

## China

### **Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors (2011)**

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# **Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors**

People's Governments of provinces, autonomous regions and municipalities directly under the Central Government, ministries and commissions of and organizations directly under the State Council :

With the in-depth development of economic globalization and the further expansion of China's opening up in recent years, the investment made by foreign investors through merger and acquisition has been on the gradual increase, which has promoted the diversified utilization of foreign investment in China and played a positive role in optimizing the allocation of resources, promoting technical progress, improving business management level and other aspects. To guide the orderly development of mergers and acquisitions of domestic enterprises by foreign investors and safeguard national security, upon the approval of the State Council, you are hereby notified of the relevant matters on the establishment of a security review system for mergers and acquisitions of domestic enterprises by foreign investors (hereinafter referred to as the "security review of mergers and acquisitions") as follows :

## **I. The scope of security review of mergers and acquisitions**

(I)The scope of security review of mergers and acquisitions is the merger and acquisition by foreign investors of domestic military-industrial and military related enterprises, neighboring enterprises of key and sensitive military facilities and other units concerning national security; and such domestic enterprises as major farm products, energy and resources, infrastructures, transportation services, key technologies and major equipment manufacturing involving in the national security and whose actual control right may be gained by foreign investors.

(II) The mergers and acquisitions of domestic enterprises by foreign investors are the following : 1. Any foreign investor purchases the equities of a domestic non-foreign-invested enterprise or offers to contribute the increase of capital of the domestic non-foreign-invested enterprises to alter it into a foreign-invested enterprise; 2. Any foreign investor purchases the equities of Chinese party of a domestic foreign-invested enterprise or offers to contribute the increase of capital of the domestic foreign-invested enterprise; 3. Any foreign investor establishes foreign-invested enterprises and purchases the assets of a domestic enterprise and handle them according to the agreement signed accordingly, or purchases the equities of a domestic enterprise via the foreign-invested enterprise; and 4. Any foreign investor directly purchases the assets of a domestic enterprise and utilize them to invest and establish a foreign-invested enterprise to operate business.

(III) That any foreign investor gains the actual control right means that the foreign investor becomes the controlling shareholder or actual controller of one domestic enterprise through merger and acquisition, including the following : 1. Total shares held by one foreign investor, its controlling parent company and subsidiary account for more than 50% through merger and acquisition; 2. Shares of several foreign investors total more than 50% through merger and acquisition; 3. The voting power enjoyed by one foreign investor whose shares may account for less than 50% through merger and acquisition has, however, been enough to have a major influence on the decisions of board of shareholders or board of directors; and 4. Other situations that may cause the actual control right to operating decision, finance, personnel and technology of one domestic enterprise to transfer to any foreign investor.

## **II. The content of security review of merger and acquisition**

(I) the effect of merger and acquisition on the national security, including the productive capacity of domestic products for the national defense, domestic service providing capacity and related equipment and facilities;

(II) the effect of merger and acquisition on the national steady economic growth;

(III) the effect of merger and acquisition on the basic social living order; and

(IV) the effect of merger and acquisition on the R&D capacity of key technologies involving the national security.

## **III. The working mechanism of security review of merger and acquisition**

(I) The system of the ministerial joint conference for security review of merger and acquisition of domestic enterprises by foreign investors (hereinafter referred to as the joint conference) shall be established to specifically undertake the security review of merger and acquisition;

(II) The joint conference, together with pertinent departments, conducts security review of merger and acquisition under the leadership of the State Council and led by the National Development and Reform Commission and the Ministry of Commerce in the areas involving mergers and acquisitions by foreign investors; and

(III) The main functions of the joint conference are to analyze the effect of mergers and acquisitions of domestic enterprises by foreign investors on the national security; to study and coordinate with the major problems arising from the security review of mergers and acquisitions of domestic enterprises by foreign investors; and to conduct the security review of necessary mergers and acquisitions of domestic enterprises by foreign investors and make the decision.

#### **IV. The procedures for security review of merger and acquisition**

(I) Any foreign investor shall file an application for the merger and acquisition of one domestic enterprise to the Ministry of Commerce in accordance with the Circular herein. For the merger and acquisition within the scope of security review, the Ministry shall request the joint conference to conduct review within 5 working days;

(II) Where relevant departments of the State Council, the national trade association, the trade enterprise and upper and lower reach enterprises deem that it is necessary to conduct security review of merger and acquisition while any foreign investor handles merger and acquisition of one domestic enterprise, they may entrust the Ministry of Commerce to put forward a proposal of security review of merger and acquisition. Where the joint conference deems that it is necessary to conduct security review of merger and acquisition, it may decide on security review.

(III) The joint conference shall firstly conduct the general review on the merger and acquisition requested by the Ministry of Commerce for security review and then special review on those failing to pass the general review. The party concerning merger and acquisition should cooperate with the joint conference, offer the materials and information for security review and receive related inquiries.

The general review adopts the written request for advice, and the joint conference solicits from relevant departments for advice within 5 working days upon receiving the application of the Ministry of Commerce for security review of merger and acquisition. And relevant departments should raise written opinion within 20 working days upon receiving the letter of written request for advice. Special review shall not be conducted, provided that relevant departments all hold that merger and acquisition doesn't affect the national security, and the joint conference shall be responsible to raise the review opinion within 5 working days upon receiving all written advice and notify the Ministry of Commerce in writing.

If some department deems that merger and acquisition may affect the national security, the joint conference should start the procedures for the special review within 5 working days, after which the joint conference organizes security evaluation of merger and acquisition and conduct review of merger and acquisition by combining the evaluation opinion, and raises the review opinion when the agreement is basically reached; if there is major difference, the joint conference shall be responsible to report to the State Council for decision. The joint conference shall complete the special review within 60 working days as of the date of starting the procedures for the special review, or report the State Council for decision, with the Ministry of Commerce notified of the review opinion in writing.

(IV) The applicant may file an application to the Ministry of Commerce for amendments to the plan for merger and acquisition or cancellation of merger and acquisition in the security review of merger and acquisition.

(V) The applicant shall be informed of opinion on security review of merger and acquisition by the Ministry of Commerce in writing.

(VI) Where the merger and acquisition of one domestic enterprise by any foreign investor has seriously affected or probably affects the national security, the joint conference should request the Ministry of Commerce and relevant departments to terminate the act of the party concerned, or take the measures of transferring related equities, assets or others to eliminate the effect of merger and acquisition on the national security.

## **V. Other provisions**

(I) Relevant departments and units shall adopt an overall point of view and deepen consciousness of responsibilities to keep the national secret and business secret, raise the efficiency, promote the healthy development of merger and acquisition by foreign investors while expanding opening up to the outside world and raising the level of utilizing foreign capital, and practically safeguard the national security.

(II) Where the merger and acquisition of one domestic enterprises by any foreign investor is involved in the newly increased investment in fixed assets, it shall go through the project approval according to the national provisions for the management of investment in fixed assets.

(III) Where the merger and acquisition of one domestic enterprise by any foreign investor is involved in the alteration of state-owned ownership, it shall be subject to relevant provisions for the management of state-owned assets.

(IV) The security review of merger and acquisition of one domestic financial institution by any foreign investor shall be separately regulated.

(V) The merger and acquisition of investors from Hong Kong Special Administrative Region, Macao Special Administrative Region and Taiwan shall refer to the Circular herein.

(VI) The system of security review of merger and acquisition shall be valid after 30 days as of the date when the Circular herein is promulgated.

**General Office of the State Council**

**February 3, 2011**

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