

July 27, 2020

France Temporarily Increases Level of Scrutiny for Foreign Investments in French Strategic Listed Entities

Until December 31, 2020, Non-EU/EEA Investors Crossing the 10% Threshold in Voting Rights of French Strategic Listed Entities Will Be Covered by the French Screening Regime

SUMMARY

On July 22, 2020, the French government issued a Decree¹ and related Order² (*Arrêté*) that temporarily strengthen foreign investment control procedures in France. Pursuant to the Decree and Order, from August 7 to December 31, 2020 non-EU/EEA investors crossing directly or indirectly, alone or in concert, the 10% threshold in voting rights of French entities listed on a French or EU regulated market and operating in a strategic sector will be subject to the foreign investment screening regime; currently, the threshold for such screening is 25%.³ This new set of measures follows the announcement by the French Minister for Economic Affairs on April 29, 2020 that foreign investment screening measures would be heightened in France in the context of the current health and economic crisis and the addition, as from April 30, 2020, of the biotech industry to the list of strategic sectors.⁴ It also comes just a few months after a new set of foreign investment screening measures entered into force in France on April 1, 2020,⁵ and is in line with recent reforms in Germany, Italy and Spain.

SCOPE OF THE REFORM

France has decided to strengthen its foreign investment control regime to prevent foreign investors from taking advantage of certain depressed share prices as a result of the COVID-19 pandemic. This is in line with the recommendations of the European Commission set forth in its guidance paper of March 25, 2020,

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encouraging Member States to prevent the sell-off of Europe's strategic assets, including protecting certain companies having capital market valuations below their "true value".⁶

As from April 30, 2020, the list of strategic sectors⁷ has been extended to include the biotechnology industry.⁸ This addition was aimed in particular at protecting companies that are currently researching and developing a vaccine against COVID-19.⁹

In addition, the French government has temporarily lowered the threshold triggering the control procedure for non-EU/EEA persons investing in French entities listed on a French or EU regulated market¹⁰ and operating in a strategic sector. From August 7 to December 31, 2020, non-EU/EEA investors crossing directly or indirectly, alone or in concert, the 10% threshold in voting rights of French listed entities will be subject to the foreign investment screening regime, down from the current 25% threshold.

Instead of filing a formal application, a foreign investor will have to send a notice (setting forth certain key information) to the French Minister for Economic Affairs ahead of its investment. The Minister may then ask the investor to file a formal application within ten working days from the notification.¹¹ If not, the authorization is deemed granted at the end of this ten-working-day period, subject to the investment being completed within six months from the date of the initial notice.

The notice from the foreign investor is required to include the following information:

- The total number of voting rights owned by the investor in the French entity before the contemplated investment and the total number, or an estimate thereof, of voting rights that the investor would own thereafter;
- The number of securities owned by the investor giving future access to the French entity's shares to be issued and the voting rights attached thereto;
- The French entity's shares already issued and the voting rights attached thereto that the investor may acquire by virtue of a financial arrangement or instrument; and
- The usual statement of intent required when a shareholder crosses 10% of the share capital or voting rights of a listed entity, including the investor's intentions towards the French entity over the next six months.¹²

Such notice must also specify the status and identity of the person(s) empowered to represent the investor or the French company subject of the investment. It must be written in French and sent to the Minister for Economic Affairs (*Direction générale du Trésor*) by email (iefautorisations@dgtresor.gouv.fr) or by mail (139 rue de Bercy, 75572 Paris Cedex 12).

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ENDNOTES

- 1 See Decree No. 2020-892 of July 22, 2020, https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=46626003600AEDC67933F143EBFB68AE.tplgfr38s_3?cidTexte=JORFTEXT000042138111&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000042137968#:~:text=un%20march%C3%A9%20r%C3%A9glement%C3%A9-.D%C3%A9cret%20n%C2%B0%202020%2D892%20du%2022%20juillet%202020%20relatif.n%C3%A9gociations%20sur%20un%20march%C3%A9%20r%C3%A9glement%C3%A9.
- 2 See Order (*Arrêté*) of July 22, 2020, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000042138252>.
- 3 Under the current regime, 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 of 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/EEA investors) – See French *Code monétaire et financier*, Art. R. 151-1.
- 4 See Les Echos, dated April 29, 2020, “Coronavirus: la France va renforcer le contrôle des investissements étrangers”, https://www.lesechos.fr/economie-france/budget-fiscalite/coronavirus-la-france-va-renforcer-le-controle-des-investissements-etrangers-1199081#utm_source=le%3Alec0f&utm_medium=click&utm_campaign=share-links_linkedin and Press release, *Direction générale du Trésor*, dated April 30, 2020, “Covid-19 – Adaptation du contrôle des investissements étrangers en France (IEF) pendant la crise sanitaire”, <https://www.tresor.economie.gouv.fr/Articles/2020/04/30/covid-19-adaptation-du-controle-des-investissements-etrangers-en-france-ief-pendant-la-crise-sanitaire>.
- 5 See S&C’s previous Client Memorandum, dated April 22, 2020, “Heightened Scrutiny of Foreign Investments in France”, <https://www.sullcrom.com/files/upload/SC-Publication-Heightened-Scrutiny-of-Foreign-Investments-in-France.pdf>.
- 6 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.
- 7 See French *Code monétaire et financier*, Art. R. 151-3. As of today, the list of strategic sectors subject to the screening regime 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;

ENDNOTES (CONTINUED)

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;

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.

ENDNOTES (CONTINUED)

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 above-mentioned 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, energy storage and biotechnology,” as defined by Art.6 of the Order (*Arrêté*) of December 31, 2019, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000039727569&categorieLien=id> (as supplemented by the Order (*Arrêté*) of April 27, 2020).

8 See Order (*Arrêté*) of April 27, 2020, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041835304&dateTexte=20200428>.

9 Note that the regulation in force already covers activities “essential to the protection of public health”. The addition of biotechnology companies in the list of strategic sectors provides greater scope for the French Minister for Economic Affairs to review transactions in this sector.

10 See Directive 2014/65/EU of 15 May 2014 on markets in financial instruments, Art. 4 (21) implemented by French *Code monétaire et financier*, Art. L. 421-1, I. A regulated market is “a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of [Directive 2014/65/EU]”.

11 See S&C’s previous Client Memorandum, dated April 22, 2020, “Heightened Scrutiny of Foreign Investments in France”, *op. cit.*

12 See French *Code monétaire et financier*, Art. L. 233-7, VII. This statement must include: (i) the means of financing the acquisition; (ii) whether the investor is acting alone or in concert; (iii) whether the investor intends to stop or continue the acquisition and whether it intends to acquire control of the company; (iv) the strategy it envisages *vis-à-vis* the issuer and the transactions to implement it; (v) its intentions regarding the outcome of financial agreements or instruments it is a party to, under which it may acquire shares already issued and the voting rights attached thereto, or creating an economic effect similar to the ownership of such shares already issued and the voting rights attached thereto; (vi) any temporary transfer agreement relating to the shares and the voting rights; and (vii) whether it intends to request its appointment or that of one or more persons as director (*administrateur*), member of the management board (*directoire*) or supervisory board (*conseil de surveillance*).

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