WINSTON & STRAWN LLP

CLIENT ALERT

Foreign Direct Investments in France

JULY 23, 2020

In the context of the Covid-19 health crisis, which weakened and still threatens to weaken a large number of companies, many States decided to strengthen their foreign direct investment screening regulation. This strengthened control of foreign investments is part of a general trend that started before the pandemic.

In Europe, the reinforcement of foreign direct investment screening procedures led to the adoption on March 19, 2019 of Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the European Union (the "**FDI Regulation**"), which entered into force on April 10, 2019 and will become applicable as of October 11, 2020. The FDI Regulation invites the Member States of the European Union ("**EU**") to protect the strategic business sectors and their critical infrastructure by equipping themselves with a foreign investment screening procedure, for those Member States that currently do not have a screening mechanism, as well as, for all Member States, by collaborating and sharing information about foreign investments. The European Commission may issue opinions in order to recommend specific actions to a Member State, in particular when an investment is likely to impact projects or programs of EU interest.

In France, the screening procedure applicable to foreign direct investments ("**FDI**"), which submits some foreign investments to prior authorization of the Minister in charge of Economy and Finance (the "**MEF**"), was subject to several reforms aiming at improving the means to protect the strategic interests of the country while maintaining France's attractiveness for foreign investors. The last important reform of this procedure results from the PACTE Act of May 22, 2019[1], completed by a decree and an order dated December 31, 2019[2], the provisions of which apply to applications for authorization and declarations submitted as from April 1, 2020.

This recent reform appeared to be insufficient in the context of the health crisis and the Minister in charge of Economy and Finance announced on April 29, 2020 a new update of the French FDI screening procedure, as recommended by the European Commission in its guidance published on March 25, 2020[3]. These new provisions, coming from an order dated April 27, 2020 and from a decree and an order dated July 22, 2020[4], include both durable and temporary measures aiming at protecting the most sensitive French companies in this context.

EXTENDED SCOPE OF FDI SCREENING

Protected business sectors:

- Activities falling within the scope of protected sectors are now grouped together in the same article. The list of these activities is identical whether the investment is made by a third-country investor or an EU investor.
- The FDI screening concerns the activities falling in particular within the scope of the energy, water, telecommunications, transport, health, aerospace and civil protection sectors, as well as the activities relating to the hosting of some sensitive data. The research and development activities relating to critical technologies are also concerned by the screening procedure (cybersecurity, artificial intelligence, robotics, additive manufacturing, semi-conductors).
- Since 2020, the activities in the written and digital press sector and the food safety sector are covered by the screening procedure. The list of critical technologies was also extended in order to include energy storage and quantum technologies, as well as biotechnologies as from April 27, 2020.
- More generally, the European Commission indicated that particular attention shall be paid to investments by third parties to the EU that are likely to impact projects of EU interest, including investments made in companies that were granted a financing under the European "Horizon 2020" research and innovation program and that participate in European projects linked to the health sector, in particular those responding to the Covid-19 outbreak[5]. In accordance with the provisions of the FDI Regulation, the MEF shall consider any opinions that may be sent by the European Commission in relation to a foreign investment and, should it not follow said opinion, shall provide explanations to the Commission.

Definition of foreign investor:

- The definition of foreign investor is now centralized in one article and includes:
  - Any natural person who is a foreign citizen;
  - Any natural person who is a French citizen but who is not a French tax resident;
  - Any foreign entity; and
  - Any French entity that is controlled by any person or entity mentioned above.
- The notion of chain of control is introduced to describe the group formed by an investor and the persons or entities controlling it. All persons and entities belonging to the same chain of control are considered as investors within the meaning of the French FDI regulation.
- The control of an investor is assessed in relation to corporate law[6] (direct or indirect, *de jure* or *de facto*, exclusive or joint control). However, if no control is established on this basis, the control of the investor will be assessed in relation to merger control law[7], which covers a broader meaning by selecting the criterion of the exercise of a decisive influence.

Controlled transactions:

- The investment transactions targeted by the French FDI regulation are (i) the acquisition of control[8] of a French entity and (ii) the acquisition of all or part of a line of business of a French entity.
- For "non-European" investors[9], the direct or indirect crossing, alone or jointly, of a shareholding threshold in a French entity is also subject to FDI screening.
  - Since April 1, 2020, the 25% voting rights threshold replaced the initial threshold of 33.33% of the share capital or voting rights.
  - From August 7, 2020[10] to December 31, 2020, the 25% threshold is temporarily lowered to 10% of the voting rights for investments in French companies listed on a regulated market (see *Temporary measures*).

SIMPLIFIED FDI AUTHORIZATION PROCEDURE

Application for opinion:

The French company or the foreign investor (with the prior approval of the French company) may, as under the previous regulation, submit beforehand to the MEF an application for opinion in order to know whether all or part of the targeted activity is subject to the French FDI regulation. The MEF has a 2-month period to issue such opinion. When the opinion is requested by the investor, the French company receives a copy of the opinion issued by the MEF.

Two-phase prior authorization procedure:

- Contrary to the application for opinion, the application for authorization of a FDI may only be submitted by the investor or, if the investment concerns several investors belonging to the same chain of control, by one of them on behalf of all members of said chain.
- The authorization procedure, which could previously last up to two months, now comprises two phases:
  - **A 1st quick phase of 30 business days for all applications for authorization:** at the end of this period, the MEF indicates to the investor whether the investment (i) does not fall within the scope of the authorization procedure, (ii) is authorized without condition, or (iii) is subject to further review.
  - **A 2nd complementary phase of 45 business days for the most complex files:** at the end of this period, the MEF (i) authorizes the investment, under conditions if need be, or (ii) rejects it.
  - Failure to respond by the MEF at the end of the 1st or 2nd phase is now deemed a rejection of the application for authorization, and is no longer deemed an authorization as under the previous regulation.
- A declaration shall be filed by the investor within two months following the completion of an investment authorized by the MEF.

Exemption:

- The exemption from prior authorization is maintained by the new system in the two following cases: (i) intragroup investments and (ii) when the investor crosses the threshold of 25% of the voting rights of an entity of which it previously acquired control under an authorization issued by the MEF.
- A third exemption is created to cover the situation where the investor acquires the control of an entity in which it previously crossed the 25% voting rights threshold under an authorization issued by the MEF. This exemption is however subject to the sending of a prior notification to the MEF and to the absence of objection by the MEF at the end of a 30-day period following said notification.
- No exemption applies if the effect of the investment is to prevent an investor from complying with the conditions of which it is responsible under an authorization previously issued by the MEF, or to transfer abroad all or part of a line of business subject to FDI screening.

Requested information and documents:

The list of information and documents that must be provided along with the application for authorization is extended by the new French regulation, both for the investor and for the entity that is subject to the investment. The application shall in particular indicate if the targeted entity participates in projects of EU interest or benefitted from a financial support from the EU. Regarding the investor, any ownership relationship or financial support during the last five years from a State outside the EU shall be mentioned. Please note that the application shall indicate, when the investor or one of the investors is an investment fund, the identity of the fund manager and of the persons controlling said manager, and not the identity of all investors of the fund [11].

TEMPORARY MEASURES: SHAREHOLDING THRESHOLD LOWERED TO 10% OF THE VOTING RIGHTS

In response to the health crisis, French government decided to temporarily lower from 25% to 10% of the voting rights, from August 7, 2020 to December 31, 2020, the shareholding threshold triggering the prior authorization procedure[12].

- These measures apply only to “non-European” investors and to investments made in listed companies whose shares are admitted to trading on a regulated market (Euronext). French companies whose shares are listed on a multilateral trading facility (Euronext Growth) are not subject to these temporary measures.
- The screening of said investments is carried out according to a fast-track procedure: the investor shall notify the transaction to the MEF in order to be exempted from prior authorization. Said notice to the MEF shall include a limited number of information. The MEF shall have a period of 10 business days to reject the exemption from prior authorization. Failure to respond by the MEF at the end of the 10-business day period is deemed an authorization.
- In the event that the MEF rejects the exemption within the aforementioned 10-business day period, the foreign investor may apply for authorization under the standard authorization procedure so that the investment be subject to an in-depth review by the MEF. Such in-depth review may lead the MEF not to authorize a foreign investor to hold more than 10% of the voting rights of the French entity.

REINFORCEMENT OF SANCTION MEASURES

The PACTE Act reinforced the powers of the MEF in order to better prevent and sanction breaches from investors. Thus, in the event of an investment made without prior authorization, the MEF may now suspend the voting rights attached to the shares which acquisition or subscription should have been subject to prior authorization, or prohibit or limit the distribution of dividends attached to said shares. It may also appoint an agent in charge of ensuring the protection of national interests within the targeted company.

The financial sanctions are also increased and may now come, at the most, to the highest of the following amounts: twice the amount of the irregular investment, 10% of the annual turnover (excluding taxes) of the targeted company, 5 million euros for an investor that is a legal entity, and 1 million euros for an investor that is a natural person.

[1] Act no. 2019-486 of May 22, 2019 on business growth and transformation, so-called “PACTE Act”.

[2] Decree no. 2019-1590 of December 31, 2019 on foreign investments in France; Order of December 31, 2019 on foreign investments in France.

[3] Communication 2020/C 99 I/01 of March 25, 2020 from the European Commission: *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)*.

[4] Order of April 27, 2020 on foreign investments in France; Decree no. 2020-892 of July 22, 2020 and order of July 22, 2020 on the temporary lowering of the screening threshold for foreign investments in French companies whose shares are admitted to trading on a regulated market.

[5] Communication 2020/C 99 I/01 of March 25, 2020 from the European Commission.

[6] On the basis of Article L. 233-3 of the French Commercial Code.

[7] On the basis of Article L. 430-1 III of the French Commercial Code.

[8] Within the meaning of Article L. 233-3 of the French Commercial Code.

[9] Any investor other than (i) a natural person who is a citizen of a Member State of the EU or of a State that is a party to the agreement on the European Economic Area and that entered into an administrative assistance agreement with France as part of its fight against fraud and tax evasion, and who is a resident in one of these States, or (ii) an entity, which members of the chain of control, within the meaning of Article R. 151-1 II of the French Monetary and Financial Code, fall within the scope of the law of one of these States, or are citizens of these States and are residents in these States.

[10] The provisions of decree no. 2020-892 do not apply to investments completed within 10 business days from the date the decree has been published.

[11] Analysis confirmed by the *Conseil d'Etat* (French Council of State) in a decision of April 3, 2020 (no. 422580) made under the previous regulation.

[12] Decree no. 2020-892 of July 22, 2020 and order of July 22, 2020.

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