(continued from page 8)

IP to the business should be considered carefully.

- **Employment:** generally the terms of employment with overseas individuals is the greatest difference to the approach to engaging US employees. Most overseas jurisdictions do not operate employment-at-will necessitating a notice period and many countries provide employees with legal rights which often require set procedures to ensure fair and transparent treatment of employees. Great care should be taken when recruiting, hiring and terminating the employment of employees outside of the US.
- **Regulation & compliance:** there are numerous areas which will be industry specific when doing business in an international jurisdiction. Privacy and consumer rights are known by many but anti-corruption laws, labelling requirements or safety regulations may also require adjustments to productsor services offered in a US domestic market.

Finally, beyond legal obligations, businesses growing outside of the US should consider many of the other factors which could impact their success – culture adjustments are regularly overlooked and lack of consideration can result in upset employees, disinterested consumers, or angry regulators. None of these help to establish a positive local presence and most can be avoided with some simple local advice and respect for local market practices. Adjustments to operating procedures may also be needed in order to trade locally, by opening a local bank account, adjusting book-keeping or tax filings in different currencies or adopting local accounting standards. And of course, recognizing the people who will be implementing your local strategy needs a sensitive HR policy and understanding thatapproaches to timezones, typical benefits and time-off can be very different overseas.

Global market growth can provide a high return on investment but up-front investment in both time and money should not be under-estimated. Each country is different and while the factors considered above will be relevant for most regions, the nuances applied locally can vary and should be considered and implemented on a case-by-case basis.

Foreign Investments in France – Guidelines of the Ministry of Economy

Raphaël Mellerio, Avocat à la Cour | Partner at Aramis Société d'Avocats, Paris, France

Faced with the relative lack of transparency of the French foreign investment control regime, the French Ministry of Economy published in September 2022 its first guidelines for a better understanding and predictability of how the foreign investment control (FIC) regime in France is enforced.

Foreign investments in business activities which are deemed *"sensitive"* in France are subject to control by the Ministry of the Economy and may require a specific governmental approval. The relevant regime is set out in the French Monetary and Financial Code (Articles L. 151-3 and R. 151-1 *et seq.).*

After a public consultation and the publication of the first annual report on foreign investments in France, the French Ministry of Economy provided its guidelines *"An Educational and Concrete Presentation on the Scope of the Foreign Investment Control Regime, the Conduct of the Control Procedure and the Follow-up of the Authorisations Issued by the French Minister of the Economy".*[1]

The guidelines provide welcome clarification on how the three cumulative criteria for FIC in France should be interpreted and applied. Those criteria are: there must be (i) an investment, (ii) by one or several foreign investors, (iii) in sensitive activities in France. As the implementation of such criteria is not always straightforward, the Ministry provided a preliminary screening procedure.

Notion of investment

A foreign investment in France is subject to control if it is carried out in an entity governed by French law (by contrast, a French branch of a foreign company is not deemed an entity governed by French law and an investment related to such branch or its assets is not subject to foreign investment control).

Relevant transactions – the transactions targeted by the French FIC legislation are (i) the acquisition of a controlling stake in a French entity, (ii) the direct or indirect acquisition all or part of a business of a French entity and (iii) for non-EU or non-EEA investors only, the holding directly or indirectly, alone or in concert, of 25% of the voting rights in a French listed company.

With respect to acquisitions of shares or assets, the scope of FIC legislation is applied widely: it covers not only acquisitions in cash but also mergers, share contributions and other types of transfers. The acquisition may also relate to all or part of a business, e.g., a portfolio of sensitive contracts, a significant number of intellectual property rights, a patent or an exclusive patent licence.

When it comes to the holding of 25% in a French listed company (a threshold which in the context of the sanitary crisis has been temporarily reduced to 10% until 31 December 2023 2), no prior approval is required for investments conducted by natural or legal persons residing or registered in a EU country, Iceland, Liechtenstein, or Norway[3] . By contrast, transactions with British stakeholders are subject to control. Finally, the approval regime only applies to investments in companies which are listed on a regulated market, so French companies listed on Euronext Growth (a non-regulated market) are not subject to this regime.

Greenfield investments – Only transactions in entities engaged in sensitive activities at the date of the transaction are subject to prior governmental approval. Therefore, the creation of entities in France by a foreign investor to develop a business in France – called "greenfield investments" – are not subject to control.

Notion of foreign investor

Natural person – An individual of French nationality is deemed a foreign investor if he/she has his/her tax residence abroad; an individual of foreign nationality is deemed a foreign investor regardless of his/her tax residence.

Legal person – Any entity incorporated under foreign law constitutes a foreign

(continued from page 9)

investor. This notion of entity covers both organized groups with legal personality (e.g., companies, SPACs, etc.) and those without (e.g., branches).

Ownership chain – According to Article R. 151-1 of the French Monetary and Financial Code, all entities which are part of the same ownership chain are all deemed investors for the purposes of the FIC rules in France. Based on the guidelines, this gives rise to two consequences:

- any member of this ownership chain is entitled to file an application for foreign investment approval on behalf of all investors;
- it is only necessary for one member of the ownership chain to be considered as a foreign investor for the foreign investor criterion to be met (i.e., even if the ultimate shareholder of the group is a French entity or national).

In the same manner, investment funds may be considered foreign investors, regardless of their management company. For instance, if an investment is carried out via a French holding company which is controlled by a Luxemburg investment fund which is itself managed by a French management company, the Luxemburg fund will be deemed a foreign investor for that matter.

Characterisation of sensitive sectors

The 30 or so “sensitive” business activities are listed in Article R. 151-3 of the French Monetary and Financial Code and Article 6 of the Decree of the French Minister of the Economy dated 31 December 2019 on foreign investments in France.

According to the guidelines, there are three types of eligibility for foreign investment control, depending on the nature of the activity carried out by the target entity:

1. **Objective eligibility:** the activity is eligible by nature and directly relates to the conduct of national or public security activities (e.g., weapons, explosive substances, dual use products, security of information systems for the defence sector, cryptology, gambling, etc.);
2. **Eligibility based on a set of indicators:** to determine whether an activity falls within the scope of foreign investment control, a “sensitive test” is applied to assess whether it has an “essential” nature for certain public national interests (such as the supply of energy or water, transport services, space operations, electronic communications networks, public health, national food security, etc.). The assessment must be based on various factors such as the clients of the target entity, the nature, the specificity and applications of the products/services provided and the know-how, the substitutability of the activities, or the dangerousness of the activities carried out;
3. **Eligibility for research and development activities:** this relates to activities involving critical technologies or dual-use goods and technologies if they are likely to be implemented in one of the activities mentioned in (1) or (2) above. The idea behind this eligibility is to target research and development activities at an early stage, i.e., before the industrialization phase, in the light of possible future applications of such activities.

The level of the turnover generated by the target entity or business is generally not a relevant indicator for the above assessment. In some complex industrial sectors, the main difficulty for a foreign investor is to determine at which level of the value chain the target company or business sits; for instance, a last-tier subcontractor may not necessarily be aware of the final use of its products or services (which may include, for instance, some military applications).

Screening of the target business by the Ministry

In view of the many uncertainties arising from the concept of “sensitive activities”, the Ministry has made it possible for an interested investor or the target company to submit a request to the Ministry to have an activity screened to determine whether activity falls within the scope of foreign investment control. This procedure is particularly useful where there are doubts about the fulfilment of the sensitivity criteria.

Provided the requesting party submits a complete file with a detailed description of the activities of the target company as well as the products/services sold to the customers, the investor or the target company may expect a position from the Ministry within two months (which is reduced to ten days for a transaction affecting a French listed company). In the course of the screening procedure, the Ministry may either conclude that the relevant activity is covered by foreign investment control (in which case the investor will be invited to submit a proper request for approval of its investment) or determine that it is not subject to such control.

The request for a prior screening by the Ministry only requires the existence of ongoing discussions on a project (which can be reflected in a letter of intent or MOU). There is no need to provide the administration with a fully binding share purchase or asset purchase agreement. The silence kept by the administration at the end of the 2-month period (or the 10-day period, as the case may be) does not mean that a request for approval is not required. In such case, based on risk assessment, the investor with the assistance of its advisors may determine whether it wishes to proceed with its investment and, if so, to file a request for approval with the Ministry of Economy to be on the safe side.

Looking back at the developments of the last few years, some of the more controversial transactions are often stopped before the formal screening process is even started. For instance, in 2021, Canadian firm Couche-Tard dropped a potential takeover over French retailer Carrefour amidst signs of opposition of the French Minister of Economy, Bruno Le Maire, on the grounds of national food security.

Based on the recently published second annual report on FIC by the French Ministry of Economy[4] , three hundred twenty five deals were submitted to the authorities in 2022. One hundred thirty one investments falling within the scope of FIC legislation were formally approved during the period, 53% of which were made subject to conditions and undertakings by the foreign investor. In defence-related deals, the share of transactions approved subject to conditions was 76%.

---

[1] Source: press release, 9 September 2022.

[2] The lowering of the threshold which was to end initially on 31 December 2022 has recently been extended further to 31 December 2023.

[3] Iceland, Liechtenstein and Norway are countries belonging to the European Economic Area (EEA) who have entered into agreements with France on administrative cooperation to combat fraud and tax evasion.

[4] 9 May 2023