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ABSTRACT

In recent years, the world has seen a heightened level of scrutiny applied to foreign investments in the name of national security and France has been no exception to the trend. This article discusses notable recent amendments to the French foreign investment screening regime, including the impact of ministerial decrees and orders issued in 2020 and 2021, the effects of the EU Regulation on FDI screening and the French Ministry of the Economy tendances.

Ces dernières années, l'examen minutieux des investissements étrangers s'est accru au nom de la sécurité nationale – et la France n'a pas fait exception à la tendance. Cet article examine les modifications notables apportées récemment au régime français de filtrage des investissements étrangers, avec notamment un focus sur l'impact des décrets et arrêtés ministériels publiés en 2020 et 2021, les effets du règlement de l'UE sur le filtrage des investissements étrangers et les tendances des services du Ministre de l'Economie.

1. Foreign direct investment (FDI) in France has been subject to regulation for several decades, with the first such law being enacted fifty-five years ago on 28 December 1966 regarding foreign financial relations.[1] However, the past decade in particular has taken on a narrative of its own in relation to FDI screening, not only in France but around the world. While in the past, attracting foreign investment was a point of pride for western economies, nowadays, foreign investments in or acquisitions of companies and strategic assets are regarded with an increasingly suspicious eye. Exacerbated by the political currents against globalisation in the latter half of the last decade and the ongoing effects of the Covid-19 pandemic, governments across the globe have grown to adopt the view that investment screening in an ever-growing array of sectors should be a part of national security policy and foreign investments ought to be subject to governmental approval.

2. France is no exception to the trend. While open to foreign investment in principle, the French government has, in recent years, applied and strengthened the French Foreign Investment Regime (FFIR) with growing vigour. The FFIR is overseen by the French minister of the economy, finance and recovery ("MOE") and governed by the French Monetary and Financial Code,[2] which has been subject to several amendments over the last few months in relation to foreign investment regulation.

3. In complement to the FFIR, the European Union adopted its own FDI screening mechanism by way of Regulation (EU) 2019/452[3] (the "FDI Screening Regulation") to ensure the EU dimension of any proposed FDI in a Member State would be taken into account via notification to the European Commission and to enhance cooperation between Member States in screening and discussing proposed transactions even if for investors, the different investment screening mechanisms in EU countries are often seen as a labyrinth.

4. Following the first year of application of the FDI Screening Regulation, the Commission released an annual report reviewing the same. According to the report, between 11 October 2020 and 30 June 2021, a total of 265 notifications were submitted by 11 Member States, and 90% of these notifications were made by 5 Member States, of which France was one.[4] The MOE is indeed very keen to make use of the cooperation mechanism and potential EU-wide commentary on proposed transactions in France.

* Grateful for the contribution by my colleague Soniya Ambadkar (trainee solicitor, Clifford Chance) to this article.

1 Loi nº 66-1008 du 28 décembre 1966 relative aux relations financières avec l'étranger, available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000880207.

2 Articles L-151-1 and R-151-1 of the French Monetary and Financial Code, available at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006645694 and https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000041461626.

3 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, OJ L 79I, 21.3.2019, p. 1, available at https://eur-lex.europa.eu/eli/reg/2019/452/oj.

4 Austria, Germany, Italy and Spain were the other four.

5. In the light of this cooperation, the French minister of economy adopted on 10 September 2021 a new order (*arrêté*),[5] which provides that, since 1st of January 2022, the so-called notification Form B[6] requested under the European cooperation mechanism set up under Regulation (EU) 2019/452 will systematically need to be submitted alongside the list of documents to be provided when submitting a French authorisation application.

6. Notification of an FDI transaction to the Commission under the FDI Screening Regulation entails an initial fifteen calendar day "Phase I" review in which approximately 80% of transactions are cleared, and potentially a "Phase II" review which is variable in duration depending on the time of receipt of the information requested by the Commission. As noted by Professor Francesco Martucci of Paris 2 Panthéon-Assas University, though national security is ultimately left in the hands of Member States, who are free to make their own assessment of FDI transactions notwithstanding comments from other Member States or the opinion of the Commission (which is non-binding), the relevant Member State may only make the final FDI screening decision after receipt of the Commission and Member States comments or opinions.[7]

I. Impact of the Covid-19 pandemic on French FDI procedure

7. As a case in point, the Covid-19 pandemic has dramatically highlighted the issues a country may face if it loses control over certain strategic sectors of its economy to foreign interests.

8. The economic impact of the Covid-19 pandemic has led to the expansion of the existing French regulation:

– The Order of 27 April 2020 relating to foreign investments in France[8] added research and development (R&D) related activities in the biotechnology sector to the list of strategic activities under the FFIR, which was most likely implemented to protect French companies working on a Covid-19 vaccine. This followed the 25 March 2020 guidance of the European Commission, which had indeed identified in March 2020 an increased risk that non-EU acquirers would attempt to obtain control over suppliers of essential products, including products in the healthcare sector. The European Commission called on Member States to make use of pre-existing FDI regimes and to introduce robust screening mechanisms where they did not already exist, to protect "*critical health infrastructures, supply of critical inputs, and other critical sectors*."[9]

It should be noted that activities essential for the protection of public health were already regulated under the French FDI screening rules before the pandemic. The aforementioned extension of the regime to cover R&D-related activities in the biotechnology sector is a permanent change and permits tighter control of foreign acquisitions in this forward-looking field, where players are often start-ups with innovative R&D activities which ultimately serve the public health motive. As a result, between 2020 and 2021, controls on foreign investment in biotechnology have almost doubled.

– In addition, Decree No. 2020-892 of 22 July 2020[10] introduced a simplified control procedure for acquisitions by non-EU/EEA investors of at least 10% of the voting rights of a French company carrying out a strategic activity and whose shares are traded on a regulated market.

In such a case, the investor must give prior notice of the transaction to the ministry of economy, which has a period of ten business days within which it could object to the transaction. If no objection is raised, the transaction is authorised, and the investor has up to six months to complete it. However, if an objection is raised, the investor must file a formal application for authorisation.

Decree No. 2020-1729 of 28 December 2020[11] extended this temporary "fast-track" framework initially until 31 December 2021. When the initial extension decision was made in December 2020, Bruno Le Maire, French minister of the economy and finance, was quoted as saying: "*In these times of economic crisis, we must guarantee the protection of our strategic companies. We will therefore maintain the threshold for controlling foreign investment in France at 10%*."

Unsurprisingly, then, this temporary lower threshold of 10% was, in November 2021, extended again for a further year. Bruno Le Maire and Franck Riester, the latter being

5 Arrêté dated 10 September 2021 published in *JORF* No. 0221 of 22 September 2021.

6 The notification Form B provides minimum requirements for the elements and content of notifications submitted by Member States. *See* https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159530.pdf.

7 Le cadre de filtrage des investissements directs étrangers : la quête d'un équilibre entre marché et intérêts stratégiques dans le système constitutionnellement intégré, *Europe* 2020, No. 3, Study No. 2, pp. 7–12.

8 Arrêté du 27 avril 2020 relatif aux investissements étrangers en France, available at https://www.legifrance.gouv.fr/loda/id/JORFTEXT000041835304.

9 Communication from the Commission Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation) OJ C 99I, 26.3.2020, p. 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.CI.2020.099.01.0001.01.ENG&toc=OJ%3AC%3A2020%3A099I%3AFULL.

10 Décret nº 2020-892 du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé, available at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042138111.

11 Décret nº 2020-1729 du 28 décembre 2020 modifiant le décret nº 2020-892 du 22 juillet 2020 relatif à l'abaissement temporaire du seuil de contrôle des investissements étrangers dans les sociétés françaises dont les actions sont admises aux négociations sur un marché réglementé, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042754696.

the minister delegate to the minister for Europe and foreign affairs, in charge of foreign trade and attractiveness, have recommended that the lower investment threshold, which was due to expire on 31 December 2021, be kept in place until 31 December 2022, noting that the current health and economic context does not alleviate the risks faced by these listed French companies. This decree implementing the extension entered into force on 1 January 2022, thus ensuring an uninterrupted continuity of this crisis measure.

Bruno Le Maire and Franck Riester made the decision to press forward with the extension in light of their view that the measure had proven its effectiveness in protecting national interests during the health crisis while preserving the relative openness of the French market to foreign investors.

Further, it was decided that the precise terms of the application of the 10% threshold measure would remain unchanged: (i) the measure has no bearing on EU or EEA investors; (ii) it applies only to investments in listed companies; (iii) it is temporary and due to expire on 31 December 2022; and (iv) it is subject to an accelerated procedure in which the investor exceeding the 10% threshold notifies the MOE. The MOE then has ten business days to decide whether the transaction should be subject to a more detailed examination via a full application for authorisation, which may lead to a prohibition of the transaction.

When making the decision to extend the measure, the French ministry took the opportunity to urge other EU Member States to adopt a similar mechanism in order to protect the whole of the EU more effectively, noting that foreign investments present a risk to security and public order and arguing that foreign investment screening better protects European interests.

II. Reform of the French FDI review process

9. There is no fee for submitting an approval request to the MOE. However, a request is mandatory where the above criteria are met. It must be made prior to completion of the transaction and is suspensory once made. The MOE can be consulted on whether a transaction falls within the purview of the FFIR, but typically takes two months to respond to such questions.

10. The formal review process is split into two parts: Phase I and (if applicable) Phase II. Phase I begins once the MOE confirms receipt of all the required documents and provides the MOE with thirty working days to either:

– confirm the investment is not subject to FDI approval under the FFIR;

– approve the transaction with conditions or commitments attached;

– approve the transaction unconditionally; or

– launch an in-depth review (Phase II).

11. A Phase II review provides the MOE with an additional forty-five working days from the decision issued at the end of Phase I to complete its investigation. This is not dissimilar to the merger control procedures that many readers may already be familiar with.

12. If the MOE does not issue a decision within the initial thirty working day period or the subsequent forty-five working day period (as applicable), the transaction is deemed to be rejected by default. This is a clear shift in approach towards a more restrictive FFIR as the previous regime allowed for approval by default in the absence of a decision within the applicable timeframe. An appeal must be lodged within thirty days of an express or implied rejection decision by the MOE.

13. In addition, on the eve of a new round of reforms, a new order (*arrêté*) of the French minister of the economy was adopted on 10 September 2021, extending the list of critical technologies in the definition of "strategic sectors" to include technologies relating to renewable energy production. Thus, R&D activities relating to these new technologies now fall within the scope of French foreign investment control. This amendment is designed to strengthen the protection of activities that are essential to guarantee the greening of the French energy mix.

14. Most importantly, the same order (*arrêté*) also added to the list of information and documentation to be filed alongside a prior authorisation application in order to comply with EU Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for screening foreign direct investment in the European Union. As part of the increased list of information, investors will need to submit to the French FDI authority the so-called EU Form. This document consists of a summary document in English based on the information included in the FDI filing. The aim is to share the EU Form with the European Commission and Member States to allow them to comment, ask questions and share their opinions on the FDI application under review.

15. In addition, the French FDI application will also need to contain additional information on the target's activities, such as a list of French and EU competitors (specifying the market share held in France by each French competitor), and a list of the IP, patents or trademarks held by the target together with details of their nature and duration. The French FDI application will also need to list the procedures for accessing and managing data relating to French customers, if any.

16. These changes entered into force as of 1 January 2022, a few months after publication of the order (*arrêté*), in order to give the affected parties and their external counsels a minimum period of time to adapt to the new measures, according to the MOE.

III. The French Foreign Investment Regime in action

17. Though formal vetoes remain rare, recent transactions have been blocked by the MOE in a striking exercise of its new powers. In particular, the acquisition of French supermarket chain Carrefour by Canadian convenience store chain Couche-Tard was prohibited by the MOE in January 2021 without even the launch of a formal review. Bruno Le Maire declared Carrefour to be "*a key link in the chain that ensures the food security of the French people*" and opposed the transaction on the ground of French food sovereignty. It is unlikely to be a coincidence that the outright prohibition came during the peak of the Covid-19 pandemic, in which several western economies faced supply chain problems in key sectors such as food and healthcare.

18. In another notable example, mere months earlier, in late 2020, the MOE had launched a formal review of the proposed acquisition of Photonis, a manufacturer of electro-optic solutions with military applications, by US defence manufacturer Teledyne. On 18 December 2020, the verdict arrived—the transaction had been prohibited by the French authorities on the grounds of French sovereignty in the defence sector. With Photonis being a strategic supplier of night vision devices to the French armed forces, the intervention is slightly less surprising than that of the Carrefour prohibition, though it nevertheless stands out amongst a relative scarcity of official vetoes by the French government on foreign investment transactions. Even if it appears that only a small proportion of transaction have been blocked over the last few months, the MOE is more often clearing transactions but subject to commitments.

IV. Conclusion

19. Overall, it can be seen from the recent developments discussed above that the French FDI landscape is growing increasingly crowded with numerous restrictions, MOE powers, potential sanctions and review processes.

20. The regime has been expanded in almost every way possible, such as the expansion of criteria for captured investments, the broadening of strategic sectors, the expansion of the applicable legal entities (in relation to both the target and the investor's chain of control) and the powers of the MOE.

21. Indeed, the MOE announced in March 2021 that it had reviewed 275 FDI transactions in 2020, compared to 216 reviews in 2019 and 184 in 2018. Based on the MOE's statistics, it can be seen that the USA remains the leading country outside the European Union seeking to invest in France, followed by Canada and Switzerland. The main investors within the European Union are Germany and Luxembourg. Most other investors come from the United Kingdom.

22. The trend on all horizons is upwards in terms of French FDI regulation. Further developments may still be around the corner. ■

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