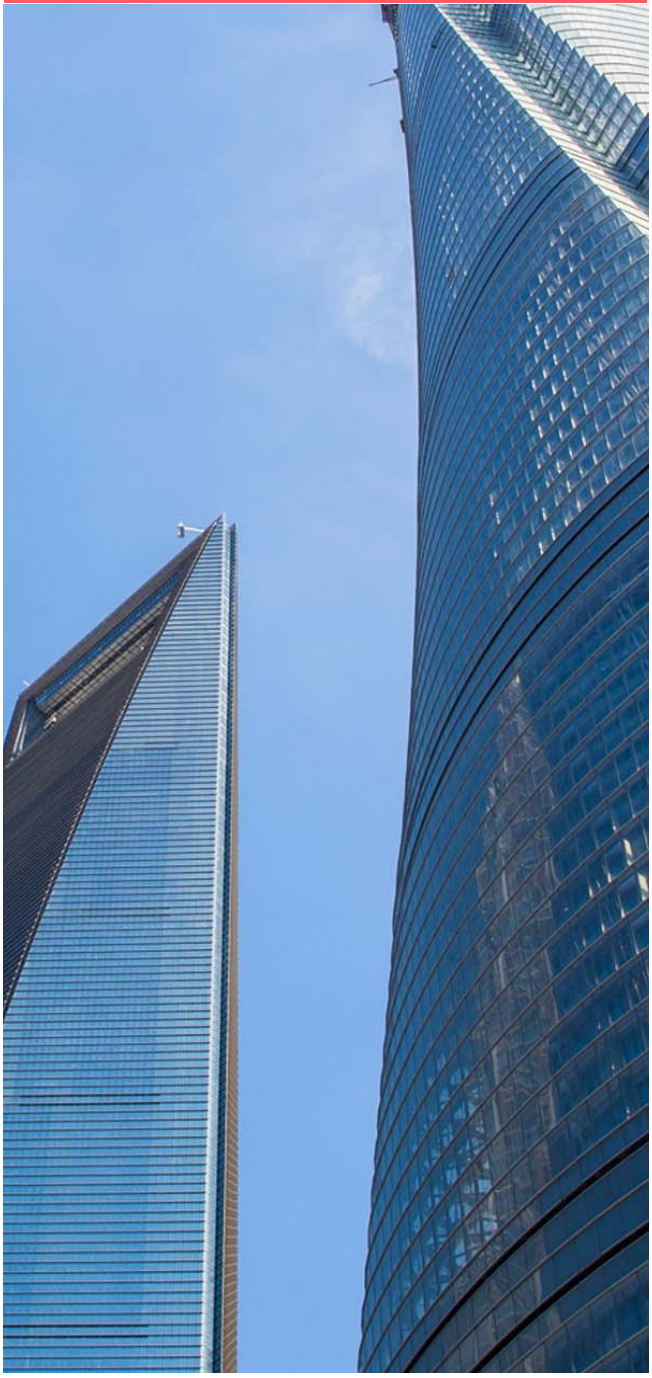
China offices

Legal flash

2022 – YEAR IN REVIEW



Index

Legal Regulations: 2022 Update

In 2022, few new pieces of legislation were passed, but several key legislative changes are particularly noteworthy. For example, the Anti-Monopoly Law was revised to refine the substantive rules and impose higher penalties for infringements. Also, the 2022 Catalogue of Encouraged Industries for Foreign Investment was expanded in a bid to boost foreign investment. As regards cybersecurity and data protection, the competent authority released additional regulations aimed at implementing the fundamental laws in this area.

Below, we summarize the most important developments in 2022:

Anti-Monopoly Law (2022 Revision)

On June 24, 2022, the Standing Committee of the National People's Congress (the "NPC") passed the 2022 revision of the Anti-Monopoly Law (the "2022 Anti-Monopoly Law"), which came into effect on August 1, 2022. This is the first major revision since the Anti-Monopoly Law was passed in 2008, with 33 clauses being modified or expanded on.

Highlights

(a) "Safe-harbor" rule applying to vertical monopoly agreements

Among other conditions, monopoly agreements are considered a monopolistic practice if they refer to agreements, decisions, or other concerted actions that eliminate or restrict competition. Theoretically, two types of monopoly agreements exist: horizontal monopoly agreements and vertical monopoly agreements.

Horizontal monopoly agreements are those that competing operators enter that:

(i) fix or change a commodity's price;

(ii) limit a commodity's production or sales volume;

(iii) split the sales market or the raw material procurement market;

(iv) restrict the purchase of new technology or equipment or restrict the development of new technology or products;

(v) boycott transactions; or

(vi) relate to any other monopolistic agreements as defined by the competent authority.

Vertical monopoly agreements are those that operators and their trading counterparties enter that:

(i) fix the price of commodities for resale to a third party;

(ii) restrict the minimum price of commodities for resale to a third party; or

(iii) relate to any other monopolistic agreements as defined by the competent authority.

Previously, monopoly agreements were expressly prohibited, with seven exceptions. Now, in addition to those exceptions, the 2022 Anti-Monopoly Law establishes a “safety-harbor” rule that applies to vertical monopoly agreements, which will not be prohibited if the operator can prove that:

- the agreements do not eliminate or restrict competition; or
- its market share in the pertinent market is lower than the threshold established by the competent authority and meets the competent authority’s other conditions.

Although the above threshold and other conditions still need to be clarified, the “safe-harbor” rule provides more flexibility to operators’ business and helps reduce the uncertainty of meeting their compliance expectations.

(b) New “stop-the-clock” mechanism

Previously, the competent authority had to complete the review of a concentration of operators within 180 days. However, under the 2022 Anti-Monopoly Law, the competent authority now has the power to suspend such reviews—by sending a written notification—if:

- the operators fail to submit documents and materials as required by the applicable provisions, resulting in a failure to carry out the review;
- new circumstances or facts arise that significantly affect the review, leading to the inability to carry out the review without further verification; or
- the restrictive conditions attached to the concentration of operators require further assessment and the operators request a suspension.

This new “stop-the-clock” mechanism gives the competent authority more time to complete reviews, particularly in complex cases. However, it also brings uncertainty for operators. To optimize procedure efficiency, operators should give their best to submit professional and comprehensive declaration materials to the competent authority.

(c) Several changes to legal liabilities

- Higher fines cap

  If illegal concentrations are made that eliminate or restrict competition, the 2022 Anti-Monopoly Law not only stipulates that those concentrations be ceased and that the pre-concentration status be restored (in accordance with existing measures), but also establishes a fine capped at 10% of the sales amount in the preceding year. For illegal concentrations that do not eliminate or restrict competition, the fines cap is raised from RMB 500,000 to RMB 5 million.

- Personal liabilities added

  The fines imposed on the liable legal representatives, persons in charge, and persons in direct charge of operators that are involved in illegal monopolistic agreements can reach RMB 1 million, in addition to any penalties imposed on operators.

- Damage to credit record

  If an administrative punishment is imposed for violating applicable regulations, it must be documented in the credit record and made public. This will have a negative effect on the operator's reputation and, in turn, its bank loan and incentive policy applications. The operator is also more likely to be subject to further inspections by the authorities.

The 2022 Anti-Monopoly Law regulates market practices and responds to the problems that have arisen since the Anti-Monopoly Law was implemented in 2008. It will significantly affect market operators' compliance requirements and authorities' law enforcement.

Further refinement of foreign investment

In an attempt to encourage foreign investors to invest in certain industries, fields, and regions, on October 26, 2022, the National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOFCOM") jointly released the Catalogue of Encouraged Industries for Foreign Investment (2022 Version) (the "2022 Encouraged Industries Catalogue"), which came into force on January 1, 2023.

The 2022 Encouraged Industries Catalogue includes 1,474 items, of which 239 are new and 167 have been modified. Below, we summarize the most important changes:

- Advanced manufacturing

  To improve the industrial supply chain and upgrade technology more quickly, items related to manufacturing end products, components, and parts—as well as raw materials—have been added or modified. These include the development, production, and application of new technology and products in the field of forestry biomass energy, the development and production of consumables related to the pharmaceutical manufacturing industry, the production of high-tech non-ferrous metal materials and their products, and the production of key components related to autonomous driving.

- Modern service industry

  To improve the quality of the service industry and foster integration between the service and manufacturing industries, new items have been added and existing ones modified in the areas of carbon-friendly, green, energy- and water-saving advanced system integration technology and services, professional design services, vocational colleges, human resources services, and the certification and auditing of clean production.

- Expanding encouraged items in the mid-west and northeast regions, as well as the Hainan Province, based on their advantages

  (i) Shanxi, Liaoning, Anhui, Ningxia, and other provinces and regions: adding items in the production of new smart phones, tablets, and other intelligent terminal products and key components.

  (ii) Inner Mongolia, Jiangxi, Guizhou, Heilongjiang, and other provinces and regions: adding items in the development and use of clean coal technology products and the primary or intensive processing of garden flowers.

  (iii) Tibet, Xinjiang, Yunnan, Qinghai, and other provinces and regions: adding items of new commercial chain operation, desert economy industry, and crossborder logistics.

Incentives for items in the 2022 Encouraged Industries Catalogue:

(a) Tariff exemption for imported equipment

Equipment imported for self-use within the total investment amount of foreign invested enterprises (“FIEs”) is exempt from tariffs, except when it is classified as non-exempt equipment under Chinese regulations.

(b) Land use

Land supply can be given priority for industrial projects that need a large area of land, and the price for the land can be set at no less than 70% of the national minimum price for land transfer.

(c) Reduced enterprise income tax

FIEs that invest in encouraged industries located in western regions and the Hainan Province are eligible for a reduced enterprise income tax rate of 15%.

(d) Specific incentive policies are also implemented at a provincial level on a case-by-case basis.

Investment under the 2022 Encouraged Industries Catalogue also follows the general legal framework applicable to foreign investment (i.e., the Foreign Investment Law and related legislation and regulatory requirements). To implement investment and apply incentives under the 2022 Encouraged Industries Catalogue, a detailed analysis should be carried out on a case-by-case basis.

Cybersecurity and data protection

To clarify certain definitions, scopes, and procedures under the Data Security Law and the Personal Information Protection Law, several regulations were released and came into effect in 2022. Below, we summarize the most important ones:

- The Cybersecurity Review Measures came into force on February 15, 2022.

  In accordance with the Data Security Law, the Cybersecurity Review Measures require cybersecurity reviews to be carried out on (i) critical information infrastructure operators' purchases of network products and services; and (ii) online platform operators' data processing activities, when these are considered to have an impact or potential impact on national security.

  The Cybersecurity Review Measures also expressly stipulate that network platform operators holding personal information of over 1 million users must apply for a cybersecurity review before they go public abroad.

- The Measures for Security Assessment of Outbound Data Transfers became effective on September 1, 2022.

  The Cybersecurity Law, the Data Security Law, and the Personal Information Protection Law all stipulate the security assessment requirements for crossborder data transfer. This new regulation outlines the regulatory scope (i.e., the security assessment of critical data and personal information collected and generated by a data processor in its operation in China and provided abroad) and procedures for this security assessment.

  Under the regulation, the data processor must first carry out a self-assessment of the risks associated with an outbound data transfer before the competent authority can provide a security assessment (i.e., both assessments are necessary for the transfer of personal data abroad). The processor must also carry out a personal information protection impact assessment before any personal information is transferred abroad, regardless of whether a security assessment is declared.

  On August 31, 2022, the competent authority released a First Edition of the Guide to Applications for Security Assessment of Outbound Data Transfers, which is aimed at standardizing and structuring the implementation of this regulation. The guide also clarifies the application scope, method, and process, as well as application materials, and provides templates for reference.

- Announcement of the Implementation of Certification for Personal Information Protection came into force on November 4, 2022.

  The Personal Information Protection Law stipulates that, when a processor of personal information needs to carry out a crossborder transfer of personal information, it may have to obtain certification from professional institutions. This new announcement has an attachment (i.e., the Implementing Rules for the Certification of Personal Information Protection). This attachment outlines the basic principles and requirements for certifying the collection, storage, use, processing, transmission, provision, disclosure, deletion, and crossborder transfer of personal information and any other processing activities carried out by personal information processors.

  It further stipulates that personal information processors that carry out crossborder processing activities must meet the requirements of TC260-PG-20222A – Security Certification Specifications for Cross-border Personal Information Processing Activities.

Tax Regulations: 2022 Update

In 2022, the effects of the COVID-19 pandemic were still being felt by people in China. The economy suffered as a result, with small and medium-sized companies bearing the brunt of the downturn. Consequently, tax legislation progress slowed, and tax regulations continued focusing on providing tax relief for companies. In this special edition, we review the most important tax policies of 2022.

As regards **value-added tax** ("VAT"), China continued its effort to expand the scope of its VAT refund policy and reduce the tax burden for small-scaled VAT payers:

- Since June 1, 2019, taxpayers in certain advanced manufacturing industries have been eligible for a full refund of incremental un-deducted input VAT, provided they meet certain conditions. From April 1, 2022, this policy was extended to include small and micro companies, as well as companies from the qualifying industries, which are as follows: manufacturing; science research, and technical service; electricity, heat, gas, and water production and supply; software and information technology; ecological protection and environmental governance; and transportation, warehousing, and postal (the "Qualifying Industries"). These companies can also apply for a one-time refund of the reserved un-deducted input VAT. From July 1, 2022, the Qualifying Industries were expanded to include the following industries: wholesale and retail; agriculture, forestry, husbandry, and fishing; accommodation and catering; residential service, maintenance, and other related services; education; sanitation and social work; and culture, sport, and entertainment.

- From April 1 to December 31, 2022, small-scaled VAT payers were exempt from VAT on the taxable income. From January 1 to December 31, 2023, a reduced VAT rate of 1% will continue to apply. In the meantime, the exemption criteria for small-scaled VAT payers changes from monthly revenue of RMB 150,000 to RMB 100,000.

- From January 1 to December 31, 2023, taxpayers from the production-oriented service industry can deduct an additional 5% input VAT from the VAT payable amount, reduced from the 10% that applied in 2022. Taxpayers from the consumer-oriented service industry can deduct an additional 10% input VAT from the VAT payable amount, reduced from the 15% that applied in 2022.

As regards **enterprise income tax** ("EIT"), in 2022, tax policies continued to center around small enterprises with low profits and research and development ("R&D") investment:

- From January 1, 2022, to December 31, 2024, for small enterprises with low profits, the taxable income above RMB 1 million but below RMB 3 million is reduced to 25% and taxed at a 20% EIT rate, equaling to an effective rate of 5%.

- From January 1 to December 31, 2022, small and micro companies purchasing equipment and instruments with a unit value above RMB 5 million were allowed to deduct a proportion of the unit value in the year of purchase when calculating taxable income for EIT purposes. Specifically, for items with a minimum depreciation period of three years according to tax law, a one-time deduction of 100% of the unit value was allowed in the year of purchase. For items with a minimum depreciation period of 4, 5, or 10 years according to tax law, a one-time deduction of 50% of the unit value was allowed in the year of purchase, and the remaining 50% could be depreciated over the remaining depreciation period.

- Starting on January 1, 2022, the R&D expense super deduction rate for technology-oriented small-to-medium enterprises is raised to 100%, and the tax base for amortizing intangible assets is raised to 200%.

- From October 1 to December 31, 2022, qualifying high- and new-technology enterprises (HNTEs) were allowed a one-time deduction on newly purchased equipment and instruments when calculating their taxable income for EIT purposes.

- From October 1 to December 31, 2022, the R&D expense super deduction rate for all qualifying enterprises was raised from 75% to 100%.

In addition to the above measures, from January 1, 2022, to December 31, 2024, provincial-level governments may reduce the following taxes by up to 50% for small-scaled VAT payers and enterprises with low profits: resource tax, city maintenance and construction tax, real estate tax, urban land use tax, stamp duty, land farmland occupation tax, the education surcharge, and the local education surcharge.

As regards **individual income tax** ("IIT"), two new pre-tax deductions were introduced:

- Starting from January 1, 2022, parents with infants who are under the age of three are eligible for special additional deductions when calculating their taxable income for IIT purposes. For each infant, a fixed amount of RMB 1,000 per month can be deducted, either 100% by one parent or 50% by each parent.

- From January 1, 2022, China started promoting the personal pension regime and implemented a tax deferral policy for personal pension contributions. Those contributing up to RMB 12,000 per year to the personal pension account can deduct the payment from their annual comprehensive income or operational income. Any capital gains obtained by the personal pension account are also tax exempt, and when conditions are met, any amounts withdrawn from it are taxed separately at 3% under the concept of salary.

On July 1, 2022, the new **Stamp Duty Law** came into effect. Ahead of its implementation, the Ministry of Finance and the State Taxation Administration released several regulations to clarify the provisions of the law, including the concept of "taxable documents that are made overseas but used in China," which indicates the following situations:

(a) If the taxable document involves real estate, the real estate is located inside China.

(b) If the taxable document involves equity, the equity belongs to a Chinese resident company.

(c) If the taxable document involves a movable asset, trademark right, copyright, patent, or know-how use rights, either the selling party or the acquiring party is located inside China (excluding situations where the movable asset, trademark right, copyright, patent, or know-how use right that is sold by an overseas party to a Chinese party but is used entirely overseas).

(d) If the taxable document involves a service provision, either the service provider or the service recipient is located inside China (excluding situations where the service is provided by an overseas party to a Chinese party but incurs entirely overseas).

In the area of **tax administration**, on December 29, 2022, the State Taxation Administration released a notice regarding the optimization of tax administration services. This notice stated that, starting from April 1, 2023, taxpayers will no longer need to register changes with the tax authorities after they have already done so with the market supervision and management authorities. Instead, the tax authorities will automatically synchronize the changed registration information shared from the market supervision and management authorities within their Golden Tax System. In addition to improving tax administration services, this optimization will also save taxpayers' valuable time.

CUATRECASAS

Contact

Omar Puertas

Partner
omar.puertas@cuatrecasas.com

Cuatrecasas Shanghai office

20 F Shui On Plaza,
333 Huai Hai Middle Road
Shanghai 200021, PRC
+86 21 2327 7000
+86 21 2327 7007
shanghai@cuatrecasas.com

Sandra Costas Rodas

Partner
sandra.costas@cuatrecasas.com

Cuatrecasas Shanghai office

20 F Shui On Plaza,
333 Huai Hai Middle Road
Shanghai 200021, PRC
+86 21 2327 7000
+86 21 2327 7007
shanghai@cuatrecasas.com

Pablo Cubel

Partner
pablo.cubel@cuatrecasas.com

Cuatrecasas Beijing office

15/F Parkview Green, Tower B,
9 Dong Da Qiao Road
Beijing 10002, PRC
+86 10 5651 0200
+86 10 5651 0268
beijing@cuatrecasas.com

For additional information, please contact our *Knowledge and Innovation Group* lawyers or your regular contact person at Cuatrecasas.