Finding Aids

CHAPTER 1 INTRODUCTION

¶1-100 General

Since the beginning of the reform process in China[1] more than 35 years ago, foreign investors have been eager to take advantage of business opportunities offered by the huge Chinese market.[2] In fact, the development of the Chinese economy since 1978 when the reforms where initiated is remarkable. In January 2006, commissioner Lie Deshui of the PRC's National Bureau of Statistics announced that due to strong investments and record exports, China's economy had grown by 9.9% in 2005 and overtaken Great Britain as the fourth largest economy in the world.[3] China replaced Germany as the third largest economy in 2007. In 2009, China overtook Germany also as the world's leading exporter.[5] China's economic growth has slowed down over the years and many commentators have predicted difficulties in the years to come for a number of reasons. However, in the second quarter of 2014 China still saw a GDP growth of 7.5%[6] and the dynamic development of China's economy seems to be ongoing at least in the short and medium term.

The volume of foreign investment and non-investment related business activities with Chinese partners has increased constantly until recently. However, China relies less on foreign investments nowadays than only some years ago.[7] Huang Yiping, Chief Asia Economist at Citigroup Hong Kong had observed as early as in October 2007 that:

> "China wants more investment into strategic high-tech areas ... If you produce garments, you're probably not very welcome."[8]

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1 "China", "mainland China" and "Chinese mainland" shall be used in the following for the People's Republic of China excluding the Hong Kong SAR, Macau SAR and Taiwan.

2 SCMP 15 February 2006, p 1.

3 SCMP 26 January 2006, p 1.

4 SCMP 9 January 2010, p 1.

5 SCMP 29 March 2010, p B 6.

6 KPMG 2014, p 1.

7 Compare Borgonjon/Sinclair 2006, pp 47-48: "After 27 years of Open Door Policy, China has an excess in capital, and many domestic companies believe that they have sufficient management experience to succeed without foreign partners. ... For the foreseeable future, it is quite possible that China's door will not remain as open as before."

8 SCMP 13 October 2007, p B 1. Also compare Anonymous 2010, p 15, in relation to the *Duly Carrying Out the Work Associated with the Use of Foreign Investment Several Opinions*, issued by the State Council on 6 April: "The Opinions appear to close the door on investment in China to foreign investors that are engaged in certain traditional industries. Conversely, however, they extend a warm welcome to foreign investors in a range of high technology and innovative sectors."

FIPs can be established by foreign companies[149] or individuals together with or without Chinese partners[150] who can be individuals, legal persons or other organisations.[151] Chinese state-owned companies or other state-owned organisations, listed companies as well as charities and other social institutions are barred from becoming general partners of FIPs.[152] FIPs can be established as ordinary or limited partnerships.[153] Foreign individuals, legal persons or other organisations can also join already existing Chinese partnerships.[154] There are no special requirements as to the qualification of foreign FIP parties.[155] Unlike EJVs, CJVs and WFOEs, the establishment of FIPs is not subject to a MOFCOM approval requirement, but must only be registered with SAIC.[156] Competent SAIC departments were instructed to accept applications for the registration of FIPs starting from 1 March 2010.[157] No statutory minimum capitalisation or minimum capital contribution of the foreign or domestic partners is required for a FIP establishment. Capital contributions can be made in cash (foreign exchange or in RMB)[158] or in kind, including the provision of services.[159] Terms and conditions regarding the capitalisation of the FIP and the contributions of the partners are to be set out in the partnership agreement.

[149] Related rules apply by analogy to investors from Hong Kong, Macau and Taiwan, Artt 15 *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in China* (eff 1 March 2010); 67 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (latest version eff 1 March 2014).

[150] Art 2 *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in China* (eff 1 March 2010).

[151] Art 2 *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in China* (eff 1 March 2010).

[152] Art 6 para 2 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (latest version eff 1 March 2014); also see Art 3 *PRC Partnership Enterprise Law* (eff 1 June 2007).

[153] Art 11 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (latest version eff 1 March 2014).

[154] Artt 12 *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in China* (eff 1 March 2010), 63 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (eff 1 March 2014).

[155] See, however, Art 16 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (eff 1 March 2014) for the establishment of partnerships of special service partnership enterprises according to Art 55 para 1 *PRC Partnership Enterprise Law* (eff 1 June 2007).

[156] Art 5 *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in Chin* (eff 1 March 2010); for the documents to be submitted to the registration authority see Art 12 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (eff 1 March 2014); Shaddox 2013, p 483.

[157] Item 1 of the SAIC *Notice on Information Infrastructure of the Administration for the Registration of Foreign-invested Partnership Enterprises* (eff 5 February 2010).

[158] Art, 4 *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in China* (eff 1 March 2010).

[159] Art 15 para 2 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (eff 1 March 2014).

Industry related restrictions[160] need to be observed when establishing FIPs.[161] FIPs are not allowed in the following categories of the *Foreign Investment Industrial Guidance Catalogue*[162]:

- industries where foreign investments are prohibited;
- industries that are only open to EJVs and CJVs, but not to WFOEs;
- industries where a majority or controlling Chinese equity holding is required; and
- industries which require a specific foreign equity ratio.[163]

In addition, a written confirmation that industry specific rules have been observed, co-signed by all partners, must be submitted when applying for registration.[164]

As far as the use of FIPs for private equity purposes is concerned, Article 14 of the *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in China*[165] declares that other rules and regulations on the establishment of partnerships for the main purpose of investments by foreigners shall prevail. It is still not completely clear what this means in practice.[166] It seems that the use of FIPs for onshore funds structures is subject to some restrictions[167] and it remains to be seen if FIPs will be able to fill the existing legislative gaps.[168]

¶1-318 Liberalisation trend[169]

Since 2013 China's new leadership under President Xi Jinping and Premier Li Keqiang has started a variety of new initiatives to further liberalise China's economic system. The first step in this direction was the announcement of the establishment of the China (Shanghai) Pilot Free Trade Zone ("Shanghai FTZ") on 29 September 2013. The Shanghai FTZ comprises four existing zones, i.e. Waigaoqiao Free Trade Zone, Waigaoqiao Bonded Logistics Park, Yangshan Bonded Port Area and Pudong Airport

[160] Compare *supra*, ¶1-312.

[161] Art 5 para 2 *Administrative Measures for the Establishment of Partnership Enterprises by Foreign Corporations and Individuals in China* (eff 1 March 2010); compare Shaddox 2013, pp 473-474.

[162] Latest version eff 10 April 2015; compare *supra* ¶1-312.

[163] Art 3 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (eff 1 March 2014).

[164] Art 12 (7) *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (eff 1 March 2014).

[165] Eff 1 March 2010; also see Art 64 *Provisions on the Administration of Registrations of Foreign-funded Partnership Enterprises* (eff 1 March 2014).

[166] Chen 2010, pp 15-17.

[167] Chen, *ibid*, p 16; compare in more detail *infra* ¶15-220 and ¶15-300.

[168] Compare Shaddox 2013, pp 481-486.

[169] Compare for the following Wolff 2014, pp 412-418.

(7) documents related to the capital structure (registered capital,[28] total amount of investment[29]), the contribution of capital and the capital to be contributed, including, the valuation certificate regarding in-kind contributions, the capital contribution verification report and copies of the investment certificates issued to each investor by the FIE;[30]

(8) ratified asset valuation reports;[31]

(9) comprehensive sets of documents evidencing any transfer of equity interest or shares;

(10) documents evidencing any increase or decrease of the registered capital[32] or the total amount of investment;[33]

(11) documents evidencing the use of equity interest/shares as security;[34]

(12) documents supporting any amendment of the above documents;

(13) other documents evidencing approvals, permits, licenses, etc., required for the establishment and operation of the company as well as copies of all documents filed with government authorities; and

(14) documents evidencing bank accounts operated by the company.

The examination of any document must be conducted in the context of other information to allow a full understanding of the situation. In one case, the general manager of a FIE Board was instructed to arrange for the transfer of FIE equity interest held by a foreign investor to one of the investor's subsidiaries. When this subsidiary was supposed to be sold one year later as part of an international restructuring exercise, the document produced by the FIE as evidence for the completed transfer was the FIE's business license. In fact, the FIE's business license showed the name of the subsidiary as owner of the equity interest. Only further investigations revealed that no transfer of equity interest had ever taken place at all. Instead, the FIE's general manager had somehow managed, presumably to facilitate her work, to convince the registration authority that a change of the name of the foreign investor had taken place, that the new name was the name of the subsidiary and that the business license had to be adjusted accordingly. Major problems arose as the registration authority now had to be confronted with the fact that the name of the foreign investor had been changed by the authority without adhering to proper procedures. A solution was found only after several rounds of negotiations with the approval and registration authorities and with a substantial delay of the completion date of the sale of the subsidiary.

[8] For the term "registered capital" see *supra*, chapter 1, note 94.

[9] The term "total amount of investment" means capital contributions made by the parties plus external financing.

[0] Note that for companies established after 1 March 2014 these documents may no longer be available, compare *supra*, ¶1-319.

[1] See for companies established before 1 March 2014, *ibid.*

[2] For the term "registered capital" see *supra*, chapter 1, note 94.

[3] For the term "total amount of investment" see *supra* note 29.

[4] For share pledges compare Wang Ling 2007, pp 23 ff.; Liu/Wang 2008-09, p 36.

¶2-220 Organisational structure

The organisational structure of a target enterprise is crucial for its operational success. The following information and materials should be checked in this context as part of a due diligence exercise (if applicable):

(1) details regarding all current and past investors/shareholders as well as details regarding governmental departments in charge of them;

(2) the company's external organisational structure, including details of all domestic and overseas subsidiaries, branches, representative offices, distribution centres, R&D operations, associated enterprises, etc., including information about their proper establishment and operation;

(3) any mergers, acquisitions or divisions the company was involved in the past;

(4) the company's internal organisational structure, including an organisation chart, the full names, age, remuneration and contact details of the members of any supervisory board, board of directors, the senior management and other key personnel, as well as information about their terms of appointment/service;[35]

(5) internal company rules or policies;

(6) information on all meetings of the company organs such as the board of directors, the supervisory board, the general shareholders' meeting and any committees; and

(7) documentary evidence regarding (1) to (6) above, including copies of business licenses, constitutional documents such as shareholder agreements, joint venture contracts, articles of association, etc., governmental approvals, verification and registration documents in relation to establishment and operation, company manuals, minutes of all meetings of the company organs and adopted resolutions during the last three years as well as in regard to senior management staff copies of letters of appointment, employment agreements and related resolutions of company organs and general company employment policies.

In the year 2005, newly-introduced legislation governing so-called round-trip investments, became a topic of heated discussion among foreign China investors. Under the concept of "round-tripping", which will be discussed in more detail in a later chapter,[36] Chinese entities or individuals establish a business entity abroad to re-invest in China from offshore for the purpose of, amongst other reasons, taking advantage of formerly available FIE tax incentives,[37] easier access to international financing, or the ability to dispose easily of the offshore holding entity after onshore assets have been transferred to its onshore subsidiary. Tax fraud and money laundering have apparently become important reasons for the use of round-tripping structures in more recent years. In

[35] For company seals and the related power to bind companies see Zhang/Xu/Li 2009; PriceWaterhouseCoopers 2010.

[36] *Infra*, ¶14-400.

[37] *Ibid.* For the impact of the recent reform of the enterprise income tax system compare *infra*, ¶2-270 and ¶20-100.

and regulations is problematic.[107] Furthermore, as Chinese manufacturers are often acquiring technology from abroad, compliance of a target enterprise with China's technology transfer regime[108] is important to ensure the uninterrupted ability to use related rights.

In this context, information and/or documents to be checked in the course of a due diligence exercise should include (if applicable):[109]

(1) information regarding intellectual property rights owned by the company;

(2) information regarding intellectual property rights owned by third parties, but used by the company on the basis of license agreements;

(3) information regarding intellectual property rights owned by third parties, but used by the company without any contractual basis;

(4) information regarding intellectual property rights owned by the company, but used by third parties on the basis of license agreements;

(5) information regarding intellectual property rights owned or used by the company and used by third parties without any contractual basis;

(6) information regarding measures taken over the past two years in relation to the violation by third parties of intellectual property rights owned or used by the company;

(7) information regarding measures over the past five years in relation to the actual or potential violation by the company of intellectual property rights owned or used by third parties, including ongoing or expected litigation in relation to intellectual property rights; and

Protection of Well-known Trademarks (eff 1 May 2009), compare Tan/Cui 2014; the *PRC Copyright Law* (latest version eff 1 April 2010) and related *Implementing Rules* (latest version eff 1 March 2013), compare Tsoi 2010, pp 10-11; Zhang/Wang 2014, Beconcini 2014; Chan/Zhang/Bailey 2013; also see the *Guiding Opinions on the Promotion of Industrial Designs* (eff 22 July 2010); the summary by Lanvers-Marks/Luo 2010, pp 22-26. The PRC is a member of the *World Intellectual Property Organisation* and many international treaties. The international significance of IP rights created in China has increased dramatically in recent years. In 2011 China became the largest filer of patents worldwide, Agence France-Presse 2012. In 2013 China' State Intellectual Property Office received 2.38 million patent applications and granted 1.3 million patents, which are the largest numbers of patent applications and patent grants received by national patent authorities worldwide, compare SIPO.

[107] According to US officials, during the first ten months of the year 2009, 89% of counterfeit goods discovered in US ports came from Hong Kong or China, Galloway 2010, p 19; also compare Simone 2009, p 16.

[108] Main legal sources are the *PRC Foreign Trade Law* (eff 1 July 2004 – partially suspended for three years as of 28 December 2012), the *PRC Administration of Technology Import and Export Regulations* (eff 8 January 2011), the *Measures for the Registration of Technology Import and Export Contracts* (latest version eff 1 March 2009), and the *Procedures for the Administration of Technology Prohibited or Restricted from Import* (latest version eff 20 May 2009) as well as the *Procedures for the Administration of Technology Prohibited or Restricted from Export* (eff 20 May 2009); also see the Supreme People's Court's *Several Issues Concerning the Application of the Law in the Trial of Technology Contract Disputes Interpretation*, (eff 1 January 2005); compare Zhang 2005, pp 29-34; Tong, 2002, pp 36-38; Yang 2005, pp 52-54.

[109] Compare Jia 2010, pp 45-47.

(8) documentary evidence supporting (1) to (7), such as (if applicable) approval and registration documents, copies of license/technology transfer agreements and court orders/documents.

¶2-300 Product liability

Product liability has become a matter of considerable concern in mainland China in recent years. Reports on defective products manufactured by Chinese entities are published by Asian media almost daily.[110]

Product liability rules form part of China's tort law system. Article 122 of the *PRC General Principles of Civil Law*, which had originally entered into force on 1 January 1987 and was last amended on 27 August 2009, provided for an initial and very basic rule on product liability. Starting from the late 1980s, a number of rules and regulations were enacted mostly at local and provincial levels addressing the administrative control of product quality.[111] Furthermore, regulations governing specialised areas such as food safety, cosmetics,[112] drugs,[113] construction and military products[114] contained basic rules on product quality. In 1994 the *PRC Product Quality Law*[115] and the *PRC Law on the Protection of Rights and Interests of Consumers*[116] entered into force. While the scopes of applicability of these two laws overlap partly, both are the main legal sources for product quality claims under Chinese law.[117] A revised version of the *PRC Product Quality Law* was passed on 8 July 2000 and has entered into force on 1 September of the same year.[118] Following widely publicised product quality problems during the first half of the year 2007 Chinese lawmakers have taken additional steps to improve China's product quality supervision and product liability systems. For instance, on 31 August 2007 the *General Administration of Quality Supervision, Inspection and Quarantine* (GAQSIQ) had promulgated three new regulations[119] addressing issues of product recall and product

[110] Compare Erfle/DeCristo 2007, pp 14-43; Fremlin 2008, pp 34 ff.; Luk/Wong 2007, pp 17 ff.

[111] See e.g. the *Shanghai Municipality, Regulations for the Protection of the Interests of Consumers* (eff 1 January 2003).

[112] Art 31 *Regulations for the Supervision over the Hygiene of Cosmetics* (original version eff 13 November 1989 – latest version eff 13 July 2013).

[113] Art 49 *PRC Drug Administration Law* (latest version eff 28 December 2013).

[114] *Administrative Regulations on the Quality of Military Products* (eff 1 July 1987 to 1 November 2010).

[115] Latest version eff 8 November 2013 – compare *infra*.

[116] Effectiveness of the original version eff 1 January 1994, latest version eff 15 March 2014; also see now the SAIC's *Measures for Punishing Acts of Infrining Consumers' Rights and Interests* (eff 15 March 2015); the Shanghai Municipality's *Regulations for the Protection of Consumer Interests* (eff 15 March 20015).

[117] See for a general analysis Epstein/Shen 2003, chapter 11; Zhao 2002, pp 581-601; Li 2003, pp 1-30; Lim 2000, pp 61-65.

[118] Compare Lim 2000, *ibid*. The *PRC Product Quality Law* was subsequently amended and partially repealed with the latest version being effective as of 8 November 2013.

[119] Compare the *Provisions for the Administration of Food Recall* (eff 27 August 2007), the *Provisions for the Administration of Recalls of Children's Toys* (eff 27 August 2007), the *Methods for the Administration of Inspection of Import and Export of Toys* (eff 15 September 2009), and the *Procedures for the Administration of Inspection, Quarantine and Supervision of Exported Aquatic Animals* (1 October 2007); the *Rules on the Recall of Defective Automobile Products* (eff 1 January 2013).

approval in case that the transferor and the FIE fail to do so.[94] Interestingly, the *Changes of Equity Interest of Investors in Foreign Investment Enterprises Several Provisions*[95] stipulate in Article 9 that the concerned FIE, and not the transferor, has to apply for the approval of a transfer of FIE equity interest. The SPC *Regulations on Several Issues Concerning the Trial of Cases of Disputes Related to Foreign Investment Enterprises (I)*[96] now extend the contractual obligation of the transferor arising out of an assignment agreement to the FIE apparently for the sake of practicality.

If an agreement regarding the assignment of FIE equity interest has not yet been approved by the competent examination and approval authority, but the potential transferee has actually started to participate in the FIE operation and the management the transferor can request the transferee to withdraw from and pay to the transferor all monies received in relation to such FIE operation and management.[97]

If a holder of FIE equity interest or an FIE uses improper means to apply for approval of the change of the current FIE-parties thus causing another FIE-party to lose its FIE-party status or part of the percentage in the FIE equity interest originally held by it, a court can reinstate the original situation unless a third party has obtained the FIE equity interest concerned in good faith.[98] The court can also order the aggrieved FIE-party to be compensated for any losses.[99]

Finally, it is important that additional approvals to be granted by authorities other than MOFCOM and its provincial and local branches may be required, e.g. depending on the particular industry[100] and whether the FIE is a listed company.[101]

¶5-140 Registration

After completing the approval process, the transfer of FIE equity interest needs to be registered, i.e. the FIE's original SAIC-registration needs to be amended accordingly.[102] The time frame for this is 30 days from the date on which the FIE's foreign enterprise

[94] *Ibid.*, Art 6 sentence 2. If an application for approval is turned down by the examination and approval authority all or parts of the purchase price already paid by the transferee to the transferor must be returned, Art 7 sentence 1 *Regulations on Several Issues Concerning the Trial of Cases of Disputes Related to Foreign Investment Enterprises (I)* (eff 16 August 2010)

[95] Eff. 28 May 1997.

[96] Eff 16 August 2010.

[97] Art 10 *Regulations on Several Issues Concerning the Trial of Cases of Disputes Related to Foreign Investment Enterprises (I)* (eff 16 August 2010).

[98] *Ibid.*, Art 21 para 1 (eff 16 August 2010).

[99] *Ibid.*, para 2.

[100] Compare *infra*, chapter 12.

[101] Compare *infra*, chapter 8.

[102] *Ibid*, Art 3 sentence 1; for a confirmation of key policies adopted in 2010 by several PRC authorities in relation to foreign investments see from the SAIC perspective the *Opinions on Improving the Work for Serving the Development of Foreign Investment Enterprises*, promulgated by SAIC on 7 May 2010; compare Li/Teng 2010, p 20.

approval certificate has been changed or handed in for cancellation.[103] In principle, all documents submitted to the examination and approval authority as part of the approval process must be provided as well to the registration authority.[104] In practice, registration authorities have often asked for the submission of additional documents.[105] In the event that a Chinese investor is to take over the entire FIE equity interest, thus converting the FIE into a purely domestic enterprise, the FIE has to submit to the registration authority all necessary documents to register the particular type of domestic enterprise into which the FIE is to be converted.[106]

¶5-150 Purchase price

It has long been a standard practice that transaction parties could freely determine the purchase price. For example, transactions where FIE equity interest was sold by one foreign party to another for a (symbolic) purchase price of one USD had obtained approval without problems.[107]

However, when the equity interest held by a Chinese investor which had invested state-owned assets is to be assigned, a value appraisal of the equity interest must be conducted and confirmed by the competent authorities.[108] The confirmed appraisal results shall determine the price of the FIE equity interest involved.[109] Furthermore, on 12 April 2003, the *Acquisition of Domestic Enterprises by Foreign Investors Tentative Provisions* had entered into force. The *Tentative Provisions* were re-enacted as the *Acquisition of Domestic Enterprises by Foreign Investors Provisions* as of 8 September 2006. They were again amended on 22 June 2009. Article 52 para 2 of the *Provisions* reads as follows:

> "The existing laws and administrative regulations concerning foreign-invested enterprises and the *Changes in Equity Interest of Investors in Foreign Investment*

[103] *Ibid*, Art 18 sentence 1; also see Item 13 *Implementation Opinions for the Application of Laws and Regulations Concerning the Examination and Approval for the Registration of Foreign-invested Companies* promulgated on 24 April 2006 by SAIC, MOFCOM, the General Administration of Customs and SAFE. A fine or other penalties may be imposed in cases where the registration is not amended properly, Art 18 sentence 2 *Changes in Equity Interest of Investors in Foreign Investment Enterprises Several Provisions* (eff 28 May 1997).

[104] Art 19 para 1 *Changes in Equity Interest of Investors in Foreign Investment Enterprises Several Provisions* (eff 28 May 1997).

[105] Wolff 2004, p 288, note 34; pursuant to Item 5 *Implementation Opinions for the Application of Laws and Regulations Concerning the Examination and Approval for the Registration of Foreign-invested Companies* (dated 24 April 2006) the EJV contract, CJV contract and the certificate of creditworthiness of the investor do not have to be submitted to the registration authority; item 13 of the *Implementation Opinions* requires, however, that the original approval document and documentary evidence for the approval of the transfer of equity interest must be submitted, compare Wang 2006, p 7; also note, that in some locations, e.g. Beijing and Shanghai, standard forms may need to be used for certain information items.

[106] For the change of the business license in this case see Art 19 para 3 *Changes in Equity Interest of Investors in Foreign Investment Enterprises Several Provisions* (eff 28 May 1997).

[107] For possible tax implications see chapter 20.

[108] Art 8 sentence 1 *Changes in Equity Interest of Investors in Foreign Investment Enterprises Several Provisions* (eff 28 May 1997); also compare *infra*, ¶13-500.

[109] *Ibid*, Art 8 sentence 2.

in principle buy A-shares via the Hong Kong Stock Exchange subject to certain quota restrictions as further discussed in the following.[78]

B-shares are RMB-denominated shares which could originally only be subscribed for and traded in foreign currency by foreign entities or individuals.[79] In February 2001, the B-share market was opened to Chinese nationals.[80] It is noteworthy that most listed companies have not issued B-shares. In any event, the number of issued B-shares is normally much smaller than the number of A-shares.

According to commonly used terminology shares of Chinese companies listed overseas are called "H-shares" when listed in Hong Kong, "N-shares" when listed in New York or "S-shares" when listed in Singapore.[81] H-shares, N-shares and S-shares are denominated in RMB, but issued and traded in foreign currency. Finally, so-called "red chips" are shares of Chinese-owned companies incorporated in HK or other offshore jurisdictions which function as holding companies in relation to onshore FIEs.[82] Red chips are normally listed on the HK Stock Exchange.[83]

Articles 138 and 139 of the *PRC Company Law*[84] stipulate that shareholders of Chinese companies limited by shares may transfer their shares in accordance with the provisions of the law at a stock exchange or via other methods, i.e. through a public offer[85] or by way of a private agreement between the acquirer and the respective shareholders.[86] In the past, the acquisition of shares by way of private agreement was the most common practice in the context of M&A activities.[87]

[78] Compare *infra* ¶8-331.

[79] Prieur, in China Company Law Guide, at 105-350; also see Doe 1999, pp 66-67; Braun/Ma 2008/09, p 21.

[80] Prieur, *ibid.*

[81] *Ibid.* The listing of Chinese companies overseas had caused much discussion in 2006 as Chinese investors seemed to be at disadvantage when it came to invest in overseas listed companies, see SCMP 8 March 2006, p A 7; SCMP 18 March 2006, p B 1; SCMP 18 April 2006, p B 1. In 2006 the so-called Qualified Domestic Institutional Investor (QDII) scheme was introduced which initially allowed only selected banks and since mid-2007 also other financial institutions, trust companies, insurance companies and securities companies to convert clients' money into foreign currency so that it can be invested abroad. Compare the *Trial Measures for the Administration of Securities Investments by Qualified Domestic Institutional Investors* (eff 5 July 2007) and the *Notice on Some Issues Regarding the Implementation of the Trial Measures for the Administration of Offshore Securities Investments by Qualified Domestic Institutional Investors* (eff 5 July 2007); the *Circular on Revising the Scope of Overseas Investments and Overseas Financial Management Services on Behalf of Customers of Commercial Banks* (dated 10 May 2007); the *Interim Measures for the Administration of Trust Companies' Overseas Financial Management Business* (eff 12 March 2007); the *Circular on Issues Relevant to Foreign Exchange Control with Respect to Overseas Securities Investments of Fund Management Companies* (eff 30 August 2007 to 29 September 2009); Stender/Yin/Xu 2007, p 28; Stender/Yin/Gao 2007 pp 34 ff.; Xi 2011, pp 71-79.

[82] Compare Guo 2008, p 36; Plowman 2009, p 14.

[83] *Ibid.*

[84] Latest version eff 1 March 2014.

[85] Compare Artt 23 ff *Administration of the Takeover of Listed Companies Procedures* (latest version eff 23 November 2014).

[86] *Ibid.*, Artt 47 ff; compare Cai 2012, p 906; for takeovers via private placements see Liu 2008, pp 354-370.

[87] Huang 2008, p 167; Cai, *ibid.*, p 907.

Shares held by the following groups of people and entities may not be transferred:[88]

- personnel of stock exchanges, securities companies, securities registration and settlement authorities and other personnel;[89]
- securities service organisations and their personnel involved in the issuance of an audit report, an asset valuation report or a legal opinion, etc. for a share issuance within the underwriting period and the following six months;[90]
- promoters within one year from the date of incorporation of the company;[91]
- persons holding shares issued prior to the public offering within one year from the date on which the shares are listed on a stock exchange;[92] and
- directors, supervisors and senior management personnel of a company if transferring more than 25% of their shares per year during their term of appointment or if transferring their shares within one year from the date on which the shares of the company are listed on the stock exchange and within half a year after leaving their posts.[93]

Share buybacks of companies limited by shares are possible in the event of:

- a reduction of the registered capital;
- the merger with another entity holding shares of the company;
- the distribution of shares to employees as an incentive;[94] and
- the request of shareholders who object to a resolution of a shareholders' general meeting on a merger or a division for the company to acquire their shares.[95]

[88] Also see the general provision of Art 38 *PRC Securities Law* (latest version eff 31 August 2014).

[89] *Ibid.*, Art 43.

[90] *Ibid.*, Art 45.

[91] *Ibid.*, Art 141; shares held by promoters of a foreign-invested company limited by shares are subject to a lock-up period of three years, Art 8 *Interim Provisions Concerning Certain Issues on the Establishment of Foreign-invested Companies Limited by Shares* (eff 10 January 1995).

[92] Art 141 para 1 sentence 2 *PRC Company Law* (latest version eff 1 March 2014).

[93] *Ibid.*, Art 141 para 2. Note that the articles of association of a company can impose additional restrictions, *ibid* para 2 sentence 3; also see the *Rules for the Administration of Company Shares Held by Directors, Supervisors and Senior Managers of Listed Firms, and Share Changes* (eff 5 April 2007).

[94] Compare for employee stock plans of listed companies Han/Shen 2007, p 80; Llinks 2007, at 30-230; Xu/Liu 2012, p 121; for SAFE registration requirements in the context of round-trip transactions the internal SAFE Notice 106 of 29 May 2007; Stender/She/Jin 2007, p 59.

[95] Art 142 (40 *PRC Company Law* (latest version eff 1 March 2014); Prieur, in Company Law Guide, at 87-170 and 106-740; Han/Chen, 2005, pp 17-19; Huang 2008, pp 153-175.

Acquisitions by FIEs

¶10-200 Holding-FIEs

Pursuant to their Article 52 para 1, the *Acquisition of Domestic Enterprises by Foreign Investors Provisions*[6] also apply to acquisitions by "companies with an investment nature" established in China by foreign investors.[7] Companies with an investment nature are foreign-invested holding companies (Holding-FIEs) established onshore. Due to the reference of Article 52 para 1 of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions*,[8] the above explanations regarding the acquisition of domestic enterprises by foreign investors in China also apply in relation to the acquisition of equity interest in limited liability companies and unlisted shares of companies limited by shares, as well as in relation to asset deals conducted by Holding-FIEs.[9] In addition, Holding FIEs may not use domestic loan amounts to invest domestically. Holding FIES can, however, use their RMB onshore income for domestic investments provided that SAFE approval has been obtained.[10]

Holding-FIEs are subject to special rules as explained in the following:

Multi-national enterprises with substantial China investment volumes have long tried to establish onshore holding companies to better co-ordinate the management of different China investment projects in relation to issues such as human resources, foreign currency and RMB, or simply for easier access to financing sources and last but not least for marketing purposes.[11] Consequently, during the early 1990s about 40 holding companies were established by foreign investors and approved by MOFTEC.[12] There was no official legal basis governing this practice. Apparently, rules regarding the approval of the establishment and operation of these holding companies had only been set out in an internal (*neibu*) document.[13]

[6] Latest version eff 22 June 2009.

[7] Also see Art 2 para 1 *Investment within China by Foreign Investment Enterprises Tentative Provisions* (latest version eff 26 May 2006).

[8] Latest version eff 22 June 2009.

[9] Artt 52 para 1 *Acquisition of Domestic Enterprises by Foreign Investors Provisions* (eff 22 June 2009).

[10] According to the SAFE *Notice on the Operating Guidelines for Issues concerning the Confirmation Requests for Capital Verification Involved in Reinvestments by Foreign-invested Companies with an Investment Nature* (eff 29 March 2011) and the MOFCOM and SAFE *Notice on Further Improving the Management Measures for Foreign-invested Investment Companies* (eff 8 December 2011).

[11] Wolff 2006, p 105.

[12] Now: MOFCOM.

[13] Friesbie/Kolenda, 1993, pp 9 ff; Wolff 2006, p 106.

Then, on 4 April 1995, the *Establishment of Companies with an Investment Nature by Foreign Investors Tentative Provisions* entered into force.[14] The *Tentative Provisions* provided for a basic legal framework governing the establishment and operation of Holding-FIEs by reinforcing the previous approval practice. The *Tentative Provisions* were supplemented by other rules and regulations[15] and have been revised several times.[16] On 17 November 2004, they were re-promulgated as the *Establishment of Companies with an Investment Nature by Foreign Investors Provisions*[17] and again amended as of 1 July 2006. Related *Supplementary Provisions*[18] were promulgated by MOFCOM on 26 May 2006.

The establishment of Holding-FIEs is subject to MOFCOM approval and SAIC registration. In an attempt to de-centralise approval procedures MOFCOM issued the *Notice on the Delegation of Approval Limits for the Establishment of Companies with an Investment Nature by Foreign Investors* on 6 March 2009.[19] The approval thresholds were again changed in 2010 by the *Notice on Questions relating to the Delegation of Foreign Investment Examination and Approval Powers* issued by MOFCOM on 10 June 2010. According to the *Notice*, local MOFCOM branches are now in charge of approving the establishment of new Holding-FIEs with a registered capital of less than USD300 million.[20]

According to the *Establishment of Companies with an Investment Nature by Foreign Investors Provisions*,[21] Holding-FIEs can be established as JVs or as WFOEs and shall take the form of limited liability companies.[22] Certain minimum requirements must be met to establish a Holding-FIE. Amongst others, in the year before the establishment of

[14] Also see *Problems Concerning the "Establishment of Companies with an Investment Nature by Foreign Investors Supplementary Provisions" Notice*, promulgated by MOFTEC on 16 February 1996 and repealed as of 10 July 2003.

[15] See e.g. the *"Establishment of Companies with an Investment Nature by Foreign Investors Tentative Provisions" Supplementary Provisions* (eff 24 August 1999 to 10 July 2003); the *"Establishment of Companies with an Investment Nature by Foreign Investors Tentative Provisions" Supplementary Provisions (2)* (eff 31 May 2001 to 10 July 2003); the *Investment within China by Foreign Investment Enterprises Tentative Provisions* (latest version eff 26 May 2006).

[16] Compare for earlier versions Tao/Tang 1999, pp 19-22; Han/Chen 2001, p 66; Wei/Curley 2001, pp 44-45; Corne 2003, pp 17-18; Corne 2004, pp 25-26.

[17] Also compare Ross/Chen 2005, pp 47-50; for Regional Headquarters established under the holding scheme see Kroymann 2006, pp 28-41; the *Several Provisions on Encouraging Multinational Companies to Establish Regional Headquarters in Beijing* (eff 1 January 2009) and the *Several Provisions on Encouraging Multinational Companies to Establish Regional Headquarters in Beijing Implementing Measures* (eff 24 June 2009).

[18] *Establishment of Companies with an Investment Nature by Foreign Investors Supplementary Provisions* (eff 1 July 2006).

[19] Compare Zhou/Xu/Troy 2009, pp 20-21.

[20] Item 4 *Notice on Questions relating to the Delegation of Foreign Investment Examination and Approval Powers* (eff 10 June 2010); compare Li/Teng 2010, p 21.

[21] Latest version eff 1 July 2006.

[22] Art 2 *Establishment of Companies with an Investment Nature by Foreign Investors Provisions* (eff 1 July 2006). For the possibility to establish Holding-FIEs as foreign-invested companies limited by shares see the *Investment within China by Foreign Investment Enterprises Supplementary Provisions* (latest version eff 26 May 2006); also compare Jun Wei/Curley 2001, p 71.

"acts whereby state-owned enterprises make use of direct foreign investment in order to merge with other domestic enterprises ... supplement their self-owned working capital ... or pay their debts."[7]

The *Tentative Provisions* set out special rules regarding the preconditions for mergers of SOEs with domestic entities, supposedly including the mergers of SOEs with FIEs, and the approval procedure. It is noteworthy that the Chinese characters used by the *Tentative Provisions* for merger[8] are not those[9] used by the *Merger and Division of Foreign Investment Enterprise Provisions*[10] and it has been speculated that it:

"... would appear, given the stated intention of the Tentative Provisions, that their application should extend to a broad sense of asset restructuring."[11]

However, the *Tentative Provisions* have entered into force before the enactment of the main body of M&A legislation, in particular, before the *Merger and Division of Foreign Investment Enterprise Provisions*[12] became effective. Consequently, it is doubtful if the *Tentative Provisions* can still be regarded as the valid authority for foreign-invested SOE-related mergers. Despite the lack of any precedence,[13] it is more likely that the practice developed based on later M&A-related laws and regulations would prevail.

On 8 November 2002 SETC, MOF, SAIC and SAFE promulgated the *Using Foreign Investment to Reorganise State-owned Enterprises Tentative Provisions*. The scope of applicability of the *Tentative Provisions*, which entered into force on 1 January 2003, covers the reorganisation of SOEs[14] through:

(1) the acquisition of all or part of state-owned property rights in SOEs, without company status, by foreign investors and the conversion of respective SOEs into FIEs;

(2) the acquisition of all or part of the state-owned equity interest of a domestic company by a foreign investor and the conversion of the target into an FIE;

(3) the assignment of a claim against a SOE to a foreign investor and the reorganisation of the SOE into an FIE;

7 Art 2 *Asset Reorganisation by State-owned Enterprises Using Foreign Investment Tentative Provisions* (eff 14 September 1998).

8 Chinese: 兼并. Also see the definition of 兼并 provided in item 1 (1) of the *Several Questions Concerning Income Tax When Enterprises are Reorganised or Change Their System Tentative Provisions* (eff 24 June 1998): "兼并 means that one enterprise buys another enterprise's property rights, causing the other enterprise to lose its legal person status or to change the substance of the legal person."

9 Chinese: 合并.

10 Latest version eff 22 November 2001.

11 Doe/Leung 1999, p 21.

12 Latest version eff 22 November 2001; compare *supra*, ¶11-200 to ¶11-260.

13 Compare *supra*, ¶11-100.

14 Other than financial institutions or listed companies, Art 2 *Using Foreign Investment to Reorganise State-owned Enterprises Tentative Provisions* (eff 1 January 2003); for the acquisition of Chinese financial institutions compare *supra*, ¶12-200, for the acquisition of listed companies, *supra*, chapter 8.

(4) the sale of all or the main assets of a SOE or a company with state-owned equity interest to a foreign investor and the use of those assets by the foreign investor to establish an FIE; and

(5) the subscription by a foreign investor to the capital increase of a SOE or a company with state-owned equity interest and the conversion of the target into an FIE.[15]

While the *Using Foreign Investment to Reorganise State-owned Enterprises Tentative Provisions*[16] emphasise their aim of facilitating the reorganisation of SOEs, their scope of applicability reaches into the areas covered by the general M&A regimes discussed in the previous sections.

Scenarios (2) and (5) address the acquisition of domestic enterprises without FIE status.[17] Scenario (4) describes asset deals conducted by foreign investors in China. In contrast, the acquisition of SOEs that have not (yet) taken the form of a company under the rules of the *PRC Company Law*[18] as addressed by scenario (1) falls outside the scope of applicability of the general M&A rules.[19] Finally, scenario (3), which addresses special features of the enforcement of claims under the *PRC Security Law*,[20] does not relate to the more specific M&A context and is, therefore, not to be discussed here.

On 1 February 2004, the *Administration of Transfer of State-owned Property Rights of Enterprises Tentative Procedures*[21] entered into force.[22] The *Tentative Procedures* define "state-owned property rights"[23] as

15 Art 3 *Using Foreign Investment to Reorganise State-owned Enterprises Tentative Provisions* (eff 1 January 2003).

16 Eff 1 January 2003.

17 Compare *supra*, chapter 6.

18 Latest version eff 1 March 2014.

19 The *Acquisition of Domestic Enterprises by Foreign Investors Provisions* (latest version eff 22 June 2009) only cover the acquisition of equity interest in domestic limited liability companies and companies limited by shares which have been established in accordance with the *PRC Company Law* (latest version eff 1 March 2014), compare Feuerstein 2004, pp 19-37 (20).

20 Eff 1 October 1995; also see the *Several Issues Concerning the Application of the 'PRC Security Law' Interpretations* (eff 13 December 2000); in relation to foreign-related security the *Foreign Debt Administration Tentative Provisions* (eff 1 March 2003), the *Administration of the Provision of Security to Foreign Entities by Domestic Institutions Inside China Procedures* (eff 1 October 1996).

21 The *Interim Measures for the Management of the Transfer of State-owned Property Rights of Enterprises* (eff 1 February 2004) are procedurally supplemented by the *Operating Rules for Transactions of Corporate State-owned Property Rights* (eff 1 July 2009). According to their Art 2 para 2 the *Interim Measures for the Management of the Transfer of State-owned Property Rights of Enterprises* (eff 1 February 2004) are not applicable in relation to listed companies and financial enterprises, see for these enterprise types *supra*, chapters 8 and 12, but have served as the basis for the enactment of e.g. the *Operating Rules for the Trading of state-owned Property Rights of Central Cultural Enterprises* (eff 1June 2013); as an example of lower-level rules see e.g. the *Administrative Measures of Chongqing Municipality for the Transfer of State-owned Property Rights of Enterprises* (eff 1 February 2009).

22 According to their Art 1 the *Interim Measures for the Management of the Transfer of State-owned Property Rights of Enterprises* (eff 1 February 2004) are formulated in accordance with the *Provisional Regulations on the Administration and Supervision of Assets of State-owned Enterprises* (originally eff 27 May 2003, latest version eff 8 January 201); also see the *Notice on Questions related to the Transfer of State-owned Property Rights* issued by SASAC on 25 August 2004.

authorities to close loopholes which allow onshore tax avoidance via offshore structures.[28]

Onshore funds

¶15-221 Onshore funds with foreign investment

Private equity funds with foreign investment established onshore are less common. Onshore RMB funds have, however, become a topic of considerable interest in recent times as they may offer access to onshore funding, open up options to circumvent the restrictions on the use of offshore SPVs,[29] provide the possibility to partner with domestic firms and enable foreign players to be closer to domestic investors[30] who – unlike the case of outbound investments – would not need special government approval to invest onshore.

Since the mid-1980s, a number of government documents have been issued to encourage state-sponsored,[31] domestic and foreign-invested venture capital projects.[32] Special rules, namely the *Regulations on the Administration of Foreign Investment Venture Capital Enterprises*,[33] apply in relation to venture capital FIEs. It has been pointed out that while these *Regulations* are aimed at making foreign-invested venture

[28] Compare *infra* ¶20-300.

[29] *Supra*, ¶14-200 and ¶14-300.

[30] Clifford Chance 2007, p 1.

[31] Compare e.g. the *Notice on the Work regarding the Good Implementation of Preferential Policies for Venture Capital Enterprises* issued by the NDRC on 7 February 2007; the *Tentative Procedures on the Management of Guidance Funds for Technology-sector Medium and Small-sized Enterprise Investments*, issued by MOF and the Ministry of Science on 6 July 2007, repealed as of 11 April 2014; also *Some Guiding Opinions on Experimenting the Use of Venture Capital as Industrial Technology Research and Development Funds* issued by MOF and NDRC on 30 January 2007 and effective on the same day; the *Notice on Questions Concerning the Implementation of Venture Capital Enterprise Income Tax Preference*, which was promulgated by SAT on 30 April 2009 and has become effective retroactively as of 1 January 2008.

[32] See e.g. Art 1 *Regulations on the Administration of Foreign Investment Venture Capital Enterprises* (eff 1 March 2003); also see Lu/Tan/Chen 2007, pp 238 ff; White/Hallworth 2000, p 18, in relation to the *Establishment of Venture Investment Mechanism Several Opinions* (issued on 16 November 1999); the *Notice on Questions Concerning the Implementation of Venture Capital Enterprise Income Tax Preference* (eff 1 January 2008); the Notice on Improving the Administration of Filings of Foreign-funded Venture Capital Enterprises (eff 7 May 2012).

[33] Eff 1 March 2003. These *Regulations* replaced the *Establishment of Foreign Investment Venture Capital Investment Enterprises Tentative Provisions*, which had been jointly issued by the MOFTEC, the Ministry of Science and Technology and the SAIC on 28 August 2001, but "fell considerably short of expectations", compare Wood/Xu 2003, p 18; Guo/Zhu/Qian 2009, p 2009.

capital projects[34] more attractive, their scope of applicability is not restricted to "pure venture capital start-up situations". It has consequently been suggested that the *Regulations* may govern a much broader range of private equity projects.[35]

Foreign-invested venture capital enterprises can be established as FIEs[36] in the form of companies,[37] or as entities without legal person status,[38] for a term of normally not longer than 12 years.[39] The scope of business of onshore venture capital FIEs is limited to the use of their own capital to make equity investments,[40] providing related consultancy services, offering management consultancy services to their investee enterprises and conducting other business approved by the competent examination and approval authority.[41] Article 32 of the *Regulations on the Administration of Foreign Investment Venture Capital Enterprises*[42] sets out expressly that venture capital FIEs may not:

(1) engage in areas not open to foreign investments;

(2) invest in publicly traded stocks and corporate bonds;

[34] See the definition of venture capital FIEs in Art 2 *Regulations on the Administration of Foreign Investment Venture Capital Enterprises* (eff 1 March 2003): "... foreign invested enterprise established within the territory of China by foreign investors, or by foreign investors together with companies, enterprises or other economic organisations registered and established under Chinese law... pursuant to these provisions for the purpose of engaging in venture capital business." Pursuant to Art 3 of the *Regulations* venture capital investments are "investment activities where equity is invested mainly into high- and new-tech non-listed enterprises ... and venture capital management services are provided in order to obtain capital appreciation gains."

[35] Wood/Xu 2003, *ibid.*

[36] It remains unclear to what extent the "normal" FIE rules apply in relation to foreign-invested venture capital enterprises established onshore.

[37] Compare Wood/Xu 2003, p 19: "...this is not a feasible option for must fund sponsors and investors.", due to inflexible capital structure and the fact that taxation will take place twice, i.e. at the corporate and the equity holders' level; the legal viability of value adjustment mechanisms, i.e. mechanisms "that enable(s) a PE investor to invest in a portfolio company based on an estimated pre-money valuation of the company that assumes certain post-closing financial or mile-stone-based performance targets will be achieved ... In the event the portfolio company fails to achieve such targets, an adjustment will be made to the pre-money valuation of the portfolio company at which the PE investor made its initial investment", Morrison Foerster 2013, p 2, was clarified by the Supreme People's Court in its decision in *Haifu Investment Co., Ltd. v. Gansu Shiheng Nonferrous Resources Recycle Company Limited*, compare *ibid.*

[38] Art 4 *Regulations on the Administration of Foreign Investment Venture Capital Enterprises* (eff 1 March 2003). In case of a non-legal person venture capital enterprise tax "passes through directly to its investors", Lu/Tan/Chen 2007, p 264; Guo 2009, p 21. It may be questionable if after the enactment of the NDRC *Notice on the Promotion of the Standardized Development of Equity Investment Enterprises* (eff 23 November 2011) foreign-invested venture capital enterprises can still be established in the form of CJVs without legal person status.

[39] Art 37 para 1 *Regulations on the Administration of Foreign Investment Venture Capital Enterprises* (eff 1 March 2003).

[40] In the form of the establishment of new enterprises, making investments into existing enterprises, acquiring equity interests from shareholders of existing enterprises and other forms of investments, compare *ibid.*, Art 31 (1).

[41] *Iibd.*, Art 31.

[42] Eff 1 March 2003.

Guidelines to offer a simplified notification procedure with reduced filing obligations in so-called "simple cases", namely cases where:

- the combined market share of concerned enterprises which in the same relevant market is less than 15%;
- concerned enterprises have buyer-seller relationships and their respective market share in the relevant upstream or downstream market is less than 25%;
- the market share in each trading-related market of concerned enterprises which are not in same relevant market and do not have buyer-seller relationships is less than 25%;
- concerned enterprises have established a joint venture outside China which does not engage in any business activities in China;
- concerned enterprises have acquired the assets of an overseas company which does not engage in any business activities in China; or
- a joint venture which is jointly controlled by two or more concerned parties comes under the control of one or more of these concerned parties.[129]

According to data published in October 2014 the new framework for simple cases has in fact "nearly halfed the length of time it takes to win clearance. ...The regulator took on average 26 days to approve deals that were filed under the new simple case procedure."[130]

¶18-344 Decision of the Anti-Monopoly Enforcement Organ

MOFCOM can decide to prohibit transactions, to allow transactions or to allow transactions only subject to the fulfilment of certain conditions.[131] The *PRC Anti-Monopoly Law* lists the following criteria on the basis of which a decision shall be made:

- the market shares and the controlling market power of the concerned enterprises;
- the degree of market concentration;
- the impact of the transaction on market entry and technological development;
- the impact of the transaction on consumers and other enterprises; and
- the impact of the transaction on the national economic development.[132]

It is obvious that these criteria are rather broad and require further specification to achieve the required predictability. Details regarding the relevant market are now set out in the *Guidelines on the Definition of Relevant Market* dated 24 May 2009.[133]

[129] Art 2 *Interim Provisions on Standards for Simple Cases in Concentrations of Undertakings* (eff 11 February 2014).

[130] Reuters 2014, p B3.

[131] Artt 28, 29 *PRC Anti-Monopoly Law* (eff 1 August 2008).

[132] *Ibid.*, Art 27; also see the *Guidelines on the Definition of Relevant Market*, dated 24 May 2009; compare Law 7-8/2009, p 10; Dai 2009, p 30-31; Taylor 10/2009, p 28-29; Art 3 *Interim Measures on Assessing the Impact of Concentration of Business Operators on Competition* (eff 5 May 2011).

[133] Compare Law 7-8/2009, p 10.

In the event that an enterprise can prove that the advantages of the transaction in terms of its impact on competition within the market will be much more significant than its related disadvantages or that the deal is in line with China's social and public interest, the *Anti-Monopoly Enforcement Organ* may allow the deal.[134] Guidelines for the assessment of the actual impact of transactions are provided by the *Interim Measures on Assessing the Impact of Concentration of Business Operators on Competition*.[135] The *Interim Measures* provide amongst others for criteria to determine if business operators may obtain controlling market power through a transaction.[136]

According to Article 26 para 1 of the *PRC Anti-Monopoly Law*,[137] a deal may not be executed prior to the decision of the *Anti-Monopoly Enforcement Organ*.[138] The legal meaning of this provision is, however, not completely clear. It appears that the decision of the *Anti-Monopoly Enforcement Organ* is not a precondition for the legal validity of any transaction because Article 48 of the *PRC Anti-Monopoly Law* sets out the legal consequences in cases where a deal is executed in violation of the provisions of the *PRC Anti-Monopoly Law*.

¶18-345 Application for reconsideration and judicial review

A concerned party that disagrees with the decision of the *Anti-Monopoly Enforcement Organ* can apply for reconsideration of the case by the *Anti-Monopoly Enforcement Organ*.[139] If a concerned party is not satisfied with the outcome of a reconsideration, it can initiate administrative court proceedings.[140]

¶18-346 Violation of the PRC Anti-Monopoly Law

Pursuant to its Article 48 PRC Anti-Monopoly Law and the Interim Measures for Investigating and Handling Failures to Legally Declare the Concentration of Business Operators,[141] if enterprises fail to notify transactions which meet the notification thresholds, the Anti-Monopoly Enforcement Organ shall issue an order to stop the execution of the transaction, to dispose of shares or assets within a set period of time or to transfer a business or to take other measures to re-establish the pre-transaction

[134] Art 28 sentence 2 *PRC Anti-Monopoly Law* (eff 1 August 2008).

[135] Eff. 5 September 2011.

[136] Art 5 *Interim Measures on Assessing the Impact of Concentration of Business Operators on Competition* (eff 5 May 2011).

[137] Also see Art 14 para 1, sentence 3 *Measures for the Review of Concentrations of Business Operators* (eff 1 January 2010); for the similar rule during the preliminary check see Art 25 para 1 sentence 2 *PRC Anti-Monopoly Law* (eff 1 August 2008).

[138] Also see Art 3 *Regulations Concerning Thresholds for Notification of Concentrations by Business Operators* (eff 3 August 2008).

[139] Art 53 para 1 *PRC Anti-Monopoly Law* (eff 1 August 2008) with Art 37 para 2 *PRC Law of Administrative Litigation* (eff 1 October 1990).

[140] Art 53 para 1 *PRC Anti-Monopoly Law* (eff 1 August 2008) with Art 37 para 2 *PRC Law on Administrative Litigation* (eff 1 October 1990); also compare the *SPC Notice on the Diligent Studying and Implementing of the 'PRC Anti-Monopoly Law'* (published on 28 August 2008).

[141] Eff 1 February 2012.

Effective Date of Latest Version	Original Issuance Date	Title of Rules	Document Nos.	Repealed / Revised by
26-Feb-2008	26-Feb-2008	Detailed Rules for the Implementation of the PRC Provisional Regulations on Arable Land Occupation Tax	MOF and SAT No.49	
		中华人民共和国耕地占用税暂行条例实施细则	财政部、国家税务总局令第 49 号	
27-Feb-2008	27-Feb-2008	Notice on Treatment Issues After the Cancellation of Several Tax Incentives for Foreign-invested Enterprises and Foreign Enterprises	Guo Shui Fa [2008]No.23	
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15-Mar-2008	15-Mar-2008	Reform of State Council Organs	First Session of the Eleventh NPC on 15 March 2008	
		关于国务院机构改革方案的决定	2008 年 3 月 15 日第十一届全国人民代表大会第一次会议通过	
16-Apr-2008	16-Apr-2008	Provisions on Several Issues Concerning the Regulation of Material Asset Reorganisations by Listed Companies	CSRC[2008] No.14	
		关于规范上市公司重大资产重组若干问题的规定	中国证券监督管理委员会公告[2008]14 号	
1-May-2008	29-Dec-2007	The PRC Law on Mediation and Arbitration of Labour Disputes	Zhu Xi Ling No.80	
		中华人民共和国劳动争议调解仲裁法	主席令第 80 号	
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		广东省高级人民法院、广东省劳动争议仲裁委员会关于适用《劳动争议调解仲裁法》，《劳动合同法》若干问题的指导意见	粤高法发[2008]13 号	
25-Jun-2008	25-Jun-2008	Guidelines for Trust Companies to Operate the Trust Private Equity Investment Business	Yin Jian Fa [2008]No.45	
		信托公司私人股权投资信托业务操作指引	银监发[2008]45 号	
1-Jul-2008	18-Jun-2008	Circular on Better Implementation of the Filing of Foreign Investment in the Real Estate Sector	Shang Zi Han [2008]No.23	
		关于做好外商投资房地产业备案工作的通知	商资函[2008]23 号	
8-Jul-2008	8-Jul-2008	Working Guidelines for Recognition and Administration of High- and New Technology Enterprises	Guo Ke Fa Huo [2008]No.362	
		高新技术企业认定管理工作指引	国科发火[2008]362 号	
11-Jul-2008	11-Jul-2008	Regulations of the Main Responsibilities as Organ, the Organisational Structure and the Personnel Plan of the Ministry of Commerce	Guo Ban Fa [2008]No.77	
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28-Jul-2008	28-Jul-2008	SPC Notice on the Diligent Studying and Implementing of the 'PRC Anti-Monopoly Law'	Fa Fa[2008]N.23	
		最高人民法院关于认真学习和贯彻《中华人民共和国反垄断法》的通知	法发[2008]23 号	
1-Aug-2008	31-Aug-2007	PRC Anti-Monopoly Law	Zhu Xi Ling No.68	
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关于外商投资企业合并与分立的规定

（〔1999〕外经贸法发第395号，根据二〇〇一年十一月二十二日《对外贸易经济合作部和国家工商行政管理总局关于修改〈关于外商投资企业合并与分立的规定〉的决定》修订。）

第一条 为了规范涉及外商投资企业合并与分立的行为，保护企业投资者和债权人的合法权益，根据《中华人民共和国公司法》和有关外商投资企业的法律和行政法规，制定本规定。

第二条 本规定适用于依照中国法律在中国境内设立的中外合资经营企业、具有法人资格的中外合作经营企业、外资企业、外商投资股份有限公司（以下统称公司）之间合并或分立。

公司与中国内资企业合并，参照有关法律、法规和本规定办理。

第三条 本规定所称合并，是指两个以上公司依照公司法有关规定，通过订立协议而归并成为一个公司。

公司合并可以采取吸收合并和新设合并两种形式。

吸收合并，是指公司接纳其它公司加入本公司，接纳方继续存在，加入方解散。

新设合并，是指两个以上公司合并设立一个新的公司，合并各方解散。

第四条 本规定所称分立，是指一个公司依照公司法有关规定，通过公司最高权力机构决议分成两个以上的公司。

公司分立可以采取存续分立和解散分立两种形式。

存续分立，是指一个公司分离成两个以上公司，本公司继续存在并设立一个以上新的公司。

Merger and Division of Foreign Invested Enterprises Provisions

([1999] Wai Jing Mou Fa No. 395, revised in the "Ministry of Foreign Trade and Economic Cooperation and State Administration for Industry and Commerce, Amending the 'Merger and Division of Foreign-invested Enterprises Provisions' Decision" on 22 November 2001.)

Article 1. These Provisions are formulated in accordance with the *PRC, Company Law* and laws and administrative regulations concerning foreign-invested enterprises, in order to standardise acts involving merger or division of foreign-invested enterprises and to protect the lawful rights and interests of the investors in and creditors of enterprises.

Article 2. These Provisions are applicable to mergers between, or division of, Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures with legal person status, wholly foreign-owned enterprises and companies limited by shares with foreign investment (Companies), which have been established in China pursuant to China's laws.

Mergers between Companies and wholly Chinese-owned enterprises shall be handled with reference to relevant laws and regulations and these Provisions.

Article 3. For the purposes of these Provisions, the term "merger" means the joining of two or more Companies to become one Company through the conclusion of an agreement pursuant to the relevant provisions of the Company Law.

The merger of Companies may take the form of merger by absorption or merger by new establishment.

The term "merger by absorption" means that a Company admits another Company into its own Company, whereby the admitting Company survives and the admitted Company or Companies is or are dissolved.

The term "merger by new establishment" means that two or more Companies merge to establish a new Company, whereby each party to the merger is dissolved.

Article 4. For the purposes of these Provisions, the term "division" means that a Company is divided into two or more Companies pursuant to the relevant provisions of the Company Law, by means of a resolution of the highest organ of authority of the Company.

The division of Companies may take the form of survived division or division by dissolution.

The term "survived division" means that a Company is split into two or more Companies, whereby the Company itself survives and one or more new Companies are established.

重新签订或变更劳动合同。对解除劳动合同的职工要依法支付经济补偿金，对移交社会保险机构的职工要依法一次性缴足社会保险费，所需资金从改组前被改组企业净资产抵扣，或从国有产权持有人转让国有产权收益中优先支付。

（三）以出售资产方式进行改组的，企业债权债务仍由原企业承继；以其它方式改组的，企业债权债务由改组后的企业承继。转让已抵押或质押的国有产权、资产的，应当符合《中华人民共和国担保法》的有关规定。债务承继人应当与债权人签订相关的债权债务处置协议。

（四）改组方应当公开发布改组信息，广泛地征集外国投资者，对外国投资者的资质、信誉、财务状况、管理能力、付款保障、经营者素质等进行调查。优先选择能带来先进技术和管理经验、产业关联度高的中长期投资者。

改组方和外国投资者应当应对方的合理要求，如实、详尽地提供有关信息资料，不得有误导和欺诈行为，并承担相应保密义务。

（五）企业改组以转让国有产权或出售资产方式进行的，改组方应当优先采用公开竞价方式确定外国投资者及转让价格。采用公开竞价方式转让，应当依法履行有关手续，并将拟转让国有产权或拟出售资产的相关情况予以公告。采取协议转让的，也应当公开运作。

不论采取何种转让方式，改组方与外国投资者均应当按照国家有关规定和本规定签订转让协议。转让协议内容应当主要包括转让国有产权的基本情况、职工安置、债权债务处置、转让比例、转让价格、付款方式及付款条件、产权交割事项以及企业重整等条款。

第九条 利用外资改组国有企业应当按下列程序办理：

labour contracts of, its staff and workers who are kept on. It shall, in accordance with the law, pay severance pay to those staff members and workers whose labour contracts are terminated and for those staff and workers, the responsibility for whom is transferred to the social insurance authority, it shall pay in full in one lump sum the social insurance premiums. The funds required shall be deducted from the net assets of the Enterprise to be Reorganised before the reorganisation or on a priority basis from the proceeds derived by the Owner of the State-owned Property Rights from the assignment of the State-owned Property Rights.

(3) If the reorganisation is to be effected through the sale of assets, the original enterprise shall succeed to the enterprise's claims and debts, otherwise the reorganised enterprise shall succeed to the enterprise's claims and debts. The assignment of mortgaged or pledged State-owned Property Rights or assets shall comply with the relevant provisions of the *PRC, Security Law*. The successor to the debts shall execute relevant agreements for the disposal of claims and debts with the creditors.

(4) The Reorganising Party shall publish information on the reorganisation, recruit Foreign Investors extensively and investigate the Foreign Investors' qualifications, reputations, financial position, management capabilities, payment guarantees, business ethics, etc. It shall give priority consideration to medium and long-term Foreign Investors that can offer advanced technology, management experience and a high degree of industrial compatibility.

The Reorganising Party and the Foreign Investor shall respond to the reasonable demands of the opposite party by providing relevant truthful and detailed information and data, may not mislead or deceive the opposite party and shall bear the appropriate confidentiality obligations.

(5) If the enterprise reorganisation is to be effected through the assignment of State-owned Property Rights or the sale of assets, the Reorganising Party shall preferentially opt for an open competitive pricing method to determine the Foreign Investor and assignment price. When selecting an open competitive pricing method of assignment, the relevant procedures shall be carried out in accordance with the law and the relevant details on the State-owned Property Rights to be assigned or the assets to be sold shall be announced publicly. If assignment by agreement is opted for, such assignment shall be conducted in an open manner.

Regardless of the assignment method opted for, the Reorganising Party and the Foreign Investor shall execute an assignment agreement in accordance with the relevant State regulations and these Provisions. The terms of the assignment agreement shall mainly include the basic information on the State-owned Property Rights to be assigned, the settlement arrangements for the staff and workers, the disposal of claims and debts, the assignment ratio, the assignment price, the method of payment and payment conditions, matters relating to the delivery of the property rights, corporate restructuring, etc.

Article 9. The Use of Foreign Investment to Reorganise State-owned Enterprises shall be effected in accordance with the following procedure:

3. 为其所投资企业提供产品生产、销售和市场开发过程中的技术支持、员工培训、企业内部人事管理等服务；

4. 协助其所投资企业寻求贷款及提供担保。

（三）在中国境内设立科研开发中心或部门，从事新产品及高新技术的研究开发，转让其研究开发成果，并提供相应的技术服务；

（四）为其投资者提供咨询服务，为其关联公司提供与其投资有关的市场信息、投资政策等咨询服务；

（五）承接其母公司和关联公司的服务外包业务。

第十一条 投资性公司从事货物进出口或者技术进出口的,应符合商务部《对外贸易经营者备案登记办法》的规定；

投资性公司从事佣金代理、批发、零售和特许经营活动的，应符合商务部《外商投资商业领域管理办法》的相关规定，并依法变更相应的经营范围。

第十二条 本规定所称投资性公司所投资企业系指符合下列条件的企业：

（一）投资性公司直接投资或与其它外国投资者和/或中国投资者共同投资，投资性公司中折算出的外国投资者的投资单独或与其它外国投资者一起投资的比例占其所投资设立企业注册资本的 25%以上的企业；

（二）投资性公司将其投资者或其关联公司、其它外国投资者以及中国境内投资者在中国境内已投资设立的企业的股权部分或全部收购，投资性公司中折算出的外国投资者的投资单独或与其它外国投资者的投资额共同占该已设立企业的注册资本 25%以上的企业；

（三）投资性公司的投资额不低于其所投资设立企业的注册资本的 10%。

第十三条 经中国银行业监督管理委员会批准，投资性公司可向其所投资设立的企业提供财务支持。

(iii) providing technical support, staff training, human resource management services to the invested enterprise for its production, sales and marketing; and

(iv) assisting the invested enterprise in loan applications and providing guarantees.

(3) establishment of research and development centres or departments in China to engage in research and development of new products and new advanced technologies, transfer of research and development findings, and provision of corresponding technical services;

(4) provision of consultancy services to its investors, provision of consultancy services to its associated companies such as market information and investment policies which are relevant to the investments of the associated companies; and

(5) undertaking contractual service operations of its parent company or associated companies.

Article 11. Investment enterprises engaging in importation and exportation of goods or technologies shall comply with the provisions of the *Measures on Filing and Registration of Foreign Trade Operators* of the Ministry of Commerce.

Investment companies engaging in commission agency, wholesale, retail and franchise businesses shall comply with the relevant provisions of the *Administrative Measures on Foreign Investment in Merchandising Sector* of the Ministry of Commerce and revise their scope of operations in accordance with the law.

Article 12. Invested enterprises of investment companies referred to in these Regulations shall refer to enterprises which satisfy the following criteria:

(1) an enterprise funded directly by an investment company or funded jointly by an investment company with other foreign investor(s) and/or Chinese investor(s) and at least 25% of the registered capital of the enterprise is funded by the foreign investor(s) of the investment company solely or jointly with other foreign investor(s);

(2) an enterprise established in China by the investors of an investment company or its associated companies or other foreign investors and Chinese investors and which has been acquired partially or wholly by the investment company, with at least 25% of the registered capital of the enterprise funded by the foreign investor(s) of the investment company solely or jointly with other foreign investor(s);

(3) the investment amount of the investment company is not less than 10% of the registered capital of an invested enterprise.

Article 13. Upon approval from the China Banking Regulatory Commission, investment companies may provide financial assistance to their invested enterprises.

1、转让企业取得受让企业股权的计税基础，以被转让资产的原有计税基础确定。

2、受让企业取得转让企业资产的计税基础，以被转让资产的原有计税基础确定。

（四）企业合并，企业股东在该企业合并发生时取得的股权支付金额不低于其交易支付总额的 85%，以及同一控制下且不需要支付对价的企业合并，可以选择按以下规定处理：

1、合并企业接受被合并企业资产和负债的计税基础，以被合并企业的原有计税基础确定。

2、被合并企业合并前的相关所得税事项由合并企业承继。

3、可由合并企业弥补的被合并企业亏损的限额=被合并企业净资产公允价值×截至合并业务发生当年年末国家发行的最长期限的国债利率。

4、被合并企业股东取得合并企业股权的计税基础，以其原持有的被合并企业股权的计税基础确定。

（五）企业分立，被分立企业所有股东按原持股比例取得分立企业的股权，分立企业和被分立企业均不改变原来的实质经营活动，且被分立企业股东在该企业分立发生时取得的股权支付金额不低于其交易支付总额的 85%，可以选择按以下规定处理：

1、分立企业接受被分立企业资产和负债的计税基础，以被分立企业的原有计税基础确定。

2、被分立企业已分立出去资产相应的所得税事项由分立企业承继。

3、被分立企业未超过法定弥补期限的亏损额可按分立资产占全部资产的比例进行分配，由分立企业继续弥补。

4、被分立企业的股东取得分立企业的股权（以下简称“新股”），如需部分或全部放弃原持有的被分立企业的股权（以下简称“旧股”），“新股”的计税基础应以放弃“旧股”的计税基础确定。如不需放弃“旧股”，则其取得“新股”的计税基础可从以

payment amount, the transaction may be dealt with pursuant to the following provisions:

(a) The tax base of the transferee's equity obtained by the transferor shall be determined according to the original tax base of the transferred assets.

(b) The tax base of the transferor's assets obtained by the transferee shall be determined according to the original tax base of the transferred assets.

(4) In an enterprise merger where the equity payment amount obtained by the shareholders of the enterprise incurred at the time of enterprise merger is not less than 85% of the total transaction payment amount, and in the case of an enterprise merger under the same control which does not require payment of consideration, the transaction may be dealt with pursuant to the following provisions:

(a) The tax base of the merged enterprise's assets and liabilities accepted by the merger enterprise shall be determined according to the original tax base of the merged enterprise.

(b) The relevant income tax matters of the merged enterprise prior to the merger shall be succeeded by the merger enterprise.

(c) The limit of losses of the merged enterprise to be made up by the merger enterprise = fair value of net assets of the merged enterprise X treasury bond interest rate for maximum term of treasury bonds issued by the State as of the end of the year in which the merger occurs.

(d) The tax base of the merger enterprise's equity obtained by the shareholders of the merged enterprise shall be determined according to the tax base of the merged enterprise's equity originally held by them.

(5) In an enterprise division where all the shareholders of the divided enterprise obtain the division enterprise's equity in accordance with the original shareholding percentage, both the division enterprise and the divided enterprise do not change their original substantive business activities, and the equity payment amount obtained by the shareholders of the divided enterprise incurred at the time of the enterprise division is not less than 85% of the total transaction payment amount, the transaction may be dealt with pursuant to the following provisions:

(a) The tax base of the divided enterprise's assets and liabilities accepted by the division enterprise shall be determined according to the original tax base of the divided enterprise.

(b) Income tax matters corresponding to divided assets of the divided enterprise shall be succeeded by the division enterprise.

(c) The loss of the divided enterprise for which the statutory period for making up of losses has yet to expire may be distributed according to the ratio of divided assets to all assets, and shall continue to be made up by the division enterprise.

(d) In the case where the shareholders of the divided enterprise obtain the division enterprise's equity (hereinafter referred to as the "new shares"), and are required to forfeit all or part of the divided enterprise's equity originally held by them (hereinafter referred to as the "old shares"), the tax base of the "new

第八条 国家建立健全与社会主义市场经济发展要求相适应的国有资产管理与监督体制，建立健全国有资产保值增值考核和责任追究制度，落实国有资产保值增值责任。

第九条 国家建立健全国有资产基础管理制度。具体办法按照国务院的规定制定。

第十条 国有资产受法律保护，任何单位和个人不得侵害。

第二章 履行出资人职责的机构

第十一条 国务院国有资产监督管理机构和地方人民政府按照国务院的规定设立的国有资产监督管理机构，根据本级人民政府的授权，代表本级人民政府对国家出资企业履行出资人职责。

国务院和地方人民政府根据需要，可以授权其它部门、机构代表本级人民政府对国家出资企业履行出资人职责。

代表本级人民政府履行出资人职责的机构、部门，以下统称履行出资人职责的机构。

第十二条 履行出资人职责的机构代表本级人民政府对国家出资企业依法享有资产收益、参与重大决策和选择管理者等出资人权利。

履行出资人职责的机构依照法律、行政法规的规定，制定或者参与制定国家出资企业的章程。

履行出资人职责的机构对法律、行政法规和本级人民政府规定须经本级人民政府批准的履行出资人职责的重大事项，应当报请本级人民政府批准。

第十三条 履行出资人职责的机构委派的股东代表参加国有资本控股公司、国有资本参股公司召开的股东会会议、股东大会会议，应当按照委派机构的指示提出提案、发表意见、行使表决权，并将其履行职责的情况和结果及时报告委派机构。

Article 8. The state shall establish and improve the state-owned assets administration and supervision system commensurate with the development of socialist market economy, establish and improve the evaluation and accountability system for maintaining and increasing the value of state-owned assets, and designate the responsibilities for maintaining and increasing the value of state-owned assets to specific persons.

Article 9. The state shall establish and improve the basic administrative system for state-owned assets, the specific measures for which shall be formulated in accordance with the requirements of the State Council.

Article 10. State-owned assets shall be protected by law and rights to such assets shall not be infringed by any institution or individual.

CHAPTER II — ORGANS THAT PERFORM THE DUTIES OF AN INVESTOR

Article 11. The State-owned Assets Supervision and Administration Commission under the State Council and state-owned assets supervision and administration organs established by local governments in accordance with the requirements of the State Council shall, subject to the authorisation of the government at the same level, perform investors' duties for state-invested enterprises on behalf of the governments at the same level.

The State Council and local people's governments may, where necessary, authorise other departments and organs to perform investors' duties for state-invested enterprises on behalf of the government at the same level.

Organs and departments that perform investors' duties on behalf of the government at the same level are hereinafter referred to as organs that perform the duties of an investor.

Article 12. Organs that perform the duties of an investor shall exercise investors' rights to state-invested enterprises, including the rights to derive a profit from their assets and to participate in significant decisions and the selection of managers, on behalf of the government at the same level.

Organs that perform the duties of an investor shall, in accordance with laws and administrative regulations, formulate or participate in formulating the articles of association of state-invested enterprises.

Organs that perform the duties of an investor shall report to the government at the same level for approval on major matters relating to investors' duties that require the approval of the government at the same level in accordance with laws, administrative regulations and the regulations of the government at the same level.

Article 13. When participating in any shareholders' meeting or general meeting of shareholders held by a state-controlled company or partly state-owned company, shareholders appointed by organs to perform the responsibilities of investors shall, in accordance with the instructions of the appointing organ, make proposals, express opinions, exercise voting rights and report on all information and results that relate to the performance of their responsibilities in a timely manner.

被并购境内企业原有所投资企业的经营范围应符合有关外商投资产业政策的要求；不符合要求的，应进行调整。

第五条 外国投资者并购境内企业涉及企业国有产权转让和上市公司国有股权管理事宜的，应当遵守国有资产管理的相关规定。

第六条 外国投资者并购境内企业设立外商投资企业，应依照本规定经审批机关批准，向登记管理机关办理变更登记或设立登记。

如果被并购企业为境内上市公司，还应根据《外国投资者对上市公司战略投资管理办法》，向国务院证券监督管理机构办理相关手续。

第七条 外国投资者并购境内企业所涉及的各方当事人应当按照中国税法规定纳税，接受税务机关的监督。

第八条 外国投资者并购境内企业所涉及的各方当事人应遵守中国有关外汇管理的法律和行政法规，及时向外汇管理机关办理各项外汇核准、登记、备案及变更手续。

第二章 基本制度

第九条 外国投资者在并购后所设外商投资企业注册资本中的出资比例高于25%的，该企业享受外商投资企业待遇。

外国投资者在并购后所设外商投资企业注册资本中的出资比例低于25%的，除法律和行政法规另有规定外，该企业不享受外商投资企业待遇，其举借外债按照境内非外商投资企业举借外债的有关规定办理。审批机关向其颁发加注“外资比例低于25%”字样的外商投资企业批准证书（以下称“批准证书”）。登记管理机关、外汇管理机关分别向其颁发加注“外资比例低于25%”字样的外商投资企业营业执照和外汇登记证。

The scope of business of investee enterprises of the acquired domestic enterprise shall comply with the relevant requirements on industry policies for foreign investment; where the requirements are not complied with, adjustment shall be made.

Article 5. Merger and acquisition of domestic enterprises by foreign investors which involves transfer of State-owned property rights of an enterprise and management of State-owned equity of a listed company shall comply with the relevant provisions on administration of State-owned assets.

Article 6. Merger and acquisition of domestic enterprises by foreign investors for incorporation of foreign investment enterprises shall be subject to approval by the examination and approval authorities pursuant to these Provisions, and change registration or incorporation registration formalities shall be completed with the registration administration authorities.

Where the acquired enterprise is a domestic listed company, the relevant formalities shall be completed with the securities regulatory authorities of the State Council pursuant to the *Administrative Measures on Strategic Investment in Listed Companies by Foreign Investors*.

Article 7. The parties involved in merger and acquisition of domestic enterprises by foreign investors shall pay tax pursuant to the provisions of China tax laws and be subject to supervision by the tax authorities.

Article 8. The parties involved in merger and acquisition of domestic enterprises by foreign investors shall comply with the relevant laws and administrative regulations of China on foreign exchange control, and promptly complete various foreign exchange approval, registration, filing and change registration formalities with the foreign exchange control authorities.

CHAPTER II — BASIC SYSTEM

Article 9. Where the capital contribution by a foreign investor in the foreign investment enterprise incorporated after merger and acquisition is more than 25% of the registered capital of the foreign investment enterprise, the enterprise shall enjoy the treatment of foreign investment enterprise.

Where the capital contribution by a foreign investor in the foreign investment enterprise incorporated after merger and acquisition is less than 25% of the registered capital of the foreign investment enterprise, unless otherwise stipulated by laws and administrative regulations, the enterprise shall not enjoy the treatment of foreign investment enterprise and its foreign debt shall be handled pursuant to the relevant provisions on foreign debts of non-foreign investment enterprises in China. The examination and approval authorities shall issue an Approval Certificate for Foreign Investment Enterprise (hereinafter referred to as the “approval certificate”) marked with the wordings “foreign investment ratio less than 25%” to the enterprise. The registration administration authorities and the foreign exchange control authorities shall issue a foreign investment enterprise business licence and foreign exchange registration certificate