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EXTENSION OF THE SCOPE OF FOREIGN INVESTMENTS CONTROL IN FRANCE

On 15 May 2014, the French Government published a decree relating to foreign investments in France that require prior authorization from the French Minister of the Economy (the "**Decree**")¹. The Decree entered into force on 16 May 2014 and is applicable to all current transactions.

Although this Decree has been published by the French government in the context of the on-going "battle" around Alstom, its scope is wider and will concern other businesses.

The European Commission has indicated that it would examine the conformity of the Decree with European Law.

A summary of the key changes brought by the Decree is provided below.

EXTENSION OF THE SCOPE OF ACTIVITIES REQUIRING PRIOR AUTHORIZATION FROM THE FRENCH GOVERNMENT

Under French Law, foreign investments in certain industry-sectors – commonly referred to as "sensitive activities", which include in particular defence-related activities – require the prior authorization of the French Minister of the Economy, essentially on the basis that such activities may affect public policy ("*ordre public*"), public safety or national defence interests. Accordingly, foreign investments in such sectors cannot be implemented until such prior authorization has been obtained.

The Decree extends the scope of foreign investments that will require the prior authorization of the French Minister of the Economy, and the following activities are now included in the list of sensitive activities:

Activities relating to equipment, products or provision of services, including those relating to the safety and proper functioning of installations and equipment, which are essential for the safeguarding of national interests with respect to public policy, public safety or defence that are listed below:

- a) *integrity, security and continuity of the supply of electricity, gas, oil or other energy sources;*
- b) *integrity, security and continuity of the supply of water in accordance with public health standards;*

¹ Decree n°2014-479 dated 14 May 2014 relating to foreign investments subject to the prior authorization regime.

- c) *integrity, security and continuity of the exploitation of transportation networks and services;*
- d) *integrity, security and continuity of the exploitation of electronic communication networks and services;*
- e) *integrity, security and continuity of the exploitation of an installation, facility or structure of critical importance within the meaning of the French Defence Code; and*
- f) *protection of public health.*

This extension applies to foreign investments made by non-European or European investors or by a French entity under foreign control (bearing in mind that, under French law, operations deemed to be investments for the purposes of foreign investment regulations vary depending on whether the investor is European or non-European).

As a consequence of such extension, both the conditions to which the authorization of the French Minister of the Economy may be subject and the grounds for refusal of a foreign investment by the French Minister of the Economy (if conditions are not sufficient to safeguard the interests at stake) have been updated to take into account the extended scope of sensitive activities.

Although this article does not intend to describe exhaustively the legal framework for foreign investments in France, we note that:

- (i) investors may submit a ruling request to the French Minister of the Economy to ascertain whether or not the contemplated investment will require its prior authorization: in such circumstances, the French Minister of the Economy has a two-month period to respond; however, a failure to respond within such period is not deemed to be a waiver from the French Minister of the Economy of the obligation to make the required filing with respect to the contemplated investment;
- (ii) should an authorization request be submitted, the French Minister of the Economy must provide a response within two months after the receipt of a complete authorization request, failing which the authorization is deemed to be granted;
- (iii) should any foreign investment that requires the prior authorization of the French Minister of the Economy be implemented without such clearance, or if the conditions imposed by the French Minister of the Economy when authorizing such investment are not complied with:
 - the French Minister of the Economy may request that the investor cease pursuing or modify the contemplated investment, or that the investor unwind the transaction at its own costs, and should the investor fail to comply with such request, the French Minister of the Economy may impose an administrative fine of up to twice the amount of the investment;
 - criminal sanctions (including 5 years imprisonment and a fine of up to twice the amount of the investment) are applicable.
- (iv) any undertaking or agreement relating to the implementation of any foreign investment which does not have the prior authorization of the French Minister of the Economy is null and void.

OTHER CHANGES RELATING TO THE CONDITIONS OF THE AUTHORIZATION

Beyond the extension of the scope of foreign investments requiring prior authorization of the French government and the related changes (see above), the Decree also extends the possibility for the French Minister of the Economy to make its authorization conditional on the divestment to a third party of the sensitive activity which necessitated its prior authorization.

Whereas such possibility was limited previously to cases where a sensitive activity was ancillary to the business at stake, it has now been extended to all cases, i.e. including when the sensitive activity does not constitute only an ancillary activity in the business at stake.

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