

## New Amendments to the PRC Foreign Investment Industrial Catalogue: Further Foreign Investment Relaxations

On 28 June 2017, the National Development and Reform Commission (NDRC) and the Ministry of Commerce (MOFCOM) jointly issued the *Foreign Investment Industrial Catalogue (amended 2017)* (the “2017 Catalogue”). This is the 7<sup>th</sup> revision to the catalogue since it was first issued in 1995, effective nationwide on 28 July 2017, replacing the catalogue adopted in 2015 (the “2015 Catalogue”).

### Background

China’s government has continued its efforts to attract foreign investments and reform the foreign investment management system in recent years. In October 2016, a new negative list regime was introduced nationwide which envisaged a category of industries being subject to special restrictions and MOFCOM approval. No full negative list was issued however and in order to establish which investments require MOFCOM approval, NDRC and MOFCOM jointly issued a circular on 8 October 2016 (the “Circular No.22”) clarifying that reference be made to the 2015 Catalogue. Subsequently, on 17 January 2017, the State Council released the *Circular on Several Measures on Expanding the Opening to and Active Use of Foreign Investments* (the “Guidelines”), requiring that the 2015 Catalogue be amended to liberalise (among others) the services industry, the manufacturing sectors and the mining industry.

### Main Adjustments

#### STRUCTURE ADJUSTMENT

Under the 2015 Catalogue, industries were classified under three categories, being *encouraged*, *restricted and prohibited*, with others not in the Catalogue deemed as permitted. To align this with the negative list regime and to avoid confusion regarding items subject to MOFCOM approvals, the 2017 Catalogue adjusted its structure and re-groups industries under two main sections: (a) encouraged, and (b) negative

list, the section which in turn consolidates and retains three business categories from the 2015 Catalogue including (i) items in the encouraged list containing restrictive requirements on shareholding structure or senior management qualifications, (ii) items in the prohibited list, and (iii) items in the restricted list. This new structure aims to provide a clearer reference to foreign investors as to how to apply the negative list regime.

#### SIGNIFICANT LIBERALISATION

Restricted or prohibited areas of foreign investment have been greatly reduced from 93 to 63, a reduction of about 30%. Reflecting the requirements in the Guidelines, the main relaxation is made in respect of the service, manufacturing and mining sectors. Examples of several such changes are set out below:

##### *Service Sector*

- Public road transportation service (removed as a restricted item)
- Ocean shipping tally service (removed as a restricted item and no longer requiring shareholding structure restriction)
- Auditing services (no longer requiring the chief representative to be a Chinese national)

##### *Manufacturing Sector – highlighted by the lifting of limitations in the motor car industry, including:*

- Motorcycle manufacturing (removed as a restricted item and no longer requiring restrictions in respect of the shareholding structure and the size of business presence)
- Manufacturing, research and development of electronic bus network technology (no longer requiring shareholding structure restriction)
- Manufacturing, research and development of electronic controllers for automobile electric power steering system (no longer requiring

shareholding structure restriction)

- Manufacturing of new energy automobile power battery (no longer requiring shareholding structure restriction)

#### *Mining Industry*

- Exploration and development of oil shale, oil sands and shale gas (no longer requiring shareholding structure restriction)
- Exploration and exploitation of precious metals (removed as a restricted item)

It should be noted that the deletion of certain items does not suggest that legal limitation or prohibitions are necessarily lifted, but only that the same limitation or prohibition apply to both domestic and foreign investments. For example, the gambling and lottery businesses remain prohibited regardless of where investors are based.

#### MERGERS AND ACQUISITIONS

Circular No. 22 contemplates that the negative list regime only applies to green-field investments, and MOFCOM approval is still required in respect of acquisition by foreign investors pursuant to the Rules on Foreign Investors Acquiring Domestic Companies (the “M&A Rules”). However the negative list section in the 2017 Catalogue confirms that MOFCOM approval will apply in respect of any acquisition of affiliates within China by offshore entities controlled by domestic companies or individuals (the “Round Trip Acquisitions”). As clarified by the MOFCOM spokesman in the news conference held on 29 June 2017, foreign acquisitions including strategic investments in listed companies, other than Round Trip Acquisitions, will all be subject to a record-filing requirement (rather than MOFCOM approval) upon the effectiveness of the 2017 Catalogue. This change expands the scope of the application of the negative list and shortens the list of matters requiring MOFCOM approval.

#### INDUSTRY DEVELOPMENT

Some new items have been added to the encouraged list including research, development and manufacturing of VR and AR equipment, key parts of 3D printing equipment, reflecting government efforts to encourage creative technology.

#### What Comes Next?

Following the issuance of the 2017 Catalogue, it can be expected that a series of amendments to relevant regulations will follow, reflecting relaxations made in the catalogue. For example, while relaxation have been introduced regarding motorcycle manufacturing, such limitations contemplated under the Automobiles Industry Development Policy (amended 2009) now also need to be adjusted. Another example concerns the construction and operation of theme parks. The prior position was that theme parks were restricted and subject to MOFCOM approval (although in practice a Chinese majority-owned JV was normally expected as a policy rather than law). Under the 2017 Catalogue, such restrictions have been removed as the restrictive item, and will now need to be reflected in local policy and regulation.

As suggested by the MOFCOM spokesman on 29 June 2017, given that the 2017 Catalogue no longer requires foreign acquisition to be subject to MOFCOM approvals, amendments to the Administrative Measures on Record-filing of Establishment and Change of Foreign-invested Enterprises (the “Administrative Measures”) will be required to specify the record-filing procedures for foreign acquisition. We note that a draft of the Administrative Measures incorporating such procedures was in fact circulated for public comments back in May 2017 and can expect the same be formally issued in due course.

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