

« FDI CONTROL IN FRANCE:
WE HAVE A LAW, BUT WE LACK A POLICY »



*Interview with Olivier Marleix,
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Is the thinking behind the French system based on economic sovereignty, protectionism, economic patriotism, the search for foreign investment, or a particular strategic vision?

Olivier Marleix: The parliamentary board of enquiry that I chaired into the sales of Alstom, Alcatel and Technip highlighted the fact that France had no specific policy. Our national legislation has provided an authorisation procedure for a very long time, but it has been rarely used, is considered to be rather formal, and is circumvented in most cases. The proof of this absence of policy is that we seem to have gone from one extreme to the other in the space of a few years. In 2014, we authorised the sale of Alstom Power, which involves considerable risks (our autonomy in civil nuclear power, the maintenance of the turbines of our 58 reactors and the equipment for our aircraft carrier and submarines). Then in 2021, we blocked the takeover of Carrefour by Couche-Tard even though, by definition, there is nothing that can be relocated, there is no monopoly and there is nothing to show that there is a clear breach of food safety. Yesterday we gave up everything for the sake of economic attractiveness, and today we block a transaction for an essentially political reason: fear of public opinion. This is rather unfortunate because,

as much as I believe that countries are justified in protecting their strategic interests, investors need a minimum level of predictability. In any case, it speaks volumes about how much this issue has become part of our economic life.

We are no doubt moving away from a French exception, whereby we wanted to believe that investors did not carry passports. The United States, a truly liberal country, has never thought like this. And judging by the recent developments in legislation on foreign investment control around the world (including the British and Germans, who are more liberal than we are), this is a global trend. Just as we can no longer hide the dark side of certain free trade agreements that create unfair competition, the nationality of shareholders now seems less trivial. The progress made by the European Union in this area is also telling. In 2014 we had to do battle to have this or that sector included on the list of strategic sectors. Now the European Commission has brought a list to the table – a list that has been voted on, covering more than thirty sectors.

What is certain is that public opinion, in France as elsewhere, prohibits governments from settling for the usual linguistic devices like “marriage between equals”

or “new Airbus”. If we really want to reassure both foreign investors and the public, we need to have a real, predictable policy.

What do you think the government’s analysis criteria for defining the strategic interests to be protected should be?

Olivier Marleix: Some of these criteria are laid down in the law itself. First, there is the investor’s nationality. Our law has become more stringent in this area. Until the PACTE Law, an EU investor was more or less treated as a domestic investor, but this is no longer the case.

Second, there is the nature of the investment: it must involve a risk of taking control of the company. During the Covid crisis, the government even lowered this threshold from 25% to 10% of voting rights.

Lastly, there is the criterion relating to the sector in which the company operates. The European Regulation of 19 March 2019 and the Decree of 31 December 2019 now cover a broad spectrum; we go well beyond the traditional triptych of “national defence, public order and public security”. The European authorities’ change of heart is clearly meant to give Member States the tools to largely protect their companies by defining a substantive criterion that can be interpreted with some flexibility.

These three criteria define whether the investment transaction is eligible for the control mechanism, after determining the interests at stake in the investor’s target company. These evaluation criteria are not defined by Parliament. The Minister for the Economy has discretionary power to assess them. This is done in consultation with the relevant sectoral ministries, which assess, among other things, whether the company in question has unique expertise and whether there are alternative suppliers or products. More broadly, we should be considering whether the company plays a key role in leading an economic sector. As the French Finance Ministry has not published its policy, we can only assume that this evaluation is done in a very empirical way.

Given the importance of the French economy’s financing needs, what importance can geostrategic considerations have?

Olivier Marleix: I do not believe that these “geostrategic” considerations are extraneous to the company. Essentially, the only issue is protecting value creation in France. To give a widely recognised example, if a strategic company is bought by the Chinese, who take over the expertise, relocate to China and leave only an empty shell for domestic creditors (a scenario that is actually far from just theoretical!), you may have temporarily met a need for fi-

ancing the French economy, but, in the end, you have destroyed any value.

You are right, the issue does relate to how France finances its large companies. We have an industrial sector that is both highly concentrated (just 80 companies produce 50% of the country’s industrial output) and poorly controlled (the largest shareholder in each of our CAC 40 companies holds an average of 28%). This creates structural fragility where the risk of a takeover is extremely high.

Without an alternative capital-based solution, the FDI control procedure or the use of golden shares by the State is largely a non-capital-based control tool. In such cases there is not necessarily a veto, but there are conditions imposed on the investor.

According to Article L. 151-3-1 of the Monetary and Financial Code, the Minister for the Economy can take precautionary measures including the suspension of voting rights, the distribution of dividends and the cessation of a company’s activity. With economic tensions rising and control intensifying, can the right balance be struck between economic attractiveness and increased control?

Olivier Marleix: The consequences of the FDI mechanism should not be exaggerated. The Finance Ministry takes two months to examine each file, which is nothing like the time it takes to go before the competition authorities. And it is certainly better to get the green light from the government authorities in a transparent way than to carry out a transaction on the sly, which if found out, as was the case with Alstom Power, leads to a board of inquiry and months, or even years, of political controversy. Once again, economic operators need predictability.

The sanctions you mention were rewritten in the PACTE Law. They have the advantage of being legally sound, which was not really the case before. They come into play in two cases: failure to obtain authorisation or failure to comply with commitments. These sanctions essentially play a deterrent role. The tool provided by the law is not only available to the government. It can also be used by French companies that believe a major customer has been acquired by a foreign company that relocates the production to which they contribute to another country.

As chairman of the board of enquiry into State decisions on industrial policy, what lessons can you take from foreign investment control in France?

Olivier Marleix: Our mechanism clearly lacks predictability. In the United States, no one is under any illusions. When you are a foreign investor, you know the

hoops you have to jump through for the CFIUS and are well aware of the array of measures that may be imposed on you. This may even go as far as having a “proxy board” that creates total separation between your capacity as a shareholder and the company’s management team.

France is not so brazen! In the sale of Alcatel to Nokia, we took fairly extensive precautions to ensure the integrity and security of Alcatel Submarine Networks (the submarine cables that carry 80% of the world’s internet traffic) with “top secret” boundaries and even a managing director approved by the Ministry of Defence, but we are not always so careful.

How do you view parliamentary control over decisions taken by the executive on foreign investment, as introduced in the PACTE Law?

Olivier Marleix: There was disagreement on this subject between the National Assembly and the Senate. The National Assembly had voted unanimously for an ambitious parliamentary control mechanism, entrusted to a parliamentary delegation for economic security. The Senate rejected this, settling a right of evocation granted to the chairs of the Economic Affairs Committees and the general rapporteurs of the Finance Committees of both chambers. This provision is now part of the law, but it is totally ineffective since their control can only relate to “closed” transactions, in other words, those on which there is no longer an active protection measure.

This is a pity because, again, the power wielded by the Minister for the Economy over these cross-border M&A transactions in strategic sectors needs predictability and trust. The only way to defuse the risk of public opinion getting out of hand is through serious parliamentary oversight. This works very well in the United States, where the

credibility of CFIUS is underpinned by bipartisan congressional oversight. As long as the French Finance Ministry refuses to allow Parliament to effectively defend national interests and act as guarantor, we will see controversial positions, as was the case, quite rightly, with Alstom, with the creation of boards of enquiry, or government vetoes for fear of controversy, as with Photonic and Carrefour. Our system lacks maturity.

During the Covid-19 pandemic, controlling certain companies/stakeholders with key know-how and managing supply chains was crucial. Does the pandemic mark a turning point for foreign investment control in France? Can we talk about a change in philosophy?

Olivier Marleix: There is no doubt that Covid-19 has made us reflect on what the French people may have felt was a loss of national industrial independence. We are probably coming within touching distance of the limits of globalisation. This is not an exclusively French phenomenon; it is one shared by all Western countries. Foreign investment control procedures are one way of guaranteeing to French people that the public authorities are paying attention to the conditions under which “their companies” are taken over. I also believe that our system will have to evolve further to provide a better definition, in the decree, of what the Minister for the Economy wants to protect, which is essentially the defence of our productive apparatus and earlier research and development efforts. Recent examples, such as the takeovers of Alcatel by Nokia and Alstom by GE, have shown us that we have not protected much! But make no mistake, FDI control procedures are the poor person’s protection. They are certainly not the only way to ensure economic sovereignty. A foreign investor was not to blame for Sanofi not producing a French Covid-19 vaccine in early 2021.