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Foreign Direct Investment (FDI) Screening: European and Chinese perspectives

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Preface in Chinese

欧盟作为世界上最开放的经济体之一，曾经对于来自世界各地的外国直接投资均保持开放态度，除了少数涉及国防和加密技术的生产领域会受到审查，其他领域的外国直接投资都不需要报给各个国家的商务部门审批，而是由企业自行决定。然而近年来，中国对于科技领域的外国直接投资日益增加并在欧洲实行了几起知名的直接投资，例如美的集团收购德国机器人制造商Kuka、福建宏芯基金拟议收购芯片设备制造商Aixtron，造成了欧盟对于外商直接投资的紧张。欧盟的决策者担心欧洲的专有技术和消费数据会被传入中国从而造成一些国家安全和社会秩序问题，因此从2017年开始，由欧盟巨头德国、法国、意大利三国牵头，致函欧盟贸易专员，建议禁止非欧盟成员国的直接投资。三国希望"非欧盟投资者"在欧盟投资特定产业时，欧盟相关产业能够得到更好的保护。2017年7月12日，德国率先通过《对外经济条例》第九次修正案，对于"非欧盟投资者"在德国进行收购制定了新的审查规则。德国经济部长布丽吉特·齐普里斯说，鉴于近年来收购数量大幅增长，交易变得更加复杂，"我们将扩大特定行业的审查范畴，包括关键基础设施的特定种类。"齐普里斯同时强调，德国依然是世界上最开放的经济体之一。随后，欧盟委员会（EC）主席容克在2017年9月的盟情咨文中提出了建立欧盟范围内的框架来筛选外国直接投资的提议，同时其他欧盟国家也开始收紧或者考虑收紧外商投资的管控机制。2018年11月，欧洲议会、理事会和委员会达成了关于建立外国对欧盟直接投资筛查框架的政治协议，并且于2019年3月通过了欧洲议会和理事会关于建立外国对欧盟直接投资筛查框架的管理条例。

《欧盟外国直接投资审查框架条例》建立了欧盟层面的合作机制，但同时各个成员国有决定权。在此之前，欧盟的外资审查制度分散于各成员国，且审查范围和机制各不相同，对外国直接投资的审查管理松散。《欧盟外国直接投资审查框架条例》建立了成员国间正式的审查参与及合作共享机制。当外国直接投资在某一成员国已被审查或者正在被审查时，该成员国有义务通知欧盟委员会和其他成员国。其他成员国可以对该成员国发表评论，并将评论同时转发给欧盟委员会；欧盟委员会可以向该成员国提出意见。该成员国应当认真考虑这些评论和意见，并结合自身情况做出判断。

《欧盟外国直接投资审查框架条例》针对特定行业和与欧盟利益相关的项目或计划。《欧盟外国直接投资审查框架条例》第四条第一款列出了"特定行业"，"非

欧盟投资者”对这些特定领域的投资都需按受欧盟的投资审查，并且这些领域的投资很可能遭到欧盟的反对。以下简要列出这些领域。

关键基础设施：能源、交通、水、卫生、通信、媒体、数据处理或存储、航空航天、国防、选举或金融基础设施、敏感基础设施以及对使用该基础设施至关重要的土地和不动产
关键技术：人工智能、机器人、半导体、网络安全、航空航天、国防、储能、量子和核技术、纳米技术以及生物技术
关键供应：能源或原材料供应、食品安全
获取敏感信息：个人信息和控制该信息的能力
媒体自由和多元化

同时，《欧盟外国直接投资审查框架条例》在附件中还列出了与“欧盟利益”相关的项目或计划，包括涉及大量或相当大比例的欧盟资金，或根据欧盟法律对安全或公共秩序至关重要的关键基础设施、关键技术或关键供应。

例如：全球导航卫星系统；哥白尼项目，即原“全球环境监视与安全计划”GMES计划；地平线2020计划；跨欧洲交通网络（TEN-T）；跨欧洲能源网络（TEN-E）；跨欧洲电信网络；欧洲国防工业发展计划（EDIDP）；永久结构性合作（PESCO）。

截至2022年9月，欧盟27个成员国中，目前仅有2个尚未公开宣布建立外资投资审查机制，目的是维护国家层面的安全和公共秩序。这是欧盟在日前发布的《外资审查年度报告》中披露的最新数据，比起1年前，建立或计划建立外资投资审查机制的成员国又多了3个。主要接受欧委会审查通知的投资者，前五名为美国、英国、中国、开曼群岛和加拿大。

本文将以意大利政府“黄金权力法案”为欧盟收紧管控外国直接投资的代表重点介绍和分析。意大利“黄金权力”，最开始叫作“黄金股份”。目的是掌握具有战略意义的行业。具体的操作是，意大利官方持有公司的少量股份，这些股份，在特定情况下，拥有最高的权力。比如说，在涉及收购的时候，如果意大利当局认定收购会对意大利产生战略层面的影响，就可以直接否决。也就是说，意大利当局不用成为最大的股东，就可以掌控意企的一些关键性决策。

“黄金股份”最初被意大利政府宣布使用时，在欧洲产生了很大的争议，因为这是明显的政府干预市场经济的行为，会破坏自由市场，一度遭到了欧盟法院的严厉谴责。后来意大利方面进行了一些改变，从2012年开始，法令N.21/2012规定了意大利政府在审查外国投资的权力，就发展成了现在的“黄金权力”。“黄金权力”授予了政府对“战略资产”的控制权、所有权、可用性或使用变化的任何交易的特殊否决权。简而言之，就是“战略资产”的控制权、所有权、使用权出现变化之前，要向政府申请，政府同意了才能进行交易。这实际上就是给了意大利政府最高级别的否决权，只要意大利政府否决了，就不能交易。最开始的时候，被这样控制的意大利企业还不多，但随着时间的推移，很多行业都被纳入到了战略范畴，意大利当局对于外国直接投资审查越来越严格。从19年新冠病毒大流行以来，意大利政府更是根据扩展到了更多方面。根据法律规定，为了保护活跃于战略市场或拥有和经营关系到意大利国家利益的敏感技术和相关资产的公司（无论是否上市）的财产，法律赋予意大利政府一项“黄金权力”，包括：

1.可就战略性市场行业内任何方式购买股份、业务或资产、许可和使用敏感技术及相关资产的交易，设立特殊规定；

2.对上述交易、行为和活动进行监管。

3.可对公司决议、行为或交易行使否决权，从而保护本国公司资产，同时还有权对特定交易附加条件或承诺。

一旦企业违反“黄金权力”法案相关规定，将面临严厉惩罚。根据规定，未就特定交易、行为或决议进行申报，或者未遵守政府依据“黄金权力”做出的决定的后果包括：

1.该等交易和行为将被认定为无效；

2.违反规定的一方将被处以最高两倍于投资价值的行政罚款，并且在任何情况下都不得低于上一财政年度营业额的1%。此外，相关契约或交易被视为无效（与持股相关的管理权可能会被中止）。对于涉及5G技术的资产，行政罚款最高为交易价值的150%，无论如何不得低于交易价值的25%。若该行为构成犯罪，则根据意大利刑法进行处罚；

3.政府可以责令恢复原状，并要求涉事公司和交易对方承担相关费用等辅助措施。

面对欧盟各国和其他西方国家越来越严格的外商投资安全审查制度，2019年《中华人民共和国外商投资法》最终颁布，并于2020年1月1日开始生效，届时曾经指导外商投资的“三资法”废除。《外商投资法》第四十二条规定，对于已设立的外商投资企业，在5年内可以就保留原企业组织形式。这意味着众多三资企业需要在5年过渡期内完成组织机构调整的工作。外商投资法明确了“负面清单+国民待遇”政策。《外商投资法》第四条规定：“国家对外商投资实行准入前国民待遇加负面清单管理制度。前款所称准入前国民待遇，是指在投资准入阶段给予外国投资者及其投资不低于本国投资者及其投资的待遇；所称负面清单，是指国家规定在特定领域对外商投资实施的准入特别管理措施。国家对负面清单之外的外商投资，给予国民待遇。”第二十八条规定：“外商投资准入负面清单规定禁止投资的领域，外国投资者不得投资。外商投资准入负面清单规定限制投资的领域，外国投资者进行投资应当符合负面清单规定的条件。外商投资准入负面清单以外的领域，按照内外资一致的原则实施管理。” 这一法规确立了外资信息报告制度，要求所有的外资企业，无论是依照备案制确立的企业还是按照许可准入制设立的，均需按照要求应当通过企业登记系统以及企业信用信息公示系统向商务主管部门报送投资信息。信息报告制度是典型的事后报告、为监督和监管提供足量信息。其立法意旨在于，一方面敞开准入大门，另一方面，又通过报告制度理解其基本信息，掌握其运行中的主要活动，便于监管和规制。负面清单模式下，中国对外资准入的限制程度迅速下降，虽然负面清单目录会随着实际状况的变化进行相应调整，但总趋势是目录范围逐年缩减，开放领域和行业日益扩大。信息报告制度取代了外商投资以往复杂的审批备案程序，进一步简化行政机关的办事程序，优化政务服务。随着开放领域的增加，制定安全审查制度也被提上日程。

2020年12月19日，经国务院批准，国家发展改革委、商务部发布《外商投资安全审查办法》（下称“《安审办法》”），该办法于2021年1月18日正式施行。《2021安审办法》共23条，规定了适用安全审查的外商投资类型、审查机构、审查范围、审查程序、审查决定监督执行和违规处理等。外资审查制度的根本目的是维护国家安全，但各国对国家安全的定义存在差异。习近平总书记与2014年提出的《总体安全观》提及了“全面和普遍的国家安全”。中国国家安全体系包括11个领域，最基本的是政治安全，特别是政权安全和制度安全，其中人民安全是国家安全的宗旨。对于外商投资安全审查中的“国家安全”内涵，《安审办法》也做了相应的规定，明确包含了军事国防相关外商投资和其他9类

重要领域（即投资军工、军工配套等关系国防安全的领域，以及在军事设施和军工设施周边地域投资；投资关系国家安全的重要农产品、重要能源和资源、重大装备制造、重要基础设施、重要运输服务、重要文化产品与服务、重要信息技术和互联网产品与服务、重要金融服务、关键技术以及其他重要领域，并取得所投资企业的实际控制权。），并注明了“其他重要领域”作为兜底条款。

《安审办法》明确中国境内适用安全审查的外商投资类型包括：

1.外国投资者单独或者与其他投资者共同在境内投资新建项目或者设立企业；

2.外国投资者通过并购方式取得境内企业的股权或者资产；

3.外国投资者通过其他方式在境内投资。

换言之，所有的投资类型都可能涉及国家安全审查，包括：新设外商独资企业、新设中外合资企业、外资并购、VIE架构、代持等等。

《安审办法》总结了中国近十年来国家安全审查工作的立法和实践，特别是自贸区外商投资安全审查的做法，对审查机构、审查范围、审查程序、审查决定的执行监督，以及违规行为的惩戒等进行了调整和补充，进一步提高了中国国家安全审查的可操作性和透明度。

Abstract

As one of the most open economies in the world, the European Union used to maintain an open attitude towards foreign direct investment from all over the world. Except for a few production areas involving national defense and encryption technology, foreign direct investment in other fields does not need to be reported. It is given to the commercial departments of various countries for approval, but it is up to the enterprises to decide on their own. However, in recent years, EU policymakers are worried that European proprietary technology and consumption data will be transferred to China, which will cause some national security and social order problems. The European Union established the "EU Foreign Direct Investment Screening Framework Regulations". The promulgation of this regulation established a cooperation mechanism at the EU level, stipulating the steps of foreign investment review, the areas that will be mainly reviewed, etc. Investments in these specific fields by "non-EU investors" are subject to EU investment review, and investments in these fields are likely to be opposed by the EU. This article will focus on the introduction and analysis of the EU screening mechanism and the Italian government's "Golden Powers Policy" as a representative of the EU's tightening control of foreign direct investment. Since 2012, Decree N.21/2012 has stipulated the power of the Italian government to review foreign investment, which has developed into the current "Golden Power". The "Golden Power" grants the government special veto power over any transaction that changes the control, ownership, availability, or use of a "strategic asset." In short, before the control, ownership, and use rights of "strategic assets" change, an application must be made to the government, and the transaction can only proceed with the government's approval. Since the 2019 Corona-virus pandemic, the Italian government has expanded to more aspects. Faced with the increasingly stringent foreign investment review mechanism of the EU and EU member states, China, as an important trading partner of the EU, has also adjusted its corresponding laws and regulations and made new regulations on foreign direct investment review. From the perspective of China's foreign investment review, two laws and regulations are mainly introduced. The first is the 2019 Foreign Investment Law, and the second

is the Foreign Investment Security Review Measures. Based on introducing the content of the regulations, this article will focus on exploring the relationship between the foreign investment review mechanism of the EU and EU member states (especially Italy) and China, and whether or to what extent these review methods in China are influenced by the EU review mechanism.

Key words: FDI, FDI Screening, EU, China, International Law

Foreign Direct Investment (FDI) Screening in EU

Definition of "Foreign Direct Investment"

Definitions given by international organizations

In the "Balance of Payments Guide (Fifth Edition)" (IMF, 2007), the World Monetary Fund defines foreign direct investment as "Direct investment is a type of cross-border investment characterized by a certain resident enterprise exercises managerial control or significant influence" (IMF, 2007) , in addition to equity in which control or influence is brought about, direct investment also includes investments in connection with this relationship, including investments in enterprises that it indirectly influences or controls, affiliates, debt, and contrarian investing. The Direct Investment Relationship Framework (EDIR) can be used to determine whether cross-border ownership leads to a direct investment relationship based on control and influence. A direct investor is an entity or group of related entities that can exercise power or significant effect over another resident entity in another economy. A direct investment enterprise is an entity controlled or significantly influenced by the direct investor. In many cases, an entity may simultaneously be a direct investor, a direct investment enterprise, and an affiliate. The definition of the IMF emphasizes that the purpose of foreign direct investment must be the purpose of the investor to obtain sustainable benefits through the establishment of enterprises.

The Organization for Economic Cooperation and Development's Standard Guide to Foreign Direct Investment (Fourth Edition) (OECD, 2008) states that "Foreign direct investment reflects the establishment of an enterprise in another economy by an enterprise resident in one economy as an investor (a foreign direct investment enterprise) to obtain persistent interest". Persistent interest reflects the long-term relationship between the direct investor and the FDI enterprise and the influence on management decisions. Management decision-making influence specifically refers to the fact that a single foreign investor owns 10% or more of the common stock or

voting rights in an enterprise (unless there are reasons to prove that the 10% equity or voting rights cannot participate in the management decision of the enterprise[1]), or if it has less than 10% of the equity or voting rights but able to participate in corporate management activities. Enterprises that influence management decision-making are foreign direct investment enterprises. The OECD (OECD, 2013) focuses on the belief that FDI can participate in business management activities, but does not require absolute control over the business. The OECD focuses on the fact that FDI can participate in business management activities, but does not require total control over the enterprises. It believes that the most significant difference between foreign direct investment and investment portfolio is that the purpose of direct investment is to form control over the investing enterprise.

In the academic field, international investment refers to the cross-border flow and transfer of capital. This capital can be used to form joint ventures directly, establish wholly-owned subsidiaries, purchase existing company equity, purchase bonds, and provide loans. International investment is divided into direct investment and indirect investment according to the purpose of the investor (Wang, 1995). The main difference between direct investment and indirect investment is the purpose of the investor in the invested enterprise. If the purpose of the investor is to participate in the business decision-making of the invested enterprise or to exercise a certain degree of control over the invested enterprise, this kind of investment is called direct investment, otherwise, it is an indirect investment.

Definitions given by EU

Since the entry into force of the Lisbon Treaty, the EU has had exclusive competence in the field of foreign direct investment. However, in the Lisbon Treaty, there is not a clear and direct definition of "foreign direct investment". Most of the BITs signed by EU member states do not use "direct investment", but "investment" in a broader sense, or "establishment" or "enterprise" in a narrow sense (Karl, 2004). Different

[1] Generally speaking, common stock rights are the same as voting rights, but under special circumstances, voting rights are not equivalent to common shares.

interpretations of the definition of foreign direct investment have emerged. One theory holds that "foreign direct investment refers only to investments directly related to international trade agreements." (Cardwell & French, 2011) There are also explanations that foreign direct investment only involves investment liberalization and does not include investment protection. However, the general theory currently formed by the EU believes that the purpose of incorporating foreign direct investment into the EU's exclusive competence in the Lisbon Treaty is to strengthen the role of the EU in international investment policy. Therefore, foreign direct investment should include market access, capital flow, Post-entry treatment, etc. In this context, foreign direct investment is limited in the traditional sense, which is similar to what the International Monetary Fund and the Organization for Economic Cooperation and Development describe as "a kind of long-term relationship that enjoys long-term Investment of benefits." (OECD, 2013)

Regarding this kind of definition of foreign direct investment, the EU's secondary legislative currency directive[2] states, "Direct Investment: All investment activities in which a natural person or any economy provides capital to establish an enterprise and establish or maintain an ongoing, direct link between the investor and the economy in which the economy is established.". In the report of the EU and its member states to the WTO Working Group on Trade and Investment, it mentioned that "foreign direct investment is a type of international investment that reflects the direct investor's long-term interest in the enterprise established by the direct investment. The criteria are: firstly, there is a long-term relationship between the investor and the established enterprise, and secondly, the investor can exercise effective management of the enterprise."[3] As explained in the "Direct Investment" of 2008, it also emphasizes the "lasting and direct link" between investors and investments. Although the Lisbon Treaty does not state this further, indirect or portfolio investments such as short-term

[2] Council Directive 88/361/EEC1988 JL-187/5: Direct investments: Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity.This concept must therefore be understood in its widest sense..."

[3] Communication from the EC and its Member States to the WTO Working Group on Trade and Investments, WT/WGTI/W/115, point 8.

loans, contractual claims, or intellectual property do not fall within the scope of FDI in the Common Commercial Policy. (Ceyssens, 2005)

The reasons for the change of EU attitude towards FDI

As one of the most open economies in the world, the EU used to be acceptable to foreign direct investment from all over the world. Except for a few production areas involving defense and encryption technology, which are subject to scrutiny, foreign direct investment in other fields does not need to be reported to the commercial authorities of each country for approval. As the United States gradually established a foreign investment security review system in the 1970s, major European countries such as Germany, the United Kingdom, and France also started to install a foreign investment security review system. However, compared with the United States, the foreign investment security review system of EU countries has been relatively loose, showing the characteristics of a lack of management and low-level control. Especially before the formal regulations, there was no unified review framework based on security or public order at the EU level. There needed to be an official coordination mechanism for security review between the EU and its member states or between member states. In this case, when investing in the EU, countries outside the EU can first invest in member states that have not established a foreign investment security review mechanism, and then transfer to the final target member state. Using this strategy can circumvent the latter's stricter foreign security review system.

But since the 2008 global financial crisis and the subsequent European sovereign debt crisis, European economic development has become harder, and the EU has gradually begun to seek opportunities to protect its national industries. Especially in recent years, China's FDI rate in Europe has increased rapidly, and economic activities have increased, especially in the science and technology fields. The high proportion of investment in China has made the EU worry that this will threaten European core technologies, industries, and even the way of life. The EU is an ideal destination for Chinese enterprises to do direct investments.

Since China's direct investment quantity in the EU has grown rapidly after the global financial crisis in 2008, the introduction of the "Regulations on screening Foreign Investment Review" has been commented on by some scholars as a "targeting Chinese investors" policy response. (Liu, 2018)

Scholars such as Janina Witkowska, a professor at the University of Lodz in Poland, pointed out that although developed countries are still the main source of foreign investment in the EU, the proportion has dropped sharply in the past few years. The proportion of investment in the EU's foreign investment stock of Switzerland dropped from 51.5% in 1995 to 41.5% in 2015. Although the overall scale of investment is relatively small, it has grown rapidly. The proportions of Brazil, China (including Hong Kong), and Russia have risen from 0.3%, 0.2%, and 0.4% in 1995 to 2.2%, 2%, and 11% in 2015. Brazil and China have become the fifth and sixth largest sources of foreign investment in the EU. Among them, China's investments and acquisitions in Europe are particularly noticeable. In terms of quantity, the number of investments and acquisitions by Chinese companies only accounts for 3% of the total number of companies among the number of foreign companies mergers and acquisitions in the EU, but the value of acquisitions in some advanced technology and sensitive sectors is higher than in other areas, raising serious security concerns. Part of the reason for this concern is that Chinese companies, as latecomers to cross-border investment, are generally regarded as lacking technological advantages. They are trying to buy at the bottom line to acquire technology when European companies are generally in financial crisis and erode the basis of the EU's competitiveness. (Witkowska, 2020)

A report jointly released by the Rhodium Group, an American think tank, Mercator Institute for China Studies in Germany, and others also showed that the EU's biggest concern about Chinese mergers and acquisitions is one-way technology and asset transfer. In this view, China's investment not only fails to produce technology spillover effects but also connects with China's domestic industrial policies and becomes a tool for acquiring cutting-edge technologies and realizing industrial

upgrading. In addition, Chinese enterprises, not only state-owned enterprises, are generally considered to be politically protected by the Chinese government and supported by the Chinese government economically, so they have an "unfair competitive advantage" in the process of investment and mergers and acquisitions, causing market distortions, and putting the EU's businesses at a competitive disadvantage (Hanemann & Rosen, 2012). According to the report released in March 2019, the EU Foreign Investment Review Regulations will cover most of China's investment in the EU, because the number and scale of Chinese companies' mergers and acquisitions in Europe in recent years have tilted towards technology industries. In 2018 only, 82% of Chinese M&A deals in Europe met at least one of the criteria that should be reviewed. (Hanemann & Rosen, 2019)

The growth of China's total investment in Europe did not directly prompt the EU to adjust its foreign investment management policy, but several large acquisitions triggered the EU to rethink its existing foreign investment regulatory policies. In 2011, although Xinmao Group's acquisition of Dutch optical fiber and cable giant Treka failed, it still triggered discussions on whether to establish a foreign investment review mechanism at the EU level. In 2017, the State Grid Corporation of China purchased a 24% stake in the Greek State Grid Corporation at 320 million euros, and in 2017, COSCO SHIPPING Ports Co., Ltd. purchased a 51% stake in the Spanish Port of Northam for 200 million euros. In 2016, ChemChina acquired a 26.2% stake in the Italian Pirelli tire manufacturer at 7.1 billion euros. In 2016, COSCO Group acquired a 51% stake in the Greek port of Piraeus. In 2016, Midea Group successfully acquired German robot manufacturing giant KUKA (Ye, 2019). It finally prompted the EU to formally propose a policy adjustment to foreign investment. At that time, Midea's acquisition of KUKA sparked a heated debate in Germany (Yao, 2018). The core issue was whether the German government should restrict Chinese companies from acquiring German high-tech and other sensitive companies to protect main technologies. The then Federal Minister of Economic Affairs, Gabriel, advocated the revision of Germany's "Foreign Economic Law", and advocated the introduction of policies at the EU level to review and restrict the acquisition of core technologies in

Europe (mainly Germany) by non-EU countries through mergers and acquisitions, to prevent German industries from losing the competitive advantage. In October 2016, the German Ministry of Economic Affairs issued several recommendations for the review of investment at the EU level, which also clearly made corresponding explanations. Although Germany also believes that it will be more conducive to requiring China to open its market reciprocity with the support of the European Union, opening up the reciprocal market seems to be the next step to consider rather than controlling Chinese companies' mergers and acquisitions in the high-tech field in the whole EU. What's more important is that the issue of opening up the peer-to-peer market originally came from the FDI review case in the United States. The political resistance that Chinese companies encounter in mergers and acquisitions in the US market is not only related to national security, but also to industries where US companies face restrictions on mergers and acquisitions in China.

Development of EU foreign direct investment screening regulations

Compared with other countries, the overall foreign investment review policy in Europe started relatively late, mostly after 2000, and some new trends and changes did not appear until 2016. Since 2016, member states such as Germany, France, and Italy have tightened foreign investment policies at the country level, and also restricted foreign mergers and acquisitions by strengthening security reviews. In February 2017, the economic ministers of Germany, France, and Italy jointly sent a letter to the EU Trade Commission, expressing concerns about the acquisition of EU companies with key technological capabilities by non-EU investors for strategic reasons, and publicly demanding that foreign direct investment be targeted at the EU level Initiate security review legislation. Under the vigorous promotion of the above-mentioned three EU member states, on September 13, 2017, the then European Commission President Juncker formally proposed in his state of the UE address that he would promote establishing a foreign direct investment review mechanism at the

EU level[4]. On the 14th, the European Commission announced the content of the relevant legislative proposals and officially launched the legislative process. The core of the European Commission's proposal is to establish a comprehensive and unified foreign investment review mechanism within the EU so that the member states and the European Commission can conduct more stringent inspections of foreign direct investment entering the EU for reasons of security and public order. The European Commission emphasized in the "Draft" note that although the EU's openness to foreign direct investment will not change, it must be accompanied by an effective review policy, to encourage other economies to open their markets and ensure compliance with the same opening rules, to protect critical EU assets and block investments that are harmful to the legitimate interests of the EU or its member states. As of September 2017, when the Draft was published, 13 of the 28 EU member states already had a comprehensive or industry-specific security review mechanism. They were Austria, Denmark, Finland, France, Germany, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, Spain, and the United Kingdom (European Parliamentary Research Service, 2019). Subsequently, Hungary passed legislation in October 2018 requiring a review of foreign investment in specific industries, and the new law came into effect in January 2019. (Investment Policy Hub, 2018)

As it concerns the core interests of the EU and its member states, the concerns and demands of the EU and its member states and between each member state are not the same. The draft was not adopted quickly after it was released. There were different opinions within the EU on whether to establish a foreign investment review mechanism at the EU level, among which Germany, France, and Italy were the most positive, while the northern, southern and central, and eastern European countries had doubts and reservations[5]. Differences existed not only on how to recognize and handle the relationship between free trade and public security and prevent policies from

[4] See European Commission, Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Screening of Foreign Direct Investments into the European Union, COM(2017) 487 final, 13 September2017, herein “EC Proposal”.

[5] Among them, the Nordic countries have always advocated liberalized trade and investment policies, and they are opposed to increasing restrictions on capital flows in concept; while the southern and central and eastern European countries are mainly based on their current economic conditions and interests.

turning into trade protectionist policies but also on how to divide and balance the relevant powers of the EU and member states to prevent the EU's "council rights" from encroaching on members national sovereignty. To a certain extent, foreign investment security review constitutes a politically sensitive issue in the EU, because according to Article 4(2) of the EU Treaty, safeguarding national security is the exclusive responsibility of member states. In this regard, the EU insisted that foreign direct investment was the domain of the Common Commercial Policy, over which the EU has an exclusive competence under Article (3)(1)(e) TFEU (2019). On 20 November 2018, the European Parliament and the Council of the European Union finally agreed to ratify the Regulation, which was subsequently ratified on 14 February and 5 March 2019.

Before the Regulation of Establishing Framework for Screening Foreign Direct Investment into the EU (hereinafter referred to as Regulations for Screening FDI into the EU), there was no unified foreign investment security review system at the EU level, nor a formal coordination mechanism or cooperation framework. In 2020, the EU issued the "Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)" to guide member states to introduce a foreign investment review system. At that time, Spain, France, Germany, the Czech Republic, Italy, Poland, and other member states introduced or revised the domestic foreign investment review law. The "Regulations for screening FDI into the EU" came into effect on October 11, 2020. According to the "Regulations for screening FDI into the EU", foreign direct investment projects that may affect the "security or public order" of EU member states will be subject to foreign investment review from the EU. The promulgation of this regulation is an important adjustment of the EU's foreign investment policy after the "Lisbon Treaty" that came into effect in 2009 granted the EU exclusive competence in foreign direct investment.

Since 2021, EU member states have continued the pace of strengthening foreign investment review, and the regulations have been continuously strengthened. For example, Germany has revised its domestic foreign investment review system, expanded the scope of review, and lowered the threshold for reviewing the shareholding ratio. The Czech Republic (International Bar Association, 2022) and Slovakia (International Policy Hub, 2021) have adopted the Regulations for Screening FDI into the EU and have used it as a blueprint to formulate a domestic foreign investment review system.

According to the latest data disclosed by the EU, the number of member states in the EU that have established foreign investment review mechanisms continues to increase. As of September 2022, 27 member states are divided into six groups according to their investment review mechanisms. (List of screening mechanisms notified by Member States, 2022)

1. Countries with existing investment review mechanisms - Austria, Finland, Malta, Poland, Portugal, Slovenia, and Spain
2. Countries that have adopted new national investment review mechanisms - Czech Republic, Denmark, and Slovakia
3. Countries that have revised existing investment review mechanisms - France, Germany, Hungary, Italy, Latvia, and Lithuania
4. Countries that have started the process of consulting or updating their investment review mechanism legislation - the Netherlands and Romania
5. Countries that have started consulting or entering the legislative process to establish a new investment review mechanism - Belgium, Croatia, Estonia, Greece, Ireland, Luxembourg, and Sweden
6. Countries that haven’t yet publicly announced the establishment of an investment mechanism - Bulgaria and Cyprus.

Contents of the Regulations for Screening Foreign Direct Investment into the EU

According to the definition in Article 2 of the Regulations for Screening FDI into the EU, "foreign direct investment means an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity". Accordingly, pure securities investment that has nothing to do with management and control rights does not fall within the scope of the application of the Regulations for Screening FDI into the EU. Further, "foreign investor" refers to a third country (non-EU) natural person or enterprise that has made or intends to make foreign direct investment, and "screening" refers to allowing the assessment, investigation, permission, restriction, prohibition, and Dissolution procedure. (EU, 2019)

The subject of review: mainly member states; plans and projects involving EU interests can be reviewed by the European Commission

The object of review: Direct investment in the EU by non-EU member states

Review criteria: Article 4 of the Regulations on Foreign Investment Review lists the factors to be considered in judging the possibility of affecting security or public order. This is the most substantive content of the Regulation, reflecting the EU's true intentions and core concerns. According to Article 4(1), in determining whether a foreign investment is likely to affect security or public order, Member States and the European Commission may focus on the potential impact of the investment on (1) critical infrastructure, whether tangible or intangible, including energy, transportation, water, sanitation, communications, media, data processing or storage, aerospace, defense, election and financial infrastructure, sensitive facilities, and land and real estate used for such infrastructure; (2) Key technologies and dual-use items, including

artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum, and nuclear technologies, as well as nanotechnology and biotechnology; (3) Supply of key inputs, including energy, raw materials, and food; (4) the ability to obtain or control sensitive information, including personal data; (5) freedom and pluralism of the media. Not only that, but Article 4(2) of the Regulations for Screening FDI into EU also stipulates that the Member States and the European Commission may take into account the following factors in making decisions: (1) whether the foreign investor, through ownership structure or significant funding, directly or indirectly controlled by a foreign government (including government agencies or armed forces); (2) whether the foreign investor has been involved in activities that affect the security or public order of a member state; (3) whether the foreign investor is engaged in illegal or criminal activities Serious risk of the activity. (EU, 2019)

The Regulations for Screening Foreign Direct Investment into the EU emphasizes that the above list is non-exhaustive. In determining whether a foreign direct investment is likely to affect security or public order, the Member States and the European Commission shall take into account all relevant factors, including the interference, failure, wear and tear of the investment to those essential to ensuring security and safeguarding the public interest or disrupt critical infrastructure, critical technologies (including critical enabling technologies) and critical inputs that will have a significant impact in a Member State or the EU. Member States and the European Commission should also take into account the specific circumstances of the foreign investment, in particular, whether the foreign investor is directly or indirectly controlled by the government of a third country, for example through significant funding, including subsidies, or whether it is implementing country-led External projects or programs. Member States and the European Commission may also take

into account information received from economic agents, civil society organizations, trade unions, etc.[6]

How member states cooperate with the European Commission: If a member state reviews a foreign direct investment, the member state must notify the other member states and the European Commission and provide relevant information. Both member states and the European Commission have the right to request supplementary information from the country. If a Member State considers that one FDI in another Member State may affect its security or public order, or has information relevant to screening, it may provide the latter with evidence-based advice, whether or not the latter has a screening mechanism or whether the investment is under screening. If the European Commission believes that foreign direct investment has the potential to affect the security or public order of more than one member state, or has information on screening, it can send an evidence-based opinion to that member state. Member States that plan to implement or have completed FDI should fully consider the suggestions and comments received, but have the final say on how to handle the investment.

The Regulations for Screening FDI into the EU aim to strengthen the coordination and cooperation of member states in foreign investment security review and to enhance the transparency and certainty of the security review mechanism within the EU. To this end, the regulation stipulates that all member states, whether or not they have a security review mechanism at the national level, must establish a focal point to implement the regulation (EU, 2019); such focal points should be appropriately set up in national governments, and have the responsibility to perform cooperation and coordination and qualified personnel and authority necessary to properly handle

[6] According to Article 9 of the Regulations for Screening Foreign Investment Review into EU, (a)the ownership structure of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed, including information on the ultimate investor and participation in the capital; (b)the approximate value of the foreign direct investment; (c)the products, services and business operations of the foreign investor and of the undertaking in which the foreign direct investment is planned or has been completed; (d)the Member States in which the foreign investor and the undertaking in which the foreign direct investment is planned or has been completed conduct relevant business operations; (e)the funding of the investment and its source, on the basis of the best information available to the Member State; (f)the date when the foreign direct investment is planned to be completed or has been completed.

confidential information. The Regulations for Screening FDI into the EU also stipulate several notifications, reporting, and information requirements related to the inflow and review of foreign capital, helping to improve transparency and information exchange.

Depending on whether the member state where the foreign investment is aimed has an internal security review mechanism, the working process of the cooperation mechanism between member states and between member states and the EU is slightly different. According to Article 6 of the Regulations for Screening FDI into the EU, member states with foreign investment security review mechanisms must notify the European Commission and other member states as soon as possible when conducting any foreign investment security review and provide relevant information. The notification may include a copy of a list of Member States in which it believes that security or public order may be affected by this, and an indication of whether the foreign investment is likely to fall within the scope of the Merger Control Regulations. The European Commission and other Member States shall, within 15 days of receipt of the notification, inform the reviewing State whether they wish to express an opinion or comment and may request the latter to provide additional information; the reviewing State shall endeavor to provide such additional information. Other member states can comment on whether the relevant foreign investment may affect their security or public order, and the European Commission can make an opinion on whether the relevant foreign investment may affect the security or public order of multiple member states. The European Commission may comment on whether or not other member states have commented; however, if more than one-third of the member states believe that foreign investment may affect their security or public order, the European Commission shall comment. The reviewing country should give due consideration to the opinions and comments of the European Commission and other member states, but the final decision is still made exclusively by the reviewing country, and neither the European Commission nor other member

states have the right to overturn the review decision made by the competent authority of the reviewing country.[7]

Member States that do not have a domestic security review mechanism do not have the problem of proactive notification. According to Article 7 of Regulations for Screening FDI into the EU, for member states without a foreign investment security review mechanism, if other member states believe that the foreign investment planned or completed in the country may affect their security or public order, or the European Commission considers that the relevant foreign investment may affect the security or public order of more than one member state, the European Commission and other member states may issue opinions or comments on this, or request additional information from the country in which the investment is made. The rest of the operation process is the same as above.

In addition, according to Article 8 of the Regulations for Screening FDI into the EU, if the European Commission considers that the relevant foreign investment may have an impact on projects or programs of Union interest in terms of security or public order, the comments and opinions can be made to the country where the investment is made. In this case, the opinion of the European Commission will carry more weight. Although still not legally binding, the country where the investment is made is no longer just made due consideration but must take utmost account of the opinion of the European Commission. According to the Regulations for Screening FDI into the EU, the so-called projects or plans concerning the interests of the European Union refer to projects or plans involving a considerable or important share of Projects or programs that fall within the scope of EU law for critical inputs. The annex to the Regulations for Screening FDI into the EU lists eight such projects and programs, including the European GNSS programs (Galileo & EGNOS), Copernicus Horizon 2020, Trans-European Networks for Transport (TEN-T), Trans-European Networks for Energy (TEN-E), Trans-European Networks for Telecommunications, European Defence

[7] The Reviewing State should reflect and give such "due consideration" through appropriate measures in its domestic law or in the wider decision-making process, in accordance with its obligation to "cooperate in good faith" under Article 4(3) of the EU Treaty. See EU Regulation, Recital 17.

Industrial Development Programme, Permanent structured cooperation (PESCO). Articles 8 and 16 of the Regulations for Screening FDI into the EU also empower the European Commission to enact mandate legislation, and this list will be revised from time to time.[8]

Whether member states must implement a national screening mechanism: Article 1 of the Regulations for Screening FDI into the EU states that it aims to establish a framework for member states to examine foreign investment based on security or public order, and between member states and between member states and the EU cooperation mechanism. As EU legislation, the Regulations for Screening FDI into the EU does not replace the existing foreign investment security review mechanisms of member states, nor does it compel any member states to establish or maintain such mechanisms, but aims to provide for member states that already have or wish to establish a review mechanism. Create an enabling framework and ensure that any such mechanism meets certain basic requirements, such as access to justice, non-discrimination, transparency, etc. In other words, although the Regulations for Screening FDI into the EU do not voluntarily require establishing a foreign investment security review mechanism, the review mechanisms that member states have or may establish in the future must comply with its relevant regulations. (EU, 2019)

Member States are not obliged to implement national screening mechanisms, they decide whether they need to establish mechanisms or screen-specific transactions. However, if Member States have implemented screening mechanisms, there are specific requirements that need to be adhered to, concerning transparency of rules and procedures, non-discriminatory treatment of foreign investors, time frames, protection

[8] Among them, the Global Navigation Satellite System (GNSS) program is a satellite positioning system research and development program that competes with the US Global Positioning System and China's Beidou program; the Copernicus program is a global environment and security monitoring program; the "Copernicus Horizon 2020" program is the European Union's The medium-term major scientific research plan jointly participated by the member states is also one of the largest official comprehensive scientific and technological research and development plans in the world; the Trans-European Networks for Transport (TEN-T), Trans-European Networks for Energy (TEN-E) and Trans-European Networks for Telecommunications are all key infrastructure projects; European Defence Industrial Development Programme, Permanent structured cooperation (PESCO), a traditional area of national security review.

of confidential information, recourse for screening decisions, and use of Measures to detect and prevent circumvention by foreign investors. Member States must notify the European Commission if they implement or amend screening mechanisms. The European Commission will publish a list of national screening mechanisms. In addition, each member state must submit an annual report to the European Commission, including the situation of foreign direct investment in the country, and provide information on the implementation of the screening mechanism.

Actual decision makers after the implementation of the Regulations for Screening FDI into the EU:

The final decision on whether to allow FDI is still made by the invested member states. Article 1(2) of the Regulations for Screening FDI into the EU (2019) recognizes the unique responsibility of member states in terms of national security, and Article 6(9) of the Regulation(2019) stipulates that EU member states enjoy the final review decision right under the EU foreign investment security review framework. The opinions of the European Commission are not binding.

Through Articles 1 and 8 of the Regulations for Screening FDI into the EU(2019), it is clarified that the review bodies of the EU foreign investment security review mechanism are the member states and the European Commission, forming a dual-track system in which the basic review of the member states and the auxiliary review of the European Commission coexist. The review pattern, this legislative design is a major development compared to the single-level review of member states based on allowing and recognizing the security review of domestic and foreign assets in member states.

EU member states enjoy the right of basic review, which is fundamentally manifested in that member states can maintain, revise or establish a foreign investment security review mechanism, and it is not compulsory or obligatory to establish or not. Regardless of whether a review mechanism is established, the supervision of foreign investment security is formulated and implemented by each member state. Moreover,

the Regulations for Screening FDI into the EU clarifies the final decision-making power of member states' security review, but due consideration should be given to the opinions and comments made by the European Commission and other member states when participating in the review.

Under the Regulations for Screening FDI into the EU, the European Commission has gained new powers to review foreign investment in plans or projects that may affect EU interests and can issue opinions on the project or plans. Although the opinions are not binding, member states will have to "consider it to the fullest extent" and provide an explanation to the European Commission if it is not adopted, which reflects its soft law effect.

The “basic review power” of EU member states focuses on coordinating the foreign investment security review mechanism among member states. The core of the “auxiliary review power” of the European Commission is to obtain the review power of foreign investment matters through the soft law mechanism. The Regulations for Screening FDI into the EU established the EU dual-track foreign investment security review pattern through the legislative design of dual authorization.

To sum up the above provisions, the EU's core concerns are mainly two points, one is the investment target, and the other is the source of funds. In terms of investment targets, the Regulations for Screening FDI into the EU focus on infrastructure, high-tech, sensitive information, and energy supplies that are strategically important to member states or the EU, and pay attention to the possibility of foreign investors gaining strategic competitive advantages through specific investments. This is even more evident when considering the eight categories of "projects or programs concerning EU interests" listed in the annex to the Regulations for Screening FDI into the EU(2019). As far as the source of funds is concerned, the regulations focus on the nature and source of funds or the relationship between investors and the government. Whether foreign investors receive financial assistance in the form of subsidies or

other forms of funding because of their close relationship with the government, thereby enjoying an unfair competitive advantage outside of market conditions.

The impact of the Regulations for Screening Foreign Direct Investment into the EU on the EU and other countries

The EU member states have established investment review mechanisms, which means that foreign-invested enterprises will face a wider range of foreign investment reviews when investing in the EU. The amendments to legislation in most member states revolve around three themes: upgrading screening procedures, expanding coverage sectors, and extending the effectiveness of the revising mechanism. The Regulations for Screening FDI into the EU does not establish a unified EU foreign investment review mechanism, but only, as its full name shows, establishes a framework that will help screen member states' foreign investment, establish a "framework" for the legitimacy, regulation, and coordination of security review mechanisms. Nonetheless, its significance and impact cannot be ignored.

Regulations for Screening FDI into the EU makes the EU foreign investment security review system established from scratch. The substantive provisions of the review subjects, objects, standards, and considerations, as well as the procedural provisions of review participation and information sharing. It is the protection of the EU's basic security interests and the strengthening of foreign investment security supervision. This demonstrates the willingness and effectiveness of the Regulations to strengthen foreign investment safety supervision.

The regular reporting system, case-by-case notification mechanism, and requirements for information provision and aggregated release stipulated in the Regulation will help improve the transparency of the EU's foreign investment inflow and review mechanism. The Regulations for Screening FDI into the EU will set up a cooperation framework and an interactive platform for EU member states. The investment host country, other Member States, and the European Commission can exchange

information, make comments or opinions and give or receive feedback on investment cases. It enables countries to gradually achieve more consensus and clarify relevant concepts and standards thereby enhancing the certainty and unity of the EU foreign investment security review. The Regulations for Screening FDI into the EU make the EU foreign investment security review mechanism more standardized and strict, and more extensive and flexible in the review content.

For other countries, especially China, the safety considerations and the targeted high-tech industries listed in the Regulations for Screening FDI into the EU make it more difficult for Chinese investors to make an investment decision, which will affect investors' willingness to invest and the size of their investments.

After the implementation of the regulation, the uncertainty of investment transactions has increased. The uncertainty of investment transactions stems from the generalization of review standards, the diversification of interest demands, and excessive review. The Regulations for Screening FDI into the EU take “safety and public order” as the review standard. However, the principled legal expression of "safety and public order" is relatively vague and has a large room for interpretation and discretion. Although the EU Regulations on Foreign Investment Review can be determined by considering factors, the factors are non-exhaustive enumeration and do not fundamentally solve the problem of ambiguous connotations.

Limitations

Different from the foreign investment security review system established by sovereign countries, the Regulations for Screening FDI into the EU does not establish a unified and comprehensive review mechanism at the EU level, nor does it form a mandatory foreign investment security review power. It is a careful compromise between a limited transfer of review powers to the EU level and the retention of the final decision of member states. The decision-making power of foreign investment security review still belongs to the member states, which is based on respect for the national

sovereignty of the member states and is also due to the objective predicament of the EU's lack of will and capacity.

For the EU member states, the opinion of the European Commission is not binding. For example, when the European Commission believes that a foreign direct investment plan or project may affect the "security and public order" of the EU, and the host country believes that the investment plan or project will not threaten the "security and public order" of its own country and the EU, he lack of binding regulations would defeat the purpose of the European Commission in safeguarding EU's overall security interests. For member states, the effect of providing comments among member states to participate in the review is limited due to the independence of the review decision power among member states. On this basis, if a foreign direct investment plan is subject to a conditional or prohibited review decision by one EU member state, it turns to invest in another EU member state. At this time, if another member state decides to approve the investment, it may not only damage the security, strategic and economic interests of the former member state but also fail to leverage the EU's collective advantages and protect overall security interests.

Italian golden power policy

Italy, as a major EU member state, together with Germany and France, contributed to the promulgation of regulations for the screening of FDI in EU. Similarly, Italy also has relatively strict foreign investment review regulations. Chapter 2 focuses on Italy's foreign investment screening regime, also known as the "Golden Power". Accordingly, a broad overview of the relevant legislation is provided, from the regime of "Golden Shares" in 1994 to the introduction of Gold Power in 2012, up to the latest reforms during the COVID-19 pandemic.

The background of the Golden Power Policy——Current status of China’s FDI to Italy

Due to the increase in China's foreign investment, especially the increase of direct investment in key areas of European countries, the foreign investment review policies of EU countries, including the Italian "Golden Power" policy, are considered to be policies aimed at Chinese investors. For most European countries, China’s investment is rarely seen as "neutral" and often pursues political goals rather than economic value. Therefore, the background analysis here is mainly based on China's direct investment in Italy.

In the 13th century, the famous Venetian traveler Marco Polo visited China and lived in China for more than ten years. He was amazed at the level of civilization China had reached at that time and brought back important technological discoveries such as the compass, money, and the use of coal. The effect of bringing technology from the East back to the West is known as the "Marco Polo" effect.

With the development of China's economy, China has risen as a technological power and a net capital exporter. Since the early 1980s, China has been working to "re-emerge" and try to narrow the technological gap with the rest of the world. Investments in Research and Development (R&D) or Artificial Intelligence (AI), and

a new focus on “technology transfer and the relationship between research and the modernization of the defense industry” (Aresu & Negro, 2019, 11-12). Furthermore, following the 2007-2008 global financial crisis, China “transitioned from a major source of foreign direct investment (FDI) to a global net exporter of capital”.(Aresu & Negro, 2019,12)

In developed countries, the main factor attracting Chinese direct investment is the market. At first, Chinese investment was mostly defensive market seeking (like post-trade FDI), as companies set up foreign subsidiaries to serve customers and increase customer loyalty. While the later investors (after 2000), aimed to increase the company's visibility in large markets where the company's growth potential has been identified (like trade following FDI). Another major factor attracting Chinese companies to developed countries is access to technology, expertise, management and marketing skills, well-known brands, and reputation. The intensification of cross-border Mergers and Acquisitions (M&A) activity by Chinese companies confirms the importance of strategic asset-seeking motivations.

As new international trade participants, the purpose of Chinese enterprises to conduct cross-border mergers and acquisitions is to accelerate the acquisition and control of strategic assets. The evolution model of Chinese entry into Italy is consistent with the pattern followed by Chinese companies for direct investment in other European countries: starting from small-scale operations in trade-related activities, towards the acquisition of tangible and intangible resources that are considered to increase China's influence in international markets capabilities and more generally to upgrade their technological and productive capabilities. In recent years, Chinese companies seem to be interested in discovering and absorbing the experience of Italian economic development, especially in design-intensive, high-quality products. Chinese companies are increasingly targeting the acquisition of technical capabilities, design skills, and brands. To capitalize on the local competitiveness of specialized manufacturing clusters in industries such as cars and home appliances, Chinese investments in Italy are increasingly targeting Italian design and branding in key areas

of expertise, as well as technological capabilities in areas such as metalworking. Chinese investment in Italy appears to reflect a reverse "Marco Polo" effect. This choice of location is linked to the intention to exploit the local capabilities available at the cluster level. The main sectors of Chinese FDI specialization in Italy reflect this approach and appear to be related to China's strategy of increasing the complexity of its exports and moving away from standardized goods and intermediate manufactures and components.

Italy is considered an important investment market due to its large market size and especially its complex needs. Chinese companies wish to acquire the knowledge to satisfy demanding customers in design, style, branding, marketing, and after-sales assistance through direct investment in Italian companies. But gradually, Chinese direct investors are not satisfied with simply seeking markets and gaining brand reputation, but instead invest more in key technology fields, such as information technology and automobile production technology.

Italy is the seventh-place European nation in terms of the stock of foreign investments from China (excluding Russia). Following the 2008 financial crisis, the intent and practice of foreign direct investment have changed significantly with China's expansion, which has had certain effects on the Italian economy. This has also prompted the Italian government to consider setting up a system for vetting foreign direct investment. Italy is a significant market for foreign investors due to its seventh-largest economy in the world and its abundance of high-tech businesses. For instance, Italy has one of the highest rates of mobile penetration in all of Europe. Rome, Milan, and Turin now each have one subsidiary of the Chinese corporation Huawei. A product design, development, and testing facility were also developed more recently. The most significant elements driving Huawei's decision to invest in Italy are the size and potential of the market and the high technology there in Italy. This demonstrates how Chinese businesses are increasing their investment levels in important technological domains.

FDI screening in Italy: a regulatory overview

The protection of a country's core economic interests is increasingly carried out through its so-called "special powers," also known as "Golden Power" in Italy, as a significant component of this "economic intelligence" endeavor. Specifically, by restricting the state's ability to place restrictions on or outright ban foreign direct investment (FDI) based on whether it could harm the public interest. The special power refers to the "Golden Power" given to the Italian government by law in order to protect the property of companies (whether listed or not) active in strategic markets or owning and operating sensitive technologies and related assets related to Italian national interests, include:

1. Special regulations may be established for the purchase of shares, business or assets, licensing and use of sensitive technologies and related assets in any form within the strategic market industry;
2. Supervise the above-mentioned transactions, behaviors, and activities.
3. The right to veto corporate resolutions, actions, or transactions can be exercised to protect the assets of domestic companies, while also having the right to attach conditions or commitments to specific transactions.

Once a company violates the relevant provisions of the "Golden Power" Act, it will face severe penalties. Consequences of failure to report certain transactions, actions, or resolutions, or to comply with decisions made by the government under the "Golden Power", include:

1. Such transactions and actions will be deemed invalid;
2. The party violating the regulations shall be subject to an administrative fine of up to twice the value of the investment and in no case less than 1% of the turnover of the previous financial year. Furthermore, related contracts or transactions are deemed void (management rights related to shareholding may be suspended). For assets

involving 5G technology, the administrative fine is up to 150% of the transaction value, and in any case, shall not be lower than 25% of the transaction value. If the act constitutes a crime, it will be punished according to Italian penal law;

The government can order the restoration to the original state, and require the company involved and the counterparty to bear relevant expenses and other auxiliary measures.

However, the Golden Power did not have as many rules from the start. The Golden Power, formerly known as Golden Shares, was renamed Golden Power in 2012 and has since been modified.

At the beginning in 1994

A so-called “Golden share” was introduced in 1994 as a form of ex-ante protection of public interests.

Its main objective was to make up for the loss of governmental authority in the wake of recent public service privatizations. Special powers in Europe were initially a response to "the need for the state to maintain decision-making powers on certain economic aspects of national interest"(Aresu & Negro, 2019). The Italian government, therefore, kept its authority to approve, reject, and appoint after certain public firms were privatized thanks to a phrase that was placed by legislation into their statutes. This “Golden Share” was originally a British legal instrument (first applied to the British Airport Authority in 1987), but also known for its French variant (action spécifique, as codified in 1986).

Article 2 of Law Decree 332/1994 specifically granted the Italian government the authority to select, via Presidential Decrees and from a list of businesses engaged in the public provision of defense, transportation, communications, energy, and other services, those businesses it deemed essential to achieving its "economic and

industrial policy goals." Article 2 empowered the government to include a specific provision in the laws of these organizations. This recognized the government's "special powers" despite their potential privatization, including the ability to (i) approve shareholding acquisitions, (ii) approve shareholders' agreements, (iii) veto the adoption of certain corporate resolutions of particular importance, and (iv) appoint administrators(Maccarone, 2020).

The Golden share also “allowed the state to prevent unwelcome takeovers , avoid the adoption of corporate resolutions which could jeopardize public interests and, more generally, exercise some control over company management”(Maccarone, 2020). Golden Share, however, was not associated with the state's preservation of (residual and symbolic) ownership in the structure of privatized enterprises, unlike the British or French institutes. In this sense, “the use of the [British] term “Golden share” could to some extent be regarded as inappropriate”(Maccarone, 2020).

In the early 2000s

The European Court of Justice (ECJ) originally asserted that the Italian Golden share discipline was illegal under European law in the early 2000s. Italian law, in the Court's opinion, violated the "freedom of establishment" and "free movement of capital" principles enshrined in European treaties, as stated in the judgments of the Court from 23 May 2000 (Commission of the European Communities vs Italian Republic)[9] and 26 March 2009 (Commission of the European Communities vs Italian Republic)[10]. This was so due to the “indeterminacy of the premises for the exercise of special powers, the excessive discretion afforded to the Italian state, and failure to respect the proportionality principle”(Maccarone, 2020). In the interim between the Court's two judgements, the Italian government endeavored, if unsuccessfully, to improve its discipline (primarily through revisions to Law 350/2003) in order to meet the ECJ's demands.

[9] See case C-58/99, “Privatisation of public undertakings – Grant of special powers”

[10] See case C-326/07, “Failure of a Member State to fulfil obligations – Articles 43 EC and 56 EC –Articles of association of privatised undertakings – Criteria for the exercise of certain special powers held by the State”.

However, the EU Court of Justice does not prohibit all EU nations, including Belgium, from using special powers. Two observations follow from the positive indication for the Belgian Golden Share. First, the ECJ was not opposed to the use of Golden share instruments from the start. Second, the ECJ and the European Commission emphasized on barring any relaxation of European freedoms (establishment and free movement of capital) based only on economic considerations. The European Court of Justice stipulates that there must be clear regulations governing the use of Golden Share, including "general interest" motivations, objectivity, publicity, and the stability of the relevant criteria, as well as respect for the principles of proportionality and non-discrimination. Only under these conditions can it be guaranteed that national policies would not impede free trade and capital migration. These requirements were met by the Belgian Golden share. Actually, the majority of European countries specifically designed their particular authorities to preserve control over industrial and commercial interests. This could have been a manifestation of "economic patriotism"(Maccarone, 2020).In fact, Italy's Golden share can be seen as part of a "wider set of provisions aimed at pursuing, more or less surreptitiously, industrial policy goals"(Maccarone, 2020). This included, for instance:

1. the so-called "poison pill", deterring hostile takeovers by making them more expensive (Law 266/2005);
2. newly-created independent regulatory agencies, especially in the energy and communications sectors (Law 481/1995);
3. the new function of Italy's national promotional bank, Cassa Depositi e Prestiti (CDP). According to Law Decree 34/2011, the Cassa was permitted to buy shares in strategic Italian companies as long as they offered reasonable chances of profitability and could be considered to be of interest to the country due to factors such as their participation in strategic industries, employment levels, revenue size, and general relevance to the productive system. CDP became "a holding firm buying shares for industrial policy purposes"(Donato, 2015) as a result of this amendment.

In conclusion, the European Union's Court of Justice does not oppose EU member states developing their own security review systems, although it does urge that each member state define explicit parameters. On the recommendation of the European Court of Justice, Italy implemented legal modifications and ultimately amended its regulatory corpus on special powers with the introduction of a new infringement process (2009/2255).

From "Golden Share" to "Golden Power": Law Decree 21/2012

The new "Golden power" transition was authorized by Law Decree 21/2012. (first applied in 2014). According to Law Decree n. 21/2012, "special powers" over corporate assets in the defense and national security sectors (Article 1) and strategic assets in the energy, transportation, and communications sectors (Article 2) are granted. Italy's special powers can be triggered based on enterprises' membership, in particular, pre-determined sectors, and are no longer connected to the past or present (partial) public control of corporations. According to Law Decree 21/2012, the Italian government has the authority to veto business decisions, object to foreign parties acquiring shareholdings, and set certain requirements and prescriptions:

1. concerning firms operating in the defense and national security sectors, "upon an effective threat to the serious detriment of the fundamental national defense and security interests" (Law Decree 21/2012, Article 1);
2. In the event of "an exceptional situation of effective threat to the serious detriment of public interests concerning the security and operation of the networks and systems, as well as the continuity of supply," firms operating in the energy, communications, and transportation sectors' "strategic assets" (Law Decree 21/2012, Article 2).

With the exception of the Italian state, national public entities, and state-controlled entities, Article 1 applies to all investments, whether controlling or non-controlling (as defined by the Italian Civil Code). It also extends to foreign investors based in EU Member States as well as Italian investors. Only foreign purchasers residing outside

of the EU and controlling investments are covered under Article 2. (i.e., a natural or legal person not having its legal or habitual residence, registered office, central administration, or principal place of business in a member state of the EU or the European Economic Area, or not established therein (Piper,2019)). Importantly, Law Decree 21/2012 transferred to secondary legislation the identification of "strategic assets" in the energy, communications, and transportation sectors as well as "strategic activities" in the defense and national security sectors.

Foreign investors are required under the two articles to notice a relevant transaction. This only applies to investments into an Italian enterprise in the defense and national security sector if the foreign investor is domiciled in the EU. Also according to Law 21/2012, the foreign investor's notification must be made within 10 days of the "signing" of the purchase agreement: the transaction is frozen while the government makes its judgment. But this notice requirement also applies to internal corporate resolutions adopted by Italian enterprises that result in mergers, demergers, asset sales, relocation of the company's headquarters overseas, changes to the corporate purpose, winding-up, or changes to legislative requirements. More particular, the responsibility applies if the Italian company has a "strategic asset" in the energy, transportation, or communications sectors and its corporate decisions have the potential to change the ownership, management, and accessibility of these assets or alter their intended use. In conclusion, although the Golden power discipline is concerned with both internal corporate resolutions and foreign entities acquiring shares of domestic companies, or foreign direct investment, this Chapter will concentrate on the former.

Upon receipt of the notification, the Italian government must assess whether the foreign investment (or corporate resolution) poses "an effective threat to the serious detriment of the fundamental national defense and security interests"(Law Decree 21/2012, Article 1) or, in the case of the sectors of energy, transport, and communications, "an exceptional situation of effective threat to the serious detriment of the public interests concerning the security and operation of the networks and

systems"(Law Decree 21/2012, Article 2). Importantly, these are the "public interests" that should be protected by the government since they might be endangered by foreign investment. The government may use one of two sorts of power if it believes that foreign investment may jeopardize these interests: the "Prescriptive powers" and the "Opposite powers". The meanings of the two powers are as followed.

1. "Prescriptive powers," which the previous Golden share discipline was unaware of; under these powers, the government may impose strict requirements on a foreign investor, such as the requirement to maintain the acquired strategic assets on Italian soil, to impose access restrictions on specific information, or, last but not least, to request government approval for key elements of corporate structure;

2. "Opposite powers": The government has the right to block the purchase of shares by a foreign investor, albeit this power should only be used in extraordinary circumstances, for example, when prescriptive ones are inadequate to protect the public interest.

Furthermore, the government has the “pre emptive right" to veto the approval of any related actions and operations of corporate assemblies and administrative organs if the notice relates to a corporate resolution of an Italian company. In any situation, the government must make a judgment in accordance with Law Decree 21/2012 within 15 days of notification[11], the time length can be prolonged if the government issues a request for additional information to either party to the transaction or third parties. Furthermore, there exists a default system named "silenzio assenso". Under this system, no public hearings are anticipated, and a "no objection" (silenzio assenso) procedure is in place: the transaction is deemed as "approved" if the government remains "quiet" and does not make a decision within 15 days of the announcement.

However, Law Decree 21/2012 specifically provides for the possibility that foreign investors or Italian businesses fail to comply with their notification responsibilities,

[11] At 2012 was 15 days but extended to 45 days in 2019.

resulting in the government's failure to screen a relevant foreign investment or corporate resolution. Sanctions may be applied in these circumstances. The methods of sanctions are different in some ways for foreign investors and the internal corporate acts. This clause only applies to violations of the duty to inform in regard to the energy, transportation, and communications sectors, according to Law Decree 21/2012.

For the foreign investors: on the one hand, if the non-notification involved a foreign investor acquiring shares, that investor's voting rights are suspended, and any corporate resolutions passed during that time are deemed invalid. The government also has the option to reject the acquisition after it has already happened. Foreign investors are required to resell their shares in this situation within a year.

For the internal corporate acts or operations: if the failure to inform included a corporate act or operation conducted internally, these are deemed null and void, and the company may be required by the government to return to the previous state.

However, the government may impose, on the foreign entity and the Italian company, in both situations like shareholding acquisition by a foreign investor and internal corporate act, "monetary penalties up to twice the value of a transaction and, in any case, not less than 1% of the aggregate turnover of the companies involved in the transaction" (White & Case, 2018).

There are also ways to deal with such sanctions. The foreign or Italian businesses may appeal these judgments before the Regional Administrative Court (Tribunale Amministrativo Regionale or TAR) of Lazio when the Italian government levies financial fines in response to a failure to notify. Italian "exclusive jurisdiction" (giurisdizione esclusiva) is given authority over the administrative judicial review of decisions made under the Golden Power. This means that the Regional Administrative Court of Lazio has the right to ask for information about "the sanctioning process in its entirety, articulated in the inspection of facts, their

systemization into a violation hypothesis (...), as well as the formal administrative stages of the evaluation"(Triscornia, 2019). Overall, Law Decree 21/2012 complied with the ECJ's observations by reducing ambiguity in the justifications for the use of special powers; introducing gradualism and proportionality; differentiating between conditions or prescriptions and vetoes; and, finally, partially limiting government discretion by allowing for administrative judicial review.

In conclusion, two supplementary decrees were issued after Law Decree 21/2012. Both of these specified the types of "assets of strategic relevance" for the energy, transportation, and communications sectors (Decree of the President of the Republic 85/2014) and the types of "activities of strategic relevance" for the defense and national security system (Decree of the President of the Council of Ministers 108/2014), respectively.

Decree of the President of the Republic 85/2014 identifies the following “assets of strategic relevance”:

- for the energy sector, the energy networks of national interest and the related conventional assets, including:

a) the national network for the transport of natural gas and the related compression stations and dispatching centres, as well as gas storage facilities;

b) infrastructures for the supply of natural gas and electricity, including onshore and offshore LNG re-gasification plants;

c) the national network for the transport of electricity and the related control and dispatching plants;

d) management activities related to the use of the networks and infrastructures referred to in letters a), b) and c);

- for the transport sector, the main networks and facilities of national interest (also guaranteeing the main trans-European connections) and the related conventional assets, including:

a) ports of national interest;

b) airports of national interests;

c) the national railway network of relevance to trans-European networks;
- finally, for the communications sector, the dedicated networks (including those for voice, data and video connectivity, security, control and management relating to networks for access to communications at a fixed location), the telecoms network publicly accessible to end-users in connection with metropolitan networks, service routers and long-distance networks, telecoms facilities used to provide access to end-users to services covered by universal service obligations and to broadband and ultra-broadband services, as well as the related conventional assets.

Decree of the President of the Council of Ministers 108/2014 identifies the "activities of strategic relevance" for the defence and national security system with the study, research, design, development, production, integration and life cycle support, including the related supply chains, of several systems or materials, of competence of the Ministry of Defence, the Ministry of the Interior or both. These systems and materials include, for instance, systems for Command, Control, Computers and Information (C4I) and advanced weapons systems integrated in C4I networks (Article 1, competence of the Ministry of Defence); systems and sensors for observation (both optical and radar), surveillance and control of territory, to be used for the protection of public order, security, public rescue and civil defence (Article 2, competence of the Ministry of the Interior); CBRN (Chemical, Biological, Radiological, Nuclear) protection and detection systems (Article 3, competence of both the Ministry of Defence and the Ministry of the Interior).

If a transaction between an Italian company and a foreign party or an internal corporate act of an Italian company involves these strategic assets or activities under the two aforementioned statutes, the contract imposes a notification obligation. Once the foreign investor or company has fulfilled its obligation to notify, it is up to the government to determine whether the Italian public interest is actually threatened and, if so, which powers (prescriptive, preemptive or objection) are most appropriate to the situation. From this time on, the "Gold Power" policy in Italy began to gradually become institutionalized.

In conclusion, from 2012 to 2017, the Italian government used it primarily in relation to changes in corporate governance or internal policies that could endanger public interests; (partial or complete) transfers of headquarters and/or manufacturing activities outside of Italian territory; and transfers of know-how outside of national borders and for the benefit of a foreign buyer, particularly regarding energy, transport, and communications infrastructures (Canino et al., 2018). From 2017, in addition to the areas related to national security mentioned in the Law Decree 21/2012, more and more areas have been included in the scope of the Gold Power review, especially in the high technology areas.

The “irresistible ascent” (2017-2019)

In 2017, Law Decree 148/2017 authorized the extension of Italy's Golden authority, as exercised under Law 21/2012 in the energy, transportation, and communications sectors, to "high-tech industries." These primarily included "critical infrastructures" (data storage and management or financial infrastructures) and "critical technologies" (Artificial Intelligence, robotics, semiconductors, technologies with potential dual-use applications, network security, space, and nuclear technology), as well as the security of critical input supplies and access to or control over sensitive information. The Law Decree also entrusted to secondary legislation the designation of "strategic assets" in the high-tech industries. However, this was not later implemented. Furthermore, Law Decree 148/2017 modified the Golden Power discipline's punishments regime. In the event of a failure to notify, the Italian government has the authority to impose "new monetary penalties of up to twice the value of a transaction and, in any case, not less than 1% of the aggregate turnover of the companies involved in the transaction" (Canino et al., 2018), which includes firms in the defense and national security sectors.

Approximately two years later, the European Parliament and the Council enacted Regulation (EU) 2019/452 "creating a framework for the screening of foreign direct investments into the Union" (March 2019). It went into effect in October 2020. It is

totally binding and immediately applicable in all Member States, as are all European Regulations. As in Chapter 1, the Regulation neither establishes a "European Golden Power" nor requires Member States to establish FDI screening systems. As a key prerogative of national sovereignty, the Member States have the last say on screening foreign investments.

Following the extension of the Golden power "shield" to "high-tech sectors" in 2017 (but in the absence of secondary legislation) and the EU Regulation of March 2019, Law Decree 22/2019, dubbed the "Brexit Decree," expanded the scope of Italy's Golden power to "broadband electronic telecommunication networks based on 5G technology." This expansion was driven by "fears for national security connected to the use of technology offered by non-European operators for the development of new 5G infrastructures"(Maccarone, 2020) in the context of increased technical competition between the US and China. Law Decree 22/2019 revised Law Decree 21/2012 immediately by adding Article 1-bis. As a result, if a company stipulates contracts or agreements for the acquisition of goods and services relating to the design, construction, maintenance, and management of networks for broadband electronic telecommunication services based on 5G technology, or acquires high-tech components functional to the realization or management of these networks, it must submit a notification. By including Article 1-bis(2012), the Italian lawmaker included 5G technology networks under the defense and national security sector rather than the communications sector (Article 2). As a result of this decision, the conditions for exercising Golden power have become less stringent, requiring the existence of "an effective threat to the serious detriment of fundamental national defense and security interests" (Article 1) rather than an "exceptional situation of effective threat to the serious detriment of public interests concerning the security and operation of networks and systems, as well as the continuity of supply" (Article 2) (Maccarone, 2020). Furthermore, including 5G technology networks in the scope of Italy's Golden power is not entirely logical from a formal standpoint: while the Golden power has traditionally allowed the Italian government to block or condition foreign acquisitions of Italian assets, it now serves the (opposite) purpose of blocking or conditioning

Italian acquisitions of foreign goods or services in the 5G sector. Importantly, the "Brexit Decree" sanctioned extension of the Golden power is also particularly innovative: "whereas there had always been a very close connection between public interests and the "fate" of companies, these new special powers (applied to 5G technology networks) find their legitimacy in a type of interest that is unrelated, so to speak, to the company per se, which turns into a mere instrument for its protection" (Maccarone, 2020).

In May 2019, the decree stipulated the review mechanism related to broadband electronic communication services based on 5G technology. At this time, the scope subject to the foreign direct investment review mechanism includes national defense and national security, broadband electronic communication based on 5G technology, energy, transportation and other industries.

In September 2019, the Italian government expanded the scope of the foreign direct investment review mechanism to include: (1) physical or virtual critical infrastructure, including energy, transportation, water conservancy, sanitation, communications, media, data processing or storage, aviation space, defense, electoral or financial infrastructure, sensitive equipment, and land and real estate critical to the use of such infrastructure; (2) critical technologies, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy reserves, quantum and nuclear technologies as well as eg nanotechnology and biotechnology.

From 2017 to 2019, the regulatory evolution of the Golden power discipline was defined as an "irresistible ascent" (Napolitano, 2019). It is widely regarded as the result of two factors: "on the one hand, rapid technological transformation and the emergence of new types of threats; on the other hand, the perceived need to protect certain strategic assets more effectively from hostile investments that might undermine essential public interests" (Maccarone, 2020). Furthermore, according to some experts, the Italian state took the position of "regulator" with Law Decree 21/2012, discarding its prior one as "entrepreneur." Others disagree, stating that

political and highly administrative assessments, which can only be issued by executive power, have not been eliminated. Previously a "entrepreneur" and later a "regulator" of foreign investments, the Italian state's evolution since 2017 has given it the new function of a "strategist" (Carofoli, 2019) or "customs officer" (Maccarone, 2020). In this regard, Italy's authorities should be able to "perform a strategic study of geo-economic and geo-political matters based on extensive technical tests and evaluations" (Carofoli, 2019).

The new Golden power for the pandemic era

The Golden Power is the Italian government's exceptional authority to prohibit or prevent foreign direct investment ("FDI") and business transactions affecting Italian critical assets. All transactions using Golden Power must be disclosed in advance to the Italian Presidency of the Council of Ministers (the "Presidency"). The Golden Power was initially confined to defense, national security, and infrastructure (transportation, energy, and communications). It was recently expanded to include more important sectors (such as high technology, fintech, insurance, and so on) in response to Law Decree 23/2020 and the Covid-19 epidemic.

The COVID-19 pandemic-caused economic catastrophe has resulted in the greatest recession since the Great Depression. In Italy, in particular, the protracted cessation of industrial activity has resulted in a collapse of both domestic and international demand, a further loss of productivity, and increased hazards to socioeconomic stability. As a result of the "Great Lockdown" (IMF, 2019), an "inevitable competitive weakening of all economic activities" (IMF, 2019) on national territory has occurred. Importantly, the depreciation of Italian industrial assets has made them more vulnerable to foreign interests. Other nations have been motivated to exploit low market values through their multinational corporations in order to strengthen their place in global sectors. The Covid-19 pandemic has prompted Golden Power to expand its scope in response to malicious manipulation and speculation on assets deemed strategic. Decree No. 23/2020 and two recent Presidential Decrees

(“DPCMs”) expanded the list of sectors considered strategic and subject to the golden power regime. This "expanded" system will remain in effect until June 2021.

A few weeks after the COVID-19 pandemic broke out, and in the midst of extreme financial volatility, Italy's Parliamentary Committee for the Security of the Republic (COPASIR) urged the Italian government to "identify and implement the best possible resources and responses (...) to defend Italy's national interests relating to strategic financial and industrial firms" (Di Francesco, 2020). On the same day, the European Commission issued a Communication urging Member States to (1) "make full use of its FDI screening mechanisms already in place to fully account for the risks to critical health infrastructures, critical input supply, and other critical sectors as envisaged in the EU legal framework; (2) for those Member States that do not presently have a screening mechanism, or whose screening mechanisms do not cover all relevant transactions, to establish a full-fledged screening mechanism and, in the meantime, to use all other available options to address cases where the acquisition or control of a specific business, infrastructure, or technology would pose a risk to the security or public order in the EU, including a risk to critical health infrastructures and the supply of critical inputs” (EU, 2020).

As a result, the Commission urged EU Member States to implement new FDI screening mechanisms as well as consolidate existing ones. Furthermore, the EU Regulation on screening foreign investments has not yet come into force in March 2020. Indeed, the Commission's Communication appeared to "seek to hasten, especially in light of the present emergency, the fulfillment of the uniform framework for investment screening established by the Regulation, in order to ensure appropriate and urgent protection to basic interests"(Maccarone, 2021). In addition to public order and security, the Commission identified several overriding grounds of general interest that Member States might raise during their screening of foreign investments. These "need not be solely economic"(EU, 2020), but can encompass public health, financial stability issues, and "protecting consumers, maintaining the financial balance of the social security system, and attaining social policy objectives that may be relevant in

emergencies" (Maccarone, 2021). As a result, the Commission seemed to be "encouraging Member States to fully utilize every tool made accessible by the European legal system" (Maccarone, 2021). The impact of the COVID-19 outbreak cannot be isolated from this shift in strategy by EU institutions.

On April 8, 2020, Law Decree 23/2020, often known as the "Liquidity Decree," was adopted. Its extensive overhaul of Italy's Golden Power was partially a reaction to the COPASIR and European Commission's concurrent proposals. The Italian government further supplemented the scope of strategic sectors: (1) including energy, transportation, water, health, communications, media, processing or archiving data, aerospace infrastructure, defense infrastructure, elections or financial infrastructure facilities, and sensitive facilities and investments in land and buildings essential to the use of such infrastructure; (2) critical technology and dual-use projects, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defense, energy storage, quantum and nuclear technologies, and nanotechnology and biotechnology; (3) the security of supply of critical products, including energy and raw materials, and food safety; (4) the ability to access confidential information, including personal data, or to control information on that data; (5) Freedom and pluralism of the media.

In June 2020, the following industries were included in the scope of the review: (1) the agri-food and steel industries; (2) the health sector, including the healthcare category and the production, import, and wholesale distribution of surgical medical devices, as well as those used as personal protective equipment Production, import, and wholesale distribution. Such norms are related to the current strategic importance in the emergency of the new crown epidemic; (3) banking and insurance, reaffirming the applicability of financial power supervision to the banking and insurance industries, where the banking and insurance industries are now included in the financial The power to regulate the financial sector are broader.

Article 15 contains two additional provisions, initially with default validity set for December 31, 2020. However, this validity was extended a first time to June 30, 2021, by Law Decree 137/2020 (approved on October 28, 2020, and known as “Decreto Ristori”) and a second time to December 31, 2021, by Law Decree 56/2021 (approved on April 30, 2021, and known as “Decreto Proroghe”). A first provision states that resolutions, acts, or operations by firms owning assets or goods in sectors referred to in the European Regulation, if they affect the ownership, control, or availability of said assets or change their destination, must be notified in accordance with the regime applicable to the energy, transport, and communications sectors (Article 2 of Law Decree 21/2012). Second, until December 31, 2021, any transactions falling within Article 2 of Law Decree 21/2012, and therefore including energy, transportation, communications, and other sectors mentioned in Article 4 of the European Regulation, must be reported, even if the investor is headquartered in an EU Member State. In other words, the screening procedure that applies to the defense and national security industries has been extended to all other disciplines. This extension was "supported based on its limited temporal applicability and tight linkage to the current emergency period, and hence, in short, its extraordinary character" (Chiomenti, 2020). Some argue that "the existing circumstances do not enable us to exclude out a future extension in time" of these rules, thereby jeopardizing their "compliance with the EU legal system" (Maccarone, 2021). Furthermore, by equalizing EU-based and non-EU-based investors, the Italian government can take into consideration their (direct or indirect) "public oversight" while considering foreign investments by the former. It will also ascertain "the adequacy of the person who purchases control to guarantee the supply of goods/ services offered by the target"(Vasques, 2020).

Article 15 has also resulted in considerable adjustments for non-EU investment. Indeed, a new temporary provision has decreased the level at which non-EU buyers are required to notify the EU. In other words, non-EU investors must declare investments that "attribute a share of voting rights or capital equal to at least 10%" and have a total value of "equivalent to or higher than 1 million euros"(Chiomenti,

2020) until December 31, 2021. These investors are subject to consecutive notice responsibilities after they achieve 15%, 20%, 25%, and 50% of voting rights or capital. This provision, in particular, seeks to encourage more thorough supervision of small and medium-sized firms (SMEs) as well as enterprises with broad-based ownership.

In the case of a failure to notify, Article 16 empowers the Italian government to launch a Golden power proceedings ex officio. Prior to the introduction of this clause, if an economic operator neglected to disclose its transaction or resolution, the subsequent actions were deemed void, and administrative consequences might be applied. In general, the new ex officio process has a "remedial function"(Maccarone, 2021), that is, it is not a true "alternative" to the standard one because the presence of a (failed) responsibility to notify must be determined. Importantly, the potential of using the Golden authority ex official involves "the construction of economic intelligence structures, in light of those already in place in other countries" (Sandulli, 2020). Finally, Article 16 empowers the Inter-ministerial Coordination Group to "request information and exhibit documents from public administrations, public or private institutions, corporations, or other third parties"(Chiomenti, 2020). The Council Presidency can also develop norms or conventions with research institutes to facilitate a more informed examination of particular instances.

Article 17 does not directly address the Golden power discipline, but it is significant for the "tight correlation"(Maccarone, 2021) that exists between Italy's foreign investment screening and the transparency requirements for ownership purchases in Article 120 of the Consolidated Law on Finance. Article 17 modifies these standards by making two substantial adjustments. On the one hand, it empowers the Italian Companies and Exchange Commission (CONSOB) to require investors to communicate their participation in firms with broad-based shareholdings of less than 3% and 5%, based on the need for investor protection as well as the efficiency and transparency of corporate control and capital markets. For the same reasons, the CONSOB may compel investors to submit a "statement of intentions" if their

acquisition of participations in a business with broad-based ownership equals or exceeds 5% (rather than 10%) of the firm's share capital. Finally, Article 17 has a particularly contentious paragraph urging that Italy's Golden authority be exercised on agri-food and steel enterprises "with the extra objective of safeguarding employment levels and productivity on national soil." The legality of this clause, however, was not extended and will expire on December 31, 2020. However, it is still contentious and confusing, especially considering the regulation overlap. According to one commentator, this article appears to grant Italy's unique powers "to the pursuit of new objectives than those underlying its exercise thus far, evidently linked to social and industrial policy goals" (Maccarone, 2021). Overall, the worldwide economic crisis, along with rising geoeconomic competitiveness and the introduction of new digital technologies, might account for the recent strengthening and broadening of Italy's foreign investment screening.

Decrees of the President of the Council n. 179 and 180 of December 2020 formalized the Golden power discipline by defining "goods and assets of national interest in the sectors referred to in Article 4, paragraph 1 of EU Regulation 2019/452"[12] and "assets of strategic relevance in the energy, transport, and communications sectors"[13]. This was largely well-received by academics and the general public, as the two Decrees increase the overall legal certainty of the Golden power discipline. From the perspective of investors, it is now comparatively simple to predict if a certain transaction may be subject to a notification obligation: anytime it includes an asset or item named in the two Decrees, the Italian government has the legal power to screen the foreign investment.

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[12] Specifically, Decree n. 179 specifies the “goods and assets of national interest” in the energy (Article 3), water (Article 4) and health sectors (Article 5), in the treatment, storage, access and control of sensitive data and information (Article 6), in the electoral infrastructures sector (Article 7), in the financial (including the credit and insurance segments) and financial market infrastructures sectors (Article 8), in the artificial intelligence, robotics, semiconductors, cybersecurity, nanotechnologies and biotechnologies sectors (Article 9), in the non-military aerospatial infrastructures and technologies sector (Article 10), in the agrifood and supply of productive factors sectors (Article 11), for dual-use products (Article 12) and for freedom and pluralism of the media (Article 13).

[13] Decree n. 180 added the following “assets of strategic relevance” to those identified by Decree of the President of the Republic 85/2014:
- for the energy sector, fundamental properties related to the use of the networks and infrastructures referred to in Decree of the President of the Republic 85/2014;
- for the transport sector, national spaceports, interports of national relevance and road and motorway networks of national interest.

Finally, the Liquidity Decree serves as "a plastic symbol of the contemporary historical turning point"(Sandulli, 2020). Because they are exerted through "a chameleonic authority, whose modalities of expression fluctuate dependent on adaptation to certain ends, "(Sandulli, 2020) a country's unique powers are particularly instructive of its sovereign objectives and self-conception. As a result, the Liquidity Decree permits two crucial remarks. To begin with, the core of what the Italian state believes it must preserve has been greatly broadened. More broadly, the reform represents a forceful "return of the state," whose control and technological machinery were greatly enhanced during the emergency period. In this view, every investor concerned about the success of their endeavor must "establish a communication with public authorities in addition to negotiating with their contractual counterparts."(Napolitano, 2019). Even though the state has been largely "restored," the ECJ's attitude to EU Member States' special powers remains significant. The proportionality principle guides Golden power activities, which should not block the pursuit of "an adequate balance between the need to protect the fundamental freedoms set forth by the European Treaties and the protection of the fundamental interests of a single Member State".(Chieppa, 2020)

Value and Limitations

The unavoidable "double movement of soliciting and screening"(Aresu, 2019) foreign direct investments characterizes contemporary governments' economic lives. As a result, nations strike a delicate balance between their responsibility to safeguard critical public interests and the necessity not to discourage foreign capital investment. The central question in the (public and scientific) debate is whether "the extension of the terms for the exercise of special powers, combined with the expansion of the scope of government intervention in recent legislative developments, is likely to result in a stronger compression of market operators' economic freedom"(Maccarone, 2019). According to some opponents, these changes are likely to foster a "neo-protectionist" use of FDI screening based on industrial policy aims. This would be detrimental to Italy's export-driven economy, deterring much-needed foreign investment.

Furthermore, it would breach the Golden power's finalists limit as a tool with just one "proper function, that is, to ensure that economic freedoms do not unfold in contrast with fundamental public interests"(Maccarone, 2019).

In this context, the exercise of the Golden power must be considered truly "effective" when it neutralizes threats to fundamental public interests without jeopardizing the attractiveness of foreign investments, especially when foreign investment harms the economic interests of the country. As a result, "saying what is outside" helps to define a state's sovereign character, serves as an effective guide for action, and promotes legal clarity as well as economic attractiveness in the eyes of foreign investors. Furthermore, any potential conflict between the two goals of protecting public interests on the one hand and maintaining the general attractiveness of the economic system on the other can be resolved by "awareness that national strategic interests tend to coincide with long-term economic ones"(Valensise, 2019).

However, the political and media debate on the Italian Golden Power is tainted by "a fundamental misconception that special powers (for various reasons) as a strategy" (Maccarone, 2021). Indeed, those who worry about the new protectionism "bending" the power of gold may be justified, since both the formal and practical character of its application may contradict the intended "special" nature of the instrument(Maccarone, 2021). Just as the Golden Power policy is also called a policy against China's FDI, its political nature cannot be ignored. Simultaneously, recurrent policy changes will enhance the uncertainty of foreign direct investment. Potential investment in Italy would be reduced as a result.

Overall, Italy's gold power strategy can preserve local assets in critical fields and, to some extent, prevent vital technology from being gained by other countries. However, if gold powers are utilized frequently or "excessively," they might be damaging to Italy's interests. If the actions of private enterprises are consistently thwarted by governmental intervention via foreign investment screening, it suggests a lack of adequate synergy between the state (particularly its intelligence services) and the

state's private sector. FDI screening should be seen as a "unique" defense mechanism, with a distinct hierarchy of protective interests. On the national level, new trade protectionism will emerge, which will be detrimental to the flow of the global economy; on the other hand, it will harm the image of the Italian government across the globe.

Impact on Foreign Direct Investment in Italy

1. The uncertainty of overseas acquisitions has increased, and compliance costs have increased.

The new policy of "Golden Power" has greatly expanded the jurisdictional framework of Gold Power. This bill is a law that specifically restricts the acquisition of foreign capital. It has the significance of an important weathervane. Overseas investors involved in overseas investment business need to be particularly vigilant. The "golden power" has been revised many times, and the industries covered by it are showing a trend of continuous expansion. If foreign companies want to invest in related fields, they need to pay special attention and invest additional costs for compliance operations to avoid investment behavior falling into the "golden power" category. The scope of the review is subject to supervision or punishment by the Italian government and even the European Union.

2. Supervision and punishment are becoming increasingly strict.

The "Golden Powers" bill not only has relevant huge fines, but also has punitive compensation measures and various other auxiliary measures, and serious cases will even involve criminal punishment. Moreover, foreign-funded enterprises that are interested in investing have repeatedly reported that they have encountered discriminatory law enforcement actions by relevant departments. This bill may make Italian law enforcement agencies increasingly strict in the supervision of enterprises with foreign-funded backgrounds.

3. Italy's radiation effect on other countries.

As a member of the European Union, Italy's economic policies can be used as a reference for other countries. Following the example of Italy, EU countries have gradually begun to formulate their own foreign investment review policies, and the free economic mobility of each country has been reduced.

4. EU laws and policies on foreign investment may continue to be tightened.

At present, the relevant part of the policy is known to expire at the end of 2021, but considering the impact of the new crown epidemic and other factors, some new laws in the European Union and Italy may continue to tighten restrictions on foreign investment.

Italy's Golden power in practice : Case studies

Case-study: Chinese company Efort and Italian company ROBOX (2022)

Since the Italian government formulated the "Golden Powers" Decree in 2012, the Italian government was given the special powers to regulate strategically important assets. Authorities have blocked foreign deals in Italy for the seventh time, including six from China, including ROBOX, while five were blocked under current Prime Minister Mario Draghi's government. In March 2022, Draghi vetoed the acquisition of drone companies by Chinese companies. Earlier, it also rejected the acquisition of Milan Semiconductor Equipment Company by a Chinese company. Earlier, the Italian government investigated the acquisition of a military drone company by Chinese investors. The acquisition was not subject to official review prior to the transaction, but the Italian government believes it has the right to approve the case. Without a satisfactory explanation, the government will file a complaint that could eventually overturn the deal.

One of the parties in this case was Efort Intelligent Equipment Co., Ltd. Efort Intelligent Equipment Co., Ltd. was formerly known as Wuhu Chery Equipment Co., Ltd., which was established on August 2, 2007, funded by Chery Automobile. On February 17, 2012, Wuhu Chery Equipment Co., Ltd. changed its name to Anhui Efort Intelligent Equipment Co., Ltd. On May 31, 2016, the company was changed into a joint-stock company and changed its name to Efort Intelligent Equipment Co., Ltd.[14] Efort Intelligent Equipment Co., Ltd. is a listed company on the Science and Technology Innovation Board on the Shanghai Stock Exchange (stock code: 688165, stock abbreviation: Efort). It belongs to the vice-chairman unit of the China Robot Industry Alliance, China's top 10 robot companies, and China's top 100 intelligent manufacturing companies[15]. It is located in the first echelon of China's industrial robot industry, and can provide customers and partners with industrial robots and

[14] See http://stockpage.10jqka.com.cn/688165/company/

[15] See https://www.efort.com.cn/index.php/tz/xxgg.html

cross-industry intelligent manufacturing solutions. ROBOX mainly designs and manufactures electronic components for robotics and motion control systems. Efort has many years of industry accumulation in the field of automation equipment, especially in the field of automotive welding process equipment, automated conveyor equipment, painting process equipment, robot integration applications and other areas to provide partners with turnkey solutions. Efort has worked with firms in the Italian robotics sector on several occasions, including but not limited to merges and acquisitions (M&A) and technology purchase. Efort successfully acquired the WFC Group (in 2017) , an Italian automotive equipment and robotic system integrator, after the successful acquisition of Italian painting robot company CMA, Italian metal processing and surface treatment system integrator EVOLUT and investment ROBOX, a manufacturer of robot core components in motion control in Italy. Through the M&A and absorption of advanced technology and experience in the field of international industrial automation, Efort has formed a coordinated development pattern of the entire industry chain from the core components of robots to the whole machine to the high-end system integration of robots. Until now Efort has 19 subsidiaries worldwide and has a smart painting robot R&D center and an intelligent robot application center in Italy.[16]

Since 1975, ROBOX SPA has been developing and manufacturing motion controllers, programming languages, development environments and libraries to solve all motion control requirements for robotics and motion control systems. ROBOX controllers are simple to use and flexible enough for any application that requires controlling the motion of any machine with speed, precision and softness. Its extensive product range can be adapted to any motion application due to architecture, modularity or stand-alone usability. ROBOX also implements custom projects, and its controllers can even be integrated into motor drives. The ROBOX controller communicates with the outside world through major industrial communication protocols and fieldbuses (OPC server, ActiveX, TCP/IP, UDP/IP, TFTP, PROFINET devices, Ethernet/IP, DF1,

[16] See https://www.efort.com.cn/index.php/welcome.html

EtherCAT host, CANopen). Main fields: robotics, food industry, packaging, beverage, palletizing, paper industry, marble, glass, textile, wood industry, AGV.[17]

For the first time, Efter collaborated with ROBOX in June 2017. The successful acquisition of ROBOX by Efort demonstrates Efort's efforts in essential components.[18] ROBOX has since become an international subsidiary of Efort. In reality, ROBOX and Efort had already worked together on several occasions. In 2022, Efort wanted to increase its stake in ROBOX (from 40% to 49%), a company from Novara. But the government has opposed the transfer of technology under the deal using special powers (Golden power). It was the fifth time in 17 months that Mario Draghi has rejected plans for Europe's third-largest economy.

Efort stated in March 2022 that it planed to execute a "Technology Licensing Agreement" with the joint-stock business ROBOX. ROBOX will share its "RTM and OB source code and files" "RPE and RPL source code and files" "RTE source code and files". These source codes and files will be transferred and allowed for usage by the Efort, and the technological platform will be built in collaboration with the Efort too. The corporation Efort will pay ROBOX a technical service fee of one million euros for the transfer and authorization of the aforementioned technology, as well as the ROBOX licensing fee depending on the robot's production over the next ten years. On March 23, Efort stated on the investor interaction platform that the company's acquisition of the underlying source code of the control platform is to complete the construction of the company's robot core autonomous control platform and realize the complete autonomy and controllability of the controller's underlying core technology. The achievement of controller autonomy, on the one hand, is beneficial to robot cost management and supply chain security; on the other hand, having an independent control platform has a good effect on satisfying customer demands faster, increasing the robot market, and receiving incremental orders.

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[17] See official website at https://www.efort.com.cn/index.php/group/index/40.html

[18] See http://xinwen.sohu.it/wap/yidalizhongwenxinwen/oulianwang/2017/0616/114529.html

Simultaneously, Efort proposed to purchase 9% equity in ROBOX jointly held by Marzio Montorsi and Lea Montorsi, ROBOX shareholders, for 2 million euros in cash. Efort intended to acquire 4.5% of ROBOX shares held by Marzio Montorsi and Lea Montorsi respectively. This is also the second ROBOX equity acquisition since 2017. After the completion of this equity transaction, Efort would hold 49% of ROBOX equity[19]. According to Efort, the company's major strategic aim and development strategy is to establish autonomous manufacture of the controller's fundamental component. The goal of this transaction is to strengthen the company's core competitiveness by building on the early strategic collaboration with ROBOX and the initial implementation of independent controller manufacturing. Following the completion of the acquisition, Efort will be able to obtain the underlying source code of the control platform, complete the construction of the company's robot core autonomous control platform, and realize the complete autonomy and controllability of the controller's underlying core technology. According to sources, as Efort mapped out the future development path early on, it figured out the technological foundation needed for each business connection. For the remaining weak connections, acquire independence and controllability through foreign mergers and acquisitions, digestion and absorption of abroad technology. So Efort's acquisition of a 9% share in ROBOX is only a representation of the company's own development. Following the full-scale implementation of independent controllers in 2020 (coverage rate reached 83.33%), Efort's controller autonomy rate reached 71.20% in the first half of 2021, surviving the solar industry's high-speed, high-precision, high-speed development. Simultaneously, the autonomy rate of Efort's RV reducers and servo drives is growing year after year.[20] According to the expectation at the time, if the transaction successfully passed the consideration of the Efort shareholders' meeting, the approval of the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) and the approval of the Italian government, the official transaction time was expected to be no later than the end of May.

[19] See Efort Announcement at https://new.qq.com/omn/20220314/20220314A09YCR00.html

[20] See the official website of Efort.

However, in June 2022, Italian Prime Minister Draghi recently used the "Golden Powers" Decree to veto a transaction in which the Italian company ROBOX transferred technology and equity to the Chinese-funded company Efort. According to reports, the denied transaction explicitly relates to a sharing and technology agreement between the Chinese robot manufacturer "Efort Intelligent Equipment Co., Ltd." and the Italian robot electrical component design and manufacturer ROBOX (including software). Following the rejection of the deal by the Italian government, Efort stated that they will collaborate with ROBOX and Italian attorneys to further contact with the necessary Italian approval authorities and publish the developments in a timely way. Concerning technology transfer, a representative for the Chinese Ministry of Foreign Affairs once stated that China places a high value on intellectual property rights protection and has never had a policy of compelling foreign companies to surrender technology. This time, Prime Minister Mario Draghi used the "Golden Powers" to shield businesses deemed strategically essential against unsolicited bids. According to the aforementioned, Italy's present "Golden Power" Act authorizes the government to prevent banking, energy, and other "assets of strategic importance to national interests" associated businesses from coming under special national powers of non-EU member states. The veto is being used this time to preserve the usage of technology in critical sectors of the country.

The Italian government opposed the acquisition not just to preserve important assets, but also because Efort had engaged with the Chinese government. This leads the Italian authorities to think that the acquisition was orchestrated by the government rather than by the market. On its website, Efort Intelligent Equipment claims to be involved in "robotics projects of the Chinese Ministry of Industry and Information Technology, Ministry of Science and Technology, National Development and Reform Commission, and other ministries". They also claims to have "participated in the establishment of a number of national standards for robots" while working with the Chinese government[21]. According to an analysis conducted for Formiche.net by Datenna, a Dutch company that deals with economic intelligence on China, on

[21] See Efort official Website

shareholders and leading figures, "the level of influence" of the Chinese state on Efort Intelligent Equipment is considered high[22], and the production of robotic components is aligned with the industrial development priorities defined in the Made In China 2025 project, i.e. the strategy through which Beijing hopes to achieve global leadership. "These links bind the corporation to numerous government institutions rather than the Chinese Communist Party," Datenna's researchers noted.[23]

[22] See Draghi blocca gli affari cinesi su un gioiello della robotica italiana at https://formiche.net/2022/06/robox-veto-golden-power-cina/

[23] Ibid.

Foreign Direct Investment (FDI) Screening in China

China’s Foreign Investment law (2019)

China's foreign investment regulations must be mentioned in order to discuss how the country's security review system for foreign investments has evolved. Comparatively speaking to EU member states, China opened up to the outside world considerably later. The reform and opening up program was not formally adopted by the Chinese government until 1979, at which point China started to welcome foreign investment. China's regulations governing foreign corporations therefore began quite late. China's attitude toward international businessmen has changed along with the country's circumstances, and corresponding legislation pertaining to foreign businesspeople have also altered. Economic development more or less has an impact on legal system changes. The objectives of soliciting foreign investment and economic development, as well as the legislative prerequisites for foreign investment, vary across historical eras.

The evolution of China's foreign investment law in the context of opening up

1979-1991: Scale orientation and initial development

From 1979 to 1991, based on the "Three Foreign Investment corporate Laws", the foreign investment legal system was initially formed. China started implementing reform and opening up in 1978. The closed planned economy was no longer functional after that. The government acknowledges that socialism may coexist with a market economy, which serves as a support system for private economic structures. By putting these rules into practice, the admission of foreign capital gained institutional legitimacy. The public sector was the only element of the domestic

economy prior to reform and opening up. There are no other types of enterprise organization forms than state-owned and collective companies, and it is impossible to identify a structural form appropriate for businesses with foreign funding or a commercial organization law that can be utilized as a guide. As a result, foreign-financed enterprise legislation must travel down a different path than domestically funded enterprise legislation. Three distinct business organizational models have given rise to three distinct foreign investment corporate regulations. The "Sino-Foreign Equity Joint Venture Law," "Foreign-Invested Enterprise Law," and "Sino-Foreign Cooperative Joint Venture Law," all of which were promulgated in 1979, 1986, and 1988, respectively, as well as subsequent implementation rules and regulations, form the framework for foreign investment laws. In 1986, the State Council created the "Regulations on Encouraging Foreign Investment," which marked the beginning of my nation's policy-based investment attraction. These regulations gave foreign-funded businesses preferential treatment with regard to land, taxation, foreign exchange, loans, and import and export regulations. For Taiwanese, overseas Chinese, Hong Kong, and Macao citizens, the "Regulations on Encouraging Investment from Taiwan Compatriots" and "Regulations on Encouraging Investment from Overseas Chinese and Hong Kong and Macao Compatriots" were created in 1989 and 1990, respectively. For governments at all levels, recruiting foreign capital through preferential policies has evolved into the primary method of doing so during the following 20 years.

The "Three Foreign investment Corporate Laws" had important organizational and management law characteristics, but they were constrained by the economic and institutional growth of China at the time. The "Three Foreign Investment Corporate Laws" have as their focal points the legal relationships governing the internal organization of foreign-funded businesses, primarily the organizational form, organizational structure, and business activity standards. The Three Foreign Investment Laws, which were influenced by the domestic economic climate of the period, concentrated on the entrance of foreign capital and cutting-edge technology through preferential policies. The creation of this legislative goal expresses the urgent

need to acquire advanced technology from foreign capital through enhancing cooperation with foreign capital, which is closely related to the "two defects" problem faced by the Chinese government and companies in the early stages of reform and opening up, i.e., the low level of technology and weak industrial foundation.

1992—2011: Efficiency orientation and rapid development

Through industrial direction, the Chinese government intended to increase the effectiveness of introducing foreign capital. The 14th National Congress of the Communist Party of China decided in 1992, beginning with Deng Xiaoping's Southern Tour, to establish a socialist market economic system, emphasized the market's fundamental role in resource allocation, and called for further market expansion and opening up to the outside world. Prior to 1992, only the southeast coast of China was available for foreign investment. Since then, the Yangtze River basin, inland provincial capitals, and border cities have all undergone a gradual opening up process, and the region open to foreign investment has grown from the coast to the interior. The range of sectors and fields that foreign capital has penetrated has also significantly increased at the same time. The "two defects" of China's economic development have mostly been addressed with the rapid increase in FDI flow and the deepening of opening to the outside world. Accordingly, the foreign investment policy's focus has been changed from emphasizing the effectiveness of attracting investment to the efficiency of attracting investment, moving away from emphasizing the scale of investment in the previous stage. With a focus on investment industry guidance and investment direction guidance, the "Foreign Investment Industry Guidance Catalogue" and "Interim Provisions on Guiding Foreign Investment Direction" that were created in 1995 adopt diverse investment pathways for various forms of foreign investment. The focus of foreign capital introduction has increasingly switched from industrial-intensive firms to high-tech enterprises since the issuance of the Investment Industry Guidance Catalogue. Additionally, around this time, a gradual improvement in the legal framework for international mergers and acquisitions started. The "China Strategy Phenomenon" of 1992 created a legal

framework that allowed foreign-funded firms to buy state-owned businesses and publicly traded companies in China. The issue of foreign-funded businesses undervaluing state-owned assets during mergers and acquisitions had drawn considerable public attention, and a lot of experts and scholars called for consistent management. The demand for international mergers and acquisitions was increasing. (Since April 1992, the Zhongce Company has extended its equity investment in China by forming a joint venture with more than 51% of Zhongce's holdings over a period of more than two years, bringing together more than 100 businesses from various sectors and areas of China. 35 Sino-foreign joint ventures were created from a group of state-owned businesses. After the joint venture, the enterprise's operating system was changed.) In this regard, China once barred foreign capital from merging with and purchasing domestically listed enterprises.

Since China's entry into the WTO in 2000, which mandated further liberalization and opening up of the economy, foreign capital mergers and acquisitions of domestically listed companies have become a trend that cannot be avoided. The "Interim Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors" and the "Notice on Relevant Issues Concerning the Transfer of State-owned Shares and Legal Person Shares of Listed Companies to Foreign Investors" were both promulgated in 2003, reopening the door to foreign capital mergers and acquisitions and establishing preliminary regulations on these transactions. On the basis of the original "Interim Regulations," the "Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors" promulgated in 2006 updated and improved the processes for foreign mergers and acquisitions and anti-monopoly investigations. Super-national treatment must end, and fair competition must be established.

Since the "combination of the two taxes" was instituted in 2008 by the "Enterprise Income Tax Law," domestically and internationally funded businesses are subject to the same tax rates. A fair competition review process was provisionally formed by the "Anti-Monopoly Law" that was put into effect in the same year, which established the

idea of fair competition. With the implementation of the "Anti-Monopoly Law" and the "Enterprise Income Tax Law," China's 20-year-old preferential policy-based investment route has come to an end. Super-national treatment for foreign investment has also been abolished, and the idea of consistency between domestic and foreign investment and fair competition has spread.

Since 2012, quality-oriented transformation

The implementation of the negative list paradigm for international investment. After 2011, China's GDP growth rate continued to slow, exerting significant negative pressure on the country's economic growth. Since the 18th National Congress of the Chinese Communist Party, the new administration has vowed to advance economic growth through high-level opening. A high-level opening model of the negative list was agreed upon in 2013 after negotiations between Sino-American trade representatives. The Shanghai Free Trade Zone was founded in the same year, and the national treatment plus negative list for foreign investment entry management system was tested. Within the bounds of the free trade zone, the rules governing the authorization of foreign investment were suspended for a period of three years.

In 2015, the Ministry of Commerce released the "Foreign Investment Law (Draft)" before to the Shanghai Free Trade Zone's negative list pilot program expiring. It wasn't passed before the pilot program ended because of the immature circumstances for "integrating three foreign investment corporate laws into one" at the time. The applicable permission clauses of the "Three Foreign Investment corporate Laws" and the "Taiwan Compatriots Investment Protection Law" were removed in 2016 by the Standing Committee of the National People's Congress. The "Interim Measures for the Administration of the Establishment and Change of Foreign-Invested Enterprises" were created by the Ministry of Commerce and it underwent two revisions in 2017 and 2018, and the country-wide use of the negative list management method for foreign investment access was added. The "Foreign Investment Law" was ultimately

passed after four years, following significant revisions made to the "Foreign Investment Law (Draft)".

The "Foreign Investment Law (Draft)" has 170 articles, 11 chapters, and covers a variety of topics, such as general principles, foreign investors and foreign investment, access management, national security review, information reporting, investment promotion, investment protection, complaint coordination and handling, supervision and inspection, legal responsibilities, and supplemental provisions. The "Foreign Investment Law" has been condensed to 6 chapters and 42 articles based on the original "Draft". In addition to the substantial reduction in the number of legal articles, the Foreign Investment Law has also achieved integration in terms of content–Incorporate the investment definition chapter of the "Draft" into the general rules, the access management, national security review, and supervision and inspection into the investment management chapter, and the complaint coordination and handling into the investment protection chapter.

Instead of placing more emphasis on foreign investment management, the number of laws and regulations has been reduced, and the crucial content has been reorganized to make the theme of investment protection and promotion more prominent. This reflects the need to transform government functions in order to "delegate regulation and strengthen services." A fundamental piece of legislation governing foreign investment is the "Foreign Investment Law." To a certain extent, the principled and ambiguous treatment of the provisions' design reflects lawmakers' attempts to strike a compromise between the consistency of the legal system and the adaptability of its application. In order to optimize the protection of national interests, the optimum balance must be struck, and international investment law practice must adapt to its quickly changing environment. The creation of the negative list management model satisfies the requirements of a high-level opening-up management system for foreign investment in china, and the national treatment of foreign investment has now been extended from post-entry to pre-entry.

The Foreign Investment Law supports high-quality development and institutional opening up. Business filings will essentially be integrated into the industrial and commercial registration processes starting on June 30, 2018, when the system of "one set of forms, one operating window" for foreign-invested enterprises to establish business filings and industrial and commercial registrations will be implemented nationwide. It may be claimed that pre-establishment national treatment has essentially been realized for foreign investment outside the negative list, and its admittance method is essentially the same as that of domestic investment, providing the groundwork for the orderly adoption of the "Foreign Investment Law."

2018 marks the 40th year since the reform and opening up policy was put into effect. Opening up to the outside world has also ushered in a new stage of development at a new historical node. A proposal to "advance the shift from commodity and element flow opening to rule-based opening" was made by the Central Economic Work Conference in the same year. In addition, the objective has changed from encouraging efficient and large-scale economic growth to supporting high-quality economic development. The Foreign Investment Law, a new fundamental foreign investment law, improves investment attraction by emphasizing investment promotion and protection more than any other prior foreign investment laws. It also attracts high-quality foreign investment through a high-level open model and long-term stable institutional advantages.

Relevant elements of the Foreign Investment Law regarding the security review of foreign investments

The "Opinions of the State Council on Implementing the Negative List System for Market Access" were published on October 19, 2015, by the General Office of the State Council. This document offers China advice on how to put in place a thorough negative list and suggests precise work schedules. There is no requirement for investments outside of the "Special Management Measures Catalogue". The "Special Management Measures Catalogue" is the negative list and the approval system is only

necessary for the investments in the "Special Management Measures Catalogue" to apply for permission. There is no need to submit an access permit application for anything not on the negative list. Foreign investments, foreign investors, and foreign-invested businesses only need to be reported to the appropriate agencies in line with the reporting system when they are founded and altered. The "Foreign Investment Law" issued in 2019 specifically included the national security review into the legislation and upgraded its effectiveness level from the original normative documents, departmental rules, etc. to laws, though the application of the national security review was not specified. This was done in order to cooperate with the negative list system. When the "Foreign Investment Law" came into effect on January 1, 2020, the "Three Foreign Investment Corporate Laws" would be abolished at the same time.

The "Foreign Investment Law" clarifies the principle of "negative list plus national treatment". Article 4 of the "Foreign Investment Law" stipulates: "The state implements a management system of pre-establishment national treatment plus a negative list for foreign investment. The pre-establishment national treatment mentioned in the preceding paragraph refers to the granting of foreign investors and their partners during the investment access stage. The treatment of investment is not lower than that of domestic investors and their investments; the so-called negative list refers to the special management measures for the access of foreign investment in specific fields stipulated by the state. The state gives national treatment to foreign investment outside the negative list. "

Article 28 of the Foreign Investment Law stipulates: "Foreign investors shall not invest in areas where investment is prohibited under the negative list for foreign investment access. Foreign investors shall comply with the conditions set out in the negative list in areas where investment is restricted under the negative list. The areas outside the negative list of foreign investment access shall be managed in accordance with the principle of consistency between domestic and foreign investment." Using the enterprise registration system and the enterprise credit information disclosure

system, all foreign-owned businesses, regardless of whether they were founded under the record-keeping system or the permit access system, are required to report investment information to the commercial authorities as needed. Ex post reporting is typical of the information reporting system, which provides adequate data for oversight and regulation. In order to facilitate monitoring and regulation, the legislative purpose is to facilitate admission while also understanding their basic information through the reporting system and grasping the key operational activities. Under the negative list model, the level of restriction on foreign investment access in China has rapidly decreased. Although the negative list catalogue is updated as necessary to reflect changes in the actual environment, the overall trend is towards a narrowing of the catalogue's scope each year and an expanding of the number of open areas and industries. The information reporting system takes the place of the formerly convoluted filing and approval processes for foreign investment, significantly streamlining administrative processes and improving governmental services. The creation of a security review system is also on the agenda given the rise in open spaces. The security review system's main goal is to protect economic and national security sovereignty. The security evaluation of foreign investment access has been enhanced in recent years by both the US and Europe, and experts and scholars have focused on how to create a security review system that is consistent with national interests. The Foreign Investment Laws makes preliminary provisions in this area.

To determine foreign investment, the Foreign Investment Law uses an enumeration approach combined with underwriting rules. Expedite the legal analysis and subsequent legislation to offer backing for the Foreign Investment Law's implementation. The Foreign Investment Law establishes a working mechanism for complaints to strengthen investment protection, promotes foreign investment by putting the principle of consistency between domestic and foreign investment into practice, and regulates investment management based on three major regimes. However, the legislation itself has a distinctly principled character, making the specific regimes less operable. After the promulgation of the Implementing Regulations, some ambiguous legal provisions have been concretized, enhancing the

applicability of the Foreign Investment Law. For those systems that cannot be refined through the Implementing Regulations, they can be resolved through legal interpretation and subsequent legislation. For example, the Foreign Investment Law provides for the application of the Anti-Monopoly Law to the review of the concentration of foreign M&A operators, but there are no relevant provisions on the interface between the anti-monopoly review and the entry permit, which can be further clarified through legal interpretation to strengthen the interface between the two laws. For systems unique to the Foreign Investment Law, follow-up legislative work needs to be carried out as soon as possible. For example, the National Development and Reform Commission and the Ministry of Commerce issued the Measures on Security Review of Foreign Investment in December 2020, which improved the security review system for foreign investment under the Foreign Investment Law. Some scholars have further pointed out that the country's security review system should continue to be improved on a standardized, transparent, orderly and restrained basis, so as to lay a solid foundation for promoting international coordination of foreign investment security reviews.

The direct legislative objective of the Foreign Investment Law is to promote, protect and regulate foreign investment, with the promotion of foreign investment as the first priority, and the fundamental objective is to promote comprehensive opening and the healthy development of the market economy through the promotion of foreign investment. The Foreign Investment Law clearly reflects the legislative objective of foreign investment promotion and protection. The investment promotion section in Chapter II contains 11 articles, including issues such as equal access to government support policies, equal participation in standardization, fair participation in government procurement activities, fair and equal treatment as domestic enterprises in terms of access to financing, as well as pilot zones, special economic zones and preferential measures. The third chapter on investment protection contains eight articles, covering important issues related to investor protection such as levy, foreign exchange transfer, intellectual property protection, government commitment and complaint mechanism. Both investment promotion and investment protection are

areas where foreign-invested enterprises have more demands, and their protection and promotion through legislation will enhance the attractiveness of the Chinese market to foreign investors and promote deep localization of foreign-invested enterprises. This shift in legislative goals is the result of significant domestic and global factors. In recent international investment treaties, there has been a tendency toward public-interest innovation, with a fundamental focus on balancing the interests of investors and host countries, moving from a one-sided emphasis on investor protection to an acceptable balance between the host country's sovereignty.

According to Article 42 of the Foreign Investment Law, established foreign-invested firms may continue operating on their original organizational structure for a further five years. Because of this, a significant number of foreign-invested firms will need to finish their organizational reorganization within the allotted five years. The "Three Foreign Investment Corporate Law" differs from the current Company Law in its provisions regarding the establishment of the supreme authority of the enterprise and the manner of distribution, so its adjustment will require a significant amount of work and possibly result in new games being played among all parties. For Sino-Foreign Joint Ventures established with direct investment from foreign investors, new discussions with the foreign investors are ineluctably required on topics like the distribution of rights to the organizational structure, the operation of the board of directors, and the equity transfer principles. More difficult problems will also be faced by those who are required to adopt a Sino-foreign cooperative venture for the prior foreign investment guideline catalogue. Taking the education and training industry as an example, the first and more specific ones are enterprises established on the basis of the Regulations on Chinese-Foreign Cooperation in Running Schools. On the one hand, these enterprises need to meet the relevant requirements of the Regulations on Co-operative Education, and on the other hand, they often take the form of Sino-foreign cooperative enterprises or joint ventures, which have special requirements for management organization and asset investment and withdrawal. It will then become a complex issue during the transitional period as to how to amend and harmonize

agreements by the cooperating parties that are inconsistent with the requirements of the Company Law.

The significance of the Foreign Investment Law for the improvement of China's foreign security review system

Both investment policies and investment laws are important tools for promoting foreign investment. Foreign investment, either directly or indirectly, promotes the technological advancement of domestic enterprises, strengthens their international competitiveness, facilitates the growth of foreign trade and investment, enhances the adaptability of local Chinese enterprises to international rules, and expands the scale of employment and tax revenue. The Foreign Investment Law, which was implemented in 2020, has transformed foreign investment legislation from fragmented to unified and represents a major change and systematic innovation in foreign investment law over the past 40 years of reform and opening up. According to statistics, China's nearly 960,000 foreign-invested enterprises nationwide contribute 13% of China's employment, 20% of its tax revenue and 50% of its imports and exports for less than 3% of the country's enterprises. The volume of capital imported and exported from a nation determines its standing with regard to international investment law. In terms of investment import and export, China has developed into a two-way power, and foreign investment will continue to play a significant promotional role for a very long time. The "The Foreign Investment Corporate Laws" emphasize organization and administration of foreign investment due to its historical context and legislative philosophy, while the Foreign Investment Law emphasizes the legislative goal of promoting and protecting foreign investment. China has increasingly shifted away from its conservative tendency to emphasize the management of foreign investment in its investment regulations in light of domestic and international factors. By including provisions on expropriation, foreign exchange, intellectual property rights, and trade secrets, emphasizing the standardization of the creation of administrative documents, encouraging governments at all levels to keep their promises, and establishing a working mechanism for complaints to improve

channels of redress, the Foreign Investment Law protects the tangible and intangible property of foreign investors. The implementation of the Foreign Investment Law, an institutional innovation based on the analysis of high-level international investment protection agreements, will significantly advance China's orderly and high-quality economic integration with the rest of the world.

China cannot go back to the closed-door era of the past due to the significance of foreign investment to its economic progress, but the dangers posed by this type of investment cannot be disregarded. A country's economy will be significantly impacted if it allows industries that are vital to its economy to pass into foreign hands and opens up the field of international investment without restriction. The "negative list" system regulates the areas in which foreign investment can be made, and the Foreign Investment Law extends the "negative list" system and legally establishes a security review system for foreign investment. The Foreign Investment Law, on the one hand, accords national treatment to foreign investment outside of the "negative list" sectors, realizing the principle of consistency between domestic and foreign investment based on equality, which emphasizes the provision of an equal platform and opportunity for domestic and foreign enterprises to compete, and that the State shall not violate the rules of fair competition and place any party in an unjustified position of competitive advantage. On the other side, rather than simply bringing foreign investment without restrictions, the breadth of access is rigorously restricted and no investment is allowed or conditional in the industries indicated in the "negative list". Clear legislation allows foreign investors to assess the risks when making investment decisions, and is more conducive to motivating foreign investment.

In recent years, the new corona-virus epidemic has affected the world economy, a wave of counter-globalization has emerged, the US is attempting to restrain China's economic growth through trade wars, developed countries are seeking a return of manufacturing industries, and international economic and trade rules are changing at an accelerated pace. These factors create a complex international environment that makes luring foreign investment and opening up to the outside world challenging. The

Central Economic Work Conference at the end of 2018 stated: "Promote a shift from openness based on the flow of goods and factors to openness based on rules and other institutions." In this context, how to encourage foreign investment and expand openness to the outside world while protecting national security industries from foreign control has become an important proposition of the times. In order to successfully promote the high-quality, secure, and orderly integration of China and the global economy, institutional openness is the execution of systematic institutional innovation based on high standards of industrialized countries. Institutional openness mainly entails three new requirements: first, to speed up the convergence of domestic systems and rules with international standards or advanced norms; second, to strengthen the implementation of external opening policies and to successfully implement multilateral and bilateral economic and trade agreements reached with other countries; and third, to take a more active role in the process of developing and improving international economic. These requirements can only be met if national security is guaranteed, and therefore the Foreign Investment Law was enacted to protect foreign investment.

In conclusion, the fundamental structure and regulations of the foreign investment legal system have been established by the new Foreign Investment Law. In terms of its legislative intent and the positioning of its target audience, the Foreign Investment Law has undergone considerable changes from the "The Foreign Investment Corporate Laws". The number of provisions in the Foreign Investment Law has been greatly decreased in comparison to the Draft Foreign Investment Law released in 2015, and considerable changes have also been made to the specific content. Over the past 40 years of reform and opening up, foreign investment rules and regulations have always been developed with the goal of using foreign investment to advance economic growth and widen access to the rest of the world. China has been luring international investment for a very long time primarily through the creation of favorable policies, ignoring the security review of foreign investment, and the promotion of foreign investment legislation has played a limited role. The openness model, which depends on the flow of production factors and preferential policies, is

no longer suitable for the needs of the times as the cost of production factors grows and policy-based investment attraction problems appear. The introduction of the Foreign Investment Law is an inherent requirement for institutional openness. In terms of specific content, there are different situations. Some provisions can be implemented directly, such as no compulsory transfer of technology by administrative means; some provisions are of a guiding and bridging nature and can be implemented in accordance with the principle of consistency between domestic and foreign investment and in accordance with the provisions of relevant laws and regulations; some systems have already formulated supporting and specific provisions, such as the negative list for foreign investment access; there are also some systems, such as the complaint mechanism for foreign-invested enterprises and the information reporting system for foreign investment, need to be refined by formulating relevant supporting regulations. At the same time, foreign investment involves a variety of difficulties, including taxation, foreign currencies, labor, and liquidation and settlement. In order to prevent barriers from preventing the execution of the foreign investment law, it is also required to increase the convergence between the foreign investment law and existing laws like the company law, securities law, and bankruptcy law. In terms of national security review, in addition to the provisions of the Foreign Investment Law itself, and to complement the Foreign Investment Law, the National Development and Reform Commission and the Ministry of Commerce issued the Foreign Investment Security Review Measures on 19 December 2020 with the approval of the State Council.

Measures for the Security Review of Foreign Investment

Background of China’s Measures for the Security Review of Foreign Investment

Opening up to the outside world is a fundamental state policy of China. China has maintained an open strategy of mutual benefit and win-win circumstances since the 18th National Congress of the Communist Party of China (CPC), continuing to encourage the extension of external opening, and worked to establish a market-oriented, rule of law, and global economic environment. With the negative list of restrictions on foreign investment access reduced for four years in a row from 2017 to 2020, the national version and the pilot free trade zone version of the restrictions reduced to 33 and 30 respectively, and with a significant opening up to foreign investment in manufacturing, energy resources, infrastructure, agriculture, and finance, China's foreign policy has achieved a significant reduction in restrictions on foreign investment access.

Since 2020, the new coronavirus outbreak has had a significant influence on international cross-border investment. One of the very few large economies in the world to continue growing in foreign investment absorption is China, which has continued to use more foreign investment despite the dire circumstances. The nation actively encourages a high degree of openness to the outside world while simultaneously steadily advancing the reform of its system for managing foreign investments.

The Foreign Investment Law and its implementing regulations, which were introduced in 2019, establish the fundamental framework of China's legal regime for foreign investment in the new era. These laws and regulations formally establish the pre-entry national treatment plus negative list management system, offering a strong guarantee of the rule of law to encourage greater opening to the outside world. It is made clear that the State creates a security assessment system for foreign investment and performs security reviews on foreign investment that affects or may influence

national security under the Foreign Investment Law and its implementing regulations. The implementation of the foreign investment security review system on the ground is of great concern to foreign-invested enterprises, foreign business associations, and other interested parties. They anticipate the introduction of specific regulations on foreign investment security review so that investment decisions can be made in compliance with the law. The internationally recognized foreign investment management mechanism known as foreign investment security review plays a significant role in balancing economic interests and preserving national security.

Major nations and regions have enhanced or introduced their foreign investment security evaluation procedures in recent years. The Foreign Investment Risk Review Modernization Act was introduced in the United States, the Framework Regulation on Foreign Direct Investment was introduced in the European Union, the Foreign Investment Reform Act was introduced in Australia, the Foreign Trade and Payments Act and the Foreign Exchange and Foreign Trade Act were amended in Germany and Japan, respectively, and the National Security and Investment Act is being drafted in the United Kingdom. In light of this, the National Development and Reform Commission of the People's Republic of China and the Ministry of Commerce developed and introduced the "Measures for the Security Review of Foreign Investment" after summarizing the practice of security review of foreign investment in China since 2011. The general idea of the "Measures for the Security Review of Foreign Investment" is as follows：

1. Combine economic growth and national security.
2. Condense the review of real-world examples and gradually enhance the security audit methodology.
3. Take into account local circumstances and learn from successful global experience.
4. To lessen the additional burden on the investment made by foreign firms, make it as clear and simple to understand as feasible.

The Development Process of China's Foreign Investment Security Review System

1. The early stage of reform and opening up - 2011

Early on in the process of reform and opening up, China's legal framework was devoid, many sectors were unsupported, and numerous legal provisions were still being discovered. The "Three Foreign Investment Corporate Laws," which deal with foreign investment, are similar to company law in that they concentrate on the internal administration of foreign businesses and do not include any clauses addressing the security assessment of foreign investment.

2. 2011-2018

In 2011, the “Notice on the Establishment of Security Review System for Foreign Investment Mergers and Acquisitions of Domestic Enterprises” was issued, setting out in some detail the circumstances of foreign investment mergers and acquisitions, the scope of review, the content of the security review of mergers and acquisitions and the procedures.

On 4 March 2011, the Ministry of Commerce of the People's Republic of China promulgated the “Interim Provisions on Matters Relating to the Implementation of the Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises” (Order No. 8 of 2011 of the Ministry of Commerce), which mainly listed the circumstances under which applications for security review should be submitted to the Ministry of Commerce, the materials to be submitted and the review procedures, and was a supplement to the Circular.

On 25 August 2011, the Ministry of Commerce promulgated the “Regulations on the Implementation of the Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises” (Ministry of Commerce Decree No. 53 of 2011), which further refined the specific process and period while adding the content of mandatory declaration.

On 20 April 2015, the General Office of the State Council published the “Notice on the Issuance of Trial Measures for National Security Review of Foreign Investment in the Free Trade Zone”, which further expanded the scope of the security review of foreign investment by expanding from the original security review target of M&A investment to include greenfield investment. In addition, the document announced the main factors to be considered in the security review of foreign investment and the specific operational mechanism of the security review of domestic and foreign investment in the Free Trade Zone.

3. 2018 - Today (The formal establishment of a security review mechanism for foreign investment)

In 2015, the Standing Committee of the 12th National People's Congress voted to adopt the "National Security Law", which, as China's first basic law in the field of national security, gates the important position of economic security in national security.

The foreign investment security review mechanism must be in line with China's foreign investment policy. China has implemented a negative list policy, which summarizes the experience accumulated since the reform and opening up, in order to improve the high-level process of opening up to the outside world. The "Three Foreign Investment Corporate Laws" were officially abolished in 2018 when the Second Session of the 13th National People's Congress (NPC) passed the “Foreign Investment Law”. There was a formal repeal of the "Three Foreign Investment Corporate Laws". Although Article 34 of the Foreign Investment Law expressly calls for a security review system for foreign investments, its general and abstract nature leaves opportunity for improvement.

With the approval of the State Council of China, the National Development and Reform Commission of the People's Republic of China and the Ministry of Commerce issued the Measures on Security Review of Foreign Investment on 19 December 2020. Based on the Foreign Investment Law and the National Security Law

as the main legal basis, the Measures on Security Review of Foreign Investment summarize the practical experience of security review work and draw on the excellent experience of countries with more developed foreign investment security reviews, and update the content of the foreign investment security review system, including the review body, scope of review, review procedures, supervision and implementation of review decisions and handling of violations. It also emphasizes how crucial it is to preserve foreign investors' enthusiasm, legal rights, and interests.

The foreign investment security review mechanism in China is in its infancy and lacks sufficient expertise. Security review agencies will struggle to undertake an exhaustive security examination of foreign investment under the pressure of large-scale foreign investment entering the Chinese market. China could take more cues from nations like the US and EU whose security assessment processes are more developed than its own, which is still in the exploratory phase. There are many problems with both the physical norms and the procedural settings.

Main Contents of Measures for the Security Review of Foreign Investment

The Measures for the Security Review of Foreign Investment consist of 23 articles, which mainly provide for the following: First, the security review body for foreign investment. Second, the scope of security review for foreign investment. Third, the declaration mechanism for security review of foreign investment. Fourth, the procedures and time limits for security review of foreign investment. Fifth is the implementation of the foreign investment security review decision. Sixth is the disciplinary action for non-compliance.

1. Types of investments applicable

In 2011, China began to establish a security review system for foreign investors' mergers and acquisitions of domestic enterprises, with the main regulatory basis being the "Circular of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic

Enterprises". The national security review system was further developed with the promulgation of the "Notice of the General Office of the State Council on the Issuance of the Trial Measures on National Security Review of Foreign Investment in Free Trade Zones". The adoption of foreign investment security review measures that are compatible with the negative list management model has been piloted in the free trade zone since 2015. The National Security Review System was subject to very comprehensive restrictions in the "Foreign Investment Law (Draft)" issued in 2015, but the "Foreign Investment Law" (Draft) announced in 2018 and beginning on January 1, 2020, contains more detailed requirements. Only extremely morally sound rules regarding the national security assessment mechanism are included in the "Foreign Investment Law" that has been put into effect.

The types of transactions subject to security review as set out in the "Notice of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises" are different from those set out in the "Notice of the General Office of the State Council on the Issuance of the Trial Measures on National Security Review of Foreign Investments in Free Trade Zones". The types of investments subject to security review in the Free Trade Zones include all types of foreign investments (including greenfield investments), while the types of investments subject to security review in non-Free Trade Zones only include cases of foreign mergers and acquisitions of domestic enterprises.

The Measures on Security Review of Foreign Investment draws on the provisions of the "Notice of the General Office of the State Council on the Issuance of the Trial Measures on National Security Review of Foreign Investment in Free Trade Zones", which clarifies that the types of foreign investment in China subject to security review include:

(1)foreign investors investing in new projects or establishing enterprises in the territory, either alone or jointly with other investors;

(2)foreign investors acquiring equity interests or assets in domestic enterprises through mergers and acquisitions;

(3)foreign investors investing in the territory through other means. In other words, all types of investment may involve national security review, including: new wholly foreign-owned enterprises, new sino-foreign joint ventures, foreign-owned mergers and acquisitions, VIE structures, proxy holdings, etc.

2. Foreign Investment Security Review Body

The Notice of the General Office of the State Council on the Establishment of the Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises established the Inter-Ministerial Joint Conference on Security Review of Foreign Investors' Mergers and Acquisitions of Domestic Enterprises (hereinafter referred to as the "Joint Conference") system, and the Measures on Security Review of Foreign Investment changed the title of the review body, i.e., the establishment of the Working Mechanism for Security Review of Foreign Investment. The Working Mechanism for the Review, with its office located at the National Development and Reform Commission (NDRC), is led by the NDRC and the Ministry of Commerce and undertakes the day-to-day work of the foreign investment security review (Note: according to the NDRC's Notice No. 4 of 2019, 1 the declaration of foreign investment security review was changed from the Ministry of Commerce to be received by the Government Service Hall of the NDRC on 30 April 2019).

The National Development and Reform Commission and the Ministry of Commerce are in charge of the Joint Conference which is held under the direction of the State Council, in accordance with the Measures on Security Review of Foreign Investment, to conduct security reviews of mergers and acquisitions in collaboration with the relevant departments according to the industries and fields involved in foreign investment mergers and acquisitions. The Joint Conference was disbanded by the Foreign Investment Security Review Measures, however the Working Mechanism Office is now in charge of security review tasks. As the Working Mechanism Office is led by the National Development and Reform Commission and the Ministry of

Commerce, rather than the two aforementioned ministries, under the usual working procedures of Chinese government departments, it is likely that the relevant sectoral ministries will still be consulted or even submitted to the State Council for a final decision when conducting a national security review of a specific transaction. The exact operation of this procedure remains to be further clarified in practice.

3. Scope of foreign investment security review

According to the Measures for Security Review of Foreign Investment, security review is required for foreign investment within the following scope.

(1)Investment in the military industry, military industrial support and other areas related to national defense security, as well as investment in the territory surrounding military facilities and military industrial facilities.

(2)Investment in important agricultural products, important energy and resources, major equipment manufacturing, important infrastructure, important transportation services, important cultural products and services, important information technology and internet products and services, important financial services, key technologies and other important areas that are related to national security and obtaining effective control of the invested enterprise.

The Foreign Investment Law of 2020 establishes a new foreign investment management system with a negative list to manage market access and a foreign investment information reporting system and a national security review system. This is an important institutional construction for China to promote foreign investment and expand openness, while managing foreign investment in a rational and scientific manner and safeguarding national security.

In recent years, China has continued to promote greater openness to the outside world and reduce restrictions on foreign investment access. For example, in the cultural sector, the ban on investment in Internet access service business establishments has

been lifted, the restriction that cinemas and performance brokerages must be controlled by Chinese parties has been removed, and foreign enterprises are allowed to engage in the production and sale of gaming equipment, etc. In the financial sector, restrictions on foreign shareholding in banks, securities, funds, futures and life insurance have been lifted, among others. While China continues to reduce its market access restrictions, countries such as the United States and the European Union are constantly updating their national security reviews (or foreign investment review systems). The Measures on Security Review of Foreign Investment may appear to be a reciprocal measure to the external environment's security review against Chinese companies in terms of the timing of its promulgation, but in reality, this provision was introduced by the Chinese government since the Notice of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises, through the General Office of the State Council on the Issuance of Trial Measures on National Security Review of Foreign Investment in Free Trade Zones, the Foreign Investment Law (Draft for Public Comments) of 2015, and the Foreign Investment Law of 2020 to the current steady pace and clear steps of institutional development.

For example, Article 59 of the National Security Law enacted in 2015 provides that "the State shall establish a system and mechanism for national security review and supervision, and conduct national security review of foreign investment, specific items and key technologies, network information technology products and services, construction projects involving national security matters, and other major matters and activities that affect or may affect national security, so as to effectively prevent and resolve national security risks."

The necessity of conducting national security reviews of network information technology products and services is mentioned here (which should logically include situations where foreign investment involves such products and services). "Foreign investors acquiring bank card clearing institutions shall implement the administrative provisions on the security review of foreign investment in domestic infrastructure,"

according to Article 26 of the Measures for the Administration of Bank Card Clearing Institutions, which were published in 2016.

With regard to the determination of "obtaining effective control of the invested enterprise", the following circumstances are covered.

(1) The foreign investor holds more than 50% of the equity interest in the enterprise.
(2) Where the foreign investor holds less than 50% of the equity interest in the enterprise, but the voting rights held by the foreign investor are capable of significantly influencing the resolutions of the board of directors, shareholders' meeting or general meeting of shareholders.
(3) Other circumstances that result in the foreign investor being able to exercise significant influence on the business decisions, personnel, finance and technology of the enterprise.

4. Procedures and timelines for security review

Regarding the initiation of security review, there is no substantial difference between the Measures on Security Review of Foreign Investment and the Circular of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises, which mainly includes two initiation methods, namely, the parties concerned taking the initiative to make a declaration, and a third party proposing a security review.

According to the provisions of the Measures for Security Review of Foreign Investment, foreign investors or relevant parties within the country shall take the initiative to declare to the working mechanism office before implementing the investment for foreign investments that fall within the scope of security review; for cases where the parties concerned do not take the initiative to declare, relevant authorities, enterprises, social groups and the public may propose to the working mechanism office to conduct a security review if they believe that the foreign investment affects or may affect national security.

Compared to the Circular of the General Office of the State Council on the Establishment of Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises, the most significant change in the Security Review Measures for Foreign Investment is the simplification and clarification of the procedures and time limits for security review. Firstly, the security review stage is simplified and the cases that need to be reported to the State Council are deleted. The aforementioned review procedures are basically consistent with the Circular of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises, except for the deletion of the requirement to report to the State Council in the Circular of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises, which provides for three review stages: preliminary review, general review and special review. The Joint Conference, for instance, "must report to the State Council for a decision if, after the special review procedure is commenced, there are significant discrepancies in the security evaluation of the M&A transaction by the Joint Conference."

Secondly, the timelines for the various stages of the security clearance process are clarified and simplified. Specifically:

(1) At the preliminary review stage, a decision on whether to initiate a security review is made within 15 working days from the date of receipt of materials that meet the declaration requirements.

(2) At the general review stage, a decision to pass the review or proceed to the next stage of review within 30 working days from the date of initiation of the review.

(3) The third stage is a special review lasting 60 working days. This stage is not a compulsory procedure and only foreign investments that do not pass the general review will proceed to the special review, and the time limit for the special review may be extended under exceptional circumstances.

The Measures on Security Review of Foreign Investment directly clarify the specific time limits for each review stage and delete the provisions in the Notice of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises regarding the internal workflow of the security review and its time limits.

For example, "For M&A transactions falling within the scope of the security review, the Ministry of Commerce shall, within five working days, submit them to the Joint Conference for review" and "Upon receipt of an application for M&A transaction submitted by the Ministry of Commerce for security review, the Joint Conference shall, within five working days, seek the views of the relevant departments in writing. Upon receipt of the written request for comments, the relevant departments shall submit their written comments within 20 working days" and "If the relevant departments consider that the M&A transaction may have an impact on national security, the Joint Conference shall initiate special review procedures within five working days after receiving the written comments".

It should be noted that, in accordance with the Measures for Security Review of Foreign Investment, the Working Mechanism Office may request the person in question to provide additional relevant materials and inquire about the situation during the security review of the declared foreign investment. The time for the additional materials does not count towards the review period. The law also lacks a clear deadline for the Working Mechanism Office to evaluate whether the stated materials comply with the declaration's requirements during the phase prior to the preliminary assessment.

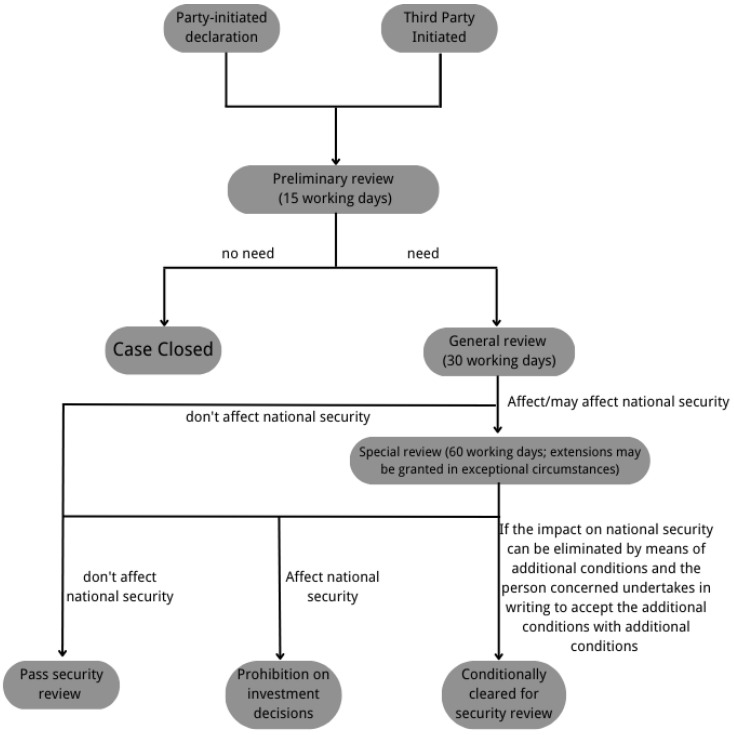

Figure 1 Foreign Investment Security Review Procedures

5. Types of security review decisions and supervision of their implementation

The Office of the Working Mechanism may decide on the following review decisions for foreign investments that need security review based on the review results.

(1)A decision to pass the security review if the declared foreign investment does not affect national security.

(2)If the declared foreign investment affects national security, a decision to prohibit the investment is made.

(3)If the impact on national security can be eliminated through additional conditions

and the person concerned undertakes in writing to accept the additional conditions, a decision to pass the security review with conditions may be made and the additional conditions shall be set out in the decision.

For those that pass the security review without conditions, the investment may be implemented; for those that pass the review with conditions, the investment shall be implemented in accordance with the additional conditions; for those that are prohibited, the investment shall not be implemented; however, if it has already been implemented, it shall dispose of the equity or assets and take other necessary measures to restore the state to that before the implementation of the investment and eliminate the additional conditions.

The Measures on Security Review of Foreign Investment also include provisions for monitoring the execution of security review judgments. The Office of the Working Mechanism, in collaboration with the pertinent departments and local governments, shall oversee the implementation of the security review decision on foreign investment. For foreign investment that has passed the security review with conditions, the implementation of the additional conditions may be verified by requesting pertinent supporting documentation, on-site inspections, and other means.

6. Consequences of violating the Measures on Security Review of Foreign Investment

While the Circular of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises does not provide for provisions on legal liability, the Measures on Security Review of Foreign Investment clearly stipulates this. According to the Measures on Security Review of Foreign Investment, for violations like refusal to declare, falsification, and failure to implement additional conditions, the person concerned may be required to sell the equity or assets within a specific amount of time, and his or her adverse credit record may also be added to the relevant national credit information system and joint disciplinary actions may be carried out in accordance with the relevant national regulations. The national credit information

sharing platform "Credit China" website and the enterprise credit information public display system are two examples of China's relevant credit information systems. Joint disciplinary actions may also include administrative, market, industry, and social restraints, as well as sanctions for trust violations.

Advantages of Security Review Measures for Foreign Investment

The review process is more rational and concise. Instead of being passed back and forth between the Ministry of Commerce and the Joint Conference, the review process and timelines are set in accordance with the principles of necessity and reasonableness, and are organized directly by the Working Mechanism Office from start to finish. Specifically, according to the risk profile of the declared projects, the review is divided into three stages, which are carried out in a hierarchical and progressive manner. The first stage is the preliminary review, in which the Working Mechanism Office shall, within 15 working days from the date of receipt of the declaration materials that meet the requirements, make a decision on whether a security review is required and notify the person concerned in writing; the second stage is the general review, in which the Working Mechanism Office shall, if it decides to conduct a security review of the declared foreign investment, make a decision to pass the review or initiate further review within 30 working days from the date of the decision. The third stage is the special review. If the Office of the Working Mechanism decides to initiate a special review of the declared foreign investment, it will make a decision to pass the review, or a decision to pass the review with conditions, or a decision to prohibit the investment, and notify the person concerned in writing. As can be observed, there are clear and suitable time restrictions specified, and the succession and advancement of reviews is procedurally visible and clear while remaining condensed and effective.

The Influence of EU FDI Security Review System on China's Legal System

The US was the first country to establish a foreign investment security review system, but for a long time there were not many followers. The EU has always had a liberal approach to foreign investment, but with the intensification of global industrial competition, changing patterns of international capital flows and growing investment from emerging economies into Europe in recent years, the EU's FDI policy has begun to change from lax to tight under both internal and external pressure. After several rounds of consultations, the EU finally adopted the FDI Review Framework Regulation on 10 April 2019, which establishes a "dual-track" foreign investment security review system at the EU level, based on the review by member states and supplemented by the review by the European Commission. Since then, the EU has published documents such as the "Guidance to Member States on FDI and the Free Movement of Third Country Capital and the Protection of European Strategic Assets" and the "White Paper on Foreign Subsidies", all of which demonstrate that the EU's foreign investment regulatory regime is being further strengthened. In fact, apart from the EU, the foreign investment security review systems in Australia, Canada and Japan are also being further tightened. The international foreign investment security review system is showing a trend of continuous improvement and tightening of foreign investment regulation, and Chinese enterprises are experiencing unprecedented setbacks and difficulties in investing overseas.

China has started to value security screening on foreign investments in response to this global environment. However, China's system for reviewing foreign investment security still has a great deal of room for improvement in terms of legislation and actual experience, as well as in terms of its level of sophistication and perfection. Chinese overseas investments will undoubtedly be negatively impacted by the changes to the EU's foreign investment review system, but some key components of the system, such as the security review's initiation and consideration phases, judicial remedies, and procedural norms, serve as significant benchmarks for China's foreign investment security review system.

The EU has consistently been a vocal supporter of trade and investment liberalization, and even though it has recently tightened its foreign investment security regulations, the fundamental principle of ensuring the "liberalization of capital flows," which is regarded as "constitutional" under its fundamental laws, won't be altered. This is in line with China's view of the new era of international economic development. This is consistent with China's philosophy for the new era of international economic development.

China's national security review currently aims to protect national security while maximizing investment openness rather than limiting international investment. In order to build and improve China's security review system for foreign investment, the EU security review system, which is based on the experience of the existing legislation and jurisprudence of the member states, offers helpful inspiration. Additionally, Chinese legislation can critically absorb its experience in order to promote the high-quality development of foreign investment in China.

The EU security review system, which was recently established as a new foreign investment security review system, is more lenient and flexible than the US foreign investment security review system because it incorporates both theoretical and practical knowledge from previous foreign investment security review laws in EU member states. This makes it a better model for China's extraterritorial reference since it is also more adaptable than the US foreign investment security review system and more in line with China's fundamental national policy of furthering its expansion and opening up to the outside world in the new era.

The Foreign Investment Law and the Foreign Investment Security Review Measures serve as the foundation of China's current foreign investment security review system, which is composed of two parts: domestic law; and international law, which is supported by bilateral or regional investment agreements that China has signed or acceded to.

In terms of China's foreign investment security review system, it is still at the stage of institutional exploration with few practical cases. the Foreign Investment Law, which came into effect in January 2020, provides for China to adopt a pre-entry national treatment plus negative list system to regulate foreign investment entry and investment activities, while establishing a new era of foreign investment in China based on reducing approval matters, simplifying approval procedures and increasing liberalization and facilitation security review system in order to safeguard the core interests of national economic security. Although China has established a foreign investment security review system in the Foreign Investment Law, the basic law regulating foreign investment activities, and issued the Measures on Foreign Investment Security Review almost a year after the official implementation of the law, the Foreign Investment Law contains only one or two principled The Measures on Security Review of Foreign Investment, on the other hand, although it provides the basic content of the security review of foreign investment in China on the basis of a summary of China's previous legislative experience, and has a preliminary security review system to regulate various forms of foreign investment nationwide, there are only 20 legal provisions with substantive content, which are simple and crude in terms of structure and content. However, there are only 20 articles with substantive content, which are relatively simple and rough in structure and content. China's foreign investment security review system has obvious shortcomings in terms of the scope of review, review standards, review initiation and judicial remedies, such as the lack of clarity in the scope of review, uncertainty in the review standards, lack of reasonable review initiation and lack of remedies and supervision mechanisms. Therefore, based on full consideration of China's national conditions and development goals, it is possible to improve and perfect China's foreign investment security review system by drawing on the EU's institutional experience, clarifying the scope of review, review standards or elements to be considered in the review, and setting up remedial channels and supervisory mechanisms for foreign investment security review. Specifically, the foreign investment security review system will be improved and perfected mainly from two aspects: substantive and procedural.

1. In the area of substantive regulation.

(1) Clarify the scope and criteria of the review. Article 35 of China's Foreign Investment Law provides that the State shall conduct security reviews of foreign investments that affect or may affect national security. According to the EU Regulation, the scope of the EU security review is foreign investment that may have a negative impact on the "security and public order" of the EU or its member states. Although the scope of both security reviews is abstract, the EU Regulation then clearly lists a number of considerations that may affect "security or public order", which in effect specifies the abstract concept of "security and public order" and provides a clear definition of "security and public order" for all EU countries. Although China issued the Measures on Security Review of Foreign Investment in December 2020, which stipulates that if a party invests in areas related to national defense security such as military industry, important agricultural products, important energy and resources, major equipment manufacturing, important infrastructure, important transport services, important information technology and internet products and services, important financial services, key technologies and other important areas related to national security, it should take the initiative to make a declaration before implementing the investment. To a certain extent, this provision has remedied the lack of precision in the scope of China's foreign investment security review. However, there is no clear definition of what constitutes "important" agricultural products, energy resources and infrastructure, and what constitutes "significant" equipment manufacturing and "key" technologies. In addition, neither the Foreign Investment Law nor the Foreign Investment Security Review Measures contain any principled, let alone specific, provisions on the security review criteria for foreign investment. A review system without review standards does not provide clear guidelines for either investors or review bodies, and does not result in so-called "expected norms". For foreign investors, they would face an unpredictable scope of review, while for Chinese review bodies, this could lead to excessive discretion, inconsistent application, or omission of review of investments that pose a threat to national security. Therefore, in terms of security review criteria, China may refer to the Regulations for Screening FDI into the EU, which does not specify security

review criteria, but rather identifies key factors that may affect China's "security or public order" in a non-exhaustive manner, providing clearer guidelines to review bodies and ensuring uniformity in the application of the law.

(2) China's Foreign Investment Law does not provide for a threshold for activating the security review of foreign investment, but the threshold for activation is set out in the Measures for Security Review of Foreign Investment, i.e. with the exception of investments in areas related to national defense security such as those involving military industry, investments in other areas as provided for in Article 4 are only required if they acquire effective control of the invested enterprise, for example, if the foreign investor holds more than 50% of the equity interest in the invested enterprise. The parties concerned are only required to make a declaration to our examination authorities. The EU Regulation does not even provide a threshold for the security review of foreign investments; rather, it assumes that security reviews of foreign investments may be necessary if they have a negative effect on the "security and public order" of the EU. This "zero threshold" regime applies to foreign investors, meaning that all investments, regardless of size and regardless of the target company's shareholding, are covered by EU Regulation. In this situation, the final line of defense for national economic security is the security review of foreign investment. As a result, China's foreign investment security review at this point should be as cautious and cautious as possible, and it is advised to adopt a "zero threshold" system design, so long as the foreign investment in China, regardless of the percentage of shareholding, whether it is a new investment or an M&A investment, should be within the scope of China's foreign investment security review.

(3) Establishment of a remedy mechanism. In the absence of a remedy mechanism, the rights and interests of investors will be greatly undermined and the incentive of foreign investors will be seriously undermined if the review body abuses its powers and improperly exercises its review rights, or if the review result is unfair and unreasonable to investors. For this reason, the EU Regulation clearly stipulates that

the government departments of member states should allow investors to seek judicial review and remedy for investment review decisions made by non-EU investors. Usually the review made by the foreign investment review department of each country's government on foreign investment is a specific administrative act in legal nature, and the parties to the investment transaction have the right to file a lawsuit for suspension or revocation to the judicial authorities. The UK, France and Germany all provide that parties who disagree with a foreign investment review decision, such as a ban on trading or the imposition of restrictive conditions, can seek remedies through litigation; where EU law has been breached, litigation can also be brought before the Court of Justice of the European Union. This is an important difference in the security review remedy systems of the major EU countries compared to the US, Canada, Australia and other countries. Article 35 of China's Foreign Investment Law provides that the security review decision made by the review body in accordance with the law shall be final. This indicates that China's security review decisions are judicially immune, i.e. the foreign investor under review is not allowed to initiate administrative review and administrative litigation against the investment security review decision. The inability to seek remedies against the administrative decisions of the reviewing authorities results in a lack of protection mechanisms for investors, which is not conducive to the expansion of opening up and the promotion of foreign investment in China. Granting parties the right to legal remedy is a proper part of the spirit of the rule of law. China's Foreign Investment Law has made a solemn commitment to the public to implement a pre-entry national treatment management system for foreign investment. Without an effective remedy mechanism as a guarantee, the host country's foreign investment access commitment will become an unenforceable blank cheque, while a complete remedy system will help to achieve the institutional functions of depoliticization, access to justice, dispute resolution, and effective resolution of disputes related to the host country's foreign investment access measures. Therefore, China's foreign investment security review system should ensure a more standardized and transparent foreign investment security review system under the premise of safeguarding national security, allowing foreign investors under review to protect

their legitimate rights and interests through a reasonable redress mechanism. In this regard, the Foreign Investment Law and the Foreign Investment Security Review Measures should be supplemented with relevant institutional content in order to truly realize the value function of the foreign investment security review system. Of course, the establishment of a relief mechanism should not only give investors the right to legal remedy in substance, but also make corresponding provisions in procedure to ensure the exercise of the parties' rights.

2. In terms of procedural norms

(1) Learn about the principles of proportionality and procedural justice in EU law. Traditionally, the EU has regarded freedom of capital movement as an important cornerstone of its economic life. As already mentioned, the Treaty on the Functioning of the European Union prohibits member states from imposing any restrictions on the free movement of capital; at the same time, however, the Treaty provides that the above-mentioned provisions do not prevent member states from taking exceptional measures on grounds of national security, as confirmed by the jurisprudence of the European Court of Justice. However, the European Court of Justice has taken a very cautious approach to restricting the freedom of movement of capital on the grounds of security and public order, and only where there is a real and sufficient "serious threat" to the essential interests of society may a Member State invoke "public security" or "security and public order". Secondly, these restrictions must comply with the principle of proportionality. The principle of proportionality is derived from German administrative law, which states that, in addition to the legal basis for the exercise of administrative power, the administrative body must choose the means that least infringes on the rights of individuals. The principle of proportionality was originally intended to solve the problem of abuse of discretion by the legislature (in the case of abstract legislative acts), the executive (in the case of abstract or concrete administrative acts) or the judiciary in the exercise of powers conferred by law. Today, numerous national and organizational bodies, including the European Court of Justice, use the principle as a

criterion for reviewing the legality of restrictions on fundamental rights. At the level of EU law, the principle of proportionality first became part of EU law by way of jurisprudence. At present, the principle of proportionality is explicitly set out in Article 5(1) and (4) of the Treaty on European Union. The principle of proportionality "requires that there must be a reasonable, balanced and proportionate relationship between the restrictions imposed by the State on fundamental rights and the ends thereby achieved, and that there must be no undue or excessive restrictions on fundamental rights". The classic formulation of the proportionality principle by the European Court of Justice in foreign investment cases is that the restrictions imposed by the host state on foreign investment are "necessary" to achieve national security objectives. This formulation of the ECJ is very close to that used by the WTO Dispute Settlement Body in a number of cases involving the general exception to Article 20 of the GATT, indicating a consistent and strict interpretation of the 'exception' to the fundamental rights obligation by both bodies. The EU will not support a member state's decision if the measures taken by its government do not guarantee national security, nor will it support a member state's decision if the measures taken by the member state are not reasonable and do not comply with the principle of proportionality.

As a member of the WTO, China has to comply with the basic principles and obligations stipulated in the WTO. At the same time, in the context of the new era, China's Foreign Investment Law clearly states in its General Provisions that it will implement a high level of investment liberalization and facilitation policy and create a fair competitive market environment, which means that China's administrative supervision of foreign investment must be of a high level. Therefore, the restrictions imposed by China's review bodies on the entry of foreign investment and its activities for national security reasons should be based on the EU treaties and the WTO general exceptions, and need to comply with the principle of proportionality, i.e. the restrictions must be necessary, reasonable, proportionate and "necessary" to achieve national security objectives. A high level of foreign investment regulation must also be procedurally fair and efficient. Article 3 of the EU Regulation sets out procedural

obligations for EU Member States to specify detailed review procedures in their national security review systems, including time limits, transparency, non-discrimination, etc. One of the core elements of the China-EU Comprehensive Agreement on Investment (CAI)[24] concluded at the end of 2020 is also to ensure transparency and procedural fairness in administrative regulation and administrative measures, as well as to guarantee the right to judicial review. The CAI also provides for the transparency and procedural fairness of administrative regulations and measures, as well as the right to judicial review. Any regulatory measure taken by a government should be subject to due process, as a matter of governmental conduct and as a necessary requirement of the rule of law. In accordance with the principles of procedural justice, any power must be exercised impartially and any decision against a person must be heard. As an external restraint to prevent the government from acting arbitrarily, procedural justice plays an important role in regulating the government's conduct and protecting the rights of investors, and can also provide a legal basis for the government to act improperly and for investors to seek redress, so procedural justice should be one of the principles that cannot be overridden in security reviews. Generally speaking, the legality of the review process, including the initiation, hearing and decision making process, should be conducted in accordance with the law, transparent and comply with the statutory time limit, which is an important embodiment of procedural justice. For example, Article 9 of China's Security Review Measures stipulates that special review procedures should generally be completed within 60 working days; in exceptional circumstances, the review period may be extended. There is no provision for the period that can be extended in exceptional circumstances, which is a procedural flaw. The EU and its member states' security review systems should be used as a reference in this regard, and the review period here should be made clearer, or at least set a maximum time limit that can be

[24] President Xi Jinping held a video meeting with German Chancellor Angela Merkel, French President Emmanuel Macron, European Council President Michel and European Commission President Ursula von der Leyen in Beijing on the evening of 30 December 2020. The Chinese and European leaders jointly announced the completion of the China-EU investment agreement negotiations as scheduled.
After 7 years and 35 rounds of negotiations, the China-EU investment agreement was finally signed. People from all walks of life in China and abroad believe that the China-EU investment agreement will not only benefit both China and Europe, but will also strongly boost the world economic recovery in the post-epidemic period, promote global trade and investment liberalization and facilitation, and make an important contribution to building an open world economy.
But only on 20 May 2022, the EU Parliament voted to suspend the agreement.

extended, in order to ensure certainty in our security review statute of limitations. In addition, due process requires the government to disclose and justify its government actions within the statutory limits and to hold hearings in due course. The administrative counterpart has the right to be informed of the relevant information, to understand the rationale for the government's administrative decision, to hire a lawyer, and to rebut and defend it, which is what due process should be. However, China's A&E Measures lack content in this regard. Therefore, relevant provisions should be added to actively safeguard and guarantee the due process rights belonging to foreign investors.

(2) Establishment of a supervisory procedure. The exercise of any power should be subject to necessary supervision. When conducting security reviews, China's review bodies should disclose as much information as possible, with the exception of information that is required to be kept confidential by law, and add a hearing procedure for foreign investment security reviews. On the one hand, this can protect the legitimate rights and interests of foreign investors and enable them to supervise the administrative authorities; on the other hand, it can also protect the public's right to know and realize the right to supervision and advice given to all sectors of society and the public by the Security Review Measures. At the same time, the annual reporting system set up in the EU Regulation, whereby the European Commission must submit an annual report on the implementation of the EU Regulation to the European Council and the European Parliament, can be used as a reference, and China's foreign investment security review body should report to the highest authority in China, the National People's Congress (NPC), and its Standing Committee, on the previous year's security review. It should report to the National People's Congress (NPC), the highest authority in China, and its Standing Committee on the work of the foreign investment security review in the previous year, and categorise the distribution of cases reviewed by industry, the key issues of concern to foreign investors, and the reasons why the review was not passed or passed with conditions, so as to be subject to the NPC's questioning and supervision, and to ensure that the exercise of power is subject to the necessary constraints, and to maintain the scientific

and impartial nature of the foreign investment security review.

China's Foreign Investment Security Review Measures in practice : Case study

Acquisition of ZHONGBAI GROUP by YONGHUI SUPERSTORES was rejected by the Chinese government according to the security review measures

ZHONGBAI HOLDING GROUP CO., LTD (ZHONGBAI GROUP), a retail enterprise controlled by WUSHANG GROUP established by Wuhan State-owned Assets Supervision and Administration Commission, with over 2,000 retail shops. YONGHUI SUPERSTORES is a supermarket chain headquartered in Fuzhou, Fujian Province and is now a listed company. In 2014, Dairy Farm International Holdings Ltd, which is owned by Jardine Matheson Holdings Limited with a British background, took a stake in YONGHUI SUPERSTORES. As of 2019, Dairy Farm International Holdings Ltd is the largest shareholder of YONGHUI SUPERSTORES, with a 19.99% stake (increasing to 20.1% in 2020). In addition to YONGHUI SUPERSTORES, Dairy Farm International Holdings Ltd also holds retail operations in Hong Kong, Taiwan, and Southeast Asia, including Mannings, Wellcome and 7-11 convenience stores. It's important to remember that Jardine Matheson Holdings Limited, which indirectly owns a controlling interest in YONGHUI SUPERSTORES, was established in 1886 by a British national with its headquarters in Hong Kong (its registered office has since been transferred to Bermuda, a British overseas territory), and that it was a significant opium smuggler into China in the late Qing Dynasty. The YONGHUI SUPERSTORES began its activities in eastern China and did not expand into central China. In contrast, one of the largest retail chains in central China is the ZHONGBAI GROUP, which has stores like Zhongbai Supermarket. Since 2013, YONGHUI SUPERSTORES has increased its stake ownership in ZHONGBAI GROUP in order to enter the Central China market. By 2017, YONGHUI SUPERSTORES became the second largest shareholder of ZHONGBAI GROUP with a 25% shareholding. While YONGHUI SUPERSTORES continued to increase

its holdings in WUSHANG GROUP, a subsidiary of the Wuhan State-owned Assets Supervision and Administration Commission, also continued to increase its shareholding in ZHONGBAI GROUP, maintaining its position as the largest shareholder (29.86% as of the date of this offer). In December 2019, YONGHUI SUPERSTORES made an offer to ZHONGBAI GROUP to increase its shareholding to 40%, surpassing the state-owned WUSHANG GROUP and becoming the largest shareholder and de facto controller.

The State Administration of Market Supervision and Administration released the Decision on Non-Prohibition of Anti-Monopoly Review of Operator Concentration on August 20, 2019, following the completion of an anti-monopoly review, approving this round of tender offer. The National Development and Reform Commission asked YONGHUI SUPERSTORES to submit an application form for the foreign investment security review and additional filings on August 21. On November 11, the The National Development and Reform Commission issued a Notice of Special Review to start a foreign investment security review for this round of tender offers. Following the security evaluation, YONGHUI SUPERSTORES canceled its offer to purchase plan on December 16 while keeping its 29.86% stake in ZHONGBAI GROUP and stating its support for Wuhan State Capital as the company's largest stakeholder. Since the Ministry of Commerce was replaced as the primary department for foreign investment security application reviews by the National Development and Reform Commission, this case is the first publicly disclosed M&A case including a national security review.[25]

Case Summary and Analysis

The current round of tender offers looks at first glance like a private company in Fuzhou (YONGHUI SUPERSTORES) increasing its stake in a state-owned holding company in Wuhan (ZHONGBAI GROUP). However, the actual controller of YONGHUI SUPERSTORES is a foreign company (Dairy Farm International

[25] See Website: https://baijiahao.baidu.com/s?id=1653144320799746331&wfr=spider&for=pc

Holdings Ltd). Behind this foreign company is a much larger foreign capital (Jardine Matheson Holdings Limited), which in turn is effectively controlled. The shareholding structure of businesses becomes more complex as globalization progresses and China's involvement in the international economy grows. By investing in private Chinese businesses, some foreign capital has established a direct connection to China's market economy. As a result, in order to assess how foreign investment may affect national security, it is first important to understand the investor's shareholding structure and financial history. The "general industry" is not a door that is always open. Retail is not one of the industries listed in the “Notice of the General Office of the State Council on the Establishment of a Security Review System for Foreign Investors' Mergers and Acquisitions of Domestic Enterprises” as needing a security review of foreign investment, but it is the industry for which the offer is intended. However, China has tightened regulations on the retail sector in recent years, and as a "general industry," the retail sector is now under scrutiny for foreign investment security. There is no "white list" of industries for foreign investment security review as a result. The relevant authorities have the right to initiate security reviews whenever there is a potential threat to national security.

In this instance, the foreign investor indirectly controlled the Chinese enterprise through the Chinese enterprise that it controlled. Shares owned by the foreign investor as well as other shares with which the foreign investor is "working in concert" might be used to gain foreign control over a Chinese company. The foreign investor's pursuit of effective control was a significant factor in the tender offer's failure. If the buyout is successful, YONGHUI SUPERSTORES might control more than 50% of the shares, gaining complete control of the ZHONGBAI GROUP and having a huge impact on the Central Chinese retail sector since YONGHUI SUPERSTORES already holds a direct 40% of the shares.

Although the criteria for determining a "foreign investor" under China's Foreign Investment Law and the Measures for the Security Review of Foreign Investment are unclear at present, there are two types of criteria for determining a "foreign investor"

under the Foreign Investment Law and bilateral investment agreements signed between China and other countries in recent years. However, the Foreign Investment Law and recent bilateral investment agreements between China and other nations specify two different types of criteria for identifying "foreign investors" in China: first, the nationality criterion for foreign natural person investors, and second, the place of incorporation criterion for foreign enterprise investors. This is in accordance with Article 192 of the Chinese Company Law, which adopts the place of incorporation standard for recognizing foreign corporations.

In fact, there is still considerable controversy in the academic community as to whether these two types of criteria can be directly applied in the process of determining the targets of national security screening. Some scholars believe that the adoption of the nationality criterion does not truly reflect the flow of capital and eliminate national security risks. This is because foreign natural person investors can circumvent controls by changing their nationality or residing in a country for an extended period of time. It leaves legal loopholes that do not truly reflect the purpose of their investment and may borrow the identity of their nationals to invest, but in fact represent the interests of foreign capital, causing hidden dangers and damage to national security in a Chinese country. On the other hand, if the criterion of place of incorporation is simply adopted, there is also a risk that foreign enterprises may use their capital to exercise control and make investments through enterprises whose place of incorporation is China, thus circumventing China's national security scrutiny. For investors from Hong Kong, Macao and Taiwan, previously, the Foreign Investment Law did not mention investments from Hong Kong, Macao and Taiwan because the Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan are all part of China, and investments made by capital from Hong Kong, Macao and Taiwan in the mainland region are not considered foreign investments. However, according to Article 48 of the Implementing Regulations of the Foreign Investment Law promulgated afterwards, investors from Hong Kong and Macao will refer to the Foreign Investment Law and these Regulations for investment in the China Mainland. Investors from Taiwan will

be subject to the provisions of the Law of the People's Republic of China on the Protection of Investments by Compatriots in Taiwan and its implementing regulations, and for matters not stipulated therein, reference will be made to the Foreign Investment Law and these Regulations. In addition, China will further develop the role of Hong Kong and Macao as independent customs territories and free ports, while encouraging compatriots from Hong Kong, Macao and Taiwan to invest and establish businesses in the China Mainland and creating favorable conditions for this purpose.

Conclusion

The protection and regulation of foreign investment has always been a key element of international investment law. With the rise of "embedded liberalism", international investment law has shifted from an emphasis on protecting the interests of foreign investors to a balance between protecting the interests of investors and safeguarding the domestic regulatory rights of host countries, of which the review of foreign investment is a very important part at the entry stage. National security is a broad and indefinite concept that is generally not clearly defined in national legislation, but a review of the relevant provisions of national foreign investment security review legislation shows that the "national security" referred to in the foreign investment security review system mainly refers to the host country's national defense and military security, the security of key sectors and industries of national importance and livelihood, as well as the security of national security. For the host country, foreign investment has a significant role to play in the promotion of national security. The importance of foreign investment security review has become increasingly apparent to host countries, as foreign investment promotes economic development while increasing the risk to national security.

The pursuit of legal certainty is an important objective of legislation, but it appears to be an exception in the case of national security review legislation, which is essentially a risk-based screening by the host country of foreign investment intending to enter its country at the pre-investment entry stage, and as the core element of the security review criteria is national security, the definition of the concept of national security shapes the criteria of the security review. However, screening criteria vary considerably from country to country around the world, depending on the system and level of development. Even in the same country, its security review standards are adjusted in due course due to different historical conditions and being in different historical periods. In contrast to the gradual convergence in the setting of security review procedures for foreign investment around the world, countries tend to retain

broad discretion in the formulation of their review standards. The US, for example, has never provided a clear and fixed definition of "national security" in its legislation, leaving enough room to take the initiative when it comes to safeguarding national security.

The connotation of foreign investment national security review is to authorize the relevant agencies to make a judgment on whether foreign investment is harmful to national security. It is the host country's national security review of the relevant foreign enterprises in which the country invests directly or through mergers and acquisitions in order to maintain its economic security, in order to make a decision on whether to approve or not, with the aim of maintaining national sovereignty and economic security. The outreach requires that the industries subject to control include not only traditional defense industries involving defense secrets and arms, but also those including traffic and interception devices, information security systems, the cryptography sector, etc. As practice evolves, the areas of review are expanding, with key industries, key infrastructure and critical technologies gradually becoming the focus of attention. For example, the EU Proposal for a Unified Foreign Investment Security Review Framework places particular emphasis on core infrastructure, which includes energy, transport, communications, data storage, aviation and financial infrastructure and sensitive facilities, and core technologies, which includes artificial intelligence, robotics, semiconductors, cyber security, aviation, nuclear power and technologies that can be used for both civil and military purposes. China's national security system comprises 11 areas, the most fundamental of which is political security, particularly regime security and institutional security, of which people's security is the purpose of national security. The Measures for the Security Review of Foreign Investment also stipulate the meaning of "national security" in the security review of foreign investment, clearly including military and defense related foreign investment and nine other important areas, and specifying "other important areas" as The "other important areas" is also specified as a bottom-up clause.

With the international economic ring in a downward spiral after the Covid epidemic, various countries and organizations have tightened their foreign investment policies and set up foreign investment security review systems. Taking the EU and China as examples, this article explores the development of foreign investment security review systems in the two countries (organizations) and the links between China's foreign investment security review and the EU review system. Foreign investment security review is a symbol of a country's progress in the rule of law, and although there are still some unresolved issues with each country's review system, all countries are accelerating the establishment of their foreign investment security review systems. Following the establishment of the EU's foreign investment security review system, China has accordingly developed a statutory law on foreign investment security review and has been influenced to a considerable extent by the EU's foreign investment security review.

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