

April 22, 2020

Heightened Scrutiny of Foreign Investments in France

New Set of Foreign Investment Measures Adopted in France and Applicable as from April 1, 2020

SUMMARY

A new set of foreign investment screening measures became applicable in France as from April 1, 2020. The new screening measures follow from reforms to the French foreign investment regime which were adopted in May 2019 pursuant to new French legislation entitled *Plan d'Action pour la Croissance et la Transformation des Entreprises*, also known as “Loi Pacte” (the “Pacte Law”),¹ and related regulations adopted on December 31, 2019 (the “Pacte Decree”).² Both the Pacte Law and Decree followed from the adoption in March 2019 of the EU Regulation establishing a framework for the screening of foreign direct investments into the Union (the “FDI Screening Regulation”).³ The new screening measures in France significantly strengthen the French State’s control over in-bound foreign investment, include a review process inspired by the U.S. CFIUS regime, and have already begun to impact certain acquisition transactions involving French technology targets.

BACKGROUND, SCOPE OF THE REFORM AND IMPACT OF THE COVID-19 OUTBREAK

As in other jurisdictions, including the U.S., in recent years there has been an accelerated policy shift in the EU towards heightened scrutiny of foreign investments in relation to strategic assets. In France, the level of scrutiny for foreign investments had been increased even prior to the COVID-19 outbreak, as a result of the successive adoption of the Pacte Law and related Pacte Decree in 2019.

Foreign Investment Framework in the EU

In the EU, Member States have the power to block certain foreign investments, provided they create a risk to security or public order. The recently adopted FDI Screening Regulation provides for a framework for the screening of foreign direct investments into the Union, which may be adopted at national levels at the option of each Member State.

To date, 14 Member States have adopted foreign investment screening mechanisms, including France, Germany, Italy, Spain and the Netherlands.⁴ Conversely, 13 Member States currently have no such mechanism, including Belgium and Luxembourg.⁵

The European Commission's powers, introduced in 2019 by the FDI Screening Regulation and taking effect as of October 11, 2020, are limited to issuing non-binding opinions, and monitoring and coordinating information exchanges across the various national regimes.

Foreign Investment Framework in France

In France, financial relations with foreign countries are in principle unrestricted, subject to certain safeguards intended to protect French national interests. Prior authorization of the Minister for Economic Affairs is required, however, for all foreign investments, as defined by the French *Code monétaire et financier*,⁶ in businesses which are (i) considered as part of the exercise of public authority or (ii) pertaining to one of the following strategic sectors: activities likely to jeopardize public order, public safety or national defense interests; or research, production or trading in connection with arms, munitions or explosive substances.⁷

Article R. 151-3 of the French *Code monétaire et financier* sets out the list of the strategic sectors covered by the foreign investment control procedure, including specific activities (e.g., businesses in relation to cryptology resources or dual-use items and technologies) and others insofar as they concern infrastructures, goods or services that are vital to guaranteeing certain domains (e.g., integrity, security and continuity of the water and energy supply or the protection of public health).⁸

Where applicable, this foreign investment control regime means that a transaction cannot close until after the issuance of a prior approval by the Minister for Economic Affairs, which may be subject to certain conditions/commitments deemed necessary for the preservation of the national interests (i.e., "proportionality principle").⁹ If the investor fails to comply with its commitments, the Minister for Economic Affairs may exercise remedial powers (e.g., withdrawal of initial authorization, injunction to comply with the commitments, implementation of precautionary measures, etc.), including the imposition of financial penalties.¹⁰

Failing such prior authorization, the investor may be sanctioned by criminal¹¹ and civil¹² fines, and the related investment agreement may be deemed null and void.¹³ In addition, the Minister for Economic Affairs may take provisional measures against the unlawful foreign investment (e.g., suspension of the voting rights

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or dividend distributions with respect to the shares held by the investor, or designation of an *ad hoc* administrator for the French target company or restrictions on the disposal of its assets).¹⁴

In spite of this screening mechanism, foreign investment flows in France have been rising over the last few years and, in particular, since the election of President Emmanuel Macron, with 1,298 and 1,323 foreign investment projects implemented in France in 2017 and 2018, respectively (compared to 962 and 1,117 in 2015 and 2016, respectively).¹⁵

Increased Scrutiny of Foreign Investments in France: the Pacte Decree

The most recent set of foreign investment screening measures adopted in France (pursuant to the Pacte Decree), which are applicable as from April 1, 2020,¹⁶ significantly extends the Government's control over foreign investments. In particular:

- The list of the strategic sectors subject to the screening regime – which is now the same irrespective of the country of origin of the investor (EU or non-EU) – has been extended to include (i) the production, processing or distribution of certain agricultural products, in particular when these contribute to certain national food-security objectives, (ii) the publishing, printing or distribution of press publications of political and general information, and (iii) research and development in energy storage or quantum technologies (see endnote no. 17 for the complete list of strategic sectors);¹⁷
- The control of the Minister for Economic Affairs is now triggered when a non-EU/EFTA investor acquires (directly or indirectly, alone or in concert) 25% of the voting rights in a French entity operating in one of the listed strategic sectors, instead of being triggered by the acquisition of 33.33% of the share capital or voting rights under the former regime;¹⁸
- The concept of “control”/“chain of control” used for the purpose of identifying whether an investor is “controlled” by a foreign person and, therefore, is subject to the screening regime, has been extended to cover “significant influence.” If it is not possible to define “control” within the meaning of Article L. 233-3 of the French *Code de commerce*,¹⁹ the Minister for Economic Affairs may rely on the provisions of Article L. 430-1, III of the French *Code de commerce*²⁰ – traditionally used in the context of merger control – that refer to the “significant influence” on the business of an undertaking, resulting from rights, contracts or other means;²¹ and
- It has now been made clear that the control of the Minister for Economic Affairs is triggered when an investment is made by a foreign investor in a French target, even if such foreign investor is ultimately controlled by a French entity (through the “chain of control”).²²

Inspired by the CFIUS foreign investment screening regime in the U.S. as well as merger control processes, the new regime also provides for a two-stage review process, with a first 30-business-day period, followed by a second 45-business-day period if further examination is deemed necessary by the Minister for Economic Affairs (replacing the one-step two-month screening period under the former regime).²³ The stated objective is that the majority of transactions will be cleared swiftly during the first stage of the control process.

Similarly inspired by the U.S. CFIUS regime, the new regime also reformed the possibility for target companies and foreign investors to file a request for an opinion with the Minister for Economic Affairs. Under the former regime, the target company and the foreign investor could file a request for an opinion as

to whether the proposed investment should go through the screening regime only after the execution of a binding agreement. The new regime allows them to file a request for an opinion at an earlier stage of their negotiations, subject to the presentation of any document evidencing an investment project, for the purpose of determining whether the business of the target falls within the scope of the screening regime.²⁴

Impact of the COVID-19 Crisis on the Control of Foreign Investments

In view of the continuing impact of the COVID-19 outbreak on financial markets and issuers' business activities, financial position and economic performance in Europe, on March 25, 2020 the European Commission issued a guidance paper to the 27 EU Member States regarding investments by non-E.U. entities in strategic industries (the "*Guidelines*").²⁵

The Guidelines encourage Member States to prevent a sell-off of Europe's strategic assets, including protecting certain companies having capital market valuations well below their "true value". While they do not introduce any new powers for the Member States (including France) or for the Commission, they are likely to have an immediate practical impact, insofar as they urge Member States to use existing foreign investment screening mechanisms or any other tools they may have to ensure the "continued critical capacity of EU industry" in and beyond the healthcare sector.

On another level, France has postponed the time periods for the review of ongoing foreign investments during the COVID-19 crisis – *i.e.*, from March 12, 2020 (which is the official date of the COVID-related "lockdown" in France) to one (1) month after the expiration of the official lockdown period (which is currently scheduled for May 11, 2020).²⁶

Teledyne Technologies Incorporated, a U.S.-listed entity, is the first reported foreign investor for whom a proposed investment has been put on hold by the French Government. In a Form 8-K filing with the U.S. Securities and Exchange Commission dated April 3, 2020,²⁷ Teledyne indicated that it has been "*verbally notified*" by the French Minister for Economic Affairs of a negative opinion with respect to its proposed acquisition of Photonis International SAS, a French provider of advanced photon and electron multipliers, which are the enabling technology for night vision in defense applications.

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ENDNOTES

- 1 See Law No. 2019-486 of May 22, 2019,
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000038496102&categorieLien=id>.
- 2 See Decree No. 2019-1590 of December 31, 2019,
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039727443&categorieLien=id> and related Order (*Arrêté*) of December 31, 2019,
<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039727569&categorieLien=id>.
- 3 See Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0452>.
- 4 See List of screening mechanisms notified by Member States as at April 15, 2020,
https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf.

The 14 EU Member States having foreign investment screening mechanisms in place are: Austria, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, The Netherlands, Poland, Portugal, Romania and Spain.
- 5 Full list is: Belgium, Bulgaria, Croatia, Cyprus, Czechia, Estonia, Greece, Ireland, Luxembourg, Malta, Slovakia, Slovenia and Sweden.
- 6 See French *Code monétaire et financier*, Art. R. 151-1 – foreign investments mean, with respect to an entity governed by French law, (i) the acquisition of its control within the meaning of Art. L. 233-3 of the French *Code de commerce*, (ii) the acquisition of all or part a business activity or (iii) crossing, directly or indirectly, whether alone or in concert, the threshold of 25% of its voting rights (noting that the latter (iii) is applicable only to non-EU/EFTA investors).
- 7 See French *Code monétaire et financier*, Art. L. 151-3, I.
- 8 See French *Code monétaire et financier*, Art. R. 151-3, as reproduced in endnote no. 17.
- 9 See French *Code monétaire et financier*, Art. L. 151-3, II and R. 151-8.
- 10 See French *Code monétaire et financier*, Art. L. 151-3-1, II.
- 11 See French *Code monétaire et financier*, Art. L. 165-1 and French *Code des douanes*, Art. 459.
- 12 See French *Code monétaire et financier*, Art. L. 151-3-2 – the Minister for Economic Affairs may, after giving the investor a minimum of 15 days to present its observations on the charges brought against it, order the payment a financial penalty not exceeding the greater of the following amounts: (i) twice the amount of the unlawful investment, (ii) 10% of the annual turnover (excluding taxes) of the target company and (iii) €5 million for legal entities and €1 million for individuals.
- 13 See French *Code monétaire et financier*, Art. L. 151-4.
- 14 See French *Code monétaire et financier*, Art. L. 151-3-1, I.
- 15 See Business France 2018 Annual Report,
https://www.businessfrance.fr/Media/Production/PROCOM/Articles%20-%20News/Bilan_int_INVEST_UK-BD.pdf.
- 16 See Decree No. 2019-1590 and Order of the Minister for Economic Affairs of December 31, 2019 on Foreign Investments in France.
- 17 See French *Code monétaire et financier*, Art. R. 151-3, noting that Decree No. 2018-1057 of November 29, 2018 already extended the scope of strategic sectors to cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, dual-use technologies, and big-data storage,

ENDNOTES (CONTINUED)

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037674063&categorieLien=id>.

As of today, the list of strategic sectors subject to the screening regime (as set forth in said Art. R. 151-3) is the following:

I. - Activities, relating to the exercise of public authority, that are likely to jeopardize national defense interests or the maintenance of public order and public safety:

a) Activities, including those mentioned in Article L. 2332-1 of the French Defense Code, relating to weapons, munitions, explosive powders and substances intended for military use or relating to war material and assimilated materials covered by Parts III and V of Book III of the second part of the French Defense Code;

b) Activities relating to dual-use items and technologies listed in Annex IV to Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items;

c) Activities carried on by entities entrusted with the protection of national defense secrecy;

d) Activities carried on in the information systems security sector, including as a subcontractor, for the benefit of an operator referred to in Articles L. 1332-1 or L. 1332-2 of the French Defense Code;

e) Activities carried on by entities that have entered into a contract, either directly or as a subcontractor, on behalf of the Ministry of Defense for the provision of a good or service falling within the scope of an activity referred to in subsections a), b), c) or f);

f) Activities relating to cryptology resources and services mentioned in paragraphs III and IV of Article 30 and paragraph I of Article 31 of Act No. 2004-575 of 21 June 2004 on confidence in the digital economy;

g) Activities relating to technical equipment or devices capable of intercepting communications or designed for the remote detection of conversations or data capture, as defined in Article 226-3 of the French Criminal Code;

h) Activities relating to the provision of services by approved assessment centers under the conditions laid down in Decree No. 2002-535 of 18 April 2002 on the assessment and certification of the security offered by information technology products and systems;

i) Gambling activities, with the exception of casinos;

j) Activities relating to measures designed to deal with the illicit use of pathogens or toxic substances or to prevent the health consequences of such use;

k) Activities relating to the processing, transmission or storage of data, the interference with or disclosure of which is liable to jeopardize the exercise of the activities referred to in subsections a) to j) of section I or II.

II. - Activities, related to the exercise of public authority, that are likely to jeopardize national defense interests or the maintenance of public order and public safety, insofar as they concern infrastructure, goods or services that are vital to guaranteeing:

a) The integrity, security and continuity of the energy supply;

b) The integrity, security and continuity of the water supply;

c) The integrity, security and continuity of the operation of transport networks and services;

d) The integrity, security and continuity of the space operations referred to in Article 1(c) of Act No. 2008-518 of 3 June 2008 on space operations;

e) The integrity, security and continuity of the operation of electronic communications networks and services;

ENDNOTES (CONTINUED)

f) The fulfilment of the missions of the national police, the national gendarmerie and the civil security services, as well as the fulfilment of the public safety assignments of customs and those of approved private security companies;

g) The integrity, security and continuity of operation of an establishment, facility or work of vital importance within the meaning of Articles L. 1332-1 and L. 1332-2 of the French Defense Code;

h) The protection of public health;

i) The production, processing and distribution of the agricultural products listed in Annex I to the Treaty on the Functioning of the European Union, where these contribute to the objectives of national food safety referred to in paragraphs 1, 17 and 19 of section I of Article L. 1 of the French Rural and Maritime Fisheries Code;

j) The publishing, printing and distribution of political and general information press publications, within the meaning of Article 4 of Act No. 47-585 of 2 April 1947 on the status of newspaper and periodical publication bundling and distribution companies, and online press services for political and general information within the meaning of Article 1 of Act No. 86-897 of 1 August 1986 on the reform of legal arrangements for the press.

III. - Activities, related to the exercise of public authority, that are likely to jeopardize national defense interests, public order and public safety, when they are intended to be carried out in connection with one of the activities referred to in section I or II:

a) Research and development activities relating to critical technologies, the list of which is defined by an order from the Minister for Economic Affairs;

b) Research and development activities relating to the dual-use goods and technologies listed in Annex I to the abovementioned Council Regulation of 5 May 2009."

The "critical technologies" referred to in Art. R. 151-3, III, a) are "cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, quantum technologies, and energy storage," as defined by Art. 6 of the Order (*Arrêté*) of December 31, 2019, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039727569&categorieLien=id>.

18 See French *Code monétaire et financier*, Art. R. 151-2.

19 See French *Code de commerce*, Art. L. 233-3, which provides the following:

"I. - For the purposes of sections 2 and 4 of this Chapter, any individual or legal entity is deemed to control another:

1° When it directly or indirectly holds a fraction of capital shares that gives it a majority of voting rights at that company's general meetings;

2° When it alone holds a majority of the voting rights in that company by virtue of a an agreement entered into with other partners, members or shareholders and is not contrary to the company's interests;

3° When it effectively determines the decisions taken at that company's general meetings through the voting rights it holds;

4° When it is a partner in or a shareholder of that company and has the power to appoint or dismiss the majority of members of that company's administrative, management or supervisory bodies.

II. - It is presumed to exercise such control when it directly or indirectly holds a fraction of the voting rights above 40% and no other partner, member or shareholder directly or indirectly holds a fraction larger than its own.

III. - For the same sections of this chapter to apply, two or more companies acting in concert are deemed to jointly control another company when they effectively determine the decisions taken at its general meetings."

ENDNOTES (CONTINUED)

- ²⁰ See French *Code de commerce*, Art. L. 430-1, III, which provides the following:
- “For the purposes of applying this Article, control will arise from rights, contracts or any other means which, either separately or in combination and having regard to the consideration of fact and law involved, confer the possibility of exercising a decisive influence on an undertaking, in particular by:
- ownership or the right to use all or part of the assets of an undertaking;
 - rights or contracts that confer decisive influence on the composition, voting or decisions of the bodies of an undertaking.”
- ²¹ See French *Code monétaire et financier*, Art. R. 151-1.
- ²² *Ibid.*
- ²³ See French *Code monétaire et financier*, Art. R. 151-6.
- ²⁴ See French *Code monétaire et financier*, Art. R. 151-4 and Order of the Minister for Economic Affairs of December 31, 2019 on Foreign Investments in France, Art. 2.
- ²⁵ See Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe’s strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), dated March 25, 2020, https://trade.ec.europa.eu/doclib/docs/2020/march/tradoc_158676.pdf.
- ²⁶ See Order (*Ordonnance*) No. 2020-306 of March 25, 2020, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041755644>.
- ²⁷ See Teledyne Technologies Incorporated, Form 8-K dated April 3, 2020, <https://secfilings.nasdaq.com/filingFrameset.asp?FilingID=14057675&RcvdDate=4/3/2020&CoName=TELEDYNE%20TECHNOLOGIES%20INC&FormType=8-K&View=html>.

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