

FOREIGN INVESTMENTS IN FRANCE: FIVE NEW BUSINESS SECTORS SUBJECT TO PRELIMINARY MINISTERIAL APPROVAL

In force as of May 16, decree n° 2014-479 of May 14 2014 (the “Decree”) extends the scope of sectors for which foreign investments are subject to preliminary ministerial approval, with the addition of the energy, water, transport, electronic communications and public health sectors.

KEY IMPLICATIONS OF THE DECREE ON FOREIGN COMPANIES

- > *There is an increasing need to address the issue of ministerial agreement at an early stage of investment transactions in France.*
- > *The new activity sectors are applicable to foreign investments from all jurisdictions. The scope of preliminary agreement is however slightly less broad when applied to investors from other European Union member states.*
- > *France is now aligned with several other countries with similar systems, including the United States, Germany and the United Kingdom.*

PRESENTATION OF THE DECREE AND ITS IMPLICATIONS FOR THE EXISTING PROVISIONS ON INVESTMENTS FROM FOREIGN COMPANIES

- 1 A new take on existing law: broadening of the scope of activity sectors with the potential to impact upon public order, public security or national defence

As a rule, foreign investments in France are free.

However, the Monetary and Financial Code requires that foreign investments on activity sectors deemed sensitive should be granted preliminary approval by the Minister for Economic Affairs. Sensitive sectors are defined as those conducting activities which (a) have the potential to impact upon public order, public security or national defence or (b) consist in weapons research, production and marketing.

Before the Decree came into force, the following sectors were deemed sensitive: the gambling (excluding casinos), private security, dual-use goods and

technologies, listening activities, management of information technology security and national defence sectors.

The Decree broadened the scope of sensitive activity sectors to include all goods and services in the following sectors:

- **Energy:** activities susceptible of affecting the integrity, security and continuity of the supply of gas, hydrocarbons and other energy sources,
- **Water:** activities susceptible of affecting the integrity, security and continuity of the supply of water, in line with the standards established in the interest of public health,
- **Transports:** activities susceptible of affecting the integrity, security and continuity of the operation of transportation networks and services,
- **Electronic communications:** activities susceptible of affecting the integrity, security and continuity of the operation of electronic communications networks and services, and
- **Health:** the Decree aims at all activities susceptible of affecting public health.

The Decree also extends the framework of preliminary approval to the entirety of the defence sector and thus includes all activities susceptible of affecting the integrity, security and continuity of the operation of an establishment, facility or work of vital importance pursuant to the Code of Defence. These precisions are not new as a number of investments related to the defence sector were already largely covered by existing provisions.

2 Context of the Decree and international perspective

Issued in the form of a decree, the list did not go through the ordinary legislative process. This allowed a quick entry into force, taking place in a singular context in which the French government wishes to have control over the transfer of one of energy giant Alstom's field of activities.

It should however be noted that the Decree was issued after the National Assembly Commission on European Affairs published a report on the defects of France's approach to foreign investments in January 2014.

Irrespective of the overall political context, the Decree aligns French practice with that of several other countries: in particular, the United-States (*Committee on Foreign Investment in the United States*, 1975; *Foreign Investment in National Security Act*, 2007), Germany (*Außenwirtschaftsgesetz*, 2008), and the United Kingdom (*Enterprise Act*, 2003), already control foreign investments on strategic sectors.

3 "Foreign investments": Basic principles

Under the new sectors covered by the Decree, all investments made by investors established outside France, or established in France but controlled by a person or entity established outside France are deemed "foreign".

The notion of “investment” (*i.e.* investment subject to agreement) is less straightforward. As a result of a complex set of rules, the scope of the definition changes according to the investor’s home country.

All foreign investments are subject to ministerial approval in the following cases:

- takeover of the company within the meaning of article 233-3 of the Code of Commerce,
- acquisition of part or all of a field of activity of a company, the head office of which is located in France.

Investors established outside the European Union or the European Economic Area must also seek ministerial approval in case of breach of a 33.33% threshold in the share capital held or voting rights within a company which head office is located in France.

4 Sanction in case of breach

In the event an investment is or has been taking place in breach of the preliminary agreement process, the Minister of Economic Affairs may instruct the investor to stop or modify the transaction, or to have the pre-investment situation restored at their expense.

After 15 days, any infringing investment will be automatically made void and the parties will be restored to their pre-investment situations. Moreover, the investor will be subject to a maximum penalty of twice the total amount of the infringing investment, which may lead to significant financial consequences.

5 Declaration requirements under foreign investments regulations

The regulations also provide for a number of declaration requirements enforceable by fines and imprisonment:

- With the exception of a specified list of operations, foreign investments – direct or indirect – are subject to preliminary administrative declaration enforceable by fines.
- In certain cases, foreign investments which amount to more than 15 million Euros are subject to ex-post declaration to the French Central Bank (for example, when the operation results in foreign investors taking over 10% or more of the share capital or voting rights within a French company).
- A number of investments specifically listed are additionally subject to declaration to the French Treasury Department.

Nonetheless, it remains to be seen whether the Decree will escape revision with regard to the principle of free circulation of capital, which prohibits Member states from restricting capital movements pursuant to article 63 of the Treaty on the Functioning of the European Union.

On the national level, we notice that summary and ordinary requests for suspension and repeal are available to any person wishing to question the legality of the Decree.

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