The European Lawyer (pg1 of 2)
July/August 2005

ANALYSIS

FRANCE

French Exon-Florio regulations to be issued

The country's Financial and Monetary Code now follows in the footsteps of the United States' Exon-Florio legislation by allowing a veto on foreign investments that threaten national security.

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Nearly two decades since the US passed the controversial Exon-Florio provision permitting the President to veto foreign investments that could threaten to impair national security, France has introduced a similar reform. An amendment adopted in December 2004 to France's Financial and Monetary Code will enable its minister of the economy to veto, or to impose conditions on, any foreign investment that could impair national defence. The reform was prompted by the realisation that existing provisions of the code were not broad enough to cover new technologies (eg biotechnology). The European Court of Justice (ECJ) also held on 14 March 2000 in the *Church of Scientology* case (C-54/99) that the code provisions as drafted were too vague to be compatible with the EC treaty.

Investments affecting national defence will now be subject to authorisation, but it is being left to a decree that is still being drafted to define what is meant by 'national defence'. The decree must satisfy three competing objectives: it has to be broad enough to cover fast evolving areas that are key to French national defence, including dual-use technologies and biotechnology; second, in order to be valid under the *Church of Scientology* case, it must list the specific sectors and technologies covered by the new law so that investors are not left guessing. This objective is not consistent with the first one, and means that France cannot use the US approach of deliberately leaving the term 'national security' undefined. Third, because foreign investment is important for the French economy, the decree cannot be perceived to discourage it, or create an arbitrary veto that could be used to protect national champions. A new parliamentary report expressed concern about recent investments by US private equity funds in terrestrial defence technologies in France, but at the same time praised the investments because they saved domestic jobs. This reflects traditional French ambivalence towards US investment. On balance, however, the country wants to promote foreign investment, even in defence-related sectors, provided it can ensure that key technology (such as vaccine research for bioterrorism) remains on French soil.

The US had to deal with similar problems when it enacted the Exon-Florio legislation almost twenty years ago. The concept of 'national security' was deliberately not defined in order to give the President maximum flexibility in exercising his authority under the statute, allowing implementation of the law to evolve over time. Even before 11 September 2001, the concept extended to critical infrastructure such as telecommunications networks and energy grids. The recent scrutiny given by the Committee on Foreign Investments in the United States (CFIUS) to Lenovo's purchase of IBM's PC business shows how flexible the notion of national security can be under US law – unlike in France, which is restricted by the ECJ *Church of Scientology* case. The review process in the US was entrusted to the CFIUS chaired by the Department of Treasury in order to show investors that decisions under Exon-Florio are not driven solely by military or security concerns, but by principles of free trade and investment. Likewise, by placing the authorisation procedure under the Ministry of Economy instead of the Ministry of Defence, France is sending the same message to potential investors.

In the US, foreign investment applications are processed by the CFIUS, then presented to the President of the United States, if necessary, for a final decision which cannot be appealed. This contrasts with the French procedure, which provides first for a decision by the minister of the economy (and not by the Prime Minister or the President), and second for an appeal to the Conseil d'Etat (Council of State).

Although the US authorisation is, in theory, unconditional, in many cases investors risk a prohibition of the investment unless they first negotiate a national security agreement with the Departments of Justice, Defense and Homeland Security. The ability to negotiate conditions is one aspect of the US procedure that the French particularly like and it is highly probable that their future decree will provide for some form of voluntary security agreement with foreign investors. Another aspect of the Exon-Florio rules that the French view favourably is the ability of the CFIUS, through informal discussions with investors early in the process, to be informed well in advance of a proposed investment. Because of the broad definition of national security, investors have to get timely assurance as to whether the investment might be considered as falling within the realm of national security or not before deciding whether to make a filing. This informal exchange gives the US authorities important information about deals that are in the making and the French decree will probably try to encourage early contacts of this kind with the Ministry of Economy.

At the time that the Exon-Florio provision was enacted, its critics (like those of the French law today) denounced its vague, even arbitrary, character. In practice, sanctions under the US law are extremely rare – out of over 2,000 notifications, only one has resulted in a veto. However, the implementation of security agreements has proven to be relatively common

The European Lawyer (pg2 of 2)
July/August 2005

and can give rise to heated negotiations with the national security-related agencies of the US government. It remains to be seen whether the French will exercise similar forbearance in applying their veto powers under the new law. As in the US, vetos will probably be rare, but security agreements may become frequent.

The French and US authorities are motivated by the same desire to strike the right balance between freedom of investment and protection of national security interests. The challenge now facing France is to draft a decree that is sufficiently flexible to keep pace with the evolution of defence-related technology sectors and sufficiently precise to satisfy the requirements of the EC treaty. Another solution of course would be for Europe to adopt a harmonised policy of controlling investments in national defence and security firms. A recent French report indicates, however, that harmonisation on this issue is unlikely in the near term. Whatever the final text of the decree, every foreign investor in a French high-tech or defence-related business will now have to consider whether it should contact the minister of the economy for guidance. In the US, contacting the CFIUS has become a routine part of any deal involving critical infrastructure or sensitive technologies. ■

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