



Catherine Nommick

e-Mail:
c.nommick@
soulier-avocats.com

Tel
+33 (0)4 72 82 20 80
+33 (0)1 40 54 29 29
Fax
+ 33 (0)4 72 82 20 90
www.soulier-avocats.com

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The foreign investment screening device in France is simplified... but not reduced

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THE FOREIGN INVESTMENT SCREENING DEVICE IN FRANCE IS SIMPLIFIED... BUT NOT REDUCED

Catherine Nommick
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In the wake of the large-scale program launched in France in 2013 to simplify the regulatory framework applicable to businesses, Decree n°2017-932 of May 10, 2017 introducing various simplification measures for businesses has streamlined the formalities that foreign companies must carry out to invest in France.

This simplification must not, however, mask the French government's intention to maintain an effective screening of foreign investments in so-called sensitive sectors deemed crucial to France's national interests in terms of public order, public security and national defense.

Making it easier for foreign companies to invest in France

Prior to May 12, 2017, date of coming into force of Decree n°2017-932 of May 10, 2017, any foreign company wishing to invest in France was required to file an administrative declaration with the General Directorate of the Treasury upon completion of the investment (Articles R 152-4 and R 152-5 of the French Monetary and Financial Code).

This obligation applied in particular to the following types of investments: Creation of a French company by a foreign corporation, acquisition of all or part of a branch of activity, direct or indirect acquisition of a controlling stake in a French company, but also acquisition of the de facto control of a French company by a foreign corporation in particular through the grant of loans or guarantees, the purchase of patents or licenses or the conclusion of commercial contracts.

If the investment did not fall within the scope of the prior authorization procedure (cf. below), the foreign investor had the obligation, upon completion of the investment, to file an administrative declaration including a number of information concerning notably the foreign investor, its shareholders and directors, the business activity and/or the company in which the investment was made as well as the source and circuit of the funds used to finance the investment. This procedure was often poorly understood by foreign investors, especially since some pieces of information could already have been provided along the various notifications made to other administrative authorities such as the business formalities center or the French Central Bank.

Indeed, where in excess of 15 million euros, some investments (acquisition of at

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least 10% of the share capital of / crossing of certain ownership thresholds in a French company, real estate investments) had to be reported to the French Central Bank for statistical purposes in order to establish the balance of payments.

Decree dated May 10, 2017 unconditionally repealed Articles R 152-4 and R 152-5 of the French Monetary and Financial Code, thereby removing the obligation to file an administrative declaration unless the relevant investment was subject to prior authorization in France.

Control over investments deemed sensitive or likely to jeopardize national interests is maintained

Since Decree n°2003-196 of March 7, 2003 (and a ministerial order issued on the same day), as supplemented by Decree n°2014-479 of May 14, 2014^[1], France has implemented a control procedure according to which any foreign investment made in France in sectors that are essential to guarantee French national interests in terms of public policy, public security or national defense are subject to a prior authorization.

The relevant sectors include inter alia the supply of energy and water, transportation and communication services, facilities and infrastructures that are deemed critical within the meaning of the French Defense Code, the production or trade of weapons and ammunitions, and the healthcare sector.

While foreign investments are defined differently depending on whether they are made by a European or non-European investor or by a French company controlled by a foreign entity, the authorization procedure is, formally speaking, the same insofar as the contemplated transaction falls within the scope of applicable regulations.

Upon receipt of the authorization request, the French administrative authorities have 2 months to issue a decision. If no decision is issued within this timeline, the request is deemed granted.

In practice, under the prior authorization procedure, the Minister of Economy may make the authorization conditional on a number of commitments by the investors with regards to both the continuation of the relevant activities and assets and compliance with prior commitments made towards clients or partners. Fulfillment of the commitments shall be periodically monitored by the competent services of the State.

Once the authorization is granted, the investor must then notify the French administrative authorities of the proper completion of the transaction.

With this procedure, France has an efficient legal framework that is similar to that implemented in other countries in and outside Europe.

However, a number of countries have recently tried to get the European Union to adopt a tougher legislation for target companies with strategic interests.

Towards a tougher control of foreign investments at the European level?

During the European Council held on June 22 and June 23, 2017, the proposal supported by France, Germany and Italy to give more power to the European Commission to screen foreign investments likely to jeopardize the strategic interests of EU Member States both from an economic and safety perspective, received a mixed reception by the other EU Member States.

In addition to the extremely sensitive political and business issues triggered in EU Member States by this discussion, the implementation of a European mechanism to screen foreign investments raises legal and institutional challenges.

Indeed, as EU law currently stands (Articles 63 and 346 of the EU founding treaty), the European Union has no jurisdiction to deal with the protection of Member States' essential interests, i.e. national defense, security and public order. In addition, the difficulty raised by the definition of "European economy security", a concept that would specifically fall within the scope of competence of the EU, should be addressed. Indeed, some transactions may concern both public security (that falls within the jurisdiction of EU Member States) and economic interests.

As such, in its conclusions released on June 23, 2017, the European Council took a cautious approach and welcomed "the Commission's initiative to harness globalization and, inter alia, to analyze investments from third countries in strategic sectors, while fully respecting Members States' competences. The European Council will revert to this issue at one of its future meetings."

Coincidence in timing or consequence of this setback (?), Germany adopted on July 12, 2017 a decree that tightens the control of foreign investments in strategic companies, in particular by extending the time-line for reviewing investment requests (this time-line being extended from 2 to 4 months) and the scope of transaction subject to prior authorization.

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Article authored by
Catherine Nommick

Notes

[1] Codified in Articles L.151-3 et seq. and R.153-1 of the French Monetary and Financial Code.

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