

Regulation of Foreign Investments in France

March 19, 2020

On April 1, 2020, new changes to the regulation of foreign investments in France will enter into force¹.

The principal changes, set forth in the new decree² (the “Decree”), are:

(i) extending the list of sectors subject to prior authorization, (ii) reducing the threshold of minority investments subject to such prior authorization and (iii) enhancing the authority of the French Ministry of Economy (the “Ministry”) in its review of authorization requests.

Extension of the List of Sectors Subject to Prior Authorization. Currently, prior authorization from the Ministry is required for certain foreign investments (even for EU investors) in activities that (i) involve the exercise of public authority, (ii) may harm public order, public safety or national defense or (iii) are related to research, production or trading of weapons, munitions or explosive powders or substances. There is a list of specific sectors that fall within these activities. This list has been expanded recently to include research and development in artificial intelligence or robotics.

As of April 1, 2020, the following sectors will also require prior authorization: (i) the production, processing or distribution of certain agricultural products, in particular when these contribute to certain national food-security objectives; (ii) the publishing, printing or distribution of press publications of political and general information; and (iii) research and development in energy storage or quantum technology.

¹ This is particularly notable given that the *Plan d’Action pour la Croissance et la Transformation des Entreprises* already changed this regulation on May 22, 2019. See <https://www.debevoise.com/insights/publications/2019/05/loi-pacte-ambitious-reform-to-improve-business>.

² *Décret n° 2019-1590* of December 31, 2019 and *arrêté* of December 31, 2019.

Reduction of the Threshold Triggering the Control of the Ministry. Investments subject to the Ministry's prior authorization are:

- the acquisition of the control (within the meaning of article L. 233-3³ of the French *Code de commerce*) of a French entity;
- the acquisition in whole or in part of a business line of a French entity; and
- the crossing, directly or indirectly, alone or in concert with third parties, of the threshold of 25%⁴ of the voting rights in a French entity.

The first two cases have not been modified. Regarding the third, the previous threshold was 33.33% of the share capital or the voting rights. Consequently, the Decree has not only decreased such threshold from 33.33% to 25%, it has also limited the threshold to the holding of the voting rights only, with no reference to the holding of the share capital.

The first two cases still apply to all foreign investors (including EU and EEA investors). Previously, the third case (providing for a 33.33% minority investment in a French entity) was not applicable to EU investors. As of April 1, 2020, this exception will be narrower in scope and will apply only when the ultimate investor and all entities within the chain of control (between such ultimate investor and the French entity) are from (and domiciled in) an EU member state or a state of the EEA having concluded with France a treaty on administrative assistance in tax matters and against tax fraud.

³ A company is deemed to control another company (i) when it directly or indirectly holds a fraction of the capital granting it the majority of the voting rights at a general meeting; (ii) when it alone holds a majority of the rights in that company by virtue of an agreement entered into with other shareholders that is not contrary to the company's interests; (iii) when it effectively determines the decisions of the general meetings through its voting rights; (iv) when it is a shareholder of that company and has the power to appoint or dismiss the majority of the members of that company's administrative, management or supervisory bodies. It is also deemed to exercise such control when it directly or indirectly holds more than 40% of the voting rights and no other shareholder directly or indirectly holds a fraction larger than its own. Two or more persons acting in concert are deemed to jointly control another company when they effectively determine the decisions taken at its general meetings.

⁴ Other European countries have already decreased their internal threshold; for instance, in Germany, the threshold is set at (i) 10% of the share capital or voting rights for investments in the defense area made by foreigners and for investments in crucial infrastructures made by non-EU investors and (ii) 25% for any other investments made by non-EU investors.

Time Period for the Ministry to Assess a Request. The time allocated to the Ministry to assess whether or not an investment requires authorization and whether or not to grant such authorization is being reduced from two months to 30 business days (*i.e.*, approximately six weeks).

However, two other major modifications mitigate such a reduction:

- If there is no response from the Ministry within 30 business days, the request will be deemed to be rejected (currently, it is deemed granted).
- In addition, the Ministry can decide within this 30-business-day period that an investment does require an authorization but that an additional review is necessary to assess whether the national interest could be preserved by subjecting the authorization to certain conditions.⁵ In such a case, an additional 45-business-day period will apply to define and assess such conditions. However, the Ministry may still refuse to grant the authorization during this additional 45-business-day period if it considers that the national interest could not be preserved, even if some specific conditions are required. No response within the 45-business-day period will also be deemed a refusal to grant the authorization.

In the case of a refusal, the decision of the Ministry must be explained. The Decree also specifically mentions that the Ministry may take into account in its assessment whether the investor has relationships with a foreign government or a foreign public entity.⁶

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⁵ For instance, the Ministry can subject any subsequent sale or transfer of major assets of the French entity invested in to its prior authorization or request a prior notice in case of a change in the shareholding of the French entity invested in.

⁶ The request for authorization must specifically disclose the existence of any share capital link or significant financial support from a foreign state or from a non-EU public entity in the last five years.

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