

PHOTONIS, CARREFOUR AND MAN ENERGY SOLUTIONS: A REVIEW OF RECENT KEY FOREIGN INVESTMENT CASES IN FRANCE



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Much has been written about the Photonis/Teledyne and Carrefour/Couche-Tard matters. These cases show that the control of foreign investments in France can follow very different institutional logic: (i) the protection of national defense interests and public safety in the strictest sense, (ii) economic security interests (the protection of key technologies, strategic sectors, sensitive data, etc.), and (iii) economic patriotism (the protection of French domestic companies and the level of employment).

The Volkswagen/MAN Energy Solutions case is completely different. It shows the importance of ex-post monitoring of the undertakings toward the French State that foreign investors committed to as part of the French foreign investment control regime. This matter confirms, if proof were needed, that ex-post control is a key enforcement tool that the French Ministry of Economy has developed in recent years.

Photonis/Teledyne: the protection of national security interests

Photonis undoubtedly constitutes a sensitive asset from the perspective of French foreign investment rules. The company develops night vision solutions for the French army. It provides detection tools in the context of the Laser MegaJoule project, which is part of the French nuclear deterrence program. It has significant R&D capabilities in France, and has a very important patent portfolio.

Ardian, the former owner of Photonis, decided to sell the company in 2019 and subsequently entered into exclusive negotiations with Teledyne, a U.S. industrial conglomerate. Because it appeared that the proposed transaction would be subject to French foreign investment control, Teledyne submitted a request for authorization to the French authorities in February 2020. A complex

and lengthy process then began. At first, Teledyne received an informal negative decision. Further discussions ensued between the services of the French Ministry of the Economy regarding certain undertakings that Teledyne would be required to commit to in order to obtain French foreign investment clearance. After agreeing to these conditions, Teledyne filed a new request for authorization on October 30, 2020, which was eventually vetoed by the French Minister of the Armed Forces.¹

There are three takeaways from a French foreign investment standpoint.

First, this matter confirms the package of undertakings that are now imposed on any foreign investor considering an investment in a highly sensitive sector in France such as national defense: (i) the French public investment bank, BPI, will have a minority stake in the share capital of the French target entity, (ii) BPI will have veto rights with respect to certain management decisions, and (iii) a defense or security committee will be set up within the French target entity, comprised of one or several representatives of the French State whose main objective is to preserve the relevant sensitive activities and data in France.

Second, this matter raises the issue of the valuation of French companies operating in a sensitive sector. According to rumors, Teledyne negotiated a lower price with Ardian based on the conditions imposed by the French Ministry of the Economy, in particular with respect to the minority shareholding of BPI.

The same issue also arises for French domestic buyers. A French investment fund planning to acquire a French company operating in a sensitive sector must take into consideration the expected resale value of the company in its overall valuation in light of the potential restrictions that may be imposed in the context of a French foreign investment review process at the exit. Ardian eventually sold Photonis to HLD, an investment group, for a much lower price than that it had initially negotiated with Teledyne.

Lastly, this matter shows the need to fully understand the inner mechanism of the French foreign investment review process in order to anticipate any potential difficulties. While the decision to authorize a transaction is technically issued by the French Minister of the Economy, the role of

the other relevant ministries should not be underestimated. The services of the French Ministry of the Economy are in charge of reviewing the proposed transaction, but the analysis of the risks associated with the transaction is mainly carried out by the relevant ministries overseeing the covered activities.

In the Photonis case, the transaction failed because the French Minister of the Armed Forces vetoed the authorization request. Moreover, the French Minister of the Economy did not issue an express refusal. It is the French Minister of the Armed Forces who made it official that Teledyne had ultimately not obtained the French foreign investment clearance.²

Carrefour/Couche-Tard: a political veto regarding a contemplated transaction at a very preliminary stage

When the Canadian company, Couche-Tard, announced its proposed acquisition of Carrefour on January 13, the French Minister of the Economy reacted immediately and issued a categorical veto. In order to do so, Bruno Le Maire wielded the enforcement hammer of the French foreign investment regime on grounds of food security.

Did this transaction fall within the scope of the French foreign investment rules? In principle, yes. The decree of 31 December 2019 extended the scope of such control to activities involving the "*distribution of agricultural products (...), when they contribute to the objectives of national food security.*"³

In itself, the extension of the scope of the French foreign investment rules to food security is perfectly legitimate. The European regulation on screening of foreign direct investments within the European Union expressly provides for the possibility for Member States to extend the scope of control to food security.⁴

Various foreign investment control mechanisms refer to food security. Such is the case in the United States, where this notion is part of the U.S. concept of "national security." Moreover, the Committee on Foreign Investments in the United States (CFIUS) issued a very noteworthy decision on the basis of food security.⁵

In this instance, did the transaction constitute a threat to the country's food security? It is doubtful. The health crisis

¹ See Press release published by Teledyne on December 18, 2020.

² See Press release published by Florence Parly on December 18, 2020.

³ Article R. 151-3, paragraph 9, of the French Financial and Monetary Code (*Code monétaire et financier*).

⁴ Article 4.1, paragraph (c), of Regulation (EU) 2019/452 of 19 March 2019.

⁵ Authorization of the acquisition of Smithfield Foods by Shuanghui International Holdings Limited by CFIUS on 11 September 2013.

has certainly revealed a need to secure supply chains for essential goods and services. But it is hard to see how a merger between Carrefour and Couche-Tard could have affected food security in France.

The French foreign investment control regime allows the Minister of the Economy to adopt a more nuanced position with respect to transactions under review. The Minister of the Economy may authorize an investment under certain conditions. In this instance, it appears that Couche-Tard was prepared to make significant commitments in terms of investments and also to keep employment at its present level in France.

Bruno Le Maire's reaction was mainly driven by political considerations: (1) to prevent France's leading private employer from ending up in foreign hands one year before the French presidential elections, and (2) to avoid being exposed to criticism regarding major French companies being brought under foreign control (GE/Alstom Energie, Holcim/Lafarge, Nokia/Alcatel Lucent, Rio Tinto/Pechiney, etc.).

Was Bruno Le Maire's reaction politically questionable? Maybe not. The proposed merger with Couche-Tard raised legitimate questions from an industrial perspective, in particular with respect to Carrefour. The synergies that could be generated from the merger of the two groups were far from obvious on paper.

Is such political reaction likely to call into question France's economic attractiveness? The argument has been put forward, but it is doubtful once again. When it comes to investing in France, foreign investors are more wary of tax issues and French labor law constraints.

The government's intervention in this project is in no way a French particularity. In the United States, known for its strong advocacy in favor of economic liberalism, there is a very elaborate foreign investment control regime, which is applied more strictly than in France. Over the past few years, many countries have adopted public policies focused on economic sovereignty and the protection of strategic domestic industries.

If Bruno Le Maire spoke publicly, it is because information relating to the proposed transaction had already leaked. He cannot be blamed for the leak at a stage where the proposed transaction remained largely incomplete.

This may ultimately be the main lesson to be learned from this matter: the need to ensure the confidentiality of the transaction while discussions have not been finalized (...).

The mere possibility that Photonis could be acquired by U.S. investor Teledyne without any opposition from the

French government sparked a public outcry at the time. The fact that the French government publicly opposed the acquisition of Carrefour by Couche-Tard also caused an uproar. These are clearly two very different cases.

Volkswagen/MAN Energy Solutions: the importance of ex-post control of the undertakings entered into by foreign investors

The French subsidiary of the German group MAN Energy Solutions, which produces diesel engines for the navy, in particular emergency engines for French nuclear submarines was involved in this matter. The group was acquired by Volkswagen in 2011, and on this occasion, the latter made commitments towards the French State in the context of the French foreign investment review process, guaranteeing the continuity of the French business and the strategic autonomy of French nuclear submarines.

As a reminder, the issuance of a foreign investment clearance in France is generally subject to the foreign investor entering into binding commitments towards the French State in an effort to (1) ensure the sustainability of sensitive activities in France (maintaining industrial and R&D capabilities, continuity of ongoing contracts with sensitive customers, etc.), (2) protect the expertise and know-how of the target French entity, (3) secure sensitive data and information to which the French entity has access, and (4) ensure that the French authorities are kept informed about the conduct of the relevant sensitive activities in France after the transaction.

At the end of 2019, MAN Energy Solutions informed Paris of its intention to stop the production of emergency engines for submarines. An issue arose: the German multinational company had undertaken to deliver the emergency engines of Barracuda submarines, which must be delivered until 2030. It must also participate in the production of the new generation of ballistic missile submarines (*sous-marins nucléaires lanceurs d'engins, SNLE*) which support French nuclear deterrence.

After more than a year of unsuccessful negotiations, Bruno Le Maire finally addressed a letter to MAN Energy Solutions in January 2021 to formally notify the German manufacturer that it needed to comply with the undertakings that it agreed to in 2011, and to remind MAN Energy Solutions of the applicable sanctions if it does not comply with these undertakings.

The matter is very timely particularly because compliance with the undertakings made by foreign investors as part of the French foreign investment review process was one of the key components of the 2019 reform enacted by the PACTE Law with respect to foreign investment control

in France. The PACTE Law significantly strengthened the applicable framework by extending the enforcement powers of the French Minister of the Economy and making financial penalties more dissuasive.

In the event that a foreign investor does not comply with its commitments, the French Minister of the Economy can now withdraw the foreign investment clearance (and therefore require the investor to unwind the transaction or request a new authorization), or order the investor to abide by the initial conditions of the authorization or new conditions set forth to remedy the non-compliance, including the sale of all or part of the French sensitive activities to a third party. The French Minister of the Economy may therefore decide whether or not to renegotiate with the defaulting investor and impose injunctions subject to daily penalties.

In order to prevent the risk of adverse effects on French national interests, the Minister of the Economy can also take provisional measures, including: (i) suspending voting rights or distributions of dividends with respect to the relevant portion of the shares held by the foreign investor in the French company, (ii) appointing a trustee who may block any decision by the board or other relevant corporate bodies that might be detrimental to French national interests, and (iii) pro-

hibiting or limiting the sales of assets related to sensitive activities in France.

The purpose of the legal framework resulting from the PACTE Law is to allow the French Minister of the Economy to act in a more accurate and swift manner and take appropriate measures based on the gravity of the breach committed by the foreign investor and the level of urgency of the situation.

An injunction by the French Minister of the Economy intending to force a foreign investor in breach of its French foreign investment undertakings to sell the relevant French activities to a third party undeniably constitutes a nuclear weapon. One could imagine that a French industrial company supported by BPI could indeed constitute an alternative solution in certain cases. It appears that the situation eventually worked out in the Volkswagen/MAN Energy Solutions matter.

There is no doubt that if the French Minister of the Economy were to decide to resort to such a weapon in the future, it would lead to complex litigation proceedings before the French administrative courts. It being understood that, in the matter at hand, and contrary to litigation relating to a refusal to grant a French foreign investment clearance, the foreign investor would not be constrained by an M&A timetable.