

« I DON'T VIEW FOREIGN INVESTMENT REVIEW AS A NEW CENTER OF GRAVITY, BUT RATHER AS AN ENDURING FEATURE OF M&A »

*Interview with Laurent Cohen-Tanugi,
Member of the Paris and New-York Bars,
Managing Partner, Laurent Cohen-Tanugi Avocats*

LAURENT COHEN-TANUGI AVOCATS

Special issue compiled and edited by Marina Guérassimova and Professors David Chekroun, Gilles Pillet (ESCP Business School) with the assistance of Paul Agard, student of the Specialised Master in International Business Law and Management, and Luidgy Belair, student of the Law & Business major at ESCP Business School



Is the review of foreign investment the new center of gravity of M&A, the third pillar alongside with merger control and compliance? Or is it only a relatively temporary phenomenon for the time needed to resolve crises (health and geopolitics)?

Laurent Cohen-Tanugi: Neither. I don't view foreign investment review as a new center of gravity, but rather as an enduring feature of M&A, like merger control. Not all transactions are strategic.

The rise of foreign investment review in strategic sectors dates back fifteen years ago, first in the United States, then in Europe and in new emerging powers.

It can be explained by the return of geopolitics in the globalized economy at the turn of the century due to a twofold reason. First, growing conflicts in international relations. Then, the massive transfer of wealth to Asia, notably China, as well as the Gulf States and Russia, which are neither allies of the West, nor democracies and market economies. The risk of having European or American strategic companies falling under the direct or indirect control of these States and their emanations cannot be taken lightly.

It is more important today for a State to protect its independence and its economy than its attractiveness.

Is the French system's philosophy based on economic sovereignty, protectionism, economic patriotism, the need for foreign investment, or a specific strategic vision? Considering the French system of foreign investment review in light of France's position in the global competition, which changes could be made?

Laurent Cohen-Tanugi: The French regime has been strengthened in the spirit of what I have just recalled. But in practice, there is always a mix of legitimate national security or strategic independence concerns, and economic and social considerations, which can sometimes be close to protectionism or conversely favor foreign investment to promote employment or France's attractiveness.

In my view, this mix is confusing. A more rigorous implementation of the French regime is desirable. Greater clarity is required on what should be protected.

In comparison, in the U.S., the rationale for protection, which is national security, can be more easily identified. The aborted Emirati acquisition of the Port of New York a few years ago is a good example.

The reason for the rejection was essentially based on national security considerations. Although political and economic concerns may have been involved, there is no doubt that national security was at stake.

Besides, in the U.S., the political nature of the decision is obvious since the decision ultimately belongs to the President. Yet, the procedure in place is duly followed. I cannot recall any example of cases reflecting pure economic or social opportunism.

How is the French system perceived by foreign investors: a welcoming and professional counter, a repellent one compared to more transparent systems, or the right balance between the two?

Laurent Cohen-Tanugi: France is known for its state interventionism and for the tendency of its governments, whether right or left, to interfere in major M&A transactions, even Franco-French ones, through non-legal channels. Remember Nicolas Sarkozy's intervention in the conclusion of Sanofi's hostile takeover bid on Aventis in 2004, which I personally witnessed, or the Veolia-Suez deal last year. The blocking of Danone's acquisition in the name of strategic interests in the 2000's has also left its mark... But France is still an attractive destination for foreign investors. The key is to find the right balance between promoting the attractiveness of the French economy and the protection of strategic interests.

Does the EU regime represent a step towards a potential unification, or at least a convergence?

Laurent Cohen-Tanugi: Yes, it is a first step towards a European level review of strategic investments within the European Single Market. This is a goal that I had explored and defended in my 2008 report "Beyond Lisbon: A European Strategy for globalization" during the French presidency of the European Union (Odile Jacob/La documentation française), because the EU dimension is as relevant there as in the area of competition.

But European political integration is not sufficient yet for this. The common external policy is still nascent. Institutionally speaking, there is no equivalent to the U.S. President. The road is long, but it is the right path to follow. The EU dimension is the right one. Deeper European integration is even more necessary in a world of continental empires and rising nationalism.

With the Teledyne/Photnis and Carrefour/Couche Tard cases, is the political dimension of the transactions overestimated, or rather systematic, relegating the technical dimension to a mere window-dressing for decisions? Is the technical dimension relevant for the method of examination or the communication? Or, is it only about signaling the government's vigilance on these transactions?

Laurent Cohen-Tanugi: Governmental positions in a country as interventionist as France sometimes carry a greater dissuasive effect than a legal veto. It would be risky to be satisfied with this. Once again, it is rather detrimental to France's image with foreign investors. An increased professionalization of controls is desirable, even if, in the last resort, the decision is political and litigation is ineffective.

Considering the French economy's need for financing, what place can geostrategic concerns have? What should they be today?

Laurent Cohen-Tanugi: National security and strategic independence concerns are paramount, at least at the European level. The global economy has become considerably more geopolitical. Whether cybersecurity or the safeguarding of a national airline during the health crisis, the issue of strategic independence is at stake one way or another. The fields should not be mixed up, and a clear review regime should be applied. But it is also necessary to maintain some agility to counteract any hostile bid from a foreign investor acting in its own interests or in the interests of its government.

Does it seem to you that the treatment differs if the purchaser is an investment fund, an industrial or according to the nationality? Industrials are sometimes seen as more predatory but allows more durable relationships; funds are often less predatory but more volatile, with the risk of being destined to be sold on without it being possible to predict to whom? What is your vision? Does the solution lie in the letter of undertaking?

Laurent Cohen-Tanugi: Letters of undertaking only have a relative legal value. Evolving circumstances following their execution can make them rapidly obsolete and allow investors to free themselves from them. The interventionist State often appeared in the past as the fall guy. Moreover, not everything is controllable. Finally, the lack of fluidity between the public and private sectors sometimes deprives the government of civil servants who are sufficiently aware of the business world.

In the end, however, no one can risk ignoring the State.

For national or European security, the investor's nationality, its ties to his home State and the assets at stake are the most important criteria. In the case of investment funds, a case-by-case examination is required. It is important to distinguish between traditional investment funds and sovereign wealth funds.

Is the health crisis a turning point? Is its impact quantitative (widening the scope of sensitive areas) or qualitative (improvement in approach)? Can we say there is a change in the philosophy of the system?

Laurent Cohen-Tanugi: I don't believe so. As in other areas, the health crisis has only accelerated trends that had already been at work for ten or fifteen years. We now have a broader vision of strategic independence and a more realistic view of competition between States, even within Europe, and the risks to supply chains in case of global disruptions. This does not justify autarky or deglobalization, but rather calls for renewed international cooperation.