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# Technology M&A 2024

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## **China: Trends and Developments**

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DaHui Lawyers



## Trends and Developments

### Contributed by:

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**DaHui Lawyers**

**DaHui Lawyers** combines in-depth knowledge of China's legal and business landscape with extensive international experience. The firm has particular strength in new economy industries as well as complex cross-border transactions. DaHui has become a go-to firm for multinational companies in the Chinese technology, media

and internet/telecommunications sectors. The firm's expertise in these highly regulated sectors has led to it becoming a key adviser and strategist to clients of all types and sizes in China's emerging but challenging market, providing highly effective and solution-oriented services tailored to clients' diversified business needs.

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# CHINA TRENDS AND DEVELOPMENTS

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## Introduction

China's overall M&A activity in 2023 decreased in terms of both domestic and cross-border deals.

According to [Wind](#), China saw 585 fewer domestic deals in the first three quarters of the year than it did during the same period in 2022 (ie, 6,101 compared with 6,686). Technology M&A in China did have an uptick in the second quarter of 2023, but [markedly dropped in the third quarter](#); the direction of a trend, if any, remains to be seen.

Outbound M&A, which recovered somewhat in 2021, fell again in 2023. The announced deal value for the first half of 2023 came in at just over USD11.73 billion, according to a [report from Ernst & Young](#). The decline is largely attributable to factors such as post-pandemic effects, geopolitical tensions, and fluctuations in the stock market.

The TMT sector, however, still has the most outbound M&A deals in China. Specifically, in the first half of 2023, it accounted for 69 deals – more than 30% of all outbound M&A deals, according to the aforementioned Ernst & Young report.

## Foreign Investment

Contrary to what geopolitical trends might suggest, China continues to open its markets to foreign investors, including (if not especially) in many tech sectors. Although parts of the Chinese economy remain subject to foreign investment restrictions (ie, limiting or prohibiting foreign participation in various industry sectors), the level of such restrictions continued to decrease through 2023.

Unlike previous years, in 2023, China's National Development and Reform Commission (NDRC)

and Ministry of Commerce (MOFCOM) did not update the Special Administrative Measures (Negative List) for Access to Foreign Investment (the "Negative List"), which specifies prohibited sectors and the maximum foreign shareholding limits for limited sectors. However, both Beijing and Jiangsu provinces promulgated regulations or draft regulations – such as [Beijing Foreign Investment Provisions \(Draft for Comments\)](#) and the [Provisions on Encouragement and Protection of Foreign Investment of Jiangsu Province](#) – that encourage foreign investment and promote creative trial regulations in their respective free trade zones. As a general example, Beijing's draft regulation promotes an online foreign-invested enterprise registration process. If all verification and registration processes can be carried out online, it will significantly simplify and accelerate the establishment process for foreign-invested entities in Beijing.

Foreign capital in the technology sector continues to grow. According to a [MOFCOM press conference](#), during the first quarter of 2023, the high-tech sector's utilised foreign investment rose by 18% – among which electronic and communication equipment manufacturing grew by 55.7%, science and technology outcome conversion increased by 50.3%, R&D and design services rose by 24.6%, and pharmaceutical manufacturing went up by 20.2%.

## Foreign Investment in TMT

The market entry requirements for obtaining value-added telecommunications operating licences have been further eased under the Administrative Provisions on Foreign-Invested Telecommunications Enterprises (the "FITE Provisions") since 1 May 2022. With such easing, the number of foreign-invested enterprises in the value-added telecommunications service sector also continues to increase. According to statis-

tics issued by the China Academy of Information and Communication Technology, the total number of foreign-invested enterprises in value-added telecommunications increased from 1,097 to 1,448 from [September 2022](#) to [June 2023](#).

The key amendments in the FITE Provisions include the removal of the previous requirement placed on foreign-invested companies to demonstrate that their principal shareholders/parent companies have a “good track record in the telecommunications business”. The telecommunications track record requirement may have precluded foreign financial investors (eg, USD-denominated funds) from taking significant stakes in Chinese companies performing internet/telecommunications activities, given that such investors could be viewed as lacking established experience of providing telecommunications services.

Before May 2022, some strategic investors in this industry even had to adopt alternative structures to bypass the “good track record” requirement. Since the deregulation, however, foreign investors seeking to obtain telecommunications operating licences in China and to become FITEs are expected to have a much easier and more straightforward experience.

## Artificial Intelligence Legislation

On 10 July 2023, the Cybersecurity Administration of China (CAC) – alongside six other PRC government departments – released the Interim Measures for the Administration of Generative Artificial Intelligence Services (the “Generative AI Measures”), effective as of 15 August 2023. Any entity, organisation or individual that provides services that generate any text, images, audios, videos or other content to the general public in mainland China using “generative AI technology” (“generative AI services”) will be subject

to the Generative AI Measures. In addition to incorporating China’s long-standing online service/content requirements and other relevant regulations, the Generative AI Measures require generative AI service providers to:

- execute service agreements with users who register for their generative AI services;
- employ effective measures aimed at preventing minors from becoming over-reliant on or addicted to such services;
- prominently label pictures, videos and other generated content in a reasonable place or area in order to alert the public to the services’ artificial/edited status if the generative AI service providers offer “deep synthesis” services;
- promptly stop the generation or transmission of illegal content and remove it, and employ measures (such as model optimisation training) to rectify the processes responsible for generating such content, as well as reporting to relevant authorities;
- carry out a security assessment in accordance with relevant state provisions; and
- complete an “algorithm filing” via the CAC’s designated online platform within ten working days of providing relevant services if the providers employ recommendation algorithms.

The Generative AI Measures also provide that PRC regulators may take necessary technical and other measures against generative AI services that are provided to users in China on an offshore level (ie, via servers and data hosted outside China) yet violate the Generative AI Measures or other PRC laws and regulations. In practice, the authors expect the most frequent result of such “extraterritorial” application of the measures to only be that non-compliant offshore generative AI services are restricted or blocked by China’s Great Firewall.

The Generative AI Measures, however, do not specify any penalties beyond those already provided for in existing PRC laws. By way of example, violations of the personal information protection provisions of the Generative AI Measures will likely only trigger penalties under the PRC Personal Information Protection Law (PIPL), which may include a warning, an order for rectification, confiscation of illegal gains and a fine of up to RMB1 million.

The Generative AI Measures provide that, upon the request of PRC regulators, generative AI service providers must co-operate during an investigation into generative AI services and explain the source, scale, type, labelling rules, algorithm mechanisms, etc, of their training data, as well as provide necessary technical, data and other support and assistance. This provision is likely of most concern to foreign investors.

In general, the Generative AI Measures can be viewed as a helpful development that will eliminate regulatory uncertainties in this cutting-edge industry and hopefully lead to the release of many more generative AI technologies and services in the near future. Specifically, the requirements of the Generative AI Measures seem softer and more friendly towards innovation and business when compared with its draft version. In the first half of 2023, China [led the world](#) in the number of funded generative AI start-ups.

## Company Law Revisions

On 29 December 2023, the Standing Committee of the National People's Congress released revisions to the Company Law of the People's Republic of China (the "Draft Company Law Revisions"), which will come into effect on 1 July 2024. The Company Law Revisions affect every type of Chinese company (including foreign-invested ones) in various ways, such as:

- corporate governance;
- contribution of registered capital;
- potential legal liability faced by directors, supervisors, senior officers and shareholders; and
- processes for liquidation and deregistration.

The key changes would impact M&A specifically in two ways.

- First, whereas the former Company Law requires a shareholder resolution in any M&A circumstances, the Company Law Revisions provide for two instances in which it will not be needed:
  - (a) when a company is being acquired by a parent holding at least 90% of the acquired company's equity (although the acquired company must notify all other shareholders, who then have a right to have their equity purchased at a reasonable price); and
  - (b) when a company seeks to acquire another company through consideration that does not exceed 10% of the acquiror's net assets.
- In addition, under the former Company Law, the shareholders of a limited liability company were not required to contribute the registered capital within a limited time. However, the Company Law Revisions impose a five-year time limit for contributing registered capital (commencing from the incorporation date).

Of course, there are changes in the Draft Company Law Revisions that do not target M&A specifically but would nonetheless be relevant to acquirers and other investors – for example, the expansion of liability for directors and a requirement that companies with 300 or more employees have an employee-representative director.

## Cyber and Data

The areas of legislation, regulation and possibly enforcement that experienced the greatest growth in 2023 were cybersecurity and data protection. This trend has persisted in recent years, with implications across all tech activities – not least in M&A.

### Cybersecurity review

The so-called “cybersecurity review” was introduced with the promulgation of the Cybersecurity Law in 2016 and was emphasised by the issuance of the Cybersecurity Review Measures (CRM) of 2020. However, it has only recently shown – and further grown – its teeth.

On 1 September 2023, the CAC imposed a fine of RMB50 million against China National Knowledge Infrastructure (CNKI) – China’s equivalent of Google Scholar – for violating the Cybersecurity Law and the PIPL. CNKI’s violations included:

- collecting personal information (PI) that was not necessary;
- collecting PI without consent from subjects;
- not disclosing or displaying the rules of collection and use of PI; and
- not deleting users’ PI in a timely manner after they de-registered their accounts.

### Cross-border data transfers

The biggest waves of 2023 in China’s data protection scene were made by the release of:

- the Measures on Standard Contracts for the Outbound Cross-Border Transfer of Personal Information (the “SC Measures”), accompanied by the Guidelines on Standard Contract Filing for Outbound Cross-Border Transfers of Personal Information (the “SCC Filing Guidelines”); and

- the Draft Regulation for Easing Cross-Border Data Transfers (the “Draft Easing Regulation”).

The broad framework set out in the PIPL – in which three avenues of regulatory compliance are provided for companies to choose from when transferring certain data out of China – is finally crystallising and thus likely coming into full effect. Any company acquiring or merging with a target that is itself a mainland China company (or that has substantial affiliates in mainland China) will have to pay more attention to regulatory compliance and its potential effects on operations in light of the concrete cross-border data transfer framework.

The SC Measures entered into effect on 1 June 2023 and, together with the Standard Contract for the Outbound Cross-Border Transfer of Personal Information (the “Standard Contract”) and the SCC Filing Guidelines, elaborate on the approach to legally exporting PI out of China. A PI handler engaging in the transfer of PI out of China based on contractual arrangements will be subject to the SC Measures unless such PI handler has already completed a PI protection certification from a qualified certification institution designated by the CAC. However, PI handlers that meet any of the threshold requirements for the mandatory application of the Data Export Security Assessment Measures (the “SA Measures”) will still remain subject to the CAC-led security assessment regime for their cross-border data transfers and are not permitted to engage in such transfers under the standard contract regime.

The SA Measures mandatorily apply to PI handlers transferring PI out of China in cases where the PI handler:

- is a critical information infrastructure operator (CIIO) seeking to transfer PI offshore;
- processes PI of more than a million data subjects and seeks to transfer any PI offshore;
- transfers offshore, on a cumulative basis, PI of more than 100,000 data subjects within a period commencing on January 1 of the preceding year; or
- transfers offshore, on a cumulative basis, the sensitive PI of more than 10,000 data subjects within a period commencing on January 1 of the preceding year.

The SC Measures also provide that the exporter must conduct a PI protection impact assessment (PIPIA). This should address a number of issues, mainly concerning the legality, legitimacy and associated risks of proposed transfers of PI, as well as the adequacy of proposed security measures to protect the same.

Similarly, a data exporter must not only execute a contract that substantially resembles the Standard Contract but must also file it and the PIPIA to the local provincial branch of the CAC within ten days. These are less stringent and burdensome requirements than those required by a security assessment.

However, on 28 September 2023, the CAC released the Draft Easing Regulation, which – if ultimately issued substantially in its present form – would benefit many multinational companies as they transfer various kinds of data out of China. The substance of the Draft Easing Regulation consists of exceptions to the requirements summarised earlier. By way of example, none of the PI export requirements under the SA Measures would apply in the following circumstances:

- PI exporting that is necessary for the conclusion or performance of a contract to which

- the PI subject is a party, such as cross-border shopping, payments, ticket and hotel bookings, visa applications, etc;
- exporting PI of employees for the purpose of implementing HR management according to employment policies and collective labour contracts;
- exporting PI of no more than 10,000 individuals within one year;
- exporting PI for the purpose of protecting an individual's life, health, or property security in emergency situations;
- exporting PI that is not collected or generated within mainland China; or
- exporting non-PI data that is collected or generated during international trade, academic co-operation, cross-border manufacturing and marketing, and certain other as-yet unspecified activities – unless such data is recognised as “important data”.

The Draft Easing Regulation is expected to be issued soon and reduce the headaches that acquirers of Chinese companies would otherwise have in integrating local with overseas operations and administration.

## Anti-Monopoly Law

Following the amendments to the Anti-Monopoly Law (AML) passed in 2022, the State Administration for Market Regulation (SAMR) released four ancillary regulations – namely, the Provisions on the Prohibition of Monopoly Agreements, the Provisions on the Prohibition of the Abuse of a Dominant Market Position, the Provisions on the Review of Concentrations of Undertakings (the “Concentration Provisions”) and the Provisions on the Prohibition of the Abuse of Administrative Power to Exclude or Restrict Competition (collectively, the “Four New Provisions”).



The Four New Provisions clarify various matters of anti-monopoly law and provide enterprises with more accurate guidance. By way of example, the Concentration Provisions elaborate on several factors relevant to determining an “implementation of concentration”, including:

- whether a market entity registration or registration of changes in rights has been completed;
- whether senior management have been appointed;
- whether one undertaking is actually participating in the business decision-making and management of another undertaking;
- whether one undertaking has exchanged any sensitive information; and
- whether one undertaking has substantially merged its business with another undertaking.

According to the AML, if an undertaking implements a concentration in violation of the AML, it may face a fine of as much as 10% of the sales from the preceding year or RMB5 million.

On 26 December 2022, the SAMR imposed a fine of RMB87.6 million on CNKI for violating the AML. Among other things, the SAMR found that CNKI used unfairly high prices, restricted transaction exclusions, limited market competition, and impacted market innovation, development and academic exchanges.

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