

Foreign Investments in France: New Regime, Effective April 1, 2020

The new regime extends the list of strategic sectors and amends the application process timeline, among other new features.

Key Points:

- The list of strategic sectors has been extended to include (i) activities pertaining to agricultural products that contribute to national food safety objectives, (ii) print and online press services for political and general information, (iii) quantum technologies, and (iv) energy storage.
- Review by the Minister of the Economy and Finance (MINEFI) is now triggered when a non-EU or non-EEA investor (directly or indirectly) acquires 25% of the voting rights in a French target with a sensitive activity instead of being triggered by the (direct) acquisition of 33.33% of the share capital or voting rights under the former regime.
- The timeline for the application process has been amended — there is now a two-step review with a first 30-business day period, which could potentially be followed by a second 45-business-day period at the MINEFI's option.
- The MINEFI's right to modify or impose new conditions of previously granted authorizations has been formalized.

As per a decree and ministerial order entering into force on April 1, 2020, the French clearance regime for foreign investments has been recrafted both in form and in substance (the April 2020 Reform). The April 2020 Reform follows the PACTE Act, which implemented substantial changes to the legislation relating to foreign investments on May 22, 2019.

The changes to the French regime take place in a global context in which several other countries have recently modified their regulations with respect to foreign investments, generally to tighten control over such investments.

This *Client Alert* answers four key questions about the general features of the foreign investment clearance process in France as amended by the April 2020 Reform and the PACTE Act, and summarizes the COVID-19 impacts on FDI in France to date.

1. How are foreign investments regulated in France?

As a general principle, foreign investments in France can be freely carried out. However, certain investments by foreign investors in sectors considered to be strategic are subject to the prior authorization of the MINEFI.

The review of foreign investments is conducted by a bureau of the Treasury Department of the MINEFI. When reviewing a foreign investment, the MINEFI generally consults with other ministries, government agencies, or regulators competent for the sector(s) concerned by the foreign investment under review, such as the Ministry of Defense, the Ministry of Transportation, or the Ministry of Health.

The prior authorization of the MINEFI generally occurs between the signing and the closing of a transaction and is a condition precedent to the closing of a transaction. When clearance has been granted by the MINEFI, a post-closing notification must be filed with the MINEFI within two months following the closing of the transaction.

In addition to the process with the MINEFI, foreign investments in France for an amount that exceeds €15 million must be notified to the Bank of France for statistical purposes.

Investors should also scrutinize the agreements entered into by the target, since certain targets that are not subject to the foreign investment regime may have entered into agreements that contain restrictions regarding the investment of foreign investors in the target. This is particularly relevant for targets that provide services or products to public-related entities.

2. Which investments are subject to clearance?

The prior authorization regime applies to investments in strategic sectors from foreign investors which result in any one of the following:

- The acquisition of control of an entity governed by French law
- The acquisition of all or part of a business (*branche d'activité*) of an entity governed by French law
- The acquisition by non-EU/non-EEA investors, directly or indirectly, alone or in concert, of 25% or more of the voting rights of an entity governed by French law

The April 2020 Reform has brought the following key changes: (i) the threshold is set at 25% for acquisitions by non-EU/non-EEA investors, instead of 33.33%, (ii) only voting rights are taken into account, as opposed to voting rights or shareholding, and (iii) indirect acquisitions are captured.

The strategic sectors concerned include defense, energy, transportation, public health, spatial industry, cybersecurity and artificial intelligence R&D, telecommunications, and — following the April 2020 Reform — print and online press services for political and general information, food safety, energy storage, and quantum technologies.

Moreover, all persons belonging to a “chain of control” — which term is defined as a group formed by the entity acquiring the target and the persons or entities that control such entity — shall themselves be deemed investors under the regulation. For private equity funds, the management company is generally considered as controlling the fund and forming part of the chain of control where relevant.

3. What is the foreign investment clearance process?

Starting April 1, 2020, there will be a two-step review process for clearance of foreign investments:

- The MINEFI has an initial period of 30 business days from the receipt of a complete filing to notify the foreign investor (i) that the investment is outside the scope of review, (ii) that clearance is granted without conditions, or (iii) that it will need to further examine the investment to determine whether the preservation of French national interests may be guaranteed with an authorization subject to conditions.

If no response has been received by the foreign investor at the end of the 30-business-day period, clearance is deemed refused.

As was already the case before the April 2020 Reform, the MINEFI determines freely when it considers a filing to be complete.

- If the MINEFI states that further examination is necessary, another period of 45 business days will start to run from the date of the MINEFI's first response. If no response is received within this additional time period, clearance is deemed refused.

The MINEFI's decision may be challenged before the French administrative courts, which must allow the investor 15 days to present its observations, unless there is a degree of urgency or there are exceptional circumstances or imminent harm would be caused to public policy, public safety, or national defense.

The decisions of the MINEFI are not made public, but the MINEFI publishes aggregated statistics regarding the number of filings, the country of origin of the foreign investors, and the strategic sectors involved on its website.

4. What conditions can be attached to the investment?

The MINEFI may impose conditions on the foreign investor with the objective of ensuring that the transaction contemplated will not adversely affect public policy (*ordre public*), public safety, or national security.

The general purpose of these conditions, which must comply with the principle of proportionality, is to (i) ensure the continuity and security of the strategic activities on the French territory and, in particular, ensure that these activities do not become subject to the legislation of a foreign state, which could hinder such continuity and security, (ii) safeguard the knowledge and know-how of the French target and prevent any unwanted appropriation, (iii) adapt the French target's internal organization and governance, and (iv) determine the principles governing the investor's and the target's reporting to the French administration.

To this end, the MINEFI may condition its authorization to the sale of part of the French target's share capital, or of all or part of its strategic business (*branche d'activité*) to an entity separate from the investor and approved by the MINEFI. When the investment authorization is subject to conditions, and in the event that the investment is carried out by several investors belonging to the same chain of control, the MINEFI designates which of these investors shall be responsible for compliance with such conditions.

The April 2020 Reform has formalized the procedure to revise existing conditions to a previously granted authorization, a question that was previously addressed in commitment letters only.

The foreign investor may request amendment to the conditions (i) in the event of a change in the economic and regulatory circumstances relating to the target's strategic business that were unpredictable at the time of the investment's completion, (ii) in the event of a change in the shareholding structure of the French target or in the chain of control, or (iii) pursuant to a condition set out in the authorization. The MINEFI has 45 business days to grant or refuse the requested amendment. Absent a response of the MINEFI after 45 business days, the request shall be deemed refused.

Furthermore, the MINEFI may itself initiate an amendment of the conditions attached to an authorization in events (ii) and (iii) above. New conditions may only be imposed by the MINEFI if the foreign investor has obtained control of the French target and to the extent such conditions comply with the principle of proportionality. The MINEFI informs the foreign investor of its intention to amend the conditions and must grant the foreign investor 45 business days in which to formulate its observations. Upon expiry of such time period, the MINEFI shall notify the foreign investor of the amended conditions as well as their effective date.

COVID-19 impacts on FDI in France to date:

- On March 25, the European Commission issued Guidelines to the EU Member States to ensure a strong EU-wide approach to foreign investment screening in light of the COVID-19 crisis and related economic vulnerability. It asked Member States to carefully scrutinize takeovers of European companies active in strategic industries by non-EU investors, and referred to "healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments." The Commission expects Member States to make full use of their foreign investment review capacities and/or introduce new legislation "to avoid that the current crisis leads to a loss of critical assets and technology."
- As of March 31, no changes have been made to the applicable FDI screening rules in response to COVID-19 in France. The new regime adopted in December 2019 will enter into force on April 1, 2020, as initially planned. However, the MINEFI announced that he would be ready to use any means available to protect French companies, including through recapitalizations, subscriptions to their share capital, or even nationalization.
- Pursuant to the French COVID-19 emergency regulation adopted on March 25, all time limits applicable to the review of any new foreign investment application made after March 12 or of any pending application as of March 12 are suspended until the expiration of a one-month period after the end of the current state of health emergency. In practice, the relevant teams of the MINEFI remain generally operational, subject to the availability of the members of other ministries that may be consulted as part of the review process.

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