MAYER • BROWN

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Global Hospitality & Leisure

Introduction

Brexit. Trump. Disruptors. Cybersecurity. Terrorism. Merger Mania.

Brand consolidation. Brand confusion....any other Brexcuses to spoil the mood of the Hotel industry?

At least the Hotel sector contributes to the well being of so many around the globe with affordable luxury, comfort, retreats, a time and place to escape and chillax.

Meanwhile, a word or two from your lawyers to chill you with warnings and encouragements? Welcome to Mayer Brown's Hospitality and Leisure Spring Newsletter!

- GDPR – another acronym to learn. Charles-Albert Helleputte and Oliver Yaros from our Brussels and London offices help to explain the implications of the new General Data Protection Regulation (GDPR) which will come into force on 25 May 2018. Given its extraterritorial reach there are significant implications for the hotel industry.
- A regulatory response to Disruptors – Andrew Armfelt from our Paris office notes how regulatory responses are seeking to tame the impact of airbnb type operations. How can this be "fairbnb"? Many jurisdictions are responding with different regulatory approaches. Andrew will identify some of these. Meanwhile, some hotel chains are responding by simply becoming core investors in the disruptors.
- Regulating the Mainland Chinese investor – Daring, ambitious and some might say aggressive acquisitions by foreign investors have helped to fuel price increases...blessing many a vendor. Governments respond by raising "national security flags", taxes or prohibitions on such foreign acquirers. Meanwhile, the Government of China has other policy objectives and considerations to address which have recently led to regulatory changes imposed on certain Mainland investors seeking to acquire significant investments overseas. Andy Yeo from our Shanghai office will update you on the latest regulatory hurdles recently imposed. A temporary slowdown in this investment sector is therefore expected to follow as the "strong slowdown signal" has been given.

A complex regulatory environment. Hopefully, we can make it easier to navigate.

Mayer Brown will have a team joining the International Hotel Investment Forum in Berlin on 6 to 8 March 2017, so we trust there will be time to catch up with many of you for fruitful and encouraging dialogues! The contact details of our team attending are set out on the next page.

Meanwhile, best wishes.

Meet the Mayer Brown Team in Berlin

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Content
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New General Data Protection Regulation in EU: Its Impact on Hospitality Sector

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The General Data Protection Regulation (GDPR) adopted on 27 April 2016 introduces a new regime for the protection of personal data in the European Union (EU). The new provisions will apply starting from 25 May 2018. Therefore, all businesses should undertake an evaluation of the next steps required to comply with the new EU data protection rules. Bearing in mind the high penalties that come with breaching the GDPR provisions, every EU and non-EU business should appreciate the impact of the new rule and define its compliance approach. Companies operating in the hospitality sector will certainly face significant challenges in reviewing their data collection and data processing systems. This is due to the type of data they collect and process on a daily basis: hotels and similar businesses widely use new technologies when carrying out their main activities (e.g. hotel reservations, check-in, and payments) and collect highly critical data, such as credit card details.

As such, companies active in the hotel and leisure sector will be significantly affected by the new rules. These businesses should review the type of data they collect, how they keep it, on which basis, how they process it and make any necessary changes to their activities to comply with the new rules in advance of their implementation. Companies should pay particular attention to those concerning the territorial scope of the GDPR (which broadens the application of existing EU data protection law) and new obligations related to the collection and processing of personal data.

Extraterritoriality

The GDPR will apply both in the case of a company established in the EU, and in a company that is not established in the EU, but processes data related to individuals located in the EU. The extended reach of this provision can be appreciated when compared to the scope of the Directive 95/46/EC (the "Directive"). While the Directive applies (until May 2018) when a company is established in at least one member state or when the processing is carried out through "means of processing" placed in a member state (e.g. equipments or processors), the GDPR extends the scope of European data protection law so that it will apply (a) when personal data related to individuals located in the EU are processed in connection with goods/services offered to them; and (b) when the behaviour of an individual in the EU is monitored by a company located outside the EU.

Therefore, international chains offering services to EU residents through a global website, for example, will now have to comply with the EU data protection rules. These situations will have to be assessed on a case-by-case basis. For instance, issues may arise when a company located outside of the EU provides a service in the language or currency of an EU member state, and this language or currency differs from that of its country of origin; albeit it is worth noting that a service which is only accessible from the EU will not be sufficient to trigger the application of the GDPR. As a result, the GDPR may apply to the collection and processing of data of an individual located in the EU who is going to travel outside the EU and performs operations such as booking a room in an hotel outside of the EU.

New Compliance Requirements for Those in Scope

When a company's processing activity falls within the scope of the GDPR, it will be required to comply with a full range of new compliance obligations. For instance, where companies are relying on consent as a ground to process personal data (e.g. to subscribe an individual to the hotel's mailing list for the purpose of receiving special offers), those businesses will need to obtain an "unambiguous" consent in the form of a statement or a clear affirmative action from the customers concerned. Other situations in which the new rules will apply include instances when personal information is provided to reserve a room or to obtain free Wi-Fi, or medical information given for the purpose of choosing the appropriate medical treatment in a hotel spa.

Under such circumstances, companies are required to review their database systems and devise new governance procedures to safeguard their clients' privacy rights and prevent identity or credit card fraud. In particular, new obligations placed on companies include detecting and reporting personal data breaches to the relevant Data Protection Authority (in some cases even to data subjects), and conducting an impact assessment to identify security measures capable of avoiding or reducing risks. Bearing in mind the sensitive nature of the data collected, those risks could be particularly high for companies operating in the hospitality sector. In this context, controllers will also be asked to keep records of the processing activities and many companies will be required to appoint a Data Protection Officer.

In addition, a review of the IT systems will place a significant burden on companies that will need to comply with the new concept of "privacy by design" and "privacy by default" introduced by the GDPR: compliance with the EU data protection law will be central in companies' planning of any new product or service related to personal data.

The changes mentioned above constitute only a fraction of the significant challenges confronting companies operating in the hospitality sector for the purpose of complying with the GDPR provisions. With less than sixteen months left to comply with the new rules, companies should start adopting measures to prevent potential breaches that may lead to high fines and significant damage to their reputation.

Taming the Airbnb Tiger in Paris

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As Paris provides the largest concentration of short-term rental properties on the website of Airbnb Inc., it is of interest to the market to monitor how the relevant authorities have sought to put some order in what has become a seemingly unregulated jungle.

Initially, the complaint against the rental website seemed to concern unfair competition as regular hotels have to collect and pay to the authorities a tourism tax, albeit Airbnb did not. This concern is not dissimilar to criticism against home owners who have avoided paying taxes and social charges on the revenue they received from renting out their homes.

As the website's popularity soars, more flats in central parts of the City of Light have been withdrawn from the domestic housing market, thus depriving local residents of the opportunity to rent affordable living accommodation. This desertification of rentals in city centres is a phenomenon seen in other countries as well, in addition to rising complaints that high turnover of short-term rental visitors creates a nuisance to other residents and deprives them of the usually quiet ambience in their residential buildings.

Calls have been made for new legislation to regulate this aspect of the sharing economy, but conscientious application of existing regulations has so far been the chosen path for the authorities in France: the first element was mandating the website to collect and pay to the French treasury a tourism tax for each night spent in the accommodation. In addition, it has been made clear that revenue from these rentals constitute income in the hands of the property owners, for which individuals' income tax should be paid. Airbnb is now obliged to furnish the details of all rentals advertised on its website to the relevant authorities.

More recently, the Social Security authorities in France have imposed new thresholds above which an owner of furnished rental accommodation is considered to be conducting a business and should register with *Régime Social des Indépendants* (RSI), social security for self-employed persons in France, and become affiliated with the social security scheme.

Indeed, it has come to light that many owners were not simply letting their principal residence while they are away on holiday (which is entirely permitted): in some cases actions by owners of multiple properties providing short-term rentals can lead to a town planning consideration. A case in point is that, since last year the Paris municipality has commenced applying the existing regulations concerning zoning and property use to define short-term holiday rentals of more than 120 days a year as a commercial business, for which business use permission is needed from the local authority, since conducting a business in a property classified as residential is illegal. In order to obtain change of use permission, compensation through turning an equivalent number of square meters of commercial space into residential use is required.

By comparison, the rules imposed by municipal authorities in other international destinations such as New York, San Francisco, London and Berlin are much more strict. These cities actually forbid short-term lettings altogether in many instances.

Airbnb is here to stay and we have even seen Europe's largest hotel operator AccorHotels entering that segment of the tourism market through the 2016 acquisition of British serviced home rental company onefinestay, which is a rival of Airbnb. These websites provide a service that is clearly in demand, and the French authorities' use of existing laws to regulate them has managed to harness them under the classical rules of society.

Funds Remittance in China Outbound Investment: Procedures and Recent Controls

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For quite a long while, the vibrant China outbound investment scene was the talk of the town; many players were already engaged in it and many more sought to enter. Then the pace started to slow down about the middle of 2016 and by early December 2016 it seemed like the wheels ground to a halt. Plummeting China foreign exchange reserves (dropping below USD 3 trillion for the first time in January 2017) and the ever-sliding RMB/USD exchange rate seemed to have taken its toll on China outbound direct investment (ODI). This note outlines the main steps involved for a Chinese company to make outbound investments and the key measures taken by China recently on tightening capital outflow.

Summary of the PRC Regulatory Regime on Outbound Investment

A Chinese company is required to obtain approval from, or make filing with relevant PRC government authorities for ODI projects. Generally speaking, the steps for an ODI project are as follows:

- Signing of term sheets or framework agreements that are usually non-binding as to the key commercial terms;
- Due diligence and negotiation of transaction documents;
- Signing of transaction documents, with a condition precedent that effectiveness thereof is subject to approval of PRC government authorities;
- Applying for and obtaining approval from, or merely filing with the National Development and Reform Commission (NDRC[1]) or the competent local office thereof;
- Applying for and obtaining approval from, or mere filing with the Ministry of Commerce (MOFCOM[2]) or the competent local bureau thereof. This step may take place in parallel with that for the NDRC;
- Applying for foreign exchange registration with a qualified bank;
- Reforming transaction documents and remitting funds overseas for the outbound investment

In addition, state-owned enterprises (SOEs) involved in an outbound investment project or otherwise engaged in the transfer of state-owned assets must also obtain approval from the State Asset Supervision

1 NDRC refers to the National Development and Reform Commission of China or its counterparts at the provincial level (local DRCs). The NDRC is a government agency reporting to the State Council and is responsible for formulating China's macroeconomic policy.

2 MOFCOM refers to the Ministry of Commerce or its counterparts at the provincial level (local commerce bureaus). MOFCOM is responsible for the administration and supervision of outbound investment by Chinese companies.

and Administration Commission (SASAC) or its counterparts at the provincial level. Companies in regulated industries, such as insurance or banking, will also require approval from their industry regulator, such as the China Insurance Regulatory Commission or the China Banking Regulatory Commission.

An investor may not sign any binding transaction document or undertake foreign exchange registration until it has obtained approval from, or made filing with, the NDRC or MOFCOM. In practice it would be prudent for investors to start some of the preparatory approval or filing work ahead of time.

APPROVAL OR FILING WITH NDRC

The following types of ODI projects require an approval from NDRC:

- Those involving "sensitive countries and regions" [3],
- Those involving "sensitive industries" [4].

In addition, ODI projects with Chinese investment of USD 2 billion or more must be approved by the State Council, based on the preliminary opinion of the NDRC.

In general, the approval from the NDRC should be issued within 20 business days after a qualified application package has been submitted.

All ODI projects that do not fall within any of the above categories require merely a filing with the NDRC or the local DRC instead of approval. The timeline would be shorter than that for the NDRC approval.

PROJECT INFORMATION REPORTS

Please note that the following projects require the investor to submit a project information report to the NDRC:

- An overseas acquisition or overseas bidding project; or
- The amount of Chinese investment is USD 300 million or more.

The requirement to produce a project information report is independent of the requirement of approval or filing with NDRC. The investor may not engage in any substantive work[5] with a third party unless and until it has obtained a confirmation letter from the NDRC. If the outbound investment project complies with national policies on outbound investment, the NDRC is required to issue a confirmation letter within seven business days after receipt of the project information report.

APPROVAL OR FILING WITH MOFCOM

An ODI project shall be approved by MOFCOM if it involves:

- A sensitive country or region[6]; or
- A sensitive industry[7].

In all other circumstances, the investor is only required to make a filing with MOFCOM or the local commerce bureau for an ODI project.

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3 "Sensitive countries and regions" for the NDRC approval include: (i) countries or regions that do not maintain diplomatic relations with the PRC; (ii) countries or regions that are subject to international sanctions; (iii) countries or regions that are subject to wars or internal strife; and (iv) countries or regions that are similar to those listed above.

4 "Sensitive industries" for the NDRC approval are: (i) investments in basic telecommunications operations; (ii) projects involving the cross-border development and utilisation of water resources; (iii) large-scale land development projects; (iv) investments in mains power transmission lines or power grids; (v) investments in news media; (vi) investments in other industries similar to those listed above.

5 Engaging in substantive work includes: (i) signing a binding agreement with a third party; (ii) submitting a binding quotation or submitting an application to the government at the investment destination to review an application; (iii) submitting a bid to acquire an overseas entity.

6 "Sensitive countries and regions" for the MOFCOM approval include: (i) countries or regions that do not maintain diplomatic relations with the PRC; (ii) countries or regions that are subject to UN sanctions; (iii) countries or regions that appear on any separate list published by MOFCOM.

7 "Sensitive industries" for the MOFCOM approval are those in relation to products or technologies whose export from China is restricted, or industries which may affect interests of more than one country or region.

In general, the approval from MOFCOM should be issued within 20 business days after submission of application. The timeline for filing would be shorter.

FOREIGN EXCHANGE REGISTRATION PROCESS

Previously the State Administration of Foreign Exchange (SAFE) was responsible for administering foreign exchange control approval procedures for outbound investment projects in accordance with relevant foreign exchange control regulations. From 1 June 2015, SAFE has delegated the responsibility for administering foreign exchange control registration procedures to qualified banks in China, and SAFE indirectly administers foreign exchange registration by monitoring the capital account information system and otherwise supervising the designated foreign exchange banks.

Recent Changes on Capital Outflow Control

For a number of years until recently, it has been the policy of China to encourage overseas investment and this is evident in the relaxation of numerous previously strict controls on ODI. With the depreciation of the RMB against the USD in 2016, many Chinese individuals and entities have grown increasingly anxious to convert their RMB funds into the stronger foreign currencies which caused further depreciation and sharp drops in foreign exchange reserves. There was a perceived increase in sham deals and transactions and the Chinese Government was understandably very concerned. The earlier regulations in 2016 stressed the need for the gatekeeper authorities to enhance scrutiny of outbound remittance applications to ensure compliance and weed out sham and disguised transactions. Hitherto unnecessary procedures, documents and interviews became required in practice, and delays became more commonplace, and culminating in the processing door effectively becoming almost shut at the end of 2016 and beginning of 2017.

On 28 November 2016, NDRC, MOFCOM, SAFE and the People's Bank of China (PBOC) released a statement that the Chinese government will continue to facilitate outbound investments and meanwhile would prevent relevant risks. At a press conference on 6 December 2016, the four departments stated that the Chinese government had concerns on the risks involved in certain types of outbound transactions, and therefore would impose stricter scrutiny. These transactions include:

- Investment in sectors such as real estate, hotel, movie theatre, entertainment and sports clubs;
- Large investment outside the core business of the investor;
- Investment by limited liability partnership;
- Investment made by a Chinese company whose registered capital is far less than its proposed overseas investment amount;
- Investment made by a newly established Chinese company.

However, the statement did not go into details on each type of transaction, nor provide further information on what supervisory measure has been put in place.

A brief introduction on the newly issued requirements on stricter scrutiny over China outbound investments is set out below.

MOFCOM AND NDRC

On 2 December 2016, MOFCOM released a circular stating that in addition to application documents that are required pursuant to existing regulations, the investor shall also submit the following documents:

- Articles of association of the overseas target entity;
- Relevant board resolutions or capital contribution resolutions;
- The latest audited financial statements;
- Explanations on preliminary works (including due diligence, feasibility study report, statement on funds source and assessment on investment environment, etc.); and
- Undertaking letter on authenticity of the investment project.

In addition, a preliminary reporting form shall be submitted online for the overseas acquisition project.

On 5 December 2016, the NDRC also issued a similar circular requiring more information/documents to be submitted for information on large outbound M&A or bidding projects, e.g. the due diligence report, and the Chinese investor's Return on Equity and its latest audited financial statements.

PBOC

On 28 December 2016, PBOC issued the revised Administrative Measures for Reporting of Large-value and Suspicious Transactions by Financial Institutions ("the revised Administrative Measures"). According to the revised Administrative Measures, which will take effect on 1 July 2017, the reporting standards of large-value cross-border transactions is RMB 200,000 or foreign currency equivalent of USD 10,000. In addition, a financial institution shall submit a report of suspicious transaction if it discovers or has reasonable grounds to doubt that any of its clients or funds or other assets, transactions or attempted transactions thereof is related to money laundering, terrorist financing or any other criminal activity, regardless of the amount of funds or value of the assets involved.

SAFE

On 26 January 2017, SAFE issued a new Circular No. 3 requiring additional supporting documents to be submitted to the bank handling capital remittance for outbound investment. These documents, as evidence of authenticity of the transaction, include a statement on the source of the capital and how the funds will be used, the relevant board resolution, the contract of the underlying transaction or other materials as may be requested by the bank.

OTHER REPORTING MEASURES

It has also been reported that further measures have been taken by governmental authorities to control outbound payments. For example, banks are now required to report any overseas transfer of USD 5 million or more to SAFE. Such overseas transfers can only be made after the Chinese regulators have re examined the underlying transaction to verify its authenticity and compliance with relevant regulations. For any outbound investment project with a capital outflow of USD 50 million or more, the fund transfers will only be made after re-examination of the underlying transaction for authenticity and compliance with relevant regulations. In addition, it was reported that SAFE and PBOC have issued internal policies, pursuant to which, certain types of large scale investment projects will be banned, such as investment exceeding USD 10 billion and a SOE's investment in real estate project exceeding USD 1 billion.

However, no regulation or notice has been published by such government authorities, nor have their officials publicly confirmed these rules.

About Mayer Brown

Mayer Brown is a global legal services organization advising clients across the Americas, Asia, Europe and the Middle East. Our presence in the world's leading markets enables us to offer clients access to local market knowledge combined with global reach.

We are noted for our commitment to client service and our ability to assist clients with their most complex and demanding legal and business challenges worldwide. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. We provide legal services in areas such as banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

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