

# LOI PACTE: Ambitious Reform to Improve Business in France

May 30, 2019

On May 22, 2019, France enacted a new legislation called *Plan d'Action pour la Croissance et la Transformation des Entreprises*,<sup>1</sup> also known as the *Loi Pacte* (the “Pacte Law”), aimed at encouraging entrepreneurship and innovation, facilitating the growth of businesses and creating jobs.

**Debevoise  
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The Pacte Law encompasses a very broad range of measures covering many aspects of company life—relevant for both small and large businesses. It covers, *inter alia*, measures relating to the compensation of officers and directors, the appointment and scope of services of statutory auditors, employee savings plans and creation of companies. The Pacte Law also authorized the privatization of important French companies (*inter alios*: *Aéroports de Paris*, which manages the Paris Airports, and *Française des Jeux*, the national French lottery company). Legal authors have mainly discussed the unusual introduction of a new principle to the French *Code civil* that a company shall be managed not only in the corporate interest but also taking into account the social and environmental concerns relating to its business. Although this introduction has been highly controversial during the Parliamentary debates,<sup>2</sup> it is not expected to have major consequences on the validity of corporate decisions but may impact the assertion by French courts of the liability of the officers or directors of certain French companies.

For this paper, we selected three main provisions of the Pacte Law which directly relate to M&A transactions, private equity investments in France and the corporate organization of French portfolio companies:

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<sup>1</sup> Which means in English “Action Plan for Business Growth and Transformation.” The *Conseil Constitutionnel* (Constitutional council, which is France’s highest constitutional authority) mainly validated this law, although it partially censored some of its articles for procedural reasons. The provisions of the law described in the present update are not affected by such censorship.

<sup>2</sup> And even before, as the introduction of such a principle in the French *Code civil* was proposed initially in a report by Jean-Dominique Senart (the former chairman of Michelin and current chairman of Renault) and Nicole Notat (former general secretary of the CFDT trade union).

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- the Pacte Law facilitates the implementation of squeeze-outs by reducing the minimum threshold from 95% to 90%;
  - the trend of reinforcing control of foreign investments by public authorities in strategic industrial sectors is growing, not only in France but more generally, all across Europe, and the Pacte Law increases the power of the French authorities to more effectively sanction or restrict such unauthorized investments; and
  - the Pacte Law promotes more effective involvement of employees in the governance of French companies.

**Reduction of the squeeze-out threshold.** Prior to the Pacte Law, following<sup>3</sup> any tender offer for all the securities issued by the company, if the remaining minority shareholders owned 5% or less of the share capital or voting rights (i.e., the initiator of the tender offer needed to own more than 95% of the share capital and voting rights), the initiator of such tender offer was allowed to initiate a squeeze-out procedure requiring all the minority shareholders to sell him all their remaining securities at a fair price.

Such conditions were considered to be too restrictive and therefore to confine the number of initial public offerings or tender offers on the French market (according to the French government, such restrictions on squeeze-out procedures restrain the willingness to list subsidiaries or portfolio companies).

Directive 2004/25/EC of April 21, 2004 on takeover bids (the “Takeover Directive”) permits member states to organize such a squeeze-out procedure at a lower threshold (i.e., 90% of the share capital and voting rights). France decided to implement this option, and consequently the Pacte Law reduced the required threshold to the same level as in many other European countries. French law now requires that the remaining minority shareholders own (after said tender offer) 10% or less of the share capital and voting rights.

Such reduction of the threshold doesn’t, however, solve the issue of the fair price paid to minority investors during the squeeze-out procedure. It is underlined by some investors that the price should take into account the premium attached to the benefits from the delisting of the company (or to the possibility to implement a tax consolidation of such delisted company), which is different from the simple control premium.<sup>4</sup> The *Autorité*

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<sup>3</sup> Note: the squeeze-out procedure can only be implemented after the successful implementation of a tender offer.

<sup>4</sup> Similarly, the *Haut Comité Juridique de la Place Financière de Paris* (Legal High Committee for Financial Markets of Paris (HCJP)), proposed that the reduction of the threshold from 95% to 90% of the share capital and voting rights would only apply to

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*des marchés financiers* (the French Financial Markets Authority or “AMF”) therefore announced on March 2019 the creation of a working group to consider options for changing the regulations and practices relating to squeeze-outs and independent appraisals. The working group is expected to provide its recommendation by the end of this semester.

**Changes in the regulation of foreign investments in France.** The Pacte Law amends the current legislation of foreign investments in France, providing more tools to French authorities in order to more effectively sanction or preclude certain investments.

Prior authorization from the French Ministry of Economy (the “Ministry”) is required for certain foreign investments (even by EU investors) in activities that (i) involve the exercise of public authority or (ii) may harm public order, public safety or national defense or are related to research, production or trading of weapons, munitions or explosive powders or substances. The French *Code monétaire et financier* sets forth an exhaustive list of sectors that would, pursuant to this provision, require prior authorization when invested in by foreign investors. A decree dated November 29, 2018<sup>5</sup> has extended this list and added, for instance, the artificial intelligence and the robotics sectors.

Prior to the Pacte Law, the Ministry was only able to subject the implementation of the investment to certain conditions. Any contractual arrangement that provided for an investment without the due prior authorization would have been deemed null and void. In the event of a breach of any authorization or if an investment was carried out without authorization, the Ministry might issue injunctions in order to return to *status quo*. Failure to comply with such injunctions would give rise to an administrative fine of up to twice the amount of the noncomplying investment.

The Pacte Law aims at reinforcing the protection of public interests when foreign investments are made in activities involving the above-mentioned sensible sectors. The injunction powers of the Ministry are reinforced as new injunctions have been created: an injunction to the investor to make an authorization request to the Ministry and an injunction to modify the investment.

The Ministry may also implement interim sanctions if it assesses that the protection of the national interests is or may be put in jeopardy. Those interim sanctions are: (i) the suspension of the voting rights of the investor in the shareholders’ meetings of the

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squeeze-out procedures applied following a tender offer from an offeror who did not yet control the company (i.e., an offeror who owned at least less than 50% of the share capital and voting rights should convince sufficient shareholders of the fairness of the proposed price to gather enough shares and satisfy such 90% threshold).

<sup>5</sup> Decree No. 2018-1057 of November 29, 2018.

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related French company, (ii) the preclusion or limitation of the distribution of dividends to such investor, (iii) the suspension of any disposal of assets, and (iv) the appointment, within the French company, of a representative in charge of protecting the national interests.

Finally, in the case of certain breaches of the rules on foreign investments (investment made without prior authorization, fraudulent obtaining of an authorization, breach of the conditions of an authorization and breach of an injunction), administrative fines may be decided by the Ministry. The amount of the fine must be proportionate to the gravity of the offense and may equal the greater of:

- twice the amount of the noncomplying investment;
- 10% of the annual turnover (excluding taxes) of the company subject to the investment; and
- €5 million for legal persons (€1 million for natural persons).

**Changes in the composition of French boards.** The Pacte Law intends to include employees more in the governance of the companies.

French *sociétés anonymes* and *sociétés en commandite par actions*, which have during at least two consecutive fiscal years employed:

- at least 1,000 employees in the company and its direct and indirect subsidiaries having their registered office located in France; or
- at least 5,000 employees in the company and its direct or indirect subsidiaries worldwide

are required to appoint directors representing the employees (such directors are employees of the company or its subsidiaries). The directors representing the employees have the same rights and duties as any other director (i.e., they have more than a supervisory role). Prior to the Pacte Law the number of such directors representing the employees was increased to two directors when the board comprised more than 12 members. This threshold has been reduced to eight members.

In addition, the Pacte Law now provides that if, at the end of a fiscal year, the employees of relevant companies hold more than 3% of their share capital, they shall be represented by one or more additional directors. This requirement was previously only applicable to listed companies.

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Please do not hesitate to contact us with any questions.

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