

# New expansion and clarification of Foreign Direct Investments control regime in France

January 2020

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Further to the Decree of 29 November 2018, which expanded the list of strategic sectors, and to the so-called « PACTE » law of 22 May 2019, which strengthened the enforcement powers of French authorities with respect to the review of foreign direct investments (“FDI”), France has published two new provisions implementing the legislative changes introduced by the PACTE law. The reform adapts the French legal framework to the coordination system introduced by the EU Regulation 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, which was entered into force on 10 April 2019 and that will be effective as of 11 October 2020.

The new Decree n° 2019-1590 of 31 December 2019 and the Ministerial Order of 31 December 2019 relating to foreign investments in France aim to grasp new strategic sectors, refine certain concepts and provide a clearer review framework for investors. The main changes to the current system are detailed below and are likely to impact future foreign investments.

The provisions of the Decree and the Ministerial Order will apply to authorization requests submitted as of 1 April 2020.

## Expanding the review to new sectors

The French foreign investment control regime remains unchanged in its principle. The review will still cover investments made by EU/EEA investors as well as non EU/EEA investors in “sensitive activities” as listed in the French Monetary and Financial Code.

The list of sensitive activities notably includes: activities relating to dual-use goods and technologies, activities of undertakings holding national defense secrets or that have concluded a contract for the benefit of the French Ministry of Defense; activities critical to public order, public security or national defense in relation to energy supply, water supply, public health, spatial operations etc.

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Under the new regulation, the Minister of the Economy (“MoE”) review will now also cover the following activities:

- Activities relating to the print and digital press;
- Activities relating to the production, transformation or distribution of agricultural products when they contribute to food security objectives (i.e. ensure access to safe, healthy, diversified food; protect and develop agricultural lands; promote France’s food independence);
- R&D activities relating to energy storage and quantum technologies (i.e. technologies relating to the manipulation and exploitation of sub-atomic particles energy capacities, applied for instance to GPS, lasers, telephony and Internet technologies).

## Refining the concepts of foreign investment and investor

Under the current regime, the concept of “*foreign investment*” covers the acquisition by a foreign investor of a (direct or indirect) controlling interest or the acquisition of all or part of the branch of activity of an undertaking whose headquarter is established in France. The Decree replaces the term “*undertaking*” by the concept of “*French entity*” which is undefined under French law. It will likely cover French corporate entities but also potentially other structures and organizational forms

The Decree maintains the current system where minority non EU/EEA foreign investments are also caught by the FDI review. Prior filing is currently required for any acquisition by a non EU/EEA investor of more than 33.33% of the share capital or voting rights of an undertaking whose headquarter is established in France. The Decree lowers the threshold to acquisition of 25% of the voting rights of a French entity whether made, directly or indirectly, by a sole investor or by several investors acting in concert. Notably, the Decree clarifies the meaning of “EU/ EEA investor” to cover (i) any legal person whose chain of control contains only entities governed by the laws of an EU/EEA Member State or entities that are nationals of, and domiciled in, such state, or (ii) any natural person who is a national of an EU/EEA Member State and has his or her domicile in such state.

## Clarification and simplification of the review process

Any investment falling within the scope of the review must be filed with the MoE for prior authorization. Prior to formally filing an authorization request, the investor or the target may elect to approach the MoE through a formal comfort process to obtain its position on whether a particular transaction falls within the scope of the review. In both cases, the MoE must render a decision within two months of receipt of a complete comfort or authorization request. Longer periods (e.g., three or four months) have to be anticipated if the MoE requests supplemental information and considers imposing commitments to clear the case.

The Decree clarifies and simplifies the review process. It maintains the possibility for the investor or the target to request prior comfort from the MoE but opens a new option for the target that will now be able to submit such request at any time to obtain comfort about whether its activity falls in the scope of the FDI review. This will be an important tool for sellers of potential sensitive targets who would like to obtain better visibility into the process.

The Decree also amends the timeframe of the formal authorization review process. The MoE will have thirty (30) business days to indicate whether a transaction falls outside the scope of the review, is cleared unconditionally or requires a further analysis. Where further analysis is required, the MoE will have an additional period of forty-five (45) business days to provide the investor with its final decision i.e. refusal of the investment or clearance with commitments.

Under the Decree, an investor can submit a commitments modification request, notably in case of an unforeseeable change in economic and regulatory conditions, or in its shareholding structure. Under certain conditions, the MoE may modify the commitments on its own initiative after having given the investor the opportunity to submit its observations.

The new regulation provides a list of information and documentation required for a filing. In practice, this list simply formalizes the current practice while detailing and completing certain elements. The information that must be provided differ for each type of request. For example, a request for comfort will require less information than an authorization request.

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In particular, it should be noted that investors will have to provide information regarding any potential significant capital ties or financial support received from a State or public body outside the European Union over the last five years. This is clearly in line with the substance of the review process. Indeed, the Decree expressly provides that the MoE will be entitled to take into consideration the fact that a foreign investor has links with a foreign government or a foreign public entity. It can thus be expected that the MoE will perform a more close and thorough review of transactions involving State-controlled foreign investors.

Furthermore, if an investment fund is part of the chain of control, the request for prior filing must specify the identity of its manager and controlling shareholders (natural or legal persons). The investor (natural person or members of the executive body of a legal person) must also certify that it has not been convicted of certain listed offences in the last five (5) years.

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