MERGERS AND ACQUISITIONS
OF LISTED AND UNLISTED COMPANIES IN CHINA

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1 Provisions regarding mergers and acquisitions are not stipulated in a unified code in China. Rather, some are incorporated into relevant laws while others can only be found in administrative regulations promulgated by the State Council or other governmental departments.

2 General rules of mergers of companies are stipulated in Chapter 9 of the PRC Company Law 2014. For mergers between foreign invested enterprises ("FIEs"), *the Provision on Mergers and Divisions of Foreign Invested Enterprises* (the "FIE Merger Provision") that is jointly promulgated by the Ministry of Foreign Trade and Economic Cooperation (now the Ministry of Commerce, the "MOFCOM") and the State Administration for Industry and Commerce (the "SAIC") will apply. The FIE Merger Provision may also provide some guidance for mergers of domestic enterprises ("DEs") with FIEs.

3 *The Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* (the "M&A Provision"), promulgated by five governmental departments including the MOFCOM and the SAIC and amended on June 22, 2009, is the most important legal document on acquisitions of DEs by foreign companies. The M&A Provision may also be referred in acquisitions of FIEs by foreign companies or of DEs by FIEs in the absence of provisions in other laws and regulations applicable to FIEs.

4 Acquisitions of companies listed in China are specifically governed by the *Administrative Regulation on Acquisitions of Listed Companies*.

5 If a new company is established for the purpose of a merger or acquisition, all laws and regulations that apply to new company establishment will also apply to the merger or acquisition. Establishment of the new company will have to conform to such issues as industrial policy, the Company Law, regulations on custom, taxation, foreign exchange and registration.

MERGERS

6 Mergers between Chinese-foreign equity joint ventures, incorporated Chinese-foreign contractual joint ventures, foreign invested limited liability companies and joint stock companies are regulated by the FIE Merger Provision. Mergers of Chinese domestic companies with foreign entities can also refer to the FIE merger provision for guidance.[1]

7 Mergers of companies may be achieved in two ways: (1) merger by amalgamation and (2) merger by consolidation.

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1 The FIE Merger Provision, art 2.

8 Merger by amalgamation refers to a company that amalgamates with other companies. The amalgamated company continues to exist while the absorbed ones are dissolved. In contrast, merger by consolidation refers to the consolidation of two or more companies into a new company, with all participating companies dissolved after the establishment of the consolidated company.

LEGAL FORM AFTER MERGER

9 Entities that can participate in a merger are limited liability companies and joint stock companies. The former category includes Chinese-foreign equity joint ventures, incorporated Chinese-foreign contractual joint ventures and common foreign invested limited liability companies. The companies participating in a merger will have to decide the legal form of the company during the merger negotiations.

10 A company that emerges from the merger of two or more companies with the same legal form, such as two or more limited liability companies or two or more joint stock companies, will retain the same legal form after merger.

11 For a merger between companies of different legal forms, like between limited liability companies and joint stock companies, the decisive factor for selecting the legal form will be whether the joint stock company is listed or unlisted. A company emerging from the merger of a listed joint stock company and a limited liability company is likely to be a listed joint stock company. This is subject to approvals of competent authorities. The company that emerges from the merger of an unlisted joint stock company and a limited liability company may either be a joint stock company or a limited liability company.[2]

APPLICATION, REVIEW AND APPROVAL

12 The default rule of review and approval is that a merger will be subject to review and approval of the authority that approved the participating companies when they were established.

13 Exceptions to the default rule include the following:

- if the establishment of participating companies was approved by two or more authorities, the authority of the city in which the newly merged company is located will be the review and approval authority for the merger;
- if a merger results in an increase of the investment capital amount exceeding the limit authorized by the original approving department, the merger will be subject to the approval of a higher level department with corresponding authority;
- If at least one of the companies to be merged is joint-stock limited company, the merger will be reviewed and approved by the Ministry of Commerce.

2 The FIE Merger Provision, art 10.

14 if one or more joint stock companies are involved in a merger, only the central level MOFCOM will have the approving authority. The following documents and materials are required in the application for a merger:

(1) merger application letter;

(2) merger agreement executed by the legal representatives of all participating companies;

(3) board resolutions on the merger by the participating companies;

(4) contracts and articles of association of the participating companies;

(5) duplicate copies of approval certificates and business licenses of the participating companies;

(6) asset inspection reports prepared and issued by the statutory Chinese asset inspection agencies for the participating companies;

(7) financial statements and inventories of the properties of the participating companies;

(8) audit reports of the previous year for the participating companies;

(9) creditors' list of the participating companies;

(10) contract and articles of association of the company emerging from the merger;

(11) directors' list of the company emerging from the merger; and

(12) other documents required by the review and approval authority.

15 The FIE Merger Provision explicitly requires the merger agreement to include: (1) inheritance plans for the benefits and liabilities of the participating companies, and (2) the methods of placement for the employees of the participating companies. The latter requirement will ensure original employees of the companies to be merged are fully re-employed or reasonably deployed.

16 If a new company is established in a new city in the process of a merger, the review and authority has to seek the advice of the relevant authority of the new city.[3]

17 A company that is to be dissolved due to a merger with another company must apply to its original review and approval authority for the dissolution.[4]

SHAREHOLDING, REGISTERED CAPITAL AND INVESTMENT AMOUNT

18 The shareholdings of the foreign investors will be no less than 25% of the registered capital of the company after the merger.

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3 The FIE Merger Provision, art 8.

4 The FIE Merger Provision, art 22.

19 The registered capital of the company after a merger will generally be the sum total of the amounts of the registered capital of the original companies. If a limited liability company merges into a joint stock company, the assets of the limited liability company will be converted into share equity in accordance with the value of each share of the joint stock company, which, together with the share equity of the joint stock company, will be the basis of calculation of the registered capital of the company after the merger.[5]

20 The proportion of equity of the investors in the new company will be determined through consultation among the investors or on the basis of the valuation of the equity value of the investors in their original companies. The proportions of equity will be stipulated in the contract and articles of association.[6]

21 The investment amount of the company after a merger will be the sum total of the investment amounts of the original companies. Additionally, the ratio between the registered capital and the investment amount will conform to relevant foreign investment regulations.

BENEFITS AND LIABILITIES

22 The surviving company after the merger or the newly established company will assume all the benefits and liabilities of the dissolved company.[7]

23 The procedure for public notice of debts inheritance plan will be undertaken before final approval. So, after reviewing the required and submitted documents and materials, the review and approval authority will only issue a preliminary reply regarding whether or not to approve the merger.[8]

24 The participating companies will send out letters of notification to their creditors and publish a corresponding announcement three times in nationally circulated newspapers at or above the provincial level. The main purpose of the notification and public notice is for the companies to explain their debts inheritance plans and obtain creditors' approval.

25 Creditors are entitled to require the merging companies to revise their inheritance plans, announce the debts becoming due, or demand provision of corresponding security. The effective period of such right is 30 days after receipt of the notification, or 90 days thereafter if no notification is received. It will be deemed approved if the

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5 The FIE Merger Provision, art 11.

6 The FIE Merger Provision, art 12.

7 The FIE Merger Provision, art 25.

8 The FIE Merger Provision, art 26.

creditors do not exercise such rights promptly.[9]

26 The review and approval authority will issue the final approval after the notification and public notice procedure.

27 The contract and articles of association of the company after the merger will become effective after the final approval by the review and approval authority.

ACQUISITIONS

28 More and more foreign investors choose to begin their direct investment in China through acquisition of a Chinese domestic enterprise, which has recently made acquisition activities quite active in China. Strategic mergers and acquisitions in China surged 52% by volume and 63% by value to reach record highs in 2014.[10] This analysis mainly focuses on acquisitions of domestic enterprises by foreign investors. Common acquisitions of Chinese domestic companies are under the regulation of the PRC Company Law 2014 and the M&A Provision, and for acquisitions of listed companies, *the Administrative Regulation on Acquisitions of Listed Companies* provide relevant rules.

29 Like in England, there are two types of acquisitions in China: equity acquisition and asset acquisition. Equity acquisition refers to acquisitions in which foreign investors purchase equity interests from shareholders of a DE or subscribe to the increase in the registered capital of a DE with the result that such DE changes into a FIE. In contrast, asset acquisition represents acquisitions in which foreign investors establish an FIE and, through the FIE, purchase the assets of a DE and operate such assets, or the foreign investors purchase the assets of a DE and use such assets as investment to establish an FIE.[11]

30 If foreign investors intend to fund the target company with additional capital as part of the equity acquisition, they may acquire an equity interest from existing shareholders and may subscribe to an equity increase.

31 All acquisition activities must adhere to industrial policy, land use policy, environmental protection policy and regulations on state-owned assets transfer (if applicable), business scope requirements, fair competition, taxation, foreign exchange and registration requirements.[12] It is important to note that all acquisitions shall be subject to scrutiny by the PRC Anti-Monopoly Law.[13]

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9 The FIE Merger Provision, art 28.

10 M&A 2014 Review and 2015 Outlook, PwC 27 January 2015

11 The M&A Provision, art 2.

12 The M&A Provision, arts 3, 4, 5, 7 and 8.

13 The M&A Provision, art 51.

EQUITY ACQUISITION VERSUS ASSET ACQUISITION

32 In both China and England, equity acquisitions and asset acquisitions have their own advantages and disadvantages. Three major considerations are assumption of liabilities, timeline and utilization of existing resources of the target company.

33 For the issue of assumption of liabilities, the major advantage of an asset acquisition is that it allows the foreign investor to avoid hidden liabilities. Such hidden liabilities include undisclosed debts, employment settlement obligations and outstanding taxes. Nonetheless, the M&A Provision requires the target domestic entity to notify the creditors of the sale of assets at least 15 days prior to the submission of the relevant application documents to the approval authorities.

34 If the foreign investor proceeds with an equity acquisition, the post-acquisition target company will continue to bear all the target company's existing and contingent liabilities.[14] Financial and legal due diligence will, therefore, be important to assess the extent of such liabilities. Representations and warranties, along with indemnification provisions in the equity sales will also help to address such risks.

35 An equity transaction can be executed expeditiously while an asset acquisition may take approximately two months.

36 Asset acquisitions will be more time-consuming than equity acquisitions since additional procedures are required, such as the establishment of an FIE and asset title transfer. In addition, it may take time for new employment contracts to be negotiated with employees whom the FIE intends to retain, as employees are not automatically transferred to the FIE. Practically, the approving authorities are more familiar with equity acquisitions and they will review the FIE establishment as well as the asset acquisition. Hence, the approval process for asset acquisitions may take longer than equity acquisitions.

37 Another major advantage of equity acquisitions is utilization of the target company's resources, such as government approvals, licences, business, clientele and goodwill. In asset acquisition, the foreign investor may not directly hold the operating licenses for the assets purchased from the target entity.

38 Furthermore, another practical issue to consider is immediate funding option for an increase of registered capital. If the foreign investor wishes to inject additional capital into the target company after an equity acquisition, the foreign investor may choose to increase the target company's capital simultaneously with the acquisition of the equity interest. In such a case, 20% of the subscribed registered capital will need to be contributed by the foreign investor prior to registration.[15] In contrast, this is not

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14 The M&A Provision, art 13.

15 The M&A Provision, art 16.

required for an asset acquisition.

APPLICATION, REVIEW AND APPROVAL

39 The review and approval authorities are MOFCOM and its local counterparts. Factors affecting approval levels include the investment amount of the enterprise after acquisition, the involved business or industry of operation and the category in the Foreign Investment Industrial Guidance Catalogue.

40 If foreign investors acquire equity of and obtain a controlling stake in a DE that is involved in a critical industry, an industry that affects national economic security, or that possesses established trademarks or China's time-honored brands, the acquisition shall be subjected to the approval of MOFCOM.[16]

41 The following documents and materials must be submitted to the competent review and approval authority in the application:

(1) Shareholders' resolution of the acquired domestic company approving the foreign investor's acquisition;

(2) Application form for establishment of the foreign invested enterprise (only applicable to equity acquisitions);

(3) Contract and articles of association of the foreign investment enterprise established after the acquisition;

(4) Acquisition agreement;

(5) Business license of the merged enterprise;

(6) Plan for re-settlement of the merged domestic company's employees;

(7) Benefits and liabilities settlement agreement (if any);

(8) Assets evaluation report;

(9) Statement on the affiliating relationship between parties to the acquisition;

(10) Financial auditing report of the merged domestic company in the previous accounting year (only applicable to equity acquisitions);

(11) Notarized and legalized incorporation certificate and credit certificate of foreign investors;

(12) Statement on the enterprises invested by the acquired domestic company and business licenses of these invested enterprises (only applicable to equity acquisitions);

(13) Proof of notice and public announcement to creditors by the domestic enterprise and statement on objections by the creditors (only applicable to asset acquisitions);

(14) Articles of association of the merged enterprise (only applicable to asset acquisitions);

16 The M&A Provision, art 12.

(15) Pre-requisite approvals by other relevant government departments for relevant matters, such as special business scope and land use rights; and

(16) Other documents and materials required by the review and approval authority.

42 The review and approval authority will decide whether or not to approve the application within 30 days after receipt of the complete application.[17] However, in practice, the authority commonly proposes revision advice and requires re-submission, demands additional documents and materials, or even postpones the deadline of approval for various reasons. Therefore, the approval process may take more time.

43 The review and approval authority will issue certificates to successful applicants. The applicant will, within 30 days after receipt of the certificate, proceed to the registration authority to register and apply for a business license. Afterwards, registration procedures with taxation, custom, land and foreign exchange authorities will be carried out before final completion of the establishment process.

REGISTERED CAPITAL AND INVESTMENT AMOUNT

44 For an FIE established as the result of an acquisition, it is generally required that foreign investors hold no less than 25% of the registered capital for the FIE to be treated as a foreign invested company in practice and enjoy relevant advantages exclusively for foreign invested companies, such as the convenience of borrowing foreign loans, taxation holiday and recession.

45 It is permitted that foreign shareholdings be less than 25%; however, the FIE will not be treated as a foreign invested company and cannot enjoy relevant advantages.[18]

46 For an equity acquisition, the registered capital of the FIE after acquisition will be the registered capital of the original DE. If there is a capital increase simultaneously with the equity acquisition, the FIE's registered capital will be the sum of the original registered capital and the increased capital.[19] The investment amount of an FIE established for the purpose of an equity acquisition is strictly regulated where its proportion to registered capital ranges from 143% to 300%, depending on the registered capital amount.[20] This means that foreign investors are obliged to contribute initially as registered capital a specific minimum portion of the total amount they intend to invest in China as guarantee of their ability to repay debts and regularly operate.

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17 The M&A Provision, art 25.

18 The M&A Provision, art 9.

19 The M&A Provision, art 18.

20 The M&A Provision, art 19.

47 For an FIE established for the purpose of an asset acquisition, the investment amount will be determined according to the transaction price for purchasing the assets and the actual scale of production and operation. The proportion of the registered capital in the total investment amount will conform to relevant provisions.[21]

TRANSFER PRICE AND PAYMENT

48 The transfer price will be determined on the basis of an evaluation of the equity interest or assets to be transferred. This is also the common English practice. The assets evaluation institution can be a domestic one or an international one. Regardless of whether a domestic or an international institution conducts the evaluation, internationally recognized evaluation methods will be adopted. Transferring an equity interest or selling assets at a price obviously lower than the evaluation result for the purpose of transferring the capital out of China in a disguised way is prohibited.[22]

49 If state-owned equity or assets are involved in the transfer, the evaluation requirements will be much stricter and will be further subjected to the approval of the state assets management authority.

50 Within 3 months after the business licence is issued, foreign investors will pay the shareholders who transfer the equity, or the domestic enterprise that sells the assets. For special situations, the period can be extended to the satisfaction of 60% consideration within 6 months, while the remaining will be cleared after 1 year.[23]

51 Foreign investors can satisfy their consideration in cash or equity of foreign listed companies held by them. If equity is used as the method of payment, special rules will apply and are described under the following section "Share Swap Option". Cash payment can be made in foreign currency or Renminbi, both of which will be subject to the approval of the foreign exchange authority.[24]

SHARE SWAP OPTION

52 The M&A Provision, for the first time, allows foreign investors to use shares held by

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21 The M&A Provision, art 20.

22 The M&A Provision, art 14.

23 The M&A Provision, art 16.

24 The M&A Provision, art 17.

them as consideration in an equity acquisition. By providing foreign investors with this alternative form of payment, equity acquisition activities are now more flexible. However, equity consideration can only be used in an equity acquisition.[25] This type of equity acquisition is also called a share swap.

53 After the acquisition, shareholders of the domestic company will possess shares of an offshore company, which constitutes offshore investment by Chinese entities or individuals. Such acquisitions are subject to much stricter, comprehensive and complicated review by the review and approval authority.

54 The equity interest used by a foreign company or an individual to acquire a domestic company can be shares of an offshore company held by the company or individual. A foreign company acquirer can use its newly allotted shares.

55 Shares of the offshore company used as consideration for an equity acquisition must satisfy the following conditions: [26]

- The equity is lawfully held and can be assigned;
- The equity is free from any dispute over ownership, pledge or any other property encumbrance;
- The equity is listed on an overseas main exchange for trading; and
- The transaction price of the equity is stable in the current year.

56 The domestic company or its shareholders will employ a competent intermediary institution, established in China and with good standing, to act as its M&A consultant. The M&A consultant will conduct due diligence on the authenticity of application documents, the financial status of the offshore company, the assets evaluation process, and legal compliance of the acquisition with relevant laws and regulations. The M&A consultant will issue a M&A consultant's report to provide clear and professional advice on the above issues.[27]

57 The review and approval authority of share swaps is the MOFCOM. In addition to documents and materials required for a common equity acquisition, the following are also required to be submitted to the MOFCOM:[28]

(1) Statement on equity restructuring or major assets restructuring of the domestic company in the latest year;

(2) The M&A consultant's report;

(3) Certificates of incorporation or identity certificates of the domestic company, the offshore company involved and their shareholders;

(4) Statement on shareholding status and name list of shareholders holding more

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25 The M&A Provision, art 27.

26 The M&A Provision, art 29.

27 The M&A Provision, arts 30 and 31.

28 The M&A Provision, art 32.

than 5% of equity of the offshore company;

(5) Articles of association of the offshore company;

(6) Statement on external guarantee provided by the offshore company;

(7) Audited financial statements of the offshore company in recent years; and

(8) Statement on stock transaction of the offshore company in the latest half a year.

58 As a result of the share swap, shareholders of the domestic company will hold equity of an offshore company, which constitutes offshore investment by Chinese entities or individuals. A successful share swap depends not only on approval of the equity acquisition activity by foreign investors, but also on that of the authority on offshore investment by Chinese entities or individuals.

59 The approval of an equity acquisition through share swap by the MOFCOM is a pending one and only effective for 6 months from the issuance of the business license.[29] During the 6-month period, the to-be-acquired domestic company or its shareholders will apply to the MOFCOM and the foreign exchange administrative authority for approval and registration of establishment of an offshore enterprise with respect to holding equity of the offshore company.

60 If the domestic company fails to go through the above procedures within 6 months, the approval certificate for the equity acquisition issued by the MOFCOM will be automatically invalidated. The domestic company will restore its equity structure to the status before the equity acquisition.[30] Shares acquired by the foreign investors will be returned and the part of the increased capital proposed will be decreased. Necessary amendments to the contract and articles of association of the domestic company will be made for the purpose of the restoration.

61 Due to the complexity of the approving procedures and the restrictions imposed on Chinese individuals and entities to hold offshore securities, in practice, share swap is rare in either private acquisition or pubic takeover involving foreign investors.

FINANCIAL ASSISTANCE

62 Unlike English law, there are no rules to prevent a company from giving financial assistance to a potential buyer of equity in such company under the Chinese law. The financial assistance can be in the form of a loan, a guarantee or other security for a loan granted by a company to allow a borrower to borrow money to purchase equity in the company. However, a foreign investor shall not use the proceeds of a loan from a foreign lender secured or guaranteed by a Chinese company to invest back in China without SAFE's prior approval.

M&A OF STATE-OWNED ENTERPRISES

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29 The M&A Provision, art 33.

30 The M&A Provision, art 36.

63 Mergers and acquisitions of state-owned enterprises ("SOEs") involving foreign investors can be very lucrative. The market advantage is obvious when the target SOE is in the position of consolidating its monopolization in the domestic market.

64 However, there are numerous concerns in the process of mergers and acquisitions for foreign investors. The main contributing factor for the collapse of mergers and acquisitions involving foreigners is attributed to the lack of understanding of Chinese culture, society and governmental operations. Further, there are other critical factors in considering mergers and acquisitions of SOEs, including a long-term plan, strong financial resources, selection and screening of target company and restructuring of the SOE's core business.

65 For mergers and acquisitions involving unlisted SOEs by foreign investors, the major governing regulation is *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors*, which stipulate procedures for foreign investor to get approvals for any merger or acquisition. Formal offer procedures are required for the sale of equity interests in an SOE, under which the transferor is generally required to effect the transfer by way of an auction or bidding process.

66 A merger or acquisition involving listed SOEs by foreign investors, the laws governing the M&A of the normal listed companies also apply to the SOEs. Besides this, a series of regulations are issued in this area, including the *Administrative Rules on the Disclosure of Shareholding Fluctuation Information in Listed Companies, Opinions in Relation to Listed Companies Involving Foreign Investment* and *Administration Measures on Strategic Investment in Listed Companies by Foreign Investors*. The procedure involving a merger or acquisition of listed SOEs by foreign investors includes the following:

(1) Acquisition by agreement;

(2) Subscription of new shares of an SOE on PRC Stock Exchange;

(3) Subscription of shares in an SOE public-listed in foreign market.

ANTI-MONOPOLY REVIEW

67 Before the promulgation of the PRC Anti-Monopoly Law ("AML") on August 1, 2008, China's M&A anti-monopoly control regime only applied to cross-border acquisitions of Chinese enterprises by foreign parties, and offshore acquisitions where the acquirer or the target company had a business presence in China. Either of these would meet the notification thresholds under art 5 of the M&A Provision before the 2009 amendment.

68 As an ancillary document to the AML, *the Regulation on Notification Thresholds of Consolidation of Undertakings* (the "Consolidation Regulation") was issued by the State Council on August 3, 2008. The Consolidation Regulation, together with the AML, represents the beginning of a new era in China's M&A anti-monopoly control regime. They level the playing field of M&A activities between Chinese and foreign parties by expanding the M&A anti-monopoly control regime to M&A activities between domestic companies.

69 Hence, the AML and the Consolidation Regulation supersede art 5 of the M&A Provision before the 2009 amendment. On June 22, 2009, the MOFCOM amended the M&A Provision by deleting the previous art 5 and referring anti-monopoly review regulations to the AML and the Consolidation Regulation.

70 In the Consolidation Regulation, a business consolidation refers to one of the following:[31]

- a merger between business operators;
- a business operator acquires control over other business operators by acquiring shares or assets; or
- a business operator acquires control over other business operators or becomes capable of exerting decisive influence over other business operators by way of contract or otherwise.

71 It is obvious that a merger, an equity acquisition or an asset acquisition falls under the above definition of business consolidation. Therefore, once a merger or an acquisition meets the notification thresholds, applicants will proceed to the anti-monopoly review authorities for clearance of anti-monopoly review.

ANTI-MONOPOLY REVIEW NOTIFICATION THRESHOLDS

72 The notification criteria are as follows:[32]

(1) The total global revenues of all business operators to the consolidation in the preceding fiscal year exceed RMB10 billion, and the China revenues of at least two of the business operators each exceed RMB400 million in the preceding fiscal year; and

(2) The total China revenues of all business operators to the consolidation in the preceding fiscal year exceed RMB2 billion, and the China revenues of at least two of the business operators each exceed RMB400 million in the preceding fiscal year.

73 Foreign investors intending to acquire small-scale Chinese domestic companies may find the Consolidation Provision acceptable. The thresholds set out in the M&A Provisions before the 2009 amendment required a filing with the relevant authorities if either the foreign acquirer or the target domestic company had more than RMB1.5 billion of business revenue in China. This "one-party revenue" test was severely criticized by foreign investors. The acquisition of a domestic company, even of a tiny

31 The Consolidation Regulation, art 2.

32 The Consolidation Regulation, art 3.

one, by a major foreign company would trigger the anti-monopoly review notification threshold and be subject to review. The Consolidation Provision abandoned the “one-party revenue” test and adopted the “total plus two-party revenue” test, which includes consolidated revenue of all the participating parties to a M&A transaction, or just the acquirer and target companies. The “two-party revenue” test under the Consolidation Regulation sets higher standards. Thus, if only one party involved in an M&A activity has PRC business revenue exceeding RMB400 million, the consolidation is not subjected to anti-monopoly review. Anti-monopoly review of acquisitions of small companies in China is not going to be of grave concern for international mega conglomerates any more. In addition, the new thresholds do not take into consideration the total number of PRC subsidiaries the parties have, nor do they consider the total value of assets or market share that the relevant parties possess in China.

74 Although it is unclear under the Consolidation Regulation whether the business revenue of a party includes the revenue of all its affiliates within and outside China, in practice, it is generally understood that the revenue of a party's affiliates should be included when calculating its own revenue. In the Anti-Monopoly Application Guidelines promulgated by the MOFCOM in 2007, it is suggested that "affiliates" should include, with respect to any party, any other person that, directly or indirectly, controls, is controlled by, is under common control with such party, or is otherwise affiliated with such party.

APPLICATION AND REVIEW

75 The MOFCOM and SAIC are the key authorities responsible for reviewing anti-monopoly applications and for determining whether any notified merger or acquisition would result in over-concentration in the domestic market. However, only the MOFCOM plays a leading role in the review process. MOFCOM established an Anti-Monopoly Bureau to take charge of anti-monopoly review in 2008.

76 The filing party should be:

- For a merger, all parties to the merger transaction;
- For an acquisition, the party that would obtain control over or exert decisive influence on another.

77 In accordance with art 21 of the AML, the anti-monopoly application must be filed with the authorities before a contemplated transaction if such transaction meets the filing threshold provided in the Consolidation Regulation. Parties to a merger or an acquisition should note that anti-monopoly review clearance is the prerequisite for final approval of the merger or acquisition. Therefore, in order to start operating as soon as possible, the anti-monopoly application should be commenced as least no later than the merger or acquisition application process.

78 Normally, the Anti-Monopoly Bureau requires an applicant to submit a written application for arranging a consultation before a formal filing.

79 The Anti-Monopoly Bureau promulgated its Anti-Monopoly Application Guidance in 2009, which, together with the AML, requires the applicant to submit the following documents and materials,

(1) basic documents such as certificates of incorporation;

(2) information such as the parties to and the nature of the transaction;

(3) Identification of all affiliates;

(4) Definition of the "relevant market(s)" affected by the proposed transaction, including definitions of product and geographic markets, and the rationale behind such definitions;

(5) Each party's sales revenue and market share in the previous two fiscal years, including evidence and the data source;

(6) Identification of main competitors;

(7) Basic information regarding the "relevant market(s)", including scale of market, market concentration rate, status of import and export of products, together with evidence and data source;

(8) Description of market structure, including upstream and downstream entities;

(9) Analysis of market entry, including entry barriers, significance of economics of scale for relevant products, intellectual property entry restrictions, and entries and exits in the past several years;

(10) Vertical and horizontal cooperation agreements in the relevant markets;

(11) Each party's market share and competitive ability in markets other than the "relevant market(s)";

(12) Anticipation of impact of the consolidation on market structure, industry development, competitors and customers, economy development and public interests;

(13) Anticipation of efficiency improvement in production and the potential benefits that the consolidation may bring to customers, with documents supporting this;

(14) Anticipation of the impact on the business operators and the "relevant market" if the consolidation is prohibited;

(15) Audited financial statements of each party in the previous fiscal year;

(16) Information regarding industry associations in relevant markets;

(17) Opinions of local governments, competent authorities and the public on the consolidation;

(18) The acquisition agreement; and

(19) Other reports or documents helping to analyze and assess the consolidation, such as a feasibility study report or a due diligence report.

80 According to the AML, the initial review period is 30 days. If the MOFCOM decides to conduct further examination, arrange hearings or consultation meetings, the review period may be extended by another 90 days. The review period can be further extended by another 60 days due to the following:

(1) The applicant agrees to the extension; and
(2) Documents and materials submitted by the applicant are not precise and need further confirmations; or
(3) Major changes of circumstances happened after submission of the application.[33]

INTELLECTUAL PROPERTY ISSUES

81 As a part of intangible assets in a merger and acquisition exercise, intellectual property plays important role in a merger or acquisition strategy, post merger or acquisition structure and evaluation of the target company.

82 In mergers and acquisitions, the due diligence exercise of ownership and licensing of intellectual property are critical.

83 More attention should be paid to the co-ownership of intellectual property. The assignment of co-ownership of intellectual property is void if it is without the other co-owner's agreement according to relative provisions in civil law. There will be inevitable financial loss if no due diligence is conducted on the issue of co-ownership.

84 Regarding the licensing of intellectual property, for example, the licensing of trademark has to be recorded in Trademark Office. However, according to art 19 of *Judicial Interpretation of Application of Law on Several Issues of Disputes in Trademark by Supreme Court*, the licensing contract is still valid even without the record, unless the parties agree otherwise. It leads to large amount of unrecorded licensing contracts which cannot be found even there is a thorough check from the record authority.

85 It is important to note that in the assignment or licensing of a trademark, the agreement has to be submitted to the Trademark Office for record. For assignment of patent, the parties have to register the written contract of assignment with the Patent Office. Further, approval of relative authorities is probably required if the assignment

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33 AML, arts 25 and 26.

of patent is from a Chinese party to a foreign party. For copyright, generally there is no requirement for record of assignment.

86 Unlike some countries, in China, apart from the income tax and business tax, there is stamp duty for transfer of IP rights. According to *Provisional Rules on Stamp Duty of PRC*, the tax rate of transfer of property titles, including copyrights, exclusive right of use of trademarks, patents and proprietary technology usage rights is 0.03% or 0.05% of the stated value and both the transferor and the transferee are subject to such stamp duty.

TAKEOVER OF PUBLIC LISTED COMPANIES

87 The key laws and regulations governing public takeover of a Chinese listed company are Company Law, Securities Law, *Measures for the Administration of Takeover of Listed Companies ("Takeover Rules")*，P*rocedures for the Administration of Strategic Investment in Listed Companies by Foreign Investors ("Strategic Investment Rules"*) and Listing Rules of Shanghai Stock Exchange and Shenzhen Stock Exchange.

88 Direct takeover of a Chinese listed company can be achieved through tender offer, share transfer or private placement.

89 An acquirer may launch a voluntary tender offer to all the shareholders of the Chinese listed company to acquire all or part of the shares of the target company.

90 Off-market share transfer, being purchasing shares from the existing shareholders (typically controlling shareholder or substantial shareholders) of a Chinese listed company, is another way of acquiring direct control in a Chinese listed company. Unless otherwise exempted by the China Securities Regulatory Commission (CSRC), such off-market purchase sealed by a sale and purchase agreement between the parties may trigger a mandatory general or partial offer obligation when either:

- a person holds a 30% interest in the target company and proposes to increase his holding; or
- a person expects to hold an interest of more than 30% in the target company following an acquisition by private agreement.

91 An acquirer can also obtain control by subscribing for new shares privately placed by the target company. The target company may need to convene an extraordinary general meeting to obtain existing shareholders' approval for issuance of the placement shares unless a general mandate is readily available.

92 Likewise, a mandatory tender offer obligation will be triggered if the private placement results in the acquirer holding an interest of more than 30% in the target company. In practice, however, this obligation may be exempted by the CSRC in certain situations which include the following:

(i) Target company is in severe financial difficulty;

(ii) Shareholders' general meeting approves the restructuring plan proposed by the acquirer; and

(iii) Newly subscribed shares are subject to a three-year moratorium.

93 Eligible foreign investors can acquire control of a Chinese listed company through the above means. Nonetheless, the restrictions imposed on foreign investment under the applicable Chinese law still apply and the takeover will be subject to approvals by the relevant authorities, including the Ministry of Commerce (MOC).

94 Under the *Strategic Investment Rules,* an eligible strategic foreign investor must satisfy the following requirements:

(i) The foreign investor is duly incorporated, in a healthy financial condition, with good credit standing and sufficient management experience;

(ii) The overseas total assets owned by the foreign investor or its parent company are no less than USD100 million or USD500 million under its management;

(iii) The foreign investor has good corporate governance, internal control system and standardized operation; and

(iv) No material penalty has been imposed on the foreign investor (including its parent company) by any foreign regulatory bodies for the last three years.