

China in focus

April 2009

Contact

For further information,
please contact:

Andrew Halper
Head of China Business Group
+44 20 7919 0764
andrewhalper@eversheds.com

Peter Corne
Managing Director, Shanghai
+86 21 6137 1001
petercorne@eversheds.com

MOFCOM amends China's Outbound Investment Rules

China's Ministry of Commerce ("MOFCOM") recently issued the Administrative Measures on Regulation of Outbound Investment ("Outbound Investment Measures", or "Measures"), which will become effective on 1 May 2009.

These Measures underlined the PRC Government's support for domestic companies intent on making overseas investments. As the measures were issued, a delegation of 20-some enterprises from China's chemicals, pharmaceutical, environmental protection, automobile and textiles industries led by MOFCOM visited several Europe countries, including Germany, Spain, UK and Switzerland.

The Outbound Investment Measures consolidate and add further detail and procedural guidance to previous measures issued by MOFCOM to encourage Chinese companies to "go international" (note that the Measures are not directed to individuals but only to "companies established in accordance with law"). The Measures also urge Chinese overseas investors to enhance their compliance with laws of their host country and their performance of corporate social responsibilities.

Under the Measures, "Outbound Investment" is defined as the following activities carried out by duly established Chinese entities:

- a) making offshore investment through the setting up of a new non-financial companies;
- b) acquiring a non-financial company offshore to the PRC; or
- c) gaining rights to own, control or manage a non-financial company offshore to the PRC.

The Outbound Investment Measures simplify approval procedures and de-centralise certain types of approval authority. Henceforth, central level MOFCOM will only review applications for overseas investments at or above 100 million USD or investment in particular countries, including those without diplomatic relations with China or other countries which shall be listed subsequently. Investment involving more than one country or region, or "investment with special purposes" (presumably to be defined later), are also subject to approval at the central level.

Where the proposed overseas investment project is at least 10 million USD and less than 100 million USD, Chinese enterprises have to apply for approval at the provincial level. This also applies to projects in energy and mineral resources, or projects to be promoted to solicit prospective PRC investors, apparently even if they are above 100 million USD. This remains to be clarified.

For projects that do not require approval of MOFCOM or its provincial offices (ie projects under 10 million USD), only an application form is required to be submitted to provincial MOFCOM, and a certificate will be granted within three days and without the more detailed approval process required for projects of 10 million and above.

A spokesman for MOFCOM estimated that more than 85% of applications will be submitted at the provincial level.

Note that for PRC companies which are under the jurisdiction of the central government (typically the larger State-owned enterprises), all proposed overseas investment projects must be submitted to central level MOFCOM, irrespective of the dollar amount of the project.

Chinese overseas investors will be responsible for carrying out feasibility studies. However, the approval authorities will only consider major issues such as the bilateral relationship, national economic security, international obligations or fair competition. This represents an important down-scaling of State direction in the conduct of overseas investment by Chinese parties.

Subsequent changes, such as further investment and termination of any outbound investment must be filed with, and approved by, the original approving authorities.

It is worth noting that the National Development and Reform Commission ("NDRC") remains the key regulator for outbound investment. Even though the new Outbound Investment Measures have been issued by MOFCOM, the NDRC is still the primary approval authority for projects falling within its remit. The Tentative Measures on Administration of Approval for Outbound Investment Projects ("NDRC Measures"), which became effective as of 9 October 2004, remain the primary legislative instrument regulating outbound investment.

Pursuant to the NDRC Measures, Chinese overseas investors would need to seek the NDRC's for natural resources-type outbound investments with a total investment amount of at least 30 million USD or other types of outbound investment of at least 10 million USD. Approval from the provincial-level counterparts of NDRC would be sufficient only for natural resources-type outbound investments with a total investment of less than 30 million USD or for other types of outbound investments of less than 10 million USD.

There is obvious overlap and a potential for confusion between the Outbound Investment Measures and the NDRC Measures. However, it has reported that the NDRC will issue amended regulations soon.

China made more than 52.1 billion USD worth of outbound investments in 2008, a figure some 96.7% greater than in 2007. In the past five years, the UK attracted 43% of the investments made in the Europe by Chinese investors, which include China Unicom, Huawei, Industrial & Commercial Bank of China and Shanghai Automobile, making the UK the largest recipient of Chinese foreign direct investment in Europe. With the support and encouragement of the Chinese government and the favourable investment environment in the UK in terms of corporate governance, flexible labour market, advanced technology and protection of investors, we are likely to see further increases in Chinese outbound investment to the UK.

This briefing is intended as general guidance and is not a substitute for detailed advice in specific circumstances.

Eversheds LLP is a foreign law firm registered with the Ministry of Justice of the People's Republic of China. Under current Chinese regulations, we are allowed to provide information concerning the effects of the Chinese legal environment, but, like all international law firms with offices in the PRC, we are not authorised to issue opinions, determinations, or certifications in respect of, the application of PRC law. We work in cooperation with a number of Chinese law firms. Should you require a legal opinion in respect of any Chinese law matter, we would be happy to assist you in obtaining one from a Chinese firm.

Data protection: Your information will be held by Eversheds LLP ("Eversheds"), in accordance with the Data Protection Act 1998, and added to our marketing databases. It may be used for internal statistical analysis, to fulfil any requests from you for further information and services and, unless you have asked us not to, to contact you about other services or events offered by Eversheds or our associated offices. We may pass your details to our associated offices (some of which are outside the EEA), but we will only allow their use for the purposes mentioned above. We may also transfer your details to any successor to our business (or a relevant part of it). An up to date list of our associated offices and their locations can be found on our website at www.eversheds.com. This privacy statement applies to all information that we hold about you.

If you do not want your information to be used in this way or your information is incorrect, please contact Sinead Greene by writing to Eversheds LLP, One Wood Street, London EC2V 7WS or send an e-mail to sineadgreene@eversheds.com. Alternatively call +44 20 7919 4500 and we will assist you with your queries.