Foreign investments control regime in France: reinforced sanctions and tighter controls under PACTE law following new EU regulation

By Luis Wolff Kono[1]

V1 – November 2019

Foreign investments control was a hot topic on the European and French legislative agenda for 2019.

At European level, concerns over the adequacy of the current control regimes of EU member states led to the adoption of a new EU regulation setting a framework for foreign investments control and creating a cooperation mechanism among the European commission and member states[2].

In France, PACTE law[3] has brought about reinforced sanctions and tighter administrative controls to the foreign investments control regime. According to the impact study of the new law, these changes are intended to "better incite investors to respect the regulation"[4].

This note provides a general overview of the new EU regulation, followed by an overview of the French foreign investments control regime and the changes effected by PACTE law.

I. EU regulation

Shortly prior to the enactment of PACTE law, the European Union Parliament and Council issued a regulation establishing a framework for the screening of foreign direct investments into the Union. The French parliament had considered the proposal for this regulation, dating from 2017, in the drafting and review of PACTE law.

The driver for this EU regulation originated from concerns about foreign investors, particularly state-owned enterprises, acquiring for strategic reasons European companies with key technologies. These concerns led EU legislators to want to better regulate this effect of globalization, with an emphasis on the necessity to analyze more carefully foreign direct investments in strategic sectors.

Far from being a French concern, this topic was an European concern.

1) Foreign investments in Europe

---

[1] Luis Wolff Kono is a corporate and commercial attorney based in Paris, France. He is admitted in New York and New Jersey, USA. Email: luis@wolffkono.com. Internet site: http://wolffkono.com.

[2] REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R0452&qid=1571748386685&from=EN.

[3] LOI n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (available at https://www.legifrance.gouv.fr/eli/loi/2019/5/22/2019-486/jo/texte)

[4] The impact study (in French) for the new law, available at http://www.assemblee-nationale.fr/15/pdf/projets/pl1088-ei.pdf.

Foreign investments play an increasingly important role in economic activity in Europe, according to a study by the European commission.[5]

Foreign ownership has risen continuously over the last ten years, which was mostly due to acquisitions of increasingly large, listed companies. While foreign-owned companies make up only 3 percent of the companies assessed, they account for a much larger share of total assets (more than 35 percent) and for about 16 million direct jobs.

In addition, the study identified a number of salient trends:

- Continuing importance of "traditional" investors from advanced economies such as US, Canada, Switzerland, Norway, Japan, and Australia, across all sectors of the EU economy: these traditional investors remain well ahead and still control more than 80 percent of all foreign-owned assets. They started investing a long time ago and have kept their acquisition rates constant over time. Their investments are diversified across sectors, with a particularly high level of diversification for the US.

- However, the data also clearly show the emergence of "new investors": the diversity of countries of origin has been increasing, with China standing out in terms of number of recent acquisitions. Investments and acquisitions from developing or emerging countries are typically concentrated in a much more limited number of sectors but in a number of subsectors, they are becoming increasingly visible, with a surge in the number of deals over the last few years as for example by China in aircraft manufacturing and specialized machinery, or by India in pharmaceuticals.

- Increasing investment by State-owned enterprises (SOEs): while SOEs represent only a small proportion of foreign acquisitions, their share in the number of acquisitions and their assets have grown rapidly. Russia, China and the United Arab Emirates stand out in this respect with a total of 18 acquisitions in 2017, three times more than in 2007.

- Growing presence of "offshore investors" (e.g. Bermuda, Cayman Islands, Monaco): they control 11 percent of foreign-owned EU companies and a significant share of foreign-owned assets (4 percent) in the EU.

- Foreign ownership is remarkably high in a number of sectors that are at the heart of the economy, such as oil refining (67 percent of total assets of the sector), pharmaceuticals (56 percent), electronic and optical products (54 percent), insurance (45 percent) or electrical equipment (39 percent).

- The "financialization" of foreign investments, in the sense of foreign investment funds and private equity firms accounting for an increasing number of acquisitions (from 102 in 2007 to

[5] COMMISSION STAFF WORKING DOCUMENT ON FOREIGN DIRECT INVESTMENT IN THE EU, dated 13 March 2019, available at https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157724.pdf.

194 in 2017). This segment is heavily dominated by the US, followed by the Cayman Islands and Switzerland.

- A rise of individuals as ultimate owners in an increasing number of acquisitions: these hold mainly Swiss, US, Russian, Norwegian and Chinese passports. Albeit these represent only 5 percent of the total number of deals, between 2007 and 2017 the number of acquisitions involving individuals or families has increased from 31 to 197.

2) Screening factors and conditions

While emphasizing that the EU and its member states have an "open investment environment",[6] the EU regulation reinforces controls in three ways.

First, while stating that harmonization of the member states' national legislations is not pursued, and not requiring member states to adopt a control regime (12 member states had control regimes at the time the regulation was being proposed), the EU regulation defines several factors that may be taken into account to evaluate the existence of a threat to national security and public order, resulting from a foreign investment.

In determining whether a foreign direct investment is likely to affect security or public order, member states and the European commission may consider its potential effects on:

(a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defense, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;

(b) critical technologies and dual use items, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;

(c) supply of critical inputs, including energy or raw materials, as well as food security;

(d) access to sensitive information, including personal data, or the ability to control such information; or

(e) the freedom and pluralism of the media.[7]

Other factors to be considered focus on the investor:

(a) whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;

(b) whether the foreign investor has already been involved in activities affecting security or public order in a member state; or

[6] Regulation (EU) 2019/452, Whereas 2.
[7] Regulation (EU) 2019/452, art. 4.1.

(c) whether there is a serious risk that the foreign investor engages in illegal or criminal activities.[8]

This list of factors is non-exhaustive.[9]

The regulation defines certain conditions which national control regimes should respect (non-discrimination, protection of investors' and target companies' sensitive information, right of appeal).

In addition to setting common EU-wide guidelines, the regulation intends also to increase transparency of control rules and decision-making, which can give investors greater predictability in assessing potential investments.[10]

3) Cooperation mechanism

The second way in which controls are reinforced is through the creation of a mechanism for cooperation and exchange of information among the EU commission and member states on screening of foreign investments.

One important topic addressed by the regulation is the scenario of investments in *one* member state posing a threat to national security or public order in *another* member state.[11] Current national legislation is likely not addressing this concern, as each member state's rules naturally focus on its own security and order, rather than on its neighbors'.

Under the cooperation mechanism, member states shall notify the European commission and the other member states of any foreign direct investment in their territory that is undergoing screening.[12] The notification may include a list of member states whose security or public order is deemed likely to be affected.

A member state may provide comments to another member state where an investment is taking place.

The European commission may issue non-binding opinions to member states, where the proposed investment is likely to affect European projects on grounds of security or public order (e.g. Galileo, Copernicus, and other projects listed in the Annex of the regulation), or where the investment undergoing screening is likely to affect security or public order in more than one member state, or where the commission has relevant information in relation to that investment.[13]

The member state receiving an opinion or comments should give them "due consideration" in line with its general "duty of sincere cooperation" laid down by EU law.[14]

The member state receiving an opinion from the European commission regarding investments likely to affect European projects should take utmost account of it through, where appropriate, measures

[8] Regulation (EU) 2019/452, art. 4.2.
[9] Regulation (EU) 2019/452, Whereas 12.
[10] Regulation (EU) 2019/452, Whereas 12 and 15.
[11] Regulation (EU) 2019/452, Whereas 16.
[12] Regulation (EU) 2019/452, art. 6.1.
[13] Regulation (EU) 2019/452, art. 6.3 and 8.1.
[14] Regulation (EU) 2019/452, art. 6.9 and Whereas 17.

available under its national law, or in its broader policy-making, and provide an explanation to the European commission if it does not follow that opinion, in line with its duty of sincere cooperation.[15]

The regulation emphasizes, however, that the final decision on approving an investment or any measures taken rests solely with the member state where the investment is taking place.[16] This appears to prevent the possibility of a neighboring member state, affected by the investment, participating or making the approval decision or having a "veto" right.

For investments not undergoing screening, the European commission may issue an opinion, and an affected member state may make comments to the member state where the investment is planned.[17] For completed investments, the opinion or comments can be issued during a period of 15 months after completion of the investment.[18] The cooperation mechanism does not apply to investments completed before 10 April 2019.[19]

This is a new regulatory aspect to be considered by investors, as it means a completed investment remains subject to potential challenge for a 15-month period after completion.

The cooperation mechanism goes beyond review of specific deals, and also involves a permanent exchange of information among member states.[20] Exchanged information can be for example about an investor's ownership or the financing for an investment.

Member states and the European commission must implement safeguards to assure the confidentiality of classified and other confidential information exchanged.[21] A recipient of information cannot disclose it without the originator's approval.

4) Annual reporting

The third way in which the control regime is reinforced is through reporting. Member states are required to notify their screening mechanisms to the European commission, which publishes a list of member states' screening mechanisms.[22]

Member states must report information about foreign investments and application of their screening mechanisms to the European commission on an annual basis.[23]

The European commission will prepare and publish annual reports on implementation of the regulation, based in part on member states' annual reports.[24]

The EU regulation will apply from 11 October 2020.

---

[15] Regulation (EU) 2019/452, art. 8.2 and Whereas 19.
[16] Regulation (EU) 2019/452, art.6.9 and Whereas 17.
[17] Regulation (EU) 2019/452, art. 7.1.
[18] Regulation (EU) 2019/452, art. 7.8 and Whereas 21.
[19] Regulation (EU) 2019/452, art. 7.10.
[20] Regulation (EU) 2019/452, Whereas 23.
[21] Regulation (EU) 2019/452, Whereas 30.
[22] Regulation (EU) 2019/452, art. 3.8. The list is available at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157946.pdf.
[23] Regulation (EU) 2019/452, art. 5 and Whereas 22.
[24] Regulation (EU) 2019/452, art. 5.3 and Whereas 32.

II. General overview of French foreign investments control regime

Foreign investments in France are generally permitted subject only to a declaration for statistical purposes for transactions in excess of 15 million euros (Section 1). However, in certain sectors considered to be sensitive as affecting essential public interests, foreign investments require prior approval from the Minister of the economy (Section 2).

The discussion below covers only the "general" foreign investments control regime, but an investor also needs to consider any sector-specific requirements, e.g. in the financial sector.

1) Declaration

Foreign investments require a declaration to be made to the French central bank (*Banque de France*) in case the investment amount exceeds 15 million euros.[25]

To fall within this declaration requirement, the investment must be one of the following types of transactions:

1) A non-French company or individual acquires or sells at least 10% of the capital or voting rights in a French company (or crosses the 10% threshold);

2) A French company or individual acquires or sells at least 10% of the capital or voting rights in a non-French company (or crosses the 10% threshold);

3) Transactions between affiliated entities, whatever their nature (loans, deposits, etc.);

4) Real estate investments in France by non-French companies or individuals (or abroad by French companies or individuals).

The declaration must be made within 20 business days after the payment of the investment.[26]

Failure to comply with declaration obligations is punished by 5-year imprisonment and a fine up to two times the amount of the violation.[27] Companies violating these obligations can be sanctioned by dissolution, ban on the exercise of professional activities, judicial monitoring, office closure, exclusion from government contracts, exclusion from public securities markets, and ineligibility to government subsidies and aid.[28]

[25] Article R152-3. Referenced articles are from the French monetary and financial code, unless a different code is indicated.
[26] Arrêté of 7 March 2003, art. 3
[27] Articles L165-1 and R165-1 ; C. douanes art. 459.
[28] C. pénal, art. 131-39

2) Approval for sensitive activities

Certain types of foreign investments require prior approval from the Minister of the economy.

These investments requiring approval are those made in an activity in France which, even on an occasional basis:

1. Participates in the exercise of public authority or

2. Falls within one of the following domains:

    a. Activities which may undermine public order, public security or national defense interests;

    b. Research, production or commercialization of weapons, ammunition, explosive powders and substances.[29]

An approval given by the Minister of the economy may specify conditions to ensure that the contemplated investment will not undermine national interests.

If an approved foreign investment is completed, a declaration must be filed with the Minister of the economy within two months after completion.

A foreign investment having obtained approval from the Minister of the economy, may also have to be declared to the French central bank if the conditions for declaration are met, as discussed in the section "Declaration" above.

Regulation implementing this legal requirement of approval for sensitive activities has created specific rules which differ depending on whether the foreign investor is European.

a) Non-European investor

Three key concepts need to be examined: what is an "investment"? Who is a "non-European investor"? And finally, which activities require approval?

An investment by a non-European investor occurs when the investor acquires "control" of a company headquartered in France, or 33,33% of capital or voting rights.[30] Regardless of whether the 33,33% threshold is reached, control can be acquired by:

1) Ownership of, or the right to exercise, a majority of voting rights, or
2) Voting rights conferring the power to determine shareholders' decisions, or

[29] Article L151-3
[30] Article R153-1

3) Right to appoint a majority of directors.[31]

An "investment" by a non-European also occurs when the investor acquires all or part of a line of business ("*branche d'activité*") of a company headquartered in France. This can happen for example, when an investor purchases the assets of a line of business.

A "Non-European investor" refers to:

i. A natural person who is not a citizen of an EU member state or of a state party to the European economic area agreement having concluded a convention of administrative assistance with France for the purpose of fighting against fraud and tax evasion;

ii. A company whose headquarters is not located in such states; or

iii. A French citizen not residing in such states.[32]

Regulation has identified the following specific activities, in which foreign investments by non-European investors require approval:

1. Gambling (except casinos)
2. Regulated activities of private security
3. Research, development or production of means for dealing with illicit use of toxic agents in terrorist activities
4. Equipment allowing interception of communications or remote detection of conversations or data
5. Services in connection with authorized evaluation centers for security certifications for information technology
6. IT security for operators of nuclear and other facilities of vital importance impacting national security or public health
7. Activities related to goods and technologies having dual military use under export control rules
8. Encryption technology
9. National defense activities
10. Weapons, ammunition, explosive powers and substances for military uses
11. Goods or services supplied to Ministry of Defense under points 7-10 above
12. Activities guaranteeing public order, security or national defense, as follows:
    a. supply of electricity, gas, gasoline, and other energy sources;
    b. water supply;
    c. public transportation and space operations;
    d. electronic communication networks and services; IT security for national police and customs security forces;
    e. nuclear facilities and other facilities impacting national security or public health;
    f. protection of public health.

[31] Code de commerce, Article L233-3
[32] Article R153-2

13. Research and development for activities mentioned in points 4, 8, 9 and 12 in the following domains:
    a. Cybersecurity, artificial intelligence, robotics, additive manufacture, semiconductors;
    b. Dual-use goods and technologies under export control rules.
14. Hosting of data whose disclosure would undermine interests protected by points 11, 12 and 13.[33]

b) European investor

Investments by European investors are also subject to approval in some cases, although less often than for non-European investments.

For European investors, the same three key concepts need to be examined: what is an "investment"? Who is an "European investor"? And finally, which activities require approval?

An "investment" by an European investor occurs when the investor acquires "control" of a company headquartered in France. "Control" is acquired when the investor has a majority of the voting rights in the company, or otherwise determines the decisions of shareholders, or appoints a majority of the board members.

Control is presumed to exist where the investor has 40% of the voting rights and no other shareholder has a higher percentage.

For European investors, the lower 33,33% ownership threshold used for non-European investors does not apply.

An "investment" also occurs when the investor acquires all or part of a line of business ("*branche d'activité*") of a company headquartered in France. This can happen for example, when an investor purchases the assets of a line of business.[34]

An European investor is:

a. a citizen of an EU member state or of a state party to the European economic area agreement having concluded a convention of administrative assistance with France for the purpose of fighting against fraud and tax evasion; or

b. A company whose headquarters are located in such states; or

c. A French citizen residing in such states.[35]

A narrower set of activities require approval when the investor is European. A few activities require approval for both European and non-European investors alike: namely, those listed in points 8 through 14 of article R. 153-2 (please see above).[36]

[33] Article R153-2
[34] Article R153-3
[35] Article R153-4
[36] Article R153-4

But for many other activities, the degree of government control is lower when the investor is European. This lower degree of control is apparent in two ways. First, for some activities, only the acquisition of all or part of a line of business of a French company by European investors requires approval. For these activities, mere acquisition of control through ownership of stock or voting rights does not require approval.

Second, some controlled activities are defined more narrowly for European investors. For example, in the case of interception equipment, only activities of research, development, production or commercialization require investment approval for European investors. By contrast, any activity relating to interception equipment requires approval for non-European investors.

For interception equipment activities, there is also an additional condition to the need for approval in the case of European investors: investment control must be required for the fight against terrorism and crime. This additional condition does not apply in the case of non-European investors.

Another example: in the case of gambling, no approval is required for European investors.

Acquisition of all or part of a line of business of a French company by European investors requires approval for the following activities:

1. (not used)
2. Private security for:
    a. operators of facilities of vital importance impacting national security;
    b. inspections and screening at airports and ports;
    c. protected areas in national defense facilities.
3. Research, development or production of:
    a. Pathogenic agents, toxins, and related products with dual military use
    b. Means of fighting against chemical weapons, to the extent investments control is required for the fight against terrorism.
4. Research, development, production or commercialization of equipment allowing interception of communications or collection of data, to the extent investments control is required for the fight against terrorism and crime.
5. Services in connection with authorized evaluation centers for security certifications for information technology, when supplied to the French state, to the extent investments control is required for the fight against terrorism and crime.
6. IT security for operators of nuclear and other facilities of vital importance impacting national security or public health.
7. Activities related to goods and technologies having dual military use under export control rules, undertaken for the benefit of companies involved in national defense.[37]

Although this list of controlled activities for European investors generally mirrors points 2 through 7 of the list for non-European investors, the European list is of narrower scope in many respects.

[37] Article R153-5

c) French company controlled by non-French company or individual

When the investor is a French company controlled by a non-French company or individual, approval may be required in the same manner as for European investors.[38] Because the approval provisions focus on the location of the investor's headquarters, it becomes irrelevant who controls the investor.

However, it is questionable that a non-European would be permitted to circumvent the normally-applicable approval rules by setting up a French or European affiliate solely for purposes of making the investment and benefiting from the lighter control rules applicable to European investors. The EU regulation warns against "artificial arrangements" set up by non-European investors to circumvent control rules.[39]

d) Intra-group investments

Investments made between companies belonging to the same group do not require approval.[40] For example, an affiliate A purchases a line of business in a controlled activity from affiliate B. A and B are ultimately owned by the same parent company. No approval is needed.

Therefore, a group restructuring its activities and moving a line of business from one affiliate to another need not worry about foreign investments control.

However, there is an exception to this general rule permitting intra-group investments. If the investment is made for the purpose of transferring "abroad" all or part of a line of business in a controlled activity, approval is required.

e) Approval procedure

Prior to the investment, in situations where there is doubt about whether approval may be required, the investor or the target company may request the Minister of the economy for confirmation that approval is required (*demande de rescrit*). The Minister responds within a period of two months.[41]

[38] Article R153-5-2

[39] REGULATION (EU) 2019/452 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, available at https://eur-lex.europa.eu. Whereas 10 of the EU regulation reads in relevant part: "Member States that have a screening mechanism in place should provide for the necessary measures, in compliance with Union law, to prevent circumvention of their screening mechanisms and screening decisions. This should cover investments from within the Union by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country." (emphasis added)

[40] Article R153-6, I

[41] Article R153-7

This confirmation allows investors to have a quick response on whether an approval procedure is required for a contemplated investment. It also affords some reassurance when the Minister tells them that their investment does not require approval.[42]

If the requirement of approval is confirmed, a request for approval must contain information about the investor, the target French company, and the investment transaction.[43]

If a request for approval is made, the Minister issues a decision within a period of two months from receipt of the request. In the absence of decision, approval is deemed to be granted.[44]

The Minister may issue an approval with conditions intended to preserve the national interests defined in article L. 151-3. These conditions relate primarily to:

- The preservation by the investor of the continuity of activities, industrial capacity, research and development, and associated technologies and know-how
- Integrity, security and continuity of supply
- Integrity, security and continuity of the operations of a facility of vital importance, or of transportation or electronic communications networks and services
- Protection of public health
- Protection of data and performance of contractual obligations of the company headquartered in France in government contracts or contracts impacting public order and security, national defense, weapons, ammunition, and explosive powders and substances.

The Minister of the economy may condition the approval on sale of any controlled activity carried out by the French company to an independent third party.

Conditions imposed must respect the principle of proportionality.[45]

If the Minister concludes that the proposed investment poses a threat to national interests in regard to public order and security and national defense, and approval conditions cannot guarantee the protection of such interests, the Minister refuses approval.[46]

The Minister may also refuse approval in case of doubts regarding the investor's "morality", namely in case of a serious presumption that the investor may commit one of the following criminal offenses:

- Drug trafficking
- Abuse of the ignorance or weakness of a minor, elderly or vulnerable person
- Pimping and prostitution
- Money laundering
- Terrorism
- Corruption

[42] Rapport N°1237 de la commission spéciale de l'Assemblée nationale, du 15 septembre 2018, tome 1, page 856, available at : http://www.assemblee-nationale.fr/15/pdf/rapports/r1237-tI.pdf.
[43] Further details about the information to be included in the request for approval are available on the site of the Minister of the economy at https://www.tresor.economie.gouv.fr/Ressources/4204_Operation-soumise-a-autorisation-prealable-que-faire-.
[44] Article R153-8
[45] Article R153-9
[46] Article R153-10

- Association of criminals
- Possession of stolen or illicit goods
- Treason, espionage, insurgency[47]

Information provided as part of the approval procedure is protected by the confidentiality duty of public servants (*secret professionnel*).[48]

f) Implementation of approval conditions

If an investment is approved with conditions, the Minister of the economy coordinates the follow-up of their implementation, in which relevant departments of the government participate.

This follow-up is made based on the following elements:

- An analysis of annual reports
- Follow-up meetings with the company
- Exchange of information between government and the company
- Implementation of measures protecting the Nation's scientific and technical heritage
- Links with clients
- Site visits by government representatives

g) Sanctions

An investment made without the required approval is null and void.[49]

In case a foreign investor does not comply with the applicable rules, either by not obtaining the required prior approval, or by not fulfilling the approval conditions, the Minister of the economy may issue an injunction to the investor, prohibiting the consummation of the transaction, modifying it, or ordering restoration of the initial situation at its cost.

In case of non-compliance with the injunction, the Minister may impose a monetary penalty up to two times the amount of the unlawful investment.

Failure to comply with approval obligations is punished by 5-year imprisonment and a fine up to two times the amount of the violation.[50] Companies violating these obligations can be sanctioned by dissolution, ban on the exercise of professional activities, judicial monitoring, office closure, exclusion from government contracts, exclusion from public securities markets, and ineligibility to government subsidies and aid.[51]

The sanctions regime was modified by PACTE law, as discussed below.

[47] Article R153-10
[48] Article 26 of Law n° 83-634 of 13 July 1983 on the rights and obligations of public servants (known as « Le Pors » law).
[49] Article L151-4
[50] Articles L165-1 and R165-1 ; C. douanes art. 459.
[51] C. pénal, art. 131-39

III. PACTE law

Article 152 of PACTE law modifies the control regime in three ways: (a) tightening of administrative controls, (b) reinforced sanctions, and (c) modification of treatment of transactions completed without prior approval.

Regulation (*décret d'application*) is expected to be issued on 23 November 2019, interpreting and complementing these provisions of PACTE law.

In a related topic, article 154 of PACTE law also revised the mechanism by which the French government may own a "golden share" (*action spécifique*) allowing control of strategic companies, but this article will not cover this related topic.

a) tightening of administrative controls

Under the current regime, the Minister of the economy may, in case of a transaction being completed without prior approval or non-compliance with approval conditions, issue an order to the investor to terminate the transaction, to modify it, or to restore the prior situation at the investor's expense.

PACTE law empowers the Minister to issue a greater variety of orders, adapted to each situation and based on urgency considerations. When a transaction was completed without approval, the Minister will be able to order the filing of a request for approval, which under prior law was not possible. This type of order would allow for an after-the-fact approval, especially useful where the investment appears risk-free and the failure to file a request for approval was a mere oversight.[52]

In cases where an investor does not comply with approval conditions, the Minister will be able to withdraw the approval, require the investor to restore the prior situation or to request a new approval. The Minister will also be able to order the investor to comply with the initial conditions or new conditions defined to account for the non-compliance, including restoring the prior situation or selling the sensitive activities.

The Minister's powers will be further reinforced by the possibility to impose penalties for delays (*astreinte*) in complying with the orders.

To quickly address threats to public order, security or national defense, the Minister will also be able to undertake preliminary measures such as suspension of the investor's voting rights, prohibition against sale of assets or distribution of dividends, and nomination of a representative in charge of protecting national interests.

b) reinforced sanctions

The sanctions regime is reinforced in a number of ways. First, PACTE law expands the scope of violations which can result in administrative sanctions.

[52] Rapport N°1237 de la commission spéciale de l'Assemblée nationale, du 15 septembre 2018, tome 1, page 859.

Under prior law, three types of violations can be sanctioned:

- non-compliance with injunctions issued by the Minister: this violation may result in the imposition of an administrative fine;
- consummation of a transaction without prior approval
- non-compliance with approval conditions

Under prior law, only the first type of violation – non-compliance with injunctions by the Minister – can result in administrative sanctions. PACTE law extends the possibility of administrative sanctions to the two other types of violation (consummation of transaction without approval, and non-compliance with approval conditions). This extension aims at providing for a fast and flexible sanctions mechanism, which is viewed as a necessity in light of the international nature of transactions involved and the national interests at stake.

The second way in which sanctions are reinforced, is through the creation of an administrative sanction for the fraudulent acquisition of an approval for a foreign investment. PACTE law empowers the Minister to impose a fine for such offense. This administrative sanction comes as a complement to the pre-existing criminal sanction for this offense under article 441-6 of the penal code, which is two years' imprisonment and 30 000 euro fine.

In such situation, the Minister may also withdraw the approval which was given.

The third aspect of sanctions' reinforcement is an increase in the amount of fines. Under prior law, maximum fines which could be imposed by the Minister were equal to double the amount of the investment. The problem with this approach was that, for small transactions, the fines were small.

PACTE law creates a maximum cap for fines based on an absolute ceiling (5 million euros for companies and 1 million euros for individuals) and a percentage (10%) of the acquired French target's revenues.

c) modification of treatment of transactions completed without prior approval

Transactions completed without prior approval were null and void under prior law. Although this sanction was severe and had a strong deterrent effect, the problem was that it did not allow for a "softer" sanction to be imposed by authorities, which in some cases may be preferable than outright cancellation of the transaction.

At times, it is not necessary to cut down the whole tree, but simply to trim its branches.

PACTE law creates a flexible approach, in which the Minister can decide to impose conditions *à posteriori* on a transaction completed without required approval. This is a useful option where national interests can be adequately protected through after-the-fact conditions, while economic benefits from the transaction can be preserved.

Under PACTE law, the Minister is empowered to deliver an approval *à posteriori* for an investment, with conditions to be met by the investor. The Minister may also sanction the investor for not having obtained a prior approval.

The rule remains that approvals, when required, must be obtained prior to the investment.

Alternatively, the Minister may choose to order the cancellation of the transaction, where appropriate.