

Comparison of Foreign Investment Reviews Between China and the European Union

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ABSTRACT

With the development of the global economy, investors are not just satisfied with the investment in their own country, they are increasingly focusing the investment on overseas markets. How to investigate the multinational corporation, especially security issues, is a huge challenge for the host country. In September 2017 the European Commission proposed a regulation on the Review of foreign investment; on March 19, 2017, New Europe Union (EU) legislation has come into force. On December 27, 2020, Measures for the Safety Review of Foreign Investment in China were reviewed and adopted, and the regulation came into effect on January 18, 2021. National security is always a serious issue for the host country, the business scope of the foreign investment object and the examination conditions should have a clear regulation. If the host country is to simply promote its economic interests, foreign investment in this country would be unconditionally adopted, which would pose a great risk to the security of the country. Given the legislation of the host country on foreign investment security review, this paper adopts a comparative method to compare the representative European Union and China. After comparing the relevant laws and regulations of the European Union and China, this paper suggests that China should further clarify the Ministry of Commerce as the lead review body and guide the national review work on the basis of existing laws; refine the review criteria and incorporate matters such as ecological safety and big data security into the review; improving the review process, prevent duplication of procedures and improve the efficiency of the review.

Keywords: *Foreign investment; Safety review; Censorship; Review coverage.*

1. INTRODUCTION

With the fierce competition of global economic development, some enterprises begin to expand their investment to overseas countries. There are several reasons for foreign direct investment by multinational companies: (1) The pursuit of high-profit investment motivation; (2) Resource-oriented investment motivation; (3) Market-oriented investment incentives; (4) Efficiency-oriented investment motivation. For the host country, the security review of foreign investment is indispensable, and the host country should pay attention to the prevention risks when opening to the outside world. Host countries should have clear regulations and restrictions on foreign investment within the scope of ensuring safety when making use of international common rules. The rapid economic growth of developing countries globally has caused primary cities to expand to become megacities. These developing countries still have large rural hinterlands, economic

resources, and young populations that have become the drivers of the opportunity to grow[1].

The European Union (EU) is one of the economies with the most open investment system and a major destination for foreign direct investment worldwide. China is one of the countries with rapid economic growth in recent years, which has a great connection with its gradual opening up of investment. In September 2017, the European Commission introduced the EU Foreign Investment Review Regulation, which came into force following the adoption of the Act by the European Parliament and Council on 19 March 2019. On December 27, 2020, China's Measures for the Safety Review of Foreign Investment were approved, and the Bill came into effect on January 18, 2021[2]. On the other hand, the European Union has put Chinese service providers under greater scrutiny for their data security compliance. In December 2018, for example, China's Mobike Cycling faced an investigation by Germany's data regulator after the fast-growing ride-sharing

company was suspected of violating the EU's General Data Protection Regulation (GDPR), which came into force on May 25, 2018. GDPR applies to any business that processes personal data automatically or manually and has extraterritorial applicability. Within China, the Foreign-Trade Zones (FTZ) has only increased scrutiny of financial services and other important areas, such as oil extraction, a move that has made investments by companies like Shell, but more detailed specifications are needed for specific inspections. By comparison, it can be found that the EU's censorship standards are quite strict compared with China's. Business scholars examine emerging markets not only as investment targets, but also as the origin of firms that may be similar to those of advanced economies, but in another institutional context, or that might operate completely differently[3].

The research on the national security examination system for foreign investment will help promote the beneficial interaction of relevant disciplines and strengthen the theoretical basis of the rule of law in China's economy. On the one hand, the establishment of a sound national security review system for foreign investment can make Our country better screen the security of foreign investment, avoid the projects involved in foreign investment threatening the security of our country, on the other hand, the establishment of the national security examination system for foreign investment can guarantee the effective supervision of government functions and prevent the favorable foreign investment caused by the abuse of departmental power from being blocked. Based on the above-mentioned reasons, studying the system development and characteristics of developed economies in the world can find the defects of our system in the process of comparison, and at the same time, we can put forward the idea of upgrading the system reform of our country, which is beneficial to our country to actively absorb the international effective experience and avoid taking detours and wrong roads. It is of great theoretical significance to the construction of our country's legal system. Therefore, to better guarantee the safety and order of domestic and foreign investment environment under the background of economic globalization, it is necessary to learn from the successful experience of the EU foreign investment review system, enrich and improve the relevant legislation of our country.

2. LEGAL REASONS OF THE CURRENT SENSOR PROBLEMS

For national security reviews of foreign investment, it refers to relate to national security grounds, by the specialized agencies to review classified to the scope of the review of foreign investment to assess the risk and impact of investment on the host country's national security. Then making appropriate decisions and risk

intervention systems of management and control. It is different between the China and Europe Union about review the level of rigor, for the security review of laws principles and the legislative focus. Their review institution, review content, and reviews are different. As global value chains have been increasingly fragmented, international business across countries has involved even more diversified firms across status-heterophyllous countries[4].

2.1. The division of labour among the review bodies is unclear

The host country has adopted internationally accepted methods for the examination of foreign investments that affect or may affect national security. China's Measures for the Safety Review of Foreign Investment, which came into effect in 2021, stipulate that the State shall establish a mechanism for the safety examination of foreign investment, with the National Development and Reform Commission and the Ministry of Commerce taking the lead in undertaking the conventional work of the safety review of foreign investment. It can be seen that China's main subject of the review is the National Development and Reform Commission and the Ministry of Commerce led the establishment of a special body "inter-ministerial joint meeting", which for foreign mergers and acquisitions in the national security review of the use of the joint meeting system.

Under the EU's censorship regime, the Commission will have the power to review specific FDI investments it considers likely to "affect the interests of the EU", but only on grounds of public safety or public order. However, the Commission does not have the power to directly reject the transaction or attach relief measures to it, but rather to advise the member States involved in FDI, even if the transaction has been completed. Member States are required to "take the views of the Commission to the maximum extent possible" and to provide an explanation if they do not comply. However, the economies of developing countries are either underdeveloped or highly dependent on Western developed countries[5].

2.2. The review was too broad

The FDI of firms can be classified into three stages of evolution (or degrees of internationalization): (1) starting from moving value chain activities outside home countries; (2) to a foreign subsidiary taking on a powerful strategic role in the firm; (3) to locating or relocating corporate or divisional HQ abroad[6]. However, after the company moved overseas, the issue of host country review ensued. To affect the national security of the host country's Foreign Investment Review, the host country uses internationally accepted

ways. The safety of foreign investment in China implemented in 2021 under review, the state creates security review mechanism for foreign investment, led by the Development and Reform Commission, the Department of Business, assume the day-to-day work of foreign investment in the safety review. This shows that the review body for the Development and Reform Commission of China and the non-permanent body established by the Commerce Ministry to take the lead “joint meeting of the inter-ministerial”, the Agency for National Security reviews of foreign mergers and acquisitions using the joint meeting system.

Review of the system in the EU, the Commission will have the right to review its opinion, may “affect the interests of the EU” of a particular foreign direct investment, but only for public safety or public order reasons review. Is directly or additional relief measures but can produce views of the Member States involved in foreign direct investment (even if the transaction has been completed). The Member States need to “maximize consider” European Commission views, such as non-compliance with such views are required to explain.

2.3. The review criteria are broad

For a comprehensive global view of the development of, the control of foreign investment cannot be confined to the Real side. As can be seen from the laws enacted by China, it considers that foreign investment constitutes a substantial or potential threat to national defense security, ideological security, financial security, energy security, food security, infrastructure security, transportation security, advanced equipment technology security, and other traditional security areas, involving important information technology, Internet products and services and other areas of network information security. The former is well understood, while the latter refers to the geographical, resource, economic, social, and other important national information collected by Internet technology and user personal information. As a user’s biometric, trajectory, social security number, credit card numbers, phone numbers, was leaked to the safety and security of the citizen against the state.

Internet world and cyberspace are no boundaries, data can be copied, any data information out of control threatened to set up, the current European and American Internet giant monopoly advantage in the Internet world, many countries lost in cyberspace network sovereignty, if not review the context of network information security investment, may damage the interests of China and Chinese citizens.

For foreign investment review regulations laid down by the EU, will be a critical examination of critical infrastructure: such as energy, transport and communication industries, and data storage; key

technologies, such as satellites, robots, and network security; and the key to the security of supply of raw materials; finally, access to and control of sensitive information. However, many Member States to avoid the review of foreign investment in robots and artificial satellites of the target company acquisitions and other business, part of the reason is that it is not fine to reject the deal or impose conditions on the transaction is in breach of EU law.

In particular the FDI, the standard is based on the changes in economic development. Chinese law and international rules and to apply its Rules related rights, as well as increasing the level of opening up in China, it would make the reforms began to in-depth, but also allow China to maintain their legal rights and interests in a more advantageous position. Since 2017, China had 4 years in a row to amend the Foreign Investment in a negative light, today restrictions fell nearly two-thirds. They have introduced a series of major opening-up measures in the financial and automotive sectors, and the manufacturing sector is now basically open. China’s review methods are more stringent in the following two areas: Firstly, investment in military industry, military support, and other areas related to national defense security, as well as military facilities and military facilities surrounding the geographical investment; Secondly, invest in 9 fields such as important agricultural products and energy and resources related to national security, and acquire actual control of the invested enterprises. Since the outbreak of COVID-19, so many countries due to shortage of materials, some product supply chain is urgent, in addition to the medical field, automotive, 5G construction and other important industries in Europe have a huge demand for the Chinese market and supply chain. The European Union to take prompt action to deal with, proposed a new strategy of medicine. The strategy will be implemented during the year stressed that not only reduce the European Union for third-country basis of Medicine (a substantial portion of from China) dependence on imports but to enhance personal defense products such as the medical product of the merger review. This suggests that while the EU’s strict Foreign Investment Review, began to try to close a specific industry chain. In Germany, the Foreign Economic Relations Ordinance since April carried out three amendments, aimed at strengthening action against foreign security review it all the more efficient in the outbreak.

The first amendment is a manufacturer of vaccines and antibiotics, medical protective equipment manufacturers, and for the Treatment Infectious Diseases Medical product manufacturers into the scope of the security-related corporate merger review.

In the future, multicultural companies must report to the German Federal Ministry of Economic Affairs, and

more than 10 percent stake in takeover provisions of the safety review is required. This marked the security auditing standards on foreign acquisitions in Germany has gone from “real threat” to “the foreseeable impact”. In October 2020, the German Foreign Economic Regulations were amended twice to implement the EU Foreign Direct Investment Review Regulation, establish an information exchange mechanism with EU commissioners and member states (to prevent a country’s FDI projects from creating security risks to other EU member states), and extend the scope of mergers and acquisitions that need to be reviewed to high-tech and future technology sectors. By the end of the transition period of the EU Foreign Direct Investment Review Regulation on 11 October, 16 member states had established corresponding review mechanisms, and seven member states, including Ireland, were taking measures. Only Bulgaria, Croatia, Cyprus, Greece, and Luxembourg do not have FDI reviews in place. Investment reviews in some member countries are also tightening. Italy’s government passed a decree in April expanding the scope of the government’s powers to review and oversee key acquisitions, and France announced that if investors outside the European Union buy a French company, a 10 percent stake would be subject to government review and approval to protect the country’s worst-hit companies.

2.4. The review was not rigorous enough

In terms of reviewing investment, the host countries have different developments, so a comparison of the way China and the EU review foreign investment can reveal some differences between them. China’s security review of foreign investment is divided into general and special reviews. If the Office of the Working Mechanism decides to conduct a security review of the declared foreign investment, the general examination shall be completed within 30 working days from the date of the decision. During the period of examination, the parties shall not make investments. After a general examination, if it is considered that the declared foreign investment does not affect national security, the Office of the Working Mechanism shall decide to adopt the security review. The parties shall be notified in writing of the decision taken by the Office of the Working Mechanism. However, if a declared foreign investment initiates a special examination, a decision shall be made by the following provisions and the parties shall be notified in writing: (1) if the declared foreign investment does not affect national security, a decision shall be made to pass the security examination; (2) if the declared foreign investment affects national security, a decision to prohibit investment shall be made; if the effect on national security can be eliminated by conditions attached and the parties undertake in

writing to accept the conditions attached, the decision may be made with conditions to pass the security examination, and the conditions attached to the decision may be set out in the decision. The special review shall be completed within 60 working days from the date of commencement; The parties shall be notified in writing of the extension of the examination period. During the period of examination, the parties shall not make investments. It is not difficult to see through the legal provisions that China’s general security review rules for foreign investment are more relaxed, avoiding excessive burden on enterprises. By the principles of necessity and reasonableness, the review procedures and time limits are set only for special reviews, with a longer time horizon and, in exceptional cases, extended periods, with no precise provision for specific extensions and number of extensions. In other words, the security review is conducted in three phases, based on the risk profile of the declared project, a hierarchical, progressive forward review, a reduction in the number of projects entering the second and third phases, a review, and a decision even if fed back to the investor.

The EU’s “new framework” recognizes that foreign security review and approval powers are exercised primarily by member governments, explicitly taking into account several strategic industries and cutting-edge technology areas, and emphasizes that this is not an “exhaustive list”, i.e., that member states can take into account more than that in implementing the review. The expansion of the discretionary power of foreign security review in member governments is highly targeted, especially the direction of China’s mergers and acquisitions in Europe is obvious. For example, the “new framework” specifically suggests that “whether investors are controlled or heavily funded by non-EU governments” is one of the considerations. For example, the focus of Chinese enterprises’ current acquisitions in Europe and the United States is precisely high-end manufacturing and cutting-edge technology, taking into account both “high-tech industries” and “non-EU governments”, to point to China’s current investment model in Europe and form a protective net against Chinese acquisitions.

3. PROPOSALS FOR IMPROVING THE SAFETY REVIEW SYSTEM FOR FOREIGN INVESTMENT IN CHINA

3.1. Improve the review organization

Aside from intervening in trade, many developing countries deviate from policy neutrality by introducing tax breaks and other policies to attract FDI[7]. A suitable review organization is required to review these foreign investments. The Ministry of Commerce needs to be made clear as the lead agency. The dual lead

mechanism of the Ministry of Commerce and the National Development and Reform Commission is determined in the provisions of the law. Although the dual lead mechanism is intended to use the two for oversight checks and balances, the different provisions have led to confusion in the functions of the two bodies and are not conducive to the conduct of the review. From a functional point of view, the Ministry of Commerce guides the work of foreign investment and economic cooperation, grasps the situation and trend of foreign investment as a whole, and makes it easier to establish links between joint meetings and foreign investors. Therefore, the Commerce Department may have an advantage as the lead agency for the security review committee. In selecting the staff of the review body, the Government should not limit itself to the selection of talents from the legal or economic sectors but should select the right integrated personnel and provide systematic training of the selected personnel. In view of China's special national conditions, there should be the same review mode between the central level and local governments to reduce the occurrence of error rates.

3.2. Improve review standards

With regard to national security, internal and external moments are in a dynamic convergence of changes, and countries have different definitions of national security. Therefore, when the state formulates the security review of foreign investment, it is difficult to make a definitive conclusion as to whether foreign investment will pose a threat to the country. Based on the need to build an open economic system, China's foreign investment security review should not be too stringent, and if all possible factors are covered, it will seriously hinder the liberalization of foreign investment and hinder opening up to the outside world. But if the design of the review criteria is too broad, creating security vulnerabilities, it is also not conducive to attracting foreign investment. China's current censorship standards are too broad and need to be refined and clarified, in which China can take ecological safety into a consideration. In practice, in recent years, a large number of foreign investments into the Chinese market, including some foreign investors forced by the home country's strict environmental standards, and in turn, high pollution, high energy-consuming industries brought about by the pollution problem passed on to China. Ecological security is closely related to the sustainable development of the economy, not only that, but ecological security is also the material basis of human survival and development, so ecological security should be included in the scope of foreign investment review. In addition, it is not difficult to see that the EU's foreign business review regulations have more stringent censorship standards, China should also refer to the EU's review security regulations to distinguish the

source of foreign investment. The effect on the quality of FDI varies significantly from different environmental regulation policies, and the effects of administrative supervision policy and social participation policy are significant[8]. Improving review criteria is therefore an issue that needs to be addressed as soon as possible.

3.3. Improve the review process

The examination of national security issues requires the introduction of detailed procedural rules outside the substantive rules, while the security review system for foreign investment is a contradiction between reconciling the capital inflow of foreign countries in the modern market economy with safeguarding national security. The examination of national security issues requires the introduction of detailed procedural rules outside the substantive rules, while the security review system for foreign investment is a contradiction between reconciling the capital inflow of foreign countries in the modern market economy with safeguarding national security. Although Chinese law provides for an ex-ante consultation procedure, it does not specify the scope of its application, only the "relevant issues" area. Therefore, the improvement of the ex anecdotes procedure should clarify the scope of the negotiations, while covering both procedural and substantive issues. At the same time, we should also refine the scope of the information procedures required to submit materials in the law, provide for the interface between the prior consultation procedure and the formal reporting procedures, allow the investment parties in the prior consultation stage has submitted materials without repeating the submission, prevent redundancy of procedures, improve the efficiency of the review. At the same time, the case reporting system will be added, and the lead body of the review body will report in writing to the Standing Committee of the National People's Congress and be questioned by the Standing Committee of the National People's Congress after the conclusion of the general review[9].

4. CONCLUSION

FDIs in a given country are affected by the capital supply in both home and host countries[10]. The foreign investment security examination system refers to the system established by a country to prevent foreign investment transactions from having a security impact on the host country under the demand of economic opening. The security examination system of foreign investment is changing dynamically with the economic development of the host country, and the economic development of the host country is different. In the area of security review, with the development of global economic integration, the more liberal countries could appropriately refer to the system of censorship of strict states and choose a review model that best suited their

development to maximize economic benefits. Thus, it provides a preliminary exploration experience for constructing a system of foreign investment review legal system with a virtuous circle in the global perspective. Under the international background of the great integration of the world economy, it has become the trend of international economic exchange to actively attract foreign investment and realize the overall development of the country with the capital, technology, and management experience brought about by foreign investment. The foreign investment safety examination system in China has experienced from scratch, from dependent foreign investment access review, anti-graft review to obtain independent review status, from principled norms to specific operational review system development process, started late, the development process is relatively slow. Based on the legal provisions introduced in 2021, in line with international rules, the specific operation of the system has been stipulated, the scope of the review has been reduced, the loopholes in the previous review work have been closed so that the review work can be followed by law and rules. However, China is in the initial stage of constructing a national security review system for foreign investment, and this paper hopes that by comparing the relevant foreign investment laws of the EU and China, China will start by perfecting the evaluation organization, setting out the examination standards in detail and improving the examination procedures currently stipulated, and construct a legal system that meets China's national conditions.

REFERENCES

- [1] Adiwan F. Aritenang “The contribution of foreign investment and industrial concentration to firm competitiveness in Jakarta Megacity ” *Cities* 113 (2021) 103152.
- [2] <https://zfxgk.ndrc.gov.cn/web/iteminfo.jsp?id=17561>
- [3] Ruth V. Aguilera, Luciano Ciravegna, Alvaro Cuervo-Cazurra, Maria Alejandra Gonzalez-Perez “ Multilatinas and the internationalization of Latin American firms” *Journal of World Business*52(2017)447–460.
- [4] Xufei Ma, Ziliang Deng , Yi Tang, “Relieving status anxiety: How low-status firms respond to international status-heterophilous relationships ” *Journal of World Business* 56 (2021) 101259.
- [5] Ruiming Liu, Yankun Kang, Jie Zhang “ Ideological taboos, entry barriers, and FDI attraction: Evidence from China ” *Journal of Asian Economics* 76 (2021) 101365.
- [6] Xiaoqing Li, Rose Quan, Maria-Cristina Stoian, Goudarz Azar “ Do MNEs from developed and emerging economies differ in their location choice of FDI? A 36-year review” *International Business Review*.
- [7] Ann Harrison, Andrés Rodríguez Clare “Trade, Foreign Investment, and Industrial Policy for Developing Countries” *Handbook of Development Economics Volume 5, 2010, Pages 4039-4214.*
- [8] Xiao Yu, Yong Li “Effect of environmental regulation policy tools on the quality of foreign direct investment: An empirical study of China ” *Journal of Cleaner Production* 270 (2020) 122346.
- [9] Zhang Yumeng, “The improvement of China's foreign investment security review system” *China National Knowledge Infrastructure*.
- [10] DonghuaChen, XinYu, ZhouZhang “ Foreign direct investment comovement and home country institutions” *Journal of Business Research Volume 95, February 2019, Pages 220-231.*