Legal and Economic Aspects of Chinese 'One Belt One Road' Investments Into Europe Via the Netherlands

The Chinese Belt and Road Initiative focusing on trade and investment from China into Europe is bound to inspire Chinese investors and their legal counsel to scrutinise EU competition and harmonisation law in combination with corporate and tax law of the EU and the respective EU member states.

Introduction

In October 2017, President Xi JinPing in his opening speech at the 19th Congress of the Communist Party of China highlighted the ambitious plans of the People's Republic of China ('PRC' or 'China') to expand its new Silk Road to Europe, also named as 'One Belt One Road', abbreviated to 'OBOR'.

A command of the competition law and harmonisation law of the European Union ('EEC law') is vital for attorneys advising Chinese investors in regard to their European inbound investments in capital markets, private companies and real estate. EEC law is extensive and detailed, even for lawyers specialised in this domain. This article describes the macro-economic and legal backdrop against which Chinese investments should be perceived, from a Dutch/EU perspective.

Economic Data

To start with, the economic parameters of trade and investment flows between the PRC and the EU, as reported by the EU's statistical bureau Eurostat (http://ec.europa.eu/eurostat) for the calendar year 2015, as reported on 12 June 2016, are summarised below.

Imports from the PRC to the EU totalled €350.5 billion, and the breakdown of this figure was as follows: primary goods €8.1 billion (of which food/drink was 4.8, raw materials 2.9 and energy 0.4), manufactured goods €341 billion (chemicals 12, machinery and vehicles 176, other manufacturers 149) and others €1.3 billion.

Exports from the EU to the PRC totalled €170 billion, resulting in an overall trade deficit (for the EU) of €180.5 or approximately 50%.

The ranking of EU countries for China ('CN') imports into Europe was: Germany €69 billion, The Netherlands ('NL') €66 billion (primarily due to its trans-shipment function towards the European hinterland), UK €55 billion, France €28 billion and Italy €27 billion.

The Chinese Ministry of Commerce for the period January to September 2016 (www.countryreport.mofcom.gov.cn) reported a combined export and import volume NL/CN totalling $57.7 billion, a decrease of 4.6% compared to 2015. Exports from NL to CN during this period were $8.33 billion, with an increase of 12%. Imports from CN to NL were $49.35 billion, a decrease of 6.9%. The trade deficit was $41.01 billion, a decrease of 10%.

Goods exported to China are mainly: electronics, food, drink, tobacco and watches. Imports into EU from China consist of a wide range of manufactured and raw materials. The major competitors in Europe of China are Germany, United States and Japan. China stays competitive in labour-intensive sectors such as furniture, toys and textiles.

Many leading and midsized Chinese corporations have located their European headquarters, marketing and sales forces, customer care centers and assembly and repair activities centres in NL due to its geographical, logistical and organisational gateway function to the heart of Europe. Rotterdam is the largest container seaport in the EU and Schiphol airport ranks number 3 in the EU (2016).

Sectors such as electronics, automotive and aviation are heavily represented by Chinese investments. In the Dutch high tech industry, outbound investment from NL to the PRC focuses on environmental techniques, food processing and agriculture techniques. The main motivating factor behind such investments is 'technology transfer' sought by Chinese companies, rather than market expansion.

NL ranks number 3 (2015) on the European index of Gross National Product, the most prominent indicator of prosperity and wealth.

The Dutch Government, within the parameters of EU legislation actively promotes and encourages research and development through expansive subsidies and tax credits.

Market Access to Investment

There is no EU agency that generally supervises, let alone approves, foreign direct investment ('FDI') from outside the EU, but each EU member state is allowed to operate an approval system as long as it does not distort the intra-EU community free flow of capital. The Dutch typically scrutinise FDI in the domains of national security, sea and airport infrastructure, nuclear energy, military equipment and IT/telecommunications and also in all domains all goods originating from the United Nations and OECD blacklisted countries.

NL pursues a completely non-discriminative treatment of FDI shareholding in Dutch companies and allows the appointment of non-residents of NL and non-Dutch nationals to the management or supervisory board of directors, capital contribution and repayment, cross-border debt borrowing and lending and for repatriation of dividend (profit), royalties and management fees.

All public procurement of goods and services by the government in each EU Member State must undergo a EU-wide public tender published in the EU journals, although only above certain thresholds, for example, for supplies under defence contracts to the central government of each member state–the EU threshold (in the year 2016) for defence was €135,000, for non-defence €209,000, for works contracts in general €5,225,000, for water, energy, transport and postal services €418,000. So most of the significant public procurement is tendered.

Foreign Exchange Control

Several EU countries have some form of foreign exchange control on inbound investment or trade payments. NL only requires reporting, for purely statistical purposes, to the Dutch Central Bank ('DNB') of transactions in excess of €25,000.

Also, it should be noted that the 2005 EU Directive 2005/60/EF on Anti-Money Laundering requires all financial service providers (including attorneys) to report so called 'unusual transactions' to the domestic Financial Intelligence Unit ('FIU') agencies.

Competition Law

European competition policy under the EU Treaty on the Functioning of the European Union ('TFEU') is a vital part of the EU internal market aiming at the optimal allocation of production means and locations, lowest price-setting and free flow of goods and services within the entire EU internal market. EU competition legislation and case law (from the European Court of Justice) originating from the 1950s forms a comprehensive set of rules that restrict the abuse of a dominant position of companies by limiting concentration and establishes a level playing field among the market participants by prohibiting state aid, import tariff and non-tariff barriers, cartels and price fixing.

Dutch domestic competition law is greatly inspired by EU law and is, to a great extent, replaced by it, above EU thresholds including merger control for a €5,000 million (combined) turnover worldwide and a turnover of €250 million EU wide.

Competition law is excluded (the so called '*de-minimis*' threshold) in the event of less than 10% of the total relevant market share and if less than eight companies are involved with a combined annual turnover not exceeding €5.5 million (for supply of goods) or €1.1 million in all other cases.

Forms of Investment

FDI can vary from a non-capital cooperation to shareholders' equity investment. The 'light' versions are commercial agency (1986 EU Directive 86/653/EC) implemented in national law, for example, regulating goodwill compensation at termination and, second, distributorship which falls under the EU Vertical Restraints Regulation regarding interstate restrictions such as price fixing. Few EU member states (including Belgium, not NL) have national legislation on distributorship protecting the distributor when terminated.

The 'heavy' versions of FDI are the branch (a non-independent part of the foreign 'parent') and the incorporated limited liability companies ('Ltd.'s', in NL 'Besloten Vennootschap', abbreviated to 'BV') which are harmonised under several EU Directives, allowing member states within limits to create their own versions, such as the Dutch 'Flex BV' introduced in 2010 with innovative options like non-voting and non-profit shares and a minimum paid-up equity of €0.01.

The Dutch public company ('NV') alternative is not suitable for most FDI. Establishment of a BV must be done by a deed executed by a civil law notary, a specialised lawyer. No approval for incorporation is required from the Dutch State.

In NL there is no legal entity version for FDI similar to the Chinese Wholly Foreign Owned Enterprise ('WFOE') and the Sino-Foreign Equity Joint venture ('SFEJV').

The corporate data is lodged with the Commercial Register which is publicly accessible through www.kvk.nl.

Finance Rules

The Dutch Financial Services Act appoints DNB to license and supervise all financial institutions (such as banks) and the Autoriteit Financiële Markten ('AFM') for the monitoring of capital markets.

EU 'passports' from the European Central Bank ('ECB') in Frankfurt simplify obtaining branches of financial institutions in each EU member state.

Investment funds comprise two versions under the 2011 EU Directive 2011/61: Undertakings for the Collective Investment in Transferable Securities ('UCITS') and Alternative Investment Fund Managers ('AIFM').

In NL, public offerings of shares are prospectus-free if offered to no more than 150 natural or legal persons or if the nominal value per share is below €100,000.

Mergers and Acquisitions (M&A)

The popular alternative to a green field investment is the acquisition of a going concern or the statutory merger of the shares or the assets of two existing companies, abbreviated to 'M&A'. A cross-border statutory merger with a non–EU company is not permitted. So, a PRC company is not eligible for a merger, unless it first creates an EU subsidiary as its EU merger vehicle.

The process of an acquisition of shares (or assets) is in line with international standards, such as non-disclosure agreements, letters of intent, memoranda of understanding, due diligence, share purchase agreements and share transfer agreements (only by notarial deed) and escrow of purchase price. Dutch documents are typically far more brief than Anglo-American style documents.

Real Estate

In NL there are no nationality or residence based restrictions in regard to ownership of real estate. Transfer of property is solely by notarial deed. The public land registry can be relied upon as to ownership entitlement.

Tax

EU tax rules and regulations have a substantial effect on domestic tax legislation which however retains its sovereignty regarding the tax rates and the sorts of taxes (mainly Corporation tax, Income tax, Inheritance tax). Value Added tax (VAT) is however harmonised within the EU due to frequent inter-state transactions, but the rates differ per country.

In NL there are special regimes for foreigners, for example 30 percentage points reduction of Income tax, and bonded warehousing for customs and VAT. Corporate tax is 20 to 25% (for profits above €400,000). Dividend withholding tax (15%) is lowered to a 5% source tax in the treaty CN/NL but can be lowered even to 0% by interposing a Dutch cooperative. The source tax between NL and Hong Kong is 0%. However, the government may abolish the dividend tax altogether as of 1 January 2018, both for foreign and domestic shareholdings.

Immigration

For work and a stay of longer than three months, a stay permit 'Machtiging Voorlopig Verblijf' ('MVV') must be applied for from the Dutch embassy in Beijing, the consulates in Shanghai, Guangzhou, Chongqing and a number of dedicated agencies in second-tier cities in China. For work, the most popular method is to obtain a MVV, the so-called 'highly-skilled' or 'Knowledge Migrant' ('KM') procedure. The KM employee must hold a Dutch employment contract for an indefinite period at a gross monthly salary of at least €3,170 for ages below 30, €4,342 above the age of 30 and €2,272 if graduated in NL. The employer must obtain a KM sponsor licence from the Dutch Immigration Authority ('IND'), if it has existed less than 18 months or has less than 50 staff. The employer must draw up a business plan. One-time KM sponsor licence costs for an unlimited number of KM workers are €5,276 or €2,638 for a start-up company.

The 2013 Modern Migration Policy Regulation ('MoMi') of IND simplifies residence procedures into one single application.

A 'golden visa' is available for wealthy migrants with a personal capital of over €1,250,000 in cash or who have invested in their own company or in real estate or in qualified investment funds.

Labour Law

NL labour law is comprehensive and changes fairly often reflecting labour market conditions, new notions of cooperation within trade and industry and the general state of the economy.

Summary

The Netherlands is an obvious intermediate or final destination for OBOR investments from China, due to its logistical position in Western Europe and historic economic ties with China.

Becoming familiar with EU and Dutch law, albeit through professional lawyers, is crucial for Chinese OBOR investors.

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