New Foreign Investment Law in France

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The vagueness and complexity of recent provisions on foreign investment in France are not suited to complex acquisition structures.

A Decree (No 2003-196) and Ministerial Order of 7 March 2003, published in the official French legal journal (*Journal Officiel*) on 9 March 2003 (together, 'New Regulation'), both immediately effective, have significantly modified the filing requirement regulations applicable to foreign investments in France (as well as to French investments abroad). Together, these texts have had the effect of repealing Decree No 89-938 of 29 December 1989 and the Ministerial Order of 14 February 1996, whose drafting was clearly unsatisfactory. The new texts, which are an integral part of French regulatory law and public order and apply equally to persons established in other Member States of the European Union, come within the scope of a long French regulatory tradition (regulation of exchanges, etc) noted for its progressive relaxation. This article will not address the 'prior authorisation regime', which is applicable on a rather exceptional basis, broadly speaking, to investments realised in certain particularly sensitive sectors (eg activities tied to national defence), that has been the object of minor modifications (eg elimination from the list of the marketing in France of certain foreign securities, lengthening of the waiting period for a response from the Minister of the Economy).

It is important to note initially that the New Regulation may be applied equally to investments carried out in France by French entities (eg the local investment vehicle of a foreign investor) or by French residents (eg where the investment is realised in France through a special purpose vehicle established outside France).

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Summary of the New Regulation

The key principles of the New Regulation are as follows:

(1) Although the texts are especially imprecise in their terminology, the term 'foreigner' relates, in fact, to the notion of residence (the criteria

being the 'principal centre of interests') and not that of nationality that continues to produce no consequence in the matter; in addition, indirect shareholdings are largely covered by the regulation and thus the words 'direct foreign investments' used across the regulation are to a great extent inaccurate.

(2) Foreign investments in France remain 'free' (subject to the prior authorisation regime in certain sectors, as already mentioned in the introduction): this relates to the principle of free financial relations between France and other countries; notwithstanding, certain formalities are nevertheless required (filing requirements). These take the form either of statistical filings aimed at establishing the French trade balance or of administrative filings aimed at 'assuring the defence of [French] national interests' (Article L 151-2 of the French Commercial Code).

(3) The filing requirement regime is composed of the following different sub-regimes that function independently from one another, which can provoke in certain cases a 'straddling' between the various filing requirements where a single transaction may trigger several filing requirements:
   (a) 'administrative' filings must be carried out with the Directorate of the Treasury (Minister of the Economy) (Article 6 of the Decree);
   (b) 'statistical' filing requirements must be carried out with the Bank of France (in the instances set forth in Articles 2 and 4 of the Decree) or with the Directorate of the Treasury (in the instances set forth in Article 5 of the Decree).

(4) The New Regulation also covers investments carried out by French residents abroad as well as, in certain instances already mentioned above, investments carried out in France by French residents or by French entities.

(5) There exist two distinct thresholds of possession beyond which an acquisition of capital (or voting rights) by non-residents in a French company is qualified, pursuant to the New Regulation, as a 'direct foreign investment': ten per cent for the purposes of statistical filing requirements (Bank of France and the Treasury) and 33.33 per cent for administrative filing requirements; the New Regulation makes clear that these thresholds are not absolute and that the administration may retain different ones in order to take into account the reality of the control being exercised on the French target concerned.

(6) Concerning the 33.33 per cent threshold retained for administrative filing requirements, it must be calculated at the close of the investment transaction at stake, on the basis of the global shareholding in the target company, even if the current transaction only concerns a minor percentage of capital or voting rights: for example, a transaction for only 20 per cent or even for only one per cent of capital or voting rights in the French target will be covered by the New Regulation if the percentage held by non-residents before the close of the new transaction is higher than 13.33 per cent in the first case and 32.33 per cent in the second.

(7) All transactions between affiliated companies, such as the granting of loans or substantial warranties, the purchase of patents or licences, the acquisition of commercial contracts or the contribution of technical assistance, that lead to actual non-resident control of a French company, or further, certain real estate investments or transactions of simple investment, can equally be qualified as foreign investments in the sense of the New Regulation and therefore be covered by its provisions.

(8) The administrative filing requirement regime contains a series of exceptions, such as, for example, the incorporation of a French company, certain extensions of French companies' activities or increases in the foreign ownership thresholds, certain intra-group transactions, certain investments made in companies active in certain industrial sectors (restaurants, hotels, hospitals, etc).

(9) Certain filing requirements are triggered during the life of the foreign investment; consequently the New Regulation extends beyond the acquisition stage, for example, on a change of control that takes place in a foreign-based acquisition vehicle that holds a shareholding in a French entity or on the resale by the foreign investor of its investment in the French target; the rather large scope of the New Regulation will in turn require constant monitoring to achieve strict compliance.

(10) Administrative filings with the Directorate of the Treasury must be carried out as 'at completion of the first event that materializes the agreement between the contracting

parties', in other words, as early as at the time of signing any investment protocol, binding term-sheet or acceptance of a binding offer letter, etc, thus well in advance of the 'closing' of the transaction; the statistical filings with the same Treasury must be carried out 'at the time of the completion of the transaction', presumably, at closing; finally, filings with the Bank of France must be carried out within 20 days from the date of payment.

(11) The regime of applicable sanctions, in particular, for defaulting on complying with statistical filing requirements is rather severe since Articles 9 of the Decree and L 165-1 of the Monetary and Financial Code incorporate the contents of Article 459 of the Customs Code that provides for significant sanctions such as jail sentence, loss of certain civic rights, publication of condemnation, etc.

Critique of the New Regulation

The New Regulation has the dual merit of clarifying the situations in which a filing is mandatory and increasing the holding threshold by foreign companies or non-resident persons in the capital or voting rights of listed French companies above which an administrative filing is required (33.33 per cent instead of 20 per cent in the predecessor regulation).

Unfortunately, the New Regulation is, in the author's opinion, still clearly unsatisfactory for three principal reasons:

(1) The scope of the 'statistical' filing requirements, in view of establishing the French trade balance with the Bank of France (Articles 2 to 4 of the Decree) and those with the Directorate of the Treasury (Article 5 of the Decree), is considerably enlarged, notably by the creation of new filing requirements, which will have the effect of provoking a multiplication of filings especially on the occurrence of complex acquisition transactions; consequently, practitioners will have to try to simplify, as much as possible, the manner by which compliance with all applicable legal requirements can be achieved, among others, by favouring the spirit of these provisions over their exact letter (eg on contribution of securities that were issued by a French entity to the capital of a foreign entity or reciprocally, on contribution of securities that were issued by a foreign entity to the capital of a French entity); it should be possible, for example, to regroup in one single filing the disclosure of various transaction steps or, alternatively, a series of transactions linked one with another, that would otherwise give rise, if they were each considered on an isolated basis, to numerous filings; it should be equally possible to establish a single filing in the name of a legal entity and to have an authorised agent (for instance, an attorney acting as counsel to said entity) signing the filings instead of preparing various filings in the name of each shareholder of that legal entity.

(2) Further, the New Regulation is as unsuited as its predecessor to the timing constraints of today's transactions, insofar as the regulation requires that a certain amount of confidential information be supplied to the authorities very early on in the acquisition process, even if, for example, the transaction is subject to various conditions precedent; consequently, it will be necessary to proceed with certain filings during the preparation stage of the contemplated transaction (ie on the signature of a binding offer letter, term-sheet, time line, etc) in order to meet the rather strict filing deadlines.

(3) Finally, the vague and imprecise drafting of the New Regulation renders it necessary, in a certain number of cases, to initiate some preliminary informal discussions with civil servants at the relevant administrative services in order to be assured as much as possible of their own interpretation of such-and-such provision: furthermore, where doubt subsists, recourse to preliminary written questions might turn out to be necessary; such a recourse to the civil administration's assistance presents the major inconvenience (aside from questions of confidentiality) of losing time precisely at the moment where the different actors participating in the transaction cannot spare it; thus, it will be necessary sometimes to arbitrate between the degree of legal certainty and the oftentimes 'time-crunched' requirements of a transaction's calendar.

We are delighted to observe, however, that beyond an apparent formalism, the various personnel in charge at the Bank of France and the Treasury, who are generally available and competent, are adopting an essentially pragmatic approach once they are presented with particular facts: for example, the Bank of France satisfies itself with responses given on a pre-printed form (these forms are, in reality, identical to those used under the prior regulations

and named 'account-summary') whether on realisation of foreign investments in France, French investments outside France or the liquidation of either of these types of investment.

Example

Certain effects of the New Regulation can be illustrated by the following example. On 10 October 2003, a non-French investor (the 'Acquirer') entered into a binding term-sheet with the shareholders of a French target company, that is moreover already up to 30 per cent owned by non-resident shareholders (the 'Target Company') by whose terms (1) he would acquire, on 10 March 2004 at the latest, ten per cent of the capital and voting rights of the Target Company and (2) the vehicle put in place by the Acquirer for completing the acquisition is a French company ('NewCo') in the process of incorporation.

The filing requirements stemming from the New Regulation should be as follows:

(1) Further to the signature of the term-sheet, ie on 10 October 2003, the acquisition by NewCo of ten per cent of the capital of the Target Company will amount to a transaction carried out by NewCo in a resident company whose capital and voting rights, after the transaction, will be owned, whether directly or indirectly, in excess of 33.33 per cent cumulatively by foreign entities or persons who are physically non-residents: the transaction should consequently trigger an administrative filing requirement with the Directorate of the Treasury in the name of NewCo (Articles 6 and 1.4(II)(d) of the Decree).

(2) On the incorporation of NewCo by the Acquirer, a specific filing may be required depending on the amount of NewCo's share capital (Article 5 of the Decree and Article 5 of the Order).

(3) Within 20 working days after the closing date (ie 30 March 2004) the shareholding of the Acquirer through NewCo in the Target Company, being at least of ten per cent of the share capital or voting rights, should qualify as 'direct foreign investment in France' for the purposes of statistical filing requirements and should equally trigger a separate filing with the Bank of France (Articles 4.1 and 1.4(I) of the Decree).

(4) After completion of the acquisition, the following potential transactions will give rise to new filing obligations on completion date (in case of filing with the Treasury) or within 20 working days from such date (in case of filing with the Bank of France):

- the sale by NewCo of its shares in the Target Company or the sale by the Acquirer of its shares in NewCo to a third party acquirer should trigger statistical filing requirements at the level of NewCo or at that of the Acquirer, with the Directorate of the Treasury (Article 5 of the Order) as well as with the Bank of France (Article 4.1 of the Decree), since either of such sales should qualify as a 'liquidation' of a direct foreign investment;
- certain modifications at NewCo's level, eg decrease in the percentage of foreign shareholding on entry of French residents to NewCo's capital, change in the corporate name or of registered address, should also be reported to the Directorate of the Treasury by a specific filing (Article 5 of the Order);
- likewise, a similar recapitalisation as immediately above at the level of the Target Company (the effect of which would be to reduce the percentage of foreign ownership in the Target Company's capital) should trigger a new filing requirement by the Target Company to the Directorate of the Treasury.

The application of the New Regulation to situations where French residents would acquire a shareholding in a French target entity through a special purpose vehicle incorporated abroad would be even more complex. For example, if NewCo is that foreign special purpose vehicle and the Acquirer is a French investor, the sale of NewCo shares by the Acquirer to a third party acquirer should first give rise to statistical filing with the Treasury on NewCo's name since the sale, although carried out abroad, will have the effect of indirectly modifying the composition of the share capital of the French Target Company (Article 5 of the Order) in addition to that of NewCo; a second statistical filing with the Bank of France should be required in the above example since the transaction would amount to a sale of a non-resident company (NewCo) by a resident company (the Acquirer) (Article 4.2 of the Decree); finally, an administrative filing should also be required in the Acquirer's name since the same transaction will have the effect of modifying the control of a non-resident company (NewCo) itself having a shareholding in the French Target Company (Articles 6 and 1.4(IV) of the Decree).

Conclusion

It is likely that practitioners in the future will become more vigilant in order to comply with the various constraints required by the New Regulation and will be advising their clients to respect them strictly, although with a certain pragmatism that is encouraged by the French authorities themselves. It will be necessary, however, to monitor these obligations constantly during the entire lifetime of foreign investments in France or French investments abroad. It will be crucial to take these constraints into account at the early stage of the acquisition process and then to remain quite reactive, in order to avoid missing the various deadlines imposed by the New Regulation.

We also anticipate that informal contacts will become more common with the Directorate of the Treasury and with the competent services of the Bank of France, in order to obtain some assurances in respect of the correct interpretation of the texts which are sometimes drafted in a vague and complex manner, all the more when confronted by complex acquisition structures using foreign-based acquisition vehicles. ■

Note

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