France Moves To Protect Strategic Assets Amid COVID-19 Pandemic

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On April 29, 2020, the French Minister of the Economy (the Minister) announced that French foreign investment rules will be adopted with the policy goal of protecting French strategic assets in the context of the COVID-19 pandemic. A forthcoming decree is expected to lower the applicable threshold that triggers French foreign investment control for investments by non-European investors in certain French public companies. This measure is expected to apply during the second half of the year. Additionally, the Minister issued an administrative order (the Order) on April 27, 2020, which added biotechnology to the list of critical technologies subject to French foreign investment control. These measures follow a series of major foreign investment reforms implemented by the French government over the past two years.[1]

Temporary Lowering of Applicable Threshold for Non-EU Investors

Under French foreign investment rules, investors qualifying as foreign investors (Foreign Investors) are required to file a request with, and obtain authorization from, the Minister prior to making certain investments (Covered Investments) in business activities in France deemed to be sensitive (Covered Activities). Under current rules, the prior authorization regime applies to the following Covered Investments:

- the acquisition of control over a French company (the Control Test);
- the acquisition, in whole or in part, of a branch of business of a French company (the Asset Test); and
- for non-European Union (EU) or non-European Economic Area (EEA) Foreign Investors, the acquisition (directly or indirectly) of more than 25% of voting rights in a French company (the Threshold Test).

The forthcoming decree is expected to lower the applicable threshold under the Threshold Test to 10% of voting rights if the relevant French company is publicly listed. The Minister believes that, in the context of the significant fall in stock prices caused by the COVID-19 pandemic, an unfriendly minority investment in a French publicly listed company with a widely spread share capital may have a destabilizing effect.

[1] Please see our March 30, 2020, client alert, "France Completes Major Foreign Investment Reform".

With the intention of not adversely affecting the ability of French public issuers to access equity capital markets, this reinforced control will be implemented as follows:

- It will not apply to European Foreign Investors (*i.e.*, those based in the EU or EEA).
- It is expected to be implemented only until December 31, 2020, pursuant to a fast-track procedure. Until that date, a non-European Foreign Investor crossing the 10% threshold in a French public company engaged in Covered Activities will be required to notify French competent authorities. Following notification, the Minister will have 10 days to decide whether or not the Foreign Investor must submit a complete filing for authorization pursuant to French foreign investment rules in order to conduct a more extensive review of the transaction. Having completed such review, the Minister may decide to withhold authorization for the Foreign Investor to hold more than 10% of voting rights in the relevant French company.

The French government will submit the draft decree to the French supreme administrative court (*Conseil d'État*) for its review in the coming days. This amended rule is expected to apply during the second half of the year. The Control Test and Asset Test remain unchanged.

Scope of Covered Activities

The French foreign investment reforms in 2018 and 2019 have extended the scope of Covered Activities to include R&D activities for certain critical technologies. Prior to the Order, the list included the following technologies: semiconductors, artificial intelligence, cybersecurity, robotics, additive manufacturing, quantum technologies and energy storage. The Order has expanded the list of critical technologies to include biotechnology. The Minister has stated that French authorities will particularly focus on French biotechnology companies developing vaccines and other health care capacities.

European Union Aspects

The above measures echo the guidelines issued by the European Commission on March 25, 2020, in which the commission urged member states to screen foreign direct investments in strategic businesses in the context of the economic crisis caused by COVID-19 and called on member states:

- to make full use of their existing foreign direct investment screening mechanisms to address the risks to critical health infrastructures, the supply of critical inputs and other critical sectors;
- for those member states that currently do not have a foreign investment screening mechanism, or whose screening mechanisms do not cover all relevant situations, to set up a full-fledged screening mechanism; and
- pending the establishment of a full screening mechanism, to use all other available policy tools to address risks to security or public order in the EU arising from acquisition or control of any particular business, infrastructure or technology.

Key Takeaways

- Acquisition by non-European foreign investors of more than 10% of voting rights in a French public company involved in certain sensitive business activities will trigger a French foreign investment review process under a forthcoming decree.
- This new measure will not apply to European foreign investors.
- It is expected to apply on a temporary basis, in response to the COVID-19 outbreak, until December 31, 2020.
- R&D activities relating to biotechnology have been added to the list of activities falling within the scope of French foreign investment control.
- These new measures echo the EU Commission's recent call on member states to screen foreign direct investments to protect critical European assets.