

China Newsletter | Q1 2024/Issue No. 60



In This Issue:

**Antitrust | Compliance | Data Privacy & Cybersecurity | Foreign Investment
International Trade**

This China Newsletter provides an overview of key developments in the following areas:

1. Antitrust

- **SAMR Solicits Comments on Guide to the Anti-Monopoly Compliance of Businesses**

2. Compliance

- **NPC Passes 12th Amendment to the Criminal Law**
- **The State Council of the PRC Introduces Implementing Rules of Consumer Rights Protection Law**

3. Data Privacy & Cybersecurity

- **China Proposes New Regulation Over Surveying and Mapping Data**
- **China's Natural Resources Regulators Make Strides in Data Security Management with New Rules**

4. Foreign Investment

- **China Issues New Measures to Attract Foreign Investment.**
- **China Updates Catalogue of Encouraged Industries for Hainan.**

5. International Trade

- **CGAC issues Administrative Measures for Duty-Free Management of Goods Imported into the Guangdong-Macao In-Depth Cooperation Zone in Hengqin**
- **MOFCOM Issues Negative Lists for Cross-Border Services Trade**

Antitrust

SAMR Solicits Comments on Guide to Anti-Monopoly Compliance of Businesses

市场监管总局就《经营者反垄断合规指南》征求意见

On March 21, 2024, the State Administration for Market Regulation (SAMR) published the draft Guide to Anti-Monopoly Compliance of Businesses for a public comment period, which closed on April 3, 2024.

While these compliance guides are not legally binding, they offer general guidance for complying with the Anti-Monopoly Law of the People's Republic of China (PRC). Currently, there are approximately 30 compliance guides covering both state and local regulations.

Unlike previous guides, the new Guide includes a chapter titled "Compliance Incentives." This section encourages entities to actively foster a culture of fair competition and establish robust anti-monopoly compliance management systems. When investigating and addressing monopolistic behavior, competent antitrust enforcement authorities may consider the effectiveness of entities' anti-monopoly compliance systems. The Guide provides details on different compliance incentive scenarios, such as pre-investigation incentives, incentives within commitment systems, leniency incentives, discretion in fine ranges, substantive reviews, and situations where compliance incentives are not awarded. The potential for incentives may motivate entities to establish and implement anti-monopoly compliance systems.

The Guide encourages entities to establish a robust compliance system based on market status, industry practices, and specific conditions. This system may involve the following departments: (i) anti-monopoly teams responsible for leading compliance efforts; (ii) business departments to handle daily compliance tasks; and (iii) functional departments (such as legal and audit) to conduct compliance activities within their respective capabilities.

Compliance

NPC Passes 12th Amendment to the Criminal Law

全国人大常委会通过《刑法修正案（十二）》

On Dec. 29, 2023, the Standing Committee of the National People's Congress (NPC) of the PRC adopted Amendment XII to the Criminal Law (Amendment XII), which took effect March 1, 2024. Amendment XII comprises eight articles that strengthen penalties for offering bribes and address internal corruption within non-state entities.

Key points:

1. Article 390 of Amendment XII outlines seven aggravating circumstances related to bribery that trigger stricter penalties for offenders who repeatedly offer bribes, offer bribes to multiple recipients, or bribe state functionaries, supervisors, administrative law-enforcing officers, or judicial officers.
2. Amendment XII introduces personal criminal liability for executives in foreign-invested enterprises, aligning their risk with that of Chinese state-owned enterprise executives. Executives can be held accountable for actions like obtaining illegal benefits through similar business operations, transferring profits to relatives or friends, or accepting substandard goods or services. Penalties may include imprisonment up to seven years and fines.

Amendment XII reflects the ongoing efforts of Chinese regulators to combat corruption across various industry sectors, including both public and private domains.

PRC State Council Introduces Implementing Rules of Consumer Rights Protection Law

国务院公布《消费者权益保护法实施条例》

The State Council of the PRC introduced the Implementing Rules of Consumer Rights Protection Law (Implementing Rules), which outlines obligations for sellers. This regulation took effect July 1, 2024.

Highlights of the Implementing Rules:

- **Safety.** The Implementing Rules emphasize the seller's responsibility for the consumer's personal safety as well as the safety of the consumer's property, including products the seller provides in the form of awards, giveaways, free use, etc. The seller must ensure consumer safety and inform them of any product defects.
- **Right to know.** The seller must ensure consumers' right to information and refrain from providing false transaction details, fabricated sales dates, or fake customer reviews. Additionally, in the context of e-commerce, the seller should not offer different prices for the same product or service based on a consumer's profile. Automatic payment renewals must be clearly notified to the consumer.
- **Right to choose.** The consumer has the right to choose, and the seller shall neither employ technical methods to coerce the consumer into accepting its product or service nor restrict the consumer's right to choose another seller. If the product or service is bundled, the seller should clearly inform the consumer.

- Personal information protection. Sellers are prohibited from collecting consumers' personal information through "one-time permission," "implied permission," or by pressuring consumers to grant permission. Additionally, sellers shall refrain from sending commercial messages or making unsolicited calls to consumers without their consent.
- Notice of ceased operation or relocation. If a seller decides to cease operation or relocate, they shall provide consumers with 30 days' advance notice. This notice can be posted at the seller's physical location, on their website, or in their e-store.
- Cancellation rights. The seller shall not extend the scope of products for which consumers are not granted the right to return without cause. Typically, items exempt from the seven-day no-reason return policy includes custom-made goods, fresh and perishable items, digital downloads or opened audio-visual content, etc. Additionally, if a consumer has opened a product package but has not altered the quality, function, or appearance of the product, the seller should provide a refund.

In addition to the above, the Implementing Rules also address other aspects of the Consumer Rights Protection Law, such as standard form contracts, special protections for elders and minors, and procedures related to repair, replacement, and refunds, etc.

Data Privacy & Cybersecurity

China Proposes New Regulation Over Surveying and Mapping Data

自然资源部就《对外提供涉密测绘成果管理办法》征意

On Feb. 20, 2024, the Ministry of Natural Resources (MNR) issued the draft for *Management Measures for Providing Confidential Surveying and Mapping Results to Foreign Entities* (Draft Measures). After the official release and implementation of the Draft Measures, current legislation such as the *Regulations on the Approval Procedure for Providing Confidential Surveying and Mapping Achievements to Foreign Entities* would be abolished.

The Draft Measures would apply to the provision of "confidential surveying and mapping results" to overseas institutions, organizations, personnel, and foreign-invested enterprises. The scope of "confidential surveying and mapping results" will be determined in accordance with the *Regulations on the Scope of State Secrets in the Management of Surveying and Mapping Geographic Information* (State Secrets Regulations), which mainly cover (1) surveying and mapping for specific accuracy, resolution, or coverage range, and (2) mapping and surveying military areas, etc.

Notably, according to the *Notice on Strengthening the Production, Testing, and Application Management of Autonomous Driving Maps* released by MNR in 2016, map data generated or used by various units and enterprises for testing autonomous driving technologies and road testing should be considered confidential surveying and mapping results. Therefore, the cross-border transfer of the above map data would also be subject to the Draft Measures, which would require approval from MNR or its local counterparts.

Specifically, the Draft Measures have put forward the following requirements for Chinese units to provide confidential surveying and mapping results to foreign parties.

1. The export of confidential surveying and mapping results overseas is only allowed in the international exchange or cooperation activities, such as international scientific research collaborations or the operation of a Sino-foreign joint venture, approved by the Chinese government, where such export is necessary.
2. The domestic party shall seek approval from the MNR or the provincial natural resources authority to provide confidential surveying and mapping results to overseas entities. The domestic party should prove the necessity of providing confidential surveying and mapping results overseas. The export of confidential surveying and mapping results should comply with national confidentiality laws, regulations, and policies. The type, scope, content, quantity, and accuracy of the data should also be consistent with the purpose of use. When necessary, MNR or the provincial natural resources authority may also organize confidentiality appraisal, security assessment, and on-site verification.
3. To prepare the application materials, the applicant should (1) apply for confidentiality review to the competent authority, determining whether the data to be transferred qualifies as state secrets, what level of confidentiality it requires, and the confidentiality period; and (2) prepare a confidentiality agreement to be signed with the foreign party, limiting the use of and access to the results and clarifying the foreign party's confidentiality obligations and liability for breach of such obligations.
4. The confidential surveying and mapping data may be encrypted or processed with other technique measures such as derivation if requested by the approving governmental entity.
5. The applicant should sign the confidentiality agreement with the foreign party, and, within 10 working days upon receiving approval from MNR or a provincial authority, submit the decision and the text of the confidentiality agreement to the competent state secrets authority for filing.
6. Within 10 working days after providing confidential surveying and mapping results to the foreign party, a copy of the signed confidentiality agreement shall be submitted to the approval authority for filing.
7. The applicant shall maintain long-term records of confidential surveying and mapping results provided overseas and keep the records traceable.

China's Natural Resources Regulators Make Strides in DataSecurity Management with New Rules

自然资源部印发《自然资源领域数据安全管理办法》

The Ministry of Natural Resources (MNR) issued the *Management Measures for Data Security in the Field of Natural Resources* (Management Measures) on March 22, 2024, refining the data security requirements in the field of natural resources and providing clear guidance and norms for related data processing activities. The Management Measures may impact data processors, including surveying and mapping service providers, autonomous driving companies, and intelligent connected vehicle enterprises.

Key takeaways:

1. Clarification on the regulated objects and entities: The Management Measures aim to regulate non-classified data processing activities in the field of natural resources carried out within China or in the process of fulfilling the responsibilities of the natural resources department within China or overseas. Notably, the Management Measures define data in the field of natural resources as data collected and generated during natural resource activities, mainly basic geographic information, remote sensing images and other geographic information data for natural resource management. Therefore, if map service providers, autonomous driving industry enterprises, etc., process these types of data in their business activities, they may also be subject to the Management Measures.
2. A multi-level and consistent regulatory system: The Management Measures clarify the supervisory responsibilities of industry regulatory departments for data security, adhering to the principle of “who manages business, who manages data, who manages data security,” and defining the regulatory responsibilities from the MNR to local industry regulatory departments (natural resource regulatory departments, marine regulatory departments of provinces, autonomous regions, municipalities directly under the central government) and the National Forestry and Grassland Administration. In terms of specific compliance requirements such as the compilation and reporting of important and core data catalogs, data security risk monitoring mechanisms, etc., the measures also clearly assign all levels of responsibility to regulatory departments.
3. Important data identification indicators and establishment of a data directory: Important data refers to data in specific fields, groups, regions, or areas that have reached a certain level of accuracy and scale. Once leaked, tampered with, or damaged, it may directly endanger national security, economic operation, social stability, public health, and safety. In order to implement the data classification and classification protection system under the *Data Security Law* framework, the Management Measures propose an innovative method of using reference indicators to judge important and core data based on the characteristics of the data. Selecting reference indicators is no longer limited to the potential adverse consequences resulted from data leakage, but now includes standards such as coverage, scale, and accuracy, making the system more cautious, reasonable, and easy to operate. At the same time, the Management Measures propose a directory of important industry data and core data (referred to as the “data directory”) and require data processors to create and report their own directories, with the goal of identifying and controlling national important data and core data.
4. Refine the security management requirements for the data lifecycle: The Management Measures also propose compliance requirements for data processors that cover the data lifecycle from collection to destruction, and emphasize special compliance requirements for important and core data. Enterprises should consider implementing the compliance obligations for each processing stage of the data lifecycle in accordance with the Management Measures.
5. Important data processors should conduct annual risk assessments: In terms of data security monitoring, early warning, and emergency management, the Management Measures require important data processors to conduct risk assessments once a year, and recommend that core data processors prioritize using third-party evaluation agencies to conduct risk assessments. This requirement is consistent with the requirements in the automotive and industrial information fields. Important data processors who fall into the scope of processing important data in multiple

industries at the same time may need to submit risk assessment reports to different regulatory authorities. In addition, the Management Measures also require data processors to conduct risk monitoring, establish a risk reporting mechanism, develop emergency plans, and report data security disposal plans and information about the disposed data to regulatory authorities annually.

The Management Measures emphasize and refine compliance requirements for data classification and grading, full lifecycle security management, and security monitoring in surveying and mapping geographic information management. Therefore, if map service providers, autonomous driving industry enterprises, etc., process basic geographic information, remote sensing images and other data specified in the measures in their business activities, they should monitor the compliance requirements to ensure data processing activities comply with the latest regulatory requirements.

Foreign Investment

China Issues New Measures to Attract Foreign Investment

国务院发布《扎实推进高水平对外开放更大力度吸引和利用外资行动方案》

On March 19, 2024, China's State Council released a 24-point plan to boost foreign capital in China. The plan, titled the *Action Plan to Solidly Promote High-Level Opening Up and Make Greater Efforts to Attract and Utilize Foreign Investment* (Action Plan), outlines various measures to attract foreign investment, including expanding market access in key industries, ensuring equal participation of foreign companies in government bidding, and facilitating cross-border data flows.

Key takeaways:

1. Expanding market access for foreign capital. The Action Plan proposes five measures to expand foreign investors' access to the China market, including:
 - a. “reasonably shortening” the “negative list” for foreign investment by eliminating all barriers to foreign investment in the manufacturing sector and steadily easing the restrictions in the telecommunications and health care industries.
 - b. in alignment with the Action Plan, the Ministry of Industry and Information Technology of China (MIIT) released a new policy allowing foreign investors to set up wholly owned subsidiaries to carry out certain licensed telecom services in four pilot regions in China (please refer to an April 2024 [GT Alert](#) for more details);
 - c. allowing certain “eligible” foreign invested enterprises (FIEs) to participate in developing and applying genetic diagnosis and treatment technologies in the pilot free trade zones (FTZs) of Beijing, Shanghai, and Guangdong. However, the “eligible” standard remains subject to further clarification by the Chinese government;
 - d. expanding access of foreign financial institutions to the China banking and insurance field;
 - e. encouraging foreign financial institutions to participate in the China bond market;

- f. encouraging foreign investors to establish private equity funds and carry out various investment activities.
2. **Facilitating cross-border data flows.** The Action Plan supports cross-border data transfers (CBDT) between FIEs and their overseas headquarters, proposing to
 - a. formulate a “whitelist” to specify the types of data that can be freely transferred within the Guangdong–Hong Kong–Macao Greater Bay Area;
 - b. define the scope of important data.
 - c. Notably, three days after publication of the Action Plan, the Cybersecurity Administration of China released the *Provisions on Promoting and Regulating the Cross-Border Data Flows* (Provisions), relaxing the requirements for data export and clarifying that data controllers can assume they are not transferring important data unless the relevant authority has “notified” them that they are, or it has publicly catalogued such data as important data. Please see a March 2024 [GT Alert](#) for more details about this provision.
 3. **Facilitating foreigners’ stay in China.** The Action Plan streamlines the visa application process for foreign business professionals traveling to China. The plan also extends the visa duration for spouses and minor children accompanying managers and technical staff of FIEs to two years, an increase from the previous 180 days. The Action Plan also calls for optimizing the management of foreigners’ work and residence permits in China by improving the application process for the permits and adopting the “one-stop acceptance and simultaneous approval” method to create a faster and more efficient approval mechanism.

China Updates Catalogue of Encouraged Industries for Hainan

国家发展和改革委员会等三部门发出《海南自由贸易港鼓励类产业目录（2024 年本）》

In March 2024, China’s National Development and Reform Committee (NDRC) published the updated *Catalogue of Encouraged Industries for Hainan Free Trade Port (2024 Edition)* (2024 Catalogue) to attract investment in Hainan. Compared with the previous catalogue released in 2020, the 2024 Catalogue introduces 33 additional businesses across health care, aerospace, and new energy sectors where investors in such sectors would receive certain favorable policies from the local government. Certain critical businesses newly added are as below:

1. In the health care sector:
 - development and production of generic drugs
 - production and operation of drug marketing license holders and medical device registrants
 - research and production of special foods (infant formula food, health food, special medical purpose formula food)
 - biomedical contract research services
 - nonclinical safety evaluation services for drugs and non-clinical research on medical devices

2. In the aerospace sector:
 - aircraft modification, disassembly, and remanufacturing
 - operation and maintenance of space launch sites

3. In the new energy sector:
 - development and manufacturing of wind turbines with a capacity of eight megawatts or above
 - operation and maintenance of offshore wind power generation
 - development of new energy storage technologies and equipment manufacturing
 - development of cascade utilization products and technologies for power batteries of new energy vehicles
 - development and operation of new energy vehicle charging and swapping infrastructure and smart system technology

Enterprises engaged in any of the encouraged businesses listed above that are registered and substantially operating in Hainan can enjoy certain specific tax incentives, including a 15% corporate income tax, lower than China's 25% corporate income tax.

International Trade

CGAC issues the Administrative Measures for Duty-Free Management of Goods Imported into the Guangdong-Macao In-Depth Cooperation Zone in Hengqin

海关总署出台横琴粤澳深度合作区进口货物免税管理办法

On Feb. 6, 2024, China General Customs Administration (GAAC) released the Administrative Measures for Duty-Free Management of Goods Imported into the Guangdong-Macao In-depth Cooperation Zone in Hengqin (the Measures). The Measures are promulgated as part of the implementation rules of the Framework Plan for Establishing the Guangdong-Macao In-depth Cooperation Zone in Hengqin, issued by the China State Council in 2021, which aims to develop a special zone in the city of Zhuhai's Hengqin island (the Cooperation Zone) to facilitate the economic cooperation between Guangdong Province and Macao.

According to the Measures, companies registered in the Cooperation Zone will be exempt from import tariffs, value-added tax, and consumption tax when importing machinery equipment (except for transportation equipment including aircraft, vehicle, ship, and yacht) and infrastructure materials through open ports between the Cooperation Zone in Hengqin and Macao. The imported goods will be used and maintained in the Cooperation Zone and subject to the supervision of the local customs for three years.

MOFCOM Issues Negative Lists for Cross-Border Services Trade

商务部出台全国及自贸区版跨境服务贸易负面清单

The Ministry of Commerce of China (MOFCOM) has issued the first negative lists for cross-border services trade, including the Special Administrative Measures (Negative List) for Cross-border Services (2024) (the Nationwide Negative List) and the Special Administrative Measures (Negative List) for Cross-border Services in Pilot Free Trade Zones (2024) (the FTZ Negative List), which took effect April 21, 2024.

Both negative lists impose special restrictions on cross-border services trade in 11 sectors, including agriculture, forestry, animal husbandry and fishery; construction; wholesale and retail; transportation, warehousing and postal services; information transmission, software, and IT services; financial services; leasing and business services; scientific research and technical services; education, health care, and social work; and culture, sports, and entertainment. The Nationwide Negative List has a total of 71 items, while the FTZ Negative List has 68.

For items included in the lists, overseas companies and individuals are restricted to providing cross-border services through cross-border delivery, overseas consumption, and movement of natural persons, as aligned with the definitions in the WTO's General Agreement on Trade in Services. For areas not included in the lists, the overseas companies and individuals will enjoy access equal to their Chinese counterparts.

** This GT Newsletter is limited to non-U.S. matters and law.*

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