

Foreign Investment Control in France: Strengthened rules but greater clarity for investors

“France’s attractiveness improved further in 2018, despite the slowdown in global growth, economic tensions and rising protectionism”. This assessment, mentioned in the 2018 annual report on foreign investment in France issued by Business France^[1] confirms France’s enhanced attractiveness in 2018.

Attractiveness, however, does not mean lack of control, provided that a simple and fast legal framework is offered to foreign investors.

It is in this context that two pieces of legislation have recently finalized the foreign investment control mechanism in France.

The control and monitoring of foreign investment have greatly intensified throughout the world and many countries have put in place an adequate legislative framework. At the European level, a common legal framework for Member States, derived from Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the European Union and for cooperation between Member States, will become applicable on October 11, 2020

Decree No. 2019-1590 of December 31, 2019 and the Ministerial Order dated the same day, both relating to foreign investments in France, complete the investment control reform that France has been carrying out for several months as part of its action plan for business growth and transformation (so-called PACTE Law of May 22, 2019^[2]). The newly introduced provisions will enter into force on April 1, 2020.

The fact that financial relationships between France and foreign countries are unrestricted remains the principle but some investments must however be subject to a prior authorization procedure by the Minister of

the Economy whenever several conditions are met.

Eligibility criteria for the authorization procedure: an extended scope of application

The prior authorization procedure is required for certain **investors** making certain types of **investments** in precisely defined “**sensitive**” **business sectors**.

As an essential prerequisite, the investment must be made by an **investor**^[3] (i) natural person of foreign nationality, (ii) natural person of French nationality not domiciled in France, (iii) entity governed by foreign law or (iv) entity governed by French law controlled^[4] by one or more aforementioned persons/entities.

The acquisition of a business division operated by a French law entity and the acquisition of the control of a French law entity by an investor, as defined above, **is considered as an investment** within the meaning of applicable regulations on the control of foreign investments.

In addition, the Decree of December 31, 2019 also specifies that prior authorization is required for any investment that results in the ownership of more than 25% of the voting rights of a French law entity, as compared to 33% until now^[5]. If the investor already held 25% of the voting rights under an investment that had previously been authorized, the new investment will either be exempt from any formalities or will be subject to prior notification to the Minister of the Economy, as the case may be.

Finally, the so-called “sensitive” activities, which until now mainly concerned activities critical to national defense or likely to jeopardize public order as well as activities essential to safeguard the country’s interests, have been extended to the media and the print and digital press, as well as food safety, energy storage and quantum technologies. A careful analysis of the new Article R. 151-3 of the French Monetary and Financial Code will have to be carried out by the investor and the target before the transaction is carried out.

Better regulated timeline for the examination of the authorization request

Until now, the administrative authorities had a period of two months to rule on the authorization request, even though there could be uncertainty as to whether the investment in question actually fell within the scope of the control procedure, sometimes due to the difficulty of determining whether national interests could be involved. In cases of doubt, prudence required that the matter would be referred to the Ministry of the Economy, and the two-month timeline could sometimes disadvantage those involved in the investment transaction.

With an initial response from the Ministry of the Economy within 30 days, the procedure now guarantees a less stringent legal framework for investors. At the end of this first period, the Minister of the Economy will indicate either that the transaction does not fall within the scope of the authorization procedure, that it falls within the scope of the procedure and is authorized without any condition, or that it falls within the scope of the procedure and that further examination is necessary. The Minister will then have an additional 45 day-period^[6], at the end of which, in the absence of a reply, the authorization request will be deemed rejected.

Appropriate sanctions in the event of failure to obtain authorization or to comply with the conditions imposed under the authorization

In order to respond effectively to the various potential infringements, the so-called “PACTE Law” introduced various measures allowing for a better graduation of penalties, depending on the infringement in question and its seriousness. Until now, a transaction carried out without prior authorization was automatically null and void, without any possibility to regularize the situation afterwards.

As such, as part of his/her powers to enforce law and order, the Minister of the Economy may:

- If the foreign investment has been carried out without prior authorization: order the investor to file a request for authorization for regularization purposes, to modify the investment or to restore the previous situation at its own expense;
- If the foreign investment has been carried out with prior authorization but in breach of the conditions imposed under such authorization: withdraw the authorization that has been issued, require compliance with the initial conditions or set new conditions (such as restoring the previous situation or divesting the business).

The “PACTE Law” also granted to the Minister of the Economy the power to impose financial penalties of up to twice the amount of the irregular investment, 10% of the turnover of the target company, 1 million euros for a natural person or 5 million euros for a legal entity. The main purpose of this penalty mechanism is to deter investments made for a symbolic price of one euro.

[1] Business France is the national agency supporting the international development of the French economy, responsible for fostering export growth by French businesses, as well as promoting and facilitating international investment in France

[2] Law No. 2019-486 of May 22, 2019 on business growth and transformation

[3] Article R. 151-1 (I) of the French Financial and Monetary Code

[4] Article R. 151-1 (II et III) of the French Financial and Monetary Code on control and chain of control

[5] Article R. 151-2 of the French Financial and Monetary Code

[6] Article R. 151-6 of the French Financial and Monetary Code

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