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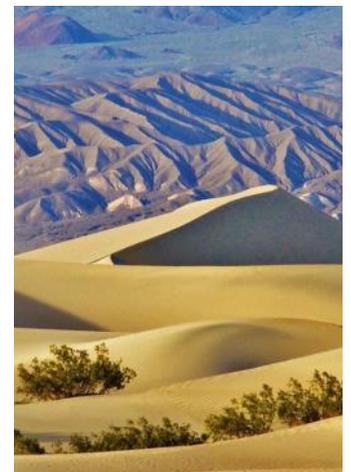
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ANTI-MONOPOLY / 反垄断

China Released Amendments to Anti-Monopoly Law 反垄断法迎来大修，进一步优化经营者集中审查规则

2022年6月24日，十三届全国人大常委会第三十五次会议审议通过关于修改《中华人民共和国反垄断法》的决定（“《修正案》”），将于2022年8月1日起正式实施。作为《反垄断法》自2008年实施以来的首次修改，《修正案》基本延续了2021年10月发布的《反垄断法（修正草案）》（“《修正草案》”）的内容（具体分析请见我所《每月立法动态》2021年11月刊），特别是在经营者集中审查规则方面，修订内容主要涉及优化经营者集中申报标准、完善未达申报标准经营者集中的调查处理程序、规定经营者集中分类分级审查制度、增加审查期限“停钟”制度、加强违法实施经营者集中行为的法律责任。此外，市场监管总局也于近日起草了《国务院关于经营者集中申报标准的规定（修订草案征求意见稿）》、《经营者集中审查规定（征求意见稿）》等六部反垄断配套法规，以配合《修正案》后续实施与落地。上述新规在经营者集中审查规则方面，主要包括以下要点：

1. 调整经营者集中申报的标准、情形与调查程序。 (i) 《国务院关于经营者集中申报标准的规定（修订草案征求意见稿）》提高了经营者集中申报的营业额标准，具体而言：单个经营者的营业额标准从原来的4亿提高到8亿元人民币，所有经营者的中国境内合计营业额从20亿提高到40亿元人民币，全球范围合计营业额从100亿提高到120亿元人民币。申报标准的提高有望减少触发申报义务的交易数量，减轻交易双方负担；(iii) 《国务院关于经营者集中申报标准的规定（修订草案征求意见稿）》还针对“掐尖收购”类型的交易提出了“营业额+市值（或估值）”的新标准，即规定“上一会计年度在中国境内营业额超过1,000亿元”的大规模企业收购“市值（或估值）不低于8亿元人民币，并且上一会计年度在中国境内的营业额占其在全球范围内的营业额比例超过三分之一”的目标公司时（如初创公司、“专精特新”企业等），将触发反垄断申报义务。这体现了《修正案》保护市场创新活力、鼓励创新的立法目的；以及(iii)《修正草案》允许执法机构在有证据证明未达到申报标准但具有或可能具有排除、限制竞争效果的经营者集中时进行主动调查，《修正案》则对该等主动调查权增加了须先“要求经营者进行申报”的前置程序以防止行政权力滥用，若经营者仍不申报，执法机构方能主动调查。
2. 调整经营者集中审查的抢跑认定、时限与重点领域。 (i) 《经营者集中审查规定（征求意见稿）》增加了对“实施集中”的定义，厘清了实践中认定“抢跑”（即在经营者集中申报前或获批前实施集中）缺乏统一判断标准的问题。具体而言，“实施集中”是指取得对其他经营者的控

On June 24, 2022, the National People's Congress Standing Committee passed the *Decision to Amend the Anti-Monopoly Law* (the "Amendment") which will come into effect on August 1, 2022. As the first major revision of China's competition law since introduced in 2008, the Amendment by and large inherited changes proposed by the Draft Amendment to the Anti-Monopoly Law in October 2021 (the "Draft Amendment") (please refer to our *China Regulatory Updates of November 2021 for details*), particularly in merger control review principles, including optimizing the filing threshold, refining the investigation procedures for sub-threshold transactions, setting up a classification and grading review system, introducing the "stop-the-clock" mechanism and strengthening liabilities for illegal merger control activities. The State Administration of Market Regulation ("SAMR") also released six pieces of related regulations to implement the Amendment, including the *Provisions of the State Council on Filing Thresholds for the Concentrations by Business Operators (Draft for Comments)*, *Interim Provisions on the Review of Concentrations by Business Operators (Draft for Comments)*. Set forth below are some noteworthy highlights:

1. Adjustments to the filing threshold, circumstances and investigation procedures in merger control filings. (i) *Raising existing filing threshold* - The *Provisions of the State Council on Filing Thresholds for the Concentrations by Business Operators (Draft for Comments)* has lifted the threshold for merger control filing by raising the operator income level, namely: for an individual operator, the level of income generated from China has been raised from RMB400 million to RMB800 million; for all operators involving in the merger control, the combined level of income generated from China has been raised from RMB2 billion to RMB4 billion; and the combined level of income generated from the global has been raised from RMB10 billion to RMB12 billion. As a result, fewer transactions are expected to trigger the filing obligation and thus ease the burden of relevant parties; (ii) *New filing threshold for Killer Acquisition* - The *Provisions of the State Council on Filing Thresholds for the Concentrations by Business Operators (Draft for Comments)* has further introduced a new filing threshold targeted a special type of acquisition commonly known as the "Killer Acquisition", which means a corporation with more than RMB100 billion income generated from China in its previous fiscal year acquiring a target company whose market value (or valuation) is no less than RMB800 million and more than one-third of its global income has been generated from China in its previous fiscal year (such as startups, unicorns, etc.). In case of a Killer Acquisition, relevant parties shall make the merger control filing. It shows the Amendment's effort to protect the innovation activities in the market and encourage market players' innovation incentives; and (iii) *Sub-threshold transactions* - The Draft Amendment allows SAMR (China's antitrust agency) to initiate a review when a business concentration does not reach the relevant filing thresholds yet evidence indicates that it nonetheless has or may have the effect of eliminating or restricting competition. The Amendment restricted this "call-in" power of SAMR by providing that it can only initiate a review after requiring the parties to make a filing and yet they failed to do so.
2. Adjustments to "gun-jumping" determination, time period and key areas in merger control review. (i) *Gun-jumping* - The *Provisions on the Review of Concentrations by*

制权、或者对其施加决定性影响的行为，包括但不限于完成股东或者权利变更登记、委派高级管理人员、实际参与经营决策和管理、与其他经营者交换敏感信息、实质性整合业务等。因此，相关经营者应当避免在经营者集中申报前或获批前实施上述行为，以便构成“抢跑”；(ii) 在审查时限方面，《修正案》在《修正草案》规定的“停钟”制度（即中止计算经营者集中的审查期限）基础上，进一步要求可以适用停钟的“出现重大影响的新情况、新事实”情形需达到“不经核实将导致审查工作无法进行”的程度，防止不合理延长时限的情形；《以及(iii)此外，相较于《修正草案》，《修正案》将经营者集中的重点审查领域从民生、金融、科技、媒体四个具体领域扩大到“涉及国计民生的重要领域”，并提出对不同领域的经营者集中采取“分类分级审查制度”。但法规尚未对该等制度做出具体解释和说明，有待立法与实践进一步明确。

《修正案》及其配套法案草案的出台使我国反垄断领域立法更适应当下实践与社会的发展，有利于进一步规范市场秩序，保护创新活力。然而，《修正案》及其配套法案对于处罚的销售额标准计算主体、产品与地域范围、“违法所得”如何确定等现行法遗留问题仍未解答，新制度与新规则在未来将如何细化和落地也需要进一步立法和实践澄清。我们将对此保持持续关注。

Business Operators (Draft for Comments) specified the definition of “Implementation of Concentration”, which clarifies the criteria for determining “gun-jumping” (i.e., implementation of concentration before making the merger control filing or obtaining the approval). “Implementation of Concentration” means the act of obtaining control or exerting decisive influence on other business operators, including but not limited to completing shareholders registration or change of rights at local AMR, appointing senior management, participation in business operation and management, exchanging sensitive information with other business operators, and substantial business integration. To avoid “gun-jumping”, relevant business operators shall not initiate activities that could be treated as “Implementation of Concentration” before making a merger control filing or obtaining a merger control approval; (ii) *Time period* - The Draft Amendment has introduced the “stop-the-clock” mechanism (i.e., suspension of the review period) to provide SAMR with more time in merger control review under certain circumstances, including when “new circumstances or new facts of significant impact” occurs. The Amendment, however, limits the use of such mechanism by requiring that a review can only be suspended if it cannot be continued without a verification of such “new circumstances or new facts”; and (iii) *Key areas* - Compared to the Draft Amendment, the Amendment expands the key review areas from four specific ones (i.e., livelihoods, finance, technology, media) to any important area “related to the national economy and people’s life” and proposes a “classification and grading review system” for concentration in different fields. There has not been any explanation or clarification in this regard and we expect to see some specific guidelines in the future.

China’s anti-monopoly legislation has become more practical with the adoption of the Amendment and its implementation regulation drafts. Hopefully, it will further regulate the market while continue boosting innovations. The Amendment, however, still leaves some questions unanswered, such as the subject, products and geographical scope of sales for calculating fines and how to determine “illegal income”, and etc. We will continue to monitor and update on the regulatory developments and corresponding PRC practice on this front.

PE FUNDS / 私募基金

AMAC Releases Key Points for Registration of Private Equity and Venture Capital Funds 中基协发布《私募股权、创业投资基金备案关注要点》

2022年6月2日，中国证券投资基金业协会（“中基协”）发布了《关于私募基金管理人登记备案工作相关事宜的通知》，对私募基金管理人登记申请材料清单进行了更新。作为附件之一的《私募股权、创业投资基金备案关注要点》（“《关注要点》”）在现行规则基础上，对以往备案实践中的经验及问题进行了梳理和总结，进一步明确和细化了募股权、创业投资基金的备案审核关注要点，主要有以下内容值得关注：

1. **基金名称与存续期限：**(i)要求合伙型或公司型基金名称包含“基金”、“投资”、“资产管理”、“资本管理”等字样；(ii)强调应当在基金合同中对基金存续期作出明确约定，同时明确现行规则中关于基金5年存续期的规定为投资期加退出期，不包括延长期。

On June 2, 2022, Asset Management Association of China (“AMAC”) released *the Circular on Matters relating to the Registration of Private Fund Managers (“Circular”)*, updating the application materials for the registration of private fund managers. As one of the attachments to the Circular, *the Key Points for the Registration of Private Equity and Venture Capital Funds* (the “Key Points”) reflected the experience and lessons learned from the past registration practice and further articulated key points for registration of private funds. The highlights of the Key Points include, among others:

1. **Registered Names and Operating Term:** (i) Both partnership funds and corporate funds shall include “fund”, “investment”, “assets management” or “capital management” in their registered names; and (ii) the operating term of private funds shall be explicitly stated in fund agreements. The Key Points also made it clear that the current “no less than 5-year rule” for the operating term of a fund only covers investment period and exit period, not including the fund extension period.
2. **Investment Scope:** (i) The fund agreements shall detail its investment scope, including a description of its major

2. **投资范围:** (i)要求在基金合同中对投资范围进行更具体的描述,包括主要投资行业、投资地域、投资阶段和投资集中度等;(ii)重申私募基金不得用于借贷、担保、明股实债等限制或禁止投资“负面清单”内的投资活动,同时将“负面清单”的范围扩大至金融资产交易中心发行的产品、首发企业股票(战略配售和港股基石投资除外)等。此外,就创投基金而言,“负面清单”范围还包括基础设施、房地产、上市公司股票、可转债或可交债等,因此如果创投基金嵌套股权基金进行上述投资的,可能无法完成中基协备案。
 3. **结构化安排:**对于采用分级安排主要投资上市公司股票的私募股权投资基金而言,《关注要点》强调了杠杆倍数不超过1倍的要求以及“利益共享、风险共担、风险与收益相匹配”的原则,并对前述原则的判定标准进行了明确。
 4. **管理机制:**重申了当基金普通合伙人与管理人分离时,普通合伙人应当与管理人存在关联关系。同时明确在普通合伙人为个人的情形下,其应当为管理人的实控人或法定代表人。值得注意的是,就此前中基协将管理人高管或关键岗位人员对于管理人出资的亦认定存在关联关系,是否按照对《关注要点》的严格解释而不再适用,有待进一步观察。
- investment sectors, geographic areas, investment phases and concentration level; and (ii) while restating that private funds shall not engage in loans, guarantees and actual debt disguised as equity, nor invest in targets appeared on the “negative list”, the Key Points further expanded such restrictions to products issued by financial asset trading centers and stocks issued in the process of IPOs (excluding the strategic placement and cornerstone investments in Hong Kong IPOs). In addition, in terms of venture capital funds, their negative investment list shall further include infrastructure, real property, stocks or convertible bonds or exchangeable bonds of listed companies. A venture capital fund would therefore have to risk failing to complete its registration at AMAC if it makes the above prohibited investments by nesting its investment in private equity funds.
 3. **Structured Arrangements:** As for private equity funds which primarily invest in stocks of listed companies by way of structured arrangement, the Key Points emphasized the “no more than one-time leverage ratio” requirement and the principle of “shared benefits and risks”, and further specified the criteria for determining the aforesaid principle.
 4. **Management Scheme:** The Key Points reiterated that where the general partner and the fund manager are not the same person, the general partner shall be affiliated to the fund manager. The Key Points further clarify that an individual general partner shall be the actual controller or legal representative of the fund manager. In practice AMAC used to treat senior executives or key employees of a fund manager as its related parties if they invest in such fund manager. It remains to see whether such practice can hold under a strict interpretation of the Key Points.

FOREIGN INVESTMENTS / 外商投资

China Further Relaxed Restrictions on Market Access for Foreign Investments in Telecom Sector 电信领域外资准入限制进一步放开

2022年4月7日,国务院发布《关于修改和废止部分行政法规的决定》,其中对《外商投资电信企业管理规定》(“《管理规定》”)进行了较大修改,修改后的《管理规定》已于2022年5月1日起施行。

本次修改的亮点主要包括:(i)删除了原《管理规定》中对经营基础和增值电信业务的外商投资电信企业的外方主要投资者应具有从事或经营相关电信业务的“良好业绩”和“运营经验”的要求(但就基础电信业务,仍保留外方主要投资者需“在注册的国家或者地区取得基础电信业务经营许可证”的要求),可能将实质降低外商投资增值电信业务领域的准入门槛,实操中如何落实上述放开政策仍有待具体实施细则的出台;(ii)对于外商投资比例限制新增了“国家另有规定的除外”的例外规定,从法规层面确认了已在自贸区以及针对港澳服务提供者开展的外资股比进一步放开政策,也为此后进一步扩大开放留有空间;以及(iii)在审批流程上,明确取消原《外商投资企业电信业务审定意见书》和《外商投资企业批准证书》等前置审批程序,与《外商投资法》等现行法规及实践保持一致,并缩短工信部门对增值电信业务的审批时间。我们也将持续关注新规的落实情况。

On April 7, 2022, the State Council issued the *Decision on Amending and Repealing Certain Administrative Regulations*, which substantially revised the *Administrative Provisions of Foreign-Invested Telecommunications Enterprises* (the “Administrative Provisions”). The amended Administrative Provisions have become effective since May 1, 2022.

Highlights of the amended Administrative Provisions include, among others: (i) deleting the requirements of “good performance” and “operational experience” in conducting telecom businesses provided for major foreign investors investing in enterprises that engage in basic and value-added telecom services (with respect to basic telecom service, however, the requirement that major foreign investors shall obtain basic telecom service operation license in their registered country or region still exists). This change may substantially relax market access restrictions for foreign investments in value-added telecom sector. Detailed implementation guidelines are to be expected; (ii) adding “as otherwise provided for by the State” as a “carve-out” exception to the restrictions on foreign shareholding ratio in telecom sector. This exception confirms the relaxed policies already carried out in FTZs and for CEPA investors, and provides legal basis for further lifting the restrictions on foreign shareholding ratio; and (iii) no longer requiring enterprise to obtain the “Examination Decision of Foreign-Invested Telecommunications Enterprise” and the “Approval Certificate of Establishing Foreign-invested Enterprise” before getting the telecom business operating licenses, a change intends to keep the Administrative Provisions consistent with the *Foreign Investment Law* and the current practice, and shortening the time for the examination and approval for value-added telecom

businesses. We will continue to monitor and update the implementation in practice in this regard.

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