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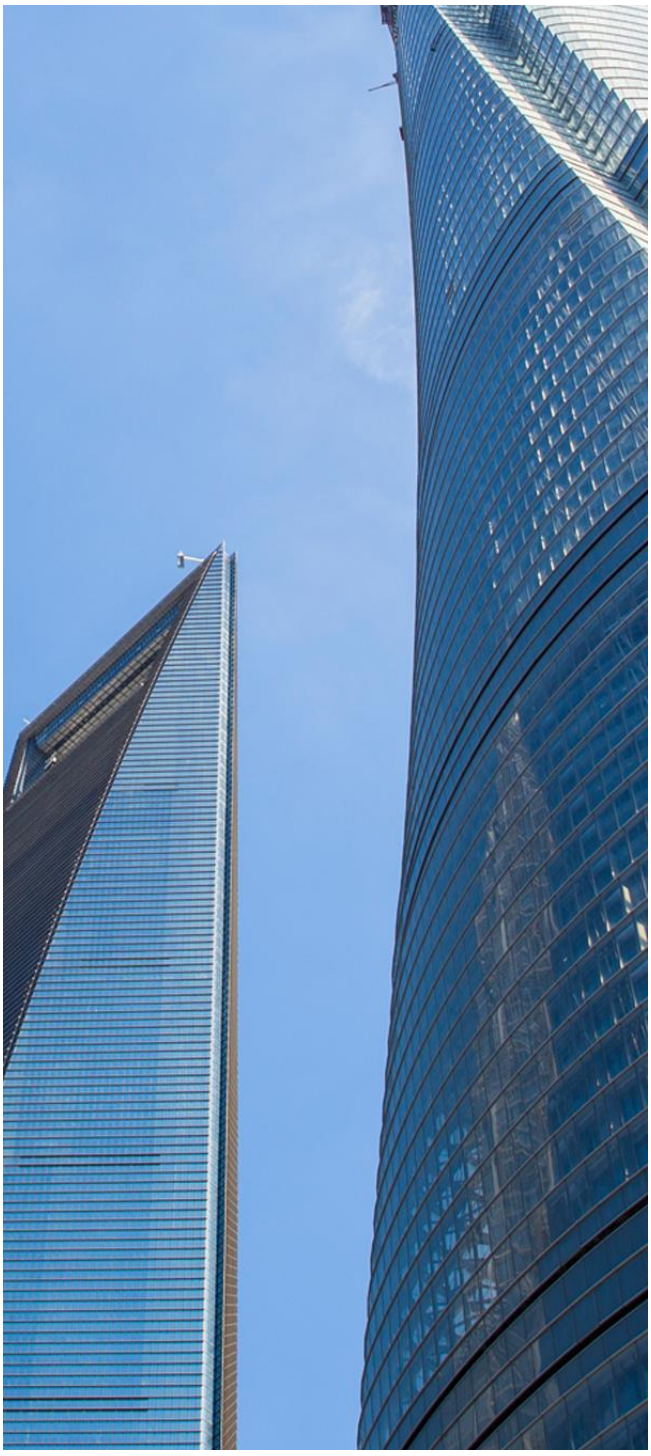
China offices

Legal flash

August 2019

This issue covers legislation published in June and July 2019



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NDRC and MOFCOM release 2019 Edition of Negative Lists for Foreign Investment Access (国家发改委和商务部发布2019年版外资准入负面清单)

On June 30, 2019, the National Development and Reform Commission ("NDRC") and Ministry of Commerce ("MOFCOM") jointly released the Special Administrative Measures for Foreign Investment Access (Negative List) (2019 Edition) (the "2019 National Negative Lists") and the Special Administrative Measures for Foreign Investment Access in Pilot Free Trade Zones (Negative List) (2019 Edition) (the "2019 Free Trade Zone Negative Lists"), effective July 30, 2019.

The changes reflect the country's move to further open the market to foreign investors. The 2019 National Negative Lists have reduced 48 items to 40 items, while the 2019 Free Trade Zone Negative Lists have reduced 45 items to 37 items. When 2019 National Negative Lists and 2019 Free Trade Zone Negative Lists take effect, they will remove certain restrictions or limitations on foreign investment access, having an impact on the following industries:

- exploration and development of oil and natural gas;
- exploration and mining of molybdenum, tin, antimony and fluorite;
- production of Xuan paper and Chinese ink ingot;
- construction and operation of urban gas pipe networks and heating power pipe networks;
- domestic vessel agency;
- domestic multi-party communications, store-and-forward and call center;
- development of wildlife resources originating in China and under national protection;
- cinema construction and operation; and
- performance brokerage.

The 2019 Free Trade Zone Negative Lists also lift the ban on foreign investment in fishing aquatic products in the sea areas under Chinese jurisdiction and in inland waters in the Shanghai Pilot Free Trade Zone.

Date of issue: June 30, 2019 Effective date: July 30, 2019

2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters adopted (2019 承认与执行外国民商事判决公约已谈判通过)

On July 2, 2019, the delegates of the 22nd Diplomatic Session of the Hague Conference on Private International Law adopted the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "HCCH Judgments Convention").

Under the HCCH Judgments Convention, a judgment given by a court in a contracting state (state of origin) must be recognized and enforced in another contracting state (requested state) without review of its merits, and the requested state may only refuse to recognize or enforce the judgment on limited, specific grounds.

Highlights:

- Under article 1, this convention applies to the recognition and enforcement of civil or commercial judgments, but not to revenue, customs or administrative matters.
- Article 5 recognizes several grounds of jurisdiction, without which a foreign judgment is not eligible for recognition and enforcement, according to the HCCH Judgments Convention.
- Article 7 lists the limited circumstances under which recognition or enforcement may be refused, i.e., when:
    - the documents that initiated the proceedings or an equivalent document were not served properly;
    - the judgment was obtained fraudulently;
    - recognizing or enforcing the judgment would be incompatible with the requested state's public policy;

- there is a choice of court agreement, under which the dispute was to be determined in a court of a state other than the state of origin;
- the judgment is inconsistent with a judgment given by a court in the requested state in a dispute between the same parties; or
- the judgment is inconsistent with an earlier judgment given by a court of another state between the same parties on the same matter, provided the earlier judgment fulfils the conditions necessary for its recognition in the requested state.

- Article 10 excludes punitive damages from the scope of recognition and enforcement.
- Article 11 grants the same enforceability to judicial settlements, provided they are enforceable in the same manner as a judgment in the state of origin.

As the recognition and enforcement of foreign civil or commercial rulings has mainly relied on reciprocity or bilateral treaties, adopting the HCCH Judgments Convention presents a new landscape for international judicial cooperation, which may change the advantaged position of arbitration in international dispute resolution. However, the HCCH Judgments Convention's success will depend on the extent to which states accept and ratify it.

"Unreliable Entity List" regime to be released soon ("不可靠实体清单"制度将于近期公布)

On July 4, 2019, MOFCOM's spokesperson confirmed in a press conference that the "unreliable entity list" regime is undergoing the required legal procedures and will be released soon.

On May 31, 2019, MOFCOM announced that the county will introduce an "unreliable entity list" regime under the Foreign Trade Law, Anti-Monopoly Law, National Security Law and other relevant laws and regulations. Under this regime, the foreign enterprise, organization, or individual that fails to abide by market rules, goes against the spirit of the contract, and boycotts or cuts off supplies to Chinese enterprises for non-commercial purposes, causing serious harm to Chinese counterparts' rights, will be put on the unreliable entity list and necessary measures will be taken against it.

On June 1, 2019, two MOFCOM senior officials confirmed in an interview that, when deciding whether to include an entity on the unreliable entity list, the Chinese government will consider whether:

- the entity has imposed blockades, blocked supplies, or used other discriminatory measures against Chinese entities;
- the entity's action is taken for non-commercial reasons and goes against market rules and the spirit of the contract;
- the entity's action has harmed the interests of Chinese enterprises or related industries; and
- the entity's actions are a threat or potential threat to China's national security.

However, all details of the unreliable entity list regime, including the first batch of unreliable entity and applicable restrictive measures, have yet to be announced.

We will provide an update when the details are released.

SAMR Releases Interim Provisions on Prohibition against Monopoly Agreements and Abuse of Dominance and Prevention of Administrative Monopoly (市场监督管理局发布有关禁止垄断协议、禁止滥用市场支配地位和制止行政性垄断的暂行规定)

On July 1, 2019, the State Administration of Market Regulation ("SAMR") released the Interim Provisions on Prohibition Against Monopoly Agreement (the "New Regulation on Monopoly Agreement"), the Interim Provisions on Prohibition Against Abuse of Dominant Market Position (the "New Regulation on Abuse of Dominance") and the Interim Provisions on Preventing Abusing Administrative Power to Eliminate or Restrict Competition (the "New Regulation on Administrative Monopoly") (together the "Three New Anti-Monopoly Regulations"), all effective September 1, 2019.

The Three New Anti-Monopoly Regulations are a combination of substantive and procedural rules, aiming to provide comprehensive and unified rules for the anti-monopoly law

enforcement agencies and to improve the law enforcement environment relating to transparency and predictability. The Three New Anti-Monopoly Regulations have reorganized the administrative regulations issued by the National Development and Reform Commission (the "NDRC") and former Administration of Industry and Commerce (the "AIC") (two of the anti-monopoly law enforcement authorities before the institutional reform of the State Council in 2018), covering three of the four types of monopolistic conduct provided under the Anti-Monopoly Law. The Three New Anti-Monopoly Regulations also establish the rules of jurisdiction, granting general authorization to the SAMR's provincial counterparts.

Highlights:

- New Regulation on Monopoly Agreement
    - Monopoly agreements and exemptions

      According to the literal interpretation of the Anti-Monopoly Law, the monopoly agreements stipulated under articles 13 and 14 of the Anti-Monopoly Law are illegal per se, unless they fall under the exemptions in article 15. The New Regulation on Monopoly Agreement provides, generally and without addressing the discrepancy between the literal interpretation and judicial practice, a guideline for the anti-monopoly law enforcement agency (i) to identify the seven forms of monopoly agreements listed under the Anti-Monopoly Law (including horizontal monopoly agreements and vertical monopoly agreements); (ii) to identify (at its discretion) other unlisted forms of monopoly agreements; and (iii) to determine whether the monopoly agreements under investigation fall within the article 15 exemptions.

    - Suspension procedure and commitments

      Under the Anti-Monopoly Law, during the investigation of suspected monopolistic behavior, the anti-monopoly law enforcement agency may decide to suspend the investigation if the business operator being investigated agrees to take specific measures to eliminate the anti-competitive effects of monopolistic behavior within an approved period, and depending on the circumstances, retrieve or terminate the investigation. The New Regulation on Monopoly Agreement provides more detailed procedures for suspension, retrieval and termination, specifying that this remedy is not available for suspected horizontal monopoly agreements containing clauses relating to price fixing or altering, output or sales restrictions and divisions or allocation of sales market or raw material procurement market.

- Leniency

  Under the Anti-Monopoly Law, if the business operator voluntarily reports the fact of entering into a monopoly agreement, providing important evidence to the anti-monopoly law enforcement authority, the authority may, at its discretion, reduce or waive any applicable penalties. The New Regulation on Monopoly Agreement further defines the scope of "important evidence" and the factors for the anti-monopoly law enforcement authority to consider when deciding a waiver or reduction. Specifically, this leniency treatment is subject to application, and timing is crucial: for the first, second and third applicant in an investigation case, the following exemption/reduction will apply, respectively: (i) exemption from penalties or fine reduced by at least 80%; (ii) fine reduced by 30% to 50%; and (iii) fine reduced by 20% to 30%.

› New Regulation on Abuse of Dominance

- Dominance

  The New Regulation on Abuse of Dominance specifies the five general factors provided under the Anti-Monopoly Law for determining dominance. It also establishes the factors for determining collective dominance and dominance in the internet sector and intellectual property rights area.

- Types of abusive conduct

  To give detailed and practical guidance to the enforcement authorities for finding abusive conduct, the New Regulation on Abuse of Dominance describes the types of abusive conduct provided under the Anti-Monopoly Law and defines its catch-all clause by stipulating the following constitutive elements for finding other unlisted abusive conduct: (i) the operator must hold a dominant market position; (ii) the operator must have implemented acts of exclusion or restriction of competition; (iii) the operator has no valid reason to justify its conduct ; and (iv) the conduct must have the effect of exclusion or restriction of competition in the market.

- Valid reasons
  The New Regulation on Abuse of Dominance states the valid reasons for justifying the potential abuse of dominance.

- Suspension procedure and commitments

  The procedural aspects of suspension and commitments under the New Regulation on Abuse of Dominance are similar to those under the New Regulation on Monopoly Agreement. On the substantive side, the suspension procedure applies to all potential abuse of dominance without exclusion.

- New Regulation on Administrative Monopoly

  - Violating act

    The New Regulation on Administrative Monopoly specifies the forms of violations considered an abuse of administrative power to eliminate or restrict competition under the Anti-Monopoly Law, including forcing to buy, sell or use designated products, impeding the free flow of goods, restricting bidding activities, restricting local investment or establishment of local branch, forcing operators to engage in monopolistic practices and formulating regulations containing provisions that eliminate or restrict competition.

  - Recommendations for higher administrative body

    According to the Anti-Monopoly Law, where administrative authorities and other organizations authorized by laws or regulations to administrate public affairs abuse their authority to eliminate or restrict competition, the anti-monopoly law enforcement agency may carry out an investigation and issue recommendations for the higher administrative body to rectify the infringing behavior. The New Regulation on Administrative Monopoly establishes the rules of jurisdiction and delegation of authority, specifying the procedures for these investigations and recommendations.

The Three New Anti-Monopoly Regulations also feature more publicity: the anti-monopoly law enforcement agencies are required to make a public disclosure after making decisions on administrative handling, and to disclose to the public through the National Enterprise Credit Information Publicity System information on administrative penalties under the law.

When the Three New Anti-Monopoly Regulations come into force on September 1, 2019, the following regulations will be abolished simultaneously: the Provisions on the Procedures for the Industry and Commerce Administration to Investigate and Penalize Cases of Monopoly Agreement and Abuse of Dominant Market Position, the Provisions of the Industry and

Commerce Administration on Prohibiting Monopoly Agreements, the Provisions of the Industry and Commerce Administration on Prohibiting Abuse of Dominant Market Position, the Provisions on the Procedures for the Industry and Commerce Administration on Preventing the Abuse of Administrative Power by Excluding or Restraining Competition, and the Provisions of the Industry and Commerce Administration on Preventing the Abuse of Administrative Power by Excluding or Restraining Competition.

Announcement on the applicable category for certain taxable income subject to individual income tax (关于个人取得有关收入适用个人所得税应税所得项目的公告)

On June 13, 2019, the Ministry of Finance and the State Administration of Taxation jointly released Announcement [2019] No. 74 to clarify the applicable category for certain taxable income when filing individual income tax ("IIT").

The highlights:

The old IIT Law, prior to 2019, provided 11 taxable income items subject to IIT under the category "other income". The new IIT Law cancelled this category and consequently the policies on these incomes need to be adjusted accordingly. With this purpose, this Announcement was released:

- Some items were placed under the category "random income", considering their random nature. Their tax rate is 20%, the same as "other income" under the old IIT Law, so the tax burden remains the same.

  These items include:

  - Income for providing guarantees to companies and individuals;
  - Income from property donated by the property owner (exempt if donated to direct relatives, people with supporting obligations and heirs);
  - Gifts (including network red envelopes) to individuals outside the company during promotion and advertisement activities, and other events like annual dinner, forum and celebration (except discount vouchers).

- Pension income from tax deferred commercial pension insurance was placed under the category "salary and wages" within comprehensive income.

However, the Announcement maintained the tax preferential policy on such income, i.e., 25% of it is tax exempt, and the remaining 75% is taxed at 10%.

- The Announcement abolished the policies on the remaining items to keep up with economic and social development.

Date of issue: June 13, 2019 Effective date: January 1, 2019

Contact

Omar Puertas

Partner
omar.puertas@cuatrecasas.com

Cuatrecasas
Shanghai office

20 F Shui On Plaza,
333 Huai Hai Middle Road
Shanghai 200021, PRC
+86 21 2327 7000
+86 21 2327 7007
shanghai@cuatrecasas.com

Pablo Cubel

Partner
pablo.cubel@cuatrecasas.com

Cuatrecasas
Beijing office

15/F Parkview Green, Tower B,
9 Dong Da Qiao Road
Beijing 10002, PRC
+86 10 5651 0200
+86 10 5651 0268
beijing@cuatrecasas.com