

FDI AND DOLIPRANE: THE PAINFUL PAINKILLER

Very popular in France, in particular for its effectiveness on headaches, the sale of the Doliprane have caused fever and migraine to the French State.

BACKGROUND

In 2023, Sanofi announced its intention to sell 50% of Opella, its public health subsidiary (100 products in portfolio, sales of €5.2bn and profits of €1bn in 2023) in order to focus on innovation in immunology.

Opella owns and is responsible for the production and distribution of the Doliprane, a paracetamol-based tablet and genuine French passion since its creation in 1964: it is the best-selling medicine in France, with 2.5 billion pills produced in France in 2022, and 454 million boxes sold. A record... yet not sufficient to prevent a shortage. Proof if need be of the enthusiasm in France caused by the little white pill!

Add to this the fact that Doliprane is partly produced in France, employing 1,700 people, and the cocktail became explosive for Sanofi and the French authorities.

It's hardly surprising, then, that Sanofi's announcement that it has selected a bid from an American fund, CD&R, valuing Opella at more than €15bn, triggered a national uproar. It should be remembered that this choice was made at the end of an auction process in which a French fund, PAI Partners, backed by Abu Dhabi's Avia, Singapore's GIC, and Canada's BCI, not only participated but also (unsuccessfully) tried to outbid them. Sanofi, for its part, justified its decision on strategic grounds, citing in particular that the United States is Opella's largest market, accounting for nearly 25% of its sales (compared to 8% for Doliprane).

Social risks, relocation of production, disappearance of a French flagship, loss of know-how... the fears of an American capture were numerous for French public opinion, which had already been on high alert following the planned sale (later abandoned) to an Indian investor of Biogaran, the French market leader in the production of generics, and quickly landed on the desk of the new government.

Expectations were therefore immense on the government and discussions focused on a relatively young but increasingly publicized regulatory tool: the control of foreign investments.

CONTROLLING FOREIGN INVESTMENT IN FRANCE

France's foreign investment control regime has been considerably strengthened over the last decade and, despite its relative youth, is now one of the oldest and most sophisticated FDI regime in the European Union.

Traditionally, it allows the Minister for the Economy to control, before they are carried out, transactions involving investment by a foreign investor in an activity that is strategic for national security and the nation's interests, including public health.

A detailed summary of the French FDI regulations can be found in appendix to this article.

In France, where *"the debate and the demand for political action are much stronger than in other geographies"*¹, the use of remedies is frequent: around 50% of FDI clearances issued over the last three years were accompanied by conditions and remedies, the aim of which is mainly to ensure that critical assets and supply of critical services are maintained in France.

THE APPLICATION TO THE DOLIPRANE CASE

It is thus from this evolving regulatory framework that the government had to draw in an attempt to appease the public outcry surrounding the sale of Doliprane.

While the French FDI criteria can easily be identified (American investor, public health activity), the stakes focused on the ways to best protect national interests.

Many political opponents were calling for an outright refusal of the deal, *"capitalising on social and security concerns"*². But such a refusal (rare in practice) would have undermined the confidence of foreign investors – similarly to the pre-emptive refusal by the former government on the Carrefour-Couche Tard deal, which deeply shocked Canadian investors, or the threat of a government veto on the Biogaran deal.

The French government was therefore creative and put in place an contractual scheme by concluding a tripartite agreement with Sanofi and CD&R. This agreement, already used in few previous politically sensitive transactions such as the sale of "Alstom Power" to General Electric (GE), goes beyond the usual framework of FDI negotiations.

This agreement lays down certain remedies which, by their nature and scope, exceed the usual FDI conditions:

- entry of the French State into Opella's capital, via a minority investment of Bpifrance³ - which stake, estimated between €100m and €150m – shall grant Bpifrance with 1 to 2% of the share capital of Opella and a seat at the Board of Directors;
- maintaining production of Doliprane in France;
- Maintaining production volume commitments in France;
- boosting investment in France;
- a ban on forced redundancies.

If the French government regularly makes its FDI clearances conditional on maintaining industrial capacities in France, the recourse to commitments to maintain employment are rare and could be a source of concerns for investors.

¹ Joachim Pohl, specialist in foreign investment control policies at the OECD, quoted in Les Echos on 18 October 2024

² Les Echos, *Le Doliprane et l'éternelle migraine du contrôle des investissements étrangers*, Anne Drif, 18 October 2024.

³ The French public investment bank

In addition, this agreement, which comes at a very preliminary stage (even before entering into exclusive negotiations), will also be binding on the target. In FDI transactions, the conditions are usually imposed on the investor, and the target is normally excluded from discussions on the conditions.

Lastly, this agreement seems to have been concluded without prejudice to other conditions that the FDI process or the entry of Bpifrance into the share capital could give rise to: for instance, Bpifrance's investments are often accompanied by so-called "blue, white and red" conditions (maintaining assets in France, maintaining the head office in France, listing on French markets, etc.).

The conclusion of this agreement may thus mark a new precedent of the French authorities' approach towards politically sensitive transactions: pre-empting issues of sovereignty as early as possible, focusing on protecting broader national interests and binding all stakeholders.

However, the real challenge for the State will lie less in drawing up these conditions than in monitoring their implementation. While each of the conditions is accompanied by potentially significant financial penalties - up to €100 million for some - their real credibility will come from a regular and dissuasive monitoring. Although such monitoring is, in practice, often lacking today, it was put in place in 2014 following GE's acquisition of Alstom's energy business, and a few years later the French government had no hesitation in sanctioning GE for its failure to fulfill the commitment it had made to create jobs in France⁴.

As the European Commission points out in its latest report on the screening of foreign investments, "*the effectiveness of the sanctions is measured only by their successful implementation and non-circumvention*"⁵. For France, as for the other Member States and the EU, it will therefore be key to find the right formula to "*strike the right balance between 'Choose France' and 'Protect France'*"⁶. For investors, however, the "Doliprane case" will prove that a serious investor, capable of anticipating and pre-empting regulatory issues, including their political and social implications, should still be able to carry out transactions in politically sensitive and strategic sectors.

FOCUS ON REGULATIONS GOVERNING THE CONTROL OF FOREIGN INVESTMENT IN FRANCE

French FDI control requires foreign investors to obtain prior authorization from the Minister for the Economy if they are planning to invest in an activity that is sensitive or strategic for national security and French interests.

The concept of investment

In addition to direct or indirect acquisitions of control of a French company, the French FDI control regime also applies to the acquisition of minority shareholdings (crossing the threshold of 25%

⁴ GE was forced to pay 50 million euros to a fund dedicated to the reindustrialisation for failing to meet its commitments.

⁵ Report from the Commission to the European Parliament and the Council - fourth annual Report on the screening of foreign direct investments into the Union

⁶ Geoffroy Roux de Bézieux, interview in Les Echos on 27 September 2024.

of the voting rights of a French company and, since 1^{er} January 2024, crossing the threshold of 10% of the voting rights of a company listed on a European regulated market), as well as to the acquisition of strategic assets (portfolio of contracts or IP rights, granting of a patent license, disposal of a business, etc.).

It should be noted that since the first of January of this year, transactions involving French branches of foreign entities also fall within the scope of French FDI control, broadening the scope of the French State's scrutiny on *foreign-to-foreign* transactions.

The concept of foreign investor

The concept of foreign investor encompasses any foreign individual or entity, as well as any French entity controlled directly or indirectly by a non-French individual or entity. In this respect, the Ministry's doctrine is clear: it is sufficient for a single entity or person within the investor's chain of control to be foreign for the entire chain of control to be considered as foreign.

In addition, the notion of "entity" is understood broadly and may include, without limitation, any company, branch, association, trust, SPAC, investment vehicle, foundation, group of companies, State, local authorities, other public or semi-public persons.

Finally, in principle, there is no difference between an EU or non-EU investor.⁷

Strategic activities

The regulations currently cover more than thirty so-called sensitive sectors and, unsurprisingly, this is where the state intervenes most, often opportunistically.

The French FDI regulations encompass three main types of activity:

- sovereign activities: defense, dual-use products, cryptology, data protection, etc.
- critical infrastructures: energy, transport, health, communications, press, agriculture, etc. and, since 1st January 2024, the extraction, processing and recycling of critical raw materials; and
- critical technologies: AI, cybersecurity, robotics, biotechnologies, etc. On 1st January 2024, the French government also added photonics to this category, as a logical consequence of the much-publicized refusal of the proposed takeover of Photonis by the American company Teledyne in 2021.

Obviously, as with other FDI regimes, the concepts used in the French FDI regulations are deliberately broad, leaving a wide margin of interpretation to the Ministry, which may take into account "*several factors, adapted to the characteristics of each activity, such as the customers of the target entity, the nature, specificity and applications of the products/services provided and know-how, the substitutability of activities, the dangerousness of the activities carried out, without this list being exhaustive*".⁸

Procedure

⁷ Except where voting rights thresholds are crossed.

⁸ Guidelines, French Treasury, September 2022

In the case of an eligible operation, the investor must apply to the Ministry for authorization before carrying out the planned operation. The Ministry has an initial period of 30 working days, which may be extended by a second period of a further 45 working days, to authorize the transaction or not, subject to certain conditions.

Our FDI team in Paris

Our FDI team in Paris combines leading experts in mergers and acquisitions, competition law and public law and draws on the experience of all of Gide's partners to provide targeted and pragmatic response to the challenges faced by their clients, both in their day-to-day business and on complex cross-border transactions. It has significant experience in analyzing and notifying foreign investments, in all the sectors concerned, such as defence, telecommunications, technologies, biotechnologies and health products, aerospace and transport, and is able to promptly and seamlessly mobilize and coordinate local counsels in most jurisdictions. Our FDI team is in regular contact with the French Treasury and is often consulted on the drafting of the regulations.

CONTACTS

OLIVIER DIAZ

olivier.diaz@gide.com

ANNE TOLILA

anne.tolila@gide.com

FRANCK AUDRAN

audran@gide.com

FREDERIC MION

frederic.mion@gide.com

PIERRE-ANTOINE DEGROLARD

pierre-antoine.degrolard@gide.com

You can also find this legal update on our website in the News & Insights section: [gide.com](https://www.gide.com)

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