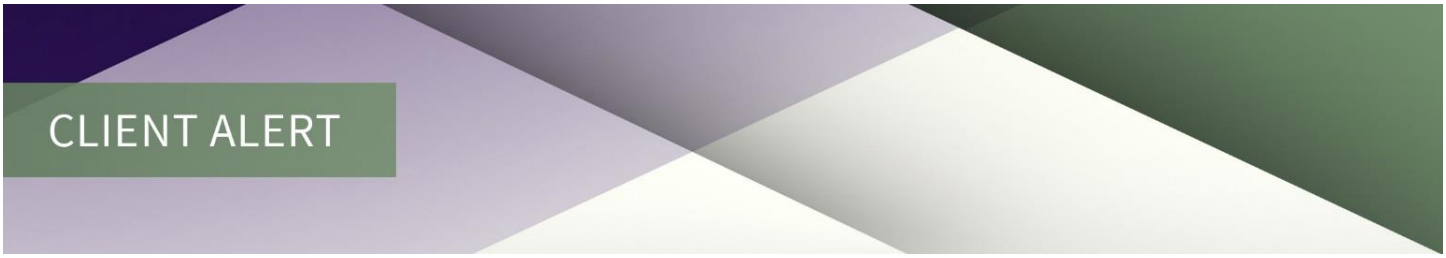

Reform of French Regulation of Foreign Investments in Sensitive Sectors

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In order to strengthen its control over foreign investment in sensitive sectors and protect French national interests, the French government has recently modified the *réglementation relative au contrôle des investissements étrangers en France* [French regulation aimed at controlling and monitoring foreign investments in France] (the "**FFIR**").

These modifications clarify and revise the FFIR, and any foreign investor investing in a sensitive sector in France should carefully consider their implications.

The FFIR was introduced in 1966 and subsequently modified and expanded in 2005 and 2014. Under the FFIR, certain investments made by foreign investors, including the acquisition of equity interests in a French company operating in a sensitive sector, may require the prior authorization of the French Ministry of Economy ("**MINEFI**").

The more recent modifications to the FFIR that are the subject of this note began with the signing into law of Law No. 2019-486, dated May 22, 2019, relating to the growth and transformation of businesses (the "**PACTE Law**"), which notably modified the sanctions and powers of MINEFI under the FFIR.

Adding to the new legal framework erected by the PACTE Law, the French administration enacted two measures published in the French Official Gazette dated January 1, 2020:

- the *décret n° 2019-1950 du 31 décembre 2019 relatif aux investissements étrangers en France* [Decree No. 2019-1950 dated December 31, 2019 relating to foreign investments in France] (the "**Decree**").

- the *arrêté du 31 décembre 2019 relatif aux investissements étrangers en France* [Order dated December 31, 2019 relating to foreign investments in France] (the "**Order**"), which mainly amends the content required in applications for prior authorization.

This new framework (the PACTE Law, the Decree and the Order, collectively, the "**Reform**") anticipates the implementation of European Regulation No. 2019/452 dated March 19, 2019, which establishes a framework for the screening of foreign direct investments into the European Union and which will come into force in October 2020.

Note that while the PACTE Law has already entered into force, only authorization requests filed after April 1, 2020 will be subject to the Decree and the Order.

APPLICABLE CRITERIA

The FFIR provides three cumulative criteria to determining whether a contemplated operation falls within its scope. These criteria relate to the origin of the investor, the type of transaction and the type of activity of the target company. The Reform has slightly modified these criteria:

First, the Decree simplifies the definition of a foreign investor for purposes of the criterion relating to the origin of the investor.

Prior to the effectiveness of the Decree, foreign investors were broken down into two categories (EU/EEA investors and non EU/EEA), while the Decree provides a single definition of a foreign investor.

Pursuant to the Decree, (i) any natural person who is a foreign national, (ii) any natural person of French nationality who is not a resident for tax purposes in France, (iii) any entity governed by foreign law and (iv) any French entity controlled by one or several of the persons/entities referred to in (i), (ii) or (iii) is a foreign investor under the FFIR.

Second, regarding the criterion relating to the type of transaction, the Decree applies to three kinds of operations: (i) the acquisition of control, under Article L. 233-3 of the French commercial code, of a legal entity governed by French law, (ii) the acquisition of all or part of an economic branch of a legal entity governed by French law and (iii) operations that result in ownership of voting rights in a legal entity governed by French law, whether direct or indirect, alone or in cooperation, surpassing a threshold of 25%. (Note that the Decree does not apply to operations described in (iii) for EU/EEA investors.)

It must be stressed that the Decree lowered the shareholding threshold that brings a transaction into the scope of the FFIR from 33.33% of the share capital or voting rights of a French company to 25% of the voting rights of a legal entity governed by French law.

Note that if a foreign investor contemplates a takeover of a group of companies located in various countries, the indirect acquisition of a French subsidiary that operates in a sensitive sector may be subject to the FFIR. As a result, completion of the takeover could depend on receipt of prior authorization from MINEFI.

Third, the criterion relating to the type of activity of the target company is met if the activity of the target company (*i.e.*, the activity of the relevant legal entity which is governed by French law) is, even occasionally, part of the exercise of public authority or pertains to public order, public safety or national defense interests or is connected to research relating to or the production or marketing of weapons, munitions or explosives.

The Decree specifies the list of sensitive sectors and activities subject to the FFIR, which continues to grow over the course of modifications to the FFIR. This list notably includes companies with activity in sectors where national defense is at stake (e.g., the sector of dual-use items and technologies) or with activity in the energy, transport, water, public health and telecommunications sectors. Note that the list remains unclear and leaves room for interpretation as to whether the activity of a legal entity governed by French law falls within the scope of the FFIR.

Moreover, the Reform expands the list of sensitive sectors to (i) print and online press services for general political information, (ii) food security (production, processing or distribution of certain food products), (iii) energy storage and (iv) quantum technologies.

Finally, while the current FFIR provides two different lists of sensitive sectors depending on whether the foreign investor is an EU/EEA investor or not, a single list of sensitive sectors will apply with the Reform. This has the consequence of expanding the list of strategic sectors for EU/EEA investors.

PROCESS FOR OBTAINING PRIOR AUTHORIZATION FROM MINEFI

The Decree and the Order amend both the process and the applicable time limits for obtaining prior authorization from MINEFI.

Under the current FFIR, MINEFI is to issue a decision within two months after receiving a complete application for authorization. In practice, though, it generally takes three to four months to obtain MINEFI's authorization.

Pursuant to the Decree, a two-stage process will apply:

- First, within 30 working days following receipt of an application for authorization, MINEFI will either (i) issue a decision stating that (A) the transaction does not fall within the scope of the FFIR and is therefore not subject to authorization, (B) the transaction falls within the scope of the FFIR and is authorized without any conditions or (C) the transaction falls within the scope of the FFIR but further examination is necessary to determine whether the

preservation of national interests can be ensured by attaching conditions to the authorization or (ii) fail to issue such a decision, in which case the application is deemed to be refused.

- Second, within 45 working days following receipt by the investor of the decision in (i)(C) above, MINEFI will either (i) issue a decision refusing or granting the necessary authorization, with or without conditions, or (ii) fail to issue such a decision, in which case the application is deemed to be refused.

We anticipate that the Reform will not change the average time needed in practice to obtain MINEFI authorization (i.e., three to four months from the filing of a complete application).

Note also that the Order has further detailed the content of the authorization request. In addition to the mandatory information already required under the current FFIR, new documents and evidence are required with respect to, among others, the investor, the chain of control of the operation or the French entity that is the target of the investment. An example of the new information that is being required is a list of French and foreign competitors of the investor and the target entity, as well as a description of the investor's financial ties to or support received from foreign governments or public bodies.

We anticipate that, from a practical standpoint, the preparation of a complete application may take longer than it used to and may require more cooperation among parties to a contemplated transaction than before the Reform.

UNDERTAKINGS AGREED BY THE INVESTOR

As a condition for granting its authorization, MINEFI may require that the investor agree to certain undertakings meant to protect national interests, notably in order to ensure the continuity of the target company's business activities and assets.

The Decree rewrites the current FFIR's requirements regarding such undertakings which are designed to ensure (i) the continuity and security of sensitive activities on the national territory, (ii) the preservation of knowledge and technical know-how of the target entity, (iii) the adaptation of the entity's internal organization and governance procedures, as well as the terms for exercising the rights acquired in the entity. MINEFI may also impose reporting and monitoring conditions to and by French authorities.

Note that MINEFI may condition its consent on the partial divestment of strategic assets. Moreover, MINEFI may require an investor to open up the share capital of the target entity to a third party (the latter being a new possibility provided by the Reform).

In fact, such undertakings are discussed on a case-by-case basis with MINEFI. Since they must be proportional to the objective of ensuring the protection of national interests, they must not patently exceed what is necessary to achieve such

objective and will depend on how sensitive and important the target's activities are in the context of the relevant strategic sector.

Finally, the Decree specifies how an investor's undertakings may be amended at the request of the investor or, in certain cases, at the initiative of MINEFI (notably in case of a change in the ownership structure of the target company).

REJECTION OF AN APPLICATION FOR PRIOR AUTHORIZATION

The Decree expands the list of grounds on which MINEFI may reject by a reasoned decision an application for authorization, notably including the case where an investor has committed (or where there is a strong presumption that the investor is likely to commit) certain serious offenses (drug trafficking, human trafficking, terrorism, etc.).

Interestingly, the Decree provides that MINEFI can now take into consideration links between an investor and a foreign State when deciding whether to grant or refuse its authorization.

MAIN RISKS ASSOCIATED WITH THE FFIR

The PACTE Law reinforces both the risk of sanction for foreign investors who are not compliant with FFIR and the powers of MINEFI, notably to ensure compliance with various undertakings made by such foreign investors.

First, should a transaction subject to the FFIR be completed without MINEFI's prior authorization, the main risks that a foreign investor faces are the transaction being declared null and void and the investor being prosecuted. MINEFI can also:

- order the investor to file an application for MINEFI's authorization;
- order the investor to return to the status quo ante at its own expense; or
- order the investor to modify its investment.

Second, in case of a breach of an undertaking imposed by MINEFI, MINEFI can:

- order the investor to comply with such undertaking;
- order the investor to remedy its breach; or
- withdraw MINEFI's authorization.

MINEFI can attach a penalty to the above-mentioned orders. Moreover, if it considers that national interests are at risk, MINEFI can adopt certain other measures, such as suspension of voting rights, appointment of a third person within the target company entitled to oppose any decision likely to affect the protection of national interests, etc.

MINEFI may also impose a heavy fine on the investor (up to €5 million for legal entities), which must be proportionate to the breach in question.

Finally, an investor faces potential criminal sanctions, including imprisonment for up to five years.

Note that under the current FFIR, we are not aware of any investor that has been prosecuted or sanctioned in connection with this regulation, including for failing to comply with any undertaking. We anticipate that after the Reform MINEFI will continue to favor dialogue with investors rather than using its sanction powers.

CONCLUSION

The Reform represents a reinforcement of the French authorities' control over foreign investments in France. If any transaction you are contemplating might fall under the scope of the FFIR, tread carefully and consider giving us a call.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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