

FRANCE AMENDS ITS FOREIGN INVESTMENT REGIME – UPDATED VERSION

JULY 2020

Recent amendments to the French foreign investment control regime have brought significant changes. We analyse the likely effects of the regime changes on M&A activity and on the timeline for foreign investment approval in France.

In particular, from 1 April 2020, the ownership threshold that triggers an approval requirement for non-EU/EEA investors has been lowered from 33.33% to 25%. All entities and persons in a chain of control are considered as a "foreign investor" over a target legal entity governed by French law. In addition, the scope of "strategic sectors" has been extended to activities in relation to (i) political and general information press services, (ii) agricultural products contributing to national food security objectives, (iii) quantum technologies, (iv) energy storage and (v) biotechnologies (as of the 27 April for (v)). The measures have also amended the applicable timeframe of the review process and specified the information required for a filing.

THE SCOPE OF EXISTING TOOLS HAS AGAIN BEEN BROADENED

Under the new regime in France, the definition of foreign investments subject to prior approval has been refined:

- Transactions subject to the regime include acquisitions by foreign investors of a **"legal entity governed by French law"**. Whereas the former provisions of the French Monetary and Financial Code applied to undertakings whose registered offices are established in France, the new regulation now covers all legal entities governed by French law, which could extend to organisations or sales offices with no legal personality.
- Investments made by a non-EU/EEA investor trigger a filing when **crossing the ownership threshold of 25% of the voting rights** of a legal entity governed by French law. This will apply regardless of whether (i) the shares are held directly or indirectly, and (ii) the relevant investor is acting alone or in concert, provided that the target is active in a strategic sector. This threshold previously was 33.33%. This threshold has been lowered to 10% for investments made in French companies active in strategic sectors by non-EU/EEA investors, where the French target's shares are listed on a regulated market.

Applying equally to EU/EEA investors and non-EU/EEA investors, prior authorisation remains required in case of acquisition of control, as defined in article L. 233-3 of the French Commercial Code, of any French law entity

Key issues

Recent Decrees and Ministerial Orders, published on 31 December 2019, 27 April and 23 July 2020, have broadened the scope of the existing French foreign investment control regime and clarified the filing requirements.

The following shall be noted:

- Modification of the definition of an investment: the ownership threshold that triggers an approval requirement for non-EU/EEA investors has been lowered to 25% (and lowered to 10% for investments made in French companies active in strategic sectors by non-EU/EEA investors, where the French target's shares are listed on a regulated market).
- All entities and persons in a chain of control are considered as "foreign investors".
- The scope of "strategic sectors" has been extended to (i) agricultural products contributing to national food security objectives, (ii) political and general information press services, (iii) quantum technologies, (iv) energy storage and, as of the 27 April, (v) biotechnologies.
- A revised timeline applies to the review process.
- The information required for filings has been clarified.

The Treasury is working on guidelines, soon to be published, assessing the precise scope of strategic sectors.

or acquisition, in part or in full, of any business activity operated by a French law entity.

- Investments made by an EU/EEA investor cover:
 - all entities whose entire chain of control is governed by EU/EEA Member State laws **or** are nationals of **and** domiciled in one of the EU/EEA Member States; and
 - any individuals having nationality of **and** domiciled in one of the EU/EEA Member States.

All entities and persons in a chain of control are considered as a "foreign investor", meaning that the foreign investment filing application could be made by any entity or person within the chain of control on behalf of the entire chain of control. **Most importantly, however, a foreign investor in a chain of control controlling a target legal entity governed by French law will be subject to a filing requirement as long as it is active in a strategic sector, and even if the foreign investor is ultimately controlled by a French entity.** The requirement is now placed upon the person or entity who exercises the power to decide whether to make the relevant investment.

- The Decree also allows a target company to seek an opinion of the Minister of Economy at any time (rather than having to wait for signing as under current practice) in order to determine whether its activity falls within the scope of the foreign investment prior authorisation procedure.

THE LIST OF STRATEGIC SECTORS HAS EXPANDED

Whilst the list of strategic sectors used to be shorter for EU/EEA investors, the new Decree removes such distinction, such that the sectors covered by the foreign investment control mechanism are the same regardless of whether the investor is EU/EEA or non-EU/EEA. This has significantly expanded the list of strategic sectors for EU/EEA investors. In addition, the overall list of strategic sectors has also been expanded (for both EU/EEA and non-EU/EEA investors) to include additional industries.

The Decree has widened the scope of the authorisation regime to activities relating to:

- the **production, transformation and distribution of agricultural products** as far as they contribute to national food security objectives (aiming to ensure access to safe, healthy, diversified, quality food in sufficient quantity, to protect and enhance agricultural land and to support the protein supply autonomy of France and the EU);
- editing, printing and distribution of **political and general information print and online press services**;
- **quantum technologies** (technologies using the interactions of molecules, atoms and smaller particles to create practical applications for building computers, telecommunications, satellite navigation, smartphones and medical diagnostics);
- **energy storage**; and
- **biotechnologies**.

See "Post-scriptum" page 6 for the full list of strategic sectors.

NEW APPLICABLE TIMEFRAME FOR A FASTER REVIEW PROCESS

- The applicant (which can be any of the investors of the chain of control) must file a request for prior approval whenever the prior approval regime applies.
- The Minister will inform the investor that submitted the application **within 30 business days of the date of receipt of a request for approval** either that:
 - the investment does not fall within the scope of French foreign investment control; or
 - the investment is authorised unconditionally; or
 - further in-depth examination is necessary.
- Under the previous regime, where no decision had been taken before the deadline, the application was deemed to have been tacitly approved. Under the new regime, however, failure to make a decision before the end of the review period would mean that the transaction will be rejected.
- Where a further examination is deemed to be necessary, the Minister has an additional period of 45 business days to provide the investor with a final decision. The final decision will either be a refusal or an approval, which may be subject to conditions. Again, if no decision has been taken within this second deadline, the application shall be deemed rejected.
- In order to better anticipate the analysis of any contemplated investment, the target company or the investor can still submit a **written preliminary request** to the Ministry to determine whether the contemplated investment is subject to prior approval. The Ministry must reply to any such request within **2 months**.

THE ORDER WHICH ACCOMPANIES THE DECREE CLARIFIES THE INFORMATION REQUIRED IN THE FILING APPLICATION

The Order now formally lists the required documents to be filed with the application request. This information relates to the investor, the target entity and the terms of the investment. In particular, the applicant must provide:

- Information regarding the investor and the target entity:
 - where the "chain of control" includes investment fund(s), the documents attesting to the identity of the fund manager(s) and the entities or natural persons that control the fund(s);

In this respect, the highest administrative court in France (the *Conseil d'Etat*) ruled on 3 April 2020 that a foreign investment fund seeking foreign investment authorisation in France is required to disclose in its application the identities of the fund manager and the persons controlling it, but is not required to disclose the identities of all investors of the fund;
 - the list of competitors of the investor and the target entity; and
 - the capital and financial links that the investor has with a State or public body outside the European Union. Indeed, the Minister will be able to take into account the fact that the investor has links with a foreign government or public body as a reason to refuse the investment.

- Information regarding the investment:

- a copy of any document attesting that the investment project is "sufficiently advanced" (similar to the CFIUS process). Even though the Order does not define the notion of a "sufficiently advanced" project, this is a notable change as, before the reform, the practice was to file a request after the execution and announcement of a binding transaction;

A copy of the offer or draft purchase agreement would now need to be provided with the filing while it was not previously required.

- the possible option on the capital balance;
- the amount of the investment in France and of the global transaction, as the case may be (if the amounts are not determined at the time of application, estimates and method used will be required);
- the rationale for the transaction in connection with the investor's global strategy;
- the financial terms of the transaction;
- the expected timetable of the transaction; and
- another important change is the need to provide the list of jurisdictions in which the operation is being notified under foreign investment or antitrust regulations.

Very recently, the Ministry services have pragmatically communicated a standard template file setting out all the information required in a filing application.

THE POWERS OF THE FRENCH MINISTER OF THE ECONOMY HAVE CONSISTENTLY BEEN STRENGTHENED OVER RECENT YEARS

In the wake of the new European regulation on establishing a framework for the screening of foreign direct investments (Regulation (EU) 2019/452), **the May 2019 Pacte Law had already strengthened and broadened the scope of the sanctions mechanism in cases of infringement by investors of the French foreign investment regulation:**

- The Pacte Law granted the Minister of the Economy the power to issue orders and injunctions if an investment had been carried out without any prior authorisation.

The Minister can now ask the investor to (i) submit a request for authorisation, (ii) revise the investment or (iii) revert to the pre-existing situation at its own expense.

- The Pacte Law also granted remedial powers to the Minister of the Economy in case of breach of the commitments made by the investor.

The Minister can ask the infringing investor to comply within a specified timeframe (i) with the commitments or (ii) with new conditions (including unwinding the investment or selling the sensitive activity).

The Minister of the Economy may also withdraw the previously granted approval, in which case the investor will need to file a new approval request, unless it decides to unwind its investment.

- If the protection of public order, public security or national defence is compromised or likely to be threatened, the Minister of the Economy also

has the power to impose interim measures to remedy the situation quickly. These include suspending the investor's voting rights in the target company, preventing or limiting the distribution of dividends to the foreign investor or even appointing a temporary representative to ensure the preservation of national interests within the target company.

- The Pacte Law also increased financial penalties for non-compliance with the French foreign investment regulation or a clearance decision. The maximum penalty is 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 or EUR5 million for corporate entities.

The December 2019 Decree also grants the Minister the right to amend or set new conditions (commitments) attached to an authorisation:

- The Minister can take the initiative to amend existing conditions in the event of a change in the ownership of the target entity of the investment or in the composition of the control chain; and
- The Minister can also set new conditions in the event the investor acquires control after having obtained an authorisation under the French foreign investment regulation.

In our experience, the Minister of the Economy reviews requests for prior authorisations in an increasingly detailed manner, and has imposed additional conditions on investors.

Even if formal veto remains extremely rare, it is nevertheless worth noting that, on 31 March 2020, the Minister of the Economy issued orally an unfavourable opinion regarding US defence manufacturer Teledyne Technologies Inc.'s anticipated acquisition of Photonis, a French night vision start-up specialising in the design and manufacture of light intensifier tubes using innovative digital technology, and which supplies NATO special forces. We will need to see if additional commitments made by the investors would lead the French Minister of the Economy, Bruno Le Maire, to clear this transaction.

Overall, across many jurisdictions, views on foreign investment are drastically changing. The European Commission and a number of Member States are responding to the Covid-19 pandemic by reforming foreign investment rules to support EU companies. Member States – such as Germany and Spain – are calling for greater coordination of EU and national measures to prevent foreign buyouts, particularly of companies targeted for their know-how in sensitive sectors such as energy, health and robotics.

A further decree (No. 2020-892) and Ministerial Order, both dated 22 July 2020, have also lowered the threshold at which the screening regime will be triggered for non-EU/EEA investors proposing to acquire shares in French listed companies active in strategic sectors. This decree states that, temporarily, until 31 December 2020, the ownership threshold that triggers an approval requirement for non-EU/EEA investors will be lowered from 25% to 10%.

These moves are unprecedented and bold, like many recent steps to address the coronavirus crisis.

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 to M&A transactions and will result in longer deadlines for clearance, increased deal execution risks and stricter tests and disclosure requirements.

Post-scriptum

The list of sensitive activities covered by the foreign investment control mechanism will be the same regardless of the country of origin of the investor, and notably includes:

I. Activities likely to jeopardise national defence interests participating in the exercise of public authority or likely to jeopardise public order and public safety:

1. 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 materials covered by Parts III and V of Book III of the second part of the French Defence Code
2. activities relating to dual-use goods and technologies;
3. activities carried out by entities privy to national defence secrets;
4. activities in the security of information systems sector carried out for a public or private operator (including as a sub-contractor to these operators) that manages or uses critical facilities as mentioned in Article L. 2332-1 of the Defence Code;
5. activities carried out by companies having entered into an agreement with the French Ministry of Defence, either directly or through sub-contracting, for the design, the provision of services or the supply of equipment with respect to goods or services within the scope of the industry sectors listed in points 1–3 above and 6 below;
6. activities relating to cryptology resources and services;
7. activities relating to equipment or technical devices permitting the interception of correspondence or designed for the remote detection of conversations or the capture of IT data;
8. service activities consisting of services relating to the auditing and certification of security provided by information technology products and systems;
9. activities within the gambling industry (except for casinos);
10. research, development and production activities relating to means of dealing with the illegal use, in the context of terrorist activities, of pathogens or toxic substances and preventing the public health consequences of such use; and
11. data processing, transmission or storage activities, the compromise or disclosure of which is such as to interfere with the exercise of the activities mentioned in points 1 to 10 of this I or II.

II. Activities likely to jeopardise national defence interests participating in the exercise of public authority or likely to jeopardise public order and public safety, when they concern essential infrastructure, goods or services, to ensure:

1. integrity, security and continuity of supply of energy sources;
2. integrity, security and continuity of supply of water;
3. integrity, security and continuity of operation of networks and transportation services;
4. integrity, security and continuity of space operations;
5. integrity, security and continuity of operation of electronic communication networks and services;
6. performance of the missions of the national police, the national gendarmerie, the civil protection services and of the public security missions of the customs department and of licensed private security companies;
7. integrity, security and continuity of operation of any facility, installation or structure of vital importance within the meaning of Articles L. 1332-1 and L. 1332-2 of the French Defence Code;
8. protection of public health;
9. the production, transformation and distribution of agricultural products as far as they contribute to national food security objectives (aiming to ensure access to safe, healthy, diversified, quality food in sufficient quantity, to protect and enhance agricultural land and to support the protein supply autonomy of France and the European Union); and
10. editing, printing and distribution of political and general information print and online press services.

III. Activities likely to jeopardise national defence interests participating in the exercise of public authority or likely to jeopardise public order and public safety, when they concern essential infrastructure, goods or services, to ensure:

1. research and development activities relating to the following critical technologies:
 - cybersecurity;
 - artificial intelligence;
 - robotics;
 - additive manufacturing;
 - semiconductors;
 - quantum technologies (technologies using the interactions of molecules, atoms and smaller particles to create practical applications for building computers, telecommunications, satellite navigation, smartphones and medical diagnostics);
 - energy storage; and
 - biotechnologies;
2. research and development activities relating to dual-use items and technologies listed in Annex I to the above-mentioned EU Council Regulation No. 428/2009 dated 5 May 2009.

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