Understanding China's Latest Draft Negative List for Market Access

TAGS Market Access Investment

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On 2 March 2016 the National Development and Reform Commission ("NDRC") and the Ministry of Commerce ("MOC") jointly issued the Notice on the Release of the Draft Negative List for Market Access (Trial) (the "Draft Negative List").

To help EU SMEs understand this new market access system in China, we have summarised the key points below, highlighting how the list originated, how it is to be applied and possible developments in the near future.

Laying the Groundwork

1. Like in many countries in the world, in China there are some business activities that market operators are not allowed or restricted to engage in. For example, reclaiming land from lakes is forbidden, and to engage in live pig butchering a special approval is needed. Such prohibitions and restrictions were previously scattered across various laws, regulations and orders of the State Council. Investors, whether domestic or foreign, while planning to invest in one business, needed to search and find regulations applicable to the business and check against provisions to see whether the entities they proposed to set up were allowed or whether there were any special conditions. It is not always easy to find the relevant provisions and most people have no idea if the proposed

investment is allowed or not. The need for a document unifying all the prohibitions and restrictions for market access was clearly necessary.

2. The Communist Party's Central Committee first raised the idea of a unified market access system in November 2013 in a decision made by its third plenary session proposing "all sorts of market subjects may enter into areas outside of the list on an equal basis and according to the law". Then in June 2014 the State Council put forth to "implement market access reform and formulate a negative list for market access" in its opinion on Promoting Fair Competition and Maintaining the Normal Order of the Market and set the principles for formulating such a list. Further in the Working Report given by Premier Li Keqiang on the three sessions of the twelve National People's Congress in March 2015 he emphasized again to "formulate a market access list". In the same month the NDRC and MOC initiated this project by inviting all departments and authorities with market access administration duties to make a comprehensive review of the industries, areas, and businesses prohibited and restricted for market subjects to invest/operate in and suggest items to be incorporated in the list.

What's in the List?

1. Contents

The Draft Negative List is based on the current laws, administrative regulations and the orders of the State Council. Currently it includes 96 items in the prohibited category and 232 items in the restricted category. Each item is further divided into sub-items in accordance with the Classification of National Economic Industries. In total there are 762 sub-items in the prohibited category and 867 sub-items in the restricted category involving 15 categories and 19 categories respectively in the Classification of National Economic Industries. For those in the prohibited category, all market subjects are not allowed to enter into such items, and administrative authorities shall not approve and verify, nor handle relevant formalities for such items.

Here are few examples for illustration: Trade in rhino horn and tiger bone is prohibited; Projects for investment in outdated production techniques and equipment in certain listed industries are also prohibited.

For those in the restricted category, two scenarios may exist. One is that administrative authorities make decisions for allowing access or not in accordance with laws and regulations after companies make their application. One example is the requirement for licensing for engagement in the telecommunications business (including commercial trials). The other is that market operators enter into relevant industries, areas, and businesses in accordance with the access conditions and modes specified by government when they are in compliance with relevant regulations. An example is that advertising registration is needed if broadcasting stations, TV stations and newspaper and periodical press are to engage in advertising. For detailed provisions of the Draft Negative List, please visit http://tgs.ndrc.gov.cn/zywj/201604/t20160413_798047.html

2. Relationship with Special Administrative Measures for the Access of Foreign Investment in Pilot Free Trade Zones (Negative List) (the "Negative List for Foreign Investment")

The Draft Negative List will apply to all investors, whether domestic or foreign, and it imposes unified requirements on all market operators. While the Negative List for Foreign Investment applies only to foreign investors currently investing in the pilot free trade zones, it is a special administration measure for market access and will be adjusted to apply to the whole country in the future.

The pilot implementation of the Draft Negative List is also planned to start first in the four provinces and municipalities directly under the central government including Tianjin, Shanghai, Fujian and Guangdong where the Negative List for Foreign Investment applies already. The logic should be, after checking against the Draft Negative List to see if certain business is allowed for all market subjects, foreign investors also need to check against the Negative List for Foreign Investment to see if operation in the relevant business is allowed for the

proposed foreign invested enterprise to be set up. The purpose of such an arrangement is to apply the two lists together to demonstrate the effect in the four pilot zones first and then roll out across the whole country forming a complete market access administration system.

Application and future development

The Draft Negative List will be piloted in four pilot zones – Tianjin, Shanghai, Fujian and Guangdong – when the State Council approves the pilot plan for the reform of the market access negative list system in the pilot zones.

Items listed in it now are subject to revision (adding in or taking out of some items) with the revision of relevant laws, administrative regulations or the order of the State Council in the future. By 2018, the central government aims to implement a unified negative list for market access in the whole country which will also be subject to adjustment with the progress of the overall reform. This is also why it is important to pay attention to the development of the list as it affects all market entrants including EU SME investors.

We will keep an eye on the development of the application of the Draft Negative List and keep you updated on further impact to your business.

If you have any further questions, please contact our legal team at http://www.eusmecentre.org.cn/expert