

SWISS INVESTMENT REPORT* 3

SEPTEMBER 2009



* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. ("Wenfei"), a Swiss law firm with its seat in Zurich, which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

Of course, the Swiss Investment Report is also addressed to any other person who is interested in obtaining background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor's perspective.

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China released the Rules for Outbound Investment – Investment Opportunities in Switzerland

I. Topic

The new “Go Out” policy encourages Chinese companies to invest abroad. In line with this policy, China has eased the rules for outbound investment, which entered into force on May 1st, 2009. On the other hand, Switzerland is home of many multinational corporations and SMEs, whose products and services are highly demanded in the Chinese market. Amongst them, some are potential targets for Chinese acquisitions. Furthermore, the Swiss market is interesting for Chinese companies, looking for direct investments opportunities not only in the financial services sector, but also in the high-technology industry. This month’s Swiss Investment Report aims to provide an overview on China’s new rules on outbound investment and, furthermore, give a brief introduction to Swiss foreign direct investment vehicles.

II. China’s new rules on Outbound Investment

The Ministry of Commerce (“MOFCOM”) issued new Measures for Overseas Investment (hereinafter “New Measures”) on March 16th, 2009, which became effective on May 1st, 2009, replacing the existing MOFCOM orders “The Provisions on the Approval of Matters Relating to the Overseas Investment in Establishing Enterprises” and “the Notice of the Ministry of Commerce and the Hong Kong and Macao Affairs Office of the State Council on Issuing the Provisions on the Approval of Matters Relating to Mainland Enterprises’ Investment in Establishing Enterprises in the Hong Kong Special Administrative Region and the Macao Special Administrative Region”.

Despite the current economic conditions, Chinese investors are still eager to seek new opportunities in overseas investment. This New Measures as a part of the “Go Out” policy of the Chinese government, intend to encourage Chinese investors to invest abroad and, by doing so, to take some pressure from the RMB regarding appreciation. The New Measures will be applied, in case a Chinese enterprise or institution with a legal person status establishes an overseas non-financial enterprise, or acquires the right to own, control or manage an existing overseas non-financial enterprise through M&A.

The New Measures simplify the application regime by delegating significant authority to the local authorities to reviewing many applications for outbound investments. According to Article 6 of the New Measures, only the following transactions are still subject to an approval by MOFCOM:

1. Overseas investment in a country which has not established a diplomatic relationship with China;
2. Overseas investment in specific countries or regions (the list of such countries and regions shall be determined by the Ministry of Commerce in conjunction with the Ministry of Foreign Affairs and other relevant departments);
3. Overseas investment with investments by the Chinese party accumulating to USD 100 million or more;
4. Overseas investments which involve the interests of multiple countries or regions; or
5. Establishing an offshore special purpose vehicle (SPV).
6. An approval from the provincial authority of MOFCOM will be required for an outbound investment, if the investment of the Chinese party accumulates to between USD 10 million and USD 100 million, or an outbound investment in the energy or minerals industry, or a project requiring domestic fund-raising (Article 7).

For such an approval process, the applicant shall submit the following documentations to MOFCOM:

1. An application form, which shall mainly cover the name, registered capital, amount of investment, business scope and duration of business of the overseas enterprise, an explanation of the sources of the invested capital, the specific contents of the investment, the equity structure, an analysis and assessment of the investment environment, and a statement of lack of any of the circumstances prescribed in Article 9 of these Measures;
2. A photocopy of the business license of the Chinese enterprise;
3. Articles of Association of the overseas enterprise and the relevant agreements or contracts;
4. The approval or filing document issued by the relevant national authorities of the target company;
5. A Pre-report of the Overseas Merger or Acquisition, if it is applicable; and
6. Other documents as specified by the competent department.

A simple review for just 3 working days will be triggered, if any overseas investment other than those listed above in Article 6/7 is made. The Chinese investors only have to fill out an application form and hand in to the competent MOFCOM (MOFCOM is responsible for the central enterprises, and the provincial MOFCOM is responsible for local enterprises). (Article 8, 16)

Generally, it is estimated that the review of the above documents will take between 20 - 30 working days, while an additional 10 days will be necessary for a consultation with the Chinese embassies/consulates in the relevant jurisdictions regarding certain kind of investment (e.g. those mentioned in Article 6 or an investment in the energy or minerals industry). Depending on the circumstances of the planned overseas investment, the authority may seek comments from the aforesaid embassy or consulate if it deems this necessary. A Certificate of Enterprise Overseas Investment with 2-year license period will be issued to the applicant, once the investment has been approved. Within such license period, the applicant shall complete not only the domestic formalities but also the legal formalities in the host country/region, otherwise the Certificate will automatically become invalid and must be returned to the issuance authority.

A planned overseas investment will not receive an approval of the competent authority of MOFCOM, if the investment would be harmful for state sovereignty, national security, public interests or bilateral relations. Certainly, an approval for an investment that would be in violation of any laws, regulations and international obligations, and an investment involving the export of any technology or goods prohibited under Chinese law will not be granted (Article 9).

The approval by MOFCOM and any other authorities shall be obtained before the relevant contracts or agreements come into effect, according to Article 26. In practice, such a clause may be inserted in the contract as a closing condition.

In case two or more enterprises jointly invest in the establishment of an overseas enterprise, the shareholder holding the majority stakes shall be responsible for handling the approval formalities after receiving the written consent of its partners. If a share transfer in an overseas enterprise between two domestic enterprises will be initiated, the transferee will take the charge of the whole modification procedures.

Implications for Chinese Companies:

1. To objectively assess its own conditions, capabilities and the investment environment of the host country/region, make overseas investment in an active and secure way; and complying with the legal requirements of the foreign country, which might require a specific qualification for the investment.
2. The name of the overseas enterprise shall not be in violation of both Chinese laws and regulations and those of the host country/region. Without an approval in advance, words as “PRC中国”, “China中华” or “State国家” or similar shall not be used as the name of the enterprise. An enterprise may pre-register the foreign name of its overseas enterprise in the host country or region before applying for MOFCOM's approval.

3. The person from the Chinese party responsible for the overseas enterprise shall promptly register with the Chinese Embassy/Consulate in written form or in person.
4. Any breach of the New Measures or provision of any false information by the Chinese investors may lead to a restriction on the overseas investment by such investor within a certain period and no policy support would be available to the enterprise in violation within 3 years.
5. Any re-investment of the overseas enterprise controlled by the domestic enterprise shall file the transaction with MOFCOM or its branch.

However, a Chinese company wishing to invest aboard still needs to consider other government supervisions, such as by NDRC, SAFE, SASAC etc. An anti-trust review may also be involved, if the specific circumstances require such a review. Further implementing rules are expected to be promulgated to clarify more details of the approval process. A Country-Specific Industry Guidance Catalogue for Overseas Investment in Switzerland as an important yardstick by MOFCOM in guiding and acknowledging investment made by China-based enterprises in Switzerland will also be published in a short time. Enterprises may enjoy in priority the preferential policies in respect of fund, foreign exchange, taxation, customs procedure, and entry & exit where they have satisfied the requirements in the Catalogue and obtained permits of overseas investment.

III. Switzerland's legal framework on foreign direct investment

Unlike China and some other countries, Switzerland does not know special rules on foreign direct investment. In particular, no approval for foreign investments in Switzerland is required. This means that generally any person, no matter whether it is a Swiss national, Swiss company, foreign national or company, has a Swiss residency or not, may freely establish a company in Switzerland and there are no different rules and laws on domestically or foreign controlled companies, as the Chinese law knows.

Therefore, from a Swiss law perspective, a Chinese investor who wishes to establish a Swiss company may do so. Of course, the Chinese investor must comply with the Swiss laws, particularly the Swiss Code of Obligations, which mainly comprises the Contract and Company Law.

Swiss law provides the following vehicles for making direct investments:

1. Company Limited by Shares (“CLS”)
2. Limited Liability Company (“LLC”)
3. Partnership
4. Limited Liability Partnership
5. Cooperative
6. Limited Liability Partnership for Collective Capital Investments (“LLPCCI”)

The CLS and CCL are by far the most popular vehicles for direct investment in Switzerland. The minimum capital for the CLS is CHF 100'000 (approx. RMB 600'000). At the time of establishment at least 20% of the company's capital has to be paid in. In any case, at least CHF 50'000 has to be contributed. The CCL requires a minimum capital of CHF 20'000 (approx. RMB 120'000), which has to be fully paid in at the establishment.

Both companies may be found by only one person, be it a natural person or a legal person. At least one representative of the CLS and CCL (director or general manager) must have its residency in Switzerland.

IV. Conclusion

Since the Chinese rules for outbound investment have been released and the Swiss law generally provides an investor-friendly, clear and straight forward legal framework for direct investment, it might now be the right time for Chinese companies to look for opportunities for investments in Switzerland.

Should you have questions regarding the information provided in this document, please do not hesitate to contact Dr. Paul Thaler (paul.thaler@wenfei.com).

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