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Client Alert

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Foreign Investments in France Subject to the Prior Authorisation of the French Government

Since 2005, France has enacted various regulations in order to control foreign investments in French companies operating in specified sectors considered as being strategic or sensitive. As a result of these regulations, investing in these sectors in France may require the prior authorisation of the French Government when the investor is not French. Lately, Decree No. 2014-479 of 14 May 2014 (named "Montebourg Decree" after French former Minister Arnaud Montebourg) has extended the list of these sectors, giving rise to a broader list and a wider margin of discretion for the French Government.

All these regulations have been enacted against a backdrop of economic patriotism in France. Their purpose is to ensure the defence of national interests, particularly in businesses which are likely to damage public order, public safety or national defence interests. Nonetheless, they should not be perceived as a critical impediment to the successful completion of investments in France by foreign investors.

This brief note aims at giving foreign investors contemplating investments in France insight into these regulations and the appropriate way to request for and obtain the prior authorisation from the French Government.

1. Sectors

The French Monetary and Financial Code provides three lists of sectors:

- A first list for **foreign investors whose registered office is located in an EU member State or an EEA member State** having entered with France into an agreement on administrative assistance to combat tax fraud and evasion
- A second list, more extended, for **foreign investors whose registered office is not located in such a State**

- A third list for **both types of foreign investors** (whether their registered office is located in such a State or not)

(a) EU/EEA foreign investors

The sectors for which an **investment carried out by an EU/EEA foreign investor** requires the prior authorisation from the French Government are the following:

(i) Certain activities of private security (e.g., private security services provided to public or private operators of vital importance[1], or directly and specifically participating in security missions in airports and ports, or taking place in reserved or protected areas of national defence)

(ii) Research, development and production of[2]:

- pathogen agents, zoonoses, toxins, their genetic elements and their translation products (as mentioned in Annex I of the Council Regulation (EC) No. 428/2009 of 5 March 2009 on dual-use items and technologies)

- means to fight against agents prohibited by the Chemical Weapons Convention of 13 January 1993

(iii) Devices to intercept correspondence and remotely detect conversations (as allowed under the French Penal Code)[3]

(iv) Services within authorised evaluation centres in relation to evaluation and certification of the security provided by IT products and systems when provided to the State agencies and bodies[4]

(v) Production of goods or supply of services in the sector of IT security by a company having entered into an agreement with a private or public operator of an infrastructure of vital importance[5]

(vi) Dual-use items and technologies in favour of companies involved in the national defence

(b) Non-EU/EEA foreign investors

The sectors for which an **investment carried out by a non-EU/EEA foreign investor** may require a prior authorisation from the French Government are the following:

(i) Gambling

(ii) Private security (e.g., surveillance, guarding, CCTV, cash transportation)

(iii) Research, development and production of means to fight the illicit use, in terrorism, of pathogen or toxic agents

(iv) Devices to intercept correspondence and remotely detect conversations (as allowed under the French Penal Code)

(v) Services within authorised evaluation centres in relation to evaluation and certification of the security provided by IT products and systems

(vi) Production of products or supply of services of security in the sector of IT security by a company having entered into an agreement with a private or public operator of an infrastructure of vital importance

(vii) Dual-use items and technologies

(c) EU/EEA or non-EU/EEA foreign investors

The sectors for which an **investment carried out by a foreign investor, whether EU/EEA or non-EU/EEA**, may require a prior authorisation from the French Government are the following:

(i) Certain activities of cryptology

(ii) Companies recipient of national defence secrets

(iii) Weapons, ammunitions, explosives for military purposes or war equipment or assimilated equipment (as defined by the French Defence Code)

(iv) Companies having entered with the French Ministry of Defence into an agreement for studies or supply of equipment (directly or through subcontractors) to design a product or service pertaining to 7° to 10° above

(v) Activities dealing with devices, products and services, including relating to the security and proper functioning of infrastructures and equipment, essential to preserve the interests of the country in the field of public order, public safety or national defence

As far as (v) above is concerned, which has been added by Decree No. 2014-479 of 14 May 2014, those activities are the following:

(i) Integrity, security and safety of supply in electricity, gas, hydrocarbons and other energy resources sectors

(ii) Integrity, security and safety of supply in water sector

(iii) Integrity, security and safety of operation of transportation networks and services

(iv) Integrity, security and safety of operation of telecommunication networks and services

(v) Integrity, security and safety of operation of an infrastructure of vital importance[6]

(vi) Protection of public health

2. Investments

The French Monetary and Financial Code defines the investments which, when carried out in the sectors mentioned above, require prior authorisation from the French Government. The definition varies depending on whether the foreign investor is EU/EEA or non-EU/EEA.

(a) EU/EEA foreign investors

The investment which, when carried out in a sector listed in 1(a) above by an EU/EEA foreign investor, requires the prior authorisation from the French Government is defined as **the acquisition of all or part of a branch of activity (branche d'activité) of a company whose registered office is located in France**.

The investment which, when carried out in a sector listed in 1(c) above by an EU/EEA foreign investor, requires the prior authorisation from the French Government is defined as **the acquisition of either all or part of a branch of activity (*branche d'activité*) or the control[7] of a company whose registered office is located in France**.

(b) Non-EU/EEA foreign investors

The investment which, when carried out in a sector listed in 1(b) or 1(c) above by a non-EU/EEA foreign investor, requires the prior authorisation from the French Government is defined as:

(i) **The acquisition of all or part of a branch of activity (*branche d'activité*) of a company whose registered office is located in France**

(ii) **The acquisition of the control[8] of a company whose registered office is located in France**

(iii) **The crossing of the 33.33%-threshold of shareholding or voting rights of a company whose registered office is located in France**

3. Procedure

When the investment to be carried out by the foreign investor is subject to the prior authorisation from the French Government, the foreign investor must apply for this authorisation by letter to the French Minister of Economy.

In case of doubt, the French Minister of Economy may be asked to assess whether the contemplated transaction is subject to such prior authorisation and has a two month period to answer. The absence of answer does not mean that there is an exemption to request the prior authorisation.[9]

Upon receipt of a request for such prior authorisation, **the French Minister of Economy has a two month period to make a decision**

and can object to the project investment subject to justifying, or grant the prior authorisation with or without conditions. Conditions may be imposed in order to preserve the national interests (*e.g.*, in relation to the sustainability of the business, the industrial capabilities, the R&D capabilities, etc.). In the absence of a decision within this two month period, the prior authorisation is deemed to be granted.[10]

Any agreement whereby an investment subject to the prior authorisation from the French Government is carried out is null and void if this prior authorisation has not been obtained. When an investment is to be, or has been, carried out without such prior authorisation being obtained, the French Minister of Economy may also order the investor to stop or modify the transaction or to restore the previous situation, after a formal notice being sent to the investor requesting its observations within 15 days. Failing to comply with such order may expose the investor to a fine up to twice the amount of the investment in question.[11]

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The regulations set out above, and in particular the Montebourg Decree, should not be perceived as a means for the French Government to block any transaction contemplated by a foreign investor in France in the name of economic patriotism.[12]It should rather be considered as a tool for the French Government to make sure that in very specific cases, the national interests at stake are preserved, in permitting discussions and negotiations with the foreign investor concerned.

If the French Government was not to grant the prior authorisation for unjustified reasons or were to subject it to disputable commitments, the foreign investor could still challenge this decision and/or the Montebourg Decree itself before the French courts for violation of the French Constitution and/or European law. The scope of these regulations, and in particular the Montebourg Decree, remains indeed uncertain. Their language which could be considered as being too broad and the inclusion of sectors in which investments should maybe not require such a system of prior authorisation are questionable, particularly in the light of the principle of free movement of capital, the freedom of trade and industry and the principles of legal certainty and proportionality.[13]

It is therefore recommended analysing at an early stage whether the project investment falls within the scope of the above-mentioned regulations and, in case of doubt, approaching the right people at the Ministry of Economy.

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1. Public or private operators of vital importance operate infrastructures of vital importance. Infrastructures of vital importance and operators of vital importance are designated as such, on a case-by-case basis, by the French authorities. They relate, among others, to the sectors of water, transportation, communication, finance, industry, food, health or energy.
2. Only when the review of the investment is necessary for the purposes of fighting against terrorism.
3. Only when the review of the investment is necessary for the purposes of fighting against terrorism and criminality.
4. See footnote 3.
5. See footnote 1.
6. See footnote 5.
7. In the meaning of Article L. 233-3 of the French Commercial Code (e.g., the majority of the voting rights at the general meetings of shareholders of the company; the majority of such voting rights pursuant to an agreement with the other shareholders, the power to determine in fact, through the voting rights held, the decisions at the such meetings; the power to appoint or revoke the majority of the members of the corporate bodies of the company; a company is deemed to control another one when it directly or indirectly holds more than 40% of the voting rights and no other shareholder directly or indirectly holds more). The control may be either direct or indirect.
8. See footnote 7.
9. Monetary and Financial Code, Art. R. 153-7.
10. Monetary and Financial Code, Art. R. 153-8 to R. 153-10.
11. Monetary and Financial Code, Art. L. 151-3 and L. 151-4.
12. In 2000, the Court of Justice of the European Communities held that *"public policy and public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society […] those derogations [to the principle of free movement of capital] must not be misapplied so as, in fact, to serve purely economic ends"* (CJEC, 14 March 2000, C-54/99, *Association Eglise de Scientologie de Paris, Scientology International Reserves Trust*).
13. In 2006, the European Commission already raised concerns about the Villepin Decree of 2005 (which enacted the first list of sectors before the Montebourg Decree extended it in 2014) (reasoned opinion from the European Commission, 12 Oct. 2006, IP/06/1353). In 2000, the Court of Justice of the European Communities had held that European law precluded *"a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments […] with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required"* (CJEC, 14 March 2000, C-54/99, *Association Eglise de Scientologie de Paris, Scientology International Reserves Trust*). The same year, further to this judgment of the Court, the French Council of State held that the Decree of 1989 (which regulated foreign investments in France at that time) was non-compliant with European law (CE, 8 Dec. 2000, No. 181533).