Global rules on foreign direct investment - PRC

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China's legal framework for foreign direct investment (**FDI**) screening / reviews is set out in the Foreign Investment Law and its implementation rules which came into effect on 1 January 2020 (**the FIL**) and are supplemented by legislation governing specific areas (as further detailed below).

Unless a FDI falls within a regulated industry, in which case the approval from the relevant industry-specific regulatory authority would be required, there are generally three layers of screening / reviews that need to be considered for FDIs into China:

1. **FDI Negative Lists:** According to the FIL, China generally adopts a national treatment regime for FDIs except for those into industry sectors falling within the scope of China's national or free trade zone negative lists (the **Negative Lists**). By way of background, the Negative Lists (appliable to the entire country or to particular free trade zones) set out such industry sectors into which FDIs are either prohibited or subject to various restrictions or requirements.
2. **National security review:** The FIL provides that China adopts a national security review regime for FDIs, which have or may have an impact on China's national security. The major and most recent legislation governing this legal regime is the *Measures on Security Review of Foreign Investment* (the **Security Review Measures**), effective on 18 January 2021, jointly issued by the National Development and Reform Commission (**NDRC**) and the Ministry of Commerce (**MOC**).
3. **Merger control declaration and clearance:** The FIL also provides that foreign investors participating in concentrations of undertakings by a merger or other means are subject to a merger control review regime under the *Anti-Monopoly Law* (the **AML**), which took effect in 2008 and was most recently revised in 2022.

The regime of FDI Negative Lists and its recent development

Consistent with the Chinese government's constant efforts to open the Chinese market to foreign investments, the Negative Lists have been substantially shortened over the last decades. The latest Negative Lists were issued and came into effect on 1 January 2022 and only contain a short list of industry sectors (or business activities), as listed below, which are still subject to market-entry prohibitions and / or restrictions:

- Certain business activities in the agriculture, forestry, animal husbandry, and fishery sectors;
- Mining of rare earth, radioactive minerals, and tungsten;
- Printing of publications and manufacturing related to Chinese herbal medicines;
- Nuclear power plants;
- Wholesale and retail of tobacco and tobacco products;

- Certain business activities in transportation and postal sectors;
- Certain business activities in telecommunication and internet services;
- Legal services; market and social surveys;
- Scientific research in relation to human stem cells and gene diagnosis and treatment; technologies, humanities and social science, and geology mapping and surveying;
- Certain business activities in the education sector;
- Hospitals and clinics; and
- Certain business activities in the culture, sports, and entertainment sectors.

On 19 March 2024, the State Council issued a new action plan containing 24 measures to promote a high-quality opening-up of the Chinese market and attract foreign investment. One of the measures is to further shorten the Negative Lists by removing Item C above from the Negative Lists (hence a full liberalisation of the manufacturing sector) and further liberalising the telecom and medical sectors. In addition, pilot schemes will be implemented in certain free trade zones (such as those in Beijing, Shanghai and Guangdong) where qualified foreign-invested companies will be permitted to engage in the development and application of gene diagnosis and treatment technologies. It is therefore expected that a new and shorter version of the Negative Lists will be published soon.

The national security review regime and its recent development

Foreign investments into China, whether through greenfield investments, or M&A transactions are subject to the national security review regime if certain conditions are satisfied. Pursuant to the Security Review Measures, “designated important industries” and “control of the target businesses falling within the scope of designated important industries” are two major determinants of whether a foreign investment requires a national security review in China. For a general introduction to China’s national security review regime, please refer to our previous article through this link: Chinas New Measures on Security Review of Foreign Investment | China | Global law firm | Norton Rose Fulbright.

As the Security Review Measures only contain very brief and generic provisions, whether or not the national security review regime applies to a particular foreign investment project is, to a great degree, subject to the discretion of the security review operational mechanism office (the **Office**) jointly led by NDRC and MOC. In practice, the Office accepts prior consultation via its published hotline numbers. If a foreign investment project may potentially trigger the need for a national security review in China, a preliminary consultation with the Office prior to the investment would be recommended.

It is also worth noting that MOC has been maintaining China’s Unreliable Entity List (**UEL**) since the relevant legislation was promulgated in 2020. Companies on the UEL are barred from, amongst others, making new investments into China. Please refer to our previous article on this topic for more information: China’s Ministry of Commerce issues Measures on Unreliable Entities List | Global law firm | Norton Rose Fulbright.

So far, only a handful of entities have been put on the UEL but it is worth watching how the regime may be enforced in future and whether this list may become longer. Generally speaking, any foreign investment into China made by a foreign investor which is on the UEL or associated with an entity on the UEL would be subject to close scrutiny or rejected by the relevant PRC regulators.

Merger control declaration regime and its recent development

China has, since the AML took effect in 2008, established a reasonably comprehensive merger control regime consisting of the AML and various implementing rules, measures and guidelines. Under these laws and regulations, the various thresholds that would trigger a compulsory merger control declaration in China were relatively low compared with the equivalent thresholds in some other jurisdictions.

To effectively exclude relatively small to medium sized transactions from the scope of a merger control declarations and expedite the process of foreign investments into China, on 22 January 2024, the State Council issued the revised *Regulation on Declaration Thresholds for Concentrations of Undertakings* (the **New Regulation on the Declaration Thresholds**), pursuant to which the merger control declaration thresholds are significantly increased, as follows:

- in the previous financial year, the combined global turnover of all undertakings concerned exceeds RMB **12 billion** (increased from RMB 10 billion), and the individual turnover of at least two undertakings concerned within China exceeds RMB **800 million** (increased from RMB 400 million); OR
- in the previous financial year, the combined turnover within China of all undertakings concerned exceeds RMB **4 billion** (increased from RMB 2 billion), and the individual turnover of at least two undertakings concerned within China exceeds RMB **800 million** (increased from RMB 400 million).

A transaction reaching either set of the thresholds mentioned above must be submitted to the Anti-Monopoly Bureau under the State Administration for Market Regulation for merger control clearance before closing. The increase of these thresholds could potentially reduce the number of FDIs and M&A transactions that are subject to the merger control declaration regime, hence it is a positive legislative development for FDIs into China.

Please note however that the New Regulation on the Declaration Thresholds reiterates that the Anti-Monopoly Bureau is empowered to request the undertakings concerned to declare a transaction which, although not meeting the aforesaid thresholds, has or is likely to have the effect of “eliminating or restricting competition”. The Anti-Monopoly Bureau may exercise discretion in determining whether or not a transaction may fall within this scope, and therefore foreign investors intending to make investments into any industry sector which has a high market concentration and fewer market players, should be mindful of the possible application of the merger control declaration requirements even though the applicable thresholds are not met.

For more information on China’s merger control regime, please find articles of our competition team through these links: The new SAMR merger compliance guidelines | Global law firm | Norton Rose Fulbright, People’s Republic of China: Competition law fact sheet | Global law firm | Norton Rose Fulbright.