The socialist rule of law with Chinese characteristics

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- The Fourth Plenum vows to ensure justice and increase autonomy in the legal system
- The party, however, will retain its full and overriding control of the legal and judicial system
- The cost of keeping a judicial efficacy and an effective party scrutiny could be very high

Fundamentals
The CCP’s Fourth Plenum was concluded yesterday with a communique to call for a series of legal reforms, broadly in line with what we outlined in our preview report, Legal reform with Chinese characteristics, on 11 September. More plenum announcements are due in the next few days.

The reforms will seek to ensure justice and increase independence in the court system and raise the awareness for the country to abide by rules. The role of the National People’s Congress will be enhanced to help oversee the implementation of the constitution. The Supreme People’s Court will set up circuit courts and look into establishing courts and procuratorates that cross lower-level jurisdictions. It will also seek to allow prosecutors to file class action-style lawsuits in the public interest.

However, the country is by no means moving to Western-style concepts of constitutionalism and separation of 3 powers. The CCP will retain its overriding role in the drive for “the socialist rule of law with Chinese characteristics”.

The Third Plenum spelled out the importance of allowing the market to play a “decisive” role in the economy, while avoiding any political or constitutional reforms. The Fourth Plenum has followed in a similar spirit, focusing on just how to enhance the quality of the party’s governance. In a typical market-driven Western political model, however, the government or courts provide institutional services, such as protecting property rights from being violated and guaranteeing fair market competition. This can help reduce “transaction costs” in the market, making it easier to do business and reducing the risk premium for investors. In China, such a premium has been very high.

It is still highly uncertain whether this new model will work effectively. Under this, the government would give up the ability to intervene in all but the most sensitive cases, in theory removing state interference from the vast majority of court cases. This would be conducive to the functioning of market forces. We believe the new model will see:

- a civil service that is checked by a more autonomous judiciary (helping to address corruption issues);
- a more autonomous judiciary but still under full party control;
- a more powerful body fighting corruption, ie, the Central Commission for Discipline Inspection;
- no clear separation between the party and the government; and
- no other checks and balances beyond the existing party apparatus.

How this model will work in practice is very uncertain. As the CCP tries to strengthen the legal system, how does it balance the need to maintain the party’s authority and promote judicial independence? How would a court write its verdict if there were a legal dispute between a foreign investor and a central SOE, or even a senior party member? Is there a role for the fourth power to play?

Can market forces work effectively in an environment where legal power remains highly centralised? If judges’ power is being scrutinised by the CCP, who is going to scrutinise the party then? Under this system, the costs of maintaining a judicial efficacy and an effective party scrutiny could be very high from an economic standpoint.

These are just a few from a long list of questions we anticipate from investors’ viewpoint. As with President Xi’s ongoing attempts to rejuvenate the nation and clean up corruption, the efficacy of legal and judicial reforms hinges on the question of how far he is willing to go, how far he is allowed to go, and whether that will be sufficient to result in lasting fundamental change. Most global investors have faith only in a legal system compatible with Western practices, especially in terms of full judicial independence and complete separation of the 3 powers. The burden, therefore, is on China to prove otherwise.
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