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Foreign Investment Control in France: New Derogatory Regime Applicable to Foreign Investment in French Public Companies

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Recent reforms on foreign investments control in France have contributed to a substantial evolution of its regime and, in particular, to strengthening its implementation. While Decree No. 2018-1057 of November 29, 2018 initially eased the prior authorization procedure for investment by introducing a preliminary written request to the French Ministry of Economy and Finance (the "Ministry") for both the French target company and the foreign investor, strengthening of the foreign investments control in France has been intensified. In this context, the so-called "PACTE" Law of May 22, 2019 (i.e., the French law on the Action Plan for Business Growth and Transformation), which became effective on February 22, 2020, strengthened and broadened the prior authorization procedure for foreign investment, in particular by strengthening the power of the Ministry to issue an injunction in the event that a foreign investment would have been made without prior authorization. Subsequently, Decree No. 2019-1590 of December 31, 2019 clarified the French foreign investments control regime by lowering the ownership threshold above which foreign investment is subject to control to 25% of voting rights compared to 33.33% of voting rights and capital previously. Such Decree also extended the French foreign investments control regime to certain strategic activities such as R&D relating to critical technologies or data processing, transmission or storage activities, etc.

In April 2020, facing the Covid-19 pandemic crisis, the French government, and in particular the Minister in charge of the Economy and Finance, Mr. Bruno Le Maire, announced its intention to (i) include biotechnology companies in the critical sectors of activities subject to foreign investments control proceedings and (ii) temporarily lower the ownership threshold above which foreign investment in French public companies is subject to control. These announcements have been now materialized through:

- Ministerial Order of April 27, 2020 pursuant to which biotechnology companies have been included in the list of the strategic activities covered by the French foreign investments control regime; and
- Decree No. 2020-892 of July 22, 2020 (the "New Decree") and Ministerial Order of July 22, 2020 (the "New Ministerial Order"), published in the French Official Gazette on July 23, 2020, which implement a derogatory regime applicable to foreign investment in French public companies (the "New Derogatory Regime").

New Derogatory Regime: Scope of Application

- **Foreign investors:** the New Derogatory Regime only applies to foreign investors which are non-European Union or non-European Economic Area natural persons or entities; thus, it does not apply to natural persons who are nationals of a member State of the European Union or of a State party to the agreement on the European Economic Area, or to entities of which all the members of the control chain, within the meaning of II of Article R. 151-1 of the French Monetary and Financial Code, are governed by the law of one of these same States or are nationals of and domiciled in one of these States;
- **Target Companies:** the New Derogatory Regime only covers investments in French companies whose shares are listed on a regulated market;
- **Investment Threshold:** the New Derogatory Regime lowers the ownership threshold above which foreign investment is subject to control to 10% of voting rights of the target company; any foreign investment above such 10% threshold will still be subject to the applicable rules of the ordinary French foreign investments control regime;
- **Critical Activities:** like the ordinary French foreign investments control regime, the New Derogatory Regime applies to all investments in critical activities of sectors included in the scope of the French foreign investments control regime under article R.151-3 of the French Monetary and Financial Code, i.e., investment in activities likely to undermine public authority, public order, public security, or national defense interests; the scope of those critical activities is very broad and encompasses strategic sectors such as defense, cybersecurity, aerospace, energy procurement, water procurement, transportation, public security, civil protection, and public health as well as data storage, agriculture, food safety, press, R&D, and biotechnologies;
- **Effective Date:** the New Decree will become effective within ten (10) business days from its publication in the French Official Gazette (i.e., August 6, 2020);
- **Term:** the New Derogatory Regime is temporary and will only apply up to December 31, 2020.

New Derogatory Regime: Main Impacts

Any investment made by a foreign investor falling within the scope of the New Derogatory Regime will not be subject to any prior approval of the Ministry provided (i) the foreign investor sends a prior notice of its investment to the Ministry (the "Prior Notice") and (ii) the foreign investor completes its investment at least within a six-month period following the Prior Notice.

Should the Ministry not make any objections within ten (10) business days following the Prior Notice, the investment made by the foreign investor is deemed to be authorized. Should the Ministry make any objections during such ten (10) business day period, the foreign investor is entitled to file a formal prior approval written request in accordance with article R.151-5 of the French Monetary and Financial Code.

Pursuant to the New Ministerial Order, the Prior Notice, which shall be written in French and sent to the Ministry by email or by post, shall provide:

- certain mandatory information: (i) the global number of the target company's voting rights held by the foreign investor pre-investment and the global number or an estimate of the target company's voting rights it will hold afterwards, (ii) the global number of securities giving access to the target company's equity and their attached voting rights held by the foreign investor, (iii) the shares already issued by the target company and their attached

voting rights the foreign investor may acquire under any agreement or any financial instrument and (iv) any information on the crossing of certain thresholds regarding the target company's equity and voting rights as set out under article L.233-7 of the French Commercial Code; and

- the status and the identity of the relevant person(s) acting for or on behalf of the foreign investor and the target company and any relevant supporting documentation attesting such power of attorney.

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If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Paris lawyers:

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