

CLIENT ALERT

Evolution of the French Regulation on Foreign Investments in Sensitive Sectors (French FDI regulation)

December 29, 2023

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The French authorities have just modified the *réglementation relative au contrôle des investissements étrangers en France* [French regulation aimed at controlling and monitoring foreign investments in France] provided by the French Monetary and Financial Code (the “**FFIR**”) by decree n° 2023-1293 published in the French Official Gazette dated 29 December 2023 (the “**Decree**”).

The FFIR has evolved significantly over the last years and its modifications by the Decree enhance the legal framework adopted at the end of 2019 (for more information on this see our previous client alert <https://www.willkie.com/-/media/files/publications/2020/02/reformoffrenchregulationofforeigninvestmentsinsens.pdf>).

Under the FFIR, certain investments made by foreign investors, including the acquisition of equity interests in a French company operating in a sensitive sector, may require the prior authorization of the French Ministry of Economy (“**MINEFI**”). As a condition for granting its authorization, MINEFI may require that the investor agrees to certain undertakings meant to protect French national interests. Note that according to MINEFI 2022 annual report, 131 transactions were authorized by MINEFI, including 70 with conditions.

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The Decree will be effective on 1 January 2024 and provides three key modifications to the FFIR which are summarized below.

1. **Expansion of the type of entities falling under the FFIR**

In a nutshell, an investment operation is subject to the FFIR if the three cumulative criteria are met:

- a foreign entity is present in the ownership chain of the operation;
- the investor (i) acquires control, (ii) acquires all or part of a business line or (iii) crosses the 25% threshold of voting rights in a French legal entity (only for non-EU or non-EEA investors);
- the French target company has business activities (i) in one of the sensitive sectors listed under Article R.151-3 of the French Monetary and Financial Code and (ii) that are liable to jeopardize public order, public safety or national defense interests.

Regarding the second criterion, the French legal entities concerned encompass a wide range of French organizations, such as companies, foundations, trusts, etc.

However, commercial establishments (*établissements immatriculés au registre du commerce et des sociétés*, an unincorporated body under French law) did not fall within this scope. The Decree modifies this state of law and the FFIR now includes French commercial establishments.

The main consequence of such modification will be that investment operations which, until now, were not subject to FFIR as long as only French commercial establishments were involved, could now fall within the scope of this regulation.

2. **Expansion of the perimeter of sensitive sectors subject to the FFIR to the mining sector**

The perimeter of sensitive sectors subject to the FFIR has expanded over the years. Article R.151-3 of the French Monetary and Financial Code notably includes companies with activity in sectors where national defense is at stake (e.g., the dual-use goods and technologies sector) or with activity in the energy, transport, water, public health, telecommunications sectors or R&D activities in critical technologies (e.g., IA, cybersecurity, energy storage, etc.). Note that the list remains unclear and leaves room for interpretation as to whether the activity of an entity governed by French law falls within the scope of the FFIR.

The Decree has added to this list the mining sector (more precisely French entities having operation in relation with “*the integrity, security or continuity of the extraction, processing and recycling of critical raw materials.*”).

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From now on, any foreign investor contemplating an investment operation in a French entity acting in this particular business sector may have to seek the prior authorization of MINEFI.

3. *Perpetuation of the COVID-19 temporary regime applicable to French listed entities on a regulated market*

In response to the COVID-19 crisis, French authorities adopted temporary measures in order to protect French listed companies from non-EU or non-EEA investors.

By decree n° 2020-892 of 22 July 2020, French authorities implemented a fast track review process in relation to contemplated transactions resulting in non-EU or non-EEA investors, directly or indirectly, alone or in concert, crossing the threshold of 10% of the voting rights of a French entity listed on a regulated market that conducts business in sensitive sectors.

This specific regime was originally applicable until 31 December 2021. It was extended twice and until 31 December 2023.

The Decree has made this specific regime permanent. From now on, non-EU or non-EEA investors contemplating such type of transaction will have to follow the applicable fast track review process.

4. *Conclusion*

The Decree represents a new expansion of the FFIR and participates in the reinforcement of the French authorities' control over foreign investments in France.

Considering the risks associated with this regulation (e.g., various administrative or criminal sanctions for non-compliant foreign investors, transactions considered as null and void, etc.), if any operation you are contemplating might fall within the scope of the FFIR, tread carefully and consider giving us a call.

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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