

France seeks to reinforce FDI control to address economic security concerns



Back in August, France's Minister for the Economy gave a high-level preview of forthcoming FDI measures which will extend the scope of covered activities and transactions, and permanently lower some triggering voting rights for non-EU/EEA investors. As Wesley Lainé sets out, the Minister's speech clearly puts investment screening on the map of French economic and national security.

During a speech on French economic priorities on 24 August 2023, the French Minister for the economy Bruno Le Maire laid out three forthcoming measures to reinforce the French foreign investment regime.¹ Although the Minister provided only a high-level preview of the proposed measures to be implemented under the French foreign direct investment ('FDI') rules, the new measures would

1. extend the scope of covered activities to cover critical raw materials;
2. make permanent the interim rule that lowered the triggering threshold to 10% of voting rights for certain investments by non-EU/non-European Economic Area ('EEA') investors; and
3. extend the scope of covered transactions to include the acquisition of a French business branch ('succursale') of a foreign company.

The Minister did not provide a timeline for the adoption of the proposed measures, but given the recent focus on economic security in France and the European Union, it is expected that a decree will be issued before the end of 2023.

The proposed measures indicate that economic security is an important component of France's national security strategy. French President Emmanuel Macron has appointed the former chairman of France's Medef business lobby to work on a report on French economic security. Moreover,



THE PROPOSAL ENTAILS EXTENDING THE SCOPE OF COVERED ACTIVITIES TO COVER THE EXTRACTION AND PROCESSING OF CRITICAL RAW MATERIALS, WHICH THE MINISTER SAYS HAVE BECOME KEY TO FRENCH INDUSTRIAL SOVEREIGNTY.

the French FDI regime is an important trade policy tool that will likely be adapted as needed to address French national security concerns.

BACKGROUND ON THE FRENCH FDI RULES

French FDI rules require a foreign investor to file a request with, and obtain authorisation from, the Minister prior to making a covered investment in a covered activity.

Covered investments

Under French FDI rules, covered investments include:

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/EEA foreign investors only, the acquisition of more than 25% of voting rights in a French company

(an interim rule lowered the 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).

As discussed further in this article, the Minister has announced that the interim rule will become permanent.

Covered activities

Covered activities include defence and security-related activities, and infrastructure, goods or services that are essential for strategic sectors – energy, water, transport, space operations, telecommunications, critical infrastructure, public health, public security, sensitive data, food security, and media. Additionally, covered activities include R&D activities involving critical technologies – semiconductors,

artificial intelligence, cybersecurity, robotics, additive manufacturing, quantum technologies, energy storage, biotechnology, and renewable energy.

Review process

The French foreign investment regime has a two-step review process – including a 30-business day Phase I review and, when necessary, a 45-business day Phase II review – that mirrors the US CFIUS review system.

PROPOSED MEASURES TO EXPAND SCOPE OF FRENCH FDI RULES

The proposed measures set out by the Minister to expand the scope of the French FDI rules include:

Critical raw materials to be added to list of covered activities.

The first proposal entails extending the scope of covered activities to cover the extraction and processing of critical raw materials. The Minister stated that critical raw materials have become key to French industrial sovereignty. The Minister raised the recent decisions made by Chinese authorities to restrict exports of gallium and germanium, which are essential components for producing semiconductors (vital to the production of numerous high-tech products), as an indication of the criticality of these raw materials. China has also announced new restrictions on exports of graphite, a key raw material in electric vehicle batteries.

In light of the foregoing statement, it is possible that this measure may target rare earth minerals. The Minister has not, however, provided additional information on the targeted critical raw materials. Consistent with past practice, it is expected that the list of critical raw materials subject to the French FDI rules will be issued in an administrative order.

Interim rule (10%) to become a permanent rule.

The second proposal relates to making permanent the interim rule, in effect for three years now, that lowered the threshold

MINEFI'S VETO OF THE FLOWSERVE/VELAN TRANSACTION SHOULD NOT BE VIEWED AS A SIGNIFICANT CHANGE IN MINEFI'S POSITION ON THE NATIONAL SECURITY RISK OF FOREIGN INVESTMENT IN FRANCE WHEN SUCH INVESTMENT INVOLVES SENSITIVE ACTIVITIES.

that triggers foreign investment review to 10% of voting rights for investments in a French company involved in a covered activity and whose shares are admitted to trading on a regulated market.² The interim rule applies to investments by foreign investors from outside the EU and European Economic Area. The Minister had announced on 5 January 2023 that the interim rule would become a permanent rule.³ The latest announcements therefore confirm that the French Ministry for the Economy ('Minefi') intends to move forward with this initiative.

Covered investments to include acquisition of a succursale of a foreign company.

The third proposal would extend the scope of covered investments to include acquisitions by foreign investors of a *succursale* of a foreign company. The objective of this proposal is to close a perceived loophole in the French FDI rules, which do not require a foreign investor to request authorisation from Minefi if such an investor acquires the *succursale* of a foreign company.

Guidelines issued by Minefi, however, clarified that a *succursale* could be deemed as a 'branch of activity' for purposes of the so-called asset test,⁴ if the French branch is an aggregate of assets and personnel capable of carrying out a sensitive business activity. A transaction that falls within the scope of the asset test qualifies as a covered investment and therefore requires prior authorisation from the Minister.

At the time of writing, the details and scope of the foregoing measures are yet to be confirmed. The proposed measures, however, are expected to be implemented by decree before the end of 2023.

ENHANCED SCRUTINY OF DEFENCE-RELATED TRANSACTIONS

In addition to economic security, defence-related considerations have historically been the main factor in French foreign investment control. Minefi's general approach

with respect to defence-related transactions has been to negotiate mitigation measures with foreign investors, instead of rejecting such investments. It appears, however, that Minefi is prepared to use its veto power in exceptional circumstances. The two cases set forth below are examples of recent decisions with different outcomes involving sensitive transactions.

Conditional authorisations imposed on most defence-related investments

According to Minefi's annual FDI report for calendar year 2022, Minefi particularly focused on defence-related foreign investments in 2022.⁵ The report provides that 42% of the filings reviewed by Minefi were assessed to be sensitive from a defence standpoint or were deemed to be dual-purpose activities (*i.e.*, civilian and defence). Notably, Minefi's enhanced scrutiny of defence-related transactions resulted in conditional authorisations being issued on grounds of defence considerations in 76% of such investments in 2022.

Heico/Exxelia

In January 2023, Minefi issued a conditional authorisation for the transaction involving the US firm Heico acquiring the French company Exxelia. Exxelia products include electronic components and rotary joint assemblies for mostly aerospace and defence applications. Notably, Exxelia makes such parts for the French Rafale fighter aircraft, as well as the US F-35 fighter jet. Reporting indicates that the French state acquired a golden share that confers special rights with respect to the sensitive activities of Exxelia as part of the conditions for authorising the transaction.

Flowserve/Velan

In October 2023, Minefi vetoed the transaction involving the US company, Flowserve, acquiring Velan, a Canadian industrial valve-manufacturing company based in Québec. Specifically, the French portion of the deal involved Flowserve acquiring Velan's French businesses, Segault and Velan SAS. Segault is a nuclear

submarine parts supplier that provides components for nuclear-propelled submarines built by state-owned shipbuilder Naval Group and it also makes industrial valves that are used on France's *Charles de Gaulle* aircraft carrier. Segault's products involve both military and civilian applications. Velan's operations include designing, manufacturing, selling and servicing nuclear classified valves for French nuclear powerplants, among others.

In May 2023, French Minister for the armed forces Sebastien Lecornu had indicated that the French state would oppose any loss of French operational control of Segault and Velan SAS.⁶ On 6 October 2023, the French press reported that Minefi had confirmed that it did not provide the required regulatory approval for the acquisition of Segault and Velan SAS as part of the Flowserve/Velan transaction. Reporting indicates that the Minister stated that the commitments by Flowserve were insufficient to eliminate identified risks. Following the French veto, it appears that Flowserve intends to terminate the transaction.⁷

EU ECONOMIC SECURITY INITIATIVES

Economic security is high on the agenda of the EU as well. To this end, the EU Council adopted a joint communication on European economic security strategy to put in place a comprehensive strategic approach to economic security on 21 June 2023. In relation to this economic security framework, the EU initially identified a list of ten critical technology areas for the EU's economic security – advanced semiconductors technologies, artificial intelligence technologies, quantum technologies, biotechnologies, advanced connectivity, navigation and digital technologies, advanced sensing technologies, space and propulsion technologies, energy technologies, robotics and autonomous systems, and advanced materials, manufacturing and recycling technologies.

In a recent recommendation,

the EU Commission (Commission) has narrowed down the list to four technology areas that it considers highly likely to present the most sensitive and immediate risks to technology security and technology leakage, namely:

1. advanced semiconductors;
2. artificial intelligence;
3. quantum technologies; and
4. biotechnologies.

The EU, in coordination with Member States, is currently engaged in a risk assessment with respect to the foregoing technologies.

When the full risk assessment is complete, it appears that the Commission will move forward with mitigation strategies. The EU's joint communication on European economic security strategy included the option for setting up a new dedicated group of Member States' experts, to assist in assessing the security risks that can result from outbound investments. On 19 July 2023, the Commission established an informal commission expert group on

outbound investments.

Reporting appears to indicate that the EU's de-risking strategy is particularly focused on China.⁸ If these reports are to be believed, the EU appears to be peering, albeit lightly, at the US outbound FDI review policy objective, which explicitly directed the US Department of the Treasury to create a new regulatory programme to prohibit or require notification of outbound US investments to China in certain sensitive sectors.⁹ Further discussion at the EU-level regarding outbound investments review is expected in 2024. Discussion on reforms to the EU FDI Regulation is also expected next year.¹⁰

ANALYSIS

Economic security

France is an important destination in Europe for investments by leading global companies. On the one hand, France has implemented a series of business-friendly reforms that have helped make the country the leading destination

for foreign investments in Europe for four consecutive years.¹¹ On the other hand, the forthcoming measures under the French FDI rules show that Minefi will continue to adapt the French FDI rules to address its concerns on the impact of FDI on French national security.

Minefi's policy response thus far is to extend the scope of French FDI rules. It can also be expected that Minefi's review of prior authorisation requests will reflect its overall position regarding economic security. The concept of economic security itself is dynamic and raises intersectional considerations (both economic and political) that could to a certain extent impact Minefi's approach depending on the transaction and the stakeholders involved.

Protection not rejection

Minefi's veto of the Flowserve/Velan transaction should not be viewed as a significant change in Minefi's position on the national security risk of foreign investment in France when such investment involves sensitive

LINKS AND NOTES

- ¹ See *Ministère de l'économie, des finances, et de la souveraineté industrielle et numérique*, speech by the French Minister for the economy, Bruno Le Maire, priorités économiques de la rentrée
- ² Minefi's guidelines provide that the interim rule applies when the shares of the French target company are listed on a French, EU or European Economic Area regulated market. The guidelines also 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.
- ³ See Pascal Bine, Wesley Lainé, France extends interim rule on foreign direct investments, 20 January 2023, Westlaw Today. [https://today.westlaw.com/Document/Ibdbc65d98df11ed8636e1a02dc72ff6/View/FullText.html?transitionType=CategoryPageItem&contextData=\(sc.Default\)&firstPage=true](https://today.westlaw.com/Document/Ibdbc65d98df11ed8636e1a02dc72ff6/View/FullText.html?transitionType=CategoryPageItem&contextData=(sc.Default)&firstPage=true)
- ⁴ Under French FDI rules, the acquisition, in whole or in part, of a branch of business of a French company (the Asset Test) qualifies as a covered investment. The French foreign investment guidelines are available on the French Ministry for the Economy's website www.tresor.economie.gouv.fr/Articles/314615b9-70b9-417f-bb94-5dd1437e7418/files/a81a841b-dc55-4685-af34-213bb0bd88cc
- ⁵ See French Ministry for the Economy, Foreign investment screening in France, Annual report 2022, www.tresor.economie.gouv.fr/Articles/5ed9606f-f37e-4517-ae5d-445dab7ecad0/files/e2fba637-c230-4a90-ac53-09479a90125b
- ⁶ Under French FDI rules, however, the French Minister for the economy makes the final ruling.
- ⁷ See France blocks Velan stake acquisition by US bidder Flowserve, Mergermarket, 6 October 2023.
- ⁸ See EU to assess export controls on sensitive tech to China, Andy Bounds, 3 October 2023, *Financial Times* – www.ft.com/content/2b7a97ab-f563-434e-8d01-70ff9fa9efa6.
- ⁹ See Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern, 9 August 2023, www.whitehouse.gov/briefing-room/presidential-actions/2023/08/09/executive-order-on-addressing-united-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/
- ¹⁰ 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.
- ¹¹ See For the 4th year in a row, France ranks 1st for Foreign Direct Investments in Europe according to EY survey, 15 May 2023, Bloomberg – www.bloomberg.com/press-releases/2023-05-15/for-the-4th-year-in-a-row-france-ranks-1st-for-foreign-direct-investments-in-europe-according-to-ey-survey.
- ¹² The relevant provision in the French FDI rules does not distinguish between different types of semiconductors. All semiconductors are within the scope of its list of critical technologies.

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activities. Defence-related transactions will continue to attract significant attention from Minefi. However, the data has shown that such transactions are likely to receive clearance subject to the investor agreeing to certain conditions with the French state.

It has also been noted in the media that the French military budget bill (*Loi de programmation militaire*) that was adopted on 13 July 2023, will likely need the support of private sector investment, including from foreign sources,

to boost the French defence ecosystem. The outcome of the Flowserve/Velan transaction is a useful warning. However, foreign investors should keep in mind that Minefi's general approach for defence-related transactions has been to negotiate mitigation measures, instead of rejecting such investments.

Practical considerations

In an era of multinational companies and globalised supply chains, crossborder transactions that fall within

the scope of French FDI control could present complex regulatory considerations. Even though a transaction may be deemed as non-sensitive at first glance, it may also raise FDI considerations that may require negotiating mitigation measures with Minefi (e.g., maintaining employment, intellectual property, or know-how in France). Therefore, stakeholders should seek to know as much as possible on the regulatory expectations and processes. Furthermore, investors and dealmakers should conduct a holistic analysis of the relevant factors when considering entering into a transaction that falls within the scope of the French FDI rules. This assessment should inform the strategy of the acquirer or target company in a transaction.

The EU's current focus on economic security with respect to key technologies will likely strengthen the resolve of EU Member States to further scrutinise transactions involving these technologies. For instance, as regards to France, R&D activities relating to the four technology areas that are currently undergoing a risk assessment at the EU level – advanced semiconductors,¹² artificial intelligence, quantum technologies, and biotechnologies – are already included on the list of critical technologies that are within the scope of French FDI rules. As the leading destination in Europe for FDI, it can be expected that France will also play an important role in driving the EU's economic security strategy.

Grainy detail: All eyes on the Black Sea Initiative



Complex, fragile and necessary – the Black Sea Initiative on the transport of grain and other foodstuffs from Ukraine has been amongst the most critical of the diplomatic efforts intended to mitigate the impact of the war. In July, Russia pulled out of the deal upon which so many African countries rely. Here, Tan Albayrak assesses the state of play and prospects of its continued operation.

All eyes have been on Black Sea since July of this year, when Russia decided to pull out of the Initiative on the Safe Transportation of Grain and Foodstuffs from Ukrainian ports, commonly known as the grain deal.

Brokered by the UN and Turkey in July 2022, the deal enabled somewhat of a stability at the peak of the war when it comes to humanitarian trade. It ensured the safe navigation of ships for the export of foodstuffs such as grain, as well as fertilizers, using demined corridors into the Black Sea. Turkey, which controls the maritime routes into the Black Sea along the Bosphorus Strait, has been inspecting the merchant vessels to ensure compliance with the scope of the deal.

The significance of the deal



stems from Ukraine being one of world's largest grain exporters, providing some 45 million tonnes annually to the global market according to the UN Food and Agriculture Organization data. Almost half of these exports have been made from the port of Odesa.

Along with the Ukraine grain deal, another deal had been made concurrently, with the goal of facilitating unimpeded exports of Russian foodstuffs, as well as fertilizers and raw materials. According to Russia, it never saw the benefits of this second agreement. Even

though not 'sanctioned', Russia purported that Western institutions (banks and insurers alike) have been applying a *de facto* embargo on these goods of Russian origin, which made exports more costly.

New corridor

Fast forward to the autumn of 2023, a new corridor is being experimented with, where Ukraine has embraced the western coast of the Black Sea, into the territorial waters of Romania and Bulgaria. Through this new route, Ukraine has incrementally been increasing its exports. However, it is too early to tell whether the levels will reach those of the original corridor. The more immediate priority seems to be to establish that hugging the western coast of the Black Sea will indeed provide safe harbour from the Russian offensive. While