Further Analysis of the Draft New Foreign Investment Law in China

TAGS Investment

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Following on the recent release of the drafted new Foreign Investment Law in China, the Centre's Advocacy team held meetings with different parties including European SMEs, the European Commission, EU Delegation in China and legal experts to discuss impact of the new draft on European business communities. Final comments were submitted to the Ministry of Commerce in China on February 17th. This is a brief analysis of the draft from the perspectives of SMEs.

The Draft comes at the time when the European Union and China are negotiating its Bilateral Investment Agreement. This would be the EU's first ever stand-alone investment agreement. It will not only aim to streamline the current bilateral investment protection agreements in place between China and the Member States into a single text, but also improve market access for their companies by addressing regulatory and other barriers.

For this reason, European business in China are placing high expectations on the proposed Draft of the Foreign Investment Law of the P.R.C. in terms of level-playing field, market access and opening-up, transparency and fair competition.

Another milestone reflected in this draft is the introduction of a foreign investment management system that intends to replace the current pre-approval system with simple filings and negative list, in addition to the unification of China's legal regime for foreign investment.

However, the new system still retains a distinction between foreign and domestic investment, which implies that national treatment and level playing field will not necessarily happen. There are no compelling reasons to regulate differently companies by their ownership structure or by the nationality of the investors. For this reason, it would be preferable to see these laws unified with the Company Law applicable to domestic enterprises.

Although there is certain liberalisation and streamlining of the investment management system, it can be observed from the text that a worrying increase of control in the proposed national security review mechanism and the reporting obligations.

These obligations will add a serious burden and cost for foreign business, and particularly for SMEs.

According to the Draft, foreign invested enterprises with lawful existence prior to the date of the law entering in effect will have to change its organisational form and structure according to the Company Law, the Law on Partnership Enterprises, the Law on Sole Proprietorship Enterprises and other relevant laws and regulations.

The consequence of this provision on joint ventures is that the partners will have to renegotiate the following:

- Corporate governance and qualified majorities;
- Exit strategies;
- The overall equity transfer.

For further information regarding the draft, please contact the Centre's Advocacy team.