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Legal Remedies for Government Intervention in Cross-border M&A: A Comparative Research Between China and the United States

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Abstract: The role of the government in cross-border M&A, as well as the intervention means and authority it adopts, have always been the focus of controversy in the practical and theoretical circles. Based on the perspective of comparative research between China and the United States, this paper, and then first analyzes the national security review systems of different countries analyzes the remedies when the government's intervention in cross-border mergers and acquisitions causes damage to private enterprises. At the same time, this paper will also analyze the existing system of government intervention in cross-border mergers and acquisitions of different countries and discuss the development trend of state intervention system in the new era based on the analysis of the TikTok case. Finally, this paper will ultimately propose suggestions for improving China's existing national security review system and further propose suggestions for improving the existing relief system based on the analysis of existing remedies. Suggestions for improving China's national security review system mainly include the formation of laws with a higher level of effectiveness, the improvement of supervision mechanisms, and the provision of remedial rights for private enterprises. The suggestions on the improvement of the remedy system mainly focus on the improvement of the host country, mainly including the power of judicial review granted to domestic judicial institutions and the improvement of the system of prior consultation agreements.

Keywords: national security reviews, legal remedies, cross-border mergers and acquisitions, government

1. Introduction

Cross-border M&A can generally be divided into three types [1]. First, horizontal cross-border mergers and acquisitions, which generally occur in the same industry, usually with the aim of expanding the share of the world market in order to grab high monopoly profits; Second, vertical cross-border mergers and acquisitions, which generally occur between the upstream and downstream supply chains of the same industry, usually in order to stabilize and expand the supply sources of raw materials or sales channels of products, so as to achieve the purpose of reducing competitors; third Hybrid cross-border mergers and acquisitions, which usually occur between two different industries, usually with the aim of enhancing the overall competitiveness of the company in the world market.

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The peculiarities of transnational commercial activities themselves determine that governments will inevitably intervene in them. However, there are often large differences between intervention regimes in different countries. Different countries often have different review subjects, review content, including remedies after government intervention. This article will briefly introduce the different censorship systems and remedies between China and the United States, and mainly compare and analyze the subject of censorship, the characteristics of the subject to review, and the explanation of key words.

Times are always evolving, and the flexibility of commercial activity itself makes the law created for it also need to be flexible. As times have changed, so has the national security review system. In general, there is a general legislative trend to tighten the foreign investment review system in various countries, gradually raising the investment threshold. On the one hand, this makes the international investment environment more difficult to predict, and on the other hand, it may also discourage private companies to engage in cross-border M&A activities. Based on case studies, this paper will specifically discuss the development trend of the security review system in the new era.

In the activities of government intervention in cross-border mergers and acquisitions, there are often a large number of situations where public power and private rights are confrontational and contradictory, and the powerful force of public power is likely to cause irreparable damage to private rights, at which time, how to improve relief measures has become an important issue. There is no doubt that it is necessary to establish efficient and complete remedies to compensate for the damage caused to private enterprises by the public power of the state in commercial activities. This paper will mainly put forward improvement suggestions for the existing remedies from four perspectives: simplifying complex operations, directing relief methods, reducing the risk of circumvention of relief procedures, and improving the effectiveness of relief procedures.

2. Comparison of U.S. and Chinese National Security System Reviews

2.1. U.S. National Security Review System

The United States is the first country to attach importance to the protection of national security in cross-border mergers and acquisitions, and it pioneered the national security review system in cross-border mergers and acquisitions, and then continuously developed and improved it, forming the now prestigious US national security review system.

2.1.1. Subject of Review

2.1.1.1. President

First, the president has investigative powers. The into cross-border mergers that may result in foreign control of entities engaged in international business activities in the United States that will have an impact on the national security of the United States President has the authority to initiate an investigation Second, the president has the power to act. The President, after investigation, has the discretion to take appropriate steps to terminate cross-border mergers and acquisitions as he deems appropriate [2].

2.1.1.2. The Committee on Foreign Investment in the United States (CFIUS)

CFIUS’s authority derives from the President’s authority to implement the following an executive order from the President Exon-Florio Amendment [2].

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2.1.2. General Attributes of Mergers and Acquisitions Subject to Review

First, the company which is accquired by a foreigner or participated by a foreigne. According to the Exon-Florio Amendment, CFIUS mergers and acquisitions should be subject to cross-border mergers and acquisitions involving or being acquired by foreigners. According to the Provisions on Mergers, Acquisitions and Receiverships by Foreigners, "foreigner" shall include both foreign natural persons and foreign entities. Second, the company which is controlled by foreign interests. "Control" in practice is more difficult to define because there are many means by which a company can be controlled in practice, and the definition of "control" in regulations is very complex. In summary, "control" generally refers to having a high degree of influence and dominance on the company's major decisions. That is, only "substantial control" needs to be achieved. For example, a foreign investor who owns 15% of the company's shares, accompanied by veto power in major corporate matters (e.g. M&A transactions) or the right to designate board seats, is also considered to have met the control standard.

2.2. China's National Security Review System

2.2.1. Subject of Review

The joint. This meeting is composed of the National Development and Reform Commission, the Ministry of Commerce and relevant departments, but does not clearly stipulate the specific division of labor among each department [3].

2.2.2. Foreign Investment Subject to Review

First, companies which affecting or likely to affect national security. However, it should be clarified that China's current legislation has not yet formed a unified and clear definition of the scope covered by "foreign investment", and the concept of "national security" in the field of foreign investment is not clearly defined in China's relevant laws and regulations. Second, Companies that may be involved in other significant matters or activities, such as the military industry and military industrial facilities, as well as in the areas surrounding military facilities and military industrial facilities [4].

3. New Development Trends in the Review of National Security Systems

With the changes in the world situation, there is a general trend of tightening the national security review system for foreign investment, and the investment threshold is gradually rising, making the future international investment environment more difficult to predict [5]. In the United States, for example the Foreign Investment Risk Review Modernization Act (FIRRMA) in 2018, the United States passed. The bill expands CFIUS's review powers, giving it the right to expedite the review of specific transactions, expanding the scope of its review of specific transaction activities, and strengthening the review of investment transactions from focused countries [6].

Take the TIKTOK case, for example. The introduction of FIRRMA in 2018 increased the scope of covered transactions in CFIUS reviews. After the introduction of FIRRMA, the acquisition of U.S. companies involving U.S. personal information changed from a voluntary application to a mandatory filing. At the same time, as FIRMMA has also added a new provision, if a transaction has been completed for more than 3 years, a member of the Committee on Foreign Investment in the United States cannot in principle initiate a review of the relevant transaction, unless the Chairman of the Committee agrees to review the completed transaction after consulting other members of the Committee. IT is these new FIRRMA provision that make it possible for the U.S. government to initiate a security review process for mergers and acquisitions that TIKTOK has already completed.

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Influenced by the United States, Japan and, Canada, Australia, the European Union other countries have also revised their national security review legislation for domestic and foreign investment. National security review regimes around the world are becoming more conservative, and this trend is less likely to change in the short term.

4. Government Interference in Remedies for Losses Caused to Private Companies

Disputes arising from the national security review system are essentially international investment disputes between foreign investors and host countries. The contradiction between the national security review system and private enterprises is essentially a contradiction between commercial private rights and state public power. Even with many restraint mechanisms, commercial and private rights, as a weak party, are still extremely vulnerable to harm by the public power of the state. Therefore, post-event relief is equally important for foreign-funded enterprises. The author divides remedies into two categories: domestic judicial remedies and private international law remedies in the host country.

4.1. International Relief Mechanisms

4.1.1. ICSID Arbitration Mechanism

International arbitration is the most common way to resolve disputes between private companies and host countries [7]. On the one hand, the arbitration institution needs to be resolved through mutual consultation between the two parties, and on the other hand, its judgment has enforceable force. It can not only protect the rights and interests of private enterprises to the greatest extent, but also resolve M&A disputes efficiently and conveniently.

4.1.2. Dispute Resolution Mechanisms under WTO Rules

The WTO dispute settlement mechanism is an important international economic organization to resolve trade-related investor measures, and it is also one of the optional methods to solve the problem of investor remedies in the national security review system [4]. The WTO's dispute settlement mechanism mainly consists of two stages: the Panel Stage and the Appellate Review stage. The Panel is composed of independent individual experts and aims to investigate whether there has been a violation of WTO regulations and issue an investigation report. If the party is not satisfied with the results of the expert investigation panel, he or she can appeal to the WTO's Appellate Body and enter the appellate review stage [4].

4.2. Domestic Judicial Remedies Procedures

4.2.1. Justiciable Model: Take the EU as an Example

The justiciability of the national security review system means that the domestic judicial organ is allowed to conduct a comprehensive judicial review of the decision of the national security review authority, and if the party to the transaction under review is dissatisfied with the decision of the review authority, it can file a lawsuit in the court, and the court even has the power to overturn the decision of the review authority [7]. This means that foreign investors have sufficient ways and means to remedy their commercial and private rights in national security reviews. This France and Germany model is adopted by EU countries represented by.

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4.2.2. Non-actionable Model: Take the United States as an Example

As the first country in the world to propose a national security review system, the U.S. government adopts a non-actionable model in its national security review legislation. That is to say, decisions or rulings of CFIUS and the President of the United States on national security review in cross-border mergers and acquisitions are not subject to the review of their own judicial authorities.

When it comes to US judicial remedies, we have to mention Trinity Group Related Parties v. CFIUS and US President Barack Obama. On September 28, 2012, U.S. President Barack Obama signed a presidential decree halting wind power projects invested by Ralls, an affiliate of Sany Group, on the grounds of suspected threats to national security. The three parties then filed a petition in the U.S. District Court for the District of Columbia, finding Obama's move unconstitutional and listing Obama and the Committee on Foreign Investment in the United States (CFIUS) as co-defendants [8].

The case went through two trials, with the court of first instance finding that it had no jurisdiction over the decision order of the President of the United States and that the President had gone through due process before making the restraining order. After Sany appealed, the court of second instance also held that it had no jurisdiction over the US president's decision-making order but held that both CFIUS and President Obama's decision-making process had procedural flaws depriving the Rawls wind project of its constitutionally protected property rights. In other words, Sany Group's related parties sued CFIUS and US President Barack Obama in the court of second instance [9].

In the United States, to judicial review, while specific decisions made by the President and CFIUS are not subject the pre-decision process is also subject to judicial review. Although this model does not protect the private rights of commercial matters as strongly as the actionable model, it is also conducive to urging administrative agencies to strictly enforce the law in accordance with the law and protect the legitimate rights and interests of foreign investors.

5. Suggestions

5.1. Suggestions for Improving China's Existing System

First of all, with a higher level of effectiveness as soon as possible, China should form a complete and unified law so that foreign investors can have a law to follow and improve judicial efficiency. China currently has few and low levels of effectiveness in the area of foreign investment security review, and there are conflicts between various legal documents. For example, the NDRC's review powers under the Interim Administrative Measures for the Approval of Foreign-Invested Projects overlap largely with the matters reviewed by MOFCOM in the Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, such as monopolistic matters, industrial policies and economic security in the review. And China's legislature should clarify as soon as possible the key concepts involved in the field of national security review. For example, the concept of "China's current legislation has not even formed a unified and clear definition of the scope of "foreign investment", and national security" in the field of foreign investment is not yet clearly defined in relevant Chinese legal norms.

Second, a corresponding supervision mechanism for the review body should be established, and corresponding relief rights should be allocated to private enterprises. On the one hand, China currently lacks an effective national security review mechanism. The relevant laws concerning the subject of review only provide in general terms that the joint meeting shall conduct security reviews under the unified leadership of the State Council, but do not make clear and detailed work on who the joint meeting should report to, who should supervise, and the procedures for supervision and accountability. On the other hand, China does not provide effective remedies and remedies for foreign investors. The Foreign Investment Law clearly stipulates that the security review made in accordance

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with the law is the final decision. That is to say, there is currently no dispute relief mechanism in China, which is undoubtedly very detrimental to the protection of the rights of private enterprises, easily undermines the investment confidence of enterprises in other countries and is not conducive to the benign development of the Chinese market.

5.2. Sound Opinions on Existing Dispute Remedies

The remedy mechanism for international disputes is characterized by complex operation and non-direct remedies. Moreover, both the ICSID arbitration mechanism and the dispute resolution mechanism under WTO rules are easily circumvented. Host countries only need to include “national security exceptions” in BIT or multilateral investment agreements to effectively circumvent the jurisdiction of international organizations. Therefore, the domestic remedies of the host country are often more efficient and powerful than those of international dispute remedies, disputes, and it is more difficult to change the means of remedy for international so the author believes that countries should focus on improving the remedies for domestic disputes.

First, domestic judicial organs should be given the power to conduct judicial review as much as possible, and the national security review system should be endowed with the justiciability of disputes. Substantive remedies are often superior to procedural remedies. Taking the EU as an example, the EU’s system of allowing judicial review of disputes by judicial authorities can undoubtedly maximize the protection of commercial private rights in the game between national public power and commercial private rights.

Second, the mechanism for prior consultation and agreement should be optimized and improved. In the U.S., for example, CFIUS welcomes the possibility for parties to cross-border M&A transactions to consult with them for review of transactions prior to formal filing, and many parties to planned M&A transactions voluntarily abandon the deal after such consultation. This kind of informal communication in advance can effectively reduce the transaction costs of foreign investors and can prompt them to take the initiative to change the form or structure of the transaction to pass the review.

6. Conclusion

As the first country to create a national security review system, the US review system is undoubtedly one of the most complete and rigorous of all existing national security review systems, and China, as a late starter in cross-border mergers and acquisitions legislation, should absorb the advantages of the US national security review system and accelerate the progress of improving the national security review system in combination with the needs of its own national conditions. China should also compare its existing national security review system with the United States, and modify and discard unreasonable parts of the existing system. At the same time, China should also revise the existing contradictions in the law and establish a sound national security review system as soon as possible to provide a good business environment for cross-border M&A enterprises.

The international community should further improve the remedy channels to provide efficient, convenient, direct, and simple remedies for commercial entities that may be harmed by public power. States should, to the extent possible, give domestic jurisdictions the power of judicial review, grant the national security review system justiciability in disputes, and transform procedural remedies into substantive remedies. All countries should provide strong relief guarantees for multinational enterprises, and maximize the protection of commercial and private rights while safeguarding national security.

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