undertakings meant to protect national interests, notably in order to ensure the continuity of the target company's business activities and assets.

Such undertakings are designed to ensure (i) the continuity and security of sensitive activities in the national territory, (ii) the preservation of knowledge and technical know-how of the target entity, and (iii) the adaptation of the entity's internal organization and governance procedures, as well as establishing the terms for exercising the rights acquired in the entity. The MINEFI may also impose reporting and monitoring conditions.

Note that the MINEFI may condition its consent on the partial divestment of strategic assets. Moreover, the MINEFI may require an investor to open the share capital of the target entity to a third party.

In fact, such undertakings are discussed on a case-by-case basis with the MINEFI. Since they must be proportional to the objective of ensuring the protection of national interests, they must not patently exceed what is necessary to achieve such objective and will depend on how sensitive and important the target's activities are in the context of the relevant strategic sector.

Average length of proceedings in France

The MINEFI emphasizes that, in terms of the length of the review period, France is in the middle of the EU countries, with processes lasting around 3.5 months. However, investors face difficulties in obtaining a clear sense, ahead of filings, of the actual review period they can expect. In practice, the average time needed to obtain the MINEFI authorization is three to four months from the filing of a complete application and in case of negotiation of undertakings.

Main risks associated with FI regulation

Should a transaction subject to the French FI control rules be completed without the MINEFI's prior authorization, the main risks that a foreign investor faces are the transaction's being declared null and void and the investor's being prosecuted.

The MINEFI can also (i) order the investor to file an application for the MINEFI's authorization, (ii) order the investor to return to the "status quo ante" at its own expense or (iii) order the investor to modify its investment.

In case of a breach of an undertaking, the MINEFI can (i) order the investor to comply with such undertaking, (ii) order the investor to remedy its breach or (iii) withdraw its authorization.

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The MINEFI can attach a penalty to the above-mentioned orders. Moreover, if it considers that national interests are at risk, the MINEFI can adopt certain other measures, such as suspension of voting rights, appointment of a third person within the target company entitled to oppose any decision likely to affect the protection of national interests, etc.

The MINEFI may also impose a heavy fine on the investor (up to €5 million for legal entities), which must be proportionate to the breach in question.

Finally, an investor faces potential criminal sanctions, including imprisonment for up to five years.

Note that in practice, the MINEFI favors dialogue with investors rather than using its sanction powers.

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