



COMMENTARY  
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## Foreign Investment in France: Strengthening Control and Extending Strategic Sectors Under PACTE Law and New Decree

### IN SHORT

**The Situation:** In the context of strengthening the control of foreign investments, particularly at the European level, the French Parliament intends to deepen control procedures and broaden the scope of authorization of foreign investments in France ("Control of Foreign Investments in France" or "CFIFs").

**The Facts:** This reinforcement must occur during the vote on the PACTE law planned for the beginning of 2019 and under a decree dated November 29, 2018, entering into force on January 1, 2019.

**Looking Ahead:** The PACTE law will increase the administration's powers to control and to sanction foreign investments in France. Parliament will carry out its own monitoring of the French government's activity in this area.

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### Current Regulation of CFIFs

France's financial monetary code (Article L. 151-3 *et seq.*) identifies 12 business sectors for which foreign investments are subject to prior authorization from the French State. These sectors are all related to public order, public authority, public security (broadly defined, including by references to the energy, water, telecommunications, transportation, and health sectors) or the interests of national defense.

If a buyer acquires control of a French company (Article L. 233-3 of the French Commercial Code) or all or part of a French business, or crosses the threshold of holding 33.33 percent of the share capital or voting rights in a French company, such acquisition qualifies as an "investment" for the application of the regulation of CFIFs.

Under the regulation of CFIFs, the French Minister for the Economy can either authorize the operation—with or without conditions/commitments—or refuse it. In all cases, the decision must be made prior to the completion of the investment. The Treasury Department (a specific department within the Ministry for the Economy), in conjunction with other relevant sector-specific French administrations, manages the granting of authorizations and the monitoring of commitments.

### Upcoming Extension of Controlled Sectors

Beginning on January 1, 2019, the Decree dated November 29, 2018, expands the sectors covered by the authorization procedure to include new sectors: spatial operations, electronic and computer-specific systems required for public security purposes, data-hosting activities, as well as research and development activities in the following sectors: cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, dual-use goods, and technologies listed in Appendix I of European Regulation No 428/2009 dated May 5, 2009.

The scope of current controlled sectors, and in particular the following, has been expanded: (i) interception of correspondences, remote detection of conversations, and capture of electronic data; (ii) security of information systems; (iii) activities related to weapons, ammunitions, powders and explosive materials for military purposes, or war material and related items; and

(iv) integrity, safety, and continuity of information systems operated by sensitive entities. This list is not exhaustive, as the administration retains control of how the term "national interests" is defined, thereby governing which sectors are included.



The draft law provides for increased monetary penalties for completion of the investment without authorization, for obtaining authorization by fraud, or for breach of commitments or noncompliance with injunctions.



#### **Extension of Entities Entitled to File a Ruling**

Companies performing the sensitive activities subject to the CFIFs (the targets) are also entitled to file a ruling ("*rescrit*") before the French Minister for the Economy to confirm whether the investment they may receive is subject to prior authorization. By exception, this provision is of immediate effect.

#### **Extension of Reasons to Reject a Foreign Investment**

Beginning January 1, 2019, the French Minister for the Economy will be empowered to reject a foreign investment for additional reasons, including when it considers that the protection of sensitive data would not be guaranteed.

#### **Significant Reinforcement of the Administration's Powers over an Unauthorized Foreign Investment**

When a transaction has been carried out without prior authorization, the French Minister for the Economy may order the investor (possibly under penalty) to: (i) file an application for an ex-post facto authorization; (ii) restore the previous situation at its own expense; and (iii) modify the investment. The Minister will also have the power to take the following precautionary measures: (i) suspension of the voting rights attached to the securities whose holding should have been subject to prior authorization; (ii) prohibition or limitation of the distribution of dividends attached to these securities; (iii) suspension, restriction, or temporary prohibition of the free disposal of assets related to the activities subject to authorization; and (iv) appointment of a company representative who could oppose any decision of the corporate bodies likely to undermine national interests.

#### **Reinforcement of the Administration's Powers over Noncompliance with Conditions/Commitments Governing a Foreign Investment**

If the investor does not respect the conditions attached to its authorization, the French Minister for the Economy may: (i) enjoin the investor to comply with the conditions within a fixed period; (ii) require the investor to take action in response to the unmet conditions, including the reinstatement of the situation prior to noncompliance or the cessation of the relevant activities; and (iii) withdraw the authorization and require the investor to apply for a new authorization.

All decisions made by the administration in the context of these new provisions may be subject to full jurisdictional appeal ("*recours de plein contentieux*") before an administrative judge.

#### **Hardening of Sanctions**

The draft law provides for increased monetary penalties for completion of the investment without authorization, for obtaining authorization by fraud, or for breach of commitments or noncompliance with injunctions. These penalties are capped at the highest of: double the amount of the irregular investment; 10 percent of the annual turnover, excluding taxes of the company subject to the investment; €5 million for legal entities; and €1 million for natural persons. Obtaining authorization by fraud also constitutes an offense punishable by two years' imprisonment and a €30,000 fine.

#### **Parliament's Control over Foreign Investments**

Every year, the French Minister for the Economy will publish statistics on CFIFs. In addition, a parliamentary delegation for economic security composed of eight deputies and eight senators will be created to oversee the government's actions regarding the protection of economic interests in France, in particular with regard to CFIFs. This delegation will prepare a public report annually documenting the activity.

## FOUR KEY TAKEAWAYS

1. The PACTE law and the decree dated November 29, 2018, will provide continued strengthening of CFIFs. At the same time, EU Regulation establishing a framework at EU level for analyzing investments from third countries in strategic sectors and creating a cooperation mechanism among member states should be passed in the coming months.
2. This decree extends the list of the sectors covered by the CFIF authorization procedure, the reasons for rejecting a foreign investment, and, for targeted entities, the possibility to request a ruling ("*rescrit*") from the French Minister for the Economy (i.e., to confirm whether the investment they may receive is subject to prior authorization).
3. The administration's authority to control foreign investments will be increased, including through injunctions, precautionary measures (in particular temporary prohibition of the free disposal of assets and appointment of an agent in the company), control with respect to compliance with the conditions/commitments, and administrative and pecuniary sanctions.
4. The law will establish parliamentary control over government activity in CFIFs authorization.



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