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Corporate M&A

China: Trends & Developments

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Trends and Developments

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COVID-19 Outbreak

The novel coronavirus (COVID-19) outbreak is, without doubt, currently the top issue bringing significant uncertainties to the People's Republic of China (China). Further, effects are spread globally, affecting the global economy and is, therefore, having a knock-on effect on socio-economic activities. With the potential negative impact on GDP growth in China in 2020, there may be new opportunities, especially in the corporate M&A market. For example, in sectors severely impacted by the COVID-19 outbreak such as the catering and traveling industry, reorganisation or M&A activities are expected to increase considerably. Investments in remote office systems, such as ZOOM, or online education and the likes are also expected to prosper.

To put the COVID-19 outbreak in context, the overall effect of the Severe Acute Respiratory Syndrome (SARS) crisis in 2003 pale in comparison due to its minor and short-lived effects. SARS was only widespread in some cities in China such as Beijing and Guangzhou. In contrast, the COVID-19 outbreak first took place in Wuhan, a large industrial and transportation hub in central China, right before the lunar new year holiday. Before the city was locked down, the virus had spilled across China and even beyond the Chinese border due to the transportation flow of people heading home for the long lunar new year holiday. Economically, in 2003, China was at the starting point of a rapid development resulting from the accession to the World Trade Organisation (WTO). State-owned enterprises were under a reform to retreat from various industries, leaving great opportunities for entrepreneurs. Increasing foreign capital flew into China as a result of strong exports and encouraging foreign direct investment (FDI) policies. The government had a vast space in which to implement an entire set of expansionary fiscal policies.

Today, China has entered a stage of steady domestic development and is facing an increasingly complicated external environment, which is further intensified by the trade disputes between China and the United States (USA). The depression of the global market to be caused by the pandemic will, unsurprisingly, hold back the Chinese M&A market. After years of fiscal expansion, the government is increasingly cautious on using economic stimulus tools. Under which, going into 2020, the COVID-19 outbreak causes even more uncertainties and complexity factors to surface, which is likely to affect socio-economic activities and potential deals in the Chinese M&A market.

Amid the COVID-19 outbreak, the Chinese government reacted swiftly to the situation by promulgating a plethora of policies, including requiring banks to provide financing support, subsidising certain enterprises for interest payment, allowing enterprises to postpone the payment of rent and labour insurance, and postponing the deadlines for listed companies for the disclosure of financial reports. Certain industrial sectors and enterprises may get more support than before. For instance, enterprises engaging in the development of equipment to fight the epidemic may enjoy lower financing costs. Even with such supporting policies, enterprises short of cash flow will still find it difficult to survive the epidemic if it were to last for months. This will drive dealmakers with abundant cash to look for cheaper targets.

Moreover, the epidemic would cause major changes to work and life-style. Certain industries may benefit from the increasing demand for products and services that can help people live and work under the threats of widespread infectious diseases, whilst other, outdated business models might be abandoned. Consequently, dealmakers will adjust the valuation methods to reflect the changes. Lastly, the long break of economic activity in many cities may hit global supply chains such that enterprises might have to consider moving production out of China, and enterprises short of liquidity might have to dispose of their assets, both resulting in an increase in cross-border transactions.

COVID-19 may also have impacts on the performance of executed transactions. Chinese governmental authorities, trade associations, arbitration institutions and courts have declared that they will assist enterprises in obtaining force majeure certificates. However, whether a force majeure argument can be justified remains to be decided in the context of a specific transaction and disputes on the causation in relation to the influence that the COVID-19 outbreak caused may occur. Disputes could also arise out of a "material adverse change/material adverse effect" clause, under which termination rights can be triggered. In addition, due to the travel restrictions and potential exposure risks involved in face-to-face meetings, dealmakers and advisory firms will require more innovative solutions in conducting due diligence and further executing the full M&A life cycle. The outbreak could also increase uncertainty during the period from the signing and closing of a deal.

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US-China Trade Disputes

Phase One agreement

The USA and China have been engaged in an economic conflict since 2018 when President Trump imposed tariffs and trade barriers on China (among other nations). Negotiation attempts have brought execution of the "Phase One" agreement on 15 January 2020. The Phase One act, formally known as the Economic and Trade Agreement between the United States of America and the People's Republic of China, became effective on 14 February 2020. Currently, its execution faces uncertainties and complexities as a result of the COVID-19 outbreak.

Under the deal, China committed, inter alia, to increase US imports by at least USD200 billion above the 2017 level within the next two years and to improve its protection of intellectual property rights. The USA has conceded to halve part of the new tariffs imposed on China. The signing of the Phase One agreement is seen as a temporary truce rather than an end of the dispute, as a large portion of the tariffs imposed still remain. It is believed that the Phase One agreement only deals with the easier aspects of the disputes between the parties.

Influence on outbound China investments

In terms of M&A, global M&A fell by 16% from the same period last year in the third quarter of 2019, hitting the lowest quarter volume since 2016 according to data compiled by Refinitiv. In the same report, statistics show that deals in Asia plunged by 20% due to the US-China trade dispute and Hong Kong's pro-democracy protests, reaching its lowest since 2017. Throughout 2019, due to the volatility brought about by the trade dispute, companies were seeing more risks, and were less likely to take an aggressive approach in engaging in M&A activities. Deals decreased significantly and became more slow-paced due to the cautious attitude. Discrepancies between the parties made it difficult to come to a consensus, which resulted in frequent cases of deals being called off just before closing. The growing uncertainties of market prospects and fears of a continuous downward spiral of China's economy, compounded by other negative factors such as outbreak of the COVID-19 epidemic, may cause M&A activities to continue to plunge even further in 2020.

For outbound investments, the so-called "Made in China 2025" programme has raised an alarm for US lawmakers and the USA has since tightened the restrictions on Chinese-led investments and mergers by intensifying scrutiny and broadening the jurisdiction of the Committee on Foreign Investment in the US (CFIUS). The new powers will make it possible for CFIUS to thoroughly scrutinise and restrict investments from China, particularly in the high-technology and other sensitive industries involving "critical technologies". Although the new program for foreign investment review by CFIUS does not single out specific countries, it is generally believed that the selected industries primarily reflect concerns with Chinese investment trends. Furthermore, the technological rivalry between the USA and China has quickly escalated with the campaign against Chinese technological companies such as ZTE and Huawei, and the Trump Administration barring US companies from using Chinese telecommunications network equipment in the USA. This in turn results in retaliation, with China delaying its approval on or blocking deals involving US companies such as Qualcomm's proposed USD44 billion takeover of the Dutch chipmaker, NXP.

The increased screening from CIFUS and the technological rivalry have hugely affected China's outbound investment in the USA. Analysts in EY have stated that Chinese acquisition of American companies fell by almost 95% from its highest point of USD55.3 billion in 2016 to USD3 billion in 2018. Increasing difficulties in investing in the USA have triggered Chinese firms to alter their investment schemes by investing in other regions such as the European Union (EU) and Southeast Asian countries. Coupled with the "One Belt One Road" initiative, there is an increasing number of deals made in Asia, Europe and Africa in industries such as infrastructure, natural resource, agriculture and logistics.

Resulting in relocation

Throughout the trade dispute, the US government has imposed tariffs on more than USD360 billion of Chinese goods, and China retaliated with tariffs on more than USD110 billion of US products. The tariffs being imposed on Chinese products have caused China-based manufacturers, both domestic and foreign invested, to invest in or relocate to other regions or countries. More investments on value-added projects are being moved to the Taiwan and Singapore, among others, while more manufacturing capacities of the lower end of the supply chain are being moved to other developing countries, such as Vietnam, Indonesia and India.

Influence on inbound foreign investments

The trade dispute and the relocation of investments away from China have caused China to further open its market to foreign investment and level the playing field for foreign investors. Amid the trade dispute, the People's Republic of China Foreign Investment Law and its implementing regulations (Foreign Investment Law) came into force on 1 January 2020. The new statute relaxes regulations on foreign investments by streamlining the investment administration process, emphasising the protection of investments to respond to foreign investors' concerns, and giving equal treatment to domestic and foreign-invested companies, except where investments are made in industries which are prohibited or restricted under the Special Administrative Measures for the Access of Foreign Investment (Negative List).

During the trade dispute, China shortened the Negative List twice, in 2018 and 2019, loosening restrictions on foreign investment and allowing for larger foreign ownership of key industries such as financial services, energy, telecommunications, automotive, etc. For example, under the latest Negative List, the limit on foreign ownership in securities companies was increased from a third to 51% with the undertaking that 100% foreign ownership will be allowed by 2021. Similarly, foreign investors currently may hold up to 50% ownership in automotive business (except for special vehicles and new energy vehicles), and each foreign investor may invest in up to two automotive manufacturers. The Chinese government undertakes to remove the forgoing restrictions in 2020 and 2022, respectively. The use of the Negative List aims to reduce the scope of discretionary administrative review on foreign investment transactions and to build confidence from foreign investors due to the certainty in being able to rely on a definitive official list rather than discretionary interpretation of the laws and policies.

Being one of the largest markets, globally, China's liberation by further opening its market will attract investors to devour the opportunities lying within the loosened restrictions. Enhanced foreign investor protections are also expected to increase inbound investment and M&A deals.

China's transformation of the economy

Recent trends also suggest that the trade dispute is contributing to China's transformation of its economy from an export-driven economy to one driven by consumption, technology and innovation. It is a popular view that the trade dispute with the USA has served as a wake-up call for China, whereby China cannot afford to continue to rely on western technologies for its development and growth. Therefore, China must change from being a major manufacturing power to a leader in technological innovations. As such, sectors such as consumption, technologies and healthcare deserve more attention from investors looking for new opportunities in China.

China's strengthening of intellectual property protection

To a large extent, the trade dispute and the Phase One agreement have expedited China's steps to strengthen its protection of intellectual property rights. China has long adopted a practice of trading its market for technologies. As a result, foreign investors often need to transfer their intellectual property rights as a condition for entry into the Chinese market. The USA has a long history of complaining about China's feeble protection of intellectual property and weak enforcement against intellectual property infringements.

But even without the trade dispute, enhancing protection of intellectual property rights is inevitable for China as "it transforms from a major intellectual property consumer to a major intellectual property producer". Under the new Foreign Investment Law, forced transfer of intellectual property by foreign companies using administrative measures are explicitly prohibited and stronger protections for foreign intellectual property and trade secrets are stressed. The amended Trademark Law and the proposed amendments to the Patent Law both stipulate to increase punitive damages for malicious infringement.

Overall, the trade dispute between the USA and China are not only about trade and business. It is also the inevitable result of the competition for technological supremacy and fundamental ideological and cultural differences between the two largest economies in the world. The trade dispute has had a lasting impact on not only both parties of the dispute, but also the rest of the world. With the signing of the Phase One agreement, the prospect looks brighter for the moment. However, uncertainties remain as to whether the deal will be properly implemented and whether the parties may come to terms as to a second phase. If not, the already turbulent environment for investment and M&A in China will become increasingly challenging in the years ahead.

Developments in China's Legal Framework on Cross-border M&A

Outbound M&A

Worldwide outbound M&A activity by Chinese investors in 2019 increased by 42.27% in value over 2018 standards based on disclosed deal volumes (USD206 billion), though the number of transactions (462) declined by 6.1%, according to Morning Whistle. The leading industries in M&A activity by deal number were manufacturing, finance and TMT. The USA, the United Kingdom (UK) and Germany remain the top three destinations, although Chinese investment in the USA has significantly decreased in number over 2018 due to a combination of factors, particularly the China-US trade dispute and the tightening scrutiny over Chinese investment in the USA by CIFUS. With the temporary truce of the trade dispute following the Phase One agreement and the finalisation of the FIRRMA regulations, investment activity in the US is expected to pick up in 2020. Driven by the "One Belt, One Road" initiative, Chinese investment in the Silk Road countries, including India, Latin America and the Association of Southeast Asian Nations (ASEAN) countries, is increasing on a yearly basis and the momentum is likely to continue through 2020.

The past few years witnessed a rapid growth of outbound M&A activity from China, creating a challenge for Chinese regulators. In order to curb anomalies in the growth of outbound investments, the China National Development and Reform Commission, Ministry of Commerce (MOFCOM) and the State Administration of Foreign Exchange (SAFE), the key gatekeepers overseeing outbound investment from China, intensively

promulgated a series of rules and regulations in 2017 attempting to streamline the governmental procedures to guide Chinese investors towards rational investment actions. In the following years of 2018 and 2019, China's outbound M&A activities displayed a generally matured rationality and, accordingly, promulgation of new regulations have mitigated the pace as well. Overall, there have been no material revisions made to primary regulations relating to overseas direct investment.

Inbound M&A

Furthering the opening-up and facilitating foreign investments was the keynote of the 2019 M&A policies, which is also essential to China's economic development. The implementation of the new Foreign Investment Law on 1 January 2020 marks China's entry into a new era of foreign investment regulations, bringing far-reaching impact on M&A of wholly Chinese owned enterprises by foreign investors ("Foreign M&A") in China.

Under the previous legal regime governing inbound M&A in China, especially Provisions on M&A of Domestic Enterprises by Foreign Investors (M&A Regulations) promulgated in 2006 and later revised in 2009, Foreign M&A were subject to the approval of the competent commerce authority, under which, Foreign M&A involving cross-border share swap and strategic investments in Chinese listed companies are subject to the approval of the MOFCOM.

Following the implementation of the Interim Measures for the Record-filing Administration of the Formation and Modification of Foreign-Invested Enterprises in 2016 (Record-filing Measures), the case-by-case approval requirement for Foreign M&A under the M&A Regulations was abolished and replaced by a simplified Record-filing mechanism. Foreign M&A, including those involving cross-border share swap and strategic investments in Chinese listed companies, only needs to be filed with the commerce authority for record. Therefore, the pre-requisite procedure for registration for change of shareholders by the target company (Company Registration) is no longer required, provided that the transactions do not fall under the Negative List.

With the coming into effect of the Foreign Investment Law, the Record-filing Measures ceased to be effective. The Foreign Investment Law provides that, where a Foreign M&A takes place, an initial information report shall be submitted electronically via the Enterprise Registration System in parallel with the Company Registration, which is a further streamlined process following the record-filing system.

Under the new legal regime, the MOFCOM, which used to serve as the primary government agency overseeing foreign investment over the years, has withdrawn from the "frontline" of foreign investment administration. Instead, the shared responsibilities of playing the "gatekeeper" role now fall on the market supervision and administration departments, the relevant industry authorities and other "competent authorities", who shall jointly ensure the effective enforcement of the Negative List. In spite of the forgoing, it is worth noting that the Negative List specifically includes Foreign M&A between related parties (Related Party M&A) in addition to certain prohibited or restricted industry categories. It is provided that Related Party M&A shall be administered in reference to the current-in-effect provisions. Whether Related Party M&A will continue to be a subject under examination and approval by the MOFCOM, even in the new era, is still a question yet to be answered.

Not surprisingly, the Foreign Investment Law is silent on the Variable Interest Entities (VIE) issue. Although the definition of "foreign investment" as provided in Article 2 of the People's Republic of China Foreign Investment Law includes "a foreign investor's acquisition of any share, equity, share of property or other similar rights of an enterprise located within the territory of China", in which the concept of "similar rights" could arguably be interpreted to cover the VIE structure, leaving room for future legal enforcement where and when necessary. Nevertheless, as the latest 2019 version of the Negative List has been succinctly reduced to include only 40 entries, with further loosening of restrictions on foreign investment along the way, the VIE model could hopefully become a diminishing issue going forward.

Under the abolished People's Republic of China Sino-Foreign Equity Joint Ventures Law and the People's Republic of China Sino-Foreign Contractual Joint Ventures Law, transfer of equity interest of foreign investment enterprises (FIE) requires unanimous consent of all non-transferring shareholders. Under the system contemplated by the Foreign Investment Law, the People's Republic of China Company Law shall equally apply to the transfer of equity in an FIE the same way as a domestic company. Under which, no shareholder consent is required for equity transfer between current shareholders, and consent from only half of the voting rights of non-transferring shareholders is required with obligations placed on dissenting shareholders to purchase the equity subject to the transfer. This change evidently increases the liquidity of equity interest held by foreign investors in China.

Following the effectiveness of the Foreign Investment Law, a large number of regulations, rules and regulatory documents may need to be amended or even abolished, including the M&A Regulations, one of the most relevant governing rules for Foreign M&A. It is not yet crystal clear whether provisions under the M&A Regulations such as the conditions for cross-border equity swaps, the requirements of asset evaluation as basis for

pricing as well as the payments schedule in Foreign M&A, will still be applicable. Moreover, while the Foreign Investment Law provides that it will govern reinvestment activities by FIEs in China, the Interim Provisions on Investment Made by Foreign-Invested Enterprises in China enacted in 2000 has not been expressly nullified, and it remains to be seen how these rules can merge and come into play together.

It is noteworthy that, in October 2019, SAFE promulgated rules explicitly lifting restrictions on FIEs which are not investment companies with respect to using their registered capital for reinvestment in China, provided that the reinvestment complies with the law and does not fall under the Negative List. These new rules are expected to boost reinvestments made by FIEs in China with smoother funding sources, which is consistent with the legislative purpose of the Foreign Investment Law to promote foreign investment activities in China.

Merger control and national security review

China adopted its Anti-monopoly Law in 2007 and has now become one of the three major jurisdictions in terms of merger control. Since March 2018, the newly established State Administration for Market Regulation (SAMR) has become the competent authority for all anti-monopoly enforcement matters, including anti-monopoly review of concentration of undertakings (ie, merger control review). Within the Anti-monopoly Bureau of SAMR, three divisions are tasked to review merger control filings while another division is responsible to investigate suspected illegal concentration of undertakings (ie, gun-jumping violations).

In 2019, SAMR received 503 merger control filings, initiated review over 462 filings and concluded review over 465 filings. Among the 465 filings, no case was prohibited, five cases were approved with restrictive conditions, while all the remaining 460 cases were approved without conditions (accounting for 98.9%). Out of the five cases approved with restrictive conditions, four are concentration between foreign companies, including American, Canadian and European companies, while one is concentration between a Chinese company and a European company.

In general, SAMR has enhanced the efficiency of its review. More than 80% of the filings were initiated as simple case, and the review period of time from initiation to clearance for most simple cases were less than 20 days. However, review of the five cases eventually approved with restrictive conditions were time-consuming. The average review period was 353 days.

In 2019, SAMR has investigated 36 cases of gun-jumping violations and made punishment decisions in 18 cases. Till now, the only punishment made is imposition of fines and the highest amount of fine to date is RMB400,000. However, it should be noted that SAMR has proposed to significantly increase the upper limit of fines to 10% of the turnover in the preceding year, which implies that a fine of millions of dollars or more would be possible in the future.

Turning to national security review, its importance for M&A in China becomes more prominent considering that China has comprehensively implemented the Negative List regime and that the Negative List has been significantly shortened in recent years. National security review was formally introduced in China through a notice of the General Office of the State Council in 2011 ("2011 Notice"), followed by interim rules promulgated by MOFCOM in the same year ("2011 Interim Rules"). The new Foreign Investment Law includes a provision (ie, Article 35) confirming the establishment of the national security review. As this provision does not contain detailed rules, review of M&As remains subject to the 2011 Notice and the 2011 Interim Rules, until further regulations or rules are promulgated.

Two developments in 2019 are worth noting. First, since 30 April 2019, the National Development and Reform Commission (NDRC) has replaced MOFCOM to act as the authority to receive applications for national security review and to deliver review decisions. Second, it was publicly reported for the first time that an acquisition was cancelled thanks to its pessimistic prospect to pass the national security review. In Yonghui's acquisition of Zhongbai, Yonghui, a listed company, announced that it received a notice from NDRC requiring it to apply for national security review on 21 August 2019, only two days after Yonghui announced that it has received clearance of merger control review from SAMR. On 13 November 2019, Yonghui announced that NDRC, after completing general review, had decided to launch special review over the acquisition. On 17 December 2019, Yonghui decided to cancel the acquisition.

Capital market

As a big step forward, China opened a new stock trading market in Shanghai Stock Exchange (SSE) since mid-2019 named the STAR (Sci-Tech innovation board) Market.

As indicated in accordance with its official slogan "Where the Rising Star Companies Cluster", the STAR Market aims to welcome high-tech companies especially those engaging in TMT sectors to go public in China. It mainly supports high-tech industries and strategic emerging industries such as New Generation IT; High-end Equipment; New Materials; New Energy; Energy Conservation & Environmental Protection; Biomedicine. It promotes the deep integration of Internet; Big Data; Cloud Computing; Artificial Intelligence and Manufacturing.

Under the "Pilot Registration-Based IPO System", SSE plays a key role in reviewing the initial public offering (IPO) filings on this Market, compared to the IPO filings with other markets in Shanghai or Shenzhen, which are under substantial review by the China Securities Regulatory Administration (CSRC). The STAR Market is much more open to IPO filings from TMT sectors. Among other purposes, it provides diversified listing standards, which makes it is possible for issuers which has not yet make profits, such as biomedicine companies, to go public. It also tolerates companies with different governance structure such as dual class voting rights and allow pre-IPO employee options to mature after the listing, which were almost impossible under the other markets due to the substantive CSRC reviews. Currently, the new People's Republic China Securities Law (Securities Law) amended in December 2019 which came into effect on 1 March 2020, has codified the Registration-Based IPO System which had been on pilot run under the STAR Market for nearly a year. With the new Securities Law coming into force, the Registration-Based IPO System will also be implemented on the Shenzhen Stock Market (SZSE).

It is anticipated that, with the IPO reform on both the SSE and SZSE markets, increasing TMT companies may choose to go public in the Chinese capital market, which used to be burdened by the extensive CSRC review. The Chinese capital marker is now much more attractive with the increased efficiency in the reformed review process and the high yield prospects. Therefore, there is an anticipated trend that investment and M&A activities will pay more attention on high-tech industries and strategic emerging industries promoted by the STAR Market and the forthcoming SZSE new board.

Global Law Office has more than 460 lawyers practising in the Beijing, Shanghai and Shenzhen offices and is one of China's leading law firms. GLO's corporate M&A practice covers a wide range of transaction types and the entire process of transactions, including unlisted/listed companies' mergers and acquisitions, transactions from initial investment to equity exit, with special expertise in handling cross-border transactions and state-owned assets-related transactions and restructuring matters. The firm provides comprehensive services to align industry sectors' needs, which include financial services, manufacturing, trade, energy and mining, automotive, real estate and construction, transportation, life sciences and healthcare, food and beverage, entertainment and sports, and TMT, etc. The firm's experience and capabilities allow for the provision of one-stop services on complex M&A transactions covering foreign investment access, industry compliance, state-owned asset governance, taxation, foreign exchange regulatory, intellectual property, labour and national security review.

The firm would like to thank Alex Liu, partner, for his contribution to this chapter.

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