



## Newsletter

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January 15, 2021

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## Update

### **China Issued Measure for Security Review of Foreign Investment**

On December 19, National Development and Reform Commission (“NDRC”) and Ministry of Commerce People’s Republic of China (“MOFCOM”) jointly issued the Measures for Security Review of Foreign Investment (“Measures”), which will take effect on January 18, 2021.

The Measures stipulate the types of foreign investment that applicable to review, institution, scope, procedure of review, supervision of review, implementation of decisions and handling of violation, etc.

The mainly content including as follows:

1.Foreign investment types: foreign investors (1) solely or jointly with other investors, invest in new projects or establish enterprises in China; (2) obtain equity or assets of domestic enterprises through mergers and acquisitions; and (3) invest in China in other ways.

2.For foreign investment within the following scope, foreign investors or relevant domestic parties (“Parties”) should proactively declare to the Working Mechanism Office before the investment is implemented: (1) investment in military industry, military industry supporting areas and other areas related to national defense security, and Investment in the

surrounding areas of military facilities and military industrial facilities; (2) investment in important agricultural products, important energy and resources, major equipment manufacturing, important infrastructure, important transportation services, important cultural products and services, important information technology and Internet products related to national security Services, important financial services, key technologies and other important areas, and obtain actual control of the invested enterprises.

The acquisition of actual control of the invested enterprise mentioned in the second item of the preceding paragraph includes the following situations: (1) foreign investors hold more than 50% of the company's equity; (2) foreign investors hold less than 50% of the company's equity, but the voting rights enjoyed can have a significant impact on the resolutions of the board of directors, the shareholders meeting or the shareholders meeting; and (3) other circumstances that cause foreign investors to have a significant impact on the business decision-making, personnel, finance and technology of the enterprise. For foreign investment within the scope, the Work Mechanism Office has the right to request the parties to declare.

3.If the Office of the Working Mechanism decides to initiate a special review of the declared foreign investment, after the review, it shall make a decision in accordance with the following provisions and notify the parties in writing: (1) if the declared foreign investment does not affect national security, a decision to pass the security review shall be made; (2) if the declared foreign investment affects national security, a decision shall be made to prohibit investment; if additional conditions can eliminate the impact on national security, and the parties have promised to accept the additional conditions in writing, they may make a conditional security review decision with additional conditions listed in the decision. The special review shall be completed within 60 working days from the date of initiation; under special circumstances, the review period may be extended. The party concerned shall be notified in writing to extend the review period. During the review period, the parties may not make investments.

## **China Issued Negative List 2020 for Market Access**

On December 16, 2020, National Development and Reform Commission ("NDRC") and The Ministry of Commerce of the People's Republic of China ("MOFCOM") jointly issued the Negative List (2020) for Market Access ("List 2020"). Compared with the Negative List (2019), the List 2020 includes 123 items and deletes 8 items.

The List 2020 is mainly revised as follows:

1. Liberalize and delete some measures.

a) Liberalization of "Approval of Forest Resources Asset Evaluation Projects", "Qualification of Mining Rights Appraisal Agency" and "Qualification of Verification Institution for Carbon Emission Permit Trading".

b) Delete some measures of "Registration Permission for Customs Clearance Enterprise", "Qualification Approval for Directors, Supervisors, Senior Managers of Securities Company", "Inspection Permission of Businesses of Import and Export Commodity Inspection and Appraisal", "Qualification Approval for Asset Evaluation Agency in Securities Service Business", etc.

2. Adjust the description of some measures in the specification. The scope of management of 20 measures was reduced, the expression of 7 measures for recordation was standardized, the 5 management measures were converted to temporary listing, and the expression of 72 measures was revised and improved.

3. Add a few measures carefully including, the relevant management measures for the establishment of financial holding

companies have been added to the list. The newly added entry item “no over-scale transfer of land management rights without obtaining permission or qualifications”, and supplementing individual legal and effective measures that meet the positioning of the List 2020.

4. Improve the design of the list system. Supplement and improve the definition of licensing items. In line with the progress of the reform of the nature reserve system and the revision of the catalogue of the industrial structure adjustment system, the corresponding provisions of the list description have been revised.

### **PBOC Issued Notice on Optimizing Cross-border RMB Policy**

January 4, 2020, the People’s Bank of China (“PBOC”) and other six departments jointly issued a Notice on optimizing Cross-border RMB policy (“Notice”), which will take into effect on February 4, 2021.

The Notice touches upon contents in five aspects:

- (1) Promoting the facilitation of RMB settlement of trade and investment to meet the needs of the real economy;
- (2) Further simplifying the procedure of Cross-border RMB settlement;
- (3) Optimizing the investment and financing management of Cross-border RMB;
- (4) Facilitating the cross-border receipt and payment of RMB under personal current account; and
- (5) Making the RMB bank settlement account of overseas institutions easier to use.

In the fifth aspect, the Notice states to expand the income scope of RMB bank settlement account of foreign institutions and receive the RMB capital remitted from foreign synonym account,

According to the Notice, there are 19 provisions of previous notices or measures inconsistent with the content of this Notice, and the new provisions of the Notice shall prevail.

### **China Issued Foreign Investment Negative List 2020 in Hainan**

On December 31, 2020, NDRC and MOFCOM issued “Hainan Free Trade Port Foreign Investment Access Negative List (2020)”, which will implement on February 1, 2021.

Compared with “National Free Trade Zone Negative List (2020)”, “Hainan Free Trade Port Foreign Investment Access Negative List (2020)” further reduced to 27 items and liberalized part of items.

1. Promote the opening of key areas such as value-added telecommunications and education

Expand the opening of value-added telecommunications services, remove restrictions on foreign investment in online data processing and transaction processing businesses, and allow enterprises with entity registration and service facilities in the Hainan Free Trade Port to develop Internet data centers and content distribution network services throughout the free trade port and internationally, and promote Hainan gathers data to develop a digital economy. Allow overseas high-level universities of science, engineering, agriculture and medicine and vocational colleges to independently run schools in Hainan Free Trade Port, and support the construction of Hainan International Education Innovation Island.

2. Expand the opening up of business services

In the field of legal services, foreign investors are allowed to invest in some Hainan-related commercial non-litigation legal affairs, so as to better meet the needs of foreign-related legal services in the trade, investment, finance and other fields of the Hainan Free Trade Port. In the field of consultation and investigation, except for radio and television listening and viewing surveys that must be controlled by the Chinese party, the foreign investment in the field of market research is cancelled; foreign investment in social surveys is allowed, and the Chinese shareholding ratio is not less than 67%, and the legal representative should have Chinese nationality.

### 3. Relaxation of access for manufacturing and mining industries

In the manufacturing sector, the national and pilot free trade zones will "remove the restriction on foreign shareholding in passenger car manufacturing in 2022 and the restriction that the same foreign company can establish two or less joint ventures in China that produce similar vehicle products" in advance. , To support the opening of the Hainan Free Trade Port automobile industry first. In the mining industry, cancel the regulations prohibiting foreign investment in rare earth, radioactive minerals, tungsten exploration, mining and beneficiation, and implement management in accordance with the same measures in the mining industry of the state and Hainan province.

## **MOFCOM Issued the Measures for Blocking the Improper Extraterritorial Application of Foreign Laws and Measures**

On January 9, 2021, MOFCOM issued the Measures for Blocking the Improper Extraterritorial Application of Foreign Laws and Measures ("Measures"), which becomes effective as of the date of promulgation.

The Measures established a prohibition system, states the judicial remedy system, and stipulate some relevant regulations for enterprises and individual to protect their rights. The content mainly includes as follow:

1. Whether improper extraterritorial application situation of foreign laws and measures exist, the working mechanism shall assess and confirm by the following factors:

- a). Whether it violates international law and international relations basic standard;
- b). Possible impact on Chinese state sovereignty, security and development interests;
- c). Possible impact on legal interest of Chinese citizens, legal persons or other organizations; and
- d). Other factors which shall be considered.

2. If a party comply with the foreign laws and measures within the scope of prohibition, infringes the legal interest of Chinese citizens, legal persons or other organizations, Chinese citizens, legal persons or other organizations can file lawsuit with the People's court according to the law to require such party for compensating the loss;

Judgement and verdict made according to the foreign laws that within the scope of prohibition result in the loss of Chinese citizens, legal persons or other organizations, Chinese citizens, legal persons or other organizations can file lawsuit with the People's court according to the law to require the party for compensating the loss.

3. Chinese citizens, legal persons or other organizations can apply to the department of Commerce of the State Council

for exempting from abiding the prohibition.

Applying for exempting from abiding the prohibition, the applicant should submit the written application to the department of Commerce of the State Council. The written application should covers the reasons and scope for the exemption.

4. If Chinese citizens, legal persons or other organizations encounters the prohibition situation of foreign laws and measures which ban or restrict third country (region) and its citizens, legal persons or other organizations to commerce should report to the department of Commerce of the State Council within 30 days. Warning and penalty measures would be taken if there is any fiction or violation.

## Article(s)

### **China's Cross-Border E-Commerce under RCEP**

by *David Zou*

Digital trade is, and will continue to be, a key economic growth factor during and after Covid-19. The Regional Comprehensive Economic Partnership (RCEP) with 15 Asia-Pacific nations (each a "Member") also aims to enhance cross-border e-commerce among Members. This article will analyze what it takes for China to adapt its cross-border e-commerce regime to the RCEP requirements.

#### **1. E-commerce Market Entry**

Chapter 8 covers e-commerce market entry under which China committed no more than 50% equity ratio. This is actually less than what China currently allows foreign investors under its domestic regulations. China's Ministry of Industry and Information lifted the foreign equity ratio up to 100% on June 19, 2015 by issuing "Circular on Lifting Foreign Equity Ratio Restriction in Online Data Processing and Transaction Business (Operating E-Commerce)". China needs to clarify its policy stances. It is expected that further liberalization will be first implemented in the free trade zones such as Hainan Island or Shanghai Lingang New Area.

#### **2. No Local Data Storage Requirements**

Chapter 12 is dedicated to e-commerce providing that "No Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that Party's territory." However, a Member can implement measures requiring a foreign firm to locate computing facilities within its territory for public policy or security interest reasons and such measures shall not be disputed by other Members. This exception could be a contentious point in the future. At present, a foreign e-commerce operator is best to store its customers' data in China or the designated telecommunication operators' data centers in Hong Kong to ensure stable platform services to its customers in China. The potential lifting of such requirements by China will significantly reduce the costs and concerns of foreign e-commerce operators entering the Chinese market.

#### **3. No Limitation on Cross-border Transfer of Information**

Cross-border E-commerce operators rely on big data. Restriction on data transfer will impede cross-border e-commerce. Members shall not prevent cross-border transfer of information by electronic means for conduct of e-commerce. Members also agree to maintain the current practice of not imposing customs duties on electronic transmissions.

However, RCEP's position is weakened by allowing Members to impose national regulatory restrictions as long as they are applied in a non-discriminatory way. China has set of laws and regulations governing the outflow of data and information which are often troublesome to some Western countries and big tech companies. Conceivably, such regulations will mostly stay in place. Nevertheless, China needs to streamline its regulations and practices on cross-border information flow.

#### **4. Protection of Data as Property Interest**

Chapter 10 on investment protection covers e-commerce data. A Member government's act which adversely impacts the tangible or intangible property rights or interest is considered expropriation, whether directly through formal transfer of title or outright seizure or indirectly. Members must conduct such expropriation for public purpose such as protection of public health, safety, public morals, the environment, and even real estate price stabilization, in a non-discriminatory manner, through due legal process, and pay fair compensation. Thus, data accumulated from e-commerce operation in China by foreign investors will be protected from unjustified expropriation under RCEP. Chinese courts have already recognized data as legally protected property interest. Clear regulation is warranted.

#### **5. Coordinated Efforts against Digital Fraud and Privacy Invasion**

Consumer confidence and cyber security is essential for a well-functioning online market. RCEP requires Members to implement measures to protect e-commerce users' personal information transferred between Members, to deal with unsolicited or 'spam' messages, to protect online consumers from fraud and misleading conduct, and to share best practice for dealing with cyber security. Members will undoubtedly have a daunting job of combating cross-border on-line fraud. Members may set up a joint law enforcement regime to enhance cooperation, information sharing, and anti-fraud successes.

#### **6. Dispute Resolution**

Regretful that RCEP's dispute settlement mechanism does not apply to e-commerce disputes under Chapter 12. If Members cannot resolve e-commerce dispute through consultation, then it moves to the RCEP Joint Committee for further discussion. However, the joint Committee does not have the power to impose any decision. Thus, a Member could get away with discriminating against specific foreign firms. Yet, RCEP mandates Members to review the application of Chapter 19's dispute settlement mechanism to Chapter 12's e-commerce dispute. Chapter 19 will only apply to those Members that have agreed to its application.

In sum, despite RCEP's provision on cross-border e-commerce, it still has many "loopholes" requiring further negotiation, liberalization, and Members' adaption. China needs to further reform its domestic rules and make necessary concessions to promote RCEP e-commerce regime. Much can be expected now that China also indicated its intention to join CPTPP which has higher requirements on cross-border e-commerce.

### **Contact Us**

Grandway Law Offices (Shanghai)

[www.grandwaylaw.com](http://www.grandwaylaw.com)

23F, S2 Building, Bund Financial Center, 600

Zhongshan No. 2 Road (E), Shanghai, 200010, China

