

## Foreign investments in strategic sectors: upgrade of French regulation

**W**hile the European institutions are adopting a framework for screening foreign investments, and along with other countries such as Germany, the U.K. and the United States<sup>1</sup>, France is strengthening its control over foreign investments.

The French government adopted a Decree<sup>2</sup> in November 2018 which came into force on January 1<sup>st</sup>, 2019 and expanded the French prior authorisation regime to new strategic sectors.

This new Decree came in advance of the draft law called “Action Plan for Business Growth and Transformation” (“Pacte” Law) currently under discussion at the French Senate. With article 55 of the future Pacte Law, the French government modernises the French foreign investment authorisation procedure by granting new remedial powers to the French Minister for Economy.

### Expansion of the prior authorisation procedure to new strategic sectors

Article R. 153-2 of the French Monetary and Financial Code, which lists the strategic sectors for which foreign investments are subject to prior authorisation of the French Minister for Economy is expanded to include new sectors. These sectors are of key interest for France’s public order, public security and/or national defence.

As from January 1<sup>st</sup>, 2019, the scope of controlled activities covers new key technology sectors, such as:

- space operations,
- electronic and computer systems required for public security purposes and data-storage activities,

- research and development in the fields of:
  - cybersecurity,
  - artificial intelligence,
  - robotics,
  - 3D manufacturing,
  - semiconductors,
  - dual-use goods and technologies listed in Annexe I of EU/Regulation No 428/2009 dated May 5<sup>th</sup>, 2009.

Actually, these newly added sensitive sectors are related to public security or national defence activities which are already in the scope of controlled sectors, thus creating an overlap, especially regarding activities concerning dual-use goods, now completely covered (Annexes I and IV). Moreover, this new layers of activities with no precise definition such as “artificial intelligence”, “robotics” or “3D manufacturing” not only generates ambiguity and uncertainty, but also may soon become obsolete as these technologies are constantly evolving.

This will create new burden on foreign investors interested in French innovative businesses.

By way of comparison, instead of inserting “*emerging technologies*” in the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), the U.S. Congress finally decided to vote the Export Control Reform Act of 2018 avoiding duplication and/or overlaps in U.S. export control regime.

<sup>1</sup>Germany amended its Foreign Trade Ordinance (Außenwirtschaftsverordnung) on July 12<sup>th</sup>, 2017; the U.K. amended the Enterprise Act of 2002 on June 11<sup>th</sup>, 2018 and the U.S. enacted the Foreign Investment Risk Review Modernization Act in 2018.

<sup>2</sup>Decree n°2018-1057 of November 29<sup>th</sup>, 2018 amending articles R.153-1 and seq. of the Code Monétaire and Financier.

## Modernisation of the French foreign investment prior authorisation regime

Pursuant to the existing French prior authorisation regime, foreign investors planning to acquire a French company involved in a strategic sector should require a prior authorisation from the French Minister for Economy.

Article 55 of the future Pacte Law does not intend to reform the French prior authorisation regime but to reinforce the remedial and sanctions' powers of the Minister. The draft bill aims at upgrading the procedure and inciting foreign investors to comply with the French foreign investment commitments.

In its current version, article L. 153-3 of the French Monetary and Financial Code confers limited powers to the Minister. Indeed, transactions conducted without prior authorisation shall automatically be null and void. Although the French administration does not consider such investment as a threat to its national interests, the Minister for Economy is not able to proceed to an ex-post regularisation.

In order to meet investors' as well as France's interests, the future Pacte Law allows the Minister to implement remedial actions. A major innovation is the creation of a new provision which empowers the French Minister to order the investor to:

- (i) request an ex-post authorisation or
- (ii) restore the original status at the investor's cost or
- (iii) modify the investment.

The future Pacte law also entitles the Minister to take provisional measures in case of threat to the French's interests – public order, public security or national defence – and to impose daily penalties. Furthermore, the bill reinforces the injunction's power of the French administration in case of noncompliance of an investor with the conditions of its authorisation. These new powers strengthen the efficiency and the transparency of the French administration.

Concerning the sanctions, article 55 of the future Pacte law would reinforce them. Up to now, the fines are limited to twice the amount of the investment. With article 55 of Pacte law, the Minister will be able to set the fine's amount up to 5 million euros or 10% of companies' turnover.

This reform brings the French foreign investment law closer to the U.S. one. Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018 provided for a declaration procedure. Failing to file the declaration form required by the Committee on Foreign Investment in the United States (CFIUS) has no effect on the validity of the transaction. In such a case, FIRRMA provides for penalties.

The above current and future provisions seek to better address practical challenges of foreign investments. The future Pacte law introduces a more flexible approach of foreign investments trying to find a balance between protection of strategic sectors and facilitation of trade transactions.

However, the broader scope – and its uncertainty – of controlled activities may balance this upgrade the wrong way...

## France foreign investment regime in a nutshell

France is one of the most comprehensive regime in Europe, with Germany, Italy and the UK ones: any material investment – direct or indirect - through a share deal (i.e. acquisition of a controlling interest or of more than 33% of the target company's share capital or voting rights) or an asset deal (i.e. all or part of a branch of activity of a company) in a French entity active in regulated sectors is subject to a mandatory notification and prior approval by the Minister for Economy.

Regulated sectors include, for both EU and non-EU investors, cyphering/cryptographic activities, military goods & services, classified activities related to National Defence, activities in relation to key France assets (energy, water, transportation, communications, IT systems of Police, Gendarmerie and Customs, essential operators and public health), and the new sectors added since January 1<sup>st</sup>, 2019.

For non-EU investors, regulated sectors also include gambling, private security, R&D or manufacture of means preventing the use of biological or toxic agents by terrorists, communication interception equipment, security of essential operators' IT systems, and dual-use goods and services.

There are no financial threshold to trigger the foreign investment review.