INVESTMENT, CONTROL, SOVEREIGNTY, ATTRACTIVENESS: SQUARING THE CIRCLE?

Interview with Mathias Audit, Partner, Audit-Duprey-Fekl, Law Professor, Sorbonne School of Law, and Matthias Fekl, Partner, Audit-Duprey-Fekl, Former Minister

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School)

Mathias Audit

Matthias Fekl

What retrospective or historical view can be taken on the French rules regarding investment control in France?

The legislative framework is based on rather old sources, as the first significant text on the subject is a law of December 28, 1966, adopted under Charles de Gaulle's presidency, known as the law on "financial relations with foreign countries". Some of its provisions now appear in what has become, with the movement toward codification, the Monetary and Financial Code. This is especially the case for the structuring principle that French law intends to uphold, namely that "financial relations between France and foreign countries shall be free" (article L.151-1 of the Monetary and Financial Code).

In other words, French law, which has been in line with the logic of opening up national markets since the 1960s, has from the outset considered the control of foreign investments as an exception to this principle. It is also note-

worthy that these rules have not been subject to debate for a long time, for several reasons of a rather different nature.

First of all, from an economic point of view, a large part of France's strategic sectors were more or less under the State's direct or indirect control, which, in law and in practice, protected them from untimely entry of foreign capital and from hostile or friendly investments or takeovers. It was only after their transfer to the private sector, in the context of successive privatization movements, that the issue of foreign control started to arise significantly in the public debate.

Second, from an institutional standpoint, it should be noted that parliamentary intervention in the area of foreign investment control has been regular but rare. There were certainly a few texts after 1966, such as the February 14, 1996 law on financial relations with foreign countries regarding foreign investment in France. However, it is essentially the intervention of the regulatory power that has progressively developed the legal framework. This is at the same time a paradox for matters supposedly governed by national sovereignty and a feature of the Fifth Republic: national representation has too often played a fairly marginal role in this field, including in the major decree of May 14, 2014, known as the "Montebourg Decree", which is at once a legal act and a strong political statement, intended to restore the concept of economic patriotism. Through the PACTE law, on the other hand, Parliament did intervene to substantially reform the legislative framework applicable to foreign investments.

What is the current state of the law regarding investment control in France?

Prior to the reforms introduced by the 2019 PACTE law and its subsequent decrees, the subject matter was characterized by two dominant features: its predominantly regulatory nature, since it was governed by decrees incorporated into the Monetary and Financial Code; and its highly evolving nature, given that these texts were subject to frequent amendments, especially as of the early 2000s.

Yet, these repeated changes of rules had not created a complete and coherent system, but rather a pile of texts that was somewhat illegible and very difficult to handle, even for experienced lawyers. For such control to be both effective and compatible with the targeted overall investment attractiveness of the French market, it must be accessible and easy to understand. The PACTE law, the decree and the December 31, 2019, order, amended by the orders of April 27, 2020, and September 10, 2021, which specified the areas in which foreign investments are subject to prior authorization and the list of documents and information that must accompany the request for authorization, have made the main mechanisms in place more coherent and the general organization of the texts more readable.

Furthermore, this new regime clearly demonstrates the importance that is now attributed to the issue of foreign investment control, and the sensitiveness in domestic politics that has become proper to it.

Moreover, it is worth noting that one of the most important contributions of the PACTE law is the strengthening of sanctions. If a foreign investment takes place without prior authorization, the Minister of Economy may, among other things, enjoin the investor not to proceed with the transaction, to modify it or to restore the previous situation at its own expense, eventually under penalty. In case of non-compliance, the Minister may impose a financial penalty on the investor, which may amount to twice the value of the irregular investment or 10% of the annual revenue before tax. Additionally, from a contractual perspective, any contract that directly or indirectly implements a foreign investment in violation of the prior authorization requirement is null and void.

How should we assess the French rules in the European context?

For a long time, Europe was rather naive when faced with competitors, which, in the East as much as in the West, pursued their interests on the world stage in a much more determined and offensive manner. In Brussels, just like in the European capitals and, besides, in Geneva, the idea that free trade almost automatically brought peace and democracy prevailed for a long time in a somewhat blissful way. We are now witnessing a fundamental movement in the opposite direction – which may well be just as excessive in its scope as the previous movement – which consists in a powerful return to sovereignty claims.

For the time being, despite initial assertions of European sovereignty on the political level, EU law mainly provides a framework for States to act. However, there is still no European sovereignty on this issue at the legal level.

This is the case with the adoption of the March 19, 2019, European regulation on the screening of foreign investments, the annex to which containing a list of projects and programs of Union interest was amended by the regulation 2020/1298 of July 13, 2020. We know that the regulation of March 19, 2019, is only meant to apply to investments from countries outside the European Union, but that is not the main point. What is striking is that this instrument essentially relies on the States. This is a far cry from the CFIUS that exists within the federal government

of the United States. This European regulation does not introduce a real mechanism of European control of third country investments; the national laws of the Members States remain the linchpins of this new text, thus being in line with their own national contingencies and imperatives... Defining the contours and precise content of the notion of European interest in this context remains a challenge for the future.

The new French legal framework arising from the PACTE law strengthens this same trend. Indeed, while the previous regime clearly distinguished between the regime applicable to European investors, which was far less burdensome, and the one applicable to non-European investors, the December 21, 2019, decree has, very significantly, put an end to this difference in regime. From now on, apart from a threshold issue, the control mechanisms apply according to the same criteria to the internal market and to investments outside of it. It will be worth observing whether, in practice, European investments will be treated differently from non-European investments by State services, including to ensure that these mechanisms are considered to be in compliance with European law by the Court of Justice of the European Union.

Does the current health and economic crisis affect the implementation of investment control in France?

As globalization has become more brutal and Europe has often been criticized for a certain naivety, these issues, which used to be at best technical and at worst frankly obscure, have turned into very sensitive topics in internal political debates, long before the COVID-19 pandemic: deindustrialization, weakening of middle classes, territorial inequalities due to globalization, rise of extremism... all those phenomena are obviously linked. This crisis brings up in an unprecedented and powerful way the question of the right balance between the reinstatement of border and the desire for openness, the protection (and proper definition) of strategic interests and the integration into the world economy.

The Couche-Tard case can be partly interpreted in this context: would the executive's refusal have been as immediate and unquestionable if we had not been in the midst of a pandemic, with cashiers and other supermarket employees on the front lines for months? Would an investment proposal from a large and friendly country, with apparently strong guarantees in terms of development and employment, have been rejected in the same way if the government had not anticipated, rightly or wrongly, polemics about a sale of distribution networks to foreign investors that had been in the spotlight throughout the pandemic?

What prospects do you see for the control of foreign investments in France?

First and foremost, when assessing foreign investment projects, the right balance between openness and closure, as well as the preservation of rational and rigorous criteria, remain necessary, in times of crisis more than ever. The current general climate creates the risk of a too narrow approach to the long-term economic interests of our country and of Europe. Although numerous defensive considerations are entirely legitimate, we must not forget that external partnerships and financing may be essential to the maintenance, regeneration, dynamism and attractiveness of the French economic environment. As one might say: beware of the Maginot Line syndrome!

Then, with regard to foreign investors, it is crucial for the French market to remain attractive and therefore, legally understandable and predictable. The existing mechanism is relatively new; it would be even more useful to be able to quickly have access to the most detailed administrative doctrine possible, such as, for instance, the publication of guidelines or general principles, together with relevant case studies. The implementation of the control system could thus be better anticipated. There is no doubt that many of the contributions you have complied in this Cahier will contribute to this objective in a very valuable way.