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China: Law & Practice

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China: Trends & Developments

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Law and Practice

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1. LEGAL SYSTEM

1.1 Legal System and Judicial Order

China is governed under a socialist legal system with Chinese characteristics that is based on the civil law system. The legal system is founded on a written constitution and the laws and decisions adopted by the National People's Congress and its standing committee. The State Council is China's top administrative authority, which is empowered to promulgate administrative regulations and whose constituent departments and sub-agencies are authorised to promulgate legally binding administrative measures, rules, decisions, and directives. At the provincial and municipal levels, people's congresses and local counterparts of the nation's administrative authorities also hold legislative and administrative powers, respectively, within their jurisdictions. Local laws and administrative documents must not conflict with their superior national-level counterparts.

The Chinese judicial system is composed of different levels of courts, including the following.

- The Supreme People's Court.
- Local people's courts:
 - (a) higher people's courts at the provincial level;
 - (b) intermediate people's courts at the municipal level;
 - (c) basic people's courts at the district or lower level.
- Military courts, and other special courts (such as railway courts and maritime courts).

The Supreme People's Court is the highest judicial authority in the Chinese judicial system and exercises supervisory power over the activities of lower courts. Court rulings in China generally do not serve as binding precedent, although certain cases have important referential value.

China has adopted a "two instances" trial system. Cases are first heard by a court that has jurisdiction over the dispute. If a litigant does not accept the judgment of first instance, it can generally appeal to the court at the next higher level before the judgment takes effect.

The people's procuratorates are divided into levels similar to the people's courts and undertake the role of public prosecutors during criminal proceedings. The procuratorates approve arrests made by the public security organs; carry out investigations of, institute, and prosecute criminal cases; and supervise the enforcement of sentences. The Supreme People's Procuratorate exercises supervisory power over the activities of procuratorates at each level.

The Supreme People's Court and the Supreme People's Procuratorate have the power to interpret the application of laws arising in judicial practice.

2. RESTRICTIONS TO FOREIGN INVESTMENTS

2.1 Approval of Foreign Investments

China has adopted a negative list approach to foreign investment. Foreign investment is generally permitted without approval in industries that are not prohibited or restricted from foreign investment under the Special Administrative Measures for Foreign Investment Access (the Negative List). Restricted industries currently include telecommunications, education, and healthcare, while prohibited industries include broadcasting and publishing, among others.

Restricted industries are subject to special administrative measures that typically include shareholding limitations and nationality requirements for the legal representative and senior executives, among others. To ensure compli-

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ance with the Negative List, foreign investors seeking to invest in restricted industries should obtain a pre-investment permit from the competent industry regulator or, if none exists, apply for a review by the local counterpart of the State Administration for Market Regulation (SAMR).

Besides the Negative List regime, foreign investors may be subject to other pre-investment administrative approvals or permits applicable to all investors, such as anti-monopoly review, national security review, and industry-specific permits.

2.2 Procedure and Sanctions in the Event of Non-compliance

The Foreign Investment Law, effective as of 1 Jan 2020, provides a general framework for authority approvals and permits for foreign investors, which include the following.

- Anti-monopoly review – a pre-closing clearance applicable to cross-border acquisitions resulting in a change of control or, in certain cases, the establishment of a joint venture that meets certain thresholds.
- National security review – a pre-closing clearance applicable to foreign investments with national security implications.
- Foreign investment project approval or record-filing – applicable to foreign investment projects involving fixed asset investments, which must be completed before the commencement of the project.
- Industry-specific permits – applicable to certain business activities that require industry regulatory approval and, in most cases, can be obtained after the foreign-invested company has obtained its business licence.

The timing of the foregoing approvals and permits often varies, depending on the extent and depth of the review process.

Failure to comply with authority approvals and permits may result in adverse consequences for foreign investors and their investments. If a foreign investor makes an investment in a restricted industry without approval, the foreign investor will first be ordered to make corrections and take necessary measures to meet the requirements. Failure to do so could result in the unwinding of the investment. Compliance issues may also negatively impact the investor's social credit status, which could make it more difficult to obtain financing and to qualify for preferential government policies, among other adverse consequences.

2.3 Commitments Required from Foreign Investors

Chinese authorities generally do not require investors to make commitments prior to investing in China beyond a general undertaking to comply with Chinese laws. Exceptions exist. For example, SAMR may impose restrictive conditions when granting anti-monopoly clearance, such as requiring divestiture of assets, reduction of ownership, or the undertaking of certain other actions.

2.4 Right to Appeal

In principle, an investor may challenge adverse administrative decisions through a complaint mechanism, administrative reconsideration with the authority, or administrative litigation before a court. However, in practice, it is highly uncommon for investors to challenge an authority's decision not to provide necessary approvals because taking legal action against the authority would be time-consuming and unpredictable.

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3. CORPORATE VEHICLES

3.1 Most Common Forms of Legal Entities

The two most common forms of legal entities in China are the limited liability company (LLC) and the company limited by shares (joint stock company). Foreign investors currently favour the LLC form, principally due to its flexible governance structure – a closely held LLC only requires a single equity holder and one executive director, and equity holders enjoy greater flexibility in formulating corporate governance policies. By contrast, a joint stock company requires at least two shareholders and a board of directors, and it must primarily abide by statutory procedural requirements for shareholder and board meetings. Both LLCs and joint stock companies afford limited liability to their investors. In general, LLCs and joint stock companies are not subject to minimum capital requirements, although specific industry rules may impose such requirements.

LLCs are more favourable for greenfield projects, wholly foreign-owned enterprises, and joint ventures. In this regard, the primary advantages of joint stock companies are that they offer access to the resources of local Chinese partners and may be listed on Chinese stock exchanges, thereby providing another exit for investors.

3.2 Incorporation Process

Establishing an LLC in China that will not engage in activities stipulated in the Negative List generally involves the following steps:

- registration for establishment with the local counterpart of SAMR; and
- post-establishment formalities with other local authorities in the LLC's jurisdiction of establishment, including registration of company seals, registration with the tax authority,

and registering with the foreign exchange authority through a bank.

LLCs can formally commence operations only upon completion of all post-establishment formalities.

3.3 Ongoing Reporting and Disclosure Obligations

Chinese law requires private companies to report certain corporate matters to SAMR and the Ministry of Commerce (MOFCOM).

- SAMR filing – private companies are required to file annual reports with SAMR and to report to SAMR on an interim basis any changes to basic information of the LLC, such as a change of shareholder, corporate name, legal representative, directors, etc.
- MOFCOM FDI reporting – private companies with foreign ownership are also required to report to MOFCOM in the event of ownership changes involving the company's ultimate beneficial owner.

3.4 Management Structures

LLCs in China are required to have a three-tiered governance structure under the Company Law:

- a board of shareholders or sole shareholder;
- a board of directors or executive director; and
- a board of supervisors or supervisor(s).

Power over an LLC is vested in its shareholder or board of shareholders. LLCs are also required to have a board of directors or an executive director, which reports to the shareholder or board of shareholders. The executive director or board of directors may appoint a general manager that manages the LLC's daily operations.

LLCs are also required to have a legal representative, who must be a natural person and who may concurrently serve as the LLC's board chairman,

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executive director, or general manager. The legal representative is responsible for engaging in civil acts on behalf of the LLC in accordance with law or the LLC's articles of association.

3.5 Directors', Officers' and Shareholders' Liability

The Company Law contains the principal legal provisions governing the liability of directors, supervisors, and officers in the execution of their duties for a company. These individuals may be held liable to the company where, for example, in executing their duties they cause a loss to the company in violation of provisions of law, administrative regulations, or the company's articles of association.

Companies in China are deemed independent legal persons that own assets and assume debts separately from their owners. Equity holders are generally not held liable for the debts of their companies beyond their subscribed and contributed capital. This "corporate veil" is qualified and may be pierced where, for example, it is shown that an equity holder has abused its limited liability status at the expense of creditors in violation of provisions of law, administrative regulations, or the company's articles of association.

4. EMPLOYMENT LAW

4.1 Nature of Applicable Regulations

Employment relationships in China are governed by two foundational laws, the Labour Law and the Labour Contract Law. In addition to these two laws, it is important for foreign investors in China to become familiar with local and provincial regulations, as well as to maintain a positive relationship with the local labour bureau, which handles employment issues on a day-to-day basis.

Chinese law also encourages employees to enter into collective agreements with their employers that set out matters generally applicable to all employees, such as remuneration, working hours, days off, holidays, health and work safety, insurance, and welfare.

4.2 Characteristics of Employment Contracts

Employers in China are required to enter labour contracts with each individual employee. By law, labour contracts must be in writing, with the exception of part-time work. If an employer fails to sign a contract with an employee within one month after the employee starts work, the employee is entitled to receive double their normal wages until a contract is signed.

Labour contracts are required to include certain material provisions, such as:

- parties to the contract;
- term of the contract;
- job description and place of work;
- working hours;
- rest and leave;
- labour compensation;
- social insurance;
- labour protection; and
- working conditions and protections against occupational hazards.

Local rules and regulations may require the inclusion of additional contractual provisions and recommend the use of standard contracts.

4.3 Working Time

Chinese law implements three types of working hour systems. These systems are the standard working hour system, the comprehensive working hour system, and the flexible working hour system. Each working hour system permits different arrangements for working hours, rest periods, and overtime pay.

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Standard Working Hour System

Employees may work up to eight hours each day and work an average of 40 hours per week. Employers may temporarily adjust working hours and workdays in accordance with actual conditions, but employees must have at least one day off each week.

Flexible Working Hour System

This system is usually applied to senior management personnel, field staff, salespersons, and others whose work cannot be measured under the standard working hour system. Prior approval from the local labour authority is required before this system can be implemented.

Comprehensive Working Hour System

This system allows for employee working hours to be calculated per week, month, quarter, or year. However, the average working hours per day and per month must be similar to those under the standard working hour system. Prior approval from the local labour authority is required before an employer can implement the comprehensive working hour system.

Employees under the standard and comprehensive working hour systems are entitled to overtime pay according to the following standards:

- for overtime worked during normal working days – no less than 150% of the hourly salary for each overtime hour worked;
- for overtime worked during any day off (generally Saturday and Sunday) and if no extra time off could be arranged in lieu thereof – no less than 200% of the hourly salary for each overtime hour worked; and
- for overtime worked during public holidays – no less than 300% of the hourly salary for each overtime hour worked.

4.4 Termination of Employment Contracts

Chinese law does not generally recognise an employer's right to at-will employment. Termination by employers is strictly regulated and must therefore rely on a statutory basis and adhere to certain procedural requirements.

Unilateral Termination by an Employee

Chinese law permits an employee to unilaterally terminate their employment relationship by resigning at will, provided that 30 days' advance written notice is given to the employer. Employees are also entitled to immediate termination in instances where the employer has acted in violation of laws or the employment contract.

Mutual Termination

Employers and employees may also terminate the employment relationship based on mutual agreement. Employees who agree to mutual termination are entitled to severance.

Unilateral Termination by an Employer

Employers can unilaterally terminate their employees in three ways: (i) summary dismissal, (ii) termination with prior notice or payment of salary in lieu of notice, and (iii) lay-offs.

Summary dismissal

Employers are entitled to terminate employees with immediate effect without severance in the case of the following serious violations:

- failure to satisfy conditions during the probationary period;
- serious violation of the employer's policies and rules;
- breach of duty or misconduct resulting in material loss to the employer;
- existence of conflicting employment relationships and refusal to rectify;
- the contract was concluded by fraud, threat, force, or coercion; and

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- the employee is investigated for criminal liability.

Termination with prior notice

Employers may also unilaterally terminate employees with prior notice of not less than 30 days (or payment of one month's salary in lieu of notice) on any of the following grounds:

- the employee suffers from a disease or non-work-related injury and is unable to perform their original duties after the statutory medical treatment period or any other duties arranged by the employer;
- the employee is found to be unqualified and the employee remains unqualified after receiving training or an adjustment of their duties; and
- a major change in objective circumstances that hinders continued fulfilment of the original contract and, upon consultation, the employer and employee are unable to amend the employment agreement.

Lay-offs

Chinese law permits employers to conduct "economic lay-offs" of 20 or more employees or over 10% of an employer's total workforce due to the following severe economic difficulties:

- bankruptcy restructuring;
- serious difficulties in production and/or business operations;
- switching production, introducing major technological innovations, or changing business models, and workforce reduction is still necessary after amending employment contracts; and
- other significant changes to the objective economic circumstances relied upon at the time of execution of the employment contracts.

Note that, before implementing an economic lay-off plan, the employer must first give 30 days' advance notice to the employee trade union and then report the plan to the local labour bureau. Employees terminated in a lay-off are entitled to severance.

Severance

Employees whose employment is terminated unilaterally or by mutual agreement may be entitled to severance from their employer. Severance payments are typically calculated at the rate of one month's salary for each full year of employment, with any period of greater than six months counting as one year. For this purpose, each month of salary is determined based on the employee's average salary over the previous 12 months.

4.5 Employee Representations

Chinese law does not require employees to be formally represented, either by a trade union or an employee representative congress. Foreign-invested companies do not typically form these representative bodies. An employer is required to consult with its employees or their representatives in instances where the employer seeks to adopt or amend the employee manual, handbook, or other sets of rules, or change substantial matters that involve the interests of employees, such as remuneration, working hours, days off and personal leave, work safety and health, insurance and benefits, training, and discipline.

5. TAX LAW

5.1 Taxes Applicable to Employees/Employers

Chinese law generally requires employers to withhold income taxes and social benefits contributions from wages, salaries, bonuses, and other amounts payable to their employees.

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Individual Income Tax

Employees are subject to individual income tax on their wages and salaries, which is levied at graduated rates ranging from 3% to 45%. Employees are allowed a general deduction from taxable income each year of CNY60,000 as well as deductions for certain social benefits contributions and applicable special deductions.

Social Benefits Contributions

Employers and their employees who work in China are generally required to contribute to the country's social benefits scheme, which is composed of the housing provident fund and mandatory social insurances – ie, medical insurance, unemployment insurance, maternity insurance, work-related injury insurance, and pension insurance.

Social benefits contribution rates vary by locality, with the employee's and the employer's shares being approximately 10% and 35%, respectively, of the contribution base. The contribution base is set at a minimum of 60% and a maximum of 300% of the local average monthly salary.

5.2 Taxes Applicable to Businesses

China primarily taxes economic activity by levying corporate income and value-added taxes. Other taxes include consumption tax, customs duties, land appreciation tax, real estate tax, stamp duty, and local surcharges.

Corporate Income Tax

Chinese tax resident companies are subject to a corporate income tax (CIT) on worldwide taxable profits at a uniform rate of 25%. Tax resident companies include companies that are established under Chinese law and companies that are established in another jurisdiction but have their effective management located inside China.

Non-Chinese tax resident companies are subject to 25% CIT on taxable profits attributable

to their permanent establishments within China. China-sourced income that non-resident companies receive that is not attributable to a permanent establishment is generally subject to a 10% CIT withholding tax. Withholding taxes are generally imposed on passive income, such as dividends, interest, royalties, and capital gains, and may be reduced under tax treaties or other arrangements.

Value-Added Tax

China imposes a value-added tax on the business-related provision of goods, intangible and immovable properties, and taxable services, and on the importation of goods into China. Applicable rates are as follows:

- 13% for the sale and importation of most goods, the provision of repairs, replacement and processing services, and the leasing of tangible movable properties;
- 9% for the sale and importation of exceptional goods, the provision of transportation services, postal services, basic telecommunication services and construction services, the leasing and sale of immovable property, and the transfer of land use rights;
- 6% for the provision of value-added telecommunication services, financial services, modern services (eg, information services) and consumer services, and sales of other intangible properties; and
- 0% for the exportation of goods and certain services.

A small-scale VAT taxpayer is usually taxed at a levy rate of 3%, unless otherwise stipulated. A small-scale VAT taxpayer whose monthly sales are CNY150,000 or less is exempt from VAT, effective from 1 April 2021.

General VAT taxpayers are entitled to a credit against output VAT for input VAT that has been levied on purchased goods and services. Tax-

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payers may be entitled to a credit or refund of input VAT on exported goods and zero-rated services.

5.3 Available Tax Credits/Incentives

CIT Incentives

Certain tax resident companies may be eligible for a preferential 15% CIT rate. Eligible companies include qualified hi-tech enterprises, advanced services enterprises, small and thin-profit enterprises, enterprises that are active in encouraged industries in China's central, western, or north-eastern regions, and enterprises that are active in specified regions that encourage investment, such as the Hainan Free Trade Port. Tax resident companies may also qualify for super deductions of R&D expenses, accelerated depreciation, and foreign tax credits.

VAT Incentives

VAT exemptions may be granted for the provision of qualified services, such as educational, medical, religious, or culture-related services; certain financial services; technology-related services; and certain exported services.

Qualified general VAT taxpayers engaging in four specified industries may receive a 10% or 15% weighted deduction for creditable input VAT from 1 April 2019 to 31 December 2021, these industries are postal services, telecommunications services, modern services (eg, information services), and livelihood services.

5.4 Tax Consolidation

Consolidated tax filings are generally permissible only for a company and its branches, which are considered dependent legal entities. Besides branch consolidations, tax consolidations are allowed on a limited basis for specified wholly owned holding companies of large corporate groups, upon approval and announcement by the national tax authority.

5.5 Thin Capitalisation Rules and Other Limitations

Related-party loans are subject to thin capitalisation rules, which state that a borrower's debt-to-equity ratio in China cannot exceed 5:1 for financial companies and 2:1 for other companies. A borrower whose debt-equity ratio exceeds the relevant threshold may be unable to deduct interest payments for CIT purposes, unless the borrower establishes with the tax authority that the lending is made at arm's length.

5.6 Transfer Pricing

In China, transfer pricing rules apply to related-party transactions based on the arm's-length principle, which means related parties to a transaction are expected to undertake that transaction as if they were independent and not subject to undue influence. Parties can be considered related by shareholding or "control" through, for example, loans, IP licensing, business operations, or management.

Chinese law requires contemporaneous documentation of related-party transactions upon reaching a specified value threshold. This documentation includes a detailed analysis of the functions and risks of the related parties and prices in comparable transactions. Companies may apply to the authorities for advance pricing arrangements to mitigate transfer pricing risk.

5.7 Anti-evasion Rules

CIT provisions contain broad anti-evasion measures, including for thin capitalisation, transfer pricing, and controlled foreign corporations. Notably, the tax authorities tend to scrutinise the indirect offshore transfer of assets taxable in China, which include equity in Chinese companies, China situs real estate, and assets connected to Chinese permanent establishments.

If a Chinese tax authority deems an indirect transfer by an offshore company to be an

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attempt to evade CIT without a bona fide business purpose, the authority can levy taxes on the domestic transferor based on the substance-over-form principle.

6. COMPETITION LAW

6.1 Merger Control Notification

In general, a merger filing to SAMR is required when an underlying transaction qualifies as a “concentration” and either of the relevant business turnover thresholds is met. Transactions may not be completed before SAMR issues a clearance decision. Offshore transactions can also be subject to the merger control rules.

The essence of a “concentration” is the possession of control. This control may be through positive control, such as shareholder voting rights, or through negative control, such as veto rights over certain critical matters. The business turnover thresholds are as follows.

- Worldwide turnover – the combined worldwide turnover of all the undertakings participating in the concentration exceeds CNY10 billion in the previous fiscal year, and at least two of the undertakings participating in the concentration each has turnover in China in excess of CNY400 million in the previous fiscal year.
- China turnover – the combined turnover in China of all the undertakings participating in the concentration exceeds CNY2 billion in the previous fiscal year, and at least two of the undertakings participating in the concentration each has turnover in China in excess of CNY400 million in the previous fiscal year.

6.2 Merger Control Procedure

Merger filings may be made under either normal or simple procedures. Simple procedure filings are available for transactions that do not raise

competition concerns based on whether the transaction meets certain conditions such as market share thresholds. Simple procedure filings are typically cleared within 30 calendar days of case establishment. For normal procedure filings, the entire process is 180 days (30 days for Phase I review, 90 days for Phase II review, and 60 days for Phase III review).

If SAMR identifies competition concerns during the review process, SAMR may request the parties to propose remedies to address such concerns. The remedy proposal is subject to negotiations with SAMR and comments from key stakeholders. SAMR will conditionally approve the transaction with remedies if the remedies can address the competition concerns. If not, SAMR is authorised to block the transaction.

Under current law, the statutory period for a merger review case does not stop after SAMR officially accepts the case. SAMR will, in practice, sometimes require undertakings to withdraw a notification to technically extend the period of review. A draft amendment to the Anti-monopoly Law issued in January 2020 has proposed that a stop-clock be introduced into the merger review process.

6.3 Cartels

Chinese law prohibits undertakings with a competitive relationship from concluding anti-competitive agreements. These agreements are classified either as horizontal monopoly agreements or vertical monopoly agreements. Certain exemptions and a leniency programme exist with respect to anti-competitive agreements and practices.

Horizontal Monopoly Agreements

Undertakings are prohibited from reaching monopoly agreements with their competitors concerning prices, production or sales volumes,

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allocation of markets, restrictions on R&D, joint boycotts, and other matters.

Vertical Monopoly Agreements

Undertakings are prohibited from reaching monopoly agreements with transaction counterparties such as suppliers, distributors, and customers concerning fixing resale prices, restricting minimum resale prices, and other matters.

Exemptions

Agreements falling into the scope of monopoly agreements can be exempted from the general prohibition of monopoly agreements if specific conditions are met, including:

- (i) the agreement has a qualifying purpose, such as technological advancement and/or product development, improvement of product quality, increases in efficiency and reductions in cost;
- (i) the agreement will not substantially restrict competition in the relevant market(s); and
- (ii) consumers can receive a fair share of the resulting benefits.

Agreements entered by undertakings to safeguard legitimate interests in foreign trade and foreign economic co-operation can be exempted from meeting the first and second conditions above.

Leniency

Undertakings that engage in anti-competitive practices in China are entitled to come forward and apply for leniency with SAMR, a mechanism similar to those in the European Union and the USA. Penalty waivers or reductions may be available to an applicant based on numerous factors, including the timing of the voluntary reporting and the importance of the inculpatory evidence the applicant provides. Generally, the first party to come forward is eligible for reduced punish-

ment, provided that it offers important evidence proving the existence of the anti-competitive practices.

6.4 Abuse of Dominant Position

A number of factors is taken into consideration when assessing the market dominance of an undertaking, including its market share, its ability to control the sales or procurement market(s), its financial and technological strength, the degree to which it is relied upon by other undertakings, and the ease of other undertakings to enter the relevant market. Market dominance is presumed to exist if the market share thresholds are met. For example, an undertaking is presumed to hold market dominance if its market share reaches or exceeds 50%. In making assessments, SAMR and the courts have shown a clear preference for third-party data and official government data.

An undertaking with market dominance is prohibited from engaging in abusive conduct, which includes selling at unfairly high prices, predatory pricing, refusing to deal, exclusive dealing, bundling, or imposing discriminatory or other unreasonable conditions.

Unfair Competition

The Anti-unfair Competition Law has been one of the most frequently enforced laws in China in the past decade, particularly in respect of commercial bribery and advertisement violations. In contrast to other countries, China has adopted this law to regulate unfair competition behaviours separately from specialised anti-monopoly and anti-bribery laws.

The Anti-unfair Competition Law initially came into force in 1993 and has been amended twice – effective 1 January 2018 and 23 April 2019. The first amendment included revisions to nearly all provisions of the law, while the second amendment mainly enhanced trade secret protections

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and increased fines and damages for unfair competition behaviours.

The Anti-unfair Competition Law mainly regulates the following types of unfair competition behaviours:

- causing a business operator's products to be confused with the well-known products of another person;
- seeking transaction opportunities or competitive advantage by using monies, assets, or other means to bribe the employees of a transaction counterparty, organisations or individuals that are entrusted by the transaction counterparty, or organisations or individuals likely to use power of authority or influence to affect the transaction;
- misrepresentation of products;
- infringement of trade secrets;
- prize-attached sales;
- fabricating or disseminating false or misleading information to harm the goodwill or product reputation of competitors; and
- the disruption of the normal operation of cyber products or services provided legitimately by other business operators in specified ways.

SAMR and its local counterparts have the authority to investigate violations of the Anti-unfair Competition Law and to impose administrative penalties, which include monetary fines, the confiscation of illegal gains, orders to cease violations, the revocation of business licences, and recording enterprises' violations in the social credit system.

7. INTELLECTUAL PROPERTY

7.1 Patents

Invention-Creations in China

The Patent Law came into effect in the 1980s and has since been periodically amended to more closely conform to international standards, most recently in 2020. The Patent Law affords patent right protections for invention-creations, which include inventions, utility models, and designs. The law defines these concepts as follows.

- Inventions – new technical solutions proposed for a product, a process or the improvement thereof.
- Utility models – new technical solutions proposed for the shape and structure of a product, or the combination thereof, which are fit for practical use.
- Designs – with respect to a product, new designs of the shape, pattern, or the combination thereof, or the combination of colour with shape and pattern of the overall product or a part thereof, which are rich in an aesthetic appeal and are fit for industrial application.

Patent Filings

The China National Intellectual Property Administration (CNIPA) Patent Office is the designated authority for the acceptance, publication, and examination of patent applications and the granting of patent rights. The CNIPA Patent Office also reconsiders rejected patent applications and grants patent invalidation requests.

Patent applications in China can be made in the following three ways.

- Direct filing – an applicant may directly file with the CNIPA Patent Office through a Chinese patent agent; the application must be in Chinese.

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- Paris Convention – within 12 months of an invention or utility model patent being filed for outside of China (or six months for a design patent), the applicant can file the same in China and claim priority to the overseas application.
- Patent Cooperation Treaty (PCT) application – a foreign applicant can file a PCT application in its home country and select China as one of the designated countries for the application to enter the national phase in China.

Patent Terms

Patent grants are valid beginning from the date of application. Invention patents are valid for 20 years, utility model patents are valid for ten years, and design patents are valid for 15 years.

Invention patentees may now request protection period compensation for unreasonable delays during the examination process. Specifically, an invention patentee may request CNIPA to grant protection period compensation if an invention patent is granted at least four years from the filing date and at least three years from the date of the substantive examination request, except where such delays are caused by the patentee.

Patent Enforcement and Compensation

In cases of infringement, a patent owner can choose to file an administrative complaint with SAMR or initiate a lawsuit with a competent court. In either case, the patent owner can obtain injunctive relief if infringement is found to exist. Patent owners tend to favour litigation to enforce their rights because SAMR administrative actions are not final and may be appealed to a competent court for judicial review.

Courts can award patent owners compensatory damages and up to quintuple punitive damages in cases of wilful and severe infringement. Damages are calculated based on the right owner's actual losses, the infringer's gains, or reference

to multiples of the patent licensing fee where actual infringement losses and gains are difficult to calculate. Statutory damages for patent infringement are between CNY30,000 and CNY5 million.

7.2 Trade Marks

Trade Marks in China

Registered trade marks in China include trade marks for goods and services, collective marks, and certification marks. A mark is generally registrable where it distinguishes the goods or services of one seller or provider from those of others, including any word, device, letter, number, 3D mark, colour combination, sound, or any combination of these elements.

Trade Mark Registrations

The CNIPA Trade Mark Office is the designated trade mark approval and registration authority. Trade mark applications generally require one year for approval. An applicant can claim priority within six months after the same application is filed outside of China or if the mark is used in an exhibition recognised by the Chinese authorities. A trade mark may be registered in China in two ways:

- direct filing – direct filings with the Trade Mark Office must be made through a Chinese trade mark agent, the application must be prepared in Chinese; or
- Madrid System – foreign applicants can file a Madrid application in their home country (if applicable) and select China as one of the designated countries for the application.

Trade Mark Terms

A trade mark registration is valid for ten years from the date it is approved. The registrant can file a renewal application within 12 months before the end of each successive ten-year period following the date of registration, or within a grace period of six months thereafter.

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Trade Mark Enforcement and Compensation

In cases of infringement, a trade mark owner can choose to file an administrative complaint with SAMR or initiate a lawsuit with a competent court. Administrative penalties include no more than five times the illegal turnover or no more than CNY250,000 in fines if the illegal turnover is less than CNY50,000.

Courts can award trade mark owners compensatory damages and up to quintuple punitive damages in cases of wilful and severe infringement. Damages are calculated based on the right owner's actual losses, the infringer's gains, or by reference to multiples of the trade mark licensing fee where actual infringement losses and gains are difficult to calculate. The maximum statutory damages for trade mark infringement are CNY5 million.

7.3 Industrial Design

Industrial designs are eligible for protection in China under the Patent Law, the Trade Mark Law, the Copyright Law, and the Anti-unfair Competition Law as described below.

- Patent Law – industrial designs are expressly eligible for patent protection as designs.
- Copyright Law – given their creative and aesthetic nature, industrial designs can be regarded as protectable works under the Copyright Law with respect to their device, shape, colour, or combination thereof.
- Trade Mark Law – industrial designs may be registrable as trade marks where they can identify the source of a product or distinguish the seller or provider, or can be used for such purpose.
- Anti-unfair Competition Law – industrial designs can be considered a packaging or trade dress; in which case they may enjoy protection under the Anti-unfair Competition Law if they are sufficiently known to the public.

Terms of protection, enforcement, and remedies with respect to industrial design rights are the same as those described in the sections on patents, trade marks, and copyright.

7.4 Copyright

Copyright in China

Copyright is the exclusive right of authors in literary, artistic, and scientific works. In China, copyright protectable works include the following:

- written works;
- oral works;
- musical, dramatic, operatic, dance or acrobatic artistic works;
- art or architectural works;
- photographic works;
- audio-visual works;
- graphic and model works, such as engineering design plans, product design plans, maps, schematic diagrams;
- computer software; and
- other intellectual achievements that have the characteristics of works.

Copyright Terms

Authors are not time-limited with respect to their rights of authorship, revision, and integrity. The right of publication and other statutory copyrights of an individual are valid for the individual's life span plus 50 years. If it is a work of a legal person, these rights are valid for 50 years after the first publication. In the case of audio-visual works, the right of publication and other statutory copyrights are valid for 50 years after the first publication.

Copyright arises upon the creation of a work and need not be registered. Nevertheless, authors may register their copyrights with the National Copyright Administration of China (NCAC), which can be used as evidence of ownership in cases of enforcement. In the case of a commis-

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sioned work, the commissioned party owns the copyright, unless agreed otherwise.

Copyright Enforcement and Compensation

In cases of infringement, a copyright owner can choose to file an administrative complaint with NCAC or initiate a lawsuit with a competent court. Administrative penalties include no more than five times the illegal turnover or no more than CNY250,000 in fines if the illegal turnover is less than CNY50,000.

Courts can award copyright owners compensatory damages and up to quintuple punitive damages in cases of wilful and severe infringement. Damages are calculated based on the right owner's actual losses, the infringer's gains, or by reference to multiples of the copyright licensing fee where actual infringement losses and gains are difficult to calculate. The maximum statutory damages for copyright infringement are CNY5 million.

7.5 Others

Software is generally protected by copyright. Software can also be patentable, such as industrial control software, internal performance enhancement software, and external data processing software. Software may also be protected as a trade secret.

Databases are principally protected by copyright, particularly where the compiling of data is considered an "intellectual achievement". Databases may also be protectable under the Anti-unfair Competition Law and the Contract Law.

Trade secrets are protected principally under the Anti-unfair Competition Law, among other legal provisions. Trade secrets are commercial information, such as technical information and business information, that is not known to the public and that has commercial value, and which the right-holder has taken measures to keep secret.

The misappropriation of trade secrets is subject to civil and/or criminal liabilities.

8. DATA PROTECTION

8.1 Applicable Regulations

Overview

China has strengthened its data protection laws in recent years, beginning in 2016 with the adoption of the Cybersecurity Law, which stipulates principled personal information and data protection requirements for operators in the digital economy. Following this development, Chinese authorities issued a series of draft rules and voluntary national standards in this area, principally the Personal Information Security Specification. These administrative efforts have been made in advance of specialised laws on personal information and data protection, namely the Data Security Law, adopted on 10 June 2021, and the Personal Information Protection Law, which we expect to be adopted within 2021. China's personal information and data protection framework is further supplemented by other laws and administrative rules, including provisions of the Criminal Law and of the Civil Code, mainly in the context of privacy and personal information protection.

China's data protection framework also comprises legal and regulatory provisions specific to certain industries. These include sensitive industries such as connected vehicles, telecoms, banking, healthcare, e-commerce, postal services, cloud services, online payments, online mapping, and ride-sharing platforms, among others.

Principal Data Security Laws

The Cybersecurity Law, effective 2017, serves as the foundational data protection law in China, establishing a comprehensive legal framework for cyber-sovereignty, network security, and personal information and data protection. The

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Cybersecurity Law imposes various requirements and obligations on network operators and more stringent requirements on operators of critical information infrastructure, which include data localisation and security assessments of cross-border data transfers.

The Data Security Law reiterates the main requirements under the Cybersecurity Law while establishing a series of protection regimes for “important data”. The Data Security Law also imposes more severe penalties on organisations and individuals that violate important data protection requirements, increases risk monitoring and reporting requirements, and further regulates cross-border data transfers. The Data Security Law also, for the first time, imposes penalties for the unauthorised provision of data in response to requests from foreign authorities.

8.2 Geographical Scope

Extraterritoriality

The Cybersecurity Law and the Data Security Law are limited in terms of their extraterritorial reach, as they apply principally to domestic networks and data processing activities, respectively. However, the laws reserve the right to investigate and impose liability on offshore actors that harm domestic interests. As a practical matter, the Chinese authorities are also empowered to block domestic access to foreign networks and websites that are deemed to be in violation of Chinese law.

Data Localisation and Cross-Border Transfers

China imposes requirements for data localisation and cross-border data transfers, which have become an increasing concern especially among multinationals. The Cybersecurity Law requires critical information infrastructure operators to conduct a security assessment of cross-border transfers of personal information and “important data” and to potentially obtain authority approval therefor. This assessment and approval mecha-

nism is also provided for in the Data Security Law and the current draft of the Personal Information Protection Law. Additionally, industry regulatory provisions currently mandate data localisation within certain sensitive industries, including financial services and healthcare.

8.3 Role and Authority of the Data Protection Agency

There are four major administrative authorities in charge of enforcing data protection rules in China:

- the Cyberspace Administration of China (CAC);
- the Ministry of Public Security (MPS);
- the Ministry of Industry and Information Technology (MIIT); and
- the State Administration for Market Regulation (SAMR).

CAC

CAC was established on 4 May 2011 and later empowered by the State Council on 26 August 2014 “to be in charge of the administration of Internet-based information content nationwide and of regulatory enforcement.” CAC implements the policies of the Office of the Central Cyberspace Affairs Commission, which shares the same administrative organisation as CAC and is under common leadership.

MPS

MPS “directs and supervises local public security organs in security monitoring work related to public information networks,” and is responsible for handling cyber and information-related crimes. Local MPS counterparts also serve as the registration authorities for information systems record-filings.

MIIT

MIIT is an authority under the State Council that is responsible for:

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- the administration of the internet industry;
- safeguarding cybersecurity, emergency administration and resolution;
- the supervision, administration and security examination of telecommunications networks, the internet and industry control system networks;
- the establishment of telecommunications networks and information security systems; and
- drafting and organising the implementation of security administration policies, rules and standards regarding the data security of telecommunications networks and the internet.

SAMR

SAMR is an authority under the State Council established in 2018 following the merger of the former State Administration for Industry and Commerce and several other agencies. SAMR and its local counterparts act to enforce provisions of the Cybersecurity Law, the E-Commerce Law, the Law on the Protection of Consumer Rights and Interests, and the Anti-unfair Competition Law, among others. SAMR has corresponding power to impose administrative penalties for illegal conduct such as violating personal information protection rules. SAMR is also responsible for standards setting and issues national standards on data protection and other technical matters.

In addition, other industry administrative authorities also supervise and manage data protection in accordance with their respective responsibilities.

9. LOOKING FORWARD

9.1 Upcoming Legal Reforms

We expect law changes to occur in the near future, particularly with respect to competition law and data protection, according to the 2021

Legislative Work Plan of the Standing Committee of the National People's Congress.

Competition Law – Anti-monopoly Law (Amendment)

Legislators plan to carry out a preliminary review of a draft amendment to the Anti-monopoly Law in 2021. The current amendment draft, issued in 2020, contains the following highlights.

- It holds liable undertakings that organise or assist in reaching a monopoly agreement in the same manner as parties to the agreement.
- It introduces tests to qualify for a monopoly agreement exemption, which could further increase the difficulty of qualifying for an exemption.
- It grants SAMR the right to adjust merger filing thresholds to adapt to market changes.
- It introduces stop-clock rules for merger reviews, which could replace the current withdraw-refile practice upon expiry of the 180-day statutory time limit.
- It substantially increases penalties for violations, including the risk of criminal sanctions in serious circumstances.

Data Protection – Personal Information Protection Law

Legislators have deliberated and submitted for public comments a second review draft of the Personal Information Protection Law, which we expect to be formally adopted in 2021. The law draws some comparisons to the EU General Data Protection Regulation (GDPR) and is intended to serve as a specialised law governing personal information subjects' rights and processing activities in China. Below are some highlights of the draft law.

- It specifies legal grounds for personal information processing, including detailed rules on informed consent and special requirements for sensitive personal information.

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- It provides for multiple mechanisms for cross-border transfers of personal information.
- It increases personal information subject rights.
- It increases administrative penalties and provides special rules on class actions.

We expect to see further administrative rulemaking around the Personal Information Protection Law once it is formally adopted, in addition to the recently adopted Data Security Law. Data protection compliance promises to be a critical area for compliance going forward into 2022.

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Han Kun Law Offices is a leading full-service law firm in China with over 600 professionals located in four offices in Beijing, Shanghai, Shenzhen, and Hong Kong. The firm's main practice areas include private equity, mergers and acquisitions, international and domestic capital markets, investment funds, asset management, antitrust/competition, banking and finance, aviation finance, foreign direct investment, compliance, private client/wealth management, intel-

lectual property, and dispute resolution. Han Kun provides a full range of legal services and business advice to Chinese companies and multinationals doing business in China. Over the years, Han Kun has been widely recognised as a leader in complex cross-border and domestic transactions that cover foreign investment access, industry compliance, labour and national security review, taxation, foreign exchange, and intellectual property.

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Zhihua (David) Tang specialises in cross-border M&A, foreign direct investment, data protection, and corporate compliance. Mr. Tang's extensive professional

experience includes positions with government authorities and international and domestic law firms. Mr Tang has advised numerous Fortune 500 Global and other multinational and foreign companies on their investments, acquisitions, and corporate compliance relating to daily operations and data protection. The clients Mr Tang represents come from a wide variety of industry sectors, such as automotive, food and beverage, healthcare, petrochemical, power, retail, FMCG, logistics, clean energy, TMT, hospitality, and advertisement.



Yaling (Michelle) Gon focuses her practice on representing clients in complicated and challenging compliance and regulatory matters, including anti-corruption, unfair

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Chen Ma is a veteran antitrust practitioner who has represented many multinational companies in high-profile merger filings and government antitrust investigations. He has also argued high-profile antitrust cases before the Supreme People's Court of China. Before joining Han Kun in 2014, Mr Ma was a partner of the Chinese law firms Fangda Partners and Haiwen & Partners for a total of 14 years. Between 1993 and 1999, Mr Ma was an associate lawyer at several leading international law firms in their New York and Hong Kong offices. Mr Ma is bilingual and bi-cultural, and he is highly regarded in the Chinese legal community.



Min Zhu concentrates his practice on corporate compliance, private equity investment, foreign direct investment, mergers and acquisitions, life sciences and healthcare, cybersecurity, and data compliance, among others. Mr Zhu has provided legal services to dozens of multinationals, foreign companies, and Chinese companies with respect to their establishment, domestic and overseas investments, as well as regulatory and compliance affairs. The clients Mr Zhu represents cover a wide variety of industries, including pharmaceuticals, medical devices, medical services, foods, automobiles, logistics, TMT, retail, and international trade.



Jun Li focuses her practice on domestic and cross-border mergers and acquisitions, direct investment, and general corporate matters. She has represented many foreign clients in cross-border transactions and investments involving China, including greenfield investments and acquisitions. Ms Li has advised numerous clients, including multinationals and start-ups, on their major initiatives as well as daily operations. Ms Li also routinely advises Chinese clients on their domestic and outbound transactions and has extensive experience in onshore and offshore structures and formalities. Ms Li represents clients from a wide range of industries, such as education, clean energy, FMCG, information technology, hospitality, entertainment, and manufacturing.



Zhichao (Kevin) Duan focuses his practice on intellectual property and data protection, with particular expertise in handling tech-related legal matters. Mr Duan has abundant experience in representing industry-leading tech companies in their complex IP disputes, IP transactions, and data-related legal matters involving the internet, AI, pharmaceuticals, and medical device industries.

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John D. Fitzpatrick focuses on assisting foreign investors to navigate the complexities of doing business in China, particularly with respect to general corporate compliance

matters, contract and document reviews, and translations. In addition, he assists the firm's corporate practice with internal investigative and corruption-related inquiries. Mr Fitzpatrick has worked with clients in the consulting, technology, retail, and automotive industries, among others. Prior to joining Han Kun, Mr Fitzpatrick worked at AllBright Law Offices in Shanghai. He holds a US Bar licence, is a US certified public accountant, and also has previous Big Four accounting experience in the USA.

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Trends and Developments

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Foreign Direct Investment

In 2021, the Chinese economy bounced back more quickly from the COVID-19 pandemic than other major economies. At the same time, we have observed a continuation of two opposing trends in China's foreign direct investment (FDI) regime: (i) greater openness to FDI, such as a relaxing of China's Negative List and accession to the Regional Comprehensive Economic Partnership (RCEP); and (ii) a reaction against heightened barriers to FDI in response to trade frictions and perceived foreign interference in China's domestic affairs.

Negative List developments

China stipulates industries and economic activities that are subject to foreign investment restrictions in the Special Administrative Measures for the Access of Foreign Investment (Negative List). The last version was issued on 23 June 2020; an updated version for 2021 is being formulated and is expected to be issued soon. While the Negative List is national in its scope, the Chinese authorities also implement negative lists that are regional in scope or applicable in designated economic development zones. Among these negative lists, the free trade zone (FTZ) negative list applies to the 21 FTZs in China. While the two lists contain generally the same provisions, the FTZ negative list tends to be more liberal and currently has 30 restricted items compared to 33 in the Negative List.

In a further nod to foreign direct investment (FDI) liberalisation, Chinese authorities issued a 2020 negative list for the Hainan Free Trade Port on 31 December 2020. The Hainan negative list contains fewer items than the FTZ list (27 as opposed

to 30), further relaxing access to industries such as mining, automotive, telecoms, education, and social investigation/research. The Hainan negative list, the shortest to date, highlights Hainan's standing as a new gateway for FDI into China and reflects the region's ambition to become a duty-free trading centre of global influence.

Since first issuing the Negative List in 2018, China has excelled at using the negative list approach to manage foreign investment and investor expectations in the context of a gradual, measured opening-up. It is reported that the Chinese authorities are revising the Negative List to further liberalise the market for foreign investors, and we expect restrictions to be loosened further, particularly in the service sector.

China's foreign investment access commitments under RCEP

On 15 November 2020, the ten member states of the Association of Southeast Asian Nations – as well as several other countries including China, Japan, South Korea, Australia, and New Zealand – formally signed the Regional Comprehensive Economic Partnership Agreement (RCEP). RCEP establishes the world's largest free-trade zone, covering 30% of the world's population (2.2 billion people) and 30% of the global economy. RCEP includes a preamble, 20 chapters, and four annexes, which cover terms such as trade in goods, trade in services, investment, intellectual property rights, movement of natural persons, and dispute resolution. In the chapters on trade in services and investment, the Chinese government commits for the first time to detailed market opening and reservation measures in a multilateral free-trade agreement.

On 15 April 2021, China formally completed the ratification of RCEP, and Japan has recently (on June 25th) completed the ratification process. In addition, it is expected that all other contracting countries will finalise the ratification procedures by the end of 2021, so that RCEP will come effect on 1 January 2022.

Measures for Security Review of Foreign Investment

The Measures for Security Review of Foreign Investment (FISR Measures) were jointly promulgated on 19 December 2020 by the National Development and Reform Commission and the Ministry of Commerce. The FISR Measures are expressly called for under the Foreign Investment Law and are intended to strengthen and provide further certainty to China's foreign investment review regime. The FISR Measures stipulate with relative clarity which investments and investors are subject to its pre-investment security review, namely those related to the military and where "actual control" is acquired in "important" industries, which include agricultural products, energy and resources, equipment manufacturing, infrastructure, transportation services, cultural products and services, information technology and online products and services, financial services, critical technologies, and other important fields.

The FISR Measures, coupled with the Negative List, and the recently promulgated revised Export Control Law and the Unreliable Entities List, provide a framework for foreign investment and trade administration that, on paper, aligns itself with international standards (eg, the Committee on Foreign Investment in the United States (CFIUS), US export controls, and the US Entity List and Specially Designated Nationals And Blocked Persons (SDN) list).

Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures

On 9 January 2021, the Ministry of Commerce promulgated with immediate effect the Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures (Rules).

The Rules state the Chinese authorities' position that Chinese persons will not abide by foreign legislation and other measures deemed to "unjustifiably prohibit or restrict" their normal economic relations with parties in third countries. The Rules are similar in substance to the Commission Delegated Regulation (EU) 2018/1100 (EU Blocking Statute), which in fact is one of multiple legal frameworks upon which the Rules are modelled, according to guidance accompanying promulgation of the Rules.

The Rules provide a mechanism whereby Chinese persons who are subject to an unjustified extraterritorial sanction may claim for losses in Chinese courts against:

- parties who caused the losses by complying with the unjustified extraterritorial sanction (ie, in violation of a prohibition order); or
- parties who benefit, to the claimant's detriment, from a judgment or ruling issued within the ambit of a prohibition order.

The Rules provide that the Chinese authorities may provide assistance to affected Chinese parties if they incur significant losses and are empowered to take countermeasures where necessary.

Anti-Foreign Sanctions Law

On 10 June 2021, the NPC Standing Committee adopted the Anti-Foreign Sanctions Law (Anti-Sanctions Law). The law fills in certain legislative gaps and provides higher legal author-

ity to impose countermeasures in response to foreign sanctions and restrictive measures, which authority has been the subject of recently promulgated administrative rules such as the Provisions on the Unreliable Entity List and the Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures. However, the Anti-Sanctions Law leaves many questions unanswered and has caused considerable concern among both Chinese and foreign financial institutions.

Data Protection

China's data protection legal framework continues to develop and promises to be a critical area for compliance going into 2022. Following China's 2016 adoption of the Cybersecurity Law – the first law in China to specially call for data protection – administrative authorities have successively issued voluntary national standards and proposed rules in this area. Now, in 2021, these administrative efforts have culminated in the current effectiveness, adoption, and continued deliberation, respectively, of the Civil Code, the Data Security Law, and the Personal Information Protection Law. We expect each of these laws to serve as key pillars of China's data protection legal framework and for future administrative rulemaking to occur in this area.

Civil Code becomes effective

The Civil Code formally came into effect on 1 January 2021, codifying an existing set of civil laws and enumerating personality and other rights. Among these personality rights, the Civil Code protects personal rights to privacy and to personal information. The Civil Code does not necessarily break new ground with respect to data protection, but rather recognises the value of personal information and offers a clear avenue for civil claims in the case of infringement. Below, we briefly describe certain highlights of the Civil Code.

Personality rights

The Civil Code protects an individual's personality rights, which include rights to bodily integrity, health, name, trade name, likeness, reputation, honour, and privacy and personal information. Certain personality rights may be licensable, such as in the case of celebrity endorsements. However, these rights may not be waived, transferred, or inherited. In the case of a decedent whose rights are infringed, next of kin have the right to sue for damages.

Privacy and personal information protection

The Civil Code contains a chapter dedicated to personal privacy and information protection. The two rights overlap in certain aspects, such as with regard to the privacy of personal information. The Civil Code defines personal information in a manner similar to the Cybersecurity Law and other legal provisions, namely as “information recorded electronically or in other ways that can be used, by itself or in combination with other information, to identify a natural person, including name, date of birth, identification number, biometric information, residential address, telephone number, email address, health information, and whereabouts.”

Personal information processing

The Civil Code defines as personal information processing the collection, storage, use, refinement, transmission, provision, and disclosure of personal information. The Civil Code imposes requirements on personal information processors that echo those of the Cybersecurity Law, such as adhering to the principles of lawfulness, justification, and reasonableness.

Data Security Law adopted

On 10 June 2021, the NPC Standing Committee formally adopted the Data Security Law, a specialised law in the field of data security that will come into effect on 1 September 2021. The law declares China's policy objectives toward data

security, protection and use, imposes obligations on data processors, and offers a series of principled framework provisions that will guide future administrative rulemaking in this area.

Data policy objectives

The Data Security Law concisely reiterates China's long-held policy objectives with regard to data, namely that it is intended to "regulate data processing activities, guarantee data security, promote the development and utilisation of data, protect the legitimate rights and interests of individuals and organisations, and safeguard the sovereignty, security and development interests of the State."

Data administration

The Data Security Law divides data security responsibilities among the central government, local governments, and industry departments and associations. "Important data" remains loosely defined, but the law calls for co-ordinating the relevant administrative departments to formulate catalogues of important data and authorises local and industry-competent authorities to also formulate catalogues. We therefore expect further clarity with respect to defining important data, which will be critical for foreign investors to grapple with data-related compliance matters.

Data processor requirements

The Data Security Law sets out principled obligations for data processors to undertake during data processing activities, such as establishing a comprehensive data security management system, organising data security education and training, and taking corresponding technical measures. While the Cybersecurity Law stipulates such requirements for network operations, we can now expect further refinement of these requirements for data processing.

Data transaction systems

Data exchanges have been established in China in recent years. These exchanges, and data transaction partnerships, have become important data sources for market players in fields such as financial risk control and credit investigation, advertising media, map surveying, and healthcare. The Data Security Law recognises these data transactions and service providers and promotes data transaction activities.

Personal Information Protection Law to be adopted

On 29 April, the NPC Standing Committee officially released a draft for the second reading of the Personal Information Protection Law (Draft PIPL). This marks a further effort to formulate a specialised law on the protection of personal information (PI) in China that has drawn comparisons to the EU's General Data Protection Regulation. Many provisions proposed in the Draft PIPL reiterate existing PI rights and protections stipulated in the Civil Code and the Cybersecurity Law, among other laws and administrative rules. The following are certain highlights of the Draft PIPL.

PI subject consent

The Draft PIPL would expressly stipulate circumstances under which parties may process PI without the consent of the PI subject, an issue currently unaddressed in the Cybersecurity Law and other effective laws. According to the Draft PIPL, PI subject consent would not be required where:

- the information was necessary for the conclusion or performance of a contract to which the PI subject is a party;
- the information was necessary for the performance of statutory duties or obligations;
- the information was necessary for responding to public health incidents or protecting lives, health, and property in an emergency;

- disposal of the PI was disclosed within a reasonable scope in accordance with the law;
- there was reasonable use in undertaking acts such as news reporting and public opinion oversight in the public interest; or
- other circumstances, provided for by laws and administrative regulations, applied.

Cross-border PI transfers

The Draft PIPL would provide clarity to PI cross-border transfer compliance by stipulating a series of transfer methods:

- passing an administrative security assessment;
- conducting a certification process with a professional organisation;
- entering into a contract with an overseas recipient based on a standard contract formulated by the competent authorities; and
- other conditions stipulated by laws, administrative regulations, or the competent authorities.

PI localisation

The Draft PIPL would set a threshold for localisation of PI, limiting localisation to operators of critical information infrastructure and PI processors that process up to a prescribed amount of PI. Parties subject to localisation would be allowed to transfer data across borders only where there were operational needs and upon completion of a security assessment process. These provisions would offer clarity to the long-standing ambiguity in the law as to which parties would be subject to PI localisation.

Competition Law

At the end of 2020, Chinese policymakers cited as a key task for 2021 the “curbing of market monopolies and preventing the disorderly expansion of capital”. Some commentators believe that the government’s intent is to slow down the rapid growth of certain private under-

takings, especially in the digital economy. To this end, Chinese authorities have made continued efforts to update competition law guidelines and enforcement, particularly with respect to digital undertakings and the platform economy. These efforts have been demonstrated in a series of high-profile enforcement actions, including in so-called “choose one of two” exclusive dealing cases. SAMR is now accepting merger filings for variable interest entity (VIE)-structured undertakings, indicating greater flexibility for foreign investors choosing to invest through such structures. These administrative actions have been made in advance of a planned amendment to the Anti-monopoly Law, which is expected to be deliberated upon within the year. Taken as a whole, these developments signal a fairer playing field, particularly for new foreign entrants to China’s markets.

Anti-monopoly administrative guidelines

The State Council Anti-monopoly Commission promulgated, on 7 February 2021, the Anti-monopoly Guidelines for the Platform Economy (Guidelines). The Guidelines are intended to assist the Chinese authorities to curb abusive practices of major internet platforms. The Guidelines prominently feature updated positions on these practices, including sales below cost, refusal to deal, tying or attaching unreasonable conditions to transactions, and disparate treatment. The Guidelines serve to assist SAMR in its enforcement actions and to warn the platform economy that these abusive practices will not be tolerated.

Notable anti-monopoly enforcement actions

On 10 April 2021, SAMR issued an administrative penalty decision against Alibaba for its abuse of market dominance in the domestic digital retail platform services market. The administrative penalty imposed amounted to CNY18.228 billion, 4% of the undertaking’s 2019 domestic revenue. The penalty is the largest yet imposed

in Chinese anti-monopoly enforcement and may be the largest administrative penalty imposed in any industry in China. In addition to the penalty decision, SAMR also issued, for the first time, an administrative guidance document, in which SAMR instructs Alibaba to:

- conduct a comprehensive internal review in accordance with the Anti-monopoly Law and inspect and regulate its own business practices;
- notify of concentrations of undertakings once they meet the notification thresholds outlined in the relevant administrative provisions and not to implement concentrations of undertakings that have or may have the effect of eliminating competition; and
- cease using technology, platform rules, data and algorithms, etc, to implement anti-competitive agreements and abuse its market dominance, thereby eliminating or restricting market competition.

SAMR is known to have initiated other investigations into major digital undertakings. Thus, this penalty decision and its accompanying administrative guidance likely reflect the beginning – not the end – of high-profile anti-monopoly enforcement actions in China.

VIE structure clearance

As part of its stepped-up enforcement actions, SAMR has recently issued failure-to-file penalty decisions against many of China's largest digital undertakings, such as Alibaba, Tencent, DiDi, and Meituan. In the past, these undertakings were unable to file their acquisition transactions for merger review because of the ambiguity surrounding the notifiability of VIE-structured undertakings. Now, it has become clear that a VIE structure is no longer an obstacle for merger filing. This change is expected to result in a flood of merger filings by digital undertakings, which commonly utilise VIE-structured arrangements.

Anti-monopoly Law amendment

The NPC Standing Committee issued its 2021 legislative work plan on 21 April 2021, detailing among other matters its intent to begin preliminary review of an amendment to the Anti-monopoly Law. We believe the amendment could be adopted sometime in 2022. Previously, SAMR issued a draft amendment to the Anti-monopoly Law on 2 January 2020, which detailed a series of proposed improvements to the law that included:

- holding liable undertakings that organise or assist in reaching a monopoly agreement in the same manner as parties to the agreement;
- introducing tests to qualify for monopoly agreement exemptions, which could further increase the difficulty of qualifying for an exemption;
- granting SAMR the right to adjust merger filing thresholds to adapt to market changes;
- introducing stop-clock rules for merger reviews, which could replace the current withdraw-refile practice upon expiry of the 180-day statutory time limit; and
- substantially increasing penalties for violations (eg, monetary penalty of 1% to 10% of the undertaking's prior year revenue), including the risk of criminal sanctions in serious circumstances.

We expect the recent developments in anti-monopoly administrative rulemaking and enforcement will inform legislators in their deliberations regarding the amendment.

CHINA TRENDS AND DEVELOPMENTS

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Han Kun Law Offices is a leading full-service law firm in China with over 600 professionals located in four offices in Beijing, Shanghai, Shenzhen, and Hong Kong. The firm's main practice areas include private equity, mergers and acquisitions, international and domestic capital markets, investment funds, asset management, antitrust/competition, banking and finance, aviation finance, foreign direct investment, compliance, private client/wealth management, intel-

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