

Foreign Investments in France: new legislation expands and strengthens the national security review mechanism

July 2019

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New legislation broadens the scope of foreign investments control review in France and reinforces the sanctions in case of infringement. As a next step, French authorities are likely to adopt new regulations by the end of 2019 to clarify the review mechanism notably in light of the EU Regulation 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

Expanding the list of sensitive sectors

The previous reform of the French legal system of national security review, implemented in May 2014, expanded the scope of activities reviewed.

A new Decree, n° 2018-1057 of 29 November 2018, further amends and expands the list of sensitive sectors subject to prior authorization by the Ministry of Economy (MoE). With respect to the EU, as well as non-EU/EEA investors, the review mechanism will now cover interception/detection of correspondences/conversations, capture of computer data, security of information systems, space operations and electronic systems used in public security missions. The new Decree also expands the scope of review to R&D activities in cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, certain dual-use goods and technologies, and sensitive data storage. Concerns regarding protection of sensitive data are now a specific ground for the MoE to impose mitigation requirements or to refuse to authorize a foreign investment.

The new Decree introduces the option for the target company to submit a written request to the Minister of Economy to get comfort about whether the projected investment is subject to prior authorization review. Previously, such requests could be submitted only by the foreign investor.

Strengthening the enforcement powers of the Ministry of Economy

On 22 May 2019, the French Parliament adopted a new set of measures to reform the review mechanism as part of the so-called "PACTE Law". Articles 152 and 153 of the PACTE Law amended the legal framework applicable to national security review and notably modified the sanctions mechanism in case of breach to prior authorization requirements.

Therefore, when a transaction has been implemented without prior authorization, the MoE may now enjoin the investor to:

- file for prior authorization; note that this measure is not only punitive, but may also be used by the MoE to give the foreign investor the possibility to cure the situation;
- unwind the transaction at his own expense; or
- amend the transaction.

If the protection of public order, public security or national defense is compromised or likely to be compromised, the MoE also has the power to pronounce the following interim measures to remedy the situation quickly:

- suspend the investor's voting rights in the target company;
- prohibit or limit the distribution of dividends to the foreign investor;
- temporarily suspend, restrict or prohibit the free disposal of all or part of the assets related to the sensitive activities carried out by the target; and
- appoint a temporary representative within the company to ensure the preservation of national interests.

If an investor fails to comply with the commitments imposed by the MoE in its clearance decision, the following injunctions may be pronounced:

- withdrawal of the clearance;
- compliance with the initial commitments;
- compliance with new commitments set out by the MoE, including unwinding the transaction or divesting all or part of the sensitive activities carried out by the target.

Non-compliance with MoE orders is subject to daily penalties

The PACTE Law has also increased the monetary sanctions in case of infringement. The amount of fine the MoE may impose to the foreign investor cannot exceed the highest of:

- twice the value of the investment at stake;
- 10 percent of the annual turnover achieved by the target company
- €1 million for natural persons; or
- €5 million for legal entities.

New Regulation expected by the end of 2019

In addition, the PACTE Law introduced some transparency in the French review system. The MoE is now required to issue yearly public general statistics (on a no-name basis) in relation to French national security reviews. This will serve as a relevant tool to get a better sense of the general approach adopted by the MoE. The first report is expected to be issued this year.

More regulatory activity is also expected in 2019. The MoE is currently working on the revision of the 2003 ministerial order defining what information foreign investors are required to provide when submitting prior authorization requests. The objective is to specify and to clarify the list of relevant information, taking into account the new coordination process between the European Commission and EU Member States set up by the EU Regulation 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. Eventually, a new decree is likely to be adopted by the end of this year to implement the PACTE Law provisions.

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