

May 17, 2019

IN THE WAKE OF INTERNATIONAL PROTECTIONISM, FRANCE STRENGTHENS ITS ENFORCEMENT SCHEME APPLICABLE TO FOREIGN INVESTMENTS

To Our Clients and Friends:

On May 16, 2019, the French Constitutional Court (*Conseil constitutionnel*) cleared most of the provisions of the ambitious so-called “Pacte” Statute on the development and transformation of businesses.

Pacte addresses a number of significant legal issues. Among them, in the wake of international protectionism and EU regulation on establishing a framework for the screening of foreign direct investments (see [Gibson Dunn’s alert of March 5, 2019](#)), Pacte significantly strengthens the French enforcement scheme applicable to foreign investments.

Government Approval Required for Foreign Investments in Strategic Business Sectors

Existing French regulation requires foreign investors, prior to making an investment in one of 14 specified sectors^[1], irrespective of its size, to obtain an authorization from the French Minister of the Economy. The affected business sectors comprise those impacting France’s public order, public safety or national defense interests.

Since November 29, 2018, are also covered certain R&D activities regarding cybersecurity and artificial intelligence as well as the hosting of data pertaining to sensitive businesses. During the discussions in Parliament on Pacte, the French Government indicated it would further broaden the scope of the business sectors affected to better protect “industries of the future” and innovation.

The authorization process applies to EU and non-EU investors who acquire:

- directly or indirectly a controlling stake in a company whose registered office is located in France; or
- all or part of a line of business of a company whose registered office is located in France.

It applies also to non-EU investors who acquire more than 33.33% of the stock or voting rights of a company whose registered office is located in France.

The Minister of the Economy may order an investor in breach of this process to withdraw from the investment, to modify the scope of its investment or to revert it. Failure to abide by the Minister’s order

exposes the investor to a fine in a maximum amount equal to two times the investment amount (in addition to the potential cancellation of the investment).

Pacte Strengthens the Sanctioning Power of the French Minister of the Economy

Under Pacte, the French Minister of the Economy is entrusted with a new power of injunction against an investor in breach of either the authorization process or the terms of the authorization[2]. The Minister may, thus, without delay and without any requirement for a prior Court approval, force the investor, under a daily penalty[3], to abide by the process (or by the conditions imposed as part of the authorization), to revert the investment at its cost or to modify its terms. The Minister may also now withdraw its authorization.

If an investment has been made without authorization, the Minister may appoint a representative in charge of ensuring that -within the conduct of the acquired business- France's interests will be protected; to this effect, the representative will be empowered to block any management decision likely to undermine these interests.

In situations where France's interests are or may be compromised, the Minister of the Economy may take new additional interim protective measures and:

- suspend voting rights attached to the fraction of the share capital held in violation of the authorization process;
- freeze or restrict distributions and remunerations pertaining to the share capital held in violation of the authorization process; and
- suspend, restrict or temporarily prohibit the disposal of all or part of the assets falling within the ambit of the strategic business sectors.

While none of these measures is subject to a prior Court approval, the investor must be given a formal notice and a 15-day delay to present its arguments, except in case of an emergency, exceptional circumstances or imminent breach of public order, public security or national defense.

Effective implementation of the Minister's extended powers will be outlined in decrees to be released later this year by the French government which will be important to monitor.

Pacte Increases Fines Against Non-Complying Investors

In addition, Pacte increases the amount of the fines that may be imposed by the Minister on an investor in breach of either the process or the terms of the authorization. The maximum fine that can be inflicted may amount to the higher of the following: two times the amount of the investment, 10 percent of the annual turnover (excluding taxes) of the company engaged in the strategic business sector, or 5 million euros for legal entities and 1 million euros for individuals.

Pacte Improves the French Parliament's Information on Foreign Investments

Eventually, in line with the EU Regulation, Pacte aims at improving transparency regarding foreign investments and compels:

- the Minister of the Economy to disclose annually to the Parliament statistical no-names data regarding the screening of foreign investments in France; and
- the French government to provide annually to certain members of the Parliament (e.g., the chairmen of the Commissions in charge of economic matters and the secretary (*rapporteurs*) of the finance Commissions) a report containing qualitative and statistical information on measures taken to protect and promote national interests and strategic business sectors as well as on the screening of foreign investments and the outcomes achieved thanks to the new legislation.

[1] The list of the 14 covered business sectors is as follows: 1° gambling industry (except casinos); 2° private security services; 3° research and development or manufacture of means of fighting the illegal use of toxics; 4° wiretapping and mail interception equipment; 5° security of information technology systems and products; 6° security of the information systems of companies managing critical infrastructure; 7° dual-use items and technology; 8° cryptology goods and services; 9° companies dealing with classified information; 10° research, development and sale of weapons; 11° companies that have entered into supply contract with the French Ministry of Defense regarding goods or services involving dual-use items and technology, cryptology goods and services, classified information or research, development and sale of weapons; 12° activities related to goods, products or services, essential to preserve French interests in relation to public order, public security and national defense (such as energy supply water supply, electronic communication networks and services); 13° R&D in relation to business sectors 4°, 8°, 9° or 12° regarding cybersecurity, artificial intelligence, robotics; 14° data hosting with respect to data pertaining to business sectors 11° to 13°).

[2] The Minister may in particular order the investor to dispose of all or part of the concerned business.

[3] The amount of which will be defined by a decree to be released later by the French government.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding the issues discussed in this update. For further information, please contact the Gibson Dunn lawyer with whom you usually work or any of the following members of the Paris office by phone (+33 1 56 43 13 00) or by email (see below):

*Nicolas Baverez - nbaverez@gibsondunn.com
Benoît Fleury - bfleury@gibsondunn.com*

GIBSON DUNN

Jean-Philippe Robé - jrobe@gibsondunn.com
Nicolas Autet - nautet@gibsondunn.com

© 2019 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.