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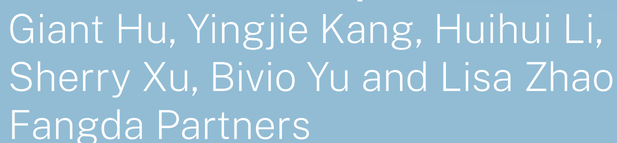

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Fangda Partners

CHINA

Law and Practice

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Fangda Partners has over 800 lawyers across its seven offices in Beijing, Guangzhou, Hong Kong, Shanghai, Shenzhen, Nanjing and Singapore. The firm is widely acknowledged as having the leading foreign direct investment (FDI) practice in China, with extensive experience in advising foreign investors on making their investments in China, including greenfield investments, joint ventures, and share and cash acquisitions. Its FDI expertise also extends to equity and asset restructuring of foreign-invested entities, as well as liquidation and deregistration. Clients also benefit from the firm's transactional capabilities integrated with its unparalleled expertise in antitrust, IP, employment and data compliance in their FDI transactions. The firm has vast experience in the full range of strategic and private equity M&A and commercial transactions, with international clients including GE, Honeywell, ABB, Hershey, Cargotec, Ford, Lear, Boeing, AMD and Philips.

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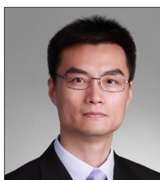

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1. Legal System and Regulatory Framework

1.1 Legal System

China's legal system (excluding that of Hong Kong, Macau and Taiwan for the purpose of this article) is commonly accepted to be a civil law system.

China's legislative framework is premised on its Constitution, which designates the National People's Congress and its Standing Committee as the supreme source of legislation. Regulations are promulgated at the central level, as well as the local provincial or municipal levels, with national-level laws taking priority over provincial and municipal-level laws. Under China's Constitution, the National People's Congress and its Standing Committee may annul or override any laws promulgated by other administrative bodies.

The judicial system in China comprises the Supreme People's Court (the final appellate court), local people's courts (at provincial, municipal, district or lower-level) and special people's courts (courts designated for military, intellectual property or financial matters). Notwithstanding that the Chinese legal system is commonly accepted to be more aligned with civil law frameworks with no principle of binding judicial precedent like in common law jurisdictions, the Supreme People's Court has issued guidelines requiring lower courts to conform their judgments to the judicial interpretations of the Supreme People's Court and the Supreme People's Procuratorate.

1.2 Regulatory Framework for FDI

FDI Review and Approval

During the past three decades, foreign investments have been subject to a case-by-case approval system. Consistent with the recent trend towards market liberalisation, the Foreign Investment Law of 2020 marked the evolution of China's case-by-case approval system for foreign-invested companies to a system that does not distinguish between foreign-invested companies and local companies for the purposes of establishment and registration, except in a limited number of sectors regarded as highly sensitive.

Negative List

Foreign investors have the same access as locally owned enterprises to the PRC market, except

for sectors identified in the Special Administrative Measures for Market Access of Foreign Investment (Negative List), the latest version of which took effect on 1 November 2024. Foreign investment restrictions fall into the following two categories:

- prohibited sectors – in which foreign investment is fully prohibited (eg, postal services, tobacco wholesale, compulsory education and online publication services); and
- restricted sectors – in which foreign ownership is limited (eg, healthcare institutions, civil airport construction and operation, and certain telecommunication-related sectors).

It is worth noting that the latest version of Negative List has removed all the restrictions on foreign investment in the manufacturing sector.

2. Recent Developments and Market Trends

2.1 Recent Developments and Market Trends

Based on data published by China's central government, FDI in China for the first nine months of 2024 increased by 11.4% from a year earlier.

The Chinese government has emphasised on several occasions its ongoing commitment to integrate with the global economy and to further liberalise the China market. This commitment has been supported through several initiatives in 2020 and 2021, including the promulgation of Foreign Investment Law and the opening up of the financial sector to allow full foreign ownership of certain financial services companies.

Also, there has been an increase in the volatility of China's foreign and trade relations with the USA, Australia, EU and India, which has led to several retaliatory and protectionist measures being promulgated by such jurisdictions. The heightened concern expressed by various countries about data privacy and subsidies which distort the markets – and the steps taken by certain countries to limit Chinese access to advanced technology – may continue to push China to focus on developing these technologies independently, and to take retaliatory or self-protective measures such as the recent promulgation of export control laws and data protection laws. Attracted by the low labour and operation costs, some foreign invested companies have moved their manufacturing plants in China to South-East Asian countries.

On 19 March 2024, General Office of the State Council of the PRC released the Notice of the General Office of the State Council on Promulgation of the Action Plan for Steady Promotion of High-level Opening-up to Attract and Utilise Foreign Investment (the "Action Plan"), which outlines a set of measures to attract foreign investment, particularly in strategic sectors such as high-tech, green energy, and emerging industries. The policy focuses on improving market access for foreign enterprises, ensuring equal treatment with domestic entities, and enhancing the protection of intellectual property. Key measures include offering financial incentives, simplifying administrative procedures, and providing tax reductions to encourage foreign capital. The Action Plan further emphasises the creation of a transparent and fair business environment, with a commitment to resolving issues faced by foreign investors.

3. Mergers and Acquisitions

3.1 Transaction Structures

Acquisitions in China can be structured as asset or share acquisitions, and such transactions are substantially similar to M&A deals conducted in other jurisdictions. Except for the prior review clearances and approvals mentioned under **3.2 Regulation of Domestic M&A Transactions**, and the foreign ownership limits in certain industries, foreign acquisitions of Chinese business would not be subject to any other significant restrictions.

Acquisitions of Chinese public companies are subject to further regulation, as is customary in other jurisdictions, for change-in-control transactions. These trigger tender offer requirements.

Investors should also be aware of the procedural issues involved in acquiring business held by Chinese parties, exiting from investments in China and remitting proceeds across the border, which may have an impact on conditions precedent and the price adjustment clause in transaction documents.

3.2 Regulation of Domestic M&A Transactions

Investing in Public Companies

Investing in public companies is subject to approvals, as elaborated under **5.2 Securities Regulation**, and may trigger disclosure or general tender offer requirements pursuant to the securities laws and listing rules.

Merger Control Review

Depending on the turnovers of the concentrating parties, an M&A transaction may require clearance from the competition authority. Please refer to **6. Antitrust/Competition**.

National Security Review

Depending on the nature of the transaction, a national security review may be triggered. Please refer to **7. Foreign Investment/National Security**.

Review and Approval by Sector Regulators

Prior approval from regulators may be required if the sector in which investment is made is regulated, as is the case with financial institutions.

State-Owned Asset Rules

If the target asset or company is deemed a state-owned asset, the transaction may fall within the purview of the State-Owned Assets Supervision and Administration Commission (SASAC) or its local counterparts or delegates. It may then need to comply with certain requirements, such as asset valuations and appraisals, prior approvals or filings with SASAC or competitive bid requirements.

4. Corporate Governance and Disclosure/Reporting

4.1 Corporate Governance Framework

Under the PRC Company Law, companies may form as either a limited liability company (LLC) or a company limited by shares. Private companies may choose either of the two forms, but they typically form as LLCs, whereas public companies must form as companies limited by shares. LLCs are limited to a maximum of 50 shareholders, while the number of initial incorporators of a company limited by shares is limited to 200 shareholders.

Foreign investors typically prefer to form LLCs in China because LLCs have greater flexibility in allocating corporate governance and share-

holder rights as compared to a company limited by shares.

On 29 December 2023, the Standing Committee of the National People's Congress of the PRC adopted an amendment to the PRC Company Law (2023 Company Law), which came into effect on 1 July 2024. The 2023 Company Law was amended with the aim to give investors more options to simplify corporate governance, strengthen shareholders' obligations in order to provide more protection to creditors, enhance property rights protections and promote sound development of the capital market.

4.2 Relationship Between Companies and Minority Investors

Shareholders of Chinese companies are protected under Chinese company law and, in the case of public companies, securities laws and the listing rules and regulations of the Chinese stock exchange on which the company is listed. Statutory shareholder protections under the PRC Company Law include:

- the right of shareholders to request the court to revoke company resolutions on the grounds of defective procedures;
- the right to initiate a derivative lawsuit by shareholders holding 1% or more of the voting rights for more than 180 days in a company limited by shares and by any shareholder in an LLC;
- the right to request repurchase of equity interests or shares if the shareholder votes against certain resolutions;
- the right of shareholders holding 10% or more of the voting rights of the company to apply for voluntary liquidation; and
- the right of shareholders to request the company to acquire their equity interests at a reasonable price if a company's controlling shareholder abuses shareholder rights and seriously damages the interests of the company or other shareholders.

4.3 Disclosure and Reporting Obligations

Both domestic and foreign-invested companies are required to submit filings to the AMR (which functions as the company registry) when there are any changes to the company's corporate information. This includes changes to shareholders and shareholding structure, changes to registered capital, operation operating term, business scope, registered address, directors, supervisors, legal representatives and general managers. The information will, in the case of foreign-invested companies, be forwarded by the AMR to the Ministry of Commerce (MOFCOM). In addition, FIEs are required to submit additional information (ie, changes) with respect to the ultimate beneficial owners to the MOFCOM and foreign exchange control authority.

5. Capital Markets

5.1 Capital Markets

The two primary stock exchanges in Mainland China are those of Shanghai and Shenzhen. Historically, only companies incorporated in Mainland China can be traded in these stock exchanges. On 15 November 2021, the third primary stock exchange in Mainland China, Beijing Stock Exchange, commenced trading.

PRC companies have historically been listed on a variety of overseas securities exchanges, notably NASDAQ or NYSE and HKSE, in addition to the Chinese stock exchanges. It is noted that, in 2023, the securities regulator CSRC issued new rules which provide that PRC companies, by way of either direct or indirect overseas offerings and listings, should file with the CSRC within three

business days after the application documents for Overseas Offering and Listing have been submitted to the overseas securities exchanges.

Based on the latest data published by the People's Bank of China, the principal source of funding for Chinese enterprises is still considered to be bank loan financing.

5.2 Securities Regulation

Companies listed on the securities exchanges of the PRC are subject to the Chinese Securities Law. The CSRC has oversight over the PRC securities markets and listed issuers.

In general, foreign investors are not subject to PRC securities laws unless the foreign investor intends to invest in a PRC company listed on the securities exchanges of the PRC. If a foreign investor is a strategic investor, the investor must meet qualification requirements for strategic foreign investors. These include thresholds on total assets and sound financial management capability. The strategic foreign investor investing in a listed company through agreement transfers or tender offers must hold at least 5% of the company's shares; for investments made through the private placement, there is no minimum shareholding requirement. All strategic foreign investors, regardless of the investment method, are subject to a 12-month lock-up period.

It is noted that on 1 November 2024, several regulators in China jointly issued the Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors (the New Measures), which took effect on 2 December 2024.

The New Measures, in comparison to the old ones, reduce thresholds and relax restrictions for foreign strategic investments. This aims to broaden access for foreign capital in China's securities market, attract greater foreign investment, and promote long-term, value-oriented participation by foreign investors. The changes introduced are as follows.

Scope of Foreign Investors

The old rules restricted eligible foreign investors to legal entities and organisations. In contrast, the New Measures expand eligibility to include foreign natural persons, enterprises, and other types of organisations.

Asset Thresholds

Under the Old Measures, foreign investors needed a minimum of USD100 million in total overseas actual assets or USD500 million in total overseas actual assets under management. The New Measures reduce this threshold to USD50 million in total actual assets or USD300 million in total actual assets under management. However, for foreign investors aiming to become controlling shareholders of a listed company, the requirements of USD100 million or USD500 million remain unchanged.

Lock-Up Period

The Old Measures mandated a lock-up period of three years for strategic investments. The New Measures reduce this period to 12 months.

Investment Methods

Previously, the Old Measures allowed strategic investments only through private placements or transfers by agreement. The New Measures introduce additional methods, including competitive bidding, subscription of new shares, and tender offers.

Shareholding Ratio Requirements

The Old Measures required a minimum shareholding ratio of 10% for strategic investments.

The New Measures remove this requirement for private placements, while reducing the threshold to 5% for investments made through agreement transfers or tender offers.

Non-strategic foreign investors may also invest via QFII (Qualified Foreign Institutional Investor) status; the thresholds for QFII qualifications were lowered in November 2020 to encourage further foreign investment in the PRC.

5.3 Investment Funds

Foreign investment funds investing in PRC-listed public companies are generally required to invest as a QFII and are accordingly subject to compliance with the QFII-related requirements to invest. The QFII requirements also include post-investment obligations, such as the obligation to make certain information reports to the CSRC.

Foreign investment funds investing in non-listed PRC companies are not subject to the QFII requirements. However, if the fund establishes a domestic fund in the PRC or if a domestic fund has overseas investors, it will be designated a "Qualified Foreign Limited Partner" (QFLP) and the establishment of the fund will have to be approved by the finance office of the local government in the fund's domicile. The rules governing QFLPs vary between cities and are not centrally regulated. It is worth noting that the Opinions also require in-depth implementation of pilot projects of domestic investment by QFLPs.

6. Antitrust/Competition

6.1 Applicable Regulator and Process Overview

China has a "pre-notification" merger control regime. Under the PRC Anti-Monopoly Law (AML), a "concentration of undertakings" that meets certain turnover thresholds must be notified to the State Administration for Market Regulation (SAMR) for merger control clearance and may not be implemented without SAMR's approval. On 1 August 2022, the amendments to the AML came into effect (the "Revised AML") following almost two years of public consultation. The Revised AML provides several key changes to the merger control regime in China, including:

- strengthening control of "killer acquisitions" and reiterating the power to review below-threshold transactions;
- introducing a "stop-the-clock" mechanism to the review timeframe and increasing the penalties for failures to notify; and
- power to delegate the review of simple case filings to local authorities.

Following the amendment of the AML, SAMR published the Regulation of Review of Concentration of Business Operators (the "Merger Review Regulation"), updating the former Interim Regulation of Review of Concentration of Business Operators (published in 2020). The Merger Review Regulation came into effect on 15 April 2023.

Concentration of Undertakings

The following types of FDI transactions may constitute a concentration of undertakings for the purpose of merger control notification:

- merger;

- acquiring control over another undertaking by virtue of acquiring its equity or assets;
- formation of a joint venture (JV) where at least two parties can exercise control over the JV; and
- acquisition of control over another undertaking or the ability to exercise decisive influence over the other undertaking by virtue of a contract or any other means (such as a VIE structure).

Definition of "Control"

There is no explicit definition of "control" under the Revised AML. SAMR has broad discretion in determining control by considering a wide range of factors. The Guidelines for the Anti-Monopoly Compliance of Concentrations of Undertakings set out examples of governance rights that would confer control over another business (Strategic Rights), including:

- right to appoint or remove senior management personnel;
- right to approve the financial budget; and
- right to approve the business plan.

The relevant factors in evaluating "control" include the purpose of the transaction, the target's shareholding structure, shareholders' reserved matters, board composition and the voting mechanism at board and shareholders' meetings.

In practice, "control" could refer to:

- holding 50% or more shares or voting rights; or
- having approval or veto power over the target's material business and management matters, such as the Listed Strategic Rights.

As there is no de minimis shareholding for the definition of control, the ability to veto any of the Listed Strategic Rights will likely be sufficient to confer control even with a minority shareholding.

Turnover Thresholds

Where an FDI transaction constitutes a "concentration of undertakings", the transaction is notifiable if the undertakings to the concentration also meet the turnover thresholds.

On 26 January 2024, the Provisions of the State Council on Thresholds for Prior Notification of Concentration of Undertakings ("Amended Thresholds") came into effect. The Amended Thresholds represent a significant increase in these thresholds, particularly in China turnover.

The amended turnover thresholds are as follows:

- the aggregate global turnover of all the undertakings to the concentration exceeds CNY12 billion (increased from 10 billion), or the aggregate Chinese turnover of such entities exceeds CNY4 billion (increased from 2 billion) in the preceding financial year; and
- each of at least two of the undertakings to the concentration had a turnover in China exceeding CNY800 million (increased from 400 million) in the preceding financial year.

Special rules apply to the calculation of the turnover of undertakings in the financial sector.

Consistent with the revised AML, the Amended Threshold reiterates SAMR's right to review transactions that do not meet the turnover thresholds, provided that there is evidence that the transaction may have the effect of eliminating or restricting competition.

No Possibility of Exemptions for Foreign Investors or Investments

Where the merger requirements are met, no exemption is available for foreign investors or investments.

Process and Timeline

The merger review procedures in China include the simplified procedure (ie, expedited merger review procedure for certain types of transactions unlikely to raise concerns in China) and the normal procedure (ie, standard procedure for the remaining types of notifiable transactions).

Upon notification, all transactions enter a pre-acceptance phase where SAMR may request further information about the transaction and the notification. There is no statutory time limit for the pre-acceptance phase; the actual duration depends on the questions and time needed to collect the requested information. In the experience of the authors, the pre-acceptance phase generally lasts four weeks on average under the simplified procedure, and four to eight weeks under the normal procedure. A notification will only be accepted once SAMR considers the information it receives to be complete and satisfactory.

Once the case is accepted, it will enter into a three-phase review period. Most cases undergoing the simplified procedure are cleared within Phase I (ie, 30 days upon case acceptance).

For cases undergoing the normal procedure, if the transaction does not raise competition concerns it is usually cleared within the review period for Phase II (ie, 90 days).

For transactions with competition concerns, the review extends to Phase III (ie, 60 days). In practice, SAMR's review of cases with significant competition concerns may exceed the maximum statutory period of 180 days for the three phases. The Revised AML introduced a "stop-the-clock" mechanism whereby the statutory merger control review period can be suspended under three scenarios, namely:

- if the filing parties fail to submit supporting information in a timely manner, which prevents the progress of the review;
- when new circumstances or facts that materially impact the review arise and need to be verified; or
- when remedy conditions need to be further evaluated (provided that the filing parties consent).

There is no maximum time limit for SAMR to suspend the review time under the "stop-the-clock" mechanism.

Clearance and Transaction Closing

Merger clearance must be obtained before the closing of the proposed FDI transaction which, in the case of a greenfield JV, refers to the incorporation of the JV and, in the case of an equity or asset transfer, the registration of the equity or asset to be acquired.

Delegation to Local Authorities

SAMR announced a pilot programme to delegate the review of certain simple case filings to five local authorities in Beijing, Shanghai, Guangdong, Chongqing and Shan'xi Provinces during a three-year pilot period commencing on 1 August 2022. Based on SAMR's guidance, a transaction can be delegated to one of the five Local AMRs where it has one of the following nexus to the relevant city or province:

- at least one of the notifying parties is based in that city/province;

- the target is based in that city/province;
- in the case of the establishment of a new joint venture, the joint venture is based in that city/province;
- the relevant geographic market of a transaction is assessed to be regional, and such regional market entirely and mainly falls within that city/province; or
- where SAMR deems it appropriate to delegate.

6.2 Criteria for Review

Substantive Review of the Transaction

The Chinese merger control regime involves a substantive overlap and competitive assessment of the investment. The substantive test involves:

- identifying the relevant markets based on the transaction parties' horizontal overlap (ie, competing businesses), vertical links (ie, upstream/downstream relationship) or neighbouring relationship (ie, complementary products);
- assessing the market share and market power of the transaction parties and the effect of the transaction on the level of concentration in the relevant markets;
- assessing the transaction's impact on market entry, technological development, suppliers and customers; and
- assessing the transaction's impact on market entry, technological development, suppliers, national economic development, industry policy and public interest.

6.3 Remedies and Commitments

Remedies

SAMR may conditionally clear a concentration on remedies, including structural, behavioural or hybrid remedies, based on a case-by-case assessment.

Structural remedies

Similar to the EU and US competition authorities, SAMR may require merging parties to commit to divesting a business, assets or minority interests within a specified time frame post-closing. An example of such a remedy imposed by SAMR was Danfoss/Eaton on 24 June 2021.

Behavioural remedies

Compared to the EU and US competition authorities, SAMR is more receptive to behavioural remedies, despite them being more difficult to implement and monitor than structural remedies. Examples of SAMR's behavioural remedies include "hold separate" remedies that require the transaction parties to operate independently for a period of time until the remedy is lifted, FRAND commitments and commitments restricting tying and bundling etc.

In June 2024, SAMR conditionally approved JX Advanced Metals Corporation's acquisition of shares in Tatsuta Electric Wire & Cable Co, Ltd, a manufacturer of equipment wires and cables. Citing the parties' high market shares and their neighbouring relationships, SAMR expressed concerns that potential tying conducts by the parties post transaction could restrict competition in the markets of blackened rolled copper foil, stainless steel FPC stiffener, electromagnetic shielding film, etc, in China. To mitigate these competition concerns, SAMR imposed behavioural remedies, including prohibiting the parties from making unjustified tie-in sales, requiring the parties to continue to supply to Chinese customers based on the FRAND principle, and maintaining the current level of compatibility between their products and third-party products. The remedies will last for eight years and expire automatically.

Hybrid remedies

Often, SAMR imposes hybrid remedies, which are a combination of structural and behavioural remedies. In September 2023, SAMR announced its conditional clearance of the acquisition of Beijing Tobishi Pharmaceutical (Tobishi) by Simcere Pharmaceutical (Simcere). Simcere is the sole distributor of batroxobin API in China and Tobishi is the only producer of batroxobin injections in the country. SAMR also identified a horizontal overlap due to Simcere's engagement in the research and development of the batroxobin injection. SAMR identified that this acquisition could potentially limit competition within China's batroxobin injection market. To address these concerns, SAMR required that Simcere divest its business related to the research of the batroxobin injection. It also imposed behavioural conditions, such as requiring Simcere to terminate its exclusive supply agreement with China's sole batroxobin API supplier, ensuring the supply of batroxobin API to the new owner of the divested business, reducing end-user prices of batroxobin injections, and ensuring an adequate supply to satisfy domestic demand. After six years, the merged entity can apply to SAMR to lift the conditions.

6.4 Enforcement

The Authority's Ability to Block or Otherwise Challenge FDI

As described in **6.3 Remedies and Commitments**, SAMR has the ability to challenge an FDI transaction (eg, impose remedies) before the investment is made, to the extent that the transaction substantially affects competition in China.

If conditions are not sufficient to address competition concerns, SAMR has the ability to block the transaction. Since the AML took effect in 2008, only three transactions have been prohibited by SAMR:

- Coca-Cola's proposed acquisition of Chinese fruit juice producer Huiyuan in March 2009;
- the proposed Maersk/MSC/CMA CGM P3 Network shipping alliance in June 2014; and
- the proposed merger between game-streaming platforms Douyu and Huya in July 2021.

Possibility to Appeal and Timeline

Under the AML, a transaction party may appeal to SAMR for administrative review within 60 days of receiving the decision. The timeframe for administrative reconsideration is 60 days.

If a notifying party is not satisfied with an SAMR administrative review decision, it can bring an administrative action within 15 days of receipt of SAMR's decision.

If still unsatisfied with the result of the administrative action, the party can seek judicial review within six months of the final administrative decision.

While an appeal is legally possible, the writers are unaware of any case where a company appealed SAMR's conditional approval decision so far.

Higher Penalty for Submitting False or Misleading Information

The Revised AML imposes higher penalties on the notifying parties for providing false disclosure or omissions in filings. For the notifying party, the fines have been increased from CNY200,000 to a maximum of 1% of the party's turnover in the preceding financial year. Responsible individuals are also subject to a fine of up to CNY500,000 (increased from CNY100,000).

Sanctions for Closing Before Clearance

The AML prohibits parties from implementing a notifiable transaction before filing a merger con-

trol notification (failure to notify) and obtaining a merger control clearance (gun-jumping).

The Merger Review Regulation provides guidance on the relevant factors for determining whether a transaction has been implemented and may so constitute a failure to notify or gun-jumping. A non-exhaustive list of actions that may constitute gun-jumping includes:

- effecting changes on the registration of the corporate entity or the register of shareholders;
- appointing senior management personnel;
- participating in business decision-making and management;
- exchanging sensitive information with other operators; and
- carrying out business integration.

The Revised AML increased the maximum fine for failure to notify and gun-jumping from CNY500,000 to CNY5 million where the transaction has no anti-competitive effect. Where the transaction has or may have anti-competitive effect, the maximum fine is 10% of the party's turnover in the preceding year.

As of November 2024, SAMR has imposed penalties on three cases of failure to notify and gun-jumping under the revised AML, with the highest fine reaching CNY1.75 million.

In addition to imposing fines, SAMR can order the transaction parties to undertake the following steps to restore the situation to the pre-transaction state:

- suspend the transaction;
- dispose of shares or assets within a specified time limit;
- transfer the business within a specified time limit; and
- implement other measures as required.

In July 2021, SAMR issued a penalty decision against Tencent for its failure to notify an acquisition of a 61.64% stake in China Music Corporation. SAMR imposed the maximum fine of CNY500,000 (the maximum fine at the time) and imposed remedies to restore competition in online music broadcasting platforms through measures such as abandoning exclusive music copyright licensing arrangements. Tencent was also required to notify SAMR of future transactions, including those that fall below notification thresholds – a requirement that generally goes beyond the scope of remedies contemplated under the AML.

While the Revised AML notes that criminal liabilities may be imposed for breaches (including gun-jumping), the precise application of criminal liabilities on undertakings and individuals is expected to be clarified in amendments to China's Criminal Law.

7. Foreign Investment/National Security

7.1 Applicable Regulator and Process Overview

National Security Review (NSR) Overview

In China, FDI that has an impact or a potential impact on national security is subject to national security review, as stipulated in both the National Security Law and the FIL. The review regime is established in 2011 and updated in the Measures for Security Review of Foreign Investment (the "NSR Measures") jointly published by the National Development and Reform Commission

(NDRC) and MOFCOM on 19 December 2020 and effective from 18 January 2021.

NSR Industry Scope

China's NSR regime targets foreign investments in two categories related to defence and national security in China.

- Category A – defence-related sectors, which are notifiable regardless of whether the foreign investor will have control over the target:
  - (a) investment in sectors related to national security, such as the military and arms industry, or other ancillary industries; and
  - (b) investment in areas adjacent to military or arms facilities.
- Category B – other sectors concerning national security, notifiable only if the foreign investor will acquire control:
- important agricultural products;
- important energy and resource;
- significant equipment manufacturing;
- critical infrastructure;
- critical transportation services;
- important cultural products and services;
- important information technology and internet product and services;
- important financial services;
- critical technology; and
- other industries with national security importance (ie, assessed on a case-by-case basis, with factors including whether the Chinese government has separately flagged or designated certain sectors or certain products or services as "strategic").

FDI Types

The NSR regime applies to direct or indirect investments by foreign investors (including those in the regions of Hong Kong, Macau and Taiwan) in Chinese domestic enterprises, primarily in the form of (i) investment in a greenfield project or establishment of a foreign-invested enterprise in China, independently or jointly with other investors, and (ii) M&A (ie, asset or equity acquisitions). The NSR regime can be extended to other transactions such as contractual control, trusts, multi-layer investments, overseas transactions, leases or convertible bonds, created to achieve the same purpose as a direct share or asset acquisition.

In particular, foreign investors investing in offshore entities who (directly or indirectly) own equity in Chinese companies or assets located in China (also called "foreign-to-foreign" deals) are also covered investment transactions. However, recent practice demonstrates that "foreign-to-foreign" deals are less likely to require a formal NSR review or lead to any substantive national security concern.

For an FDI transaction originally not subject to NSR, NSR approval will need to be sought before the parties can make any changes to, for example, the business structure, business scope or identity of foreign controllers, that result in the FDI falling within the scope of the NSR. Likewise, if an FDI transaction has already received NSR approval but the parties contemplate making changes to the transaction, the parties must seek new NSR approval before they make the changes.

Control Determination

With regard to "Category B" investment, a foreign investor is regarded to acquire control if:

- the foreign investor and its affiliates acquire 50% interest or more in an enterprise;
- the foreign investor with another foreign investor acquires 50% interest or more in an enterprise; or

- the foreign investor acquires less than 50% interest in an enterprise but has sufficient voting rights to materially influence shareholder meeting or board of director meetings; and
- there are other factors allowing the foreign investors to exert significant influence over the enterprise's operational decisions, human resources matters, financial matters and technology.

Monetary Thresholds

There are no monetary thresholds for a transaction to be qualified for NSR review.

Changes to Existing Transactions

As well as new transactions, changes to existing transactions that may affect national security (eg, changes to the foreign investor's contractual rights, the business scope of the foreign-invested entity, or the foreign investor's identity) may trigger NSR notification obligations afresh.

Reviewing Authority

An interagency function called the "NSR Working Mechanism" is empowered under the NSR Measures to organise, co-ordinate and supervise the NSR review. This function, which is consensus-driven, is jointly led by NDRC and MOFCOM and, depending on the investment areas concerned, other ministries of the central government, such as the Ministry of National Defence (MOD), the Cyberspace Administration of China (CAC), the Ministry of Industry and Information Technology (MIIT) and the Ministry of Transport (MOT), may also be involved to give their opinions.

The Office of the NSR Working Mechanism (the "NSR office"), which comes under NDRC, carries out the day-to-day NSR functions, including accepting the notifications and handling all communications with parties to the NSR process.

Process and Timeline

The review process involves three phases, as follows.

- Notification and pre-acceptance phase (15 working days) – the transaction parties notify the NSR office by submitting the following materials:
  - (a) notification form;
  - (b) investment plan;
  - (c) explanation as to whether the foreign investment will affect Chinese national security; and
  - (d) other materials required by the NSR office.

The NSR office shall determine within 15 working days from its satisfaction regarding receipt of complete notification materials as to whether NSR review is required.

- General review phase (30 working days) – if the NSR office determines that NSR review is required, it shall conduct a general review and determine in 30 working days whether to approve the FDI or extend to the special review phase.
- Special review phase (60 working days or longer if necessary under special circumstances) – if the NSR office considers that the notified transaction may have national security concerns during the general review phase, it will launch a special review of 60 working days. The special review period may be extended if special circumstances apply. However, the NSR Measures do not specify the circumstances to trigger such extension or the time limit for the extended review period.

During the review process, the NSR office may request additional information and the review

period shall be suspended (ie, stop the clock) while awaiting materials from the transaction parties.

7.2 Criteria for Review

NSR review will consider the FDI's impact on national defence and security, including the production of national defence products and relevant equipment, national economic stability, basic social stability, the research and development of key technologies related to national security, national cultural safety and public ethics and national network security. However, no specific criteria have been published for the substantive assessment.

The NSR is a highly discretionary process and is subject to the opinion of the NSR Working Mechanism, in particular the specific industrial and regulatory authorities for the invested sectors.

7.3 Remedies and Commitments

Foreign investors can amend the investment structure or commit to restrictive conditions to address NSR concerns. However, there are no specific rules or guidance on the types of concerns the NSR office may have and the restrictive conditions that may be required to address its concerns. The NSR is a highly discretionary process subject to the NSR office's opinions in case-by-case assessments.

In the case of approval with conditions, the parties have a continuing obligation to perform and implement the conditions imposed under the approval decision. In practice, the NSR office may together with the authorities of local governments, conduct on-site inspections over the parties subject to the conditions, to verify whether the conditions are strictly implemented.

7.4 Enforcement

NSR – Possibility to Block FDI

Where the FDI has impacted or will likely significantly impact national security and the effect could not be remedied by conditions, the NSR office may reject the investment. If the investment has already been implemented, the NSR office may unwind the relevant transaction.

Only a handful of investments have been blocked, according to public information.

According to the FIL, the prohibition decisions made by the NSR Office are final, which means that the parties cannot appeal the decisions through judicial review.

Consequences for Investing Without Prior Notification to the Relevant Authority

The following consequences are possible.

- Unwinding of the transaction – the NSR office may order the transaction parties to make an NSR notification if a transaction has been implemented without the requested NSR notification. Failing to follow such order may result in the transaction being unwound, even if it does not raise national security concerns. And if the NSR office identifies a national security concern which cannot be mitigated by the parties' proposed remedy measures, then it will also have the power to unwind the transaction.
- Adverse record in China's credit information system – failures to notify relevant transactions will be recorded in China's credit information system and subject to associated penalties. This will also likely result in reputational risks and an impaired relationship with the Chinese government.

Under the NSR Measures, there is no monetary penalty imposed on foreign investors for the failure-to-notify violation.

8. Other Review/Approvals

8.1 Other Regimes

Foreign Exchange Control Regime

China has foreign exchange control regulations administered by the State Administration of Foreign Exchange (SAFE). Cross-border transactions are classified into two categories: capital items and trade items. Capital items – capital contributions, loans and dividend distributions – are subject to stricter scrutiny than trade items. SAFE has delegated most transaction review and oversight powers to PRC banks.

Outbound Direct Investment Regime

PRC enterprises, no matter whether foreign or domestically owned, must obtain approvals before investing overseas (ODI approvals). These approvals include those from NDRC, MOFCOM and SAFE. The procedures to obtain these approvals may take weeks or sometimes months.

Investment in Manufacturing

Domestic and foreign investment in manufacturing projects require additional governmental approvals, including from NDRC, which has oversight over manufacturing activities and production capacity nationwide. The project may also need to obtain EHS-related permits, zoning permits and construction permits.

9. Tax

9.1 Taxation of Business Activities

Enterprise Income Tax

Enterprise income tax (EIT) is levied on the taxable income obtained by enterprises. Taxable income means the balance of gross income obtained by enterprises in a tax year, after deducting non-taxable income, exemptions, various deductions and losses carried forward from the previous five years.

Taxpayers are classified into resident enterprises and non-resident enterprises. Resident enterprises include enterprises incorporated in China, and those incorporated outside China based on foreign laws but with de facto management bodies in China. Non-resident enterprises are enterprises established based on foreign laws and with their de facto management bodies outside China.

Resident enterprises are subject to EIT on income sourced both in and outside China, while non-resident enterprises are subject to EIT on income sourced in China or on income attributable to permanent establishment (PE) constituted in China.

The standard EIT rate is 25%, while beneficial rates may be applicable to certain enterprises, including but not limited to qualified high-tech enterprises.

Income derived by non-resident enterprises which do not have PE in China, or which have PE in China but the income derived is not effectively connected with the PE, is subject to EIT at 10%, unless a preferential tax rate is granted under the relevant double taxation agreement/arrangement (DTA).

If a company is organised as a partnership, the company is transparent for the purpose of EIT. Income/loss shall be calculated at the level of the partnership, while income tax shall be paid by the partners based on the respective conditions.

Value-Added Tax

Value-added tax (VAT), which is levied on the turnover of taxpayers, applies to sale or import of goods, provision of processing, repair and replacement services, provision of services and transfer of intangible properties and immovable properties in China.

Taxpayers of VAT are divided into small-scale and general VAT payers based on annual turnover and the tax rates are different for each type of tax payer and the nature of goods/service, which varies from 3% to 13%.

Other Taxes

Enterprises may also be subject to other taxes such as consumption tax, land appreciation tax, real estate tax, stamp duty, etc, depending on the goods manufactured or sold, business activities or transactions carried out in China.

9.2 Withholding Taxes on Dividends, Interest, Etc

Non-resident enterprises are subject to EIT on dividends, interest and royalties obtained from resident enterprises, and the resident enterprises are obligated to withhold such EIT at 10% (as well as VAT, if applicable) from the relevant payments made to the non-resident enterprises (withholding taxes).

Preferential income tax rates may be provided by the DTAs concluded by China with other countries or regions, which may reduce tax rates to 5% or 7% depending on applicable DTAs.

For dividends, DATs may provide for minimum level of stock ownership (usually 25%) and holding period.

9.3 Tax Mitigation Strategies

Income Tax Deferral

Restructuring transactions, including but not limited to debt-to-equity conversion, mergers and acquisitions, and spin-offs, conducted by enterprises, upon fulfilment of the prescribed conditions, may be eligible for tax deferral treatment.

Reinvestments of dividends obtained by non-resident enterprises from resident enterprises are eligible for tax deferral. For this purpose, the scope of resident enterprises excludes public listed companies.

Super-Deduction of R&D Expenses

Expenses incurred by enterprises for R&D activities, upon fulfilment of the prescribed conditions, may be eligible for super-deduction at 200% of such expenses; intangible assets generated by R&D activities undertaken by enterprises may be amortised at 200% of the costs and expenses capitalised.

Accelerated Depreciation of Fixed Assets

Newly purchased equipment and appliances (excluding buildings and structures) with a unit value of no more than CNY5 million are allowed for quick deduction in a lump sum during the current period.

As to newly purchased equipment and appliances (excluding buildings and structures) with a unit value of more than CNY5 million, enterprises may opt for a reduced depreciation period or other eligible accelerated depreciation methods.

VAT Credits Refunds

Under qualified conditions, enterprises may apply to the tax authorities for refund of VAT credits that could not be recovered through sales.

9.4 Tax on Sale or Other Dispositions of FDI

Non-resident enterprises are subject to EIT at 10% on the capital gains derived from the transfer of equity interests in resident enterprises.

Special treatments may be specified by DTAs for such capital gains. Under most DTAs, China would not levy income tax on the capital gains derived by non-resident enterprises if they hold less than 25% equity interest in the resident enterprises transferred for the 12 months prior to the transfer; under certain DTAs, China would not levy income tax on the capital gains derived by non-resident enterprises.

9.5 Anti-Evasion Regimes

Under the EIT regime, there are specific tax rules and regulations pertaining, respectively, to transfer pricing for related-party transactions, cost-sharing arrangements, advanced pricing arrangements, thin capitalisation and general anti-avoidance.

Transfer Pricing

Business transactions between related parties must be made on an arm's length basis; otherwise, the tax authority may apply special tax adjustments to the transactions by reasonable methods.

Thin Capitalisation

If an enterprise's debt-to-equity ratio for related parties exceeds 2:1 (5:1 for financial institutions), the excessive interest expenditure will not be allowed for deduction when calculating EIT, unless the enterprise could prepare transfer pricing documentation to justify the arm's length nature of the expense.

General Anti-Avoidance Rules (GAAR)

The tax authorities shall have the discretion to make tax adjustments on arrangements adopted by enterprises that do not have reasonable commercial purposes but are mainly for the purpose of tax avoidance.

Specifically, arrangements adopted by non-resident enterprises for the indirect transfer of taxable assets in China, including equity interests of resident enterprises, immovable properties situated in China, if deemed to be lacking in sufficient commercial substance, will be subject to EIT at 10%, pursuant to the State Administration of Taxation Public Notice Regarding Certain Enterprise Income Tax Matters on Indirect Transfer of Properties by Non Resident Enterprises (Bulletin [2015] No 7).

10. Employment and Labour

10.1 Employment and Labour Framework

In China, the employment relationship between an employer and an employee is mainly governed by:

- national laws including the PRC Labour Law, PRC Employment Contract Law, PRC Social Insurance Law, PRC Law on Mediation and Arbitration of Labour Disputes, and certain provisions on the implementation of these national laws;
- interpretation by the PRC Supreme Court on the Application of Law in the Trial of Labour Dispute Cases (I);

- national regulations and policies issued by relevant governmental authorities, particularly the Ministry of Human Resources and Social Security; and
- local regulations and policies issued by local governmental authorities.

Under the PRC Trade Union Law, a basic-level trade union committee should be established in any enterprise with 25 or more members but, in practice, not all enterprises establish these trade union committees. Even in enterprises with trade union committees, collective bargaining is not common in practice in China.

Foreign investors should also pay attention to the immigration regulations in China, including work visa, work permit and residence permit requirements at national and local levels. Foreign investors who wish to initially establish representative offices instead of companies should note that PRC laws restrict representative offices of foreign enterprises from directly hiring local employees and require them to hire local employees through labour dispatch service providers.

10.2 Employee Compensation

Typically, employees in China are entitled to salary payments, statutory social insurance and housing fund contributions. Statutory social insurance contributions comprise basic pension, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance.

Other benefits include statutory annual leave and certain benefits applicable to certain classes of workers. In addition, in tech and other start-up companies, equity-incentive compensation has also become rather common through employee stock options and restricted share awards.

Under PRC law, a change in the controlling investor or shareholder of an employer does not affect the validity or effectiveness of the employer's employment contracts. Neither does it entitle employees to additional compensation as a matter of law unless employment is terminated, in which case severance based on law and mutual consultation may apply.

10.3 Employment Protection

Generally speaking, unless there are changes to the employment relationship or arrangements following an acquisition, change-of-control or other investment transaction, employees will not be entitled to additional rights or severance payments. However, if the employer wishes to terminate an employee, the employee will be entitled at minimum to the statutorily prescribed severance based on the duration of employment and, in most cases, 30 days' prior written notice. The employee's salary and benefits terminate as of the termination date unless both parties agree otherwise.

The transfer of employment from one employing entity to a new entity requires mutual agreement between the employer and employee. In an asset or business sale, the employer and purchaser often offer employees the opportunity to transfer employment to the purchaser. If the employee agrees to the transfer, either the employer (ie, the seller) will pay the transferred employee's severance based on the employee's service years, with the employee then being deemed a new hire of the purchaser, or the purchaser will recognise the employee's previously accumulated service years in the new employment contract.

Employers deciding matters directly affecting the immediate interests of employees are required to comply with consultation and notification procedures prescribed in the labour laws.

These consultation and notification procedures include seeking comments from the employee representatives' congress or all employees, discussing the comments with the trade union or the representatives nominated by the employees, and notifying all employees of the final decision.

11. Intellectual Property and Data Protection

11.1 Intellectual Property Considerations for Approval of FDI

In 2024, China continued to successively promulgate a series of policies, which distinctly showcase China's evolving openness and receptiveness towards foreign investment, specifically in bolstering the integration of advanced intellectual property. Such policies, among others, include the Notice of the General Office of the State Council on Promulgation of the Action Plan for Steady Promotion of High-level Opening-up to Attract and Utilise Foreign Investment.

From the perspective of intellectual property, the PRC General Office of the State Council issued the Guidelines for Promoting High-Quality Development of Intellectual Property on 29 March 2024. The guidelines explicitly outline the development of opinions on strengthening the protection of intellectual property rights in foreign-related matters. Simultaneously, they encourage the establishment of efficient and expedited mechanisms for resolving patent disputes, with a particular focus on enhancing administrative adjudication processes for major patent infringement disputes and early resolution mechanisms for pharmaceuticals.

In the field of Artificial Intelligence Generated Content (AIGC), the Interim Measures for the Administration of Generative Artificial Intelligence Services (the "Interim Measures"), which came into effect on 15 August 2023, generally stipulate that foreign investment in the AIGC sector must comply with laws and regulations related to foreign investment. However, no detailed rules addressing this issue have been introduced thus far. This suggests that China may, in the future, enact regulations to clarify the regulatory requirements in respect of AIGC-related activities.

Meanwhile, the PRC Ministry of Commerce released the Catalogue of Technologies Prohibited and Restricted from Export for public consultation on 21 December 2023. The updated Catalogue notably reduces the restricted or prohibited items, specifying the principles in respect of certain technical control, fostering an environment conducive to advancing cross-border technological collaboration.

11.2 Intellectual Property Protections

In 2023, China continued with its development of knowledge innovation overall. Compared with 2022, granted invention patents in China increased by 15.3%, and those of foreign applicants increased by 0.5%. The overall active registered trade mark increased by 8.1%, and the active approved registrations of foreign trade mark increased by 3.4%. The number of layout-designs of integrated circuits announced and certified in 2023 increased by 24.3%. The amount of intellectual property pledge financing in 2023 was CNY853.9 billion, showing a year-on-year increase of 75.4%.

In the past year, several amendments of regulations related to intellectual property (IP) were promulgated, demonstrating China's overall legislative inclination towards stronger protection. In the realm of patent, the State Council further

amended the Implementing Regulations of the Patent Law of the People's Republic of China, emphasising the principle of good faith in patent applications and detailing the operational rules of the open licensing system. With regard to trade marks, on 1 October 2024, the National Intellectual Property Administration released the draft Measures for the Calculating Illegal Gains in Trade Mark Infringement Cases for public consultation, providing practical guidelines for calculating damages in trade mark infringement cases and thereby enhancing predictability in damage awards. The amendments not only emphasise the regulation of malicious trade mark registrations but also strengthen obligations concerning trade mark usage. In terms of anti-unfair competition, the State Administration for Market Regulation issued the Interim Provisions on Internet Unfair Competition, which came into effect on 1 September 2024, specifying certain types of unfair competition practices in the online marketplace and tightening regulations on unfair practices by platform operators. This move reflects the Chinese government's commitment to establish a healthier business environment.

In judicial practices, influential cases of IP infringement or unfair competition can be seen from time to time with substantially large amounts of damages granted by the PRC courts. For instance, in a case of trade secret infringement, the Supreme Court awarded the plaintiff over CNY640 million in economic damages and reasonable expenses. The judgment also addressed specific aspects of civil liability for stopping the infringement of trade secrets, including the methods, content, and scope of non-monetary obligations, as well as the accrual of delayed payment penalties and standards for non-performance of non-monetary obligations. This is in line with the main tone of China's continuous emphasis on the protection of IP rights.

In the field of AIGC, China has demonstrated openness in its legislative and judicial practices. For instance, the promulgated version of the Interim Measures adopted the wording of requiring AIGC service providers to "take effective measures to improve data quality", in place of "guarantee the data authenticity, accuracy, objectivity, and diversity" in the draft version, providing more flexibility in terms of the requirements to AIGC service providers. This adjustment lowers the standards for training data quality and the obligations of service providers regarding accuracy, thereby relaxing regulatory principles and compliance requirements. This reflects China's intent to foster the development of the generative AI sector.

In judicial practice, Chinese courts have ruled in a couple of AIGC-related cases that content generated by AI, if it embodies the author's unique choices and arrangements, can be deemed original and protected under copyright law. These rulings demonstrate the judiciary's effort to balance adherence to the "only human can be treated as author" principle with the recognition of the value in utilising AI for creation, thereby encouraging innovation in this field.

It is also worth noting that China has shown an increasingly open and supportive attitude toward foreign-related intellectual property. In 2024, the International Association for the Protection of Intellectual Property (AIPPI) World Congress was held for the first time in Hangzhou, China. The 2024 AIPPI Hangzhou Resolution released therein will serve as an important reference for international organisations and national governments in formulating intellectual property laws and policies.

11.3 Data Protection and Privacy Considerations

Overview of Data Protection Legislation

Currently, China's legal regime for data protection comprises four main pieces of legislation, namely the Personal Information Protection Law (PIPL), the Data Security Law (DSL), the Cyber Security Law (CSL) and the Regulations on Network Data Security Management (RNDSM). The DSL and the PIPL came into force, respectively, on 1 September 2021 and 1 November 2021, while the RNDSM has been effective since 1 January 2025.

The DSL regulates the security and protection of data processing activities, and the data in the DSL is defined broadly to include all categories of data including but not limited to personal data and non-personal data.

The PIPL regulates the processing and protection of personal data, providing several core principles and requirements for personal data processing, such as requirements on lawful basis, transparency, data minimisation, purpose limitation, data completeness and accuracy, and security protection. Under the PIPL, individuals are granted a wide range of rights on their personal data, including the right to information, the right to be informed of decisions, the right of access, the right to ask for correction or deletion, and the right to withdraw consent, as well as the right to data portability. Many provisions of the PIPL seem to be inspired by the EU General Data Protection Regulation. There are, however, key differences, notably that the PIPL has a strong focus on consent by individuals as to how their personal data is processed. The concept of "legitimate interest" for processing personal data, which is widely used in the EU, is not recognised in the PIPL.

The RNDSM provides detailed operational guidelines for the implementation of the PIPL, DSL and CSL, for example, specifying the requirements on the protection of important data under the DSL and conditions on the exercise of right to portability under the PIPL. The RNDSM also imposes extra obligations on companies processing large amounts of personal data. For example, companies processing personal data of more than 10 million individuals shall designate dedicated personnel and internal body responsible for network data security.

In addition, the Administrative Measures for Generative AI Services, which entered into force on 15 August 2023, also provide certain compliance requirements on data protection covering the R&D, testing, deployment and provision of generative AI services.

Extraterritorial Effect of Data Protection Laws

Both the PIPL and the DSL propose clear extraterritorial applicability to data processing activities that take place outside China, which has been substantially followed by the newly promulgated RNDSM.

- The PIPL applies extraterritorially to the processing of the personal data of data subjects in China that takes place outside China if such processing is (i) for the purpose of provision of goods and/or services to data subjects in China; (ii) for analysing or assessing the behaviour of data subjects in China; or (iii) in other circumstances as provided by Chinese laws and regulations. Foreign companies subject to PIPL's extraterritorial effect shall set up an organisation or appoint a representative in China dedicated to data protection and file the name and contact information of any appointed organisation or representative with competent regulators.

- The DSL applies extraterritorially where the data processing activities taken place outside of China harm the national security, public interests or the legal rights and interests of citizens or organisations of China.

Regulation of Cross-Border Data Transfer

The DSL, PIPL, RNDSM and certain supporting rules issued by CAC – ie, the Measures on the Security Assessment of Cross-Border Data Transfer, the Provisions on the Standard Contract on Cross-Border Transfer of Personal Data and the Standard Contract on Cross-Border Transfer of Personal Data (China SCC), the Rules for Implementation of Personal Information Protection Certification, and the Provisions on Promoting and Standardising Cross-Border Data Flows, establish the integrated regulatory framework on cross-border data transfer (CBDT).

Specifically, in addition to other CBDT compliance requirements under the PIPL (such as engaging in personal information protection impact assessment), companies need to rely on any of below prerequisites when transferring personal data outside of China:

- passing the security assessment for CBDT organised by the CAC (Security Assessment);
- obtaining a certification on personal data protection issued by a licensed agency;
- concluding an agreement with the overseas recipient using the China SCC and filing such agreement with the provincial CAC;
- where the CBDT of personal data is necessary to conclude or perform a contract to which the individual is a party;
- where the CBDT of employees' personal data is necessary for human resources management in accordance with the employment rules and regulations developed in accordance with the law and collective contracts concluded in accordance with the law;
- where the CBDT of personal data is necessary to perform statutory duties or fulfil statutory obligations;
- where the CBDT of personal data is necessary to protect the life, health, and property security of a natural person in an emergency;
- where a data handler who is not a Critical Information Infrastructure Operator (CIIO) transfers the personal data (excluding sensitive personal data) of fewer than 100,000 individuals overseas as of January 1 of the current year; or
- where the CBDT of personal data falls outside the scope of the negative list to be formulated by and applicable limited to the free trade zones.

In any event, where a company wants to transfer important data outside of China, the security assessment shall be passed.

Penalties and Enforcement of Violation

Violation of the CSL, DSL or PIPL will result in criminal, administrative and civil penalties. In particular, data handlers found to be in serious breach of the PIPL may be imposed fines of up to 5% of a company's revenue during the preceding year or CNY50 million, and the legal ramifications also apply to an individual who processes personal data in breach of the PIPL. The regulators also have the power to suspend or terminate any mobile app or online service that illegally processes personal data. Those who are responsible for causing the violation may be disqualified from being directors, supervisors, general managers or personal data protection officers.

Multiple Chinese regulators have been actively enforcing the data protection laws and their

implementation measures. Among others, the enforcement against illegal processing of personal data by mobile applications, mini-apps on WeChat and Alipay, and third-party SDKs deployed in mobile applications has been a continuous and routine broad-sweeping law enforcement campaign. In addition, cybersecurity review is sometimes used as a regulatory tool by the CAC to probe foreign investors' investments and acquisitions of Chinese companies.

Privacy litigation has been on the rise in China, which may continue to be the case – particularly with PIPL lowering the bar for data subjects to bring claims against companies by shifting the burden of proof to defendant companies. In addition, the procuratorial organs, as authorised by the PIPL, can also actively bring up public interest litigation on personal information.

Trends and Developments

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Fangda Partners

Fangda Partners has over 800 lawyers across its seven offices in Beijing, Guangzhou, Hong Kong, Shanghai, Shenzhen, Nanjing and Singapore. The firm is widely acknowledged as having the leading foreign direct investment (FDI) practice in China, with extensive experience in advising foreign investors on making their investments in China, including greenfield investments, joint ventures, and share and cash acquisitions. Its FDI expertise also extends to equity and asset restructuring of foreign-invested entities, as well as liquidation and deregistration. Clients also benefit from the firm's transactional capabilities integrated with its unparalleled expertise in antitrust, IP, employment and data compliance in their FDI transactions. The firm has vast experience in the full range of strategic and private equity M&A and commercial transactions, with international clients including GE, Honeywell, ABB, Hershey, Cargotec, Ford, Lear, Boeing, AMD and Philips.

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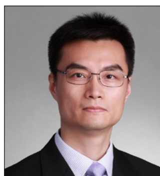

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Foreign Investors Now Have Easier Market Access but Higher Compliance Costs

With the Foreign Investment Law taking effect at the beginning of 2020, China's foreign investment regime has officially evolved from a case-by-case approval system – in place for over three decades – to a new system where foreign-invested companies and domestic companies are treated almost equally in terms of their establishment and corporate changes, with the exception of a small number of sectors under the negative list.

However, as China's legal system has been evolving, compliance costs for many market players, including domestic enterprises and foreign-invested enterprises, have also increased. For example, the Chinese government is more serious about enforcing environmental and labour regulations. As a result, high-pollution industries and labour-intensive industries have been relocating to South Asia where compliance and labour costs are lower. In 2024 there was tremendous development of legislation in merger control, gradual raising of statutory retirement age and data protection. These new pieces of legislation, accompanied by tightened law enforcement, suggest increasing compliance costs for companies in the future. Some foreign invested manufacturing companies have been relocated to countries such as those in Southeast Asia due to the low cost in those countries and also to avoid geopolitical risks and export control measures, while the majority of foreign invested companies have chosen to remain in China to stay close to the market and supply chain.

Local policies on FDI have also become more selective on technology and new investment sectors in order to promote high-tech industries, representing a shift from quantity to quality.

New Trend of Investment

In the context of a challenging global economy, foreign investment in China showed strong resilience in 2024. According to data from China's central government, Foreign Direct Investment (FDI) in the first nine months of 2024 grew by 11.4% compared to the previous year, indicating renewed confidence from investors in China's economic outlook. However, under the tightening regulatory environment, some M&A financings in the TMT sector were suspended. Investors, especially those from overseas, have gradually become cautious, preferring to invest in more established target companies and focusing on semiconductors and intelligent hardware,

EV OEM and related industries, newly emerging Metaverse and Web 3.0-related fields and new energy sectors. This is also consistent with the government's determination to shift the focus of China's economy to more innovative and sustainable industries.

China's goal of achieving "carbon peak and carbon neutrality" has also generated new opportunities, such as green finance. More green, blue (financing ocean-related conservation projects) and sustainable development bonds have come to the market, expanding the range of products on China's domestic debt markets. The promulgation of new panda bond guidelines and the roll-out of the pilot programme for social and sustainability panda bonds are expected to channel more funding into the green, social, sustainability (GSS) sectors and further open up the bond market.

Trends in Merger Control

On 1 August 2022, China's revision of the Anti-Monopoly Law (AML) came into effect, introducing significant changes to the country's merger control landscape. In March 2023, the State Administration for Market Regulation (SAMR) finalised the Regulation on Review of Concentration of Business Operators, further clarifying the law's implementation. On 26 January 2024, the Provisions of the State Council on Thresholds for Prior Notification of Concentration of Undertakings (the "Amended Thresholds") came into effect. The Amended Thresholds represent a significant increase in these thresholds, particularly in China turnover.

Predictable timelines for no-issue cases and extended review periods persist for remedy cases

Since mid-2022, SAMR has delegated merger review of cases that qualify for the simplified procedure (simple cases) to five of its local branches. The support of local officials lent predictability to review timelines for no-issue cases: simple cases typically take around six to eight weeks, while no-issue cases that fall under the normal review procedure took approximately four to six months.

The 2022 AML revisions introduced a "stop-the-clock" mechanism, which may be triggered:

- when parties fail to submit the required information on time;
- when new facts are discovered during the review process; or
- upon the parties' request during remedy discussions.

Based on SAMR's decisions, the "stop-the-clock" mechanism was employed in three conditional cases in 2023, namely MaxLinear/Silicon Motion, Simcere/Tobishi and Broadcom/VMware, and one conditional case in 2024, namely JX Advanced Metals/Tatsuta Electric.

While this mechanism reduced the administrative burden where parties had to withdraw and refile their filing once the statutory timeline expired, it appeared not to have an actual impact on the overall review timeline for remedy cases. The review process for remedy cases remained a marathon, with timelines being long and unpredictable. This year's only remedy case JX Advanced Metals/Tatsuta Electric took 475 days for clearance, which is a significant extension compared to the average review timeline of 363 days in 2023 and 364 days in 2022. This trend underscored the unpredictable and lengthy nature of China's review timeline for complex cases.

The merger threshold was raised and the number of cases dropped

The Amended Thresholds represent a significant increase in China merger control's thresholds:

- raising the aggregate global turnover of all the undertakings to the concentration from CNY10 billion to CNY12 billion;
- raising the aggregate Chinese turnover of all the undertakings to the concentration from CNY2 billion to CNY4 billion; and
- raising the turnover in China of each of at least two of the undertakings to the concentration from CNY400 million to CNY800 million.

The increased threshold is expected to substantially reduce the number of merger control cases reviewed by Chinese authorities. According to the data publicly released by SAMR, a total of 456 merger control cases were reviewed in the first three-quarters of 2024, and while the number of cases reviewed in the whole year of 2023 was 797, it is already possible to discern a downward trend in the number of cases.

Three failure-to-notify or gun-jumping cases were fined under the revised AML

The Revised AML increased the maximum fine for failure to notify and gun-jumping from CNY500,000 to CNY5 million where the transaction has no anti-competitive effect. Where the transaction has or may have an anti-competitive effect, the maximum fine is 10% of the party's turnover in the preceding year.

As of the end of November 2024, SAMR has imposed penalties on three failure-to-notify and gun-jumping cases with no anti-competitive effect under the revised AML, with the highest fine reaching CNY1.75 million.

Trends in Gradual Raising of Statutory Retirement Age

On 13 September 2024, the Standing Committee of the National People's Congress (NPCSC) approved the Decision on Gradual Raising of Statutory Retirement Age (the "Decision"), and authorised the Measures for Gradual Raising of Statutory Retirement Age issued by the State Council (the "Measures"). The new regulations will gradually raise the statutory retirement age for male employees from 60 to 63 years old, and that for female cadres and female blue-collar workers will be raised from 55 to 58 and from 50 to 55, respectively. In addition, the Measures provide that, starting in 2030, the minimum number of years of basic pension contributions required to receive retirement benefits will be gradually raised from 15 years to 20 years at the pace of an increase of six months annually.

This is the very first formal amendment to retirement ages at national level since the 1950s. However, as it had been planned in the 14th Five-Year Plan (2021–2025) approved by NPCSC on March 2021 to take small steps to raise the retirement age, the above Decision is not coming as a surprise to the public. According to a news report by Xinhuanet on 31 May 2024, as of March 2024, the number of people insured by China's basic pension insurance was 1.07 billion. The Decision is interpreted as a response to the rapid development of the Chinese society as well as to the pressure faced by the public-pension system.

The Decision may give rise to new labour law issues, such as whether the labour relationship continues during the time the employee has reached current statutory retirement age, but has not yet reached the raised retirement age; and if the relationship continues, whether the employer is entitled to terminate it unilaterally

when a statutory termination ground is satisfied pursuant to the current labour law regime.

Given the Decision and the Measures stipulate the principles of "adjustment by small steps, flexible implementation, advancement by classification, and overall planning with due consideration of all factors", we believe more supporting regulations/policies will be released in the future to address the possible labour law issues in due course.

Trends in Taxation

In general, the trends and developments in taxation are characterised by key words such as digitisation, intelligence and globalisation, and taxpayers need to constantly learn and adapt to these changes to ensure tax compliance in an efficient and effective manner. Specifically, the following should be noted.

- Through the application and evolution of the digital tax administration systems and big data analysis, tax authorities have stepped up efforts in comparing data, analysing issues, assessing cases and identifying compliance issues of taxpayers, thus improving the efficiency and effectiveness of tax collection and administration.
- The widespread application of artificial intelligence has led to continuous improvement in tax supervision and administration, and made it possible for tax authorities to detect and take precautionary measures against cases involving fraud.
- With the further development of global economic integration, international organisations and governments of various countries/regions have strengthened tax information exchange and co-operation to jointly combat cross-border tax evasion. The formulation and implementation of international tax rules is an important part of global tax co-operation.
- State Taxation Administration adopts an open and co-operative approach to such international tax co-operation projects as the "Two-Pillar Solution" initiated by OECD as well as those promoted by the United Nations, by proactively participating in technical discussions, addressing China's position, and taking a leading role in international tax reform in the face of economic transition and transformation.

Trends in Data Protection

With the China data protection regulatory framework established upon the promulgation of the Cyber Security Law (CSL), the Personal Information Protection Law (PIPL) and the Data Security Law (DSL), the State Council published the Regulations on Network Data Security Management (RNDSM) in September 2024, which provide detailed operational guidelines for the implementation of the PIPL, DSL and CSL and will be effective from January 2025.

In addition, during 2022 to 2024, the Cyberspace Administration of China (CAC), which is China's primary regulator for data protection, as well as other regulators in China have made significant progress in formulating various drafts and finalised rules on regulating specific issues in data protection, like cross-border data transfer, personal information compliance audit, AI and algorithm.

Personal information protection

The RNDSM has provided more detailed requirements on personal information under the legal framework of PIPL, for example, the disclosures in privacy notice, conclusion of DPA in data sharing, conditions on exercising the right to portability, and extra compliance obligations

of companies processing large amounts of personal information. These detailed requirements are expected to be key areas of focus for regulators in upcoming law enforcements.

In addition, the CAC published draft administrative measures on personal information protection compliance audit for public comments in 2023, and this draft rule is expected to be finalised in early 2025. Under the draft rule, companies processing personal information of over one million people shall undergo a compliance audit at least once a year while all other companies that process personal information shall undergo a compliance audit at least once every two years, and when the CAC finds that personal information processing activities have relatively high risks or there are any personal information security incidents, it may require companies concerned to conduct compliance audits. When the draft rule is finalised, compliance audits will become an important regulatory tool in personal information protection.

Cross-border data transfer

Since 2022, the CAC has been working on the regulation of cross-border data transfer. Following the launch of the Provisions on Promoting and Standardising Cross-border Data Flows and the RNDSM in 2024, the regulatory rules on cross-border data transfer have been maturely formulated. Under the present rules, companies do not need to go through governmental processes for cross-border transfer of personal information under several prescribed scenarios or where the volume of personal information to be transferred is lower than the de minimis threshold. Many MNCs in China benefited from these exemptions, and their compliance burdens on cross-border data transfer have been largely reduced.

In addition, China raised the Global Cross-Border Data Flow Co-operation Initiative in late 2024. The initiative puts forward constructive approaches to the governance of cross-border data flow and makes clear China's stance and position in advancing global cross-border data flow co-operation. It can be expected that the regulation on cross-border data transfer will not be a material obstacle to normal international trade and investment inside or outside China.

AI and algorithm

There is no comprehensive law on AI yet while the CAC, together with other regulators, has published administrative measures regulating certain types of algorithms in recent years, in particular, the Administrative Measures for Generative AI Services, the Administrative Measures for Deep Synthesis of Internet-Based Information Services, and the Administrative Measures for Algorithm-generated Recommendations for Internet Information Services. These rules require companies who use certain algorithms, including LLM, in providing services to the public in China to complete governmental filings. Based on the statistics publicly available, nearly 200 LLMs have completed such filing.

In November 2024, Chinese regulators also initiated special law enforcement campaigns to crack down problems in the use of algorithms, such as "information cocoons", manipulation of ranking, exploitation of workers in new employment forms, and big data-based discrimination. With the rapid development of AI-related technology, we believe there will continue to be further comprehensive legislation and regulatory actions in this regard.

Important data protection

The DSL formulates a national data classification regime and provides that the processing

of important data is subject to more stringent rules. The recently released RNDSM reiterates the rules on the identification and protection of important data under the DSL. It could be observed that certain sectoral and regional regulators have published rules on important data identification and protection in the respective sectors or regions as well as been carrying out the identification of important data. As the rules on important data protection become clearer, companies shall keep in view on the progress of important data identification in the relevant sectors and regions and adopt compliance measures in a timely manner.

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