

New French Regulations Tighten Control on Foreign Investments

A new decree expands the list of sectors in which foreign investors must seek prior French Minister of the Economy authorization

The French government issued a new decree 2014-479 dated 14 May, 2014 expanding the list of strategic sectors in which foreign investments in France require prior authorization of the French Minister of the Economy pursuant to article L.151-3 of the French Monetary and Financial Code.

This decree extends French state control already applicable to foreign investments in certain strategic areas (such as national defence, information technology). The additional sectors include energy, transport, water, public health and telecommunications.

The decree, which comes as a reaction of the French government following the recent bid made by General Electric on Alstom, entered into force immediately, on 16 May, 2014. As a result, completion of any foreign investments in France in one of these strategic sectors is now subject to the clearance of the French Minister of the Economy.

New sectors relate to energy, transport, water, public health and telecommunications

More specifically, the scope of the prior authorization of the French Minister of the Economy is extended to foreign investments in “activities relating to equipment, products or services, including those relating to the safety and the proper functioning of facilities and equipment, essential to guarantee the French national interests in terms of public policy, public security or national defence, as listed below :

- Integrity, security and continuity of the supply of electricity, gas, oil or other source of energy ;
- Integrity, security and continuity of the water supply in accordance with the standards laid down in the interest of public health ;
- Integrity, security and continuity of the operation of transportation networks and services;
- Integrity, security and continuity of the operation of electronic communication networks and services ;
- Integrity, security and continuity of the operation of an installation, facility or structure of vital importance within the meaning of articles L. 1332-1 and L. 1332-2 of the Defence Code ;
- Protection of the public health.”

Decree affects both EU and non-EU foreign investors

Investments in these additional strategic sectors will be subject to a prior authorization whether investors are “EU investors” (defined as individuals or legal entities, being EU residents or residents of a member

state of the European Economic Area having signed an administrative cooperation with France combating tax fraud and evasion), or “non-EU investors”.

French regulation defines foreign investments subject to the prior authorization procedure when made in strategic sectors as follows:

- A transaction as a result of which a non-EU investor (i) acquires the control (within the meaning of art. L. 233-3 of the commercial code) or (ii) acquires all or part of a business (*branche d'activité*) or, (iii) crosses the threshold of 33.33 percent of the share capital, of a company whose registered office is located in France.
- A transaction as a result of which an EU investor (i) acquires the control (within the meaning of art. L. 233-3 of the commercial code) or (ii) acquires all or part of a business of a company whose registered office is located in France.
- A transaction as a result of which a French investor under foreign control acquires all or part of a business of a company whose registered office is located in France.

Review, conditions for authorization and grounds for refusal

When a foreign investment is subject to the clearance of the French Minister of the Economy, the transaction cannot be completed prior to authorization. The foreign investor shall submit a formal application for prior authorization to the French Minister of the Economy who shall render a decision within two months of the date of receipt of a full and complete formal application for authorization. If the Minister of the Economy fails to render a decision, authorization shall be deemed to have been granted.

The formal review process and communications with the foreign investor are carried out by the departments of the Ministry of Economy in relation with other governmental agencies depending on the strategic sector(s) concerned.

As a condition of authorization, the French Minister of the Economy may impose certain conditions on the foreign investor to ensure that the contemplated transaction will not adversely affect public policy (*ordre public*), public safety or national security. Alternatively, the Minister of the Economy may refuse to authorize the contemplated transaction if adverse effects cannot be remedied.

French regulation defines the conditions which may be imposed by the French Minister of the Economy, being mostly those guarantying the target's continuity of business activities and assets (industrial capabilities; R&D capabilities and related know-how); the safety of the supply chain which the target must provide or of which it is a part; the target's performance under procurement contracts or contracts concerning public safety or national security, whether as a contractor or a sub-contractor. To take the additional strategic sectors into account, the decree has added that such conditions may also aim at guarantying “the integrity, security and continuity of the operations of an installation, facility or structure of vital importance within the meaning of articles L. 1332-1 and L. 1332-2 of the Defence Code or of any transportation and electronic communication networks and services, or the protection of the public health”.

Furthermore, the decree authorizes the French Minister of the Economy to require the sale of part of the target's activities falling within a strategic sector to a third party independent from the foreign investor. This was already provided for by existing French regulations, but only if the strategic business concerned was an ancillary activity of the target.

Risks and Sanctions for violations

Any transaction completed without the prior authorization from the French Minister of the Economy in violation of French regulations is null and void and any interested party could claim this nullity. Criminal sanctions (imprisonment up to five years and a fine of up to twice the amount of the transaction) are also applicable.

Furthermore, in the case of investments carried out without the requisite authorization and in the case of a foreign investor breaching the conditions imposed as part of an authorization previously granted, the French Minister of the Economy may issue an injunction requesting the foreign investor: (i) not to proceed with the transaction or (ii) to modify the concerned transaction or (iii) to take any required actions (at the investor's own costs) to re-establish the former situation within a maximum period of twelve months. If the investor does not comply with the injunction, the French Minister of the Economy may impose a fine of up to twice the amount of the transaction.

Recourse against the decision

Decisions of the French Minister of the Economy are subject to full review and foreign investors may (on serious grounds) contest the conditions imposed for authorization or the refusal to authorize before the administrative law courts.

Compliance with EU regulations

The European Commission (EC) may contest the decree as it constitutes a "restriction of capital movements between Member States and between Member States and other countries", which is prohibited by Article 56 of the EC Treaty. Exceptions are permitted where the constitutional or fundamental legislation of Member States (as defined by Article 58 of the EC Treaty) allows such measures as substantively and formally "justified by reasons relating to public interest or public safety", and are clearly defined in accordance with the principle of proportionality.

The decree covers a very broad scope of activities in the additional strategic sectors and it is questionable whether the decree may be justified by reasons relating to public interest or public safety. The press has relayed EU Market Regulation Commissioner Michel Barnier's concern regarding this decree. Michel Barnier has indicated that the EC will examine whether the decree complies with the EU rules described above.

The possible review of whether or not the decree complies with EU regulations will not suspend its entry into force. Foreign investors active in the newly restricted sectors should therefore immediately request prior authorization or delay pending transactions, especially given the seriousness of potential sanctions for non-compliance.

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