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Briefing note

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China relaxes outbound direct investment rules

In order to promote outbound investments of Chinese companies, the National Development and Reform Commission (NDRC) issued the *Administrative Measures on Approval and Filing of Outbound Investment Projects* (New Measures) in April 2014. The New Measures took effect on 8 May 2014 and replaced the old rules, the *Interim Administrative Measures on the Approval of Outbound Investment Projects (2004)* (Old Measures). This briefing examines how the New Measures have relaxed the regulatory authority of NDRC which will provide a more favourable environment for outbound investments.

Relaxed regulatory approval regime

The New Measures have streamlined the regulatory regime such that certain outbound investment projects no longer require government approval. Such projects are only required to be filed with the relevant authorities, which implies a lower degree of government monitoring. According to the New Measures, NDRC has also delegated its authority downwards such that the filing of certain outbound investment projects need only be made at the provincial levels of NDRC.

However, NDRC still retains a close watch on outbound investments in "sensitive" countries and regions. These are countries and regions that are sanctioned, subject to war or civil commotion or have no diplomatic relations with China. Previously, the Old Measures required outbound investments in the Taiwan Region to be subject to NDRC or even State Council approval. The New Measures now stipulate that such investments will be regulated separately by the rules yet to be promulgated. Similarly, outbound investments in "sensitive" industries such as basic telecommunication, cross-border hydro-resources development, large-scale land development, main electricity transmission line and grid and media will be tightly monitored. Investments in sensitive countries and region as well as sensitive industries at least trigger the requirement of central NDRC's approval.

The table below summarises the different regulatory requirements triggered by the New Measures as compared to the Old Measures.

	New Measures	Old Measures
Filing with NDRC at provincial level	• Investment amount < USD300 million; and • Investment by local enterprises.	N/A
Approval of NDRC at provincial level	N/A	• Investment amount < USD30 million in the natural resources development field; or • Using foreign exchange < USD10 million in all other fields
Filing with NDRC at central level	• Investment amount ≥ USD300 million but < USD1 billion; or • Investment by central state-owned enterprises	• Investment amount < USD30 million in the natural resources development field; • Using foreign exchange < USD10 million in all other fields; and • Investment by central state-owned enterprises
Approval of NDRC at central level	• Investment amount ≥ USD1 billion; or • Investment in sensitive countries/regions or sensitive industries	• Investment amount ≥ USD30 million but < USD200 million in the natural resources development field; or • Using foreign exchange ≥ USD10 million but < USD50 million in all other fields
Approval of the State Council	• Investment amount ≥ USD2 billion; and • Investment in sensitive countries/regions or sensitive industries	• Investment amount ≥ USD200 million in the natural resources development field; or • Using foreign exchange ≥ USD50 million in all other fields

Clearer application scope

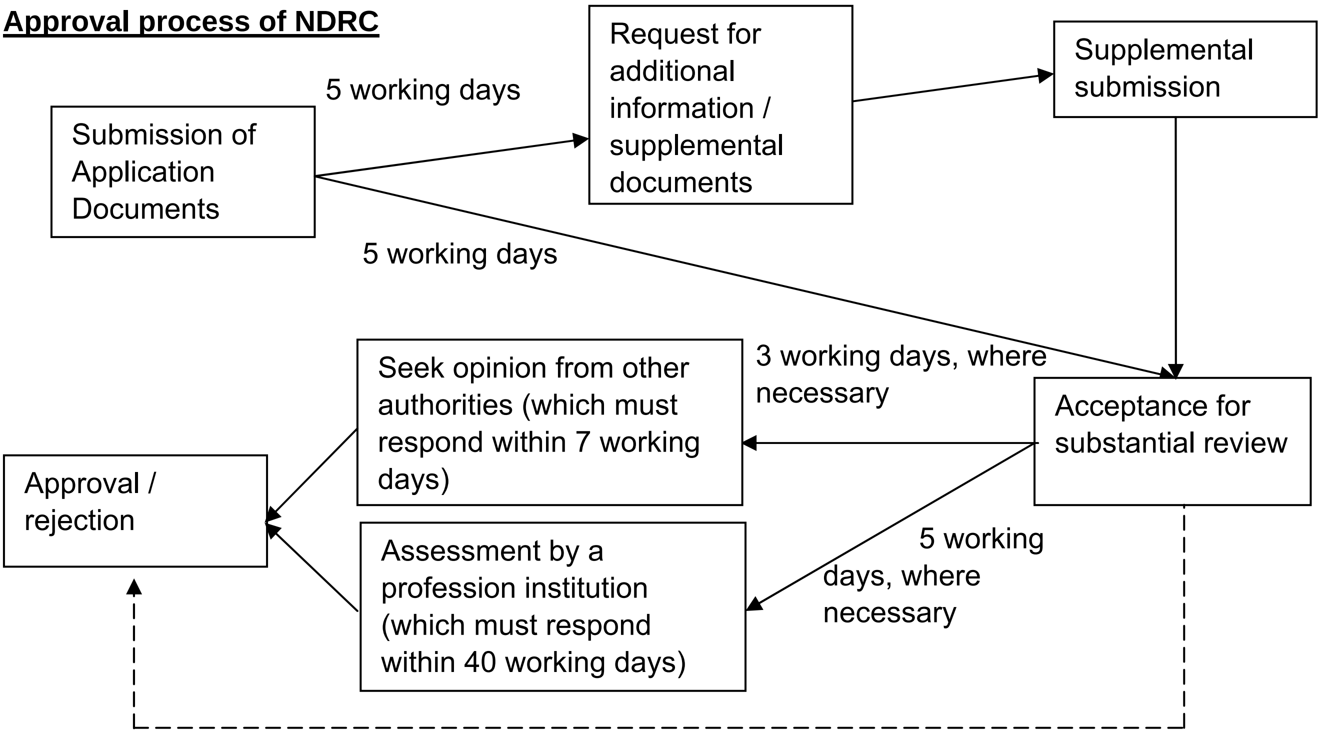
The Old Measures applied to outbound investment projects which were defined as investment projects made by Chinese legal persons (or through offshore enterprises or entities in which they hold a controlling equity stake) outside China. Such projects included greenfield investment, acquisition, joint venture and capital increase. The term "investment through offshore companies or entities" was an ambiguous term and had caused much uncertainty.

The New Measures now clarify this uncertainty by defining outbound investment projects as investment projects (including greenfield investment, acquisition, joint venture, capital increase and capital injection) which are made by (i) Chinese legal persons outside China, or (ii) the offshore enterprises or entities of a Chinese legal person with the financing, guarantee or security provided by this Chinese legal person.

Foreseeable approval/filing timeframe

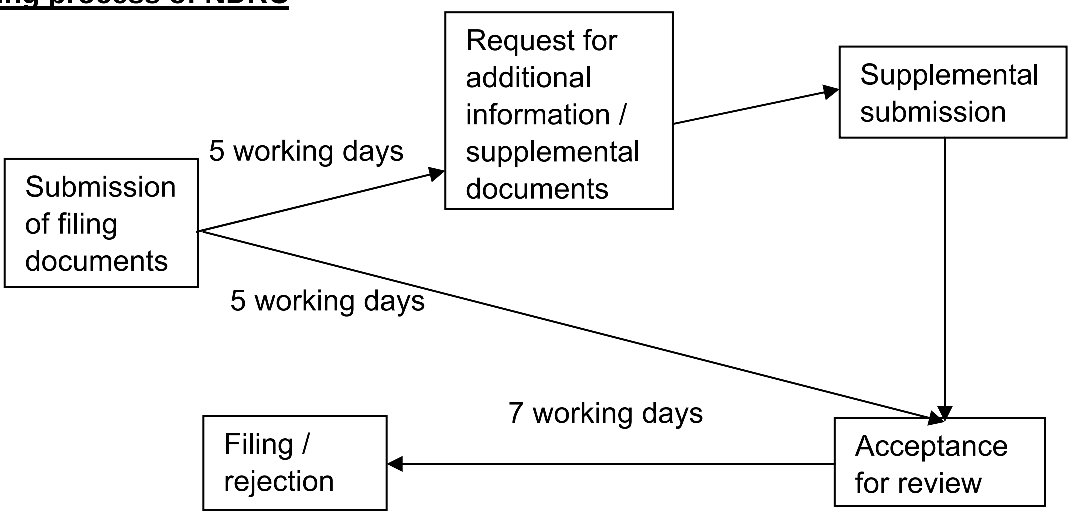
Under the Old Measures where approval timelines were unclear, the general perception was that obtaining government approval for outbound investments would be very time consuming. It was also uncertain as to whether regulators would request for additional information and supplemental documents any time during the application, and when an application would be accepted for substantial review. The New Measures have made progress in clarifying that NDRC would now request for submission of additional information and supplemental documents through a one-off notice within a prescribed timeframe. However, the New Measures still fail to set a timeframe within which NDRC will consider the supplemental submission in order to proceed with a substantial review, but at least the 20 working days limit prescribed under the *PRC Administrative Approval Law* would be relevant. The diagrams below illustrate the respective procedures and timelines for an approval or a filing conducted by NDRC under the New Measures.

Approval process of NDRC



Unless assessment by a professional institution is required, substantial review must be completed with 20 working days, with the approval of head of NDRC, which could be extended for another 10 working days

Filing process of NDRC



Looking at the above, one will note that NDRC continues to monitor outbound investment filing applications quite closely. It does not only confirm whether a filing request is within its jurisdiction, but also conducts a substantial review of such request. The review involves ensuring that the application complies with laws and regulations, industrial and outbound investment policies, and capital account administrative measures. It also ensures that the investor has the capability to make the investment, and that the investment does not endanger the sovereignty or security of the State or harm public interest.

Under the New Measures, an applicant must obtain the approval reply or filing notification, as appropriate, from NDRC before it may proceed with the outbound investments. Accordingly, if the applicant were to enter into any contractual arrangements prior to this, the obtaining of the approval reply or filing notification must be included as a condition precedent to the transaction documents.

According to the New Measures, if the relevant outbound investment is an acquisition or involves bidding and the proposed investment amount exceeds USD300 million, the Chinese investor needs to file a project information report to NDRC. NDRC will determine whether or not to confirm the report within seven working days. The Chinese investor may not execute any binding agreement, make any enforceable offer, apply to foreign government authority or make a formal bid before obtaining such confirmation from NDRC.

Other developments

The New Measures further provide that they are applicable by reference to an onshore investor which invests in, or establishes, an offshore private equity fund. Previously, under the Old Measures, it was not clear whether an onshore Chinese private equity fund can make outbound investments, and it was not practical for a Chinese limited partner to contribute capital in an offshore private equity fund. Under the New Measures, it seems that now an onshore investor can act as the general partner for, and / or contribute capital to, an offshore private equity fund after completing the necessary NDRC filing or approval. In addition, natural persons and other entities without legal person status may also carry out outbound investments according to separate rules. It remains to be seen how the regulations will develop in these respects.

Prospect

The New Measures have introduced important changes to clarify and simplify the regulatory regime for outbound investments. Specific timelines for government approval or filing now give investors and their foreign partners greater certainty on when outbound investments may be launched. As certain transactions now qualify for a mere filing as opposed to an approval requirement with NDRC or its provincial counterparts, government interference appears to be lessened and the outcome of applications may become more predictable. These benefits help create a more favourable regulatory environment for investors to conduct outbound investments in line with the "go abroad" policy promoted by the central government. It is likely that there may be a surge in outbound investments by Chinese entities as time progresses.

Yet, NDRC has not absolved of all its control over outbound investments. Certain investments involving high investment amount or sensitive industries/regions are still subject to high level monitoring. While Chinese investors and foreign partners would still have to live with these restraints, they may wish to start considering how best to take advantage of the relaxations under the New Measures. Corresponding amendments to the rules that result in reducing government interference on outbound investments is also expected to be issued by other relevant authorities, such as the Ministry of Commerce.

Contacts

China/Asia

Tiecheng Yang
Partner
E: tiecheng.yang@cliffordchance.com

Stephen Harder
Partner
E: stephen.harder@cliffordchance.com

Tim Wang
Partner
E: tim.wang@cliffordchance.com

Terence Foo
Partner
E: terence.foo@cliffordchance.com

Glen Ma
Partner
E: glen.ma@cliffordchance.com

Kelly Gregory
Partner
E: kelly.gregory@cliffordchance.com

Europe

Stefanie Tetz
Partner
E: stefanie.tetz@cliffordchance.com

Kathy Honeywood
Partner
E: kathy.honeywood@cliffordchance.com

Paolo Sersale
Partner
E: paolo.sersale@cliffordchance.com

Nick Fletcher
Partner
E:nick.fletcher@cliffordchance.com

Nicholas Rees
Partner
E: nicholas.rees@cliffordchance.com

Americas

Evan Cohen
Partner
E: evan.cohen@cliffordchance.com

Anthony Oldfield
Partner
E: anthony.oldfield@cliffordchance.com

Middle East and Africa

Nigel Wellings
Partner
E: nigel.wellings@cliffordchance.com

Anthony Giustini
Partner
E: anthony.giustini@cliffordchance.com

Edmund Boyo
Partner
E: edmund.boyo@cliffordchance.com