

# ARTICLE

## FRENCH PRIME MINISTER ANNOUNCES THE EXTENSION AND DIVERSIFICATION OF MEASURES TO CONTROL FOREIGN INVESTMENTS IN FRENCH COMPANIES

Real Estate and Construction Environmental Law Public Law and Public Procurement Law European Law | 19/02/18 | Vincent Brenot Emmanuelle Mignon

### AERONAUTICS & DEFENSE ENERGY

Under French Law, while the principle that "*financial relations with foreign countries are free*" prevails, this freedom is tempered, in a limited number of industrial or services sectors, by a system of prior authorisation to be requested to and granted by the Minister for Economic Affairs. Any foreign company contemplating to carry out an investment in those sectors, which are of strategic interest to the State, must seek an administrative approval.

This mechanism concerns activities involved in the exercise of public authority or activities which may harm public order, public security or the interests of national defence, as well as research, production or marketing activities related to weapons, ammunition, powders and explosive substances.

A 2005 Administrative Decree initially listed economic sectors targeted by this mechanism, mainly: national defence, weapons' sale, electronic surveillance and gambling. In the context of the negotiations between General Electric and Alstom for the sale of its energy branch, the scope of the sectors concerned by this mechanism of prior authorization was extended, by decree No. 2014-479 of 14<sup>th</sup> of May 2014, to sectors contributing to the integrity, security and continuity of energy and water supplies, to the continuity of operation of transport and electronic communication networks, and to vital infrastructures as defined by the Defence Code, as well as to the protection of public health.

Upon receiving a request for authorization, the Minister may deny the investment. Yet, much more frequently, the Minister will give its approval subject to a number of conditions defined by him, usually on the following grounds: protecting national jobs but also sensitive tangible and intangible assets owned by the company affected by the investment, and, possibly, ensuring the continued operation of the activity concerned. In particular, the Minister may impose measures to "waterproof" targeted activities within the acquirer's group so as to limit the circulation of information or know-how, which disclosure would be detrimental to the State's interests.

Following the announcements made in mid-January by Mr Bruno Le Maire, Minister for Economic Affairs, **Prime Minister Édouard Philippe confirmed, on Friday 16<sup>th</sup> of February 2018, the government's plans to strengthen the existing foreign investments control mechanism by working in several directions.**

First of all, the **scope of sectors** subject to prior authorization should be extended to those rendered strategic by recent technological advancement, in which France has significant players: artificial intelligence, space business, data storage and semiconductor industry. The proposed extension will only be possible in accordance with European Union law, which allows Member States to adopt measures restricting the free movement of capital only on grounds of public order or public security.


The **sanctions incurred** in the event of non-compliance with the conditions imposed by the Minister for the performance of the operation could also be diversified in order to reinforce their applicability. Indeed, under the current rules, if the Minister finds that an investment was performed without its authorisation or in breach of the conditions he imposed, he can cancel the investment and fine the investor, for an amount that may be up to twice the value of the irregular investment. The severity of these sanctions makes their application almost impossible in practice.

Also, once the investment is performed, **external audits would be made compulsory**, in order to ensure the compliance over time with pre-imposed conditions. This new measure aims at reinforcing the effectiveness of those conditions.

The legal framework related to the creation of **shares giving their holders specific rights** (known as "golden shares") could be made more flexible, in particular to make it easier for the State to hold and exercise special prerogatives with regard to decisions on transfers of intellectual property rights, set-ups outside France or certain asset disposals. Here again, the proposed scheme can only be implemented in accordance with the European principle of free movement of capital, and therefore under conditions which restrict it only in proportion to the objectives which can justify them under European Law.

French President recently made a call for the implementation of a mechanism controlling foreign investments at the European level. Therefore, it is likely that the French system will be reformed bearing in mind its future compliance with European Law.

Last but not least, **a monitoring system was announced**, in order to lead a targeted surveillance on a limited number of pre-identified companies to which the French State considers of specific value in order to preserve them from foreign take-overs or hostile acquisitions of shareholding. In this purpose, the Council of Defence and National Security will



receive new prerogatives. Also, a financial intervention force will be created, under the supervision of BPI France and the French State Shareholding Agency (*Agence des Participations de l'État*), with the aim to protect French companies against hostile capital movements.

The whole of these measures will be, on one hand, introduced into a legislative bill, called "PACTE", which shall be presented in the Council of Ministers planned on the 18<sup>th</sup> of April 2018, and on the other hand, provided by an administrative decree whose adoption is expected for next spring.

In the next few weeks, French government will have to balance between the implementation of a mechanism designed to protect French flagship companies from the greed of aggressive foreign investments while preserving the attractiveness and openness of the French economy. Indeed, adding administrative and calendar constraints could turn out to hamper the realisation of certain M&A operations.

August Debouzy will closely follow the concretisation of these announcements, which shall, when appropriate, be the subject of a training session, were all these measures adopted.

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