

**FOREIGN INVESTMENT CONTROLS IN FRANCE:  
CURFEW FOR COUCHE-TARD!**

*Questioned about the contemplated "friendly partnership" between the French food distribution group Carrefour and the Canadian Couche-Tard, the French Minister of the Economy, Mr. Bruno Le Maire, publicly stated that he was "not favorable, a priori, to the acquisition by a foreign competing company" of "France's leading private employer, a vital link in the food security of the French population, in food sovereignty".*

*This high-profile matter gives an opportunity to provide an update on the latest developments in the regulations governing the control of foreign direct investment ("FDI") in France, in the context of the health crisis due to the Covid-19 pandemic.*

**1. STATE INTERVENTION WAS UPSTREAM AND OUTSIDE ANY PROCEDURE**

Recent statements made by the Minister of the Economy reflect the evolution in the administration's FDI practices that has been observed for the past several years<sup>1</sup>.

France's FDI control regime, dating back to a 1966 statute and included in the French Monetary and Financial Code, provides that FDI in sensitive sectors are subject to prior approval by the Minister of the Economy. Over various reforms, foreign investors and then target French companies were given the option of submitting a request to the Minister of the Economy for an opinion as to whether the contemplated transaction fell within the scope of FDI control regulations.

In the Carrefour – Couche-Tard matter, Bruno Le Maire expressed his position "a priori", even before an official referral was made by the relevant parties. This approach reflects the State's wish to be involved earlier and earlier in the sale process, in order to highlight the need for investors to take into account the FDI implications at the stage of structuring their transactions<sup>2</sup>, in particular by making a commitment to maintain jobs and decision-making centers in France, as seemed to be envisaged by Couche-Tard<sup>3</sup>.

**2. INTERVENTION TARGETED FOOD SECURITY, A NEW SENSITIVE SECTOR**

Sensitive sectors refer to activities that are likely to harm national interests, the list of which is defined by decree. This list, which initially targeted mainly defense-related activities and the army, has been constantly expanding since 2014 as a result of a series of reforms in line with economic news and scientific and technological developments. Activities relating to agricultural products that "contribute to national

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<sup>1</sup> A. Sauty de Chalon et G. Nataf, « Contrôle des investissements étrangers – La volonté de l'État français d'assurer une meilleure protection de sa souveraineté », *Revue des Juristes de Sciences Po*, n° 19, Octobre 2020, p. 18.

<sup>2</sup> N. Bonucci, C. Paulhac, R. V. Johnston, Q. Dang & M. E. Rogers, "French Authorities Block U.S. Acquisition of French Company", Paul Hastings, January 2021.

<sup>3</sup> O. Pinaud, « Carrefour enflamme le débat sur le protectionnisme à la française », *l'AGEFI Quotidien / Edition de 7H*, 15 janvier 2021.

food security objectives" have been included since April 1, 2020, under a decree dated December 31, 2019.

By citing the very terms of "food security", referred to in the new regulation, and which he frames within a broader and vague concept of "food sovereignty", Bruno Le Maire signals his intention to use the tools at his disposal to protect national interests. As the crisis has highlighted France's dependence on other countries and drawn attention to sectors that had not previously been sufficiently regarded as critical, the Minister welcomed the fact that the French system had anticipated such a situation.

### **3. GROWING AND DELIBERATE INTERVENTIONISM**

Government communications around FDI control issues, and particularly around decisions refusing to grant an authorization, have been rare to date. Now the government is increasingly clear about its policy on FDI.

For example, during discussions on the takeover of the French plant in Hayange from the bankrupt British Steel group, the Ministry of Economy made it clear to the press that it would prefer a French or European buyer to Chinese Jingye, which had bought the rest of the group<sup>4</sup>. In the end, the Jingye did not obtain authorization and it was finally British Liberty Steel which was authorized to acquire the Moselle plant.

In an even more unprecedented way, the first official refusal was pronounced against the American Teledyne, in the context of the proposed takeover of Photonis, a French company specializing in night vision instruments for the army. In a press release dated December 18, 2020, entitled "Sovereignty of strategic companies"<sup>5</sup>, the French Ministry of the Armed Forces announced that "the offer for the takeover of Photonis by the industrial company Teledyne has not been approved under the regulations on foreign investment in France", explaining that the conditions of this takeover did not meet the requirements of protecting and safeguarding "the French economic and industrial sovereignty of defense".

Previously, the focus was mainly on Asia, particularly in view of the spectacular growth of Chinese investments targeting cutting-edge technologies. The Couche-Tard and Teledyne matters show that fears may also come from North America, which was historically considered an ally<sup>6</sup>.

### **4. IN THE CONTEXT OF THE HEALTH CRISIS AND GLOBALIZATION OF PROTECTIONISM, THE FRENCH APPROACH REMAINS QUITE BALANCED**

These high-profile issues are rekindling the debate on protectionism. However, the French government's media stance on FDI should be put into perspective.

First of all, they are arising in a period of crisis where the French State has chosen to support the economy massively, in particular through guaranteed loans or payroll tax deferral measures granted to companies. It is precisely in this context that the regulations on FDI control have been further tightened several times in the past months. A decree dated April 27, 2020 extended the list of critical technologies to the biotechnology sector, and a decree dated July 22, 2020 lowered the threshold for holding voting rights in a French company triggering the control procedure from 25%

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<sup>4</sup> *France Bleu*, 3 mars 2020, « *Le gouvernement souhaite un autre repreneur que Jingye pour British Steel à Hayange* ».

<sup>5</sup> Ministère des Armées, 18 décembre 2020, « *Communiqués\_Souveraineté des entreprises stratégiques : Florence Parly annonce que l'État travaille à une solution alternative de reprise de Photonis* ».

<sup>6</sup> N. Bonucci, C. Paulhac, R. V. Johnston, Q. Dang & M. E. Rogers, "French Authorities Block U.S. Acquisition of French Company", Paul Hastings, January 2021.

to 10%. However, the lowering of the threshold is limited in three respects<sup>7</sup>, insofar as it only concerns investors from non-EU countries for an investment in a listed company and is accompanied by a simplified notification procedure exempting the company from the authorization requirement (the authorization may result from the administration's silence within a period of 10 days). This is a temporary measure, initially scheduled to run until December 31, 2020, though extended to December 31, 2021.

Above all, it should be recalled that, in the context of the globalization of protectionism that has characterized the movement to strengthen FDI control mechanisms around the world in recent years<sup>8</sup>, France's FDI control mechanism remains one of the most open.

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<sup>7</sup> S. Giordano, A. Velitchkova et A. Melchior, « *Contrôle des investissements étrangers : Paris a entendu les industriels et reste pragmatique* », *La Tribune*, 11 août 2020.

<sup>8</sup> R. Dalmas, A. Nicolai, B. Egan et J. Wang, « *Vers la mondialisation du protectionnisme ?* », *La Semaine Juridique – Entreprise et Affaires*, n° 4, Janvier 2020, p. 1024.