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In-Depth: Mergers & Acquisitions (formerly The Mergers & Acquisitions Review) provides a practical overview of global M&A activity and the legal and regulatory frameworks governing M&A transactions in major jurisdictions worldwide. With a focus on recent developments and trends, it examines key issues including relevant competitiāon, tax and employment law considerations; financing; due diligence; and much more.

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China

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Introduction

Before the establishment of a modern corporate law system in China at the end of 1980s, almost all corporate merger and acquisition (M&A) transactions in China occurred in public sectors as a method to reform or restructure state-owned enterprises, which, technically speaking, were not M&A transactions in a commercial context. M&A was introduced as a commercial concept in China by the enactment of the Company Law in 1993. The legal framework of M&A in China has generally followed a similar model to other civil law jurisdictions, but with its own features. One of these is the special mechanism regarding M&A transactions involving state-owned enterprises and another is its special regulation on foreign direct investment. Since the economic reform that began in 1979, China has gradually become one of the most attractive target countries for foreign investment. Following China's entry to the World Trade Organization in 2002, Chinese companies have been increasingly more active in the global M&A market, which renders China a hot spot for both inbound and outbound M&A transactions.

Year in review

Overview of M&A activity

In 2023, the volume of Chinese M&A (including both inbound and outbound deals) decreased by 27 per cent compared with 2022, reaching 8,563 deals, which was the first time the figure was below 10,000 since 2019, and barely reached two-thirds of the whole volume of 2021 (the highest in the past five years). The value of transactions in 2023 decreased by 28 per cent to US$ 333.1 billion, the lowest level since 2014. Affected by the difficulty of US dollar fundraising for Chinese investment and geopolitical issues, the biggest decline came from the sector of financial buyers. In inbound deals, the deal volume and deal value of financial buyers decreased by 27 per cent and 37 per cent respectively, and in outbound deals, the deal volume and deal value of mainland China financial buyers decreased by 53 per cent and 89 per cent respectively, which pulled down the whole deal value of mainland China outbound deals to a 55 per cent decline. However, private-owned enterprises (POE) presented a strong performance in outbound deals. The deal volume of mainland China outbound by POEs increased 13 per cent and the deal volume increased 62 per cent, both the first increase since 2021. Foreign strategic buyers were also active. Although the volume of inbound deals by foreign strategic buyers decreased by 35 per cent, the deal value increased by 4 per cent, which means a 60 per cent increase in average deal size.[2]

Developments in corporate and takeover law and their impact

The Company Law

China's new Company Law was officially approved by the National People's Congress on 29 December 2023 and entered into effect on 1 July 2024. The new Company Law attracted much attention as it was the second full-scale amendment to the Company Law in nearly 20 years: since its enactment in 1993, the Company Law had been amended four times, but the 2005 amendment was the only previous full-scale amendment.

The one-board system

China's Company Law adopted the 'two-board system' with respect to companies' internal organisation, meaning that companies had to establish a board of directors to exercise the power of execution and a board of supervisors to exercise the power of monitoring based on the election or appointment at shareholders' meetings. In the new Company Law, in addition to the two-board system, companies are allowed to form an audit committee inside the board of directors to supervise the accounting matters of the company. Furthermore, in companies with an audit committee, there will be no need to establish a board of supervisors (or individual supervisor).

The new Company Law also requires any limited liability company having more than 300 employees and any company limited by shares to have a representative of the employees on the board of directors. The previous Company Law only required state-owned enterprises (SOEs) to include a representative of the employees in their board of directors, but the new Company Law has abandoned such a 'capital approach'.

Introduction of class shares

Article 95 of the new Company Law provides that the articles of association of a company limited by shares shall include the types of class shares, number, rights and obligations of each class if the company issues class shares. Article 144 further provides that a company limited by shares can issue:

1. preferred or inferior shares on distribution of dividend and residual assets;
2. shares that have more or fewer voting rights than ordinary shares; and
3. shares that require the approval of the company to be transferred.

However, a listed company is not allowed to issue class shares of the types (b) and (c) above.

Strengthening the senior management's responsibility

Article 147 of the previous Company Law requires the director, supervisor and senior management to bear a duty of loyalty and fiduciary duty to the company, but does not clearly state what the duty of loyalty and fiduciary duty mean. The new Company Law makes it clearer by stating that the duty of loyalty means the director, supervisor and senior management shall not seek to appropriate an interest by using their powers and positions in the company and the fiduciary duty means that they shall pay the reasonable attention that is generally required as management in the process of performing their duties in order to secure interests for the company to the maximum extent.

The new Company Law also adds more detailed articles about self-dealing and usurping business opportunities. The new Company Law states that entering into a contract and transaction with the next of kin of any director, supervisor or senior management or a company, which is directly or indirectly controlled by the next of kin of any director, supervisor or senior management, shall also be deemed as self-dealing.

Furthermore, the new Company Law makes it clear that if a director or senior management intentionally or recklessly causes any damage during the process of performing his or her duties, then such director or senior management shall be jointly and severally liable with the company.

Time limit on making capital contribution

Arguably, the most debated modification by the new Company Law was the resumption of the time limit to make capital contribution. According to Article 47 of the new Company Law, all shareholders shall make capital contribution to the company in accordance with the articles of association; however, the capital contribution must be fully made within five years after the establishment of the company.

Before its amendment in 2013, the Company Law required that all shareholders of a company should pay at least 20 per cent of their capital contribution at the time of the company's establishment and should pay the rest of the capital subscribed by each shareholder within two years after the establishment of the company (or within five years in the case of an investing company). The time limit and the 20 per cent threshold requirement were lifted by 2013's amendment and shareholders could freely decide the schedule of capital payment. In practice, to increase the flexibility of investment, there emerged a trend to set a long-term limit on capital payment for 10 years, 20 years or even longer. Creditors of the company would experience problems asking the shareholders to pay capital contribution when the company became unable to settle its debts. To this end, the new five-year limitation was believed to be introduced to protect the creditor's interests.

Together with the resumption of the time limit to make capital contribution, there were other mechanisms introduced by the new Company Law to strengthen the protection from creditors. For example, according to Article 54 of the new Company Law, when a company fails to settle its debts due, the company or the creditor can require a shareholder who has subscribed capital, but before the expiry of the time limit, to pay its capital contribution. Furthermore, in order to ensure that the company will take proper action to deal with late payment of capital, Article 51 of the new Company Law requires the board of directors to inspect the progress of capital contribution. If any shareholder does not make capital contribution in accordance with the articles of association, the company can request the shareholder to make capital contribution in writing. If the company fails to make such a request and causes damage to the company, the responsible directors are liable for compensation.

Negative Lists and Encouraged Industries Catalogue

The 2024 version of the Negative List (see below) was published on 8 September 2024 and comes into effect from 1 November 2024. The 2024 version of the Negative List is the latest update since 2021. But unlike previous updates, the negative list only applicable in free trade zones (FTZ Negative List) was not updated at the same time as the Negative List, therefore the 2021 versions of both the FTZ Negative List, which was released on 27

December 2021 and enacted from 1 January 2022, and the 2021 Negative List are still in force at the time of writing.

Compared with the 2021 version, the 2024 version of the Negative List removes two restricted items, which seems nominal. However, these two items are the only restrictions in manufacturing in the 2021 version. Therefore, after 1 November 2024, all manufacturing industries will be completely open to foreign investors, which marks a big step forward in the history of China's foreign direct investment regulatory regime. (The 2021 version of the FTZ Negative List had already lifted all restrictions over manufacturing industries.)

On 26 October 2022, the revised Catalogue of Industries Encouraging Foreign Investment (2022 version) came into effect, with a total of 1,474 industries and business areas, which is 239 more than the 2019 version. Among these 1,474 areas, 519 are applicable nationwide (39 more than the 2020 version) and the remaining 955 (200 more than 2020 version) are specifically applicable in central and western regions. The 2022 version continues to encourage foreign investment into advanced manufacturing and modern services areas as well as advantageous industries in the central and western regions, such as agricultural product processing and tourism development. At the same time, enterprises that meet the requirements can also enjoy preferential treatment for duty-free imports of their own equipment, purchase of land use right and a 15 per cent corporate income tax rate (10 per cent less than the ordinary tax rate).

Legal framework

General regime applicable to mergers and acquisitions

In general, an acquisition of a company in China can be achieved by:

1. share or equity acquisition;
2. assets acquisition; and
3. corporate merger (merger by absorption and merger by incorporation).

Unlike other jurisdictions, business acquisition (acquiring all tangible and intangible assets related to a certain business as a whole) is not among the available options. However, the buyer can make a de facto business acquisition through a mix of share or equity acquisition and assets acquisition (conduct a company separation with target business injected into the separated company and then transfer the equities of the separated company or respectively transfer all assets, contracts and employees related to the target business). While all these vehicles have their own pros and cons, in practice, share or equity acquisition is still the most frequently used method because of its relatively light procedural burden. Investors can acquire equities from existing equity holders or subscribe newly issued equities. In the case of an equity acquisition by a foreign investor, the investor can directly acquire the equities of the target company or acquire equities of the target company's holding company established in overseas jurisdictions, if any, to further reduce the procedural burden and increase the flexibility of designing the transaction schemes. However, when the offshore scheme is chosen, the investor is advised to pay attention to the tax burden. When an investor acquires a company by asset acquisition, they should pay particular attention to the procedures of changing the registration of ownership of the assets. This may incur a heavy burden if multiple types of assets (especially land use right and real-estate) are involved in the transaction.

Although the above regime is generally applicable to M&A transactions of all types of companies, there are some special requirements that need to be followed for certain types of acquisitions. The most typical example would be acquisitions of SOEs. In China, the concept of SOE has a very broad coverage, including SOEs that are wholly owned by the state, partially invested and controlled by the state or partially invested by the state (including joint ventures between SOE and foreign investors). The central government (State Council) and local government perform their duties and exercise their rights as an equity investor of a SOE through the central government and local governments' State-owned Assets Supervision and Administration Commission (SASAC). Therefore, the government plays an important role in acquisition transactions with respect to an SOE.

In China, there is a special and rather complicated legal regime that regulates transactions for state-owned assets from various perspectives. Since equities, shares and assets of an SOE are defined as a type of state-owned asset, acquisition of an SOE is also subject to the regime. The key concept is to ensure that all state-owned assets (including the SOE) can be acquired or transferred on a 'fair price and fair dealing' basis.

When it comes to the acquisition of an SOE, the buyer is advised to pay particular attention to the following points:

1. approvals from SASAC may be required; especially if an important SOE is involved in the merger, prior approval by the competent SASAC will be mandated before a board resolution can be made;
2. an accounting firm and asset valuer need to be engaged to set a fair baseline for price negotiation;
3. even after the buyer and seller have reached their agreement on the deal, most of the transfer of state-owned assets will be conducted in an auction-like procedure in a property rights exchange. The parties should be very careful on setting proper deal conditions to avoid an unexpected third-party buyer jumping in during the auction procedure; and
4. there are some requirements regarding the payment mechanism with respect to acquisition of state-owned assets, thus buyers should be aware that they are not completely free to negotiate the payment conditions.

Special regime applicable to foreign investment

Except for the generally applied regime, acquisition of a company in China by a foreign investor should also be in compliance with some special regimes that are applicable to foreign investment. Since most of these special regimes have been discussed in detail in former editions of *In Depth: Mergers & Acquisitions*, this chapter will focus on some of the latest developments that are worth noting.

Negative Lists

When a foreign investor considers acquiring a company in China, the Negative List will be the first thing that the investor should check. The formal name of the Negative List is the Special Administration Measures for Foreign Investment Market Entry. This list sets out the industries and business areas that a foreign investor is restricted to or even prohibited from investing in, and thus it is usually called the 'Negative List'. Other than the general Negative List, there is another type of Negative List that is applicable only in free trade zones (the FTZ Negative List). The FTZ Negative List is slightly shorter than the general Negative List and the administration measures are more lenient, which means foreign investors have a higher level of freedom to invest in companies in free trade zones.

The Negative List was published in 2018[3] for the first time and since then has been updated together with the FTZ Negative List a few times. As mentioned above, at the time of writing, the latest Negative List is the version that was updated in 2021. According to this version, foreign investment in 31 industries is either prohibited or subject to certain restrictions. That number was 48 when the Negative List was published for the first time in 2018 and in the 2020 version it was 33. The Negative List and the FTZ Negative List are discussed above.

Foreign Investment Security Review

On 19 December 2020, Measures for Security Review of Foreign Investment (the Security Review Measures) were published and came into effect on 18 January 2021.

A security review system for foreign investment was introduced for the first time in 2011. In 2015, the National Security Law reinstated the security review for foreign investment as part of the whole national security system but did not provide many details. The Security Review Measures are the long-awaited special regulations on the topic of security review for foreign investment.

According to the Security Review Measures, a foreign investor or domestic party should report to the competent authority before the execution of such investment when a foreign investor:

1. invests into military industries or military industry related areas;
2. makes an investment in areas near military facilities; or
3. invests in areas that concern national security (such as important agriculture products, important natural resources and energy, manufacturing of important equipment, important infrastructure, important culture products and services) and acquires the power to control the target company.

The security review is to be divided into two phases. Within the first 30 days, the competent authority is to conduct a general review to see if the investment could possibly cause any influence on national security and if the authority finds that the investment will not cause any influence on national security, the review procedure can be concluded. If the authority finds that such investment could possibly cause any influence on national security, the second phase, namely the special review, will be triggered to further evaluate the potential influence. The authority should finish the special review within 60 days but can extend such deadline if it is deemed necessary. According to the Security Review Measures, the National Development and Reform Commission (NDRC) and Ministry of Commerce (MOFCOM) will jointly take responsibility for a security review for foreign investment.

However, the Security Review Measures are still silent on some important topics such as the content of the security review. Therefore, we shall continue to follow up with any developments in this area.

Data export security assessment

Since 2021, we have witnessed some of the most important developments in the field of data law. China's Data Security Law came into effect on 1 September 2021 and the Personal Information Protection Law came into effect on 1 November 2021. Following the enactment of this cornerstone legislation, the long-awaited Measures for Data Export Security Assessment (the Data Export Measures) were released on 7 July 2022 and came into effect on 1 September 2022. The Data Export Measures added a very important dimension to be considered when a foreign investor acquires a Chinese company. In particular, when the target company possesses a huge amount of personal information or important data, acquiring the company will grant access to this information to the foreign investor, which would have a similar effect as that of data export.

According to the Data Export Measures, when a data processor provides data overseas and falls under any of the following circumstances, the data processor shall apply for a data export security assessment to the State cyberspace administration via the provincial cyberspace administration for its domicile where the data processor:

1. provides important data overseas;
2. is a critical information infrastructure operator (CIIO) or a data processor that processes personal information of at least one million persons;
3. has provided personal information of 100,000 individuals or sensitive personal information of 10,000 individuals overseas on a cumulative basis since 1 January of the previous year; and
4. falls under any of the other circumstances stipulated by the state cyberspace administration where a data export security assessment needs to be applied for.

In addition to the Data Export Measures, on 23 February 2022, the Measures on the Standard Contract for Outbound Transfer of Personal Information (the SCC Measures) were released and came into effect on 1 June 2023. When data or personal information does not meet the requirements set forth in the Data Export Measures for a security assessment, the transferor and transferee must at least enter into a standard contract and file with the relevant authority. More importantly, both the Data Export Measures and the SCC Measures require the data processor to conduct a self-assessment before the security assessment at the state cyberspace administration or file with the relevant authority.

However, the Data Export Measures and the SCC Measures raised great concerns from businesses, including the M&A industry, due to their relatively vague and strict thresholds and possible heavy compliance burden that may be incurred by parties of cross-border M&A transactions.

As response to such concerns, Measures on Promotion and Regulation of Cross-border Data Transfer (the New Data Export Measures) were published by China Administration of Cyberspace on 22 March 2024, with immediate effect. The New Data Export Measures modified and supplemented the Data Export Measures in the following aspects.

First, the New Data Export Measures expressly declare that for data that have not been defined or publicly stated by the relevant authority to be 'important data', the processor is not required to apply for a data export security assessment. Second, the New Data Export Measures ease the requirements for data export security assessment, entering standard contract or passing personal information protection certification. Namely, if a data processor, other than a CIIO, exports no more than 100,000 persons' personal information since each 1 January, then there is no need to conduct the security assessment, enter into standard contract or pass the personal information protection certification, and a data export security assessment will only be required if a CIIO exports personal information or important data or a processor other than a CIIO exports important data or non-sensitive personal information of more than 1,000,000 individuals or sensitive personal information of more than 10,000 individuals on a cumulative basis since 1 January of the current year, which is significantly lower than the Data Export Measures. Finally, the new Data Export Measures also allow free trade zones to produce their own negative lists relating to data export.

Foreign involvement in M&A transactions

Outbound M&A

In 2023, the number of outbound M&A transactions in China declined heavily in terms of both the volume and the value of transactions compared with 2022, reaching 354 deals and US$19 billion, respectively. The performance of outbound deals has maintained a low level for the third consecutive year since 2020.[4]

In terms of target regions, in 2023, Asia was still the region that attracted most outbound deals. Deal value to the Middle East dropped almost 98 per cent compared with 2022, which was a record-breaking high year because of China Merchant Fund and Black Rock's US$15.5 billion acquisition of Aramco Gas Pipelines Company in 2022. Africa is the only region that witnessed an increase in deal value: outbound deals worth US$2.8 billion were made to Africa in 2023, while in 2022 the figure was only US$0.7 billion.

Inbound M&A

In 2023, strategic buyer transactions decreased by 28 per cent in terms of volume and 22 per cent in terms of value; in comparison with 2022, both were the lowest that they have been since 2018. However, the deal value for foreign strategic buyers increased 4 per cent, which reflected the grow of average deal size. For financial buyer transactions, private equity transactions decreased by 42 per cent in terms of volume and 37 per cent in terms of value. For VC buyer transactions, the deal volume decreased by 21 per cent and the deal value decreased by 45 per cent.[5]

Observed from the perspective of foreign direct investment, global foreign direct investment in 2023 decreased marginally by 2 per cent.[6] But cross-border M&A have decreased by 46 per cent in terms of deal value. Foreign direct investment in developing Asian countries fell by 8 per cent and China, as the second largest foreign direct investment recipient in the world, saw a rare decline in inflows. Sizeable declines were recorded in India and west and central Asia.[7]

Significant transactions, key trends and hot industries

Similar to 2021, in 2022 industry, energy and power and finance were still the top three sectors for strategic buyer transactions in terms of deal value. High technology, consumer and healthcare were the next three popular sectors. Regarding private equity deals, high technology has still been the sector that has attracted the biggest value of deals and the industrial sector and energy sector have maintained their stable positions in the top three sectors. However, real estate and telecommunications are the two sectors that increased in 2023.

In 2023, mega deals were mainly concentrated in the energy and power, financial services and semiconductor sectors. China Yangtze Power's US$11.9 billion acquisition of China Three Gorges Jinsha Yun-chuan Hydropower 100 per cent shares was among the top mega domestic M&A deals. The major financial group CIIC closed its deal of acquiring 5 per cent shares of China Huarong, one of the major assets management companies, at a price of US$1.7 billion. Together with 21 per cent of China Huarong's shares that were already in the possession of CIIC, China Huarong has now became a consolidated subsidiary of CIIC. The US insurance tycoon, Chubb, spent US$1.5 billion in acquiring Huatai Insurance's shares. After that, since its first investment into Huatai 22 years ago, Chubb has finally secured controlling power over Huatai.

International automobile manufacturers are now in race for business partners in the Chinese EV market. On 26 July 2023, Volkswagen announced its US$700 million investment into Xiaopeng, a rising EV manufacturer, to acquire near 5 per cent of the shares with one seat in the board. The two companies are planning joint development of EV cars, which will, it is hoped, be launched in 2026. Just less than three months later, in October 2023, Stellantis, the parent company of Alfa Romio, Crysler, Maserati and Fiat, also declared its acquisition of 20 per cent of the shares of Leapmortor, an emerging EV manufacturer, at a price of €1.5 billion, with a great expectations for the synergy effects. Growth of the EV market also promoted transactions along the supply chain. Further to its acquisition of Lithea in 2022, Ganfeng Lithium spent another US$ 343 million to acquire Mali Lithium, holder of the Goulamina lithium mine in Mali.

Financing of m&a: main sources and developments

In China, cash is still the main source for M&A. The buyer can either use its own capital or secure finance by bank loans. In 2015, the China Banking Regulatory Commission (now the

State Administration of Financial Regulation) amended its Guidelines on Risk Management of Commercial Bank's Takeover Loan (the Guideline) to guide the commercial banks on its business for company takeover loans. In accordance with the Guideline, in an M&A transaction, the takeover loan must not account for more than 60 per cent of the whole consideration and, in principle, the term of loan should not be longer than seven years. The Guideline also requires commercial banks to set up a professional internal team to conduct due diligence and risk assessment regarding the lending of takeover loans. The internal team is to assess risks from, inter alia, a business perspective, the market structure, operational strategy, management team, enterprise culture and support by shareholders.

Regarding foreign-invested companies in China, for the purpose of managing foreign exchange, foreign-invested companies are not allowed to use their registered capital to pay consideration in an M&A transaction (except for those foreign-invested companies that are established with the purpose of making investment). As such, foreign-invested companies can only use the funds generated from their business operations to pay the consideration. However, in 2019, the State Administration of Foreign Exchange lifted this restriction. Currently, all foreign-invested companies are allowed to use their registered capital for a 'share investment purpose' so long as such an investment does not violate the Negative List.

In addition to cash, in China, company shares can also be used as consideration in M&A transactions, especially in M&A transactions by listed companies. In this case, the buyer would typically issue new shares to the seller and the seller would transfer all shares of the target company to the buyer in exchange for the newly issued shares of the buyer.

Employment law

The most important employment laws are the Labour Law (which came into effect from 1 January 1995) and the Employment Contract Law (which came into effect from 1 January 2008). Given the fact that most employment relationships are established by an employment contract, the Employment Contract Law has become the most significant and fundamental legislation in the area of employment law. The Employment Contract Law sets out the fundamental rules on the establishment, content, validity, performance and termination of an employment contract as well as the legal liabilities that may arise in the event of any violation to those rules. In addition, many other important topics are covered in this area by other laws and regulations. For example, trade union, social insurance, employment dispute resolution mechanisms, labour safety and special protection of female employees. More importantly, the rules and practice on employment matters may differ from each other in different provinces. All of these have rendered the area of employment law relatively broad and complicated.

Although there have not been any major developments in the area of employment law from a M&A perspective in the past year, employment law is still an area to which a buyer needs to pay attention when acquiring a company in China. One typical problem is insufficient contribution to social insurances. In China, both the employer and employee have to contribute to an employee's social insurance. However, in many cases, the employer does not pay a contribution that is in accordance with the ratio and standards required by law. There are many reasons for such a situation. Sometimes the employer does so purely to save employment costs, the employer may do so in order to save administrative burden or perhaps the employees themselves wish to have more in-pocket salary. When facing such a situation, the buyer is advised to make special arrangements to deal with potential legal risks due to the insufficient contribution to social insurance that may occur after the acquisition.

Another problem that often occurs in an M&A transaction is the target company's employees may ask for compensation because of the change of shareholder. Legally speaking, a change of shareholder would not change the target company's legal personality and cause no impact on the continuance of the employment contract; thus the employees would have no legal ground to make such a claim. However, if the employees make such a claim, the parties to the M&A must properly handle the issue to avoid any negative impact on the takeover of the target company.

Tax law

As for tax laws and regulations in M&A, there has been no substantive legislation or amendment in the past three years. As already covered in previous editions of *In Depth: Mergers & Acquisitions*, when foreign investors, as non-resident enterprises, obtain income from an M&A transaction conducted in China, an enterprise income tax of 10 per cent must be applied if the non-resident enterprise has no establishment in China, or has an establishment in China but whose income has no association with such establishment.

Competition law

The merger control filing procedure has always been a factor that parties feel is hard to control. Although since the introduction of the merger control filing there have only been a few cases that were rejected by the Chinese anti-monopoly authority, the filing procedure can sometimes last for a couple of months or even years due to the heavy caseload of the authority. Furthermore, the law and regulations were not very clear on some key concepts, including 'control' and 'concentration', and thus parties to an M&A transaction, especially in complicated cases, may sometimes find it difficult to determine whether a merger control filing is necessary.

On 24 June 2022, the amended draft of the Anti-Monopoly Law (AML) was approved by the Standing Committee of the National People's Congress and the amended AML came into effect on 1 August 2022.

As a part of the amendment to the AML, on 27 June 2022, the State Administration of Market Regulation (SAMR) released amendment drafts to six relevant regulations in the field of AML. Among these, the most noteworthy from an M&A perspective was the amendment to the Provisions of the State Council on the Thresholds for Declaring Concentration of Business Operators (the Threshold Provision) and the Provisions on Review of Concentration of Business Operators (the Review Provision). The Review Provision was approved on 10 March 2023 and came into effect on 15 April 2023 and the Threshold Provision was approved on 29 December 2023 and came into effect on 22 January 2024.

The new threshold is to be 12 billion yuan in terms of global turnover (10 billion yuan under the previous threshold) of all operators participating in the concentration and 800 million yuan in terms of PRC turnover (400 million yuan under the previous threshold), respectively, of at least two operators participating in the concentration. Alternatively, 4 billion yuan (2 billion yuan under the previous threshold) in terms of total PRC turnover of all operators participating in the concentration and 800 million yuan in terms of PRC turnover (400 million yuan under the previous threshold), respectively, of at least two operators participating in the concentration. Under the new thresholds, many M&A transactions would no longer be subject to a merger control filing in China.

However, the 'killer acquisition' threshold, namely the PRC turnover of an operator participating in the concentration in the last fiscal year exceeding 100 billion yuan, and the market value (or valuation) of the other operators being not less than 800 million yuan and the PRC turnover of such operator accounting for more than one-third of its global turnover, was removed from the final version of the Threshold Provision.

In addition to raising the threshold, the review powers were delegated to local SAMR. The Review Provision allows the SAMR to delegate its review power to provincial SAMR. On 15 July 2022, SAMR announced its pilot plan to delegate its review power to five provincial SAMRs (i.e., Beijing SAMR, Shanghai SAMR, Guangdong SAMR, Chongqin SAMR and Shaanxi SAMR) to review the merger control filings that are eligible for simplified filing procedures. According to SAMR's new release, in 2023, which was the first full year after the provincial SAMRs were granted the review power, SAMR (both central and provincial) completed the review of 797 cases, among which 707 cases were eligible for simplified procedures. Among all simplified cases, 352 cases where delegated to five provincial SAMRs. The Shanghai SAMR completed 157 cases, which was the most among all five provincial SAMRs. Among all 797 cases, 782 cases were approved unconditionally and the average length for review was 25.7 days, 0.8 days shorter than the previous year.[8]

Outlook and conclusions

It had been expected that after the covid-19 pandemic, with all containment measures lifted, China's economy might have recovered quickly, but the actual situation was far from satisfying. Domestic demand showed a strong rebound at the beginning of 2023 but failed to maintain momentum. Although the government has launched a few rounds of supportive policies, including reduction of house loan interest rates, the real estate industry was still struggling with no clear sign of recovery. Furthermore, China's population has decreased in 2023 for the second consecutive year since 2022, and it is widely believed that the population will probably not increase again in the near future. In addition, according to some experts, China's urbanisation has reached its high point, leaving little room for further expansion. Apparently, the impact of depopulation goes far beyond the real estate industry. Healthcare and life science had been an active sector for M&A deals during the covid-19 pandemic, but was also facing a slowdown in 2023. Education is another sector that has experienced a 'change in wind direction' in recent years. EV, AI and photovoltaic are perhaps among the few industries that have achieved fast growth in the past few years, but ongoing regulatory, economic and geopolitical uncertainty are casting a shadow over their future development.

Nevertheless, there continue to be some positive points for M&A in China. First, there is no doubt that China will clearly follow its policy of welcoming foreign investment and continue to open up the market to foreign investors, actively introduce and use foreign capital, and achieve the above goals by including more sectors in the encouraged industries catalogue, while continuing to shorten the Negative List, promote investment in central and western regions and the Belt and Road Initiative.

Second, in order to balance the negative influence of outside markets, the Chinese government has paid great attention and effort to form a more unified and freely flowing domestic market to promote domestic demand. All market entry restrictions and local subsidy policies are going to be strictly reviewed to promote the flow of business within China. Hopefully, we can see more domestic M&A deals in domestic markets.

Outbound investment and localisation of manufacturing are also being encouraged as a way to avoid unstable trade policies. Many EV manufacturers and photovoltaic manufacturers are actively seeking opportunities to expand their overseas business. In any event, given its sheer market size, we believe a stably growing China, even if not expanding as fast as previously, is still at the top of the list to attract M&A deals.

Endnotes

1 Yuchuan Sun is a partner and Pengcheng Zhang is an associate at Hanling & Partners. ^ Back to section

2 PwC China M&A 2023 Review and Outlook, released by PwC in February 2024 (China M&A 2023 review 2024 outlook_EN (pwccn.com)). ^ Back to section

3 Before the issuance of the Negative List, the Guidance Catalogue for Foreign Investment Industries served the same function for more than 30 years. ^ Back to section

4 PwC China M&A 2023 Review and Outlook, released by PwC in February 2024 (China M&A 2023 review 2024 outlook_EN (pwccn.com). ^ Back to section

5 ibid. ^ Back to section

6 World Investment Report 2024, released by UNCTAD in June 2024. ^ Back to section

7 ibid. ^ Back to section

8 www.samr.gov.cn/fldes/sjdt/gzdt/art/2024/art_4e6d3db63fb34a50b6dd0436f9fdea73.html. ^ Back to section

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