

Chinese Corporate Acquirers and Strategic Investors

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中国的公司收购者和战略投资者

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Increasingly, Chinese technology, media and telecommunication, or TMT, companies are supplementing their own strategic and business development efforts by participating in the outbound acquisition of and/or equity funding into growth stage companies outside of China which may over time be able to provide the corporation's business with potential strategic and financial gain in an era where Chinese internal economic growth has moderated. In order to effectively and efficiently deliver practical legal and business advice to the business development and investment professionals within a corporate strategic acquirer/investor, in house counsel advising on these matters must be sure to consider a variety of issues unique to these types of transactions.

在中国国内经济增长放缓的大环境下，越来越多的中国科技、媒体和电信公司，即 TMT 公司，通过对外收购中国境外的成长型企业，和/或参与其股权融资，补充自己的战略和业务发展力度，以期逐渐给企业经营提供潜在战略及财务回报。为了有效和高效的给战略收购者或投资者内部的业务发展及投资专业人士提供实用的法律和商业意见，参与此类项目的公司内部法律顾问需考虑此类交易中独特的各种问题。

In contrast to the limited involvement an in house lawyer may have when working with a traditional acquirer or investor involved in what generally is a one-off purely finance-driven M&A or capital investment decision, in house counsel and their business development and investment professional colleagues within corporate strategic acquirers and investors often must provide ongoing legal and business guidance and support throughout the life cycle of, for example, the phases of a staged strategic acquisition (e.g., the recent staged sale of our client Lazada Group, the largest eCommerce platform in Southeast Asia, to Alibaba Group) or investment portfolio company. In house counsel advising a strategic acquirer or investor must be prepared to provide legal services at all stages of the relationship, from assisting in the integration of an acquired business, to funding of still growing portfolio companies, to advising on strategic collaborations or partnerships, and to overseeing exit strategies as portfolio companies are acquired or undertake initial public offerings. In addition, in the case of strategic portfolio companies, these often require advising on expansion capital rounds and structuring complex business arrangements and milestone dependent future equity or debt infusions that may accompany strategic relationships, often with affiliates of the strategic investor itself. First-hand knowledge of today's global business and legal market touching on China is crucial at each of these steps, as can be working relationships with traditional investment funds, domestic and global advisory banks, and third party financing sources, such as traditional acquisition financing or venture lenders, focused on the industry who also may be involved in these transactions.

在传统收购者或投资者通常进行的一次性财务并购或资本投资项目中，公司内部法律顾问的参与程度往往有限。与之不同的是，例如在**一项分阶段的战略投资中**，或就投资组合中的公司而言，战略收购者或投资者内部的公司内部法律顾问、业务发展及投资专业人士**往往需要提供持续的法律及业务指导和支持**，贯穿整个投资的始终。最近我们的客户之一，**Lazada 集团**（东南亚地区最大的电子商务平台）分阶段出售给阿里巴巴集团，就是前述**分阶段的战略投资**的一个例证。战略收购者或投资者的公司内部法律顾问必须有所准备，在投资项目的**所有阶段提供法律服务**，包括帮助被收购业务的整合、为尚在成长阶段的投资组合中的公司提供资金、为战略合作或合伙提供**法律咨询**、**在投资组合中的公司被收购或上市时监督其退出策略的执行**等。此外，就**战略投资组合公司**而言，往往还需要为**多轮资本投资、复杂业务架构、里程碑性质的未来股权或债权融资**等等提供法律咨询，这些事件与**战略投资**关系相伴，通常涉及**战略投资者的关联**

方。在上述每个步骤中，当今全球经济及法律市场的与中国相关的第一手知识至关重要，与专注于此类行业并可能参与这些项目的传统投资基金、本土和国际咨询银行、第三方融资渠道如传统收购融资贷款人或创业融资贷款人的工作关系也至关重要。

The strategic nature of many corporate acquisitions and equity investments often also require increased scrutiny and analysis by in house lawyers of ancillary legal issues that can accompany the strategic relationship, including intellectual property review, tax structuring, analysis of licensing arrangements, structuring employment and equity compensation matters, navigating complex regulatory environments, overseeing and understanding potential litigation, reviewing the applicability of anticorruption and competition law issues, and sometimes even structuring around or advising on bankruptcy-related issues when, for example, an investment portfolio company finds itself in distress.

很多公司收购及股权投资项目的战略性质，决定了公司内部法律顾问需要对与之相关的法律问题进行严格审查和分析，包括知识产权审阅、税务结构、许可安排的分析、雇佣及股权激励架构、复杂监管环境指引、监督和了解潜在诉讼、审查反腐败法和竞争法问题的适用性等，有时甚至需要构架及咨询破产相关问题，例如当投资组合公司发现自己处于困境时。

TMT focused corporate acquirers and equity investors face a number of considerations unique from those of more traditional companies and investors, such as industrial or manufacturing companies. For example, the decision for how to integrate an acquisition targets business into the so-called technology “stack” of the acquiring company may drive how best to time or structure the transaction, as might how the intellectual property is held, and the decision of whether or not a TMT corporate investor should have a board seat on a private company it has invested in but may also have a strategic interest in is a question that needs to be carefully considered. In the latter case, in house lawyers may be asked to help implement internal structures that will shield their investment professional colleagues who could be assuming certain fiduciary roles at their portfolio companies, from their separate business colleagues who may potentially be engaging in ancillary activities as part of the corporation’s overall strategy that are competitive to the portfolio company. In house lawyers working on these types of transactions must also be aware of the ability for their investment professional colleagues to opt for a non-voting board observer seat type role and to consider how such a position might impact the corporate strategic investor’s ability to monitor its portfolio company relationship, from each of a financial and strategic perspective.

以 TMT 为核心的企业收购者和股权投资者面临一系列不同于传统公司和投资者的独特的考虑因素。例如，怎样将被收购目标的业务整合到收购方的技术库中、知识产权如何持有、TMT 公司投资者是否应该出任被投资并具有战略价值的公司的董事等，均可能会影响交易的最佳时间和架构，需要认真考虑。在最后一个例子中，负责投资的团队成员由于在投资组合公司中任一定职务而对投资组合公司负有忠诚义务，而其他业务团队成员可能参与公司与投资组合公司相竞争的整体战略规划，此时，公司内部法律顾问可能会被要求帮助实现内部架构，从而将这两组人隔离开来。参与此类交易的公司内部法律顾问应当注意投资专业团队成员选择担任不具有投票权的董事会观察员或类似席位的权利，考虑该等席位会如何影响战略投资者从财务及战略角度监督投资组合公司的权利。

Similarly, large corporate strategic acquirers and investors must structure their transactions to be sure that certain standard provisions in acquisition or investment documents are properly tailored to protect the corporation from reputational and financial liability. For example, it is critical to focus carefully on publicity and confidentiality provisions, to insure that an acquisition target or portfolio company does not use the corporate acquirer/investor’s involvement to improperly promote its business or financing prospects in a manner that might lead to a shareholder suit or similar litigation if the business does not perform as promised. While the corporate acquirer or investor is

unlikely to be directly drawn into any such litigation, it presumably will not want its own reputation tarnished through its affiliation with a situation of this type.

同样，大型企业战略收购者和投资者应当合理安排交易架构，确保在收购或投资中的某些标准条款适当的根据交易进行调整，保护公司的声誉和经济责任。例如，必须审慎审查公开和保密条款，确保被收购目标或投资组合公司不会利用企业收购者/投资者对项目的参与而不恰当的为自己牟取业务或财务利益，致使当业务表现不如预期时导致股东诉讼或类似诉讼。虽然企业收购者/投资者被直接牵涉至这些诉讼的几率不大，但仍不希望因为涉及这类情形而影响自己的声誉。

In addition, in the investment context it is critical to carefully review technical investment provisions, such as so-called “drag-along” rights to make clear that the strategic investor will not have to represent to any subsequent buyer of the portfolio company business anything about the business’ operations, or have an indemnity obligation that is uncapped or joint and several with other stockholders who may not have the same financial means as the strategic investor.

此外，在投资中，审慎审查技术性的投资条款十分重要，比如领售权条款，确保战略投资者不会被要求对投资组合公司业务的下—手买家就业务经营作出任何陈述和保证，或承担没有最高额限制的、或其他股东连带的赔偿义务，因为其他股东与战略投资者的财务利益可能并不一致。

In house counsel to corporate acquirers and strategic investors often are asked to assist in preparing and putting in place acquisition and investment approval processes, and, for example, forms of confidentiality agreements that do not “taint” business development or investment professionals or other business personnel who may be working within the company’s greater business in areas competitive to a possible acquisition target or portfolio company. Working to standardize these processes and agreements facilitates and simplifies additional investments and the monitoring of existing portfolio companies.

企业收购者及战略投资者的公司内部法律顾问通常会被要求帮助准备和完善收购和投资的审批过程，此外还有可能需要准备保密协议的范本，确保保密协议不影响业务发展和投资专业人士及其他业务团队的人员，而这些人员在公司中从事的业务可能与被收购目标或投资组合公司在某些业务领域相竞争。

Acquisitions and equity investments by TMT focused Chinese corporate strategic acquirers and investors raise unique issues for both the corporation and its portfolio companies, and in house lawyers working on these types of transactions must be well prepared to navigate and address these issues in order best to help achieve the long-term legal and business objectives of their company’s business.

专注于 TMT 的中国企业收购者和投资者所进行的收购和股权投资使企业和其投资组合公司面临独特的问题，参与此类项目的公司内部法律顾问需要做好准备，探索和解决这些问题，从而最大程度的帮助实现公司业务的长期法律和业务目标。

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