

Notional Interest Deduction (from page 8)

For a general overview of the Notional Interest Deduction regime as it was conceived in June 2005, see Werner Heyvaert & Dirk Deschrijver, *Belgium Stimulates Equity Financing*, Intertax, Volume 33, Issue 10, 2005, 458-465.

²Reference might be made to Article 7(1) in conjunction with Article 23A of the OECD Model Tax Convention (2005).

³The English version of the *Argenta* ruling (Case No. C-350/11, July 4, 2013), together with a commentary by Mr. P. Wattel, are published in *Highlights and Insights on European Taxation (H&I)*, 2013/140.

⁴E.g., the Republic of Ireland, where the standard corporate tax rate is only 12.5 percent.

⁵As well as real estate property located in a treaty country.

⁶Or that have real estate property located in a treaty country. The European Economic Area (EEA) consists of all EU Member States plus Norway, Iceland and Liechtenstein (i.e., three members of the European Free Trade Association or EFTA; although

Switzerland is the fourth member of EFTA, it is not a member of the EEA).

⁷For purposes of this rule, the total amount of the NID will also be reduced by a proportion thereof corresponding to the net book value of any real estate located in such country.

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⁹Articles 366 and 371 Income Tax Code 1992 (ITC92).

¹⁰Article 376, §1, ITC92.

¹¹Case C-322/11 (K), ruling from the ECJ dated November 7, 2013; conclusion from Advocate General P. Mengozzi of March 21, 2013. Both documents can be found on www.curia.europa.eu.

¹²Bart Peeters, *L'imputation transfrontalière de pertes et le droit européen*, *Fiscologue International*, Issue No. 360 (31.12.2013), pp. 6-8.

¹³<http://eur-lex.europa.eu>.

¹⁴See, for example, the comments of Dr. Mathieu Isenbaert in *Trends.be* of July 4, 2013, <http://trends.knack.be/economie/nieuws/beleid/europa-torpedeert-notionele-interestafrek-wat-zijn-de-gevolgen/article-4000343021196.htm>. □

FRANCE

French Decree Extends List of Foreign Investments that Must Obtain Prior Authorization

By Thibaud Forbin and Sabine Naugès (McDermott Will & Emery, Paris)

As a general rule, foreign investment in France is unrestricted. Some investments in strategic sectors, however, require prior authorization.

The French Government issued a decree on May 14, 2014 that amends key provisions of the French Monetary and Financial Code (notably Article R. 153-2, 12°) dealing with foreign investments, and extends the list of investments for which foreign investors must obtain prior authorization from the French Minister of Economy before making an investment in a French company.

The decree is the result of a law adopted by the French legislator at the end of 2004 that aimed to ensure that all foreign investments touching upon public order, public security or interests of national defense were subject to official scrutiny (see Article L. 151-3 of the French Monetary and Financial Code).

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Strategic and Sensitive Sectors

Prior authorization was already required for the following investments made in "strategic" and "sensitive" sectors:

- investments made by companies headquartered *inside* the European Union (see Article R. 153-4 of the French Monetary and Financial Code) into private security services, interests concerning the prevention of illicit use of biological or toxic agents or other agents

The decree targets not only foreign investments made by companies headquartered outside of the EU but also in the EU.

prohibited in the construction of chemical weapons, equipment designed to intercept communications, the evaluation and certification of systems used in information technology, the production of goods or provisions of services relating to the security of information systems, goods and technology with dual applications;

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Prior Authorization (from page 9)

- investments made by companies headquartered *outside* the European Union (see Article R. 153-2, 1° to 11° of the French Monetary and Financial Code) into the interests indicated above and, in addition, gambling (with the exclusion of casinos); encryption and decryption systems for digital applications; businesses certified for national defense; trade in weapons, munitions and explosives for military applications or equipment used in warfare and businesses under contract to supply research or equipment to the French Ministry of Defense or its subcontractors.

Water, Electricity, Gas, Transportation, Telecom

The decree extends the list of foreign investments that are required to seek prior authorization (see Articles R. 153-2, 12 ° and R. 153-4 of the French Monetary and Financial Code as amended by the decree).

With the issuance of the decree, energy, in addition to the abovementioned investments, foreign investments made in activities related to the integrity, safety and continuity of (i) the supply of water, electricity, gas, hydrocarbons and any other source of energy, and (ii) the operation of transport services and telecommunications also fall within the scope of Article L. 151-3 of the French Monetary and Financial Code. Moreover, foreign investments made in activities related to “the protection of public health” are subject to prior authorization as well.

It is noteworthy that the decree targets not only foreign investments made by companies headquartered outside of the EU but also in the EU.

Investments in those sectors require prior authorization when the following transactions are contemplated:

- for any investor (i.e., businesses headquartered either inside or outside the European Union): the acquisition of a controlling interest, i.e., a majority of voting rights, in a French company and the acquisition of all or part of a business line;
- for investors headquartered outside the European Union only: the acquisition of interests exceeding 33.33 percent of equity or voting rights in a French company.

Consequences of the Decree

The decree applies to transactions in progress on or after May 16, 2014. Companies that have already entered into negotiations related to an acquisition in the sectors listed above and which have not formally completed negotiations should ask the Ministry of Economy whether or not the transaction falls within the scope of the decree and therefore requires authorization.

Once a request for authorization is filed, the Ministry has two months to inform the applicant that it is withholding authorization; no response within the two-month period is deemed acceptance.

If the companies involved do not apply for authorization even though the contemplated transaction falls within the scope of Articles R. 153-2, 12 ° and R. 153-4 of the French

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Monetary and Financial Code, or if it is not granted by the Ministry, the company is required to either not complete the transaction, or modify the transaction or even restore the previous status quo at its own expense. In addition, civil fines of up to twice the amount of the non-complying investment or criminal sanctions (including imprisonment for up to five years, seizure of the investment, and a fine of up to twice the amount of the investment) may be imposed.

If the Ministry denies authorization, an appeal may be filed with the Administrative Court, which may decide to annul the Ministry’s decision.

Compatibility of the Decree with EU Law

Under EU law, any restriction on the movement of capital between Member States or between Member States and third countries must be justified—such as on the grounds of public policy or public security—and proportional, which means it must not go beyond what is necessary to attain the pursued objective.

EU case law allows a Member State to introduce a system of prior administrative authorization for foreign investments if the system is based on objective and non-discriminatory criteria that are known in advance to the parties involved. It is uncertain at the moment whether or not the decree is compatible with EU law as it could be considered as overreaching.

If the European Commission has doubts as to the decree’s compatibility with EU law, it has the option to deliver a reasoned opinion after giving the French Government the opportunity to submit observations. The Commission could then decide to bring proceedings against France before the Court of Justice of the European Union (CJEU). If the CJEU finds that the decree is contrary to EU law, it could deliver a ruling specifying the measures to be taken by the French Government to rectify the situation. □