Reinforcement of Foreign Direct Investment Control Rules - Continued But Is It the End?

Friday, March 6, 2020

Decree n°2019-1590 of 31 December 2019 relating to foreign investments in France

Order of December 31, 2019 relating to foreign investments in France

The French Government adapted once more the control procedure for foreign investments pursuant to a Decree (“Décret”) and an Order (“Arrêté”), both of 31 December 2019 and published in the Journal Officiel of 1 January 2020.

These texts bring substantial modifications to the existing regulations set out in the Code monétaire et Financier (“CMF”) and allow, in particular, for the completion of the reform of investment control carried out by the government within the framework of the PACTE[1] law.

The new procedure will apply to applications filed or declarations submitted as from 1 April 2020.

Overhaul of the Regulatory Section of the CMF

The structure of the regulatory section of the CMF on foreign investments has been
substantially overhauled. With a view to bring simplification and clarification, the current provisions which are part of the Chapter III of Title V of Book I are the subject of a renumbering within a new chapter of the same Code[2]. The rewriting of the articles allows, through greater clarity and the harmonization of certain concepts, a better understanding of the foreign investment control procedure in France.

**Extension of the Scope of Sensitive Activities**

As a result of the implementation of *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union*, the Decree extends the list of sectors of activity which are the subject of a control by the French authorities.

In accordance with European standards, the foreign investment projects relating to the sectors of activity set out below will soon be subject to a prior authorization procedure:

- The production, processing or distribution of agricultural products listed in Annex I to the Treaty on the Functioning of the European Union, when these products contribute to certain objectives related to food security[3];
- Editing, printing or distributing written press publications of political and general information[4], and online press services of political and general information[5];
- Research and development activities relating to critical technologies, such as quantum technologies and energy storage[6] when these activities and technologies are implemented in one of the sectors concerned by the control procedure.

**Harmonization of the List of Controlled Activities**

The list of activities covered by the control procedure has been harmonized, so that it will now be common to all the different categories of investors.

More specifically, the Decree removes the old distinction between foreign investments to be made by an entity from a Member State of the European Union, a third-party State or made by a French company controlled by a foreign entity, a foreign natural person or a French individual residing outside France. Indeed, prior thereto, the scope of controlled activities was varying depending on the nationality and/or domicile of the investor.

**Clarification of the Contours of the Concept of “French Law Controlled Entity”**

The Decree allows to reinforce and better adapt the French control procedure in the presence of several levels of foreign investors.

For example, for investments made by a French entity controlled by a French (but not
domiciled in France) or foreign natural person or by a foreign entity, when no control
could be carried out on the basis of Article L.233-3 of the French Commercial Code, it
must now be assessed under Article L.430-1 of the same code, i.e. taking into
account the rights, contracts or other means which confer, alone or jointly, and
having regard to matters of fact or the law, the possibility to exercise a decisive
influence on the company’s activity. One is therefore moving away from pure
mathematical formulae and percentages to get closer to the operational, or even
political, elements of the shareholding chain.

**Lowering the Controlled Shareholding Threshold**

The future Article R.151-2 of the CMF recourses to the existing typology of the
definition of investment transactions subject to prior authorization. Will always
constitute an investment within the meaning of the rules on foreign investment
control, the fact for a foreign investor to acquire in a French entity: (i) the control
within the meaning of Article L.233-3 of the French Commercial Code, (ii) all or part
of a branch of activity of such entity, or (iii) solely for investors from States outside
the European Union, a certain threshold of voting rights.

The critical shareholding threshold is now lowered to 25%, from 33% previously, it
being noted that to assess the crossing of the threshold, it will be irrelevant
whether the investor crossed it directly or indirectly or whether it acted alone or “in
concert”. In addition, only the holding of voting rights will now be taken into account
and no longer, as was the alternative, the shareholding.

The Decree also sets out that the triggering of the control due to the crossing of a
threshold remains reserved to investors from third-party States as it is neither
applicable to European investors nor to persons from the European Economic Area
(EEA), with respect to the latter provided that there is in place an assistance
agreement (fraud, tax evasion) with the relevant State, nor to a person controlled
(including indirectly) by a person from a European or EEA State or having the
nationality of such State, provided that he is also domiciled there. The text refers to
“all members of the chain of control”, a new concept which makes it possible to
catch multiple intermediaries (transparent or not). This chain is defined in the new
Article R.151-1 of the CMF as the set formed by an entity subject to French or foreign
law and the persons or entities that control it, each entity or person constituting an
investor under the terms of the regulations.

**Update of the List of Documents and Information to be Provided with the Filing**

A new list of documents and information to be provided together with the request for
authorization is set out in Article 1 of the Order.

New elements to be included in the application include, inter alia:

- mention of any significant shareholding link or financial support, from a State
  or a public body outside the European Union, over the last five years;

- mention of any involvement in projects or programs of interest to the European
Union[7], or any financial support with European Union funds;

- a list of French and foreign competitors of the investor and of the entity which is the target of the investment;

- motives for the transaction in relation to the overall strategy of the investor;

- the list of States in which the operation has been or will be notified as part of mergers and foreign investment controls legislation and the dates of the various notifications;

- the references of the prior authorization application(s) previously submitted by the investor, an entity of the group to which the investor belongs or the entity that is the subject of the investment.

In practice, this new list should not change the habits of economic actors, since the authorities already frequently request from the applicant, in addition to the information already provided in support of the application, the provision of most of the information mentioned above.

A New Adjustment of the Authorities’ Response Times

Based on the documents and information received, the Minister of Economy (Ministre de l’Economie) will now have to respond to a request for prior authorization within 30 working days from the date of receipt, as opposed to two months under current regulations. Contrary to the previous rule, if no response is received by the applicant within this time frame, the request will be deemed rejected.

If the Minister of Economy considers that further examination is necessary to determine whether or not the authorization should be subject to conditions in order to safeguard national interests, he will have an additional 45 days to do so. The Decree sets out the objectives pursued by the Minister of Economy when setting conditions. These may include, for example, adapting the entity’s internal organization and governance rules or setting the terms and conditions for information to be provided to the administrative authority in charge of the control.

Clarification of the Content of the Investment Declaration

The Order provides further information on the content of the declaration that will have to be made following the completion of an investment that would have been authorised.

It should state:

- the date on which the transaction was carried out;

- the allocation of the shareholding in the target at completion of the transaction as well as any change in the chain of control of this entity which has occurred since the date of issue of the authorization by the Minister of Economy;

- the amount actually paid for the investment if available, or the estimated and
updated amount of the investment, together with, as the case may be, the method used to provide such estimate.

All the measures described and the concepts used in these new texts illustrate increased sensitivity to the preservation of national interests and State security in the broadest sense. While the sophistication of the arrangements or group structures seems to have been taken into account, certain sectors still seem to be left out, such as land grabbing, especially through the takeover of farms which own such land. If the fashion for TV Series were to gain the Government, it would be possible to hope for new episodes on these major issues.

[1] Law n° 2019-486 of 22 May 2019 relating to the growth and transformation of businesses

[2] Chapter I of Title V of Book I of CMF

[3] More specifically, these are the objectives mentioned in 1°, 17° and 19° of I of Article L. 1 of the Code rural et de la pêche maritime (Rural and maritime fishery Code)

[4] Within the meaning of article 4 of law n° 47-585 of 2nd April 1947 on the status of grouping and distribution companies for newspapers and periodicals.


[6] The concept of “critical technologies” is detailed in Article 6 of the Order and covers, in addition to the activities mentioned above, cyber security, artificial intelligence, robotics, additive manufacturing and semiconductors which were already covered by current regulations.


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