

# GUIDE TO MERGERS & ACQUISITIONS IN CHINA AND GERMANY

## VOLUME I: M&A IN CHINA – CHINESE CONTRIBUTION

Legal

Supported by the German Federal Ministry  
for Economic Affairs and Energy  
and the PRC Ministry of Commerce



GERMANY  
TRADE & INVEST



## CONTENT

<b>Section A</b>	<b>1</b>
<b>Mergers and Acquisitions in China and Germany</b>	
Preface	2
Top 10 Specifics Germany and China	4
Top 10 Specifics Germany	4
Top 10 Specifics China	6
<b>Section B</b>	<b>9</b>
<b>Mergers and Acquisitions in China - Chinese Contribution</b>	
<b>I. M&amp;A Environment</b>	<b>10</b>
1. Investment Climate	10
1.1 China (Shanghai) Pilot Free Trade Zone	11
1.2 Expansion of Free Trade Zone	12
2. Industrial Policy	13
3. M&A History	14
4. Forms of Business Establishments	15
4.1 Overview of Forms of Business Establishments	15
4.2 Organizational Structure	17
4.3 State-invested Enterprises	22
5. Legal Framework	23
5.1 The PRC Legal System for Foreign Investment	23
6. Taxation (General)	25
6.1 Overview of M&A-related Taxes	25

## MERGERS & ACQUISITIONS IN CHINA AND GERMANY

7. Foreign Investment Access and Regulation	28
7.1 Catalogue for Guidance of Foreign Investment Industries	28
7.2 “Negative List” Model Adopted by FTZs	29
7.3 Approval and Registration Requirements for Foreign M&As	30
7.4 Anti-monopoly Review of Concentration of Undertakings	31
7.5 M&A Security Review	39
8. Relevant Government Authorities	43
8.1 Major Government Authorities Relating to Foreign M&As	43
8.2 Assistance to Foreign Investors	45
8.3 Protection for Foreign Investors	45
8.4 Environmental Protection	46
9. Overview of the Process for M&A in China	47
10. M&A Structure: Share Acquisition and Asset Acquisition	49
<b>II. M&amp;A Transaction - Share Acquisition</b>	<b>52</b>
1. Acquisition Strategy and Identification of Targets	52
1.1 Acquisition Strategy	52
1.2 Reasons for Sale	52
1.3 Who could provide Assistance - Acquisition Team	53
2. Preparatory Activities	56
2.1 Transaction Structure	56
2.2 Transaction Structuring	60
2.3 Methods of Payment of Consideration	62
2.4 Special Requirements for Capital	63
3. Due Diligence	65
3.1 General Introduction	65

## MERGERS & ACQUISITIONS IN CHINA AND GERMANY

3.2 Corporate Information and Government Approvals	68
3.3 Finance and External Financing	70
3.4 Assets	71
3.5 Intellectual Property	73
3.6 Major Contracts	75
3.7 Taxation	76
3.8 Human Resources and Labor	76
3.9 Environment	78
3.10 Lawsuit, Arbitration and Administrative Punishment	79
4. Valuation - Qualifications and Requirements	80
4.1 Approaches for Asset Valuation	80
4.2 Valuation of State-Owned Assets	82
5. Contractual Documents	83
5.1 Essential Transaction Documents	83
5.2 Third Party Consent	86
5.3 Liabilities	87
5.4 Execution	88
6. Approvals, Record Filings and Registrations	89
6.1 Approvals, Record Filings and Registrations Required	90
6.2 Application Documents	93
7. Closing	93
7.1 General Introduction to Major Governmental Formalities for Completing a Transfer of Equity Interests	93
7.2 Foreign Exchange Registration	94
7.3 Capital Contribution Certificate	95
7.4 Post-closing Integration	95
8. Taxation	97
8.1 Enterprise Income Tax	97
8.2 Stamp Tax	98

<b>III. M&amp;A Transaction - Asset Acquisition</b>	<b>99</b>
1. General Procedure for Asset Acquisition	99
2. Transaction Documents	101
3. Valuation	101
4. Taxation	102
5. Signing and Closing	103
5.1 Signing	103
5.2 Closing	104
Annex I: Abbreviations	112
Annex II: Major Power and Duties of Corporate Organs	114
Annex III: Legal Framework for Foreign Investment	117
Annex IV: Contact Information of Investment Promotion Agencies	119
Annex V: Essential Terms in EJV Contracts, CJV Contracts and AOA's	132
Annex VI: Application Documents for Share Acquisition	136

# Section A

## **Mergers and Acquisitions in China and Germany**

**Preface**

**Top 10 Specifics Germany and China**

## Preface

The “Guide to Mergers & Acquisitions in China and Germany” (“Guide”) was developed in several years of work by the Working Group on Legal Issues of Trade and Economic Cooperation for the Sino-German Joint Economic Commission.

In the Ministers’ Joint Declaration of 26 May 2013, the Ministry of Commerce (MOFCOM) of China and the German Federal Ministry for Economic Affairs and Energy emphasized their mutual interest in the preparation of this publication, which was seen as a further instrument for the promotion of investments on both sides.

The publication is officially recommended for use by the relevant business circles.

The Guide has been designed in two parts intended for the respective target groups in the two countries. Volume I addresses German investors envisaging the acquisition of shareholdings or assets in China. It was prepared by the Chinese Delegation. Volume II addresses Chinese enterprises contemplating investments in Germany by way of the acquisition of shareholdings or assets. This part of the Guide, focusing on investments in Germany, was prepared by members of the German Delegation, i.e. representatives of enterprises and associations (including VDMA) with a track record of longstanding experience with business in China. In the process of redacting the two Volumes, the opinions of relevant enterprises and associations from both countries are solicited. While Volume I appears in English, Volume II is presented in a bilingual English and Chinese version so as to be accessible to as many Chinese readers as possible.

Both volumes contain, in a common section A, a preface as well as an introductory survey of the most important features of the respective target country as detailed in the text section of the Guide. Section B describes the legal, administrative and economic characteristics of the respective country.

The development of German investments in China since their beginning in the early eighties has now reached a stage where it is much more frequently the case that German investors acquire shareholdings in or assets of Chinese companies, rather than establishing “greenfield foreign invested enterprises” alone or together with a Chinese partner. In recent years Chinese investment interests abroad, notably in Germany, have undergone an enormous development

spawning a steadily increasing number of projects where Chinese investors acquire shareholdings in or assets of German enterprises in order to take over the relevant companies in Germany or to participate in their management.

The present publication was created in the parties' common intent of assisting in this new stage of German investments in China and in the positive development of investments by Chinese companies in Germany, and of providing investors with guidelines for the structure of the associated transactions. In light of the features of the investment environment in each country, the Guide covers the issues of common concern to investors, focuses on the legal framework relating to M&A activities, and introduces the process and caveats for equity M&A and asset M&A separately.

Foreign investment is an important part of China's fundamental state policy of opening up. In order to adapt to the trend of economic globalization, China is speeding up the construction of an open economy, unifying the laws and regulations applying to domestic and foreign investment, and further relaxing the restrictions on foreign investment. China's legal system on foreign investment will also go through great changes. In January 2015, the Ministry of Commerce, P.R.C. published the *Foreign Investment Law of the People's Republic of China (Draft for Public Opinions)* in its official website to solicit public opinions. The Draft, referring to the common international practices, adopts the approach of negative list for foreign investment administration, constructs uniform administration for the market access of foreign investment as well as supervision in the post-market access stage, improves the regime for national security review, and reinforces the investment promotion and protection, so as to create a more stable, transparent and predictable legal environment for foreign investors to invest in China.

The German and Chinese delegations trust that this Guide will contribute to the facilitation and simplification of M&A transactions in their respective jurisdictions.

The Working Group  
on Legal Issues of Trade and Economic Cooperation  
under the Sino-German Joint Economic Commission

# Top 10 Specifics Germany and China

## A. Top 10 Specifics Germany

1. Germany welcomes Chinese investment. Foreign investment is subject to very few restrictions, only (see Section I. 9.1.1 and Section I. 9.2), such as for sensitive (mainly military) sectors and in very few other cases also for non-sensitive sectors.
2. The legal vehicle most commonly used for foreign investments in Germany is the limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*). Agreements for the transfer and assignment of shares in a German *GmbH* require notarization in front of a German notary public.
3. Company's management personnel or directors can also have other nationality than German. To hire and train competent, reliable and appropriate management personnel to be working abroad should be the task prior to the strategic tasks of Chinese enterprises planning to undertake any M&A transaction in Germany.
4. With a few exceptions, such as in the banking sector where specific business licenses are required, generally, companies in Germany do not need a Government approved business license, but are free to operate for as long as they do not operate unlawfully.
5. With the exception of certain approvals (such as under cartel law and for national security), M&A in Germany as such does not require administrative approvals for being permissible and effective (see Section II. 4.4).

6. M&A transactions as such are not subject to approvals from trade unions or other employees associations. Still, German labor law foresees certain rights for company work counsels to involve and to discuss the company's business matters, which involvement, has proven over the past to help building a stable and harmonious relationship between the employer and the employees.
7. Complex German tax law requires aside accurate tax due diligence procedures, a customized acquisition structure. Therefore, tax advice should be sought early in the process.
8. Timing – M&A-Process, in particular auction processes in Germany often require quick decision.
9. Like in other jurisdictions an asset deal allows to specifically select assets and liabilities while the share deal is less complex (please refer to Section I. 8) .
10. Real Estate – ownership of land in Germany is different from China (please refer to Section III. 1.3.2).

The difference in cultural and transactional practice may be challenging for investors.

## B. Top 10 Specifics China

1. China welcomes foreign investment and foreign M&A. The legal regime in these respects is continuously liberalized.
2. China established Pilot Free Trade Zones (“FTZ”) in Shanghai, Guangdong, Tianjin and Fujian to further reform and open up, and in particular to deepen administrative system reform and to expand the opening up in the area of investment and trade (see Section I.1.1 and Section I.1.2).
3. M&A of domestic companies by foreign investors are generally subject to approvals, examinations and registrations requirements (see Section I.7.3, Section I.8 and II.6). The M&A transaction and certain transaction documents (including share transfer agreement , joint venture contracts, Articles of Associations, etc.) will become effective upon approval by the Ministry of Commerce (MOFCOM) or its local counterparts (see Section II.7.1).
4. Any foreign direct investment in China, either by way of greenfield investment or M&A transaction is subject to the *Catalogue of Guidance of Foreign Invested Industries* (“Industrial Catalogue”). The latest version of the Industrial Catalogue as amended in 2015 has significantly reduced the numbers of restricted industries and further liberalized the market entry for foreign investments (see Section I.7.1). The Company's/Target's Business License and sometimes qualification permits or licenses for certain businesses play an important part of the deal as it defines the allowed/in-scope business activities.
5. China has established an anti-monopoly review regime for concentration of undertakings. Any M&A transaction that meets the statutory notification thresholds is required to be notified to MOFCOM for anti-monopoly review (see Section I.7.4). A national security review regime on M&A of domestic enterprises by foreign investors is also established (see Section I.7.5).

6. M&A Transactions involving State-invested Enterprises (SIEs) or state-owned assets are required to comply with certain mandatory requirements and procedures, including approval from the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) or its competent local counterparts, mandatory valuation, minimum transfer price, and undertaking public auctioning process (see Section I.4.3, Section II.4.2 and Section II.6.1.3).
7. Like in other jurisdictions, foreign investors are permitted to structure M&A transactions in China through either share acquisition or asset acquisition. Upon approval, the domestic company acquired by foreign investors through share acquisition will be formed as a foreign-invested enterprise (FIE). Under the assets acquisition, foreign investors shall establish an FIE to operate the acquired assets (see Section I.10).
8. A careful due diligence review is important. Certain legacy risks uncovered in due diligence exercises (such as on tax, employees, missing or incomplete licenses and permits) should be taken into consideration when defining the appropriate deal structure (asset deal or share deal) (see Section II.3).
9. Under both share acquisition and asset acquisition, foreign investors are required to pay consideration within the statutory time limit (see Section II.2.3.1).
10. Under asset acquisition, the requirements and procedures for the transfer of titles of different types of properties vary. The transfer of employees is implemented via termination/rehire (possibly using a tripartite agreement) and may trigger severance payments (see Section III.5.2).

The difference in cultural and transactional practice may be challenging for investors.



# Section B

## **Mergers and Acquisitions in China - Chinese Contribution**

Among other authors commissioned by MOFCOM, Zhong Lun Law Firm provided legal services to the establishment of this Guide.

# I. M&A Environment

## 1. Investment Climate

China is one of the most dynamic and promising economies in the world. Over the last three decades of reform and opening up, China has made great achievements. China's economy has grown steadily, and people's living standard is continuously improving. The modern industrial system is being gradually perfected, and international competitiveness has been improved significantly. Remarkable achievements have been made in economic restructuring, leading to the creation of a large domestic market and creating enormous potential for regional development. The science and technology sector and the education sector are also developing rapidly, and the quality of the labor force is continuously improving. The legal system of China is approaching maturity, and a level playing field has been established. China's gross domestic product reached RMB 63.6 trillion in 2014 and ranks high among the world's major economies.

### Major Indicators of China's National Economy in 2014

Indicators	Statistics	Year-on-year Increase
GDP	RMB 63.6463 trillion	7.4%
Overall Fixed-asset Investment	RMB 51.2761 trillion	15.3%
Number of Increased Urban Employees	13.22 million	-
Industrial Added Value	RMB 22.7991 trillion	7.0%
Total Import & Export:	RMB 26.4334 trillion	2.3%
Export	RMB 14.3912 trillion	4.9%
Import	RMB 12.0423 trillion	-0.6%

(Source: Statistics Bulletin of National Economy and Social Development 2014, published by the National Statistics Bureau)

China is one of the most popular foreign investment destinations in the world. Making use of foreign investment is an important part of China's fundamental national policy of opening-up. China has also been rigorously implementing measures to honor its commitments for its accession to the World Trade Organization ("WTO") by lifting controls over the right to engage in foreign trade, significantly reducing the entry threshold for foreign investment, remarkably

increasing the level of liberalization and facilitation of trade and investment, and improving the opening-up and regulation standard of commercial environment. In 2014, the amount of foreign investment attracted by China reached USD 128.5 billion, continuously sustaining the first place of developing countries since 1992.

China's development has benefited and will continue to benefit the world by providing more market, growth, investment and cooperation opportunities to other countries. In the coming five years, the import value and overseas investment of China will exceed USD 10 trillion and USD 500 billion respectively, and outbound trips will exceed 500 million visits. Facing the new international and domestic environment, China will adopt a more proactive opening-up policy and establish a new open economic regime in order to further facilitate foreign investment access, improve the environment of foreign investment, promote free flow of factors in the global and domestic markets, and make more contribution to the growth of the world economy.

## 1.1 China (Shanghai) Pilot Free Trade Zone

On September 29, 2013, the Chinese Government launched the China (Shanghai) Pilot Free Trade Zone ("*Shanghai FTZ*") in Shanghai. The establishment of the Shanghai FTZ is a major initiative of China to further reform and open up within the new environment.

### 1.1.1 General Objectives

According to the *Overall Plan for the Shanghai FTZ*, the general objectives of the Shanghai FTZ are as follows:

"During the course of two to three years period of pilot reforms, the Shanghai FTZ shall expedite the transformation of government functions, expand the opening-up of the service sector, promote the reform of the foreign investment administrative system, and develop headquarter economy and new forms of trade; explore RMB convertibility under capital account items and a full opening up of the financial services; explore to establish classified supervision of goods status; and create a policy support framework for investment and innovation activities and cultivate an internationalized business environment under the rule of law. The Shanghai FTZ will pilot a free trade zone in line with international standards, expedient investment and trading procedures and free convertibility of currencies, under an effective and appropriate supervision, and within an investor-friendly regulatory environment. The experience thus gained shall serve as a source of new ideas and methods for the whole country to further opening up the economy and deepening of the reform".

### 1.1.2 Reform Measures

#### *Deepening administrative system reform:*

The Shanghai FTZ is accelerating the transformation of government functions, and exploring ways to establish a new administrative system that would be compatible with the high-level international trade and investment rules, including shifting the focus of the administration from prior approval to in-process and after-the-fact supervision. Administrative transparency will be enhanced, and an information disclosure mechanism which is able to reflect the participation of investors and be in line with international standards will be established. An effective mechanism to protect the interests of investors will be put in place. Various types of investors will also have a playing field for fair competition, and the free transfer of investment incomes of qualified foreign investors will be permitted.

#### *Expanding the opening up in the area of investment:*

The sectors of financial services, transportation services, commercial and trade services, professional services, cultural services, and social services will be further liberalized, and market access restrictions such as the requirements concerning the qualification of investors, limitations on foreign equity ratio, restrictions concerning business scope, etc., will be suspended or cancelled, in order to create an environment of equal market access for all investors. The Shanghai FTZ adopts an administrative system based on a pre-establishment national treatment and a negative list approach. With respect to investment made in a field not included in the negative list, in accordance with the principle of equal treatment to domestic and foreign investment, verification and approval of foreign investment projects will be replaced by a record filing system. The examination and approval of contracts and articles of association (“AOA”) of foreign invested enterprises will also be replaced by the record filing.

In addition, the Shanghai FTZ will promote a transformation of the trade development method, further intensify the pursuit of opening-up and innovation in financial sectors, and establish a supervision and taxation environment that is suitable and adapted to a high-level investment and trade service system.

## 1.2 Expansion of Free Trade Zone

Since its establishment, the Shanghai FTZ has made proactive exploration and innovation in the negative list system of foreign investment administration, trade facilitation, opening-up of financial service sector, improvement of government supervision, etc., and set up a series of practices that can be expanded and apply across the country. With an aim to advance a new round of high-level opening-up, the Chinese government has decided to:

- (1) intensify the reform and opening-up in the Shanghai FTZ, shorten the negative list, launch new opening-up measures in the services sector, advanced manufacturing sectors, etc., and extend certain opening-up measures to the Pudong New Area;
- (2) promote 28 reform experiences regarding investment, trade, finance, opening up of the services sector and in-process and after-process supervision across the whole country, and 6 innovative measures regarding customs supervision and inspection and quarantine system in other special customs supervision zones in China; and
- (3) establish another 3 free trade zones in Guangdong, Tianjin and Fujian.

## 2. Industrial Policy

China follows a socialist market economic system. The government conducts market-oriented administration policy on the economy, e.g. prices of resources supplied and most of the commodities and services traded are determined by the market; there is a free movement of labor, and companies have business autonomy to the extent permitted by law without interference from the government. For the establishment of fair, open and transparent market rules, China will adopt a unified market access regime. Guided by a negative list method, various types of market operators may enter the fields outside the negative list on an equal footing according to the laws.

The use of foreign investment is one of the major pillars of China's economic growth. China encourages foreign investment in the fields such as advanced manufacturing industry, high and new technology industry, modern service industry, new energy industry, energy conservation and environment protection industry. China is also promoting the orderly opening-up of services sectors including finance, education, culture, and medical treatment, and reducing the access limitation on foreign investment in services sectors such as nursery and senior care, architectural design, accounting and auditing, commercial and trade logistics, electronic commerce, and further opening up the general manufacturing industry.

### 3. M&A History

Generally speaking, there are two main approaches to foreign investment in China:

- (1) greenfield investment, and
- (2) mergers and acquisitions (“M&A”).

Compared with greenfield investment, M&A does not normally involve new fixed-asset investment and thus may allow foreign investors to swiftly enter the Chinese market. M&A can also promote industrial restructuring and efficient use of existing resources. This is the reason why the Chinese government encourages foreign investors to enter the Chinese market via M&A.

In 2003, the Ministry of Foreign Trade and Economic Cooperation, among other ministerial departments, enacted the *Tentative Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*, which established the basic regime for foreign investors to merge and acquire domestic enterprises. The above provisions were amended twice, in 2006 and 2009 respectively. The current version is the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors* promulgated in 2009.

## 4. Forms of Business Establishments

### 4.1 Overview of Forms of Business Establishments

Under the PRC laws, there are three basic forms of business establishments, namely, limited liability company, company limited by shares, and partnership. Partnership is further classified into general partnership and limited partnership.

	Limited Liability Company	Company Limited by Shares	Partnership	
			General Partnership	Limited Partnership
<b>Applicable Law</b>	The Company Law	The Company Law	The Partnership Law	The Partnership Law
<b>Number of Shareholders</b>	1~50 shareholders	2~200 promoters; no upper limit on the number of shareholders	minimum 2 partners	2~50 partners, including at least 1 general partner
<b>Responsibilities</b>	Shareholders shall be responsible for the company to the extent of their respective subscribed capital contributions.	Shareholders shall be responsible for the company to the extent of their respective subscribed shares.	Partners shall be jointly and severally liable for the debts of the partnership without limit.	General partners shall be jointly and severally liable for the debts of the partnership without limit, while limited partners shall be liable for the debts of the partnership to the extent of their respective subscribed capital contributions.
<b>Tax</b>	Enterprise income tax		Partnerships are not subject to enterprise income tax. Partners shall pay their respective income taxes.	

#### 4.1.1 Foreign-invested Enterprises

Foreign-invested enterprises (each, a “*FIE*”) mainly include Sino-foreign equity joint ventures, wholly foreign-owned enterprises, Sino-foreign cooperative joint ventures, foreign-invested companies limited by shares, and foreign-invested partnerships.

- A **Sino-foreign equity joint venture (“EJV”)** refers to a joint-venture enterprise established by one or more foreign investors (including foreign companies, foreign enterprises, other foreign economic organizations, and/or foreign individuals) together with one or more Chinese investors (including Chinese companies, Chinese enterprises, and/or other Chinese economic organizations) within the Chinese territory pursuant to the *Law on Sino-foreign Equity Joint Ventures (“EJV Law”)*. An EJV is a limited liability company. Parties to an EJV shall share profits and bear risks and losses in proportion to their respective contributions to the registered capital of the company. The highest authority of an EJV is its board of directors, which determines all significant matters of the EJV in accordance with its AOA.
  
- A **wholly foreign-owned enterprise (“WFOE”)** refers to an enterprise established within the Chinese territory with foreign capital by one or more foreign investors (including foreign enterprises, other foreign economic organizations, and/or foreign individuals) pursuant to the *Law on Wholly Foreign-owned Enterprises (“WFOE Law”)*. A branch established in China by a foreign enterprise or by any other foreign economic organization is not regarded as a WFOE. WFOEs adopt the form of limited liability company, or other forms of liability if approved by the competent authority.
  
- A **Sino-foreign cooperative joint venture (“CJV”)** refers to an enterprise established by one or more foreign investors (including foreign enterprises, other foreign economic organizations, and/or foreign individuals) jointly with one or more Chinese investors (including Chinese enterprises and/or other Chinese economic organizations) within the Chinese territory in accordance with the *Law on Sino-foreign Cooperative Joint Ventures (“CJV Law”)*. In their cooperative joint venture contract, the parties to a CJV agree on investment or cooperative conditions, distribution of profits or products, allocation of risks and losses, method of business management, ownership of property upon expiration of the contract term, etc. CJVs include CJVs with Chinese legal personality and CJVs without legal personality. CJVs with Chinese legal personality take the form of a limited liability company. A CJV shall have a board of directors or a joint management committee to make decisions on significant matters in accordance with its cooperative joint venture contract or AOA.
  
- A **foreign-invested company limited by shares** refers to a company limited by shares established within the Chinese territory by one or more foreign shareholders (including foreign companies, foreign enterprises, other foreign economic organizations, and/or foreign

individuals) jointly with one or more Chinese shareholders (including Chinese companies, Chinese enterprises, and/or other Chinese economic organizations).

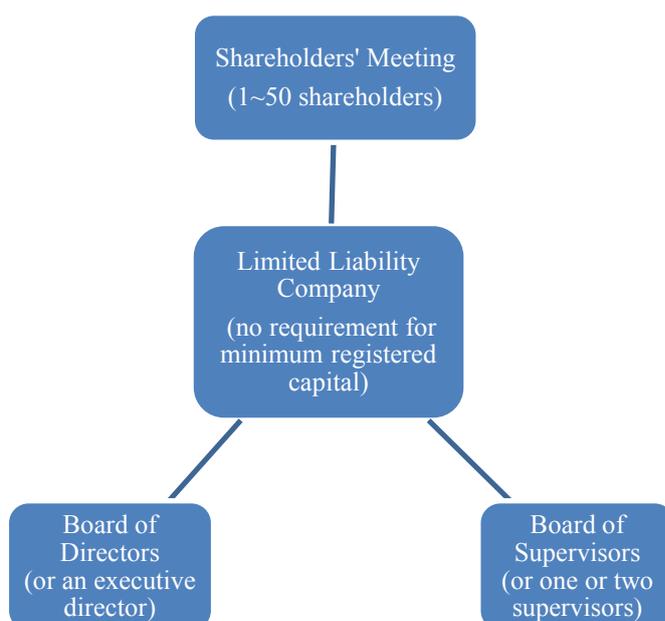
- A **foreign-invested partnership** refers to a partnership established by two or more foreign enterprises and/or individuals in China, or a partnership established in China by one or more foreign enterprises and/or individuals as one party and one or more Chinese individuals, Chinese corporate entities and/or other Chinese organizations as the other party.

## 4.2 Organizational Structure

### 4.2.1 Organizational Structure of a Limited Liability Company

The organizational structure of a limited liability company mainly includes:

- Shareholders' meeting;
- Board of directors (or an executive director);
- Manager; and
- Board of supervisors (or one or two supervisors).



#### **4.2.1.1 Shareholders' Meeting**

A limited liability company is incorporated by 1 to 50 shareholders. The shareholders' meeting is composed of all the shareholders and is the highest authority of the company. The shareholders' meeting holds regular meetings and interim meetings. The duties and powers of the shareholders' meeting include mainly determining the operation policies and investment plans of the company, electing and changing directors and supervisors who are not employees' representatives, examining and approving reports of the board of directors, board of supervisors or supervisor(s), and examining and approving annual financial budget plans, final account plans, profit distribution plans and loss recovery plans of the company (please refer to Annex II for details).

#### **4.2.1.2 Board of Directors**

The board of directors of a limited liability company shall comprise 3 to 13 directors. The board of directors is accountable to the shareholders' meeting. The duties and powers of the board of directors include mainly convening the meetings of shareholders and reporting to the shareholders' meeting, implementing the resolutions of the shareholders' meeting, determining the operation and investment plans of the company, and drawing up annual financial budget plans, final account plans, profit distribution plans and loss recovery plans of the company (please refer to Annex II for details). The board of directors shall have a chairman and may have one or two vice-chairmen. The selection method of the chairman and the vice-chairmen shall be stipulated in the AOA of the company. A limited liability company which has a smaller number of shareholders or is smaller in scale may have one executive director rather than a board of directors.

#### **4.2.1.3 Manager**

A limited liability company may have a manager, whose appointment and removal shall be decided by the board of directors. The manager shall be accountable to the board of directors. The duties and powers of the manager mainly include managing the production and operation of the company, organizing the implementation of the resolutions of the board of directors, organizing the implementation of the annual operation plans and investment plans of the company, etc. (please refer to Annex II. for details). The manager shall attend the meetings of the board of directors as non-voting attendee.

#### **4.2.1.4 Board of Supervisors**

A limited liability company shall have a board of supervisors that comprises no less than 3 supervisors. The board of supervisors shall have a chairman who is elected by a majority of all the supervisors. A limited liability company which has a smaller number of shareholders or is smaller in scale may have one or two supervisors rather than a board of supervisors. The duties and powers of a board of supervisors or the supervisor(s) mainly include inspecting the financial

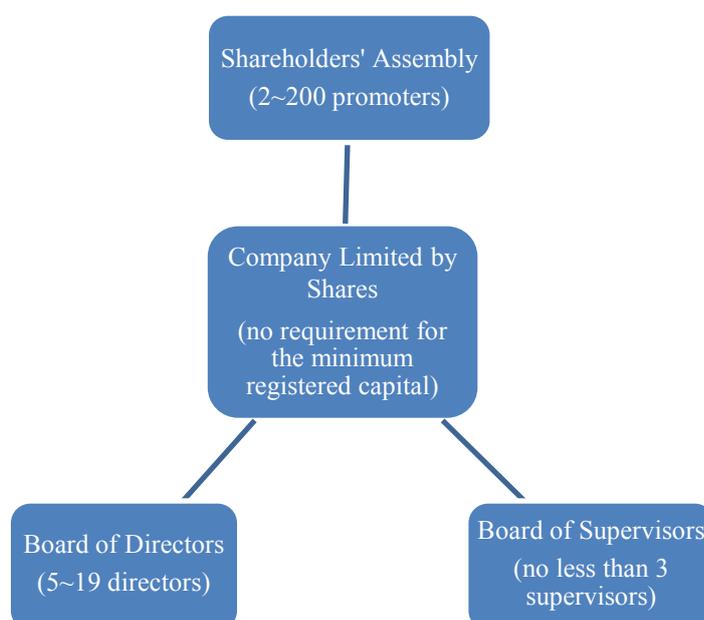
affairs of the company, and supervising the performance of duties by directors and senior officers.

The post of legal representative<sup>1</sup> of a limited liability company shall be held by the chairman of the board of directors, the executive director or the manager, depending on how the AOA of the company stipulates, and shall be registered as required by law.

#### 4.2.2 Organizational structure of a Company Limited by Shares

The organizational structure of a company limited by shares mainly includes:

- Shareholders' Assembly;
- Board of Directors;
- Manager; and
- Board of Supervisors




---

<sup>1</sup> Article 38 of the *General Principles of Civil Law* provides that a natural person who is in charge of a legal person and exercises powers and duties on behalf of the legal person as provided by law or the legal person's articles of association is the legal representative of the legal person. Article 43 of the same law further provides that an enterprise legal person shall assume civil liability for the business activities of its legal representative and other employees.

#### **4.2.2.1 Shareholders' Assembly**

The shareholders' assembly of a company limited by shares is composed of all the shareholders and is the highest authority of the company. Article 37 of the *Company Law* regarding the powers and duties of the shareholders' meeting of a limited liability company also applies to the shareholders' assembly of a company limited by shares (please refer to Section 4.2.1.1 of this Guide for details).

#### **4.2.2.2 Board of Directors**

A company limited by shares shall have a board of directors, which comprises 5 - 19 directors. The board of directors shall have a chairman and may have one or two vice-chairmen. The chairman and the vice-chairmen shall be elected by a majority of the board of directors. Article 46 of the *Company Law* regarding the powers and duties of the board of directors of a limited liability company also applies to the board of directors of a company limited by shares (please refer to Section 4.2.1.2 of this Guide for details).

#### **4.2.2.3 Manager**

A company limited by shares shall have a manager whose appointment and removal shall be decided by its board of directors. Article 49 of the *Company Law* in relation to the powers and duties of the manager of a limited liability company also applies to the manager of a company limited by shares.

#### **4.2.2.4 Board of Supervisors**

A company limited by shares shall have a board of supervisors which shall comprise no less than 3 supervisors. The board of supervisors shall have a chairman and may have vice-chairman. The chairman and the vice-chairman shall be elected by a majority of the board of supervisors. The board of supervisors shall consist of shareholders' representatives and an appropriate number of employees' representatives; the ratio of employees' representative(s) shall not be less than one-third of all the supervisors, and the specific ratio shall be stipulated in the AOA of the company. Employees' representative(s) sitting on the board of supervisors shall be appointed by the employees of the company via the employees' representative congress or employees' congress of the company or by other means of democratic election. Articles 53 and 54 of the *Company Law*

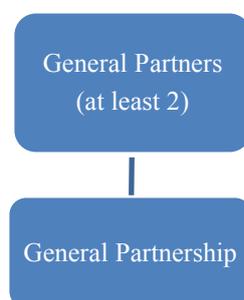
which provide the powers and duties of the board of supervisors of a limited liability company also apply to the board of supervisors of a company limited by shares.

The post of the legal representative of a company limited by shares shall be held by the chairman of the board of directors or the manager, depending on how the AOA of the company stipulates, and shall be registered as provided by law.

### 4.2.3 Organizational Structures of a Partnership

#### 4.2.3.1 Organizational Structure of a General Partnership

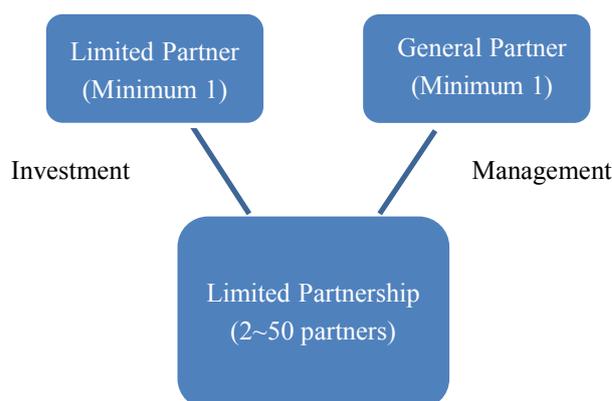
A general partnership is established by two or more partners based on a written partnership agreement. The organizational structure of a general partnership is normally as follows:



Partners of a general partnership enjoy equal rights in conducting partnership affairs and shall be jointly and severally liable for the debts of the partnership without limit. Pursuant to the partnership agreement or upon decision by all the partners, one or more partners may be authorized to represent the partnership to conduct partnership affairs.

#### 4.2.3.2 Organizational Structure of a Limited Partnership

A limited partnership is established by at least two and no more than 50 partners based on a written partnership agreement, including at least one general partner. The organizational structure of a limited partnership is normally as follows:



The partnership affairs of a limited partnership shall be conducted by its general partner(s). Its limited partner(s) shall not conduct partnership affairs or act on behalf of the partnership. General partners shall be jointly and severally liable for the debts of the partnership without limit, while limited partners shall be liable for the debts of the partnership only up to their respective subscribed capital contributions to the partnership.

#### 4.3 State-invested Enterprise

A state-invested enterprise (“SIE”) refers to a wholly state-owned enterprise, wholly state-owned company, state-controlled company, or partly state-owned company, which is established with capital provided by the state. Regarding SIEs’ organizational forms, establishment, and organizational structures, the *Company Law* and other enterprise-related organic laws shall apply.

According to Article 47 of the *Law on State-owned Assets of Enterprises*, where a wholly state-owned enterprise, wholly state-owned company or state-controlled company is to be merged with another company, divided into two or more companies or restructured, or where a substantial proportion of its assets are to be transferred, an investment is to be made with non-

monetary property, or the company is going into liquidation, an evaluation of relevant assets shall be carried out in accordance with the relevant provisions.

According to Article 53 of the *Law on State-owned Assets of Enterprises*, where any interests derived from the state's capital contribution to an enterprise are to be transferred to another entity or individual ("*Transfer of State-owned Assets*"), the transfer shall be decided by the organ that performs investor's duties of the state; where any such organ decides to transfer all of the state-owned assets, or decides to transfer part of the state-owned assets which will lead to the State's loss of control over the target enterprise, such organ shall report the matter to the people's government at the same level for approval. Transfer of State-owned Assets shall be publicly conducted at a legally established asset exchange, except as otherwise decided by the state that such transfer can be carried out by virtue of an agreement. The transferor shall faithfully disclose the relevant information in order to invite a transferee; if two or more candidate transferees are showing interest in the transfer, a bidding process shall be carried out for the transfer. For more details, please refer to Section 6.1.3 of Part II. of this Guide.

## 5. Legal Framework

### 5.1 The PRC Legal System for Foreign Investment

The legal system of China entails multiple levels, which includes the Constitution, laws, administrative regulations, local regulations, autonomous region regulations and separate regulations, and rules and regulations of the departments under the State Council and of local governments.

Article 18 of the *Constitution of the People's Republic of China* states that:

*The People's Republic of China permits foreign enterprises, other foreign economic organizations or foreign individuals to invest in China and to enter into various forms of economic cooperation with Chinese enterprises and other Chinese economic organizations in accordance with the law of the People's Republic of China. All foreign enterprises, other foreign economic organizations as well as Sino-foreign joint ventures within the Chinese territory shall abide by and comply with the law of the People's Republic of China. Their legitimate rights and interests are protected by the law of the People's Republic of China.*

The *EJV Law*, the *CJV Law* and the *WFOE Law* (collectively referred to as “*Three FIE Laws*”) are the three fundamental laws governing foreign investment in China. The *Company Law* is applicable to foreign-invested limited liability companies and foreign-invested companies limited by shares, provided that if the laws on foreign investment provide otherwise, the provisions of the law on foreign investment shall prevail. The *General Principles of the Civil Law*, the *Property Law*, the *Contract Law*, the *Securities Law*, the *Anti-monopoly Law*, the *Enterprise Income Tax Law*, etc., also apply to FIEs and foreign investment activities.

The State Council and its relevant departments and commissions have promulgated a series of administrative rules and regulations in accordance with the Three FIE Laws to promote, regulate and protect foreign investment (please refer to Annex III for laws, rules and regulations that are most relevant to foreign investment, especially M&A), including:

*Supplemental regulations of the Three FIE Laws:*

- the *Implementation Regulations of the Law on Sino-foreign Equity Joint Ventures*,
- the *Implementation Regulations of the Law on Wholly Foreign-owned Enterprises*,
- the *Implementation Regulations of the Law on Sino-foreign Cooperative Joint Ventures*,
- the *Administrative Measures for Establishment of Partnerships in China by Foreign Enterprises or Individuals*, and
- the *Interim Regulations on Several Issues Concerning Establishment of Foreign-invested Companies Limited by Shares*;

*Industrial policies for foreign investment:*

- the *Provisions on Guidance of the Orientation of Foreign Investment*,
- the *Catalogue for Guidance of Foreign Investment Industries*,
- the *Catalogue of Priority Industries for Foreign Investment in Central and Western China*, and
- the *Administrative Measures for Approval and Record-filing of Foreign Investment Projects*;

*Laws and regulations regarding foreign M&As:*

- the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*,
- the *Administrative Measures for Strategic Investment in Listed Companies by Foreign Investors*,

- the *Notice of the General Office of the State Council on Establishment of National Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors*.

In November 2013, the third plenary session of the eighteenth Central Committee of the Communist Party of China passed the Decision of the Central Committee of the Communist Party of China on Several Major Issues Concerning Comprehensive Deepening of Reform, which required “establishing a new system of opening-up economy” and “unifying laws and regulations applying to domestic and foreign investment and ensuring the stability, transparency and predictability of foreign investment policies”. In order to implement this decision, the Ministry of Commerce of the People’s Republic of China (“*MOFCOM*”) started to amend the Three FIE Laws. In January 2015, MOFCOM published the *Foreign Investment Law of the People's Republic of China* (draft version to solicit opinions) for public comments. The amendment of the Three FIE Laws has been included in the Legislation Plan of the Standing Committee of the Twelfth National People's Congress.

## 6. Taxation (General)

There are 18 types of taxes in China, being the value-added tax, consumption tax, business tax, enterprise income tax, individual income tax, resources tax, urban land use tax, real estate tax, city maintenance and construction tax, arable land occupation tax, land value-added tax, vehicle purchase tax, vehicle and vessel tax, stamp duty, deed tax, tobacco tax, customs duties, and vessel tonnage tax. Among these, the tax authorities are responsible for collecting 16 types of taxes, while the Customs are responsible for collecting customs duties and vessel tonnage taxes. The Customs are also responsible for collecting value-added tax and consumption tax on imported goods on behalf of the tax authorities.

### 6.1 Overview of M&A-related Taxes

#### 6.1.1 Enterprise Income Tax

All enterprises and other organizations receiving income (excluding sole proprietorship enterprises and partnerships) within China will be subject to the enterprise income tax. Enterprises are classified into resident enterprises and non-resident enterprises. Resident

enterprises shall pay the enterprise income tax on their global income, whether the income is derived from sources within or outside of China. Non-resident enterprises shall pay the enterprise income tax as determined on the basis of whether they have any organizations or establishments within China and whether their income is actually related to such organizations or establishments in China. For the purpose of calculating enterprise income tax, the taxable income of an enterprise in a tax year shall be the total income of the enterprise in the same tax year, less any non-tax income, tax exemption income, deductions and income used to cover the losses of prior years. The rate of enterprise income tax is 25%.

### 6.1.2 Individual Income Tax

Individual income tax applies to taxable income received by individuals (including 11 taxable items, such as the income from wages and salaries obtained by individuals, income from production and operation of individual industrial and commercial households). Seven levels of progressive tax rates ranging from 3% to 45% apply to individuals' wages and salaries; five levels of progressive tax rates ranging from 5% to 35% apply to the production and operation income of individual industrial and commercial households, and the income from contract or lease operation of enterprises and institutions (Note: The 5% to 35% progressive tax rates also apply *mutatis mutandis* to the production and operation income of sole proprietorships and that of partnerships' investors); and a flat tax rate of 20% applies to all the other income.

### 6.1.3 Value-added Tax

Value-added tax is applicable to entities and individuals that engage in selling goods, providing processing, reparation or replacement services or importing goods in China. Value-added tax taxpayers are classified into general taxpayers and small-scale taxpayers. As for a general taxpayer, the value-added tax is imposed on the added value resulted from its sale (or import) of goods or provision of processing, reparation and/or replacements services, with the standard tax rate being 17%, low tax rate being 13%, and tax rate for export goods being zero (except otherwise provided by the State Council); as for a small-scale taxpayer, a simple method of tax calculation applies, and the tax rate is 3%. According to the *Pilot Plan for Imposition of Value-Added Tax in Place of Business Tax*<sup>2</sup> issued by the Ministry of Finance and the State Administration of Taxation, two low tax rates of 11% and 6% were newly added from January 1, 2012.

---

<sup>2</sup> See the *Pilot Plan for Imposition of Value-Added Tax in Place of Business Tax* (Cai Shui [2011] No. 110) jointly issued by the Ministry of Finance and the State Administration of Taxation on October 16, 2011.

#### **6.1.4 Business Tax**

Business tax is applicable to entities and individuals that engage in providing taxable services, transferring intangible assets or selling immovable property within China. Business tax payable shall be calculated on the basis of the business turnover, transfer price or sales amount of taxable services or taxable activities. The tax rates applicable to the entertainment industry are ranging from 5%-20%, and the tax rate applicable to all the other taxable items is 3% or 5%.

#### **6.1.5 Land Value-added Tax**

Land-value added tax is imposed on the added value derived from transfer of state-owned land use right, constructions and other facilities attached on land at four-level progressive tax rates of 30%, 40%, 50% and 60%.

#### **6.1.6 Deed Tax**

Deed tax is imposed on land or housing to which the use right or title is transferred by means of granting, assignment, purchase/sale, giving as gift, or exchange, and shall be paid by the entities and individuals who are transferees. The tax base for granting, assignment or purchase/sale of land or housing is the transaction price; the tax base for giving land or housing as gift shall be assessed by the tax collection authorities; and the tax base for exchange of land or housing is the difference between the exchange prices. The tax rates range from 3% to 5%.

#### **6.1.7 Stamp Duty**

Stamp Duty is applicable to entities and individuals that execute or accept taxable instruments specified in tax laws during economic activities and exchanges. According to the nature of the taxable instrument, the tax amount payable shall be calculated at a proportionate tax rate of 1‰, 0.5‰, 0.3‰ or 0.05‰ depending on the contract price concerned, or on the basis of a fixed amount which is 5 RMB per instrument.

## 7. Foreign Investment Access and Regulation

Before merging and acquiring a Chinese company, a foreign investor needs to consider the foreign investment access policy applicable to the relevant industry and business sector. If foreign investment is permitted in the industry, the foreign investor needs to further consider the specific qualification and approval procedural requirements, including requirements for obtaining approvals and registration, and whether the investment will trigger national security review and review of concentration of undertakings.

### 7.1 Catalogue for Guidance of Foreign Investment Industries

Under the *Regulations on Guidance of the Orientation of Foreign Investment*, foreign investment projects are classified into four categories: encouraged, permitted, restricted and prohibited. Encouraged, restricted and prohibited projects are included in the *Catalogue for Guidance of Foreign Investment Industries*. Other projects which do not fall under any of the encouraged, restricted or prohibited categories are permitted ones, which are not listed in the *Catalogue for Guidance of Foreign Investment Industries*.

In addition, in order to attract and guide foreign investors to invest in the central and western areas of China, the Chinese government has formulated the *Catalogue of Priority Industries for Foreign Investment in Central and Western China*. Projects listed in this catalogue are eligible to enjoy preferential policies accorded to encouraged projects.

The *Catalogue for Guidance of Foreign Investment Industries* has set out special restrictions in respect of the form of investment and foreign investors' proportion of shareholding in certain foreign investment projects under the encouraged or restricted category. For instance, for projects that are subject to the requirement of "EJV or CJV only", foreign investors are only permitted to make investment by establishing an EJV or CJV; for foreign investment projects in which "the Chinese party shall hold a controlling share", the total investment of Chinese investors in such projects shall reach 51% or higher of the registered capital; for foreign investment projects in which "the Chinese party shall hold a comparatively controlling share", the proportion of the total investment of Chinese investors in such projects shall be higher than the proportion of investment of any other single foreign investor.

In March 2015, the *Catalogue for Guidance of Foreign Investment Industries* (as amended in 2015) was published jointly by the National Development and Reform Commission of the People's Republic of China ("NDRC") and MOFCOM upon approval by the State Council and took effect on April 10, 2015. In comparison with the *Catalogue for Guidance of Foreign*

*Investment Industries* (as amended in 2011), the number of restricted items has been reduced significantly from 79 to 38; the restrictions on foreign equity ratio have been eased, with the number of “EJV or CJV only” items being reduced from 43 to 15, and the number of items concerning “the Chinese party shall hold a controlling share” being reduced to 35 from 44; the total number of encouraged items remains unchanged, except that 76 of them are revised. The *Catalogue for Guidance of Foreign Investment Industries* (as amended in 2015) has demonstrated a wider than ever opening policy to foreign investment in comparison with its previous versions. It further liberalizes the market entry for foreign investment in the service sectors and general manufacturing sectors, and encourages foreign investors to invest in modern agriculture, high and new technology, advanced manufacturing, energy conservation and environmental friendly sectors, as well as new energy and modern service sectors, etc., and to undertake transferred high-end industries and invest in research and development segments, with a view of further increasing the quality of China’s use of foreign investment.

According to the *Catalogue for Guidance of Foreign Investment Industries*, a M&A transaction cannot be used to enable a foreign investor(s) to hold all the shares in a target company if the business scope of such company falls within any industry in which a WFOE is prohibited to be established. In the case of an industry where the Chinese party shall hold a controlling stake or a comparatively controlling stake, the Chinese Party will retain the controlling or comparatively controlling status after the completion of the M&A transaction. Foreign investors may not merge and acquire any target company engaged in an industry in which foreign investment is prohibited.

## 7.2 “Negative List” Model Adopted by FTZs

On September 29, 2013, the Shanghai Municipal People’s Government issued the *Special Administrative Measures for Access of Foreign Investment to China (Shanghai) Pilot Free Trade Zone (Negative List)* to facilitate and regulate the construction of Shanghai FTZ. On July 1, 2014, the Shanghai government revised the Shanghai Negative List, whereby the number of restricted measures was cut down from 190 to 139, and the conditions for some administrative measures without specific restrictive conditions were clarified.

On 8 April 2015, the General Office of the State Council promulgated the *Special Administrative Measures for Access of Foreign Investment to Pilot Free Trade Zones (Negative List)* (“FTZs Negative List”) and applied it to four pilot free trade zones in Shanghai, Tianjin, Guangdong and Fujian, with an aim to further expand the opening to foreign investment and improve the administrative transparency.

For the fields not covered by the FTZs Negative List, the principle of equal treatment of domestic and foreign investment applies, which means foreign investment projects in such fields are only subject to record filing, except in the case where domestic investment projects remain subject to government approval as prescribed by the State Council. Record filing also applies to establishment and modification of FIEs. The change of administrative model from a positive list to a negative list improves the administrative transparency and enhances investment facilitation.

### 7.3 Approval and Registration Requirements for Foreign M&As

Pursuant to the relevant Chinese laws, M&A of domestic companies by foreign investors are subject to government approvals, examinations and registrations (as the case may be), which mainly include:

Functions and Duties	Responsible Departments
<b>Approval for the establishment and modification of FIEs</b>	MOFCOM or local Commercial Approval Authorities (as defined below)
<b>Approval for or record-filing of foreign-invested projects</b>	The State Council, provincial governments, local governments, NDRC or its local counterparts, or the department of State Council in charge of the sector concerned
<b>Registration of establishment and modification of FIEs</b>	State Administration for Industry and Commerce or its local counterparts (“AIC”)
<b>Anti-monopoly Review of concentration of undertakings</b>	MOFCOM
<b>Security review of M&amp;A of domestic companies by foreign investors</b>	Joint Committee for National Security Review of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (“ <i>Joint Committee</i> ”)
<b>Transfer of state-owned assets</b>	State-owned Assets Supervision and Administration Commission of the State Council of the People’s Republic of China or its local counterparts (“SASAC”)

Please refer to Section 6 of Part II. of this Guide for the specific requirements for aforesaid approval and registration procedures. Following is a brief introduction to review of concentration of undertakings and national security review.

## 7.4 Anti-monopoly Review of Concentration of Undertakings

The *Anti-monopoly Law* established a review regime for concentration of undertakings. According to this law, if an M&A transaction between a domestic company and a foreign investor would reach the statutory threshold, a notification for concentration of undertakings will have to be filed with the authorities. For the main laws and regulations that govern concentration of undertakings, please refer to Annex III.

### 7.4.1. Notification of Concentration of Undertakings

#### 7.4.1.1 Requirements for Notification

A foreign investor needs to consider the following three factors in assessing whether a transaction is subject to a notification for concentration of undertakings:

- whether this transaction is a concentration of undertakings as defined in the *Anti-monopoly Law*;
- whether the turnover reaches the threshold for notification; and
- whether any exception applies to this transaction.

#### *(i) Definition of Concentration of Undertakings*

According to the *Anti-Monopoly Law*, a concentration of undertakings shall be deemed to arise in the following circumstances:

- (1) merger of undertakings,
- (2) acquisition of control by an undertaking over another undertaking through acquisition of shares or assets; and
- (3) acquisition of control by an undertaking over another undertaking by acquisition of the ability to exerting a decisive influence on such undertaking through contract or other means.

"Control" in the context of concentration of undertakings includes separate control and joint control. The right of control could be obtained by an undertaking directly, or indirectly through another undertaking under its control. More importantly, the right of control or decisive

influence shall be determined on basis of a large number of legal factors and factual elements. Concentration agreement and the AOAs of the other undertakings of concentration (in respect of, for instance, the proportion of shareholding post-concentration, and the right to appoint and remove directors) are important elements of determination, but not the only elements. If control cannot be ascertained based on the concentration agreement and the AOAs, an undertaking may otherwise be regarded as having obtained control over another undertaking by *de facto* acquisition over the other undertaking as a result of dispersion of shares of the shareholders or due to other reasons.

*(ii) Turnover Thresholds*

According to Article 3 of the *Provisions of the State Council on Notification Thresholds for Concentration of Undertakings*, undertakings shall file a notification with MOFCOM if their concentration reaches any of the following thresholds:

- the total amount of the global turnovers yielded by all the participating undertakings of the concentration during the previous accounting year exceeds RMB 10 billion, with at least two undertakings each achieving a turnover of more than RMB 400 million within China during the previous accounting year; or
- the total amount of the turnover within China realized by all participating undertakings of the concentration during the previous accounting year exceeds RMB 2 billion, with at least two undertakings each achieving a turnover of more than RMB 400 million within China during the previous accounting year.

With respect to the calculation of turnover, it is worthwhile to note that:

- (1) “turnover” refers to an undertaking’s revenue (after tax and surcharges) from sales of goods or supply of services;
- (2) “within China” means that the purchaser of the goods or services supplied by an undertaking is located within China;
- (3) the turnover of each participating undertaking of the concentration includes not only its own turnover, but also the turnovers of the companies that have a controlling relationship with it; and

- (4) when a turnover in a sector such as banking, insurance, securities or futures is calculated, a special formula should be applied, which is:

*turnover = (aggregate of turnover elements, or premium income-business taxes and surcharges) × 10%.*

It is worth noting that in case only a part of one or more undertakings is acquired, and the seller no longer has control over the part sold after completion of the transaction, then only the turnover of that part involved in the concentration shall be calculated. This mainly includes two circumstances:

- (1) for an asset deal, only the turnover of the assets sold by the seller shall be calculated if the seller loses control over these assets after the deal; or
- (2) for a share purchase, only the turnover of the target company shall be calculated if the seller loses control over the target company after the transaction.

*(iii) Circumstances where notification is not required*

According to Article 22 of the *Anti-monopoly Law*, under any of the following circumstances, undertakings may choose not to file a notification with MOFCOM:

- One of the undertakings involved in the concentration owns 50% or more of the shares or assets of each of the other undertakings; or
- An undertaking not involved in the concentration owns 50% or more of the voting shares or assets of each of the undertakings involved in the concentration.

**7.4.1.2 Undertakings Bearing the Obligation of Notification**

For concentration through merger, all the participating undertakings shall notify the concentration. For concentration through other means such as acquisition of shares or assets, the undertaking which acquires control or has a decisive influence bears the obligation of

notification, while the other undertakings should cooperate by, for instance, providing necessary data, information and materials.

When an undertaking bearing the obligation of notification fails to notify the concentration, the other participating undertakings of the concentration may file the notification.

#### **7.4.1.3 Notification Process**

Prior to formal notification, a foreign investor may apply for consultations with MOFCOM, with an aim to clarify certain issues, e.g. whether it is required to notify the concentration, who bears the obligation to file the notification, how long it will take to proceed with the notification (such as the time for filing and the time frame for review), and what documents are required to be submitted. The application for consultations should be raised in writing and contain information such as a summary of the transaction, and the questions intended for consultation.

Formal notification should normally be filed after the undertakings have signed the concentration agreement, e.g. a share transfer agreement. An undertaking bearing the obligation of notification may notify the concentration either by itself or through an agent. Such agent may be another participating undertaking of the concentration, or others, like a lawyer.

MOFCOM will verify the documents and materials submitted by the notifying party. In case such documents or materials submitted are incomplete, the notifying party shall supplement the relevant documents or materials within the time limit prescribed by MOFCOM. If the notifying party fails to do so before expiration of the time limit, the notification shall be deemed as not filed. If the documents and materials submitted are verified to be complete, MOFCOM will accept the concentration filing and inform the notifying party in writing.

#### **7.4.1.4 Legal liability for Failure to Notify**

A concentration of undertakings that reaches the applicable statutory threshold must be notified to MOFCOM before the concentration is implemented. The undertakings shall not implement the concentration without notification. In case the undertakings implement concentration without notification, MOFCOM may instruct them to cease the concentration, to dispose of their shares or assets within a specified time limit, to transfer the business within a specified period of time, and to adopt other necessary measures to return to the state prior to the concentration. MOFCOM may also impose a fine of no more than RMB 500,000 on the undertaking which is responsible to notify the concentration.

## 7.4.2 Review of Concentration of Undertakings

### 7.4.2.1 Review Process

The review process is divided into two stages: preliminary review and further review.

The preliminary review shall be completed within 30 days from the date when MOFCOM accepts the concentration filing. MOFCOM shall make a decision on whether to conduct a further review and inform the notifying party of its decision in writing.

If MOFCOM decides to conduct a further review, it shall, within 90 days from the date of that decision, complete the further review and decide whether to prohibit the concentration, and inform the notifying party of such decision in writing. Under any of the following circumstances, MOFCOM may extend the review period, provided that the extended period shall not exceed 60 days:

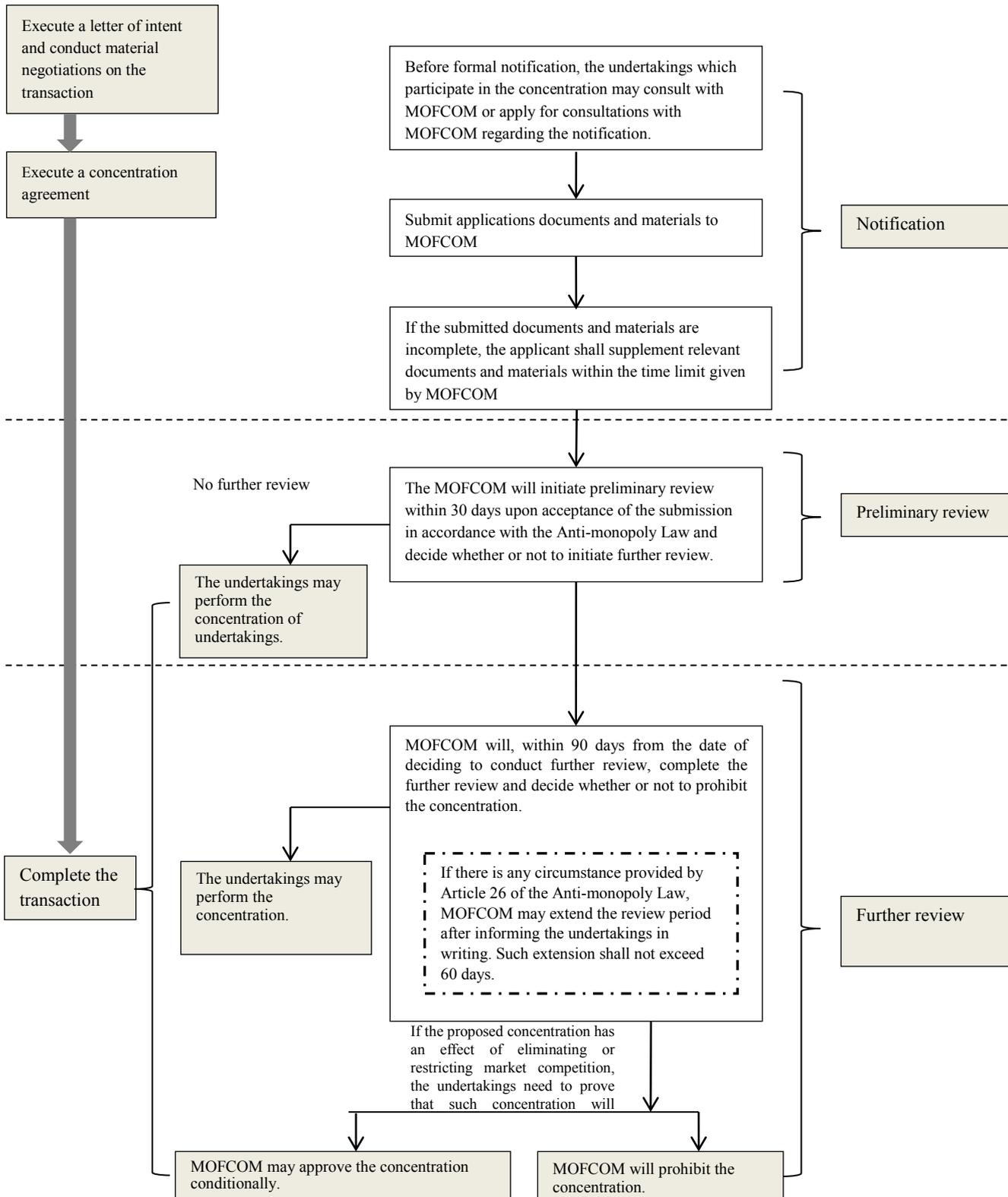
- the notifying party agrees to an extension of the review period;
- the documents and materials submitted by the notifying party are inaccurate and require further verification; or
- there is any significant change to the relevant situation following the notification.

### 7.4.2.2 Result of the Review

After review, MOFCOM may produce three types of final decisions: prohibition, unconditional approval, or approval with condition(s). By the end of 2014, MOFCOM has completed review of 994 cases of concentration of undertakings, out of which 968 cases (accounting for about 97% of the total) were approved unconditionally, 24 cases were approved with condition(s), and only 2 cases were prohibited (the latter two account for about 3% in total).

The general process of notification and review of concentration of undertakings is shown as follows. Foreign investors need to consider how to coordinate the transaction process on the left and the process of notification and review on the right of the flowchart below.

**Flowchart of Anti-monopoly Review of Concentration of Undertakings**



### 7.4.3 Fast Track Procedure

In February 2014, MOFCOM promulgated the *Interim Provisions on Standards Applicable to Simple Cases Regarding Concentration of Undertakings*. In April 2014, the Anti-monopoly Bureau of MOFCOM promulgated the *Guidelines for Notification of Simple Cases Regarding Concentration of Undertakings* (for Trial Implementation).

The establishment of a review system for simple cases of concentration of undertakings can expedite review of the cases which obviously have no effect of limiting competition, thus reducing the burden of enterprises. Foreign investors pursuing an M&A transaction may engage a lawyer to assess whether the transaction falls within the scope of simple cases and decide whether to notify the concentration as a simple case.

#### 7.4.3.1 Applicable Standards for Fast Track Procedure

A concentration of undertakings will be regarded as a simple case when it falls under any of the following circumstances and the fast track procedures may be applied:

Category	Applicable Provisions
Market share	In the same relevant market, the total market share taken up by all undertakings participating in the concentration is less than 15%;
	The market share of each of the undertakings participating in the concentration and which have an upstream-downstream relationship between them is less than 25% in the upstream or downstream market in which such undertaking is engaged;
	The market share of the undertakings participating in the concentration and which are neither in the same relevant market nor have an upstream-downstream relationship between them is less than 25% in each market related to the concentration.
Scope of business activities	The undertakings participating in the concentration establishes a joint venture outside China which does not conduct business activities in China;
	An undertaking participating in the concentration purchases the equity interests in or assets of an overseas enterprise which does not conduct business activities in China.
Acquisition of control	A joint venture jointly controlled by two or more undertakings comes under the control of one or more of the undertakings through the concentration.

However, a case of concentration of undertakings falling under any of the following circumstances shall not be regarded as a simple case:

- a joint venture jointly controlled by two or more undertakings comes under the control of one of the undertakings through concentration, and such undertaking is a competitor of the joint venture in the same relevant market;
- the relevant market related to the concentration is difficult to be defined;
- the concentration may have an adverse effect on market access or technological advancement;
- the concentration may have an adverse effect on consumers or on any other relevant undertakings;
- the concentration may have an adverse effect on the national economy; or
- the concentration may have such other adverse effect on market competition as determined by MOFCOM.

#### **7.4.3.2 Steps of Fast Track Procedure**

##### *Step 1: Consultation:*

Undertakings may, prior to the notification of concentration, choose to consult with MOFCOM on issues such as whether the transaction may be regarded as a simple case to which the fast track procedure may apply. Consultation is not statutorily required, and it is up to the undertakings to decide whether or not to initiate the consultation.

##### *Step 2: Notification:*

The notifying party which chooses the fast track procedure to notify the concentration needs to submit a notification form for anti-monopoly review of a simple case, a disclosure form for a simple case, and other notification materials.

*Step 3: Acceptance of concentration filing:*

After reviewing the documents, if MOFCOM believes that the transaction meets the threshold for a simple case, it will initiate the fast track procedure; if the threshold is not met, the notifying party will be required to re-notify the transaction as an ordinary case.

*Step 4: Announcement:*

MOFCOM will announce the disclosure form on its official website for 10 days after accepting the filing. During this period, any third-party entity or individual may submit opposite opinions in writing to MOFCOM as to whether the disclosed case can be determined as a simple case, along with supporting evidence and its/his contact information. MOFCOM will verify the opinions and evidence provided by the third party. If MOFCOM intends to revoke its preliminary recognition of the case as a simple case, it will listen to the notifying party's opinion.

*Step 5: Review:*

After accepting the concentration filing, MOFCOM will review the notification in accordance with the *Anti-monopoly Law* and make its review decision. During the review, MOFCOM will revoke its preliminary recognition and require the notifying party to re-notify the transaction as an ordinary case if it is shown that the case should not have been recognized as a simple case.

## 7.5 M&A Security Review

If the M&A transaction between a domestic company and a foreign investor involves national security issues, it shall be subject to national security review as required by relevant regulations. These regulations include the *Notice of the General Office of State Council on Establishment of National Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* issued by the General Office of the State Council in February 2011, and the *Regulations of the Ministry of Commerce on Implementation of National Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* issued by MOFCOM in August 2011.

### 7.5.1 Scope of M&A Security Review

National security review covers the following:

- foreign investors' M&A of domestic military industrial enterprises or military industry-related supporting enterprises, domestic enterprises located near key or sensitive military facilities, and other entities relating to national defense security;
- foreign investors' M&A of domestic companies relating to national security in areas such as important agricultural products, important energy and resources, important infrastructure, important transport service, key technologies, and major equipment manufacturing, whereby the foreign investors might acquire the actual control thereof.

Whether the M&A of a domestic company by a foreign investor falls within the scope of national security review needs to be determined on the basis of the material content and actual impact of the transaction involved. Investor may not escape the national security review in any way, including but not limited to, by holding shares on behalf of others, trust, multi-level reinvestment, leasing, loans, variable interest entities, or overseas transactions.

### 7.5.2 Content of M&A Security Review

During the process of national security review of an M&A transaction, the following factors will be evaluated:

- Impact of the transaction on the national defense security, including its impact on the domestic production capacity of products, domestic capacity of provision of services, and relevant equipment and facilities, which are required for national defense;
- Impact of the transaction on the stable operation of the national economy;
- Impact of the transaction on the basic societal order; and
- Impact of the transaction on the R&D capacity for key technologies related to national security.

### **7.5.3 Competent Authorities for M&A Security Review**

The Joint Committee is in charge of the security review of M&A transaction between domestic companies and foreign investors. The Joint Committee is headed by NDRC and MOFCOM under the leadership of the State Council and is participated by relevant ministries depending on the industries and sectors involved in the M&As.

### **7.5.4 Procedure for M&A Security Review**

#### **7.5.4.1 Initiation of M&A Security Review**

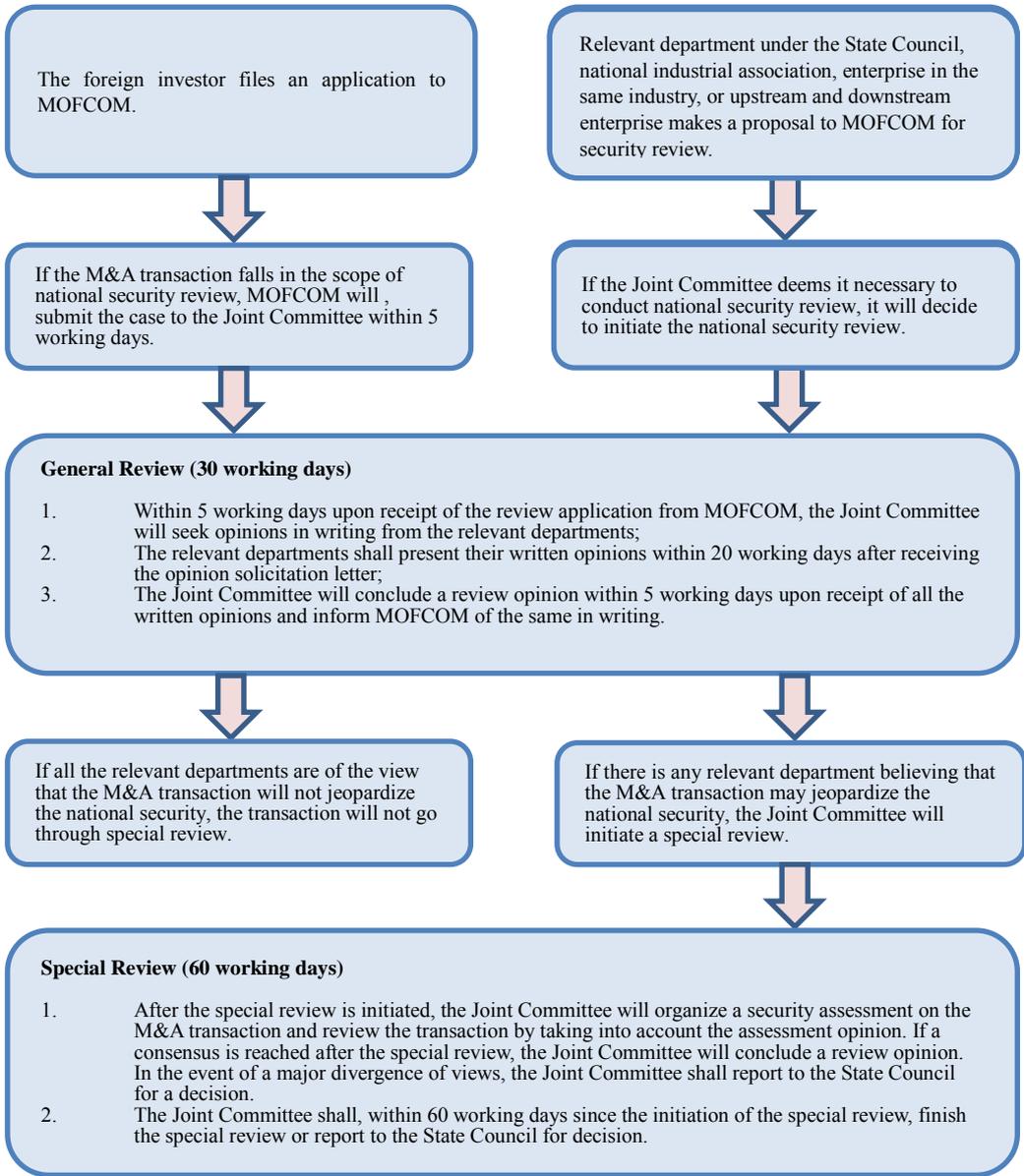
A foreign investor pursuing an M&A transaction involving a domestic company, which falls within the scope of the M&A Security Review, is required to file an application with MOFCOM for national security review. Before filing an official application with MOFCOM, the foreign investor may request consultations with MOFCOM on procedural issues. However, consultation is not a precondition for submitting an official application. Furthermore, the result of consultation has no binding force or legal effect, nor shall it serve as the basis for submitting an official application.

Where a relevant department under the State Council, the relevant national industrial association, an enterprise in the same industry, or an enterprise on the upstream or downstream side considers it necessary to conduct security review with regard to a foreign investor which is conducting a M&A transaction involving a domestic company, it may make a proposal to MOFCOM. Where a local commerce authority finds, during its processing of an M&A application, that an M&A transaction is within the scope of security review but no notification has been made to MOFCOM, the local commerce authority shall suspend its examination procedure and require the foreign investor to file a security review application with MOFCOM.

#### **7.5.4.2 Procedure for M&A Security Review**

National security review is divided into two stages: general review and special review. An M&A transaction that fails the general review will enter the special review stage. Please refer to the following flowchart for the process of national security review.

**Flowchart of M&A Security Review**



#### **7.5.4.3 Consequences of Failing to Pass National Security Review**

If an M&A transaction has caused or may cause a major impact on the national security, the Joint Committee shall require MOFCOM and the relevant departments to terminate the M&A transaction, or take effective measures such as transfer of relevant equities or assets, in order to eliminate the impact of such M&A on the national security.

## **8. Relevant Government Authorities**

### **8.1 Major Government Authorities Relating to Foreign M&As**

#### **8.1.1 MOFCOM and its local counterparts**

MOFCOM is in charge of matters related to foreign investment utilization in China. It is responsible for macroscopically guiding foreign investment across China, setting up foreign investment policies and reforming plans and organizing their implementation, examining and approving the establishment of FIEs (including newly established FIEs and M&A projects) and modifications of the existing FIEs, examining and approving the contracts and AOAs for major foreign investment projects and their major modifications as specifically provided by laws, and supervising FIEs' compliance with relevant laws, regulations and their contracts and AOAs. As one of the anti-monopoly law enforcement agencies, MOFCOM also conducts anti-monopoly review of concentration of undertakings.

MOFCOM's local counterparts, i.e. local Commercial Approval Authorities, are in charge of examining and approving establishment and modification of FIEs within their respective competence.

#### **8.1.2 NDRC and its local counterparts**

NDRC is in charge of formulating the *Catalogue for Guidance of Foreign Investment Industries* together with other relevant departments, and examining and approving major foreign investment projects according to its competence as prescribed by the State Council.

The local counterparts of NDRC are in charge of examining and approving or recording foreign investment projects within their respective competence.

### **8.1.3 State-owned Assets Supervision and Administration Authorities**

State-Owned Assets Supervision and Administration Commission of State Council (“*SASAC of the State Council*”) and its local counterparts perform investor’s responsibilities on behalf of the state, and supervise and manage the state-owned assets of the enterprises invested in by the state. The transfer of state-owned assets, including to foreign investors, shall be decided by the competent state-owned assets supervision and administration authorities or reported by them to the people’s government at the same level for approval.

### **8.1.4 Administration for Industry and Commerce**

State Administration for Industry & Commerce (“*SAIC*”) is responsible for formulating detailed rules regarding administration of enterprise registration. SAIC and its local counterparts register FIEs within their respective competence.

### **8.1.5 China Securities Regulatory Commission**

China Securities Regulatory Commission supervises and administers the securities market in accordance with the law.

### **8.1.6 State Administration of Foreign Exchange**

State Administration of Foreign Exchange (“*SAFE*”) performs functions relating to administration of foreign exchange in accordance with the law. It administers foreign exchange of capital accounts and regulates foreign exchange accounts inside and outside China.

### **8.1.7 Administrative Authorities in Charge of Industries**

The parties to a foreign M&A transaction may also be subject to the approval, supervision and administration of relevant administrative authorities in charge of the industry in which the target enterprise or assets is/are operated.

## 8.2 Assistance to Foreign Investors

The Investment Promotion Agency of MOFCOM (“CIPA”) is responsible for providing assistance to foreign investors for their investment in China. Local governments also establish similar investment promotion agencies. For the contact information of CIPA and its local counterparts, please refer to Annex IV of the Guide.

Foreign investors may also log onto the *Invest in China* Website at <http://www.fdi.gov.cn> to obtain information relevant to foreign direct investment in China. This website offers information such as policies and laws, development of industries, government departments that administer investment, foreign investment statistics, investment institutions, investment services, foreign investment attraction projects, cross-border investment, and investment news. The website has set up a database for foreign investment projects. Foreign investors can search potential investment projects in China by industry, country/region, project name, source, date of issuance, valid period, or key word.

Apart from the administrative authorities, foreign investors may also engage professional intermediaries to assist them in conducting M&A transactions in China. Such professional intermediaries include financial intermediaries (such as commercial banks and investment banks) and non-financial intermediaries (such as accounting firms and law firms). Financial intermediaries could assist foreign investors in selecting target companies, facilitating transaction process and providing financing for their transactions. Non-financial intermediaries could assist foreign investors in evaluating and pricing target companies and providing legal support for their M&A transactions, including participating in the negotiations between foreign investors and target companies, helping finalize M&A scheme, and providing assistance in the execution and closing of relevant agreements.

## 8.3 Protection for Foreign Investors

The legitimate rights and interests of foreign investors and their investment enjoy full protection under Chinese laws. In particular, the state does not subject FIEs to nationalization or expropriation, except that the state may, in special circumstances and according to the public interest needs, expropriate FIEs in accordance with the legal procedures, in which case corresponding compensation will be paid. Net profits and other funds received legally by the

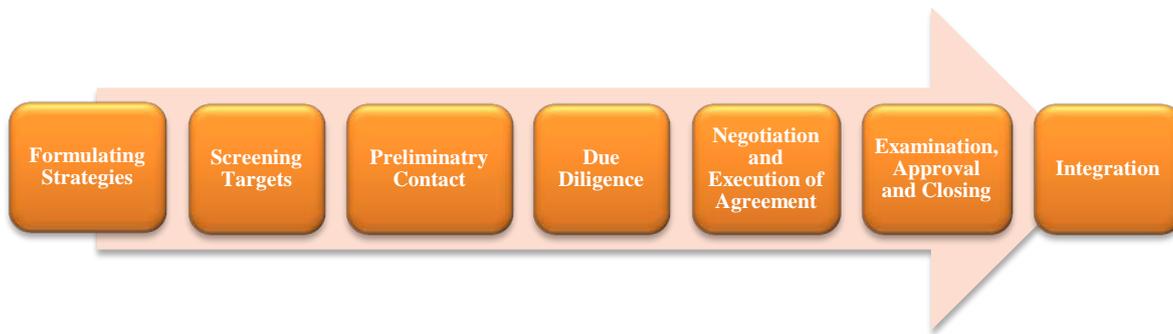
foreign investors may be remitted abroad in accordance with the relevant exchange control regulations. The intellectual property rights of foreign investors and FIEs are also fully protected by Chinese laws, which are fully consistent with the *Agreement on Trade-related Aspects of Intellectual Property Rights* and other international conventions.

In addition, the international conventions and treaties that have been entered into by China have provided protection to foreign investors at the level of international law. China has entered into bilateral investment protection agreements with 132 countries and regions, including Germany. On October 7, 1983, the *Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investment* and the *Protocol* were signed in Beijing. On December 1, 2003, the two countries signed in Beijing a new *Agreement between the people's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investment* (“2003 China-Germany BIT”) and a new *Protocol on the Agreement between the people's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investment*, which have become effective since November 11, 2005. The 2003 China-Germany BIT provides provisions concerning national treatment, most favored nation treatment, fair and equitable treatment, expropriation and compensation, remit-back of investment and profit, dispute settlement between the two parties, dispute settlement between a party and investors of the other party, etc. Besides, China entered into the *Convention Establishing the Multilateral Investment Guarantee Agency* in 1988 and *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* in 1993.

## 8.4 Environmental Protection

Please refer to Section 3.9 of Part II. of this Guide.

## 9. Overview of the Process for M&A in China



Before entering the Chinese market, a foreign investor needs to formulate a strategy for its M&A transaction in China in line with its own needs, understand China's overall investment climate as well as the investment climate for the industry, region and market concerned, and screen target candidates by carrying out searches through various channels. Once a preliminary target is identified, the foreign investor will generally go through the following transaction process:

### *Phase I: Preliminary Contact*

The foreign investor approaches the target company for preliminary contact, and negotiates on and executes a letter of intent, whereby obtaining an exclusive or non-exclusive right of negotiation for a specific period of time in the future. Normally, this phase will take three to four months;

### *Phase II: Due Diligence*

The foreign investor normally needs to conduct a due diligence on the target company or the target assets as well as the transaction-related background information from financial, legal, technical, commercial and other perspectives and collect and analyze relevant information about the transaction, in order to better understand the target company or assets and related issues. Normally, this phase will take around two to three months;

### *Phase III: Negotiation and Execution*

The transaction structure is determined, and transaction documents are drafted and executed after negotiation. In general, this phase will take three to six months, depending on the structure and scope of the transaction, the complexity of the legal documents and the progress of negotiations, etc.;

### *Phase IV: Examination, Approval and Closing*

After the relevant transaction documents are signed, the transaction needs to be examined and approved by and registered with relevant government authorities in China before closing of the transaction. This phase usually takes three to six months, depending on the specific circumstances such as the transaction structure, legal issues involved and the complexity of the target company,

### *Phase V: Integration*

Upon completion of the transaction, the foreign investor normally needs to integrate the target company with the investor's existing business, personnel and corporate structure inside and outside China, so as to realize its commercial objectives of the M&A transaction in China. The time period required in this phase ranges from four to six months, depending on the specific circumstances of the transaction. If any merger or deregistration of an existing PRC company is involved, it will take even longer to complete the whole integration process.

Part II. and Part III. of this Guide will elaborate in more details on the main procedures for a share acquisition and an asset acquisition respectively.

## 10. M&A Structure: Share Acquisition and Asset Acquisition

There are two basic ways for mergers and acquisitions by foreign investors:

### *- Share Acquisition:*

A foreign investor acquires all or part of the equity interests in a domestic target company from its existing shareholders, or subscribes to the increased registered capital of a domestic target company to acquire part of the equity interests in the target company; or

### *- Asset Acquisition*

A foreign investor acquires all or part of the assets of a domestic target company. But according to the Chinese law, the foreign investor must establish an entity in China to manage and operate the acquired assets. The foreign investor may either establish a new FIE first and then acquire the assets of the domestic target company, or first acquire the assets and then establish a business entity to operate such assets.

The afore-mentioned two ways of M&A are significantly different from each other. For the details about the share acquisition, please refer to Part II. of this Guide, and for the asset acquisition, please refer to Part III. of this Guide. Below is a brief summary of the differences between the two ways of M&A.

As regards the succession to the rights and obligations, in the case of share acquisition, the buyer will succeed to all the existing assets, rights, obligations and liabilities of the domestic target company after completion of the transaction regardless of whether the investor is aware of these or not; while in the case of asset acquisition, the buyer will only succeed to the assets and liabilities selected and purchased by it.

With respect to the closing process, in a share acquisition deal, it is normally only required to go through the formalities of examination and approval and registration of the transferred equity interests in the target company in order to complete the legal and actual closing of the transaction;

while in an asset acquisition deal (including business operation), it is required to identify the assets to be transferred and then to determine the specific forms of transfer and closing according to the nature of each transferred asset. For example, real estate transfer is subject to real estate registration, and transfer of intellectual properties which have been registered in different countries and regions is required to go through certain registration formalities in the relevant jurisdictions.

In respect of the formalities, in addition to the required governmental approvals, an asset acquisition deal entails more third-party consents and transfer formalities than a share acquisition deal. In an asset acquisition transaction, a foreign investor needs to obtain prior consents from the creditors and relevant third parties (including clients, suppliers, lessors, etc.) of the target company, and then set up a new FIE or utilize an established FIE to take over and operate the transferred assets and business. In a share acquisition transaction, a foreign investor needs to check whether there are any clauses such as right of first refusal or change of control clause in the original AOA of the target company and the commercial contracts (e.g. loan contract) between the target company and third parties in order to determine if prior consents of the other shareholders of the target company or any third parties should be obtained, but there is no need to obtain third-party consents for acquiring the assets of the target company.

Another material difference between the two types of M&A transactions is that the buyer may achieve different commercial results after the completion of the transaction. In a share acquisition deal, the buyer acquires the whole or part of the equity interests in the target company without affecting the business operation of the target company; while in an asset acquisition deal, the buyer may avoid unnecessary liabilities or other potential risks by cherry-picking the assets and businesses, provided that the buyer would usually not be able to control and manage the target assets during a certain transition period until the establishment of an acquiring entity, issuance of required certificates and approvals, obtaining of third-party consents and transfer of employees and assets.

We summarize the pros and cons of the two types of M&A transactions in the following table:

Transaction Structure	Pros	Cons
Share Acquisition	<ul style="list-style-type: none"> <li>retention of various licenses, certificates and permits of the target company;</li> <li>relatively simple examination and approval procedures;</li> <li>lighter tax burden and relatively easy tax arrangements ; and</li> <li>maintenance of existing contracts and labor relationships with minimum impact on the existing business operation caused by the transaction.</li> </ul>	<ul style="list-style-type: none"> <li>Succession to existing debts, liabilities and obligations of the domestic target company;</li> <li>reliance only on the representations and warranties of the seller for economic compensation for the debts, obligations and liabilities undisclosed by the domestic target company</li> </ul>
Asset Acquisition	<ul style="list-style-type: none"> <li>cherry-picking of key assets of the target company, with non-preferred assets retained by the seller; and</li> <li>avoidance of succession to the seller’s existing liabilities</li> </ul>	<ul style="list-style-type: none"> <li>takeover and operation of the acquired assets and business by means of establishing a new FIE or using an existing one;</li> <li>inability to take over the licenses or certificates that were granted to the sellers by the government;</li> <li>existing contracts and employees not allowed to be transferred automatically;</li> <li>more complicated procedures for transferring the acquired assets than for a share acquisition.</li> <li>Inability to succeed to previous tax treatments and preferences automatically.</li> <li>various taxes to be levied, such as business tax, value-added tax, land value-added tax, and Stamp Duty depending on the categories of the acquired assets.</li> </ul>

## II. M&A Transaction - Share Acquisition

In this Part II., we will discuss the general transaction procedures, legal requirements, major transaction documents and other aspects in connection with share acquisitions by foreign investors in China.

### 1. Acquisition Strategy and Identification of Target

#### 1.1 Acquisition Strategy

There are many ways for a foreign investor to develop its global business; one important way is to carry out acquisitions in China. An acquisition may be horizontal in order to expand the current scale of business, vertical (e.g., acquisition of an upstream supplier or a downstream distributor), or diversified in order to enter into new industries or geographical markets.

In any case, foreign investors need to develop their acquisition strategies that are clear and meet their own needs, and set up their thresholds and standards for searching and screening potential targets in China. China has a large territory, and different regional markets within China may have different characteristics. As a result, foreign investors may need to adopt different strategies for operation and acquisition in different regional markets of China.

Foreign investors may select and screen target companies in China through a variety of channels pursuant to their own acquisition strategies. For more information about assistance to foreign investors, please refer to Section 8.4 of Part I. of this Guide.

#### 1.2 Reasons for Sale

During the process of selecting a target company, a foreign investor may need to consider, apart from its own strategy and standard, the reason why the prospective seller wants to sell the target company. The motives for a seller to sell its shares or assets are diverse. A seller may sell for demand of funds or commercial reasons, e.g. the original investor wishes to withdraw after achieving its commercial purposes, or a small-scale family or private-owned business encounters

a bottleneck in management, finance, or development. It may also be a seller who chooses to sell due to non-commercial reasons, e.g. poor health of the founder of a private-owned company or lack of trustful successors, or even the founder choosing to invest in a totally different industry.

Knowing different motives of the seller and understanding its willingness to sell will have significant impact on target selection and further negotiation.

### 1.3 Who could provide assistance - Acquisition Team

Compared with a domestic acquisition in its home country, a foreign investor may face more challenges in carrying out an acquisition in China, which can be divided into the following three categories:

#### *Difference in Legal System*

The Chinese law is different from that of a foreign investor's home country or that the investor is familiar with. A foreign investor needs to exert much more efforts to understand the impact of the differences between these laws on its acquisition in China.

#### *Difficulties in implementation*

A foreign investor may face practical difficulties, such as language, extra staff for carrying out acquisitions, time difference, etc. in carrying out an acquisition. A foreign investor needs to pay particular attention to the issue of translation. As the Chinese language is commonly used in negotiation and documentation, the foreign investor needs to be fully prepared for the time and cost that translation work may take, risks that may result from language difference, and possible solutions.

#### *Cultural diversity*

Foreign investors may also have to face challenges incurred from differences in culture and course of dealing. For example, Chinese entrepreneurs prefer face-to-face communications during the negotiation process of acquisitions. Sometimes a face-to-face communication between the Chinese and foreign parties may be more effective than exchanges of documents or emails. In addition, Chinese parties sometimes may use implicit or general expressions while foreign investors may prefer detailed expressions in documentation and negotiation. Therefore, an expert

in the foreign investor's team who is familiar with the Chinese culture will help a smooth proceeding of the negotiation on the transaction.

Therefore, foreign investors may need to involve more professional advisors to assist in their acquisitions in China, which may include:

*Strategy consultants*

- strategic professionals may help a foreign investor develop acquisition strategies, implementation guidance and plan;

*Transaction consultants*

- professional investment banks, acquisition consultants and financial consultants have plenty of project resources and information and can help a foreign investor select target companies, contact potential Chinese target companies, facilitate transaction opportunities, and conduct business valuation or negotiation on price;

*Accountants*

- accountants can carry out financial and tax due diligence, cooperate with lawyers to assist the foreign investor in formulating the best deal structure with comprehensive consideration of tax and legal factors, and provide professional financial or tax advice on transaction documents;

*Lawyers*

- lawyers may answer legal questions for the foreign investor, conduct legal due diligence on the target company, draft various legal documents, provide assistant in negotiation, and handle approval formalities required for the completion of the transaction;

*Technical consultants*

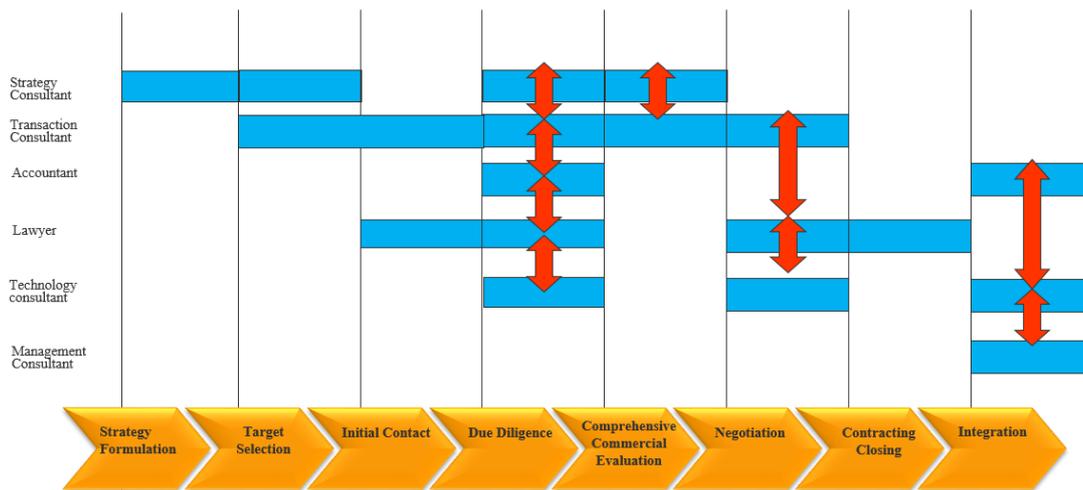
depending on the specific needs of a project, the foreign investor may need to hire technical consultants specialized in other professions to conduct special due diligence on the target

company, including investigation in and advice on issues such as environment protection, engineering, or mining.

*Management consultants*

after completion of acquisition, a management consultant may assist the foreign investor in integrating the acquired target in pursuit of synergistic effect.

**Composition of M&A Team and Role**



The abovementioned professionals have their own specialties and play different roles in M&A transactions. It is important for the investors to understand the functions of each professional, which is the assurance of the successful coordination of each party’s work, completion of transaction, and realization of goals of the M&A transactions.

## 2. Preparatory Activities

### 2.1 Transaction Structure

Foreign investors may choose different transaction structures for their share acquisitions in China depending on the specific commercial factors or legal requirements.

#### **2.1.1 Total Acquisition vs. Partial Acquisition**

A share acquisition may be a “total” or “partial” acquisition based on the foreign investor’s equity ratio in the target company after the acquisition:

##### *Total Acquisition:*

The foreign investor becomes the sole shareholder of and obtains full control over the target company by acquiring all the equity interests in the target company;

##### *Partial Acquisition:*

The foreign investor obtains part of the equity interests in the target company by acquiring some of the equity interests from the original shareholder(s), or subscribing to additional registered capital of the target company. After the completion of the share acquisition, the target company will become an EJV or a CJV if there are one or more Chinese shareholders in the target company, or become a WFOE with multiple foreign shareholders if none of the other shareholders is a Chinese entity.

Generally speaking, whether to choose a total acquisition or a partial acquisition depends on the commercial factors involved in a certain project. For example, the foreign investor needs a Chinese company to continue to be the joint venture partner and operate the target company together with it; the buyer requires the original shareholders to retain some equity interests until certain commercial conditions are met; the original shareholders of the target company are unwilling to sell all the equity interests in the target company; or the buyer does not have enough capital to acquire all the equity interests, etc.

In order to acquire a domestic target company, a foreign investor must also satisfy the requirements of market-entry policies. Therefore, a foreign investor may also be subject to a cap on the foreign equity ratio in the target company under some circumstances.

According to the *Catalogue for Guidance of Foreign Investment Industries*, a company in an industry where wholly foreign ownership is prohibited shall not become a WFOE after a share acquisition; a company in an industry where the controlling or relatively controlling shareholder is required to be the Chinese party shall remain controlled or relatively controlled by the Chinese party after acquisition by a foreign investor; for a company in an industry where foreign investment is prohibited, a foreign investor is not allowed to acquire any shares therein.

Please note that the foreign equity ratio in a target company refers to the total equity ratio of all foreign investors in the target company (rather than the equity ratio of any individual foreign investor) after the M&A transaction.

### **2.1.2 Direct Acquisition vs. Indirect Acquisition**

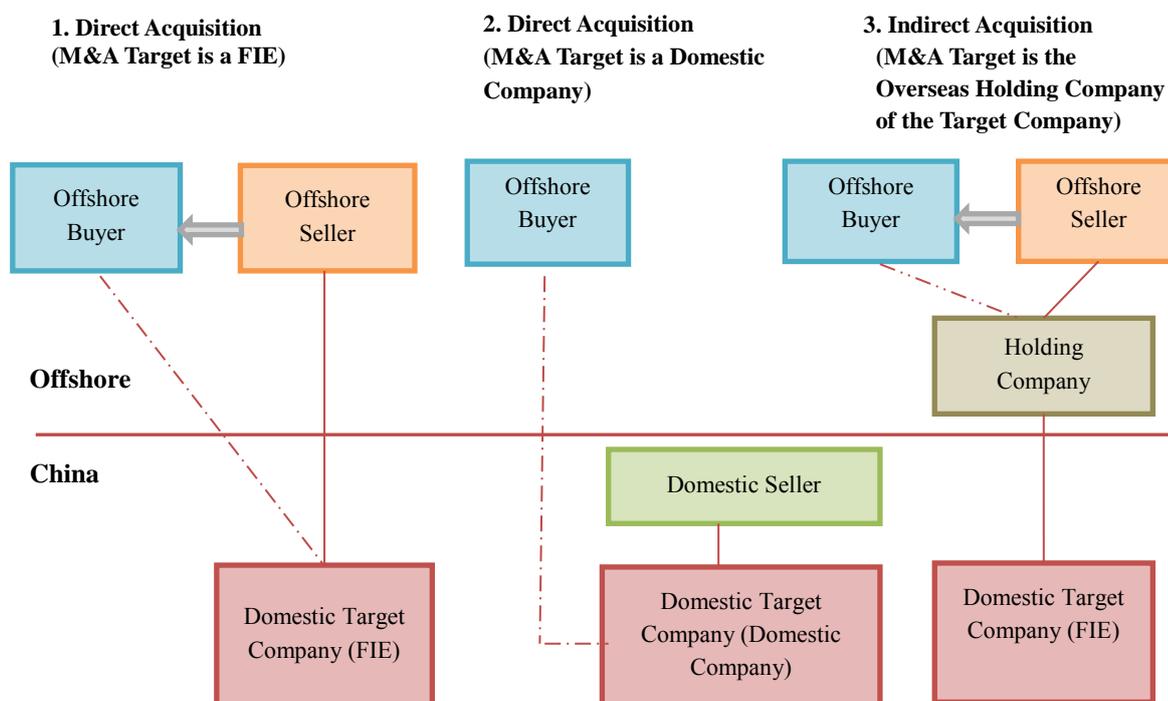
A share acquisition may take the form of “direct acquisition” or “indirect acquisition”, depending on whether the target company to be acquired by a foreign investor is a domestic entity in China.

Direct share acquisition means that one or more foreign investors directly purchase all or part of the equity interests in a domestic target company in China or subscribe to additional registered capital of such company.

Indirect share acquisition means that one or more foreign investors indirectly acquire a Chinese domestic target company by acquiring all or part of the equity interests held by its shareholder, which is a holding vehicle incorporated overseas.

Foreign investors mainly choose direct acquisition.

### Direct and Indirect Acquisition



#### 2.1.2.1 Direct Acquisition

A foreign investor’s direct share acquisition in China can be further classified into the following two sub-categories based on the nature of the target company:

The first category is where one or more foreign investors acquire the equity interests in or subscribe to additional registered capital of an FIE incorporated in China, leading to a change in the equity ratios of investors of the FIE.

The second category is where one or more foreign investors acquire the equity interests in or subscribe to additional registered capital of a non-FIE incorporated in China (“*Domestic Company*”), changing such Domestic Company into an FIE.

The above two kinds of direct acquisitions are both conducted within the territory of China, and shall comply with the qualification requirements for foreign investors provided under Chinese laws and regulations as well as market-entry policies. The equity/share transfer agreements for

direct acquisitions are governed by PRC law and need to be approved by relevant Chinese authorities.

However, the aforementioned two types of transactions are subject to different Chinese laws. A foreign investor's direct share acquisition of a Domestic Company is governed by the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*; while a foreign investor's direct share acquisition of a FIE is governed by the *Provisions on Change of the Equity Interests of the Investors in a Foreign Invested Enterprise*, and for matters not covered by these provisions, the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors* will apply mutatis mutandis.

Moreover, where a foreign investor acquires a domestic limited liability company and converts it into a company limited by shares, or acquires a Domestic Company which is a company limited by shares, the *Interim Regulations on Several Issues concerning Establishment of Foreign-invested Companies Limited by Shares* shall apply. For matters not covered by these provision regulations, the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors* will apply mutatis mutandis.

### 2.1.2.2 Indirect Acquisition

Indirect share acquisition applies only where the target company in China is wholly owned by an overseas holding company. In such case, what a foreign investor acquires are the equity interests in the overseas holding company, not those in the domestic target company. Normally, the transaction documents are governed by a foreign law, and the acquisition is closed at the place where the overseas holding company is incorporated. In general, an indirect share acquisition and its transaction documents are not required to be approved by or registered with the Chinese authorities, unless it triggers a review of concentration of undertakings, national security review, tax filing, etc.<sup>3</sup>

---

<sup>3</sup> See the *Notice of the State Administration of Taxation on Strengthening of Administration of Enterprise Income Tax on Income Derived from Transfer of Equity Interests by Non-resident Enterprises*, issued by the State Administration of Taxation on December 10, 2009. According to this notice, where the equity interests in a Domestic Company are transferred through a transaction by which the equity interests in the overseas holding company of the Domestic Company are transferred, the party which transfers the equity interests in the Domestic Company shall declare to the tax authority where the Domestic Company is located within thirty days after the date of signing the equity/share transfer agreement and may be required to pay relevant taxes.

### 2.1.3 Merger

According to the *Company Law*, merger of companies may take two different forms: merger by absorption and merger by consolidation. Merger by absorption means that a company absorbs one or more other companies and continues to legally exist while the absorbed companies are dissolved. Merger by consolidation means that two or more companies merge into a newly incorporated company while all the merged ones are dissolved.

The *Rules on Merger and Division of Foreign-invested Enterprises* set forth special provisions on mergers between FIEs and mergers between FIEs and Domestic Companies. These two types of mergers shall comply with the market-entry policies of foreign investment in China and shall be approved by relevant authorities. Specifically, mergers between FIEs shall take place only after the shareholders paid up their capital contributions and the merged companies have commenced business operating; while mergers between FIEs and Domestic Companies shall take place only after shareholders of the concerned FIEs have paid up all their capital contributions pursuant to the relevant agreements or AOA of the FIEs.

## 2.2 Transaction Structuring

### 2.2.1 Domestic Investment by FIEs

Domestic investment by a FIE means that an existing FIE establishes a subsidiary or acquires the equity interests in another FIE or a Domestic Company within the territory of China (“*Invested Company*”). FIEs may acquire Domestic Companies in the industries which are open to foreign investment, subject to the conditions and procedures provided by law. Below is a summary of the major characteristics and legal requirements for domestic investment by a FIE:

Domestic Investment by a FIE	Characteristics and Legal Requirements
Industrial policies for foreign investment	FIEs' domestic investment is analogically subject to the <i>Provisions on Guidance of the Orientation of Foreign Investment</i> and the <i>Catalogue for Guidance of Foreign Investment Industries</i> ; specifically, FIEs are not allowed to invest in the business sectors in which foreign investment is prohibited.
Types of investors	EJV, CJV, WFOE, or foreign-invested companies limited by shares
Types of Invested Company	limited liability company or company limited by shares
Necessity of approval for acquisition	<p>Depending on the business scope of the Invested Company:</p> <ul style="list-style-type: none"> <li>• Encouraged or Permitted Sectors: Approval from the local Commercial Approval Authority is not required. The Invested Company shall apply to the AIC for registration of change in shareholding.</li> <li>• Restricted Sectors: The acquiring party shall file an application for approval to the local Commercial Approval Authority where the Invested Company is located, and thereafter, the Invested Company shall apply to the AIC for registration of the change in shareholding.</li> </ul> <p>Furthermore, after the Invested Company completes the registration of the change in shareholding, the acquiring FIE is required to file for record with the original approval authority in relation to its domestic investment in the Invested Company.</p>

### 2.2.2 Offshore Special Purpose Vehicle

A foreign investor may first establish an offshore special purpose vehicle (“SPV”), and indirectly acquire the equity interests in a certain target company in China through such SPV. This structure may offer more flexibility on the investor’s exit. When the foreign investor decides to exit, it may sell its equity interests in such SPV, thereby indirectly disposing the equity interests in the domestic target company.

## 2.3 Methods of Payment of Consideration

During preparation for a M&A project, a foreign investor may also need to consider the potential methods of payment and the requirements for time of payment, the estimate capital demand of the M&A project, and arrange financing or other payment of non-monetary transaction considerations.

### 2.3.1 Payment of Consideration for Equity Transfer

Cash is the most common form of payment of consideration for equity transfer. In recent years, SAFE has simplified the procedures of administrative approval, and removed or adjusted a few administrative approval requirements for foreign exchange in relation to foreign direct investment. For example, from December 17, 2012, foreign investors may conduct direct investment in China (such as acquiring the equity interests in a Domestic Company or subscribing to its additional registered capital) by using either foreign exchange dividends from other invested FIEs or proceeds generated from equity transfer, capital reduction, dissolution, or early recovery of investment or other earnings legally obtained in China, without the need to obtain the prior approval of the foreign exchange authorities.

Moreover, a foreign investor may use RMB funds legally obtained overseas to conduct foreign direct investment activities in China upon approval by relevant Commercial Approval Authority in China, such as setting up a new enterprise, subscribing to additional registered capital, or M&A of a domestic enterprise, etc. (“*Foreign Direct Investment with Cross-border RMB*”). However, the invested FIE is not allowed to use such cross-border RMB to directly or indirectly invest in domestic negotiable securities or financial derivatives (except for strategic investment in listed companies), or providing entrusted loans<sup>4</sup>.

With regard to the statutory requirement for the time limit for payment of equity transfer consideration, it is worth noting that in the case of a foreign investor’s acquisition of the equity interests in a Domestic Company, which in turn is converted into a FIE, the foreign investor shall pay the total consideration to the selling shareholder within three months from the date of issuance of the business license of the FIE; provided that if there is a need for extension of time due to special circumstances, the foreign investor may upon approval by the Commercial Approval authority, pay no less than 60% of the total consideration within six months from the date of issuance of the business license of the FIE and then the remaining consideration within

---

<sup>4</sup> See Articles 1 and 3 of the *Announcement on Matters Relating to Direct Investment with Cross-border RMB* promulgated by MOFCOM.

one year of issuance of the FIE's business license, and is entitled to dividends based on the ratio of its actually paid-up capital contribution to the FIE.<sup>5</sup>

### 2.3.2 Payment for Subscribing to Capital Increase

Where a foreign investor acquires a domestic target company by subscribing to its capital increase, the foreign investor may contribute in cash, in kind, or with an intellectual property right or other non-monetary property which can be evaluated in currency and is legally transferable, except for those prohibited by laws or administrative regulations. Valuation is required for any non-monetary properties used for capital contribution. Neither overvaluation nor undervaluation is allowed.

The *Company Law* as newly amended has removed the original statutory restriction on the time limits of capital contribution. Accordingly, the previous restrictions or provisions on the minimum initial contribution, minimum ratio of capital contribution in cash, and the time limits for capital contribution have been removed. The investors (i.e., shareholders or promoters) of a FIE may freely agree with each other on the amount of capital to be subscribed to, and the form and time limit of capital contribution, provided that the joint venture contract and AOA of the FIE must include provisions on these matters as agreed by the parties.<sup>6</sup>

## 2.4 Special Requirements for Capital

### 2.4.1 Registered Capital and Equity Ratio

Registered capital means a total amount of capital as registered with the AIC for the purpose of establishing a corporate entity. It is the total amount of capital subscribed to by all investors of the entity. A shareholder's ratio of capital contribution to the registered capital of the entity reflects the equity ratio of the shareholder in the entity.

---

<sup>5</sup> See Article 16.1 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*.

<sup>6</sup> See Paragraph 1, Article 1 of the *Notice on Improving the Review and Administration of Foreign Investment* promulgated by MOFCOM.

When a foreign investor acquires an existing Domestic Company by share acquisition and then converts it into an FIE, the capital contribution ratios and the equity ratios of the foreign investor and the original shareholders need to be determined pursuant to actual circumstances of the transaction. According to Article 18 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors* :

- Where a foreign investor acquires the equity interests of a shareholder in a Domestic Company by agreement and the Domestic Company is thereby converted into a FIE, the registered capital of the FIE shall be the registered capital of the original Domestic Company, and the equity ratio of the foreign investor shall equal to the proportion of its acquired equity interests to the original registered capital;
- Where a foreign investor subscribes to the additional registered capital of a Domestic Company which is a limited liability company, and thereby converts it into a FIE, the registered capital of the FIE after the acquisition shall be the aggregate of the original registered capital of the Domestic Company and the additional registered capital subscribed to by the foreign investor. The foreign investor and the original shareholders of the acquired Domestic Company may agree upon their respective ratios of capital contribution to the overall registered capital post-acquisition based on the asset valuation of the Domestic Company;
- Where a foreign investor subscribes to the additional registered capital of a Domestic Company limited by shares, the equity ratio of the foreign investor shall be determined based on the number of shares held by it.

#### **2.4.2 Registered Capital and Total Investment**

Total investment is a special concept applicable to FIEs only. It means the total amount of the working capital for production and the capital for fundamental construction required to be put into a FIE according to the production scale of the FIE set out in its AOA (or joint venture contract). Total investment comprises registered capital and loans.

According to Article 19 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*, in the case of share acquisition by a foreign investor, the maximum total investment amount of the FIE incorporated after the acquisition shall generally be determined in accordance with the following

Registered Capital	Total Investment
<b>Less than and including USD 2,100,000</b>	Not exceeding 10/7 of the registered capital
<b>From USD 2,100,000 to and including USD 5,000,000</b>	Not exceeding two times of the registered capital
<b>From USD 5,000,000 to and including USD 12,000,000</b>	Not exceeding 2.5 times of the registered capital
<b>More than USD 12,000,000</b>	Not exceeding 3 times of the registered capital

### 3. Due Diligence

#### 3.1 General Introduction

Similar to M&A transactions in other countries and regions, foreign investors need to perform due diligence on their target companies when conducting M&A transactions in China, regardless of asset acquisition or share acquisition.

Due diligence is an essential procedure for foreign investors to manage and control risks. Foreign investors need due diligence to make up for their insufficient knowledge of and access to the transaction targets and relevant information. The issues and risks of the target company in legal, financial, business, human resources and other aspects discovered through due diligence are crucial basis for a foreign investor as the buyer to bargain during the negotiation on the acquisition price, contract terms, etc. Meanwhile, the result of due diligence can also help the buyer determine closing conditions, prepare a post-acquisition integration plan, arrange for obtaining necessary consents of any third parties, and draft necessary ancillary documents.

##### 3.1.1 Process of Due Diligence

A due diligence is primarily conducted by the buyer, but it will only work out well if the seller and the target company fully co-operate. Although foreign M&A activities in China are on the

rise, some companies in China are still not familiar with due diligence conforming to the international standards. Some sellers may have concerns about the buyer's motivation to conduct a due diligence, and some are quite reluctant to disclose sensitive information to the potential and competitive buyer for fear that the transaction will fail. Therefore, during the process of due diligence, foreign investors would need to be patient and form a team having local experience and adopt more flexible communication strategies.

### **3.1.2 Scope of Due Diligence**

The scope and focus of due diligence depend on the nature and type of the target to be acquired. For example, if the target is in the real estate sector, the investigation needs to focus on land use right and housing title and the legality thereof. If the target is a consumer product distributor, the focus may be on the titles to manufacturing facilities, brands, technologies and other intellectual property rights, as well as the legality of such titles and rights. If a manufacturing company is to be acquired, there is a likelihood that the issues of environmental protection, health and production safety will be involved, so the buyer needs to retain professional consultants to carry out due diligence on environment, health and production safety. Besides, the extent and depth of due diligence may also be subject to certain practical factors, such as available time, limit of expense, and urgency of the transaction.

For an M&A transaction in China, commercial, financial, taxation and legal due diligence are indispensable in most cases. In addition, it may involve technical due diligence in other special fields, such as environmental protection, production safety, information technology, human resources and mining, depending on the target company's actual situation and the buyer's need.

#### **3.1.2.1 Commercial Due Diligence**

Commercial due diligence is generally conducted by the internal commercial team of the buyer. External advisers may be engaged to provide assistance if necessary. Commercial due diligence looks at the target company's major commercial issues, such as market positioning, competitors, the business' strengths and weaknesses, production, sales, market development, and R&D capability. Commercial due diligence aims to test the degree that the business elements of the target company match the acquisition plan and indicators formulated by the buyer, and provide the basis for the buyer's management to consider the actions and risk control measures to be taken after completion of the transaction.

### 3.1.2.2 Financial and Tax Due Diligence

As an important part of due diligence, the buyer normally retains an accounting firm to investigate the financial and tax situations of the target company. Financial due diligence needs to focus on major financial issues that may affect the decision-making of the buyer, so as to enable the buyer to understand the existing and potential financial risks and opportunities that the transaction is likely to bring about, and decide how well the target will fit into the buyer's business strategy if these risks and opportunities are taken into account. Also, financial due diligence may help quantify potential synergies, adjust the financial data according to different accounting standards, choose the best transaction, tax and financing structures, and assess the target company's proper value.

### 3.1.2.3 Legal Due Diligence

Foreign investors usually engage lawyers to conduct legal due diligence. Legal due diligence aims to review the legality and validity of the target shares or target company and its business, uncover existing legal risks, and recommend, as the case may be, proper measures to be taken, such as adjusting the transaction structure to avoid risks, requesting the seller to make warranties and undertakings for compensation in the transaction documents, setting necessary conditions precedent for transaction, arranging consideration payment in installments through an escrow account or by other means, and taking remedial measures after the M&A transaction.

In a typical foreign acquisition of the shares in a Domestic Company, the scope of legal due diligence will generally include the following:

#### Legal Due Diligence—General Scope

- |   |  |
|---|--|
| <input type="checkbox"/> Corporate information              | <input type="checkbox"/> Tax   |
| <input type="checkbox"/> Approvals/Permits                  | <input type="checkbox"/> Labor   |
| <input type="checkbox"/> Finance and financing              | <input type="checkbox"/> Insurance (social insurance & commercial insurance) |
| <input type="checkbox"/> Assets (movable properties)        | <input type="checkbox"/> Environment, health and safety                      |
| <input type="checkbox"/> Land and housing (owned or rented) | <input type="checkbox"/> Litigation  |
| <input type="checkbox"/> Intellectual property              | <input type="checkbox"/> Compliance  |
| <input type="checkbox"/> Major Contracts                    | <input type="checkbox"/> Others  |

Following are the key contents of legal due diligence.

### 3.2 Corporate Information and Government Approvals

The most important matter to be verified in a legal due diligence is whether the potential target company is duly established and legally existing or whether the equity interests to be purchased are legally transferable.

Generally, the registration information and files of a target company can be inquired with local AIC. According to the *Interim Regulations on the Disclosure of Enterprise Information*, such information shall include information about the company's registration and record-filing, mortgage registration of moveable assets, equity pledge, and administrative punishments, as well as other information that shall be disclosed in accordance with the law (including information on the granting, change and renewal of administrative licensing, and so on). During the review of the AIC registration and record files of a target company, care should be given to whether these files are authentic, complete and consistent with the facts, particularly whether all the changes of the target company have been registered with local AIC, and the latest existing status of the target company.

Apart from inquiry with AIC, the buyer may also need to require the seller and the target company to provide other documents and information regarding the due establishment and legal existence of relevant enterprises. The table below lists the key issues that need to be focused on during the review of basic corporate information documents:

Major Documents	Issues
<b>Business License</b>	<ul style="list-style-type: none"> <li>• Whether the business scope of the target company involves any industry that is restricted or prohibited under the <i>Catalogue for Guidance of Foreign Investment Industries</i>;</li> <li>• Whether there are any special qualification requirements for foreign investors, and whether any approval of a higher-level Commercial Approval Authority or industrial authority is required;</li> <li>• Whether the actual operation activities are consistent with the business scope specified in the business license;</li> <li>• Whether the registered address is the same as the actual address;</li> <li>• Whether the term of operation is approaching expiration, etc.</li> </ul>
<b>Corporate Governance Structure</b>	<ul style="list-style-type: none"> <li>• Whether the target company's existing corporate governance structure is proper;</li> <li>• Whether there is any defect in or restriction over the equity interests in the target company, which would affect the current shareholders' rights to freely transfer their equity interests.</li> </ul>
<b>Constitutional Documents</b>	<ul style="list-style-type: none"> <li>• Reviewing AOA, shareholders' agreement, joint venture agreement, resolutions of the shareholder's meetings, board resolutions etc.;</li> <li>• Key items: the amount, subscription to, and time limits for contribution, of the registered capital; appointment and authorities of directors and management personnel; procedure and conditions of effectiveness for equity transfer;</li> <li>• Whether equity transfer is subject to the consent of other shareholders, and whether the shareholders have the right of first refusal, etc.;</li> <li>• Whether there are any special agreements (such as non-competition agreement) between the shareholders, and if yes, what is the impact of these agreements on the proposed transaction.</li> </ul>
<b>Approvals, Permits and Licenses</b>	<ul style="list-style-type: none"> <li>• Whether the target company is in an industry that requires any special approval or license in order to operate;</li> <li>• Whether the target company has obtained all the required qualifications;</li> <li>• Whether any relevant certificate or license has expired, etc.</li> </ul>
<b>Documents Reflecting Capital Structure and Capital Contribution</b>	<ul style="list-style-type: none"> <li>• Capital verification report(s)<sup>7</sup>, valuation report(s) for contribution in kind, capital contribution certificate issued to each shareholder; security on equity interests or shares; etc.</li> <li>• Whether the original shareholders have paid up their subscribed registered capital;</li> <li>• All prior shares transfer agreements and capital increases;</li> <li>• Whether there are any encumbrances on the relevant equity interests or shares, etc.</li> </ul>

<sup>7</sup> It is worth noting that the *Company Law* (Amended in 2014) has cancelled the statutory requirement that a capital verification report shall be obtained from a legally established capital verification institute after a shareholders of a limited liability company has paid for the capital contribution, except where laws, administrative regulations or decisions made by the State Council otherwise provide with respect to the actual payment for and the minimum amount of the registered capital of a limited liability company. In addition, the paid-up capital of a limited liability company is no longer an item that must be registered with the AIC, so it is more necessary than ever for the buyer to know about the capital contribution information of the target company. Therefore, from the perspective of law, the shareholders may choose to conduct capital verification at their own will. Despite that, in practice, a foreign investor may still, through negotiation, require the target company to provide its capital verification report(s) with an aim to verify the status of capital contribution in connection with the target shares. This is especially necessary for a share acquisition by means of capital increase.

### 3.3 Finance and External Financing

Legal due diligence on finance and bank loans mainly involves examining the authenticity, legality and validity of the relevant documents in order to identify major legal issues that may affect the value of the target company and transaction price. Information and documents that need to be reviewed and issues regarding external financing of a target company may include the following:

Finance and Financing Documents	Issues
<ul style="list-style-type: none"> <li>• <b>Bank account information and specimen seals and signatures reserved with banks ;</b></li> <li>• <b>Profit distribution and relevant board resolutions;</b></li> <li>• <b>Information about all overdrafts, credits, loans in RMB and foreign currencies, including shareholder loans;</b></li> <li>• <b>Other unpaid debts, including lenders, terms, interests, and other conditions for loan;</b></li> <li>• <b>Information about security provided by the company to any third parties, security provided by any third parties to the company, or security provided by any other entities with respect to the company’s debts;</b></li> <li>• <b>Other legal documents regarding external financing, such as loan agreements, guarantee contracts, bonds, relevant approvals, and duplicate of security-related registration certificates.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Whether any financing contracts concluded with banks or other financial institutions contain any provisions that limit "change of control", thus requiring prior consent of banks to be obtained in case any shares in the target company are transferred;</li> <li>• Whether the purpose of a loan agreed in relevant contract is inconsistent with its actual use, which may cause the target company to be required by the bank to accelerate loan repayment or bear liability for default;</li> <li>• Whether the target company lent money to and borrowed money from other enterprises, which could lead to invalidity of relevant loan contracts;</li> <li>• Whether the target company borrowed any money from non-specific parties, which might violate relevant financial laws and regulations;</li> <li>• Whether the target company has legally gone through registration of real estates, equity interests, intellectual property and other properties that are used as financial guarantee.</li> </ul>

### 3.4 Assets

#### 3.4.1 Real Property

In case the target company owns or leases any real property, including land and buildings and other structures attached on land (“*Real Property*”), the common legal issues that legal due diligence needs to focus on may include:

Real Property	Issues
<b>Owned Real Property</b>	<ul style="list-style-type: none"> <li>• Whether the target company has obtained all necessary ownership or use right certificates, e.g. housing ownership certificate, state-owned land use right certificate, or real property ownership certificate;</li> <li>• Whether the land used by the target company is owned collectively by farmers, and whether such land is used for production or construction purpose in violation of relevant laws;</li> <li>• Whether the relevant land-use right and property ownership were obtained in compliance with law. For example, whether the land used by the target company has undergone grant formalities if the land was originally acquired through allocation; whether the company has signed a land grant contract for the land used by it; whether the land-use right grant fee has been paid in full;</li> <li>• Whether the land use right or real property ownership is imposed with any mortgage, and whether there are any restrictions on the share transfer by, or change of, the current controlling entity of the target company;</li> <li>• Whether there are any disputes over the land use right or housing ownership of the company.</li> </ul>
<b>Leased Real Property</b>	<ul style="list-style-type: none"> <li>• Reviewing lease term, lease scope, rent, expenses, purpose of use, security deposit and other forms of security, and conditions and liability for termination of lease;</li> <li>• Whether a change of actual control of the target company (as lessee) may affect the performance of relevant lease contract, which in turn would prevent the target company from using the Real Property after the M&amp;A transaction.</li> </ul>

### 3.4.2 Major Assets

Apart from Real Property, the buyer also needs to verify other major assets of the target company, such as important machines and equipment, inventories and vehicles, and review related materials and documents. In general, due diligence on major assets focuses on the following issues:

Documents	Issues
<ul style="list-style-type: none"> <li>• <b>List of major assets, of which the unit price exceeds a certain amount;</b></li> <li>• <b>Documents evidencing the ownership of major assets, and contracts (including purchase agreements, transfer agreements, and lease agreements) relating to major assets;</b></li> <li>• <b>Relevant asset appraisal reports, especially reports and registration documents relating to state-owned assets, if any;</b></li> <li>• <b>Mortgage registration and pledge registration of major assets, and related principal debt contracts and security contracts;</b></li> <li>• <b>Registration certificates and insurance records of all vehicles.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Verifying the ownership of, and dates of purchase/lease, and depreciation of, major assets owned by the target company;</li> <li>• Verifying the ways by which the ownership of relevant assets were obtained (e.g. by purchase, acceptance as gift, or assignment from third parties), and whether the target company has gone through the necessary registrations and other government formalities for these assets;</li> <li>• Reviewing the lease term, rent, fees and security for leased assets, as well as the conditions and liability for termination of lease;</li> <li>• whether there is any mortgage, pledge or other encumbrances on the major assets of the target company;</li> <li>• Whether the target company has bought insurance for all the vehicles as required under law, and whether there is any major accidents covered by insurance.</li> </ul>

### 3.5 Intellectual Property

In M&A transactions, the legal due diligence on intellectual property generally includes verification of the ownership to trademarks, patents and copyrights and review of relevant contract terms. Depending on circumstances and the type of target company, the scope of due diligence on intellectual property may also cover trade names, business names, protection of geographic marks, layout-design rights of integrated circuits, know-hows, enterprise/product-related internet domain names, databases, rights concerning new varieties of plants, goodwill, important personnel mastering key technologies, etc.

To conduct intellectual property due diligence, apart from lawyers, a buyer may also need the assistance of patent agents, technical personnel, and experts specialized in relevant industries. If necessary, special investigations may be conducted on legal and technical issues so as to verify the effectiveness of and identify the potential infringement risks in relevant intellectual property rights in technology aspect. The buyer not only may collect intellectual property-related information and materials from the seller, but it also may search and verify information and materials from the online databases of relevant government authorities, media, and industry associations in order to ensure the accuracy, completeness and relevance of the information and materials.

Generally, intellectual property due diligence needs to focus on the following issues:

Documents	Issues
<b>List of intellectual properties</b>	<ul style="list-style-type: none"> <li>• Confirm the contents of registered and unregistered intellectual properties owned or used by the target company;</li> </ul>
<b>Ownership and registration status</b>	<ul style="list-style-type: none"> <li>• For registered patents and trademarks, the buyer needs to verify the ownership and registration status recorded on the ownership certificates, such as whether there are any co-owners, security, or third-party licensees. In addition, the buyer needs to investigate the validity periods of these rights, any possibility of invalidity or revocation, any third-party infringement, the protection scope of these rights, etc.</li> </ul>
<b>Agreements in relation to the acquisition and licensing of intellectual properties</b>	<ul style="list-style-type: none"> <li>• Whether the target company signed any intellectual property-related contracts with third parties, such as licensing contracts, joint development contracts, commissioned development contracts, and technology transfer contracts;</li> <li>• Whether registration and other government formalities have been completed for imported technology licensing and transfer contracts; and the scopes of, and payment terms for transfer fee or royalties of, acquired, transferred or licensed rights;</li> <li>• Whether a change of control of the target company is subject to the consent of any third parties, whether such change will have an adverse impact on relevant contracts, etc.</li> </ul>
<b>Protection of intellectual properties and trade secrets</b>	<ul style="list-style-type: none"> <li>• Whether the target company has established a good confidentiality system and practical management measures;</li> <li>• Whether the target company has entered into valid confidentiality agreements and non-competition agreements with its employees, whether the target company and its employees have performed their obligations under those agreements, etc.;</li> </ul>
<b>Disputes</b>	<ul style="list-style-type: none"> <li>• Whether the target company was or is involved in any claim, dispute or settlement in respect of any intellectual property rights;</li> </ul>

### 3.6 Major Contracts

The target company may have entered into major contracts that are closely related to its operation. Due diligence on major contracts shall focus on the following issues:

Contract Clauses	Issues
<b>Parties</b>	Particular note shall be taken on whether the counter party to each contract is affiliated to the target company. For example, whether they share the same trade name, or whether the person signing the contract on behalf of the counter party or its legal representative is a shareholder, director or senior officer of the target company.
<b>Execution</b>	Whether each contract has been duly executed. For example, whether the contract is sealed with company chops if so required, whether the person signing the contract on behalf each party is duly authorized, etc..
<b>Effectiveness and term</b>	Whether each contract has a definite validity term; whether the effectiveness of the contract is subject to any condition; whether there are any provisions for automatic early termination of the contract, etc.
<b>Assignment</b>	Whether any contract is permitted to be transferred to an affiliate or any third party; whether the prior consent from the other party is required in case of such transfer; whether there are any procedural requirements for the transfer of contract; etc.
<b>Change of control</b>	Whether the transfer of one party's equity interests or a change of control is subject to the prior consent of the other party according to the contract.
<b>Retention of title</b>	Whether one party to a purchase and sales contract retains the title or ownership to the subject matter under the contract;
<b>Confidentiality</b>	Whether there is any confidentiality period, and what are the liability for and consequences of breach of the confidentiality obligation by one party;
<b>Warranties and indemnity undertakings</b>	Whether there are warranties in each contract; whether the target company undertakes to compensate third parties for damage caused by product or service, etc.
<b>Breach of contract</b>	Particularly, whether there is any restriction on or exclusion of the liability of the target company or the counter party to a contract for breach of the contract; if so, whether such restriction or exclusion can be realized.
<b>Governing law and dispute resolution</b>	Whether any contract is governed by a foreign law; and whether the agreed method and venue of dispute resolution are proper or convenient, etc.

### 3.7 Taxation

Through financial, tax and legal due diligence, the buyer may verify the tax-related issues of the target company arising during its business operation (including tax types, tax rates and available preferential tax treatments), and examine whether the target company has fulfilled its tax payment obligations and whether there are any unpaid taxes or any other tax risks. If necessary, the buyer may engage professional consultants to calculate the amounts involved in potential tax risks, and adjust transaction prices or include tax guarantees and/or indemnity undertakings in the transaction documents accordingly in order to reduce tax risks in the M&A transactions. For an overview of the types of taxes in China, please refer to Section 6 of Part I. of this Guide.

### 3.8 Human Resources and Labor

Investigation into the target company's human resources and labor issues is one of the most important parts in the due diligence process. Pursuant to the requirements of the relevant labor laws and regulations of China, an employer shall enter into written labor contracts with its employees in order to establish a legal employment relationship with them. A typical labor contract is signed between an employer and each of its individual employees. Subject to the consent of all employees and reporting to the local labor administrative department, the labor union of an employer can act on behalf of the employees to enter into a collective labor contract with the company. A change of control of the employer, such as share acquisition by a foreign investor, generally does not change existing labor relationships, nor does it affect the performance of existing labor contracts.

The following issues may commonly be found during a due diligence on human resources and labor:

Documents	Issues
Labor contract templates	<ul style="list-style-type: none"> <li>• Whether the probation period-related clauses in the labor contracts comply with the <i>Labor Contract Law</i>;</li> <li>• Whether any labor contract lacks any essential statutory clauses;</li> <li>• Whether the rescission conditions of a labor contract exceed the scope stipulated by the <i>Labor Contract Law</i>;</li> <li>• whether there is any breach of a collective labor contract, etc.</li> </ul>
Employee handbooks	<ul style="list-style-type: none"> <li>• Whether the clauses regarding working hours, overtime work and compensation comply with the <i>Labor Law</i>;</li> <li>• Whether the internal rules for paid annual leave comply with the <i>Regulations on Paid Annual Leave of Employees</i>;</li> <li>• Whether there are other circumstances in violation of labor laws and regulations, etc.</li> </ul>
Written statement for purchase of social insurances	<ul style="list-style-type: none"> <li>• Whether the target company has paid social insurance premiums and housing provident fund on time and in full for all its employees, etc.</li> <li>• Whether the types of social insurances purchased by the target company are fewer than those statutorily required;</li> <li>• Whether the payment percentages and base amounts of social insurances and housing provident fund are legal, etc.;</li> </ul>
Confidentiality and non-competition agreements	<ul style="list-style-type: none"> <li>• Whether the confidentiality scope stipulated in each confidentiality agreement is reasonable;</li> <li>• Whether the non-competition term exceeds the statutory term;</li> <li>• Compensation standard and payment methods for non-competition, etc.</li> </ul>

### 3.9 Environment

According to Chinese laws and regulations, environmental impact assessment is required before a company commences a construction project. After the construction project is completed, the company shall have the environmental protection facilities inspected by the environmental authority and obtain the approvals, permits and certificates relating to environmental protection as required by law. In addition, companies may not discharge pollutants beyond the permitted scale and scope approved by the government.

Where the target company engages in production, construction or other business which may have an impact on the environment, the compliance issues regarding environmental protection, employee health and work safety might be given rise to. Apart from lawyers, the buyer may also need to employ other professionals to conduct comprehensive technical due diligence on relevant issues concerning the target company, the result of which will provide a basis for the buyer to determine the transaction price, negotiate with the seller and carry out the post-deal integration plan.

The following environment issues may be found during the legal due diligence:

- the target company has not handled the environmental impact assessment formalities for its construction project, or has not obtained the environmental approval;
- the target company fails to go through the approval formalities for a new environmental assessment after the environment of the construction project incurs a significant change;
- the environmental protection facilities for the target company's construction project do not comply with relevant provisions and have not been put into use;
- the trial production of the construction project has not been approved by the environment authorities, or the target company fails to complete the formalities for environmental protection inspection after the construction project has been put into trial production for three months;
- the target company has not obtained the license for pollutant emission;
- the target company transferred the production facilities that may severely pollute the environment to an enterprise which is unable to prevent and control pollution;
- the target company has severely polluted the environment;
- the target company has a history of being punished for violating the environmental protection laws, etc.

### 3.10 Lawsuit, Arbitration and Administrative Punishment

The buyer needs to get the knowledge of any lawsuits and arbitration (pending or not) where the target company has been involved and any administrative punishments the target company has received in recent years, focusing on the scopes of such lawsuits and arbitration, possibility of the target company to win, and their possible legal and financial implications.

When it comes to lawsuit, focus needs to be put on pending lawsuits in such aspects as cause of action, parties, subject matter and amount in dispute, jurisdiction, preservative measures, lawsuit stages, possible court ruling or arbitral award, as well as whether the court ruling is final and binding and whether there is any likelihood of retrial. In addition, it is necessary to know whether there are any potential similar disputes and whether any assets of or equity interests in the target company are frozen, attached or seized. As to any administrative punishments which are imposed on the target company, special attention needs to be given to whether the target company has any record of severe violation of laws or regulations, and if yes, whether such violation would disqualify or restrict the target company from engaging in certain business, whether the fines have been paid in full, and whether the violations have been rectified.

It is worth noting that the Supreme People's Court has been promoting the disclosure of judicial practice information via the Internet in recent years. Since March 30, 2009, the Supreme People's Court has launched a platform offering information inquiry of persons subject to judicial enforcement at courts nationwide. In addition, according to the *Interim Measures for Online Disclosure of Judgment Documents of the Supreme People's Court* which came into force on July 3, 2013, unless otherwise provided by law, all judgement documents of the Supreme People's Court are required to be published on the Judicial Opinions of China website of the Supreme People's Court ([www.court.gov.cn/zgcpwsw](http://www.court.gov.cn/zgcpwsw)). By far, all effective judgements of the three-level local courts in nearly thirty provinces, autonomous regions and municipalities are also disclosed on the Judicial Opinions of China website. Foreign investors may search the lawsuits information of the target company on the above-mentioned website and platform.

## 4. Valuation - Qualifications and Requirements

In an M&A transaction, the parties usually need to evaluate the target assets in order to determine the transfer price accurately. According to Article 14 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*, the parties to an M&A transaction shall use the value of the to-be-transferred equity interests as determined by an asset valuation institution as the basis for determining the transfer price. Unless the M&A transaction involves the transfer of state-owned assets, it is not compulsorily to undergo a third party valuation. Nevertheless, the parties to an M&A transaction may choose an asset valuation institution legally established in China to evaluate the equity interests proposed to be transferred. Asset valuation should be conducted based on internationally accepted valuation methods. Equity transfer or disposal of assets shall not be conducted at a price evidently lower than the price determined by the valuation institution for the purpose of transferring funds overseas in disguise.

As required by the *Administrative Measures for Examination, Approval, Supervision and Administration of Asset Valuation Institutions*, an asset valuation institution shall obtain certain asset valuation qualifications in accordance with the applicable laws and comply with relevant laws and regulations, practice criteria and practice standards.

### 4.1 Approaches for Asset Valuation

According to Article 22 of the *Standards for Asset Valuation - Enterprise Value* issued by the China Appraisal Society in December 2011, the basic approaches for valuing shareholders' equity are income approach, market approach and cost approach (asset-based approach). When appraising enterprise value, a certified asset appraiser shall, in accordance with the appraisal purpose, appraisal object, type of value, collection of materials, and other relevant conditions, analyze the applicability of the three basic approaches and properly select one or more of them.

#### 4.1.1 Income Approach

The income approach refers to the appraisal method for determining the value of an appraisal object through capitalization or discounting of the expected income. A certified asset appraiser shall, in light of an enterprise's historical business operations, future income projections, and the adequacy of the acquired appraisal materials, properly consider the applicability of this approach. The income approach commonly uses specific models that include the dividend discount model

and the discounted cash flow model. The dividend discount model is a specific method in which the expected dividends are discounted to present value so as to determine the value of an appraisal object. This method generally applies to the appraisal of partial equity value where no control exists. The discounted cash flow model generally includes the discounted Free Cash Flow of Firm model and the discounted Free Cash Flow of Equity model. The income period shall be properly determined in accordance with the applicable laws and regulations of the state, the relevant industry's status quo and development prospects, stipulations in agreements and articles of association, the enterprise's business operations, asset characteristics, and resources, etc. And the discount rate shall be reasonably determined by fully considering relevant capital market information such as the level of interest rate on the benchmark appraisal date and the rate of investment return in the market, the specific risks of the relevant industry and the subject enterprise, etc.

#### **4.1.2 Market Approach**

The market approach refers to an appraisal approach for determining the value of an appraisal object by comparing the appraisal object with a comparable listed company or a comparable transaction. A certified asset appraiser shall properly consider the applicability of this approach according to the sufficiency and reliability of the collected business operation data and financial data of the comparable enterprise, and the quantity of comparable enterprises that can be collected. There are two specific methods commonly used in the market approach, i.e. the guideline listed company method and the guideline transaction method. The guideline listed company method refers to a specific method in which the value of an appraisal object is determined by acquiring and analyzing the business operation data and financial data of a comparable listed company, calculating the appropriate value ratio, and comparatively analyzing the comparable public company with the subject enterprise. The guideline transaction method refers to a specific method in which the value of an appraisal object is determined by acquiring and analyzing the information on sales, acquisitions and mergers of the comparable enterprise, calculating the appropriate value ratio, and making comparative analysis with the subject enterprise. A certified asset appraiser shall properly select a comparable enterprise for the comparative analysis with the subject enterprise. When selecting a comparable enterprise, the certified asset appraiser shall focus on the business structure, business operation mode, enterprise size, assets allocation and utilization, stage of business circle, growth, business operation risks, financial risks and other factors.

### 4.1.3 Cost Approach (Asset-based Approach)

The asset-based approach refers to the appraisal approach in which the value of all the assets and liabilities of the subject enterprise on or off the balance sheet are properly appraised and the value of an appraisal object is determined based on the balance sheet of the subject enterprise on the appraisal benchmark date. A certified asset appraiser shall, according to accounting policies, an enterprise's business operations, and other circumstances, identify all the assets and liabilities on or off the balance sheet of the subject enterprise. Where there are assets or liabilities that have a major impact on the value of an appraisal object and are difficult to be identified and appraised, the applicability of the asset-based approach shall be considered. When enterprise value is appraised on the premise of a going concern, in general, the asset-based approach may not serve as the sole appraisal approach.

## 4.2 Valuation of State-owned Assets

If the target of an M&A transaction is state-owned assets, such transaction shall be subject to compulsory valuation. According to Article 55 of the *Law on State-owned Assets of Enterprises* for transfer of state-owned assets, the minimum transfer price shall be determined in a reasonable manner on the basis of a price that has been evaluated in accordance with the law and recognized by an organ that performs the duties of investor or approved by the people's government at the same level after being reported by such an organ. According to Article 13 of the *Provisional Measures on Administration of Transfer of State-owned Property Rights in Enterprises*, during the transaction of a state-owned asset, if the transfer price of the asset is lower than 90% of its assessed value, such transaction shall be suspended and may not be continued until consent is given by competent approval authorities. The main purpose of the aforementioned provisions is to help determine the base price for asset transfer through strict asset valuation procedures in order to prevent state-owned assets from being sold at an extremely low price.

## 5. Contractual Documents

### 5.1 Essential Transaction Documents

In a share transaction, the major transaction documents include letter of intent, share transfer agreement, a new joint venture contract (if applicable) and the AOA of the target company.

In case the transactions documents are written in a language other than Chinese, such documents need to be submitted to Chinese administrative authorities alongside with their Chinese translation.

#### 5.1.1 Letter of Intent

A letter of intent is not mandatorily required by Chinese law. Nevertheless, after the parties to a share acquisition transaction had an initial contact and complete a preliminary background investigation on each other, they usually sign a letter of intent (sometimes called a term sheet or memorandum of understanding) if they are willing to proceed with the transaction. A letter of intent primarily aims to hammer out a cooperation framework and ensure a smooth going of the subsequent process of the transaction. A letter of intent usually includes clauses on the following matters:

- (1) the target to be acquired;
- (2) confidentiality;
- (3) information and data supply;
- (4) allocation of expense;
- (5) consideration;
- (6) schedule;
- (7) exclusivity; and
- (8) termination.

Whether a letter of intent is legally binding usually depends on the actual needs of the parties. Generally speaking, a letter of intent as a whole is usually not legally binding except for its confidentiality clauses. All parties and individuals involved in a share acquisition shall keep

business secrets confidential so that if the transaction fails, the foreign investor' intention on such M&A transaction will not be prematurely disclosed to others, and the interests of the target company will be protected as well.

In addition, in comparison with the seller in a share acquisition deal, a foreign investor being the buyer puts more human, material and financial resources in the transaction and therefore is exposed to more risks. Hence, the foreign investor may consider including certain protection clauses into the letter of intent in addition to confidentiality clauses, which include:

*(1) exclusive negotiation clause:*

This clause may stipulate that the seller shall not negotiate with a third party in any way on transfer or sale of the equity interests in or assets of the target company without the buyer's consent, otherwise the seller will be deemed to have breached the contract and shall be liable for the breach; and

*(2) information and data supply clause:*

This clause enables the foreign investor to request the target Domestic Company to provide its information and data as required by the foreign investor, especially the information and data undisclosed to the public, in which way the foreign investor will be able to gain a more comprehensive picture of the target company.

### **5.1.2 Equity/Share Transfer Agreement or Capital Increase Agreement**

An equity/share transfer agreement or capital increase agreement contains all the terms and conditions for a share acquisition transaction and is an essential as well as the most important transaction document in such transaction. It is worth noting that the equity/share transfer agreement or capital increase agreement for a share acquisition cannot become effective until it is approved by the competent Commercial Approval Authority.

Pursuant to Article 22 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*, an equity/share transfer agreement and/or capital increase agreement shall include the following primary content:

- information of the parties thereto, including their names and domiciles, as well as the names, titles, and nationalities of their respective legal representatives, etc;

- percentage and price of the equity interests to be purchased or of the increased capital to be subscribed to;
- term and method of performance of the agreement;
- rights and obligations of the parties thereto;
- liability for breach of contract and dispute resolution; and
- time and place of execution thereof.

In practice, apart from the aforementioned essential clauses required by laws, a foreign investor and its Chinese counterparty may, through consultation, freely introduce other clauses in their equity/share transfer agreement or capital increase agreement, including

- (1) the seller's representations and warranties;
- (2) the seller's disclosure obligations; and
- (3) the seller's indemnification obligations.

The clauses concerning the seller's representations and warranties are aimed at specifying the obligations and liability assumed by the seller for the transaction and serve as the basis for indemnification to the foreign investor in the event that the seller breaches any such representations or warranties and causes a loss to the foreign investor. This clause plays an important role in ensuring an honest disclosure and due performance by the seller and helping the foreign investor to avoid legal risks. Generally, representation and warranty clauses would mainly include the following statements:

- (1) the target company is legally established;
- (2) all the previous divisions, mergers and equity transfers of the target company are completed legally;
- (3) the target company has been carrying out business and paid taxes in compliance with the laws and regulations;
- (4) there is no defect in the equity interests to be transferred;
- (5) the internal approval procedure for the equity transfer have been completed;
- (6) the assets of the target company are fully owned by the target company with no disputes involved; and
- (7) all the target company's debts have been disclosed to the foreign investor.

The clauses regarding the seller's disclosure obligations render these obligations contractually binding after having been incorporated into the equity/share transfer agreement or capital increase agreement and may serve as a legal basis for the foreign investor to claim compensation in case the seller fails to perform any such obligations. The foreign investor may request the seller to disclose various detailed information about the target company through consultation.

The clauses regarding the seller's indemnification obligations provide the foreign investor with a legal basis to claim against the seller indemnification in the event that the seller breaches any of its representations or warranties or fails to disclose information as agreed.

### 5.1.3 New Joint Venture Contract and AOA

If a foreign investor acquires partial equity interests in the target Domestic Company, then the target company will be transformed into an EJV or CJV after the transaction. Accordingly, the parties shall enter into an equity joint venture contract or cooperative joint venture contract and prepare a new AOA for the target company. For the statutory content of a joint venture contract and AOA, please refer to Annex V of this Guide. Foreign investors may also refer to the Germany Trade and Invest website for the model clauses of an equity joint venture contract<sup>8</sup>.

## 5.2 Third Party Consent

A share acquisition is also subject to consent of the relevant third parties, e.g. the target company's other existing shareholders and other relevant parties.

### 5.2.1 Consent of the Other Shareholders of the Target Company

According to the *Company Law*, if a shareholder of a limited liability company intends to transfer its equity interests in the company, the other shareholders enjoy the right of first refusal to purchase such equity interests. This right generally is included in the AOA of the company. The seller shall notify, in advance, the other shareholders of its intention to transfer as well as the terms and conditions for the transfer. The other shareholders have the right of first refusal to

---

<sup>8</sup> <http://www.gtai.de/GTAI/Navigation/DE/Trade/Recht-Zoll/Wirtschafts-und-steuerrecht/internationales-wirtschafts-und-steuerrecht,t=deutschchinesischer-joint-venturevertrag--musterklauseln-2013,did=760106.html>

purchase the equity interests under the same terms and conditions applicable to other potential buyers. If the other shareholders fail to exercise their right of first refusal within the period of time stipulated by the AOA of the target company after receiving the notice sent by the seller, the seller may transfer the equity interests to third parties.

At the early stage of a share acquisition transaction, it is crucial to secure the non-transferring shareholders' waiver of their right of first refusal to purchase the equity interests to be transferred; otherwise the whole transaction may end up in vain. Moreover, in most cases, the AOA of a company will provide that any transfer of the equity interests in the company is subject to a unanimous approval of the board of directors. For this reason, in addition to obtaining the consents of the non-transferring shareholders, it is also important to secure a commitment of the target company's directors appointed by these shareholders to vote in favor of the transfer.

### **5.2.2 Consent of Third Parties**

A change of control clause in a commercial contract grants a party a right to terminate the contract or claim a breach of contract if the shareholding structure of the other party changes. Usually, the change of control clause can be found in a bank loan agreement.

In a share acquisition, the parties should deal with the contracts that contain a change of control clause, especially the contracts which are critical to the business of the target company or under which a breach of the change of control clause will impose onerous default liability on the target company. For this reason, it is important to obtain the consent of the counterparty to each such contract to the proposed equity transfer, and the parties to the share acquisition transaction need to make it clear that obtaining such consent is a condition precedent for closing of the transaction.

## **5.3 Liabilities**

As a common practice in a share acquisition, no assets, rights, obligations or liabilities of the target Domestic Company will be changed after a foreign investor acquires the equity interests in the company, no matter whether or not the foreign investor is aware of such assets, rights, obligations or liabilities. Therefore, it is vital for the foreign investor to verify the target company's debts and liabilities through due diligence.

For a foreign investor, certain potential liabilities which arise out of the target company's historical operation activities may be hard to be discovered by means of due diligence conducted before the share acquisition, or such potential liabilities will not occur until the closing of the transaction. Therefore, it is particularly important for the foreign investor to include an indemnification clause in the equity/share transfer agreement, covering liability in respect of tax payment, environmental protection, product liability, employment, etc.. By doing so, the foreign investor is entitled to claim indemnification from the seller in case the seller incurs any such liability.

## 5.4 Execution

### 5.4.1 Written Form of Contracts

Pursuant to Article 11 of the Contract Law, "written form" means a form such as written agreement, letter, data message (including telegram, telex, fax, electronic data interchange and email) or any other form, the contents of which can be reproduced in a tangible form.

### 5.4.2 Execution of Contracts

#### 5.4.2.1 Execution by a Company

Written contracts can be executed either by signing or by sealing. As a matter of convention, the official seal of a company is usually affixed next to the signature of the company's authorized representative where both Chinese and foreign parties are involved. A foreign company may also execute a document with its authorized representative's signature alone and without its company seal, provided that such way of execution complies with the AOA of the foreign company. Co-signing on the same signature page may be a safer approach to reduce risks of disputes over the authenticity and genuineness of the documents' signatures. Chinese law does not require transaction documents like equity/share transfer agreement to be notarized.

### 5.4.2.2 Execution by an Individual

The execution of documents by individuals takes the same forms as those by companies. In practice, execution with signature alone (i.e., without seal) is more common for individuals than for companies.

## 6. Approvals, Record Filings and Registrations

### 6.1 Approvals, Record Filings and Registrations Required

Generally speaking, a share acquisition is subject to the following approvals, record filings and registrations:

	FIE	Domestic Company	SIE
<b>General approvals and registrations</b>			Apply to the competent SASAC for approval for transfer of state-owned assets
	Apply to MOFCOM or other competent local Commercial Approval Authority for approval for the share acquisition		
	Apply to competent AIC for registration		
	Apply to tax, customs, land, foreign exchange and other administrative authorities for corresponding registrations		
<b>Special approvals (if applicable)</b>	Apply to the State Council, provincial governments, local governments, NDRC or its local counterparts, or the department of State Council in charge of the sector concerned, for project approval/record-filing		
	Apply to relevant industrial authority for market-entry approval		
	Apply to MOFCOM for review of concentration of undertakings		
	Apply to MOFCOM for national security review		

This section will give a brief introduction to the procedures for share acquisition approval, project approval/record filing, and approval for transfer of state-owned assets. For the requirements and procedures for review of concentration of undertakings and national security review, please refer to Section 7 of Part I. of this Guide.

### 6.1.1 Approval for Foreign M&A

According to Article 6 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*, M&A deal involving a Domestic Company and a foreign investor for the purpose of incorporating a FIE, shall be approved by MOFCOM or competent local Commercial Approval Authority. Therefore, after an equity/share transfer agreement and other legal documents are executed, relevant documents shall be submitted to the Commercial Approval Authority for approval. Only when such approval is obtained will the equity/share transfer agreement come into effect. For the specific division of the approval powers, please see below:

Categories	Administrative Authorities
<ul style="list-style-type: none"> <li>Encouraged projects and permitted projects under the <i>Catalogue for Guidance of Foreign Investment Industries</i> which require nationwide balancing and each of which has a transaction price of over USD 300 million<sup>9</sup>; or</li> <li>Restricted projects under the <i>Catalogue for Guidance of Foreign Investment Industries</i>, which has a transaction price exceeding USD 50 million each.</li> </ul>	MOFCOM
<ul style="list-style-type: none"> <li>Foreign M&amp;A projects which do not require an approval of MOFCOM.</li> </ul>	Local Commercial Approval Authorities

### 6.1.2 Project Approval/Record-filing

According to the latest *Catalogue of Investment Projects Subject to Governmental Approval* (2014 Version) promulgated by the State Council and the *Measures for the Administration of*

---

<sup>9</sup> See Article 1 and Article 3 of the *Notice of the Ministry of Commerce on Issues Concerning the Decentralization of Approval Powers for Foreign Investment*.

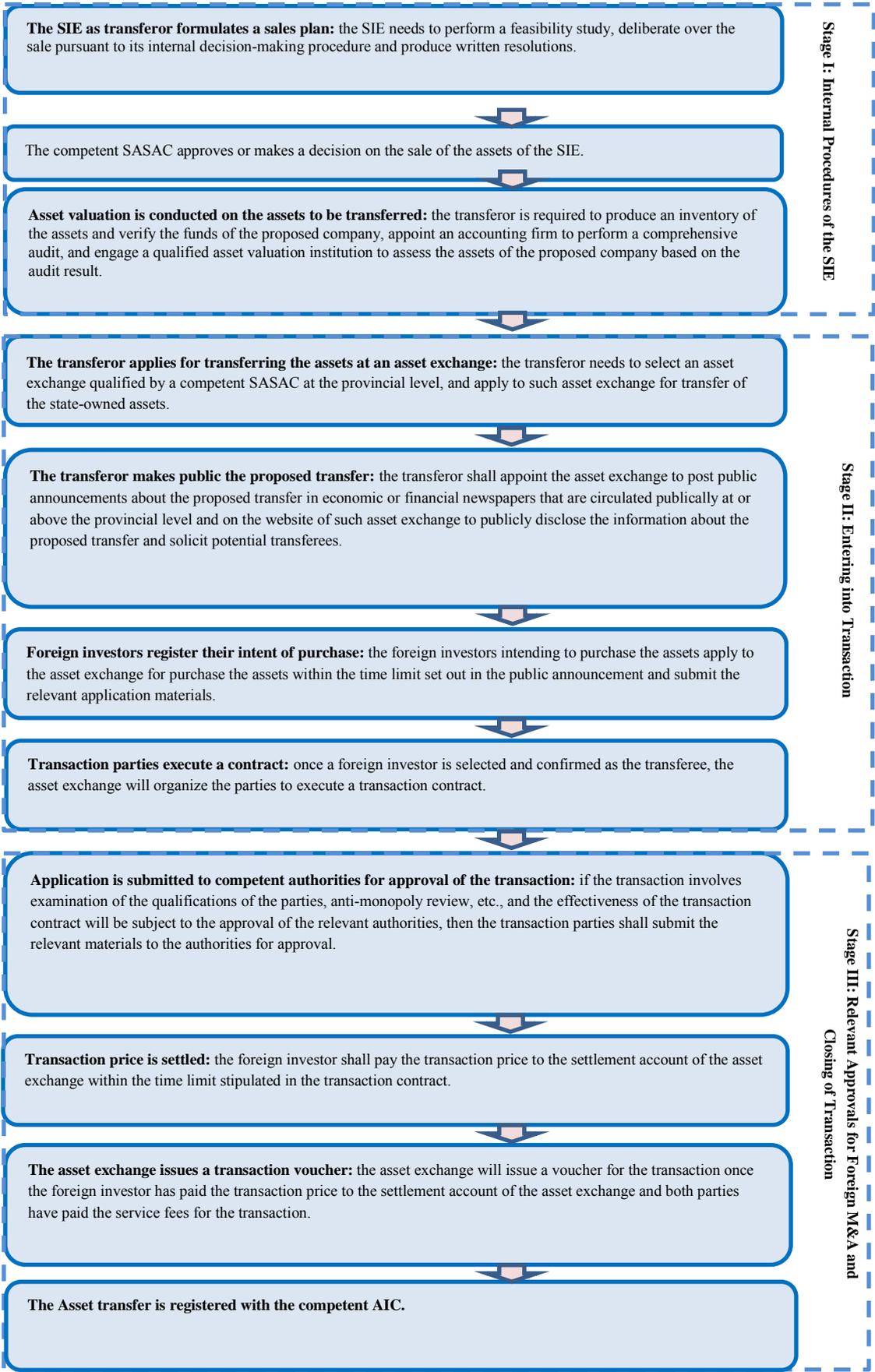
*Approval and Filing of Foreign Investment Projects* promulgated by NDRC in 2014, foreign investment projects involving fixed-asset investment are subject to the approvals or shall be filed for record. The requirements for Project approval/Record-filing for foreign M&A projects and the division of approval powers are summarised below:

Categories	Administrative Authorities
<ul style="list-style-type: none"> <li>Encouraged projects with a total investment (including capital increase) of USD 1 billion or above and which are also subject to majority Chinese ownership (including comparatively controlling ownership) requirements under the <i>Catalogue for Guidance of Foreign Investment Industries</i>;</li> <li>Restricted projects under the <i>Catalogue for Guidance of Foreign Investment Industries</i> each with a total investment (including capital increase) of USD 100 million or above.</li> </ul>	Approved by NDRC (Among the two categories of projects, those with a total investment (including capital increase) of USD 2 billion or above each shall be further filed with the State Council for record)
<ul style="list-style-type: none"> <li>Restricted projects under the <i>Catalogue for Guidance of Foreign Investment Industries</i> with a total investment (including capital increase) of below USD 100 million each</li> </ul>	Approved by the provincial governments
<ul style="list-style-type: none"> <li>Encouraged projects under the <i>Catalogue for Guidance of Foreign Investment Industries</i> which are subject to the majority Chinese ownership (including comparatively controlling ownership) requirements, with a total investment (including capital increase) of below USD 1 billion each</li> </ul>	Approved by local governments
<ul style="list-style-type: none"> <li>Projects prescribed to be approved under Articles 1 to 10 of the <i>Catalogue of Investment Projects Subject to Governmental Approval (2014 Version)</i></li> </ul>	Approved respectively by the State Council, NDRC, the department of the State Council in charge of the industry, or provincial or local governments
<ul style="list-style-type: none"> <li>Other foreign investment projects</li> </ul>	Filed with the local counterparts of NDRC for record

### 6.1.3 Approval for Transfer of State-owned Assets

In a foreign M&A transaction, if the target company is a SIE, such M&A transaction shall also comply with the Chinese laws and regulations regarding transfer of state-owned assets. Below is the approval process for transfer of state-owned assets of SIE in foreign M&A transactions:

**Process for Transfer of State-owned Assets of a SIE**



## 6.2 Application Documents

The parties to a foreign M&A transaction shall submit a series of application documents to the relevant competent approval authorities for approval or registration as required under law. Please refer to Annex VI of this Guide for a brief introduction to the documents that may be required to be submitted during each approval or registration stage in the process of a share acquisition.

## 7. Closing

As described in Section 4.1.3 of Part II. of this Guide, in a direct acquisition of a Domestic Company by a foreign investor, either in the form of share acquisition or of subscription to the capital increase, a series of government approvals and registration formalities are required to be fulfilled after the execution of the equity/share transfer agreement and other transaction documents, before the parties complete the closing of the transaction. Therefore, there will be a time gap between the execution of the transaction documents and the closing. Furthermore, during the closing, a number of foreign exchange registration formalities will be involved for the payment of the consideration for the acquisition to be finally concluded.

### 7.1 General Introduction to Major Governmental Formalities for Completing a Transfer of Equity Interests

#### **7.1.1 Approval of Commercial Approval Authorities**

As aforesaid, generally speaking, a foreign investor shall obtain the approval of MOFCOM or the local competent Commercial Approval Authorities and be issued with a certificate of approval.

The M&A transaction documents (including equity/share transfer agreement, joint venture contract, AOA, etc.) will not come into effect until approved by the competent commercial approval authorities.

### 7.1.2 Registration with AIC for Equity Transfer and Subsequent Changes

Within 30 days following the approval by the commercial approval authorities, the target company shall go through a modification registration with the competent AIC and obtain a new business license which reflects the new shareholding relationship.

Meanwhile, a foreign investor may also require the target company to apply for registration with applicable AIC regarding changes such as change of directors or the name of the target company.

### 7.1.3 Modification Registration with Other Governmental Authorities

Within 30 days following the receipt of the new business license, the target company needs to complete the following registrations or formalities as set out below to reflect the changes to the target company:

- Foreign exchange registration through a bank as required by SAFE (please refer to Section 7.2 of this Part);
- Taxation registration with State Administration of Taxation or its local competent counterpart;
- Application for an organizational code certificate to the General Administration of Quality Supervision, Inspection and Quarantine or its local competent counterpart;
- Finance registration with the relevant finance authorities;
- Statistics registration with the state and the local statistics bureaus;
- Customs registration with the competent Customs;
- Other essential registrations (if applicable) with the governmental authority in charge of the industry that the target company is engaged in.

## 7.2 Foreign Exchange Registration

Direct investment in China by a foreign investor, including establishing a FIE or project by way of new establishment or M&A and thereby obtaining the ownership, control, business management rights, etc. (“*Foreign Direct Investment*”) shall be registered with SAFE or its local counterpart in accordance with PRC laws and regulations on foreign exchange control.

According to the *Circular of SAFE on Further Simplifying and Improving Foreign Exchange Control Policies on Direct Investment*, effective as from June 1, 2015, a bank chosen by a target

company in accordance with the law shall directly handle the foreign exchange registration in relation to its Foreign Direct Investment. SAFE and its local counterparts will indirectly supervise the foreign exchange registration of Foreign Indirect Investment through the banks.

### 7.3 Capital Contribution Certificate

If a foreign investor conducts an M&A transaction by subscribing to a capital increase, thereby changing the target company into a FIE, then after the foreign investor has completed its capital contribution, the target company shall issue a capital contribution certificate to the foreign investor.

The capital contribution certificate shall contain the following information: name of the company, date of establishment, registered capital, names of investors (shareholders), method of capital contribution, amount of capital contribution or conditions for providing cooperation, date of capital contribution, and serial number and date of issuance of the capital contribution certificate. For the purpose of facilitating the statistical work of foreign investment in China, within 30 days after issuing an capital contribution certificate to a foreign investor, the target company shall send a duplicate of the capital contribution certificate affixed with its official seal to local Commercial Approval Authority where the target company is located and provide supporting documents regarding the capital contribution.

### 7.4 Post-closing Integration

The key to the success of an M&A transaction in China rests with the swift and effective solution of the post-closing integration issue. Therefore, if a foreign investor proposes to invest in China, it needs to take into account its integration strategy throughout the M&A process and organize a powerful executive team to complete the post-closing integration to face the challenges from legal, cultural, commercial and other perspectives.

#### **7.4.1 Effective Post-closing Integration of Business**

After the closing of an M&A transaction, the buyer usually needs to restructure its existing business in China with the ones of the target company. This may involve the merger, division, deregistration, etc. of domestic entities and overseas entities. Restructuring of business may also involve integration of personnel, which includes not only replacing the management team of the target company by the buyer's personnel, but also adjusting the current employees' positions and work scopes.

#### **7.4.2 Maintenance of Relationship with Seller**

In an M&A transaction, the buyer and the seller usually have negotiated over and reached a consensus on to what extent they will keep cooperating or maintain the relationship with each other after the M&A. It is relatively common that some management personnel remain in the target company after the M&A transaction. In this case, the buyer would need to consider setting up a certain mechanism in order to minimize the influence the seller may have on the business and personnel after the M&A. The buyer also needs to seek necessary support from the seller. To that end, the buyer may consider the following measures:

- Restricting the seller from engaging in any business or activities which may compete with those of the target company during a certain period of time;
- Restricting the seller from soliciting or hiring the employees of the target company;
- Restricting the seller from disclosing to the public any information about the M&A transaction without the consent of the buyer;
- Requesting the seller to continue to assist in providing cooperation in connection with the M&A activities for a certain transitional period.

#### **7.4.3 Effective Understanding and Communication**

The post-closing integration for a foreign investor in China may involve not just differences of corporate culture between companies, but also culture, language and other differences between countries. It would therefore require some patience from the foreign investor to perform effective communications with the management and the ordinary employees of the target company, introduce its own company culture, understand the existing practice of the target company and seek common goals and values, so as to achieve the final integration of the buyer into the target company.

## 8. Taxation

The major taxes that may be involved in a share acquisition are listed in the table below:

Type of Tax		Tax Rate	Item	Taxpayer
Enterprise Income Tax		25%	Equity transfer	Seller (as Domestic Company)
		10%, or exempted (if the requirements under the relevant tax treaty are fulfilled)		Seller (as non-Domestic Company)
Stamp Duty		0.5%	Execution of equity/share transfer agreement	the parties to the M&A transaction

### 8.1 Enterprise Income Tax

Pursuant to the *Notice on Several Issues Relating to Treatment of Enterprise Income Tax Pertaining to Restructured Business Operations of Enterprises* (Cai Shui [2009] No.59), unless meeting the requirements for the application of special tax provisions on restructuring, the seller shall confirm the income or loss from the equity transfer. The tax base for the equity interests obtained by the buyer shall be determined on the basis of fair market value.

If the seller is a Domestic Company, it shall pay enterprise income tax at the statutory rate of 25%. If the seller is a non-Domestic Company, then the seller should pay enterprise income tax for its income coming from the transferred assets and derived from or accruing in the territory of China, and such tax payments shall be withheld at source. The applicable withholding tax rate is 10%.

For the target company, the income taxes applicable to it will remain unchanged in principle regardless of any change of its shareholding structure.

## 8.2 Stamp Duty

Usually, both the seller and the buyer shall pay for Stamp Duty at the rate of 0.5‰. The tax base is the consideration stipulated in the equity/share transfer agreement.

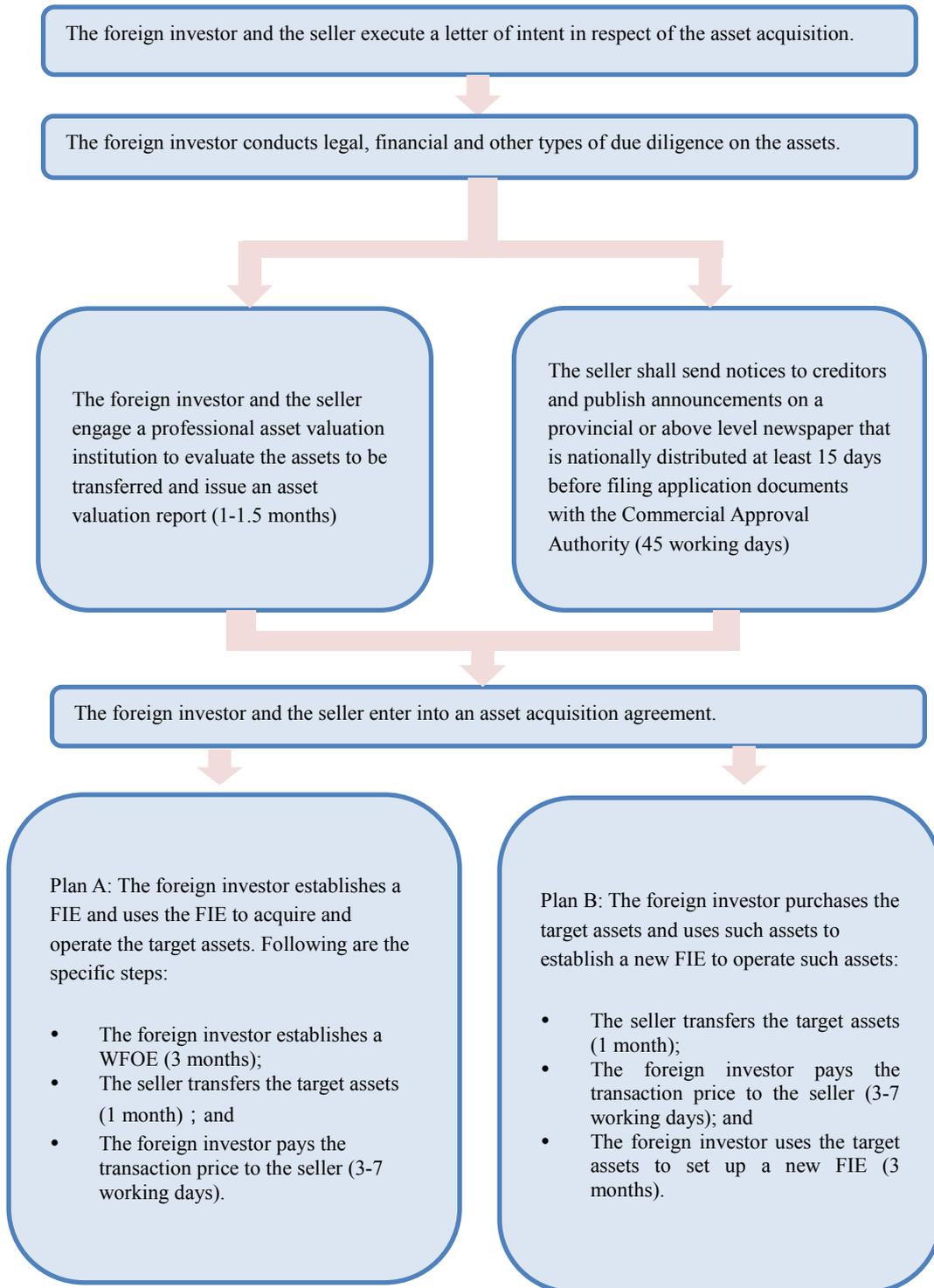
Please refer to Section 6 of Part I. of this Guide for other taxes required to be paid for an M&A transaction.

### **III. M&A Transaction - Asset Acquisition**

#### **1. General Procedure for Asset Acquisition**

In an asset acquisition deal, a foreign investor may first establish a FIE, then uses the FIE to acquire and operate the target assets of a Domestic Company (including a FIE) by entering into an agreement. Alternatively, a foreign investor may acquire the target assets of a Domestic Company and then uses such assets to establish a new FIE to operate the assets. For a comparison between a share acquisition transaction and an asset acquisition transaction, please refer to Section 10 of Part I. of this Guide.

If a foreign investor intends to carry out an asset acquisition, it shall apply for examination and approval with the competent authorities based on the total investment amount, the type of FIE and the industry to be entered into by the FIE and in accordance with the relevant laws, administrative regulations and departmental rules governing the establishment of FIEs. Below please find the general procedure for an asset acquisition.



## 2. Transaction Documents

In an asset acquisition transaction, the transaction documents mainly include a letter of intent and an asset acquisition agreement. Similar to the letter of intent in a share acquisition transaction, the letter of intent in an asset acquisition is a preliminary agreement (sometimes called memorandum of understanding) reached between the transaction parties based on their negotiations. It may serve as the framework for the transaction and also the basis for further negotiations. It also lays down the foundation for the future due diligence on the target company. The letter of intent normally includes framework clauses, some of which are legally binding but most are not. Please refer to Section 5.1 of Part II. of this Guide for more details.

According to Article 24 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*, an asset acquisition agreement shall be governed by Chinese law and mainly include the following content:

- information on the parties to the agreement, including their names, addresses, and the names, titles and nationalities of their respective legal representatives, etc.;
- a list of assets proposed to be acquired and their prices;
- term and method of performance of the agreement;
- rights and obligations of the parties to the agreement;
- liability in case of default and dispute resolution; and
- date and venue of execution of the agreement.

Although Chinese law does not require that each asset to be transferred must be itemized in an asset acquisition agreement, for the convenience of closing the transaction, foreign investors are advised to work out a list of the target assets and any other items to be transferred, which would help distinguishing the assets to be transferred from those not.

In addition, depending on the nature of the target assets as well as the closing methods, the parties may need to sign agreements in connection with the transfer of staff, real estate, contractual relationship, intellectual property, account payables, etc. These agreements may be annexed to and as such, become an integral part of the assets acquisition agreement. Please see Section 5.2 of Part III. of this Guide for matters to be noted with respect to different types of assets acquisition.

### 3. Valuation

According to Article 14 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*, the parties to an asset transaction shall determine the transaction price based on the outcome of the valuation produced by a competent asset valuation institution. In an asset acquisition transaction, the scope of valuation is the value of the assets to be transferred. The parties may agree on the appointment of an asset valuation institution established in China pursuant to the law. Internationally accepted valuation method shall be adopted for assets valuation. Assets are not allowed to be sold at a price which is evidently lower than the valuation outcome in an attempt to move funds overseas in disguise. Where the merger and acquisition of a domestic enterprise by a foreign investor involves transfer of state-owned assets, the relevant provisions on administration of state-owned assets shall apply. For the details of the valuation of state-owned assets as well as related transaction procedures, please refer to Section 4.2 and Section 6.1.3 of Part II. of this Guide.

### 4. Taxation

The following table contains a brief summary of the major taxes that would be involved in an asset acquisition.

Tax Type	Tax Rate	Item	Taxpayer
Business Tax	5%	transfer of intangible assets (excluding patent, unpatented technical know-how, goodwill, trademark and copyright)	Seller
Deed Tax	3% to 5%	purchase of land use rights or unmovable property	Buyer
Land value-added tax	30%-60%	earnings from disposal of land use rights or buildings	Seller
Value-added tax	13% or 17%	inventory transfer	Seller
	2% reduced from the original rate of 3%, or 17% (as the case may be)	transfer of fixed assets	Seller
	6%	transfer of patent, unpatented technical know-how, goodwill, trademark or copyright	Seller
Supplemental customs duty and import value-added tax	assessed by Customs	within five-year Customs supervision period, disposal of equipment that has enjoyed VAT rebate	Seller
Stamp Duty	0.03% or 0.05%	signing contract	buyer and seller

Please note that in an asset acquisition, the applicable value-added tax rate usually is 6%, 13% or 17%, depending on the categories of the transferred assets, and the tax amount payable shall be the balance after the input tax amount is offset against the output tax amount for the current period. Output tax amount is the sales amount of the goods that have been sold (or the taxable labor services that have been provided) multiplied by the applicable tax rate, while input tax amount is the value-added tax amount paid or borne by the taxpayer for purchase of goods or acceptance of taxable labor services. Pursuant to the *Interim Regulations of the People's Republic of China on Value-added Tax*, the 13% tax rate applies to foodstuffs, edible vegetable oils, tap water, heating, air-conditioning, hot water, coal gas, liquefied petroleum gas, natural gas, methane, coal products for domestic use, books, newspapers, magazines, feeds, chemical fertilizers, pesticides, agricultural machinery, agricultural films, and other products prescribed by the State Council.

In addition, land value-added tax, deed tax and Stamp Duty are involved in the transfer of real estates. The seller is the taxpayer for land value-added tax. Based on the percentage of land value increment, a four-level progressive tax rates, i.e. 30%, 40%, 50%, and 60%, shall apply. The buyer is the taxpayer for deed tax, which shall be calculated at the rate of 3% to 5% based on the price of the transferred real estate. Stamp Duty may vary according to the types of assets transferred, or specifically, a tax rate of 0.3‰ is applicable to transfer of inventory or fixed assets, and a tax rate of 0.5‰ applies to transfer of real estate or intangible assets. Both parties to the transfer shall pay their own Stamp Duty.

For introduction of other type of taxes in connection with asset acquisition, please refer to Section 6 of Part I. of this Guide.

## 5. Signing and Closing

### 5.1 Signing

Please refer to Section 5.4 of Part II. of this Guide for the do's and don'ts for the execution of documents.

## 5.2 Closing

As introduced above, in an asset acquisition transaction, the foreign investor needs to set up a new FIE to acquire and operate the assets of a Domestic Company; or alternatively, the foreign investor may acquire the assets of a Domestic Company first and then use the assets acquired to set up a new FIE to operate the assets. After approval by the approval authorities, the transaction parties shall transfer the relevant assets and personnel to the new FIE by different means in accordance with relevant laws and regulations.

### 5.2.1 Transfer of Labor Relationships

In an asset acquisition transaction, the buyer acquires certain assets of the target company, but the employees of the target company and their labor contracts are not automatically transferred to the buyer. In order to transfer the employees to the buyer, the target company shall reach an agreement with the employees on termination of the existing labor contracts as well as the amounts of economic compensation for such termination. Following the termination of the existing labor contracts and the payment of the compensation to the employees, a new employment contract may enter into between the buyer and the employees. According to Article 47 of the *Labor Contract Law of the People's Republic of China*, the amount of economic compensation payable to an employee shall be calculated and paid based on the number of years of service of the employee at the rate of one month's salary for each complete year of service. Where the period of service is more than six months but less than a year, it shall be deemed as a complete year of service; where the period is less than six months, the employer shall pay half a month's salary to the employee as economic compensation. However, if the buyer agrees to continue to employ these employees and carry forward their service years accrued, the employment contracts can be terminated without paying economic compensation after reaching an agreement with the employees<sup>10</sup>.

---

<sup>10</sup> According to Article 10 of the *Implementation Regulations for the Labor Contract Law of the People's Republic of China*, where an employee is transferred to a new employer for reasons not attributable to himself or herself, his/her length of service with the original employer shall be consolidated into his/her length of service with the new employer. If the original employer has paid economic compensation for his/her length of service with the original employer, the new employer shall not take into consideration the employee's length of service with the original employer when calculating economic compensation payable to the employee for terminating the labor contract.

## 5.2.2 Transfer of Real Property

### 5.2.2.1 Introduction to China's Land System

According to Article 8 of the *Land Administration Law of the People's Republic of China*, all land within the territory of China is either owned by the State (“*State-owned Land*”) or collectively owned by farmers (“*Collective-owned Land*”). Land in urban areas (including cities and towns) are owned by the State, and land in rural areas and suburban areas (including land used for building farmers' houses, an land and hills allowed to be retained by farmers) are collectively owned by farmers unless otherwise provided by laws.

Lands in China are categorized into three types: land for agricultural use, land for construction use and unused land. Land for agricultural use refers to land that is directly utilized for agricultural production, including cultivated land, woodland, grass land, land for farm land water conservancy, and water surface for breeding. Land for construction use refers to land on which buildings and structures are built, including land for urban and rural housing and public facilities, land for industrial and mining purposes, land for communication and water conservancy facilities, land for tourism, and land for military installations; and unused land refers to the land other than that for agricultural and construction uses. Land shall be used strictly in line with the permitted purposes of land use defined in the general plan for the utilization of the land.

In accordance with the principle of separating the ownership to land from the right to use land, China implements a system under which the right to use state-owned land in urban areas is granted or transferred, except for underground resources, buried things and public utilities. Unless the law provides otherwise, any foreign or domestic company, enterprise, other organization or individual may enter into a contract for the grant of state-owned land use right with the land administration department of a people's government at or above the county level to obtain the state-owned land use right (“*Granted Land Use Right*”) through agreement, tendering, auction, listing, etc. in accordance with applicable provisions. The foreign or domestic company, enterprise, other organisation or individual who obtains a Land Use Right may develop, use and operate the land in accordance with the land use right grant contract, or lease or transfer the Granted Land Use Right in accordance with the law.

According to Article 12 of the *Provisional Regulations of the People's Republic of China on Grant and Transfer of Right to Use State-owned Land in Urban Areas*, the maximum term of grant of a Granted Land Use Right may vary in light of the land's purposes: 70 years are the

maximum term for land used for residential purposes, 50 years for industrial purposes, 50 years for educational, scientific, technological, cultural, public health or sports purposes, 40 years for commercial, tourism or recreational purposes, and 50 years for comprehensive use or other purposes.

According to the Chinese law, the state may allocate state-owned land use right to SIEs, government agencies or other organisations free of charge (“*Allocated Land Use Right*”). Allocated Land Use Rights are not allowed to be transferred, sold, or leased unless they are converted into Granted Land Use Rights upon approval and land grant fees are paid.

### 5.2.2.2 Transfer of Real Property

Under Chinese law, if an asset acquisition involves transfer of real estate, the ownership of the buildings and the land use right to the land occupied by the buildings shall be transferred simultaneously. Upon transfer of the real estate, the rights and obligations stated in the land use right grant contract shall also be transferred. In the case of transfer of a real estate to which the land use right was originally obtained by way of grant, the land use term following the transfer shall be the land use term stipulated in the original land use right grant contract less the number of years for which the land has been used by the original land user<sup>11</sup>.

According to Article 38 of the *Law of the People’s Republic of China on Administration of Urban Real Estates*, a real estate to which the ownership is not registered and the ownership certificate is not obtained as required under law shall not be transferred. Where a real estate to which the land use right was obtained by grant is to be transferred, the real estate must satisfy the following conditions in order to be transferred: (i) the land use grant fee has been fully paid pursuant to the grant contract, and the land use right certificate has been obtained; (ii) investment and development have been carried out pursuant to the grant contract, with 25% or more of the total investment amount having been used for the development if the real estate is a housing construction project, or the conditions for industrial land use or other construction land use having been put into place in the case of development of a tract of land; and (iii) the housing ownership certificate has been obtained if the housing has been completed by the time of transfer of the real estate.

---

<sup>11</sup> See Article 32, Article 42 and Article 43 of the *Law of the People’s Republic of China on Administration of Urban Real Estates*.

The parties to an asset transaction shall enter into a real estate purchase and sale agreement on the transfer of real estate. Such agreement shall be in writing and usually in Chinese. The real estate registration authorities in some cities may accept a bilingual version of the agreement. In practice, registration authorities may provide the transaction parties with a template for the real estate purchase and sale agreement. Additional provisions agreed upon by the parties may be attached to such template as an appendix.

China implements a system for compulsory reporting of real estate transaction prices. When transferring real estate, the real estate owner shall truthfully report the transaction price to the real estate registration authority without concealment or misstatement. The reported transaction price shall be taken as the basis for payment of taxes and fees. Where the transaction price is evidently lower than the normal market price, the appraisal price as determined by a qualified valuation firm shall be used as the basis for the payment of taxes and fees.

### 5.2.2.3 Registration of Real Property

China has long been implementing registration of, and issuance of certificates for, land use right and housing ownership. A real estate owner shall complete two registrations: one is land use right registration, upon which the state-owned land administration authorities will issue a state-owned land use right certificate<sup>12</sup>; and the other is housing ownership registration, upon which the housing administration authorities will issue a housing ownership certificate<sup>13</sup>. If real estate is transferred, or the use right or ownership thereto is changed, the parties to the transaction shall go through a modification of registration with the housing administration authorities for such transfer or change, and then present the new housing ownership certificate to the land administration authorities of the same level for registration of change of land use right. Upon verification by the land administration authorities of the same level, the people's government of the same level will issue a new land use right certificate or change the original land use right certificate.

---

<sup>12</sup> According to Article 5 of the *Rules for Implementation of the Land Administration Law of the People's Republic of China*, for state-owned land used by an entity or individual, the user of the land shall submit a registration application to the land administration authorities and obtain a certificate of state-owned land use right after the completion of such registration.

<sup>13</sup> According to Article 61 of the *Law of the People's Republic of China on Administration of Urban Real Estates* (as amended in 2007), the housing administration authorities will issue a housing ownership certificate upon housing ownership registration.

On November 24, 2014, the State Council promulgated the *Provisional Regulations on Real Estate Registration*, which introduced a unified real estate registration system across the country, effective as from March 1, 2015. These provisional regulations unify the real estate registration authorities, registration methods and registration procedures and integrate the registrations of land, housing, forest land and grass land into the duties of one department. The Ministry of Land and Resource is responsible for guiding and supervising the national real estate registration work. A local people's government at or above the county level shall designate a department to be responsible for real estate registration within its jurisdiction ("*Real Estate Registration Authority*") and accept the guidance and supervision of the department of the superior people's government in charge of real estate registration.

The unified real estate registration applies to the real estate such as land, sea areas, housing and forest. Real Estate Registration Authority conducts unified management of initial registration, change registration, transfer registration, deregistration, correction registration, dissenting registration, advance notice registration and sequestration registration, establishes real estate register and issues real estate ownership certificate<sup>14</sup>.

Thus, after the *Provisional Regulations on Real Estate Registration* came into force, for the transfer of real estate involved in an asset acquisition, the foreign investor and the seller shall apply for the change of registration of the real estate with the Real Estate Registration Authority where such real estate is located.

Please note that real estate ownership certificates issued and real estate registers prepared in accordance with the law prior to the effectiveness of the *Provisional Regulations on Real Estate Registration* remain in effect after these provision regulations came into force. The rights enjoyed by the owners of real estates shall not be affected by the change of real estate registration authorities or registration procedures.

---

<sup>14</sup> [http://www.gov.cn/xinwen/2015-03/07/content\\_2829241.htm](http://www.gov.cn/xinwen/2015-03/07/content_2829241.htm)

### 5.2.3 Transfer of Intellectual Properties

In an asset acquisition, the hand-over and transfer of intellectual properties are crucial to the transaction. Foreign investors shall pay attention to the following points:

#### 5.2.3.1 Transfer of Trademark

According to Article 42 of the *Trademark Law of the People's Republic of China (as amended in 2013)*, in case of transfer of a registered trademark, the transferor and the transferee shall enter into a transfer agreement, and jointly submit an application to the relevant trademark administration authorities. Upon approval of the transfer of a registered trademark, the transfer shall be published. The transferee will enjoy exclusive rights to the use of the trademark from the date of publication. In other words, although the transfer agreement is concluded and is effective on the date when the parties sign or affix a seal on the agreement, the buyer will not enjoy the trademark right or obtain the certificate of trademark registration until the publication of the transfer by the trademark administration authorities.

#### 5.2.3.2 Transfer of Patent

Pursuant to China's relevant laws, both the right to apply for patent as well as the right to patent are transferable. According to Article 10 of the *Patent Law of the People's Republic of China*, the parties shall either enter into a patent transfer contract or a contract for the transfer of patent application right in writing, and undergo registration formalities with the patent administrative authority of the State Council. After approving the transfer, the patent administrative authority of the State Council will make a public announcement of such transfer. The transfer of a patent or a patent application right will become effective from the date of registration. A patent transfer contract refers to a contract under which a patentee transfers its patent right to a transferee and the transferee pays the transfer price. A contract for transfer of patent application right refers to a contract under which a transferor transfers his right to apply for a patent for his technical findings to a transferee and the transferee pays the transfer price. Foreign investors need to note that a patent right transfer contract or a contract for transfer of patent application right entered into between the transferor and the transferee does not affect the validity of any related patent implementation licensing contract or know-how transfer contract concluded between the

transferor and any other third party prior to the conclusion of the aforesaid patent right transfer contract or contract for transfer of patent application right<sup>15</sup>.

### **5.2.3.3 Transfer of Other Intellectual Properties Which are not Required to be Registered**

An asset acquisition transaction may also involve know-how or other intellectual properties which are not required to be registered. If an asset list only briefly states the items to be transferred, the parties may have different understandings of the scope and/or the content of the assets concerned, which in turn may lead to a dispute. In this regard, it is recommended that the parties reach a consensus on the scope of the assets to be transferred at the stage of due diligence and specify the carriers of these intangible assets.

### **5.2.4 Consent from Third Parties**

According to Article 88 of the *Contract Law*, a party may transfer its rights and obligations under a contract as a full package to a third party with the consent from the other party to the contract. Thus, where an asset acquisition transaction involves a transfer of a contract, the transaction parties need to, prior to any negotiations, obtain consent from the other party to the contract before transferring such contract.

Moreover, in case of transfer of a tangible asset which has been mortgaged or pledged, prior consent must be obtained from the relevant right holder. Article 191 and Article 217 of the *Property Law of the People's Republic of China* provide that the mortgagor of mortgaged property shall not transfer the property during the mortgage period without the consent of the mortgagee. A pledgee who transfers the pledged interests during the term of pledge without the consent of the pledgor shall compensate the pledgor for any damage to or loss of pledged property. Hence, if the mortgagee or the pledgor of an asset does not give consent to the transfer of the asset, the foreign investor may request the target company to pay off its debts or cause the debts to be fully paid so as to release the encumbrance from the asset and thus allowing the asset to be validly transferred.

---

<sup>15</sup> See Article 24 of the *Interpretation of the Supreme People's Court on Issues relating to Applicable Laws for Trial of Dispute Cases involving Technical Contracts*.

As to the transfer of receivables, if the receivables are subject to any encumbrance such as pledge, the transfer of such receivables is subject to the prior consent of the pledgee, unless the buyer of the receivables releases the pledge by paying off the debts. The transfer of receivables may take effect without the debtor's consent, unless otherwise stipulated in the relevant agreement. The registration information about the pledge of receivables can be found in the "Receivables Pledge Registration System" on the website of the credit reference centre of the People's Bank of China (<http://www.pbccrc.org.cn>).

## Annex I: Abbreviations

Abbreviations	Full Name
<b>AIC</b>	State Administration for Industry and Commerce or any of its local counterparts
<b>Anti-monopoly Bureau</b>	Anti-monopoly Bureau of the Ministry of Commerce of the People's Republic of China
<b>Anti-monopoly Law</b>	Anti-monopoly Law of the People's Republic of China
<b>AOA</b>	Articles of Association
<b>CIPA</b>	Investment Promotion Agency of the MOFCOM
<b>CJV</b>	Sino-foreign cooperative joint venture
<b>CJV Law</b>	Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures
<b>Commercial Approval Authorities</b>	MOFCOM or any of its local Commerce Administrative Authorities
<b>Company Law</b>	Company Law of the People's Republic of China
<b>Contract Law</b>	Contract Law of the People's Republic of China
<b>Foreign Direct Investment with Cross-border RMB</b>	Direct investment activities in China by foreign investors by means of enterprise establishment, capital increase, equity holding, merger and acquisition of domestic enterprise, etc. using offshore RMB lawfully obtained.
<b>Domestic Company</b>	Non-foreign-invested enterprise established within the territory of China
<b>EJV</b>	Sino-foreign equity joint venture
<b>EJV Law</b>	Law of the People's Republic of China on Sino-foreign Equity Joint Ventures
<b>FIE</b>	Sino-foreign equity joint venture, wholly foreign-owned enterprise, Sino-foreign cooperative joint venture, foreign-invested companies limited by shares, or foreign-invested partnership
<b>Foreign Direct Investment</b>	Direct investment in China by a foreign investor, including establishing a foreign-invested enterprise or project by way of new establishment, merger and acquisition etc. and thereby obtaining ownership, control, business management rights, etc.
<b>Foreign-invested Investment Company</b>	Wholly foreign-owned or Sino-foreign equity joint venture company established in China by foreign investor(s) to carry out direct investment activities
<b>General Principles of Civil Law</b>	General Principles of Civil Law of the People's Republic of China
<b>Joint Committee</b>	Joint Committee for National Security Review of Mergers and Acquisitions of Domestic Enterprises by Foreign Investors
<b>Law on State-owned Assets of Enterprises</b>	Law of the People's Republic of China on State-owned Assets of Enterprises

## MERGERS & ACQUISITIONS IN CHINA

Abbreviations	Full Name
<b>M&amp;A</b>	Merger and acquisition
<b>MOFCOM</b>	Ministry of Commerce of the People's Republic of China
<b>FTZs Negative List</b>	The Special Administrative Measures for Access of Foreign Investment to Pilot Free Trade Zone (Negative List)
<b>NDRC</b>	National Development and Reform Commission of the People's Republic of China
<b>Partnership Enterprise Law</b>	Partnership Enterprise Law of the People's Republic of China
<b>SAFE</b>	State Administration of Foreign Exchange of the People's Republic of China
<b>SASAC</b>	State-owned Assets Supervision and Administration Commission of State Council of the People's Republic of China or any of its local counterparts
<b>SASAC of the State Council</b>	State-owned Assets Supervision and Administration Commission of State Council
<b>Shanghai FTZ</b>	China (Shanghai) Pilot Free Trade Zone
<b>SIE</b>	Wholly state-owned enterprise, wholly state-owned company, state-controlled company or partly state-owned company, which is established with state capital.
<b>State Council</b>	State Council of the People's Republic of China
<b>WFOE</b>	Wholly foreign owned enterprise with all its capital provided by foreign investor(s)
<b>WFOE Law</b>	Law of the People's Republic of China on Wholly Foreign-owned Enterprises

## Annex II: Major Power and Duties of Corporate Organs

### 1. Powers and Duties of Shareholders' Meeting

Pursuant to Article 37 of the *Company Law*, the shareholders' meeting of a limited liability company shall exercise the powers and perform the duties as follows:

- determining the operation policies and investment plans of the company;
- electing and removing directors and supervisors who are not representatives of employees, and determining remunerations of directors and supervisors;
- reviewing and approving reports of the board of directors;
- reviewing and approving reports of the supervisors or the board of supervisors;
- reviewing and approving the annual financial budget plans and final account plans of the company;
- reviewing and approving the profit distribution plans and loss recovery plans of the company;
- taking resolutions on increase or reduction of the registered capital of the company;
- taking resolutions on issuance of corporate bonds;
- taking resolutions on merger, division, dissolution or liquidation of the company, or on change of corporate form of the company;
- amending the AOA of the company; and
- other powers and duties stipulated in the AOA of the company.

Pursuant to Article 99 of the *Company Law*, the above powers and duties of the shareholders' meeting of a limited liability company also apply to the shareholders' assembly of a company limited by shares.

### 2. Powers and Duties of Board of Directors

Pursuant to Article 46 of the *Company Law*, the board of directors of a limited liability company shall report to the shareholders' meeting and exercise the powers and perform the duties as follows:

- convening the meetings of the shareholders and reporting to the shareholders' meeting;
- executing decisions of the shareholders' meeting;
- determining the business plans and investment schemes of the company;
- formulating the annual financial budget plans and final account plans of the company;
- drawing up the profit distribution plans and loss recovery plans of the company;
- drawing up the plans for increase or reduction of the company's registered capital and issuance of corporate bonds;
- drawing up the plan for merger, division or dissolution of the company, or on change of the corporate form of the company;
- determining the internal management organization of the company;
- determining the appointment and dismissal of the manager of the company and his/her remunerations, and determining the appointment and dismissal of the deputy manager(s) and person

- in charge of finance and their renunciations based on the nomination of the manager;
- Drawing up the basic management system of the company; and
- other duties and powers stipulated in the AOA of the company.

Pursuant to Article 108 of the *Company Law*, the above powers and duties of the board of directors of a limited liability company can also apply to the board of directors of a company limited by shares.

### 3. Powers and Duties of Board of Supervisors

According to Article 53 of the *Company Law*, a board of supervisors or a supervisor (in the absence of a board of supervisors) of a limited liability company shall exercise the powers and perform the duties as follows:

- inspecting the company's finance;
- supervising the directors and officers in the performance of their duties and proposing the removal of a director or senior officer who violates the law, administrative regulations, the AOA of the company, or a decision of the board of shareholders;
- requiring a director or senior officer who acts against the interests of the company to remedy to the situation;
- proposing convening ad hoc meetings of the shareholders, and convening and presiding a meeting of the shareholders when the board of directors fails to do so as required by the Company Law;
- making proposals at the meetings of shareholders;
- filing a lawsuit against a director or senior officer in accordance with Article 115 of the Company Law; and
- other duties and powers stipulated in the AOA of the company.

Moreover, pursuant to Article 54 of the *Company Law*, a supervisor may attend the meetings of the board of directors as non-voting attendee and make queries on the resolutions of the board of directors or give suggestions to the board of directors. The board of supervisors or a supervisor (in the absence of a board of supervisors) may conduct investigation upon discovering any irregularities in the business operations of the company and may, at the expense of the company, appoint an accounting firm, etc. to assist in the investigation, if necessary.

Pursuant to Article 118 of the *Company Law*, the above powers and duties of the board of supervisors (or of a supervisor) of a limited liability company can also apply to a company limited by shares.

### 4. Powers and Duties of the Manager

Pursuant to Article 49 of the *Company Law*, a limited liability company may have a manager, whose appointment and dismissal shall be decided by the board of directors. The manager shall report to the board of directors and exercise the powers and perform the duties as follows:

- managing the production and business operations of the company and organizing the implementation of resolutions passed by the board of directors;
- organizing the implementation of the annual business plans and investment schemes of the company;
- drafting the plan for setting up the internal management organization of the company;

## MERGERS & ACQUISITIONS IN CHINA

- drafting the basic management system of the company;
- drawing up company rules and policies;
- proposing the appointment and dismissal of the deputy manager(s) and the person in charge of finance;
- determining the appointment and dismissal of management staff other than those positions which are to be decided by the board of directors; and
- other duties and powers granted by the board of directors.

Pursuant to Article 113 of the *Company Law*, the above powers and duties of the manager of a limited liability company also apply to a company limited by shares.

## Annex III: Legal Framework for Foreign Investment

### 1. A Selection of the General Laws and Regulations on Foreign Investment

- *General Principles of the Civil Law of the People's Republic of China;*
- *Company Law of the People's Republic of China;*
- *Contract Law of the People's Republic of China;*
- *Securities Law of the People's Republic of China*
- *Partnership Law of the People's Republic of China;*
- *Insurance Law of the People's Republic of China;*
- *Arbitration Law of the People's Republic of China;*
- *Labor law of the People's Republic of China;*
- *Regulations of the People's Republic of China on Foreign Exchange Control;*
- *Enterprise Income Tax Law of the People's Republic of China and Implementation Regulations of the Enterprise Income Tax Law of the People's Republic of China;*
- *Interim Regulations of the People's Republic of China on Value-added Tax and Detailed Rules for the Implementation of the Interim Regulations of the People's Republic of China on Value-Added Tax;*
- *Interim Regulations of the People's Republic of China on Consumption Tax and Detailed Rules for the Implementation of the Interim Regulations of the People's Republic of China on Consumption Tax;* and
- *Interim Regulations of the People's Republic of China on Business Tax and Detailed Rules for the Implementation of the Interim Regulations of the People's Republic of China on Business Tax*

### 2. Special Laws and Regulations on Foreign Investment

- *Law of the People's Republic of China on Sino-foreign Equity Joint Ventures and Implementation Regulations of the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures;*
- *Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures and Implementation Regulations of the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures;*
- *Law of the People's Republic of China on Wholly Foreign-owned Enterprises and Implementation Rules of the Law of the People's Republic of China on Wholly Foreign-owned Enterprises;*
- *Provisions on Guidance of the Orientation of Foreign Investment, Catalogue for Guidance of Foreign Investment Industries, and Catalogue of Priority Industries for Foreign Investment in Central and Western China;*
- *Provisions on the Establishment of Investment Companies by Foreign Investors;*
- *Interim Provisions on Certain Issues Concerning the Establishment of Foreign-Invested Companies Limited by Shares;*
- *Administrative Provisions for Foreign-Invested Venture Capital Enterprises;* and
- *Administrative Measures for Establishment of Partnerships in China by Foreign Enterprises or Individuals*

### 3. Special Laws and Regulations on Foreign M&A

- *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors;*
- *Administrative Measures for Strategic Investment in Listed Companies by Foreign Investors;*
- *Provisions on Merger and Division of Foreign Investment Enterprises;*
- *Several Provisions on Changes in Equity Interest of Investors in Foreign-invested Enterprises;*
- *Interim Provisions on Investment in China by Foreign-invested Enterprises;*
- *Notice on Issues Relating to Strengthening Administration of Approval, Registration, Foreign Exchange and Taxation Pertaining to Foreign Investment Enterprises;*
- *Interim Provisions of the Ministry of Commerce on Equity Contribution Involving Foreign-Invested Enterprise;*
- *Notice of the General Office of State Council on Establishment of National Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors; and*
- *Regulations of the Ministry of Commerce on Implementation of Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors*

### 4. Laws and Regulations on Concentration of Undertakings

- *Anti-Monopoly Law of the People's Republic of China;*
- *Provisions of State Council on Notification Threshold for Concentration of Undertakings;*
- *Guidelines of the Anti-monopoly Commission of the State Council on the Definition of Relevant Markets;*
- *Measures on Computation of Turnover Notified in Concentration of Undertakings in the Financial Industry;*
- *Measures on Notification of Concentration by Undertakings;*
- *Measures on Examination of Concentration of Undertakings;*
- *Provisional Measures on Investigation and Punishment of Undertakings Which Fail to Notify Concentration of Undertakings as Required by Law;*
- *Interim Provisions on Assessment of Impact of Concentration of Undertakings on Competition;*
- *Interim Provisions on Standards Applicable to Simple Cases Regarding Concentration of Undertakings, and;*
- *Provisions on Imposing Additional Restrictive Conditions on Concentration of Undertakings*

## Annex IV: Contact Information of Investment Promotion Agencies

Name:	Investment Promotion Agency of Ministry of Commerce of PRC
Address:	No. 28 Donghou Alley, Andingmenwai St., Dongcheng District, Beijing, China
Zip code:	100710
Phone:	+86-10-64515344
Fax:	+86-10-64515304
Website:	<a href="http://www.cipa.gov.cn">http://www.cipa.gov.cn</a> , <a href="http://www.fdi.gov.cn">http://www.fdi.gov.cn</a>

Name:	China International Investment Promotion Agency (Germany)
Address:	Bockenheimer Landstr. 61 60325 Frankfurt, Germany
Phone:	+ 49-(0) 69 24 75 6800
Fax:	+ 49-(0) 69 24 75 68099
Email:	<a href="mailto:cipade@fdi.gov.cn">cipade@fdi.gov.cn</a>

Name:	Beijing Investment Promotion Bureau
Address:	3rd Floor, Building F, Fu Hua Mansion, No.8, Chaoyangmen North Avenue, Dongcheng District, Beijing, China
Zip code:	100027
Phone:	+86-10-65543151
Fax:	+86-10-65543161
Website:	<a href="http://www.investbeijing.gov.cn">http://www.investbeijing.gov.cn</a>

Name:	Tianjin Foreign Investment Service Center
Address:	15th Floor, Tower A International Commercial Trade Center, No.59, Machang Road, Hexi District, Tianjin, China
Zip code:	300203
Phone:	+86-22-85589808, 85589820
Fax :	+86-22-85589808, 85589836

## MERGERS & ACQUISITIONS IN CHINA

Name:	Shanghai Foreign Investment Service Center
Address:	Level 15-16, New Town Mansion, No.83, Loushanguan Road, Shanghai, China
Zip code:	200336
Phone:	+86-21-62368800, 62368361
Fax:	+86-21-62368026, 62368024
Website:	<a href="http://www.fid.org.cn">http://www.fid.org.cn</a>

Name:	Chongqing Promotion & Service Center for Foreign Investment
Address:	No.65, JianxinRoad, Jiangbei District, Chongqing, China
Zip code:	400020
Phone:	+86-23-89018215, 89018888
Fax:	+86-23-89018885
Website:	<a href="http://www.cqipa.com">http://www.cqipa.com</a>

Name:	Hebei Investment Promotion Service Center
Address:	No.334 Hepingxi Road, Qiaoxi District, Shijiazhuang, Hebei Province, China
Zip code:	050071
Phone:	+86-311-87909795
Fax:	+86-311-87801027
Website :	<a href="http://www.hecom.gov.cn">http://www.hecom.gov.cn</a>

Name:	Shanxi Provincial Foreign-Invested Enterprises Association
Address:	No.1 JiefangnanRoad ,Taiyuan, Shanxi Province, China
Zip code:	030001
Phone:	+86-351-4675269
Fax:	+86-351-4675399
Website:	<a href="http://www.shanxiinvest.com.cn">http://www.shanxiinvest.com.cn</a>

## MERGERS & ACQUISITIONS IN CHINA

Name:	Foreign Investment Promotion Center of Inner Mongolia Autonomous Region
Address:	No.63, Xinhua Avenue, Hohhot, The Inner Mongolia Autonomous Region, China
Zip code:	010050
Phone:	+86-471-6946021
Fax:	+86-471-6610893
Website:	<a href="http://www.nmgswt.gov.cn">http://www.nmgswt.gov.cn</a>

Name:	Liaoning Provincial International Investment Promotion Center
Address:	No.45-1, Beijing Avenue, Shenyang, Liaoning Province, China
Zip code:	110032
Phone:	+86-24-86892298
Fax:	+86-24-86895130
Website:	<a href="http://www.china-liaoning.org">http://www.china-liaoning.org</a>

Name:	Jilin Province Foreign-Invested Enterprise Association
Address:	No.4, Kangping Avenue, Chaoyang District, Changchun, Jilin Province, China
Zip code:	130061
Phone:	+86-431-88787668, 88787676
Fax:	+86-431-88787600
Website:	<a href="http://www.investjilin.com">http://www.investjilin.com</a>

Name:	The Investment Service Center of Heilongjiang Province
Address:	No.175, Heping Road, Dongli District, Harbin, Heilongjiang Province, China
Zip code:	150040
Phone:	+86-451-82641382
Fax:	+86-451-82641383
Website:	<a href="http://www.hljswt.gov.cn/gjtz/index.jhtml">http://www.hljswt.gov.cn/gjtz/index.jhtml</a>

## MERGERS & ACQUISITIONS IN CHINA

Name:	Jiangsu International Investment Promotion Center
Address:	Jiangsu International Economy and Trade Building, No.50 Zhonghua Road, Nanjing City, Jiangsu Province, China
Zip code:	210001
Phone:	+86-25-57710268
Fax:	+86-25-57710266
Website:	<a href="http://www.iinvest.org.cn">http://www.iinvest.org.cn</a>

Name:	Zhejiang International Investment Promotion Center
Address:	No.470, Yan'an Road, Hangzhou, Zhejiang Province, China
Zip code:	310006
Phone:	+86-571-28939302/07/08/09
Fax:	+86-571-28939315, 28939305
Website:	<a href="http://www.zjfdi.com">http://www.zjfdi.com</a>

Name:	Anhui Foreign Investment Promotion & Development Center
Address:	No. 1569, Qimen Road, New Municipal and Cultural District Development, Hefei, Anhui Province, China
Zip code:	230061
Phone:	+86-551-2621242,2621351
Fax:	+86-551-2621343
Website:	<a href="http://www.ahbofcom.gov.cn">http://www.ahbofcom.gov.cn</a>

Name:	Fujian Foreign Investment Service Center
Address:	Floor 16, Pingdong Office Building, No.128, Hualin Road, Fuzhou, Fujian, China
Zip code:	350003
Phone:	+86-591-87842758, 28309617, 88605303, 88605320, 87842066, 87810640
Fax:	+86-591-87843753
Website:	<a href="http://www.fjfdi.com/investfj/eindex1.htm">http://www.fjfdi.com/investfj/eindex1.htm</a>

## MERGERS & ACQUISITIONS IN CHINA

Name:	Investment Promotion Bureau of Jiangxi Province
Address:	Level 21, Chang Qing International Trade Building, No.8, Hongcheng Road, Nanchang, Jiangxi Province, China
Zip code:	330002
Phone:	+86-791-86246803 86246802
Fax:	+86-791-86246806
Website:	<a href="http://www.jxdoftec.gov.cn/tswz/zsy/">http://www.jxdoftec.gov.cn/tswz/zsy/</a>

Name:	Shandong International Investment Promotion Agency
Address:	No.6, Liyang Avenue, Jinan, Shandong Province, China
Zip code:	250002
Phone:	+86-531-89013557, 89013321, 89013555, 89013559, 89013325
Fax:	+86-531-89013602
Website:	<a href="http://tzcj.shandongbusiness.gov.cn">http://tzcj.shandongbusiness.gov.cn</a>

Name:	Henan Investment Promotion Agency
Address:	B404 Office, Jinmao Building, No.115, Wenhua Road, Zhengzhou, Henan Province, China
Zip code:	450002
Phone:	+86-371-63576208/6962/6823/6910
Fax:	+86-371-0371-63939134
Website:	<a href="http://www.hntc.gov.cn">http://www.hntc.gov.cn</a>

Name:	Department of Commerce of Hubei Province
Address:	12th Floor, Jinmao Building, No.8, Jiangnan North Road, Wuhan, Hubei Province, China
Zip code:	430022
Phone:	+86-27-85773805, 85766076, 85774233, 85710065, 85774233
Fax:	+86-27-85773668
Website:	<a href="http://www.hbdofcom.gov.cn">http://www.hbdofcom.gov.cn</a>

## MERGERS & ACQUISITIONS IN CHINA

Name:	Department of Commerce of Hunan Province
Address:	No.98, Wuyi Avenue, Changsha, Hunan Province, China
Zip code:	410001
Phone:	+86-731-82287060/7058/9505/7212
Fax:	+86-731-82295160
Website:	<a href="http://www.hunancom.gov.cn">http://www.hunancom.gov.cn</a>

Name:	Guangdong Board of Investment Promotion
Address:	Level 6, Foreign Economy and Trade Building, No. 351, Tianhe Road, Guangzhou, Guangdong Province, China
Zip code:	510620
Phone:	+86-20-38819380/9399/9377
Fax:	+86-20-38802234
Website:	<a href="http://www.gdbip.org.cn">http://www.gdbip.org.cn</a>

Name:	Guangxi Investment Promotion Agency
Address:	Xinggui Building, No.91, East Minzu Avenue, Nanning, Guangxi Autonomous Region, China
Zip code:	530022
Phone:	+86-771-5885983, 5872329
Fax:	+86-771-5861612
Website:	<a href="http://www.gxipn.gov.cn">http://www.gxipn.gov.cn</a>

Name:	Hainan Department of Commerce
Address:	No.69, Guoxing Avenue, Haikou, Hainan Province, China
Zip code:	570203
Phone:	+86-898-65332141, 65201132, 65379230
Fax:	+86-898-65338762
Website:	<a href="http://www.dofcom.gov.cn">http://www.dofcom.gov.cn</a>

## MERGERS & ACQUISITIONS IN CHINA

Name:	Sichuan Investment Promotion Agency
Address:	No.25, Yongling Road, Chengdu, Sichuan Province, China
Zip code:	610031
Phone:	+86-28-66469948/47
Fax:	+86-28-66469900
Website:	<a href="http://www.scinvest.cn">http://www.scinvest.cn</a>

Name:	Guizhou Investment Promotion Agency
Address:	Floor 1, Building 5 of the Provincial Government. Guiyang, Guizhou Province, China
Zip code:	550004
Phone:	+86-851-6830152, 6859984
Fax:	+86-851-6814219
Website:	<a href="http://www.investgz.gov.cn">http://www.investgz.gov.cn</a>

Name:	Investment Promotion & Cooperation Bureau of Yunnan Province
Address:	Zhengtong Building, No.309, Guomao Road, Kunming, Yunnan Province, China
Zip code:	530100
Phone:	+86-871-67195654, 67195610, 67195586, 67195603
Fax:	+86-871-67195605
Website:	<a href="http://www.yn-invest.gov.cn">http://www.yn-invest.gov.cn</a>

Name:	Investment Promotion Bureau of Tibet Autonomous Region
Address:	No.22, Middle Beijing Road, Lhasa, Tibet Autonomous Region, China
Zip code:	850000
Phone:	+86-891-6335237
Fax:	+86-891-6335237

## MERGERS & ACQUISITIONS IN CHINA

Name:	Shaanxi Service Center for Foreign Investment
Address:	Level 6, Department of Commerce of Shaanxi Province, Place of the Province Government, Xin Cheng Chamber, Xi'an, Shaanxi Province, China
Zip code:	710061
Phone:	+86-29-87290646/1504/1591/1368/2606
Fax:	+86-29-87291618
Website:	<a href="http://www.sxdofcom.gov.cn">http://www.sxdofcom.gov.cn</a>

Name:	Gansu Provincial Agency of Investment and Trade Promotion
Address:	No.35, Guangyang South Road, Lanzhou, Gansu Province, China
Zip code:	730000
Phone:	+86-931-8833929, 8835315
Fax:	+86-931-8811567
Website:	<a href="http://www.gsinvest.gov.cn">http://www.gsinvest.gov.cn</a>

Name:	Department of Commerce of Qinghai Province
Address:	No.2, Haiyan Road, Chengxi District, Xining, Qinghai Province, China
Zip code:	810001
Phone:	+86-971-6321711, 6321796
Fax:	+86-971-6321791
Website:	<a href="http://www.qhcom.gov.cn">http://www.qhcom.gov.cn</a>

Name:	Foreign-Invested Enterprises Association of Ningxia Hui Autonomous Region
Address:	No.363, Jiefang West Syreet, Yinchuan, Ningxia Autonomous Region, China
Zip code:	750001
Phone:	+86-951-5018120, 5022628
Fax:	+86-951-5044239
Website:	<a href="http://www.nxdoftec.gov.cn">http://www.nxdoftec.gov.cn</a>

## MERGERS & ACQUISITIONS IN CHINA

Name:	Department of Commerce of Xinjiang Autonomous Region
Address:	No.1292, Xinhua South Road, Urumqi, Xinjiang Autonomous Region, China
Zip code:	830049
Phone:	+86-991-2855575, 2850407
Fax:	+86-991-2860255, 2865720
Website:	<a href="http://www.xjftcc.gov.cn">http://www.xjftcc.gov.cn</a>

Name:	Bureau of Commerce of Xinjiang Production and Construction Corp
Address:	No.188, Yangziji Road, Urumqi, Xinjiang Autonomous Region, China
Zip code:	830099
Phone:	+86-991-2896421, 2896423, 2896456
Fax:	+86-991-2896451
Website:	<a href="http://swj.xjbt.gov.cn">http://swj.xjbt.gov.cn</a>

Name:	Haerbin Investment Promotion Agency
Address:	Level 2 of East Side Building of Government Office Building, No.1, Century Avenue, Songbei District, Haerbin, Heilongjiang Province, China
Zip code:	150021
Phone:	+86-451-86776015, 86776024
Fax:	+86-451-86776008
Website:	<a href="http://www.hecpb.gov.cn">http://www.hecpb.gov.cn</a>

Name:	Changchun Department of Commerce
Address:	No. 1578, Renmin Avenue, Changchun, Jilin Province, China
Zip code:	130051
Phone:	+86-431-82715900, 82731307, 82777575
Fax:	+86-431-82739861
Website:	<a href="http://www.ccmbc.gov.cn">http://www.ccmbc.gov.cn</a>

## MERGERS & ACQUISITIONS IN CHINA

Name:	Bureau of Foreign Trade and Economic Cooperation of Shenyang
Address:	No.35, Qingnian Avenue, Shenhe District, Shenyang, Liaoning Province, China
Zip code:	150021
Phone:	+86-24-2722005, 22722006, 22723838, 22730135, 22723577
Fax:	+86-24-22724746
Website:	<a href="http://www.symoftec.gov.cn">http://www.symoftec.gov.cn</a>

Name:	Jinan Municipal Foreign Investment Bureau
Address:	Floor 1, Longding Avenue, Lixia District, Jinan, Shandong Province, China
Zip code:	250099
Phone:	+86-531-62311139
Fax:	+86-531-62311139
Website:	<a href="http://www.jinanbusiness.gov.cn/institution/xxzx/">http://www.jinanbusiness.gov.cn/institution/xxzx/</a>

Name:	Nanjing Investment Promotion Center
Address:	Block C, Xincheng Building, No.265, Middle Jiangdong Road, Jianye District, Nanjing, Jiangsu Province, China
Zip code:	210019
Phone:	+86-25-68787002, 68787005
Fax:	+86-25-68787170
Website:	<a href="http://www.njfiw.gov.cn">http://www.njfiw.gov.cn</a>

Name:	Hangzhou International Investment Promotion Center
Address:	No.2, Wensan Road, Hangzhou, Zhejiang Province, China
Zip code:	310012
Phone:	+86-571-85175056
Fax:	+86-571-85159006

## MERGERS & ACQUISITIONS IN CHINA

Name:	Guangzhou International Investment Promotion Center
Address:	Floor 7, Guangzhou Administrative Affairs Service Center, Zhujiang New Town, Guangzhou, Guangdong Province, China
Zip code:	510623
Phone:	+86-20-38920731, 38920735
Fax:	+86-20-38920730
Website:	<a href="http://www.investguangzhou.gov.cn">http://www.investguangzhou.gov.cn</a>

Name:	Wuhan Investment Promotion Bureau
Address:	No.27, Lihuangpi Road, Wuhan, Hubei Province, China
Zip code:	430017
Phone:	+86-27-82796662, 82796660
Fax:	+86-27-82796663
Website:	<a href="http://www.wuhaninvest.com">http://www.wuhaninvest.com</a>

Name:	Chengdu Investment Promotion Commission
Address:	Level 5-6, Block C, No. 68, Shujin Road, Tianfu Avenue, Chengdu, Sichuan Province, China
Zip code:	610041
Phone:	+86-28-61885500, 800-886-7888
Fax:	+86-28-61885504
Website:	<a href="http://www.chengduinvest.gov.cn">http://www.chengduinvest.gov.cn</a>

Name:	Department of Commerce of Xi'an (Municipal Department of Commerce)
Address:	Floor 6, Building 1, Municipal Government Chamber, Fengchengba Road, Xi'an, Shaanxi Province, China
Zip code:	710021
Phone:	+86-29-86786486, 86786501, 86786503, 86786487
Fax:	+86-29-86786487, 86786544
Website:	<a href="http://www.xaonline.gov.cn">http://www.xaonline.gov.cn</a>

## MERGERS & ACQUISITIONS IN CHINA

<b>Name:</b>	<b>Dalian Investment Promotion Center</b>
<b>Address:</b>	Foreign Economy and Trade Building, No. 219, Huanghe Road, Xigang District, Dalian, Liaoning Province, China
<b>Zip code:</b>	116011
<b>Phone:</b>	+86-411-83698000, 83780880, 83686665, 83780660
<b>Fax:</b>	+86-411-83686426
<b>Website:</b>	<a href="http://www.dalian-gov.net/GalaxyPortal/dalian/Organization/cujingzhongxin.jsp">http://www.dalian-gov.net/GalaxyPortal/dalian/Organization/cujingzhongxin.jsp</a>

<b>Name:</b>	<b>Qingdao Foreign Investment Service Center</b>
<b>Address:</b>	Yi, No.1, Fuzhou West Road, Qingdao, Shandong Province, China
<b>Zip code:</b>	266034
<b>Phone:</b>	+86-532-85918566, 83096621, 81978616, 83096612
<b>Fax:</b>	+86-532-83096610
<b>Website:</b>	<a href="http://www.qdis.gov.cn">http://www.qdis.gov.cn</a>

<b>Name:</b>	<b>Ningbo Bureau of International Promotion</b>
<b>Address:</b>	Level 12, Block A, Development Building, No.118, Heji Avenue, Jiangdong District, Ningbo, Zhejiang Province, China
<b>Zip code:</b>	315000
<b>Phone:</b>	+86-574-87178836, 87178848, 87178843
<b>Fax:</b>	+86-574-87315992
<b>Website:</b>	<a href="http://www.ningbochina.com">http://www.ningbochina.com</a>

<b>Name:</b>	<b>Xiamen Municipal Bureau of Investment Promotion</b>
<b>Address:</b>	Floor 14, Foreign Trade Building, No.15, Hubin West Road, Xiamen, Fujian Province, China
<b>Zip code:</b>	361012
<b>Phone:</b>	+86-592-5117081, 5112381, 5061884, 5365325
<b>Fax:</b>	+86-592-5112317
<b>Website:</b>	<a href="http://www.xipa.com.cn/cn/zxjs">http://www.xipa.com.cn/cn/zxjs</a>

## MERGERS & ACQUISITIONS IN CHINA

<b>Name:</b>	<b>Shenzhen Investment Promotion Bureau</b>
<b>Address:</b>	Floor 12, Great China International Trade Plaza, No.1, Fuhuayi Road, Futian District, Shenzhen, Guangdong Province, China
<b>Zip code:</b>	518034
<b>Phone:</b>	+86-755-82004028, 82004023, 82004003
<b>Fax:</b>	+86-755-82004008
<b>Website:</b>	<a href="http://www.investshenzhen.gov.cn">http://www.investshenzhen.gov.cn</a>

## Annex V: Essential Terms in EJV Contracts, CJV Contracts and AOAs

### 1. Essential Terms in EJV contracts and CJV contacts

Essential Terms	Key Points and Contents
<p>Article 11 of the <i>Implementation Regulations of the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures</i> provides that an EJV contract shall include the following essential terms:</p> <ul style="list-style-type: none"> <li>• The name, country of registration, and legal address of each party to the EJV; and the name, title and nationality of the legal representative of each party;</li> <li>• The name, legal address, purposes, and business scope and scale of the EJV;</li> <li>• The total investment and registered capital of the EJV; the amount, ratio and forms of and time limits for capital contribution by each party; and provisions concerning incomplete contribution and equity transfer;</li> <li>• The ratio of profit distribution and loss sharing among the parties;</li> <li>• Composition of the board of directors, the number of directors, duties and powers of the general manager, vice general manager(s) and other senior management personnel, and methods for their appointment;</li> <li>• Primary production equipment and technologies to be used and their sources of supply;</li> <li>• Methods of purchase of raw materials and sale of products;</li> <li>• Processing principles for finance, accounting and audit;</li> <li>• Provisions concerning labor management, salary, benefits, social insurances, etc.;</li> <li>• Term, dissolution, and liquidation procedures of the EJV;</li> <li>• Liability for breach of contract;</li> <li>• Methods and procedures for resolving disputes between the parties to the EJV; and</li> <li>• Language used for the contract, and conditions for the contract to come into effect.</li> </ul>	<p>The foreign investor needs to negotiate and determine the content of the EJV or CJV contract with the shareholders of the target company, and should focus on:</p> <ul style="list-style-type: none"> <li>• The trade name of the new company. Trade name is the unique and exclusive part of an enterprise name. Therefore, the parties need to decide whose trade name will be used in the name of the new company;</li> <li>• The business scope of the new company. According to relevant PRC laws, a company as a legal person shall engage in business and operation in consistence with its business scope as approved and registered. Therefore, the parties need to determine the business scope of the new company according to the company's business plan;</li> <li>• The compositions, duties and powers, formation methods, and rules of procedure of the board of directors, the board of supervisors, and the management team of the new company. If the foreign investor intends to acquire the control of the target company, the rules of procedure of the target company need to be modified in order to achieve that end;</li> <li>• The resources of the target company, such as its brand and technologies. The parties may negotiate to determine, depending on their respective bargaining powers, which party will be responsible for the resources required for the operation of the new company, including funds, land, technology, brand, etc.</li> <li>• The applicable law shall be the Chinese law.</li> </ul>

Essential Terms	Key Points and Contents
<p>Article 12 of the <i>Implementation Regulations of the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures</i> provides that a CJV contract shall include the following primary terms:</p> <ul style="list-style-type: none"> <li>• The name, place of registration and domicile of each party to the CJV; and the name, title and nationality of the legal representative of each party (if a foreign party is a natural person, his/her name, nationality and address shall be specified);</li> <li>• The name, address and business scope of the CJV;</li> <li>• The total investment and registered capital of the CJV; and the methods and time limits for contributing investment or provision of cooperative conditions by each party;</li> <li>• Assignment of investment contributed or cooperative conditions provided by each party;</li> <li>• Method of distribution of profits or products to and sharing of risks or losses by the parties;</li> <li>• Composition of the board of directors or the joint management committee of the CJV, the distribution of the number of directors or committee members, the duties of the general manager and other senior management personnel, and measures for their appointment and dismissal;</li> <li>• Main production equipment and technologies to be used and their sources of supply;</li> <li>• Arrangements for sale of products within and outside China;</li> <li>• Arrangements for foreign exchange income and expenditure of the CJV;</li> <li>• Term, dissolution and liquidation of the CJV;</li> <li>• Other obligations of the parties and their liability for breach of contract;</li> <li>• Processing principles for finance, accounting and audit;</li> <li>• Resolution of disputes between the parties to the CJV; and</li> <li>• Procedures for amendment of the cooperative joint venture contract.</li> </ul>	

2. Essential Terms in AOA's

WFOE	EJV	CJV
<p>Article 15 of the <i>Implementation Regulations of the Law of the People's Republic of China on Wholly Foreign-owned Enterprises</i> provides that the AOA of a WFOE shall include the following:</p> <ul style="list-style-type: none"> <li>• name and domicile;</li> <li>• purpose and business scope;</li> <li>• total investment, registered capital, subscribed amount of capital contribution, form of capital contribution, and time limit for capital contribution;</li> <li>• organizational form;</li> <li>• internal organizations and their respective duties, powers and rules of procedure, as well as the respective duties and authorities of the legal representative, the general manager, the chief engineer, the chief accountant, etc.;</li> <li>• principles and systems for finance, accounting, and audit;</li> <li>• labor management;</li> <li>• term of operation, termination, and liquidation; and</li> <li>• procedure for amending the AOA.</li> </ul>	<p>Article 13 of the <i>Implementation Regulations of the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures</i> provides that the AOA of a EJV shall include the following p:</p> <ul style="list-style-type: none"> <li>• name and legal address of the EJV;</li> <li>• purposes, business scope, and term of operation of the EJV;</li> <li>• name, country of registration, and legal address of each party to the EJV, and name, title, and nationality of the legal representative of each party;</li> <li>• total investment and registered capital of the EJV; amount, ratio, types, and time limits for capital contribution; provisions concerning equity transfer; and ratio of profit distribution and loss sharing among the parties;</li> <li>• composition, duties and powers, and rules of procedure of the board of directors; term of office of directors; and duties and powers of the chairman and the vice chairman;</li> <li>• composition of the management body and its rules of procedure; and duties and powers of the general manager, the vice general manager(s) and other senior management personnel, and methods for their appointment and dismissal;</li> <li>• principles for the financial, accounting, and auditing systems;</li> <li>• dissolution and liquidation; and</li> <li>• procedures for amendment of the AOA.</li> </ul>	<p>Article 13 of the <i>Implementation Regulations of the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures</i> provides that the AOA of a CJV shall specify the following:</p> <ul style="list-style-type: none"> <li>• name and domicile of the CJV;</li> <li>• business scope and cooperation term of the CJV;</li> <li>• name, place of registration and domicile of each party to the CJV, and name, title and nationality of the legal representative of each party (where the foreign party is a natural person, his name, nationality and domicile shall be specified);</li> <li>• total investment and registered capital of the CJV; and types and time limits for capital subscription, investment or provision of cooperative conditions;</li> <li>• distribution of profits or products and the sharing of risks or losses among the parties to the CJV;</li> <li>• composition, duties and powers, and rules of procedure of the board of directors or the joint management committee; term of office of directors or committee members; and duties and powers of the chairman and the vice chairman of the board of directors or the director or deputy director of the joint management committee of the CJV;</li> <li>• composition, powers and rules of procedure of the business management body; and duties, appointment and dismissal of the general manager and other senior management personnel of the</li> </ul>

## MERGERS & ACQUISITIONS IN CHINA

CJV;

- provisions concerning the recruitment, training, labor contract, salary, social insurance, benefits, occupational safety, health and other labor management matters of employees;
- financial, accounting and auditing systems of the CJV;
- methods of dissolution and liquidation of the CJV; and
- procedures for amendment of the AOA.

## Annex VI: Application Documents for Share Acquisition

Step	Administrative Authority	Required Documents	Time Frame
Project approval/record-filing	NDRC and its local counterparts <sup>16</sup>	<p><b>Project Approval:</b></p> <p>A project application report needs to be prepared in accordance with the relevant laws and regulations in order for a proposed Foreign Direct Investment project to be approved. The project application report shall contain the following information:</p> <p>(1) information of the project and investor(s);</p> <p>(2) resources utilization and ecological environment impact analysis; and</p> <p>(3) economic and social impact analysis.</p> <p>In the case of a M&amp;A transaction of a Domestic Company by a foreign investor, the project application report shall include the information of the foreign investor; the arrangement for the M&amp;A transaction; the financing scheme; the information of the target company; the mode of operation, the scope of acquisition and the shareholding structure of the target company after the M&amp;A transaction; and the plan for use of income.</p> <p>Along with the project application report, the applicant shall also submit:</p> <p>(1) company incorporation and registration documents and the latest audited financial statements (including balance sheet, income statement and cash flow statement) and bank reference certifications of both the Chinese and foreign investors;</p> <p>(2) letter of intent on investment, as well as board resolutions on the capital increase or M&amp;A project;</p>	<p><b>Project Approval:</b></p> <p>If the application documents of a project are not complete or fail to meet the relevant requirements, the approval authority shall, within 5 working days after the receipt of application documents, notify the applicant of all the problems at one time for rectification.</p> <p>NDRC or its local counterpart shall complete the approval of a project application within 20 working days from the date of acceptance of project application.</p> <p>If NDRC or its local counterpart cannot make a decision on whether or not to grant an approval within 20 working days, the approval period may be extended by 10 working days upon approval by the person in charge of the authority, and the applicant shall be notified of the reasons for extension.</p> <p>But the aforesaid approval periods do not include the time for entrusted assessment and expert review.<sup>17</sup></p>

<sup>16</sup> Certain projects are subject to approvals of the State Council, provincial government, local government, or other relevant departments of the State Council. Please refer to Section 6.1.2 of Part II., Section B of this Guide.

<sup>17</sup> See Articles 12 and 15 of the *Measures for the Administration of Approval and Record-filing of Foreign Investment Projects*.

## MERGERS & ACQUISITIONS IN CHINA

		<p>(3) opinion on site selection issued by the urban-rural planning authority (only applicable to a project to which the land use right is allocated free of charge);</p> <p>(4) preliminary examination opinion on land use issued by the land and resources authority (preliminary examination is not required for a reconstruction or expansion project which does not involve new land and is conducted within the area of the approved construction land) ;</p> <p>(5) examination and approval documents on environmental impact assessment issued by the environmental protection authority;</p> <p>(6) energy conservation examination opinion issued by the energy conservation examination authority;</p> <p>(7) confirmation documents issued by relevant authorities if any state-owned assets are invested as capital contribution; and</p> <p>(8) other documents as required to be submitted by relevant laws and regulations.<sup>18</sup></p>	
		<p><b>Project Filing for Record:</b></p> <p>To apply for the record-filing of a foreign investment project, the project applicant shall submit the basic information of the project and investors, and other documents including the corporate registration certificates of the Chinese and foreign investors, letter of intent on investment, as well as board resolutions regarding the capital increase or the acquisition.<sup>19</sup></p>	<p><b>Project Filing for Record:</b></p> <p>In respect of a foreign investment project for which the record-filing is rejected, the local approval authority shall issue a written opinion and explain the reason within 7 working days.<sup>20</sup></p>

<sup>18</sup> See Article 8 and Article 10 of the *Measures for the Administration of Approval and Record-filing of Foreign Investment Projects*.

<sup>19</sup> See Article 18 of the *Measures for the Administration of Approval and Record-filing of Foreign Investment Projects*.

<sup>20</sup> See Article 20 of the *Measures for the Administration of Approval and Record-filing of Foreign Investment Projects*.

## MERGERS & ACQUISITIONS IN CHINA

<p><b>Approval for Transfer of State-owned Assets</b></p>	<p>SASAC or the people's government at the same level</p>	<p>The following documents need to be submitted for approval in the case of transfer of any state-owned assets:<sup>21</sup></p> <ul style="list-style-type: none"> <li>(1) resolutions on transfer of the state-owned assets;</li> <li>(2) plan for transfer of the state-owned assets;</li> <li>(3) property right registration certificates for state-owned assets of the transferor and the subject enterprise;</li> <li>(4) legal opinion issued by a law firm;</li> <li>(5) basic conditions that must be satisfied by the transferee; and</li> <li>(6) other documents required by the approval authority.</li> </ul>	<p>In practice, the competent SASAC will make a decision within 30 working days after receiving the documents.</p>
<p><b>Approval for Share Acquisition</b></p>	<p>MOFCOM and the local Commercial Approval Authorities<sup>22</sup></p>	<p>In a share acquisition by a foreign investor, the investor shall submit the following documents to the competent Commercial Approval Authority according to the total investment amount of the FIE post-acquisition, the type of enterprise and the industry in which the FIE is engaged:<sup>23</sup></p> <ul style="list-style-type: none"> <li>(1) a resolution unanimously passed by the shareholders of the target company on consenting to the share acquisition, if the target company is a limited liability Domestic Company; or a resolution passed by the shareholders' assembly of the target company on consenting to the share acquisition, if the target company is a Domestic Company limited by shares;</li> <li>(2) an application for conversion of the target company from a Domestic Company into a FIE pursuant to the laws;</li> <li>(3) the contract and the AOA of the FIE post-acquisition;</li> <li>(4) an agreement on acquisition of the</li> </ul>	<p>In a foreign M&amp;A of a Domestic Company, which is thereafter changed into a FIE, the competent Commercial Approval Authority shall make a decision on whether or not to grant an approval within 30 days from the date of receipt of all documents required to be submitted. Where approval is granted, the Commercial Approval Authority shall issue a certificate of approval.<sup>24</sup></p>

<sup>21</sup> See Article 28 of the *Provisional Measures on Administration of Transfer of State-owned Property Rights of Enterprises*.

<sup>22</sup> According to *Notice of the Ministry of Commerce on Relevant Issues Concerning the Decentralization of Approval Powers for Foreign Investment*, the establishment or change of a FIE with a total investment amount of less than US\$ 300 million in the case of an encouraged or permitted sector under the Industrial Catalogue or less than US\$ 50 million in the case of a restricted sector under the Industrial Catalogue, is subject to the approval and administration of local Commercial Approval Authorities. In an acquisition of a Domestic Company by a foreign investor, the transaction value shall be used to determine whether the applicable investment limit is reached or not.

<sup>23</sup> See Article 21 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*.

<sup>24</sup> See Article 25 of the *Foreign M&A Provisions*.

## MERGERS & ACQUISITIONS IN CHINA

		<p>shares of any shareholders in the target Domestic Company or on subscription to the additional capital of the target Domestic Company by the foreign investor;</p> <p>(5) the financial audit report of the target Domestic Company for the preceding financial year;</p> <p>(6) the identity certificate (or incorporation certificate) of and bank reference letter for the investor, which has been notarized and legalized;</p> <p>(7) a description of any enterprises invested in by the target Domestic Company;</p> <p>(8) the business licenses (duplicate copy) of the target Domestic Company and the enterprises invested in by it;</p> <p>(9) a staff resettlement plan for the target Domestic Company; and (10) other documents required by law.</p>	
<p><b>Registration with AICs</b></p>	<p>SAIC and its local counterparts</p>	<p>A Domestic Company acquired by a foreign investor shall submit the following documents when applying for a modification registration, and be responsible for the authenticity and validity of the documents:<sup>25</sup></p> <p>(1) an application for the modification registration;</p> <p>(2) an agreement on the acquisition of the shares of any shareholders in the Domestic Company or subscription to the additional capital of the Domestic Company by the foreign investor;</p> <p>(3) the revised AOA (or the amendment to the original AOA) of the post-acquisition FIE and its joint venture contract required to be submitted pursuant to the law;</p> <p>(4) the certificate of approval for the FIE;</p> <p>(5) the incorporation certificate (applicable to entity) or identity certificate (applicable to natural person) of the foreign investor;</p> <p>(6) a new list of directors for the FIE, a document specifying the names and domiciles of newly appointed directors, and the appointment documents of the newly appointed directors; and</p> <p>(7) any other relevant documents and</p>	<p>SAIC or its competent local counterpart shall decide whether or not to register the modification within 15 days after its acceptance of the application.<sup>26</sup></p>

<sup>25</sup> See Article 26 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*.

<sup>26</sup> See Article 53 of *Regulations on Administration of Registration of Companies*.

## MERGERS & ACQUISITIONS IN CHINA

		certificates required by SAIC.	
<b>Registrations of Tax, Customs and Foreign Exchange Matters</b>	Tax authorities, the Customs, foreign exchange authorities, etc.	The investor shall complete registration procedures with the applicable tax authorities, customs, land authorities, foreign exchange authorities and other relevant authorities within 30 days from the date of receipt of the business license of the FIE. <sup>27</sup>	

---

<sup>27</sup> See Article 26 of the *Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors*.

## MERGERS & ACQUISITIONS IN CHINA

This Guide is only for the purpose of providing reference to investors. It shall not replace any provisions of the law of the People's Republic of China, nor be viewed as official interpretation of any such provisions by the Chinese government. Investors are advised to inquire into relevant PRC laws and regulations in effect at the time of their investment and to consult PRC lawyers, accountants and other professionals for advice on specific legal, taxation and financial issues, and not make decisions solely relying on this Guide.

# CONTACT

## **Publisher**

Germany Trade and Invest  
Gesellschaft für Außenwirtschaft und Standortmarketing mbH  
Villemombler Straße 76, 53123 Bonn, Germany  
T. +49(0)228 24993-0  
F. +49(0)228 24993-212  
E-Mail: info@gtai.com  
Internet: www.gtai.com

**Head Office:** Friedrichstraße 60, 10117 Berlin, Germany

**Executive Board:** Dr. Benno Bunse, Chairman/CEO; Dr. Jürgen Friedrich, CEO

## **Editorial Office/Contact**

Frauke Schmitz-Bauerdick LL.M., Bonn  
T. +49 (0) 228 24993-432  
E-Mail: frauke.schmitz-bauerdick@gtai.de

## **Notes**

©Germany Trade & Invest, September 2015

All market data provided is based on the most current market information available at the time of publication. Germany Trade & Invest accepts no liability for the actuality, accuracy, or completeness of the information provided.

## **Layout**

Germany Trade & Invest

## **About Us**

Germany Trade & Invest is the foreign trade and inward investment agency of the Federal Republic of Germany. The organization advises and supports foreign companies seeking to expand into the German market, and assists companies established in Germany looking to enter foreign markets.

All inquiries relating to Germany as a business location are treated confidentially. All investment services and related publications are free of charge.

## **Support**

Supported by the Federal Ministry for Economic Affairs and Energy on the basis of a decision by the German Bundestag.

