

Legal Update

Foreign Investments in France New Regulatory Framework

The declarations of the French Minister of Economy on April 29, 2020 regarding new restrictions on foreign investment underlines a global trend towards increased scrutiny on inbound foreign investments in French strategic companies.

However, the level of screening for foreign investments in France had in fact already been increased prior to the outbreak of the COVID-19 pandemic. Since April 1, 2020, foreign investments are indeed subject to a new regulatory framework derived from legislation adopted in May 2019 (the PACTE law) and the related decree and ministerial order adopted on December 31, 2019. These measures also implement EU regulation of March 19, 2019 establishing a framework for the screening of foreign direct investments into the Union.

1. SCOPE OF FOREIGN INVESTMENTS REGULATIONS

Foreign investments in France in sectors deemed sensitive for French national interests are subject to prior authorisation (the "FDI Clearance") delivered by the Minister of Economy (the "MINEFI"), which must be obtained before a transaction can be completed.

- **Conditions.** FDI Clearance is required for any transaction that satisfies all 3 following conditions:
 1. Foreign origin of the Investment. The foreign investment comes from a country other than France (including a member state of the European Union, party to the agreement on the European Economic Area or other countries).¹
 2. Nature of the prospective transaction. Transactions which are subject to FDI Clearance are:
 - » the controlling² acquisition of a company whose head office is established in France by a non-French investor;
 - » the acquisition of all or part of a branch of a company whose head office is established in France by a non-French investor; or

¹ It has now been clarified that, in case of an indirect acquisition of control through various companies, each of these companies is deemed to be an investor for the purpose of FDI Clearance. As a result, any investment made by a French investor through a non-French entity will be deemed to be made by a foreign investor for such purposes.

² When no "control" can be established under the definition of control commonly used for French corporate law purposes (contained in article L. 233-3 of the French Commercial Code), the MINEFI may rely on the broader concept of control used for the purpose of merger control in France and the EU (contained in article L. 430-1-II of the French Commercial Code), which also covers "decisive influence".

- » the direct or indirect crossing of 25% voting rights of a company whose head office is established in France by a non-EU/EEA investor.³ On April 30, 2020, the MINEFI declared that this threshold would be temporarily reduced to 10% for listed companies in the context of the COVID-19 crisis. This measure is expected to apply only during the second semester of 2020.

3. Activity of the target. The investment must be in a French company that operates within certain strategic sectors which:

- » are considered as part of the exercise of public authority ; or
- » pertain to activities likely to affect public order, public security, interests of national defence, or research, production or marketing activities of weapons, ammunition, powders and explosive substances.

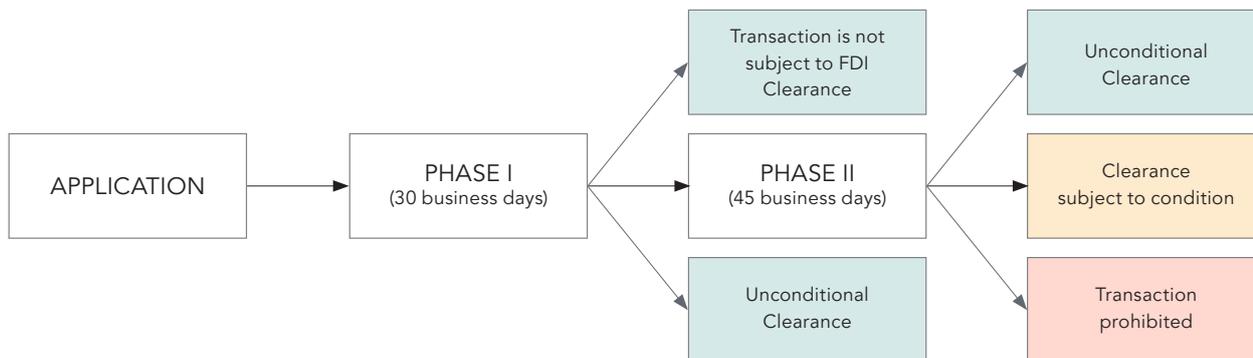
These strategic activities are listed in article R. 151-3 of the French monetary and financial code, which has been significantly extended in recent years and now includes space related operations, computer and electronic security, data hosting activities, R&D activities relating to cybersecurity, artificial intelligence, robotics, semiconductors and dual-use goods and technologies. Since the PACTE law, this list (which is now the same regardless of whether the investor is based in the EU/EEA) covers (i) R&D activities relating to quantum technologies and energy storage technologies, (ii) the production, transformation or distribution of agricultural products which contribute to national food supply security and (iii) the editing, printing or distribution of political and general information.

- **Exemptions.** No FDI Clearance is required in the following cases:
 - » where the investment is made between entities belonging to the same group;
 - » where the foreign investor acquires, directly or indirectly, individually or as part of a concerted action, more than 25% of the voting rights of an entity already controlled by such foreign investor; or
 - » where the foreign investor acquires the control of an entity in which it had been previously authorized to acquire, directly or indirectly, individually or as part of a concerted action, more than 25% of the voting rights.
- **Preliminary opinion.** In order to anticipate the MINEFI's analysis of a contemplated investment, a target company or an investor may request an opinion from the MINEFI to determine whether the activity of the target company is subject to FDI Clearance. This possibility is now available earlier in the process, as soon as a document evidencing the existence of a prospective investment can be submitted. The MINEFI is required to answer within 2 months.

2. PROCEDURE FOR FDI CLEARANCE

- **Filing of the application.** Prospective foreign investor are required to file an application with the MINEFI with information on the investor, the target company and the terms of the prospective transaction. The list of required information, which is now formally detailed in the ministerial order adopted on December 31, 2019, has been significantly extended under the new rules.
- **Two-stage screening process.** The new regulatory framework replaces the previous one-step screening period of 2 months by a two-phase screening process:
 1. A first 30-business-day phase during which the MINEFI may inform the investor either (i) that the investor is not required to obtain FDI Clearance, (ii) that FDI Clearance is granted unconditionally or (iii) that further examination is required to determine whether a conditional clearance is sufficient to protect national interests;
 2. A second 45-business-day phase if further examination is deemed necessary during which the MINEFI may (i) clear the transaction (subject to conditions if necessary) or (ii) prohibit the transaction.

³ A 33.33% threshold applied previously.



If the MINEFI does not provide a response within the applicable timeframes, the application is deemed to be rejected. Any such decision may be challenged, like any administrative decision, before the French administrative courts.

- **Conditional clearance.** A typology of conditions imposed by the MINEFI is provided in Article R. 151-8 of the French monetary and financial code. Based on known precedents, examples of such conditions relate to :

- » information or consultation rights granted to the French State;
- » information, veto and/or preemption rights to the French State on disposals of specific assets;
- » representatives of the French State or French citizens on the investor's board of directors,
- » maintaining of certain contracts for a minimum duration;
- » maintaining the sustainability of the industrial capacities in France;
- » preserving the R&D capabilities or the associated technologies and know-how;
- » ensuring the maintenance of vital infrastructures;
- » data protection.

The nature, scope and wording of such conditions are generally a key area of negotiation for investors, it being specified that undertakings can later be reviewed at the request of the investor or of the MINEFI in certain circumstances (e.g., in the event of a change in the target's chain of control).

3. SANCTIONS FOR NON-COMPLIANCE WITH THE FOREIGN INVESTMENTS REGULATIONS

- **Injunctions.** The MINEFI may issue the following injunctions and impose financial penalties against non-compliant investors:
 - » in relation to an unlawful investment made without FDI Clearance: (i) require the investor to file an application, (ii) modify the terms of the transaction or (iii) reinstate the *status quo ante* at the investor's own costs.
 - » in relation to a breach of commitments: (i) withdraw the authorization, (ii) require the investor to comply with the commitment or (iii) require the investor to comply with new undertakings (including unwinding the investment or selling the sensitive activity).
- **Interim measures.** The MINEFI may also impose temporary measures (e.g., suspension of the investor's voting rights or dividend distributions, appointment of a temporary representative to ensure the preservation of national interests within the target company or restrictions on the disposal of its assets).
- **Financial penalties.** Financial penalties may also apply and are capped as the highest of the following amounts:
 - » twice the amount of the irregular investment;
 - » 10% of the annual turnover (excluding taxes) of the target company;
 - » 5 million euros for legal entities and 1 million euros for individuals.
- **Invalidity of the Transaction.** Investment made without FDI Clearance may be deemed null and void.

4. IMPACT OF THE COVID-19 CRISIS ON THE SCREENING PROCESS

- **EU guidelines towards increased scrutiny.** On March 25, 2020, the European Commission issued guidelines regarding an EU-wide approach to foreign investment screening, in the context of the COVID-19 crisis. The guidelines underline the risks that the EU's strategic capacities are exacerbated by the volatility or undervaluation of European stock markets and call on the Member States to protect strategic businesses, infrastructures or technologies from foreign buyouts.
- **Tightened regulations at the French level.** On several occasions since the COVID-19 outbreak, the MINEFI committed itself to protect strategic assets. On April 29, 2020, Bruno Le Maire also declared that :
 - » the threshold for the direct or indirect crossing of voting rights of a listed company by a non-EU/EEA investor would be temporarily reduced from 25% to 10%⁴;
 - » the scope of activities that are subject to FDI Clearance would be extended to include biotechnology companies. The latter has already come into force through a ministerial order dated April 30, 2020.
- **Impact on the timing.** The COVID-19 crisis will also result in longer deadlines for the screening process. Time periods for the review of ongoing foreign investments have been postponed until one month after the expiration of the state of emergency in France (i.e., currently June 25, 2020).

4 This measure is expected to apply only during the second semester of 2020, with a special screening procedure. The MINEFI would be required to decide within 10 days of the notification whether the transaction should be subject to an at-length screening procedure.

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