

China's Foreign Investment Law – What's Ahead? [1]

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The new Chinese Foreign Investment Law will eliminate the familiar distinction between foreign-invested enterprises (FIEs) and locally-owned companies in terms of their legal structure. While the new law seems to bring about greater cohesion and further encourages foreign investors in China, some questions arise.

On 1.1.2020, China's new Foreign Investment Law (FIL) will enter into force. The FIL will replace the existing regime of 3 laws regulating FIEs in China.

[2]

We would like to focus on some major changes and questions raised by the FIL.

1. The corporate form is no longer determined by shareholders' national identity

This means that the distinct legal structures of Wholly Foreign Owned Enterprise (WFOE) and Equity Joint Venture (EJV) will be gone, with all companies being subject to the Chinese Company Law.

In practice, foreign and Chinese investors will benefit from greater flexibility in purchasing corporate equity and corporate governance will become less rigid, for example eliminating the requirement for unanimous board approval on "hard" decisions.

2. A 5-Year adjustment period for existing entities

The FIL will allow existing WFOEs, EJVs and CJVs (Cooperative Joint Ventures) to continue holding their current structure until 1.1.2025.

3. National treatment to foreigners beyond the Negative List

While the Negative List prohibiting or restricting foreign investments in certain industries remains, it was shortened. In industries unmentioned on the List, foreign-invested and locally-owned companies should enjoy at least the same national treatment. On the provincial level, two regulatory documents recently published in Shanghai further demonstrate the official policy of removing local regulatory barriers placed on foreigners in non-restricted industries.

[3]

4. A ban on government-forced transfer of technology

This ban is not new and seems to have been drafted to answer US concerns in the trade war negotiations.

Some questions also arise:

1. Gaps and uncertainties

The FIL is extremely short (42 articles), with even the aforementioned Shanghai regulations being mostly declaratory in nature. Much remains in the dark and we will have to wait for implementing rules to see how the FIL will actually be implemented.

2. Will MOFCOM registration be abolished?

Under the previous regime, FIEs had to register with the Ministry of Commerce (MOFCOM). It is unclear whether this would continue.

3. What will happen to Variable Interest Enterprises (VIEs)?

VIEs are elaborate contractual arrangements currently used by certain foreign investors who wish to operate

in restricted industries and Chinese companies operating in these industries who wish to be able to list on foreign stock exchanges. In the past, Chinese courts deemed the VIE structure illegal, and yet the FIL remains silent regarding VIEs. However, implementing rules might change this.

In summary, much of the FIL's practical implications depend on its implementing rules and it is highly recommended to follow future developments. Meanwhile, there is ample work for lawyers in amending the incorporation documents and restructuring current FIEs to comply with the FIL.

[1]
For a more detailed version of this article please refer to Lichtblau, Z. (2019). **China's New Foreign Investment Law – No more JVs and WFOEs - Now what?**. [online] LinkedIn.com. Available at: <https://www.linkedin.com/pulse/chinas-new-foreign-investment-law-more-jvs-wfoes-now-lichtblau/> [Accessed 12 Oct. 2019].

[2]
Law on Wholly Foreign-Owned Enterprises; Law on Sino-Foreign Equity Joint Ventures Law on Sino-Foreign Cooperative Joint Ventures.

[3]
See: **Several Opinions of the Shanghai Municipal People's Government on Further Promoting Foreign Investment** [effective since 16.9.2019]; **Decision of the Standing Committee of the People's**

Congress of Shanghai Municipality on Several Issues concerning the Implementation of the Foreign Investment Law of the People's Republic of China [will become effective on 1.1.2020].