

Foreign investment screening reform: anticipating the requirements.

Summary of the presentation by Jean-Pierre Viennois, Partner
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Introduction.

Foreword.

In the course of his **mergers and acquisitions** practice, particularly on behalf of foreign companies and groups, Jean-Pierre Viennois, a partner at Bremens Avocats, regularly deals with **foreign investment law**. Whether the transaction involves absorbing a company, acquiring control of it or simply restructuring a group, foreign investment screening now arises at the very first stages of a deal: it shapes the timetable, the structuring, the transaction documents and, at times, the very feasibility of the operation.

Foreign investment law is also a subject he has taught on the Master's programme in private international law at the Lyon Faculty of Law. It was likewise the theme of a **conference organised by Bremens Avocats in 2020**, in partnership with the university and the students of the DIF Master's programme (in particular its president, P. Galletti), and with the kind participation of Caisse d'Épargne Rhône Alpes (CERA). The conference was chaired by François Baroin, former Minister for the Economy and Finance, and marked the entry into force of the previous major reform, that of 2019.

The growing weight of screening in transactional practice is no accident. Public authorities, in France and throughout the Union, are paying increasing attention to deals involving **technologies, infrastructure and supply chains**. Legislation follows in quick succession, and every adjustment, however limited, may have tangible effects on a transaction in progress. For investors and their advisers alike, a precise understanding of the regime and its developments has become a prerequisite for legal certainty in transactions.

Summer 2026 marked a **new stage** in the development of this body of law, with the adoption of a major European instrument, **Regulation (EU) 2026/1386 of 17 June 2026** on the screening of foreign investments in the Union, and of two French texts: **Decree No. 2026-718 of 30 July 2026** and the **Order of 30 July 2026** on foreign investments in France. The EACC autumn opening session was therefore a natural occasion to devote a short session to a subject of direct relevance to **Franco-American relations**, since American investors are foreign investors within the meaning of both French and EU law.

The purpose of screening.

The purpose of the rules establishing foreign investment screening is easy to grasp: it is to **protect French and European companies** that are strategic for France and/or the EU against foreign appropriation or influence liable to undermine interests regarded as essential. Screening is not intended to discourage foreign investment, which France and the Union welcome for its contribution to growth, employment and innovation. Its aim is to identify, among all transactions, those that present a particular risk.

The underlying concern was originally **military**. Today it is also **technological, economic and health-related**. Global technological competition, supply chain tensions and the experience of the health crisis have considerably broadened the notion of essential interests, well beyond the defence sector alone. The aim is to safeguard national and European interests regarded as essential by establishing a **control mechanism (also referred to as screening)** for foreign investments, making it possible, where appropriate, to **prohibit** those deemed dangerous or to **make them subject to conditions**. This concern is the same in France and at European Union level.

French law and EU law are closely intertwined, and separating them may seem artificial. That is nevertheless the approach taken here, as it is the clearest way to understand foreign investment screening.

French law (I) is currently the regime directly applicable to transactions carried out in France. **EU law (II)**, long confined to organising cooperation between authorities, is on its way to becoming the common foundation of all national regimes.

I.

French law

French law.

A long-standing regime, regularly strengthened.

France established a foreign investment control regime as early as **1939**, in the context of the exchange controls introduced at the outbreak of the war. The regime was **thoroughly overhauled** by the Law of 28 December 1966 on financial relations with foreign countries, and again in **2019** by the PACTE Law and the Decree of 31 December 2019, which came into force on 1 April 2020. It has since been supplemented on several occasions: in **2020**, in the context of the health crisis, notably by lowering the screening threshold for listed companies; in **2023**, by making that threshold permanent and extending the list of sensitive activities; and finally in **2026**, with the Decree and Order of 30 July.

The principles are straightforward. Financial relations between France and foreign countries are **free in principle** (Article L. 151-1 of the Monetary and Financial Code, the “CMF”). By way of exception, certain transactions require **prior authorisation** from the Minister for the Economy (Article L. 151-3 CMF), while others are subject to a lighter **prior notification procedure**. The regime rests on three sets of rules, which are examined briefly in turn: the **conditions** for screening (A), the **procedure** (B) and the **sanctions** for breach (C).

A. Conditions for screening.

Three **cumulative** conditions must be met for a transaction to be subject to screening: the involvement of a **foreign investor** (1), an **investment transaction** (2) and a **sensitive target** (3). The absence of any one of them is sufficient to exclude the regime. This is why the analysis of any transaction always begins with a rigorous characterisation exercise.

1. A foreign investor (Article R. 151-1 of the Monetary and Financial Code (CMF)).

Article R. 151-1 CMF adopts a broad concept of foreign investor. The following are foreign investors:

- a)** any **natural person of foreign nationality**;
- b)** any **natural person of French nationality who is not domiciled in France**;
- c)** any **entity governed by foreign law**;
- d)** any **entity governed by French law that is controlled**, within the meaning of Articles L. 233-3 and L. 430-1 of the French Commercial Code, by one or more of the persons or entities referred to above.

This last category is essential in practice. It means that a **French subsidiary of a foreign group** (for example, an American group) is itself a foreign investor when it makes an acquisition in France. Control is moreover assessed **along the entire chain of ownership**: each person or entity in the chain of control is regarded as an investor, which requires the shareholding structure to be identified precisely, up to the ultimate beneficial owner. The combined reference to the Commercial Code (control in law or in fact

within the meaning of Article L. 233-3, and decisive influence within the meaning of the merger control rules of Article L. 430-1) gives the concept a very wide scope.

2. An investment transaction (Article R. 151-2 CMF).

Not every transaction carried out by a foreign investor is subject to screening. Article R. 151-2 CMF exhaustively lists three types of transactions:

- a) the **acquisition of control** of a company or establishment governed by French law, within the meaning of Article L. 233-3 of the Commercial Code;
- b) the **acquisition of all or part of a line of business** of an entity governed by French law, which includes asset sales and transfers of business as a going concern (*fonds de commerce*);
- c) **crossing the threshold of 25% of the voting rights** of an entity governed by French law, this threshold being lowered to **10% where the company's securities are admitted to trading on a regulated market**. This threshold criterion applies only to investors that do not belong to a Member State of the European Union or of the European Economic Area.

As regards the 10% threshold applicable to listed companies, the regime is lighter: the investor files a prior **notification** with the Minister, who has a short period in which to decide whether the transaction must be the subject of a formal authorisation application. Failing such a decision, the transaction may proceed.

The summer 2026 reform clarifies the notion of regulated market. Until now, the reference to a regulated market "within the meaning of Article L. 421-1 CMF" covered markets located in the Union or the European Economic Area. Decree No. 2026-718 of 30 July 2026 supplements paragraph 4° of Article R. 151-2 CMF: for the purposes of foreign investment screening, a regulated market is any market meeting the definition in Article L. 421-1, with an **order of the Minister for the Economy** setting the list of third-country markets regarded as such. The order of the same date establishes that list, which includes several major financial centres outside the Union (London, Zurich, Toronto, Singapore, Tokyo, Seoul). These provisions have applied since **17 August 2026**.

The scope of the reform must be clearly understood. It **extends the 10% threshold mechanism to French companies listed on certain foreign markets**. For any investment in a French company listed outside the Union, it will therefore now be necessary to **check whether the place of listing appears on the list** set by order. This check is particularly relevant for North American investors, given the large number of regulated markets in the United States.

3. A sensitive target (Article R. 151-3 CMF).

The third condition relates to the activity of the target company. Screening applies only if the French entity carries out, even occasionally, an activity **liable to undermine national defence interests, involved in the exercise of official authority or liable to undermine public order and public security**. Article R. 151-3 CMF groups these activities into three broad categories.

First, activities that are sensitive by nature, which traditionally form the sovereign core of the regime. These include, in particular:

- activities relating to **weapons, ammunition, powders and explosive substances** and to **war materiel**;
- activities relating to **dual-use goods and technologies**;
- activities in the **information systems security** sector;
- activities of entities that have entered into a **contract with the Ministry of the Armed Forces**;
- activities relating to **cryptology means and services**;
- and other activities exhaustively listed in the text.

Second, activities relating to infrastructure, goods or services essential to guarantee:

- a) energy supply**;
- b) water supply**;
- c) the integrity, security and continuity of transport networks and services**;
- d) the integrity, security and continuity of space operations**;
- e) the integrity, security and continuity of electronic communications networks and services**;
- f) the protection of public health**;
- g) the publishing, printing and distribution of political and general news publications**;
- h) the integrity, security and continuity of the extraction, processing and recycling of critical raw materials**;
- i) and a series of other essential interests referred to in the text.**

Third, research and development activities relating to **critical technologies** or to **dual-use goods and technologies**.

The list of critical technologies is set by order. It covers, in particular, cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, quantum technologies, energy storage and biotechnology.

Characterising the target's activity is often **the most delicate point** of the analysis. The sensitive activity may be carried out only on an ancillary basis, by a subsidiary, or arise from a single contract. In case of doubt, the investor or the target company may consult the Minister through a **request for preliminary review**, in order to ascertain whether the activity concerned falls within the scope of screening. This step, which is akin to a ruling request, is invaluable for securing a transaction at an early stage.

B. Procedure.

1. The authorisation application.

Where all three conditions are met, the investor must file a **prior authorisation application** with the **Directorate General of the Treasury** (DG Trésor), which reviews applications on behalf of the Minister for the Economy. Activity is sustained: some **400 applications** were filed in 2024. The content of the application is set by order. It includes, in particular, detailed information on the investor and its **chain of control**, on the terms and financing of the transaction, and on the target's activities. The review involves all the government departments concerned, brought together within an **interministerial committee** (CIIEF).

2. An initial phase of 30 working days.

From receipt of a complete application, the Minister has **30 working days** to rule. There are three possible outcomes:

- the transaction is **not subject to authorisation**, because one of the screening conditions is not met. This is the case for approximately **50%** of applications, i.e. some 200 applications;
- the transaction is **authorised unconditionally**: approximately **25%** of applications;
- a **further review** is required, where the transaction raises issues warranting in-depth analysis.

3. A further review of 45 working days.

In the event of a further review, the Minister has an additional period of **45 working days** to rule. At the end of that period, the transaction may be:

- **authorised unconditionally** (these applications being included in the 25% mentioned above);
- **authorised subject to conditions**, which concerns approximately **25%** of applications;
- **refused**, which remains exceptional (approximately **3%** of applications).

The conditions attached to an authorisation are intended to ensure that the transaction will not undermine the protected interests. They may relate, in particular, to the **continuity and security of sensitive activities**, the **preservation of know-how and capabilities in France**, the **protection of sensitive information** or certain aspects of the target's **governance**. Finally, it should be borne in mind that, in the absence of a response within the time limits, **authorisation is deemed refused**: silence on the part of the administration amounts to rejection.

In practice, these time limits must be **built into the transaction timetable from the outset**. Obtaining authorisation is generally stipulated as a **condition precedent** to completion, and preparation of the application (in particular, documenting the investor's chain of control) should begin as early as possible. This is the whole point of the call to **anticipate the requirements** of screening.

The transaction documents must draw the consequences: a precise definition of the condition precedent and of the **long-stop date** beyond which the transaction may be abandoned, mutual **cooperation** undertakings for the preparation of the application and dealings with the administration,

allocation of risk in the event of refusal or of an authorisation subject to conditions deemed too onerous, and even break fee mechanisms. On the seller's side, anticipation involves identifying the target's sensitive activities in advance. On the buyer's side, it involves preparing, upstream, the information on its shareholding structure and financing, which is often the most time-consuming to gather.

C. Sanctions.

1. Breaches.

The sanctions regime is commensurate with the importance of the protected interests. The breaches covered by the Monetary and Financial Code are as follows:

- **making an investment without prior authorisation;**
- **obtaining an authorisation by fraud;**
- **failure to comply with the conditions** attached to the authorisation;
- **failure to comply, in whole or in part, with an injunction** of the Minister;
- **failure to file a notification** when crossing the threshold of 10% of the voting rights of a listed company.

2. Administrative measures and sanctions.

In response to such breaches, the Minister has a range of graduated measures at its disposal, in addition to civil and criminal sanctions:

Measure	Content
Ministerial injunctions	Injunction to file an authorisation application or a notification, to comply with the conditions imposed or to restore the prior situation , at the investor's expense.
Interim measures	Suspension of voting rights, prohibition or limitation of dividend distributions, restrictions on the free disposal of assets, appointment of a trustee responsible for safeguarding national interests.
Nullity	Nullity of undertakings, agreements and contractual clauses entered into in breach of the regime.
Financial penalty	Up to the highest of the following amounts: twice the amount of the unlawful investment, 10% of the target's annual turnover excluding VAT, €5 million for a legal entity or €1 million for a natural person.
Criminal sanctions	Sanctions provided for by Article 459 of the Customs Code for breach of the rules governing financial relations with foreign countries.

Nullity deserves particular attention from a transactional perspective: it undermines the entire transaction documentation and may be invoked long after completion. Combined with the scale of the

financial penalties, it makes foreign investment screening a **major legal risk** that no prudent acquirer can ignore.

Compliance with the regime does not end at completion. Where authorisation is subject to conditions, these remain binding on the investor over time and are **monitored by the administration**, which may request information on their implementation. Any subsequent change (disposal of all or part of the investment, change in the chain of control, reorganisation of sensitive activities) must be assessed in light of the commitments given. A breach discovered several years after the transaction exposes the investor to the same measures as those described above.

II.

**European
Union
law.**

European Union law

European foreign investment law, a law in the making.

EU foreign investment law is **destined to play a major role**. It is a **law in the making**. To gain a clear view of it, two fundamental points must be borne in mind.

First, foreign investments fall within the Union's **common commercial policy**, that is, the policy governing trade relations between the Union and the rest of the world (Article 207 TFEU). Since the Treaty of Lisbon, this policy has expressly covered foreign direct investment. As a result, the Union **alone is competent in principle** to govern these relations, the common commercial policy falling within its exclusive competence (Article 3 TFEU).

Second, foreign investments fall within the **free movement of capital** (Article 63 TFEU), which has the particular feature of applying not only between Member States but also between Member States and third countries. Member States are therefore **not in principle entitled to maintain or introduce restrictions** on this freedom, subject to the exceptions provided for in the Treaty, notably on grounds of public policy or public security, which the Court of Justice interprets strictly.

The Court of Justice clarified the division of competences in its **Opinion 2/15 of 16 May 2017** on the free trade agreement with Singapore: **foreign direct investment** falls within the Union's exclusive competence under the common commercial policy, whereas portfolio investment, which is not intended to exert influence over the management of the company, falls within shared competence. Yet it is precisely direct investments (those conferring influence over the target) that screening mechanisms address.

In other words, foreign investments are **by nature transactions governed by EU law**, and Member States are only meant to retain **residual competence** in this field, without underestimating the competence they hold in matters of national defence under Article 346 of the Treaty on the Functioning of the European Union (TFEU).

This is nevertheless a politically sensitive subject, and the Union has moved slowly, sparing national regimes. Accordingly, the TFEU provides that **restrictions on the movement of capital** to or from third countries involving direct investment which **existed on 31 December 1993** may be maintained by Member States (Article 64 TFEU).

For some **fifteen years**, however, the Union has resolved to take up the subject and gradually make it its own. A first step was taken with **Regulation (EU) 2019/452 of 19 March 2019**, the first European framework for the screening of foreign direct investment, **which became applicable on 11 October 2020**. That Regulation aims to provide a European framework for screening, but it essentially confines itself to organising **cooperation** between Member States and the Commission: it does not require Member States to establish a screening mechanism and leaves them broad discretion as to scope, thresholds

and procedures. It should nonetheless be seen as a **claim**: that of the Union to legislate in this field, and thus to progressively **Europeanise** the regime.

The reform of 17 June 2026.

Experience gained since 2020 has revealed the limits of the initial framework. Some Member States had no screening mechanism at all, and those that did applied **significantly different scopes, thresholds, criteria and procedures**. These divergences created risks of circumvention (an investor being able to structure its transaction through the least demanding Member State) and genuine complexity for multi-jurisdictional transactions subject to heterogeneous regimes. Against a backdrop of mounting geopolitical tensions, the European legislature therefore opted for **greater harmonisation**.

This claim is decisively extended by **Regulation (EU) 2026/1386 of 17 June 2026** on the screening of foreign investments in the Union, which repeals and replaces the 2019 Regulation. Adopted on the dual legal basis of Article 114 (internal market) and Article 207 (common commercial policy) TFEU, it was published in the Official Journal of the European Union on **26 June 2026** and **entered into force on 16 July 2026**. It will, however, apply only from **17 January 2028**, the date on which Regulation 2019/452 will be repealed. Certain provisions, essentially addressed to the Commission and the Member States (common form, European portal, secure information exchange infrastructure), apply from entry into force.

The reform pursues a twofold objective: it **renews and supplements the cooperation procedure** (A), and it **establishes a minimum screening regime** for foreign investments in the Union, which each Member State will be required to implement (B).

A. Strengthened cooperation.

The cooperation mechanism between Member States and the Commission, created in 2019, is **consolidated** on several points:

- **mandatory notifications**: in many cases, the Member State receiving an authorisation application or a notification will be required to forward it to the Commission and to the other Member States;
- **harmonised time limits** for comments from other Member States and opinions from the Commission;
- **greater weight for Commission opinions**, in particular where a project or programme of Union interest is at stake;
- **enhanced coordination** for multi-jurisdictional transactions involving filings in several Member States, supported by a European online portal and a secure database.

For investors, this strengthened cooperation has a direct practical consequence: an application filed in one Member State may be examined, through comments and opinions, by the other Member States and by the Commission. The **consistency of the information** provided in the various Member States concerned therefore becomes an issue in its own right.

B. Mandatory national screening.

The Regulation's main innovation is to make screening **mandatory**. Whereas the 2019 Regulation left each Member State free to introduce a national mechanism or not, **all Member States will be required to establish a national screening mechanism** for foreign investments, based on a **common set of minimum rules** covering scope, procedure and decision-making standards.

The Regulation lays down its own **definitions**, notably of foreign investment and of sensitive sectors:

- **foreign investment** no longer covers only direct investment from third countries, but also investment made **through an entity established in the Union and controlled by a foreign investor** (so-called "intra-EU" investment), in order to prevent circumvention. Related transactions carried out within a short period between the same parties may also be treated as a single investment;
- **sensitive sectors** are covered by a common minimum list, for which prior authorisation is required: military and dual-use items, semiconductors, quantum technologies and artificial intelligence, critical raw materials, critical infrastructure (transport, energy, digital), systemic financial infrastructure and electoral systems;
- **the procedure** is framed: the initial review phase is capped at **45 days** and is common to all Member States, while the duration of the in-depth phase remains a matter for each Member State. **Effective sanctions** must also be provided for.

These are **minimum** rules: Member States **may introduce or maintain screening in sectors other than** those covered by the Regulation. France will therefore be able to retain a broader scope than the European baseline, as is already the case on many points.

For **American investors**, and more broadly for all third-country investors, the extension to intra-EU investment has considerable practical significance: an acquisition made by the European subsidiary of an American group will be treated as a foreign investment in all Member States, and no longer only in those which, like France, already adopted a broad concept of foreign investor. In return, the harmonisation of sectors and time limits should improve the **predictability** of procedures, particularly for transactions affecting several Member States.

The French regime will nevertheless have to be **revised by 17 January 2028** to comply fully with the new Regulation: taking intra-EU investment into account, alignment with the minimum list of sectors, and coordination of time limits and notification flows with the European mechanism. The preparatory work undertaken by the Ministry of the Economy should lead in the coming months to a **legislative and regulatory reform**, which the Decree and Order of 30 July 2026, limited in scope, merely herald.

Next step?

The 2026 Regulation is probably not the culmination of the Europeanisation of screening. Several options are conceivable for the future:

- **maintaining the status quo, with improved definitions and procedures.** In this respect, Jean-Pierre Viennois notes, for example, a restriction in the definition of foreign investment (Article 2, point 1, of the Regulation) which he considers of limited relevance;
- **introducing rules that are no longer minimum but mandatory**, i.e. prohibiting Member States from screening (and *a fortiori* from prohibiting) investments outside the framework set by the Union;
- **introducing a screening procedure at Union level:**
 - either **partial**, on the model of merger control, where the foreign investment is of Union interest;
 - or **full**, a scenario that appears unlikely at first sight, as it would be unnecessarily burdensome, but which cannot be ruled out should an excessively protectionist or, conversely, excessively lax trend emerge in certain Member States.

By way of conclusion.

Foreign investment screening is now a structural feature of any transaction involving a foreign investor and a French or European target. French law, regularly strengthened, currently sets its operational rules. EU law is progressively shaping its common framework, and will do so in a binding manner from January 2028. **Anticipating the requirements** of screening (characterisation of the transaction, documentation of the chain of control, timetable, conditions precedent) is the best way to control its effects.

**Lyon**

45, quai Charles de Gaulle | 69006 Lyon
+33 4 72 40 69 00

Paris

3, avenue de l'Opéra | 75001 Paris
+33 1 40 28 40 04

Geneva

Route de Jussy 35 | CH-1211 Genève 6
+41 22 512 99 54

www.bremens-avocats.com

Law firm registered with the Lyon Bar

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