

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

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Like other EU countries, France is bolstering its national security-related regulatory regimes. The French government recently affirmed its goal to remain attractive for foreign investments while preserving French national interests.

Expanding the List of Sensitive Sectors

The latest reform of the French legal system of national security review, implemented in May 2014, expanded the scope of activities reviewed (whether EU or non-EU) by the so-called “Montebourg Decree,” notably to energy, water supply, transportation, telecoms and public health.

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 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.

The new Decree applies to requests for prior authorization filed from 1 January 2019.

Strengthening the Enforcement Powers of the Ministry of Economy

In 2017, the French National Assembly created a Parliamentary Enquiry Committee to investigate how French national security interests have been protected in recent transactions involving strategic companies. The investigation has increased the pressure on the services of the MoE in charge of the review process to ensure that they have completed a thorough review of both the activities at stake and the profile and intentions of the foreign investors.

Against this background, a new set of measures to reform the review mechanism is currently discussed by the French Parliament as part of the so-called “PACTE Law.”

On 10 October 2018, the draft PACTE Law was subject to a first vote by the French National Assembly. The draft will next be submitted to the Senate, and a final version of it is likely to be adopted by the Parliament in early 2019. Article 55 of the draft amends the French legal framework applicable to national security reviews.

The draft PACTE Law proposes to amend the sanctions mechanism in case of infringement of the prior approval obligations. While removing the sanction consisting in the nullity of the infringing transaction, the proposed reform aims at giving the French government a larger pallet of possible sanctions it can adapt and leverage.

Notably, if a transaction has been implemented without prior authorization, the MoE will now have the power to order the investor to:

- amend the transaction
- file for a prior authorization request
- restore the previous pre-transaction situation at his own expense
- suspend the voting rights of the investor and appoint a temporary manager entrusted with the management, the operation and the representation of the legal entity at stake
- suspend, restrict or prohibit temporarily the free disposal of all or part of the assets related to the sensitive activities at stake
- prohibit or limit the distribution of dividends to shareholders

If an investor fails to comply with the clearance conditions imposed by the MoE, the MoE will also have the power to withdraw the authorization and to order the investor to:

- divest all or part of the sensitive activities at stake
- implement the initial clearance conditions or new conditions set out by the MoE, including measures to restore the previous pre-transaction situation

The MoE may also impose daily penalties in case of non-compliance with its order.

Eventually, the MoE may also have the power to impose monetary sanctions in case of infringement of FIC obligations; i.e., a fine, the amount of which cannot exceed the highest of the following amounts:

- twice the value of the investment at stake
- Ten percent of the annual turnover achieved by the undertaking concerned by the foreign investment
- €1 million for natural persons
- €5 million for legal entities

Finally, in order to improve transparency over the review process, the Parliament is also considering the creation of a new permanent Parliamentary Committee in charge of economic security.

This new Committee would be composed of eight members of the National Assembly and eight members of the Senate, all subject to specific national security confidentiality rules. The government would be required to report annually to this new Committee on past transactions reviewed, cleared or rejected during the previous year. In the same vein, the MoE would issue yearly public general statistics (on a no-name basis) in relation to French national security reviews.

Foreign investors should be aware that identifying and protecting strategic activities has become an increasing concern in the French review process, as well as in relation to clearance commitments that may be required as a condition to obtain prior authorization.

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