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OECD and European Commission's Reports on Foreign Investment Mechanisms

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The OECD published, in November 2021, a report on the development of foreign investment policies in 62 countries between October 2020 and October 2021.[2] During this period, 32 out of 62 economies (including a number of non-OECD countries) modified their investment policies, mainly to address risks associated with inward foreign investment and acquisition of assets with strategic importance. The report notes that investment screening mechanisms "*address an important set of exposures, especially those linked to espionage, sabotage, single-supplier dependency and similar risk and that are related to inward investment*".[3] The pandemic clearly has sped up the adoption or modification of these policies, with sovereignty often being used as the main argument for doing so.

A number of other countries, including Belgium, Estonia, Brazil, and Chile, are considering introducing such policies to safeguard their national interests.

Over the past two years, France substantially strengthened its Foreign Direct Investment ("FDI") screening by broadening the scope of the prior authorization procedure, requesting further information, and reinforcing the power of the Ministry of Economy and Finance. The ownership threshold has been lowered from 33.33% of voting rights and capital to 25% of voting rights only and the field of activities considered as "sensitive" has been significantly extended.[4]

Even more recently, France further toughened its investment control mechanisms. Temporary measures were implemented, notably the lowering of the threshold from 25% to 10% of voting rights in public companies. Such measure was supposed to last until December 31, 2021, and was ultimately extended until the end of 2022.[5] French authorities also extended the scope of FDI screening to "technologies involved in the production of renewable energy".[6]

On January 1, 2022, the 2nd amendment to the German Regulation for Critical Infrastructure entered into force, broadening the definition of Critical Infrastructure, in particular in the IT and energy sectors. Consequently, more transactions will become subject to an FDI screening in Germany. Investments of 10% or more in a business considered Critical Infrastructure are subject to mandatory FDI filings and standstill obligations. This is the most recent act in a series of amendments to the German FDI regime that broadened its scope significantly over the last two years.[7]

On January 4, 2022, the National Security and Investment Act came into force in the United Kingdom. It introduces new powers for the government to investigate and, if necessary, intervene in foreign investments that could harm national security.

The OECD report indeed confirms the increasing importance of "security" in FDI mechanisms, a notion which expands from the traditional sector of defense to a broader set of industries considered "strategic", a concept which is not harmonized and purportedly quite broad.

The European Commission ("EC") also released, on November 23, 2021, its first annual report on the screening of FDI within the European Union. The report makes similar findings, and also highlights the increased cooperation between Member States, one of the main objectives of the EC.[8]

The report notably highlights that the vast majority (80%) of transactions that are filed do not appear strategic and eventually escape formal screening. The reason for this is twofold: national law is not always very clear on what is strategic or not, and some authorities are not yet very sophisticated. These shortcomings may also lead to screenings of transactions with no relevance for, or impact on, other EU Member States, such as the acquisition of a French company by a French private equity firm, through a Luxembourg fund.

Another figure worthy of attention is the significant share of multi-jurisdictional FDI transactions (where the investment target is present in several Member States): almost a third (29%) of the cases. With the EU cooperation mechanism, Member States may become aware of a transaction that was not notified under their national mechanism, but rightly should have been, or they may launch an "ex officio" action.

Conducting a cross-jurisdictional FDI analysis prior to any transaction is thus more important than ever. However foreign investors should not be unduly concerned, as the vast majority of deals are cleared in Europe (91%).

Thus, despite France's veto regarding the acquisition of French company Photonis by U.S. company Teledyne Technologies, and Mr. Bruno Le Maire's (French Ministry of Economy) public statement against the envisaged acquisition of Carrefour by Couche-Tard, a Canadian retailer,[9] France is the European country which attracted the most foreign investments for the last three years.

In addition, the French FDI authority has gained in experience, and while it is customary to offer commitments to obtain clearances, these remain quite standard and in line with common practice.

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[1] With thanks to Juliette Hua and Adèle Patinier

[2] It also covers non-OECD Members including China, India, and Indonesia.

[3] OECD, Freedom of Investment Process – *Investment Policy developments in 62 economies between 16 October 2020 and 15 October 2021*, November 2021.

[4] See our previous e-alert: "Foreign Investment Control in France: New Derogatory Regime Applicable to Foreign Investment in French Public Companies", July 24, 2020

[5] See Decree n°2021-1749 of December 22, 2021

[6] See Order of September 10, 2021, effective on January 1, 2022.

[7] See our previous e-alert: "Further Tightening of Foreign Investment Control in Germany", February 12, 2021.

[8] For further information: COM(2021) 714 final – First Annual Report on the screening of foreign direct investments into the Union.

[9] See our previous e-alerts: "French Authorities Block U.S. Acquisition of French Company", January 13, 2021 and "Let the Data Speak: French Foreign Investment Screening Is No Hurdle for M&A Deals", February 5, 2021.

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