

# France extends interim rule on foreign direct investments

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On 23 December 2022, the French government issued decree number 2022-1622, which extended to 31 December 2023 the interim rule, in effect for two years now, that lowered the threshold that triggers foreign investment review to 10% of voting rights for certain investments. The interim rule applies to investments by foreign investors from outside the European Union (EU) and European Economic Area (EEA) in certain French publicly listed corporations.

The interim rule was first implemented in July 2020 in response to the economic implications of the COVID-19 pandemic for French strategic assets, and was extended in December 2020 and December 2021.

In a press release announcing the latest extension, French officials cited national security risks, namely, opportunistic share acquisitions by non-EU foreign investors in French public companies involved in sensitive activities.<sup>1</sup> French officials also cited current economic conditions and the energy crisis as underlying reasons for the latest extension.

## The interim rule

The French foreign direct investment (FDI) rules require foreign investors to file a request with, and obtain authorization from, the French Minister for the Economy (MoE) prior to making certain investments (Covered Investments) in business activities in France involving sensitive sectors or strategic assets (Covered Activities).<sup>2</sup>

*The interim rule was first implemented in July 2020 in response to the economic implications of the COVID-19 pandemic for French strategic assets.*

Under the French FDI rules, Covered Investments are defined as:

- (1) the acquisition of control over a French company;
- (2) the acquisition, in whole or in part, of a branch of business of a French company; and

- (3) for non-EU, non EEA foreign investors only, the acquisition of more than 25% of voting rights in a French company (the Threshold Test).

The interim rule lowered that 25% threshold to 10% if the French company is involved in a Covered Activity and its shares are admitted to trading on a regulated market.

*French officials cited current economic conditions and the energy crisis as underlying reasons for the latest extension.*

French FDI authorities retain some discretion in deciding what exactly constitutes Covered Activity in a given case, but under the FDI rules, that consists of:

- (1) activities that are in-scope by their nature (*i.e.*, public order, public security and national defense activities);
- (2) activities that are determined to be in-scope pursuant to a sensitivity test based on various criteria (*e.g.*, the target's customers; the nature, specificity and use of the target's products, services and solutions; market substitutability; dangerousness of target's activities); and
- (3) research and development (R&D) activities involving critical technology or dual-use goods and technology that may be used in connection with any of the activities referred to in item 1 or 2.

## Clarification of the scope of the interim rule

The French Treasury's FDI guidelines, issued in September 2022, provide that the interim rule applies when the shares of the French target company are listed on a French, EU or EEA regulated market.<sup>3</sup>

The guidelines state that the interim rule does *not* apply to French public companies whose shares are admitted to trading on a non-regulated market (*e.g.*, Euronext Growth) or on a market in a non-EU or non-EEA country.

The guidelines also confirm that, when all the persons in the chain of control of an investor from another EU or EEA country are established in an EU or EEA country, the Threshold Test (and therefore the interim rule) does not apply.

### Assessment of crossing the threshold test

Under French FDI rules, a Covered Investment arises when a non-EU or non-EEA foreign investor crosses the 25% threshold (or 10% under the interim rule) acting alone or in concert with other investor(s), even if the foreign investor has no specific controlling rights.

*Covered Investments falling within the scope of the interim rule are subject to a simplified prior notification requirement and a fast-track review process.*

The FDI guidelines refer to the concepts of “threshold crossing” and “acting in concert” (*action de concert*), which are defined and implemented under French corporate and securities law.

With respect to the notion of a concerted action, the guidelines recall that an agreement to act in concert need not necessarily be in writing, and may be express or tacit. If such an agreement is not in writing, the existence of a concerted action can be established on the basis of “serious, precise and concordant indicia.”

### Notification requirement and fast-track review process

Covered Investments falling within the scope of the interim rule are subject to a simplified prior notification requirement and a fast-track review process.<sup>4</sup>

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Following the notification, the MoE will decide within 10 business days if the proposed investment must undergo a standard review process pursuant to French FDI rules. If the MoE does not raise any objection within 10 business days following receipt of the prior notification, the proposed investment is deemed authorized, in which case, completion of the foreign investment must take place within six months of the notification.

The MoE may, however, reject the exemption and decide that the proposed investment must be subject to a standard review under French FDI rules (*i.e.*, 30-business day phase I review, and if necessary, 45-business day phase II review). The launch of a standard review process may eventually lead to the MoE imposing binding commitments on the foreign investor as a condition of issuing FDI clearance.

Per the guidelines, a Covered Investment in a French listed company that is authorized pursuant to the 10% threshold interim rule does not require additional FDI authorization if the foreign investor subsequently crosses the 25% threshold.

### Notes

<sup>1</sup> See Communiqué de presse, N° 458, Prorogation en 2023 sur la mesure d’abaissement temporaire du seuil déclenchant le contrôle IEF dans les sociétés française cotées sur un marché réglementé, <http://bit.ly/3XpEYwb>

<sup>2</sup> French FDI rules define foreign investors as: (i) any individual of foreign nationality; (ii) any individual of French nationality who is not tax-domiciled in France; (iii) any foreign-registered entity; or (iv) any French entity that is under the control of one or more persons or entities listed in (i), (ii) or (iii).

<sup>3</sup> See our 14 November 2022 client alert, “France Issues Guidelines on Foreign Investment Control Regime,” <http://bit.ly/3WncRfU>

<sup>4</sup> See our 23 December 2020 client alert, “France Extends COVID-19 Interim Rules on Foreign Investments and Vetoes Teledyne’s Acquisition of Photonis,” <http://bit.ly/3XFARfl>

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