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France has established a foreign direct investment ("FDI") screening regime under which any foreign investor (either from EU/EEA or outside of EU/EEA) who wants to invest in sensitive business sectors in France must obtain the FDI prior approval of the French Ministry of Economy and Finance ("Minefi").

Over the last years and even recently, the scope of the FDI regulation in France has been considerably broadened. On December 31, 2019, the last piece of the French FDI regulation was published (Décret n° 2019-1590 du 31 décembre 2019 relatif aux investissements étrangers en France). Such decree will become effective on April 1, 2020 and will significantly change the French FDI regulation regime. The purpose of this “client alert” is to set out the key features of the new French FDI screening regime.

Key feature #1 – Definition of Investment

Under the current French FDI regulation, an investment means either:

- (i) to acquire control, within the meaning of Article L. 233-3 of the French Commercial Code, of a company whose registered office is located in France;
- (ii) to acquire all or part of a branch of activity of a company whose registered office is established in France; or
- (iii) to cross the threshold of 33.33% of the capital or voting rights of a company whose registered office is located in France,

it being specified that (iii) does not apply where the foreign investor (i.e., the entity or individual ultimately controlling the acquiring vehicle) is established in any State of the European Union (EU) or country of the European Economic Area (EEA).

As of April 1, 2020, (i) and (ii) above will remain unchanged in substance but the threshold in (iii) will be lowered from 33.33% to 25%. Again, such provision will not apply to EU/EEA investors. However, the exception will be available now only to the extent that all entities or individuals in the chain of control of the acquiring vehicle are established in the EU/EEA and not just the entity or individual ultimately controlling it.

Key feature #2 – Definition of Investor

As of April 1, 2020, the following individuals and entities are each deemed a foreign investor under the new French FDI regulation:
It is further specified that all individuals and entities belonging to a “chain of control” are deemed investors within the meaning of the French FDI regulation. In other words, an EU/EEA entity will be considered as an EU/EEA investor for the purposes of the above mentioned 25% participation exception only if all individuals and entities in the chain of individuals or entities controlling it are established in the EU/EEA.

Key feature #3 – Sensitive sectors

Over the last years and even recently, the list of the business sectors subject to the Minefi FDI screening has been significantly expanded. Historically, the French FDI regulation has been covering the security and defence sectors in the broadest meaning: activities relating to weapons, ammunition, cryptology, entities depositary of the national defence secret, etc.

In 2014, the scope was already further extended to include inter alia the integrity, security or continuity of the supply of energy, water, and the operation of transport and telecommunication networks, etc.

In 2018, the French FDI regulation was further amended in the context of the incoming EU regulation for the screening of foreign investment and extended further the lists of sensitive sectors to: integrity, security and continuity of space operations and research and development activities concerning cybersecurity, artificial intelligence, robotics, additive manufacturing, and semiconductors.

As of April 1, 2020, approximately 20 business sectors will be considered as sensitive. Such sectors will now also include the production, processing or distribution of agricultural products, the editing, printing or distribution of political and general information press publications and research and development activities concerning quantum technologies and energy storage.

It must be further noted that as of April 1, 2020, the list of the sensitive sectors subject to the Minefi FDI screening will not depend anymore on whether the foreign investor is established in the EU/EEA or outside the EU/EEA. Foreign investors must also be aware that the wording used in the French FDI regulation to describe the sectors considered as sensitive is generally broad, imprecise and subject to interpretation by the Minefi, leaving room for a further expansion of an already broad scope.

Key feature #4 – Impact on the M&A timeline

When a contemplated investment falls within the scope of the French FDI regulation because of the investment nature (cf. Key Feature #1 above) and the business sector targeted, the foreign investor must obtain the Minefi FDI prior approval before closing the contemplated investment. Therefore, the Minefi clearance must be listed as a condition precedent to the closing in the transactional documentation.

As of today, the Minefi must authorize (under certain conditions as the case may be) or disapprove the contemplated investment within 2 months from the FDI prior approval filing with the Minefi. Such 2-month period only starts to run when the Minefi considers the foreign investor FDI prior approval filing complete.
As from April 1, 2020, the Minefi must confirm within 30 business days from the FDI prior approval filing (the “Phase 1 Response”) whether:

- (i) the contemplated investment does not fall within the scope of the French FDI regulation, or
- (ii) the contemplated acquisition falls within the scope of the French FDI regulation but it is authorized without conditions, or
- (iii) an additional examination is necessary to determine whether national interests protection may be guaranteed by attaching conditions to the Minefi FDI clearance.

Should the Minefi consider that an additional examination is necessary, the Minefi shall issue its FDI refusal or clearance (subject to conditions where appropriate) within 45 business days from the receipt by the foreign investor of the Phase 1 Response.

Therefore, the whole FDI screening by the Minefi may delay the closing date by a period of time running from thirty business days to a maximum of 75 business days as from the date of the FDI prior approval filing with the Minefi.

Foreign investors are generally advised to be cautious since the sanctions applicable in the event of non-compliance with the French FDI regulation are very dissuasive. The Minefi has a very dissuasive panel of injunctions, precautionary measures (e.g., suspension of voting rights, prohibition of distribution of dividends, temporary restriction or interdiction to divest assets) and sanctions.

Sanctions applicable include criminal conviction (5 years of imprisonment – although very unlikely) and substantial monetary fine in an amount not exceeding the highest of the following: (i) double of the amount of the non-compliant investment, (ii) 10% of the annual revenue (taxes excluded) of the target entity or (iii) 5 million euros for legal entities and 1 million euros for individual. Furthermore, any transaction subject to the FDI regulation which is closed without the Minefi FDI prior approval may be declared void.

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