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NEW TREND ON THE OUTBOUND INVESTMENTS

For the purpose of further guiding, regulating and promoting the development of outbound investments (“ODI”), on August 4, 2017, the General Office of the State Council issued a circular on forwarding the *Guiding Circular of the National Development and Reform Commission, the Ministry of Commerce, the People’s Bank of China and the Ministry of Foreign Affairs for Further Guiding and Regulating the Direction of Outbound Investments* ([Guo Ban Fa [2017] No.74]) (“Circular 74”).

The current outbound investment regulation regime is mainly constituted by the *Administrative Measures for Outbound Investment* issued by the Ministry of Commerce (“MOFCOM”) on September 6, 2014, ([Order of the Ministry of Commerce [2014] No.3]) (“MOFCOM Order No. 3”), the *Administrative Measures for Approval and Record-filing on Overseas Investment Projects* effective from May 8, 2014 (NDRC Order No. 9) and then further revised by the National Development and Reform Commission (“NDRC”) on December 27, 2014 (NDRC Order No. 20¹, collectively, “NDRC ODI Orders”) and the *Administrative Provisions on Foreign Exchange of the Outbound Direct Investments of Domestic Institutions* issued by the State Administration of Foreign Exchange (“SAFE”) on July 13, 2009 (Hui Fa [2009] No. 30, “SAFE Circular 30”) and the *Circular on Further Simplifying and Improving the Direct Investment-related Foreign Exchange Administration Policies* issued by SAFE on February 13, 2015 (Hui Fa [2015] No.13, “SAFE Circular 13”).

Circular 74, on the basis of above mentioned ODI rules, further classify the outbound investments into three categories, i.e. encouraged, restrict and prohibited, and heralds supporting systems and policies to be constructed or issued to manage and distinguish the investment activities as set out in three categories.

We hereby mainly focus on the newly classified outbound investments categories introduced by Circular 74 as follows.

PROHIBITED CATEGORY

The Prohibited Category was first promulgated by MOFCOM Order No. 3, while NDRC ODI Orders do not expressly set any prohibition. Circular 74 unifies the Prohibited Category with NDRC and MOFCOM, the two major ODI approval administrative divisions by clearly indicating that it is prohibited for domestic enterprises to engage in outbound investment projects that harm or are likely to harm national interests or national security, including:

- i. Outbound investments that involve the export of core technologies and products in the military industry of China without the prior approval of the state;
- ii. Outbound investments that utilize the technologies, processes or products prohibited from export by China;
- iii. Outbound investments in gambling, pornography, etc. sectors;
- iv. Outbound investments prohibited in international treaties to which China is a party or has acceded; and
- v. Other outbound investments that endanger or may endanger the national interests and security of China.

Among the five prohibited sections, it is worthwhile to note that, from legal perspective, currently there is no explicit definition of core technologies and products in military industry under section i, therefore, any outbound investment involving technology license and technology transfer in military industry shall pay close attention to the definition to be further clarified and/or consult both NDRC and MOFCOM as the case may be.

Regarding the technologies, processes and products prohibited from export by China, the primary resource is Catalogue of Technologies Prohibited or Restricted to Be Exported in China ([Order of the Ministry of Commerce and the Ministry of Science and Technology [2008] No. 12])² issued by MOFCOM and Ministry of Science and Technology and batches of Catalogue of Prohibited Exports issued by MOFCOM and General Administration of Customs in recent years

(hereinafter referred to as “Catalogues”). Furthermore, the Measures for Administration of Technologies Prohibited or Restricted to Be Exported intentionally excludes the export of nuclear technology and technologies in relation to dual-purpose nuclear products, dual-purpose chemical products, dual-purpose biological products, missiles, national defense and military products, extra research shall be undertaken if the outbound investment project may trigger any export of above mentioned technologies and/or processes.

RESTRICTED CATEGORY

Circular 74 provides that restrictions will be placed on the outbound investments which go against China’s diplomatic policy of pursuing the peaceful development road, opening-up strategy of mutual benefits and win-win results, or macro-control policies, including:

- i. Outbound investments carried out in sensitive countries and regions that have not established diplomatic relationship with China, those with wars or those restricted by bilateral or multi-lateral treaties or agreements concluded by China;
- ii. Outbound investments in real estate, hotels, cinemas, entertainment and sports clubs, etc.
- iii. Setting up equity investment funds or investment platforms abroad without specific industrial projects;
- iv. Outbound investments carried out by using backward production equipment that fails to meet the technical requirements of the investment destination countries; and
- v. Outbound investments that fails to meet the environmental protection, energy consumption or safety standards of the destination countries.

Section i, ii and iii under the restricted category shall obtain prior approvals from relevant authorities. It has been the first time the Chinese government expressively restricts the outbound investment in real estate, hotels, cinemas, entertainment, sports clubs and equity investment funds or platforms without specific industrial projects, and the recent outbound investment record shows in August 2017, no said projects obtained ODI approvals from MOFCOM³.

Although Circular 74 does not include the “sensitive industry” regulated by NDRC Order No.9⁴ and the “sensitive industry”⁵ regulated by MOFCOM Order No. 3 in the Restrict Category, based on our communication with competent authorities, said restriction shall still apply and the approvals issued by NDRC and MOFCOM are still compulsory.

However, whether approval procedure or record-filing administration shall apply to the fourth and fifth sections of the Restricted Category is still unclear, which need to be clarified by the competent authorities.

ENCOURAGED CATEGORY

Circular 74 shows that the Chinese government intends to support competent and eligible domestic enterprises to actively and prudently carry out investment activities abroad. In order to press ahead the “One Belt, One Road” strategy, deepen international production capacity cooperation, foster the output of domestic advanced production capacities, good-quality equipment and applicable technologies, improve China’s capacity in technology research and development and manufacturing, make up the country’s shortage in energy resources, and promote the quality improvement and upgrading of relevant sectors in the country. The Encouraged Category includes following items:

- i. Outbound investments in infrastructure that is conducive to the construction of “One Belt, One Road” initiative and interconnection with neighboring infrastructure;
- ii. Outbound investments that can drive the output of advantageous production capacity, high-quality equipment and technical standards;
- iii. Investments cooperated with overseas high-tech and advanced manufacturing enterprises and encouraging the establishment of research and development centers abroad;
- iv. Offshore oil and gas, mineral and other energy resources exploration and development on the basis of prudent assessment on economic benefits;

- v. Investments that expand agricultural cooperation with foreign countries and carry out mutually beneficial investment cooperation in the fields such as agriculture, forestry, animal husbandry, side-line production and fishery; and
- vi. Outbound investments in service fields such as business, culture and logistics, and supporting qualified financial institutions in establishing branches and service networks abroad to develop business in compliance with the laws.

The outbound investments in the Encouraged Category would enjoy several preferential policies regarding taxation, foreign exchange, insurance, custom, information etc., which will be legislated and released by relevant authorities.

CONCLUSIONS

It is visible that the Circular 74 has several adjustments and supplements to the current ODI regulation regime. It plays an important role in further instructing the direction and management of the outbound investments. Though the classification and some concepts set forth in Circular 74 are still relatively general, it is expected that the relevant authorities will promulgate more specific rules and definitions in this regard. Apart from a series of preferential policies to be issued in the near future, Circular 74 also refers several new systems will be implemented to regulate the outbound investments, such as “the blacklist system for overseas investment” and “the capital fund rules for outbound investment made by state-owned enterprises”. We will keep close eyes on the practice and the implementation measure to be promulgated by relevant authority in this field.

¹ Order No. 20 of NDRC means *Decision on Revising Relevant Provisions of the Administrative Measures for Approval and Record-filing of Overseas Investment Projects and the Administrative Measures for Approval and Record-filing of Foreign Investment Projects* ([Order of the National Development and Reform Commission of the People's Republic of China No.20]).

² *Catalogue of Technologies Prohibited or Restricted to Be Exported in China* [Order of the Ministry of Commerce and the Ministry of Science and Technology [2008] No. 12] entered into force on November 1, 2008.

³ <http://finance.china.com.cn/news/20170914/4391190.shtml>

⁴ Article 7 of the Administrative Measures for Approval and Record-filing on Overseas Investment Projects issued by NDRC effective from May 8, 2014 (NDRC Order No. 9), “... Sensitive industries referred to in these Measures shall include: basic telecommunication operation, development and utilisation of cross-border water resources, large-scale land development, electric main, power grid, news media etc.”

⁵ Article 7 of the Administrative Measures for Outbound Investment issued by MOFCOM on September 6, 2014, ([Order of the Ministry of Commerce [2014] No.3]) “... Industries for which verification management shall be implemented refer to industries exporting products and technologies the export of which is restricted by China, or affecting the interests of a country (region) or more.”

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