How to

Establish a Foreign Invested Enterprise (FIE) in China

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Special attention should be drawn to the newly published Foreign Investment Law which will come into effect on 1 January 2020 and the following five years (2020-2024) will be a transition period. China’s foreign investment regime is undergoing significant transformation and numerous implementing regulations and rules will be enacted in due course to replace and/or harmonize the existing rules and regulations.

Additionally, the relevant catalogues and negative lists contained in this document are as of the date of the finalization of this document. Afterwards, on 30 June 2019, the National Development and Reform Commission and the Ministry of Commerce released the following three documents on, effective from 30 July 2019:

- the Special Administrative Measures (Negative List) for the Access of Foreign Investment (2019);
- the Special Administrative Measures (Negative List) for the Access of Foreign Investment in Pilot Free Trade Zones (2019); and
- the Catalogue of Industries Encouraging Foreign Investment (2019).

Attention should be drawn to the new lists and catalogue after 30 July 2019.
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I. Overview

The regulatory regime governing foreign invested enterprises (“FIEs”) in China (more precisely the People’s Republic of China, “the PRC”) has been changing rapidly in recent years and the newly enacted Foreign Investment Law marks a new milestone. In order to attract more foreign investment, legislative changes have been aimed at simplifying the procedures for foreign investors in relation to most of their investment activities in China. The new Foreign Investment Law, which will become effective on 1 January 2020 and provides a 5-year transition period (2020-2024), is replacing China’s existing three-decade old FIE laws and regulations, abolishing the long-standing three FIE types, and unifying and harmonizing FIEs and domestic Chinese companies from business organization format and corporate governance perspectives as well as from other far-reaching aspects. However, in practice setting up an FIE in China is still a demanding process, as the legal requirements and administrative conditions are complex and quite different to European practice.

This Guideline aims to provide SMEs with a complete picture of the formation process for incorporating FIEs in China taking into account the forthcoming Foreign Investment Law and its implications. It features checklists of documents needed to establish an FIE, details the approval and/or record filing requirements administered by governmental authorities, and forecasts immediate changes to be brought by the new Foreign Investment Law.
2. Types of FIEs in China

Historically, the three types of FIEs most commonly encountered in China are the:

1) Wholly Foreign Owned Enterprise (“WFOE”) (“外商独资企业”)
2) Equity Joint Venture (“EJV”) (“中外合资企业”)
3) Cooperative Joint Venture (a.k.a Contractual Joint Venture, “CJV”) (“中外合作企业”)

EJV and CJV are generally referred as “JV”.

There are three other forms of investment vehicle that are used less commonly by foreign investors, particularly SMEs, in China.

4) Foreign Invested Company Limited by Shares (“FICLS” a.k.a. Foreign Invested Joint Stock Company) (“外商投资股份有限公司”)

An FICLS is a joint-stock company with its capital divided into shares of equal value and voting rights, i.e. only one class of ordinary shares. It is established primarily in order to be able to list on the Chinese stock exchange. The number of FICLS is relatively small compared to WFOE and JV, but the number of FICLS has been increasing due to the development and further opening-up of the Chinese capital markets.

5) Foreign Invested Partnership Enterprise (“FIPE”) (“外商投资合伙企业”)

This is a relatively new type of vehicle which has been gradually developed since 2010. Unlike both WFOE and EJV with limited liability protection, FIPE is not a commonly adopted investment vehicle in China due to the risk of unlimited liability on the part of the general partner. It is particularly attractive to the private equity and venture capital industries. One feature of the FIPE is the same as partnership in other jurisdictions, i.e. it has a tax passing through status meaning that the income tax liability will be passed through to the partners.

Please note the PRC Partnership Law was amended in 2006 and came into force in 2007. The 2006 amendment modernised the PRC Partnership Law and started accommodating internationally recognised limited partnership as a business organisation form. Under the amended PRC Partnership Law, FIPE became one of the options for foreign investors from 2010 onwards. Since then, in practice, CJV has rarely been adopted and FIPE could be an alternative to CJV as it offers the flexibilities which CJV had previously featured and, more importantly, FIPE is governed by the more mature PRC Partnership Law.

6) Representative Office of Foreign Enterprise (“RO”) (“代表处”)

An RO does not have independent legal personality and is restricted to liaison and marketing activities; no direct profit making activities by the RO are allowed under the current Chinese regulatory regime. Legally speaking, an RO is not considered a type of FIE. For detailed information on the establishment and operation of ROs in China, please refer to the guideline on the Establishment and Operation of a Representative Office in China on the EU SME Centre’s website.
FICLS and RO will not be discussed in this Guideline as they are not the most relevant investment vehicles for SMEs. FIPE will be discussed in the section about CJV.

Please note the above distinctions of different types of FIEs, in particular the WFOE, EJV and CJV, are to be abolished by the new Foreign Investment Law which will become effective on 1 January 2020. Between 2020 and 2024, there will be a 5-year transition period, during which existing FIEs may retain the current organisational forms and relevant implementing rules are to be published by the State Council in due course. It is important to keep yourself updated frequently and take note of the latest regulatory developments to maintain compliance.
3. Pre-Establishment

Although most industry sectors are already open to foreign investment, all foreign investments in China are subject to some level of approval or filing/registration with the relevant government authorities. In recent years, the Chinese government has committed to effectively reducing the burden on foreign investors when they set up FIEs in China and ultimately to treat domestic and foreign market players in the same way. For foreign investors, the specific industry sector and the location of the proposed investment are two important factors to be considered carefully. Hence, at the early stages of formulating a business plan for an FIE, foreign investors should be aware of the advantages and disadvantages of the particular industry and location they plan to invest in. This section will address industry and location issues as well as the practical matters which foreign investors may encounter at the pre-establishment stage of the FIE. It is worth noting that relevant authorities, sometimes government agency officers or caseworkers over the counter, have a measure of discretion when it comes to interpretation of applicable regulatory and/or administrative requirements.

3.1 Industry Access for the Foreign Investment

Foreign investments in certain industry sectors may be subject to special regulatory requirements. Prospective foreign investors should conduct a thorough investigation of the specific industry they plan to invest in and the regulatory requirements that may apply.

3.1.1 Catalogues of Industries Governing Foreign Investment


The Foreign Investment Catalogue 2017 provides a list of encouraged industries, where the government welcomes foreign investment and may provide support through various means, including tax incentives, financial subsidies/grants and customs duty incentives, and a negative list of industries, which are prohibited or subject to special administrative measures for the admission of foreign investments. While the list of encouraged industries continues to be effective, about one year later the negative list was replaced by the Special Administrative Measures (Negative List) for Foreign Investment Access 2018 (“Negative List 2018”) which was published by the NDRC and the MOFCOM against the background of the 40th anniversary of China’s reform and opening-up. In this latest and shortened Negative List 2018, the prohibited and restricted industry sectors were further narrowed down significantly and market access for foreign investments has been substantially liberated.

In addition to the above Negative List 2018 concerning foreign investment, it is worth noting that on 21 December 2018 the NDRC and MOFCOM jointly promulgated the Negative List for Market Access (2018)

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2. For instance, eligible imported equipment may be exempt from the customs duty. The below official websites’ published notices could be of reference.
   - [http://www.mofcom.gov.cn/article/b/g/200902/20090206024672.html](http://www.mofcom.gov.cn/article/b/g/200902/20090206024672.html)

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which sets out those businesses generally prohibited for investment by any investor (whether Chinese or foreign) and those regulated businesses subject to licensing requirements. Any foreign investor must also comply with this *Negative List for Market Access (2018)* which includes the banning of investment in police training schools, movie imports, post office business and internet news.

On 1 February 2019, MOFCOM and NDRC published the *Catalogue of Encouraged Industries for Foreign Investment (Draft)* for public consultation, which aims at revising and unifying the encouraged industries listed in the *Foreign Investment Catalogue* at the national level and *Catalogue of Priority Industries for Foreign Investment in Central and Western China*. That catalogue in draft sees an expansion in the scope of encouraged industries for foreign investment.

### 3.1.2 Negative List at the National Level

The *Negative List 2018* applies at the national level, i.e. all over China. With respect to the industries set out in the *Negative List 2018*, foreign investment is either prohibited or subject to special administrative measures, mainly involving foreign shareholding restrictions and senior executive criteria such as a nationality requirement. For the industries not mentioned in the *Negative List 2018*, all foreign investors are given equal treatment to domestic Chinese investment.

Attention needs to be paid to section 6 of the explanatory preface of the *Negative List 2018* which provides the cultural, financial and other sectors not listed in the Negative List for Foreign Investment Access and related measures for administrative approval, qualifications and national security shall be subject to the current regulations. That reference could be of particular importance for some prospective foreign investors considering the access to China’s cultural, education and financial related sectors.

The main highlights of the liberalizing measures demonstrated by the *Negative List 2018* are as follows:

a. Promoting the opening-up of service industries:

   e.g.

   1) Financial sectors - the foreign shareholding limit in the banking sector was completely abolished, while the maximum ratio of the foreign shareholding in securities companies, fund management companies, futures companies and life insurance companies has been raised to 51% (i.e. foreign control is allowed now and foreign investors may enter the sectors by way of acquiring the controlling stake in a domestic licence holder). By 2021, the foreign shareholding limit in the whole financial industry will be eliminated.
   2) Infrastructure - there are no longer foreign investment restrictions for the railway network and power grids.
   3) Transportation - the foreign investment restrictions applied to the railway passenger transport companies, international maritime transport, and international shipping agents have been eliminated.
   4) Trade and commerce - the restrictions on foreign investment in gas stations, the purchase and wholesale of grains have been removed.

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b. Liberalizing the sensitive manufacturing sectors:

  e.g.

1) Vehicles - the foreign shareholding limit in the special-purpose and new-energy vehicle categories has been abolished. By 2020, the foreign shareholding limit in commercial vehicles will be eliminated. By 2022, the foreign shareholding limit in the passenger car sector will be eliminated; also a foreign auto company will no longer be subject to a maximum of two subsidiaries in China.
2) Shipbuilding - the foreign investment restrictions, applied to aspects of ship design, manufacturing, repair and related activities, have been removed.
3) Aircraft - the foreign investment restrictions on all types of aircraft have been eliminated.

c. Broadening market access to the agriculture and energy sectors:

  e.g.

1) Agriculture - foreign investment restrictions on seed (except wheat and corn seed) production have been eliminated.
2) Energy - foreign investment restrictions on special rare coal mining have been eliminated.
3) Natural resources - foreign investment restrictions on graphite exploitation, rare earth smelting and separation, and tungsten smelting have been eliminated.

3.1.3 Negative List for Pilot Free Trade Zones

Two days after the release of the national Negative List 2018, NDRC and MOFCOM jointly announced the Special Administrative Measures (Negative List) for Foreign Investment in Pilot Free Trade Zones (“FTZs”) ("Negative List in FTZs"), which took effect on 30 July 2018. The Negative List in FTZs applies in all the FTZs (currently there are 12 FTZs in China, namely the Shanghai, Guangdong, Tianjin, Fujian, Liaoning, Zhejiang, Henan, Hubei, Chongqing, Sichuan, Shaanxi, Hainan Free Trade Zones).

The Negative List in FTZs has gone even further than the national Negative List 2018 in reducing the restrictions on foreign investment in some areas. For example, the following industry sectors listed in the Negative List 2018 have been removed from the Negative List in FTZs:

1) Exploration and exploitation of petroleum and natural gas;
2) Smelting and processing of radioactive mineral resources as well as the production of nuclear fuel;
3) Stage performance agencies.

3.2 Location

Various administrative regions and economic/industrial zones in China offer incentives for foreign investment, including tax incentives, financial subsidies/grants, access to infrastructure, and reduced red tape, depending on the locality/region. Foreign investors are advised to assess these incentives together with its China business strategy and geographic coverage plan when choosing a location for their FIE.

Mainland China consists of 23 provinces, four municipalities and five autonomous regions, and within those there are more than 200 national industrial/economic development zones and numerous local industrial parks.

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Currently most foreign investments are concentrated on the east coast and in the large cities. China’s central government is concerned about the economic underdevelopment of the Central and Western regions of China, and thus encourages foreign investments in those regions through various incentive schemes. Foreign investment projects that fall under the Catalogue of Priority Industries for Foreign Investment in Central and Western China are entitled to enjoy preferential policies. In addition to the Central and Western areas, preferential policies and incentives are also available to foreign investments into Northeast China (Inner Manchuria). Due to the shrinking of its once-powerful industrial sector and the decline in its economic growth, this latter region is called China’s Rust Belt. As a result, the Chinese government has launched the “Northeast Area Revitalization Plan” campaign and foreign investments into that area have been encouraged. In general, all local authorities have some latitude to adapt and apply local rules (within limits set by higher tiers of government) which may be advantageous to FIEs such as relaxed market access requirements, favourable terms for the acquisition of suitable land, local tax rebates etc.

Additionally, apart from their own Negative List mentioned above, the Pilot FTZs feature innovative policies with respect to finance, customs, liberalization of foreign investment and tax treatment, and simplified administrative measures e.g. reduced investment barriers with respect to the qualifications of foreign investors, application requirements of some licences, equity holding percentage and business scope restrictions.

### 3.3 Practical Issues for Pre-Establishment of FIEs

#### 3.3.1 Who can act to prepare for the establishment of a new FIE?

Before an FIE is officially established, there are quite a lot of issues to be handled by the investor(s). Situations do vary in different Chinese cities or provinces, also the relevant practice relating to the pre-establishment of a JV or WFOE can differ slightly.

In a JV (incl. EJV and CJV) scenario, domestic and foreign investors need to delegate and authorise someone to handle the matters, usually the Chinese party will take the lead and the foreign party will cooperate by providing all the necessary information, assistance and instructions.

In a WFOE scenario assuming that there is only one foreign investor (sole shareholder), someone needs to be authorised and delegated with relevant powers to handle the set-up matters on the ground. He or she could be an executive or employee of the shareholder company or to be employed by the WFOE after it is duly incorporated. Detailed Power of Attorney normally needs to be prepared and executed by the shareholder company, ensuring sufficient and specified powers to be exercised by such a person in accordance with the shareholder company’s reporting and operational procedures. In most cases, that person will be the legal representative of the WFOE. Before and/or after such person is designated, a local handling agent and/or lawyer and/or accountant or business consultant can be engaged in China to provide advice, representation and assistance.

To set up an FIE, no matter whether it is a WFOE, JV or FIPE, the investor’s representative (as principal), or the engaged and authorized local advisor (lawyer/accountant/consultant as agent), will need to secure a name for the to-be-incorporated FIE as the very first step (details to be illustrated in section 4.4.1).
3.3.2 Lease arrangement before an FIE is formally established

Once the contemplated FIE’s name is pre-approved by the applicable company registry⁸, in most cases, a foreign investor might consider using the pre-approved company name to enter into a lease agreement with the landlord or a licence agreement or service agreement (in case of a serviced office) to secure business premises. Although the formal time point for an FIE’s valid establishment is when the Business Licence⁹ is issued by the SAMR or its applicable local counterpart, it may take another few days to get the company stamp made. In terms of executing a lease agreement, a foreign investor’s authorised representative can sign this and the company stamp, when it is available, can be affixed later to finalize the formal execution. Where the lease is agreed by the foreign investor (i.e. the shareholder of the FIE) before the FIE is formally established, a lease assignment or licence arrangement might be necessary at a later stage after the FIE is set up, and landlord’s consent is normally involved although such consent shall not be unreasonably withheld.

3.3.3 Local government’s commitments and/or foreign investment promotion and facilitation measures

In reality, most local governments are motivated to attract and promote foreign investment as part of demonstrating their political performance. There might be various offerings in favour of foreign investors such as land supply, road access to the planned site, purposely built sewage pipe system to support water treatment/pre-treatment and other environmental protection facilities, local tax rebates or fiscal subsidy/grant, administrative and/or logistic facilitation measures (e.g. one-stop contact point assistance) etc.

From a foreign investor’s point of view, it is rather important to understand how the local government’s commitments/offerings can be materialized and eventually realized. Quite a number of local governments have got used to issuing “red-letterhead documents” which could be their working meeting minutes or a particular statement or undertaking. The new Foreign Investment Law has explicitly provided that local governments can only formulate foreign investment promotion and facilitation policies and measures within their statutory authority. Thus the legal effect of the “red-letterhead documents” should be carefully reviewed if the foreign investor is going to materially rely on any specific commitment/offering made by the local government.

Additionally, a foreign investor may consider entering into a civil contract with the local government and incorporating the government’s commitment/offering as part of its contractual obligations to ensure the relevant legality, validity and enforceability issues as well as foreign investor’s right to claim damages if there is any breach. The new Foreign Investment Law expressly provides that local governments shall honour their commitments to foreign investors and FIEs, and perform the contracts entered into therewith in accordance with law; where it is necessary for them to change such a commitment or a contract due to national or social public interest, it shall be done with due process and the foreign investor/FIE shall be compensated accordingly. Nevertheless, please note when government is a contracting party, its administrative role might

⁸ After the recent Chinese government reform, the State Administration for Market Regulation (“SAMR”) and its local counterparts have assumed the previous State Administration for Industry and Commerce (“SAIC”)’s duties and powers acting as the company registry in China. Please note that SAMR has other market regulatory functions in additional to company registry such as standardization, anti-trust, combatting unfair competition, trademark infringement and piracy, consumer protection, product quality supervision, inspection and quarantine etc.

⁹ In southern China, such as Guangdong province (Canton), a Business Licence might bear the title “Business Registration Certificate” but this is ultimately the same thing.
concur with its civil position and the nature of the contract signed by the government might be subject to complicated legal analysis. From a practical point of view, it is good practice to have a written agreement concluded with the local government as necessary. However it is not realistic to expect that equitable relief such as a court order for an injunction or specific performance could be easily, if at all, obtained from the local court against the local government. Eventually it is a business judgment call for the foreign investors.

### 3.3.4 IPR protection and technology transfer

IP issues are always the key issues for foreign investors when considering trading with and/or investing into China. It is never too early to assess the IP risk exposure and how to formulate a set of complete and effective protection measures when any China initiative is being considered.

Trademark, service mark, trade name, patent, design, copyright, software, data, know-how and any other proprietary intellectual property rights shall be within the protection horizon.

The new *Foreign Investment Law* emphasizes the protection of the IPRs of foreign investors and FIEs, imposing legal liability for IP infringement, and encouraging technical cooperation based on voluntariness and business rules, and clarifies that the relevant administration and officials shall not use any administrative measures to coerce technology transfer.

### 3.3.5 Costs incurred for the new FIE but paid by the investor/shareholder

In principle, if the FIE is successfully incorporated, the relevant costs and expenses of company formation paid by the investor, and funds advanced by the investor for the FIE’s business operation, can be booked by the new FIE. The specific accounting treatments have to comply with the PRC accounting rules (the PRC GAAP). The FIE may repay the funds to the investor, and generally speaking there are no legal barriers to remittance of such funds, provided that foreign exchange procedures are complied with.

### 3.3.6 Immigration rules to be aware of

Generally speaking, a foreigner entering China must hold a valid visa which is issued by a Chinese embassy or consulate in the relevant foreign country with which the PRC has diplomatic relations. From a business point of view, the following types of Chinese visa are most relevant:

1) **“L” Visa** – for tourists, easy to apply, can accommodate a foreigner’s quick visit and short stay (normally valid for six months with a limited number of entries and short stay after each entry);

2) **“F” or “M” Visa** - for foreign visitors intending to visit China for exchanges, visits, commercial and trade activities (could be valid for one year with multiple entries and relatively longer stay after each entry);

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10 There are a few visa exemptions such as 72-hour transit visa exemption etc., for detailed and most updated information, please see [https://www.visaforchina.org/](https://www.visaforchina.org/)
3) “R” Visa - for high-level foreign talents/professionals and those in urgent shortage for the country's economic and social development (multiple entries and a path to Employment Permit and Resident Permit after entering China)\(^1\);

4) “Z” Visa – for employment purpose, i.e. work visa (single entry and a path to Employment Permit and Resident Permit after entering China)

Foreigners who enter China to handle the incorporation and establishment of FIEs are recommended to apply initially for an “F” or “M” visa. If a foreign individual intends to stay in China for a longer period to work for the FIE, if an employment contract or a service agreement with the FIE or a secondment arrangement by the shareholder of the FIE is necessary, then a “Z” visa or “R” visa should be applied for subject to applicability.

Please note: the specific Chinese visa policies vary in different countries due to the different diplomatic reciprocal arrangements between a particular country and the PRC.

A Residence Permit (employment-type) actually functions as a multi-entry Chinese visa, which will enable a foreigner to stay in China for a certain period of time (normally one year) and to exit and re-enter China for international travel within this period.

For the immigration and employment registration procedures for a foreigner coming to work in China, please refer to the guideline of the EU SME Centre at http://www.eusmecentre.org.cn/guideline/how-apply-chinese-work-and-business-visa.

There is no mandatory limitation in respect of how many expats an FIE may employ, however, it should be at a reasonable level and suitable for its business nature, scale, operational need etc. An FIE’s registered business scope, registered capital and total investment normally are the relevant factors to be considered.

3.3.7 Can people be temporarily employed before an FIE is established?

Generally speaking, a business entity, as employer, can only legally hire employees if it has been duly incorporated and registered with the SAMR or its applicable local counterparts. Where a prospective employee is temporarily hired by the foreign investor before the FIE is formally registered in China, any contract signed might be regarded as a service agreement rather than an employment agreement under Chinese law. In case such temporary employment relationship is constructed prior to the incorporation registration of the relevant FIE, the contemplated FIE, and its foreign investor, may be considered as engaging in illegal employment and its investor/the FIE may be held liable to pay increased compensation\(^1\) if the employee suffers a work-related injury.

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\(^1\) On November 28, 2017, the State Administration of Foreign Expert Affairs (“SAFEA”) and MOFCOM jointly published the Implementing Measures for the Foreign Talent Visa Regime, in order to attract “Super Brains” from all over the world. Applicants for an “R” Visa will enjoy a fast application process called “Green Path” and no application fees are charged. Applicants for an “R” Visa shall meet the relevant criteria set forth for high-level foreign talent/professional (Category A) which is updated from time to time by the relevant authorities such as SAFEA.

\(^1\) Measures for Lump-sum Compensation to the Disabled or Deceased Employees of Entities Involving Illegal Employment (2011)
Alternatively, a Chinese individual (a prospective employee of the FIE who is instructed to handle relevant matters for the FIE during its formation process) may sign an employment agreement with a staffing agency such as FESCO\(^\text{13}\). As this kind of individual is hired out to work ultimately for the FIE, the staffing agency would be paid for the employee’s wages, social insurance and other relevant costs and expenses. Please note that such an arrangement is temporary and transitional, so the FIE will undertake the employer’s responsibilities after it is duly set up. For a JV, before the FIE has been duly incorporated, the employee(s) of the Chinese party may be designated to work on FIE matters upon the mutual agreement between the foreign and Chinese parties.

\(^{13}\) Beijing Foreign Enterprise Human Resources Service Co., Ltd (http://english.fesco.com.cn/)
4. Wholly Foreign Owned Enterprise (WFOE)

A WFOE (sometimes erroneously referred to as a “WOFE”) is a company, usually a limited liability company, established in China with its capital fully invested by foreign investor(s). A WFOE is directly controlled by its foreign shareholder(s) and governed by a board of directors or by a sole executive director appointed by the investor(s). In the last decade, WFOE’s corporate form, governance and almost all other material aspects have been harmonized and made to comply with the PRC Company Law, that is to say, there will be no foreseeable major changes to the WFOEs after the new Foreign Investment Law becomes effective from 1 January 2020. WFOEs account for more than 50% of all the FIEs in China; this model provides foreign investors with full control and rights to the business and profits – the most commonly used legal vehicle for the investor.

4.1 Incorporation Documents / Application Documents

In general, in order to incorporate a WFOE which is not subject to the special administrative measures stipulated in the applicable negative list (i.e. national Negative List 2018 or Negative List in FTZs), a foreign investor’s application documents mainly include:

- Notice/Certificate of the Name Pre-approval\(^{14}\) (《企业名称预先核准通知书》)
- SAMR Application Form for Registration of an FIE (《外商投资企业设立登记申请书》)
- MOFCOM Filing Application Form for Establishment of an FIE (《外商投资企业设立备案申请》)
- MOFCOM Undertaking Letter of an FIE for Filing the Establishment signed by the shareholder (《外商投资企业设立备案申报承诺书》)
- Articles of Association of the FIE executed by the shareholder (《章程》)
- Shareholder’s resolutions regarding the establishment of the FIE, the appointment of the legal representative, director(s), supervisor(s) and the senior executive(s) such as the general manager of the FIE
- Certificate of Incorporation/Business Registration Certificate or equivalent proving the identity and legal status of the FIE’s shareholder (投资方合法主体资格证明)
- Relevant documents showing an FIE’s business premises (住所使用证明)
- The shareholding structure chart tracing to the ultimate actual controller/beneficial owner of the FIE
- Supplementary Information Sheet (《补充信息登记表》)
- Power of Attorney authorizing a person handling the registration process (《指定(委托)书》)
- Power of Attorney for service of legal documents (《法律文件送达授权委托书》)
- Other relevant POAs and passports and IDs of the relevant individuals involved in the incorporation process

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\(^{14}\) The State Administration for Market Regulation issued a new reform policy on 1 April 2019 to further simplify the name pre-approval procedures, making it easier for an investor to incorporate a company in China. In general, it will be easier to reserve a name for the company to be incorporated and the corporate names database will be accessible to the public for a name search etc.
However, for a WFOE affected by the applicable negative lists, additional documents are required for approval:

- Application Form
- Feasibility Study (to some extent, a business plan equivalent)
- Shareholders Agreement in case there are two or more investors/shareholders
- Environmental Protection Assessment Report (for projects that may have an impact on the environment, e.g. manufacturing)

In principle all the documents listed above, if the originals are in English, must be accompanied by a respective Chinese translation to be submitted at the same time. An investor shall ensure the accuracy and completeness of the translation.

### 4.2 Registered Capital and Total Investment

China eliminated statutory Registered Capital (defined as below) requirements in March 2014 with the amended *PRC Company Law*. Now foreign investors can choose how much capital to inject upon setting up an FIE, as well as the period of contribution. Nevertheless, in practice, the relevant authorities may require a suitable amount of capital to ensure that the amount can adequately support the early stages of an investment, given the relevant industry sector and the contemplated business operation etc. Certain regulated industries are still subject to statutory minimum Registered Capital requirements. A foreign investor may choose to pay up the Registered Capital of the WFOE within the operating period of the WFOE, whether by means of a one-off payment or payment by instalments.

Registered Capital is the initial cash investment dedicated by the shareholder to an FIE, once injected, which is instrumental to begin operations. This is not to be confused with the Total Investment allocated to the FIE, also stipulated in the articles of association and registered with the relevant authorities, which not only encompasses Registered Capital but also the possible foreign loan amount that can be lent to the FIE.

The gap between the Registered Capital and the Total Investment (“投注差”) is normally left for the WFOE's foreign debt registration. In other words, a WFOE is allowed, not obliged, to obtain loans and incur foreign debts within such a gap. Such a foreign debt management system has been practiced throughout the PRC for years. Alternatively, another relatively new foreign debt management system, specified by the *Notice of the People's Bank of China on Full-coverage Macro-prudent Management of Cross-border Financing* (issued on 11 January 2017), may be adopted.

If a foreign investor does not want to follow the foreign debt management system where the gap between the Registered Capital and the Total Investment is essential, the investor may make the Registered Capital equal to the Total Investment; otherwise, the Total Investment has to be higher than the Registered Capital. The amount of the Total Investment does not constitute a legal obligation of capital contribution by the shareholder of the WFOE, and the shareholder is under no obligation to offer any loan to the WFOE unless otherwise agreed upon between the shareholder and its WFOE.
The ratio of the Registered Capital to the Total Investment shall comply with the following provisions:

<table>
<thead>
<tr>
<th>Total Investment</th>
<th>Registered Capital</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than $3 million</td>
<td>No less than 70% of the Total Investment</td>
</tr>
<tr>
<td>More than $3 million but less than $10 million</td>
<td>No less than 50% of the Total Investment with a minimum of $2.1 million if the Total Investment is less than $4.2 million</td>
</tr>
<tr>
<td>More than $10 million but less than $30 million</td>
<td>No less than 40% of the Total Investment with a minimum of $5 million if the Total Investment is less than $12.5 million</td>
</tr>
<tr>
<td>More than $30 million</td>
<td>No less than 1/3 of the Total Investment with a minimum of $12 million if the Total Investment is less than $36 million</td>
</tr>
</tbody>
</table>

Any change to the Registered Capital has to be filed and registered with relevant authorities. It is important to calculate an optimal amount of Registered Capital at the beginning. That amount should be sufficient to allow a new FIE to run smoothly. An under commitment of Registered Capital can leave a business short of crucial funds, while an over commitment would obviously lead to unused capital that could otherwise be devoted to better purposes. In most cases, the Registered Capital funds the FIE’s operations until it begins generating enough income to cover its costs and expenses.

Foreign investors may use US Dollars, Euros, Pounds Sterling or any other convertible currency as well as Offshore RMB to make capital contributions. Where foreign investors wish to invest with RMB which they have obtained in China, such RMB should be profits generated by foreign businesses through other FIEs or proceeds generated from the liquidation, divestment or capital redemption of other FIEs.

### 4.3 Capital Contribution Method

Generally, foreign investors may make capital contributions in cash or in kind, such as machinery equipment, intellectual property rights and other intangible property such as land-use rights which may be valued in monetary terms and may be transferred in accordance with the law.

There are also some exclusions such as labour, credit, name of a natural person, goodwill or reputation, franchise right, or a collateral that are not recognised as valid capital contribution according to the current regulations.

There used to be requirements on the ratio of initial capital contribution, the ratio of monetary capital contribution, and the timeline of capital contribution to FIEs. However MOFCOM eliminated these general requirements in 2014. Nevertheless, in regulated industry sectors, the minimum ratio of initial capital contribution and monetary capital contribution may still be required subject to the nature of the regulated business activities.

Regarding capital contributions in kind, non-cash properties shall be free of any encumbrances such as mortgages, pledges and/or other rights restrictions. The in-kind contribution shall be fairly evaluated and verified. Specific requirements may apply:
• For instance, in the case of machinery equipment as a capital contribution to the WFOE, such machinery equipment shall be essential or at least relevant to the operations of the WFOE, otherwise customs clearance could be problematic. The appraisal of the said machinery equipment shall be the fair market price and a detailed list with the type, specifications, quantity, unit price etc. shall be prepared and provided. When the machinery equipment arrives at the port in China, the WFOE shall apply to the Chinese inspection authorities to conduct an import inspection.

• In the case of industrial property rights, know-how or other IP rights as a capital contribution, a foreign investor shall be the legitimate owner and/or rights-holder. Necessary supporting documents must be provided. In practice, whether an IP licence can be used as part of or the whole capital contribution has no definite answer yet. In most cases, foreign investor is advised to have a comprehensive IP planning from capital injection, fund repatriation and IP protection perspectives. For example, dedicated Chinese trademark(s) (sometimes China specific domain name too) can be injected as capital contribution, but patent or know-how technologies can be licensed to the WFOE to generate repatriated cash flow for the foreign investor.

In-kind capital contributions require a foreign investor to duly complete the effective ownership or rights transfer to its FIE in accordance with the law.

4.4 The Formation Process

Incorporating a WFOE involves the following steps:

• Internal designation of authorised representative(s) to handle the incorporation issues, preferably identifying a local person in China (an existing employee or potential employee) to liaise with relevant authorities and banks in due course with respect to administrative and logistic matters;

• Appointment of necessary external advisors such as a local lawyer, accountant and tax advisor to procure necessary advice; appointment of a handling agent which is not a must but might be cost effective if a foreign investor has got no one to handle the logistics on the ground;

• SAMR (or its local counterpart) - pre-approval of company name;

• Secure business premises for the intended FIE;

• Preparation of the application documentation including relevant shareholder’s resolutions, board resolutions, director/supervisor/senior executives’ appointment documents, articles of association of the FIE, ultimate beneficial owner’s disclosure as well as various POAs, certificates and forms;

• NDRC (or its local counterpart) - fixed asset investment project approval or filing (if applicable);

• Relevant permit, licence, consent or certificate to be issued by the governing regulator(s) if regulated business activities are contemplated; alternatively, an FIE can be incorporated first and then apply for the relevant licence or permit (before the licence or permit is granted, an FIE is not allowed to conduct or operate any regulated activities);

• MOFCOM (or its local counterpart) - filing or approval (if affected by the relevant negative list) of the establishment of an FIE\(^\text{15}\)

• SAMR (or its local counterpart) - application of the FIE registration and Business Licence issued by the SAMR (or its local counterpart)

\(^{15}\) From 30 June 2018, the MOFCOM filing can be submitted online together with the FIE establishment registration with SAMR if no approval is required, i.e. not affected by the relevant negative list.
4.4.1 FIE’s name pre-approval

The very first step in the company formation process is to apply to the local company registry (SAMR or its local counterpart) for pre-approval of the proposed name (a.k.a. “pre-verification of the enterprise name” 企业名称预核准).

In order to be registered and officially recognised, the company name must be in Mandarin. The company name shall consist of four parts:

1) the **administrative region**
   
   E.g. Beijing or Shanghai or Shenzhen depending on where the FIE is to be incorporated.
   
   Please note if a foreign investor wants to include the words “China”, “national” or “international”, or exclude the administrative region in its FIE’s proposed name, a name conflict search has to be conducted at the national level and currently a minimum registered capital of RMB 50 million is necessary.

2) the **trade name**
   
   Name conflicts do happen frequently and it is advisable to prepare two to four name options in order of preference in the name application form.
   
   If there is any existing company in the same region and same industry with the same or similar trade name, the suggested name option is likely to be ruled out.
   
   Where the proposed trade name is the same or related to a registered trademark, a consent or licence shall be obtained from the trademark holder.

3) The **industry sector** e.g. “consulting” “advanced materials” “design” “intelligent electric” etc.

4) The **organizational form** i.e. “Co., Ltd.” “Ltd.”

Undoubtedly, the name is important and should be relevant to the target market. In addition to brand identification and a coherent marketing strategy, Chinese consumers pay attention to whether the name has an aesthetically pleasing sound and whether the name has an auspicious meaning in the Chinese language. That is why it is advisable that a foreign investor carefully considers a good choice of name for its FIE and not merely prepare a phonetic transcription of the parent company’s English/foreign name.

4.4.2 NDRC: fixed asset investment project approval or filing (if applicable)

In China, in order to effectively implement various national economic and social development strategies, industry policies, environmental protection and macro-prudential regulatory measures, and safeguard orderly exploitation of the natural resources, fixed asset investment projects are subject to NDRC filing or approval requirements (via its local counterparts in most cases unless significantly large projects would be filed or approved at central governmental NDRC level).

In December 2016, the State Council (China’s central government) published the *Catalogue of Investment Projects Subject to Government Review and Approval (2016 Version)* (“Catalogue”)\(^{18}\). Where a proposed project is affected by the Catalogue, government (via NDRC and its local counterparts) review and approval is

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16 See footnote 14.
18 [http://www.gov.cn/zhengce/content/2016-12/20/content_5150587.htm](http://www.gov.cn/zhengce/content/2016-12/20/content_5150587.htm)
a pre-requisite requirement. Outside of the Catalogue, any company intending to invest in and construct a project shall be subject to administration by record-filing with NDRC or its applicable local counterpart.

With respect to an FIE, fixed asset investment projects mostly involve the construction of plant, manufacturing facilities as well as relevant equipment procurement and installation. A foreign investor in the service and trading industries not involving fixed asset investment and construction by its proposed FIE in China normally does not need to deal with NDRC filing or approval.

### 4.4.3 MOFCOM: record filing or approval of the establishment of an FIE

Since June 2016, when both the *Provisional Measures for Record-Filing Administration of the Establishment and Change of FIEs* (2016) was adopted by MOFCOM, and a joint announcement was made by MOFCOM and the NDRC (“Announcement No. 22 of 2016”), the record filing system has been officially in place nationally. The new administration system has afforded foreign investors so-called “pre-establishment national treatment” all over China, and represents a significant step forward for the Chinese government towards its aim of a “new open economy.”

Generally speaking, in this new era of the PRC’s foreign investment regulatory regime, the majority of foreign investment activities will no longer need prior approval from MOFCOM and its local counterparts. Instead, other than those affected by the relevant negative list, all foreign investments are now subject to a procedural record filing requirement which is no longer a pre-requisite to the incorporation/registration of an FIE in China.

Since 30 June 2018, where a foreign investor has obtained a name pre-approved for the FIE, if not affected by the relevant negative list, the MOFCOM filing application and SAMR registration application can be submitted online simultaneously.

Where a proposed FIE involves any business on the relevant negative lists, application for approval at the governing MOFCOM authority would be necessary and approval document is required for the FIE registration application.

### 4.4.4 SAMR: registration of an FIE and issuance of Business Licence

As mentioned above, since the middle of 2018, foreign investments, which are not subject to any negative list, have been enjoying a simpler and faster registration procedure. Once MOFCOM filing and SAMR registration applications have been duly made online at the same time, in a normal case (i.e. without any irregularities and no missing documents or information), an FIE can be incorporated and registered within a week or so and a Business Licence is issued within a short time frame.

### 4.5 Post-establishment Registrations / Administrative Matters

#### 4.5.1 Consolidated registration

In the past, a newly established FIE was required to register with various Chinese government authorities after having been incorporated: this included foreign exchange registration, tax registration, organisational code registration, social insurance registration, customs registration and statistics registration.

In order to reduce the administrative burden borne by business and create a more investment friendly environment, since 2015 the Chinese government has embarked on a cross-ministry administrative reform to consolidate dozens of different registrations. From “three in one”, “five in one” and until recently “twenty-four in one”, the unification process is still continuing nationally. Along with the government’s institutional
infrastructure being restructured and integrated, dozens of registration/filing certificates have been consolidated into one Business Licence with a unified code, the most important registration and a single identification code for each business.

Eventually, the government’s objective is to enable an investor to fill out only “one application form” and submit “one set of documents” to “one designated government agency” to establish a legal entity in China for carrying out its business as soon as practically possible.

4.5.2 Foreign exchange registration

Shortly after the issuance of the Business Licence, each FIE is required to complete foreign exchange registration with a bank\(^ {19} \) which is obliged to comply with various guidelines issued by the foreign exchange authority. This registration is a pre-requisite for an FIE to open a foreign currency account with a local bank and receive the registered capital and shareholders’ loan or any other third-party loan borrowed from outside China (in foreign currency or offshore RMB).

An FIE has two types of foreign currency account, called “capital account” and “current account”. The inflow and outflow of foreign currencies in the capital account and the exchange settlement are subject to the scrutiny by the State Administration of Foreign Exchange (“SAFE”). However, the current account is actually a trading account and there is no restriction on the purchase and settlement of the foreign currencies provided that relevant transactions are genuine and legitimate. Some of the most common examples of current and capital account transactions are listed below:

- **Current account items:**
  - Payments: goods and/or services purchases, royalties, expatriate wages and benefits, repayment of loan interest;
  - Receipts: goods and/or services sales
- **Capital account items:**
  - Payments: repayment of loan principal, declared dividend and profit distribution, equity acquisition, reinvestment, capital redemption or reduction, liquidation and dissolution;
  - Receipts: capital contributions, capital increase, foreign currency loans

4.5.3 Bank account

In China, each company can have multiple bank accounts but must have a basic RMB bank account for the ordinary course of business, cash withdrawals, salary payments and reimbursements. An account opening licence was required to be obtained from the People’s Bank of China for the opening of the basic RMB bank account. Starting from June 2018 such requirement began to be cancelled in piloted places. By the end of 2019 the licence will not be required in all China and only record-filing is needed for the opening of the basic RMB bank account.

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\(^ {19} \) All eligible banks’ foreign exchange systems are monitored and supervised by the foreign exchange authority, therefore, the relevant information requested and provided to the bank is also submitted to the foreign exchange authority.
4.5.4 Company stamps and other stamps

Company stamps and various other types of stamps are widely used in China and have a considerable practical importance for a company’s daily business operations. Company stamps, legal representative stamps, financial special stamps, contract special stamps and Fapiao\(^\text{20}\) special stamps are the most commonly used stamps and each has a particular purpose.

- A company stamp officially represents the intent/authority of a legal entity, and is often used to be affixed on a contract or other formal documents issued by the company;
- A legal representative stamp can be regarded as equivalent to the signature of the legal representative of a company;
- A financial special stamp is used for accounting and bank settlement purposes;
- A contract special stamp is used for contract execution; and
- A Fapiao special stamp is used when a company purchases and issues Fapiao.

Company stamps and other stamps can only be engraved by the designated stamp makers which are regulated by the relevant authority. Stamps’ specimens, except the legal representative stamp, need to be filed with the public security authority and such filing can be handled by the company itself or the accredited stamp maker.

4.5.5 VAT registration

Subject to 4.5.1 above, tax registrations are still in the process of being consolidated and Chinese tax authorities, from central to local level, are undergoing significant reform. Value Added Tax (“VAT”) reform, since 2012, has replaced original Business Tax to be the major turnover tax in China. VAT tax registration may still need to be completed separately with the competent tax authority.

\(^{20}\) Fapiao is an official tax invoice in regulated form and printed out through the tax-control system.
5. Equity Joint Venture (EJV)

An EJV is a joint venture ("JV") between foreign and Chinese parties in the form of a limited liability company. The foreign party shall generally contribute at least 25% of the registered capital of the EJV, and the profits, risks and losses of the EJV are shared in proportion to each party's contribution to the registered capital.

The appointment of directors (not the shareholders meeting) is the highest governance body of the EJV. The appointment of directors and other corporate governance issues are regulated by the EJV contract (equivalent to the shareholders agreement) and the articles of association of the EJV.

For almost 40 years, the EJV has been a commonly used form of cooperation between foreign investors and their Chinese partners; EJVs account for almost 40% of all FIEs.

5.1 Incorporation Documents / Application Documents

The information provided under Section 4.1 for the establishment of a WFOE is mostly applicable to the formation of an EJV, save for the requirement that an EJV must have a Joint Venture Contract ("JVC" shareholders agreement equivalent). The JVC is an important legal document agreed upon and entered into by the parties to govern their rights and obligations with respect to the joint venture and how to manage and operate it in all major aspects. JVC, together with Articles of Association ("AOA" the constitutional document of an EJV), sets forth an EJV’s governance structure, decision making process, operational and financial affairs etc. It is advisable for foreign investors to ensure sufficient rights and protection are in place in both the JVC and AOA such as board members, the senior executive appointment and removal process, right to information, inspection, reserved matters and veto powers if needed.

JVC shall include the following provisions:
- Parties’ agreement on the establishment of a JV
- JV’s purpose, scope of business, premises and term
- Total Investment and Registered Capital
- Each party’s rights and responsibilities
- Licensing of technology, IPRs arrangements if applicable
- Board of directors and supervisors
- Management
- Labour and employment
- Annual operating plans and budgets

21 If the foreign shareholding is less than 25%, the company will not be recognized as an FIE (instead it will be the same as other domestic companies) in terms of benefiting from relevant tax preferential policies specifically applicable to the FIE, mostly in respect of imports, exports and customs, but relevant restrictions on the FIEs which are not applicable to the pure domestic enterprises remain.

22 This is to be changed by the new Foreign Investment Law in its 5-year transition period, i.e. EJV’s corporate governance structure is to be aligned with the PRC Company Law and the shareholders’ meeting will be the highest authority.

23 There will be implementing regulations published during the 5-year transition period of the new Foreign Investment Law and it remains to be clarified whether a JVC is still a legal document mandatorily required for an EJV’s incorporation and registration. No matter whether it is statutorily required to be submitted for registration and/or filing purpose, in practice, it is always necessary to enter into a JVC or shareholders agreement disregarding the name.
- Financial affairs and accounting
- Tax and profit distribution
- Confidentiality and non-competition
- Early termination
- Liquidation and dissolution
- Liability for breach of contract
- Other normal legal clauses such as governing law, dispute resolution etc.

5.2 Other Matters related to an EJV

Sections 4.2 to 4.5 in relation to WFOEs generally apply to the EJVs in the same way.
6. Cooperative Joint Venture (a.k.a. Contractual Joint Venture) (CJV) and FIPE

6.1 CJV

A CJV is a joint venture (JV) between foreign and Chinese parties. It can take the form of a limited liability company with legal person status, or a cooperative venture between the parties where no separate company is formed, i.e. without independent legal personality. In the latter case, whether to register and file such a CJV without independent legal personality with the relevant authorities is optional.

Most aspects of the CJV are governed by contract and this is why it is often referred to as a contractual joint venture. A CJV allows, subject to some conditions, the early recovery of investment by the foreign party through a contractually agreed increase in the ratio of the foreign party’s profits distribution. It also may allow a foreign party to recover its investment prior to paying income tax, subject to approval by the tax authorities, via such means as depreciation of fixed assets and amortization of intangible assets.

A CJV is governed by a board of directors if it is a limited liability company, or a joint management body if it is not.

In the early days of China’s reform and opening up, CJVs were used especially in a lot of infrastructure projects, power and natural resources projects, particular manufacturing projects, and Sino-foreign education cooperation projects. As mentioned above, in recent years, the CJV gradually appears to have become a less popular option for foreign investment.

CJVs account for less than 10% of all FIEs.

6.2 FIPE

As the number of CJVs has declined, since 2010 the FIPE format has been gradually adopted by foreign investors. FIPEs are governed by the PRC Partnership Law which is in line with international partnership practice in most material aspects. Limited partnership has been more commonly used for FIPEs which enables limited partner(s) to enjoy limited liability protection if the relevant limited partner(s) is/are not materially involved in the FIPE’s management, while a general partner is responsible for partnership affairs and bears unlimited liability.

Unlike a limited liability company, a partnership enjoys much more flexibility and the partnership agreement can stipulate all aspects of a partnership’s operations, governance, capital contribution, profit distribution as well as liquidation etc.

6.3 Other Matters of a CJV and/or an FIPE

The information provided in Section 4.1 to 4.5 and Section 5.1 generally applies in the same way to the CJVs in the form of a limited liability company with legal person status as well as the FIPEs (though without independent legal person status) as both of them are subject to the registration requirements.

For the CJVs in the form of a cooperative venture between the parties where no separate company is formed, i.e. without independent legal personality, there is no mandatory registration requirement.
7. The Implications of the New Foreign Investment Law

In the last four decades, China’s foreign investment regulatory regime has been governed by the three major pieces of legislation initially adopted during the 1980s, before the PRC Company Law was conceived, and amended several times afterwards, i.e. the Sino-Foreign Equity Joint Venture Law (中外合资企业法), Sino-Foreign Cooperative Joint Venture Law (中外合作企业法) and Foreign Enterprise Law (外资企业法) and their numerous implementing, clarifying and supporting regulations, administrative measures, decrees and various notices.

There have been years of efforts to reconcile the legal conflicts between these three FIE laws and the PRC Company Law. But more importantly, it is commonly perceived that the current laws in this area need to be comprehensively updated in the light of dramatic economic and social changes during the past decades.

As early as 19 January 2015, MOFCOM issued a consultation draft of the Foreign Investment Law (the “2015 Draft”), as the first attempt by the Chinese regulator to update the existing statutory framework governing FIEs. The 2015 Draft then contemplated some far-reaching implications for the foreign investment legal regime, and caused heated debates and controversies immediately thereafter.

After years of deliberation, on 26 December 2018, the legislation bill of the Foreign Investment Law (“2018 Draft”) was submitted to the Standing Committee of the National People’s Congress of China (NPC), China’s parliament and national legislature, for review.

On 29 January 2019, the further revised bill went through the second review of the Standing Committee of the NPC, and on 15 March, the Second Session of 13th NPC passed the PRC Foreign Investment Law which will take effect on 1 January 2020 with a 5-year transition period (2020-2024).

The finally adopted Foreign Investment Law shows some major changes to the 2015 Draft in content and structure, by significantly shortening the articles from 170 to 42, stipulating details for promotion, protection and management of foreign investment, and leaving the controversial issues of variable interest entities (i.e. VIE) unspecified for the moment.

The new Foreign Investment Law will replace the existing regulations for FIEs (WFOE, EJV and CJV) and is designed to unify the administrative systems, further encourage foreign investment and ease concerns about China’s investment environment, specifically

- it has banned forced technology transfer and illegal government “interference” in foreign business practices;
- it explicitly provides that foreign investors are entitled to “national treatment” at the time of making the investment, though they will be subject to the relevant negative list;

Although the new Foreign Investment Law, effective from 1 January 2020, will replace the three existing FIE regulations and Article 42 thereof provides the existing FIEs may retain the current “organizational forms” within the five-year transition period, the meaning of “organizational form” has been ambiguous to some extent. Majority of the FIEs, mainly WFOEs and JVs, have taken the organizational form of limited liability company (Ltd.) in accordance with the PRC Company Law and that will remain unchanged for sure. If the “organizational forms” refer to the widely recognized three main types of FIEs, i.e. WFOE, EJV and CJV, that does not make sense as the WFOE and JV categorization is logic and useful and will continue to be referred in the foreseeable future from a practical point of view. That is also why this Guideline has continuously adopted the WFOE and JV introduction category. It is well believed that most FIEs, mainstream practice, will continue to be 100% subsidiary (WFOE) or JV after 1 January 2020.
- it expands the application of those rules and policies supporting the development of domestic enterprises to also cover FIEs;
- it permits FIEs to participate in bidding for government procurement projects and equally participate in the standardization work;
- it clarifies that FIEs may raise equity or debt financing in China (including pursuing a listing on a Chinese stock exchange and issuing a corporate bond);
- it reaffirms further protection of the intellectual property rights of foreign investors and FIEs.

During the 5-year transition period, detailed regulations and rules will be enacted to guide existing FIEs (WFOE, EJV and CJV) in aligning their legal forms, corporate governance structure to normal domestic Chinese companies with limited liability or partnership, i.e. FIEs are to be governed by the PRC Company Law and the PRC Partnership Law in general.

As a basic law governing the FIE regulatory regime, the new *Foreign Investment Law* is to be supported by numerous implementing rules and regulations as well as practical guidance and authoritative interpretations. It is advisable to keep being updated with the latest developments in practice, enjoy the benefits and protection offered by the new law and maintain proper compliance at the same time.
8. Taxation

The following section contains brief information on the most important taxes applicable to Chinese companies including FIEs. Due to the limited scope of this Guideline, we are unable to provide more detailed information on company taxes in China, but we recommend that FIEs and foreign investors consult professional tax advisors and the guidelines of the EU SME Centre on Corporate Income Tax\(^{25}\), and Turnover Tax System\(^{26}\) for more information.

8.1 Valuable Added Tax (VAT)

China’s turnover tax reform started in 2012, and the reform programme has now been rolled out nationally, with VAT completely replacing the original Business Tax. Service providers are no longer subject to Business Tax; instead, they pay VAT at different rates as applicable.

Under the VAT regime, basically the taxpayers are classified into two categories, i.e. small-scale taxpayer\(^{27}\) and general taxpayer.

- 9% for taxpayer selling or importing listed goods\(^{28}\) (input VAT can be deducted)
- 13% for taxpayers selling or importing non-listed goods, or processing and repairing services (input VAT can be deducted)
- 6% for taxpayers rendering services and transferring intangible assets, unless otherwise stipulated by the law (input VAT can be deducted)
- 0% for taxpayers engaged in the export of goods and selling services and intangible assets cross-border within the scope stipulated by the State Council
- 3% for small-scale taxpayers (input VAT cannot be deducted)

In addition to the above VAT rates, there is still a VAT rate of 5%. This not only applies to small-scale taxpayers but also general taxpayers paying tax on certain basic transactions such as house renting to individuals, selling houses, etc.\(^{29}\)

8.2 Corporate Income Tax (CIT) a.k.a. Enterprise Income Tax (EIT)

- 25% for general taxpayers
- 20% for qualified small profit enterprises
- 20% for non-resident enterprises which have no office or premises in China (withholding CIT if applicable), and in practice 10% is normally applied
- 15% for hi-tech enterprises encouraged by the State policies

\(^{25}\) http://www.eusmecentre.org.cn/guideline/china-enterprise-income-tax

\(^{26}\) http://www.eusmecentre.org.cn/guideline/understanding-chinas-turnover-tax-system

\(^{27}\) “Small scale” refers to business entity with turnover under certain stipulated amount.

\(^{28}\) Listed goods include (a) grain and edible vegetable oil; (b) tap water, heating, air-conditioning, water heating, coal gas, liquefied petroleum gas, natural gas, methane and coal products for domestic use; (c) books, newspapers and magazines; (d) fodder, fertilisers, pesticides, agricultural machinery and agricultural films; (d) any other goods stipulated by the State Council.

\(^{29}\) http://www.chinatax.gov.cn/n810341/n2340339/c3467024/content.html
9. Relevant Authorities

The PRC governmental authorities most concerned with foreign investment activities are:

- The State Administration for Market Regulation (“SAMR”) and its local counterparts
- The Ministry of Commerce (“MOFCOM”) and its local counterparts
- The National Development and Reform Commission (“NDRC”) and its local counterparts
- State Administration of Foreign Exchange (“SAFE”) and its local counterparts
- State Administration of Taxation (“SAT”) and the local tax bureaus
- General Administration of Customs (“GAC”) and its local counterparts
10. Relevant Laws and Regulations

The main pieces of legislation include:

- Implementing Regulations for the WFOE Law (2014) (WFOE Regulations)
- Implementing Regulations for the EJV Law (2014) (EJV Regulations)
- Implementing Regulations for the CJV Law (2017) (CJV Regulations)
- Administrative Regulations on the Registration of Permanent Representative Organizations of Foreign Enterprises (2013) (RO Regulations)
- Catalogue of Industries for Guiding Foreign Investment (2017)
- Special Administrative Measures (Negative List) for Foreign Investment Access (2018)
- Special Administrative Measures (Negative List) for Foreign Investment Access in Pilot Free Trade Zones (2018)
- Provisional Measures on Administration of Filing for Establishment and Change of Foreign Investment Enterprises (2018)
- Negative List for Market Access (2018)
- Catalogue of Investment Projects Subject to Government Review and Approval (2016)
- Administrative Measures on Approval and Filing of Foreign Investment Projects and its amendment issued by the NDRC (2014)
- SAMR’s Notice on the Registration of Foreign Invested Enterprises after the Implementation of the Record-Filing Administration (2016)
- Provisional Rules on the ratio between registered capital and Total Investment of Sino-foreign Equity Joint Venture (1987)
- Foreign Investment Law (2019)
About the EU SME Centre

The EU SME Centre helps EU SMEs get ready for China by providing them with a range of information, advice, training and support services. To find out more, visit: www.eusmecentre.org.cn.

Need more help?

The EU SME Centre provides a range of China Business Solutions, including:

- Tailored China market research
- Company verification
- Customised step-by-step guide to exporting to China
- Importer/distributor search, and others

Read more about China Business Solutions at www.eusmecentre.org.cn/solutions or contact info@eusmecentre.org.cn. To submit your enquiries directly to our experts go to Ask-the-Expert www.eusmecentre.org.cn/expert.

Further reading…

The EU SME Centre has over 100 reports, guidelines and case studies in its Knowledge Centre, the following may be relevant to you:

- Individual Income Tax in China
- Tax Liability for Non-Resident Enterprises Engaging in Service Provision
- China Enterprise Income Tax
- Establishment and Operation of a Representative Office
- Establishment of a Foreign Invested Enterprise in China
- Repatriation and Reinvestment of the Assets of Foreign Invested Enterprise in China

Access the Knowledge Centre here: www.eusmecentre.org.cn/knowledge-centre.

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