Five To-Dos until X-mas 2024

What your shareholders, CEO, CFO and DPO need to know

The year 2024 brought many regulatory changes for foreign-invested companies in the People's Republic of China ("PRC" or "China").

To prevent that the most urgent legal changes will be forgotten in the busy pre-X-mas season, we have compiled the below five to-dos, which you and your colleagues shall address before X-mas.

1) Revised PRC Company Law - with obligatory amendments

On July 1, 2024, the revised PRC Company Law with over 100 articles being added or amended took effect. Below are examples of the most important amendments that CFOs and shareholders should be aware of:

1. **Contribution of registered capital**:
    - New companies established after July 1, 2024, have a maximum 5-year period for registered capital contribution.
    - For companies established before July 1, 2024, a transitional period of 3 years applies (until June 30, 2027), if their registered capital has not yet been fully paid in and the contribution period in their Articles of Association exceeds 5 years.
2. **Company structure**:
    - Many companies have one or two supervisors to prevent employee representative in supervisory board. As of July 1, 2024, two supervisors are no longer permitted.
    - Small scale companies may abolish the supervisory board.
    - For companies with at least 300 employees, an employee representative in the board of directors is required, unless already appointed in the supervisory board.
3. **Early payment of capital contributions**:
    - In case the company has insufficient funds to pay creditors' claims, the company or its creditors may require shareholders for premature capital contribution.

What your shareholders need to do:

- **Review and amend Articles of Association**: To verify and, if legally required, adjust the registered capital contribution period or the registered capital amount.
- **Analyze and update company structure**: Check whether the supervisory board is desired to maintain "four-eyes-principle" or can be abolished.

What your CFO needs to do:

- **For 2025 budget planning**: Check outstanding registered capital of the company and its contribution period. Consider possible early payment of registered capital in the 2025 budget.

For detailed information (in German) please refer to our article: [Große Novelle des Gesellschaftsgesetzes der VR China]

2) Foreign Investment Law - End of transition period for amending JV structures

The Foreign Investment Law (FIL) came into effect on January 1, 2020, resulting in the abolition of the "three Joint Venture (JV) laws" and the "old JV company structures".

Investors who have established a JV with a Chinese partner in China prior to January 1, 2020, must, if they have not already done so, amend their JV's Articles of Association and other incorporation documents within a 5-year transition period ending on **January 1, 2025.**

Failure to register any necessary amendments may result in your JV not being able to register any changes related to the registered capital, board of directors, legal representative, etc. in the company register.

What your CEO needs to do:

- **Review the JV establishment documents**, including the provisions on the powers, duties and voting rights of the board of directors, legal representative, the statutory reserve and the distribution of profits, and if necessary,
- **Require the shareholders to adjust the documents accordingly**.

3) CAC Measures on Promotion and Regulation of Cross-border Data Transfer - Exemptions for cross-border data transfer

On March 22, 2024, the Provisions on the Regulation and Promotion of Cross-border Data Transfer ("CAC Provisions") entered into effect. The CAC Provisions contain the long-awaited exemptions for personal information cross-border transfer and represent a relaxation of the strict regime under the PRC Personal Information Law ("PIPL").

While some companies in China have adopted a "wait and see" approach, waiting for implementation regulations and exemptions to the PIPL, others have proactively implemented compliance measures, such as concluding standard contracts with the overseas recipient of personal information.

As the authorities recently enforce the PIPL more strictly, companies shall take the necessary measures to ensure their data protection compliance.

What your Data Protection Officer (DPO) needs to do:

- **Conduct data categorization/quantification**: Analyze and categorize the types of personal information processed and provided abroad as a basis for the next steps.
- **Verify the exemptions applicability**: Evaluate whether your data transfers meet any of the specified exceptions for cross-border transfers under the CAC Provisions.
- **Enter into CAC standard contract**: If none of the exemptions apply, consider entering into the CAC standard contract with your HQ in Austria and adopt other compliance measures.

For more information on requirements on cross-border data transfers under Chinese law, please see the following articles:

- Article (in English): [Cross-Border Data Transfer: How to Transfer Your Data Out of China];
- Article (in German): [CAC-Bestimmungen zur Regulierung und Förderung des grenzüberschreitenden Datenverkehrs – Echte Erleichterungen des strengen Datenschutzregimes für KMU in China?]

4) Fair Competition Review Regulations – End of Subsidies for (foreign) Investors?

On August 1, 2024, the "Regulation on the Review of Fair Competition" ("Regulation") came into force, which generally prohibits all forms of benefits, incentives and subsidies to certain enterprises that do not have a legal basis in laws or regulations or approval by the State Council ("Subsidies").

According to the Regulation, investment contracts concluded with local governments, in which the Subsidies have been agreed or will be agreed in the future can be now reviewed for fairness and, if necessary, declared invalid. As a result, all companies in China run the risk of not receiving the agreed Subsidies or even being required to refund the Subsidies or tax refunds they have already received.

The Regulation, which was issued by the State Council, and therefore has a higher status than previous regulations, as well as the first cases from official practice show that the Regulation will most likely be enforced in practice and will have a significant practical impact on the budgets of (foreign-invested) companies in China.

What your CFO needs to do:

- **Review your investment agreements:** Examine your existing investment agreements to determine whether your Subsidies have a legal basis.
- **Prepare for 2025 budget adjustments:** Be prepared to adjust your financial budget for 2025 in case of changes in local government policies or denied financial support.

Should you wish to receive more information on this topic, please follow our [LinkedIn profile] or send us an email at info@bktlegal.com to receive our newsletter with more details.

5) Increased D&O Liabilities under PRC Criminal Law and PRC Company Law

The revised PRC Criminal Law, which entered into force on March 1, 2024, expands the scope of specific crimes previously applicable only to state owned enterprises (SOE) to private companies and introduces stricter penalties for corruption crimes in the private sector.

Together with the amended Company Law, which specifies and tightens obligations of directors, supervisors and managers, the new Criminal Law significantly increases the liability risks of such persons.

What your Directors and Officers (D&O) need to do:

- **Review your D&O insurance:** Assess your Directors and Officers (D&O) insurance policy to ensure it adequately covers the increased risks associated with the new provisions under both Company Law and Criminal Law.
- **Educate leadership teams:** Conduct training sessions for Directors and Managers to raise awareness of the new legal responsibilities and the potential consequences of non-compliance.

- **Implement compliance measures:** Strengthen internal compliance and governance frameworks to minimize the risk of misconduct and ensure in employee trainings that all employees understand their legal obligations.

For more information on the revised PRC Criminal Law, please refer to our article (in German): Novellierung des Strafgesetzes in China

Should you require our support during the implementation of the above to-dos, please do not hesitate to contact Burkardt & Partner, your legal counsel in China, anytime!

Contact:

Rainer BURKARDT, Head of Practice & Executive Counsel

E-MAIL r.burkardt@BKTlegal.com

MOBILE +86 186 1687 7153
PHONE +86 (21) 6321 5157