

# **Recent Legislation Changes**

## **- In relevance with M&A since 2008 -**

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汇衡律师事务所  
HHP ATTORNEYS-AT-LAW

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# Business Vehicles (1)

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- Foreign-Invested Partnership (March 1, 2010)
  - Partners are two or more foreign companies/individuals; or, partners are foreign and Chinese companies/individuals
  - Only registering with State Administration for Industry and Commerce (SAIC)
- Not yet possible for forbidden sectors or sectors only opened to JVs or having a limit on foreign participation
- Internal opinion exchange between SAIC and Ministry of Commerce (MOC)
- Capital injection required
- First one: Carlyle-Fosun (Shanghai) Equity Investment, US\$100 mio, Mar. 2010

## Business Vehicles (2)

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- Chinese Individuals for Joint Venture Partners
  - Pilot Region with clear rules: Pudong New Area, Shanghai (May 1, 2010)
    - New Establishments of joint ventures
    - Chinese individuals acquiring equity of existing FIEs
    - Restricted to encouraged and allowed sectors (restricted sectors excluded)
  - Other Regions with similar practices: Tianjin, Hangzhou, Shenzhen
- Only possible when foreign investors partially acquire local companies having Chinese individual shareholders under M&A Rules
- For Equity Joint Ventures and Contractual Joint Ventures, the Chinese partners have to be entities other than individuals under the Joint Venture Laws

## Business Vehicles (3)

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- Capital Contribution by way of Equity Swap (March 1, 2009)
  - In the past, only cash and contribution in kind were acceptable and equity contribution was always a problem under the Chinese law.
  - NOW equity in a Chinese company can be used for swapping equity in another Chinese company (invested company):
    - Full paid-in capital
    - No pledge or other encumbrance
    - No ban in transfer under bylaws
    - Governmental approval granted (if required)
    - Not exceeding 70% of the invested company
- Evaluation required for the equity to be contributed.
- For new establishments, the equity contribution can be done within one year; for capital increase, the equity contribution has to be done on real time.

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# Antitrust (1)

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- Anti-monopoly Law (Aug. 1, 2008)
  - Monopoly Agreements
  - Abuse of Dominant Market Position (SAIC)
  - Concentration of Business Operators (MOC)
    - Merger of Business Operators
    - Acquiring controlling stake in other operators through equity or asset acquisition
    - Acquiring controlling stake in other operators by way of contracts etc. or decisive influence by one over other operators
- Anti-monopoly Commission of State Council
- State Development & Reform Commission – Price Monopoly
- MOC – Merger Control Filing & Review
- SAIC – Monopoly Agreement, Abuse of Dominating Status, Administrative Restriction on Competition

## Antitrust (2)

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- Provisions on Notification Thresholds for Concentration of Business Operators (Aug. 3, 2008)
  - Total global turnover of all operators of the concentration exceeded RMB 10 billion during the previous financial year, AND at least two operators' turnover in China exceeded RMB 400 mio EACH during the previous financial year;
  - Total turnover in China of all operators of the concentration exceeded RMB 2 billion during the previous financial year, AND at least two operators' turnover in China exceeded RMB 400 mio EACH during the previous financial year;
  - If a concentration does not reach a reporting threshold above, but the facts and evidence demonstrate that it would or could eliminate or restrict competition, MOC shall investigate at its discretion.
- Guidelines for Definition of Relevant Market (May 24, 2009)
  - Product Market & Geographic Market
  - Demand Substitutability, Supply Substitutability

# Antitrust (3)

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- Provisions on Filing and Review of Concentration of Business Operators (Jan. 1, 2010)
  - Turnover of a party to a concentration
    - Turnover of the party
    - Turnover of business operators directly or indirectly controlled by the party (“Daughter Operators”)
    - Turnover of business operators that directly or indirectly control the party (“Mother Operators”)
    - Turnover of business operators directly or indirectly controlled by Mother Operator (“Sister Operators”)
    - Turnover of business operators jointly controlled by two or more of the above operators
  - Intra-group Turnover exclusive, tax and duty exclusive
  - Review within 90 days after filing (60 days extension possible)
  - To avoid the possible effect of eliminating or restricting competition of a concentration, the business operators may propose restrictive conditions to revise the concentration transaction plan.
    - structural conditions, e.g. divesting part of assets or business of the operators in concentration
    - behavioural conditions, e.g. opening networks, platforms or other infrastructure, licensing key technologies and/or termination of exclusive agreements
    - combination of structural conditions and behavioural conditions

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# SAFE & MOC Stands (1)

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- SAFE (State Administration for Foreign Exchange)
- Circular on Improving Procedures for Converting FIEs' Capital from ForEx into RMB (Aug. 29, 2008)
  - RMB converted from Capital in ForEx shall not be used for equity investments in mainland China.
  - For FIE holding companies incorporated in China, any move of capital is subject to SAFE's approval.
  - Daily amount for free conversion: USD 50,000.
- Foreign Shareholders' Loan for equity investments – NO GO since Aug. 2008

## SAFE & MOC Stands (2)

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- MOC (Ministry of Commerce)
- Guidance Manual for Administration on Foreign Investment Entry (Dec. 18, 2008)
  - Where a Chinese party in a joint venture transfers shares to foreign investors, M&A Rules do not apply. Target company under M&A Rules means non-FIE.
  - Where Chinese companies & individuals use their offshore vehicles to acquire their onshore affiliates, MOC approvals shall be obtained. Only possible for the cases that the offshore vehicles are listed companies, or the offshore vehicles were set up with proper approvals and the investments come from the profits of the offshore vehicles.
  - 10% foreign participation: threshold for being an acquisition under M&A Rules
  - Transactions with a volume above USD 100 mio for encouraged sectors or USD 50 mio for restricted sectors require MOC approvals (same for cases with same amounts of total investment after the transaction)

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# Supreme Court's Stand (1)

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- Provisions on Several Issues Concerning the Trial of Disputes Involving FIEs (Part I) (Aug. 5, 2010)
  - Effectiveness of A M&A Contract: If a contract enters into effect only upon approval by MOC or other approval authority, such contract shall enter into effect on the date of approval. If such a contract has not been approved, the court shall hold that such contract has not entered into effect. If a concerned party requests that such contract be confirmed as invalid, the people's court shall reject such request.
  - Application Obligation: The fact of a contract waiting for approval shall not affect the performance by the concerned parties of their approval application obligations or the validity of the relevant contractual provisions on their approval application obligations.
  - Except for substantive changes like registered capital, company type, business scope, operation term, capital contributions, mergers, divisions and equity transfers, other supplementary agreements may be held effective by the court without MOC approval.

## Supreme Court's Stand (2)

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- Continue: Provisions on Several Issues Concerning the Trial of Disputes Involving FIEs (Part I) (Aug. 5, 2010)
  - After concluding share purchase agreement BUT before MOC approval:
    - ➔ Seller and FIE fail to apply for approval
    - ➔ Termination of SPA, return of purchase price, compensation damage; or
    - ➔ Force seller and FIE to apply for approval, or buyer to apply for approval; and
    - ➔ Buyer may ask compensation for losses like price disparity of the equity, returns on the equity and other reasonable losses if seller and FIE do not obey to the court order.
  - When MOC turns down a SPA:
    - ➔ Return of purchase price
    - ➔ If seller has default, the court may support buyer's request for compensation.

## Supreme Court's Stand (3)

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- Continue: Provisions on Several Issues Concerning the Trial of Disputes Involving FIEs (Part I) (Aug. 5, 2010)
  - One Year Limit on First Refusal: If a shareholder transfers its equity to a third party, another shareholder requests rescission of SPA on the grounds of first refusal, court shall uphold such request, unless it fails to assert its right of first refusal within one year from the date on which it learnt or ought to have learnt of the execution of SPA.
  - No need to register share pledge agreement. Share pledge agreement becomes effective upon conclusion.

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**Thank You**

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