

# France Strengthens Foreign Investment Controls, Expands Jurisdiction to ‘Commercial Establishments’ Registered in France

Skadden

01 / 16 / 24

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

## Pascal Bine

Partner / Paris  
33.1.55.27.11.01  
pascal.bine@skadden.com

## Wesley Lainé

Associate / Paris  
33.1.55.27.11.73  
wesley.laine@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West  
New York, NY 10001  
212.735.3000

68, rue du Faubourg Saint-Honoré  
75008 Paris, France  
33.1.55.27.11.00

On 28 December 2023, the French government adopted [decree number 2023-1293](#) (Decree), together with an [administrative order](#) of the same date (Order), that expanded the scope of covered investments and covered activities under French foreign direct investment (FDI) rules (as amended, the New Rules).<sup>1</sup>

The key aspects to note are:

- The scope of covered investments under French FDI rules has been extended to the acquisition of control of an unincorporated “commercial establishment” registered in France and owned by a foreign company.<sup>2</sup>
- The New Rules permanently establish the voting rights triggering threshold at 10% for investments by non-European Union and non-European Economic Area (EEA) foreign investors in French publicly-listed companies involved in covered activities.
- The scope of covered activities has been extended to the extraction, processing and recycling of critical raw materials and to the security of prison establishments.
- The New Rules amend the list of covered critical technologies for R&D activities subject to French FDI control, replacing renewable energy with the broader low carbon energy, and adding photonics to the list.
- The New Rules merge the prior intragroup exemptions from authorization into a single exemption limited to cases where the ultimate controlling shareholder of the relevant foreign investor already has control over the French target company.

The New Rules entered into force on 1 January 2024.

## Background on French FDI Rules

French FDI rules require a foreign investor to file a request with, and obtain authorization from, the French Minister for the Economy (MoE) prior to making a covered investment (Covered Investment) in a covered activity (Covered Activity) in France. The French foreign investment regime has a two-step review process — including a 30-business-day phase I and, when necessary, a 45-business-day phase II review. As discussed below, the FDI Rules also include a fast-track review process for certain Covered Investments involving French publicly-listed companies.

## Extension of the Scope of Covered Investments

### Covered Investments Prior to the Decree

Prior to the New Rules, Covered Investments were defined as:

- the acquisition of control of a French company (Control Trigger);<sup>3</sup>
- the acquisition, in whole or in part, of a branch of business of a French company (Asset Trigger); or
- for non-EU, non-EEA foreign investors only, the acquisition of more than 25% of voting rights in a French company (Threshold Trigger).

<sup>1</sup> The Decree and the Order were published in the *Journal officiel de la République française* on 29 December 2023.

<sup>2</sup> Under French law, a commercial establishment (*établissement commercial*) is an unincorporated body and a place of business that is registered with a Trade and Companies Register in France.

<sup>3</sup> French FDI rules assess control pursuant to article L. 233-3 of the French Commercial Code. [The French FDI guidelines](#) confirm that the Control Trigger includes the acquisition of “deemed control,” “de facto control” and “joint control,” as such concepts are defined under French corporate law.

# France Strengthens Foreign Investment Controls, Expands Jurisdiction to ‘Commercial Establishments’ Registered in France

In July 2020, in response to the economic implications of the COVID-19 pandemic for French strategic assets, the French authorities implemented an interim rule that lowered the Threshold Trigger to 10% of voting rights if the French target company is involved in a Covered Activity and its shares are admitted to trading on a regulated market (Interim Rule). The Interim Rule had been renewed on a yearly basis since 2020 and was set to expire on 31 December 2023.

## Extension of the Scope of Covered Investments

The Decree extends the scope of Covered Investments by amending the Control Trigger and integrating the Interim Rule permanently into the Threshold Trigger:

- i. **The Control Trigger:** The Decree has extended the Control Trigger to the acquisition of control over an unincorporated commercial establishment that is registered in France and owned by a foreign company.<sup>4</sup> As a result, a corporate transaction between two foreign entities (*i.e.*, non-French) that would lead the foreign buyer to have control over an unincorporated French commercial establishment owned by the foreign seller (or any of its non-French affiliates) will fall within the scope of Covered Investments under French FDI rules.
- ii. **The Threshold Trigger:** The Decree has made the Interim Rule’s 10% voting rights Threshold Trigger permanent for non-EU and non-EEA foreign investors. As was the case under the Interim Rule, the 10% voting rights triggering threshold applies only in cases where the French target company’s shares are admitted to trading on a regulated market. [The French FDI guidelines](#) have clarified that the rule applies in cases where the French company’s shares are listed on a French-, EU- or EEA-regulated market.
- iii. The Decree has also maintained the simplified notification and fast-track review process for Covered Investments that fall within the scope of the 10% voting rights Threshold Trigger that had been in place before the New Rules. Following notification, the MoE shall decide within 10 business days if the foreign investor’s proposed investment must undergo a standard review process pursuant to French FDI rules.  
  
The Order extended the list of required information that a foreign investor must submit as part of the notification.

<sup>4</sup> The Decree expressly states that the commercial establishment must be registered with a French Trade and Companies Register.

## Extension of the Scope of Covered Activities

### Critical Raw Materials

The Decree extended the scope of Covered Activities to the extraction, processing and recycling of critical raw materials (CRMs). The French FDI Rules and the guidelines have not provided a specific list of the in-scope CRMs, but it is expected that the French authorities will consider the EU Commission’s [list of critical raw materials](#). The EU has determined that these CRMs are often indispensable inputs for a wide set of strategic sectors: renewable energy, digital technologies, electric vehicles, space, defense and health.

The EU’s proposed [Critical Raw Materials Act](#), which aims to establish a framework for ensuring a secure and sustainable supply of critical raw materials in the EU, expands the current list of 30 materials to 34 and the act would require the EU to review, and if necessary, update the list of CRMs every four years.<sup>5</sup> The act was [approved by the EU Parliament in December 2023](#) and is awaiting formal endorsement of the EU Council before it is published in the EU’s Official Journal.

The latest list of EU CRMs is provided at the end of this article.

### Security of Prison Establishments

The list of Covered Activities involving civil security was extended to the security of prison establishments.

### R&D; List of Covered Critical Technologies

Under French FDI rules, R&D activities for certain critical technologies fall within the scope of Covered Activities. Prior to the New Rules, the list of covered critical technologies included: cybersecurity, AI, robotics, additive manufacturing, semiconductors, quantum technology, energy storage, biotechnology and renewable energy.

The Order made two changes to the list:

- i. **Low carbon energy.** The Order amended the list of covered critical technologies by replacing renewable energy with the broader low carbon energy. As its name implies, it is generally understood that low carbon energy comprises energy generated from low carbon sources such as wind, solar, hydro and nuclear power.<sup>6</sup>

<sup>5</sup> Under Article 2(1) of the proposed Critical Raw Materials Act, “raw material” means a substance in processed or unprocessed state used as an input for the manufacturing of intermediate or final products, excluding substances predominantly used as food, feed or combustion fuel. The expanded list of CRMs is set forth in [Annex II](#) to the act.

<sup>6</sup> See Marta Moses, “[What Is Low-Carbon Energy?](#)” EDFEnergy.com (July 8, 2020).

# France Strengthens Foreign Investment Controls, Expands Jurisdiction to ‘Commercial Establishments’ Registered in France

- ii. **Photonics.** The Order also added photonics to the list of covered critical technologies for R&D activities subject to control.

## Simplification and Limitation of the Scope of French FDI Exemptions

### French FDI Exemptions Prior to the Decree

Prior to the New Rules, three types of cases were exempt from the prior authorization requirement; specifically, where:

1. The foreign buyer and the seller are affiliates (*i.e.*, buyer and seller are each held more than 50% by the same shareholder).
2. The foreign investor crosses the 25% voting rights threshold (directly or indirectly) in a French company that is already under its control.
3. The foreign investor acquires control of a French company<sup>7</sup> in which it had previously crossed the 25% threshold (directly or indirectly) pursuant to a foreign investment clearance delivered on the basis of the Threshold Trigger. (The MoE may object to such acquisition of control within a 30-day period following notification.)

### The New French FDI Exemption Implemented by the Decree

The New Rules merged the first two cases set forth above into a single intragroup exemption. Specifically, the new rule provides that a foreign investor is exempt from the French FDI prior authorization requirement if the ultimate controlling shareholder of the relevant foreign investor already has control over the French target company.

However, the new exemption rule did not take into account the third case. As a result, if a foreign investor proposes to acquire control of a French company in which the foreign investor had previously crossed the 25% voting rights threshold (directly or indirectly) pursuant to a foreign investment clearance, the foreign investor will be required to submit a new authorization request to the MoE prior to the completion of the transaction.

## Takeaways

- The expansion of the scope of the French FDI rules show that attention to the national and economic security implications of foreign investments remains high in France.
- The French authorities’ expanded jurisdiction means that corporate transactions that may appear to have only nominal French ties might end up within the French authorities’ review net.<sup>8</sup>
- Parties contemplating covered transactions involving CRMs should expect French regulators to devote more attention to supply chain matters in potential mitigation agreements.
- Parties to a potential corporate transaction should anticipate and assess the likelihood of a potential filing in France early in their negotiations in order to assure a successful outcome.

## EU Expanded List of Critical Raw Materials

(Per Annex II to the EU Critical Raw Materials Act. Additions since prior 2020 list bolded.)

- Antimony
- **Arsenic**
- Baryte
- Bauxite
- Beryllium
- Bismuth
- Boron
- Cobalt
- Coking Coal
- **Copper**
- **Feldspar**
- Fluorspar
- Gallium
- Germanium
- Hafnium
- Helium
- Heavy rare earth elements
- Light rare earth elements
- Lithium
- **Magnesium**
- Manganese
- Natural graphite
- Nickel – battery grade
- Niobium
- Phosphate rock
- Phosphorus
- Platinum group metals
- Scandium
- Silicon metal
- Strontium
- Tantalum
- Titanium metal
- Tungsten
- Vanadium

<sup>7</sup> Control within the meaning of article L. 233-3 of the French Commercial Code.

<sup>8</sup> See Wesley Lainé, “Five Things You Need To Know Should France Strengthen Its FDI Regime,” *Foreign Investment Watch* (November 19, 2023)