

在双循环和新监管环境下中国境内的跨境并购交

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概述

对于包括中国在内的全球各国经济发展而言，外商直接投资始终且将持续发挥至关重要的作用。本文将着重分析在中国经济持续增长以及中国境内经济和政治的监管变化背景下通过兼并与收购（“**并购**”）途径来华投资的商机。

本文分为三部分，概述如下：

第一部分包括对新颁布的《外商投资法》（“**《外商投资法》**”）以及旨在支持、监管及鼓励外商来华投资的相关法律法规的概览，如：

- 《外商投资法实施条例》
- 经中华人民共和国商务部（“**中国商务部**”）全面调整的外商投资备案制度
- 持续缩减的负面清单
- 持续扩展的鼓励类产业目录
- 国家外汇管理局（“**外管局**”）的改革措施

- 证券法规的修改
- 国家市场监督管理总局（“市监局”）出台的新措施。

上述举措通过精简法律及监管方面的流程、保证提供平等待遇、扩大外商投资可开展业务活动的范围以及改善外商投资的资本市场准入等方式，极大地加快与鼓励外商投资通过并购途径进入中国。

第一部分还审视了新出台的《外商投资安全审查办法》（“《安审办法》”）。在世界其他主要经济体各自更新了其外国投资审查制度的背景下，《安审办法》相应更新了中国原有的外商投资审查制度。第一部分还讲述了中国原有外商投资审查制度的更新会对中国境内并购交易的影响。

第二部分分析了 2020 年 1 月 1 日《外商投资法》生效后以及 2020 年新冠疫情下外商投资交易如何发生转变。我们总结的一些主要趋势包括 2020 年来华并购强劲复苏（尽管第一季度出现下跌），以及新能源、消费品与零售、医疗、工业、汽车与高新技术等行业并购高度活跃。这反映出中国经济在消费和生产方面在新的“双循环”背景下将持续发展；中国企业的收购者与投资者日益呈现国际多样化趋势。

我们认为，中国对新冠疫情的迅速、强有力应对有助于交易量恢复到疫情前的水平，从中彰显出中国经济的实力与竞争力，反映出中国正成为吸引力日

益增强的并购及其他形式外商投资目的地。但疫情也导致交易周期延长，买卖双方就新的领域展开谈判和尽职调查并重新评估各个行业的商业模式，新的《安审办法》很可能会影响到相关行业的交易时间安排。

本文第三部分列出了政策制定者与交易主体基于以上结论需纳入考量的方面。这些方面包括：认识到当地经验的重要性（尤其是操作经验），以便顺利获取交易机会及完成交易；认识到透明度在获取监管批准中日益增加的重要性；资本市场在中国企业与全球投资者之间日益重要的连接作用；以及中国国内并购交易市场的成长和成熟对来华外商投资并购趋势的日益重要的影响。

因此，目前正是交易主体与政策制定者开展对话、培训、联络以加快对华投资的重要时机。考虑到全球范围内贸易与外商投资审查的紧张局势和新冠疫情的持续影响，可能对来华并购交易业务的增长造成重大障碍（尽管中国内地已有效应对新冠疫情）。该等对话尤为重要，也为中国企业与政策制定者持续分享应对新冠疫情的经验与见解提供了绝佳机会。这样做不仅有利于中国，同时也惠及全球。

第一部分：法律背景

早在 2020 年 1 月 1 日《外商投资法》（于 2019 年 3 月 15 日通过）生效之前，外商对华投资政策过去几年一直在加速放宽。2016 年 10 月，中国内地对其拥有数十年历史的外商投资审批制度进行了彻底改革。新设外商投资企业以及对中国境内注册企业的外资并购交易不再必须取得中国商务部批准。而对外商投资继续施行限制和禁止的投资领域仍须接受商务部审批——这些领域构成了“负面清单”。

对华投资持续放宽的趋势在近期两项主要法律进展中得到了体现：一是负面清单的持续缩短（以及相应的鼓励类产业目录的同步扩大）；二是《外商投资法》致力于为外商投资企业提供同等待遇与知识产权保护，同时保留针对歧视中国内地投资者的经济体采取行动的权利。

在放宽外商投资的背景下，还应该注意的是中国在 2020 年 12 月出台了新的措施，对 2011 年基于国家安全的外商投资审查制度作出了更新。虽然该等措施的影响尚未显现，但其构成了中国外商投资政策的重要组成部分，并使得中国在强化外商投资审查方面与世界其他主要经济体保持一致。

2019 年《外商投资法》

《外商投资法》于 2020 年 1 月 1 日生效。这是一项具有里程碑意义的立法，旨在实现两个目标：改善外国投资者在华的经营环境，以及确保外商投资企业与国内企业平等参与市场。

《外商投资法》具有高度概括性，其中提出的许多措施可按其旨在实现的目标归类如下：

- (1) 给予外国投资者同等待遇；
- (2) 知识产权的保护；
- (3) 为在中国内地经商提供便利；
- (4) 确保中国可以在适当情况下采取保护性对等措施。

下面是《外商投资法》中提出的一些措施：¹

- 同等待遇
 - 外国投资者和本国投资者可享有同等待遇（负面清单列明的行业除外）（第 4 条）

¹ 资料来源：http://www.fdi.gov.cn/1800000121_39_4872_0_7.html。

- 外商投资企业平等参与政府采购活动和标准制定工作（第 15 条和第 16 条）
- 外商投资企业可在中国内地通过公开发行股票、公司债券等证券和其他方式进行融资（第 17 条）
- 外商投资企业和中资企业在经营许可与证照审核方面的标准一致（第 30 条）
- 知识产权保护
 - 行政机关及其工作人员不得利用行政手段强制外国企业转让技术（第 22 条）
 - 鼓励基于“自愿原则和商业规则”开展技术合作（第 22 条）
- 便利在华经商
 - 建立“外商投资服务体系，为外国投资者和外商投资企业提供法律法规、政策措施、投资项目信息等方面的咨询和服务”（第 11 条）
 - “各级”政府须“简化办事程序，提高办事效率，优化政务服务，进一步提高外商投资服务水平”（第 19 条）

- 建立“外商投资企业投诉工作机制”以处理“行政机关及其工作人员的行政行为侵犯[外商投资企业]合法权益”的情况（第 26 条）
- 对等措施
 - 对于在投资方面对中国采取歧视性措施的国家，中国可采取“相应的”措施（第 40 条）
 - 建立外商投资安全审查制度，对“影响或者可能影响”国家安全的外商投资进行安全审查，在该制度下作出的任何审查决定为“最终”决定（第 35 条）

尽管《外商投资法》为外商来华投资设定了一个更为明确的原则性框架，但预计在 2021 年或以后将会出台进一步的实施条例和法规以细化《外商投资法》具体规定。例如，《外商投资法》的征求意见稿中提到了对可变利益实体的处理，但最终的《外商投资法》中并没有提及可变利益实体结构，因此该架构作为外商投资工具仍然存在不确定性。

以下是部分影响到外商来华投资的配套法律法规。

2019 年《外商投资法实施条例》

《外商投资法实施条例》（“《**实施条例**》”）对《外商投资法》中的一些概念作出了重要的解释和说明。特别是，《实施条例》对《外商投资法》中规定的对外商投资实行征收时需给予合理补偿的原则进行了具体阐释，即：征收应当具有非歧视性、应当按市场价值给予补偿及被征收方有权申请行政复议。

《实施条例》通过以下方式为消费者要求政府部门履行其在《外商投资法》下的义务，遵守政策承诺和相关合同约定提供了明确的依据：（1）明确“政策承诺”应包括本地区投资所适用的所有书面形式的支持政策、优惠待遇和便利条件，及（2）明确禁止以政府机构、人员或职能调整为由违反合同约定。

在《外商投资法》承诺保护外国投资者的知识产权方面，《实施条例》承诺将加大对侵权者的惩处和执法力度。

在《外商投资法》承诺保障外商投资企业通过公平竞争参与政府采购活动、平等对待外商投资企业的基础上，《实施条例》进一步规定不得以所有制形式、组织形式、投资者国别或者品牌对供应商予以限定。

外商投资备案制度的全面调整

几乎在《实施条例》发布的同时，中国商务部也对外商投资备案制度进行了全面调整。

根据《外商投资法》中关于外商投资信息报告制度的规定，中国商务部面向所有外商投资企业出台了新的信息报告制度，从而取代了自 2016 年以来实施的外商投资企业设立及变更备案的管理制度。新的报告类型包括初始报告、变更报告、注销报告和年度报告。这些报告将通过企业信用信息公示系统提交，该系统也用于新成立外商投资企业和内资企业的注册。此外，新的信息报告制度还明确外国投资者在中国内地的所有直接和间接投资均须遵守新信息报告的要求。

新制度为外国投资者节省了时间并提高了效率，使其可通过单一平台提交所有与外商投资企业有关的信息，而无需向中国商务部和市监局进行多次申报备案。向中国商务部提交信息报告与向市监局申请设立外商投资企业并无先后顺序要求，基本上可一次性完成提交。

对于负面清单之外的行业（见下文），外国投资者（包括外商投资企业）的所有投资备案按照内外资一致的原则进行。需要注意的是，最高人民法院关于《外商投资法》的新司法解释明确禁止中国法院以未获得相关行业监管批

准为由宣布该等行业的相关投资协议无效或尚未生效，从而明确了投资协议的效力与遵守相关行业的监管批准/同意/备案要求之间的界限。

对于负面清单项下限制类行业的外商投资企业而言，先前关于需获得中国商务部批准的要求（涉及到商务部签发批准证书）已取消。只要这些外商投资企业遵守负面清单项下关于外资持股比例、法定代表人和主要负责人（如适用）的限制，在已获得必要的特定行业监管批准的前提下，市监局应为设立该等外商投资企业办理注册登记。

最后值得注意的一个关键变化是，履行这些程序并不是法律层面交易交割的先决条件。因此，改革后的制度有望进一步加快外资通过来华并购进入中国内地的进程。

负面清单持续缩减

2020年6月，中国公布了最新的外商投资准入负面清单（限制或禁止外商投资的产业清单），清单下条目继续减少。全国负面清单由40条减至33条（而自由贸易区（“**自贸区**”）外商投资准入负面清单由37条减至30条）。值得注意的是，金融服务行业及汽车业的外资限制大幅放开：取消证券公司、基金管理公司、期货公司、寿险公司以及商用车制造企业外资股比上限。其

他变化包括允许外国投资者在城市人口 50 万以上的城市供排水管网合资企业中持有多数股权，以及允许外商独资设立职业教育机构。

2020 年 12 月，中国发布了更新版《市场准入负面清单》²，再次延续了禁止类和限制类项目数量减少的趋势。新的负面清单中共有 123 项（禁止类 5 项，限制类 118 项）：比 2019 年的 131 项有所减少³。该负面清单中删除了石油和天然气勘探与生产以及证券公司高级管理人员任命的审批，但该负面清单中新增了对设立金融控股公司的限制⁴，这显示中国决心按中国现行金融分业监管体制，并由各监管机构严格承担其监管责任。

鼓励类产业目录持续扩展

2020 年 12 月，国家发展和改革委员会（“发改委”）和中国商务部公布了《鼓励外商投资产业目录（2020 年版）》（“《目录》”），其中列出了在国家层面以及中西部、东北地区鼓励外商直接投资的产业，并已于 2021

² 《市场准入负面清单》不同于上一段中所述的《外商投资准入负面清单》。前者适用于所有类型的境内投资，既适用于国内投资者，也适用于外国投资者；后者仅适用于外商投资。

³ 资料来源：《中国减少了市场准入负面清单所列项目》，2020 年 12 月 16 日，路透社

⁴ 资料来源：《中国发布 2020 年版负面清单》，2020 年 12 月 23 日，《China Briefing》

年 1 月生效。2020 年版的《目录》包含 1,235 个事项（与 2019 年的 1,108 项相比，增加了大约 11%）⁵。

《目录》在国家层面上的主要趋势包括继续鼓励外国投资者和外商投资企业投向高科技制造业（例如，新能源汽车发动机；新能源汽车和智能汽车零部件；汽车充电桩和储能充电桩；新能源发电设备；量子计算机、类脑计算机等下一代计算机；4G 和 5G 移动通信设备；等等）和风险投资与科技研发等服务业。聚焦于先进制造业，最终将令中国国内消费者可以获得范围更广且更为精密的产品和服务。从区域层面上看，应当注意到河南省、陕西省、广西壮族自治区已将“医疗器械、防疫防护用品、原料药生产”等列入其各自鼓励类产业目录。⁶

简化来华外商投资资金的汇入

外管局于 2019 年 10 月推出 12 项改革措施促进外商投资。这些措施特别包括(i)允许中国境内主要业务为非投资业务的外商投资企业以其资本金进行股权投资（在此之前，此类外商投资企业必须在其业务范围中加注“投资”字样才能进行股权投资，而这项要求在实践中很难实现）；及(ii)便利出

⁵ 资料来源：《中国鼓励类产业目录扩展以改善外商投资准入》，2021 年 1 月 5 日，《China Briefing》

⁶ 资料来源：同上。

售中国境内业务资产的卖家与以外币付款的买家开展交易。随后于 2020 年 12 月，外管局、中国人民银行、发改委和国有资产监督管理委员会联合发出通知，旨在加快跨境人民币资本流在中国国内经济中的使用。该新通知中的一个要点是，简化了外国投资者使用跨境人民币开设账户之结构，也便利了在华外商投资企业支付新的收购交易对价时使用人民币利润，致使出售中国资产的卖方更为容易地接受以跨境人民币资金和在投资的人民币利润作为收购的对价，并进一步激励投资者考虑将其中国境内投资的利润进行再投资，而不是将该等资金调回至中国境外。

证券法的修改

《外商投资法》规定：“外商投资企业可以依法通过公开发行股票、公司债券等证券和其他方式进行融资”⁷ 2020 年，中国内地的证券法进行了修订，首次公开募股从核准制转变成注册制，增加了信息披露要求，并加大了对违规行为的处罚力度。这些措施不仅将推动中国内地资本市场的开放，也有助于吸引更多国内外投资者，这在另一方面又强化了来华投资者和收购者通过中国内地资本市场募集并购融资的趋势。

⁷ 资料来源：http://www.fdi.gov.cn/1800000121_39_4872_0_7.html

市监局的新措施

2020年4月，市监局通过其监督和监管市场竞争和垄断的部门发布了关于支持新冠疫情防控和复工复产反垄断执法的公告。市监局已建立“绿色通道”，对包括医药制造、医疗仪器设备及器械制造、食品制造、交通运输、批发零售等与疫情防控和基本民生密切相关领域在内的部分行业的经营者集中反垄断审查申请，进行快速审查。

鉴于新冠疫情，对无争议案件的审查工作日益加快。据报道，在2020年第一季度，市监局批准根据其经营者集中反垄断审查简易程序进行的交易平均需要12.8天，而上一季度为13.4天。审查时间的略有缩短印证了市监局对复工复产所承诺的支持。

市监局在2020年3月中旬的一份新闻稿中证实，自2月3日以来已收到37份经营者集中反垄断审查申请，正式启动45起，审结45起，平均每个工作日审结2起，这“极大地支持了公司的并购活动。”

利用“绿色通道”不仅加快了简化的合并审查程序，而且一些按照普通程序申报的无争议案件也被注意到获得快速批准：例如，2020年4月，市监局在第一阶段就批准了可口可乐和中国蒙牛乳业新设合营企业的合并审查申请，在以前案件的正常审批过程中，如此快速批准的情形极为罕见。

相比之下，复杂的案件继续面临漫长的审查过程。根据市监局 2020 年公布的附条件批准决定，申报方自提交申请之日起平均需要 291 天才能获得批准，而四个附加限制性条件案件中就有两个被撤回并重新提交。这表明，对于涉及实质性问题的被受关注的交易，市监局仍然倾向于投入时间进行全面审查。

外商投资安全审查办法

《外商投资法》保留了基于国家安全理由审查及/或禁止交易的权利，但在历史上很少被实际行使。鉴于发改委和商务部于 2020 年 12 月公布了《安审办法》，并已于 2021 年 1 月生效，这方面的情况预计将有所变化。新的安审制度更新了原先的规则，其被视为主要关注的是军事、能源和基础设施领域的大型交易，因此相应的更新以反映了中国商业和技术的发展及期望。

《安审办法》是中国内地应对外商投资政策不可或缺的重要组成部分，是在世界许多其他主要经济体更新其外国投资审查制度的背景下出台的（有关美国、欧洲和英国的分析，参见本报告第三部分）。

修订后的《安审办法》已涵盖到中国境内所有类别的外商直接投资和间接投资，并引入了负责基于国家安全而进行外商投资审查的新设办公室（“**安审办公室**”）。安审办公室下设于发改委，并由发改委和商务部共同领导。如

以前一样，《安审办法》的涵盖范围包括来自台湾地区、香港特别行政区和澳门特别行政区的投资者。

《安审办法》所适用的交易包括：(1) 国防安全领域的相关投资；和 (2) 对关系国家安全的农产品、能源、资源、基础设施、装备制造、交通运输、文化活动、信息技术和互联网、关键技术、金融服务和其他重要产业进行投资并取得所投资企业的实际控制权或重大影响力。关于外国投资者通过收购上市公司股份进行相关交易时如何适用《安审办法》的进一步规定有待公布。

《安审办法》规定的安全审查将分三个阶段进行，一旦向安审办公室申报某一宗交易：

- 第一阶段：安审办公室在收到申报材料后 15 个工作日内将决定是否需对该交易进行安全审查。
- 第二阶段：若安审办公室决定需要进行审查，则会进行“一般审查”，需时最长为 30 个工作日。
- 第三阶段：经一般审查，若安审办公室认为该交易影响或可能影响国家安全，则会进行“特别审查”，需时最长为 60 个工作日（或在安审办公室决定需要延长的情形下的更长时间）。

特别审查可能导致交易被禁止，或者被附加条件以消除交易带来的国家安全风险。

与世界许多其他主要经济体的审查制度一样，《安审办法》中没有对“国家安全”作出定义。但从《安审办法》所列出的一系列活动中可以清楚看到，凡根据《外商投资法》进行交易的外国投资者，还必须准备好与安审办公室合作以便通过关于外商投资审查的安全审查，而且应在其交易规划阶段将相关时间安排、信息披露及风险等因素考虑在内。

第二部分：新版《外商投资法》生效和新冠疫情发生后来华并购交易有何变化？

当然，对于向中国内地的并购交易而言，《外商投资法》的生效并非唯一的宏观层面的变化。我们也注意到新冠疫情对国际交易的各环节均产生重大影响。由于疫情导致对商业模式的改变，收购评估和资产组合也相应地被迫调整。由于在疫情所产生影响的潜在规模和期限各持己见，买卖双方对估值预期的差距经常扩大。由于国际旅行和实地访问已变得困难重重，竞标和尽职调查流程也变得更加耗时。

中国经济再度加速增长

中国内地有效应对疫情致使其经济快速复苏。不仅“中国经济在[2020年]第二季度重新增长”⁸，而且“2020年第四季度，中国国内生产总值增长6.5%，超出预期……中国将是世界上唯一一个[2020年]没有发生经济衰退的大型经济体”。⁹

中国经济实力表现在：

⁸ 资料来源：《今年中国工业生产增速最快》，2020年12月15日，《金融时报》

⁹ 资料来源：《中国经济的增长速度比疫前更快》，2021年1月18日，《金融时报》

- 中国内地工业生产快速增长：2020 年第四季度增幅为 7.1%¹⁰；
- 2021 年中国内地消费经济预期会复苏并增长：高盛预测，消费领域将“接力成为 2021 年的主要增长动力”，估计 2021 年家庭消费增幅达 13%（而 2020 年降幅为 4%）；¹¹
- 中国内地贸易顺差 2020 年 12 月达到 780 亿美元：这是月度贸易顺差的历史新高，其动力来自于全球对医疗设备和疫情期间隔离所需相关物资的需求；¹²
- 2018 年以来人民币兑美元汇率首次达到 1 美元兑人民币 6.5 元水平，“大致回到了 2018 年年中美国总统特朗普发动中美贸易战之前的水平”，也反映出中国对疫情的成功控制；¹³
- 中国内地股市 2021 年 2 月达到全球金融危机以来的最高水平，而且在本文撰写之时¹⁴，沪深 300 指数已接近其历史高位；

¹⁰ 资料来源：同上，《金融时报》

¹¹ 资料来源：《中国消费者成为经济复苏先锋》，2020 年 11 月 29 日，《金融时报》

¹² 资料来源：《中国月度贸易顺差创历史新高》，2021 年 1 月 14 日，《金融时报》

¹³ 资料来源：《人民币兑美元汇率自 2018 年以来首次突破 1 美元兑人民币 6.5 元水平》，2021 年 1 月 4 日，《金融时报》

¹⁴ 2021 年 3 月 1 日

- 中国沪深 300 指数比标准普尔 500 指数表现更出色：“中国沪深 300 指数今年[2020 年]上涨了约 27%，按美元计，超过标准普尔 500 指数达 13 个百分点”。¹⁵

与西方经济体相比，中国内地应对疫情能力极强，被视为中国经济短期和长期增长的潜在高效加速器。在短期内，“中国对新冠疫情的有效管控正在拉开其与其他国家的差距，因为有许多国家正在面对新一波疫情而重新实施限制措施。”¹⁶ 从长期来看，“由于[疫情应对差异]，目前预测中国经济将在 2028 年超越美国，比我们原先在[2019 年]预测的 2033 年提早了五年。”¹⁷

既然如此，《外商投资法》生效和疫情爆发后，进入中国内地的并购交易在 2020 年有何变化？基于我们国际并购的经验和国际并购交易数据的广泛采集，我们注意到存在以下趋势：

2020 年中国内地来华并购额上升

尽管发生新冠疫情，2020 年已公布的中国内地来华并购交易额为 465 亿美元，相较于 2019 年的 444 亿美元，增幅约为 5%。

¹⁵ 资料来源：《全球投资者押注中国突破人民币 1 万亿元》，2020 年 12 月 14 日，《金融时报》

¹⁶ 资料来源：彭博社，2020 年 12 月 14 日

¹⁷ 资料来源：英国经济和商业研究中心的《2021 年世界经济排行榜》

2020 年第一季度，中国内地的来华并购额为 67 亿美元（比 2019 年第一季度下降 46%）。与之形成明显对比的是，2020 年最后九个月的来华并购额达到 399 亿美元（与 2019 年同期相比上升 24%）。¹⁸ 交易活动反弹并保持良好势头不仅证明中国内地对疫情应对有方，而且证明中国经济在对外开放及（如上所述）其经济活力与增长前景方面富有吸引力。

汽车、消费及零售、能源、金融、医疗、科技和工业制造等板块高度活跃

2020 年中国内地的 70% 来华并购发生在汽车、消费及零售、能源、金融服务、医疗、科技和工业板块。¹⁹

2020 年宣布的上述板块大型来华投资交易包括：

- Amgen Inc、Baker Bros Advisors LP 和高瓴资本组成的投资者集团以 21 亿美元进一步收购生物制品生产商百济神州 12.5% 的股权（医疗）；
- 由红杉、富达、璞米和软银远景基金等组成的投资者集团以 17 亿美元收购南京互联网服务供应商江苏满运软件科技有限公司具体数量未披露的少数股权（科技）；

¹⁸ 资料来源：Refinitiv 数据库

¹⁹ 资料来源：Refinitiv 数据库

- 香港特别行政区蓝思科技以 14 亿美元收购金属板材制品制造商可利科技和可胜科技（工业）；
- 大众以 10 亿美元收购蓄电池和电子设备制造商国轩高科股份有限公司 23%的股权（汽车/新能源/高新技术）；
- 韩国私募股权投资基金旗下的 Indigo Glamour Co Ltd. 以 9 亿美元收购 Car Inc.（北京一家乘用车租赁服务供应商）其余 79%股权（消费）；
- 包括高瓴资本、Coatue Management LLC、Mubadala Investment Co PJSC、卡塔尔投资局、Aspex Management (HK) Ltd 和红杉资本在内的国际投资者集团以 9 亿美元收购汽车制造商广州小鹏汽车科技有限公司未披露的少数股权（汽车/工业）；
- 百事公司以 7 亿美元收购网上零售商杭州郝姆斯食品有限公司（零售）；
- 日本 MS&AD 保险集团控股有限公司以 7 亿美元收购交银康联人寿保险有限公司（上海一家人寿保险公司）37.5%的股权（金融服务）；
- 香港百江燃气有限公司以 7 亿美元收购上海燃气（一家天然气分销商）（能源）；

- 大众向其合资合作伙伴以 7 亿美元收购汽车制造商江淮大众汽车有限公司 25%的股权，使大众所持股权比例从 50%增至 75%（汽车/工业）；
及
- 三星以 7 亿美元收购半导体及相关设备生产商 TCL 华星光电技术有限公司 12.33%的股权（高新技术）。

还应当注意的是，按交易额计算，上述板块在“境内”的并购交易（即目标公司和收购方均位于中国境内）中占比接近 80%，反映出上述板块的重要性。分析人员指出，“在政府关于加大对先进工业和基础设施投资力度的倡议下，受到‘双循环’和‘产业升级’举措的积极影响，境内并购交易额在消费和工业领域均创下历史新高。”²⁰

反映出中国内地经济消费和生产领域的转型和发展

来华投资方面上述板块的重要性反映出中国经济消费和生产两个领域的持续发展。新制定的第十四个五年规划（即 2021 年至 2025 年发展规划）中，消费和生产是中国政府强调的两大核心领域。“双循环”——即随着中国生产

²⁰ 资料来源：普华永道，2021 年 1 月 27 日

性经济的技术升级，中国国内消费市场也会增长强化——这一原则是贯穿“十四五”规划的一个非常显著的特征。

在中国内地经济消费领域增长和演变的背后存在着若干潜在驱动因素：

- 2020 年非常高的储蓄率中有部分会释放。2020 年前三季度，中国内地储蓄率为 37%，而正常水平约为 30%。²¹2021 年消费者信心恢复后，这一高储蓄率会释放为消费。
- 随着全球经济摆脱疫情危机而催生的全球性需求，预计 2021 年中国内地就业市场将表现强劲。即便是目前，其就业情况也相对强劲：2020 年 11 月失业率为 5.2%，维持在 2019 年 12 月的水平。²²
- 中国内地中产阶级的持续崛起：全球的中产阶级中超过 20%在中国内地。到 2027 年，估计中国内地中产阶级人口将达到 12 亿，占世界总人口的四分之一。²³崛起的中国中产阶级对更高质量的消费品，对技术、医疗保健、金融等服务以及对汽车类产品的需求有所提升——类似于西方经济体中中产阶级的行为。但中国的中产阶级还要求以新

²¹ 资料来源：摩根士丹利，2020 年 12 月 1 日

²² 资料来源：《金融时报》，2020 年 12 月 15 日

²³ 资料来源：Brookings，2020 年 10 月

的方式获得新的产品和服务：例如，就电子商务和金融科技而言——这类行为所产生的趋势很可能会改变未来全球中产阶级的消费模式。

- 60 岁以上人口预期在未来 10 年不断增长：该年龄组的人数预计将从 2019 年的 2.41 亿增至 2029 年的 3.51 亿（人口增长规模超过 1 亿）。

²⁴ 该年龄组人口的增长将导致医疗和金融服务（例如退休和保险相关服务）的需求增长。

从生产端看，来华投资方面上述板块的重要性还反映出中国内地产能潜力，尤其是中国内地经济向价值链高端移动的趋势，例如：

- 第十四个五年计划提到了关键产业的重要性，包括“人工智能、量子计算机、半导体、健康和生命科学、神经科学、生物工程、航空航天技术和深海勘探”；²⁵
- 中国内地始终希望转型成为高附加值产品制造者，这一愿望广泛存在于《中国制造 2025》战略等举措以及被移出负面清单或列入《鼓励外商投资产业目录》的业务；

²⁴ 资料来源：Populationpyramid.net

²⁵ 资料来源：英中贸易协会《Focus》，2020 年 12 月 3 日

- 中国内地的工业研发费用增速位居世界第一（2019 年达到 21%，而同年美国为 11%、欧盟 6%、日本 2%）²⁶；及
- 国际社会日益认识到中国内地在重要新兴技术领域取得世界领先地位的潜力。例如：“到 2025 年，中国的技术生态系统将会成熟，在活力、创新和竞争力方面将会与硅谷不相上下。随着中国创新的重心从消费互联网转向工业互联网，这种活力将越来越多地体现在信息技术的工业应用上。中国将会大面积地成功部署超高容量的“新基础设施”——云计算、5G 网络、智能城市和监控网络等——以推动向工业互联网的过渡。”²⁷

在过去几年中，中国内地企业寻求提升价值链地位的一个途径是开展境外投资，以便获得合适的资产、技术、专业知识和合作伙伴。然而，西方经济体对外资进入敏感行业的监管和政治壁垒越来越多，使得通过这一途径提升价值链地位变得不再那么可行（参见下文第三部分）。

放宽外商来华投资是支持在中国内地不断发展壮大高附加值工业基础的途径之一，并将在境外投资活动继续受到阻碍或禁止的情况下变得愈发重要。支

²⁶ 资料来源：《2020 年欧盟工业研发投入积分榜》

²⁷ 资料来源：《2025 年预测》，Marco Polo，2020 年 10 月 26 日

持中国内地经济持续向更高价值的产品与服务转型，对于满足中国内地不断壮大的中产阶级内需以及推动中国经济至关重要。

收购方正在日趋国际化

2020 年，约有半数的来华并购交易收购者位于香港特别行政区（212 亿美元，占总交易额的 45%）。紧随其后的是美国（61 亿美元，占 13%）、新加坡（50 亿美元，占 11%）、韩国（23 亿美元，占 5%）、德国（23 亿美元，占 5%）和英国（20 亿美元，占 4%）。²⁸

鉴于香港特别行政区与中国内地之间的政治、法律、文化和商业联系，收购者集中于香港特别行政区不足为奇。然而，来华并购的香港特别行政区以外收购者所占比例长期以来呈不断上升态势。2015 年，这一比例是总额的 37%（其来华并购交易额为 199 亿美元，而总额为 544 亿美元）。2020 年，这一比例为 55%（其来华并购交易额为 253 亿美元，而总额为 465 亿美元）。²⁹ 同样，这不仅反映出中国内地经济持续放松管制，还反映出其作为增长势头强劲、充满活力的地区与日俱增的吸引力。

²⁸ 资料来源：Refinitiv 数据库

²⁹ 资料来源：Refinitiv 数据库

随着新冠疫情后的谈判和尽职调查变得费时，因而拖长交易时间

在其他所有条件相同的情况下，《外商投资法》及相关法律变动缩短了交易时间（尽管《安审办法》在未来可能会有一些反向效应——参见第一部分）。

商务部的审批制度已由市监局的网上信息报告制度所取代，因此，与外商收购中国企业或资产相关的外商投资信息报告应首先提交至市监局的网上系统。废止商务部的审批制度可能会加快交易的推进。³⁰

但是，我们最近就国际并购项目提供法律服务所获得的经验显示交易时间在变得更长。这是由于交易谈判的重点焦点因新冠疫情而发生变化以及交易流程及时间安排也受到疫情影响所致。

从交易谈判角度看，买方寻求额外保障及附加条件，以免受与新冠疫情相关的风险。曾有交易谈判特别关注重大不利变化的条款，允许在收购目标的业务发现明显恶化时潜在买方退出交易，以及分手费及反向分手费（即在交易由于特定理由没有得到完成时收购目标和买方向对方支付的费用）。

由于买卖双方对新冠疫情危机的持续时间和影响持有不同的观点，因此在买卖双方不断扩大的估值预期差距之上出现了这些谈判点。鉴于疫情在中国与

³⁰ 如果一项收购交易导致控制权转移给一个境外实体，且涉及关键行业，或对中国的经济安全带来影响，或导致转让一家拥有任何驰名商标或老字号的企业的控股权益的，则有关交易仍或须预先向商务部申报。

世界其他地区的受控速度之对比，这种观点上的差异在出售专注于国内业务的中国企业的卖家与国际买家之间尤为明显。

从交易流程的角度看，尽职调查持续期以及交易签署至交割的期间均变长。这大部分是由于疫情引致的旅游限制（例如 14 天检疫要求以及入境中国须遵守的严格签证要求）。尽管很多尽职调查工作可以远距离进行，但关键事项往往仍需亲身查证。此外，主要业务事项的移交也往往仍需由专人亲身进行。

最后一点，预计新的《安审办法》还将影响到交易的时间安排，特别是，对于被视为关系到国家安全的重要领域的交易。尽管《安审办法》于不久前公布，但鉴于其所涵盖的交易类型和行业范围相当广泛，我们预计有相当多的交易中必须包含关于向安审办公室申报并经其审查的规定。

第三部分：给交易主体和政策制定者的建议

基于上文第一部分和第二部分所讨论的观察和趋势，我们在下文提供了一系列建议，供寻求参与对华并购交易的交易主体和寻求管理对华并购交易的政策制定者参考。

当地经验愈发重要

鉴于疫情仍在持续，国际买家对远程开展尽职调查的需求也将继续增加。大型国际律师事务所和会计师事务所在中国内地均设有办事处或建立了“最佳伙伴安排”，协助开展法律和会计尽职调查，并就法律流程问题提供建议和意见。

然而，将运营尽职调查外包往往会更为困难。这是由于运营尽职调查的很大一部分通常是由收购方内部团队进行的，用以确定业务同新所有者之间的契合度。该等尽职调查更加需要当地专业知识的协助，特别是考虑到（1）颁布《外商投资法》并调整负面清单后，向对华投资新放开的业务活动领域扩大；（2）受疫情影响，相当数量的商业模式正在经历巨大的变革；以及（3）有必要了解对商业成功有影响或至关重要的利益相关方（例如，特定的客户关系、供应商关系或监管关系），并了解这些关系在多大程度上将继续存在或将会如何演变，尤其是在发生所有权变更后。

当地运营专家在寻找新的投资或收购目标方面也可能发挥巨大作用。最有吸引力的投资或收购目标可能是相对处于创业阶段或者鲜为人知的业务，尤其是出现在新兴产业或涉及新兴技术的领域。

因此，交易主体同当地专家建立联系以协助开展尽职调查将大有裨益。政策制定者可通过（例如）网络平台、线上研讨会及会议等形式促成这种合作关系。

经验丰富且创新性强的顾问愈发重要

正如第二部分所介绍的，疫情对交易的发起、评估、谈判、尽职调查和交割的方方面面都产生了变化。为应对这些挑战，无论是在并购的结构设计、开展尽职调查还是项目管理，都正在发展形成新的交易应对方案和规范。

因此，与投入疫情时代“在线”交易的经验丰富且创新能力强的顾问开展合作，对收购方、投资者和卖方愈发重要。这些顾问能够将其在更广泛交易领域同时获得的见解向任何特定情况提供借鉴。特别是如果买卖双方对新冠疫情所造成影响有着截然不同的预期，如何弥合这种认识上的差距对于成功谈判交易将非常重要。

透明度愈发重要

尽管《外商投资法》和《实施条例》简化了相关流程，但是交易仍须遵守大量的监管申报要求。根据我们的经验，在负责管理修改后的外国投资备案制度的地级监管机构，之间仍然在实际操作方面相对缺乏统一性，例如：申报是以纸质形式还是电子形式、作为交易申报材料的一部分需要提供哪些配套文件等等。监管机构在处理交易时也要求得到更多信息。新的《安审办法》还要求向安审办公室披露更大范围的潜在的交易类型和业务活动。

因此，交易主体须做好准备提高其业务和竞标的透明度。政策制定者可以持续保持申报要求的一致性并精简流程，从而提高交易的速度和确定性。

分享疫情管控经验的机会

中国应对新冠疫情的经验以及因此所取得的经济表现，对全球其他地区而言具有启示意义。中国的企业和政策制定者将持续有很大的机会与全球其他地区分享其应对新冠疫情的经验。与世界分享经验，将可以继续展示中国经济的韧性，也有益于对华并购交易（不论在交易数量还是交易价值方面）。这会加速全球其他地区的经济复苏，便于潜在的海外买家和投资者参与其目标中的中国境内并购交易，从而消解其本国新冠疫情所带来的问题。最后，从长远看，这会提升全球的商业活动规模水平和社会韧性（例如，面对未来潜

在全球性疫情时)：这样的全球风险消减将不仅会促进国际商业活动进一步增长，也会减少未来如疫情等全球性震荡的负面影响。

关于可变利益实体的疑问继续存在

可变利益实体 (VIE) 这一结构允许外国投资者通过合约安排对中国企业进行实际控制 (并获取经济利益)。VIE 这种结构被采用在外商投资受限制的行业内为中国企业引入外资伙伴。由于它们被视为规避外国投资限制的一种方式，在法律上的地位历来较为模糊。《外商投资法》涵盖“直接或间接”进行的投资活动，其规制范围不但包括收购股权“或其他类似权利”的投资者，也包括投资者以“法律、行政法规或者国务院规定的其他方式的投资”。《安审办法》中有类似的扩展性规定。

我们在之前一届中国发展高层论坛上发表的报告中³¹，概述了在市场参与者中存在的关于 VIE 结构在《外商投资法》下是否及将会如何被监管的问题以及可能带来的后果。考虑到“中国境外的投资者对使用 VIE 的公司投资了大约 1 万亿美元”³²，这个问题尤其重要。

《外商投资法》中未明确提及 VIE 交易结构。此外，最终颁布的《实施条例》中删除了先前的征求意见稿中关于国务院批准的中国投资者在境外设立的全

³¹ 见“扭转趋势——外商对华投资的机遇”，年利达律师事务所，2019年。

³² 资料来源：《经济学人》，2017年9月16日

资企业向中国境内的反向投资可豁免外资持股限制的规定（这曾被视为是对未来 VIE 架构的监管埋下伏笔）。

作为一个重大突破，最近发布的《关于平台经济领域的反垄断指南》确认，如果达到营业额要求，涉及 VIE 结构的交易需要进行反垄断申报（与其他交易一样），从而结束了围绕该问题的长期不确定状态。由此，市监局对三家大型中国民企（阿里巴巴、腾讯和顺丰速递）未申报其涉及 VIE 结构的交易的行为作出了处罚，并且在最近审查并批准了一项明确涉及 VIE 结构的反垄断申报³³。

国际资本市场的作用

对中国境内资本市场的国际投资继续快速增长。这一增长势头的驱动力有：

- 债券通交易量在 2020 年的持续增长；
- 沪伦通于 2019 年成功启动（而且中国证券监督管理委员会于 2020 年 6 月批准中国太平洋保险通过沪伦通渠道发行证券）；
- 中国 A 股在摩根士丹利资本国际（MSCI）指数的全球基准股中的权重翻了两番；

³³ 该项申报涉及由明察哲刚和百胜集团的一家子公司共同控制的一个绿地投资合资项目（股比为 60/40），为餐饮业提供了技术解决方案。

- 2020 年 9 月份公布了外国机构投资者进入中国 A 股市场的两大对华投资渠道（QFII 和 RQFII）将合二为一，变成单一的“合格外国投资者”制度，进而为这些市场提供更为广泛更为深入的机会。

与之同时，《外商投资法》允许通过发行公开交易证券的方式为相关投资筹集资金。所有这些均意味着，除了外商对中国内地企业的直接投资外，投资者对在中国内地有直接投资的外国企业的兴趣也在进一步提升。。这一点，可从 2020 年外国投资者参与中国资本市场的巨大热情看出：据估计，2020 年，“外国投资者购买了金额超过一万亿元人民币[1500 亿美元]的股票和债券…这些交易都是通过将[外国]投资者与内地相互联通起来的香港特别行政区计划实现的”。³⁴

就资本市场而言，政策制定者、监管机构和证券交易所因此有机会就信息披露和投资规范予以协调（或至少可以予以明确解释）以进一步鼓励国际投资。银行家和基金经理们同时将有机会就公开市场上，新的投资机遇增加利用技术手段进行路演和尽职调查。

³⁴ 资料来源：《金融时报》，2020 年 12 月 14 日

境内并购对于管理外资来华并购的诉求越来越重要

2020 年是中国内地并购活动强劲的一年：发生了 7,340 亿美元的并购交易——“是自 2016 年以来的最高水平，得益于国家和政府的有力投资支持”，“境内并购[回升]到了 2017 年时的水平，其原因是国家对各种银行和证券公司的大力参与和支持以及为应对动荡的经济状况而加快了对[国有企业]的改革”。³⁵

中国内地并购活动的强劲水平不仅表明国内业务的持续成熟。它也代表着一个非常有影响力的因素，将会影响外资考虑和谈判来华并购的方式。随着国内竞购人越来越普遍并精通并购，国际竞购人需提高其并购建议的吸引力以跟上步伐：这可能会涉及到拟议并购的金额、条件、商业论证力度或其他无形因素。在涉及中国境内国有资产的并购交易中，国家强制性挂牌程序的广泛使用对所有买家施加了若干强制性的交易条款，这也限制了竞购人可为这些资产设计交易架构的程度。

竞争日益激烈的环境给国际竞购人带来了挑战，他们不仅要评估每笔交易的收购价值，还要考虑到每笔收购对集团整体在中国内地的长期投资和增长的总体计划的贡献。我们在第一部分中所讨论的在简化资金汇付方面工作的最

³⁵ 资料来源：普华永道，2021 年 1 月 27 日

新进展，以及不同的投资和开发区为吸引长期投资承诺而出台的一系列地方性招商引资激励措施³⁶，预计将成为吸引外资来华并购的越来越重要的因素。

外国投资审查日益严格

我们过去在中国发展高层论坛上就中国对外投资和外来投资发表的报告中曾经指出，美国、欧盟以至澳大利亚等其他经济体对进入其认为（特别是基于国家安全角度出发）属于国家重点行业的外国投资（往往是中国投资，但不完全是中国投资）设定的政治和监管壁垒正日益增多。鉴于《外商投资法》提出中国可对歧视中国投资的国家采取措施（并且曾有投资者在开展对华投资的谈判时寻求管理该等风险的例证），故这一加速的趋势变得尤为重要。来华投资的投资者需继续跟踪了解相关情况，并与深入了解中国内地乃至全球监管环境的专家顾问紧密合作，以确定其交易受该等措施影响的风险。

美国

在美国，美国外国投资委员会（CFIUS）的管辖权因《外国投资风险审查现代化法》而获得扩大，该法已于 2020 年 2 月正式实施。美国外国投资委员会 2019 年的年报³⁷ 确认，企业提交的经美国外国投资委员会裁定属于该委

³⁶ 取决于特定地区的政策，这些措施可能包括各种优惠措施，包括退税、租金补贴、设备购买补贴及聘用专家的激励措施等。

³⁷ 资料来源：<https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf>

员会管辖范围的交易申报共有 231 项，与 2017 和 2018 年的数字相仿。这些申报中有 89% 涉及制造行业（特别是电脑和电子产品制造、电力设备制造和运输设备制造）、金融、信息和服务行业（特别是专业服务和科技服务）或公用事业行业的交易。

2017-2019 年间，中国收购方提出的申报占了相关交易的 20%，比例为各国之首（其次为日本，占 14%）。但应注意的是，若仅以 2019 年计，中国企业并未占据美国外国投资委员会排行榜的榜首位置。例如，2019 年的申报交易为 231 宗，其中由中国收购方提出的仅占 25 宗，少于占第一位的日本（46 宗），与加拿大（23 宗）则不相伯仲。在 2019 年收购美国“关键技术”的交易申报名单中，中国收购方，只有 3 宗，占比远低于其他国家如日本 20 宗、德国 11 宗、法国和加拿大 7 宗、英国 6 宗、南韩 4 宗。

即使撇开广泛宣传报道的时任特朗普总统要求剥离 Musical.ly（广受欢迎的视频分享应用软件 TikTok 的美国前身）的美国总统行政命令不计，以及 2020 年 12 月美国商务部工业和安全局将 59 个中资实体和个人列入其视为从事与美国国家安全和/或外交政策利益背道而驰的活动的“实体清单”中，美国各外国投资审查部门在 2020 年也采取了大量行动。

2020年9月，美国外国投资委员会发布了一项新规则，修改了非美国公司投资“关键技术”企业时需要办理交割前申报的其中一个门槛。对那些美国外国投资委员会视为善意的投资者，相关交易不再仅因为目标公司经营敏感行业而需要办理强制性的交割前申报。另一方面，如投资者来自受到较严格出口许可规定限制的国家，则须办理更多的申报手续。关于新门槛的规定也要求各当事方做更深入的尽职调查，以评估是否需要在交割前向美国外国投资委员会申报。各当事方不但需要了解相关的美国企业有否开发或生产关键技术，还需要知道该非美国投资者或其所有人是否需要申领出口许可证。对那些处于发展初期、出口合规计划还不成熟的美国企业而言，要进行这类分析是很困难的。如果非美国投资者不惯于处理出口管制手续或者不熟悉这类手续如何适用于投资者的所有人，进行以上分析时同样会遇到难题。

最后，关于美国外国投资委员会，应该注意到，2021年1月，美国总统职位已移交给了拜登。该委员会将在拜登时代以何种方式存在的早期迹象包括搁置将TikTok的美国业务强制出售给包括甲骨文和沃尔玛在内的集团的交易，原因是，拜登政府开始审查以“助其确定特朗普政府所说的国家安全威胁是否仍继续支持该项禁令”³⁸。且有报道称，美国外国投资委员会现在正越来越

³⁸ 资料来源：《华尔街日报》，2021年2月10日

越多地审查对科技企业的风险投资，“甚至包括资金来源可追溯到中国的小额并购交易”。³⁹

欧洲

欧洲方面，在欧盟外商直接投资审查框架于 2019 年获得通过后，新的欧盟外商直接投资审查框架已于 2020 年 10 月开始运作。这一框架：

- 创立了一个供成员国和欧盟委员会之间互相交流信息并于必要时就具体投资项目提出关注的合作机制；
- 允许欧盟委员会在某项投资对多于一个成员国的安全或公共秩序构成威胁时，或在某项投资可能损害到攸关欧盟整体利益的项目或计划时，提出相关意见；
- 为欧盟委员会与成员国之间以及各成员国之间的合作定下限期，并须遵守不歧视和严格保密的规定；
- 为基于安全或公共秩序的理由在国家层面维持或采用审查机制的成员国提出若干核心要求；
- 鼓励在投资审批方面进行国际合作，包括分享经验、最佳做法和关于共同关注事项的信息。⁴⁰

³⁹ 资料来源：《华尔街日报》，2021 年 1 月 31 日

⁴⁰ 资料来源：https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1867

应该注意的是，新的法规补充（而非取代了）欧盟成员国的审查机制，且这种审查机制在某些国家也正在被强化。其旨在帮助成员国和欧盟委员会共同评估外国直接投资给安全和公共秩序带来的潜在跨境威胁。成员国可对是否在其境内批准投资以及基于何等条件作出批准保留最终决定权。⁴¹

这一新框架可能会延长交易期限（因为每个成员国都将等待欧盟委员会和其他成员国的意见，作为其自身审查程序的一部分）。

另外，2020年6月，欧盟委员会还出台了一系列建议，旨在阻止外国投资者利用政府补贴在对欧洲资产竞购时提出超过其他竞标对手的报价。⁴² 建议表示“对收购欧盟目标背景下的外国补贴表示格外关切”。⁴³ 尽管中国没有被提及，但是评论人士表示该等措施可能是针对中国收购方提出的。⁴⁴ 欧盟有望于2021年发布其针对外国补贴的建议书。

⁴¹ 资料来源：https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf

⁴² 资料来源：https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1070

⁴³ 资料来源：
https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf

⁴⁴ 资料来源：<https://www.nytimes.com/2020/06/17/business/european-union-china-deals.html>

这些政策已经导致中国在欧洲和美国的对外投资额锐减：例如“根据德国经济研究所统计，中国投资者去年（2019 年）在德国的兼并收购交易额仅为 13 亿欧元，只占 2017 年 120 亿欧元的交易额中的一小部分。”⁴⁵

强化对外国投资的审查（特别是在美国）是与世界各主要经济体之间正在进行的贸易投资谈判同时进行的。经过 7 年谈判，欧盟和中国于 2020 年 12 月原则上签订了《全面投资协定》（CAI）。欧盟表示，该协定将“显著改善欧盟投资者的竞争环境”。该交易提供了对于汽车、电信、云计算和医疗保健等行业的“增强的市场准入权”，并“使欧盟与美国在中国金融服务市场中处于同一地位。”对于中国而言，该协定“锁定了中国公司在欧盟[针对上文所述的欧盟所认为的扭曲市场的竞争]寻求扩大其合法武器时在欧盟市场上的现有权利”。该协定“还为中国提供了制造业方面的新的开放以及可再生能源方面的增长市场”。⁴⁶

英国

2020 年 11 月，英国政府在其《国家安全和投资法案》中公布了其对审查外国投资权力的拟议改革。该法案首次建议在英国引入独立的 CFIUS 风格的外国投资制度。该法案为被视为在具有最高国家安全风险的行业规定了强制性

⁴⁵ 资料来源：Nikkei Asia，2020 年 4 月 3 日

⁴⁶ 资料来源：《金融时报》，2020 年 12 月 31 日

申报义务，而对其他行业则只规定了自愿性申报义务。再加上非常广泛的管辖范围且无安全港措施，这将覆盖到十分广泛的并购交易。英国政府的影响评估估计，新制度每年将会导致收到 1,000-1,830 宗交易申报 —— 这是一个巨大的变化，因为自 2003 年实行现行制度以来，仅有 12 宗交易以国家安全为由进行了审查。

英国政府预计以下 17 个关键行业的某些交易将面临强制性申报：民用核能、通讯、数据基础设施、国防、能源、运输、人工智能、自主机器人、电脑硬件、密码认证、先进材料、量子技术、工程生物学、政府的关键供应商、紧急服务的关键供应商、军事或两用技术以及卫星和太空技术。

强制性申报制度将通过自愿申报制度得到加强，鼓励各方申报他们认为从国家安全角度判断可能需要关注的“触发事件”。这项制度将伴随有一个广泛的“召来”机制，使英国政府能在交易完成后五年内（该期限与意大利、法国和德国相当）审查未申报的交易，而如果英国政府已获悉交易，则上述时间缩短至六个月内。尤其是，对于在该法案出台后发生的交易，英国政府从该项新法开始实施时即有追溯权力，以便将该项法案出台之后发生的交易“召来”以供审查。

该法案界定了一系列“触发事件”，使英国政府能够审查范围广泛的交易，包括低比例的少数持股的情况，即：

- 某一人士获得某一实体超过 25%、50%及 75%的表决权或股份（或能阻止或通过一项公司决议）；
- 某一人士的持股或表决权增加超过 15%；
- 就自愿申报制度而言，凡涉及“具有重大影响”的收购，则适用较低的门槛。这是英国反垄断审查背景下的一个熟悉概念（只要收购低至 10-15%的股权即可触发）。

该法案还将涵盖范围广泛的资产类型交易，包括土地、有形动产以及（就知识产权而言）具有工业价值、商业价值或其他经济价值的任何创意、信息或技术。

此外，将不存在营业额或市场份额方面的安全港，从而使并购交易规避国家安全审查。

尽管英国政府强调英国仍然开放投资，且拟议的外国投资制度旨在对应地减轻国家安全风险，但该法案清楚地表明了英国对外国投资审查更为宽松做法的终结，并使英国与其他国家保持一致。如在影响评估中所预测的每年将会有 1,000-1,830 宗申报这一数字是准确的，将会意味着英国的外国投资安全

审查规定将会成为国际投资者越来越重要的考虑因素，并且需要在交易流程的早期就将其纳入交易可行性研究、合同条件和交易时间表中。

英国对外国投资制度改革的部分原因是人们对来自中国的投资感到担忧：例如，英国政府最近对 Canyon Bridge（由中国国有的中国国新控股提供支持）获得对英国半导体芯片制造商 Imagination Technologies 的逐步控制的担忧以及近期有关华为参与英国 5G 网络的决定。但是，干预措施不仅限于中国投资者。过去一年，英国政府也干预了涉及北美私募股权和金融投资者的交易（例如 Cobham / Advent 和 Inmarsat / Connect Bidco）。

结束语

综上所述，通过精简流程、提供平等待遇保证、扩大外商投资可开展的业务活动范围以及改善外商投资资本市场的渠道等方式，新《外商投资法》和相关法律措施极大地加快及鼓励外商投资通过并购途径进入中国。《安审办法》是《外商投资法》的重要配套规定，并构成了中国对外商投资的政策回应的一项重要组成部分。

中国迅速并成功地应对新冠疫情不仅意味着交易回暖，同时也凸显了中国经济的实力与极大的潜力，使中国成为更具吸引力的外商投资（包括并购）的目的地。

但是，疫情已导致交易持续时间被延长，收购方与卖方之间的谈判和尽职调查出现新领域，也以及须重新评估各个行业的商业模式。此外，贸易与外商投资审查相关的持续紧张局势对于交易也有不利影响。因此，交易主体与政策制定者，可拥有很大机会会通过开展对话、教育与沟通联络等方式加快对华的投资。

Cross-border M&A in mainland China amidst dual circulation and a new regulatory environment

Linklaters

Executive summary

Foreign direct investment (**FDI**) has been, and continues to be, a subject of fundamental importance to the development of economies worldwide, including mainland China. This paper focuses on the inbound investment opportunity into mainland China, specifically through mergers and acquisitions (**M&A**), amidst a backdrop of continuing economic growth and regulatory change in China's domestic economy and polity.

The paper is divided into three sections, summarised below:

Section 1 includes a review of the new Foreign Investment Law (**FIL**) and associated laws and regulations that support, regulate and encourage foreign investment into mainland China, such as:

- the Implementing Rules for the FIL

- the Ministry of Commerce of the People’s Republic of China’s (**MOFCOM**’s) overhaul of the foreign investment filing system
- the ongoing reduction of the Negative List
- the ongoing extension of the Encouraged Industries Catalogue
- reform measures by the State Administration of Foreign Exchange (**SAFE**)
- changes to securities laws and new measures from the State Administration for Market Regulation (**SAMR**)

These measures have significantly accelerated and encouraged foreign investment into mainland China through M&A by reducing and simplifying legal and regulatory processes, offering reassurances in relation to equal treatment, widening the range of business activities available for foreign investment, and improving capital market access for foreign investors.

Section 1 also reviews the new Measures for the Security Review of Foreign Investment (**Measures**), which update mainland China’s pre-existing foreign investment screening regime against a backdrop of other major economies’ own activities in updating their foreign investment screening regimes, and discusses how they may impact inbound M&A into mainland China.

Section 2 is a review of how dealmaking by foreign investors has changed in the light not only of the FIL coming into force on 1 January 2020, but also the backdrop of the Covid-19 pandemic of 2020. Some of the major trends we identify include a strong recovery in mainland Chinese inbound M&A in 2020 despite a fall in the first quarter of 2020, and significant activity in sectors such as new energy, consumer and retail, healthcare, industrials, automotive and high technology. This reflects the development of both the consumer side and the production side of mainland China's economy, which will continue in light of the renewed focus on "dual circulation"; and increasing international diversification among acquirors of, and investors in, mainland Chinese businesses.

We suggest that China's rapid and robust handling of the Covid-19 pandemic has helped deal flow to recover to pre-Covid-19 levels and highlighted the strength and attractive prospects of mainland China's economy, including as an increasingly attractive destination for M&A and other forms of foreign investment. Nevertheless, the pandemic has led to a lengthening in deal duration, new areas for negotiation and due diligence between acquirors and sellers, and reappraisals of business models across industries – and it is likely that the new Measures will also impact deal timetables for transactions in relevant sectors.

Section 3 of this report suggests areas of consideration for policymakers and dealmakers in light of these findings. These areas include a recognition of the

importance of on-the-ground expertise (particularly operational expertise) in order to successfully source and close deals; a recognition of the increasing importance of transparency in obtaining regulatory clearance; the increasing roles of the capital markets in connecting mainland Chinese businesses and international investors; and the increasing influence of mainland China's growing and maturing domestic M&A market on the trends in inbound M&A.

Dealmakers and policymakers therefore have a significant opportunity to accelerate investment into mainland China by engaging in dialogue, education and networking. Such dialogue is particularly important given ongoing global tensions in relation to trade and foreign investment scrutiny and the continued effect of the Covid-19 pandemic, which may significantly hinder the growth of inbound M&A, despite the robust handling of the pandemic in mainland China.

We also suggest that there is an exciting opportunity for mainland Chinese businesses and policymakers to continue to share their experience and insights of managing the Covid-19 pandemic, with corresponding benefits not only to China but also the world.

Section 1: Legal context

The liberalisation of inbound investment into mainland China has accelerated over the last few years, even before the FIL came into force on 1 January 2020 (it was enacted on 15 March 2019). In October 2016, mainland China fundamentally reformed its decades-old foreign investment approval system. Newly-established foreign invested enterprises and foreign-related M&A of companies incorporated in mainland China would no longer require the approval of MOFCOM.

MOFCOM's approval jurisdiction was retained for those investment sectors that continued to operate restrictions and prohibitions on foreign investment – a group of sectors known as the “Negative List”.

The continuing liberalisation of inbound investment into mainland China can be seen in two major recent legal developments: firstly, the ongoing shortening of the Negative List (and the parallel expansion of the Encouraged Industries Catalogue); and secondly the FIL which takes measures to offer equal treatment and intellectual property (**IP**) protection for foreign-invested businesses, while also reserving the right to take action against economies that discriminate against mainland Chinese investment.

Against this backdrop of liberalising foreign investment, it should also be noted that China also published, in December 2020, new measures which updated the 2011 regime for foreign investment screening on the basis of national security.

While the impact of these measures is yet to be felt, they are a vital component of China's policy response to foreign investment and bring China into line with other major economies in enhancing the scrutiny of foreign investment.

The Foreign Investment Law 2019

The FIL came into force on 1 January 2020. It is a landmark piece of legislation meant to serve two aims: improving the business environment for foreign investors in mainland China and ensuring that foreign invested enterprises (**FIEs**) participate in the market on an equal basis as domestic enterprises.

The FIL is relatively high level in nature, and many of the measures suggested therein can be grouped under the aims of:

- (1) offering equal treatment to foreign investors
- (2) offering reassurances over IP protection
- (3) offering reassurances over the ease of doing business in mainland China
- (4) ensuring that China retains the ability to take protective and reciprocal action where appropriate

A selection of some of the measures in the FIL is given below.⁴⁷

⁴⁷ Source: http://www.fdi.gov.cn/1800000121_39_4872_0_7.html

- Equal treatment
 - Foreign investors enjoy equal treatment with domestic counterparts, excluding sectors specified on the Negative List (Article 4)
 - FIEs have equal rights when participating in government procurement and standards setting processes (Articles 15 and 16)
 - FIEs have the ability to raise funds through public share offerings, corporate bonds, and other means in mainland China (Article 17)
 - A consistent standard for foreign-invested businesses and mainland Chinese businesses for reviewing business permits and licenses (Article 30)

- IP protection
 - Administrative departments and their staff members are prohibited from using administrative means to require technology transfers from foreign businesses (Article 22)
 - Technology co-operation is encouraged based on “free will and business rules” (Article 22)

- Ease of doing business in mainland China
 - The establishment of a “service system for foreign investment, and [the provision to] foreign investors and foreign-funded enterprises

[of] consultation and services in respect of laws and regulations, policies and measures, investment project information and other aspects” (Article 11)

- Government “at all levels” must “streamline procedures for handling affairs, raise their efficiency and optimise government services, so as to further improve the services offered for foreign investment” (Article 19)
- Establishing a “complaint mechanism for foreign-funded enterprises” to be used where “any administrative act of an administrative department or its staff member infringes [an FIE’s] legitimate rights and interests” (Article 26)
- Reciprocity
 - Provision for China to take “corresponding” measures against countries that discriminate against Chinese investment (Article 40)
 - A foreign investment security review system that would cover foreign investments “affecting or having the possibility to affect” national security, any decisions under this system being “final” (Article 35)

Although the FIL has set out a clearer framework for foreign investment into mainland China, further detailed rules and regulations are expected to flesh out

the high-level provisions of the FIL over the course of 2021 and beyond. For example, although the treatment of variable interest entities (**VI**Es) was mentioned in the consultation draft of the FIL, the final form of the FIL is silent on VIE structures, so these continue to carry uncertainty as vehicles for foreign investment.

Some of the ancillary laws and regulations that have impacted foreign investment transactions in mainland China are given below.

[Implementing Rules for the Foreign Investment Law 2019](#)

The implementing rules (**R**ules) make important clarifications to the concepts given in the FIL. In particular, the Rules help enforce the FIL principle that foreign investments will not be expropriated without reasonable compensation: no discrimination, market value must be compensated, and rights of administrative appeal for the expropriated party.

The Rules provide a defined basis for investors to hold government authorities to their FIL obligations to comply with commitments and contracts, by (i) specifying that “commitments” include all forms of written policy support or preferential/accommodative treatment for local investments, and (ii) expressly disallowing changes to governmental divisions, officers or functions as basis for renegeing on their contractual obligations.

On the FIL's commitment to protect foreign investors' IP, the Rules promise to step up sanctions and law enforcement against infringers.

To underpin the FIL's commitments to a fair and competitive government procurement process including equal treatment of FIEs, the Rules provide that supplier selection may not be restricted on the basis of ownership, corporate form, nationality or brand.

Overhaul of foreign investment filing system

Around the same time as the Rules were released, MOFCOM updated its foreign investment filing system.

In accordance with the provision for a foreign investment information reporting system in the FIL, MOFCOM has introduced new reporting requirements for all FIEs, replacing the previous filing-based system for establishment of, and changes to, FIEs which had been in place since 2016. The new reports, which comprise an information report, an amendment report, a deregistration report and an annual report, are to be submitted through the enterprise creditworthiness publicity system which is also used to register the establishment of new FIEs and domestic enterprises. It is also clarified that the new reports must be completed for all direct and indirect investments by FIEs in mainland China.

The new system has resulted in time and efficiency savings for foreign investors, enabling them to submit all FIE-related information on a single platform without needing to make multiple filings with MOFCOM and SAMR. Procedures for the filing of the new MOFCOM reports and the application to SAMR for the establishment of FIEs are not sequential and can largely be completed in a single submission.

All investment filings made by foreign investors, including FIEs, in sectors not on the Negative List (see below) are to be treated the same as domestic investor filings. Importantly, the new judicial interpretation of the Supreme People's Court on the FIL expressly prohibits mainland Chinese courts from declaring that an investment agreement in any of these sectors is void (or has not come into effect) on the basis that relevant industry regulatory approvals have not been obtained, thus drawing a clear line between the effectiveness of an investment agreement and compliance with industry regulatory approval, consent and filing requirements in these sectors.

For FIEs in sectors restricted to foreign investment under the Negative List, the previous requirement of MOFCOM approval, involving the issuance of a MOFCOM approval certificate, has been abolished. SAMR is required to register the establishment of these FIEs provided they comply with the restrictions as to foreign ownership percentage, legal representative and key persons in charge (if

applicable) under the Negative List, and to the extent that necessary industry-specific regulatory approvals have been obtained.

Finally, a key change of note is that compliance with these procedures is not, as a matter of law, a condition precedent to deal closing. The reformed regime is thus expected to further speed up the process of foreign investment by inbound M&A into mainland China.

[The ongoing shortening of the Negative List](#)

China released its updated Foreign Investment Negative List (a list of industries where foreign investment is either restricted or prohibited) in June 2020, which continued to reduce the number of such industries and sectors. Areas on the national Negative List fell from 40 to 33 (and from 37 to 30 in free trade zones (FTZs)). Notably, there was significant liberalisation of the financial services and automotive sectors: foreign ownership caps on securities, fund management, futures, life insurance companies, as well as commercial vehicle enterprises, were removed. Other changes include allowing foreign investors to take majority shares in water supply and drainage joint ventures in cities with a population of more than 500,000, and wholly foreign-owned institutions to set up vocational education institutions.

In December 2020, China released its updated Negative List for Market Access⁴⁸, which again continued to reduce the number of prohibited and restricted areas of business. The new list stood at 123 items (5 prohibited, 118 restricted): a reduction from 131 in 2019⁴⁹. Activities deleted from the list included oil and gas exploration and production and the appointment of new executives in securities companies – while items added to the list included restrictions on the establishment of financial holding companies⁵⁰, showing China’s determination to place responsibility for financial regulation firmly with the existing individual financial sub-sector regulatory authorities.

[The ongoing extension of the Encouraged Industries Catalogue](#)

In December 2020, the National Development and Reform Commission (**NDRC**) and MOFCOM published the 2020 Catalogue of Encouraged Industries for Foreign Investment (**Catalogue**), which lists industries where FDI will be encouraged at a national level and for central, western and north eastern regions,

⁴⁸ The Negative List for Market Access is distinct from the Foreign Investment Negative List described in the previous paragraph. The former applies to all types of investment into mainland China, whether for domestic or foreign investors; the latter is for foreign investment only.

⁴⁹ Source: “China reduces items on the negative list for market access”, 16 Dec 2020, Reuters

⁵⁰ Source: “China releases 2020 Negative List for market access”, 23 Dec 2020, China Briefing

and which became effective in January 2021. The 2020 Catalogue contains 1,235 items (a rise of c. 11% versus 2019, where there were 1,108 items)⁵¹.

The main trends of the Catalogue at the national level include a continuing encouragement for foreign investors and FIEs to invest in high-tech manufacturing (e.g. automotive engines using new energy sources; components of new energy vehicles and intelligent vehicles; automotive charging piles and charging piles for energy storage; new energy power generation equipment; quantum computers, brain-like computers and other next-generation computers; 4G and 5G mobile telecom equipment; etc.) and services such as venture capital and scientific R&D. This focus on advanced manufacturing sectors will ultimately increase the range and sophistication of products and services available to China's domestic consumers. At the regional level, it should be noted that Henan, Shaanxi and Guangxi provinces have added “medical equipment, epidemic prevention and protection articles, and active pharmaceutical ingredient (API) production” to their encouraged list.⁵²

⁵¹ Source: “China Expands Encouraged Catalogue, Improves Foreign Investor Access”, 5 Jan 2021, China Briefing

⁵² Source: *ibid.*

Simplifying funds remittances for inbound investments in mainland China

SAFE introduced 12 reform measures to boost foreign investment in October 2019. These include in particular (i) allowing foreign-invested businesses in mainland China whose main purpose is not investment to make equity investments with their registered capital (before this change, such FIEs were required to have “investment” in their business scopes in order to make equity investments – a change that was difficult to make in practice); and (ii) making it easier for sellers of PRC assets to deal with buyers paying in foreign currency. This was followed, in December 2020, by a joint notice by SAFE, the People’s Bank of China, NDRC and the State-owned Assets Supervision and Administration Commission, which aims to accelerate the use of cross-border renminbi (**RMB**) capital flows in the Chinese domestic economy. A key part of the new notice simplifies the account opening structures in the use of cross-border RMB by foreign investors as well as the use of profits generated in RMB by FIEs in China to pay for new acquisitions. This makes it easier for sellers of PRC assets to accept cross-border RMB and reinvested RMB profits as payment for acquisitions and further increases incentives for investors to consider reinvesting profits from their investments in mainland China instead of repatriating them abroad.

Changes to securities law

The FIL states that “foreign-funded enterprises may conduct financing through public offering of shares, corporate bonds and other securities or by other means”.⁵³ In 2020, the mainland Chinese securities law was amended so as to transition towards a registration-based IPO system, increase disclosure requirements, and impose larger penalties for violations. These measures will not only liberalise mainland China’s capital markets but also improve their attractiveness to domestic and foreign investors: in turn, increasing the propensity of inbound investors and acquirors to use them in order to fund M&A.

New measures from SAMR

In April 2020, SAMR, through its arm that supervises and regulates market competition and monopolies, published antitrust measures to manage the Covid-19 pandemic and the resumption of work and industrial production. SAMR has established a “green channel” for expediting its review of merger filings in some industrial sectors, including the pharmaceutical manufacture, medical equipment and apparatus manufacture, food production, transportation, wholesale and retail, and other sectors closely related to daily life and the prevention and control of the pandemic.

⁵³ Source: http://www.fdi.gov.cn/1800000121_39_4872_0_7.html

Notwithstanding Covid-19, the review of no-issue cases has been increasingly expedited. SAMR reportedly took an average of 12.8 days to approve deals placed under its simplified merger review procedure in the first quarter of 2020 compared to 13.4 days in the preceding quarter. This slight shortening of duration was evidence of SAMR’s commitment to support resumption of work and industrial production.

SAMR confirmed in a press release in mid-March 2020 that it has received 37 merger filings since 3 February 2020, formally initiated 45 cases and closed 45 cases, at average closing two cases per business day, which “greatly supported company M&A activity.”

Not only is the simplified merger review procedure expedited by taking advantage of the “green channel”, some no-issue cases filed under the normal procedure have also been observed as having been cleared speedily: for example, in April 2020, SAMR cleared the merger filing for a joint venture between Coca-Cola and China Mengniu Dairy within Phase 1, such a swift approval being rarely seen in previous cases reviewed under the normal procedure.

In contrast, complex cases continue to face lengthy review processes. Based on SAMR’s conditional approval decisions published in 2020, it took filing parties an average of 291 days to obtain the approvals from the date of submission, and two

out of the four remedy cases were pulled and refiled. This indicates that for high-profile deals with substantive issues, SAMR still typically takes time for a thorough review.

Measures for the security review of foreign investment

Whilst the FIL reserves the right for deals to be scrutinised and/or blocked for national security reasons, this has historically been little used in practice. This is expected to change given the publication of the Measures by NDRC and MOFCOM in December 2020, which took effect in January 2021. The new regime updates the previous rules, which were seen as mainly focused on large deals in the military, energy and infrastructure spaces and hence needed updating to reflect China's commercial and technological development and aspirations. The Measures are an important and necessary component of mainland China's policy response to foreign investment and come against a backdrop of many other major economies updating their foreign investment screening regimes (see section 3 of this report for the US, Europe and UK experience).

The revised Measures cover all types of foreign direct and indirect investments in mainland China, and also introduce a new office (**Office**) responsible for foreign investment screening for national security reasons. The Office will be set up by NDRC and jointly managed by NDRC and MOFCOM. As before, investments by

investors from Taiwan, Hong Kong SAR and Macau SAR are all covered by the Measures.

Transactions covered by the Measures include (1) investments in sectors relating to national defence and security, as well as (2) investments where control or major influence is acquired in businesses in sectors such as agriculture, energy, resources, infrastructure, manufacturing of heavy equipment, transport, cultural activities, IT and internet, key technologies, financial services, and other important sectors to the extent that they have a bearing on national security.

Further rules are to be published on how the Measures will apply when the foreign investor conducts the transaction by acquisition of listed shares.

Security review under the Measures will be a three-stage process once a transaction is notified to the Office:

- Stage 1: The Office will decide whether there is a need for a security review of the transaction within 15 working days of notification.
- Stage 2: If the Office decides a review is required, it will conduct an “ordinary review”, which will take up to 30 working days.
- Stage 3: If the Office decides following its ordinary review that the transaction will or could affect national security, it will conduct a “special

review”, which will take up to 60 working days (or more, if the Office decides that this duration needs to be extended).

The special review can result in the transaction being prohibited, or conditions being set in order to eliminate the national security risk of the transaction.

In line with many other major economies’ screening regimes, “national security” is not defined in the Measures. But it is clear from the wide set of activities listed in the Measures that foreign investors seeking to pursue transactions in the light of the FIL must also be ready to work with the Office in order to clear foreign investment screening security review, and to incorporate the associated timelines, disclosures and risks in their deal planning.

Section 2: How is inbound dealmaking changing, following the new FIL and the onset of Covid-19?

Of course, the FIL coming into force was not the only macro-level change for inbound M&A into mainland China. We have also seen the Covid-19 pandemic having a significant impact on international dealmaking at every stage of the process. Acquisition screening and portfolio review processes have been upended by the need to factor in changes in business models necessitated by the pandemic. The gap between buyers' and sellers' valuation expectations has often widened due to differing views about the potential size and duration of the pandemic's effect. Auction and due diligence processes have also lengthened as international travel and site visits have become more problematic.

The relative resurgence of growth in the Chinese economy

Mainland China's robust handling of the pandemic has led to a rapid recovery in its economy. Not only did "China's economy return to growth in the second quarter [of 2020]"⁵⁴, but "China's gross domestic product expanded 6.5% in the fourth quarter of 2020, beating forecasts... China will be the only one of the world's big economies that did not shrink [in 2020]"⁵⁵.

⁵⁴ Source: "China's industrial production rises at fastest rate this year", 15 Dec 2020, Financial Times

⁵⁵ Source: "China's economy expands at faster rate than before coronavirus", 18 Jan 2021, Financial Times

Signs of the strength of mainland China's economy include:

- The rapid growth of industrial production in mainland China: 7.1% growth in the fourth quarter of 2020⁵⁶.
- The forecast recovery and growth in mainland China's consumption economy in 2021: Goldman Sachs predict that consumption will "take over the baton and become the main growth driver in 2021", estimating that household consumption would increase 13% in 2021 (versus a 4% fall in 2020).⁵⁷
- Mainland China's trade surplus hitting US\$78bn in December 2020: its highest monthly level, driven by global demand for medical equipment and lockdown-related goods.⁵⁸
- The renminbi/US dollar exchange rate breaching 6.5 for the first time since 2018, "roughly back to the level it was before President Donald Trump kicked off a trade war between Beijing and Washington in mid-2018", reflecting China's successful control of Covid-19.⁵⁹

⁵⁶ Source: Financial Times, *ibid*

⁵⁷ Source: "Chinese consumers move towards forefront of economic recovery", 29 Nov 2020, Financial Times

⁵⁸ Source: "China trade surplus breaks record monthly level", 14 Jan 2021, Financial Times

⁵⁹ Source: "Renminbi rallies past 6.5 per dollar for first time since 2018", 4 Jan 2021, Financial Times

- Mainland China’s stock market reaching its highest level since the global financial crisis in February 2021, and at the time of writing⁶⁰ the CSI 300 is close to its all-time high.
- The outperformance of Mainland China’s CSI 300 stock market index versus the S&P 500: “China’s benchmark CSI 300 index is up about 27% this year [2020], in dollar terms, beating the S&P 500 by more than 13 percentage points”.⁶¹

The extremely competent handling of the pandemic in mainland China is seen as a potentially highly significant accelerator for its economy in the short term and longer term versus Western economies. In the short term, “China’s control over the pandemic is widening its divergence with other nations, many of which are now reimposing virus restrictions amid new waves of cases.”⁶² In the longer term, “as a result [of the comparative handling of the pandemic], the Chinese economy is now forecast to overtake the US economy in 2028, five years earlier than in 2033 as we previously forecast [in 2019].”⁶³

⁶⁰ 1 March 2021

⁶¹ Source: “Global investors place RMB 1 trn bet on China breakthrough”, 14 Dec 2020, Financial Times

⁶² Source: Bloomberg, 14 Dec 2020

⁶³ Source: CEBR World Economic League Table 2021

So how has inbound M&A into mainland China changed in 2020 following the FIL and the onset of the pandemic? We note the following trends from our experience and wider data on international M&A:

[Inbound M&A into mainland China increased in 2020](#)

Announced inbound M&A into mainland China was US\$46.5bn in 2020. This was c. 5% higher than the figure for 2019 (\$44.4bn), despite the Covid-19 pandemic.

In Q1 2020, inbound M&A into mainland China was US\$6.7bn (46% below Q1 2019). By contrast, inbound M&A in the last nine months of 2020 came to US\$39.9bn (24% above the corresponding level for 2019).⁶⁴ The rebound and maintenance of deal activity is testament not only to mainland China's management of the pandemic, but also the attractiveness of its economy in terms of its continuing opening-up, as well as its robustness and growth prospects of its economy, as described above.

⁶⁴ Source: Refinitiv database

Significant activity in the automotive, consumer and retail, energy, financials, healthcare, technology and industrials sector...

70% of inbound M&A into mainland China in 2020 was in the automotive, consumer and retail, energy, financial services, healthcare, technology, and industrial sectors.⁶⁵

Large inbound M&A deals announced in these sectors in 2020 include:

- The US\$2.1bn acquisition of a further 12.5% stake in BeiGene, a manufacturer of biological products, by an investor group comprising Amgen Inc, Baker Bros Advisors LP and Hillhouse Capital Group (healthcare).
- The US\$1.7bn acquisition of an undisclosed minority stake in Jiangsu Manyun Software Technology Co Ltd, a Nanjing-based internet service provider, by a consortium of investors including Sequoia, Fidelity, Permira and Softbank Vision Fund (technology).
- The US\$1.4bn acquisition of Meeca Technology and Topo Technology, manufacturers of sheet metal works, by LENS Technology of Hong Kong SAR (industrials).

⁶⁵ Source: Refinitiv database

- The US\$1.0bn acquisition of 23% of Gotion High-Tech Co Ltd, a manufacturer of storage batteries and electronic equipment, by Volkswagen (automotive/new energy/high technology).
- The US\$0.9bn acquisition of the remaining 79% of Car Inc, a Beijing-based provider of passenger car rental services, by Indigo Glamour Co Ltd, a unit of South Korea-based private equity fund (consumer).
- The US\$0.9bn acquisition of an undisclosed minority stake in Guangzhou Xiaopeng Motors Technology Co Ltd, an automobile manufacturer, by an international investor group including Hillhouse Capital, Coatue Management LLC, Mubadala Investment Co PJSC, Qatar Investment Authority, Aspex Management (HK) Ltd and Sequoia Capital (automotive/industrials).
- The US\$0.7bn acquisition of Hangzhou Haomusi Food Co Ltd, an online retailer, by PepsiCo (retail).
- The US\$0.7bn acquisition of 37.5% of BoCommLife Insurance Company Ltd, a Shanghai-based direct life insurance carrier, by Japan-based MS&AD Insurance Group Holdings (financial services).
- The US\$0.7bn acquisition of Shanghai Gas, a natural gas distributor, by Hong Kong SAR-based Panva Gas Holdings Ltd (energy).

- The US\$0.7bn acquisition of 25% of JAC Volkswagen Automotive Co Ltd, a manufacturer of automobiles, by Volkswagen from its joint venture partner, taking Volkswagen's stake from 50% to 75% (automotive/industrials).
- The US\$0.7bn acquisition of a 12.33% stake in TCL China Star Optoelectronics Technology Co, a manufacturer of semiconductors and related devices, by Samsung (high technology).

It should also be noted that these sectors also accounted for nearly 80% of “domestic” M&A (ie where the target and the acquiror were both based in mainland China) by value, reflecting their importance. Analysts have noted that “domestic M&A value hit a record high in both consumer and industrials sectors, positively influenced by the “Dual Circulation” and “Industrial Upgrade” government initiatives to expand investment in advanced industrials and infrastructure.”⁶⁶

...reflecting the transition and development of the consumer and production sides of the mainland Chinese economy

The importance of the sectors listed above for inbound M&A reflects the ongoing development of both the consumption and the production sides of mainland

⁶⁶ Source: PwC, 27 Jan 2021

China's economy. Both the consumption and the production sides of the economy are core to the government's new five-year plan (its fourteenth, set to run between 2021 and 2025), in which the principle of "dual circulation" – that is, the strengthening of mainland China's own consumer market in conjunction with the technological upgrading of its production economy – features very strongly.

There are several potential drivers behind the growth and development of the consumption side of mainland China's economy:

- The partial unwinding of the very high savings ratio seen during 2020. In the first three quarters of 2020, the savings ratio in mainland China was 37% versus a normal level of c. 30%.⁶⁷ As consumer confidence returns in 2021, this high savings level may be released as consumption.
- Mainland China's job market is expected to perform strongly in 2021 as the world's emergence from the Covid crisis drives global demand. Even now employment is relatively strong: unemployment was 5.2% in November 2020, the same level it was in December 2019.⁶⁸
- The continuing rise of mainland China's middle class: over 20% of the global middle class resides in mainland China. By 2027, it is estimated that 1.2 billion people in mainland China will be in the middle class,

⁶⁷ Source: Morgan Stanley, 1 Dec 2020

⁶⁸ Source: Financial Times, 15 Dec 2020

making up on quarter of the world total.⁶⁹ The rise of the middle class in China led to increasing demand for higher quality consumer products, technology, healthcare, financial services and automotive products – similar to the behaviour of the middle class in Western economies. But the middle class in China is also demanding new products and services delivered in new ways: for example, in relation to e-commerce and fintech – and it is likely that the trend-setting arising from this behaviour will change the way the middle class around the world engage in consumption in future.

- The projected growth over the next 10 years of the number of people aged 60 and above: a cohort projected to grow from 241 million in 2019 to 351 million in 2029 (a rise of more than 100 million people).⁷⁰ The rise of this cohort will result in increasing demand for healthcare, as well as financial services such as retirement and insurance.

On the production side, the importance of these sectors for inbound M&A also reflects the potential of mainland China’s industrial capabilities, especially the movement of mainland China’s economy up the value chain, for example:

⁶⁹ Source: Brookings, October 2020

⁷⁰ Source: Populationpyramid.net

- The 14th five-year plan mentioning the importance of key industries including “artificial intelligence, quantum computers, semiconductors, health and life sciences, neuroscience, biological engineering, aerospace technologies, and deep-sea exploration”.⁷¹
- Mainland China’s continuing desire to transition into a manufacturer of highly value-added products has been widely seen in measures such as the “Made In China 2025” strategy as well as the activities that have come off the Negative List or put onto the Catalogue of Encouraged Industries for Foreign Investment.
- Mainland China has the fastest growth in industrial R&D in the world (21% in 2019, versus 11% for the US, 6% for the EU, and 2% for Japan)⁷².
- Increasing international recognition of mainland China’s potential in achieving world-leading status in important emerging technologies. For example: “by 2025, China’s technology ecosystem will have matured and be on par with Silicon Valley in terms of dynamism, innovation, and competitiveness. That dynamism will increasingly take the form of industrial applications of information technology, as the locus of Chinese innovation shifts from the consumer internet to the industrial internet. China will largely succeed in deploying highly capable “new

⁷¹ Source: China-Britain Business Focus, 3 Dec 2020

⁷² Source: 2020 EU Industrial R&D Investment Scoreboard

infrastructure”—cloud computing, 5G networks, smart cities, and surveillance networks, among others—to facilitate this transition to the industrial internet.”⁷³

Over the last few years, one route through which mainland Chinese businesses have sought to move up the value chain has been outbound investment, in order to acquire suitable assets, technologies, expertise and partners. However, increasing regulatory and political barriers in Western economies to foreign investment into sensitive sectors have more recently made this a less viable route for going up the value chain (see section 3 below).

The liberalisation of inbound foreign investment into the mainland Chinese economy is a way of supporting the development of an increasing high-value-add industrial base in mainland China and will be increasingly important if outbound investment activity continues to be hindered or blocked. Supporting the continuing path of the mainland Chinese economy into higher-value products and services will also be particularly important to service the domestic demands of mainland China’s growing middle class as well as to promote mainland China’s economy more generally.

⁷³ Source: Forecast 2025, Marco Polo, 26 Oct 2020

Acquirors are becoming more international

Hong Kong SAR-based acquirors accounted for nearly half of inbound deal flow in 2020 (US\$21.2bn, 45% of total). This was followed by the United States (US\$6.1bn, 13% of total), Singapore (US\$5.0bn, 11% of total), South Korea (US\$2.3bn, 5% of total), Germany (US\$2.3bn, 5% of total) and the UK (US\$2.0bn, 4% of total).⁷⁴

The concentration of Hong Kong SAR-based acquirors is unsurprising given political, legal, cultural and commercial linkages between this region and mainland China. However, the proportion of non-Hong Kong SAR-based acquirors for inbound M&A has been on a long-term upswing. In 2015, this figure was 37% of the total (US\$19.9bn of inbound M&A versus a total of US\$54.4bn). In 2020, this figure was 55% of the total (US\$25.3bn versus a total of US\$46.5bn).⁷⁵ Again, this reflects not only the ongoing liberalisation of the mainland Chinese economy but also its increasing attractiveness as a robust region with strong growth prospects.

⁷⁴ Source: Refinitiv database

⁷⁵ Source: Refinitiv database

Deal times are lengthening as negotiations and due diligence become more protracted post-Covid-19

Everything else being equal, the FIL and associated changes in law and policy would have shortened the duration of deals (albeit that the Measures may have a countervailing effect in future – see section 1). MOFCOM’s approval system has been replaced by the SAMR online information reporting system and, accordingly, a foreign investment information report should be first filed with the SAMR online system in relation to the acquisition by a foreign investor of a mainland Chinese company or assets. The repeal of the MOFCOM approval system is a potential accelerator for deals.⁷⁶

However, our recent experience of advising on international M&A suggests to us that deal times have lengthened. This is due to the Covid-19 pandemic changing the key focus areas for deal negotiation, as well as the impact of the pandemic on deal processes and timelines.

From a deal negotiation perspective, buyers are seeking additional protections and conditionality in order to cover themselves against Covid-19 related risks. We have seen especial focus on material adverse change (MAC) clauses, allowing

⁷⁶ Advance filing with the central MOFCOM may still be required if an acquisition which results in control passing to a foreign entity involves a key industry, has an impact on the economic security of mainland China or results in a transfer of the controlling interest of an enterprise that owns any famous or traditional brands.

potential buyers to walk away from deals if there is a significant worsening in the target's business, as well as break fees and reverse break fees (where targets and buyers pay a fee to the other side in the event of a transaction not completing for specified reasons).

These negotiation points come on top of widening valuation expectations between buyers and sellers, as the two sides take different perspectives on the duration and impact of the Covid-19 crisis. This difference in perspective can be particularly pronounced between the seller of a domestically-focused mainland Chinese business versus an international purchaser, given the speed with which the pandemic has been contained in mainland China versus the rest of the world.

From a deal process perspective, the durations of due diligence and between deal signing and closing are lengthening. This is largely due to travel restrictions arising from the pandemic (for example, 14-day quarantine requirements, and stringent visa requirements for travel into mainland China). While a lot of due diligence can take place remotely, crucial items often need to be checked in person. In addition, handing over key business matters will also frequently still need to take place in person.

Finally, the new Measures are also expected to impact deal timelines, particularly for deals in areas deemed to be important to national security. The Measures have

only recently been published, but given the wide range of transaction types and sectors that they cover, we expect a significant portion of dealmaking will have to include provision for notification to and review by the Office.

Section 3: Recommendations for dealmakers and policymakers

We list below a set of recommendations for dealmakers seeking to participate in, and policymakers seeking to manage, inbound M&A into mainland China following the observations and trends listed in sections 1 and 2 above.

The increasing importance of on-the-ground operational expertise

While the pandemic runs its course, international buyers will continue to have a greater need to conduct due diligence remotely. Large international firms of lawyers and accountants will have offices or “best friend arrangements” in mainland China to support legal and accounting due diligence, as well as commenting on legal process issues.

However, it is often harder to outsource operational due diligence, given that a large part of it is often conducted in-house by acquiring companies in order to ascertain how a business might be integrated with its new owner. There is a greater need for local expertise to assist with such due diligence, particularly given:

- (1) the increasing range of business activities that are newly open to inbound investment following the launch of the FIL and changes to the Negative List
- (2) the number of business models that are undergoing significant evolution as a result of the pandemic

(3) the need to understand stakeholders that are influential or vital to commercial success (for example, particular customer, supplier or regulatory relationships), and to understand the extent to which these relationships will continue or how they might evolve, especially after a change in ownership.

Local operational experts are also potentially of great use in sourcing new investment or acquisition candidates. The most attractive candidates for investment or acquisition might be relatively new start-ups or otherwise unknown businesses, especially in emerging subsectors or where developing technologies are concerned.

Dealmakers would therefore be well served to develop relationships with local experts to assist such diligence. Policymakers are well placed to catalyse such relationships through (for example) networking platforms, online seminars and conferences.

[The increasing importance of experienced and innovative advisers](#)

As described in section 2, the pandemic is changing every aspect of how deals are sourced, valued, negotiated, diligenced and closed. New solutions and norms are evolving in dealmaking in response to these challenges, whether it is in relation to structuring, conducting due diligence, or the project management of an M&A process.

It is therefore increasingly important for acquirors, investors and sellers to work with experienced and innovative advisers who are plugged into “live” dealmaking in the Covid-19 era, and who can bring contemporaneous insights from the wider dealmaking universe to any particular situation. In particular, being able to bridge the gap of understanding between a buyer and seller with very different expectations of the impact of Covid-19 will be very important to negotiating deals successfully.

The increasing importance of transparency

Significant regulatory reporting requirements remain in relation to dealmaking, despite the streamlining arising from the FIL and Rules. In our experience, there is still a relative lack of uniformity of practice amongst authorities tasked with administering the revamped foreign investment filing regime at local level: for example, differences in whether filings should be physical or electronic, what accompanying documentation needs to be submitted as part of transaction filings and so on. In addition, authorities require increasing amounts of information in order to process deals. The new Measures will also require transparent disclosures to the Office for a wider set of potential deal types and business activities.

Dealmakers therefore need to be prepared to offer increasing levels of transparency about their businesses and bids. Policymakers can assist the speed

and certainty of deals by continuing efforts to make reporting requirements more consistent and increasingly streamlined.

The opportunity to share expertise in pandemic management

China's handling of the Covid-19 pandemic, and resulting economic performance, has been instructive to the rest of the world. There is a significant continuing opportunity for mainland Chinese businesses and policymakers to share their expertise in handling the pandemic with the rest of the world. Such expertise sharing would continue to showcase the strength of the mainland Chinese economy, with corresponding benefits for inbound M&A (both in terms of volume and value). It would speed up the recovery of the rest of the world, again putting potential overseas buyers and investors in a better position to engage in targeted M&A in mainland China to offset problems in their home markets caused by the pandemic. Finally, it would increase global levels of business and societal resilience in the long run (for example in the face of potential future pandemics): such a global de-risking would not only encourage further growth in business internationally, but would also reduce the negative impact of future global shocks, not limited to pandemics.

Ongoing questions about variable interest entities

VIE structures allow a foreign investor to take effective control over (and to receive economic benefits from) a mainland Chinese company through

contractual arrangements. They have been adopted as a structure to enable foreign partnership with mainland Chinese businesses in sectors that are subject to restrictions on foreign investment. They have historically been perceived as having an ambiguous status due their perceived use as a manner of skirting foreign investment restrictions. The FIL covers investment activities being conducted “directly or indirectly” and covers not only investors acquiring equity “or other similar rights” but also “where a foreign investor invests in any other way stipulated under laws, administrative regulations or provisions of the State Council”. Similar expansive provisions are seen in the Measures.

In a previous report for the CDF⁷⁷ we described ongoing questions among market practitioners as to if and how VIEs might be regulated under the FIL, and the possible ramifications thereof. This is especially important given that “investors outside China have about US\$1tn invested in firms that use them [VIEs]”⁷⁸.

The FIL does not expressly touch on VIE structures. Furthermore, the provision in the consultation draft of the Rules which would have exempted from foreign ownership restrictions all reverse investments into mainland China by wholly Chinese-owned entities subject to approval by the State Council (which was

⁷⁷ See “Reversing the flow; the inbound investment opportunity in China”, Linklaters, 2019.

⁷⁸ Source: Economist, 16 September 2017

considered a step to lay down the foundation for future regulation of VIE structures) was withdrawn from the final text.

In what was a major breakthrough, the recently published *Antitrust Guidelines for Platform Economy* confirms that transactions involving a VIE structure require merger control filings if the turnover thresholds are met (just as with other transactions), ending the long-time uncertainty surrounding this issue. Thus, SAMR penalised three large private Chinese companies (Alibaba, Tencent and SF Express) for failure to notify their transactions involving a VIE structure, and have recently reviewed and cleared a merger filing⁷⁹ explicitly involving the VIE structure.

The role of international capital markets

International investment into mainland China's capital markets continues apace.

This has been encouraged by:

- the continuing rise of Bond Connect through 2020
- the successful launch of Shanghai-London Stock Connect in 2019 (and the approval by the China Securities Regulatory Commission for China Pacific Insurance to issue securities through this scheme in June 2020)

⁷⁹ The filing relates to a greenfield 60/40 JV jointly controlled by Mingcha Zhegang and a subsidiary of the Yum group to provide technology solutions for the catering sector.

- the quadrupling of the weighing of China A-shares in Morgan Stanley Capital International's global benchmarks
- September 2020's announcement that two major inbound investment programmes (QFII and RQFII) which provide foreign institutional investors with access to China's A-share markets will be combined into a single 'qualified foreign investor' regime to provide broader and deeper opportunities in these markets.

In parallel, the FIL allows for investments into be funded by the issuance of public securities. All of this means a greater level of investor interest in foreign businesses with direct investments in mainland China, alongside foreign direct investment in mainland Chinese businesses. This can be seen by the enormous foreign investor appetite for participating in China's capital markets in 2020: it is estimated that in 2020, "foreign investors snapped up more than RMB1tn [US\$150bn] worth of stocks and bonds.... which came through Hong Kong [SAR] programmes that connect [foreign] investors with the mainland".⁸⁰

Policymakers, regulators and exchanges in the capital markets therefore have an opportunity to harmonise, or at least to clearly explain, disclosure and investment norms in order to further encourage international investment. Bankers and fund

⁸⁰ Source: Financial Times, 14 Dec 2020

managers also have the opportunity to increase their use of technology in order to conduct roadshows and due diligence into new public market investment opportunities.

The increasing importance of domestic M&A in setting expectations for inbound M&A

2020 was a strong year for M&A activity in mainland China, with US\$734bn of deals taking place – “the highest since 2016, driven by strong state and government investment support” with “domestic M&A [rebounding] to levels last seen in 2017 driven by strong state involvement and support for various banks and securities companies and accelerated reform of [state-owned enterprises] in response to the turbulent economic conditions”.⁸¹

The strong level of domestic M&A activity does not just demonstrate the continuing maturing of mainland China’s activity. It also represents a highly influential factor that will impact the way inbound M&A will be considered and negotiated. As domestic bidders become more prevalent and better versed in M&A, international bidders will need to improve the attractiveness of their deal proposals to keep pace: whether this relates to value, conditionality, the strength of the business case of the proposed combination, or other intangible factors. The

⁸¹ Source: PwC, 27 Jan 2021

widespread use of state-mandated auction processes in M&A transactions involving state-owned assets in mainland China which imposes certain mandatory deal terms on all buyers also limits the extent to which bidders can structure their deal proposals for these assets.

This increasingly competitive environment poses a challenge to international bidders to evaluate acquisitions not just on a per deal basis, but to factor in the contribution that each acquisition can make to their overall plans for long-term investment and growth in mainland China on a group basis. Recent developments on the simplification of funds remittances discussed in section I, as well as the range of local incentives available in different investment and development zones that are aimed at attracting long-term investment commitments⁸², are expected to become increasingly important factors in sealing the attractiveness of acquisitions in mainland China for foreign investors.

The increasing scrutiny of foreign investment

Our previous reports to the CDF on outbound and inbound investment to and from mainland China described the increasing political and regulatory barriers to foreign investment (often, but not always, mainland Chinese investment) in the US and Europe and other economies such as Australia into sectors deemed to

⁸² Depending on the policies in the particular region, these could cover various benefits including tax rebates, rental subsidies, allowances for purchase of equipment and incentives for hiring experts.

have national importance (particularly from a national security perspective). This accelerating trend is important, given the FIL's statement that China may take measures against countries that discriminate against Chinese investment (and there are anecdotal examples of investors seeking to manage such risks in negotiating their inbound investments in mainland China). Inbound investors will need to continue to monitor the situation, and work with advisers with deep knowledge of the regulatory outlook in mainland China as well as the wider global picture, in order to ascertain the risks of their deals being affected by such measures.

United States

In the US, the Foreign Investment Risk Review Modernization Act (**FIRREA**), which broadened the jurisdiction of the Committee on Foreign Investment in the United States (**CFIUS**), completed its implementation in February 2020. CFIUS's 2019 annual report⁸³ confirms that companies filed 231 notices of transactions that CFIUS determined to be subject to CFIUS jurisdiction – in line with the levels of 2017 and 2018. 89% of these notices related to transactions in the manufacturing sector (especially computer and electronic product manufacturing,

⁸³ Source: <https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2019.pdf>

electrical equipment manufacturing, and transportation equipment manufacturing), finance, information and services (especially professional, scientific and technical services), or the utilities sector.

Over the period 2017-2019, mainland China-based acquirors accounted for 20% of covered transactions: the highest share of any country (the next largest being Japan with 14%). Nevertheless, it should be noted that mainland China was not at the top of the CFIUS league tables in 2019 alone. For example, in 2019, mainland China-based acquirors only accounted for 25 out of 231 notified transactions: second place behind Japan (with 46), and nearly on par with Canada (23).

Mainland China was also very low down the list of acquirors of US “critical technology” in 2019, with only 3 instances versus 20 for Japan, 11 for Germany, 7 for France and Canada, 6 for the UK and 4 for South Korea.

2020 was an active year for the various authorities responsible for US foreign investment review, even without considering the widely publicised presidential order by then-President Trump requiring the divestment of Musical.ly, the US predecessor of the popular video-sharing application TikTok, or the activity in December 2020 where the US Department of Commerce Bureau of Industry and Security added 59 mainland Chinese entities and individuals to its “Entity List” for activities deemed to be contrary to the US’s national security and/or foreign policy interests.

In September 2020, CFIUS issued a new rule revising one of the thresholds for non-US investments in “critical technology” businesses for which pre-closing filings will be required. For those investors that CFIUS would view as benign, certain transactions will no longer be subject to mandatory pre-closing filings just because the target was involved in a sensitive industry. On the other hand, investors from countries subject to heavier export licensing requirements will be subject to more required filings. The new threshold also increases the level of diligence required by parties to assess whether a pre-closing CFIUS filing is required. Not only do the parties have to know whether the US business develops or produces critical technologies, they also need to know whether export licenses would be required for the non-US investor or its owners. This analysis can be particularly challenging for early-stage US businesses with immature export compliance programs. It may also present issues for non-US investors that are less accustomed to dealing with export controls or their application to the investors’ owners.

Finally in relation to CFIUS, it should be noted that January 2021 saw the presidency transfer to Joe Biden. Early signs of how CFIUS might pertain in the Biden era include the shelving of the forced sale of TikTok’s American operations to a group including Oracle and Walmart as the Biden administration began a review to “help it determine whether the national security threat cited by the

Trump administration continues to warrant the ban”⁸⁴, as well as reports that CFIUS is now increasingly scrutinising venture capital investments into technology businesses, “even small-dollar deals, where the money can be traced back to China”.⁸⁵

Europe

In Europe, the new EU framework for screening FDI became operational in October 2020. This follows the EU framework for screening foreign direct investment approved in 2019. This framework:

- Created a cooperation mechanism for Member States and the European Commission (EC) to exchange information and, if necessary, raise concerns related to specific investments.
- Allows the EC to issue opinions when an investment poses a threat to the security or public order of more than one Member State, or when an investment could undermine a project or programme of interest to the whole EU.
- Sets deadlines for cooperation between the EC and Member States, and among Member States, observing non-discrimination and strong confidentiality requirements.

⁸⁴ Source: Wall Street Journal, 10 Feb 2021

⁸⁵ Source: Wall Street Journal, 31 Jan 2021

- Establishes certain core requirements for Member States who maintain or adopt a screening mechanism at national level on the grounds of security or public order.
- Encourages international cooperation on investment screening, including sharing of experience, best practices and information on issues of common concern.⁸⁶

It should be noted that the new regulation complements (rather than replaces) screening mechanisms of EU Member States, which are also being strengthened in several countries. It is designed to help Member States and the EC to collectively assess potential cross-border threats to security and public order arising from a foreign direct investment. Member States retain the final decision as to whether an investment is authorised in their territory and under which conditions.⁸⁷

It is likely that this new framework will increase deal durations (as each Member State will await the views of the European Commission and other Member States as part of its own screening procedure).

Additionally, in June 2020, the EC published a set of proposals intended to prevent foreign investors from using government subsidies to enable them to price

⁸⁶ Source: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1867
⁸⁷ Source: https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157945.pdf

out other bidders for European assets.⁸⁸ The proposals describe “a specific concern about foreign subsidies in the contexts of the acquisition of EU targets”.⁸⁹ While mainland China is not mentioned by name, commentators have suggested that such measures may be directed towards mainland Chinese acquirors.⁹⁰ The EC is expected to release its proposal on addressing foreign subsidies in 2021.

These policies have contributed to a significant fall in mainland Chinese outbound investment into Europe and the US: for example, “Chinese investors’ mergers and acquisitions in Germany last year [2019] amounted to just €1.3bn, according to the German Economic Institute, a fraction of the €12bn of deals seen in 2017.”⁹¹

The increasing scrutiny of foreign investment, particularly in the US, runs parallel to ongoing trade and investment negotiations between the world’s major economies. In December 2020, Europe and China concluded a deal in principle for a Comprehensive Agreement on Investment (CAI), following 7 years of negotiation. The EU says that the deal will “significantly improve the level playing field for EU investors”. The deal offers “enhanced access rights” to areas including the automotive, telecom, cloud computing and healthcare sectors, and

⁸⁸ Source: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1070

⁸⁹ Source: https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf

⁹⁰ Source: <https://www.nytimes.com/2020/06/17/business/european-union-china-deals.html>

⁹¹ Source: Nikkei Asia, 3 April 2020

“puts the EU on the same footing as the US when it comes to operating in the Chinese financial services market.” For China, the deal “locks in existing rights for Chinese companies in the EU market when the EU is looking to expand its legal arsenal” as against what it perceives as market distorting competition, as described above. It “also offers China new openings in manufacturing and the growing market for renewable energy”.⁹²

UK

In November 2020, the UK government published, in its National Security and Investment Bill, its proposed reforms to its powers to scrutinise foreign investment. The Bill proposes the introduction of a standalone CFIUS-style foreign investment regime for the first time in the UK. The Bill provides for a mandatory notification obligation for sectors perceived to be of highest national security risk, with a voluntary regime for others. Coupled with a very broad jurisdictional scope and no safe harbours, this will capture a very wide range of transactions. The Government’s Impact Assessment estimates that the new regime would result in 1,000-1,830 transactions being notified per year—a huge-step change given that only 12 transactions have been reviewed on national security grounds since the current regime was introduced in 2003.

⁹² Source: Financial Times, 31 December 2020

The Government expects some transactions in the following 17 key sectors will face mandatory notification: civil nuclear; communications; data infrastructure; defence; energy; transport; artificial intelligence; autonomous robotics; computing hardware; cryptographic authentication; advanced materials; quantum technologies; engineering biology; critical suppliers to government; critical suppliers to the emergency services; military or dual-use technologies; and satellite and space technologies.

The mandatory regime will be reinforced by a voluntary notification system whereby parties are encouraged to notify “trigger events” they consider may be of interest from a national security perspective. This will be accompanied by an expansive “call-in” mechanism to enable the Government to review non-notified transactions up to five years post-completion (a period equivalent to the Italian, French and German regimes), reduced to six months if the Government has become aware of the transaction. In particular, the Government will have a retroactive ability from commencement of the new legislation to “call in” transactions for review where the transaction occurred following the introduction of the Bill.

The Bill defines a set of “trigger events” which enable the Government to scrutinise a broad range of transactions including low levels of minority shareholding, namely:

- Where a person acquires more than 25%; 50%; and 75% of votes or shares in an entity (or is able to block or pass a corporate resolution).
- Where a person’s shareholding or voting rights increase above 15%.
- For the voluntary regime, a lower threshold applies for acquisitions involving “material influence”. This is a familiar concept from the UK merger control context (and can be triggered by acquisitions of shareholdings as low as 10-15%).

The Bill will also cover transactions involving a broad range of asset types, including land, tangible moveable property and, with respect to IP, any idea, information, or technique with industrial, commercial or other economic value.

There will be no turnover or market share safe harbours below which transactions will fall outside the remit of the Government’s national security review procedures.

While the UK Government has emphasised that the UK remains open for investment and that the proposed foreign investment regime is designed to mitigate national security risks in a proportionate manner, the Bill clearly signals the end of the UK’s lighter touch approach to foreign investment screening and brings the UK into line with its international peers. If the 1,000-1,830 notifications per year forecast in the Impact Assessment is accurate, this would

imply that foreign investment rules will be an increasingly important consideration for international investors and will need to be factored into deal feasibility, contractual conditionality and transaction timetables at an early stage of the process.

The UK foreign investment reforms are driven in part by perceived concern over investment from China: for example, the UK Government's recent concerns in relation to Canyon Bridge (backed by Chinese state-owned China Reform Holdings) to obtain gradual control over UK semiconductor chipmaker Imagination Technologies, and the recent decision in relation to Huawei's involvement in Britain's 5G networks. However, interventions have not been limited to Chinese investors. The UK government has also intervened in the past year in deals involving North American private equity and financial investors (such as Cobham/Advent and Inmarsat/Connect Bidco).

Conclusion

In conclusion, the new FIL and associated legal measures have done a significant amount to accelerate and encourage foreign investment into mainland China through M&A by streamlining processes, offering reassurances on equal treatment, widening the range of business activities available for foreign investment, and improving capital market access for foreign investors. The new Measures are a vital complement to the FIL, and form a necessary component of China's policy response to foreign investment.

China's rapid and robust handling of the Covid-19 pandemic has meant not only that deal flow has recovered, but has also highlighted the strength and attractive prospects of the mainland Chinese economy, making it an even more attractive destination for foreign investment including M&A.

Nevertheless, the pandemic has led to a lengthening in deal duration, new areas for negotiation and due diligence between acquirors and sellers, and reappraisals of business models across industries. In addition, ongoing tensions in relation to trade and foreign investment scrutiny are also a headwind to deal flow.

Dealmakers and policymakers therefore have a significant opportunity to

accelerate investment into mainland China by engaging in dialogue, education and networking.