



PRC Ministry of Commerce issues new outbound investment rules

The PRC Ministry of Commerce has issued measures regarding outbound investments. PRC companies face a variety of challenges when attempting to purchase assets abroad. The release of the new measures lends increasing support from the PRC government to PRC investors, making it easier for them to obtain the approvals required for outbound investments. The measures also introduce an expedited approval process for certain qualifying transactions with an investment amount of less than US\$100m. This briefing summarises the main provisions of these new measures.

The Outbound Investment Measures

Despite the current economic conditions, PRC companies continue to actively explore acquisition opportunities abroad. However, PRC companies wishing to invest abroad must navigate through a myriad of approval authorities, including the State Council, the National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM) and the State Administration of Foreign Exchange (SAFE), as well as sector-specific regulators such as the China Banking Regulatory Commission and the China Insurance Regulatory Commission where relevant. Investments by state-owned entities will also require approval by the State-owned Assets Supervision and Administration (SASAC). In some instances, review by the PRC's anti-trust regulator may also be triggered.

Arranging for the timely preparation and filing of application documents with the various authorities can be a challenge for most PRC investors, particularly when faced with a competitive bid situation for overseas targets.

On 16 March 2009, MOFCOM issued the Measures for the Administration of Outbound Investments (the Outbound Investment Measures), which will become effective on 1 May 2009.

The Outbound Investment Measures introduce procedures designed to simplify the approval regime. The measures define an 'outbound investment' as including the establishment of a new overseas enterprise, the merger with or acquisition of an existing overseas

enterprise, or obtaining control rights or business management rights thereof. The Outbound Investment Measures only address MOFCOM approval but not those of other relevant PRC authorities, in particular the NDRC, which administers separate rules issued in 2004 for the verification of outbound investments (the Interim Administrative Measures for Verification of Outbound Investment Projects). Until further regulations are introduced, it will be difficult to assess the practical effect of the Outbound Investment Measures on the overall approval process.

Key provisions

Scope of application (Articles 2 and 38)

The Outbound Investment Measures apply to the making of an investment in an overseas jurisdiction (including Hong Kong, Macau and Taiwan) by a PRC enterprise (企业) or an 'institution organisation' with the status of a legal person (事业单位法人) in:

- an overseas non-financial enterprise; or
- an overseas non-enterprise legal person.

The Outbound Investment Measures do not apply to overseas investments made by PRC individuals.

Approval authority (Articles 4 to 7)

Responsibility for the administration and supervision of outbound investments is divided between MOFCOM and its provincial-level counterparts.

Investments requiring MOFCOM approval (Article 6)

MOFCOM will be responsible for approving transactions in the following circumstances:

- the investment is to take place in a country with which China has not established diplomatic relations;
- the investment is to take place in a country or territory as set out in a list to be formulated jointly by MOFCOM, the Ministry of Foreign Affairs and other relevant authorities;
- the amount to be invested by the PRC investor equals or exceeds US\$100m;
- the interests of multiple countries (territories) will be involved; or
- where a PRC investor has established an offshore special purpose vehicle for the purpose of listing overseas.

Investments requiring provincial approval (Article 7)

MOFCOM's provincial-level counterparts will have approval authority in the following circumstances:

- the amount to be invested by the PRC investor equals or exceeds US\$10m and is less than US\$100m;
- the investment is to be made in the area of energy or mining; or
- if an 'invitation for business and investment' (招商引资) in China is necessary.

Investment qualified for 'expedited procedure' (Article 16)

For other outbound investments that do not fall within any of the above categories (ie investments not covered under Article 6 or 7 of the Outbound Investment Measures), the following procedures shall apply:

- if the PRC investor is the head office of a 'centrally administered enterprise', it shall submit its application to MOFCOM through an electronic application system according to the 'expedited procedure' as set out below; and
- if the PRC investor is a 'local enterprise', it shall submit its application to a provincial counterpart of MOFCOM through an electronic application system in accordance with the 'expedited procedure'.

Delegation of central power

The above reflects a delegation of approval power from central MOFCOM down to its provincial-level counterparts. A MOFCOM spokesman commented that

on the basis of statistical data from projects approved in 2008 the Outbound Investment Measures are estimated to lead to 85 per cent of the PRC foreign investment projects being approved at the provincial level.

Basis for MOFCOM not granting approval (Article 9)

MOFCOM or its provincial counterparts shall not approve an outbound investment if the investment:

- will be harmful to China's sovereignty, security and social public welfare or will breach China's laws and regulations;
- will be harmful to relations between China and the relevant country (territory);
- may be in breach of international treaties to which China is a party; or
- involves the export of technology or goods whose export is prohibited under PRC law.

An application for approval under the Outbound Investment Measures can be made as soon as the Chinese party has executed transaction documents in which the approval by MOFCOM and any other relevant governmental authorities may be made as a closing condition. In some cases, the seller may ask for additional assurances, typically in the form of a non-refundable deposit or a break fee, to be secured by a bank guarantee or letter of credit.

Completion of the investment cannot take place until MOFCOM approval has been obtained, given that SAFE will require MOFCOM approval as a prerequisite for permitting the PRC investor to remit the full amount of the investment funds abroad.

Procedure, documentation and timeline

Qualified applicant (Article 17)

If two or more PRC investors intend to invest overseas on a joint basis, then the party acquiring the larger stake relative to the other investors will be responsible for processing the approval formalities after it has obtained written consent from its co-investors.

If the shares in an overseas enterprise are to be transferred from one PRC enterprise to another, the transferee will be responsible for processing the modification formalities.

Timing (Articles 10, 11, 13, 14 and 16)

The documentation, responsible authority and timing for the processing of the documents will vary depending on the corporate status of the applicant.

Generally, the Outbound Investment Measures provide that the approval process will take approximately 20 to 40 business days, depending on various factors including the size and type of the proposed projects, the type of applicant and whether MOFCOM or a provincial counterpart has jurisdiction.

As discussed above, for investments not covered under Article 6 or 7 of the Outbound Investment Measures, the investor is entitled to avail itself of a new 'expedited procedure' introduced by these Outbound Investment Measures. Under these procedures, it is proposed that the review by MOFCOM (or its local counterpart) will be completed within three business days.

Enterprise outbound investment certificate (Articles 5, 15, 16, 29 and 30)

MOFCOM or its provincial counterpart will issue an Enterprise Outbound Investment Certificate (the Certificate) to the PRC investor once the investment has been approved.

The Certificate is valid for two years from the date of issue, during which the applicant must complete domestic formalities including foreign exchange, bank, customs, foreign affairs and relevant formalities in the country where the investment is being made. If these formalities are not completed within two years, then the Certificate will automatically lapse and the applicant must return the Certificate to the original approving authority. The applicant would then be required to re-start the application process if it intends to continue the investment.

Modification and termination (Articles 19 and 20)

Applicants are required to apply for a modification with the original approving authority if any change (eg a subsequent change in shareholding) takes place in the original application after MOFCOM approval has been obtained.

Similarly, if an overseas investment that has already been approved is terminated, then applicants are required to make a filing with the original approving authority and return the Certificate.

Name of overseas enterprise (Article 22)

The name of an overseas enterprise must be in compliance with both PRC laws and laws of the jurisdiction in which the investment is made.

Unless approval has been obtained in advance, the name of the overseas enterprises must not include the words 'PRC/中国', 'China/中华', 'State/国家' or words of a similar nature.

The name of the overseas enterprise in languages other than Chinese may be registered in the host jurisdiction before applying for MOFCOM approval of the outbound investment.

Re-investment (Article 39)

If an overseas enterprise that is controlled by a PRC enterprise itself makes a further investment outside the PRC, then the PRC enterprise must file the transaction with MOFCOM or its relevant principal counterpart within one month after completion by submitting a standard form (filing form for overseas investment made by overseas chinese invested enterprises).

Consultation (Article 10)

The Outbound Investment Measures require MOFCOM (or its provincial counterparts) to consult with Chinese embassies/consulates in the relevant jurisdictions about certain categories of investment (eg those falling under Article 6 of the Outbound Investment Measures or relating to the energy or resources sector). For other types of investments, consultation is discretionary. In addition, the Outbound Investment Measures provide that verifications by other relevant governmental authorities (eg NDRC) must be obtained before the outbound investment contracts or transactions come into effect under PRC law.

Penalties (Articles 32 and 33)

The Outbound Investment Measures also set out penalties that may be imposed upon PRC investors by MOFCOM if there is a breach of the Outbound Investment Measures (including the provision of false information in application documents). The penalties may include restrictions on the investor's ability to make other overseas investments within a certain period.

Implications for PRC investors

The Outbound Investment Measures will be supplemented with further implementing regulations that will clarify some of the details that are currently lacking. As the Outbound Investment Measures only address the MOFCOM approval regime, PRC investors will still need to consider other factors in approvals/verification procedures with NDRC, SAFE, SASAC, industry-specific regulators, as well as the anti-trust regulator where circumstances warrant.

Moreover, for PRC companies wishing to make investments overseas, the PRC approval formalities are merely the first step in a series of potential hurdles to overcome and it is vital to have an understanding of the legal and regulatory regime of the jurisdictions in which overseas assets are located. On 9 March 2009, Vice-Premier Wang Qishan urged PRC investors to be cautious when considering making acquisitions offshore. Vice-Premier Wang highlighted concerns such as differences in corporate culture and management practices, as well as challenges in dealing with foreign trade unions and employees, as potential hurdles when making successful acquisitions. He also emphasised the need for conducting thorough due diligence, and understanding the laws and customs of the host countries because they are critical in any PRC investor's overseas investment strategy.

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