

FRANCE EXTENDS ITS FOREIGN INVESTMENT REGIME AND THE EU MOVES CLOSER TO CREATING ONE

More than four years after the enactment of the Montebourg decree, French foreign investment regulations have been amended by Decree no. 2018-1057 dated 29 November 2018, which extends the list of protected industries and strategic assets that are subject to authorisation by the French Minister of Economy.

Alongside the *“Plan d’action pour la croissance et la transformation des entreprises”* (Action plan for growth and transformation of companies – commonly referred to as the PACTE bill) currently under discussion in French Parliament, the Decree will supplement the existing foreign investment regulations in strategic sectors in France.

The most significant changes brought by the Decree include the extension of foreign investment control to digital technologies and the right for a target company to submit a request to the Ministry of Economy to enquire whether a contemplated foreign investment falls within the scope of the regulations.

The strengthening of the French foreign investment control regime is to be read in conjunction with the wider European Union proposal for screening foreign direct investments.

THE FRENCH REFORMS

Whilst the definition of foreign investment remains unchanged...

Pursuant to the French foreign investment control regime (Articles L. 151-3 and seq. and Articles R. 153-1 and seq. of the French Monetary and Financial Code (*Code Monétaire et Financier* - “CMF”), foreign investments in specific French industries are subject to prior approval by the French Minister of Economy.

The definition of foreign investments subject to prior approval remains unchanged and is as follows:

- Investments made by a non-EU/EEA investor which consist of: (i) the acquisition of a controlling share of a company with headquarters in France or (ii) the acquisition of all or part of a division of a company with headquarters in France or (iii) crossing the threshold of 33.33% in the shares or voting rights of a French company, provided that the target company or business is active in a strategic sector.
- Investments made by an EU/EEA investor which consist of (i) the acquisition of a controlling share over a company with headquarters in France or (ii) the acquisition of all or part of a division of a company with headquarters in France, provided that the target company or business is active in a strategic sector.
- In addition, acquisitions of all or part of a business division engaged in a strategic sector of a company with headquarters in France made by a French registered company, which is itself controlled by a company with headquarters located outside France, may also be subject to the same prior authorisation regime as the aforementioned investments.

It is worth noting that the foreign investment control does not apply to non-controlling investments as opposed to recent changes in foreign investments regulations in other countries.

...the list of strategic sectors has come to grips with digital technologies

Following the announcements made in January 2018 by the Minister of Economy, Bruno Le Maire, considering that a "new investment doctrine" would need to be set out to ensure more clarity on investments carried out by foreign groups, the Prime Minister, Edouard Philippe, confirmed, in February 2018, the government's plans to strengthen the existing foreign investments control mechanism, announcing the intention to extend the scope of the strategic business sectors to the so-called "*sectors of the future*".

In this respect, the Decree has widened the scope of the authorisation regime to activities relating to:

- equipment for capturing computer data;
- information system security, including, as a subcontractor;
- research and development relating to the activities mentioned in Article L. 2332-1 of the Defence Code relating to weapons, ammunition, powders and explosive substances intended for military purposes or war material and assimilated;
- the integrity, security and continuity of space operations;
- the integrity, security and continuity of electronic and computer systems required in the active service of the French national security forces and French customs;
- research and development activities relating to cybersecurity, artificial intelligence, robotics, additive manufacturing and semiconductors;
- research and development activities relating to dual-use goods and technologies;

- hosting of data whose compromise or disclosure is likely to harm the exercise of activities or interests in the two previous sectors.

The Decree allows the target company to file a preliminary request to the Minister of Economy for prior ruling

Prior to any investment in a strategic sector governed by these foreign investment regulations, an investor may file, pursuant to Article R. 153-7 CMF, a preliminary request ("*rescript*") to the Minister of Economy to obtain confirmation as to whether its contemplated investment is subject to the prior authorisation requirement. The Minister of Economy must reply within two months from the receipt of the request, it being specified that the absence of a response within the two-month period does not mean that the investor would be exempt from requesting the prior authorisation.

The Decree now allows target companies to seek the prior opinion of the Minister of Economy in order to determine whether a potential transaction falls within the scope of the foreign investment prior authorisation procedure, which decision will have a binding effect.

A ministerial order will be issued soon by the Minister of Economy to detail the contents of the request for ruling.

Timetable

The Decree applies to investments notified to the Minister of Economy as from 1st January 2019. The right granted to the target companies to seek prior opinions of the Minister of Economy came into force on 2nd December 2018.

Investors which have executed transaction documents in 2018 for expected completion in 2019 and which have not contemplated any filing for prior authorisation should review in detail the provisions of the Decree to ensure that the activities to be acquired do not fall within the scope of the new sectors.

The Decree comes alongside the French State's willingness to strengthen the sanctions for non-compliance with foreign investment regulations

- The PACTE bill (which has been approved by the National Assembly on 9 October 2018 and will be subject to review by the French Senate in January 2019) aims to increase the scope of the existing sanctions for non-compliance with foreign investment regulations.

Pursuant to the PACTE bill, the Minister of Economy will be granted the right to issue orders and injunctions if an investment has been carried out without any prior authorisation. In this case, the Minister can ask the investor either to (i) submit a request for authorisation, (ii) revise the investment or (iii) get back to the pre-existing situation at its own expense.

- In addition, if the protection of national interests is jeopardized as a result of the completion of the foreign investment, the Minister of Economy will be able to (i) suspend the voting rights attached to the shares held by the investor, (ii) prohibit the distribution of dividends to the investor or (iii) prevent the sale of all or part of the assets relating to activities requiring the prior authorisation.
- The Minister will also be entitled to impose a financial penalty in case of non-compliance with the foreign investment regulations or clearance decision. The maximum penalty will be the highest of the following amounts: twice the amount of the defaulting investment, 10% of the annual turnover (excluding

tax) of the target company, EUR1 million for individuals and EUR5 million for corporate entities.

This strengthening of the sanctions illustrates the recent enforcement approach taken by the French State with respect to strategic assets.

Recent filings show that the Minister of Economy has reviewed in a more detailed manner the requests for prior authorisations with further conditions being imposed on the investor although the Minister of Economy has always taken a proportionate and pragmatic clearance approach. The proposed extension of the control may however result in an increase of the complexity of the cases and in the number of filings which may be a source of further delays.

Investors engaged in cross-border transactions need to be aware that the recent strengthening of foreign investment control regimes in a growing number of countries will bring new challenges in M&A and will result in longer deadlines for clearance, increased deal execution risks and additional disclosure requirements.

THE PROPOSED EU LEGISLATION

The French reform is in fact directly aligned with the EU proposal on investment screening. This draft EU legislation was recently finalised pursuant to an agreement that was reached in November 2018 between the European Parliament, national governments, and the European Commission and approved by the European Parliament's Committee on International Trade on 11 December 2018. It is now set to be signed off by a full plenary vote of the European Parliament in February 2019 and then rubber stamped by the Council.

In substance, the proposed legislation would allow the European Commission to review (but not block) certain investments of "European Union interest" and to issue a non-binding opinion to the EU Member State in which the investment takes place. It would also clarify the scope of the issues that EU governments may take into account when applying their national screening regimes without falling foul of EU law, set certain common standards for those regimes and implement a system of cooperation, information exchange and advisory opinions between Member States and the Commission.

Our [briefing of September 2017](#) contains details of the proposed legislation. The most significant changes that have been recently introduced involve expansion of the non-exhaustive list of factors that can be taken into account when screening a foreign investment:

- As regard the potential impact of an investment on "critical infrastructure", the list of such infrastructure now includes that relating to water, health, media, aerospace, defence, electoral infrastructure and any land and real estate crucial for the use of such infrastructure (in addition to the sectors covered in the initial draft legislation, being energy, transport, communications, data storage, space, financial infrastructure and sensitive facilities). The legislation also makes it clear that both virtual and physical infrastructure is covered.
- As regards potential effects on "critical technologies", the list of such technologies now includes quantum, aerospace, defence and energy storage technologies (in addition to AI, robotics, semiconductors, dual

use technologies, cybersecurity and nuclear that were previously specified) and that nanotechnologies and biotechnologies are also within scope.

- As regards effects on the supply of "critical inputs", the legislation now provides that this includes energy or raw materials, as well as food security.
- It is clarified that personal data is considered to be sensitive information, access to which may be taken into account.
- A new factor of "freedom and pluralism of the media" has been added.
- The presence of a serious risk that the foreign investor engages in illegal or criminal activities can be taken into account (in addition to control or funding of the investor by a non-EU government).

In addition, the list of "projects or programmes of European Union interest" – in respect of which the Commission is empowered to issue an opinion of which "utmost account" must be taken by Member States – is now exhaustively set out in the legislation, with procedures allowing for its amendment by way of delegated legislation.

The final version of the legislation now provides that it will become applicable 18 months and 20 days after its publication in the Official Journal of the EU.

While the proposed EU legislation does not require EU governments to have a foreign investment screening regime, there has been a marked trend towards tighter control of foreign investments in many EU countries.

Most recently, the UK has proposed a sweeping new national security screening regime (see our [July 2018 briefing](#)) and Germany has lowered the threshold for review of foreign investments from 25% down to 10% for operation of critical infrastructure and defence-related investigations and expanded the scope of the regime to include investments in media undertakings (see our [December 2018 briefing](#)). The proposed EU legislation, once passed and implemented, is likely to exacerbate that trend.

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