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I	Interpretation of New Rules — the new GDR Rules in China
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I. Interpretation of New Rules — the new GDR Rules in China

On May 16, 2023, the China Securities Regulatory Commission ("**CSRC**") introduced the "*Guidelines on the Application of Regulatory Rules - Overseas Issuance and Listing Class No. 6: Guidelines for Overseas Issuance of Global Depositary Receipts by Domestic Listed Companies*" (the "**new GDR Rules**"). These new rules aim to provide comprehensive guidance regarding the principles and procedures pertaining to the overseas issuance of Global Depositary Receipts ("**GDRs**") by Chinese-listed companies. GDRs are tradable certificates which are issued to represent deposited equity securities, and which permit the (indirect) exercise of the membership and property rights attached to the deposited equity securities. In this article, we will delve into several key aspects of the new GDR Rules that might interest global investors and regulators.

1. Size of Market Capitalisation

Previously, the determination of capital requirements relied on the regulations of overseas exchanges. For example, the issuer's reported equity capital must be at least CHF 25 million on the first day of trading, according to the Listing Rules published by SIX Exchange Regulation, the Swiss stock exchange's self-regulation authority.

In a noteworthy development, the CSRC has, for the first time, introduced capitalisation requirements for Chinese-listed companies seeking to issue GDRs overseas. However, the wording ("*of a certain size of market capitalisation*") remains vague, without specifying the exact criteria. On June 2, 2023, the Shanghai Stock Exchange ("**SSE**") published yet another new regulation regarding GDRs - the "*Interim Measures for the Listing and Trading of Depositary Receipts on the Shanghai Stock Exchange and Overseas Stock Exchanges (Draft for Comments)*". This new draft regulation prescribes that if a listed Chinese company issues GDRs overseas (e.g. in Switzerland) with its new domestic shares as the underlying securities, (i) the issuer's equity capital must be no less than RMB 20 billion (approx. CHF 2.6 billion) prior to the date of application, and (ii) it must have been listed on the SSE for at least one year.

2. Industries for Investment

Before implementing the new GDR Rules, there were no specific regulations governing the industries eligible for GDRs issuance by Chinese listed companies. However, certain industries, including emerging sectors such as semiconductors, healthcare, lithium batteries, as well as consumer and financial industries, have seen GDRs issuances. Under the new GDR Rules, fundraising via overseas issuance of GDRs must focus on "the *main business areas in line with national industrial policies*". While geopolitical interests are surely at play, hopefully, the GDRs market will also see Chinese-listed companies in promising industries such as technology (e.g. AI, Greentech) or electric vehicles competing for the attention of international investors.

Companies are now also mandated to demonstrate practical needs for "*overseas business expansion and development*". Essentially, this means companies are asked to mull it over before hurrying to make the decision to list overseas. Such listing practices should be based on the genuine need of establishing a presence overseas, rather than hype. The financing decisions should be rational and realistic.

3. Various rules and procedures for issuing GDRs abroad

The new GDR Rules encompass a wide range of rules and procedures that regulate the issuance of GDRs abroad. One of the key highlights is that Chinese-listed companies, when conducting the initial or subsequent issuance of GDRs overseas, are required to apply to the domestic stock exchange for the registration of additional underlying shares to be issued. Additionally, the issuer must file the GDRs issuance with CSRC.

Numerous other important rules are also specified, including:

(1) The circumstances under which a company is prohibited from offering GDRs overseas.
(2) The minimum price at which GDRs can be offered to investors.
(3) The locked-up period for converting GDRs back to domestic underlying shares.
(4) The maximum limit on the shareholding of a single overseas investor in a Chinese-listed company.
(5) The maximum number of shares that can be issued in relation to the total share capital prior to the issuance.

(6) The minimum time interval required between GDRs issuances, and between GDRs and A-share issuances.
(7) Guidelines for the utilisation of funds raised from overseas GDRs issuances.
(8) The internal decision-making process within companies to issue GDRs.
(9) The obligations to disclose relevant information by listed companies.

Summary

Overall, the new GDR Rules aim to strengthen the legal framework for Chinese-listed companies to follow when issuing GDRs overseas. These updates specify the capitalisation requirements, encourage policy-aligned industries to venture into overseas GDRs listings, and define various rules and procedures for domestic regulatory oversight. By incorporating these rules and procedures, the regulatory landscape is expected to become more transparent, and should be conducive to the healthy growth of the GDRs market. These are timely legislative updates given the continued rise of popularity of this powerful mechanism to raise funds overseas, which has been and will remain alluring for deep-pocketed Chinese enterprises in the days and years to come.

II. Interpretation of New Rules — 4 newly-released implementation regulations supporting the new PRC Anti-Monopoly Law

On March 24, 2023, the State Administration for Market Regulation (SAMR) introduced four new implementation regulations "(**Regulations**") to support the recently updated PRC Anti-Monopoly Law ("**AML**"):

- Regulation on Prohibiting Monopoly Agreements ("**Agreements Regulation**")
- Regulation on Prohibiting Conduct Abusing a Dominant Market Position ("**Abuse of Dominance Regulation**")
- Regulation on the Review of Concentrations between Business Operators ("**Merger Review Regulation**")
- Regulation on Preventing Conduct Abusing Administrative Powers to Eliminate or Restrict Competition ("**Administrative Monopoly Regulation**").

The Regulations cover crucial areas such as the prohibition of monopoly agreements, abuse of dominant market positions, the review of operator concentration, and exclusion/restriction of competition by administrative power. As the first set of implementation rules since the new law came into effect, these regulations recently took effect on April 15, 2023.

The Regulations provide additional clarity on the definitions and implementation of the Anti-Monopoly Law, thus improving law enforcement and increasing the compliance burden for companies operating in China. It is important for business operators to be aware of these Regulation updates, as they may create compliance difficulties for a diverse range of activities – from entering into sales agreements to engaging in Mergers & Acquisitions.

The new Regulations, together with the recently-updated AML**,** have brought many striking changes. Some of the most significant changes are the following:

- **Clarification of the definition of "monopoly agreements"**

  The Agreements Regulation now provide an expanded definition of "monopoly agreements". In the AML, "monopoly agreements" are defined as "agreements, decisions or other concerted actions that exclude or restrict competition". The Regulation further explains the meaning of "other concerted actions", which are defined as "behaviours in which there is substantial coordination between business operators even if no express agreement or decision has been made." The Regulations also add factors that should be considered, e.g. if the market behaviour of the business operator is consistent. Accordingly, the Agreements Regulation is expected to give the competent authority less freedom of interpretation, as the undefined term is now further defined and criteria for its use are further specified.

- **Changes to standards for the application of the safe harbour rule**

  A new framework for the application of the safe harbour is established. It provides business operators with the possibility to engage in activities, for example, by setting price ceilings for distributors, which could be considered anti-competitive under the law. But it only applies to vertical monopoly agreements, not

horizontal ones. However, the specific criteria for obtaining such an exemption remains yet to be determined.

- **Clarification of "relevant market"**

  In the AML, the term "relevant market" is used to determine how dominant a company's position is within a given market, when discussing the illegality of monopoly agreements and abuse of a dominant market position to restrict competition. The Abuse of Dominance Regulation and Agreements Regulation now provide further clarity on how the term is interpreted: *"the commodity scope and geographical scope in which business operators compete for specific commodities or services […] within a certain period of time, including relevant commodity markets and relevant geographic markets."* In addition, a "demand substitution" and "supply substitution" analysis must be conducted when defining the relevant market. Therefore, in determining the scope of the relevant market, consideration must be given to different product prices, characteristics and uses, as well as the distribution channel through which a product is purchased.

- **Continued enforcement focus on the digital sector**

  The Abuse of Dominance Provisions provides multiple updates on the platform economy. For example, when defining "relevant markets", it specifies several ways: on the basis of particular goods on the side of the platform, of the multilateral goods involved in the platform as a whole, or of multiple relevant markets separately. Moreover, it provides various factors to consider the market dominance of digital platforms, such as "transaction amount", "number of transactions" and the "ability to control traffic".

In summary, the new Regulations, as well as the amended AML, will place a higher obligation on companies and other entities to comply with China's antitrust rules. They require companies to conduct more thorough due diligence before undertaking consolidation transactions, or signing agreements with other companies.

It is important to remember that one of the most significant changes in the 2022 revision of the AML was the increase in fines for violations, which now extends to the accompanying Regulations. The consequences of violations are therefore now more severe in the Regulations and there likely will be less room for interpretation and leniency.

The Regulations are supposed to improve competitiveness and create fairer conditions in Chinese markets. The revised provisions unveil continued efforts by SAMR to improve its practices on competition administration in China, the success of which remains to be tested by the market. It is worth noting for companies to ensure that their compliance programs and policies are in accordance with the latest regulation evolutions.

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