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LexisNexis® Mergers & Acquisitions Law Guide 2018
并购法律指南 2018

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Feature Article
专题

Feature Article: Mechanics of M&A in Indonesia

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A. Regulatory Framework

In general, mergers and acquisitions in Indonesia are governed by the following laws and regulations:

a) Law No. 40 of 2007 regarding Limited Liability Companies ('Company Law') as well as its implementing regulation, i.e. Government Regulation No. 27 of 1998 regarding Mergers, Consolidations, and Acquisitions of Limited Liability Companies ('PP 27');

b) Law No. 25 of 2007 regarding Investment as well as its implementation, i.e. Presidential Regulation No. 44 of 2016 regarding List of Business Fields that are Closed to Investment and Business Fields that are Conditionally Open for Investment, Regulation of Head of Investment Coordinating Board (BKPM) No. 14 of 2015 regarding Guideline and Procedure of Principle License in Investment as most recently amended by Regulation No. 8 of 2016, and Regulation of Head of Investment Coordinating Board (BKPM) No. 15 of 2015 regarding Guideline and Procedure of Investment Licensing and Non-Licensing; these laws and regulations only apply to the merger and acquisition transaction which involves a foreign investment;

c) Law No. 5 of 1999 regarding Prohibition of Monopoly and Unfair Business Competition as well as its implementing regulation, among others: Government Regulation No. 57 of 2010 regarding Merger, Consolidation, and Shares Acquisition which may Cause the Monopoly Practice and Unfair Business Competition, Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha* or KPPU), Regulation No. 11 of 2010 regarding Consultation on Merger or Consolidation of Business Entity and Acquisition of Shares in the Company, and KPPU Regulation No. 13 of 2010 regarding Guidelines on Merger, Consolidation of Business Entity and Acquisition of Shares which may cause Monopoly Practices and Unfair Business Competitions, as most recently amended by the KPPU Regulation No. 2 of 2013;

d) Law No. 8 of 1995 regarding the Capital Market as well as several other regulations issued by the Capital Market and Financial Institution Supervisory Agency (*Badan Pengawas Pasar Modal dan Lembaga Keuangan* or BAPEPAM-LK) which is currently known as the Financial Services Authority (*Otoritas Jasa Keuangan* or OJK), such as:

   (i) Financial Services Authority (*Otoritas Jasa Keuangan*) Regulation No. 54/POJK.04/2015 on Voluntary Tender Offers;

   (ii) Rule No. IX.G.1 on Mergers and Acquisition of Public Companies or Issuer Companies as an attachment to the Decree of Chairman of BAPEPAM-LK No. Kep-52/PM/1997;

   (iii) Rule No. IX.H.1 on Public Company Acquisition as an attachment to the Decree of the Chairman of BAPEPAM-LK No. Kep-264/BL/2011;

(iv) Rule No. IX.E.2 on Material Transaction and Change of Main Business as an attachment to the Decree of BAPEPAM-LK No. Kep-614/BL/2011;

(v) Financial Services Authority (*Otoritas Jasa Keuangan*) Regulation No. 31/POJK.04/2015 on Disclosure of Material Information or Fact by Issuers or Public Company; and

(vi) Financial Services Authority (*Otoritas Jasa Keuangan*) Regulation No. 29/POJK.04/2015 on Issuers or Public Company exempted from Reporting and Disclosure Requirement.

These laws and regulations will be applied only if either the target or the purchaser is a publicly listed company;

(vii) Related tax regulations, among others: Law No. 7 of 1983 as currently amended by Law No. 36 of 2008 regarding Income Tax Law; Law No. 8 of 1983 as currently amended by Law No. 42 of 2009 regarding Value Added Tax; Law No. 21 of 1997 as currently amended by Law No. 20 of 2000 on the Acquisition Duty of land and/or building and Government Regulation No. 34 of 2016 on Income Tax of transfer of land and building and conditional agreement and its amendment; and

(viii) Any other specific regulations depending on the nature of business of the target or the purchaser (as applicable), such as banking sector, forestry, mining.

B. Mechanics of Mergers and Acquisitions

Mergers

Company Law and PP 27 define a merger as a legal act which is conducted by one company or more to merge itself into another company which has existed previously and the merging company will then be dissolved.

Since there will be a transfer of assets and liabilities of the merging company into the merged company, the tax aspect of a merger transaction will relate to the following:

(a) Transfer Tax

Transfer tax will be in the form of:

(i) VAT (in the event that one of the parties of the merger is not a registered taxable entrepreneur); and/or

(ii) fees for acquisition of land and building (*bea perolehan hak atas tanah dan bangunan* or BPHTB) if the transfer relates to property/land. At the request of the taxpayer, the Director General of Taxation may grant a BPHTB reduction of up to 50% for land and building rights transfers in business mergers or consolidations at book value;

(b) Income tax as a result of capital gain by the transfer of assets and liabilities of the merging company to the merged company.

Transfers of assets in business mergers must generally be conducted at market value. Gains resulting from this type of restructuring are assessable, while losses are generally claimable as a deduction from income. However, a tax-neutral merger, under which assets are transferred at book value, can be conducted subject to the approval of the Director General of Taxation, in which the merger plan must pass a business purpose test by the Director General of Taxation. As for a tax-driven arrangement, it is prohibited and therefore tax losses from the combining companies may not be passed on to the surviving company.

Acquisitions

In Indonesia, there are two types of acquisitions: shares acquisitions and asset acquisitions. For the purpose of this article, we will only elaborate further on shares acquisitions. Company Law defines a shares acquisition as a legal act conducted by a legal entity or individuals to acquire either all or most of the shares in a

company which may result in a change of control of such company.

A shares acquisition can be achieved by means of:

(a) Transfer of majority shares in the target company to the purchaser

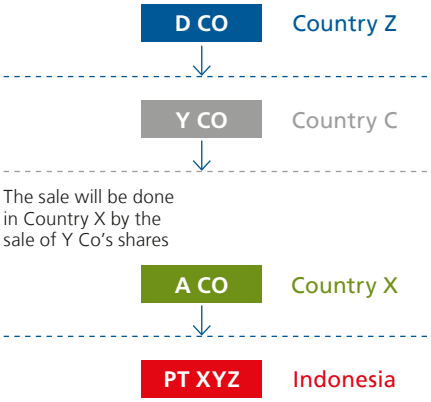
If the acquisition is achieved by a transfer of shares, the seller will have an obligation to pay taxes in relation to the capital gain achieved for such transfer of shares under the following conditions:

(i) if the seller is an Indonesian tax subject, the obligation to pay tax on the capital gains is the seller's obligation. There is no obligation on the part of the buyer to withhold any amount from the sale price;

(ii) if the seller is not an Indonesian tax subject, the resident buyer must withhold 20% of the estimated net income (i.e. the capital gain amounting to 25% of the transaction value) to the seller from the sale of the shares, except where the taxation of capital gains is reserved for the treaty partner by an applicable tax treaty. To obtain the benefit of the applicable tax treaty, the seller must comply with the certification, eligibility, information and reporting requirements in force in Indonesia. Currently, the seller would need to provide a certificate of tax domicile issued by competent tax authority (the Internal Revenue Services) to the purchaser and the company;

(iii) if the target is a publicly listed company, the obligation to pay tax on the capital gains as a result of the transfer of shares will be subject to final income tax at the rate of 0.1% of the gross amount of the transaction, provided that the share being sold is not a founder share. If it is a founder share, then the tax will be added by 0.5% of the nominal value of the shares in the company by the closing of the stock exchange at the end of 1996 or the nominal value of the shares in the initial public offering if the shares of the company are listed on the stock exchange after 1 January 1997.

In relation to this tax obligation, if the seller is a multinational company, they usually prefer to complete the deal outside of Indonesia, in a country which has a favourable tax regime for them, e.g. they usually own the shares in an Indonesian company through their subsidiary in country X ('A Co') which has a favourable tax regulation to them. Once they decide to exit from the Indonesian company, they will do the transaction through A Co so that the sale will be conducted in country X for the purpose of having a lower tax rate rather than doing the transaction in Indonesia.



However, if Country X is a tax haven country, the disposal of shares of A Co in Country X might be subject to tax pursuant to Regulation of Minister of Finance No. 258/PMK.03/2008 regarding Withholding of Income Tax of Article 26 for the Income of Sale or Transfer of Shares as intended under Article 18 Paragraph (3c) of Income Tax Law Which is Obtained by Non-Resident Taxpayer ('PMK 258'). Pursuant to PMK 258, the transfer of shares of a company which was established in a tax haven country and has a special relationship with Indonesian company or permanent establishment in

Indonesia is subject to 20% of the estimation of the net amount. The estimation of the net amount will be calculated as 25% from the sale price. However, if the country origin of the seller has a tax treaty agreement with Indonesia, the withholding of the income tax for the gains will only be conducted once the treaty provides that Indonesia has the right of taxation for this type of transaction. We believe that there is no special rule dealing with the disposal of stock in real property, energy, and natural resources companies.

Under Bank Indonesia Regulation No. 17/3/PBI/2015 on Mandatory Use of Rupiah in the Territory of Indonesia ('BI Regulation'), Bank Indonesia requires every business actor to set a price of a good and/or service in Rupiah. In addition to BI Regulation, Bank Indonesia has issued a circular letter No. 17/11/DKSP as the implementing regulation of the BI Regulation on 1 June 2015 ('Circular Letter'). Article 2.A of the Circular Letter clearly mentions that every business actor in Indonesia must set the price of a good and/or service only in Rupiah and is prohibited from setting the price in any other currency (dwual quotation); or

(b) Issuance of new shares in the target company to be subscribed by the new shareholder which dilutes the share proportion of the previous shareholder in the target company.

If the acquisition is achieved by subscription of new shares in the company, the subscription of these new shares will not be subject to tax.

Nevertheless, if such subscription of new shares is based on the conversion of an existing loan (i.e. shareholder loan, advance payment and/or convertible bond), such conversion shall be subject to be taxed (if the amount of advances (shareholder loan) is lower than the value of shares, the difference may be deemed as deemed interest given to the lender, which will be subject to income tax). Further, Government Regulation No. 15 of 1999 stipulates that the conversion of a certain form of claim into shares must be announced in two newspapers.

In the event the conversion of the existing loan comes from offshore, the Regulation of Bank Indonesia (Peraturan Bank Indonesia) No. 16/22/PBI/2014 concerning Reporting of Foreign Exchange Flow Activity and Reporting of the Application of Prudential Principles in Management of Offshore Loan of Non-Bank Corporations ('PBI No. 16/22/PBI/2014') states that an Indonesian company (and individual, as relevant) conducting foreign exchange activities, inter alia, obtaining an offshore loan, must submit foreign exchange traffic reports ('Foreign Exchange Traffic Report') and the application of prudential principles reports ('Prudential Principles Reports') periodically to Bank Indonesia in accordance with the provisions and procedures set forth in PBI No. 16/22/PBI/2014 and subsequent implementing regulations prevailing from time to time.

The Foreign Exchange Traffic Report consists of reports on:

(i) the execution of the loan agreement, the realisation and repayment of the loan thereunder including all payments of interest under the loan agreement;

(ii) foreign exchange activities other than offshore loan conducted by an Indonesian company (which includes a guarantee granted by an Indonesian party in favour of an offshore party); and

(iii) an offshore loan plan. An Indonesian company proposing to obtain an offshore loan must submit certain reports which include information and supporting data on the offshore loan plan for one year (and any amendment to it) e.g. nominal amount of the offshore loan, type of the offshore loan, and the relationship with the creditor.

The Prudential Principles Reports consist of:

(i) the application of prudential principles report;

(ii) the application of prudential principles report which has passed attestation procedure;

(iii) information on the satisfaction of credit rating requirement; and

(iv) financial statements.

Other than the above, the utilisation of certain types of offshore loan, i.e. (i) loans related to project development whose financing is in the nature of '*nonrecourse*', '*limited-recourse*', '*advanced payment*', '*trustee borrowing*', '*leasing*' and so forth; (ii) loans related to project development whose financing is based on 'BOT', 'B&T' and so forth, shall be coordinated under the Team PKLN as required by the Presidential Decree No. 39 of 1991, dated 4 September 1991 concerning Coordination of the Management of Offshore Loan ('Decree No. 39/1991'). Further, article 12 of Decree No. 39/1991 stipulates that the borrower of an offshore loan shall submit a regular report to the PKLN team regarding the performance of the obtained offshore loan.

In addition, article 3 of the Minister of Finance Decree No. KEP-261/MK/IV/5/1973 concerning Rules on the implementation for obtaining offshore loan, as later amended by No. 417/KMK.013/1989 and No. 279/KMK.01/1991 stipulates a regular report regarding offshore loan shall be submitted to the Department of Finance and Bank Indonesia as of the effective date of the loan agreement and subsequently every three months; or

(c) Mandatory Tender Offer for a Publicly Listed Company

If the acquisition transaction occurs in a publicly listed company, it will trigger a mandatory tender offer ('MTO') since there is a change of 'controller' in the publicly listed company. A controller is defined as a party who (i) owns more than 50% of the issued shares in the company; or (ii) has less than 50% of shares but has the means to determine the management and/or policies of the company. However, the change of controller as a result of an issuance of new shares pursuant to a rights issue is exempted from a MTO requirement.

In order to conduct a MTO, the new controller must:

(i) submit a draft announcement of the information disclosure in relation to the MTO along with its supporting documents to the OJK and the target company within two business days after the takeover announcement;

(ii) submit any changes and/or additional information on the draft announcement and its supportive documents within five business days after receipt of the request to change the draft from the OJK (if any);

(iii) announce the information disclosure in at least one Indonesian daily newspaper having national circulation within two business days after receipt of the letter from the OJK stating that the new controller may announce the disclosure of information on the MTO (the new controller must also submit evidence of the announcement in a daily newspaper as mentioned above to the OJK within two business days after the date of the announcement). The announcement of information disclosure in respect of the MTO must include:

- the background of the takeover;
- details of the estimated number and percentage of shares to be purchased;
- details of the number and percentage of shares of the target company that have been acquired, including call option, any rights to receive dividend or any benefit as well as proxy in voting rights in the target company;
- details of the new controller, including name, address, nationality and affiliation relationship with the target company, if any (for individual) or the establishment, capital structure, board of directors and commissioners, shareholding composition, beneficial

owner and affiliation relationship with the target company, if any (for non-individual);

- details of the target company, including name, address, and line of business;
- terms and conditions of the MTO i.e. purchase price and calculation method, MTO period, terms payment, purchase mechanism, and explanation on any governmental approvals that must be obtained in relation to the MTO, if any;
- names and addresses of the capital market supporting institutions or professionals involved in the MTO; and
- any other important information i.e. details of any lawsuit in relation to the takeover and additional information that is required so that the disclosure is not misleading;

(iv) conduct the MTO within a 30-day period as of the day following the date of the announcement of the information disclosure as stated in (iii) above;

(v) make a MTO settlement, with money transfer, at least no later than 12 business days after the end of the MTO period; and

(vi) submit a report on the MTO's result to the OJK within five business days after the end of the MTO settlement. The settlement of the MTO transaction must be made with money settlement as mentioned in (v) above. It cannot be exchanged with a securities settlement.

The price of a MTO transaction is regulated as follows by the regulations regarding the MTO:

(i) in the event the acquisition is directly exercised over shares of a publicly listed company listed and traded at the stock exchange, the lowest MTO price must be at least:

- the average of the highest price of the daily trading at the stock exchange during the last 90 days before the acquisition announcement or the negotiation announcement; or
- the exercise price of the acquisition, whichever is higher;

(ii) in the event the acquisition concerns shares of a publicly listed company listed and traded at the stock exchange, however during the period of 90 days or more before the acquisition announcement or before the negotiation announcement, the said shares were not traded on the stock exchange or its trade was temporarily suspended by the stock exchange, the MTO price must be at least:

- the average of the highest price of the daily trading at the stock exchange during the last 12 months, counted backwards from the last trading day or the day it was temporarily suspended; or
- the exercise price of the acquisition, whichever is higher;

(iii) in the event the acquisition concerns shares of either a publicly listed company or an equity issuer whose shares are unlisted, the MTO price must be at least:

- the exercise price of the acquisition; or
- the fair price determined by the appraiser, whichever is higher;

(iv) in the event the acquisition indirectly concerns shares of a publicly listed company listed and traded at the stock exchange, the MTO price must be at least equal to the average of the highest price of daily trading at the stock exchange during the last 90 days before the acquisition announcement or negotiation announcement;

(v) in the event the acquisition is indirectly exercised over shares of a publicly listed company listed and traded at the stock exchange, but during the last 90 days or more before the acquisition announcement or before the negotiation announcement, was not traded at the stock exchange or its

trade was temporarily suspended by the stock exchange, the MTO price must be at least the average of the highest price of daily trading at the stock exchange during the last 12 months counted backwards from the last trading day or the day the trade was temporarily suspended; and

(vi) in the event the acquisition is indirectly exercised over shares of either a publicly listed company or an equity issuer whose shares are unlisted and not traded on the stock exchange, the MTO price must be at least equal to the fair price as determined by the appraiser.

The period for price determination, as mentioned in (i) and (iv) above, will follow the exercise period of the MTO in the event the exercise of the MTO exceeds the deadline of 180 days as of the negotiation announcement (provided that this MTO price calculation is higher than the MTO price under (i) and (iv) above).

Following the takeover, if a new controller owns more than 80% of paid-up shares of a target company after exercising the MTO, the new controller must transfer a portion of the shares to the public, so that there will be at least 20% shares of the target company owned by at least 300 persons within two years as of completion of the MTO.

In the event the Takeover results in ownership of more than 80% of paid-up shares of the target company, a MTO must still be carried out to give the public shareholders the chance to benefit from the offer price determined under Rule IX.H.1, even though the new controller will later have to divest at least the same percentage of shares it has acquired in the MTO to at least 300 persons within two years.

The above obligations will not apply if the target company undertakes a corporate action (such as a rights issue) which dilutes the new controller's shareholding and results in compliance with the minimum free float requirement as explained above.

If change of control in a publicly listed company results from an issuance of new shares by virtue of the rights issue of a pre-emptive right (which is defined as a right attached to a share enabling the shareholders to purchase new securities, including shares, securities convertible into shares and warrants, before they are offered to other parties), under the Financial Services Authority (*Otoritas Jasa Keuangan*) Regulation No. 29/POJK.04/2015, the requirements to make a MTO are waived.

Prior to making a rights issue, the listed companies (the "**Listco**") must submit a registration statement relating to the rights issue to the OJK at least 28 days before the extraordinary general meeting of shareholders ('Registration Statement'). Under current Indonesian regulations, Listco may not proceed with a rights issue until the Registration Statement (filed with the OJK) becomes effective. Unless stipulated otherwise by the OJK, the Registration Statement will become effective only after the shareholders approve the rights issue at an extraordinary general meeting of shareholders. In practice, the OJK will review and give comments on the Registration Statement document within 28 days.

Before making a rights issue, if a public company seeks to raise a specific amount, Listco must obtain a guarantee from a party, the Standby Purchaser, which agrees to purchase any remaining excess rights shares ('Remaining Excess Rights') at a price which is at least equal to the exercise price. There are no restrictions on the identity of such a party. Any party may act as the Standby Purchaser, including the principal shareholder of Listco.

If, after the excess rights application by the shareholders, there are still Remaining Excess Rights, the Standby Purchaser will be responsible to purchase the Remaining Excess Rights at the exercise price and must pay for the Remaining Excess Rights within two working days after the end of the trading period.

Timeline

The timeline for mergers and acquisitions depends on the complexity of the transaction. For a normal transaction, the process should be completed within two to four months. However, for a complex transaction or a transaction which involves a publicly listed company, the process could take longer.

Employees

Pursuant to article 127 of Company Law, a company must announce to its employees any plan of change of ownership at the latest by 30 days prior to the call of a general meeting of shareholders for the agenda of change of ownership in the company. In general, the employees do not have a direct say in a merger or an acquisition. However, if the merger and/or acquisition results in a change of control in the company, the employees will be entitled to request for a termination and receive severance payment from the company. Pursuant to Law No. 13 of 2003 regarding Manpower ('Labour Law'), once the employees decide to terminate their employment with the company, the company will be required to pay the severance package to the employee, which amounts are regulated under the Labour Law or the company's regulation or the Collective Labour Agreement. The components of the severance package are severance payment, service appreciation payment and compensation payment.

Documentation

In general, the following documents are required to be prepared for a merger and acquisition transaction:

a) announcement of the summary of the merger/acquisition plan to the public through at least one newspaper having nationwide circulation;

b) announcement to the employees in writing;

c) resolution of general meeting of shareholders or circular resolution of shareholders of the company approving the merger/acquisition plan;

d) BKPM's approval on the merger/acquisition plan (applicable only if it involves foreign investment);

e) Notarial deed of acquisition or deed of merger in Indonesian language;

f) approval or receipt of notification in relation to the merger/acquisition from the Ministry of Law and Human Rights;

g) announcement of the result of merger/acquisition in at least one newspaper having nationwide circulation;

h) updated shareholders' register of the company as a result of the merger/acquisition;

i) new share certificates of the shareholders of the company as a result of the merger/acquisition;

j) updated company registration number.

If the transaction involves a merger or an acquisition through an issuance of new shares, a merger/acquisition plan will be required in addition to the abovementioned documents. A merger/acquisition plan should consist of the following information, among others:

a) name and domicile of the merging/acquiring and surviving/acquired entities;

b) the reason behind the merger/acquisition transaction;

c) the method of assessment and conversion of shares of the merging company into the shares of the surviving company;

d) the amount of shares to be acquired (for acquisition transactions only);

e) the readiness of the funding (for acquisition transactions only);

f) draft amendment of the articles of association of the company after the merger/acquisition (if any);

g) financial statement of the merging company (for merger transactions only);

h) further plan or ceasing of business activities of the merging company (for merger transactions only);

i) pro-forma balance sheet of the surviving company/the acquiring company;

j) the manner of settlement on the status, rights, and obligations of the members of the board of directors, board of commissioners, and employees of the merging/acquired company;

k) the manner of settlement on the rights and obligations of the merging company against the third party (for merger transactions only);

l) the manner of settlement on the rights of the shareholders who do not approve the merger/acquisition of the company;

m) the names of the members of the board of directors and board of commissioners of the surviving company as well as their honorariums, salaries and allowances for merger transactions only);

n) the estimated period of entering into a merger/acquisition;

o) the report on the situation, development and result that have been attained of the merging company (for merger transactions only);

p) the main activities of the merging company and the alteration occurred during the current accounting year (for merger transactions only);

q) the detailed issues arising during the accounting year that affect the activities of the merging company (for merger transactions only).

C. Anti-trust Review

Notification to the KPPU of a merger or acquisition transaction is mandatory only when the transaction is not conducted between affiliated companies and the value of assets or the value of sales of the companies involved in the transactions exceeds a certain amount, i.e. (a) if the combined national assets of the parties to the transaction exceed IDR 2.5 trillion (approximately USD 188 million); and/or (b) if the combined national turnover (revenue) of the parties to the transaction exceeds IDR 5 trillion (approximately USD 376 million); and/or (c) if the combined national assets exceed IDR 20 trillion (approximately USD 1.5 billion) once the parties are banking institutions. Combined national assets or national turnover means the total amount of assets and turnover of the parties to the transaction and their parent/subsidiaries in Indonesia. In the event that the abovementioned thresholds are met, then the merger/acquisition transaction must be reported to the KPPU within 30 days of its effective date. Failing to comply with this requirement may result in a sanction in the amount of IDR 1 billion (approximately USD 76 thousand) per day of delay, provided that the maximum administrative sanction that can be imposed due to the delay will not exceed IDR 25 billion (approximately USD 1.88 million). In practice, in 2016, the KPPU imposed fines to a company which failed to submit the notification on time, the total of which was around IDR 8billion for a total of 20 business days delay, or approximately IDR 400 million per business day.

Nevertheless, recently, the KPPU has been taking a stricter approach to business actors' compliance with the notification requirement in respect of their merger, consolidation and share acquisition. The mandatory notification to the KPPU is in place only if the value of the merger, consolidation and share acquisition exceeds the threshold limit as stipulated by the prevailing regulation. The stricter approach is apparent from the KPPU's current uncompromising attitude in imposing fines on companies which are tardy in their compliance with the notification requirement.

The KPPU also provides a chance for business entities conducting mergers/acquisitions to have a pre-consultation with the KPPU in the event that the transaction might be complex, so that

they will have time to evaluate the transaction and provide remedies to the KPPU if the KPPU believes that the merger/acquisition transaction may potentially result in monopoly or unfair business competition.

The KPPU regulations state that once the KPPU has confirmed the submission is complete, it will conduct an initial review, which should be completed within 30 business days as of the confirmation date. If the KPPU concludes that the proposed transaction does not result in a monopoly and/or unfair business competition, it should announce its opinion by the end of the 30-day period. However, if based on its initial review the KPPU finds that (a) the HHI index after the proposed transaction is above 1800 with the delta above 150; (b) the parties concerned or their affiliates have a dominant position, the KPPU will conduct a subsequent review, which should be finalised within 60 business days after completion of the initial review. However, the prevailing legislation is silent on the maximum duration to review the completeness of the submission. Based on our experience, the duration usually depends on the complexity of the overlapping business of the parties concerned, so there is no exact timeline for the KPPU to confirm that the submission is complete.

D. Tax Protection in a Merger/Acquisition Transaction

In the agreement for a merger or acquisition, the parties to the agreement usually put a representations and warranties clause where the seller or the target provides certain representations and warranties to the purchaser in relation to the condition of the stock and/or business asset, such as (a) the seller or the target company has paid all of its tax obligations to the government as of the execution date of the agreement and will provide the purchaser with a list of outstanding tax obligations that may be incurred in the future until the closing date from time to time, (b) in the event that after the closing date, the result of the tax correction made by the authorized agency appears to be beyond the reasonable tax propriety, the seller/the target agrees and binds itself to bear all of the payments in connection to such tax correction provided that such tax correction has resulted from the transaction done by the target company prior to the closing date, (c) the seller/the target company has made all returns, given all notices and submitted all computations, accounts or other information required to be made, given or submitted to any tax authority in accordance with the laws, and all such returns and other documentation were and are true, complete and accurate, (d) the seller/the target company has not carried out, been party to, or otherwise involved in any transaction where the sole or main purpose or one of the main purposes was the unlawful avoidance of tax or unlawfully obtaining of a tax advantage. In addition, the purchaser could also add a tax covenant from the seller to the purchaser as a schedule to the agreement.

Aside from the representations and warranties clause itself, an indemnity or a payment for misrepresentation or incorrect warranties is usually provided for under the agreement. The parties to the agreement can set aside a certain amount of money as a remedy of such misrepresentations or incorrect warranties.

Nevertheless, if the tax issues in the target company are too complicated and too costly to be remedied, the purchaser usually decides not to acquire the shares in the target company but acquire its business instead. In this case, the purchaser usually sets up a new company or acquires a new company with a good record which will further acquire the business of the target company.

E. Recent Developments

The Minister of Finance recently issued a new regulation concerning the utilisation of book value for the transfer and acquisition of assets in the framework of merger, amalgamation,

division, or acquisition of business through the issuance of Minister of Finance Regulation Number 52/PMK.010/2017 (the '**PMK 52**') which revokes the previous regulation (Minister of Finance Regulation No. 43/PMK.03/2008). Comparing to the previous regulation, PMK 52 has a new addition relating to the possibility of using book value for the acquisition of business. Nevertheless, it is only limited for the acquisition of business in the form of a merger between a tax subject who is a permanent establishment running a banking business with a limited liability company in Indonesia where the surviving entity is the limited liability company. The PMK 52 also regulates more detail in the criteria and requirement for the application to the Directorate General of Taxation for this use of book value.

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A. 监管框架

总体而言，在印度尼西亚的企业兼并和收购受到以下法律法规的规范：

a) 2007 年关于有限责任公司的第 40 号法律（«公司法»）及其执行法规，即 1998 年关于有限责任公司兼并、合并与收购的第 27 号政府法规（'PP 27'）；

b) 2007 年关于投资的第 25 号法律及其执行法规，即 2016 年关于禁止投资的和有条件地开放投资的业务领域清单的第 44 号总统条例、2015 年投资协调委员会（BKPM）主席关于主要投资许可指南和程序的第 14 号法规（经过 2016 年第 8 号法规最新修订），以及 2015 年投资协调委员会（BKPM）主席关于许可投资及不许可投资指南和程序的第 15 号法规；这些法律法规仅适用于涉及外国投资的兼并与收购交易；

c) 1999 年关于禁止垄断和不公平商业竞争的第 5 号法律及其执行规范，除此之外还有：2010 年关于可能会引起垄断行为、不公平商业竞争的兼并、合并和股份收购的第 57 号政府法规、商业竞争监督委员会（*Komisi Pengawas Persaingan Usaha* 或 简称为"KPPU"）2010 年关于商业实体兼并与合并及公司股份收购商讨的第 11 号法规，以及 2010 年 KPPU 关于可能会引起垄断行为、不公平商业竞争的兼并与合并及公司股份收购指南的第 13 号法规（经 2013 年第 2 号 KPPU 法规最新修订）；

d) 1995 年关于资本市场的第 8 号法律以及由资本市场和金融机构监督管理机构（*Badan Pengawas Pasar Modal dan Lembaga Keuangan* 或 BAPEPAM-LK）（现称为金融服务管理局，*Otoritas Jasa Keuangan* 或 简称 OJK）颁布的若干其他法规，例如：

(i) 金融服务管理局（*Otoritas Jasa Keuangan*）关于自愿要约收购的第 54 / POJK.04 / 2015 号法规；

(ii) BAPEPAM- LK 主席法令 No. Kep-52/PM/1997 附件 No. IX.G.1 规定，关于公众公司或发行人公司兼并和收购的第 IX.G.1 号法规，随附于资本市场和金融机构监督管理机构第 Kep-52/PM/1997 号局长令；

(iii) 关于公众公司收购的第 IX.H.1 号规则，随附于资本市场和金融机构监督管理机构第 Kep-264/BL/2011 号局长令；

(iv) 关于重要交易和主营业务变更的第 IX.E.2 号规则，随附于资本市场和金融机构监督管理机构第 Kep-614/BL/2011 号局长令；

(v) 关于发行人或上市公司重大信息或事实披露的第 31/POJK.04/2015 号金融服务管理局（*Otoritas Jasa Keuangan*）规则；以及

(vi) 关于发行人或上市公司豁免报告和披露要求的第 29/POJK.04/2015 号金融服务管理局条例。

以上法律法规仅适用于目标对象或购买方是公开上市公司之情况；

(vii) 相关税收规定，其中包括：1983 年关于所得税法的第 7 号法律（目前经 2008 年第 36 号法律最新修订）；1983 年关于增值税的第 8 号法律（目前经 2009 年第 42 号法律最新修订）；1997 年关于土地和 / 或建筑收购费

的第 21 号法律（目前经过 2000 年第 20 号法律最新修订）和 2016 年关于土地和建筑转让所得税的第 34 号政府法规、附条件协定及其修正案；以及

(viii) 任何其他特定法规取决于目标公司或购买方（视情况而定）的业务性质，如银行业、林业、矿业等。

B. 兼并和收购方式

兼并

《公司法》和 PP 27 将兼并定义为：一个或多个公司将其自身并入另一家此前存在的公司的合法行为，且此后兼并公司解散。

由于资产和负债将从被合并公司转移到兼并后的公司，兼并交易所涉及的税务事宜将按下列规定执行：

(a) 转让税

转让税的形式为：

(i) 增值税（合并当事方中，一方为非注册的应纳税企业）；和 / 或

(ii) 土地和建筑收购费（*bea perolehan hak atas tanah dan bangunan* 或 BPHTB）（如果转让涉及财产 / 土地）。应纳税人请求，税务局长可能会就商业兼并或合并中土地和建筑权利转让按照账面价值给予高达 50% 的土地和建筑收购费减免；

(b) 因兼并公司的资产和债务转入兼并后的公司产生的资本收益而计征的所得税。

通常情况下，商业兼并中的资产转让应以账面价值为准。此类重组活动产生的收益可征税，产生的损失通常情况下也可进行索偿，从收入中扣除。然而，按照账面价值转让资产的中性税收兼并活动，可以根据税务局局长的批准进行，在前述审批中兼并计划必须通过税务局局长的商业目的测试。禁止达成税收驱动的安排，进而兼并公司所产生的税务损失不得转移至续存公司。

收购

在印度尼西亚，有两种收购方式：股权收购和资产收购。就本条而言，我们将仅就股权收购进行详细阐述。根据《公司法》，股权收购是一个法人或个人收购一家公司全部或者大部分股权，并且可能导致该公司控制权变更的合法行为。

通过以下方式可以达成股权收购：

(a) 将目标公司大部分股权转让至购买方

如果通过股权转移达成收购，那么根据下列情况，出售方将有义务支付该等股份转让产生的资本利得所应缴纳的税务：

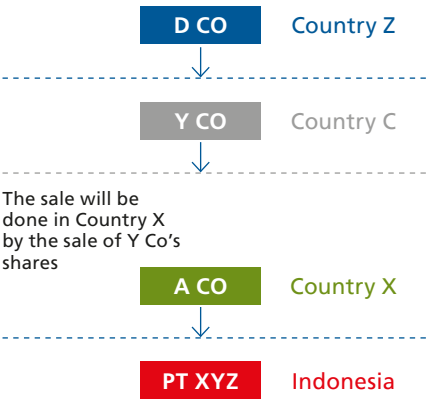
(i) 如果出售方是印度尼西亚的纳税主体，那么出售方有义务支付资本利得税。购买方没有义务从售价扣除任何数额；

(ii) 如果出售方不是印度尼西亚的纳税主体，那么作为纳税居民的购买方必须就该等股权出售向出售方预缴预计净收入的 20%（意即资本利得达到交易价值的 25%），除非资本利得税的税收权通过可适用的税务条约保留给了条约相对方。为了获得可适用的税收条约所规定的利益，出售方必须符合在印度尼西亚有现行有效的认证、资质、信息和报告要求。目前，出售方将需要向购买方和该公司提供税务主管部门（国家税务局）颁发的税务注册地证明。

(iii) 如果目标对象是上市公司，股权转让所导致的资本利得税纳税义务将根据最终所得税计算，假如被出售的该等股权并非创始人的股权，最终所得税等于交易总价的 0.1%。假如前述股权系创始人股权，则税费将在 1996 年年末股票交易所闭市时或者首次公开募股时（如果公司股权在 1997 年 1 月 1 日以后上市）的股票名义价值的基础上上浮 0.5%。

就纳税义务而言，如果出售方是跨国公司，其通常倾向于在印度尼西亚以外的、税制对其有利的国家完成交易，例如，通常它们通过在 X 国的子公司（“A 公司”）持有一家印尼公司的股权，而 X 国的税务法规对它们有利。一旦它们决定退出印尼公司，它们将通过 A 公司进行交易，因此交易在

X 国实施，以达成比在印尼进行交易税率更低的目的。



然而，如果 X 国是个避税国家，根据财政部部长关于非居民纳税人根据《所得税法》第 18 条第 (3c) 段出售或转让股权获得收入而扣缴第 26 条所规定的所得税的第 258/PMK.03/2008 号法规（'PMK 258'），在 X 国对 A 公司股份进行处置可能缴税。依据 PMK 258，在避税国家成立的、并且与印尼公司有特殊关系或在印尼有常驻机构的公司转移股权，需缴纳净额估值 20% 的税额。净额估值按销售价格的 25% 计算。然而，如果出售方本国与印尼有税务协定，那么只有在协定规定印尼有权就此类交易收税时，才会由公司就该等收入缴纳所得税。我们确信没有针对房地产、能源、自然资源公司的股份处置的特殊规定。

根据印度尼西亚银行有关"在印度尼西亚境内强制使用印尼盾"（'BI 法规'）的第 No. 17/3/PBI/2015 号法规，印度尼西亚银行要求所有商业参与者以印尼盾为单位为商品和 / 服务设定价格。除了 BI 法规外，印度尼西亚银行 2015 年 6 月 1 日发行第 17/11/DKSP 号通函（'通函'）作为 BI 法规的实施规则。通函第 2.A 条明确规定，所有商业参与者在印度尼西亚境内只能以印尼盾为单位为商品和 / 服务设定价格，禁止以任何其它货币定价（双重报价）；或

(b) 目标公司发行的供新股东认购的新股，该等股份稀释了目标公司旧股东的持股比例

如果通过认购公司新股的方式完成收购，则认购的这些新股不会被征税。

但是，如果对新股的该等认购行为是基于现存贷款（即股东贷款、预付款和 / 或可转换债券）的转换，此类转换行为应被征税（如果预付款（股东贷款）的金额低于股权价值，差价视为给贷方的认定利息且应缴纳所得税。）。1999 年第 15 号政府法规规定，将特定形式的请求权转换为股权必须在两家报纸公开宣布。

在转换海外现存贷款的情形中，印度尼西亚银行 (*Peraturan Bank Indonesia*) 关于外汇流量活动报告和非银行企业海外贷款管理审慎原则适用报告的第 16/22/PBI/2014 号法规（'PBI No. 16/22/PBI/2014'）规定印尼企业（与个人相对应）进行外汇活动，尤其是取得海外贷款，必须根据 PBI No. 16/22/PBI/2014 规定的条款和流程及其后续不时更新的实施规则，定期向印度尼西亚银行提交外汇流量报告（"外汇流量报告"）和审慎原则适用报告（"审慎原则报告"）。

外汇流量报告包括以下报告：

(i) 贷款协议的签署，放贷和还款，包括根据贷款协议对所有应计利息的支付；

(ii) 由一家印尼公司进行的除海外贷款外的外汇活动（包括一家印尼公司为海外公司之利益而出具的保证）；以及

(iii) 海外贷款计划书。提请获得海外贷款的印尼公司必须提交特定报告，包括海外贷款计划一年内的信息和证明数据（及其任何修改版本），例如海外贷款面额，海外贷款的类型以及与债权人的关系。

审慎原则报告包括：

(i) 审慎原则适用报告；

(ii) 通过认证流程的审慎原则适用报告；

(iii) 满足信用等级要求的相关信息；以及

(iv) 财务报表。

除以上外，特定种类海外贷款的使用，例如：(i) 有关项目开发的贷款，其融资的本质为"无追索权"、"有限追索权"、"预付款"、"信托借款"、"租赁"等；(ii) 基于"BOT"、"B&T"融资有关项目开发的贷款等，应根据 1991

年 9 月 4 日发布的 1991 年关于协调海外贷款管理的第 39 号总统法令（简称“39/1991 法令”）的要求接受海外商业贷款团队协调。39/1991 法令第 12 条规定，海外贷款的借方应当向海外商业贷款团队定期提交有关所获得的海外贷款的使用情况报告。

此外，财政部部长关于获取海外贷款实施规则的第 KEP-261/MK/IV/5/1973 号法规第 3 条（后经第 417/KMK.013/1989 和第 279/KMK.01/1991 号法规修订）规定，必须向财政部和印度尼西亚银行定期提交有关海外贷款的报告，在贷款协议生效日及其后每三个月提交；或

(c) 针对上市公司的强制要约收购

如果一家上市公司发生收购交易，由于上市公司出现“控制人”更改的情形，因此将引发强制要约收购（“MTO”）。控制人的定义是，(i) 持有公司发行的股份超过 50%；或 (ii) 持有公司发行的股份少于 50%，但拥有决定公司经营和 / 或政策的手段的一方。但是，基于配股而发行新股进而导致控制人变更的，可以免除 MTO 要求。

为了进行 MTO，新的控制人必须：

(i) 在接管公布后两个营业日之内向 OJK 和目标公司提交一份关于 MTO 的信息披露公告草案及其证明文件；

(ii) 在收到 OJK 更改草案的要求后五个营业日之内提交公告草案和证明文件的任何变更和 / 或额外信息（若有）；

(iii) 在收到 OJK 说明新控制人需要宣布 MTO 信息披露事项的信件后，两个营业日内在至少一家全国发行的印度尼西亚日报上公布信息披露（新控制人必须同时在两个工作日内向 OJK 提交在前述日报公开宣布的证据）。宣布有关 MTO 的信息披露事项必须包括：

- 接管的背景；
- 预计购买股权数额和百分比的详细信息；
- 目标公司已购股票数额和百分比的详细信息，包括看涨期权、任何获得股利的权利或任何利益以及目标公司表决权的代理权；
- 新控制人的详细信息，包括名称、地址、国籍和与目标公司的所属关系（如有）（就个人而言），或者公司、资本结构、董事会和监事会成员、股权构成、收益所有人、与目标公司的隶属关系（如有）（就非个人而言）；
- 目标公司的详细信息，包括名称、地址和营业范围；
- MTO 的条款和条件，即购买价格和计算方法、MTO 期限、支付条款、购买机制，以及对任何有关 MTO 必须取得的政府批准的解释（如有）；
- 参与 MTO 的资本市场辅助机构或专业人士的名称和地址；以及
- 任何其它重要信息，例如与接管有关的任何诉讼的详细信息，以及防止披露事项被误导的额外信息；

(iv) 在 (iii) 所述的信息披露事项公布日后的 30 天内实施 MTO；

(v) 在 MTO 期限结束后 12 个营业日内进行 MTO 交割处理，包括货币转移；以及

(vi) MTO 交割处理结束后 5 个营业日内向 OJK 提交一份关于 MTO 结果的报告。MTO 交易的交割处理以 (v) 中提及的货币结算方式进行。禁止以有价证券交割来代替。

以下有关 MTO 的法规对 MTO 交易的价格进行了规定：

(i) 如果收购行为直接通过上市公司上市并且在证券交易所交易的股票来执行，最低 MTO 价格不得低于：

- 宣布收购或宣布协商前 90 天内证券交易所每日交易的平均最高价格；或
- 收购的执行价格，取较高者；

(ii) 如果收购涉及上市公司上市并且在证券交易所交易的股票，但是在宣布收购或宣布协商前 90 天，所述股票没有在证

券交易所交易或其交易被证券交易所暂时叫停，则最低 MTO 价格不得低于：

- 前一个交易日或暂时叫停之日前 12 个月内证券交易所每日交易的平均最高价格；或
- 收购的执行价格，取较高者；

(iii) 如果收购涉及的股票所属的公司既非上市公司也非股票未上市的股票发行人，则最低 MTO 价格不得低于：

- 收购的执行价格；或
- 评估人决定的公允价格，取较高者；

(iv) 如果收购间接涉及上市公司上市并且在证券交易所交易的股票，MTO 价格不得低于宣布收购或宣布协商前 90 天内证券交易所每日交易的平均最高价格；

(v) 如果收购系间接通过上市公司上市并且在证券交易所交易的股票执行，但是在宣布收购或宣布协商前 90 天，上述股票没有在证券交易所交易或其交易被证券交易所暂时叫停，MTO 价格不得低于前一个交易日或暂时叫停之日前 12 个月内证券交易所每日交易的平均最高价格；以及

(vi) 如果收购系间接通过上市公司的股份或者股票未上市且未在证券交易所交易的发行人的股份执行，MTO 价格不得低于评估人决定的公允价格。

假如 MTO 的行使时间超过了协商公告中 180 日期限，则此前 (i) 和 (iv) 提到的价格评定期限将根据 MTO 执行期限而定（前提是该 MTO 价格的计算值高于 (i) 和 (iv) 中的 MTO 价格）。

接管后，如果新的控制人在执行 MTO 后持有多于目标公司 80% 的已缴付股票，则新控制人必须将一部分股票向公众转让，因此直到 MTO 完成的两年内目标公司将至少有 20% 的股票由至少 300 人持有。

如果接管导致某方持有多于目标公司 80% 的已缴付股票，则必须继续进行 MTO 使得公众股东有机会从 IX.H.1 规定的售价获利，即使新的控制人在此后两年内必须将其通过 MTO 收购的至少同样比例的股份向至少 300 人转让。

如果目标公司实行了稀释新控制人的股份的法人行为（如权利股发行），并且符合上述最低自由浮动要求，则以上义务不适用。

如果因增发优先股（其定义为使得股东有权优先购买包括股份、可转换为股票和权证的证券在内的新有价证券的附着于股票之上的权利）而发布新行导致一家上市公司控制权变更，根据金融服务管理局 (*Otoritas Jasa Keuangan*) 第 29/POJK.04/2015 号条例，可免于进行 MTO。

增发之前，上市公司（“Listco”）必须在特别股东大会召开的至少 28 天前向 OJK 提交一份有关增发登记声明（“登记声明”）。根据现行印度尼西亚法规，Listco 在登记声明（向 OJK 提交的）生效前不能进行增发。除非 OJK 另行规定，只有当股东在特别股东大会上批准了增发，登记声明才生效。在实践中，OJK 将在 28 日内对登记声明文件进行审查并发表意见。

在增发之前，如果上市公司希望筹集到一定的数额，Listco 必须从一方（即后备购买方）获得担保，该方同意以至少等同于执行价的价格购买任何剩余多余股权（“剩余多余权益”）。对于后备购买方没有身份限制。包括 Listco 主要股东在内的任何一方都可以充当后备购买方。

如果股东申报多余权益后仍然存在剩余多余权益，后备购买方将有义务以合约价格购买剩余多余权益，且必须在交易期限结束后两个工作日内付款。

时间表

兼并和并购的时间表长度取决于交易的复杂程度。通常情况下，整个过程应当在二到四个月间完成。但是，对于复杂的交易或者涉及上市公司的交易，该过程可能更长。

雇员

根据《公司法》第 127 条，公司必须至少在召开全体股东大会商议公司所有权变动议程 30 天以前向其雇员宣布任何有关所有权变动的计划。一般而言，雇员就兼并或收购没有直接的话语权。但是，如果兼并 /

收购结果导致公司控制权变更，雇员有权要求终止并且获得公司向其支付的遣散费。根据 2003 年有关劳动力的第 13 号法律（«劳动法»），一旦雇员决定终止与公司之间的雇佣关系，公司需要支付员工遣散补偿金，补偿金数额根据《劳动法»、公司规章或集体劳动协议而定。遣散补偿金包括遣散费、服务增值金和补偿金。

文件

大体而言，兼并和并购交易需要准备以下文件：

(a) 至少通过一家全国范围发行的报纸公开宣布兼并 / 并购计划概述；

(b) 对员工的书面声明；

(c) 同意兼并 / 收购计划的股东大会决议或公司股东的正式决议；

d) BKPM 对于兼并 / 收购计划的批准（只有在涉及外来投资时适用）；

(e) 印尼语的收购 / 兼并行为公证书；

(f) 法务和人权部有关兼并 / 收购的批准或收到相关通知；

(g) 至少通过一家全国范围发行的报纸公开宣布兼并 / 收购结果；

(h) 更新后的该公司股东名册，以作为兼并 / 收购的成果；

(i) 该公司股东的新股权证书，以作为兼并 / 收购的成果；

(j) 更新后的公司注册号。

如果交易涉及通过发行新股完成兼并或收购，则除以上提到的文件外另需要一份兼并 / 收购计划。兼并 / 收购计划应当包含以下信息：

(a) 兼并 / 收购实体和存续 / 被收购实体的名称和地址；

(b) 兼并 / 收购交易的目的；

(c) 兼并公司股权并入存续公司股权的评估和转换方法；

(d) 拟被收购的股权数额（仅适用于收购交易）；

(e) 出资意愿（仅适用于收购交易）；

(f) 兼并 / 收购后有关公司组织章程的修正草案（如有）；

(g) 被收购公司的财务报表（仅适用于合并交易）；

(h) 被收购公司的未来计划或者终止营业（仅适用于兼并交易）；

(i) 承替公司 / 并购公司形式上的资产负债表；

j) 兼并 / 被收购公司董事会成员、监事会成员和雇员的身份、权利和义务的处理方式；

(k) 合并公司对于第三方权利和义务的交割方式（仅适用于兼并交易）；

(l) 对于不同意公司兼并 / 收购的股东的权益的处理方式；

(m) 存续公司董事会成员和监事会成员姓名及其报酬、薪金和补贴（仅适用于兼并交易）；

(n) 预计进入兼并 / 收购的期限；

(o) 被收购公司已达成的形势、发展和结果的报告（仅适用于兼并交易）；

p) 被收购公司的主要活动和本会计年度发生的变更（仅适用于兼并交易）；

(q) 本会计年度发生的、影响合并公司活动的具体事项（仅适用于兼并交易）。

C. 反垄断法综述

只有当交易在非关联公司之间进行并且交易涉及的资产价值或公司出售价值超过一定数额时，向 KPPU 通知兼并或收购交易才是强制性的，即（a）如果交易各方合并的国家资产（收入）超过 2.5 万亿印尼盾（约合 1.88 亿美元）；和 / 或（b）如果交易各方的兼并全国营业额（收入）超过 5 万亿印尼盾（约合 3.76 亿美元）；和 / 或（c）一旦当事方是银行机构，合并的国家资产超过 20 万亿印尼盾（约合 15 亿美元）。兼并的国家资产或国家营业额是指交易各方及其在印度尼西亚的母公司 / 子公司的总资产和营业额。如果达到上述限额，则必须在合并 / 收购交易生效日后 30 天内向 KPPU 报告。如果不遵守这一要求，会处以罚款，每迟延一天处罚 10 亿印尼盾（约合

76,000 美元），但前提是由迟延而导致的行政处罚最高不得超过 250 亿印尼盾（约 188 万美元）。在实践中，2016 年 KPPU 对未能按时提交通知的公司就共计 20 个营业日的延误处以罚金总额达 80 亿印尼盾，或者每个营业日约 4 亿印尼盾。

然而，KPPU 近期一直在采取更加严格的方式对企业是否兼并、合并和股份收购方面的通知要求进行监管。只有当兼并、合并和股份收购的价值超过现行法规规定的限额时，KPPU 才会强制通知。KPPU 目前对迟延履行通知要求的企业实行罚款，更加严格的监管方式反映出其强硬的态度。

在交易情形复杂的情况下，KPPU 还为进行兼并 / 收购的商业实体提供了向 KPPU 进行预咨询的机会，以便在 KPPU 认为并购交易可能会导致垄断或不公平的商业竞争时，商业实体有时间对该等交易进行评估并向 KPPU 提出补救方案。

KPPU 法规规定，一旦 KPPU 确认提交完成，将进行初步审查，并在确认之日起 30 个营业日内完成。如果 KPPU 认为拟议交易不会造成垄断和 / 或不公平的商业竞争，则应在 30 天期限届满前公布其意见。然而，如果根据初步审查，KPPU 发现：(a) 该交易达成后 HHI 指数高于 1800、增量高于 150; (b) 有关当事方或其附属公司占支配地位，KPPU 将在初步审查完成后 60 个工作日内完成后续审查。然而，现行的立法并没有规定审查呈文完整性的最长期限。根据我们的经验，持续时间通常取决于有关各方重叠业务的复杂性，因此 KPPU 对提交文件完整性的确认没有确切的时限。

D. 兼并／收购交易中的税务保护

在兼并或收购协议中，协议各方在卖方或目标方向买方就股票和 / 或业务资产的状况提供某些陈述和保证时，通常会提出陈述和保证条款，例如因为 (a) 卖方或目标公司在协议签署日前已经向政府缴纳了所有的税收义务，并将向买方提供到截止日前未来可能随时发生的未清偿税务清单，直至完成，(b) 如果在截止日期之后，由被授权机构进行税务调整的结果似乎超出了合理的税收准则，则卖方 / 目标方同意并承担与该等调整相关的全部责任，(c) 卖方 / 目标公司已完成了所有纳税申报，发出所有通告，提交了所有法律要求出具、提交给税务机关的会计核算、账目和其他信息，并且所有这些纳税申报和其他文件都是真实的、完整的、准确的，(d) 卖方 / 目标公司没有履行、参与或以其他方式参与任何以非法避税或非法获得税收利益为单一、主要目的或主要目的之一的行为。此外，购买方还可以将卖方对购买方的税收契约添加到协议的附件。

除了声明和保证条款本身之外，赔偿或者虚假陈述或错误保证所引起的赔偿通常根据协议规定实施。协议各方可以预留一定数额的金钱作为对虚假陈述或错误保证的赔偿。

但是，如果目标公司的税收问题太复杂、成本太高，则购买方通常决定不收购目标公司的股份而收购其业务。在这种情况下，购买方通常会成立一家新公司或者收购一家有良好记录的新公司，以进一步收购目标公司的业务。

E. 最新发展

财政部部长最近发布了一项新的规定，即关于在企业兼并、吞并、分裂或收购的框架中使用账面价值的第 52/PMK.010/2017 号财政部长法规（“PMK 52”），该规定废除了先前的第 43/PMK.03/2008 财政部长法规。与先前的规定相比，PMK 52 新增了有关在企业收购案例中使用账面价值的可能性的内容。不过，这等可能性的发生仅限于一家经营银行业的常驻居民纳税主体与一家印度尼西亚有限责任公司进行兼并且存续实体为该有限责任公司的商业收购。PMK 52 同时就向税务总局申请使用账面价值的标准和要求作出了更多详细规定。

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Jurisdictional Q&As
司法管辖区Q&A

1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Takeovers of unlisted companies with more than 50 members, as well as stock-exchange listed bodies and managed investment schemes, are primarily regulated by statute, being Chapter 6 of the Corporations Act in respect of contractual offers and Part 5.1 of the Corporations Act in respect of acquisitions by scheme of arrangement.

A person proposing to increase their "voting power" from 20% or below to more than 20%, or to increase their "voting power" if it is already more than 20%, in such an entity will generally do so via a contractual takeover or scheme of arrangement, because of a statutory prohibition in Australia that would generally otherwise apply to making that acquisition, or offering to do so.

Takeover bids subject to Chapter 6 of the Corporations Act divide between:

a) Off-market takeovers. A large majority of Australian takeovers are off-market rather than market bids. A bidder's off-market takeover is comprised of an offer to all holders of securities (whether or not listed) in a bid class for all those securities or a specified proportion of them; and

b) Market takeover bids. A market bid comprises the acquisition of listed securities by contractual offer through the relevant stock exchange. A bidder must offer to acquire all securities in the bid class. Market bids must be unconditional and made in cash. This makes them less flexible than off-market takeovers and therefore less common, but they may prove significantly faster to implement where possible. Their average value tends to be lower than for off-market takeovers.

A scheme of arrangement comprises an acquisition with the consent of holders of target securities (see Question 7) according to a court-approved procedure.

The rules and regulations of relevant stock exchanges (such as the Australian Securities Exchange or ASX) also apply to listed entities.

Australian regulation of takeovers is founded on the general principles of section 602 of the Corporations Act, which suggest the purpose of the Australian regime is to ensure that:

a) acquisition of control of relevant entities takes place in an efficient, competitive and informed market;

b) holders of target securities and target management:

   (i) know the identity of any person who proposes to acquire a substantial interest in the target;

   (ii) have a reasonable time to consider the proposal; and

   (iii) are given enough information to enable them to assess the merits of the proposal; and

c) as far as practicable, holders of target securities have a reasonable and equal opportunity to participate in the benefits of a proposal.

The principles are said to inform the policy of the two principal regulatory bodies (ASIC and the Takeovers Panel).

The principal concepts defined for the purposes of Chapter 6 of the Corporations Act on takeovers are:

a) Relevant interest – defined broadly to extend the scope of the 20% acquisition prohibition beyond simple acquisitions of holdings to encompass persons who:
   (i) are the holder of securities; or
   (ii) have the power to exercise, or control the exercise of, a right to vote attached to securities; or
   (iii) have the power to dispose of, or control the exercise of disposal of, securities.

   The concept of power or control is extended to encompass power and control that is both direct or indirect and exercisable by (or in breach of) trust, agreement, practice or any combination of them, whether or not enforceable. Arrangements, options and rights which may give rise in the future to such power or control also often lead to the relevant interest being deemed to exist, even if they are conditional;
b) Associate – defined broadly to aggregate relevant interests of persons who are connected quite indirectly, encompassing as associates two persons where:
   (i) one controls the other or they are under the common control of another person;
   (ii) they are subject to an agreement or proposed agreement (whether or not enforceable) for the purpose of controlling or influencing a relevant entity's management or affairs; or
   (iii) they are acting, or proposing to act, in concert in relation to a relevant entity's affairs; and
c) Voting power – defined to include all votes attached to securities that a person and associates have relevant interests in, divided by the total number of votes attached to all voting securities in the entity.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

ASIC

The principal regulator for mergers and acquisitions in Australia is the Australian Securities and Investments Commission (ASIC). ASIC is an independent statutory body which supervises compliance with the Corporations Act, including its takeover provisions. ASIC has broad powers under those provisions, including:

a) exempting a person from them; or
b) declaring that provisions apply to them as if specified provisions were omitted, modified or varied.

ASIC may apply to the Takeovers Panel for declarations of unacceptable circumstances in takeover disputes and consequential remedial orders, but the Takeovers Panel is the arbitral body.

ASIC is also the regulator with whom scheme of arrangement documents must be registered and can also appear to present its views in court proceedings either for the convening of scheme meetings or, following those meetings, for the approval of the scheme.

ASX

The rules of the Australian Securities Exchange will govern a target and/or bidder if either or both is listed on that exchange, although some Australian companies may also (or might instead) be listed on a foreign stock exchange.

Takeovers Panel

The primary arbiter of disputes in relation to Australian takeovers is the Takeovers Panel (the Panel). The Panel consists of members appointed by the Federal Government on the basis of their particular expertise in takeovers. The Panel is the primary venue for dispute resolution while takeovers are current.

As a statutory body, the Panel's decisions are nevertheless still subject to judicial review by the Federal Court under statute and the

High Court under the terms of the Australian Constitution. Unlike the United Kingdom, the review power has actually been exercised in practice against the Panel in the celebrated *Glencore* decisions of 2005/6.

The Panel has broad powers in takeovers including:

a) declaring *unacceptable circumstances* even if they do not constitute a contravention of the Corporations Act. The Panel may then make any order it thinks appropriate, including divestment orders and orders affecting third parties; and

b) reviewing ASIC decisions modifying, or exempting persons from, takeover provisions.

The Panel has published several Guidance Notes on its policy. Unacceptable circumstances in relation to control (or a substantial interest) may arise in respect of any transaction (not solely contractual takeovers) and the Panel has jurisdiction. In addition to ASIC, any person (including the target) whose interests may be affected may apply to the Panel for a declaration of *unacceptable circumstances* in relation to control.

Certain acquisitions may also require approval from:

a) the **Foreign Investment Review Board (FIRB)**. FIRB is a non-statutory body which assists the Federal Government with the Australian foreign investment regime. For various control transactions, a *foreign* acquirer may ultimately require the approval of the Australian Treasurer, acting on the advice of FIRB (see Question 15); and/or

b) the **Australian Competition and Consumer Commission (ACCC)**. The ACCC monitors compliance with the *Competition and Consumer Act 2010* (Cth). The ACCC may become involved in control transactions which would, or be likely to, have the effect of substantially lessening competition in an Australian market (see Question 4).

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are allowed in Australia but are less common than recommended offers or schemes due to the diminished possibility of due diligence and elevated execution risk.

It is generally considered impractical to effect a hostile bid by scheme of arrangement, although some practitioners consider that it is technically feasible.

It is possible in Australia to attempt to coerce target boards by announcing non-binding bids to target security holders with the aim of encouraging them to pressure target management to agree to recommend a proposal (so-called "bear hug"/"virtual bid"). As it stands, there is no Australian parallel to the United Kingdom "put up or shut up" regime.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

In terms of laws that are not acute in their application to all takeovers and mergers in Australia but can significantly restrict or regulate particular transactions:

a) The ***Foreign Acquisitions and Takeovers Act* 1975** (Cth) (as amended, particularly most recently in December 2015) (**FATA**) restricts and regulates transactions whereby certain acquisitions of Australian corporations, businesses or land are made by "*foreign persons*", for which the legislative definition can extend far beyond investors who would necessarily consider themselves foreign to Australia e.g. Australian-incorporated companies in which a *foreign person* is deemed to hold a substantial interest.

It is in the context of FATA that Australia generally regulates transactions with implications for national security. National security is an explicit discretionary consideration under

the Federal Government's foreign investment policy for the Federal Treasurer's determination of whether transactions subject to FATA are "contrary to the national interest", but due to varying political pressures the criterion has been fairly inconsistent in its application;

a) The ***Competition and Consumer Act* 2010** (Cth) (CCA) prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market. The CCA is supervised by the Australian Competition and Consumer Commission (ACCC) (see Question 2);

b) The ***Broadcasting Services Act 1992*** (Cth) currently contains rules which can significantly restrict and regulate transactions in the media sector; and

c) there are also sector-specific laws which regulate other particular takeovers and mergers (see Question 14).

5. What documentation is required to implement these transactions?

The bidder prepares a bidder's statement with required information about the bidder and the bid. The bidder's statement usually includes the offer document, which outlines formal offer terms.

The Corporations Act dictates the content requirements of the bidder's statement. They include:

a) the identity of the bidder;

b) the bidder's intentions regarding the continuation of, or changes to, the target's business and future employment of its present staff;

c) (for off-market bids) the fact the statement has been lodged with ASIC;

d) if the consideration is cash, details of funding arrangements;

e) if the consideration includes securities, all material normally required for an offer document for them;

f) particulars of consideration paid for bid class securities in four months preceding the bid by the bidder or associates;

g) (for off-market bids) the bidder's interests and voting power in target; and

h) any other information that is material to the decision of target security holders whether or not to accept and known to the bidder.

The bidder's statement must be lodged with ASIC, any relevant prescribed market on which target securities are listed (e.g. ASX) and served on target. Between 14 and 28 days after it has been served on target, the bidder's statement must be sent to target's security holders.

The target must issue a target's statement in response within 15 days. The target's statement must be sent to bidder and target's security holders, and lodged with ASIC and any prescribed market on which target securities are listed (e.g. ASX).

A target's statement must include all information that bid class security holders and their professional advisers would reasonably require to make an informed assessment whether to accept the offer. A target's statement must also contain a recommendation by each target director with reasons for that recommendation or why it is not made. If either or both:

a) the bidder's voting power in the target is 30% or more; and/or

b) the bidder and the target share a common director,

the target's statement must include/be accompanied by an independent expert's report, but a target may also include one entirely voluntarily to support their position.

If the bidder or target, respectively, becomes aware of:

a) a misleading or deceptive statement in, or an omission of information required from, its respective original documentation; or

b) a new circumstance, arising after the respective original documentation was lodged, that

should have been included if it arose before lodgement,

and (in any case) the matter is material to target security holders, the bidder or target (as applicable) must prepare a supplementary statement.

In a scheme of arrangement, the target sends a notice of meeting and explanatory statement to target security holders. This documentation contains similar details to the target's and bidder's statements and must be registered with ASIC and approved by the court before dispatch.

6. What government charges or fees apply to these transactions?

There are not generally government charges or fees applicable to implementing takeover transactions in and of themselves, but:

a) there is a A$2,400 filing fee for lodging a bidder's statement and any other documents with ASIC for an off-market bid and a A$1,194 ASIC fee for applying for certain exemptions from Chapter 6 of the Corporations Act;

b) there is a A$2,400 fee payable on any application to the Panel; and

c) in respect of transactions which are submitted for approval under FATA (see Question 15), as a condition to the timetable to decision to start running, submissions need to be accompanied by the prior payment of often substantial application fees (e.g. A$25,300 for business applications), which are not refundable in the event of an unsuccessful or withdrawn application.

7. Do shareholders have consent or approval rights in connection with a deal?

In respect of takeovers implemented by way of contractual offer:

a) there might commonly be *minimum acceptance conditions* to an off-market bid, which would usually be set by reference to reaching the level to squeeze out minority shareholders (see Question 12). Unlike in the United Kingdom, there is not a regulatory provision requiring a non-waivable minimum acceptance condition of over 50% of the voting rights of the target; and

b) *maximum acceptance conditions* in an off-market bid under which the bid will terminate, or bid consideration will reduce, if:

   (i) the number of acceptances;

   (ii) the bidder's voting power in target; or

   (iii) bid class securities in which the bidder has relevant interests,

   reaches or exceeds a particular level, are not permitted.

In respect of takeovers implemented by way of a scheme of arrangement, a scheme proposal must be approved by 75% by value and (generally) with a bare majority in number of holders of offer class securities present and voting at a scheme meeting. Unlike in the United Kingdom, the court in Australia has discretion to dispense with the majority headcount requirement. Votes of the offeror and associates are usually excluded, which can make it difficult to execute a scheme where an offeror already has a substantial target stake. A scheme provides "all-or-nothing" certainty that, if approved, the offeror acquires all the scheme class securities; but equally if not approved, acquires nothing at all.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Directors owe fiduciary duties to shareholders of a target which will be familiar from other common law jurisdictions (such that their duty is to accept takeover proposals that are in the best interests of the target irrespective of whether they are in the best interests of those directors personally) and certain statutory duties under the Corporations Act.

Except in particular circumstances, controlling shareholders are not generally bound by fiduciary

duties and are free to accept or refuse takeover proposals acting in what they perceive to be their own best interests.

9. In what circumstances are break-up fees payable by the target company?

A target will often agree a break fee in recommended bids (whether by contractual offer or scheme of arrangement) if a transaction fails in circumstances such as the target board withdrawing its recommendation, potentially subject to a "fiduciary-out" for superior competitive proposals.

The Panel may declare *unacceptable circumstances* if the size/structure of a break fee poses a disproportionate disincentive to competitive bids or unduly coerces target security holders. The Panel considers break fees not exceeding 1% of the equity value of the target "generally not unacceptable" unless payment is subject to excessive/coercive triggers. "Naked no vote" break fees may fall into this category, i.e. break fees payable where a bid is rejected by security holders even in the absence of a competing proposal.

It is possible, but less common, for targets to seek a reverse break fee if a transaction fails in circumstances such as the bidder not obtaining regulatory consent for which it was responsible, or breaching the pre-bid agreement.

10. Can conditions be attached to an offer in connection with a deal?

Market bids must be unconditional and for a whole bid class. Off-market bids may be conditional, but are prohibited by the Corporations Act from being subject to:

a) *subjective conditions*, i.e. defeating conditions, the fulfilment of which depend on the bidder or associate's opinion/belief/state of mind or events in the sole control of a bidder or associates. This effectively rules out general due diligence conditions in bids;

b) *maximum acceptance conditions* (see Question 7); or

c) *discriminatory conditions* upon which the bidder acquires securities from some, but not all, accepting holders.

Australian off-market bids typically include conditions for regulatory approvals (see Question 4); funding (see Question 11); absence of certain events (e.g. inhibitory Court orders or regulatory steps; target insolvency); and no material adverse change. There is not as much Australian regulatory guidance/practice as there is in the United Kingdom as to the (limited) possibilities of invoking a material adverse change condition. There is some indication that the Australian Panel might take a similarly stringent view.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Unlike the United Kingdom, committed funding of a cash offer is not strictly required under Australian law before an offer is announced.

Both the Panel and ASIC historically advocated that bidders met an objective test as to the reasonableness of their funding expectations to avoid (amongst other things) being "reckless" in breach of the Corporations Act. They require bidders to have reasonable grounds to expect funding to be available for acceptances once the offer became unconditional, even if not formally documented, or subject to drawdown conditions, at announcement.

However, the Federal Court departed in a recent case from the objective test and suggested bidders' boards would only be "reckless" if:

a) they were subjectively aware of a substantial risk they would not meet their funding obligations if a substantial proportion of offers were accepted; and

b) having regard to the circumstances known to them, they were not justified in taking the risk.

This may lead to calls for legislative reform to harmonise the resulting legal position with more stringent expectations of ASIC, the Panel and market participants.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Australian law permits compulsory acquisition by a bidder, if bidder and associates by the end of an offer period, have:

a) *relevant interests* in at least 90% (by number) of bid class securities; and

b) acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid.

This 90% requirement explains one attraction of a scheme of arrangement. 100% ownership can be achieved by scheme with the votes of merely 75% by value of scheme class securities represented and voted at scheme meetings (see schemes of arrangement in Question 7). Turnout at scheme meetings can often be much less than 100%, so schemes can be secured with the approval of much less than 75% by value of scheme class securities, rather than the inflexible 90% required after a contractual offer for statutory squeeze-out.

Other provisions permit compulsory acquisition within the period of six months after a person becomes a 90% holder in relation to a class of securities.

13. What is the waiting or notification period that must be observed before completing a business combination?

A bidder who announces a bid must make the offer within two months. A bid must be open for acceptance for a minimum of one month and no more than twelve months, although once an offer has concluded there is no general rule preventing the bidder from immediately announcing a whole new offer.

It typically takes three to four months to conclude a takeover offer and implement compulsory acquisition. There are certain rules governing the announcement of extensions to a previously announced offer period (up to the twelve month limit) which provide for increased flexibility to extend an offer period if a competing bid is announced.

14. Are there any industry-specific rules that apply to the company being acquired?

Aside from the *Broadcasting Services Act* 1992 in relation to certain media interests, there are other sector-specific foreign investment restrictions applicable to banking, airlines, airports, shipping and telecommunications.

15. Are cross-border transactions subject to certain special legal requirements?

Some foreign investments, known as "*notifiable transactions*", are subject to compulsory prior notification to the Australian Federal Treasurer for approval. Other foreign investments, known as "*significant transactions*", are not subject to compulsory prior notification to the Australian Federal Treasurer but are effectively subject to a de facto prior approval requirement given that the Australian Federal Treasurer can make orders requiring the action to be unwound subsequent to implementation, if the action is found to be contrary to the national interest.

The circumstances for "*notifiable transactions*" are generally (subject to applicable free trade agreements) when *foreign persons* acquire:

(a) an interest of at least 20% in an Australian entity worth at least A$252 million;

(b) a variety of "direct" interests in an Australian agribusiness worth at least A$55 million or Australian agricultural land worth at least A$15 million;

(c) any interest in generic Australian land worth at least A$55 million (figures at present thresholds subject to indexation).

The additional circumstances for "*significant transactions*" are when *foreign persons* acquire *any* interest in an Australian entity or business worth at least A$252 million resulting in a *change of control* of that entity or business.

Acquiring a "direct" interest in an Australian entity or business of any size or starting an Australian business is compulsorily notifiable for a *foreign government investor* which includes foreign governments but also emanations of foreign governments which might have otherwise considered themselves independent, such as sovereign wealth funds and Chinese or other state-owned enterprises (SOEs).

The process is now by online submission for approval to FIRB. The Treasurer has thirty calendar days to make a decision whether to notify objections after receiving notice an action is proposed to be taken, of which the investor must effectively be informed within a further ten calendar days after the decision deadline. In our experience, it is imprudent to rely on a response from FIRB ahead of the statutory deadline.

The Treasurer may make orders against transactions considered to be "*contrary to the national interest*". The national interest is not subsceptible to statutory definition but some guidance is offered by Australia's Foreign Investment Policy which suggests the Government typically considers the following factors when assessing foreign investment proposals:

(a) national security (see Question 4);

(b) competition (FIRB apparently as a matter of course consults the ACCC on foreign investment applications);

(c) other Australian Government policies (including tax). The potential application of conditions as to Australian taxation compliance for approved foreign investors is now subject to a specific FIRB guidance note;

(d) impact on the economy and the community; and

(e) character of the investor.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

In common with other common law jurisdictions, a takeover by way of acquisition of a target company's shares does not of itself impact the existing employment contracts of employees of the target (subject to bespoke provisions in their contracts of employment).

If the target is a company, then the bidder must include in the bidder's statement details of the bidder's intentions regarding, amongst other things, the future employment of target's present employees (see Question 5).

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

On 2 September 2016 the Panel issued a Consultation Paper entitled "*Guidance Note 4 Remedies General*". The Panel response statement on 30 January 2017 amended the Panel's Guidance Note on general remedies whereby the Panel reiterated the Panel's willingness to entertain proactive approaches by parties potentially subject to declarations of unacceptable circumstances to give undertakings to resolve the relevant circumstances.

On 14 September 2016 the Panel issued a Consultation Paper entitled "*Guidance Note 12 Frustrating Action*". The Panel's response statement on 30 January 2017 emphasised that the restrictions on targets undertaking what might otherwise be corporate actions unacceptably frustrating bids would not apply if the bid did not give target shareholders a genuine opportunity to dispose of their shares and gave as an example bids conditional on third party approvals where the third party had ruled out giving approval.

This guide is a statement of the relevant law as at 15 August 2017 and it is not intended as a substitute for specific advice.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

对股东超过 50 人的非上市公司、在证券交易所上市的机构以及管理投资计划进行收购，适用的主要法规是《公司法》第 6 章关于合同要约的规定以及该法案第 5.1 条通过协议安排进行收购的规定。

如果收购方拟将其“投票权”从不超过 20% 提高至超过 20%，或者“投票权”已经超过 20% 的股东选择继续增持，此情况下，需要通过要约收购或者协议安排进行收购，因为如果收购股份达 20% 或以上，澳大利亚有相关法律禁止直接收购。

《公司法案》第 6 章规定的要约收购分为以下几种类型：

(a) 场外收购。澳大利亚绝大部分收购都是场外收购而非场内收购。收购人的场外收购是指在一次要约中向所有证券持有人（不论上市与否）出价购买所有或指定部份的证券的一种收购方式；以及

(b) 场内要约收购。场内要约收购是指在相关证券交易所通过合同要约收购上市证券的收购方式。收购人必须在一次要约中收购所有证券。场内要约不得附加条件，并且须以现金形式支付。这使得场内要约收购的灵活性比场外收购低，因此该方式不太普遍，但是该方式被证明在某些情形下可能更加快捷。其收购交易额的平均值往往比场外收购低。

协议安排是指按照法院所批准的程序，得到目标公司的股权或证券持有人（参见问题 7）同意的收购方式。

相关证券交易市场（例如澳大利亚证券交易所或者称“ASX”）的规章制度亦适用于上市实体。

澳大利亚收购规则建立在《公司法》第 602 条所规定的一般原则之上，即澳大利亚制度的目的是为了确保：

(a) 对相关实体控制权的收购在高效、竞争、透明的市场中进行；

(b) 目标证券持有人以及目标公司的管理团队：

  (i) 了解提出收购大量公司权益的人士的身份；

  (ii) 拥有合理的时间考量收购方案；

  (iii) 获得充分信息，以评估收购方案的优劣；以及

(c) 在切实可行的情况下，目标证券的持有人拥有合理且平等的机会参收购方案所带来的利益。

所述原则是强调两个主要监管机构（澳大利亚证券投资委员会与收购委员会）的政策。

《公司法》第 6 章，关于收购的主要概念如下：

(a) 相关利益—广义上讲，将 20% 或以上的收购限制范围，扩大至下列人士：

  (i) 证券持有人；或者

  (ii) 有权行使，或者控制与证券有关的投票权利的人士；或者

  (iii) 有权出售证券或者有能力控制出售行为的人士。

权力或控制权的概念延伸至在信托、协议、惯例或其任何组合下，无论其可执行与否，直接或间接的行使的权力或控制权。未来可能导致该等的协议安排、选择权与权利未来可能产生该权力或控制权，会导致想相关利益被视为确实存在，即使其存在是有条件的；

(b) 联合体—广义定义是指非常间接关联的人士所拥有的相关利益的集合。如果两名人士存在以下情形，即为联合体：

(i) 一方控制另一方，或者二者共同受第三人控制；

(ii) 二者为控制或影响一个相关实体的管理或事务而遵守一份协议或者拟议协议（不论生效与否）；或者

(iii) 二者在与相关实体有关的事务中采取或拟将采取一致行动；以及

(c) 投票权—是指某人及其联合体具有相关利益在其中的证券所附着的一切投票权利，除以在该实体中所有具有投票权的证券所附的投票权总数。

2. 有哪些主要的政府监管机购或组织规管兼并收购活动？

澳大利亚证券投资委员会

澳大利亚兼与收购的主要监管机构为澳大利亚证券投资委员会（简写作“ASIC”）。澳大利亚证券投资委员会是监督遵守《公司法》（包括其收购条例）的独立法定机构。根据这些规定，澳大利亚证券投资委员会拥有广泛的权力，包括：

(a) 使某人豁免这些规则；或者

(b) 如果特定规则被遗漏、修改或变更，宣布该规则适用于上述行为。

澳大利亚证券投资委员会可以向收购委员会申请在收购争议以及相应补救命令中宣布存在不可接受的情况，但收购委员会是裁决机构。

另外，协议安排文件必须经注册，澳大利亚证券投资委员会是负责注册的监管机构，并且还可以出庭就协议安排会议的召集、跟进以及安排的批准发表其见解。

澳大利亚证券交易所

虽然一些澳大利亚公司也可能（同时或仅）在境外证券交易所上市，但是只要收购目标、收购人两者之一在澳大利亚证券交易所上市，澳大利亚证券交易所规则便适用。

收购委员会

收购委员会是与澳大利亚收购有关的争议的主要裁决人（以下简称“委员会”）。委员会由联邦政府根据在收购领域的专业能力而任命的成员组成。当收购正在进程中，该委员会是解决争议的主要机构。

委员会作为一家法定机构，其决定仍应遵循联邦法院根据法律进行的司法审查以及最高法院根据《澳大利亚宪法》条文进行合宪审查。与英国不同，在著名的 2005/6 号嘉能可（Glencore）案决定中，针对委员会的审查权在实践中得以实际行使。

委员会在收购领域拥有广泛的权力，包括：

(a) 宣布存在“不可接受的情况”，即使其并不构成对《公司法》的违反。委员会届时可以做出其认为适当的任何决定，包括撤资令以及影响第三方的其他命令；以及

(b) 对使某人豁免收购规则或更改收购规则的澳大利亚证券投资委员会决定进行审查。

委员会就其政策发布了若干份指导说明。与控制权（或者实质利益）有关的“不可接受的情况”可能在任何交易（不仅限于要约收购的情形）中发生，并且委员会对此拥有管辖权。除了澳大利亚证券投资委员会，任何利益可能受到影响的人（包括目标公司）均可向委员会申请宣布存在与控制权有关的不可接受的情况。

某些收购还可能需要获得下列机构的批准：

(a) **外国投资审查委员会（FIRB）**。外国投资审查委员会是协助联邦政府执行澳大利亚的外国投资制度的非法定机构。对于多种控制权交易，外国收购人可能最终需要获得澳大利亚财政部根据外国投资审查委员会提出的建议作出最终审批（参见问题 15）；以及 / 或者

(b) **澳大利亚竞争与消费者委员会（ACCC）**。澳大利亚竞争与消费者委员会负责监督《2010 年竞争与消费者法》（澳洲法案）的执行情况。如果控制权交易将要或者很可能削弱澳大利亚市场的竞争，澳大利亚竞争与消费者委员会可以参与该交易（参见问题 4）。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

澳大利亚允许恶意收购，但由于降低了尽职调查的可能性而增加了执行风险，与获提案的要约收购或协议安排方式相比，恶意收购更不普遍。

一般认为，通过协议安排来进行敌意收购是不现实的，虽然一些从业人员认为这在技术上是可行的。

在澳大利亚，可以试图通过向目标公司持有者公布一个无约束力的要约来逼迫目标董事会，以鼓励他们迫使目标公司的管理团队同意收购方案（即所谓的“狗熊式拥抱”/“虚假要约”）。就目前的情况而言，澳大利亚不存在类似于英国的“要么发出正式收购要约，要么就收手”的制度。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

在澳大利亚，并不存在完全适用于所有兼并收购事宜的法律，但是存在可以显著限制或规范特定交易的法律：

(a) **《1975 年外资收购与接管法》(澳洲法案)**（修订版，特别是近期 2015 年十二月修改版）（以下简称 FATA）就“外国人”对澳大利亚公司、业务或者土地的某些收购交易作出了限制与规定，其中“外国人”的法律定义可能远远超过认为其自身是澳大利亚的外国投资者，例如外国人在澳大利亚组建的公司中持有大量股份。

《1975 年外资收购与接管法》规定，澳大利亚对影响国家安全的交易进行总体监管。国家安全是联邦政府外国投资政策下联邦财政部明确的自由裁量因素，以确定根据《1975 年外资收购与接管法》该等交易是否“违背国家利益”，但由于政治压力的变化，该标准在适用时相当不一致；

(a) **《2010 年竞争与消费者法》**（澳洲法案）（以下简称“CCA”）禁止可能或者将要实质性削弱任何市场竞争的兼并收购。《2010 年竞争与消费者法》由澳大利亚竞争与消费者委员会（ACCC）负责执行（见问题 2）；

(b) **《1992 年广播服务法》(澳洲法案)** 目前对媒体行业进行了重点限制与规定；以及

(c) 还存在规定特定行业的兼并收购的各类法律（见问题 14）。

5. 进行这些交易时需要哪些文件？

收购人应编制收购人声明，声明须包含有关该收购人与收购要约的必要信息。收购人声明通常包括要约文件，该文件列明正式的要约条款。

《公司法》规定了收购人声明的内容要求。这些要求包括：

(a) 收购人的身份；

(b) 收购人关于目标公司的延续性、改革以及其现有员工安置的打算；

(c) （对于场外要约收购而言）已向澳大利亚证券投资委员会提交声明的事实；

(d) 如果对价是以现金形式支付，则须披露资金安排的细节；

(e) 如果对价包括证券，则须披露证券要约文件通常所需的一切重要资料；

(f) 收购人或联合体在收购前的四个月内收购目标证券支付对价的详细费用；

(g) （对于场外要约收购而言）收购人在目标公司中的股份与投票权；以及

(h) 收购人所知悉的且对于目标证券持有人决定是否接受该要约而言重要的任何其他信息。

收购人声明必须提交给澳大利亚证券投资委员会及目标公司挂牌上市的任何相关交易市场（例如澳大利亚证券交易所），并且应送达目标公司。在其被送达给目标公司后的第 14 至 28 天内，收购人声明必须送达给目标证券持有人。

目标公司必须在 15 天内出具目标公司声明进行应答。目标公司的声明必须送达给收购人及目标证券持有人，并且必须提交给澳大利亚证券投资委员会及目标公司挂牌上市的

任何相关交易市场（例如澳大利亚证券交易所）。

如果满足下列任一情形，那么目标公司的声明必须包括拟目标证券持有人及其专业顾问在充分知情的情况下做出是否接受该等要约时，可能需要的一切合理信息。目标公司声明必须包含每位目标董事的建议以及该等建议的理由或者如何做出该等建议：

(a) 收购人在目标公司中的投票权大于或等于 30%；以及 / 或者

(b) 收购人与目标公司拥有一名相同的董事，

目标公司声明必须包括 / 附有独立专家报告，但是目标公司还可以邀请一名完全自愿支持其立场的人士。

如果收购人或者目标公司分别注意到：

(a) 各自的原始文件所要求的信息存在误导、欺骗性陈述或者遗漏；或者

(b) 在各自的原始文件提交后出现了应当在提交前载入文件的新情况，

并且（在任何情况下）该等事实对于目标证券持有人而言是重要的，则收购人或者目标公司（如适用）必须编制一份补充声明。

在协议安排的情况下，目标公司须向目标证券持有人发出会议通知与解释性声明。该等文件必须包含与目标公司声明及收购人声明相似的详细信息，并且必须在发出前提交澳大利亚证券投资委员会进行登记且获得法院的批准。

6. 这些交易须缴纳哪些政府费用？

一般而言，除下列费用外，没有其他为完成收购交易而支付的政府收费或费用：

(a) 向澳大利亚证券投资委员会提交收购人声明与任何其他文件时，场外要约收购的提交费用为 2,400 澳元，以及申请《公司法》第 6 章规定的某些豁免时，须向澳大利亚证券投资委员会缴纳 1,194 澳元的费用；

(b) 向收购委员会提交任何申请，均须缴纳 2,400 澳元；以及

(c) 对于需要根据《1975 年外资收购与接管法》（见问题 15）获得审批的一些交易，审批决策以费用支付为开始条件之一。申请的同时要支付一大笔费用（例如 25,300 澳元的业务申请费用），且在交易失败或者撤回申请时这些费用不可返还。

7. 交易是否需要股东的同意或批准？

关于以合同要约的方式完成的收购：

(a) 场外要约收购普遍存在“最低接受条件”，参照这些条件通常会挤出少数股东（参见问题 12）。与英国不同，澳大利亚并无监管规定要求不可豁免的最低接受条件（目标公司超过 50% 的投票权同意）；以及

(b) 不允许这样的场外要约收购最高接受条件。在该条件下，如果发生下列情形，该收购将被终止或者收购对价将减少：

  (i) 赞成票的数量；

  (ii) 收购人在目标公司中的投票权；或者

  (iii) 收购人在目标证券中有相关利益，达到或者超过特定限度。

关于以协议安排方式完成的收购，方案必须经过出席收购方案会议并参与投票的要约证券持有人所持证券价值的 75%，以及以绝大多数人数（一般而言）通过。与英国不同，澳大利亚法院有权自由裁量并废除对人数的要求。要约人和联合体的投票权通常被予以排除，因为在要约人已经实质性地掌握目标公司股权的情况下，若不排除，该方案会变得很难执行。协议方案提供“要么全有要么全无”的选择，即如果获得通过，则要约人收购该方案项下的所有证券；但同样地，如果未获通过，则无法收购任何证券。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

董事对于目标公司股东负有与其他普通法国家相似的忠实义务（因此其义务是以符合目标公司最大利益而接受收购方案，而不论其

是否符合这些董事个人的最大利益）以及《公司法》规定的某些法定义务。

除非发生特定情形，否则控股股东一般不受忠实义务的约束，并且可以忠于其认为的自身最大利益自行决定接受或拒绝收购方案。

9. 哪些情况下，目标公司须支付分手费？

在被提案的要约（不论是通过要约收购还是协议安排的方式）中，目标公司往往会同意交易在某些情况下失败时支付解约金，例如目标公司董事会可能依照“受信出口”条款为了更具有竞争力的方案而撤回其提案。

如果解约金的范围 / 构成不合理地妨碍了竞争性收购或者过度强迫目标证券持有人接受，收购委员会可能宣布存在不可接受的情况。收购委员会认为，除非符合过度 / 强制性触发条件，否则解约金不超过目标公司股份价值的 1% 才被视为“一般不可接受”。“没有投票权的裸票”解约金可能属于这一类，意即即使不存在竞争方案，如果证券持有人仍然拒绝该要约时，那就要支付解约金。

如果交易在某些情况下失败，例如因收购人的原因未获得监管部门批准，或者违反收购预先协议，目标公司很可能寻求反向解约金，但这种做法并不普遍。

10. 要约可否附加交易相关的条件？

场内收购不得附任何条件，并且须就整个收购目标提出。场外收购可以是附带条件的，但是《公司法》规定了一些限制条件：

(a) 主观条件，即决定性条件，其成就取决于收购人或联合体的主观意见 / 观念 / 状态或者独立处于收购人或联合体唯一控制之下的事件。这有效地排除了收购中的一般性尽职调查条件；

(b) 最大接受条件（参见问题 7）；或者

(c) 针对支持收购人从某些但并非全部证券持有人处收购证券的歧视性条件。

澳大利亚场外收购条件通常包括通过监管部门批准（见问题 4）；资金（见问题 11）；无某些事件（例如禁止性的法院命令或监管程序；目标公司破产）；没有重大的不利变化。在援引重大不利变化条件的（有限）可能性上，澳大利亚监管指导 / 实践并不如英国那样多。有迹象表明澳大利亚委员会可能采取同样严格的观点。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

与英国不同，澳大利亚法律并不严格要求在要约宣布前落实资金。

收购委员会与澳大利亚证券投资委员会都曾经主张收购人应对其资金预期的合理性进行客观测试，以避免（除开其他事项）违反《公司法》的“鲁莽行为”。他们要求收购人在公告中陈述合理的理由，证明一旦收购要约变得不附条件或者须遵从提款条件仍有足够的资金，即使没有正式合同文本约束。

但是，联邦法院在最近的一次客观测试中背离了以往的做法，并且表示如果出现下列情况，收购人的董事会只会陷入“鲁莽行为”：

(a) 他们在主观上意识到如果要约的实质性部分被接受，他们存在无法履行其出资义务的实质性风险；以及

(b) 就其所知道的情况而言，由他们承担风险并无合理依据。

这可能会导致法制改革的诉求，以协调澳大利亚证券投资委员会、收购委员会以及市场参与者之间对法律地位更加严格的期待。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

如果收购人与联合体在要约阶段结束时满足下列条件，澳大利亚法律允许收购人进行强制收购：

(a) 拥有拟收购证券至少 90%（总计）的相关利益；以及

(b) 获得该收购要约中收购人拟收购证券的至少 75%（总计）。

该等 90% 的要求阐释了协议安排方式的一项吸引力。如果协议安排方案经过出席收购方案会议并参与投票的要约证券持有人所持证

券价值的 75% 通过，则 100% 的所有权可通过协议安排的方式获得（见问题 7 中的协议安排）。协议安排方案会议的出席率往往远低于 100%，因此方案可以远低于目标证券价值 75% 的比例而获安全通过，而非要约收购方式所规定的法定解除须达 90% 的硬性要求。

其他规则允许某人在成为相关目标证券的 90% 的持有人之后六个月内进行强制收购。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

宣布收购的收购人必须在两个月内作出要约。收购要约必须提供至少一个月、不超过十二个月的接受考虑期，但是并无一般性规则禁止在报价结束后收购人立即公布一个全新的报价。

通常需要三到四个月的时间完成收购要约并实施强制收购。如果要对已公布的要约期限进行延期（最长不超过 12 个月），有一定的规则限制。这为存在有竞争要约的情况下延长报价期提供了灵活性。

14. 是否有适用于被收购公司的行业特定规则？

除了与特定媒体利益有关的《1992 年广播服务法》之外，还存在适用于银行、航空、机场、航运与通信行业的外商投资行业限制。

15. 跨境交易是否受任何特殊法律要求的制约？

某些外商投资项目被称为“须公布的交易”，必须向澳大利亚联邦财政部进行强制性的事前通知，并获批准。其他外商投资项目被称为“重大交易”，无须向澳大利亚联邦财政部进行强制性的事先通知，但是考虑到如果澳大利亚财政部在交易完成后发现该等项目违反国家利益，那么其可以签发解除该行动项目的命令，这些项目事实上须履行事前通知的要求。

当外国人满足以下要求，则为“须公布的交易”的情形（须符合可适用的自由贸易）：

(a) 在澳大利亚实体中占比至少 20%、价值至少为 25,200 万澳元的股份；

(b) 在澳大利亚农业综合企业中拥有价值至少为 5,500 万澳元的诸多“直接”股份，或者价值至少为 1,500 万澳元的澳大利亚农业用地；以及

(c) 在澳大利亚通用土地中拥有价值至少为 5,500 万澳元的任何股份（目前的限额数字为指数形式）。

“重大交易”的额外情形是外国人获得澳大利亚实体或企业的任何股份且价值至少为 2.52 亿澳元，且导致该等实体或企业的控制权变化。

外国政府投资者获得任何规模的澳大利亚实体或企业的“直接”利益或者开办澳大利亚企业均须履行强制性申报义务，外国政府投资者不仅包括外国政府，还包括可能认为其具有独立地位的外国政府衍生体，例如主权财富基金以及中国或其他国有企业（SOEs）。

目前，该程序通过网上申请的方式向外国投资审查委员会申请批准。在收到拟采取行动的通知后，财政部有三十日的时间决定是否发出反对意见。在该决定期限届满之前的十日内，该反对意见必须有效地通知到投资者。根据我们的经验，外国投资审查委员会在法定截止日期之前一般不会作出回应。

财政部可以针对“违背国家利益”的交易作出命令。国家利益没有法定定义，但是澳大利亚的外国投资政策提供了一些指导意见，这表明澳大利亚政府在评估外国投资提案时通常考虑以下因素：

(a) 国家安全（见问题 4）；

(b) 竞争（很显然，外国投资审查委员会自然会就外国投资申请向澳大利亚竞争与消费者委员会咨询）；

(c) 澳大利亚政府的其他政策（包括税收）。目前，需要根据外国投资审查委员会的一项特别指南来审查已经批准的外国投资者在澳大利亚的税收合规情况；

(d) 对经济与社会的影响；以及

(e) 投资者的特征。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

与其他普通法国家一样，通过收购目标公司的股份而进行的接管本身并不影响目标公司雇员现有的雇佣合同（视其雇佣合同中的特定条款而定）。

如果目标对象是一家公司，那么收购人必须在收购人声明中陈述收购人关于目标公司现有雇员未来就业情况的打算（见问题 5）。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

2016 年 9 月 2 日，收购委员会发布了名为“第 4 号指导说明——一般救济”的咨询文件。委员会在 2017 年 1 月 30 日的反馈声明修改了委员会关于一般救济的指导说明，委员会借此重申了其推动各方在公布存在不可接受的情况下采取积极措施承诺解决相关障碍的意愿。

2016 年 9 月 14 日，委员会发布了名为“第 12 号指导说明——阻挠行动”的咨询文件。收购委员会在 2017 年 1 月 30 日的反馈声明中强调，如果该收购要约未能给予木笔阿婆公司股东处置其股权的真正机会，对目标公司施加的限制可能以另一种方式构成不可接受的阻挠收购的公司行为，故将无法适用，另外，声明列举了以第三方批准为条件而第三方不予批准的收购范例。

本指南对于相关法律的陈述截至 2017 年 8 月 15 日，且并非旨在具体情况下替代法律建议。

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

For the purposes of the legal, regulatory and contractual review of mergers and acquisitions in Bangladesh ('M&A') and, where applicable, detailing of corporate counsel practice points in relation thereto, we list out below the various M&A transaction structures available in Bangladesh.

Asset purchase

This refers to the acquisition of a business via purchase of its assets rather than the owning entity's shares. An asset purchase may be preferable due to:

(a) the higher risk to the acquirer in a share acquisition of assuming the target entity's undisclosed liabilities, which risk is far higher in jurisdictions where there is greater exposure to tort or other contingent liabilities; and

(b) potential tax benefits to the acquirer from being able to record the assets in the acquirer's books at the consideration paid for such assets and therefore achieve 'stepped-up basis' in the business assets so acquired.

In Bangladesh, however, acquisitions of a business via an asset purchase is uncommon due to:

(a) the difficulty in and, in the case of gas connections for a manufacturing facility, the impossibility of obtaining consents for the assignment to the acquirer of critical permits and licences and third-party contracts;

(b) in the case of movable property, incurrence of substantial stamp taxes and possibly value added tax on the value of such property; and

(c) in the case of real property, the transfer to and registration of such property in the acquirer's name incurs significant transfer costs and taxes, including stamp tax, advance tax and registration costs.

Incorporation of a New Joint Venture Entity

This refers to the incorporation of a new Bangladesh private or public company limited by shares via subscription of ordinary and/or preference shares therein, by foreign and/or local joint venture shareholders to engage in any transaction or business, including:

(a) to acquire a business via purchase of its assets (as detailed above);

(b) to start a new business, such as in the technology and/or outsourcing sector;

(c) to engage in a regulated activity under a licence issued by a regulatory agency, e.g. the provision of telecommunications services under a licence issued by the Bangladesh Telecommunications Regulatory Commission ('BTRC'); or

(d) under a financeable Bangladesh government-backed power purchase agreement or similar guaranteed requirements or an off-take contract, to engage in and build, operate and own/build, operate and transfer a power or other infrastructure project.

Strategic acquisition of all or substantially all interests in a target

This refers to the acquisition by a foreign or local strategic acquirer of substantially all/majority of the unlisted shares of a Bangladesh target. Strategic acquisitions to accomplish horizontal or vertical mergers occur in Bangladesh

generally in the ready-made garments manufacturing sector. In such strategic acquisitions, the selling shareholder's interests are generally purchased in whole at once or over time, with the acquirer taking complete control of the acquired entity/facilities, so the emphasis is mostly on past matters and ensuring that the acquirer is able to be made wholly liable for any misrepresentations by the selling shareholder. Specifically, in such 100% acquisitions, the acquirer's counsel would focus on an in-depth due diligence of the target and the seller, with issues brought up in such review reflected in specific deal-related representations and warranties of the selling shareholder in the share purchase agreement ('SPA') and indemnification of the acquirer in case of a material breach thereof. In regards to such indemnification rights and obligations in the SPA, it would be a reasonable request by the acquirer to hold back a portion of the purchase price in order to secure the selling shareholder's indemnification obligations under the SPA.

Acquisition by an investor/alternative investment fund of minority interests in a target

This refers to a foreign or local private equity or other alternative investment fund acquiring generally a minority interest in a Bangladesh target. Unlike the above example of a 100% acquisition of shares, this is an acquisition where the focus of legal and contractual matters takes on an additional dimension with regards to governing the on-going relationship of the parties as co-owners in the target (generally specified in a shareholders' agreement and thereafter incorporated in the target's amended articles of association).

Substantial acquisition of listed securities

This refers to the acquisition by a foreign or local acquirer of the listed shares of a target 'without' and 'within' the Dhaka Stock Exchange Ltd (DSE) and Chittagong Stock Exchange Ltd (CTS) trading systems, pursuant to the BSEC (Substantial Acquisition of Shares, Takeover and Control) Rules 2002.

Amalgamations and restructuring

This is between two Bangladesh private or public limited companies, having listed or unlisted shares, with the approval of the High Court Division of the Supreme Court of Bangladesh ('High Court') in an order specifying shares or/and other consideration issued/paid to the non-surviving entity's shareholders in accordance therewith.

Considering the above transactions, the key laws and regulations are as follows:

(a) The Companies Act 1994 ('CA 1994'), which regulates:

(i) acquisition of shares by way of subscription in a new private or public company limited by shares, incorporated by two or more joint venture shareholders by filing:

- The memorandum of association, setting forth, among other items, the objects of the entity (s 7). Objects clauses may be amended under section 12(1) by a special resolution passed by the affirmative vote of 75% of the shares represented at an extraordinary general meeting held with 21 days' prior notice (s 87). In so far it is confirmed by a court order under s 12(2); and
- the articles of association, in which certain provisions of schedule I to the CA 1994 are deemed to be contained therein, relating to adjournment of general meetings, instrument appointing a proxy, director share qualification of at least one share, vacation of an office of a director, committees of directors, payment of interim dividend, books of accounts, auditors and notices to members;

(ii) in the case of a shareholders' agreement governing the relationships of the shareholders, which would likely

include special privileges or rights given thereunder to an investor coming in as a minority shareholder, it is recommended that the key provisions of such shareholders' agreement are incorporated into the articles of association, by an amendment thereto by a special resolution (see above), so that shareholder disputes under certain sections of the CA 1994 can be submitted for relatively faster resolution thereof to the High Court, which has statutory jurisdiction over company matters under certain sections of the CA 1994;

(iii) the directors of a company shall not, without consent of the company at a general meeting, sell or dispose of any undertaking of the company and remit any debt due by a director (s 107). A director may not enter into contracts or engage in transactions on behalf of the company with affiliates of such director without first obtaining the approval of the board for such contract/transaction (s 104);

(iv) in an acquisition of shares in a company by subscription or share purchase, the acquirer must ensure that:

- the acquirer's board of directors approves such allotment or transfer (ss151 and 38); and
- the other shareholders waive any pre-emptive right as to a new issue of shares or right of first refusal in the case of a share transfer (s 155 and clause 42 of schedule I of the CA 1994 unless otherwise stated in the articles of association of the company);

(v) in structuring an acquisition of shares by an investor/private equity/alternative investment fund, the restriction imposed by s 58 on a company being prohibited from directly or indirectly purchasing its own shares limits such investor's exit options as it cannot rely on the target to buy it out in the event of an exit trigger;

(vi) the CA 1994 has various sections relating to the protection of minority interests by way of petitioning the court for relief (subject to having standing to do so):

- under s 71, if the share capital of a company is divided into different classes of shares, and the rights attached to any class of shares are varied, the holders of less than 10%in aggregate of the issued shares of that class, who did not consent, may apply to the court to have the variation cancelled;
- if, on the application of members having not less than one-tenth of the shares issued, the court finds that the affairs of the company or powers of the directors are being exercised in a manner which is prejudicial to one or more of those members, it may make such order as prayed for or such other order as it deems fit; and
- under s 230, when an offer is made to purchase all of a target's shares from its shareholders and where 75% of such target's shareholders have approved the transferee's offer, then the transferee can bind the dissenting shareholders (who did not vote to approve the offer) by notice thereof, and be bound to purchase the dissenting shareholders' shares on the same terms as provided to the majority. A dissenting shareholder may petition the court for relief from being bought out pursuant to s 230.

(vii) S 228 provides for the applicable creditors and/or members to approve by vote of 75% or more of such creditors and/or members present at a meeting, a proposal or scheme of arrangement or reorganisation of a company and

thereafter to submit the same except in connection with an application to the High Court to petition the court to issue an order in connection therewith. Section 229 allows for the parties to a s 228 application to present a scheme of amalgamation for a transferor company to be amalgamated into a transferee company, either by way of the High Court sanctioning such scheme ('Scheme') or by issuance of a new order by the High Court.

(b) The Contract Act 1872 ('CA 1872'), which governs the interpretation of acquisition contracts, contain the following relevant key provisions:

(i) all agreements are contracts if they are made with the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void (section 10);

(ii) past consideration is valid (unlike English Law, where past consideration is invalid);

(iii) sections 73 and 74 contain the provisions for damages for a breach of contract;

(iv) section 73 provides for payment by a defaulting party of compensation for loss or damage which naturally arises from the defaulting party's breach or which the parties knew likely to result from the breach when they made the contract. Compensation is not paid for any remote or indirect loss that results from the breach;

(v) section 74 provides for payment of liquidated damages on a breach of contract, as stipulated in the contract. The sum is not left for a competent court to determine. The suffering party will receive this amount, whether or not it has actually suffered any loss or damage. The provision does not distinguish between liquidated damages and penalty. A contract clause need not clarify that the amount agreed by the parties as liquidated damages is not in the nature of a penalty.

(c) The Income Tax Ordinance 1984 and the Statutory Regulatory Orders issued thereunder provide significant guidance on structuring merger and acquisition transactions:

(i) in regards to share subscriptions, there is no tax consequence as the company receiving such subscription funds does not earn any 'income' at the time of subscription;

(ii) in the event of a share transfer, no tax is imposed on the seller of the shares:

- if the transfer is of unlisted securities under a gift, will, bequest or irrevocable trust (s 2(66)); or
- if the transfer is of unlisted or listed securities under a plan of amalgamation (s 2(2)) where the consideration is only in the form of securities of the surviving entity (capital gains tax would attach on any portion of the consideration paid in cash).

In regards to the tax consequences on the transfer of listed securities by way of gift, will, etc., per s 53M, any transfer by way of gift, will, etc. of listed securities owned by sponsor shareholders, directors or placement holders attracts a capital gains tax thereon of 5% between the market price of such shares and the cost of acquisition thereon;

(iii) furthermore, amalgamation of a wholly-owned subsidiary with the parent company does not raise any tax issues for the surviving parent, as liability of capital gains tax ('CGT') can only be on the transferor and not the transferee, being the parent in this case;

(iv) the CGT rate for listed securities (other than by sponsoring shareholders, directors or placement holders) is 10%, and the CGT rate for unlisted securities/private company shares is 15%.

(v) in the case of dividends, s 54 imposes a 20% withholding tax on dividends paid to resident entity shareholders, which dividend income is subject to further taxation as income to such entity shareholders. Under the taxation system in Bangladesh, no credits can be claimed on the 20% domestic withholding tax suffered against the income tax payable on the dividends received. This is why Bangladesh does not have group holding companies ('group' companies are generally separate companies under the same brand and owned by the same or substantially the same individual shareholders). In the case of dividends paid to foreign shareholder entities, the withholding tax rate on dividends is subject to a reduction to 15% or 10% under applicable Double Tax Agreements between Bangladesh and the foreign shareholder's jurisdiction of incorporation/jurisdiction in which it has its registered address.

(d) Under the Registration Act 1908, certain documents are required to be registered:

(i) non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish any title or interest to or in immoveable property;

(ii) instruments of mortgage referred to in s 59 of the Transfer of Property Act 1882;

(iii) leases of immoveable property from year to year or for any term exceeding one year; and

(iv) instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest etc.

Other key laws and regulations, detailed in responses to the questions below, are as follows: the Foreign Exchange Regulation Act 1947 ('FERA 1947'), and the regulations promulgated thereunder by the Bangladesh Bank ('BB'), the central bank of Bangladesh, which regulations are compiled by the BB in the Guidelines for Foreign Exchange Transactions Volume 1 & Volume 2 (2009), and updated by BB's circulars issued from time to time (collectively, the 'ForEx Guidelines'), the Securities and Exchange Ordinance, 1969, the Securities and Exchange Commission (Substantial Acquisition of Shares, Takeover and Control) Rules 2002 ('SEC Acquisition Rules 2002'), the Bangladesh Securities and Exchange Commission (Public Issue) Rules 2015 ('Public Issue Rules'), the Bangladesh Securities and Exchange Commission (Alternate Investment) Rules 2015 ('Alternate Investment Rules'), and the Competition Act 2012. If an agreement provides for dispute resolution through arbitration, the Arbitration Act 2001 governs the process of arbitration if the parties have chosen to resolve disputes through mechanisms provided in the Arbitration Act 2001. The value of instruments of transfer and registration of shares are governed by Stamp Act 1899.

In addition to these key laws and regulations, there are other sector-specific laws depending on the types of companies involved, such as the Bangladesh Energy Regulatory Commission Act 2003, Insurance Act 2010, and Telecommunication Act 2001 ('TA 2001') etc. The TA 2001 is the principal legislation that primarily governs merger matters of all licensees in the telecommunications sector.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In connection with an acquisition of shares by way of a share transfer, as opposed to statutory amalgamation, the following regulatory bodies/agencies play a key role:

Registrar of Joint Stock Companies and Firms ('RJSC')

This is relevant where partnerships and private and public limited companies are registered by filing of organisational or applicable charter documents by the partners or promoters, as the case may be, of the entity being registered. The RJSC also serves as the agency overseeing the statutory and annual filings required of firms/companies in order to be considered as in good standing with the RJSC. Any acquisitions of shares by way of:

(a) subscriptions and issuances of new shares in companies to existing or new shareholders; or

(b) transfers to an acquirer of shares previously held by exiting shareholders of companies, are required under the CA 1994 to be registered with the RJSC. However, the RJSC may not register any share issuances or acquisitions concerning the target unless and until the target complies with its corporate filing requirements and update all of its records. Accordingly, one of the first key due diligence activities in a share acquisition transaction is to review the target's public records at the RJSC and ensure compliance of filing requirements. Furthermore, as, under s 159 of CA 1994, banks and financial institutions are required to record with the RJSC all mortgages and charges in order to perfect the same (or risk that the mortgages/charges will be voided if not recorded with the RJSC), an initial due diligence review of a target's RJSC records provides a good picture of the liabilities of the target.

Bangladesh Securities and Exchange Commission ('BSEC')

In connection with the issue of capital, a private limited company must first obtain BSEC's consent prior to increasing its paid-up capital to BDT 100 million. As such consent comes with significant additional disclosure requirements, many private limited companies artificially keep their paid-up capital below the above amount so as to avoid applying for BSEC's approval. BSEC recently also promulgated the Alternative Investment Rules and the Public Issue Rules. The former established the regime under which an alternative investment fund and a fund manager may be registered in Bangladesh, for purposes of raising funds within and outside of Bangladesh. This unfortunately does not take into account foreign private equity funds which are governed by limited partner ('LP') agreements and covenants therein, and which may find it impossible to be governed by a parallel regulatory regime that may conflict with their existing agreements with their LPs. The Public Issue Rules, promulgated a few months after the Alternative Investment Rules, provided a shorter lock-in period upon an IPO of one year (from the original three years) for existing shareholders who are "Alternative Investment Funds". BSEC also regulates and oversees, along with the DSE and the CSE, substantial acquisitions of listed securities under the SEC Acquisition Rules 2002, pursuant to which:

(a) under s 6, if any person, either an existing shareholder or a new subscriber, wants to acquire shareholding of more than 10% of a company outside the stock exchange, such person must submit a proposal to the existing shareholders by issuing a public notice expressing an intention to acquire shares;

(b) per s 7, if the acquisition is through a stock exchange, then the acquirer must issue a public notice through a merchant bank licensed with BSEC;

(c) under s 17, when an acquirer publishes a notice of its intention to acquire shares in a company, any other person can acquire those shares within two weeks of publishing the notice; and

(d) any company in financial distress can be acquired by any financial institution or scheduled banks or any other person or group of persons or by another company by following the process stated in the SEC Acquisition Rules 2002.

High Court

With regards to statutory amalgamation under ss 228 and 229 of the CA 1994, the High Court may either by the order sanctioning the Scheme or by any subsequent order make provisions for all or any of the following matters:

(a) the transfer to the transferee entity of the whole or any part of the undertaking and of the transferor's properties and liabilities;

(b) appropriation by the transferee company of any shares, debentures policies or other like interest in the transferor;

(c) the reconstruction or amalgamation of the share capital by consolidation of shares of different classes or by division of shares into shares of different classes or both;

(d) the continuation by or against the transferee of any legal proceedings pending by or against the transferor bank/financial institution;

(e) the dissolution of the transferor entity;

(f) provision made by the transferor/transferee entities for dissenting stakeholders; and

(g) such other matters as may become necessary in view of the proposal made in the scheme.

Others

For business combinations or acquisitions in the telecommunications sector, statutory pre-approval is required from the BTRC. For banking companies, the Bangladesh Bank is the regulatory body from which pre-approval must be obtained. In this regard, it may be noted that the Bangladesh Bank has published detailed guidelines for banks and financial institutions to follow in proposing to move forward with an amalgamation. Such guidelines provide the most detailed regulatory observations on the criteria used by a regulator and the High Court in approving a Scheme. This is valuable, especially in light of the stricter scrutiny of amalgamation Schemes as seen in the recent obstacles placed in Summit Group's amalgamation plan for its energy subsidiaries.

Further, public listed companies have notification requirement to BSEC, which is made as a necessary party when approval is sought from the High Court. As the BSEC is the regulator of public listed companies, it can represent itself before the High Court and submit observations to add additional conditions to be followed in relation to the contemplated amalgamation. Following the approval of the amalgamation scheme by the High Court, records of all the companies are updated at the RJSC.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are comparatively uncommon in the Bangladesh jurisdiction. For public listed companies under the SEC Acquisition Rules 2002, a 'competitive takeover' following public declaration of an acquisition is allowed, and a 'bailout takeover' to rescue weak companies with a negative net worth is also allowed. Under s 230 of the CA 1994, a transferee whose offer has been accepted by 75% of the shares represented in meeting can notify the dissenting transferor shareholders (those who did not accept the offer) of exercising a transferee's rights under the said section, in which case unless the dissenting shareholders petition the High Court to stop the transferee's exercise of such right, the dissenting shareholders must sell, and the transferee must buy, their shares at the same price and terms offered to the majority.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

The National Council for Industrial Development ('NCID') has listed the following four sectors as "Restricted Sectors" for takeovers and mergers by foreign shareholders:

(a) Arms and ammunitions and other military equipment and machinery;

(b) Nuclear power;

(c) Security printing and minting; and

(d) Forestation and mechanized extraction within the boundary of reserved forest.

NCID has again listed seventeen sectors as "Controlled Sectors" which require prior permission from the respective line ministries/authorities before allowing takeovers and mergers by foreign shareholders:

(a) Fishing in the deep sea;

(b) Bank/financial institution in the private sector;

(c) Insurance company in the private sector;

(d) Generation, supply and distribution of power in the private sector;

(e) Exploration, extraction and supply of natural gas/oil;

(f) Exploration, extraction and supply of coal;

(g) Exploration, extraction and supply of other mineral resources;

(h) Large-scale infrastructure project (e.g. flyover, elevated expressway, monorail, economic zone, inland container depot/container freight station);

(i) Crude oil refinery (recycling/refining of lube oil used as fuel);

(j) Medium and large industry using natural gas/condensed and other minerals as raw material;

(k) Telecommunication service (mobile/cellular and land phone);

(l) Satellite channel;

(m) Cargo/passenger aviation;

(n) Sea-bound ship transport;

(o) Sea-port/deep sea-port;

(p) VOIP/IP telephone; and

(q) Industries using heavy minerals accumulated from sea bed.

Again as discussed in answer to question 2, some other sector-specific legislations regulate takeovers and mergers in Bangladesh and restrict a transferee's ability to acquire interests in the licensed company. Under a number of telecommunication licences, for instance, not only is there a ceiling, and in certain instances even outright prohibitions, on foreign direct and indirect ownership of or participation in the licensee company, but also security clearance vetting requirements by and information requests from the BTRC for its prior approval of a transferee act. This is to discourage participation in such an industry by those not already cleared.

5. What documentation is required to implement these transactions?

Conditions of an acquisition or fresh issuance of shares may be additionally governed by a share subscription agreement or SPA and, in the event of the acquisition of a minority interest, a shareholders' agreement. In an acquisition of shares, after obtaining approval from sector-specific regulatory authorities for companies which require pre-approval and for companies not requiring regulatory approval, the usual documentation is:

(a) a receipt of the encashment certificate from the scheduled bank for the purchase price as such funds are required to be transferred to the seller's bank account by the purchaser prior to the closing or at the closing;

(b) share transfer instruments, RJSC Form 117, in respect of the sale shares signed by the seller and the buyer;

(c) an affidavit of the transfer of the sale shares;

(d) share certificates duly signed for the transfer;

(e) a duly executed resignation letter from the seller resigning as managing director/director of the company if the seller is transferring its entire shares;

(f) no objection certificates from the existing shareholders of the company waiving their rights of first refusal;

(g) minutes of meeting of the board of directors of the company:

(i) approving the sale of shares where the seller participates and approves the transfer in writing;

(ii) authorising the company to take any and all actions in relation thereto regarding the share purchase and transfer of sale shares;

(iii) accepting the seller's resignation as managing director/director of the company if the seller is transferring its entire shares etc;

(h) notice in relation to the meeting of board of directors of the company mentioning the above agenda; and

(i) a duly executed form XII to reflect the changes in the list of directors etc.

Following the closing, the purchaser shall cause the company to duly file all requisite filings and returns relating to the transactions contemplated as above with the RJSC.

6. What government charges or fees apply to these transactions?

A stamp duty of 1.5% on the full transaction value is applicable in the case of a transfer and purchase of shares. For a fresh issuance of shares, stamp duty is not applicable. However, for a fresh issuance of shares above the value of BDT 100 million, BSEC's approval is required. An application fee of BDT 5000 is payable. In addition, an appropriate consent fee is also collected by BSEC on the issued value which is determined by BSEC in the Consent Letter.

7. Do shareholders have consent or approval rights in connection with a deal?

Unless the articles of association require the board of directors to obtain approval from shareholders in relation to a deal above a certain threshold, there is no generic requirement to obtain shareholders' approval. A director is barred by statute from entering into deals supplying goods or services to a company of which it is also a director. Without approval by shareholders after a general meeting, directors are also barred from entering into a deal in which the company's undertaking is being sold or disposed of or remitting any debt of a director of the company.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

There is no statutory obligation in relation to any duty to stakeholders in connection with a deal unless the same is pre-agreed in the articles of association of the company. There is provision for calling an extraordinary general meeting on requisition by one-tenth of the shareholders on any matter, and a special meeting on requisition does not exclude scrutiny of any potential deal.

9. In what circumstances are break-up fees payable by the target company?

There is no statutory obligation in relation to break-up fees payable by the target company to a purchaser investor. However, it is a common practice for the seller in an acquisition transaction to request a non-refundable down payment if closing does not occur by a specific date or is delayed as a result of the acquirer being unable to fund the acquisition or fulfil one or more conditions precedent provided for in the share subscription agreement and/or SPA.

10. Can conditions be attached to an offer in connection with a deal?

Conditions may be attached in connection with a deal in a pre-agreed manner through the share purchase agreement and/or share subscription agreement. In addition, amalgamation permission by the High Court may include conditions if they are imposed by a regulator.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Financing by financial institutions by way of extending credit facilities may require lien of shares of the company and/or creation of floating or fixed charges, hypothecation or mortgage on the company's future and current assets. Shareholders or directors may extend shareholders' loans to the company. The CA 1994 further recognises financing through a 'premium' over the face value of any share subscription for any specific purpose or payment of redemption of preference shares subject to approval of the board. Financing by issuance of a debenture is also allowed under the CA 1994; however, any issuance of debenture in the form of debt security (e.g. bond) must be approved by BSEC pursuant to the Private Placement of Debt Security Rule 2012. The rules on the issuance of debt security, whether secured or unsecured, require mandatory retention of a quota for subscription of offered debt security by banks and financial institutions. Any creation of a charge or security, pursuant to any relevant financing, must be registered at the RJSC, failure of which renders the creation of charge or mortgage void ab initio. Enforcement of a charge or mortgage created by financial institutions is conducted through specialist money loan courts. For private individual financing from shareholders or other financing institutes not recognised as licensed institutions, either arbitration may be pursued or a money suit may be filed. A company's creditors may also resort to winding up of the company at the Company Bench of the High Court.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

The stake of minority shareholders may be diluted if, on call for a fresh subscription pro-rata, such minority shareholders refuse to pay and if such shares are then subscribed by the majority or a third party. Furthermore, as detailed above, section 230 of the CA 1994 provides for the buying out of all interests of dissenting shareholders by a transferee whose offer has been accepted by 75% or more of the shareholders of the transferor/target company. However, in such instance, the dissenting shareholders may petition the High Court to stop the transaction. Similarly, minority shareholders being subjected to unconsented-to variations in the rights of the shares held by them may petition the High Court to stop such variations pursuant to s 71 of the CA 1994. Finally, as long as minority shareholder(s) individually or collectively hold 10% of the outstanding shares in a company, they will have standing to petition the High Court under s 233 of the CA 1994 to review the majority's/board's actions for any evidence of undue prejudice against the minority.

13. What is the waiting or notification period that must be observed before completing a business combination?

Save for serving of notice for meetings such as board meetings, shareholders' extraordinary and special meetings, or as required by the applicable regulator to be provided under consents for such deal, or such notification periods as may be provided in a High Court Order under ss 228/229 of the CA 1994, there is no notification period that must be observed before completing a business combination.

14. Are there any industry-specific rules that apply to the company being acquired?

As discussed above, specific industries require compliance with the industry-relevant legislations prior to any acquisition. For example, telecommunications, banking, insurance, broadcast, power generation, stock brokerage, travel agency, etc. are some specific sectors in which industry-specific rules in relation to

ownership must be complied with prior to any acquisition.

15. Are cross-border transactions subject to certain special legal requirements?

Cross-border transactions are subject to additional compliance with ForEx Guidelines. Bangladesh has a restrictive foreign exchange regime where outward remittance of foreign exchange requires specific approval from the Central Bank, Bangladesh Bank, unless the Bangladesh Bank has issued a prior circular authorising a particular transaction to be generally exempt. However, there has been a significant liberalisation of the policy in regards to the repatriation of the aforementioned sale proceeds. Prior to the issuance of Bangladesh Bank's FE Circular 32 of 31 August 2014 ('Circular 32'), the Bangladesh Bank, under Chapter 9, Paragraph 3(B) of the Foreign Exchange Guidelines (2009), would previously consider for repatriation, proceeds of sale of unlisted securities of an amount not exceeding the net asset value of the securities (as determined from the audited financial statements of the target company). The Circular 32, however, has provided two additional methods of valuation (market value and income approach), which in most cases are likely to provide a higher valuation of the fair value, being the amount that may be repatriated, of the securities and thus the amount the Bangladesh Bank would allow for repatriation.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

The labour laws in Bangladesh do not take into account of mergers and acquisitions or notification of the same to the labour force. The Labour Act 2006, as amended in 2013 and the Labour Rules 2015 promulgated thereunder require notification to the Bangladesh government Department of Labour, Chief Inspector of Labour of an organisation of a factory and changes thereto, including appointment of new managers of a factory. When such managers are changed, the establishment is required to report to the Chief Inspector. Further, any gratuity, pension, etc. that is in force and provided by the previous employer would be deemed to be continuing unless the contract of employment is renewed with new conditions. The Act also provides for prescribed processes for layoffs, retrenchment, termination by employer without stigma, etc., which processes the new employer would be under a statutory obligation to follow.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

The Competition Act 2012 provides for pre-approval/permission from the Competition Commission for any merger or acquisition effecting competition in any sector or market. When the Act becomes effective following the formation of the contemplated Competition Commission which will be in charge of the enforcement of this Act, it may impact M&A activities significantly. Recently, the High Court issued a direction for the addition of an independent valuation of shares of merged entities, and has added that for every amalgamation hearing of listed companies, BSEC should be added as a party for the regulator to make observations regarding conditions in a proposed amalgamation/merger scheme before the court.

Recently Bangladesh has witnessed one of the biggest mergers in the telecommunication sector of the country when Axiata Group of Malaysia (Robi Axiata) has taken control over Bharti Airtel (Airtel Bangladesh). This merger between Robi Axiata and Airtel Bangladesh was finally implemented on 16 November 2016 after the High Court Division of the Supreme Court of Bangladesh has approved such merger in the case, Robi Axiata Limited & others vs. Registrar of Joint Stock Companies and Firms; 36 BLD (HCD) (2016) 599.

In this landmark merger case, along with approving the merger of Robi Axiata and Airtel Bangladesh, the High Court Division has given necessary guidelines to both the companies (a) to ensure employment security of existing employees by devising an international standard Voluntary Retirement Scheme (VRS), with a view that the employees are not prejudiced and are free to choose whether or not to stay in the newly merged company, (b) that all the third-party service providers, suppliers, distributors, retailers and all other ancillary bodies related to both companies were directed to maintain their business transactions in the same manner as they have previously maintained.

The Bangladesh Investment Development Authority (BIDA) is the principal government agency for encouraging foreign investment in Bangladesh. Recently, BIDA has coordinated the establishment of an 'One-Stop Centre' for the following services:

(a) Trade License from respective city corporations and local government bodies are to be given within 48 hours, assuming all required documents are provided. The BIDA with local government division ensures this service;

(b) Company registration with RJSC is to be completed within 48 hours;

(c) Registration of the BIDA is to be completed within a day, assuming all required documents are provided;

(d) Electricity connection is to be given within 10 days after receipt of the application from the BIDA where the representative of power development board authority is working;

(e) An environmental certificate are to be given within 10 days by the BIDA where respective officer from Environment Department is working;

(f) Gas connection is to be given within 10 days from the date of application received;

(g) Foreign loan borrowing application is to be disposed of within 30 days of receipt of the application assuming all required documents are provided;

(h) Tax related complication are to be taken care of by the BIDA through the respective National Board of Revenue officer and results are to be received within 10 days after an application is made by the entrepreneur;

(i) Assistance for land acquisition is to be provided by the BIDA; and

(j) Online services are also to be provided by the BIDA.

However, this One-Stop Centre of the BIDA has not yet been implemented in practice. The exact date of its implication is still unknown. We have to wait to see its impact, once it is implemented.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

为了对孟加拉国的兼并与收购（简称“并购”）进行法律、监管和合同审查，并在适当时详细说明公司顾问有关该领域的执业要点，我们在下文列出了孟加拉国各种并购交易结构。

资产收购

资产收购系指通过收购企业资产而非企业股份进行的企业收购。由于以下情形，资产收购更受青睐：

(a) 与对侵权行为或者其他或有负债披露更为充分的国家相比，目标公司的未披露负债所带来的风险远大于此，因此采取收购股权方式的收购方会承担更大的风险；以及

(b) 收购方凭借其为某些资产支付对价进而在以这种方式收购的商业资产中达到“递增基数”，故得以将该等资产记载于收购方的账簿，收购方可就此获得潜在税收优惠。

然而在孟加拉国，通过资产购买来收购一家企业并不常见：

(a) 在接通生产设备的燃气供应的收购案例中，收购方很难且不太可能获得转让所需关键许可、牌照及第三方同意书；

(b) 如果是动产，可能对其征收高额印花税及增值税；

(c) 如果是不动产，以收购方名义转让登记此类财产，将产生高额转让成本及税费，包括印花税，预付税款及登记费用。

新成立合资企业

新成立合资企业系指外国和／或本国合资公司的股东通过参与下列交易，认购普通股和／或优先股，成立孟加拉国新的私人或公众股份有限公司：

(a) 通过购买企业资产收购其业务；（如上所述）；

(b) 开始新业务，例如技术和／或外包行业；

(c) 根据监管机构签发的牌照从事受监管的业务，例如根据孟加拉国电信管理委员会（“BTRC”）颁发的许可证提供电信服务；或者

(d) 根据受孟加拉国政府财政支持的电力采购协议、类似担保要求或承购合同，从事电力或其他基础设施项目的建设、经营和拥有／建设、运营和转让。

对目标公司的全部或份绝大多数权益的战略性收购

这是指境外或境内战略性收购人对一家孟加拉国目标公司的绝大多数／大多数未上市股份进行的收购。在孟加拉国，实现横向或纵向兼并的战略收购通常发生在成衣制造行业。卖方股东的利益一般是随着收购方完全持有被收购实体／设备的控制权而一次性全部或分期购买，故其重点主要在于过去事项以及确保收购方能够对卖方股东的任何虚假陈述完全负责。具体来说，此类 100 % 的股权收购中，收购方的律师将着重对目标公司及卖方进行深入尽职调查，并指出在该等调查中发现的卖方股东在股权买卖协议（“SPA”）中所作的与具体交易相关的陈述和担保，以及收购方重大违约所作的赔偿中出现的问题。关于买卖协议方面的赔偿权利义务，收购方有理由收回部分购买价款，以担保卖方股东在收购协议项下的赔偿责任。

投资者 / 另类投资基金对目标公司的少数权益进行收购

这是指外国或本国私募股权或其他另类投资基金购买孟加拉国目标业务的少数股权的一般收购。与上述 100 % 股权收购不同，此类收购的法律和合同事项的重点在于当事人各方作为目标业务共同所有者的持续关系管理这一额外方面。（通常在股东协议中具体规定，之后纳入目标公司经修订的章程中）。

上市股票重大收购

这指的是根据 2002 年«BSEC(重大股份收购，接管和控制）规则»，在达卡证券交易所有限公司 (DSE) 和吉大港证券交易所 (CTS) 交易系统场内或场外，外国或本国收购者对目标公司上市股份的收购。

合并和重组

这发生在两家具有上市或非上市股份的孟加拉国私营或公共有限责任公司之间，经孟加拉国最高法院的高等法庭（“高等法庭”）批准并按其指示向未存续实体的股东发行 / 支付的股份或其他对价。

上述交易相关主要法律法规如下：

(a) 1994 年《公司法》(1994 年《公司法》)，规定：

(i) 通过认购两名或多位合营股东创立的新设立私人或公众有限责任公司股份进行收购的，公司创设人需提交下列文件：

- 载明公司目标的协议备忘录，除其他事项外，阐述实体的对象（第 7 条）。根据第 12(1) 条的规定，须提前 21 天书面通知召开特别股东大会，以代表出席该会的股东 75 % 股权的赞成票通过特别决议可以对目标条款进行修改（第 87 条）。截至目前，该规定已由一项根据第 12（2）条做出的法院命令所确认；以及
- 公司章程，章程须包含 1994 年《公司法》所列附表一规定的大会休会，代理人的委任文书，至少拥有一份股权的董事资格、董事职位空缺、董事委员会、中期股息支付、账簿、审计师及向成员进行通知等内容；

(ii) 如果以股东协议规范股东关系，该协议可能规定以少数股东身份进入的投资者据此获得的特别优先权或特殊权利，建议通过特别决议（见上文）将股东协议的关键规定作为修正案纳入公司章程，以便可以将 1994 年《公司法》某些部分规定的股东争议提交给对该等事项具有法定管辖权的高等法庭获得相对较快的裁决。

(iii) 未经股东大会同意，公司董事不得出售或处置公司业务，或者豁免董事债务（第 107 条）。董事不得在未经本公司董事会批准的情况下，代表公司与其关联公司签订合同或进行交易（第 104 条）；

(iv) 在通过认购或收购方式购买公司股份时，收购方必须确保：

- 收购方董事会已批准此种分配或转让（第 151 条和 38 条）；以及
- 除公司章程另有规定外，其他股东放弃对新发行股份优先认购权或股份转让的优先购买权（即 1994 年《公司法》第 155 条和第 42 条）；

(v) 由投资者 / 私募股权 / 另类投资基金收购股份时，第 58 条规定禁止直接或间接购买自己的股票，限制了投资者的退出期权，因为一旦退出，目标公司无法购买其股权；

(vi) 1994 年《公司法》中有多章节与通过向法院起诉保护少数股东权益相关（有资格采取此类救济或豁免措施）条款：

- 根据第 71 条，如果公司股本被划分为不同类别的股份，任一类型股份权利发生变更，而持有该类别已发行股份总数不到 10 % 的股

东不同意变更的，可以向法院申请取消该等变更；

- 法院会根据不少于已发行股份十分之一的股东申请，裁定公司的事务或董事权力的行使以损害一个或多个成员权益的方式进行，法院可以做出其认为合适的其他命令；以及
- 根据第 230 条规定，当收购目标公司全部股份的方案经目标公司 75 % 的股东同意时，则受让人可以约束异议股东（没有投票赞成要约的人士），受让人可以采用与大多数股东相同的条件购买异议股东的股份。异议股东有权根据第 230 条规定向法院请求救济或豁免。

（vii）第 228 条规定，出席会议的债权人和 / 或股东 75% 以上投票通过一项提案、协议安排或公司重组，进而将该事项提交至高等法庭，但请求高等法庭签发与之有关的命令除外。第 229 条规定，双方可通过第 228 条申请提出将出让公司并入受让方公司的合并计划，或通过高等法庭批准该计划（“方案”）或由高等法庭发出新命令。

（b）1872 年《合同法》（“1872 年《公司法》”）规定了收购合同的诠释，其中包含以下相关的关键条款：

(i) 所有的协议都是合同，如果这些协议是经双方当事人用合理对价就合法目标公司达成的自由合意，并没有明确宣布为无效（第 10 条）；

（ii）过去的对价有效（不同于英国法律，英国法规定过去的对价是无效的）；

（iii）第 73 及 74 条包含违反合同的损害赔偿规定；

（iv）第 73 条规定，违约方应对违约自然产生的损失或损害，或双方当事人在合同订立时知晓违约行为可能导致的损失进行赔偿。因违约而产生的任何遥远或间接损失，不予赔偿；

(v) 第 74 条规定，按合同规定支付违约金。违约金数额不得由管辖权法院确定。遭受损失方将获得这笔款项，无论其是否实际遭受任何损失或损害。本条不区分违约金和罚金。合同条款无需说明合同双方约定的违约金数额属于非罚金性质。

（c）1984 年《所得税条例》及据其发布的《法定监管条例》为并购交易结构提供了重要指导：

(i) 就股份认购而言，由于收到认购资金的公司在订购时未赚取任何“收入”，因此不存在纳税后果；

(ii) 在下列股权转让的情况下，对股份出让者不征税：

- 通过赠与、遗嘱、遗赠或不可撤销的信托转让非上市股票（第 2（66）条）；或者
- 根据合并计划进行的非上市或上市证券转让（第 2（2）条），且其对价仅限于存续实体股权的形式（以现金支付对价将征收资本利得税）。

关于以赠与、遗嘱等形式进行的上市证券转让的税务后果，根据第 53M 条，发起人股东，董事或股东以赠与、遗嘱等形式转让上市证券应按市场价格和股票购买成本差额的 5% 征收资本利得税；

(iii) 此外，全资子公司与母公司进行合并不会对存续的母公司征税，因为资本利得税（“CGT”）只对出让方而非本情形中作为受让方的母公司征收。

(iv) 上市股票（发起股东，董事或出资人除外）适用资本利得税税率为 10 %，非上市证券 / 私人公司股份的资本利得税税率为 15 %。

(v) 在派息的情况下，第 54 条规定对支付给居民企业股东的股息征收

20% 的预扣税，上述股息作为股东收入还将进一步征税。根据孟加拉国的税收制度，对于股息所得的 20 % 应缴纳国内预扣税款不得提出减免。这就是孟加拉国没有集团控股公司的原因（“集团”公司通常是同一品牌下的独立公司，由同一或实质同一个人股东所有）。在向外国企业股东支付股息的情况下，根据孟加拉国与其公司设立的国家 / 注册地所在国之间适用的双重征税协议，股息预提税税率将降低至 15 % 或 10 %。

(d) 根据 1908 年《登记法》，下列特定文件须进行登记：

(i) 形成、宣告、转让、限制或注消任何不动产所有权或权益的非遗嘱文书；

(ii) 1882 年《财产转让法》第 59 条所述抵押贷款工具；

(iii) 每年续期或租期超过一年的不动产租约；

(iv) 确认收到或支付形成、宣告、转让、限制或注消上述权利、所有权或权益对价的文件。

在后文问题的回答中详细引用的重要法律法规有：1947 年《外汇监管法》（‘FERA 1947’），孟加拉国中央银行——孟加拉银行（“BB”）据此颁布的条例，孟加拉银行将这些条例编制于《外汇交易指南》第 1 卷和第 2 卷 (2009 年), 并且孟加拉银行不时对此发布更新（统称《外汇指引》,1969 年《证券交易法》,2002 年《证券交易委员会（重大股份收购，接管和控制）规则》（证券交易委员会 2002 年《收购规则》),2015 年《孟加拉国证券和交易委员会（公开发行）规则》（《公开发行规则》),2015 年《孟加拉国证券和交易委员会（另类投资）规则》(《另类投资规则》), 以及 2012 年《竞争法》。如果协议规定通过仲裁来解决争议，且双方选择 2001 年《仲裁法》规定的机制来解决争端，则适用 2001 年《仲裁法》规定的仲裁程序。转让股份价值及登记由 1899 年《印花税》管辖。

除了这些重要的法律法规外，还有其他取决于公司类型的特定法律，如 2003 年《孟加拉国能源监管委员会法》、2010 年《保险法》和 2001 年《电讯法》（“TA 2001”）等。2001 年《电讯法》是主要法律，主要规定电讯业所有持牌人的合并事宜。

2. 有哪些主要的政府监管机购或组织规管兼并收购活动

对于通过与法定合并相反的股份转让方式收购股份，以下监管机构 / 组织起关键作用：

股份公司及公司注册处（“RJSC”）

合伙、私人和公众有限公司通过合伙人或发起人（视情况而定）提交组织文件或公司章程而进行注册时，就涉及到该机构。RJSC 同时负责监管企业 / 公司所需的法定年度申报文件，以便在 RJSC 被视为表现良好。以下列任何方式收购股份：

(a) 公司向现有或新增股东发行新股；或

(b) 现有公司股东将持有的股份向收购方转让的，应根据 1994 年《公司法》要求向 RJSC 注册。然而，RJSC 对于涉及目标公司的股票发行或收购不予注册，除非目标公司符合其公司文件要求并更新其所有备案信息。因此，股权收购交易中首要尽职调查活动是审查目标公司在 RJSC 的目标业务公开记录，并确保符合文件要求。此外，根据 1994 年《证券及期货条例》第 159 条，银行和金融机构必须就全部抵押和费用向 RJSC 备案，以完善备案（或如果没有向 RJSC 备案费，则抵押 / 费用将面临失效的风险），对目标公司在 RJSC 备案的情况进行初步尽职调查，可以很好地了解目标公司的负债情况。

孟加拉国证券交易委员会 (BSEC)

就资本发行而言，私人有限公司必须首先获得 BSEC 的批准，才能将其实缴资本增加至 1 亿孟加拉塔卡。由于这种批准要求重大额外披露，许多私人有限公司人为地将实收资本维护在上述数额以内，以避免需要申请 BSEC 批准。BSEC 最近还颁布了《另类投资规则》和《公共发行规则》。前者确立了

在孟加拉国另类投资基金和基金经理的注册制度，目的是在孟加拉国内外筹集资金。但这并未考虑到由有限合伙人（“LP”）协议管理的外国私募股权基金，在该基金中可能出现与他们现有的 LP 协议相冲突而无法适用平行监管制度的情况。《公开发行规则》实施几个月后颁布的《另类投资规则》，为“另类投资基金”现有股东上市后提供较短的一年（原三年）锁定期。根据 2002 年 SEC《收购规则》，BSEC 还与 DSE 和 CSE 一起对重大上市股票收购进行监管：

(a) 根据第 6 条，如果现有股东或新认购拟在证券交易所以外获得超过 10％的公司的股权，则其必须向现有股东提交提案，发出公告表示有意收购股份；

(b) 根据第 7 条规定，如果通过证券交易所进行收购，则收购方必须通过经 BSEC 许可的商业银行发出公告；

(c) 根据第 17 条规定，当收购方发出拟收购公司股份的通知时，任何其他人可在公布发布后两周内购买该等股份；以及

(d) 任何财务困难的公司均可按照 2002 年 SEC《收购规则》所述的程序，由金融机构或计划内银行或任何其他人士、集团或公司收购。

高等法庭

关于 1994 年《公司法》第 228 条和第 229 条下的法定合并，高等法庭可以通过批准该方案，或发布后续命令就以下全部或任何事项做出规定：

(a) 向受让人转让全部或部分资产和负债；

(b) 受让人拨付转让人的股份、债权或其他类似权益；

(c) 通过合并不同类别的股份或将股份分成不同类别，以重组或合并股本；

(d) 出让人公司进行或针对出让人银行 / 金融机构的未完结的法律程序，由受让人继续进行或转为针对受让人公司；

(e) 出让人解散；

(f) 出让方 / 受让方对异议股东作出规定；以及

(g) 鉴于方案中提出的建议，如有必要，可规定必要的其他事项。

其他

对于电信行业的企业合并或收购，BTRC 需要进行法定的预先批准。对于银行来说，孟加拉国银行是监管机构，必须事先获得其批准。在这方面，孟加拉国银行已经发布了有关银行和金融机构的详细准则，以推动合并。上述准则为监管机构和高等法庭在批准计划时采用的标准提供了详尽的监管意见。特别是鉴于最近峰会集团为其能源子公司制定合并计划遇到严格的审查障碍，上述准则尤为有价值。此外，当从高等法庭获得批准时，上市公司应向作为必要一方的 BSEC 发出通知。BSEC 作为上市公司监管机构，可以自身名义就预期合并相关附加条件向高等法庭提交意见。高等法庭批准合并计划后，公司在 RJSC 的全部备案将被更新。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

恶意收购在孟加拉国国内相对少见。证券交易委员会 2002 年《收购规则》允许上市公司进行“竞争性收购”，以及对负资产净值的疲弱企业进行“救助收购”。根据 1994 年《公司法》第 230 条的规定，受让人要约已被股东大会 75％表决权股份通过的，受让人有权通知异议出让方股东（不接受要约的人）根据上述条款行使受让人的权利，除非异议股东向高等法庭提出请求要求终止受让人行使该等权利，否则持异议的股东必须以向大多数人提供的同等价格与条款将其股权出售给受让人。

4. 有没有哪些法律对某些兼并收购有限制或监管作用（例如，反垄断或国家安全法）?

国家工业发展委员会（“NCID”）将以下四个行业列为外国股东并购的“限制领域”：

(a) 武器弹药，其他军事装备及机械；

(b) 核能；

(c) 安全印刷和铸造；以及

(d) 在保留森林边界内的造林和机械化开采。

NCID 再次将 17 个行业列为“受管制的领域”，这些领域需经各部门 / 主管单位事先许可，才能允许外国股东进行并购：

(a) 深海捕鱼；

(b) 私营银行 / 金融机构；

(c) 私营保险公司；

(d) 私营发电，供电和配电公司；

(e) 天然气 / 石油的勘探、开采和供应；

(f) 煤炭的勘探、开采和供应；

(g) 其他矿产资源的勘探、开采和供应；

(h) 大型基础设施项目（如天桥，高架路，单轨，经济区，内陆集装箱堆场 / 集装箱货运站）；

(i) 原油精炼厂（用作燃料的润滑油回收 / 精炼）；

(j) 以天然气 / 浓缩等矿物为原料的大中型工业；

(k) 电信业务（移动电话 / 手机和有线电话）；

(l) 卫星频道；

(m) 货运 / 客运航空；

(n) 海上船舶运输；

(o) 港口 / 深港口；

(p) VOIP / IP 电话；以及

(q) 以海床积累的重金属为原材料的行业。

正如回复问题 2 时的论述，特定部门立法规范了孟加拉国的兼并收购，并限制了受让人从持牌公司获利的能力。例如许多电信牌照不仅有上限，甚至在某些情况下完全禁止外国人直接或间接地在持牌公司持股或参股，而且为获得 BTRC 的事先批准还需进行安全及信息审查。这样做是为了禁止未经审查人士进入此类行业。

5. 进行这些交易时需要哪些文件？

收购或新发行股票的条件可以接受股份认购协议或 SPA 的约束，并且在收购少数股权时，还会受股东协议约束。收购股份时，需要经事先批准的公司以及无需监管批准的公司获得特定监管部门要求批准后，需要准备下列资料：

(a) 收到计划内银行购买价款的兑现证明，因为买方必须在交易结束或关闭前将这些资金转入卖方的银行账户；

(b) 卖方和买方签署的销售股份的转让票据，RJSC 117 表格；

(c) 出售股份转让的宣誓书；

(d) 为转让签署的股权证明；

(e) 卖方转让其全部股份时，卖方辞去总经理 / 董事一职的正式辞职信；

(f) 没有公司现有股东放弃优先购买权的异议证明；

(g) 公司董事会会议纪要：

  (i) 通过卖方参与并书面同意转让的股份出售；

  (ii) 授权公司就股份购买和转让采取一切行动；

  (iii) 如卖方转让其全部股份，接受卖方辞去总经理 / 董事的职务；

(h) 涉及上述议程的公司董事会会议通知；以及

(i) 反映董事名单变动的经正式签署的表格 XII。

交易结束后，买方应促使公司按时向 RJSC 提交交易相关的全部必要文件和报告。

6. 这些交易须缴纳哪些政府费用？

转让和购买股份适用交易总额 1.5 % 的印花税。新股发行不适用印花税。但是，如果新发行股份超过 1 亿孟加拉塔卡，则需要经过 BSEC 的批准。申请费为 5000 孟加拉塔卡。另外，BSEC 在同意书中根据股份发行的价值收取适当的同意费。

7. 交易是否需要股东的同意或批准？

当交易额度高于一定限额时，除非公司章程要求董事会获得股东的批准，否则一般无需经过股东批准。某一公司董事同时为另一公司董事的，法律禁止其参与本公司为该公司提供商品或服务的交易。未经股东大会批准，董事也将被禁止参与公司业务出售或处置或者免除公司董事任何债务的交易。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

除非在公司章程中预先达成一致，否则交易参与人不承担法定责任。经十分之一的股东召集可召开临时股东大会，经提请召开的特别会议不排除对潜在交易进行审查。

9. 哪些情况下，目标公司须支付分手费？

目标公司没有向买方投资者支付终止费用的法定义务。然而，收购交易中的常见做法是，如果交易未在特定日期完成，或由于收购方无法为收购募足资金或履行股份认购协议和 / 或 SPA 中规定的先决条件而延迟的，卖方可以主张不退还定金。

10. 要约可否附加交易相关的条件？

股份购买协议和 / 或股份认购协议可以通过事先约定的方式规定附加条件。此外，高等法庭的兼并许可也可包含监管机构的附加条件。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

金融机构通过扩大信贷进行融资，可能需要在公司股份上设置留置权，或者对公司未来及目前的资产设置浮动或固定费用，质押或抵押。股东或者董事可以向公司提供股东贷款。1994 年《公司法》进一步认可通过特定股票认购面值“溢价”，或经董事会批准赎回优先股的方式来进行融资。1994 年《公司法》也允许发行债券进行融资；但以债权证券（如债券）形式发行的债券必须经过 BSEC 批准，并根据 2012 年《债务安全法》规定的私人配售方式发行。无论是有担保还是无担保债券的发行规则都要求强制性保留提供债务担保的银行和金融机构的认购限额。融资相关的担保或抵押都必须在 RJSC 注册，否则上述担保或抵押自始无效。金融机构设立的担保或抵押的实现通过专门的货币借贷法庭进行。公司债权人可以对从股东或其他无牌照融资机构处获得的私人融资提起仲裁或起诉，还可以诉至高等法庭的公司法庭要求对公司进行清算。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

如果要求认购新股票份额而少数股东拒绝认购付款，这些股份随后被多数股东或第三方认购的，少数股东的股份可能会被稀释。此外，如上文所述，1994 年《公司法》第 230 条规定，受让方的要约经出让方 / 目标公司 75% 或以上的股东接受，受让方可购买异议股东的全部股份。但在这种情况下，异议股东可以请求高等法庭停止交易。同样，未经少数股东同意变更其股份的，可以请求高等法庭根据 1994 年《公司法》第 71 条的规定停止变更。最后，只要少数股东单独或合计持有公司 10 % 的已发行股份，即有权根据 1994 年《公司法》第 233 条的规定向高等法庭提出上诉，以审查多数股东 / 董事会对少数股东的歧视行为。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

除董事会会议、股东特别会议通知的送达，或者应有权监管机构要求规定该等交易的批准期限，或高等法庭根据 1994 年《公司法》第 228/229 条的要求规定通知期以外，商业合并完成前无需遵守通知期的规定。

14. 是否有适用于被收购公司的行业特定规则？

如上所述，特定行业在任何收购前都需要遵守行业相关的立法。例如，电信、银行、保险、广播、发电、股票经纪、旅行社等都是特定行业，在收购前必须遵守与所有权相关的特定行业规则。

15. 跨境交易是否受任何特殊法律要求的制约？

跨境交易须遵守《外汇指引》的规定。孟加拉国实行限制性的外汇制度，外汇汇款需要得到孟加拉国中央银行 - 孟加拉银行的特别批准，但孟加拉银行事先通知授权取消特定交易限制的除外。但是，在上述出售所得款项汇回本国的政策方面，已经有了明显的自由化。在孟加拉银行 2014 年 8 月 31 日颁布的 32 号外汇通知（“32 号通知”）之前，孟加拉国银行根据《外汇管理条例》（2009 年）第 9 章第 3（B）条，将预先考虑将不超过股票净资产的非上市股票出售所得汇回本国（根据目标公司经审计的财务报表而定）。然而，32 号通知提供了两种额外的估值方法（市场价值法和收益方法），在大多数情况下，这些方法可能较高地估算了孟加拉银行允许汇回国内证券的公允价值（可能被汇回国内的数额）。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

孟加拉国的劳工法没有考虑到兼并和收购或就该等情形向劳动者进行通知。2013 年修订的 2006 年《劳工法》以及据此制订的 2015 年《劳动条例》要求就工厂组织及变更，包括工厂新任命经理，通知孟加拉国政府劳工部首席监察员。当经理职务发生变更时，必须向首席监察员报告。此外，除非以新条件延长雇佣合约，否则将视为继续执行前雇主提供的酬金、养老金等待遇。该法案还规定了裁员、削减开支、雇主无歧视解除雇佣等程序，且新雇主有义务继续遵守上述程序。

17. 近期是否有任何影响并购活动的改革或调整监管的提案?

2012 年《竞争法》规定，影响任何行业或市场竞争的兼并或收购行为，都必须事先获得竞争委员会的批准。随着竞争委员会的推动，该法案生效，委员会将负责执行该法案，其可能会对并购活动产生重大影响。近期高等法庭发布了关于合并企业股票附加独立估值增值的指南，并补充说明对于每项上市公司合并案件的审理，应增加 BSEC 参加审理以便作为监管人在法庭审理兼并 / 合并计划。

近期马来西亚的 Axiata 集团（“Robi Axiata”）接管了 Bharti Airtel（“Airtel Bangladesh”），为目前孟加拉国电信行业最大的兼并案。经孟加拉国最高法院的高等法庭在 Robi Axiata 有限公司和其他公司诉股份公司及公司注册处（36 BLD (HCD) (2016) 599）一案中批准合并后，Robi Axiata 与 Airtel 最终于 2016 年 11 月 16 日完成合并。

在这个具有里程碑意义的合并案中，高等法庭同意批准 Robi Axiata 和 Airtel 的合并，为两家公司提供了必要的指引：(a) 通过制定符合国际标准的主动离职计划（“VRS”），员工可以一视同仁的自由选择是否留在新合并的公司，以确保现有员工的劳动安全，(b) 与第三方服务提供商、供应商、分销商、零售商以及与两家公司有关的其他辅助机构采用与以往相同方式开展业务。

孟加拉国投资发展局 (BIDA) 是促进孟加拉国外商投资的主要政府部门。最近，BIDA 协调建立了提供下列服务的“一站式中心”：

(a) 在提供所有必要的文件的情况下，各市政府和地方政府机构将在 48 小时内签发商业许可证。该服务由 BIDA 及地方政府部门共同确保；

(b) 48 小时内完成 RJSC 公司注册；

(c) 在提供所有必要的文件的情况下，一天内在 BIDA 完成注册；

(d) 将在电力开发局代表工作所在地的 BIDA 收到申请后的十日内接通电力；

(e) 环境部门的代表负责人工作所在地的 BIDA 将在 10 天内颁发环保证书；

(f) 自收到申请之日起十日内接通天然气；

(g) 在提供所有必要的文件的情况下，外国借款申请在收到申请的 30 天内处理完毕；

(h) BIDA 通过各自的国家税务主管部门进行税务合规审查，该结果将在企业提出申请后 10 天内收到；

(i) BIDA 对土地征用提供协助；以及

(j) BIDA 同时提供在线服务。

但是，BIDA 的一站式中心尚未付诸实践。确切的实施日期仍然未知。一旦实施，我们期待它所带来的影响。

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The corporate type which is the most frequently used in Japan is a stock corporation referred to as "*Kabushiki Kaisha*" (KK), which is established and governed by the Companies Act (*Kaisha Hou*). All listed companies in the Tokyo Stock Exchange are KKs (excluding REITs or investment trusts).

(a) The most typical action in M&A transactions is a share transfer of a target company. The Companies Act stipulates the required procedures surrounding the transfer of ownership of the shares. Parties should fully comply with the Companies Act and the process will be agreed on in a share transfer agreement. Although the share transfer agreement should be drafted in accordance with the Companies Act, general contractual terms in the agreement are concurrently governed by the Civil Law (*Minpou*).

(b) The Companies Act also regulates statutory corporate organizational restructuring actions such as merger (*Gappei*), corporate split (*Kaisha Bunkatsu*), share exchange (*Kabushiki Koukan*), and statutory share transfer (*Kabushiki Iten*). Parties need to implement the applicable procedure required by the Companies Act to conduct these actions. For instance, these actions need to be approved by the Board of Directors or the shareholders meeting, as applicable.

(c) Other forms of M&A include asset sales (referred to as "business transfers" (*Jigyou Joto*) in Japan) and third-party allotment of new shares. The Companies Act also stipulates relevant procedures required for these transactions.

If a listed company is involved, the M&A process must be implemented in full compliance with the Financial Instruments and Exchange Act (*Kinsho Hou*) and relevant rules and regulations set forth by the stock exchange. The Financial Instruments and Exchange Act establishes rules relating to tender offer, disclosures, reporting system of the ownership of shares more than a certain percentage (5%), in addition to insider trading. Further, stock exchanges (the main stock exchange in Japan is the Tokyo Stock Exchange) also have rules on timely disclosures.

Other than the above, depending upon deal size and situation, parties may need to consider antitrust implications under the Antimonopoly Act. The Foreign Exchange and Foreign Trade Control Law ("Foreign Exchange Law") may also apply depending upon business category. Notification to relevant authorities may be required in certain circumstances.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

From a legal perspective, in principle, there are no governmental restrictions on M&A transactions, except if the transaction meets thresholds under the Antimonopoly Act or a target company conducts a certain category of businesses related to national security.

If the size of both an acquired company and an acquiring company exceeds certain thresholds set forth in the Antimonopoly Act, the transaction is subject to merger review by the Japan

Fair Trade Commission ("JFTC"). The parties are required to obtain clearance from the JFTC prior to closing. In the case where the M&A transaction includes a combination between competitors with large market shares, the JFTC may carefully review the case and request curative measures.

In the case of special business fields such as the military, nuclear power, and broadcasting and telecommunications, the parties are also required to obtain an approval from relevant governmental authorities pursuant to the Foreign Exchange Law.

From a practical perspective, a party needs to pay attention to a competent authority of the central government or local government. Approval from these entities is not necessarily legally required to implement the M&A transaction, but an explanation or a consultation with them may be important to continue the business after the transaction closes.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are permitted in Japan. They are not necessarily common, but have occurred in the past. However, there were few cases which resulted in success.

The bottom-line rule under the Financial Instruments and Exchange Act, which regulates a listed company or securities, is that a share acquisition should be made through the way of public tender offer if it results in the possession of more than one-third of all of voting rights of a listed company. A public tender offer is generally called a "TOB" (takeover bid). A TOB is a public offer of the purchase of a certain listed company at a designated price. Most TOBs are "friendly deals," where the process is initiated with the prior consent from the board of directors of a target company. If the TOB is initiated without the consent of the board of a target company, it will be called a hostile TOB.

In Japan, activist funds gradually became more prevalent in the 2000s. These funds sought companies with undervalued share prices and extended buyout offers. In most cases, the activist fund acquired a certain number of shares of the company and approached its target as a shareholder. If negotiations were not successful, a hostile TOB was commenced. Other than the activities of activist funds, there were some cases of hostile bids emanating from working companies with real business strategies in mind. The most famous example of this is the hostile bid made by Livedoor to Nippon Broadcasting in 2007.

As the number of the cases of hostile bids increased in Japan, listed companies began to introduce takeover defense measures designed based on the Companies Act and the Financial Instruments and Exchange Act. Today, the most prevalent takeover defense measure is the so-called "pre-warning type defense measure." It seeks information disclosure of acquisition plans, etc., from the acquirer and then requests an independent third-party advisory to issue an opinion on whether such acquisition would improve corporate value. However, many listed companies have abolished such takeover defense measure as it appears too protective for current officers and rather lowers the corporate value.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

(a) Under the Antimonopoly Act, if the amount of annual sales and the size of assets of involved parties exceed a certain threshold, notification to the JFTC is required. In summary, in the case of stock acquisition or merger, the transaction is subject to merger review by the JFTC if the total amount of local annual sales of the company group to which an acquiring company belongs exceed 20 billion yen and the total amount

of local annual sales of the company group to which a target company belongs exceed 5 billion yen, and the acquiring company is going to obtain more than 20% or 50% of voting rights. In the case of asset sale (business transfer), the threshold regarding local annual sales of a target company group is 3 billion yen.

The waiting period in Phase I is 30 days after receipt of notification. In the case of acquisitions without competition law concerns, the review of the JFTC will be completed within this period. If there is an issue under competition law, the process shifts to Phase II.

(b) The Foreign Exchange Law also requires prior notification when a contemplated investment falls into an inward direct investment by a foreign investor, and the investment will be made into a company which is conducting business in relation to the maintenance of national security or public order in Japan. For example, the rule of prior notification will apply if a target company (or any of its subsidiaries) conducts business concerning weapons, aircraft, nuclear power related business, electric power, telecommunications, pharmaceutical manufacturing, or security services. The waiting period is 30 days. This rule will apply to the case where only more than 10% of shares are obtained. Even if a subsidiary of the target company is engaged in a business corresponding to a pre-notification business category, this obligation of prior notification is required.

5. What documentation is required to implement these transactions?

The required documentation differs depending on the structure of M&A, i.e., whether the shares of the target company contain restrictions on transfer, whether it is a listed company, etc. An internal corporate process for making the decision of entering into an M&A transaction is necessary in both the acquiring company and the acquired company. Typically, a resolution of the board of directors or the shareholders meeting may be required. After the implementation of the M&A, it might be necessary to apply for the change of registration at the Legal Affairs Bureau if there is a change in the registered items as corporate information.

(a) In the case of stock transfer, if a target company issues a share certificate, the transfer of shares will take effect by actual delivery of the share certificate(s) under the Companies Act. In the absence of physical share certificates, an application form for change of recorded items in the shareholders registry is required.

(b) In the case of a merger, it is necessary to publish the many documents specified in the Companies Act, namely, a merger agreement, a statutory disclosure document (before and after the effective date), a notice to creditors, public notice to the Official Gazette, and an explanation of the situation regarding creditors who opposes the transaction.

(c) Likewise for the company split, it is necessary to prepare a division plan, disclosure documents, a notice to creditors, and public notice, etc.

In addition, in the case of a listed company, it is necessary to prepare statutory disclosure documents for the Financial Services Agency and timely disclosure documents required under timely disclosure rules of the stock exchange.

6. What government charges or fees apply to these transactions?

There are no special or specific charges by the government on an M&A transaction. If the case is subject to the JFTC's review, the filing fee to the JFTC will be charged. As for the application to change the registration information at the Legal Affairs Bureau, fees and taxes will be charged.

7. Do shareholders have consent or approval rights in connection with a deal?

In the case of a share transfer of a public company, as it is basically a transaction between existing shareholders and an acquirer, consent of shareholders or shareholders meeting is not required in connection with the transaction itself. An acquirer needs to pay much more attention to the rules and regulations under the Financial Instruments and Exchange Act and/or the rules set forth by the stock exchanges.

In the case of a share transfer of a private company, a share transfer between shareholders is subject to the approval of the board of directors and/or the shareholders meeting in principle. A private company here means a stock corporation with a restriction on a share transfer in its Articles of Incorporation.

Based upon the recent amendment of the Companies Act in 2014, when a company is transferring a subsidiary's share with a value exceeding one-fifth of total assets, a super-majority (equal or more than two-thirds of voting rights) resolution of the shareholders meeting becomes necessary as of 2015. This is a requirement of obtaining the consent of shareholders or shareholder of an acquired company. This rule is the same in the case of an asset sale (business transfer).

As for corporate organizational restructuring actions such as merger, corporate split, share exchange and statutory share transfer under the Companies Act, a super-majority resolution of the shareholders meeting is necessary, except when it falls under exceptional cases.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

In principle, as Japan operates under a civil law system unlike US/UK's common law system, the legal developments on the issue of the duty of directors have been made on the basis of written provisions of the Companies Act. Based upon relevant provisions in the Act, directors shall perform their duties for the company in a loyal manner, which is commonly interpreted as directors owe the company a duty of care to be a good manager. Having stated the above, as legal theory under common law has a big influence on corporate practices in Japan, it is safe to assume directors owe a similar level of fiduciary duties to the company. In cases where there is a dispute between controlling shareholders and minority shareholders, a derivative suit by minority shareholders against directors sometimes occurs following an M&A.

As for the duty of controlling shareholders against stake holders, there have been no significant legal developments so far.

9. In what circumstances are break-up fees payable by the target company?

Depending upon the size or character of the deal, the break-up fee clause, which allows a seller to terminate the existing contract under certain situations (e.g., in case of a proposal from a competing purchaser) by paying a certain penalty to the original acquirer, is sometimes prescribed in the definitive agreement. If it is agreed to between the parties, it becomes binding to parties, in principle. There have been no significant legal developments to date as to what extent it becomes binding.

10. Can conditions be attached to an offer in connection with a deal?

Yes, it is typical to attach several conditions and exceptions to an offer in connection with a deal. For instance, there being no material adverse change or obtaining a clearance with no exception from the JFTC are typical conditions attached to an offer.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Under the Companies Act or other M&A related laws, there is no specific requirement or restriction concerning financing. Particularly in a LBO deal, a loan agreement and other agreements of setting collateral/pledges with financial institutions are key aspects of an M&A transaction. Firstly, an acquiring company establishes a new company ("Newco") as a vehicle for acquisition and such Newco acquires shares of the targeted company or conducts a merger, etc., with it.

As mentioned above, although there is no requirement of a minimum level of financing, parties need to be careful of tax laws. Typically, in the case where the amount of a loan from a foreign entity exceeds three times the capital amount provided by a foreign entity, a payment of interest of loans (for such excess amount) to such a foreign entity will not be deemed deductible expenses under thin capitalization rules (*Kasyou Shion Zeisei*).

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Yes, minority shareholders can be squeezed out through several methods. Recent amendments of the Companies Act affect such methods.

(a) A controlling shareholder holding 90% or more of voting rights of the company (referred to as "special controlling shareholder" (*Tokubetsu Shihai Kabunusi*) is entitled to force minority shareholders to sell all of their shares to the special controlling shareholder (*Kabushiki Uriwatashi Seikyu*). Thus, a special controlling shareholder may forcibly acquire all shares (which should be less than 10%). As it is not necessary to hold a general shareholders meeting for this process and the special controlling shareholder may directly acquire remaining shares at one time, the controlling shareholders may complete squeezing out in the shortest time by this procedure. This is newly adopted by the amendment of the Companies Act in 2014.

(b) If the ratio of a controlling shareholder is less than 90% of voting rights, the shareholder may consider using the way of statutory consolidation of shares (*Kabushiki Heigou*) for squeezing out. This method is a little bit technical. The company proceeds with a statutory consolidation of shares at such a ratio that the number of shares held by minority shareholders is less than one share in the first step. Then, the company sells out such fractional shares in accordance with relevant provisions in the Companies Act. The super-majority resolution of the company is required. Minority shareholders opposing this process at the shareholders meeting have rights to request share purchase from the company at legitimate consideration to the court, if they consider the purchase price is unfairly low.

Prior to enforcement of the amendment of the Companies Act in 2015, there were many cases where squeeze-out was carried out by another method using classified shares with "all acquisition provisions." However, as this way extremely complicated, the above two methods have become mainstream nowadays.

13. What is the waiting or notification period that must be observed before completing a business combination?

The waiting period under the Antimonopoly Law is thirty (30) days after filing of the notification, and in the case of acquisitions without concern under the competition law perspective, the JFTC's review will end within this period. In most cases, the JFTC may send a notice to the effect that any measures will not be taken. Otherwise, the deal is deemed to have an anti-competition concern and shifts to Phase II of review, which would take much longer.

The actual process usually starts with a prior consultation with the JFTC before making an official filing. Parties should be careful in that the Japanese government authorities, including the JFTC, tend to be very strict regarding formalities. The filing is often not accepted as an official filing due to lack of necessary documents or information.

The waiting period under the Foreign Exchange Law is also thirty (30) days, in principle. If there are clearly no concerns regarding national security or public order with the deal, a competent authority may grant a clearance before the period expires.

As with M&As in other jurisdictions, obtaining necessary clearance from relevant authorities will be one of the important conditions precedent of closing stipulated in a definitive M&A agreement.

14. Are there any industry-specific rules that apply to the company being acquired?

As to the industries for which prior notification is required under the Foreign Exchange Law, such as weapons, aircraft, nuclear power related business, electric power, telecommunications, pharmaceutical manufacturing, or security services, parties also need to analyze if an M&A affects approvals or licenses which a targeted company may possess.

An M&A involving financial institutions such as a bank, trust bank, investment bank, securities company, and insurance company should proceed with caution. Banks are especially highly regulated and monitored by the Financial Services Agency ("FSA") of Japan in terms of financial soundness, and it is safe to consider that an M&A including a bank will mean that all phases are subject to pre-approval of the FSA, in principle.

Other than the above, when a target company is conducting business which requires an approval or license by the governmental authority, such as transportation, shipping, forwarding, energy, etc., the effect of the M&A should be carefully examined through the due diligence process.

15. Are cross-border transactions subject to certain special legal requirements?

As mentioned above, if a target company is conducting certain kinds of business regarding the maintenance of national security and public order, an investment of a foreign entity requires prior notification under the Foreign Exchange Law.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Depending upon the M&A structure, the effect on labor relationships in a targeted company may differ.

(a) In the case of a share transfer, as only the ownership of the shares of the targeted company is transferred, there is no direct impact on labor contracts between the targeted company and its employees. Existing labor contracts simply continue to be effective in the same as it was as before the transaction.

(b) In the case of a merger, a surviving company (an entity of an acquiring company) inherits the labor relationships between a disappearing company and its employees without any change. Therefore, the employment conditions are transferred as they are, and multiple employment conditions would exist in parallel in a surviving company. Please be aware that Japanese labor legislation is much more employee-friendly, compared to other jurisdictions, and so practically it is difficult to simply reduce headcount at the company's discretion. The dismissal of an employee needs an unavoidable reason or must adhere to other strict requirements. Further, in principle, it is not possible to change the employment conditions to the disadvantage of an employee without his or her consent.

(c) In the case of corporate split, there is a special law regarding the transition of employees. Labor contracts will be transferred to an acquirer's entity under the same conditions as before, although consent from individual employee is not required, in theory. The special law (The Labor Contract Succession Act) stipulates procedures for protecting employees to be assigned and also employees not to be assigned by a contemplated corporate split.

(d) In the case of an asset sale (business transfer), it is necessary to agree with individual employees in order to inherit workers. Therefore, a key employee for a transferring business sometimes refuses transition to an acquiring entity and this becomes an issue.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

The amendments of the Companies Act in 2014, which became effective in 2015, affected the method of squeezing out, as mentioned above. After a simple way of squeezing out by a special controlling shareholder (having more than 90% shares) was introduced, there have been a lot of cases using this method to make an entire subsidiary. Further, the statutory consolidation of shares has become the mainstream method of squeezing out. This amendment of the Companies Act also affected an activity on the seller side. When a company sells its subsidiary of which the assets in the book exceed one-fifth of total assets, a super-majority resolution of the shareholders meeting is required.

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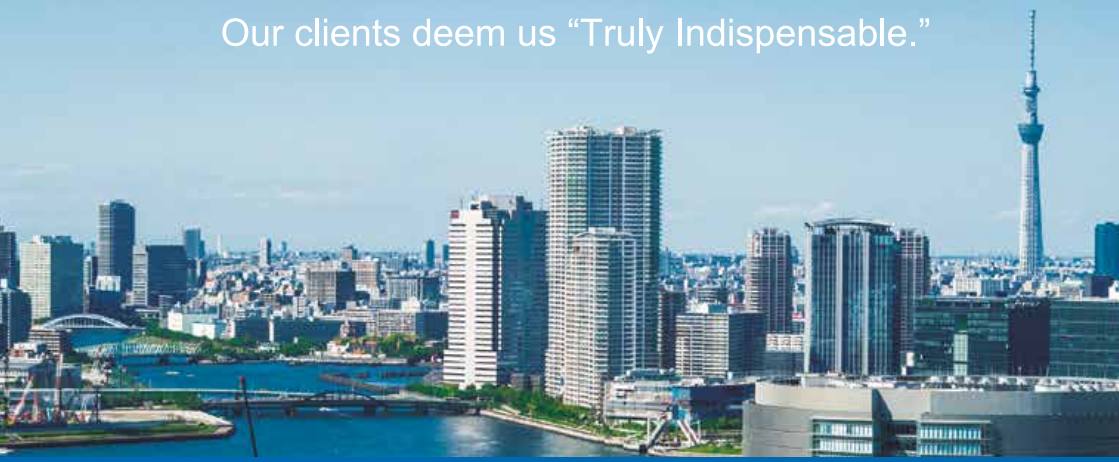

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1. 您所在管辖区有哪些主要适用的并购法律法规？

在日本，最常见的企业类型是股份公司，即所谓的“株式会社”（简写作“KK”），其由《公司法》（即 Kaisha Hou）确立并加以规范。所有在东京证券交易所上市的公司均为株式会社（不包括 REITs 或者信托投资基金）。

(a) 在企业并购交易中最典型的行为是目标公司的股份转让。《公司法》规定了转让股份所有权的必要程序。各方应当严格遵守《公司法》，并且在股份转让协议中商定该程序。尽管股份转让协议应当依照《公司法》起草，但协议中的通用合同条款同时适用《民法》（*Minpou*）。

(b) 《公司法》还规定了法定公司重组行为，例如合并（*Gappei*）、公司分立（*Kaisha Bunkatsu*）、股权置换（*Kabushiki Koukan*）以及法定股份转让（*Kabushiki Iten*）。各方进行这些行为需要完成《公司法》所要求的可适用的程序。例如，这些行为需要通过董事会或股东会的批准（如有）。

(c) 并购的其他形式包括资产出售（在日本被称为“业务转让”（*Jigyou Joto*））以及向第三方配发新股。《公司法》还规定了这些交易必要的相关程序。

如果涉及上市公司，则并购程序必须严格遵守《金融商品交易法》（*KinshoHou*）以及交易所制定的相关规则和条例。除了内幕交易外，《金融商品交易法》确立了有关要约收购、披露、对超过特定比例（5%）的股权变动的报告制度。另外，证券交易所（日本主要的证券交易所为东京证券交易所）还对及时披露进行了规定。

除上述规定外，根据交易规模和形势，各方可能需要考虑《反垄断法》下的反垄断影响。《外汇及对外贸易管理法》（简称“《外汇法》”）也可能适用，这取决于业务类型。在某些情况下，可能需要向相关机构发出通知。

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

从法律的角度而言，原则上，并购交易并不存在政府限制，除非该项交易达到了《反垄断法》所规定的限度，或者目标公司从事与国家安全有关的某种业务类型。

如果被收购企业与收购方的规模均超过了《反垄断法》规定的特定限度，则该项交易须经过日本公平贸易委员会（简称“JFTC”）的并购审查。各方应当在交割之前获得 JFTC 授予的许可。如果并购交易包括拥有大规模市场份额的竞争对手之间的联合，JFTC 可能会对该并购案进行仔细审查并且要求采取预防措施。

在军事、核电、广播、电信等特殊业务领域，各方还需依照《外汇法》获得有关政府部门的批准。

从实践的角度而言，一方需注意中央政府或地方政府的主管权限。为完成并购交易，获得这些实体的批准并非一定是法律上必要的，但在交易结束后，向其寻求解释或与之咨询，对继续开展业务而言可能是至关重要的。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

在日本允许恶意收购。此类情形可能不一定常见，但在过去确已发生。然而鲜有成功案例。

管控上市公司或证券的《金融商品交易法》的规则底线是，如果股权收购将导致持有上

市公司有表决权股票超过三分之一，则应当通过公开要约收购的方式进行股份收购。公开要约收购通常被称为“TOB”（要约收购）。TOB 是以指定价格购买特定上市公司的公开要约。大多数 TOB 是“友好的交易”，这些交易的过程自目标公司董事会同意时开启。如果未经目标公司董事会同意而发起 TOB，则其会被称为恶意 TOB。

在日本，维权基金在 21 世纪逐渐普遍起来。这些基金努力搜寻股价被低估以及买断要约被延期的公司。在大多数情况下，维权基金获得了一定数量的公司股份，并以股东身份接近其目标。如果谈判不成功，则开始恶意 TOB。除了维权基金的活动之外，还有一些拥有真正商业战略眼光的上进公司提出的恶意收购。此类情形中最著名的例子是 2007 年由活力门（Livedoor）对日本放送公司（Nippon Broadcasting）发起的恶意收购。

随着日本恶意收购案例数量的攀升，上市公司开始引入以《公司法》及《金融商品交易法》为基础而设计的防御措施。如今，最普遍的收购防御措施是所谓的“预警式防御措施”。其寻求从收购方就收购计划等进行信息披露，并随后要求独立第三方咨询机构就该等收购是否提高公司价值发表意见。但是许多上市公司已经废除了该等收购防御措施，因为其显得太过于保护现有高级管理人员，反而削弱了公司价值。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？（例如，反垄断或国家安全法）

(a) 根据《反垄断法》，如果所涉各方的年度销售额及资产规模超过特定限度，则须通知 JFTC。总之，在股票收购或兼并的情形中，如果接收公司所属的集团公司当地年销售总额超过 200 亿日元，目标公司所属的集团公司当地年销售总额超过 50 亿日元，并且接收公司将获得超过有表决权股份的 20% 或 50%，则该项交易须经 JFTC 的并购审查。在资产出售（业务转让）的情形中，与目标公司集团当地年销售额有关的限额为 30 亿日元。第一阶段的等待期为收到通知之日后 30 天。在与竞争法事宜无涉的收购中，JFTC 的审查将在这一时期完成。如果存在竞争法规定的事宜，该程序将进入第二阶段。

(b) 《外汇法》还规定，如果一项拟议投资系外商直接投资，并且将被投资于从事维护日本国家安全或公共秩序的公司，则应当事先通知。例如，如果目标公司（或其任何子公司）从事有关武器、飞机、核电相关业务、电力、电信、制药制造或安全服务方面的业务，将适用事先通知规则。等待期为 30 天。本规则适用于仅获得超过 10% 股份的情况。即使目标公司的附属公司开展与预先通知业务类型相对应的业务，也需要履行事先通知的义务。

5. 进行这些交易时需要哪些文件？

所需的文件因并购的结构而有所不同，即目标公司的股票是否包含对转让的限制，是否为上市公司等。在收购和被收购公司中，均须经过公司内部对并购交易的决策程序。通常，董事会或股东会的决议可能是必需的。并购完成后，如果已注册的公司信息发生变更，则有必要向法律事务局申请变更登记。

(a) 根据《公司法》，在股票转让的情况下，如果目标公司发行股份证书，则股票转让将在实际交付股份证书之时生效。在没有实物股份证书的情况下，需要向股东登记机关提交变更登记项目的申请表。

(b) 在合并的情况下，需公布《公司法》规定的许多文件，即合并协议、法定披露文件（在生效日期之前及之后）、向债权人发出的通知、在政府公报刊登的公告，以及对反对交易的债权人情况的说明。

(c) 同样地，对于公司分立的情形，需准备拆分计划、披露文件、向债权人发出的通知以及公告等。

另外，在涉及上市公司的情形中，需向金融厅提交法定披露文件，并根据证券交易所及时披露规则对文件进行及时披露。

6. 这些交易须缴纳哪些政府费用？

政府对并购交易没有特殊或特定的收费。如果并购案须经 JFTC 的审查，JFTC 将收取申请费。向法律事务局申请变更注册资料，将收取手续费及税金。

7. 交易是否需要股东的同意或批准？

上市公司的股份转让基本上是现有股东与收购方之间的交易，并不需要经与交易本身有关的股东或股东大会批准。收购方需要更多地关注《金融商品交易法》和（或）证券交易所规定的规则和条例。

在私人公司股份转让的情形中，股东之间的股份转让原则上须经董事会和（或）股东会批准。此处的私人公司是指公司章程对股份转让设有限制的股份有限公司。

根据 2014 年最新修订的《公司法》，自 2015 年开始，当一家公司转让一家子公司的股份且该等股份价值超过总资产的五分之一时，经绝大多数表决权（等于或超过三分之二的表决权）通过的股东大会决议开始成为必要。这要求获得被收购公司多名或一名股东同意。在资产出售（业务转让）的情况下，这条规则是相同的。

在《公司法》下的公司兼并、公司分立、股权置换和法定股份转让等公司重组行为中，经绝大多数表决权通过的股东大会决议是必要的，但例外情况除外。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

原则上由于日本践行不同于美国 / 英国普通法系的民法体系，有关董事责任问题的立法进展则是根据《公司法》的成文规则而制定的。董事会应当根据《公司法》的有关规定以忠实的方式履行公司的职责，这通常被解释为董事们有责任成为公司的一名优秀管理者。如上文所述，因为普通法的法律理论对日本的公司实践有很大影响，因此可以假定董事对公司负有类似的信托义务。在控股股东与中小股东之间存在争议时，一项并购交易完成之后有时会发生少数股东对董事的衍生诉讼。

至于控股股东对利益相关方的责任，至今尚无法律上的重大进展。

9. 哪些情况下，目标公司须支付分手费？

根据交易的规模或性质，有时会在最终协议中规定终止费条款，允许卖方在某些情况下（例如，存在竞争购买方的提议）通过向原收购者支付一定罚款来终止现有合同。如果双方就终止费条款达成一致，则该条款原则上对当事人具有约束力。至于终止费条款在多大程度上具有约束力，至今尚无法律上的重大进展。

10. 要约可否附加交易相关的条件？

是的，为与交易有关的要约附加若干条件及例外情形是典型的做法。例如，不存在实质性不利变化或者必须获得 JFTC 授予的许可是典型的附加于要约的条件。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

根据《公司法》或其他与并购相关的法律，不存在与融资有关的特定要求或限制。尤其是在杠杆收购（LBO）交易中，贷款协议以及其他向金融机构设定抵押 / 质押的协议是并购交易的关键因素。首先，接收公司建立了一家新公司（简称“新公司”）作为收购的工具，并且该等新公司与之共同收购目标公司的股权或者进行兼并等活动。

如上所述，虽未规定最低限度的融资水平，但各方需密切关注税法。通常，当从某一外国实体获取的贷款金额超过该外国实体所提供资金金额三倍时，根据资本弱化规则（*KasyouShionZeisei*），向该等外国实体支付贷款（针对该等过限金额）利息将不被视为可扣除费用。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

是的，少数股东可能通过若干种方法被排挤出去。最近修订的《公司法》对该等方法造成了影响。

(a) 持有本公司 90% 或以上投票权的控股股东（简称“特殊股东”（*Tokubetsu Shihai Kabunusi*））有权强迫少数股东向特殊控股股东（*Kabushiki UriwatashiSeikyu*）出售其所持有的全部股份。因此，特殊控股股东可以强行收购所有股份（不得少于 10%）。由于无需就该程序召开股东大会，并且特殊控股股东可以一次性直接收购剩余股份，控股股东可以通过该程序在最短时间内完成清算。这由 2014 年《公司法》修正案最新通过。

(b) 如果控股股东的投票权比例低于 90%，股东可以考虑使用法定并股（*Kabushiki Heigou*）的方式开展排挤行为。该方法略具技术性。公司以一定比例进行法定并股，该比例使得少数股东持有的股份数量在第一步中不到一股。然后，公司按照《公司法》的有关规定出售该部分股份。经该公司绝大多数表决权通过决议是必要的。如果对股东会决议投反对票的少数股东认为收购价格过低，其有权向法院请求公司以合理对价来购买股份。

在 2015 年《公司法》修正案施行前，许多情况中采用了另一种使用分级股票的方法来贯彻“所有收购规定”进行排挤行为。然而，由于这种方式极其复杂，上述两种方法现已成为主流。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

《反垄断法》规定的等待期为发出通知之日起的三十（30）天，并且在与竞争法事宜无涉的兼并情形中，JFTC 的审查将在这一时期内结束。大多数情况下，JFTC 可能会发出不得采取任何措施的通知。否则，该交易被视为涉及反竞争事宜，并且进入第二阶段的审查，这将需要更长的时间。实际过程通常始于正式提交之前的与 JFTC 的事前磋商。各方应当注意，包括 JFTC 在内的日本政府机构在手续方面往往非常严格。由于缺乏必要的文件或资料，该文件通常不作为正式文件归档。

原则上，《外汇法》规定的等待期亦为三十（30）天。如果该项交易明显与国家安全或公共秩序无涉，主管机关可能在该期限届满前授予许可。

与其他司法管辖区中的并购一样，获得有关机构的必要许可将是最终并购协议所规定的交割之前的重要条件之一。

14. 是否有适用于被收购公司的行业特定规则？

对于《外汇法》要求事先通知的行业，如武器、飞机、核电相关业务、电力、电信、制药或安全服务，各方还需分析并购是否会影响目标公司可能通过的批准或拥有的许可证。

涉及银行、信托银行、投资银行、证券公司以及保险公司等金融机构的并购活动应当谨慎进行。出于金融稳定的考虑，银行受到金融服务局（简写作“FSA”）的高度管制和监督，并且如果一项并购活动牵扯到银行，可以认为原则上所有阶段均须获得 FSA 的前置审批。

除此之外，当目标公司开展需要政府当局批准或许可的业务时，如客运、航运、货运、能源等，则应通过尽职调查仔细审查并购的效果。

15. 跨境交易是否受任何特殊法律要求的制约？

如上所述，如果目标公司从事有关维护国家安全和公共秩序方面的某些业务，外国实体的投资需根据《外汇法》进行事先通知。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

根据并购的结构，对目标公司劳动关系的影响可能不同。

(a) 在股份转让的情况下，由于只有目标公司股份的所有权被转让，因此目标公司与其雇员之间的劳动合同不受直接影响。现有的劳动合同与交易之前一样，继续有效。

(b) 在兼并的情况下，存续公司（接收公司的实体）承继了消失公司与其雇员之间没有任何变化的劳动关系。因此，就业条件是转移的，并且在存续公司中，多重就业条件并存。请注意，与其他司法管辖区相比，日本劳动立法更加有利于雇员，因此实际上很难简单地减少雇员人数。解雇员工需要不可避免的理由，或者必须遵守其他严格的要求。此外，原则上，不经雇员同意，无法改变其就业条件。

(c) 在公司分拆的情形中，关于雇员的转移有特殊法律。劳动合同将以等同于以往的条件转移到收购方实体，但是理论上并不要求雇员同意。特殊法律（《劳动合同继承法》）规定了保护雇员被分配的程序，并规定雇员不得因公司分拆而被分配。

(d) 在资产出售（业务转让）的情况下，必须与个体雇员达成一致以便继承劳动者。因此，转移业务的重要雇员有时会拒绝被转移到接收实体，而这就造成了问题。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

如上文所述，于 2015 年生效的 2014 年《公司法》修正案对排挤行为产生了影响。在特殊控股股东（拥有超过 90% 股份）进行排挤行为的简单方法被引入后，已有诸多案例使用这种方法来创立一家完整的子公司。此外，法定并股已成为排挤行为的主流方法。《公司法》的这一修正案也影响到卖方一端的活动。当公司出售账面资产超过总资产五分之一的子公司时，需有经绝大多数表决权（等于或超过三分之二的表决权）通过的股东大会决议。

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Mayne Wetherell

1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The majority of mergers and acquisitions are not heavily regulated in New Zealand and are given effect through a private contract for the sale and purchase of shares or assets. However, additional layers of regulation apply if one of the entities is listed or widely held, if the merger involves competitors, or if foreign buyers are investing in significant or sensitive New Zealand assets.

Companies Act 1993

If the merger or acquisition is effected through a New Zealand registered company (e.g. as vendor and/or purchaser), and involves the acquisition or disposal of assets, rights or liabilities that have a value of more than half the value of the relevant company prior to the transaction, the transaction will constitute a major transaction under the Companies Act 1993 ('Companies Act') requiring approval of that company's shareholders by a special resolution, being a default threshold of 75% of the votes of all shareholders entitled to vote and voting, unless otherwise increased ('Special Resolution').

Amalgamations

The Companies Act provides a mechanism for amalgamations, whereby two companies combine and continue to operate as one company. The shareholders of the amalgamating companies can take shares in the amalgamated company or receive other consideration. Amalgamations can be either short form or long form. Short form amalgamations are typically only available for the merging of a company and its wholly owned subsidiary or two companies that are wholly owned by the same entity. A short form amalgamation is approved by a resolution of the board of each amalgamating company and does not need to comply with the amalgamation process in the Companies Act. In any other case, an amalgamation must be 'long form' (e.g. where the two merging companies are not related). A long form amalgamation requires the relevant companies to prepare an amalgamation proposal that sets out the terms of the amalgamation and the proposal must be approved by the board of each amalgamating company and a Special Resolution of the shareholders of each amalgamating company.

Schemes of arrangement

The Companies Act provides for a court-sanctioned amalgamation known as a scheme of arrangement. Court approval is required where the amalgamation involves an overseas company or the amalgamated company will not satisfy the solvency test, and is desirable where an amalgamation is complex or there are difficulties obtaining shareholder approval through normal means.

A scheme of arrangement typically involves the bidder and target company jointly developing an offer structure that target shareholders vote on, and the High Court may order that the scheme be binding on such terms and conditions as the court thinks fit.

New Zealand Stock Exchange Listing Rules

Entities listed on New Zealand's stock exchange, operated by NZX Limited ('NZX'), are subject to listing rules ('NZX Listing Rules') that apply directly to issuers and market participants and indirectly (through market participants) to investors. The NZX Listing Rules are highly

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Matthew is a corporate partner at Mayne Wetherell. Matthew has experience on a wide range of corporate activity including domestic and foreign M&A, joint ventures and equity capital markets, with a particular focus on foreign direct investment. Matthew has been recognised by Asia Pacific Legal 500 and IFLR.

Recent transactions:

- Acted for Universal Robina Corporation on its acquisition of Griffin's Foods from Pacific Equity Partners and its acquisition of Snack Brands Australia.
- Represented a consortium comprising KKR, Varde Partners and Deutsche Bank on its acquisition of GE Capital's consumer finance business, and Bain Capital and Deutsche Bank on the acquisition of GE Capital's commercial finance portfolio.
- Advised Intermediate Capital Group in relation to the IPO of Tegel Foods.
- Advised TPG in relation to the acquisition and then ASX IPO of Inghams.
- Acted for Lempriere Australia in relation to the merger and partial divestment of its wool scour assets with Cavalier.

prescriptive; the following requirements are of relevance to mergers and acquisitions:

(a) 50% shareholder approval for major transactions or related party transactions, or 75% shareholder approval where required by the Companies Act;

(b) a listed company must continuously disclose material information to the market, which may include transactions involving the sale of more than 5% of issued securities; and

(c) there are also specific rules that govern the rare occurrence of a takeover of a listed entity that is not governed by New Zealand's Takeovers Code (see 'Takeovers Code' below).

Financial Markets Conduct Act 2013

The Financial Markets Conduct Act 2013 ('FMCA') requires mandatory shareholder disclosure if a person has 5% or more of a class of quoted voting products in a listed issuer.

The FMCA also provides regimes which generally prohibit persons who possess undisclosed material information regarding a public issuer from trading, advising or disclosing this information, known as insider trading, as well as practices that involve creating a false impression of market information, known as market manipulation.

Takeovers Code

New Zealand's Takeovers Code applies to 'Code Companies' to ensure that shareholders of listed and widely held companies are well informed of, and can participate in, changes of control in their company. The Takeovers Code prescribes a detailed framework for material investment in Code Companies, and ensures disclosure to, and equal treatment of, shareholders in Code Companies.

A Code Company is a New Zealand registered company that is listed on the NZX (or has been listed in the previous 12 months) or has 50 or more shareholders holding a voting right and 50 or more share parcels. The Takeovers Code prohibits a person (directly, indirectly or through their associates) from becoming the holder or controller of voting rights in a Code Company where that interest would be 20% or more. This rule captures existing holders or controllers of 20% or more of the voting rights who wish to increase their holding or control. Exemptions to the fundamental rule allow a person to become the holder or controller of an increased percentage of the voting rights in a Code Company without contravening the Takeovers Code and include:

(a) a Code-compliant full offer for all voting and non-voting securities of the target;

(b) a Code-compliant partial offer for a specified percentage of voting securities that would result in the offeror holding or controlling more than 50% of the voting rights;

(c) acquisition or allotment of voting securities approved by an ordinary resolution (excluding the persons acquiring, disposing of or allotting the securities and their associates);

(d) unlisted small Code Companies with an enterprise value of NZ$20 million or less;

(e) a 5% creep exception for persons that hold or control between 50% and 90% of the voting rights applies once in a 12-month period;

(f) by a compulsory acquisition if the person already holds 90% of the voting rights in the Code Company;

(g) a court-approved scheme of arrangement under the Companies Act; and

(h) an individual or class exemption granted by the Takeovers Panel.

Commerce Act 1986

New Zealand's anti-trust legislation, the Commerce Act 1986 ('Commerce Act'), applies to all mergers and acquisitions and prohibits business acquisitions and other conduct that substantially lessens competition in a market.

Merging firms can apply to the Commerce Commission ('ComCom') for clearance or authorisation of a proposed merger. The ComCom will clear a merger if it is satisfied that the merger is not likely to substantially lessen competition in a market. Alternatively, the ComCom may authorise a merger that substantially lessens competition in a market, if the merger is likely to result in a benefit to the public. Authorisations for mergers are relatively rare.

The clearance and authorisation processes are not mandatory at any stage of a merger, and notification is not required at any point. Accordingly, the ComCom has the power to investigate and commence proceedings if it suspects that a merger or acquisition has breached the Commerce Act. The ComCom may also make orders such as the divestiture of assets or shares or apply to the Court to seek an injunction. The ComCom cannot grant clearances or authorisations retrospectively, so participants of a proposed merger must assess in advance whether the merger could give rise to a substantial lessening of competition in a market in New Zealand and, if so, the merger should be made conditional on ComCom approval.

Overseas Investment Act

The Overseas Investment Act 2005 ('OIA') applies to all mergers and acquisitions, and

certain foreign investment will require consent from the Overseas Investment Office ('OIO') (see question 15 for further information).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The New Zealand Companies Office is the government agency that handles amalgamation applications, and the High Court of New Zealand regulates schemes of arrangement.

The Financial Markets Authority ('FMA') is the government agency that regulates capital markets and financial services in New Zealand (including administering the FMCA). The FMA promotes and facilitates the development of fair, efficient and transparent financial markets in New Zealand and can take action against issuers who are in breach of the applicable regulations.

The Takeovers Panel is responsible for administering and enforcing the Takeovers Code in New Zealand. The Takeovers Panel consists of practitioners appointed by the Governor General who operate in the merger and acquisition market, including lawyers, directors and investment bankers.

As mentioned above, the ComCom is New Zealand's competition regulator, and the OIO assesses applications for consent of foreign investment.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Yes, hostile bids are permitted in New Zealand.

The default position is that shareholders have the right to sell their shares, subject to any limitations imposed in a company's constitution or shareholders' agreement, if applicable. While these limitations can empower the board of directors to prevent certain transfers which may hinder the possibility of a hostile bid, such transfer restrictions are not permitted for entities listed on the NZX.

Both amalgamations and schemes of arrangement, which are more flexible and certain in nature, require director approval, thus effectively preventing their use in the context of a hostile bid.

Regulated takeovers of Code Companies can be hostile; however, friendly offers are relatively common in New Zealand. Directors who do not agree with a proposed bid usually provide written statements containing adverse recommendations to shareholders.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

New Zealand does not undertake a national security review of merger and acquisition activity, other than through the OIO and, in certain cases, Ministerial review, where all applications for consent are tested against prescribed investment criteria. One potential consideration for the OIO will be control of strategically important infrastructure on sensitive land. Applicants must be of good character, have relevant business experience or acumen, be able to demonstrate a financial commitment to the investment, be eligible for visa or entry permission under New Zealand's immigration laws and, in certain cases, demonstrate a benefit to New Zealand (see question 15 for further information). See question 1 for a discussion on New Zealand's 'anti-monopoly' legislation, the Commerce Act, and question 14 for industry-specific regulations.

5. What documentation is required to implement these transactions?

Private Treaty

The vast majority of mergers and acquisitions in New Zealand are documented by private treaty, and the parties can include in the sale contract (almost) any agreed terms, conditions, warranties and indemnities. A typical private

treaty contract in New Zealand includes a comprehensive suite of vendor warranties, which are disclosed through a due diligence process.

Amalgamations

A merger effected by way of amalgamation requires a standard form application, which can be completed online through the Companies Office. Short form amalgamations require resolutions from the board of each amalgamating company, various director certificates and directors consent forms. A long form amalgamation also requires an amalgamation proposal setting out the terms of the proposal to be attached to the amalgamation application.

Schemes of Arrangement

A company wishing to undertake a merger through a scheme of arrangement must submit an application to the High Court for approval. The High Court has discretion to approve the arrangement subject to orders it thinks fit, including, for example, an order for a shareholder meeting to be held to approve the arrangement.

A Code Company undertaking a scheme of arrangement is also required to submit a no-objection letter from the Takeovers Panel unless the High Court is satisfied that the shareholders of the Code Company will not be adversely affected by an arrangement as compared to regulation under the Takeovers Code. When providing a no-objection statement, the primary question that the Takeovers Panel will consider is whether shareholders will be adversely affected by the transaction being implemented by a scheme rather than by a takeover under the Takeovers Code. To obtain a no-objection letter, an applicant must provide an independent adviser's report on the merits of the transaction for each class of shareholders, a draft notice of meeting and a draft explanatory memorandum.

Regulated Takeovers

The Takeovers Code heavily prescribes the required documentation for a regulated takeover of a Code Company, including the terms of the takeover offer itself, director recommendations and an independent report. The Takeovers Panel also encourages summaries of key information.

For an acquisition or allotment approved by an ordinary resolution, the directors of a Code Company must obtain an independent report on the merits of the acquisition or allotment with regard to the interests of the shareholders voting on the resolution to approve it. The independent report must be sent to the shareholders and the Takeovers Panel along with statements from the directors as to whether or not they recommend approval and their reasoning.

Commerce Commission Authorisation or Clearance

Applicants seeking a clearance or authorisation for a merger or acquisition must complete the ComCom's prescribed application form. Applicants are encouraged to provide additional information that may be relevant to the ComCom's assessment of the merger or acquisition.

Overseas Investment Office Consent

Applications are made by way of a letter from the applicant to the OIO along with supporting information. In relation to sensitive land applications, this includes a detailed business plan addressing the benefits to New Zealand.

6. What government charges or fees apply to these transactions?

The fees that apply to amalgamations, schemes of arrangement and regulated takeovers are de minimis. ComCom and OIO fees can cost up to NZ$23,000 and NZ$54,000, respectively, in addition to any legal fees and other transactional costs.

Mayne Wetherell

Michael Harrod

Partner, Mayne Wetherell

Michael Harrod is a corporate partner at Mayne Wetherell. Michael has experience across a range of corporate and commercial transactions, and with a particular focus on cross border M&A. Michael has been recognized by Chambers and Partners, Asia Pacific Legal 500 and Asialaw Profiles.

Recent transactions:

- Acted for Yealands Wine Group in relation to the sale of that business to Marlborough Lines.
- Acted for FlexiGroup in relation to its acquisition of Fisher & Paykel Finance and on its recent acquisition of commercial leasing business Telecom Rentals and Equico.
- Acted for Acurity/Connor Healthcare on its successful full takeover offer of NZX-listed Acurity Health Group.
- Acted for Quadrant on its acquisition of Jetts NZ (New Zealand's largest fitness group).

7. Do shareholders have consent or approval rights in connection with a deal?

Private Treaty

As noted earlier, if the merger or acquisition is effected through a New Zealand registered company (e.g. as vendor and/or purchaser), and involves the acquisition or disposal of assets, rights or liabilities that have a value of more than half the value of the relevant company prior to the transaction, the transaction will require approval of that company's shareholders by a Special Resolution.

Amalgamations

A long form amalgamation requires a Special Resolution of the shareholders of each amalgamating company. Shareholder approval is intrinsic to a short form amalgamation.

Schemes of Arrangement

There is no mandatory requirement for shareholder approval to be obtained in relation to a scheme of arrangement involving a non-Code Company. However, the High Court has the discretion (which it commonly exercises) to require that shareholder approval of the scheme be obtained.

Where a scheme affects the voting rights of a Code Company, there is a mandatory requirement for shareholder approval of the scheme. This typically requires approval by 75% of the votes of each class of shareholder that is entitled to vote and voting, as well as the majority of votes of all shareholders entitled to vote.

Regulated Takeovers

Regulated takeover offers must be made to each shareholder of the target Code Company.

Regulated takeovers of full offers are subject to a mandatory 50% minimum acceptance condition (see question 10) unless the shareholders of the target approve otherwise, while partial offers do not have a minimum acceptance condition.

An allotment or acquisition of voting securities requires an ordinary resolution of shareholders excluding the persons acquiring and disposing the voting securities and their associates.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Directors

Directors are subject to various prescribed duties under the Companies Act, such as the duties to act in good faith, in the best interests of the company, and to not act in a way which would create a substantial risk of serious loss to the company's creditors. Director's duties are generally owed to a company; however, shareholders may bring a derivative action in the company's name if required.

Directors' duties in regulated takeovers

If the transaction involves a target Code Company, the directors of the target company must follow the prescribed process for responding to a bidder, and provide adequate disclosure to shareholders throughout the process. For example, a report from an independent adviser on the merits of any proposed takeover is to be provided to the shareholders. The independent adviser appointed by the target company will be considered by the Takeovers Panel, which will grant its approval only if it is satisfied that the adviser is competent to act and is independent of all parties involved in the transaction.

The Takeovers Code requires the directors of a target Code Company to make a recommendation to the shareholders about what the shareholders should do regarding the transaction, or give their reasons for not making a recommendation to the shareholders.

The Takeovers Code also broadly prohibits defensive tactics. Directors of a target Code Company that have received a takeovers notice or have reason to believe an offer is imminent must not take any action which could result in an offer being frustrated, or shareholders being deprived of an opportunity to decide on the merits of the offer. Guidance from the Takeovers Panel lists specified actions as potentially qualifying under defensive tactics, which includes:

(a) acquisition or disposition of a major asset;

(b) incurrence of a material new liability or making a material change to an existing liability (e.g. variation of existing contracts to include clauses that would be triggered by a takeover);

(c) declaration of an unusually large dividend;

(d) material issues of securities; or

(e) acquisition of an asset that would render the offer subject to regulatory approval that was not anticipated by the offeror prior to the issuing of a takeover notice.

Controlling Shareholders

Generally, a controlling shareholder does not owe any duties to the target company or its fellow shareholders. Accordingly, when making decisions as a shareholder, other than in exceptional circumstances, a person need only have regard to their own personal interests.

9. In what circumstances are break-up fees payable by the target company?

In New Zealand, except for recovery of expenses by a target Code Company, break-up fees are a matter of negotiation between the parties. Break-up fees payable by the target are not typical in the New Zealand market (although break fees payable by a bidder who fails to satisfy a condition are from time to time observed).

A target Code Company and its directors have a statutory right to recover properly incurred expenses from an offeror in relation to a regulated offer or takeover notice.

10. Can conditions be attached to an offer in connection with a deal?

Yes, conditions can be attached to an offer in connection with a deal. Common conditions include obtaining the requisite regulatory approval (including OIO and ComCom), no prescribed events occurring such as material breaches, events of default and insolvency events, and no material adverse change to the target's company or business.

Regulated Takeovers

The Takeovers Code imposes a compulsory condition where the offeror does not already control more than 50% of the voting rights. In that case, a takeover offer for a Code Company must contain a minimum acceptance condition which requires the offeror to receive sufficient acceptances to result in the offeror controlling more than 50% of the voting rights in the target company.

In addition, the Takeover Code restricts the offeror's freedom to impose conditions in its offer. Specifically, the offeror may make the offer subject to conditions only if the fulfilment of the condition is not under the control of the offeror or dependent on the offeror's judgement.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Except as noted below, the parties are free to agree the financing arrangements of a merger or acquisition. Depending on the transaction dynamics, the bidder may seek to include a finance condition in a private treaty sale.

Schemes of Arrangement

While there are no mandatory minimum financing requirements for a scheme of arrangement, the High Court may look at financing as a factor in determining whether to sanction a binding scheme.

Regulated Takeovers

An offeror under a regulated takeover for a Code Company must confirm that it will have sufficient resources available to meet the consideration that would be provided upon full acceptance of its offer. While there is no explicit prohibition on a finance condition in a regulated takeover, fulfilment of any such condition cannot be under the control of the offeror (accordingly, in practice, the offeror's financing needs to be arranged ahead of the launching of the offer). Note that consideration in a takeover bid must be the same for all securities belonging to the same class.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Regulated Takeovers

The Takeovers Code allows a dominant shareholder in a Code Company holding or controlling 90% or more of the voting rights to forcibly squeeze out minority shareholders by way of compulsory acquisition. Once a person and their associates hold or own 90% of the voting rights, they become a dominant owner and must notify the Takeovers Panel and issue an acquisition notice to outstanding security holders within 30 days of becoming a dominant owner. Shareholders may then object to, or accept, that offer. After a prescribed 21-day period has passed, the dominant owner can compulsorily acquire the remaining shares within seven days. If the dominant owner does not compulsorily acquire the shares, the holders of the remaining shares also have the right to require the dominant owner to purchase their shares.

Minority shareholders can often be squeezed out if the takeover is structured as a scheme of arrangement (see question 7 for further information).

Non-regulated Takeovers

There are no explicit minority shareholder squeeze-out rights for non-Code Companies. However, amalgamations and schemes of arrangement can be used to squeeze out minority shareholders.

As discussed in question 8, the Companies Act allows shareholders who believe they have been prejudiced, to apply to the court for an order to remedy the prejudice. In addition, shareholders who vote against certain Special Resolutions may also require the company to purchase their shares under the Companies Act.

13. What is the waiting or notification period that must be observed before completing a business combination?

Amalgamations

An amalgamation requires the board of each amalgamating company to provide notice to every secured creditor of the company and, for long form amalgamations, to the public not fewer than 20 working days before the amalgamation is proposed to take effect.

Schemes of Arrangement

There is no mandatory waiting period for a scheme of arrangement; however, any application for court approval will be subject to the scheduling requirements of the High Court.

Regulated Takeovers

The Takeovers Code imposes strict timelines throughout the prescribed process. The regulated bid process is commenced by the delivery of notice of the bidder's intention to make a takeover to the target, the Takeovers Panel and NZX (if the target is a listed company). After at least 14 clear days and within 30 days of that notice, the bidder must launch the offer by delivering an offer document to shareholders, the target, NZX (if applicable) and the Takeovers Panel or let the notice lapse. The offer period must not be shorter than 30 days and not longer than 90 days. If a variation notice is sent, varying the offer, the offer must remain open for at least 14 days after the notice is sent.

An acquisition or allotment of voting securities requires notice to be sent to shareholders along with the report from an independent adviser at least 10 working days prior to the shareholders meeting.

See question 12 for the notification periods for compulsory acquisitions under the Takeovers Code.

14. Are there any industry-specific rules that apply to the company being acquired?

In addition to the general regulation outlined above, certain industries require sector-specific approval in order to make an investment. As examples only:

(a) aviation: prior written consent of the Crown may be required before a person acquires 10% or more of voting rights in Air New Zealand Limited (New Zealand's national carrier);

(b) telecommunications:

  (i) prior written consent of the Crown is required before a person acquires 10% or more, or a non-New Zealand national acquires more than 49.9%, of the voting rights in Chorus (New Zealand's largest telecommunications infrastructure company); and

  (ii) network operators have duties to notify the Government Communications Security Bureau of proposed changes affecting the ownership, control, oversight or supervision of any equipment, system or service that falls within an area of specified security interest;

(c) banks: to be a registered New Zealand bank, certain ownership requirements must be satisfied, and in order for a person to acquire a direct or indirect qualifying interest of 10% or more of the voting securities in a New Zealand incorporated registered bank, prior

written consent of the Reserve Bank of New Zealand ('RBNZ') is required;

(d) insurers: before a potential acquirer takes control of a licensed insurer, the RBNZ must be notified, and the RBNZ must determine whether the insurer will continue to satisfy all licensing requirements post-acquisition;

(e) non-bank deposit takers ('NBDTs'): the RBNZ's prior written consent is required for a transaction that will result in a person gaining a level of influence over a NBDT which would allow a person to directly or indirectly appoint 25% of the NBDT's governing body or have a qualifying interest in 20% or more of the NBDT's voting securities;

(f) gaming: approval is required from the Secretary of Internal Affairs in order to acquire a 'significant influence' in a company that holds a casino licence;

(g) mixed ownership model companies: no person other than the Crown may have more than 10% of issued shares or voting securities in a mixed ownership model company listed under the Public Finance Act 1989;

(h) electricity: there must be a separation of ownership of electricity distribution from electricity supply businesses;

(i) fisheries: no person may own a number of quota shares that is more than 35% of the combined total allowable commercial catches for every stock of any one species. There are also specific ownership limits relating to certain species; and

(j) trustee companies: a transfer of shares in statutory trustee companies must not be registered until the transfer has been approved by the directors of the company in their absolute discretion, subject to any provisions of any additional specific trustee company legislation.

15. Are cross-border transactions subject to certain special legal requirements?

Approval of foreign investment in New Zealand is principally regulated by the OIA. Foreign investment requires consent from the OIO or relevant Ministers if it will result in the acquisition by an overseas person (or associate) of a direct interest in, or 25% or more ownership and/or control of interests in, sensitive land and/or significant business assets. The acquisition of fishing quota is also regulated.

Significant business assets are high value businesses with more than NZ$100 million of assets. Sensitive land includes the foreshore or seabed, reserves and non-urban land. The consent process for sensitive land is more involved and prolonged.

All applications for consent are tested against prescribed investment criteria. Applicants must be of good character, have relevant business experience or acumen, be able to demonstrate a financial commitment to the investment, and be eligible for visa or entry permission under New Zealand's immigration laws. Applicants for sensitive land consent are also required to demonstrate that their investment will, or is likely to, benefit New Zealand and, in certain cases, that the benefit is substantial and identifiable.

The OIO triage applications by considering the risk and complexity factors relating to the investor and the investment to determine the required resources. The OIO will then advise the applicant of the expected timeframe. Consent decisions are generally processed within 55 and 75 working days, depending on the complexity of the assets being acquired and excluding the time where the OIO is waiting for further information to be provided or is consulting with third parties. There is a high approval rate for high quality and well prepared applications.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

If the transaction proceeds by a share sale, the purchaser will acquire all employees with the target on their existing terms of employment subject to any change of control provisions contained in employment or collective bargaining contracts. If the transaction proceeds by an asset sale, employees need to be offered new employment contracts by the purchaser, if desired.

The Employment Relations Act 2000 protects certain classes of vulnerable employees who have a right to transfer their employment to the purchasing entity on their existing terms and conditions.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Overseas Investment Regime

New class exemptions to the investment screening regime under the OIA came into force in February 2017. These class exemptions exempt transactions that may be considered 'less sensitive' including, for example, certain transactions between two overseas persons where approval under the OIA has previously been granted in connection with the relevant land.

Takeovers Code

In March 2017, the Takeovers Panel proposed a change to the definition of a 'Code Company' (discussed in question 1) to exclude small unlisted companies and remove the disproportionate cost of code-compliance for them. The Takeovers Panel recommended that the definition of a 'Code Company' only capture companies that, together with their subsidiaries, have a total annual revenue of $15 million, or total assets of at least $30 million at the end of the company's most recently completed accounting period.

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New Zealand Direct Investment Experts

Mayne Wetherell is the law firm of choice for complex and high value foreign direct investment transactions in New Zealand.

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Mayne Wetherell

司法管辖区： 新西兰
律所： Mayne Wetherell
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Mayne Wetherell

1. 您所在管辖区有哪些主要适用的并购法律法规？

在新西兰，大多数兼并和收购并没有受到严格监管，并且通过出售和购买股票或资产的私人合同即可生效。但是，如果其中一个实体上市或者被公众持有，并且该项兼并涉及竞争对手，或者外籍买方投资于重要或敏感的新西兰资产，额外层面的监管机制则适用。

1993 年《公司法》

如果兼并或收购通过新西兰境内注册公司生效（例如作为卖方和 / 或买方），并且涉及价值超过相关公司在该等交易前价值的 50% 的资产、权利或负债的收购或出售 / 处置，则根据 1993 年《公司法》（以下简称“《公司法》”），该项交易将构成需要该公司股东通过特别决议批准的重大交易，该决议通过的默认标准为获得具有投票权并参与投票的全部股东所拥有的投票权的 75% 支持，除非以其他方式增加该比例（即“特别决议”）。

联合

《公司法》规定了联合机制，两公司借此结合并作为一家公司继续运营。被合并公司的股东可以在合并后的公司持有股权或者获得其他对价。联合可以采取短期形式，亦可采取长期形式。短期联合通常仅适用于一家公司与其全资子公司之间的联合或者受同一实体全资控股的两公司之间的联合。短期联合须经各被合并公司的董事会决议批准并且无需遵守《公司法》规定的联合程序。在任何其他情形中，联合必须是“长期”的（例如当两家被合并公司不具有关联关系时）。长期联合要求相关公司编制联合方案，该方案应详细规定联合条款并且须经各被合并公司的董事会决议以及各被合并公司的股东会特别决议批准。

协议安排

《公司法》规定了被称为协议安排的一种经法院批准的联合。当联合涉及到海外公司或者联合后的公司将不满足偿付能力标准时，法院批准是必须的，并且当合并情形复杂或者通过正常途径难以取得股东同意时，法院批准是可取的。

协议安排通常涉及收购公司和目标公司共同商定一种获得目标公司股东投票赞成的要约结构，并且高等法院可以命令该等方案受到其认为合适的条款和条件的约束。

新西兰股票交易所上市规则

在由新西兰证券交易所有限公司（简称“新西兰证券交易所”）运营的新西兰股票交易所上市的实体应当遵守直接适用于发行人与市场参与者以及间接（通过市场参与者）适用于投资人的上市规则（简称“新西兰证券交易所上市规则”）。新西兰证券交易所上市规则具有高度说明性；下列要求与兼并及收购相关：

(a) 重大交易或者关联交易须经 50% 的股东同意，或者《公司法》要求 75% 的股东通过；

(b) 上市公司必须持续向市场披露重大信息，包括涉及出售超过已发行证券 5% 的交易；以及

(c) 至于新西兰《收购法》（见后文《收购法》）未规定的上市实体鲜有发生的情况，有特定规则加以规定。

2013 年《金融市场行为法》

2013 年《金融市场行为法》（简称“FMCA”）要求强制披露在发行人中拥有 5% 及以上投票权的股东。

Mayne Wetherell

Matthew Olsen

合伙人，Mayne Wetherell

Matthew是Mayne Wetherell律师事务所的公司业务合伙人。Matthew在广泛的公司业务领域经验丰富，包括国内和国外并购、合资企业和资本市场，尤其专注于外商直接投资。Matthew获得《亚太法律500强》及IFLR推荐。

近期交易：

- 代表环球罗宾娜公司（Universal Robina Corporation）收购太平洋股权合伙公司（Pacific Equity Partners)持有的格瑞芬斯食品公司（Griffin's Foods）股权，以及收购澳大利亚零售品牌公司（Snack Brands Australia）。
- 代表科尔伯格-克拉维斯集团（KKR）、瓦德投资管理合伙公司（Varde Partners）和德意志银行（Deutsche Bank）组成的财团，收购通用资本（GE Capital）的消费金融业务，并代表贝恩资本（Bain Capital）和德意志银行（Deutsche Bank）收购通用资本的商业金融资产组合。
- 在泰格尔食品公司（Tegel Foods）首发上市（IPO）过程中，为中间资本集团（Intermediate Capital Group）提供法律咨询。
- 为德州太平洋集团（TPG）收购Inghams公司及之后Inghams在澳大利亚证券交易所上市提供法律咨询。
- 代表澳大利亚伦普利澳洲公司（Lempriere Australia），参与同卡瓦利洗毛厂（Cavalier）的合并，以及对卡瓦利羊毛洗涤业务资产的剥离。

FMCA 还规定了一些制度，广泛禁止拥有与公开发行人有关的未公开重大信息的人士出售、告知或披露该等信息，即内幕交易，以及参与制造虚假市场信息的活动，即操纵市场。

《收购法》

新西兰《收购法》适用于“代码公司”以确保上市及公众持股公司的股东充分知晓并且能够参与其公司的控制权变化。《收购法》规定了代码公司重大投资的详细流程，并且确保向代码公司股东的信息披露及其平等待遇。

代码公司是指在新西兰证券交易所上市（或者曾经在 12 个月内上市）的在新西兰注册的公司，或者拥有超过 50 名具有投票权的股东以及超过 50 份的股权份额的公司。《收购法》禁止某人（直接、间接或者通过其联合体）拥有代码公司 20% 及以上权而成为代码公司投票权的持有人或控制人。该规则对已持有或控制 20% 或以上投票权且希望增持其投票权或控制权的持有人或控制人施加了限制。基础规则存在豁免情形，即允许某人不违反《收购法》而成为增持代码公司投票权的持有人或控制人，这些豁免情形包括：

(a) 就所有具有投票权和不具有投票权的证券提出合法有效的完整要约；

(b) 就特定比例的具有投票权的证券提出合法有效的部分要约，且该等证券将导致要约人持有或控制超过 50% 的投票权；

(c) 通过普通决议（除去收购、出售 / 处置或分配该等证券的个人及其联合体）批准对具有投票权的证券进行收购或分配；

(d) 企业价值不超过 2 亿新元的非上市小规模代码公司；

(e) 对于持有或控制 50% 至 90% 投票权的人士在每 12 个月期间内适用一次 5% 的蠕变法则（即每 12 个月收购不多于 5% 的股份）。

(f) 在该人已经持有代码公司 90% 的投票权的情况下采取强制收购的方式；

(g) 法院根据《公司法》批准的协议安排；以及

(h) 收购委员会单独或按类别授予豁免。

1986 年《商业法》

新西兰的反托拉斯法——1986 年《商业法》适用于一切兼并与收购，并且禁止实质性削弱市场竞争的企业收购及其他行为。

兼并企业可以向商业委员会（即“comcom”）申请拟议兼并的许可或授权。如果该等兼并将不会实质性地削弱市场竞争，则商业委员会将许可该等兼并。另外，如果兼并可能对公众有益，即使其实质性地削弱市场竞争，商业委员会也可能授权该等兼并。授权兼并的情况相当罕见。

许可或授权程序在任何兼并阶段均非强制的，并且在任何时候均无需通知。因此，如果商业委员会怀疑一项兼并或收购违反《商业法》，其有权调查并启动程序。商业委员会也可签发诸如剥夺财产或股权的命令，或者向法院申请签发强制令。商业委员会不得事后授予许可或授权，因此拟议兼并的参与者必须提前评估该等兼并是否可能导致新西兰市场竞争的实质性削弱，并且如果会导致如此，该等兼并应当以通过商业委员会的批准为条件。

《海外投资法》

2005 年《海外投资法》（即“OIA”）适用于一切兼并与收购，并且某些外商投资项目需要获得海外投资办公室（即“OIO”）的批准（见问题 15 以进一步了解信息）。

2. 有哪些主要的政府监管机购或组织规管兼并收购活动？

新西兰公司办公室是处理联合申请的政府机构，并且新西兰高等法院对协议安排进行监管。

金融市场管理局（简称“FMA”）是对新西兰资本市场和金融服务（包括执行 FMCA）进行监管的政府机构。FMA 推动和促进新西兰公平、有效和透明的金融市场的发展，并且可以针对违反可适用的监管规则的发行人采取措施。

收购委员会负责执行和实施新西兰《收购法》。收购委员会由总督任命的执业于合并与收购市场的从业人员组成，包括律师、董事与投资银行家。

如前所述，商业委员会是新西兰竞争监管机构，并且 OIO 对外国投资项目审批申请进行评估。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

是的，新西兰允许恶意收购。

默认的情形是，股东有权根据公司章程或股东协议所规定的任何限制（如适用）出售其股份。然而这些限制可能授权董事会阻止某些股份转让，以阻碍恶意收购的可能性，新西兰证券交易所上市实体不允许适用该等转让限制。

在性质上更加灵活与确定的两种方式——联合及协议安排均要求董事批准，从而有效地防止其被使用在恶意收购的情形中。

对代码公司进行受监管的收购可能是恶意的；但是，善意要约在新西兰相当普遍。不同意拟议收购的董事通常需要向股东提供载有反对意见的书面声明。

Mayne Wetherell

Michael Harrod

合伙人，Mayne Wetherell

Michael Harrod是Mayne Wetherell律师事务所的公司业务合伙人。Michael拥有大量企业与商业交易经验，尤其专注于跨境兼并与收购。Michael获得《钱伯斯》、《亚太法律500强》以及《亚洲法律概况》的推荐。

近期交易:

- 代表叶兹兰酒业集团 (Yealands Wine Group) 参与其向马尔堡电力有限公司（Marlborough Lines) 出售股份的交易;
- 代表福莱希集团 (FlexiGroup) 参与对斐雪派克金融公司的收购，以及其最近对商业租赁企业Telecom Rentals与Equico的收购。
- 代表阿奎蒂/康纳医疗保健 (Acurity/Connor Healthcare) 成功地完整收购新西兰证券交易所上市公司Acurity健康集团 (Acurity Health Group) 。
- 代表卡德兰特 (Quadrant) 收购Jetts新西兰 (Jetts NZ，系新西兰最大的健身企业）。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

当对一切审批申请进行规定的投资标准测试后，除了通过 OIO 审查以及在某些情况下的部长级审查，新西兰不进行兼并收购活动的国家安全审查。OIO 一项潜在考量是对敏感的土地上具有重要战略意义的基础设施的控制权。申请人必须品行良好，具备相关商业经验或才能，能够证明其经济能力足以负担该项投资，根据新西兰移民法有资格获得签证或入境许可，并且在某些情况下表现出对新西兰有利的积极作用（详见问题 15）。参见问题 1 关于新西兰的反垄断法律制度、《商业法》以及问题 14 关于特定行业规则的讨论。

5. 进行这些交易时需要哪些文件？

私人协约

在新西兰，绝大多数兼并与收购都是以私人协约的形式进行的，并且当事人可以在买卖合同规定（几乎）任何经商定的条款、条件、保证和赔偿。在新西兰，一份典型的私人合同包括一整套通过尽职调查过程披露的卖方保证。

联合

以联合方式进行的兼并要求进行标准的申请，这可以通过公司办公室在线完成。短期联合要求各目标公司的董事会决议、诸多董事证明以及董事同意书。长期联合也要求详细规定方案条件的联合方案并附加于联合申请。

协议安排

拟通过协议安排方式进行兼并的公司必须申请高等法院进行审批。高等法院有权根据其认为合适的要求自行批准该方案，包括诸如要求举行批准该方案的股东大会。

进行协议安排的代码公司也必须提交收购委员会无反对意见的声明，除非高等法院信纳，代码公司的股东将不会因该安排受到与《收购法》下的监管规则负面影响。在发表无反对意见声明时，收购委员会将考虑的基本问题是，与根据《收购法》进行的收购相比，股东是否会受到以安排方式完成的交易的不利影响。为了获得无反对意见声明，申请人必须提供关于交易为各阶层股东带来的益处的独立顾问报告、会议通知草稿以及解释性备忘录草稿。

受监管的收购

《收购法》严格规定了代码公司开展受监管的收购所需的文件，包括其自身的收购要约条款、董事建议以及独立报告。收购委员会也鼓励提供关键信息的摘要。

至于以普通决议通过的收购与分配事项，代码公司董事必须获得一份独立报告，该报告须说明该等收购或分配对于有权表决的股东的益处。该等独立报告必须与董事声明一并送达给股东和收购委员会，不论其通过与否及其理由为何。

商业委员会授权或许可

寻求兼并或收购许可或授权的申请人必须填写商业委员会规定的申请表格。申请人应尽量提供与商业委员会评估兼并或收购有关的额外信息。

海外投资办公室的批准

申请人应通过申请信与证明材料向 OIO 作出申请。与敏感土地有关的申请还应当包括陈述对新西兰有利之处的详细的商业计划书。

6. 这些交易须缴纳哪些政府费用？

适用于兼并、协议安排和受监管的收购的费用非常低廉。除了任何法律费用和其他交易成本之外，商业委员会和 OIO 收费分别可达 23,000 新元和 54,000 新元。

7. 交易是否需要股东的同意或批准？

私人协约

如前所述，如果兼并或收购通过新西兰境内注册公司生效（例如作为卖方和 / 或买方），并且涉及价值超过相关公司在该等交易前价值一半以上资产、权利或负债的收购或出售 / 处置，则该项交易将必须经过该公司股东的特别决议。

联合

长期联合须经各被合并公司股东的特别决议。股东批准是短期联合的内在要求。

协议安排

在涉及非代码公司的协议安排中，获得股东批准并非强制要求。但是，高等法院有权自行（其普遍行使的自由裁量权）要求该等方案获得股东同意。

如果一项方案影响代码公司的投票权，则该方案获得股东同意是强制要求。这通常要求经过有权并参与投票的各类股东投票权的 75% 以及有权投票的所有股东投票权的绝大多数同意。

受监管的收购

必须向目标代码公司各股东发出受监管的收购要约。完整的受监管的收购要约须强制性地符合 50% 的最低赞成票条件（见问题 10），除非目标公司股东以其他形式批准，而部分要约不存在最低赞成票条件。

对具有投票权的证券进行收购或分配必须通过普通决议（除去收购、出售 / 处置或分配该等证券的个人及其联合体）批准。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

董事

根据《公司法》，董事具有诸多规定的义务，例如善意、代表公司最大利益、不采取具有导致公司债权人严重损失的实质性风险的方

式行事。董事通常对公司负有义务；但是，如有必要，股东可以以公司的名义提起派生诉讼。

在受监管的收购中董事负有的义务

如果一项交易涉及目标代码公司，代码公司的董事必须遵循规定的程序对收购人进行应答，并且通过该程序向股东充分披露信息。例如，独立顾问关于拟议收购任何益处的报告应当向股东披露。目标公司所任命的独立顾问将由收购委员会进行考量，只有当其确信顾问有能力采取行动并独立于交易中所有参与方时才予以批准。

《收购法》要求目标代码公司的董事向股东提出有关股东应在交易中如何行事的建议，或者说明其不向股东提出建议的理由。

另外，《收购法》广泛禁止防御性策略。已收到收购通知或者有理由相信要约即将到期的目标代码公司董事不得采取任何可能导致要约收到阻挠的行动，或剥夺股东考量要约益处的机会。收购委员会的指导列明了被视为可能构成防御性策略的特定行为，其中包括：

(a) 收购或出售 / 处置主要资产；

(b) 出现新的重大负债或者对现有负债作出重大变更（例如更改现有合同以规定将被收购触发的条款）；

(c) 宣告发放异常重大的股息；

(d) 证券的重大发行；或者

(e) 在收购公告发布前，收购一项要约人无法预期的、将阻碍该等要约且须经监管部门批准的资产。

控股股东

一般而言，控股股东对目标公司或其股东不负任何义务。因此，除了特殊情况外，一个人以股东身份作出决定前只需要考虑到自己的个人利益。

9. 哪些情况下，目标公司须支付分手费？

在新西兰，除目标代码公司可收回的费用外，终止费是双方当事人之间谈判的一项事宜。在新西兰市场上，通常不由目标公司支付终止费（虽然由未能满足某一条件的收购人支付终止费的情形不时发生）。

目标代码公司及其董事有法定权利，从要约人手中收回与受监管的要约或收购通知有关的实际发生的适当费用。

10. 要约可否附加交易相关的条件？

是的，与交易有关的要约可以附条件。常见的条件包括获得必要的监管批准（包括 OIO 和商业委员会），未发生诸如实质性违约、违约事件和破产事件等规定事件，目标公司或其业务无重大不利变化。

受监管的收购

《收购法》规定了要约人尚未控制超过 50% 的表决权的强制条件。在这种情况下，对代码公司的收购要约必须包含最低接受条件，即要求要约人获得足够的赞成票以使要约人控制目标公司超过 50% 的表决权。

此外，《收购法》限制要约人在要约中施加条件的自由。具体而言，要约人只能在条件的成就不受要约人控制或依赖要约人判断的情况下才可作出要约。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

除下文所述，各方可自由同意规定或收购的融资安排。根据交易进展，收购人可能寻求在私人协约出售条款中规定财务状况。

协议安排

虽然对于协议安排没有强制性的最低融资要求，但是高等法院可能将融资视为决定是否批准具有约束力的协议安排的一项考量因素。

受监管的收购

对代码公司进行受监管的收购的要约人必须确认其有足够的资源以满足在要约被完全接受时能够支付所提供的对价。虽然在受监管的收购中对财务状况没有明确限制，但任何该等条件的成就均不能由要约人控制（因此在实际情况中，要约人的融资需要在发起

要约之前进行安排）。须注意，收购要约对于同一类别的所有证券所提出的对价必须相同。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

受监管的收购

《收购法》允许持有或控制 90% 或以上表决权的代码公司主要股东通过强制收购的方式强行挤除少数股东。一旦某人及其联合体持有或拥有 90% 的投票权，他们就成为占主导地位的所有者，并且必须在获得支配权的 30 天之内通知收购委员会并向剩余证券持有人发出收购通知。届时股东可能会反对或接受该要约。在规定的 21 天期限届满后，占主导地位的所有者可以在七天之内强制收购剩余股份。如果占主导地位的所有者不强制收购该等股份，剩余股份的持有人也有权要求主要所有者购买其股份。

如果以协议安排的方式进行收购，少数股东往往会被挤出（详见问题 7）。

不受监管的收购

非代码公司没有明确的少数股东退出的权利。然而，可以采用联合与协议安排方式来挤出少数股东。

正如问题 8 所讨论的内容，《公司法》允许认为自己受到损害的股东向法院申请填补损害的命令。此外，投票反对某些特别决议的股东也可能要求公司根据《公司法》购买其股份。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

联合

各被兼并公司的董事会须向该公司的各担保债权人通知联合事项，在长期联合中，还须在拟议规定生效前向公众进行不少于 20 个工作日的公布。

协议安排

协议安排没有强制性等候期，但任何提交法院批准的申请都须符合高等法院的进度要求。

受监管的收购

《收购法》在规定的程序中规定了严格的时间表。规定的要约程序自收购人的收购意图通知送达目标公司、收购委员会和新西兰证券交易所（如果目标公司为上市公司）开始启动。在该通知后的至少 14 个完整工作日之后、30 天之内，收购人必须通过向股东、目标公司和新西兰证券交易所（如适用）和收购委员会发出要约文件确定其报价，否则通知失效。要约期限不得少于 30 日，不得超过 90 日。如果发出改变报价的变更通知，该报价必须在发出通知后至少 14 天内保持有效。

收购或分配具有投票权的证券的通知须在股东大会召开至少 10 个工作日前连同独立顾问的报告一并发送给股东。

《收购法》规定的强制收购的通知期参见问题 12。

14. 是否有适用于被收购公司的行业特定规则？

除了上述一般规定外，某些行业还需要特定部门的批准才能进行投资。仅限于下列行业：

(a) 航空：在某人获得新西兰航空公司（新西兰国家航运商）10% 或以上表决权之前，可能需要事先书面同意；

(b) 电信：

  (i) 在某人获得 Chorus（新西兰最大的电信基础设施公司）10% 或以上或者非新西兰国民获得超过 49.9% 的投票权时，须事先征得新西兰政府的书面同意；以及

  (ii) 网络运营商有义务就影响所有权、控制权、监管或监督权的拟议变更向政府通信安全局进行通知，前述监管或监督是指针对任何设备、系统或服务等属于特定安全保证范围内事项的监督；

(c) 银行：要注册一家新西兰银行，必须满足一定的所有权要求，并且为了使得某人获得新西兰境内注册银行 10% 或以上具有投票权的证券的直接或间接合法

权利，新西兰国家储备银行（简写作“RBNZ”）的事前书面同意是必须的；

(d) 保险公司：在潜在收购人控制一家持牌保险公司之前，必须通知新西兰国家储备银行，并且新西兰国家储备银行必须确定保险公司在收购后是否会继续满足所有许可要求；

(e) 非银行储蓄机构（简写作“NBDTs”）：对于将导致某人获得 NBDT 一定程度的影响力的交易事项，须获得新西兰国家储备银行的事先书面同意，该程度是指将允许某人直接或间接任命 25% 的 NBDT 主管机构或者对 NBDT20% 或以上的投票权拥有合法权利益。

(f) 博彩业：必须获得内部事务部长的批准才能在拥有赌场牌照的公司获得“重大影响力”；

(g) 混合所有制模式公司：除新西兰政府以外的任何人不得拥有 1989 年《公共财政法案》列明的混合所有制公司 10% 以上的已发行股票或者具有投票权的证券；

(h) 电力：电力分配企业的所有权必须与电力供应企业分开；

(i) 渔业：就任一类别的股票，任何人均不得拥有超过允许商业渔获量的 35% 的配额份额，对某些物种也有特定的所有权限制；以及

(j) 受托公司：除非根据任何额外的特定受托公司立法制度的任何规定，公司董事在其自由裁量权范围内进行酌情批准，否则不得转让法定受托公司的股份。

15. 跨境交易是否受任何特殊法律要求的制约？

在新西兰的外国投资项目主要由 OIA 进行审批。如果一项外商投资项目将导致外籍人士（或联合体）在敏感的土地和 / 或重要的业务资产中获得直接利益或者 25% 或以上的所有权和 / 或利益控制权，则该项投资需要获得 OIO 或相关部长的同意。捕捞配额的收购也受到管制。

重要的商业资产是指价值超过 1 亿新元的高价值财产。敏感土地包括滩涂或海床、保护区和非城市土地。敏感土地的审批程序更为复杂和漫长。

所有审批申请均按规定的投资标准进行测试。申请人必须品行良好，具备相关商业经验或才能，能够证明其经济能力足以负担该项投资，并且根据新西兰移民法有资格获得签证或入境许可。敏感土地审批的申请者还须证明其投资将或者有可能对新西兰有益，并且在特定情形下，这些益处是实质性的、可识别的。

OIO 在考量有关投资者与投资项目的风险和复杂性因素时运用归类法来确定所需资源。OIO 届时将告知申请人预期的时间表。批准决定通常在 55 至 75 个工作日内作出，具体取决于被收购资产的复杂程度，并且除去 OIO 正在等待提供进一步信息或者与第三方咨询的时间。高质量和经过充分准备的申请具有很高的通过率。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

如果交易是通过出售股票的方式进行的，则买方将根据其现有雇佣条件继续雇佣目标公司的所有雇员，但须符合雇佣合同或集体谈判合同中的控制条款所发生的任何变化。如果交易是通过出售资产的方式进行的，在必要的情形下，买方需与雇员签订新的雇佣合同。

2000 年《就业关系法》保护某些弱势雇员，其有权根据现有的条款和条件向买方实体实现转移就业。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

海外投资制度

一类新的 OIA 投资审查制度下的豁免情形已于 2017 年 2 月生效。这类豁免情形豁免了可能被视为“不敏感”的交易，包括某些交易，例如两名外籍人士在 OIA 审批之前已经被授予了与相关土地有关的批准。

《收购法》

2017 年 3 月，收购委员会提议修改“代码公司”的定义（参见问题 1）以排除小规模未上市公司，并取消对其不合理的合规成本。收购委员会建议“代码公司”的定义仅限于最近会计年度末年度总收入为 1500 万新元或者总资产至少为 3000 万新元的公司及其子公司。

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Mergers and acquisitions in Pakistan are primarily governed by the following laws and regulations:

(a) The Companies Act, 2017 ('Companies Act);

(b) The Competition Act, 2010 ('Competition Act');

(c) The Competition (Merger Control) Regulations, 2016 ('Merger Regulations');

(d) The Securities Act, 2015 ('Securities Act'); and

(e) Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, 2008 ('Takeover Regulations').

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The major regulators of mergers and acquisitions in Pakistan are:

(a) The Competition Commission of Pakistan ('Competition Commission');

(b) The Securities and Exchange Commission of Pakistan ('SECP'); and

(c) State Bank of Pakistan ('SBP').

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Yes, however they are relatively uncommon.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Competition Act

The Competition Act provides that where an undertaking intends to acquire shares or assets of another undertaking or where two or more undertakings intend to merge the whole or part of their businesses and meet the pre-merger thresholds prescribed in the Merger Regulations, the undertaking concerned must seek clearance from the Competition Commission.

Securities Act and Takeover Regulations

Part IX of the Securities Act contains detailed provisions in relation to the acquisition of shares of a listed company. Where an acquirer intends to acquire

(a) Voting shares which would entitle the acquirer to more than 31% but less than 50% of the voting shares of a listed company; or

(b) Additional voting shares, in case the acquirer already holds more than 31% but less than 50% of the voting shares of a listed company; or

(c) Control of a listed company,

the acquirer is compulsorily required by the Securities Act to make a public announcement of an offer to acquire the voting shares of the target company. Pursuant to Regulation 14(1) of the Takeover Regulations, where an acquirer acquires control of a listed company the acquirer is required to "make a public announcement of offer to acquire at least 50% of the remaining voting shares of the target company". Further Regulation 14(2) of the Takeover Regulations provides that "Where the public offer is made conditional upon minimum level of acceptances,

such minimum level shall not be more than 35% of the remaining voting shares. A few types of transactions are exempt from making a public offer. For instance, acquisition of shares through a scheme of arrangement or exercise of an option by a bank or a financial institution does not require the acquirer to make a public offer.

Companies Act

Schemes of arrangements for mergers or demergers are dealt with under sections 279 to 285 of the Companies Act. These provisions, inter alia, allow one or more companies to enter into a compromise or arrangement with its members or creditors in respect of a merger or demerger of the concerned companies. Under the relevant sections, a company involved in a business combination has to file a petition with the SECP for an order to hold an extraordinary general meeting ('EOGM') where shareholders approve the business combination. Once the shareholders have approved the combination, the company must petition the SECP for its approval of the scheme of arrangement, which lays out the particulars of the combination including issues of property, liabilities and debts of the companies, share swaps, the continuation of any legal proceedings, and dissolution, without winding up, of one or more of the concerned entities.

Section 183 of the Companies Act provides that the directors of a public company, or of a subsidiary of a public company, shall not, except with the consent of the shareholders in a general meeting, either specifically or by way of an authorisation, sell, lease or otherwise dispose of the undertakings or a sizeable part thereof (unless the main business of the company comprises of such selling or leasing).

5. What documentation is required to implement these transactions?

Competition Act

If the transaction relates to an acquisition of shares or assets, such transaction would be implemented by way of agreements or instruments. Wherever such acquisition or merger meets the pre-merger thresholds prescribed in the Merger Regulations, the concerned undertakings are required to submit a pre-merger application to the Competition Commission. Such application is to be in the form prescribed in the Schedule to the Merger Regulations and is to be accompanied by the following supporting documents:

(a) Written proof of the representative's authority to act on the applicant's/applicants' behalf (if applicable);

(b) copies of the final or most recent version of all documents bringing about the merger, whether by agreement between the merger parties, acquisition of a controlling interest or a public bid;

(c) in the case of a public bid, a copy of the offer document; if it is not available at the time of notification, it should be submitted as soon as possible and not later than when it is posted to shareholders;

(d) copies of the most recent annual report and accounts (or equivalent for unincorporated bodies) for all the merger parties;

(e) copies of all analyses, reports, studies, surveys, and any comparable documents prepared by or for any member(s) of the board of directors (or equivalent) or other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the merger with respect to market shares, competitive conditions, competitors (actual and potential), the rationale of the merger, potential for sales growth or expansion into other product or geographic markets,

and/or general market conditions. For each of these documents, indicate (if not contained in the document itself) the date of preparation and the name and title of each individual who prepared the document; and

(f) copies of all business plans for each merger party for the current year and the preceding five years.

Securities Act and Takeover Regulations

Pursuant to the Securities Act, with regard to an acquisition of shares of a listed company, a number of notices, undertakings and disclosures are required to be made to the SECP, target company and the securities exchange on which the voting shares of the target company are listed. Some of the key filings are as follows:

(a) Disclosure of aggregate shareholding to the SECP, target company and securities exchange on which the voting shares of the target company are listed is required upon acquisition of more than 10% of the voting shares of a listed company. If additional shares are acquired within a period of 12 months after acquisition of more than 10% of the voting shares of a listed company, compliance with the above disclosure obligations shall be required only if the total acquisition exceeds an aggregate of 30%.

(b) the target company shall immediately, in writing, inform the stock exchange and SECP when a firm intention to acquire control or voting shares of the target company, beyond the thresholds prescribed under section 111 of the Securities Act, is notified to the board of directors of the target company. Section 111 of the Securities Act provides that a person shall make a public offer to acquire voting shares of the listed company if such person intends to acquire, directly or indirectly:

  (i) voting shares, which (taken together with voting shares, if any, held by such person) would entitle such person to more than 30% of the voting shares of a listed company; or

  (ii) additional voting shares in case the acquirer already holds more than 30% but less than 51% of the voting shares of a listed company: provided that such acquirer shall not be required to make a fresh public offer within a period of 12 months from the date of the previous public offer; or

  (iii) control of a listed company.

(c) Any person intending to acquire voting shares of the target company which will attract the provisions of section 111 of the Securities Act shall, after careful and responsible consideration, make a public announcement of such intention in the newspaper. The public announcement of an intention to acquire the shares of the target company shall contain the information as prescribed in Schedule III to the Takeover Regulations.

(d) A public announcement of offer shall be made by the acquirer within 180 days of making the public announcement of an intention to acquire voting shares or control of a target company beyond the thresholds prescribed under section 111 of the Securities Act. The public announcement of offer shall contain the information as prescribed in Schedule IV to the Takeover Regulations.

(e) The acquirer is required to furnish security for the performance of its obligations under the public offer. Such security can be in the form of a cash deposit or a securities deposit or a bank guarantee.

(f) The manager to the public offer has to file a due diligence certificate with the SECP prior to the public offer.

(g) Public announcements of the offer are required to be filed with the SECP along with the supporting documents specified in Schedule VII to the Takeover Regulations.

Companies Act

As discussed above, if the acquisition involves a sale or disposal by the directors of a public company, or a subsidiary of the public company, of its undertakings or a sizeable part thereof, such sale must be authorised by a resolution of the shareholders passed in a general meeting.

Where one or more companies are looking to enter into a Scheme of Arrangement under sections 279 to 285 of the Companies Act, the concerned companies are required to file a petition with the SECP along with the Scheme of Arrangement which lays out the particulars of the combination including issues of property, liabilities and debts of the companies, share swaps, the continuation of any legal proceedings, and dissolution, without winding up, of one or more of the concerned entities.

6. What government charges or fees apply to these transactions?

Competition Act

Every pre-merger application made to the Competition Commission is required to be accompanied by a processing fee which varies depending on the turnover of the applicant. Regulation 6 of the Merger Regulations prescribes the following fees in Table 1.

If the application is being made by an asset management company, the fee shall be charged on the basis of the value of assets under the management of merger parties, at the rates shown in Table 2.

Securities Act and Takeover Regulations

With respect to the acquisition of shares of a listed company, where an acquirer is required to make a public offer under the Securities Act; the public offer is required to be submitted to the SECP along with a non-refundable processing fee of 500,000 rupees.

Companies Act

The Companies Act has been enacted very recently and the SECP has not yet framed any specific rules or regulations which prescribe the fees or charges that will be applicable to applications made to the SECP under sections 279 to 285 of the Companies Act for sanctioning a Scheme of Arrangement.

S. No	Period	Tax Year 2015	Tax Year 2016	Tax Year 2017
1.				Filer
2.	Where holding period is less than 12 months	12.5%	15%	15%
3.	Where holding period is 12 months or more but less than 24 months	10%	12.5%	12.5%
4.	Where holding period is 24 months or more but security was acquired before 1 July 2013	0%	7.5%	7.5%
5.	Where security was acquired before 1 July 2013	0%	0%	0%

Table 1

Turnover of the applicant undertaking	Amount of fee
Up to 500 million rupees	300,000 rupees
More than 500 million but not exceeding 750 million rupees	600,000 rupees
More than 750 million but not exceeding 1,000 million rupees	750,000 rupees
More than 1,000 million but not exceeding 5,000 million rupees	1,050,000 rupees
More than 5,000 million but not exceeding 10,000 million rupees	1,500,000 rupees
Exceeding 10,000 million rupees	2,250,000 rupees

Table 2

Assets	Amount of fee
Up to 5 billion rupees	300,000 rupees
More than 5 billion but not exceeding 7.5 billion	600,000 rupees
More than 7.5 billion but not exceeding 10 billion	750,000 rupees
More than 10 billion but not exceeding 50 billion	1,050,000 rupees
More than 50 billion but not exceeding 100 billion	1,500,000 rupees
Exceeding 100 billion rupees	2,250,000 rupees

Notes:

1. For the purpose of capital gains tax on sale of shares, a public company means a company in which not less than 50% of the shares are held by a government (Federal, Provincial or foreign), a company whose shares were traded on a registered stock exchange in Pakistan at any time in the tax year and which remained listed at the end of that year and a unit whose units are widely available to the public and any other trust as defined in the Trusts Act, 1882.

Tax Year 2017 (continued)	Tax Year 2018			
	Securities acquired before 01-07-2016		Securities acquired after 01-07-2016	
Non-Filer	Filer	Non-Filer	Filer	Non-Filer
18%	15%	18%	15%	20%
16%	12.5%	16%		
11%	7.5%	11%		
0%	0%	0%	0%	0%

Sale of Shares

The instrument providing for a sale of shares is chargeable to stamp duty. In the province of Sindh, such duty is chargeable, in the case of physical shares, at 1.5% of the face value of the shares. In the event the shares are held in dematerialised form with the Central Depository Company of Pakistan Limited, each transaction of shares is subject to a transaction fee of 0.004% of the market value of the shares transacted.

The capital gain on disposal of shares of a company not being a public company is chargeable to tax. In the event that shares are held for one year or less, 100% of the gain is taxable, and if held for more than one year, 75% of the gain is taxable. The amount of such gain is added to the taxpayer's total taxable income for a tax year and is not taxed separately.

The capital gain arising on disposal of shares of a public company1 shall be chargeable to income tax at the rates shown in Table 3.

Sale of Assets

Sales Tax

A sale of assets, if comprising of goods that are not exempt from sales tax, may incur sales tax if the sale is made by an importer, manufacturer, wholesaler (including dealer), distributor or retailer.

Income Tax

The gain on the disposal of any moveable property, other than stock-in- trade, consumable stores, raw materials held for the purpose of business, depreciable assets or intangibles, is chargeable to tax. In the event that such property is held for one year or less, 100% of the gain is taxable, and if held for more than one year, 75% of the gain is taxable. The amount of such gain is added to the person's total taxable income for a tax year and is not taxed separately. The gain arising on the disposal of immoveable property held for a period of up to five years shall be chargeable to tax at the rate of 10%, where the holding period of the immoveable property is more than five years, no capital gain tax shall be charged.

Persons responsible for mandatory registration of the instrument of transfer of immovable property are required to collect advance income tax from the transferor at the rate of 1% of the consideration received in case of filers and 2% for non-filers. Such collection is not required to be made where the property has been held by the transferor for more than 3 years. Further the same persons are required to collect advance income tax from the transferees at the rate of 2% of the value of the immovable property if the transferee is a filer and the value of the property is greater than 3 million. In the event the transferee is a non-filer the applicable rate is 1% of the value of the immovable property

Stamp Duty

Instruments for sale of property are chargeable to stamp duty at rates applicable in the relevant province.

Other Transaction Charges

Instruments for transfer of immovable property are required to be registered upon payment of the prescribed fee. The registration fee, as currently applicable in Sindh, is 1% of the value of the property as determined in accordance with prescribed valuation tables.

Any conveyance of immoveable property is also subject to capital value tax at the rates applicable in the relevant province.

7. Do shareholders have consent or approval in connection with a deal?

Sale of Assets

Section 183 of the Companies Act provides that the directors of a public company shall not, except with the consent of the shareholders in a general meeting, either specifically or by way of an authorisation, sell, lease or otherwise dispose of the undertakings or a sizeable part thereof (unless the main business of the company comprises of such selling or leasing). Furthermore,

a sale of assets by a company may be subject to restrictions imposed by the constitutional documents of the company.

Scheme of Arrangement

Under Section 279 of the Companies Act, the shareholders must approve of the scheme of merger or amalgamation in an EOGM. The scheme of arrangement is considered approved if a majority in number representing three-fourths in value of the creditors or class of creditors, or members, as the case may be, present and voting either in person or, where proxies are allowed, by proxy at the meeting, agree to any compromise or arrangement'.

Private Company

A sale or issue of shares of a private company is subject to the restrictions imposed by the Companies Act. Ordinarily when a private company decides to issue new shares, such shares must first be offered to the existing members in proportion to their existing shareholding and only if such members reject the offer is the company free to offer such shares to other people. Similarly where a member of a private company wants to sell its shares it must first offer such shares to the remaining members in proportion to their existing shareholding and only if such offer is rejected, is the selling member allowed to sell its shares to another person.

A sale or issue of shares by shareholders of a private company may also be subject to other restrictions under the constitutional documents of the company e.g. transfers to certain types of entities may be restricted.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Scheme of Arrangement

Section 281(1)(a) of the Companies Act requires directors and chief executives to disclose the directors' or chief executive's material interest in the merger to affected creditors and shareholders.

Securities Act

Section 119 of the Securities Act restricts the board of directors of the target company from taking certain actions during the public offer period. The board of directors shall not:

(a) sell, transfer, or otherwise dispose of or enter into an agreement for sale, transfer, or for disposal of the undertaking or a sizeable part thereof, not being sale or disposal of assets in the ordinary course of business of the company or its subsidiaries;

(b) encumber any asset of the company or its subsidiary;

(c) issue any rights or bonus voting rights during the offer period; or

(d) enter into any material contracts.

Controlling shareholders have a duty of good faith to minority shareholders. Also, Section 117 of the Securities Act restricts shareholders participating in a share purchase agreement with the acquirer from participating in the public offer.

9. In what circumstances are break-up fees payable by the target company?

The laws of Pakistan do not specifically regulate break-up fees. The Contract Act, 1872 allows compensation for any loss or damage caused by the breach that naturally arose in the usual course of business (including any loss that the parties knew about when they made the contract) but not for any remote or indirect loss sustained by the reason of such breach. Transaction parties are allowed to agree to amounts of liquidated damages which would be payable upon termination of the transaction by the target company. However, liquidated damages clauses may not be enforced by the courts where such clauses impose liquidated damages by way of a penalty and not as a genuine pre-estimation of the actual loss that will be suffered by the acquirer.

10. Can conditions be attached to an offer in connection with a deal?

With regard to unlisted companies, the parties are free to establish conditions to the business combination that do not contravene the provisions of the Companies Act.

For listed companies, an acquirer may make the public offer conditional upon a 'minimum level of acceptance' from the tendering shareholders (section 116 of the Securities Act and regulation 14 of the Takeover Regulations). Under current regulations, the acquirer can impose a 'minimum level of acceptance' of not more than 35% of the remaining voting shares of the target company.

Before proceeding with a public announcement of an offer, a potential acquirer must appoint a manager to the offer. The manager to the offer is required by law to ensure that before the public announcement of the offer is made, the acquirer has made firm arrangements for funds for payments to shareholders under the public offer.

Conditions attached with any deal would also have to satisfy the provisions of the Contract Act, 1872. This is particularly relevant in the case of contingency contracts. Contracts which are contingent on the occurrence of future events may not be enforceable till such events occur or may become void if the occurrence of such future conditions becomes impossible.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Generally, a buyer has arranged for financing separately, and the subject is not dealt with in the transaction documents.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Yes, but only in limited circumstances. Where a scheme or contract involving the transfer of shares or any class of shares in any company (the 'transferor company') to another company (the 'transferee company') has, within 120 days after the making of the offer on that basis by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within 60 days after the expiry of the said 120 days, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire the dissenting shareholder's shares. When such a notice is given, the transferee company shall, unless, on an application made by the dissenting shareholder within 30 days from the date on which the notice was given, the court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company. The squeeze-out provisions are subject to certain additional conditions prescribed in the Companies Act.

13. What is the waiting or notification period that must be observed before completing a business combination?

Competition Act

The Competition Act prohibits undertakings from proceeding with a merger which meets the pre-merger notification thresholds until such undertakings have obtained clearance from the Competition Commission.

Section 11(3) of the Competition Act states that 'the concerned undertakings shall submit a pre-merger application to the Competition

Commission as soon as they agree in principle or sign a non-binding letter of intent to proceed with the merger.'

Once this application has been submitted, the Competition Commission shall conduct a first phase review and it shall, within 30 days of receipt of the application, issue an order either allowing the merger or initiating a second phase review. If the Competition Commission chooses to initiate a second phase review, it may require the merger parties to provide such information as it considers necessary. The Competition Commission shall, within 90 days of the receipt of the requested information, make an order either allowing or rejecting the merger.

Takeover Regulations

The Takeover Regulations provide a fairly comprehensive timeline regarding the public offer for an acquisition of shares of a listed company.

An acquirer must publish a public announcement of offer within 180 days of publishing a notice regarding its intention to acquire voting shares. The acquirer's offer statutorily expires on the 60th day of the publication of the public announcement of offer. The acquirer is required to make payment for the tendered shares within 30 days of expiry of the acceptance period (60 days from the announcement of the public offer).

Scheme of Arrangement

There is no definite waiting period for a merger or amalgamation under the Companies Act. The Companies Act has recently been enacted and we have not yet seen any application for such mergers being made to the SECP and therefore the timelines associated with such process are as yet uncertain. However, the process is not expected to take over one year from the date on which the scheme of amalgamation is approved by shareholders in respective general meetings.

14. Are there any industry-specific rules that apply to the company being acquired?

Yes. Below are some industry-specific regulations on mergers and acquisitions.

Non-Banking Finance Companies

For example, an amalgamation of non-banking finance companies ('NBFCs') is subject to approval by the SECP under section 282(L)(4) of the Companies Ordinance, 1984. Also, unlike the general provisions where a majority representing 75% of the value of shares present at the meeting must approve of the merger, for the mergers of NBFCs, a majority representing two-thirds in value of the shareholders of each NBFC, present either in person or by proxy, must approve of the scheme.

Insurance Companies

With respect to insurance companies, the Insurance Ordinance, 2000 ('IO') provides that in the case of an acquisition of shares of more than 10% in an insurance company, or, in the case of a non-life insurer of the whole or any part exceeding 10% of the business located in Pakistan of the insurer, such acquisition shall not proceed unless the acquirer has obtained approval from the SECP. The IO further provides that the life insurance business of an insurer shall not be transferred to any person or transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme sanctioned by the court having jurisdiction over one of the concerned parties.

Banking Companies

Mergers and acquisitions of banking companies would also be governed by the Banking Companies Ordinance, 1962 ('BCO'). Pursuant to its powers under the BCO, the SBP regulates share acquisitions of banking companies e.g. SBP approval is required to hold 5% or more of the voting shares of a banking company. Similarly, the merger or amalgamation of

banking companies requires approval from the SBP.

Broadcast Media

Companies providing broadcast media and related distributions services are required to be licensed under the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 which prohibits the grant of a licence to companies owned, controlled or managed by foreign nationals or companies. This in effect prevents any foreign entity from acquiring such companies in Pakistan.

15. Are cross-border transactions subject to certain special legal requirements?

Transactions involving foreign exchange and cross-border transfer of securities are also governed by the Foreign Exchange Regulation Act, 1947 ('FERA'). Section 18(1) of FERA prohibits a person resident in Pakistan from doing any act whereby a company which is controlled by persons resident in Pakistan ceases to be so controlled. The SBP has not granted any general permission for such transactions as such any transaction involving a change of control of a company from a resident person to a non-resident person requires the special permission of the SBP.

Section 13(1) of FERA restricts, except with the general or special permission of the SBP, inter alia, the transfer of securities (including shares) to or in favour of a person resident outside Pakistan. Chapter XX of the Foreign Exchange Manual provides a general exemption from restrictions under section 13(1) in relation to the transfer and export of securities on a repatriation basis, provided the issue price or purchase price is paid in foreign exchange through normal banking channels, the purchase price is not less than the price quoted in the stock exchanges of the country or in the case of an unlisted company not less than the break-up value of the shares as certified by a practising chartered accountant.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

The laws governing labour and employee benefits do not specifically provide for business combinations. In the event that the business combination entails termination of more than 50% of the workforce or the closing down of the whole of the establishment, prior permission of the Labour Court, the Government of Sindh or the Government of Khyber Pakhtunkhwa shall be required under the West Pakistan Industrial and Commercial Employment (Standing Orders) Ordinance, 1968 ('Standing Orders'), the Sindh Terms of Employment (Standing Orders) Act, 2015 (as applicable in the province of Sindh) and the Khyber Pakhtunkhwa Industrial and Commercial Employment (Standing Orders) Act, 2012 (as applicable in the province of Khyber Pakhtunkhwa). Standing Orders apply to every industrial establishment or commercial establishment where 20 or more workmen are employed. The term 'workman' has been defined in the Standing Orders to mean any person employed in any industrial or commercial establishment to do any skilled or unskilled, manual or clerical work for hire or reward.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

The Companies Act has recently been enacted whereby the SECP has been empowered to authorize compromises and arrangements between the members or creditors of a company and the company itself. The SECP is as yet to formulate rules or regulations governing the procedure applicable to such applications. The SECP is likely to prescribe rules for dealing with such applications in the near future.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

巴基斯坦的并购主要受以下法律和法规的制约：

(a) 2017 年公司法（“《公司法》”）；

(b) 2010 年竞争法（“《竞争法》”）；

(c) 2016 年竞争（并购规制）条例（“《并购条例》”）；

(d) 2015 年证券法（“《证券法》”）；以及

(e) 2008 年上市公司（大幅购买表决权股份及收购）条例（“《收购条例》”）。

2. 有哪些主要的政府监管机购或组织规管兼并收购活动？

巴基斯坦兼并和收购的主要监管机构有：

(a) 巴基斯坦竞争委员会（“竞争委员会”）；

(b) 巴基斯坦证券交易委员会（“SECP”）；以及

(c) 巴基斯坦国家银行（“SBP”）。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

是的，但它们相对并不常见。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

《竞争法》

《竞争法》规定，如果企业有意收购另一企业的股份或资产，或者两家或多家企业打算将其全部或部分业务合并，并满足并购条例规定的合并前门槛，有关企业必须向竞争委员会寻求许可。

《证券法》和《收购条例》

《证券法》第九部分有关于收购上市公司股份的详细规定。当收购方拟收购

(a) 投票股份，该投票股份将使收购方持有上市公司超过 31% 但低于有表决权股份的 50% 的股份；或者

(b) 额外的有表决权股份，如果收购方已持有上市公司 31% 以上但低于有表决权股份的 50% 的股份；或者

(c) 控制一家上市公司，

《证券法》强制要求收购方公告收购目标公司有表决权股份的报价。根据《收购条例》第 14 条第（1）款，如果收购方获得了对上市公司的控制权，则收购方必须“将收购目标公司至少 50% 的剩余有表决权股份的报价予以公告”。《收购条例》第 14 条第（2）款进一步规定：“如果公开报价是以最低接受程度为条件的，则此最低接受程度不得超过剩余有表决权股份的 35%。一些类型的交易免于公开报价。例如，通过银行或金融机构的安排或行使期权的方案来收购股份则不要求收购方公开报价。

《公司法》

《公司法》第 279 条至第 285 条规定了合并或分拆的安排方案。 这些条款，除了其他规定外，允许一家或多家公司与其成员或债权人就有关公司的合并或分拆进行妥协或安排。 根据有关条款，参与企业合并的公司必须向 SECP 提出申请，请求召开股东特别大会(“EOGM”),在大会上股东同意企业合并。一旦股东同意合并，公司必须向 SECP 申请批准协议安排计划，计划中说明合并的详细情况，包括公司财产、公司负债和债务、股权互换、进行中的任何法律程序以及解散，但非一个或多个相关实体的清盘。

《公司法》第183条规定，上市公司或上市公司的附属公司的董事除非经股东大会同意，否则不得专门或经授权出售、租赁或以其他方式处理公司资产或重大资产（除非公司的主要业务包括该等销售或租赁）。

5. 进行这些交易时需要哪些文件？

《竞争法》

如果交易涉及股份或资产的收购，则此类交易将以合同或契约的形式实施。无论此收购或兼并是否满足《并购条例》规定的合并前条件，有关企业必须向竞争委员会提交一份合并前申请。该申请须符合《并购条例》附表所规定的格式，并附有以下证明文件：

(a) 代理人有权利代表一名申请人 / 多名申请人行事的书面证明（如适用）；

(b) 达成合并的所有文件的最终版本或最新版本的副本，不论该合并是通过合并各方之间的协议、获得控股权，或通过公开招标；

(c) 在公开招标的情况下，报价文件的副本；如果在提交申请时不能获得，应尽快提交，不迟于向股东发布之前；

(d) 所有合并各方的最新年度报告和账目（或非法人机构的等同资料）的副本；

(e) 所有分析、报告、研究、调查以及任何理由或为董事会（或同等会议）成员或其他行使类似职能的人员（或被授权行使此类职能的人员）或股东大会准备的类似文件副本，以评估或分析合并的市场份额、竞争条件、（实际的和潜在的）竞争对手、合并的理由、销售增长潜力或扩展至其他产品或市场，和 / 或一般市场条件为目的。对于每个文件，请注明（如果文件本身不包含）准备的日期以及准备文件的每个人的姓名和职称；以及

(f) 本年度和前五年每个合并方的所有经营方案的副本。

申请人的营业额	费用金额
高达5亿卢比	300,000卢比
超过5亿，但不超过7.5亿卢比	600,000卢比
超过7.5亿，但不超过10亿卢比	750,000卢比
超过10亿，但不超过50亿卢比	1,050,000卢比
超过50亿，但不超过100亿卢比	1,500,000卢比
超过100亿卢比	2,250,000卢比

资产	费用金额
高达50亿卢比	300,000卢比
超过50亿，但不超过75亿卢比	600,000卢比
超过75亿，但不超过100亿卢比	750,000卢比
超过100亿，但不超过500亿卢比	1,050,000卢比
超过500亿，但不超过1000亿卢比	1,500,000卢比
超过1000亿卢比	2,250,000卢比

《证券法》和《收购条例》

根据《证券法》的规定，收购上市公司的股份，需要向 SECP、目标公司和目标公司上市的证券交易所发出若干通知、承诺和披露。一些主要文件如下：

(a) 如果收购上市公司 10％以上有表决权股份，则需要向 SECP、目标公司和目标公司上市的证券交易所披露总股份。如果在收购上市公司 10％以上有表决权股份的 12 个月内追加获得股份，仅在总收购股份超过 30％的情况下，才需要遵守上述披露义务。

(b) 当目标公司的董事会被告知有企业意图获得控制目标公司或收购有表决权的股份超出《证券法》第 111 条规定的门槛时，目标公司应立即书面通知证券交易所和 SECP。《证券法》第 111 条规定，如果有人意图直接或间接获得上市公司的股权，该人应公开报价以获得上市公司有表决权的股份：

(i) 有表决权的股份（由该人持有的有表决权股份，如有的话）将使该人具有上市公司超过 30％以上的表决权；或者

(ii) 在收购方已经持有上市公司 30％以上但低于 51％ 有表决权的股份的情况下，额外获得有表决权的股份：该收购方不得在自上次公开报价之日起 12 个月内提出新的公开报价；或者

(iii) 控制上市公司。

(c) 任何有意获得目标公司有表决权股份的人士，应遵守《证券法》第 111 条，经认真且负责的考虑后，在报纸上公告该意图。有意收购目标公司股份的公告，应载明《收购条例》附表三所规定的信息。

(d) 收购方应在发布有意收购目标公司股份或超过《证券法》第 111 条规定的门槛对目标公司进行控制的公告之日起 180

2017纳税年度

序号	期限	2015 纳税年度	2016 纳税年度	2017 纳税年度
1.				积极纳税人
2.	持有期少于12个月	12.5%	15%	15%
3.	持有期限为12个月以上但少于24个月	10%	12.5%	12.5%
4.	持有期限为24个月以上，但在2013年7月1日前收购证券	0%	7.5%	7.5%
5.	2013年7月1日前收购证券	0%	0%	0%

[1] 注释：为明确出售股份而获得的资本增值税，上市公司是指不少于50%的股份由政府（联邦、省或外国）持有的公司，股份在税收年度的任何时间均在巴基斯坦注册的证券交易所交易并且在该年度末仍然上市的公司，以及可由公众和1882年《信托法》中定义的任何其他信托广泛持有的单位。

日内公开报价。公开报价应载明《收购条例》附表四所规定的信息。

(e) 收购方必须提供担保履行公开报价的义务。此种担保可以是现金存款或证券存款或银行担保的形式。

(f) 公开报价的经理必须在公开报价前向 SECP 提交尽职调查证书。

(g) 公开报价应与《收购条例》附表七所指明的证明文件一并提交给 SECP。

《公司法》

如上所述，如果收购涉及上市公司或上市公司的子公司的董事出售或处理公司资产或重大资产，则该出售必须经股东大会的决议授权。

如果一家或多家公司正根据《公司法》第 279 至 285 条订立协议安排方案，则有关公司需要向 SECP 提交请愿书，并附有协议安排方案，其中列名合并详情，包括公司财产、负债和债务、股权互换、任何进行中的法律程序以及解散，但非一个或多个相关实体的清盘。

6. 这些交易须缴纳哪些政府费用？

《竞争法》

向竞争委员会提交的每份合并前申请必须附有一份处理费用，具体数额取决于申请人的营业额。《并购条例》第 6 条规定了以下费用：

如果申请是由资产管理公司提出的，费用应根据合并方管理的资产价值确定，按照以下费率收取费用：

《证券法》和《收购条例》

关于收购上市公司股票，根据《证券法》，收购方需要进行公开报价；公开报价必须提交给 SECP，不可退还的处理费为 50 万卢比。

《公司法》

《公司法》是最近颁布的，SECP 尚未制定任何具体的规则或条例来规定为使协议安排计

2017纳税年度

2017 纳税年度	2018 纳税年度			
	证券于2016-07-01之前收购		证券于2016-07-01之后收购	
非积极纳税人	积极纳税人	非积极纳税人	积极纳税人	非积极纳税人
18%	15%	18%	15%	20%
16%	12.5%	16%		
11%	7.5%	11%		
0%	0%	0%	0%	0%

划得到批准而根据《公司法》第 279 条至第 285 条向 SECP 提交申请的费用或收费。

出售股份

提供出售股份的文书须缴付印花税。在信德省，在实物股票的情况下，该等责任是以股份面值的 1.5 % 征收。当股份是以无纸化形式由巴基斯坦中央存管公司持有的情况下，每股交易的交易费用为股份交易所在市场价值的 0.004 %。

因处置不属上市公司股份而获得的资本收益应予以征税。如果股份持有不足一年，所有收益均应纳税，如果持有一年以上，则 75 % 的收益应纳税。该收益额应纳入纳税人纳税年度的应纳税收入总额，不得单独纳税。

因处置上市公司 股份产生的资本收益应按照以下费率计征所得税：

出售资产

销售税

所出售资产如果包含不能免除销售税的货物，并且如果是进口商、制造商、批发商（包括经销商）、分销商或零售商进行销售，则可能需要被征收销售税。

所得税

因处置任何动产（为业务目的持有的存货、消耗品、原材料除外）而获得的收益，不论是可折旧资产还是无形资产，均须缴税。如果持有此种财产的时间不到一年或为一年，所有收益均须课税，如果持有时间为一年以上，75 % 的收益须课税。此类收益的金额将纳入个人纳税年度的应纳税所得总额，不得单独纳税。因处置持有时间达五年的不动产所产生的收益应按照 10 % 的税率征税，如果持有不动产的时间超过五年，则不征收资本收益税。

负责不动产转让文件强制性登记的人员，必须向转让人征收预提收入税，对积极纳税人以所获对价 1% 的比率征税，对非积极纳税人以所获对价 2% 的比率征税。如果转让人持有财产的时间为 3 年以上，则不需要被征收预提收入税。 此外，如果受让人是积极纳税人并且财产价值超过 300 万，则负责不动产转让文件强制性登记的人员需要向受让人以不动产价值 2% 的比率征收预提收入税。如果受让人是非积极纳税人，适用税率为不动产价值的 1 %。

印花税

出售财产的文件应按照相关省份的适用税率征收印花税。

其他交易费用

转让不动产的文书必须在缴纳法定费用后进行注册登记。目前适用于信德省的注册费是根据规定的估值表确定的财产价值的 1 %。

任何不动产转让也按照相关省份适用的税率征收资本价值税。

7. 交易是否需要股东的同意或批准？

出售资产

《公司法》第 183 条规定，上市公司或上市公司的附属公司的董事除非经股东大会同意，否则不得专门或经授权出售、租赁或以其他方式处理公司资产或重大资产（除非公司的主要业务包括该等销售或租赁）。此外，公司出售资产可能受到公司章程文件的限制。

协议安排方案

根据《公司法》第 279 条，在 EOGM 上，股东必须批准并购或兼并方案。如果代表债权人、一类债权人或成员（视情况而定）价值的四分之三的多数人出席并亲自投票或者在允许代理人出席并投票时经代理出席并投票，在会议上同意任何妥协或安排，则该方案被视为已获批准。

非上市公司

出售或发行非上市公司的股份受《公司法》规定的限制。通常当一家非上市公司决定发行新股时，该等股份必须首先按照现有股权比例向现有股东发行，只有在该股东拒绝该要约时，该公司才可以自由地向其他人发行股份。同样地，如果一家非上市公司的股东打算出售其股份，首先必须按照其现有股权的比例向其他股东出售此类股份，只有在该

要约被拒绝的情况下，打算出售股份的股东才可以将其股份出售给其他人。

非上市公司股东出售或发行股份也可能受到公司章程文件规定的其他限制，例如转移给某些类型的实体可能受到限制。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

安排方案

《公司法》第 281（1）（a）条要求董事和董事长向受影响的债权人和股东披露董事或董事长在兼并中的重大利益。

《证券法》

《证券法》第 119 条限制目标公司的董事会在公开发售期间采取某些行为。董事会不得：

（a）出售、转让或以其他方式处理公司资产或重大资产，或者为了出售、转让或处理公司资产或重大资产而订立协议，但在公司或其子公司的正常经营过程中出售或处理资产除外；

（b）抵押公司或其子公司的任何资产；

（c）在要约期内授予任何权利或投票权；或者

（d）订立任何重大合同。

控股股东对少数股东负有诚信义务。此外，《证券法》第 117 条规定，与收购方签订股份购买协议的股东不得参与公开发行。

9. 哪些情况下，目标公司须支付分手费？

巴基斯坦的法律没有具体规定协议解约金。1872 年的《合同法》允许赔偿在正常经营过程会中因违约而自然发生的任何损失或损害（包括双方当事人在订立合同时已知晓的任何损失），但不包括因该违约而造成的任何间接损失。交易双方可以同意目标公司在交易终止时支付的违约金额。但是，违约金条款可能不会由法院强制执行，该条款所约定的违约金被当作一种惩罚，而非真正预估收购方将遭受的实际损失。

10. 要约可否附加交易相关的条件？

对于非上市公司，双方可以自由地为业务兼并创造条件，而不得违反《公司法》的规定。

对于上市公司，收购方可以根据招标股东“最低限度的接受”（《证券法》第 116 条和《收购条例》第 14 条）进行公开报价。根据现行规定，收购方可以对目标公司剩余不超过 35% 的股份进行“最低限度的接受”。

在进行公开报价之前，潜在的收购方必须指定报价经理人。法律要求经理人需要确保在作出公开报价之前，收购方已经对用于支付给股东的款项作出了明确的安排。

任何交易附带的条件也必须符合 1872 年《合同法》的规定。这对于突发事件合同尤为重要。基于将来事件的发生而生效的合同可能直至该事件发生之前并非是可以强制实施的，或者如果这种将来事件的发生变得不可能，则合同可能失效。

11. 在交易文件中，如何处理融资问题？是否有要求达到最低融资水平的规定？

一般来说，买方已经单独安排了融资，交易文件不处理这个问题。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

是的，但只在有限的情况下。当任何公司（“出让公司”）的股份或任何类别的股份转让给另一公司（“受让公司”）的计划或合约已经被转让股份价值不少于十分之九的持有人批准（不包括受让公司或其子公司或者其代理人在提出要约之日已经持有的股份），在提出要约后的 120 天内，受让公司可以在上述 120 天期满后的 60 天内的任何时间，以规定的方式通知异议股东其有意收购异议股东的股份。当发出通知时，除非异议股东在发出通知之日起 30 日内提出申请且法院认为适当之外，受让公司应当根据方案或合同的约定，有权并有约束力地获得同意股权转让的股东的股份。挤出条款受到《公司法》规定的额外条件的限制。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

《竞争法》

如果达到兼并前需进行通知的门槛，除非兼并获得竞争委员会的许可，否则《竞争法》禁止企业进行兼并程序。

《竞争法》第 11 条第（3）款规定，“有关企业在原则上同意或签署不具约束力的兼并意向书后，应向竞争委员会提交兼并前申请。”

申请提交后，竞争委员会应进行第一阶段审查，并应在收到申请后 30 天内发布命令，允许兼并或启动第二阶段审查。如果竞争委员会选择进行第二阶段审查，则可能要求兼并方提供其认为必要的信息。竞争委员会应在收到其所要求的信息后 90 天内作出允许或反对兼并的命令。

《收购条例》

《收购条例》为公开收购上市公司股份提供了一个十分全面的时间表。

收购方必须在发布有意收购有表决权股份的通知后的 180 天内进行公开报价。收购方的报价自公开之日起 60 日内依法到期。收购人需要在接受期届满之日起 30 日内（公开报价之日起 60 日内）支付招标股份。

协议安排方案

根据《公司法》，并购或兼并没有明确的等待时间。《公司法》最近已经颁布，我们还没有看到向 SECP 提出这样的兼并申请，因此与这一过程有关的时间表尚未确定。但是，从股东在股东大会上批准兼并方案之日起，这一过程预计不会超过一年。

14. 是否有适用于被收购公司的行业特定规则？

是的。以下是一些特定行业的并购规定。

非银行金融公司

例如，非银行金融公司（“NBFCs”）的合并，须经 SECP 根据 1984 年《公司条例》第 282（L）（4）条批准。另外，一般条款规定出席会议所代表股份价值的 75% 的股东必须批准，NBFCs 的兼并与此不同，每个 NBFC 中代表股份价值三分之二的股东必须批准该计划，不论是亲自出席或由代理出席。

保险公司

就保险公司而言，2000 年《保险条例》（“IO”）规定，在收购保险公司超过 10％的股份的情况下，或者如果非寿险保险公司的全部或其业务超过 10% 位于巴基斯坦，除非收购方已获得 SECP 批准，否则不得进行收购。IO 进一步规定，保险公司的人寿保险业务不得转让给任何人，也不得转让给任何其他保险公司的人寿保险业务或与其合并，除非按照对有关各方有管辖权的法院认可的方案执行。

银行公司

兼并和收购银行公司也会受到 1962 年《银行公司条例》（“BCO”）的约束。根据 BCO 赋予 SBP 的权力，SBP 监管银行公司的股份收购，例如，持有一家银行公司 5％以上的有表决权的股份需要 SBP 的批准。同样地，银行公司的并购或兼并也需要 SBP 的批准。

广播媒体

提供广播媒体和相关发行服务的公司必须根据 2002 年《巴基斯坦电子媒体管理机构条例》获得许可，该条例禁止向外国公民拥有、控制或管理的公司授予许可证。这实际上阻止了任何外国实体在巴基斯坦收购这样的公司。

15. 跨境交易是否受任何特殊法律要求的制约？

涉及外汇和跨境证券转让的交易也受到 1947 年《外汇管理法》（“FERA”）的管辖。FERA 第 18（1）条禁止巴基斯坦居民通过受巴基斯坦居民控制的公司采取任何行动而使公司摆脱此类控制。SBP 没有给予这种交易一般许可，因为任何涉及将公司的控制权从居民变为非居民的交易都需要 SBP 的特别许可。

除非经 SBP 的一般或特别许可，FERA 第 13 条第（1）款尤其做了限制将证券（包括股票）

转让给或支持巴基斯坦境外居民的规定。《外汇手册》第二十章规定了一个对第 13 条第(1)款有关在遣返的基础上转让和出口证券的限制的一般性豁免，只要发行价格或购买价格是通过正常的银行渠道以外汇支付，购买价格不低于国家证券交易所挂牌交易价格，或者在非上市公司的情况下，购买价格不低于经执业注册会计师认证的股票的分拆价值。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

管理劳工和雇员福利的法律并不具体规定企业兼并。根据 1968 年《西巴基斯坦工业和商业就业（现行命令）条例》（“现行命令”）、2015 年《信德信息就业（现行命令）条例》（适用于信德省）和 2012 年《开伯尔 - 普什图省工商业就业（现行命令）条例》（适用于开伯尔 - 普什图省），如果企业兼并需要解雇 50% 以上的劳动力或关闭整个企业，则需要劳动法院、信德省政府或开伯尔 - 普什图省政府的事先许可。《现行命令》适用于每个有 20 名以上工人的工业企业或商业机构。根据《现行命令》的定义，“工人”是指任何工业或商业机构雇用的通过从事任何技术性或非技术性工作、手工或文书工作而获得报酬或奖金的人。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

《公司法》最近已经颁布，SECP 有权授权公司成员或债权人与公司本身之间的妥协和安排。SECP 尚未制定适用于此类申请程序的规则或条例。SECP 很可能会在不久的将来制定处理这类申请的规定。

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The Kingdom of Saudi Arabia (hereinafter referred to as "**KSA**") is an Islamic country with a legal system that follows *Sharia*, which is a set of Islamic principles mainly derived from *Quran*, *Sunnah* (Sayings of the prophet Muhammad) and *Ijtihad* (Islamic scholars' opinions). In addition to *Sharia*, there is Basic Law of Saudi Arabia which contains characteristics of what might be called a constitution in other countries.

Under Basic Law, the government may issue regulations with the condition that these regulations do not conflict with the principles of *Sharia* such as Trademark Law, Labour Law, Income Tax Law…. etc., which are codified laws not contradicting *Sharia*.

In particular, there are key laws and regulations that specifically govern mergers and acquisitions in KSA. According to these laws and regulations, there are two types of acquisitions in KSA, private acquisitions (more particularly in Limited Liability Companies "**LLC**"), and public acquisitions (involving listed joint stock companies, "**JSC**"). Rules and regulations regarding each type differ as will be illustrated hereinafter.

The key laws and regulations that govern mergers and acquisitions in KSA are as follows:

a) New Companies Law of 2015 (hereinafter referred to as "**NCL**") issued by Royal Decree No. M/3 dated 28/01/1437 Hijri corresponding to 10/11/2015 Gregorian calendar, which came into force in 2016 and replaced the old Companies Law of 1965, governs the formation and operation of both private and public companies in KSA, including a chapter of only four articles regulating some of the provisions of mergers and acquisitions;

b) The Capital Market Law (hereinafter referred to as "**CML**"), issued by Royal Decree No. M/30 dated 02/06/1424 Hijri, corresponding to 31/07/2003 Gregorian calendar and its implementing rules, provides the legal framework for regulating the capital market in KSA.

   The CML establishes the Saudi Capital Market Authority (hereinafter referred to as "**CMA**"), the Stock Exchange (known as ***Tadawul***) and incorporation of a national securities depository centre;

c) Merger and Acquisition Rules (hereinafter referred to as "**M&A Rules**") issued by CMA dated 21/09/1428 Hijri, corresponding to 31/10/2007 Gregorian calendar, and were subsequently amended in 2012. The said rules regulate public M&A;

d) The Foreign Investment Law (hereinafter referred to as "**FIL**"), issued by Royal Decree No. M/1 dated 05/01/1421 Hijri corresponding to 10/4/2000 Gregorian calendar and its Implementing Rules;

e) The Corporate Governance Rules, issued by the CMA Board Resolution Number 1/212/2006 dated 21/10/1427 Hijri, corresponding to 12/11/2006 Gregorian calendar as amended by Resolution Number 1-10-2010 dated 30/03/1431 Hijri, corresponding to 16/03/2010 Gregorian calendar; and

f) The Competition Law (hereinafter referred to as "**CL**"), issued by Royal Decree No. M/25 dated 04/05/1425 Hijri, corresponding to 22 /06/2004 Gregorian calendar.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The most relevant government regulators and agencies, among others, involved in M&A transactions in KSA are as follows:

a) Ministry of Commerce and Investment (hereinafter referred to as "**MOCI**").

MOCI is the ministry primarily responsible for the commerce sector in KSA. MOCI is responsible for studying and approving applications of companies' registration, partners' resolutions (addendums) and issuing commercial registration certificates. In the context of M&A transactions, MOCI regulates both private and public companies;

b) The Saudi Arabian General Investment Authority (hereinafter referred to as "**SAGIA**").

SAGIA is the main body involved in regulating foreign investments in KSA, and it is responsible for issuing the required licenses for foreign investors, who wish to establish their business in KSA. SAGIA aims to promote and enhance local and foreign investments in KSA;

c) CMA.

CMA supervises and regulates parties that are covered by the CML and has the right to enact regulations and rules to improve the application of CML.

In the context of M&A transactions, CMA is the main regulator of listed JSCs, and has primary jurisdiction over public companies involved in securities, investment, banking, brokerage activities and asset management;

d) The Council of Competition.

The Council of Competition is given power by law to review and make decisions about whether to approve certain mergers and acquisitions based on their possible impact on competition in KSA; and

e) The Department of *Zakat* and Income Tax (hereinafter referred to as "**DZI**")

DZI is the authority that regulates *Zakat* and tax in KSA, and it is responsible for collecting tax from investors.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Although hostile bids are uncommon in KSA and Saudi companies tend to prefer mutual consensual agreements, they are not prohibited by the M&A Rules. In the same way, NCL is silent on these types of bids.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

a) FIL.

Foreign investments in KSA must be licensed by SAGIA prior to establishing or operating any entity in KSA that includes a non-GCC citizen(s).

According to FIL, foreigners can conduct all commercial activities, unless they are expressly prohibited. The prohibited activities are limited to a list known as the negative list.

The negative list includes the following:

i) Oil exploration, drilling and production.

ii) Real estate investment in Makkah and Medina.

iii) Manufacturing of military equipment, instruments and uniforms;

b) CL.

Competition Law aims to protect and encourage fair competition and combat monopolistic practices that affect lawful competition.

According to Article IV of the above-mentioned Law "Practices, agreements or contracts among current or potential

competing firms, whether the contracts are written or verbal, expressed or implied shall be prohibited, if the objective of such practices, agreements or contracts, or consequent impact thereof is the restriction of commerce or violation of competition among firms."

Article VI of the same Law prohibits any merger or acquisition which creates a dominant market position or restricts market entry (such as price fixing and restrictions on the free flow of goods and services). Firms involved in merger operations which cause them to be in a dominating position, shall notify the Competition Council in writing at least 60 days prior to completion of the operation; and

c) Labour Law (Hereinafter referred to as "**LL**") issued by Royal Decree No. M/51 Dated 23/08/1426 Hijri, corresponding to 27/09/2005 Gregorian calendar.

According to LL, an acquirer must assess whether the target company fulfils the requirements of KSA nationals for employment in terms of the Saudization policy.

Pursuant to the LL "All firms in all fields, and regardless of number of workers, shall work to attract and employ Saudis, provide conditions to keep them on the job and avail them of an adequate opportunity to prove their suitability for the job by guiding, training and qualifying them for their assigned jobs".

There are requirements in terms of the nationality of the employees in KSA and advice should be sought in respect of employment requirements for KSA citizens. The minimum number of Saudi employees depends on the activity of the company. Generally, 30% of the employees are required to be Saudi, save for specific sectors, for example, construction companies have different Saudization percentages.

Besides Saudization, pursuant to Article 18 of LL, in case of transferring the ownership of a company to a new owner(s), or in case of mergers, the effective employment contracts shall continue and remain in force.

5. What documentation is required to implement these transactions?

M&A transactions generally include, among others, the preparation and execution of the following documents:

a) In regard to private M&A transactions, the following documents must be submitted to MOCI:
   (i) Submission of both of the companies' commercial registration certificates;
   (ii) A foreign investment license from SAGIA (where a foreign party is involved);
   (iii) Submission of the target entity's shareholders' resolution amending its articles of association for MOCI's approval. The shareholders' resolution must include the selling/purchasing of the shares. After MOCI's approval, and the publication thereof, the shareholders' resolution shall be notarized before a notary public; and
   (iv) Issuance of an amended commercial registration certificate by MOCI.

b) In regard to public M&A transactions, the following documents must be submitted to CMA:
   (i) The announcement for the company's intention to make an offer (including the identity of the bidder and the terms and conditions of the offer);
   (ii) The timetable;
   (iii) The offer documents (including financial information, shareholdings, dealings and cash confirmation);
   (iv) Offeree board circulars (views of the board and material contracts);
   (v) The approval of the offer documents; and
   (vi) Forms of acceptance.

c) In regard to public M&A transactions involving a foreign investor, additional documents must be submitted to SAGIA to issue, amend or cancel the investment license, as the case may be.

The requirements to obtain a foreign investment license and the process of it, used to be very complicated and time consuming. However, recent changes to SAGIA rules simplified the procedures, in order to speed the licensing process and make it more efficient.

The current required documents for obtaining said license are as follows:

(i) The investor's commercial registration certificate and articles of association, translated and attested by the competent authorities, including the Saudi embassy;

(ii) A copy of the general manager's passport;

(iii) A copy of the national identification card if one of the partners is a Saudi national.

(iv) Submission of initial approval from the relevant ministries or authorities in KSA, if the activity requires a relevant authority approval;

(v) Submission of financial statements for the License Applicant's entity from outside KSA for a period of not less than one (1) year stating the status of the entity financial position.

After obtaining SAGIA investment license, additional documents shall be provided and procedures shall be taken before other relevant Saudi authorities in order for the completion of the M&A transaction. SAGIA offers a one stop shop for government services including Labour Office and MOCI.

6. What government charges or fees apply to these transactions?

The charges and fees which apply to M&A transactions are of those paid to the relevant authorities (whether CMA, SAGIA, MOCI etc) for the purpose of obtaining the required approvals and licenses.

The said fees are constantly changed by the competent authorities; the fee for SAGIA license is currently SR 2000 per year, the yearly CR for an LLC fee is SR 1200, and the publication fee for an LLC is SR 1500.

7. Do shareholders have consent or approval rights in connection with a deal?

In connection to M&A transactions in private companies, approvals of shareholders of the company proposing part of its shares are required. The NCL prescribes an imperative provision in article 161 which states that "if a partner wishes to assign his share, for or without consideration, to a non-partner, the other partners shall be informed of the assignments conditions through the company's director. In such case, each partner may request redemption of the share at its fair value within thirty days from the date of notification, unless the article of association provides for a different valuation method or period."

Therefore, shares must be offered first to the other shareholders before they may be sold to third parties. The M&A agreement must respect the provisions of article 161.

Furthermore, the sale may be subject to restrictions imposed by the Article of Association of the company, *Sharia* principles or other provisions of NCL.

In connection to public companies' M&A transactions, matters requiring shareholder approval should be specified in the JSC's bylaws. Amending the JSC's bylaws can only be done through a resolution approved at an

extraordinary general assembly meeting. In the case of merger of JSC with another company, the resolution shall not be valid unless it is passed by shareholders holding a majority of three-quarters of the shares.

Unlike LLCs, JSC shareholders do not have pre-emptive rights on a transfer of shares in a JSC, unless the bylaws provide otherwise.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

The NCL does not provide for special approval from stakeholders upon a company's acquisition. However, in public acquisitions, the M&A Rules provides that Directors of an offeror and the offeree company must always, in advising their shareholders, act only in their capacity as directors and consider the shareholders' interests, together with those of employees and creditors. Directors of the offeree company should give careful consideration before they enter into any commitment with an offeror.

9. In what circumstances are break-up fees payable by the target company?

NCL is silent with regard to break-up fees. However, according to general principals of law, based on *Sharia*, applied in KSA, break-up fees are acceptable, subject to certain conditions.

As to public M&A transactions, the M&A Rules permits a "break-up fee' which may be paid in the event an acquisition offer fails.

According to M&A Rules article 24 "Any break-up fee that is proposed must be of a minimal size (no more than 1% of the offer value) and the offeree company board and its financial adviser must confirm to the Authority in writing that the fee to be in the best interests of shareholders."

Furthermore, the CMA should be consulted before arranging any break-up fee.

10. Can conditions be attached to an offer in connection with a deal?

Conditions are commonly accepted in relation to private acquisitions in KSA, provided that they do not violate NCL and general principals of law based on *Sharia*. In practice, conditions are often related to obtaining the required approvals and licenses from the relevant authorities, as well as conducting a satisfying legal and financial due diligence results.

For public acquisitions, M&A Rules allow for conditions as long as they do not depend solely on the subjective judgments of the directors of the offeror or of the offeree company.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

In regard to private M&A transactions, there are no regulations that require a minimum level of financing in KSA. In practice, it varies from one bank to another, where each bank has different standard requirements and conditions, subject to the sophistication of the transaction as well as the amount of the loan.

In practice, there are some cases where the relevant agreement contains a specific article whereby the seller is obliged to provide all necessary documentations and assistance to the financing body whom the purchaser is dealing with to finance the transaction. In some transactions, the financing agreement may be attached to the transaction document.

As to public M&A transactions, M&A Rules provide that all offer documents must contain a description of how the offer is to be financed and the source of the finance, and when the offer includes cash, the offer document must contain a bank guarantee issued by a local bank guaranteeing the bidder's ability to satisfy full acceptance of the cash offer.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

There are no squeeze-out possibilities contained in the M&A Rules nor in the NCL. All shareholders must be treated equally.

13. What is the waiting or notification period that must be observed before completing a business combination?

Generally, there is no certain waiting period in private M&A transactions. However, in practice, the contracting parties must obtain all required approvals and licenses and approvals from MOCI before the completion of the transaction.

As to public M&A transactions, and pursuant to M&A Rules, once the offer announcement is made, the offeror must immediately notify CMA in order to establish a timetable related to the acquisition.

14. Are there any industry-specific rules that apply to the company being acquired?

In addition to the rules and requirements specified in NCL, M&A Rules, CMA, SAGIA and FIL, some additional regulatory approvals from other Saudi regulators may also be required, depending on the industry. For example, approvals from the Communications and Information Technology Commission (CITC) in regard to telecommunication companies and approvals from Saudi Food and Drug Authority (SFDA) in regard to companies in the Healthcare sector.

15. Are cross-border transactions subject to certain special legal requirements?

There are several legal requirements for cross-border transactions, depending on the nature of the transaction. For instance, taxation under the Saudi Arabian tax laws and anti-money laundering law. Moreover, the transaction must be in compliance with the FIL and the investor must obtain an investment license from SAGIA beforehand.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Please refer to answer 4 (c).

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

To the best of our knowledge, currently, there are no recent proposals for reforms or regulatory changes that would impact M&A activity in KSA.

General Reservations:

a) Any views and interpretations expressed in this article are based on the practical experience of the lawyers of Sharif Akkad Law Firm (MAK). The views are subject to the law as it stands on 1 October 2017 Gregorian calendar. These laws are subject to change from time to time and thus the accuracy of this article cannot be guaranteed at any given time and specific update thereof should always be sought.

b) It should be noted that in KSA laws are usually called regulations, accordingly if any reference in this article is made to a regulation; this refers to a codified law. Also note that Umm Al- Qura Gazette is the Official Saudi Gazette.

c) Where regulations ("laws") are translated into English in this article such translation is unofficial and cannot be guaranteed to be wholly consistent with the precise or actual meaning of the Arabic version of the regulation. The regulations of KSA are promulgated in Arabic and any translation of the same into English is for guidance purposes only.

d) The opinions in this article are not based upon or subject to a specific agreement,

contract or other legal document. This article is general in its nature with regards to the enquiries stated herein.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

沙特阿拉伯王国（以下简称为“沙特”）是一个伊斯兰教国家。沙特按照伊斯兰教教法制定了法律制度；伊斯兰教教法是一套伊斯兰教戒律，主要源自《古兰经》、《圣训》（先知穆罕默德语录）和《伊智提哈德》。除伊斯兰教教法外，还有沙特基本法，内容包括在其它国家被称为宪法的相应特征。

政府可按照基本法制定各项规章制度，但前提条件是规章制度不得与伊斯兰教教法原则相冲突，例如《商标法》、《劳动法》、《所得税法》等等；前述法律都是与伊斯兰教教法相一致的成文法律。

沙特还专门制定了管理兼并和收购业务的重要法律法规。按照该类法律法规的规定，在沙特主要有两类收购，即，私人并购【尤其发生在有限责任公司（“有限责任公司”）】和公开并购【涉及已上市的股份公司（“股份公司”）】。下文详细解释了适用于不同类别并购的规章制度：

适用于沙特并购交易的重要法律法规有：

(a) 回历 1437 年 1 月 28 日，即，公历 2015 年 11 月 10 日，王室法令第 M/3 号 2015 年《新公司法》（以下简称为“新公司法”），于 2016 年生效，替代 1965 年的旧公司法，适用于在沙特设立和经营私有和公共公司等事宜，其中有一个章节，仅有四条款，对并购作出了相关规定；

(b) 回历 1424 年 6 月 2 日，即，公历 2003 年 7 月 31 日，王室法令第 M/30 号《资本市场法》（以下简称为“资本市场法”）及其执行条例，规定了约束沙特资本市场的法律体制。按照资本市场法设立了沙特资本市场管理局（以下简称为“资本市场管理局”）、证券交易所（即，“沙特交易所”）和国家证券托管中心；

(c) 资本市场管理局于回历 1428 年 9 月 21 日，即，公历 2007 年 10 月 31 日，制定了《并购条例》（以下简称为“**并购条例**”），随后于 2012 年进行了修改。并购条例适用于公开并购；

(d) 回历 1421 年 1 月 5 日，即，公历 2000 年 4 月 10 日，王室法令第 M/1 号《外商投资法》（以下简称为“外商投资法”），及其执行条例；

e) 资本市场管理局理事会于回历 1427 年 10 月 21 日，即，公历 2006 年 11 月 12 日，制定了条例编号为 1/212/2006 的《公司治理条例》，随后，于 1431 年 3 月 30 日，即，公历 2010 年 3 月 16 日，进行了修订，条例编号 1-10-2010；以及

f) 回历 1425 年 5 月 4 日，即，公历 2004 年 6 月 22 日，王室法令第 M/25 号竞争法（以下简称为“竞争法”）。

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

涉及沙特并购的主要相关政府监管机构和部门有：

(a) 商业投资部（以下简称为“商业投资部”）

商业投资部是一个主要负责沙特商业板块事务的部门。商业投资部负责研究和批准公司登记、合伙人决议（附录）和签发商业登记证书等。就并购交易而言，商业投资部同时管理私人和上市公司；

(b) 沙特投资总局（以下简称为“投资总局”）

投资总局是管理沙特外商投资的主要部门，负责向愿意在沙特设立公司的外国

投资人签发必要的许可证。投资总局旨在促进和增强本地和外国资金在沙特的投入。

(c) 资本市场管理局

资本市场管理局负责监督和管理受资本市场法约束的各方，有权颁布各项规章制度，促进资本市场法的适用。

就并购交易而言，资本市场管理局主要负责监管已上市的股份公司，对涉及证券、投资、银行、经纪和资产管理等业务的上市公司具有优先管辖权；

(d) 竞争理事会

经法律授权，竞争理事会负责审核并根据对沙特竞争可能产生的影响决定是否批准并购交易；以及

(e) 扎卡特和所得税部（以下简称为“扎卡特和所得税部”）

扎卡特和所得税部是沙特管理扎卡特和税务的机构，负责向投资商征收税金。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

尽管恶意收购在沙特不常见，且沙特公司倾向于签署协商一致协议，但并购条例并不禁止该类收购。同样地，新公司法亦不禁止该类恶意收购。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

(a) 外商投资法

在沙特境内设立或经营任何实体之前，外商投资（包括非海湾阿拉伯国家公民）必须获得 投资总局的许可。

根据外商投资法的规定，除明令禁止外，外商可开展一切商业活动。禁止活动参见负面清单。

负面清单包含下列内容：

(i) 石油勘探、钻井和生产；

(ii) 在麦加和麦地那进行房地产投资；

(iii) 制造军事设备、仪器和制服。

(b) 竞争法

竞争法旨在保护和鼓励公平竞争和防止出现影响合法竞争环境的垄断行为。

上述法律第 4 条规定：“如果业务、协议或合同的目标或者后续影响将限制贸易或者妨碍企业竞争，禁止当前或潜在竞争性企业实施该类业务、协议或合同，无论是否书面或口头、明示或默示签约。”

竞争法第 6 条禁止产生市场支配地位或限制市场准入的任何兼并或收购（例如，定价和限制货物和服务的自由流通）。如果通过兼并行为可能获得支配地位，相应企业应在完成兼并行为前至少 60 天书面通知竞争理事会；以及

(c) 回历 1426 年 8 月 23 日，即，公历 2005 年 9 月 27 日，王室法令第 M/51 号劳动法（以下简称为“劳动法”）。

根据劳动法的规定，收购方必须评估确定目标公司是否满足聘请沙特当地公民的政策要求。

劳动法规定，“各行各业的所有企业，无论员工数量多少，均应吸引和雇佣阿拉伯人，提供工作条件，通过引导、培训和获得从事分配工作的资格条件等，使阿拉伯人能够有充足机会证明能够适任工作”。

沙特法律提出了雇佣沙特公民的相关要求；企业可咨询获得雇佣沙特公民的相关要求。雇佣沙特阿拉伯员工的最低数量视公司业务活动而定。通常情况下，沙特阿拉伯员工必须占员工总人数的 30%，但特定领域除外，例如，建筑公司雇佣的沙特阿拉伯人比例另有要求。

除劳动法第 18 条规定的雇佣沙特阿拉伯人要求外，如果向新业主转让公司所有权，或者公司兼并，原有效的劳动合同应继续有效。

5. 进行这些交易时需要哪些文件？

除其它事项外，通常情况下，并购交易还包括编制和签署下列文件：

(a) 如果是私人并购交易，必须向商业投资部提交下列文件：

(i) 提供双边公司的商业登记证；

(ii) 投资总局签发的外商投资许可（如果涉及境外投资方）；

(iii) 提供目标公司关于修改公司章程的股东决议，以便获得商业投资部批准。股东决议必须包含股份出售 / 购买事宜。经商业投资部批准且公告后，应向公证机构公证股东决议；以及

(iv) 商业投资部签发经修改的商业登记证。

(b) 如果是上市公司并购交易，必须向资本市场管理局提交下列文件：

(i) 表明公司有要约意愿的公告（包括投标人身份和招标条款和条件）；

(ii) 并购时间表；

(iii) 要约文件（包括财务信息、股权、交易和现金确认等）；

(iv) 被要约人的董事会通知（董事会意见和重要合同）；

(v) 批准要约文件；以及

(vi) 接受表。

(c) 如果上市公司的并购交易涉及外商投资人，为签发、修改或取消投资许可之目的（视具体情形而定），还应向投资总局提供其它文件。

获得外商投资许可的要求及其程序通常很复杂且费时。但是，沙特已修改了投资总局条例，简化许可程序，以便加速完成许可程序，使工作更具效率。

目前，为获得上述许可必须提交的文件有：

(i) 经主管机构（包括沙特大使馆）翻译和认证的投资人的商业登记证和公司章程；

(ii) 总经理护照复印件一份；

(iii) 国民身份证复印件一份，如果其中一个合伙人是沙特公民；

(iv) 如果业务活动须经相关机构批准，则需提供沙特相关部门或机构签发的初始批准；

(v) 沙特境外的许可申请人实体至少一（1）年期财务报告，说明该实体的财务状况。

在获得投资总局投资许可后，还应向沙特其它相关机构提交其他文件，办理相应程序，以便完成并购交易。投资总局提供一站式政府服务，包括劳动局和商业投资部。

6. 这些交易须缴纳哪些政府费用？

并购交易收费和费用是属于为获得必要批准和许可而应向相关机构（资本市场管理局、投资总局或商业投资部等）支付的费用。

相应机构经常调整上述费用。投资总局许可费用为每年 2000 沙特里亚尔，有限责任公司每年 CR 费用为 1200 沙特里亚尔，有限责任公司的广告费为 1500 沙特里亚尔。

7. 交易是否需要股东的同意或批准？

如果是涉及私人公司的并购交易，必须获得提供部分股份的公司股东的批准。新公司法第 161 条强制性规定了“如果合伙人希望向非合伙人转让其股份，无论是否有对价，公司董事应通知其他合伙人股份转让条件。届时，各合伙人可在通知之日起三十天内以公平价值赎回股份，但公司章程另行规定不同估值方法或期限的除外”。

因此，在向第三方出售之前，必须向公司其他股东发出要约。并购协议必须体现新公司法第 161 条规定。

此外，出售股份还应按照公司章程、伊斯兰教法原则或新公司法的其它规定执行。

如果是涉及上市公司的并购交易，股份公司的规章制度应规定必须获得股东批准。在获得经特别股东大会批准的决议后方可修改股份公司的规章制度。如果股份公司与其它公司兼并，当且仅当持有四分之三股份的多数股东同意，决议方可有效。

与有限责任公司不同，在转让股份公司股份时，股份公司股东不享有优先认股权，但公司规章制度另行规定的除外。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

新公司法未规定在公司收购时须获得股东的特别批准。但是，在上市企业收购中，并购条例规定，要约方和被要约方的董事必须仅以董事身份，考虑股东权益，通知公司的股东、员工和债权人并购事宜。在与要约方缔结任何承诺前，被要约方的董事应认真考虑。

9. 哪些情况下，目标公司须支付分手费？

新公司法未规定单方终止协议费。但是，根据法律的通用原则以及伊斯兰教教法，在特定条件下，在沙特可收取单方终止协议费。

就上市公司并购交易而言，并购条例允许在收购要约失败时支付“单方终止协议费”。

并购条例第 24 条规定“拟收取的任何单方终止协议费必须是最低费率（不得超过要约价的 1%），被要约方的董事会及其财务顾问必须以书面形式向管理局确认，该费用符合股东的最大利益”。

此外，在确定任何单方终止协议费之前，应当咨询资本市场管理局。

10. 要约可否附加交易相关的条件？

在沙特，如果与私人企业收购相关的条件不违反新公司法和根据伊斯兰教教法制定的法律通用原则，私人企业收购的条件通常都能被接受。事实上，并购条件通常涉及获得相关机构的必要批准和许可，以及获得令人满意的法律和财务尽职调查结果。

就上市公司收购而言，如果不仅仅依靠要约方和被要约方的董事主观判断确定并购条件，并购条例将批准通过该并购条件。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

就私人企业并购交易而言，不存在要求获得沙特最低融资水平的相关规定。事实上，视不同银行而变化。各家银行有不同的标准要求和条件，根据交易的复杂性和贷款金额而定。

事实上，某些交易协议会特别规定卖方有义务向买方的融资机构提供一切必要的文件和援助，以便为交易融资。在某些交易中，交易文件可附带融资协议。

就上市公司并购交易而言，并购条例规定所有要约文件必须包含要约如何获得融资以及融资来源、要约何时包括现金以及要约文件必须获得地方银行签发的保证投标人有能力充分满足现金要约条件的银行担保函等规定。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

并购条例或新公司法均未规定存在排挤式兼并的可能性。必须公平对待全体股东。

13. 什么是完成业务兼并之前必须遵守的等待期或通知期？

一般情况下，私人企业并购交易中不存在等待期。但是，在交易完成之前，合同双方必须获得一切必要批准和许可以及商业投资部批准。

就上市公司并购交易而言，根据并购条例，一旦发布要约公告，要约方必须立即通知资本市场管理局，确立收购时间表。

14. 是否有适用于被收购公司的行业特定规则？

除新公司法、并购条例、资本市场管理局、投资总局和外商投资法规定的规则和要求外，还应根据不同行业获得沙特其它监管机构的监管批准。例如，电信公司的并购应获得通讯和信息技术委员会（以下简称为“通讯和信息技术委员会”）的批准，医疗保健企业的并购应获得沙特食品和药品管理局（以下简称为“食品和药品管理局”）的批准。

15. 跨境交易是否受任何特殊法律要求的制约？

还有针对跨行业交易的法律要求，视交易性质而定。例如，沙特阿拉伯的税法和反洗钱法规定的税项。此外，交易必须遵守外商投

资法规定，投资人必须事先获得投资总局的投资许可。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

请参照答案 4 (c)。

17. 近期是否有任何影响并购活动的改革或调整监管的提案?

就我们所知，目前未提出可能影响沙特并购交易的改革或监管变革提案。

保留意见：

(a) 根据 Sharif Akkad 律师事务所律师的实际经验给出本文陈述的任何观点和解释。按照公历 2017 年 10 月 1 日的法律规定陈述观点。鉴于沙特可不时修改法律，因此，无法保证本文规定在任何特定时间的准确性，相反，需要经常修改。

(b) 应当指出的是，在沙特，法律通常被称为规定；因此，如果对本文的任何援引被列入规定中，视为成文法律。还应注意的是，麦加报纸是沙特的官方报纸。

(c) 如果本文规定（以下简称为“法律”）被翻译成英文，英文译本为非官方文本，不能保证与阿拉伯文本的精确或实际含义完全一致。沙特规定将以阿拉伯语发布，英文文本仅做指引用。

(d) 本文规定项下的意见不是依照或者根据具体协议、合同或其它法律文件提出的，本文规定旨在概述其规定的调查内容的一般性。

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WENGERPLATTNER
ATTORNEYS AT LAW

1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Transactions with respect to privately held companies are mostly structured as a share deal, an asset deal or a merger (transferring one company's assets to another pre-existing company or transferring two companies' assets into a new company). There is no specific statute governing the acquisition of a company whose shares are not listed on a stock exchange. Instead, the following rules apply:

(a) general rules on the sale of goods as set forth in articles 184 et seq. of the Swiss Code of Obligations of 30 March 1911, as amended ('CO');

(b) mergers and de-mergers of entities as well as transfers of assets and changes of legal forms are governed by the Swiss Federal Act on Mergers, Demergers, Transformations and Transfers of Assets of 3 October 2003 ('MA').

In the case of public (i.e. listed) companies, in particular the following laws and regulations apply with regard to a public takeover offer:

(a) Swiss Federal Act on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 19 June 2015 ('FMIA');

(b) Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 25 November 2015 ('FMIO');

(c) Ordinance of the Swiss Financial Market Supervisory Authority ('FINMA') on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading of 3 December 2015;

(d) Ordinance of the Takeover Board on Public Takeover Offers of 21 August 2008, as amended;

(e) Regulation of the Swiss Takeover Board of 21 August 2008, as amended; and

(f) Listing Rules of the SIX Swiss Exchange, the main stock exchange in Switzerland, regarding disclosure requirements in relation to price-sensitive information and the listing and de-listing of shares.

Although the public takeover offer is the most common form of a change of control with regard to public companies, a takeover of a public company can also be performed by way of a statutory merger under the MA. As statutory mergers involving public companies are very rare in Switzerland, these are not further dealt with in this article.

Also, the Swiss Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, the Swiss Federal Act on Acquisition of Real Property by Foreigners of 16 December 1983, as amended, and special sector-related rules in regulated industries apply in the context of Swiss merger and acquisition transactions (see question 4).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The following regulators and agencies play key roles in merger and acquisition transactions:

WENGERPLATTNER
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Dr. Oliver Künzler

Partner, Wenger Plattner

Oliver Künzler is a partner in the Business Group Corporate and Commercial. He deals primarily with international and national M&A transactions, restructurings and reorganisations, private equity and venture capital transactions and financings. He also advises shareholders and companies on all aspects of contract, commercial and corporate law.

He further specialises in advising small and medium-sized enterprises, particularly with respect to business succession and structuring.

Oliver Künzler regularly publishes and speaks on topics of contract, commercial and corporate law. He is active in several national and international professional organisations and serves as an expert on business succession.

Professional qualifications. Lic.iur., University of Zurich, Switzerland, 2002; admitted to the Bar in Switzerland, 2004; Dr.iur., University of Zurich, 2006.

Areas of practice. Corporate and commercial; banking and finance; insolvency and restructuring; life sciences and health law; tax.

Languages. German, English, French, Italian.

Professional associations/memberships. Zurich Bar Association (ZAV); Swiss Bar Association (SBA); International Bar Association (IBA); SMB next (KMU next).

(a) the Takeover Board (www.takeover.ch) is the regulator for takeover offers regarding public companies in Switzerland. It can issue binding orders which can be challenged before the FINMA. The decisions of the FINMA can be appealed to the Swiss Federal Administrative Court;

(b) the FINMA (www.finma.ch) is Switzerland's independent financial market regulator. Its mandate is to supervise banks, insurance companies, exchanges, securities dealers, collective investment schemes, and their asset managers and fund management companies. It also regulates distributors and insurance intermediaries. The FINMA is responsible for ensuring that Switzerland's financial market functions effectively. Also, the FINMA is the supervisory authority of the Takeover Board;

(c) the Federal Competition Commission (www.weko.ch) is the regulator for merger control matters in Switzerland. Its tasks include combatting harmful cartels, monitoring dominant companies for signs of anti-competitive conduct and preventing the imposition of restraints of competition by the state.

The decisions of the Takeover Board and the FINMA, as well as most offer documents, are available at www.takeover.ch.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are permitted in Switzerland. The FMIA regulates both friendly offers (i.e. the offer is supported by the target's board of directors) and hostile bids (i.e. the offer is not supported by the target's board of directors). There is no obligation to notify any authority, including the Takeover Board, or the target's board of directors before announcing the offer to the public. Although most takeovers are friendly, the number of hostile bids has increased in Switzerland in recent years. Between 1998 and mid-2010, out of 128 public offers, 113 were recommended and 15 were hostile bids. Nevertheless, in 2016, out of 6 friendly bids no hostile bid was submitted.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

(a) Swiss Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 ('Cartel Act'):

Under the Cartel Act, the Competition Commission must be notified of any concentrations of undertakings (including mergers, acquisitions of control and joint ventures), provided that in the business year preceding the concentration, the undertakings concerned together reported:

(i) an aggregate worldwide turnover of at least CHF 2 billion or an aggregated turnover in Switzerland of at least CHF 500 million; and

(ii) at least two of the undertakings concerned reported an individual turnover in Switzerland of at least CHF 100 million.

Irrespective of the above conditions, it is mandatory to notify a planned concentration to the Competition Commission if the following two conditions cumulatively apply:

(i) one of the undertakings involved in the planned concentration has been held to be dominant in a market in Switzerland in a final and non-appealable decision under the Cartel Act; and

(ii) the concentration concerns either that market or an adjacent market, or a market upstream or downstream thereof.

(b) Swiss Federal Act on Acquisition of Real Property by Foreigners of 16 December 1983, as amended (Lex Koller):

Moreover, according to the Lex Koller, the acquisition of certain real estate by foreign individuals, or companies that are controlled by such persons, is restricted and may require prior approval by the relevant cantonal authority where the real estate is located (see question 15).

(c) Special Regulations for Particular Sectors:

Special regulations have to be taken into account in connection with the acquisition of the business of a regulated industry (e.g. financial institutions as well as entities in the media, telecommunications, pharmaceuticals or transport sector). For example, new qualified shareholders of a regulated financial institution (including a bank, securities dealer, insurance company, fund management company etc.) have to be notified to, and approved by, the FINMA.

5. What documentation is required to implement these transactions?

For the sale of a privately held company, the key document is the transaction agreement: depending on the type of the transaction, this would be a share purchase agreement, an asset purchase agreement or a merger agreement.

If listed companies are involved as targets, a transaction can be structured as:

(a) a tender offer for cash;

WENGERPLATTNER
ATTORNEYS AT LAW

Dr. Marc Nater

Partner, Wenger Plattner

Marc Nater is a partner in the Corporate and Commercial business group. He advises national and international clients primarily in the fields of corporate and commercial law, public and private company acquisitions and mergers (M&A), private equity, capital market law and financing. He is an authorized issuers representative at the SIX Swiss Exchange.

Marc Nater advises athletes, sports associations and clubs, with a special focus on sponsorship agreements, transfer agreements and disputes.

Marc Nater speaks regularly at national and international conferences.

Professional qualifications. Lic.iur., University of Zurich, Switzerland, 1992; admitted to the Bar in Switzerland, 1995; LLM, University of Virginia, School of Law, USA; Dr.iur., University of Zurich, 2000.

Areas of practice. Corporate and commercial; banking and finance.

Languages. German, English, French.

Professional associations/memberships. Zurich Bar Association (ZAV, member of the board/currently President); Board of Directors and Managing Director of various companies.

(b) an exchange offer for securities; or

(c) a combination thereof.

Before the buyer/offeror is granted access to the due diligence materials, pre-agreements such as a confidentiality agreement, a stand-still agreement and a letter of intent are normally executed. These documents set out the transaction process and mostly include provisions regarding exclusivity, confidentiality and break-up fees.

In most cases, public offers start with a preliminary announcement prior to the publication of the offer. A preliminary announcement is a short document which sets out the main terms of the offer (scope, price, kind of consideration, timetable and conditions). Within six weeks after the preliminary announcement, the offeror must publish the offer in a prospectus containing, in principle, the same conditions as those in the preliminary announcement. Prior to publication, the offeror must submit the offer to an independent audit firm or to a securities dealer for review. The audit firm or the securities dealer issues a short report, which has to be published together with the prospectus. Also, the board of directors of the target company submits a report to the holders of equity securities setting out its position in relation to the offer. The report of the board of directors of the target company may be published either together with the prospectus or after the publication of the prospectus.

On the business day following the date on which an offer is due to expire, the offeror must make an announcement through the electronic media and must simultaneously inform the Takeover

Board and the SIX Swiss Exchange. The provisional interim announcement must state the number of equity securities acquired and held by the offeror and specify whether the conditions of the offer (if any) have been fulfilled. The definitive interim result must be published not later than four trading days after the expiry of the offer. If the offer has been successful, the acquiror has to grant the shareholders of the target company an additional acceptance period to tender any shares that are still outstanding. Upon expiry of this additional time period, the acquiror has to publish the final result of the tender offer.

The interim and final results must be distributed through:

(a) publication on either the offeror's website or a website dedicated to the public offer;

(b) delivery to the major Swiss media, the major press agencies active in Switzerland as well as the major electronic media which distribute stock exchange information (financial information providers);

(c) delivery to the Takeover Board; and

(d) delivery to the SIX Swiss Exchange.

6. What government charges or fees apply to these transactions?

Depending on the type of transaction, the following charges or fees may apply:

(a) the sale of shares may be subject to a transfer stamp duty of 0.15% (for shares of a Swiss company) or 0.30% (for shares of a foreign company);

(b) the Takeover Board levies fees between CHF 25,000 at minimum and CHF 375,000 at most, depending on the value of the transaction and the degree of difficulty of the proceedings;

(c) notaries' fees are required in transactions where real estate is involved. Such fees are cantonal fees and may vary depending on where the real estate is located.

7. Do shareholders have consent or approval rights in connection with a deal?

According to the Swiss public tender offer regime, there is no particular requirement with regard to shareholders' approval. However, the shareholders have to give their consent if, in the course of a public takeover, the share capital of the company has to be increased in order to issue the shares offered as consideration.

If the articles of association of the target company contain any anti-takeover measures (such as transfer restrictions on registered shares), the offeror will normally make its offer conditional on the cancellation of such provisions by the shareholders' meeting (see question 10).

Also, the offeror can make the offer conditional on getting a minimum acceptance, e.g. for at least 50% of the shares, or may seek irrevocable tender commitments from or conclude direct agreements with significant shareholders (see also question 10).

Moreover, shareholders holding directly or indirectly 3% or more of the voting rights in the target, whether exercisable or not:

(a) can obtain legal standing in takeover proceedings by applying to the Takeover Board within five trading days after the earlier of: (i) the publication of the prospectus, or (ii) if the first order by the Takeover Board on the offer is published before the prospectus (e.g. orders relating to the preliminary announcement), after publication of that order; and

(b) can, if they have not applied to obtain legal standing and have yet to participate in the proceedings, file an appeal with the Takeover Board against the first order issued by the Takeover Board on the offer within five trading days after publication of such order, if published before or together with the prospectus.

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Dr. Martina Braun

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Martina Braun is a senior associate and a member of the IP and IT and of the Corporate and Commercial teams. One of her key areas of expertise is advising on all aspects of contract law. Further she advises and represents clients on all aspects of intellectual property law and information technology, with a particular focus on data protection. She also deals with health law matters.

Martina Braun completed her doctoral thesis on copyright law and worked at the Centre for Business Law at the University of Lausanne.

Professional qualifications. Lic.iur., University of Lausanne, Switzerland, 2005; Dr.iur., University of Lausanne, 2010; admitted to the Bar in Switzerland, 2011.

Areas of practice. Contract law; Intellectual property (IP) and technology law (ICT); data protection; life sciences and health law.

Languages. German, French, English.

Professional associations/memberships. Zurich Bar Association (ZAV); Swiss Bar Association (SBA); Institute for the Protection of Industrial Property (INGRES); Center of Commercial Law (CEDIDAC); Data Protection Forum Switzerland.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Controlling shareholders do not owe any duties to minority shareholders.

Directors owe a duty of care and loyalty towards the company. Further, they have to act in the best interests of the company and to abstain from any action that could harm those interests.

However, anyone who directly or indirectly acquires equity securities representing more than one-third of the company's voting rights in a listed Swiss target company is obliged to make a mandatory takeover offer to the remaining shareholders for all listed equity securities of the company. Companies may, by resolution of the shareholders' meeting:

(a) waive the duty to make a mandatory takeover offer (opting-out); or

(b) raise the threshold from one-third to 49% (opting-up).

The FINMA's predecessor, the Federal Banking Commission, had ruled that shareholders could not resolve on an opting-up or opting-out provision that applied only for a limited period of time and for a specific shareholder. The Takeover Board extended the scope of this rule to a general opting-out adopted by the shareholders' meeting, if the resolution has actually or implicitly been taken in view of a specific transaction or in favour of a specific shareholder. However, the Takeover Board reversed this practice and held instead in a decision in 2012 that it would not challenge opting-out decisions if a majority-of-the minority vote consented to it.

Moreover, the Takeover Board can grant exemptions from the duty to make a mandatory takeover offer if specific circumstances apply.

9. In what circumstances are break-up fees payable by the target company?

In the case of private acquisitions, break-up fees payable by the target company may be contractually agreed on within the legal limits. However, it is not yet very common in Switzerland. In general, break-up fees, if any, are to be paid by the seller.

Pursuant to the practice of the Takeover Board, the amount of break-up fees payable by the target company in a public merger must be proportional and constitute a compensation for incurred costs and expenses. However, it is uncertain – and has yet to be decided by a court – whether break-up fees of a purely punitive nature are allowed.

It may be noted that in applying the principle of culpa in contrahendo, a seller and/or buyer might be considered to have breached their pre-contractual duties and might be obliged to pay damages. As the target company is not a party to the transaction, this principle, however, will in general not apply to it.

10. Can conditions be attached to an offer in connection with a deal?

In the case of private acquisitions, the bidder is free to submit a conditional offer. For example, offers will typically be subject to a successful due diligence exercise.

As regards public acquisitions, a distinction has to be made whether the public takeover bid is voluntary or not. If it is voluntary, the offer may be subject to clearly defined objective conditions, provided that the bidder has a justified interest to do so and that the outcome and the occurrence of the condition may not be substantially influenced by the bidder. If the bidder has to contribute to the fulfilment of the condition, the bidder has to take all reasonable measures to ensure the occurrence of the condition. When the offer period closes, the bidder must clearly state whether the conditions have been satisfied. The bidder can reserve the right to waive certain conditions.

In contrast, mandatory bids must in principle be unconditional, except in the event of important reasons, such as obtaining regulatory approvals, absence of injunctions preventing completion, and recognition of the bidder as a shareholder with voting rights.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

In private mergers and acquisitions, the seller will typically ask for proof of financing and for representations and warranties of the buyer pursuant to which the buyer is in possession of the necessary funds to consummate the planned transaction. However, there are no mandatory requirements regarding the level of financing or debt-equity ratio.

In contrast, funding must be in place before a public offer is announced. Prior to its publication, the offer must be submitted to an independent audit firm (see question 5), which examines whether the offer is in compliance with the legal requirements. In particular, the audit firm reviews the financing of the offer and the availability of the financing. The offer is to be published in the prospectus (see question 5) containing, inter alia, all essential information regarding the financing of the offer (i.e. details of the sources of financing) and a confirmation of the audit firm that the bidder has taken adequate measures to ensure that the necessary financial means will be available on the closing date. Commitment letters from the supporting banks are generally sufficient as basis for the issuance of the funding confirmation.

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Eva Schott

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Eva Schott is a senior associate on the Corporate and Commercial and Life Sciences and Health Law teams. She advises national and international companies as well as individuals on all aspects of corporate, pharmaceutical and real estate law. Eva Schott also deals with litigation matters across all these areas.

In advising on pharmaceutical issues, Eva Schott is also able to draw on her extensive experience serving as Legal Counsel at a major pharmaceutical company based in Basel.

Professional qualifications. MLaw, University of Basel, Switzerland, 2007; admitted to the Bar in Switzerland, 2010.

Areas of practice. Corporate and commercial; life sciences and health law.

Languages. German, English, French.

Professional associations/memberships. Zurich Bar Association (ZAV); Swiss Bar Association (SBA).

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Pursuant to Swiss law, minority shareholders of a company domiciled in Switzerland may be squeezed out in two different ways:

(a) articles 8(2) and 18(5) of the MA provide that in the case of a statutory merger of two or more companies, a minority shareholder may be squeezed out by decision of the shareholders of the transferring company if they hold at least 90% of the voting rights;

(b) pursuant to article 137 of the FMIA, a bidder in a public offer who holds more than 98% of the voting rights of the target company on expiry of the offer period may, within three months, request the court to cancel the outstanding equity securities by initiating an action against the company. The remaining shareholders may participate in these proceedings. The target company must re-issue such equity securities and allot them to the bidder either against payment of the offer price or against fulfilment of the exchange offer in favour of the holders of the equity securities which have been cancelled.

13. What is the waiting or notification period that must be observed before completing a business combination?

Pursuant to article 9 of the Cartel Act, planned concentrations of undertakings must be notified to the Competition Commission before their implementation if the conditions as set out under question 4 are fulfilled.

Within one month upon receiving notification of a planned concentration of undertakings, the Competition Commission decides if there are grounds for conducting an investigation and, if

applicable, notifies the undertakings concerned of the opening of an investigation. If no such notice is issued within that time period, the concentration may be implemented without reservation. The undertakings concerned must refrain from implementing the concentration during this one-month examination period, unless authorised by the Competition Commission to do so.

If the Competition Commission decides to conduct an investigation, the investigation should be completed within four months, unless the Competition Commission is prevented from doing so for reasons attributable to the undertakings concerned. Consequently, the entire procedure should not take more than five months from the date of notification. Upon completion of the investigation, the Competition Commission decides (in an appealable order) whether the concentration may be implemented (with or without conditions) or not.

In addition to the notification and waiting periods regarding concentrations, each legal entity involved in a statutory merger pursuant to the MA shall, during a 30-day period prior to the merger resolution, make available the following documents of all legal entities involved in the merger for inspection by the shareholders:

(a) merger agreement;

(b) merger report;

(c) audit report; and

(d) annual accounts and annual reports of the three preceding years and, if any, interim balance sheets.

Provided that all shareholders consent to it, small- and medium-sized companies may waive such right of inspection.

14. Are there any industry-specific rules that apply to the company being acquired?

Mergers and acquisitions involving banks and insurers are subject to the approval of the FINMA (see also question 4).

As regards banks, any bank incorporated under Swiss law or having a place of business in Switzerland must obtain a licence from the FINMA prior to engaging in business operations. Further, each person or legal entity must notify the FINMA prior to directly or indirectly purchasing or selling a qualified equity interest in a bank incorporated under Swiss law. This duty of notification also applies if qualified equity interests are increased or decreased in such a way that they reach, exceed or fall below the thresholds of 20%, 33% or 50% of the capital or voting rights respectively.

Similarly, taking up business operations as a securities dealer in Switzerland is subject to the prior approval of the FINMA. If a securities trading entity, which is organised pursuant to Swiss law, subsequently becomes controlled by a foreign person, it must obtain the approval of the FINMA. The same applies in the case of a foreign controlled securities dealer if a foreign holder of a substantial participation in such entity changes.

Further, insurance companies subject to the supervision of the FINMA must obtain an authorisation from the FINMA prior to commencing business operations. Mergers, de-mergers and conversions of insurance companies must likewise be approved by the FINMA.

Finally, transactions regarding other regulated industries (e.g. telecommunications, pharmaceuticals, radio and television) may be subject to certain restrictions, such as notification duties, regulatory approvals or other specific requirements (see also below).

15. Are cross-border transactions subject to certain special legal requirements?

The Lex Koller provides for several mandatory restrictions of the direct or indirect acquisition of property rights and/or rights similar thereto by non-residents or foreign-controlled companies. Any purchaser subject to the Lex Koller must obtain an authorisation from the

competent local authorities. Otherwise, the property acquisition at hand remains non-effective. However, the Lex Koller does not apply to commercial real estate, such as business premises or plant locations.

Further, the purchase by foreign persons of shares in Swiss companies, which are active in regulated areas such as banking, insurance, transport, national defence, telecommunications, radio and television, is subject to certain restrictions.

Finally, as in many other countries, Switzerland has put in place and/or participates in international sanctions and embargos against certain countries and/or particular goods.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

If the employer transfers a business or a part thereof to a third party by way of a private asset deal, or by way of a statutory merger under the MA, the employment relationship and all ancillary rights and obligations automatically pass to the buyer, unless the employee refuses such transfer. Where the employee refuses the transfer, the employment relationship ends on expiry of the statutory notice period. Until then, the acquirer and the employee are obliged to perform the contract.

The former employer and the acquirer in a private asset deal are jointly and severally liable for any claims of an employee which fell due prior to the transfer or which fall due between that juncture and the date on which the employment relationship could normally be terminated or is terminated following refusal of the transfer by the employee. The same rules apply in a statutory merger.

Before the transfer of the business or the business unit takes place, the employer must inform the employees' representative body or, where there is none, the employees directly, of the reason for the transfer and the legal, economic and social consequences for the employees. If any measures are expected to affect the employees as a result of such transfer, the employees' representative body must be consulted before the relevant decisions are taken. In a statutory merger, the employees' representatives of both the absorbing and the absorbed entities must be informed or consulted before the respective shareholders' meetings resolve on the merger.

In contrast, in a private share deal and in a public takeover offer, a target's board is not required to inform or consult its employees.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

On 1 January 2016, the FMIA and its ordinances entered into force, replacing substantial parts of the Federal Act on Stock Exchanges and Securities Trading.

Further, on 1 January 2016, the Federal Act on Combatting Money Laundering and Terrorist Financing was revised.

In addition, the company law is currently under revision with the objective to modernize it. On 23 November 2016, the Federal Council adopted its related report for the attention of the Swiss Parliament. It is planned to enhance the flexibility of the provisions on establishing a stock corporation and on capital structures and to update the requirements regarding annual general meetings of stock corporations. Further, the Federal Council aims to strengthen shareholder rights and to introduce moderate rules on the remuneration of executives. Also, the financial flows within the commodities sector shall be made more transparent. Finally, by enacting guidelines regarding the representation of both genders in the top management of major listed companies, gender equality shall be promoted.

Another ongoing revision relates to the provisions on the commercial register. As part of this revision, it has been proposed to abandon the requirement of a separate 'Stampa Declaration' when a new company is founded.

Finally, the Parliament is currently engaged in discussions regarding the revision of the Financial Services Act and the Financial Institutions Act. The planned changes would, inter alia, affect the Federal Act on Combatting Money Laundering and Terrorist Financing.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

私人控股公司的交易常用的方式有股权交易、资产交易或者兼并（将一家公司的资产注入另外一家已经存续的公司，或将两家公司的资产注入到一家新的公司）。对于收购尚未公开上市交易的公司股权，目前没有具体的法律，但是适用如下规定：

(a) 1911 年 3 月 30 日颁布的《瑞士债务法》及其修订，从第 184 条起关于商品销售的总体规定；

(b) 2003 年 10 月 3 日颁布的《瑞士联邦关于资产兼并、拆分、转制和转让的法案》。

如果是公众公司（即上市公司），在涉及公开收购要约时，还需要特别遵守以下法律法规：

(a) 2015 年 6 月 19 日颁布的《瑞士联邦关于证券及衍生品交易中的金融市场工具和市场行为的法案》；

(b) 2015 年 11 月 25 日颁布的《证券及衍生品交易中的金融市场工具和市场行为的法令》；

(c) 2015 年 12 月 3 日颁布的《瑞士金融市场监督管理局关于证券及衍生品交易中的金融市场工具和市场行为的法令》；

(d) 2008 年 8 月 21 日颁布的《并购委员会关于公开收购要约的法令》，及其修订；

(e) 2008 年 8 月 21 日颁布的《瑞士并购委员会规定》，及其修订；以及

(f) 瑞士证券交易所（瑞士主要的证券交易所）的《上市规则》中关于价格敏感信息的披露要求、上市、退市等相关规定。

公众公司变更控股权最常见的形式是公开收购要约，但是也可以根据《瑞士联邦关于资产兼并、拆分、转制和转让的法案》进行法定兼并完成对公众公司的收购。由于公众公司的法定兼并在瑞士非常少见，这里就不再赘述。

同时，1995 年 10 月 6 日颁布的《瑞士联邦关于卡特尔及其他竞争限制的法案》，1983 年 12 月 16 日颁布的《瑞士联邦关于外国人购置不动产的法案》及其修订，以及管制行业的相关政策都需要在瑞士的并购交易中得到遵守（参见问题 4）。

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

以下监管机构在并购交易中有重要作用：

(a) 并购委员会（www.takeover.ch）是要约收购瑞士公众公司的监管当局。它可以发布有法律约束力的指令，并接受瑞士金融市场监督管理局的指导。瑞士金融市场监督管理局的决定可以向瑞士联邦行政法院申诉。

(b) 瑞士金融市场监督管理局（www.finma.ch）是瑞士独立的金融市场监管当局，其职责是监管银行、保险公司、交易所、证券交易商、集合投资计划，以及上述机构的资产管理人、基金管理公司。它还监管分销商和保险中介机构。瑞士金融市场监督管理局负责确保瑞士金融市场有效运行。同时，瑞士金融市场监督管理局也是并购委员会的监管机构。

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Oliver Künzler 是公司及商务法业务团队的合伙人，主要负责国际和国内并购交易、重组、私募和风险资本交易以及融资项目。他也向股东和公司提供合同、商务和公司法相关咨询。

他专注于为中小企业提供咨询，尤其擅长业务继承和架构方面。

Oliver Künzler 定期发布文章和演讲，话题关于合同、商务和公司法。他活跃于数个国内和国际专业组织，并且是商业继承法的专家。

专业资质：2002年，瑞士，苏黎世大学，法学硕士；2004年获取瑞士律师资格；2006年苏黎世大学，法学博士。

业务领域：公司与商务法；银行与金融；破产与重组；生命科学和医疗健康有关法律；税务。

工作语言：德语、英语、法语、意大利语。

苏黎世大律师公会专家成员；瑞士律师协会；国际律师协会；SMB next (KMU next)

(c) 联邦竞争委员会（www.weko.ch）是瑞士合并控制问题的监管当局。其职责包括应对有害的卡特尔，监测寡头企业限制竞争的行为，防止国家施加竞争限制。

并购委员会和瑞士金融市场监督管理局的决定，以及多数的要约文件都可以在 www.takeover.ch 获取。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

瑞士允许恶意收购。《瑞士联邦关于证券及衍生品交易中的金融市场工具和市场行为的法案》对善意收购（即被收购标的的董事会支持该要约）和恶意收购（即被收购标的的董事会反对该要约）都有规定。在要约公布之前，无须通知任何监管机构（包括并购委员会）或是目标公司的董事会。尽管多数收购都是善意的，但是近年来瑞士境内的恶意收购数量也越来越多。1998年至 2010 年中，共有 128 宗公开收购要约，其中 113 宗是善意的，15 宗是恶意的。2016年，共有 6 宗善意收购，并无恶意收购呈交。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

(a) 1995 年 10 月 6 日颁布的《瑞士联邦关于卡特尔及其他竞争限制的法案》（以下称“《反卡特尔法案》”）：

根据《反卡特尔法案》，除非在企业集中事件前一个财政年度，企业具有如下特征，否则任何企业集中事件（包括兼并、收购控制权、合资）都必须报告竞争委员会：

(i) 兼并的全球营业收入不少于 20 亿瑞士法郎，或兼并在瑞士境内的营业收入不少于 5 亿瑞士法郎；

(ii) 至少有两家涉及的企业各自在瑞士的营业收入不少于 1 亿瑞士法郎。

无论上述条件如何规定，如果同时满足以下两个条件，那么就有义务向竞争委员会告知计划中的集中事件：

(i) 该计划中的集中方案涉及的企业，在《反卡特尔法案》下，被不可上诉裁决判定为在瑞士某个市场中占支配地位；并且

(ii) 该集中方案关系到该市场或者相邻市场，或者上下游市场。

(b) 1983 年 12 月 16 日颁布的《瑞士联邦关于外国人购置不动产的法案》，及其修订（以下称“《雷克斯科勒法案》”）：

此外，根据《雷克斯科勒法案》，外国个人或由外国个人控制的公司在购买某些不动产时受限，可能需要不动产所在的州相关政府机构事前审批（参见问题 15）。

(c) 特定行业的特殊规定：

受监管行业（例如：金融机构，以及媒体、电信、药品或运输行业企业）的业务收购需要特殊规定。例如，受监管的金融机构（包括银行、证券交易商、保险公司、基金管理公司等）吸纳的新的合格股东需要向瑞士金融市场监督管理局报告，并得到其批准。

5. 进行这些交易时需要哪些文件？

对于出售私人控制公司而言，重要的文本就是交易文件：根据交易类型，可能是一个股份购买协议，一个资产购买协议或者一个兼并协议。

如果并购目标涉及上市公司，交易架构可能是：

(a) 现金收购要约；

(b) 证券交换要约；或者

(c) 兼并。

在收购方 / 要约方获得初步尽职调查材料之前，通常会签署一些预先协议，如保密协议、终止协议和意向书。这些文本约定了交易过程，多数含有排他、保密和协议解约金条款。

在多数情况下，要约正式公布之前会有一个初步的公告。初步公告包含要约的主要内容（范围、价格、对价种类、时间表和条件）。要约方必须在初步公告公布之后六个星期内以招股说明书形式公布要约，并且条件原则上要与初步公告相同。在公布之前，要约方必须把要约交给独立的审计师事务所或者证券交易商审查。审计师事务所或证券交易商要出具一份较短的报告，并与招股说明书一起公布。此外，目标公司董事会要向股东提交一份报告，阐明其对要约的态度。目标公司董事会的报告可以与招股说明一起公布，也可以随后公布。

要约到期日后的第一个工作日，要约方必须通过电子媒体发布一个公告，并同时抄报并购委员会和瑞士证券交易所。这一临时公告必须说明要约方购买和持有的权益证券数量，并且明确要约条件（任一）是否得到满足。确定的临时结果必须在要约期满后四个交易日内公布。如果要约成功，收购方要向目标公司股东授予额外的接受期，供其处理流通股份。额外接受期结束之日，收购方必须公布要约收购的最后结果。

临时及最终结果须通过以下渠道公布：

(a) 在要约方的网站或其指定的网站公布；

(b) 抄送给发布股票交易信息的瑞士主要媒体、在瑞士活跃的主要新闻通讯社以及主要的电子媒体（金融信息服务商）；

(c) 抄送给并购委员会；并且

(d) 抄送给瑞士证券交易所。

6. 这些交易须缴纳哪些政府费用？

根据交易的类型，可能需要缴纳以下费用：

(a) 出售股份需要缴纳转让印花税，税率为 0.15%（瑞士公司股份）或 0.3%（外国公司股份）；

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Marc Nater为运动员、运动组织和俱乐部提供关于赞助合同、转让合同及纠纷的咨询。

Marc Nater 定期在国内外会议上发言。

专业资质：1992年，瑞士，苏黎世大学，法学硕士；1995年获得瑞士律师资质；2000年，美国，佛尼吉亚大学法学院，LLM；2000年苏黎世大学，法学博士。

执业领域：公司与商务法；银行和金融。

工作语言：德语、英语、法语。

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(b) 根据交易金额大小和程序难易程度，并购委员会收取 25,000 至 375,000 瑞士法郎不等的费用。

(c) 如果涉及不动产交易，还需要缴纳公证费。这些费用是州政府收取，根据不动产所在地区各有不同。

7. 交易是否需要股东的同意或批准？

根据瑞士对公开要约收购的规则，没有对股东的审批作特别的要求。但是在公开要约收购过程中，如果需要增发股份作为对价的，需要股东同意。

如果目标公司的章程中有任何反收购措施（例如对注册的股份限制转让），要约方通常要求以股东大会取消这些条款作为要约的前提条件（参见问题 10）。

同时，要约方也可要求以获得不低于某一比例的赞成票作为要约的前提条件，例如至少代表 50% 股份的股东同意；或者以获得重要股东不可撤销的承诺或与其直接签署协议作为要约的前提条件。

此外，直接或者间接持有目标公司 3% 或以上投票权（无论该投票权是否可以行使）的股东：

(a) 可以通过向并购委员会申请，在下列日期（孰早）后的五个工作日内获得收购过程的法律地位：(i) 招股说明书公布之日，或者 (ii) 如果并购委员会关于要约的第一个命令早于招股说明书（例如，关于初步公告的命令），即为该命令公布之日；并且

(b) 如果其没有申请法律地位，也没有参与程序，可以在并购委员会公布第一个命令之日（与招股说明书之前或与之一起公布）后的五个交易日内向并购委员会提交申请，反对这一命令。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

控股股东对小股东没有任何义务。

董事对公司负有关心和忠诚的义务。此外，他们必须按照公司的最佳利益行事，不得采取任何可能损害这些利益的行动。

此外，如果任何人直接或者间接获得代表公司表决权的权益证券超过三分之一，那么就必须向该公司全部上市的权益证券的其他持有人发出强制收购要约。公司可以通过股东会做出如下决议：

(a) 豁免做出强制收购要约的义务（豁免义务）；或者

(b) 将比例门槛从三分之一提高到 49%（提高门槛）。

瑞士金融市场监督管理局的前身——联邦银行委员会规定股东不得针对特定股东在有限时间内提供门槛或者豁免义务。并购委员会将这一规定延展至股东会授予的豁免义务，针对股东会决议实质上或者暗含的针对特定交易或者有利于特定股东的情况。然而，并购委员会在 2012 年改变了这一做法，如果多数小股东都同意，并购委员会就不再反对豁免义务。

此外，并购委员会可以根据具体情况豁免强制邀约收购的义务。

9. 哪些情况下，目标公司须支付分手费？

在非公开收购的情况下，目标公司应付的解约金由双方在法定范围内协商。但是，这在瑞士还不常见。如果有解约金的话，一般是由出售方支付。

根据并购委员会的惯例，公众公司兼并时，目标公司应付的解约金必须成比例，并且能够补偿产生的成本和费用。但是，这也有不确定的地方——法院还没有裁定——是否允许纯惩罚性质的解约金。

需要指出的是，根据缔约过失原则，卖方和 / 或买方可能被认为违反其之前的合同义务，并可能要支付赔偿金。由于目标公司不是交易的参与方，原则上不适用这一条。

10. 要约可否附加交易相关的条件？

对非上市公司进行并购时，要约方可以自由发出附带条件的要约。例如，要约通常要以成功的尽职调查为前提。

对上市公司进行收购时，需要区分该公开收购要约是否出于自愿。如果出于自愿，除非要约方具有正当利益，并且要约方对结果和出现的情况不会有重大影响，否则要约方须清晰明示客观条件。如果要约方需要满足条件，那么要约方必须采取一切合理措施确保条件满足。当要约期结束，要约方必须明示条件是否满足。要约方可以保留豁免某些条件的权利。

相反，除非有重要理由，例如获得监管部门批准、未收到禁令、确认要约方为无投票权的股东等，要约收购原则上是无条件的。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

在非上市公司的并购中，卖方通常要求对方提供财力证明，亦即拥有完成计划交易所需资金的陈述和保证。但是，对于融资程度或者负债权益比没有法定要求。

相比之下，公布对公众公司要约收购之前，资金必须到位。在公布之前，必须将要约递交独立的审计师事务所（参见问题 5），审查是否满足法律合规要求。审计师事务所要特别审查要约的资金以及融资能力。公布要约的招股说明书（参见问题 5）中需要包含要约财务的关键信息（即资金来源的详细情况），以及审计师事务所出具的确认函，确认要约方采取了充分的措施确保要约期结束之日能够有必要可用的资金。通常情况下，银行的承诺函可以作为资金充足的证明。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

根据瑞士的法律，可以通过以下两种途径将瑞士境内的小股东排挤出公司股东名单：

(a) 《瑞士联邦关于资产兼并、拆分、转制和转让的法案》第 8（2）节和第 18（5）节规定了两个或多个公司法定兼并的情形。如果持有公司至少 90% 的投票权的股东作出决定，可以要求小股东退出；

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Martina Braun完成了主题为专利法的博士论文，并曾经在洛桑大学商务法研究中心工作。

专业资质：2005年，瑞士，洛桑大学法学硕士；2010年，洛桑大学法学博士；2011年获得瑞士律师资质。

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工作语言：德语、法语、英语。

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(b) 根据《瑞士联邦关于证券及衍生品交易中的金融市场工具和市场行为的法案》的 137 节，在对公众公司进行要约收购时，如果要约方在要约期结束日持有目标公司 98% 以上的投票权，那么它可以在三个月内通过法院向公司提起诉讼，注销剩余的流通权益证券。这些剩余股东可以参与诉讼。目标公司必须重新发行这些权益证券，并将其登记给要约方。要约方须向被注销的权益证券持有人支付要约价格或者完成交换要约的条件。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

根据《反卡特尔法案》第 9 节，如果问题 4 的相关条件均已满足，在计划的企业集团化实施前，须报告竞争委员会。

竞争委员会收到计划中的企业集团化报告之后的一个月内，将决定是否有理由进行调查。如果适用，将通知相关企业开始调查。如果在此期间内没有上述通知，就可以毫无保留的实施集团化。除非得到竞争委员会的授权，相关企业在一个月的审查期内不得进行企业集团化。

如果竞争委员决定开展调查，除非因为相关企业的原因导致调查受阻，否则调查应当在四个月内完成。因此，整个流程从报告日起不超过五个月。调查完成后，竞争委员会以命令的形式当即决定集团化是否可以（是否附带条件）实施。

除了报告和等待期，每个根据《瑞士联邦关于资产兼并、拆分、转制和转让的法案》实施法定兼并的法律实体必须在兼并决议前的 30 天内向股东提供下列全部法律实体的文件，供其审查：

(a) 并够协议；

(b) 并购报告；

(c) 审计报告；和

(d) 近三年的年度决算和年度报告，以及中期资产负债表（如有）。

除非全部股东都同意查阅，否则中小型公司可以豁免股东查阅上述文件的权利。

14. 是否有适用于被收购公司的行业特定规则？

涉及银行和保险公司的兼并收购要获得瑞士金融市场监督管理局的批准（参见问题4）。

关于银行，所有根据瑞士法律组建或者在瑞士实地经营的银行，在其开业之前需要获得瑞士金融市场监督管理局颁发的许可。此外，每个个人或法律实体在直接或者间接购买或出售根据瑞士法律组建的银行的合格权益之前，都必须向金融市场监督管理局报告。这一报告义务也适用于以下情形：合格的权益增加或者减少，使得持有的资本或者投票权分别超过或者低于20%、33%或50%。

类似的，证券交易商在瑞士从业也需要获得金融市场监督管理局的事先批准。如果某个依照瑞士法律组建的证券交易企业控制权转移至外国人，那么需要得到金融市场监督管理局的批准。以下情形同样适用：外国控制的证券交易商中，如果外国大股东发生变化。

此外，受金融市场监督管理局监管的保险公司在开业前需要获得金融市场监督管理局颁发的授权。同样的，保险公司的兼并、拆分和转化也需要由金融市场监督管理局审批。

最后，其他受管制行业（例如：电信、制药、广播和电视）的交易都受到某些限制，如报告义务、监管审批或其他具体要求（参见下文）。

15. 跨境交易是否受任何特殊法律要求的制约？

《雷克斯柯勒法案》规定了几种非居民或外国控制公司直接或者间接收购财产权和/或类似权利的法定限制。适用于《雷克斯柯勒法案》的购买者需要获得当地监管机构的授权。否则，财产收购无效。但是《雷克斯柯勒法案》对商业不动产不适用，如经营场所或厂房。

此外，外国人购买瑞士公司股权的，如果涉及受监管行业，如银行、保险、运输、国防、电信、广播和电视，会受到某些限制。

最后，同很多其他国家一样，瑞士已经实施和/或参与对某些国家和/或特定商品的国际制裁和禁运。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

如果雇主通过私人资产交易或根据《瑞士联邦关于资产兼并、拆分、转制和转让的法案》进行法定兼并，将业务或者一部分企业转让给第三方的，除非雇员拒绝，雇佣关系和所有附属权利和义务自动转移给受让方。如果雇员拒绝业务转让，那么雇佣关系于法定通知期到期之日终止。在此之前，受让方和雇员有义务执行该合同。

私营资产交易中的前雇主和受让方对雇员在业务转让之前或者业务转让至雇佣关系正常结束（或者因为雇员拒绝转让而结束）期间的索赔负有连带责任。相同的规则也适用于法定兼并。

在业务或业务单元转让之前，雇主必须通知雇员代表机构或（若无代表机构）雇员本人如下事项：转让的理由，对雇员造成的法律、经济和社会结果。如果转让会对雇员造成影响，那么必须在相关决定做出之前咨询雇员代表机构。在法定兼并的情况下，转让方和受让方各自股东会作出兼并的决议之前，均应当通知或咨询各自的雇员代表机构。

相反，在私人公司的股权交易或者公开要约收购中，标的公司的董事会无需通知或者向其雇员征询意见。

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专业资质：2007年，瑞士，巴塞尔大学，法学硕士。2010年获得瑞士律师资质。

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17. 近期是否有任何影响并购活动的改革或调整监管的提案？

2016 年 1 月 1 日，《瑞士联邦关于证券及衍生品交易中的金融市场工具和市场行为的法案》及其条例生效，替代了《联邦关于股票交易所和证券交易的法案》的部分内容。

此外，2016 年 1 月 1 日，修订了《联邦关于反洗钱和恐怖金融的法案》。

此外，目前正在对《公司法》进行现代化改造。2016 年 11 月 23 日，联邦委员会通过了相关报告，并提交瑞士议会。计划更新有关股份制公司年度股东大会的要求，以加强有关设立股份制公司和资本结构的条文的灵活性。此外，联邦委员会准备加强股东权利，并对高管薪酬进行适度的规定。此外，大宗商品行业的资金流应当更加透明。最后，通过制定主要上市公司高层管理人员性别代表的准则，促进两性平等。

另一项正在进行的修订涉及商业登记册的条文。作为本次修订的一部分，有人建议，在成立一家新的公司时，可以豁免媒体声明的要求。

最后，议会正在参与讨论对《金融服务法案》和《金融机构法案》的修订。这一修订事后会影响《联邦关于反洗钱和恐怖金融的法案》。

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The key laws governing mergers and acquisitions in Taiwan include:

(a) The Company Act, which provides the fundamental rules governing companies in Taiwan;

(b) The Business Mergers and Acquisitions Act (the "M&A Act"), which sets forth rules governing corporate mergers and acquisitions in Taiwan;

(c) The Financial Holding Company Act and Financial Institutions Merger Act, which govern mergers and acquisitions of financial institutions; and

(d) The Laws and regulations that are applicable where public companies are involved include:

(i) The Securities and Exchange Act, and the rules and regulations thereunder, in particular 1) Regulations Governing the Acquisition and Disposal of Assets by Public Companies, 2) Regulations Governing Public Tender Offers for Securities of Public Companies, and 3) Directions for Public Companies Conducting Private Placements of Securities;

(ii) The Operating Rules of the Taiwan Stock Exchange Corporation (applicable in transactions involving companies whose shares are listed on the Taiwan Stock Exchange ("TWSE")); and

(iii) The Taipei Exchange Rules Governing Securities Trading on the TPEx (applicable in transactions involving companies whose shares are listed on the Taipei Exchange ("TPEx")).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

(a) The Department of Commerce, Ministry of Economic Affairs, a government regulator overseeing companies' activities;

(b) The Securities and Futures Bureau, Financial Supervisory Commission, a government regulator overseeing mergers and acquisitions of public companies;

(c) TWSE, a regulator of companies whose shares are listed on TWSE;

(d) TPEx, a regulator of companies whose shares are listed on TPEx;

(e) The Investment Commission, Ministry of Economic Affairs ("ICMOEA"), a government regulator responsible for reviewing outbound and inbound investment;

(f) The Fair Trade Commission, a government regulator responsible for merger control; and

(g) Other government authorities responsible for overseeing highly regulated industries, such as the National Communications Commission, Securities and Futures Bureau, Banking Bureau, Insurance Bureau, etc.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are in general permitted in Taiwan by implementing tender offers. However, they are uncommon in Taiwan because of the hostile-bidder-unfriendly practice of relevant laws and regulations. Notwithstanding, more and more discussions about the disciplining function of hostile

takeovers triggered by a recent case indicate that there will likely be an increase in the number of hostile bids in Taiwan in the future.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti- monopoly or national security legislation).

(a) Laws and regulations governing outbound and inbound investment, include:

(i) Statutes for Investment by Foreign Nationals and Overseas Residents (including the rules and regulations thereunder), which regulate inbound investment by foreign entities and Taiwanese residing overseas;

(ii) Regulations Governing Foreign Investments by Taiwan entities (including the rules and regulations thereunder), which regulate outbound investment by Taiwan entities;

(iii) Laws and Regulations Regarding Hong Kong and Macao Affairs (including the rules and regulations thereunder), regulating inbound and outbound investment involving Hong Kong/ Macao entities; and

(iv) Acts Governing Relations between the People of the Taiwan Area and the Mainland Area (including the rules and regulations thereunder), regulating inbound and outbound investment involving Mainland Chinese entities;

(b) The Fair Trade Act, which, through the process of merger control review, regulates takeovers and mergers in Taiwan to ensure that adverse effect on market competition is minimized; and

(c) Other laws and regulations governing highly regulated industries, such as Financial Institutions Merger Act and Cable Radio and Television Act.

Takeovers and mergers involving Mainland Chinese entities are generally under stricter scrutiny by the Taiwan government authorities.

5. What documentation is required to implement these transactions?

In general, documentation required to implement mergers and acquisitions in Taiwan are similar to other jurisdictions, including transaction agreements (i.e., merger agreements, share purchase agreements, asset purchase agreements or share swap agreements, and ancillary agreements, such as escrow agreements), corporate authorization documents (i.e., resolutions approving relevant transactions by directors and shareholders of the parties (as applicable)), and documentation for obtaining consent or approval from, or making, filing or registration with, relevant government agencies; provided that laws and regulations applicable to certain transactions may require specific matters to be set forth in relevant transaction agreements and/or resolutions approving relevant transactions by directors and shareholders of the parties (as applicable).

6. What government charges or fees apply to these transactions?

The following government charges or fees apply to M&A related transactions:

(a) for change of Taiwan company registration: currently, NT$1,000;

(b) for set-up of a company in Taiwan:

(i) for reservation of a company name: currently, NT$150-300; and

(ii) for incorporation: currently, NT$1 for every NT$4,000 in the amount of authorised share capital but in no event shall it be less than NT$1,000;

(c) for set-up of a branch in Taiwan: currently, NT$1,000; and

(d) for registration of capital increase of a Taiwan company: currently, NT$1 for every NT$4,000 in the amount of authorised share capital but in no event shall it be less than NT$1,000.

In addition, various taxes and duties, including stamp duty, deed tax, securities transaction tax, VAT and land value increment tax, may be incurred as a result of transactions related to an M&A deal. However, in certain cases where the prescribed conditions are met, tax exemption or deferral will apply.

7. Do shareholders have consent or approval rights in connection with a deal?

Under Taiwanese law, M&A deals are generally required to be approved and/or authorized by a super majority of shareholders' votes cast in a shareholders' meeting, except those that presumably have relatively minor effect on the parties, such as mergers of a company and its 90%-or-more-owned subsidiary and sales of a minor portion of a company's assets.

Moreover, a shareholder who dissents with an M&A deal proposed by the company has an appraisal right to demand the company buy back shares held by him/her/it at a fair price; provided that he/she/it has refrained from casting any votes on the proposal of said deal at the relevant shareholders' meeting.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

(a) Directors always owe fiduciary duties to the company and its stakeholders, and in particular:

(i) in an M&A deal, the M&A Act requires that a company's board of directors act in the best interest of the company and that each director who has personal interest in said deal disclose such interest and the reason why he/she votes for or against said deal.

(ii) in a tender offer, directors of the target company are required to give advice to shareholders in response to the offer based upon their review of the offeror (including its financial condition and source of funds) and the terms of the offer, and to specify the rationale.

(b) Controlling shareholders who are not directors of the company do not owe any duty to the stakeholders in connection with an M&A deal, except that in case of tender offers, controlling shareholders of the target company are required to refrain from entering into any kind of agreement with the offeror to obtain special rights, interests or benefits which will result in unequal treatment among shareholders of the target company.

9. In what circumstances are break-up fees payable by the target company?

There are no laws or regulations that govern break-up fees in Taiwan. Parties to M&A transactions may agree to break-up fees by contract.

10. Can conditions be attached to an offer in connection with a deal?

Under Taiwan law, conditions are generally permitted to be attached to an offer in connection with a deal, and it is quite common to negotiate

closing conditions in M&A deals. However, only limited conditions are allowed to be attached to a tender offer, which include:

1) minimum and/or maximum number of shares to be purchased,
2) a specified tender offer period, and
3) required governmental approvals.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

In certain cases of M&A deals, applicable laws and regulations require buyers' sources of funds to be specified in the transaction documents. For example, the Regulations Governing Public Tender Offers for Securities of Public Companies requires that offerors provide information about their financing resources with supporting documents, such as bank guarantee letters or independent financial advisors' certifications.

There are no regulations in Taiwan requiring any minimum level of financing in an M&A deal.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Minority shareholders of the target company can be squeezed out via a merger or a share exchange under the M&A Act where the consideration is all cash because unanimous consent of all shareholders of the target company to such merger or share exchange is not required. There are no special procedures required to be observed for squeezing out minority shareholders and duly passed resolutions are acceptable.

13. What is the waiting or notification period that must be observed before completing a business combination?

Business combinations that are subject to merger control review by the Fair Trade Commission may not be completed until the expiration of a waiting period of 30 business days (or such other length of period as prescribed by the Fair Trade Commission in a specific case) commencing from the date that all application documents required by Fair Trade Commission have been submitted. Because the question of whether such documents have been submitted is determined by the Fair Trade Commission by giving a written notice to the applicant in each case, in practice the waiting period is not always predictable.

14. Are there any industry-specific rules that apply to the company being acquired?

(a) Industry-specific laws and regulations may provide special rules for acquiring companies in those specific industries. In general, acquisition of companies in highly regulated industries, such as the financial industry, infrastructure industry, communication industry and etc., are under strict scrutiny, especially when any foreign or Mainland Chinese entities are involved.

(b) In addition, under the laws and regulations governing inbound investment, ICMOEA is authorized to generally prohibit or restrict foreign and/or Mainland Chinese entities from investing in certain industries.

15. Are cross-border transactions subject to certain special legal requirements?

In cross-border M&A transactions, depending on scale of investment, prior approval of outbound or inbound investment from ICMOEA or filing with ICMOEA to report outbound or inbound investment may be required.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Generally, buyers in M&A deals may determine if they would like to retain any employees of the

target companies by giving them employment offers; provided however, that such offers must at least contain benefits determined based on the respective seniority of those retained employees under the employment contract with the target company. Notwithstanding the foregoing, for cases that are subject to the review of the authorities, the result of the review may be affected by whether the employees are retained.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

The M&A Act has been amended in July 2015 for promoting M&A activities, which we believe has been and will continue to be the Taiwanese government authorities' attitude towards M&A activities in the future.

In addition, the Regulations Governing Public Tender Offers for Securities of Public Companies has been amended in November 2016 with the aim of protect minority shareholders of the target company and prevent offerors from failing to pay the consideration.

Besides the above, the proposed reforms to the Company Act may also help facilitate M&A activities.

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1. 您所在管辖区有哪些主要适用的并购法令？

在台湾，规范兼并与收购的关键法律包括：

(a) 《公司法》，该法规定了台湾公司的最基本规则；

(b) 《企业并购法》（“《并购法》”），该法详细规定了台湾企业兼并与收购的规则；

(c) 《金融控股公司法》与《金融机构合并法》，两部法律对金融机构的兼并与收购作出了规范；以及

(d) 适用于涉及公开发行公司的有关法令包括：

(i) 《证券交易法》以及据此颁布的条例与规章，特别是 1）《公开发行公司取得或处分资产处理准则》；2）《公开收购公开发行公司有价证券管理办法》；3）《公开发行公司办理私募有价证券应注意事项》；

(ii) 《台湾证券交易所股份有限公司营业细则》（适用于涉及在台湾证券交易所（“TWSE”）上市的公司的交易）；以及

(iii) 《财团法人中华民国证券柜台买卖中心证券商营业处所买卖有价证券业务规则》（适用于涉及在证券柜台买卖中心（“TPEx”）上市的公司的交易）。

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

(a) 经济部商业司，系对公司活动进行监管的政府监管机构；

(b) 金融监督管理委员会证券期货局，系对公开发行公司兼并与收购进行监管的政府监管机构；

(c) TWSE，系对股份在 TWSE 上市的公司的监管机构；

(d) TPEx，系对股份在 TPEx 上市的公司的监管机构；

(e) 经济部投资审议委员会（“ICMOEA”），系负责审查境外与境内投资的政府监管机构；

(f) 公平交易委员会，系负责事业结合管制的政府监管机构；以及

(g) 负责监管高度管制行业的其他政府机构，例如国家通讯传播委员会、证券期货局、银行局、保险局等。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

在台湾，通过公开收购的方式进行恶意收购一般是被允许的。但是，由于存在不利于恶意收购人的相关法令，因此恶意收购在台湾并不常见。尽管如此，近期发生的案例引发了越来越多关于规范恶意并购的讨论，由此可见未来台湾的恶意收购案件数量很可能有增加的趋势。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

(a) 规范境外与境内投资的法令包括：

(i) 《外国人投资条例》与《华侨回国投资条例》（包括据此颁布的条例与规章），分别对外国实体和定居海外的台湾侨民的境内投资作出了规定；

(ii) 《公司国外投资处理办法》（包括据此颁布的条例与规章），对台湾实体的境外投资作出了规定；

(iii) 《香港澳门关系条例》（包括据此颁布的条例与规章），对涉及香港 / 澳门实体的境内与境外投资作出了规定；以及

(iv) 《台湾地区与大陆地区人民关系条例》（包括据此颁布的条例与规章），该条例对涉及中国大陆实体的境内与境外投资作出了规定。

(b) 《公平交易法》，该法通过事业结合申报审查程序对台湾的收购与兼并作出了规定，以确保限制市场竞争的不利后果最小化；

(c) 对高度管制行业作出规定的其他法令，例如《金融机构合并法》与《有线广播电视法》。

一般而言，涉及中国大陆实体的收购与兼并会受到台湾政府机构更加严格的监管。

5. 进行这些交易时需要哪些文件？

一般而言，在台湾进行兼并与收购所需的文件与其他法域相似，包括交易协议（即兼并协议、股份购买协议、资产购买协议或者股份转换协议以及附属协议，例如第三方托管协议）、企业授权文件（即董事会及股东会同意相关交易的决议（如适用））以及获得相关政府机构同意或批准所需文件，或者向该等机构提交或登记的文件；但适用于特定交易的法令可能要求在相关交易协议和 / 或各方董事会及股东会同意相关交易的决议（如适用）中应记载特殊事项。

6. 这些交易须缴纳哪些政府费用？

适用于并购相关交易的政府费用或规费如下：

(a) 台湾公司变更登记费用：目前为新台币 1,000 元；

(b) 在台湾成立一家公司：

(i) 公司名称预查：目前为新台币 150-300 元；以及

(ii) 设立登记：依章程所定资本总额，每 4,000 元新台币收费 1 元新台币，但不得低于 1,000 元新台币；

(c) 在台湾设立一家分公司：目前为新台币 1,000 元；以及

(d) 台湾公司增资变更登记：目前，依资本总额增加之数额，每 4,000 元新台币收费 1 元新台币，但不得低于 1,000 元新台币。

此外，与并购交易有关的交易可能会产生印花税、契税、证券交易税、营业税以及土地增值税等多种税负。然而，在满足规定条件的某些情况下，可以免税或延期缴税。

7. 交易是否需要股东的同意或批准？

根据台湾法律，并购交易一般需要获得股东会特别决议同意和 / 或授权，但对各方产生的影响可能相对较小者除外，如公司与其持股 90% 以上的子公司合并以及小部分公司资产的出售。

此外，不同意公司所提出的并购交易的股东拥有股份收买请求权，可要求公司以公平价格回购他 / 她 / 它所持有的股份；但前提是他 / 她 / 它在相关的股东会上就所述交易放弃表决权。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

(a) 董事一直对公司及其利害关系人负有忠实义务，特别是在下列情形中：

(i) 在并购交易中，《并购法》要求公司董事会为该公司的最大利益行事，并且要求在所述交易中具有自身利害关系的每位董事披露该等利害关系以及他 / 她投票支持或反对所述交易的理由。

(ii) 在公开收购中，目标公司的董事须基于其对公开收购人（包括其财务状况以及资金来源）以及收购条件的审查，向目标公司股东提供建议并说明其所持理由。

(b) 并非公司董事的控制股东对并购交易的利害关系人不负有任何义务，例外系在公开收购中，目标公司的控制股东被要求不得与公开收购人达成任何形式的协议以获得将导致目标公司股东之间非公平待遇的特殊权利或利益。

9. 哪些情况下，目标公司须支付分手费？

在台湾，不存在规定分手费的法令。并购交易的各方得通过合同就分手费进行约定。

10. 要约可否附加交易相关的条件？

根据台湾法律，与交易有关的要约一般允许附有条件，并且就并购交易协商交割条件是相当常见的。但是，公开收购允许附有的条件是有限的，其中包括：1）拟购买的最低或最高股份数量，2）指定的公开收购期间，以及 3）必需的相关主管机关审批。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

在某些并购交易中，适用的法令要求买方在交易文件中明确记载资金来源。例如，《公开收购公开发行公司有价证券管理办法》要求公开收购人提供资金来源信息及证明文件，例如银行履约保证函或独立财务顾问出具之确认书。

在台湾，不存在任何要求并购交易最低融资限度的规章。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

根据《并购法》，如果对价全部以现金形式支付，目标公司的少数股东可通过合并或者股份转换被挤出，因为对于兼并或者换股，并不要求目标公司的所有股东一致同意。对少数股东的挤出无需遵循特别程序，适当通过的决议是可接受的。

13. 什么是完成业务兼并之前必须遵守的等待期或通知期？

受到公平交易委员会事业结合审查的企业兼并须经为期 30 个工作日（或者公平交易委员会在特定情形中指定的其他时限）的等待期届满才可完成，该等待期自公平交易委员会所要求的全部申报资料完整提交之日起算。因为公平交易委员会对于是否提出完整申报资料之认定系在个案中通过向申请人发出书面通知为之，因此等待期实务上往往难以预测。

14. 是否有适用于被收购公司的行业特定规则？

(a) 特定行业所适用的法令可能规定了收购该特定行业公司的特殊规则。一般来说，收购高度管制行业（如金融业、基础设施业、通讯业等）的公司均受到严格监管，特别是在涉及外国实体或者中国大陆实体时。

(b) 另外，根据有关境内投资的法令，ICMOEA 一般被授权禁止或限制外国实体和 / 或中国大陆实体在特定行业进行投资。

15. 跨境交易是否受任何特殊法律要求的制约？

在跨境并购交易中，取决于投资规模，需要获得 ICMOEA 对境外或境内投资的事先批准或者向 ICMOEA 报请备查。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

一般而言，并购交易的收购方得决定他们是否想要通过给予载明劳动条件之留用通知来留用目标公司的任何员工；但是，该等留用必须至少包含以被留用员工在目标公司劳动合同下的工作年资为基础而认定的利益，且在须受监管机构审查的情形下，审查结果可能会受到员工是否留用的影响。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

为促进并购活动，《并购法》已于 2015 年 7 月修订，我们认为这是目前台湾政府当局对待并购活动的态度，并且也将是其未来的立场。

另外，《公开收购公开发行公司有价证券管理办法》已于 2016 年 11 月修订，其目标是保护目标公司少数股东并防止收购人违约不支付对价。

除前述情况外，拟议的《公司法》修正也可能有助于促进并购活动。

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

There is no specific regulation exclusively governing mergers and acquisitions in Turkey. However, there are a number of primary laws that encompass various aspects one would expect to see in a typical mergers and acquisitions transaction. Such key laws and regulations that govern mergers and acquisitions in Turkey are:

(a) the Turkish Commercial Code No. 6102;

(b) the Turkish Code of Obligations No. 6098;

(c) the Capital Markets Law No. 6362;

(d) the Law on the Protection of Competition No. 4054;

(e) the Corporate Tax Law No. 5520;

(f) the Labour Law Code No. 4857; and

(g) the Trade Registry Regulation.

In some sector-specific deals, such as those involving an insurance company or an energy company, some other laws and regulations that govern such sectors may also become relevant. Although they are not directly related to mergers and acquisitions, they might have to be taken into consideration in a typical M&A deal.

It is also worth noting that if the transaction concerns a listed company, some other regulations and communiqués issued by the Capital Markets Board may apply. The most typical ones are as follows:

(a) The Communiqué on Mergers and Demergers Serial No. II – 23.2, which governs procedures and principles for mergers and demergers in listed companies;

(b) The Communiqué on Mandatory Tender Offers Serial No. II – 26.1, which governs general rules for mandatory and voluntary tender offers; and

(c) The Communiqué on the Principles Regarding Material Transactions and Exit Rights Serial No. II – 23.1, which lays out general principles governing conduct of material transactions and exit rights in listed companies.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In general, mergers and acquisitions are not regulated by governmental bodies save for those concerning companies operating in regulated sectors. Sectors such as energy, telecommunications, banking, financial services and insurance are regulated by specific legislation and are subject to supervision of certain governmental institutions. Therefore, the parties to M&A deals involving companies operating in such sectors may need to obtain certain approvals and clearances from relevant government agencies. Although not exhaustive, some of the authorities regulating specific industries – and whose approval may therefore need to be sought in M&A deals – are as follows:

(a) the Energy Markets Regulatory Authority for the energy sector;

(b) the Banking Regulation and Supervision Agency for the banking sector;

(c) the Undersecretariat of Treasury for the insurance sector;

(d) the Information and Communication Technologies Authority for the telecommunications sector; and

(e) the General Directorate of Mining Affairs for the mining sector.

The Turkish Competition Authority is also relevant in M&A deals if the turnovers of the transaction parties exceed certain thresholds. Further details on anti-trust and competition law aspects of such deals are set out under Question 4 below.

Finally, parties to the deal usually have to complete certain procedural steps with the relevant Trade Registry and the Ministry of Customs and Trade for registration of governance actions. Appointment of Board of Directors members, amendments to company articles of association and similar corporate actions need to be registered with the relevant Trade Registry in order to complete and register the governance processes. In case of share acquisition by a foreign company, there is also a requirement to notify the General Directorate of Foreign Investments, which is a straightforward and simple process.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

There is no provision of law that puts forward an explicit restriction on hostile bids under Turkish law; however, hostile bids are practically not feasible in Turkey. This is due to the fact that the decision to sell the shares in a company eventually comes down to the relevant shareholder's discretion. Still, in a scenario where the Board of Directors is not cooperative, they have the ability to hinder or at least delay the deal by, for instance, not making company records available to the purchaser or refraining from adopting the necessary corporate resolutions to effectuate the deal.

It is also noteworthy that pre-emptive measures in hostile takeovers such as the "poison pill", the "white knight" or the "golden parachute" are not available under Turkish law. Some other customized deal protection measures can be introduced under the relevant share purchase agreement:

(a) The seller may grant the purchaser an exclusivity period where the parties mull the details of the envisaged transaction,

(b) Parties may agree on a "break fee" which becomes payable by the party that walks away unless certain conditions are not met, or

(c) Parties may render the deal contingent upon realization of a certain event (e.g., obtaining merger clearance from the Turkish Competition Authority).

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

The primary regulation that may have a restrictive effect on takeovers and mergers is the Communiqué Regarding Mergers and Acquisitions Requiring the Competition Authority's Approval ("Communiqué 2010/4"). Transactions exceeding certain thresholds established in Communiqué 2010/4 require the approval of the Turkish Competition Authority. A transaction is subject to the notification requirement if either of the following thresholds is met:

i. the domestic turnover (the turnover that is generated in Turkey) of the target exceeds TL 30 million, and the global turnover of one of the parties to the transaction exceeds TL 500 million; or

ii. the domestic turnover of the target and the acquirer exceeds TL 30 million and combined turnovers of all parties exceed TRY 100 million.

Furthermore, as explained above, M&A deals in regulated sectors, such as telecom, energy, insurance etc. may be subject to certain approvals or clearances to be obtained from the relevant government authority or the regulator.

5. What documentation is required to implement these transactions?

Typical M&A transactions mainly consist of three phases: (i) the pre-transaction phase, where the parties conduct preparatory actions; (ii) the transaction phase, where the deal is negotiated and prepared for closing; and (iii) the completion phase. The relevant documentation required for each phase is as follows:

(a) Pre-Transaction Phase

i. Vendor's due diligence investigation to identify any issues regarding the target company;

ii. Letter of intent or memorandum of understanding laying out intent of the parties;

iii. Non-disclosure or confidentiality agreement governing confidential aspects of the deal; and

iv. Term sheet setting out main terms that are to govern the deal.

(b) Transaction Phase

i. Buyer's due diligence checklist regarding the seller's documents and information that are to be reviewed;

ii. Drafting and negotiating the share purchase agreement;

iii. Documents that have to be prepared in line with the conditions precedent in the SPA (e.g., third party consents and other applications);

iv. Resolutions by the competent corporate bodies of the parties regarding the approval of the transaction;

v. If the acquisition is a partial takeover of the shares, the shareholder agreement that is to govern the company's management and governance after the takeover;

vi. if the transaction includes a merger or a demerger, a merger/demerger agreement with the corporate documentation required to register the merger at the relevant Trade Registry;

vii. if the transaction includes an asset transfer, a separate asset transfer agreement with the documents required to register the immovable properties at the Title Deed Registry;

viii. ancillary agreements and closing documents relating to the transactions (e.g., share certificates representing the target shares, management and consultancy agreements and employment agreements of key officers);

ix. if the transaction is subject to any specific legislation and/or clearance requirement, the approvals from the related government agencies and bodies;

x. carrying out closing actions to actually implement the transfer of shares or assets; and

xi. necessary post-closing notices (e.g., the notice pursuant to the Article 198 of the Turkish Commercial Code, the notice to the General Directorate of the Foreign Investment, etc.).

6. What government charges or fees apply to these transactions?

There are no specific charges or fees that apply to takeovers or mergers. However, depending on the type of the transaction and ancillary steps in the transaction, there may be certain nominal fees such as trade registry expenses, Competition Board contribution fee, etc.

7. Do shareholders have consent or approval rights in connection with a deal?

In general, there are two types of capital companies in Turkey:

(i) joint stock corporations, and

(ii) limited liability partnerships.

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Ümit Hergüner

Senior Partner, Hergüner Bilgen Özeke

Ümit Hergüner is the senior partner at Hergüner Bilgen Özeke, which he founded in 1989, and as head of the Corporate Practice Group, he is involved in every major M&A transaction, as well as lending his expertise on all project finance and strategic investment matters. He serves as a Member of the International Relations & European Union Center Advisory Board of the Union of Turkish Bar Associations (TBB) in Ankara.

In addition, he has served as the American Bar Association (ABA) and TBB Representative to the International Bar Association's (IBA) Working Group on UN Guidelines on Human Rights and Business. He is a Board Member of the International Law Institute (ILI) in Washington, D.C. and he is a former President of the Istanbul chapter of ILI.

He has also been heavily involved in the Corporate Governance Association of Turkey (TKYD), having served as its President as well as serving on the TKYD Advisory Board. He is also a member of the Turkish Industrialists and Businessmen Association (TÜSİAD). Mr. Hergüner holds an undergraduate and a Master's degree from Istanbul University School of Law, as well as LL.M. degrees from American University Washington College of Law, and the University of Virginia School of Law.

In joint stock corporations, the approval of the other shareholders, through a general assembly meeting, is not required in share transfer transactions (unless otherwise required by the articles of association). In fact, contractual arrangements that restrict the transfer of shares such as call options, rights of first refusal, etc. are not enforceable at the company level, and are only binding between the parties. Therefore, in a typical share sale transaction, the relevant shareholder may freely transfer its shares. However, in an M&A deal that is to be carried out by way of transfer of certain assets of a joint stock corporation, a general assembly resolution approving the transfer may be required if the value of the assets to be transferred constitutes a material portion of the total value of the assets of the transferring company.

In limited liability partnerships, M&A deals, including transfer of shares as well as assets, require the approval of the other shareholders. Share transfers in limited liability partnerships only become binding when the transfer is approved by the general assembly of shareholders. Similarly, asset transfers in limited liability partnerships also need the approval of shareholders to be valid and binding.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

The members of the Board of Directors are required to play an active role during the sale process in connection with a deal, which includes (among others) such duties as approving the release of the company records, and objecting to the transaction if they believe the deal is against the company's interests. The articles of association of a company may only restrict the transfer of shares by subjecting the said transfer to the approval of the company. Such approval can be granted by the Board of Directors. However, this discretion is not unlimited, and the Board of Directors may decline consent to a transfer on the basis of two conditions: (a) if there exists an important ground for refusal as provided under the articles of association, or (b) if the company offers to purchase the transferred shares on its own or on other shareholders' or on third parties' behalf based on the "real value" of the shares at the time of the request for consent.

However, this discretion of the Board of Directors may not be effective if the selling shareholder is, at the same time, the majority shareholder, as the Board of Directors may be replaced through an extraordinary general assembly meeting by the majority shareholder at any time.

9. In what circumstances are break-up fees payable by the target company?

The share purchase agreement may set forth a break-up fee if one of the parties walks away from the deal without any valid grounds. There is no specific requirement for break-up fees to be enforceable and the parties may contractually agree on and customize break-up fee provisions.

10. Can conditions be attached to an offer in connection with a deal?

Yes, conditions can be attached to an offer in connection with a deal. In practice, these pre-conditions are specified as conditions precedent to closing under a typical share purchase agreement. For instance, obtaining merger clearance for a transaction from the Turkish Competition Authority or completion of certain corporate actions before the closing of the deal may be introduced as conditions precedent under the share purchase agreement.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

No specific financing requirement that must be satisfied in an M&A deal is set forth by law. However, the parties may contractually agree on a condition precedent that requires securing a minimum level of financing by the purchaser.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

In private companies, there are two mechanisms that permit the minority shareholders to be squeezed out: (a) squeeze-out by a majority shareholder who holds shares corresponding to at least 90% of the share capital of the company, and (b) squeeze-out in the case of a merger.

In the first mechanism, a majority shareholder can file a lawsuit to squeeze-out a minority shareholder if the minority shareholder(s) acts in a manner so as to obstruct the company's operations, acts in bad faith, creates perceptible disruption in the company, or acts recklessly.

In the second mechanism, the minority shareholders of a dissolving company that participates in a merger may be compelled to sell their shares in exchange for a compensation payment.

Umut Özdoğan

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In listed companies, there are also two different possibilities for triggering the squeeze out mechanism: (a) initiative of majority shareholder holding 97% of the voting rights in the target company, and (b) merger of two companies in accordance with the provisions of the Communiqué on Mergers and Demergers Serial No. II – 23.2, which sets forth a process similar to that of private companies with certain procedural differences stemming from the capital markets rules.

In the first option, a shareholder (one shareholder individually or multiple shareholders acting in concert) holding 97% of the voting rights may trigger a squeeze out in order to acquire the remaining shares of the target company.

In the second option, a majority shareholder may initiate the merger process. Pursuant to the Material Transactions Communiqué, mergers involving listed companies qualify as material transactions, and shareholders who have voted against material transactions are entitled to exercise their sell-out rights or they may receive shares in the surviving entity. However, even if the minority shareholders do not exercise their sell-out rights, they can be squeezed out by the majority shareholder in return for a compensation payment after the merger process is completed.

13. What is the waiting or notification period that must be observed before completing a business combination?

If the business combination is to be carried out by way of a share sale transaction, there is no mandatory waiting or notification period per se as required by the transaction. However, there may be certain notifications/approval periods in sector-specific deals as detailed under, amongst others, Question 2. There are also certain public announcement requirements to be satisfied in listed companies even though such requirements do not affect the validity of the transaction.

If the business combination is to be carried out by merger of two companies, an announcement to the creditors of the dissolving entities needs to be published in the Trade Registry Gazette three times in a three-month period. Typically, the merger can only be registered with the Trade Registry after such three-month period has expired.

14. Are there any industry-specific rules that apply to the company being acquired?

As also explained above, the approval of relevant regulators and/or government agencies may be required if the company being acquired operates in certain regulated sectors such as energy, telecommunications, insurance and banking.

For example, transfer of shares in a banking institution requires the approval of the Banking Regulation and Supervision Agency if the shares to be transferred exceed 10% of the share capital of the relevant bank.

Similarly, energy companies holding licenses issued by the Energy Market Regulatory Authority must obtain the approval of the EMRA if there is a transfer of shares corresponding to at least 10% of the share capital of private companies and 5% of the share capital of publicly-held companies.

15. Are cross-border transactions subject to certain special legal requirements?

Cross-border transactions are not subject to any special legal requirements. However, certain restrictions apply to foreign investments in strategic sectors. For example, if the acquirer is a foreign party and the transaction involves transfer of any real property, approvals of the relevant regulators may be required. Although any acquirer which is controlled by more than 50% foreign shareholders can acquire title to real estate or rights in rem (property rights other than ownership) in Turkey, there are restrictions such as (amongst others) real estate acquisition being listed among the Turkish company's purposes and within its scope (as stated in the Articles of Association). Further, pursuant to Article 36 of the Regulation on Land Registry Law, legal entities having at least 50% foreign shareholding must notify the government when they acquire real property in Turkey. In addition, for certain strategic sectors, the following restrictions apply:

(a) For media service providers, foreign shareholders may not have more than 50% of the registered capital. In addition, foreign persons may not be shareholders of more than two media service providers pursuant to the Article 19(f) of the Radio and Television and Broadcasting Services Code.

(b) For civil commercial aviation operators, the majority of the shareholders have to be Turkish nationals pursuant to the Article 9 of the Commercial Air Transportation Regulation.

(c) For purchase of real estate in restricted military areas, military security zones or strategic zones, further requirements may apply pursuant to the Land Registry Law.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Within the scope of share transfers, the Labor Code and/or other legislations under Turkish law do not regulate any changes in the employment relations of a company whose shares are transferred to a third party. Since the employer is the company itself and it remains the same following any share transfer, the employment relations between the employer and the employees remain unaffected. Therefore, the employees of a company whose shares are transferred will continue to be employed at the company without any changes/modifications in their employment status, including their rights and benefits, as a result of the share transfer.

Employee transfers carried out within the scope of an asset transfer, however, may require certain additional actions such as obtaining employee consents for any material changes in employment conditions or executing tripartite transfer agreements. Employees are not bound by such changes unless they consent to such changes within 6 business days.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

To overcome global economic stagnation, the Turkish government has been attempting to stimulate economic growth and ameliorate the business environment. To that end, it has introduced the Omnibus Law for Improvement of Investment Environment no. 6728 to reduce transaction costs and to contribute to investor welfare. The most prominent change introduced by the new law is the abolishment of stamp duties arising from agreements in relation to transfers of shares in joint stock companies and limited liability partnerships. Formerly, the parties were required to pay an onerous stamp duty corresponding to 0.948% of the highest amount stipulated in the agreement. Also, pursuant to the said new law, only one set of original transaction documentation is subject to the stamp tax obligation rather than each set.

Also, following the failed coup attempt in July 2016, the government had announced a resolution of "state of emergency" in accordance with Article 120 of the Turkish Constitution and the state of emergency is still in effect upon its extension for the fifth time in July 2017. In terms of legal environment, the main implication of the state of emergency has been the transfer of the authority to issue laws (in the form of decrees having the same effect as laws) from the Parliament to the Council of Ministers, which is otherwise not the legislative but the executive body within the State. This shift was related to the necessity to take the actions required to eliminate the events leading to the declaration of the state of emergency in the most efficient and rapid manner. In the state of emergency, once the Council of Ministers adopts a decree, it is immediately published in the Official Gazette, becoming immediately effective, and is only subsequently submitted to the approval of the Parliament. As a result, the relevant laws enter into force prior to having been blessed by the Parliament. The Parliament has 30 days to approve or disapprove such decree laws. In the meantime the decree remains legally binding.

In the past year, however, the state of emergency has not had any direct effect on commercial and financial affairs in the business realm. The measures taken were primarily limited to the measures necessitated by the coup attempt. The only repercussion of the state of emergency on commercial and financial affairs was that it initially caused some delays in communications with public institutions due to the purge of certain officials within various public bodies. Recently, the effects of such actions have been almost completely eliminated and the functions of institutions are back to normal.

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Hergüner Bilgen Özeke Attorney Partnership, is Turkey's leading independent business law firm. Since its establishment in 1989, it has been providing legal guidance to foreign and domestic clients on all aspects of international business law, and it is known as the firm which brought the 'full-service law firm' concept to Turkey. The firm has represented some of the world's largest and most well-known multinational corporations, international financial institutions, agencies and other notable clientele in various sectors over the last twenty years.

The legal team consists of approximately 90 lawyers, 15 of whom are partners, who come from a variety of educational and professional backgrounds and who routinely manage cases that require a full grasp of both Turkish and cross border transactions, as well as sensitivity to diverse business cultures. This size, experience, and local knowhow permits the firm to serve as a one-stop shop by offering specialized teams to clients who need a law firm for a variety of potential issues, but also one with a significant understanding of the local market and culture.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

土耳其没有专门针对并购的监管法规。然而，土耳其政府颁布过一些主要的法规，覆盖一个典型的并购项目中所包括的各种事项。在土耳其，这样的对并购项目具有法律约束力的主要法律法规包括：

(a) 土耳其第 6102 号商业法；
(b) 土耳其第 6098 号职责标准；
(c) 第 6362 号“资本市场法”；
(d) 第 4054 号“保护竞争法”；
(e) 第 5520 号公司税法；
(f) 第 4857 号“劳动法”；和
(g) “贸易登记条例”。

一些特定行业的并购项目将会受到行业监管法律法规的制约，比如涉及保险公司或能源公司的交易。尽管这些法律法规并不是针对并购交易制定的，但一个典型的并购项目在运作时还是需要考虑到这些法律法规的相关规定要求。

值得注意的是，如果交易涉及一家上市公司，由资本市场监管机构发布的其他法律法规和公告可能也会产生约束力。最为典型的相关规定包括：

(a) 关于兼并和分拆的系列公告第 II – 23.2 号，规定了上市公司进行业务兼并和分拆的程序和原则；
(b) 关于强制要约收购的系列公告第 II – 26.1 号，该公告对强制要约收购和自愿要约收购的相关事项进行了具体规定；和
(c) 关于重大交易和退出权利原则的公告第 II – 23.1 号，该公告对上市公司开展重大交易和享有的退出权利需要遵循的一般性原则进行了具体规定。

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

一般来说，并购交易不受政府机构的监管，但在一些受到严格管控的行业内发生的并购交易除外。比如，能源、电信、银行、金融服务和保险业受到一些特定法律法规的约束，由某些特定政府部门进行监管。因此，如果并购项目涉及到的交易方是在这些行业内运营的企业，那么这些企业则可能需要获得相关政府监管部门的批准才能开展项目。下面是部分管理特定行业的政府部门的清单，这些行业内的并购项目可能需要通过这些政府部门的审批才可以进行：

(a) 能源行业——能源市场监管部门；
(b) 银行业——银行业监管和管理局；
(c) 保险业——财政部副部长；
(d) 电信业——信息和通信技术管理局；
(e) 采矿业——矿业管理总局。

如果并购项目中交易各方的收入超过一定标准，那么该项目需要接受土耳其市场竞争监管机构的审查。反垄断和竞争法中对于此类交易的具体规定将在下面的第四个问题中进行具体介绍。

最后，为了记录企业治理行为，交易各方通常需要在贸易登记处、海关和贸易部完成一些具体的登记流程。此外，为了完成和记录公司治理流程，企业还需要就董事会成员任命、公司章程修改和其他类似的公司治理行为，在相关的贸易登记处进行登记。如果发生公司股份被一家外资企业收购的情况，公司还需要通知外商投资管理总局，不过这是一个比较简单、便捷的登记流程。

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高级合伙人，Hergüner Bilgen Özeke

Ümit Hergüner是Hergüner Bilgen Özeke公司的高级合伙人，公司业务部的主管合伙人，该公司成立于1989年。他参与了所有重大的并购交易，凭借其在项目融资和战略投资领域内的知识和经验为客户提供专业服务。他是安卡拉的土耳其律师协会（TBB）国际关系和欧盟中心顾问委员会的委员。此外，他还是联合国人权和商业指导原则国际律师协会（IBA）工作组中的美国律师协会（ABA）和TBB代表。他是华盛顿特区国际法律协会（ILI）的董事会成员，也是ILI伊斯坦布尔分会的前任主席。他还积极参与了土耳其公司治理协会（YKYD）的工作，曾是该协会主席和TYKD顾问委员会成员。他也是土耳其企业家联合会成员（TÜSİAD）。Hergüner先生拥有伊斯坦布尔大学法学院的学士和硕士学位，以及美国大学华盛顿法学院和弗吉尼亚大学法学院的法学硕士学位。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

在土耳其的法律体系中，没有明确限制恶意收购的规定；然而在实际情况中，在土耳其开展恶意收购不具有可行性。这是因为出售一家企业股权的决定最终是由相关股东来决定的。而且，如果出现董事会不合作的情况，股东可以采取措施阻止或至少推迟交易的进行，比如，拒绝向收购方提供公司信息，或是拒绝执行为顺利开展项目而必须执行的公司决议等。

需注意的是，为防止恶意收购所采取的一些预防性措施，如“自戕式防御”(poison kill)、“白衣骑士”(white knight)、“黄金降落伞”(golden parachute)计划等，在土耳其法律体系中是不存在的。但是，在相关的股权收购协议中可以加入其他一些个性化的保护性规定：

(a) 卖方给予买方一定时间的排他期，双方可以利用这段时间对未来交易细节进行认真考虑；

(b) 交易各方对于“分手费”达成一致，当一方退出交易时，需要向另一方支付“分手费”，除非一些事先约定的特定条件没有满足，或是

(c) 交易各方可以以某一事件是否实现为交易达成的先决条件（比如，获得土耳其市场竞争监管机构的批准）。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

可能限制企业收购和兼并行为的主要法律法规是“并购项目需要获得市场竞争监管机构的批准的公告”(“第2010/4号公告”)。“第2010/4号公告”中规定，超过一定金额的交易需要通过土耳其市场竞争监管机构的审批。如果交易符合下述条件中的任意一条，则该交易需要满足有关“信息通知”的要求：

(i) 被收购企业的国内营业收入（在土耳其境内产生的营业收入）超过 3,000 万土耳其里拉，交易涉及的任意一方的全球营业收入超过 5 亿土耳其里拉；或者

(ii) 被收购方和收购方国内营业收入超过 3,000 万土耳其里拉，以及所有交易方的营业收入总额超过 1 亿土耳其里拉。

此外，正如前面所介绍的那样，在受到严格监管的行业发生的并购交易，如电信、能源、保险业等，可能需要获得政府相关部门或监管机构的批准。

5. 进行这些交易时需要哪些文件？

典型的并购交易流程主要包括三个阶段：(i) 交易前阶段，交易各方开展交易准备工作；(ii) 交易中阶段，交易各方就交易条款进行谈判，为交易达成做好准备工作；和 (iii) 交易完成阶段。每一阶段需要准备的文件清单如下：

(a) 交易前阶段

(i) 被收购企业尽职调查报告，以明确该企业运营中存在的问题；

(ii) 意向书或谅解备忘录，明确交易各方的交易意愿；

(iii) 信息不泄露协议或保密协议，明确交易各方的保密职责；和

(iv) 交易条款清单，明确该交易的主要交易条款。

(b) 交易中阶段

(i) 收购方开展尽职调查工作的任务清单，明确需要审查的被收购方的资料和信息；

(ii) 起草股权收购协议，并就该协议展开磋商；

(iii) 根据股权收购协议（SPA）的规定需要准备的资料（如，第三方同意书和其他适用规定）；

(iv) 交易各方主管公司出具的关于批准该交易的决议书；

(v) 如果是收购部分股权的交易，需要准备对交易完成后公司的管理和治理体系进行具体约定的股东协议书；

(vi) 如果交易包括兼并或分拆，需准备兼并 / 分拆协议书，以及在相关贸易登记处进行合并登记时要求提交的相关公司文件；

(vii) 如果交易涉及资产转移，需单独准备一份资产转移协议书，以及在所有权登记处进行不动产登记时要求提交的资料；

(viii) 辅助协议和完成交易的相关文件（比如，被收购股份的股票证书，管理和咨询协议以及核心管理人员的雇佣协议）；

(ix) 如果交易需要满足某些特定法规要求和 / 或获得特殊批准，则需要准备相关政府机构和部门的核准证明材料；

(x) 开展完成交易的相关工作，实际执行股份或资产的转移；和

(xi) 必要的交易后通知（比如，土耳其商业法第 198 条款规定的通知，外商管理总局要求的通知等）。

6. 这些交易须缴纳哪些政府费用？

没有针对收购或兼并项目的收费项目。然而，根据交易类型和交易涉及的流程的不同，可能会有一些收费项目，比如贸易登记费用、需向竞争管理委员会缴纳的费用等。

7. 交易是否需要股东的同意或批准？

通常来说，土耳其有两种类型的投资公司：

(i) 股份有限公司

(ii) 有限责任合伙制公司

股份有限公司的股权转移交易不需要通过召开股东大会获得其他股东的批准（除非公司章程另有规定）。实际上，限制股权转让的合同安排，如认购期权、优先否决权等，在公司层级是不能强制执行的，只在交易方之间具有约束力。因此，在一个典型的股权转让交易中，相关股东可以自由转让

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股份。然而，如果一个并购交易涉及股份有限公司的资产转让，而且转让的资产价值在公司总资产中占到一个非常重要的比例，那么则需要召开股东大会通过资产转让决议。

有限责任合伙制公司的并购交易（包括转移股权和资产）需要获得其他股东的同意。有限责任合伙制公司的股权转移交易只有在股东大会上得到批准以后才具有法律效力。同样的，有限责任合伙制公司的资产转移交易也只有在得到股东批准以后才生效、产生法律效力。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

董事会成员需要在一个交易流程中发挥重要作用，包括但不仅限于批准向对方提供公司信息，如果认为交易违反公司利益则需要履行职责否决交易提案。公司章程只能通过提出把交易提交给公司进行审批这一方式来阻止股权转移交易的进行，董事会可以批准该交易。然而，这样的决定权不是没有限制的，董事会成员的否决权可以基于以下两个条件做出：(a) 根据公司章程的规定，存在重要的理由否决该交易提案；(b) 基于股权在提交审批时的“实际价值”，收购方是单独收购、代表其他股东收购、还是代表第三方收购被转让的股权。

然而，董事会的决定可能不会生效，因为如果出售股权的股东同时也是大股东，那么大股东可以随时召开特别股东大会对董事会成员进行调整。

9. 哪些情况下，目标公司须支付分手费？

股权收购协议可能会对分手费的相关事宜进行具体规定，用以约束交易中的一方没有任何正当理由而退出交易的行为。目前法律法规没有要求并购交易一定要有分手费的规定，交易方可根据实际情况，用合同的形式约定分手费的相关事宜。

10. 要约可否附加交易相关的条件？

是的，一个交易的收购要约中可以附加条件。在实际情况中，这些先决条件被认为是完成一个典型的股权收购交易之前需要满足的条件，比如，就一个兼并交易获得土耳其市场竞争监管机构批准，或是在交易结束之前完成某些特定的公司行为，这些都可能会作为股权收购协议达成的先决条件。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

法律法规没有明确规定一个并购交易必须满足的具体融资要求。然而，交易各方可以以合同的形式明确要求买方确保获得一定金额的资金，以此作为协议达成的先决条件。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

在私营公司中，存在两个允许小股东被动退出的机制：(a) 持有公司股份比例超过 90% 的大股东可以迫使小股东退出公司；和 (b) 在公司与其他公司兼并的过程中被动退出。

在第一种机制中，当小股东出现以下行为时，大股东可以通过法律诉讼迫使小股东退出公司：妨碍公司经营、恶意行事、明显扰乱公司经营或鲁莽行事。

在第二种机制中，将被其他企业并购的公司的小股东可能被迫出售其股份以换取补偿金。

在上市公司中，也存在两种不同的、被迫退出机制启动的可能性：(a) 由持有公司超过 97% 的投票权的大股东发起；和 (b) 两家公司兼并的交易中，《关于兼并和分拆的系列公告第 II – 23.2 号》也规定了与私营公司类似的流程，只是根据资本市场规则对某些具体程序进行了调整。

在第一种可能性中，持有公司 97% 以上投票权的一个股东（一个股东个体、或是多个股东组成的一个联合体）为了获得公司剩余股份，可以采取措施迫使小股东退出。

在第二种可能性中，一个大股东可以启动兼并流程。根据重大交易原则公告，涉及上市公司的并购交易属于重大交易，对重大交易投反对票的股东有权出售他们的股票，或是获得新公司的股票。然而，即使小股东不行使卖出股票的权利，他们也可能在大股东的压力下被迫退出，在公司兼并程序完成后他们将获得一定金额的补偿金。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

如果业务的兼并是通过股票交易来进行的，那么交易本身是没有关于等待或通知期的强制性要求。然而，针对某些特定行业内发生的交易是有一些特定的通知 / 批准期规定的，这些行业包括但不仅限于问题 2 中提到的那些行业。此外，上市公司还需要满足一些信息公告要求，尽管这样的要求并不影响交易的进行。

如果业务的兼并是通过两家公司的合并来进行的，那么则需要在三个月的时间里，通过贸易登记处的公报向即将消失的公司实体的债权人发布三次通告。通常情况下，兼并交易只有在这三个月期限期满后才能在贸易登记处进行登记。

14. 是否有适用于被收购公司的行业特定规则？

如上文所述，如果被收购公司是一些被严格监管的行业的企业，比如能源、电信、保险业和银行业，那么交易则需要获得相关监管机构和 / 或政府部门的批准。

例如，在转让银行股份的交易中，如果转让股份数量超过银行总股本的 10%，则该交易须获得银行业监督管理委员会的批准。

同样，在以下两种情况下，持有由能源市场监督管理委员会（EMRA）颁发的资源开采许可证的能源公司的股权交易必须获得 EMRA 的批准：私营能源公司的 10% 以上的股权的交易，公众能源公司 5% 以上的股权的交易。

15. 跨境交易是否受任何特殊法律要求的制约？

法律法规体系中没有专门针对跨境交易的规定，然而，对于在一些具有战略意义的行业中的外商投资是存在一些限制的。比如，如果交易中收购方是一家外国公司，而且交易涉及不动产的转移，那么该交易则需获得相关监管部门的批准。尽管外资持股比例超过 50% 的公司可以在土耳其收

购房地产或物权（除了所有权以外的物权），但法律法规对该收购行为还是有一定的限制，包括（但不仅限于）房地产收购是该外资公司的经营目标之一，并在该外资公司营业范围内（按照公司章程规定）。此外，根据《土地注册条例》第 36 条，外资持股比例超过 50% 的法人实体在土耳其收购房地产时，必须通知有关政府部门。对于在具有战略意义的行业内发生的跨境交易，以下限制条件适用：

(a) 对于媒体服务提供商来说，外资持有的注册资本比例不能超过 50%。此外，根据《广播电视及广播服务》第 19（f）条款规定，外国人士不得成为两个以上的媒体服务提供商的股东。

(b) 对于民用商业航空服务经营者来说，根据《商业航空运输条例》第 9 条的规定，公司的多数股东必须是土耳其公民。

(c) 如果在限制军事区、军事安全区或是具有战略意义的地区购买房地产，可能需要根据《土地注册条例》的要求满足其他条件。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

在股权转让交易中，《劳动法》和 / 或其他土耳其的法律法规并不会要求进行了股权转移的公司的雇佣关系发生变化。因为雇佣者就是公司本身，在股权转移以后雇佣者没有发生变化，所以雇佣者和员工之间的雇佣关系也没有受到影响。因此，如果公司员工的股份被转让给第三方，该员工仍然是这个公司的员工，他们的就业情况不会因为股权发生转移而产生任何改变 / 调整，包括他们应享有的权利和利益。

如果并购交易涉及资产转移，那么将会出现员工转移的情况，但这需要开展一些其他工作，包括就雇佣条件的重大变化获得员工的同意，或是就员工转移签署三方协议。如果雇员在雇佣关系变化建议提出后的六个工作日内没有同意该提议，那么这些条件不会对雇员产生约束力。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

为了克服全球经济滞涨带来的困难，土耳其政府一直在积极采取措施刺激经济增长，改善营商环境。为此，政府发布了《改善投资环境综合法案第 6728 号》，旨在降低交易成本，使投资者受益。这个新法案中最重要的一个变化就是取消了股份有限公司和有限责任合伙制公司在达成股权转移协议时需要缴纳的印花税。在以前，交易方需要缴纳相当于协议规定的最高交易金额 0.948% 的高额印花税。此外，根据新法案，只有一套原始交易文件需要缴纳印花税，而不是像以前那样每套都需要缴纳。

在 2016 年 7 月发生的政变失败后，根据《土耳其宪法》第 120 条规定，政府宣布了土耳其进入“紧急状态”，2017 年 7 月，“紧急状态”第五次延期，直到目前仍然有效。在法律环境方面，“紧急状态”的主要影响就是把立法权（以法令的形式颁布，具有和法律法规一样的效力）由议会转移到了部长理事会。此前，部长理事会只是国家的法律执行部门，而不是立法部门。立法权转移是为了能够用最有效、最快速的方式镇压那些会促使政府宣布国家进入“紧急状态”的事件的必要措施。当国家处于“紧急状态”中时，一旦部长理事会通过一项法令，该法令将会立即在官方公报中公布并生效，然后再提交给议会批准。因此，该法令是先生效再由议会批准。议会将在 30 日之内表决通过或否决该法令，在这期间该法令一直具有法律效力。

在过去一年的时间里，国家“紧急状态”并没有对商业和金融活动产生任何直接的影响。政府的举措主要限于那些为了预防政变的发生而必须采取的措施。“紧急状态”对于商业和金融活动的唯一影响是在刚进入“紧急状态”的那段时间里，企业和政府部门之间的沟通出现了一些问题，这主要是因为当时在各个政府部门有一些官员受到处理。最近，处理官员带来的影响几乎已经完全消失了，各部门和机构恢复了正常的工作状态。

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Hergüner Bilgen Özeke Attorney Partnership, is Turkey's leading independent business law firm. Since its establishment in 1989, it has been providing legal guidance to foreign and domestic clients on all aspects of international business law, and it is known as the firm which brought the 'full-service law firm' concept to Turkey. The firm has represented some of the world's largest and most well-known multinational corporations, international financial institutions, agencies and other notable clientele in various sectors over the last twenty years.

The legal team consists of approximately 90 lawyers, 15 of whom are partners, who come from a variety of educational and professional backgrounds and who routinely manage cases that require a full grasp of both Turkish and cross border transactions, as well as sensitivity to diverse business cultures. This size, experience, and local knowhow permits the firm to serve as a one-stop shop by offering specialized teams to clients who need a law firm for a variety of potential issues, but also one with a significant understanding of the local market and culture.

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The keys laws and regulations that govern mergers and acquisitions ("**M&A**") taking place in the United Arab Emirates ("**UAE**") are dependent on whether the target company in question is an onshore ***or*** offshore company.

Onshore:

UAE companies incorporated outside a free zone (referred to as 'onshore UAE companies') are subject to the Federal Law concerning Commercial Companies (2/2015) (the "**Federal Law**"). The Federal Law is the main piece of legislation applicable to all companies onshore (whether listed or not listed).

In addition, the Federal Law is further supplemented by a host of other laws, regulations and ancillary decisions that would be applicable to public and/or private M&A deals being conducted onshore, which include the:

(a) UAE Labor Law No. 8 of 1980;

(b) UAE Federal Law No. 5 of 1985;

(c) UAE Federal Law No. 4 of 2000 Concerning The Emirates Securities and Commodities Authority;

(d) Securities and Commodities Authority Disclosure and Transparency Regulations 2000;

(e) Regulations for Trading, Clearing, Settlement, Transfer of Ownership and Safekeeping of Securities (SCA Board of Directors' Decision No. 2 of 2001);

(f) Federal Law No. 4 of 2012 on the Regulation of Competition;

(g) Cabinet Decision No. 13 of 2016 Concerning Application of Competition Law; and

(h) Abu Dhabi Securities Exchange ("**ADX**") Rules (this is only applicable to companies listed on the ADX).

The Federal Law permits M&A activity in three forms of onshore companies, which include:

(a) a **limited liability company** – a company most widely used onshore by local and foreign investors. This company is a private company and its shares cannot be offered to members of the public and is subject to the 49/51 Rule, as discussed in paragraph 3 and 15 below;

(b) a **public joint-stock company** – a onshore public company, whose shares must be listed on the securities market in the UAE; and

(c) a **private joint-stock company** – a onshore private company whose shares cannot be offered to the public.

Offshore:

Companies operating in one of the many free zones in the UAE (referred to as 'offshore UAE companies') are subject to their own separate legal framework; the relevant laws of the specific free zone will apply to the company established within it. However, in the event that that an offshore company undertakes activity onshore (outside the legal remit of the relevant free zone), then the onshore laws, rules and regulations will apply regardless of the fact that the company is based in the free zone. For example: if an offshore company is raising financing for an acquisition and it is providing security over its real property that is based onshore, then the relevant laws, rules and regulations onshore

would need to be complied with to ensure the successful registration of the charge onshore.

There are a host of different forms of offshore companies which can be subject to public or private M&A activity in the UAE; these include:

(a) a limited liability company;

(b) a free zone company established in one of the many free zones, for example companies limited by shares, known as 'LTDs' in the DIFC. A free zone company provides for the possibility of ownership of 100 per cent in the company by foreign subscribers to the capital; and

(c) a free zone establishment – which in essence is a free zone company but with one shareholder.

Arguably one of the major free zones in the UAE is the Dubai International Financial Centre ("**DIFC**"). This guide will also explore the relevant laws, rules and related provisions in respect of M&A activity taking place in the DIFC. The main piece of legislation applicable to companies in the DIFC (whether listed or not listed) is the DIFC Companies Law 2009 (DIFC Law No. 2 of 2009) and the DIFC Companies Regulations. In addition, listed DIFC companies are subject to a host other laws, rules and regulations, which include the:

(a) DIFC Regulatory Law (DIFC Law No. 1 of 2004);

(b) DIFC Markets Law 2012 (DIFC Law No. 1 of 2012);

(c) DIFC Takeover Regulations 2015;

(d) DIFC Takeover Regulations Rules 2015 (The Takeover Code);

(e) DFSA Market Rules Module of DFSA Rulebook;

(f) DFSA Takeover Rules Module of DFSA Rulebook; and

(g) NASDAQ Dubai Business Rules.

As a final point to this section, it is also worth noting that the Federal Law applicable to onshore companies will also apply to offshore companies in the event that it has not been varied by the relevant free zone.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The regulators for M&A activity being conducted onshore are the:

(a) Securities & Commodities Authority (the "**SCA**") for listed entities; which is the regulator of the Abu Dhabi Securities Exchange and the Dubai Financial market;

(b) Competition Regulation Committee of the UAE Ministry of Economy;

(c) UAE Central Bank for banks and licensed financial companies; and

(d) departments of economic development in each of the emirates, such as the UAE Insurance Authority.

The regulator for M&A activity being conducted in the DIFC is the:

Dubai Financial Services Authority, an independent regulator of financial services conducted in or from the DIFC. The DFSA also regulates NASDAQ Dubai, the international stock exchange located in the DIFC.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Onshore:

To the extent of our knowledge, due to the lack of precedent for, and, legal hurdles to a hostile takeover in the UAE, hostile takeovers in the UAE are essentially rare. The 49/51 ownership restrictions imposed on foreign investors rules out the prospect of a foreign bidder willing to acquire the control of a UAE onshore company. This 49/51 rule stipulates that foreign investors may not own more than 49 per cent of the share capital of an onshore UAE company (whether public or private) (the "**49/51 Rule**").

Many listed companies onshore are therefore often significantly owned and run by

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Hasan's corporate expertise includes working with multinational and domestic corporations, private equity firms and family business groups on their operations and management, corporate structures, mergers, acquisitions and investments. He frequently acts for fund sponsors, investors and asset management firms on fund formation, investment structuring and regulatory compliance.

Hasan has worked extensively on infrastructure and energy projects, equity and debt capital markets transactions, and corporate restructurings.

His private client expertise covers strategic advisory services to high-net-worth individuals and family groups in relation to family offices, private investments and holding structures.

Prior to establishing RIAA Barker Gillette (Middle East) LLP, Hasan achieved partner status at various other international law firms. He has been based in the Middle East for more than 15 years.

governmental bodies, prominent local establishments and/or well-known family offices who often hold a considerable amount of influence and control in the UAE. This influence and control coupled with the 49/51 Rule onshore makes the possibility of a hostile takeover very slim, if not impossible. It is however worth noting that the SCA regulates takeover offers, and will review the potential tender on its own merits and facts. However, to date there is no precedent or guidance as to how such a hostile bid will be viewed.

DIFC:

To the extent of our knowledge, to date we are not aware of any hostile bids to have taken place in the DIFC; however, it is worth noting that the legal framework of the DIFC does not differentiate between a hostile and friendly bid. This coupled with the fact that the DIFC legal framework is modelled on English Law where hostile bids, albeit rare, have been permitted, means that there is a possibility of hostile bids taking place in the DIFC at some point in the future.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Acquisitions are generally not subject to national security legislation or reviews. Acquisitions in certain sectors, will however require certain approvals and/or consents from government entities, including but not limited to the Ministry of Interior, UAE Central Bank, Insurance Authority and the General Headquarters of the Armed Forces.

The UAE has also recently brought into force the Federal Law No. 4 of 2012 on the Regulation of Competition which regulates anti-competitive behaviour and monopoly practices in the UAE. Premerger approval is required from the Competition Regulatory Committee of the Ministry of Economy for any proposed economic concentration, which includes a merger or acquisition, and which would result in a market share in excess of 40 per cent of the relevant market. This applies to both domestic and cross-border M&A transactions.

5. What documentation is required to implement these transactions?

The parties to a transaction may wish to record the main points on which they have agreed and the basis on which they are prepared to proceed with the relevant transaction. The principal terms of the proposed transaction may therefore be set out in the heads of terms, or letter of intent. The heads of terms may also provide for an agreed period of exclusive negotiations. The heads of terms are not intended to be legally binding, but will serve and exercise the minds of the parties' intentions and is a starting point for negotiation of the sale and purchase agreement. Transacting parties should carefully consider whether they wish to be legally bound by any of the terms of the agreement, and clearly set out what provisions, if any, they wish to be legally bound by.

The other preliminary and principal documents required to implement a transaction onshore or in the DIFC includes:

(a) an information memorandum;

(b) a non-disclosure agreement;

(c) corporate authorisations, including the board minutes and relevant power of attorneys;

(d) a heads of terms agreement;

(e) a lock-out agreement;

(f) a process letter;

(g) an offer letter;

(h) an acquisition agreement;

(i) all ancillary documents: such as requests for the change of control, transitional services agreement, key employee agreements, intellectual property licences and other material documents;

(j) a disclosure letter with the bundle of disclosed documents;

(k) filings; and

(l) a standard share transfer form in Arabic or English and Arabic before a UAE notary if the transaction is related to a merger or acquisition of an onshore company.

In respect of an offshore transaction (a transaction conducted in any of the free zones), the documents are generally the same and the documents required depends on the requirements of the relevant free zone. Often a shareholders' resolution approving the transaction is required and a new share certificate will also be issued to the purchaser on a share sale. The relevant governing body or free zone authority will also issue an amended licence for the company registering the change in ownership.

6. What government charges or fees apply to these transactions?

Apart from the obvious fees of lawyers (including local counsel), commercial, and financial advisors, the transacting parties can also expect

to pay notary fees which are payable in relation to the execution of agreements to transfer shares, and other assets. Various other filings are also likely to incur a charge, for example: where the acquiring company has sought acquisition finance and has provided a security package to the relevant banks; the various filings at the relevant authorities in respect of the secured assets are also likely to result in fees or charges.

The size, complexity and timeframe of the deal will impact the charges and fees that apply to the transaction in question. The transaction may also involve the appointment of various external consultants who may perform a variety of highly specialised services such as risk management review, post-acquisition integration, due-diligence and public relations services.

7. Do shareholders have consent or approval rights in connection with a deal?

Under the Federal Law and the DIFC laws, a director must act in accordance with the company's objectives and the powers granted to him or her by the shareholders of the company. Therefore, a director must ensure that he or she has obtained the necessary internal approvals before entering into any arrangement to bind the company. It is often the case that conditions are also attached requiring shareholder approval of the transaction.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Onshore:

Corporate governance in the UAE is primarily focused on listed companies. Under Article 22 of the Federal Law the directors of a company must "do all acts in agreement with the objective of the company and powers granted" to them by the company.

In addition, as set out under Article 14 of the SCA's Corporate Governance Code, a director of a public shareholding company listed on the securities market must avoid actual or potential conflicts of interest and may not participate in the voting on the decision relating to the deal or transaction. If these duties have been breached, then under Article 162 of the Federal Law, the directors of a company will be "liable towards the company, the shareholders and the third parties for all acts of fraud, misuse of power, and violation" of the provisions of the Federal Law or the articles of association of the company or an error in management.

A director must declare to the other directors any conflict of interest with the company in respect of a proposed transaction with the company, and is not permitted to vote on a resolution concerning the relevant transaction.

Duties to third parties:

On an acquisition, a purchaser of shares faces a danger in respect of long term contracts entered into by the relevant target company. Such contracts often include a term which entitles the other third party to terminate the contract if the control of the target changes hands. These 'change of control' clauses would obviously be more of a concern for the purchasing entity, but the company divesting its interest should be aware that they may also have a duty to obtain such consents for the change of control from the relevant third parties under existing arrangements.

Duties to employees:

To the extent of our knowledge, there are no obligations under statute in the UAE whereby a seller needs to consult with its employees before terminating their employment contracts. However, it is advisable that the sellers take into account any internal company policies and processes when considering making employees redundant or when terminating their contracts.

DIFC:

The laws of the DIFC contains a duty to act in the best interests of the company. The directors are required to exercise their duties in accordance

with the standard of care and skill expected of a prudent person.

Schedule 3 of the Law of Obligations of the DIFC also imposes onto the directors of a company the fiduciary duty of loyalty, confidentiality, care, skill and diligence, and duties to avoid a conflict of interest and to avoid secret profits. In respect of employees, the statutory provisions included in the Employment Law DIFC Law No.4 of 2005 and any amendments thereof should also be observed.

9. In what circumstances are break-up fees payable by the target company?

To the extent of our knowledge, break fee arrangements are not as common in private transactions in the UAE as they are in the UK.

Onshore:

To the extent of our knowledge, there are no regulations in respect of break fee arrangements. However, under the current regulatory regime, the transacting parties can agree to break fees unless the SCA provides otherwise. The directors should also be advised to take into account their general duties as directors of the onshore company.

DIFC:

Similarly, there are no prohibitions on break fees under the DIFC regime. However, such arrangements are required to be disclosed through an announcement of the company intending to make an offer. The scope for the directors of the target agreeing break fees is principally based on their duties.

10. Can conditions be attached to an offer in connection with a deal?

Many acquisitions onshore are carried out on a split exchange and completion basis because of the various approvals and consents required from external bodies. Naturally, the purchaser will want to ensure as a prerequisite, that certain conditions are included as conditions precedent or subsequent to the deal. This would include the necessary waivers, approvals and consents, and a condition that the Department of Economic Development or relevant free zone authority will approve and authorise the share transfer and issue an amended licence reflecting the change in ownership because without it, the target will not be permitted to operate.

There will also be conditions attached in respect of specific sectors that the target company operates within. In respect of a banking or financial services business for example, the approval of the UAE Central Bank is required. Other sectors that are subject to certain approval requirements include education, healthcare and telecommunications. The conditions attached to the offer would be purely dependent on the sector, and the diligent purchaser should seek to include the ones necessary for the target company.

Please also see Question 11 below.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Onshore:

To the extent of our knowledge, there are currently no laws or regulations which require a minimum level financing from a potential bidder or purchaser. A condition may however be imposed in the sale and purchase agreement in respect of the purchaser's ability to finance the transaction in question. This will depend however on the bargaining strengths of the parties involved.

DIFC:

Under the DIFC regime, in particular under the DFSA Takeover Rulebook, Rule 2.4.4, a bidder must not make an announcement of a firm intending to make a bid unless the bidder and its financial advisors have proper grounds for believing that the bidder is and will continue to be able to implement the bid. In addition, the announcement of a firm's intention to make a

bid must include a confirmation by the financial advisors or any other appropriate third party that the resources available to the bidder are sufficient to satisfy full acceptance of the bid.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

Onshore:

To the extent of our knowledge, there is no customary or compulsory 'squeeze-out' rules or procedures in the UAE. This means that the bidder has no assurance they will be able to acquire 100 per cent of the share in the target company unless all the shareholders accept the offer.

DIFC:

There is a 'squeeze out' procedure under the DIFC Companies Law in which an offeror can rely on a right to buy-out minority shareholders. However, this would only be available where the offeror has received acceptances in relation to 90 per cent of the issued share capital of a company.

13. What is the waiting or notification period that must be observed before completing a business combination?

Onshore:

When there is a public takeover, the parties to the transaction will make a joint public announcement to the market place. There is no specific timeframe set by the SCA, but the SCA and the relevant stock exchange will assist the transacting parties by setting out a suitable timetable. The SCA and relevant stock exchange will propose a timetable for the tender offer to allow the shareholders a reasonable timeframe in order to make an informed decision as to the offer.

DIFC:

Under the DIFC regime, the offer document in a public takeover must be sent to the shareholders of the target company within 21 days of the announcement of the firm's intention to make an offer. The offer must also be filed with the DFSA at least 24 hours before despatch. The timetable is triggered when an announcement of a firm's intention to make a bid is made namely:

(a) the offer must remain open for at least 35 days after the offer document was sent;

(b) once the offer has been declared unconditional in respect of the acceptances, it is required to remain open for acceptance for not less than 14 days after the date on which it would otherwise have expired;

(c) within 21 days after the dispatch date, the board of directors of the target are required to issue a target circular to its shareholders with its views on the relevant bid; and

(d) once a bid has declared unconditional as to the acceptances, a further 21 days is permitted within which all the remaining conditions must be fulfilled or waived. If such conditions are not fulfilled in that period the bid will lapse.

14. Are there any industry-specific rules that apply to the company being acquired?

As mentioned Question 10 above, acquisitions in a number of industries are subject to the prior approval of the relevant governmental bodies. This would depend on the relevant industry of the target company. Common industries that have their own specific set of rules and restrictions include:

(a) financial services;

(b) telecommunications;

(c) healthcare;

(d) education; and

(e) the utilities sector.

15. Are cross-border transactions subject to certain special legal requirements?

As discussed earlier in this guidance note, the 49/51 Rule has long imposed significant restrictions on foreign investors onshore. The 49/51 Rule favours state nationals, and requires every company incorporated under the Federal Law onshore to have not less than 51 per cent of its share capital owned by UAE nationals. Thus foreign investors acquiring a company are prevented from owning more than 49 per cent of the onshore UAE company that they are proposing to acquire. There are however certain ways to get around this rule; some of these methods include:

(a) tailored constitutional documents to provide the foreign investor with more control and rights in the onshore company; and

(b) a shareholders' agreement, which can set out the rights of the shareholders, providing the foreign investor with more control over the onshore UAE company.

Certain regulated industry sectors including real estate outside defined zones remain off-limits to foreign investment and/or require approvals which can be time consuming and often difficult to obtain.

To the extent of our knowledge, there are no restrictions on foreign investors owning shares in the DIFC, however, acquisitions taking place onshore or offshore in specific sectors such as airlines, utility companies and banks will be subject to additional ownership restrictions and thus appropriate consents and/or licences should be obtained from the relevant authorities.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

The UAE Labor Law (No 8 of 1980) is the applicable employment legislation in the UAE. The prospective acquirer should be aware of the following:

(a) All onshore employees that are not Emiratis are required to enter into an employment contract in the form required to do so by the Federal Ministry of Labour (the "Ministry"). The contract of employment will need to be registered with the Ministry in order to obtain a labour card and residency visa for the new employee. The employment contract can be supplemented with additional terms and conditions provided that it does not conflict with the law;

(b) The Arabic language is the official language to be used in all contracts of employment onshore (the English Language is sufficient for employment contracts in the numerous free zones including the DIFC);

(c) Contracts of employment in the UAE may be for either:

  (i) a limited period (a fixed term not to exceed two years) and the employment contract must also include a notice for termination; or

  (ii) an unlimited period, whereby the employer can terminate the employment under an unlimited term contract by giving 1 to 3 months' notice.

(d) As there are no pension schemes for expatriates, upon the termination of the employment contract, an employee is entitled to an end-of-service gratuity. The end of service gratuity is calculated on the final basic salary taking into account the length of service of the employee;

(e) Medical health insurance is now mandatory for the employer to provide to its employees; and

(f) There is no social security or income tax payable on the employees' wages.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Onshore:

There have been recent discussions in respect of relaxing the 49/51 Rule and to encourage foreign direct investment into the UAE, onshore. In 2016, the Ministry of Economy in the UAE published a draft foreign investment law; under this law the authorities encouraged foreign direct investments into various sectors. It is unclear how this will impact public M&A or what sectors foreign investors can invest in with 100 per cent participation.

DIFC:

To the extent of our knowledge no proposals or reform is currently proposed.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

监管在阿拉伯联合酋长国（“UAE”）所发生并购（“M&A”）的关键法律法规主要取决于所涉目标公司是在岸公司还是离岸公司。

在岸：

在免税区之外组建的阿拉伯联合酋长国公司（被称为‘在岸 阿拉伯联合酋长国公司’）要接受联邦法案中关于商业公司规定（2/2015）（“联邦法案”）的监管。联邦法案是适用于所有在岸公司（不管是上市的还是没上市的）主要立法。

此外，联邦法案还有一系列其他法律、规章和附属决定作为增补，也适用于监管在岸进行的公开和 / 或私有并购交易，其中包括：

(a) 阿拉伯联合酋长国劳动法 1980 年第 8 号；

(b) 阿拉伯联合酋长国联邦法案 1985 年第 5 号；

(c) 阿拉伯联合酋长国联邦法案 2000 年第 4 号关于阿联酋证券及商品管理局的法案；

(d) 2000 年证券及商品管理局披露与透明度规章；

(e) 证券交易、结算、交割、所有权转让与保管规章（SCA 董事会决议 2001 年第 2 号）；

(f) 联邦法案 2012 年第 4 号关于竞争规章的法案；

(g) 内阁决议 2016 年第 13 号关于竞争法案应用；以及

(h) 阿布扎比证券交易（“ADX”）规则（只适用于在 ADX 上市的公司）。

联邦法案允许三种形式的在岸公司开展并购活动，其中包括：

(a) 有限责任公司 – 当地和外国投资者最广泛使用的在岸公司。这种公司是私有公司，其股份不能公开发行，受规则 49/51 监管，如下面的第 3 段和第 15 段所讨论的那样；

(b) 公有股份公司 – 在岸上市公司，其股份必须在阿拉伯联合酋长国的证券市场上市；以及

(c) 私有股份公司 – 在岸私有公司，其股份不能公开发行。

离岸：

在阿拉伯联合酋长国的诸多免税区之一内经营的公司（被称为‘离岸阿拉伯联合酋长国公司’）受它们自己独立的法律框架监管；特定免税区内的相关法律将适用于在该免税区内设立的公司。但是，如果一个离岸公司从事在岸活动（在相关免税区的法律管辖范围之外），那么在岸法律、规则和规章将适用，不用考虑公司是位于免税区这个事实。例如：如果一家离岸公司在为收购募集资金，并将其位于在岸的不动产作为抵押，那么它也需要遵守在岸的相关法律、规则和规章，以确保在岸募集的资金能成功注册。

在阿拉伯联合酋长国，可进行公开和私有并购活动的离岸公司的形式有很多种；其中包括：

(a) 有限责任公司；

(b) 免税区公司，设立在诸多免税区之一，例如，股份有限公司，在迪拜国际金融中心（“DIFC”）被称为‘LTDs’。免税区公司可提供公司所有权百分之百由外国认股人认购的可能性；以及

(c) 免税区机构 – 它本质上是一个免税区公司，但只有一位股东。

阿拉伯联合酋长国内最有争议的免税区之一是迪拜国际金融中心。该指南也将探索与发生在迪拜国际金融中心的并购活动有关的法律、规则和规定。适用于迪拜国际金融中心公司的主要立法（不管上市与否）是 2009 年迪拜国际金融中心公司法（迪拜国际金融中心法案 2009 年第 2 号）和迪拜国际金融中心公司规章。此外，上市的迪拜国际金融中心公司还受一系列其他的法律、规则和规章的管辖，其中包括：

(a) 迪拜国际金融中心监管法案（迪拜国际金融中心法案 2004 年第 1 号）；

(b) 迪拜国际金融中心市场法案 2012 年（迪拜国际金融中心法案 2012 年第 1 号）；

(c) 迪拜国际金融中心接管规章 2015 年；

(d) 迪拜国际金融中心接管规章规则 2015 年（接管法典）；

(e) DFSA 规则手册中的 DFSA 市场规则模块；

(f) DFSA 规则手册中的 DFSA 接管规则模块；以及

(g) NASDAQ 迪拜商业规则。

作为本部分的最后一点，还值得一提的是，适用于在岸公司的联邦法案，如果没有被相关免税区更改的话，也将适用于离岸公司。

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

在岸并购活动的监管机构有：

(a) 监管上市实体的证券与商品管理局（“SCA”）；该机构是阿布扎比证券交易和迪拜金融市场的监管机构；

(b) 阿拉伯联合酋长国经济部竞争监管委员会；

(c) 监管银行和特许金融公司的阿拉伯联合酋长国中央银行；以及

(d) 阿联酋每一个成员国的经济发展部门，例如，阿拉伯联合酋长国保险管理局。

对发生在迪拜国际金融中心的并购活动进行监管的机构有：

迪拜金融服务管理局，这是一个独立的监管机构，专门监管在迪拜国际金融中心内部或从中发生的金融服务。DFSA 还负责管理 NASDAQ 迪拜，这是位于迪拜国际金融中心的国际股票交易所。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

在岸：

据我们所知，在阿拉伯联合酋长国，由于缺乏恶意收购的先例和法律障碍的原因，敌意收购的发生本质上是很少的。对外国投资者实施 49/51 所有权限制，排除了有意愿收购的外国投标人控制阿拉伯联合酋长国在岸公司的可能性。这条 49/51 规则规定，外国投资者不得拥有阿拉伯联合酋长国在岸公司（不管上市与否）49% 以上的股份资本（“49/51 规则”）。

因此，许多在岸上市公司通常都是由政府机构、显赫的当地公司和 / 或知名的家族理财室主要拥有和经营的，它们通常在阿拉伯联合酋长国具备相当大的影响力和控制力。这种影响力和控制力，再加上在岸的 49/51 规则，让恶意收购的可能性即使不为零的话，也是非常小的。不过，值得一提的是，SCA 会管理接管要约，并审核潜在投标人自身的优点和事实。然而，迄今为止，关于如何审核这样的恶意投标，尚没有先例或指导。

迪拜国际金融中心：

据我们所知，迄今为止我们尚未发现在迪拜国际金融中心发生任何恶意投标；不过，值得一提的是，迪拜国际金融中心的法律框架并没有对恶意投标和善意投标加以区分。再加上迪拜国际金融中心的法律框架实际上是以英国法为模板制定的，其中恶意投标，尽管很罕见，但是，这是被允许的，这意味着，在将来的某个时点上，迪拜国际金融中心有可能发生恶意投标。

RIAA
Barker
Gillette

Hasan Rizvi

执行合伙人，RIAA Barker Gillette (Middle East) LLP

Hasan Rizvi是RIAA Barker Gillette (Middle East) LLP的中东执行合伙人。他专注于公司法、商业与私募股权。Hasan的执业领域包括项目融资、重组、企业融资以及争议解决。他参与了中东、亚洲和非洲地区多个行业与部门的一系列备受关注的交易。

Hasan在企业方面的专长包括为跨国和国内企业、私募股权公司以及家族企业集团的业务和管理、企业结构、兼并、收购和投资合作提供咨询。他经常为基金发起人、投资者和资产管理公司就基金组建、投资、结构设计以及监管合规等方面提供帮助。

Hasan在基础设施和能源项目、股权和债务资本市场交易以及企业重组方面有广泛的工作经验。

他在私人客户方面的专长包括向高净值个人和家族集团提供与家族办事处、私人投资和持股结构有关的战略咨询服务。

在建立RIAA Barker Gillette (Middle East) LLP之前，Hasan曾在诸多其他国际律师事务所中获得过合伙人地位。他已在中东工作超过15年之久。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？（例如，反垄断或国家安全法）

收购交易通常不受国家安全立法监管或审核。不过，对于有些部门，收购交易需要获得政府机构的审批和／或同意，包括但不仅限于内政部、阿拉伯联合酋长国中央银行、保险管理局和武装部队总部。

阿拉伯联合酋长国最近还颁布了联邦法案2012年第4号，关于竞争监管的法案，该法案主要监管阿拉伯联合酋长国的反竞争行为和垄断惯例。对于提议的任何有可能导致相关市场的市场份额超过40%的经济集中提案，在并购之前都需要从经济部竞争管理委员会获得审批，其中包括兼并或收购。这既适用于国内并购交易，也适用于跨境并购交易。

5. 进行这些交易时需要哪些文件？

交易双方可能会希望记录下他们同意的要点，及他们准备继续相关交易的基础。因此，所提议交易的主要条款会被列在意向书中。在双方同意的独家谈判阶段，也可能提供意向书。意向书不具备法律约束力，但是可以记录和执行双方的意图，是买卖协议谈判的起点。交易双方应仔细考虑他们是否愿意让这些协议条款变得具有法律约束力，并明确列出他们希望具有法律约束力的规定（如果有的话）。

在岸交易或在迪拜国际金融中心实施交易所需要的其他初步的基本文件还包括：

(a) 一份信息备忘录；

(b) 一份保密协议；

(c) 组建授权书，包括董事会会议记录和相关授权书；

(d) 一份意向书协议；

(e) 一份锁定协议；

(f) 一份程序函；

(g) 一份邀约；

(h) 一份收购协议；

(i) 所有辅助文件：如控制权更改请求、交易服务协议、关键员工协议、知识产权许可证和其他重要文件；

(j) 附带一系列保密文件的保密函；

(k) 申报表；以及

(l) 如果交易是兼并或收购一家在岸公司，则需要一份经阿拉伯联合酋长国公证人公证的阿拉伯语或英语及阿拉伯双语的标准股份转让表格。

关于离岸交易（在任何一个免税区开展的交易），文件基本相同，具体需要什么文件取决于相关免税区的要求。通常需要一份股东批准交易的决议书，在售出股份的交易中，要向股份购买者出具新的股份证书。相关监管机构或免税区管理局也会为公司出具一份经过修订的许可证，登记所有权的变更。

6. 这些交易须缴纳哪些政府费用？

除了显然需要支付的律师（包括本地律师）、商业和金融顾问费用之外，在执行涉及股份或其他资产转让的协议时，交易双方还需要支付公证人费用。各种其他申报也有可能产生收费，如：在收购公司寻求收购融资时，以及给相关银行提供担保产品时；给相关机构提供关于担保资产的各种申报时，也有可能导致产生费用或收费。

交易的规模、复杂性和时间框架会影响适用于相关交易的收费和费用。交易还可能会任命各种外部咨询顾问，履行各种高度专业性的服务，像风险管理审核、收购后的整合、尽职调查，以及公共关系服务。

7. 交易是否需要股东的同意或批准？

根据联邦法案和迪拜国际金融中心法案，董事必须根据公司的目标和公司股东授予他或她的权力行事。因此，董事在签署任何对公司具有约束力的协议之前，必须确保他或她已获得必要的内部批准。通常的情况是附上要求股东批准交易的条件。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

在岸：

阿拉伯联合酋长国的公司监管主要以上市公司为主。根据联邦法案第 22 条，公司董事必须“以公司的目标为目标，利用公司赋予他们的权力做协议中规定的所有事情”。

另外，如 SCA 的公司监管法典中第 14 条所规定的那样，在证券市场上市的公共持股公司的董事，必须避开实际或潜在的利益冲突，可能不能参与相关交易决策的投票。如果违背这些职责，那么根据联邦法案第 162 条，公司董事须“为其所有欺诈行为、滥用权力，以及违背联邦法案或公司组建章程的规定或其管理错误而对公司、股东和第三方负责”。

董事必须向其他董事澄清任何与所提议的公司交易有关的利益冲突，并且不允许在相关交易的决议中投票。

对第三方的责任：

在收购交易中，股份的购买者会面临相关目标公司签署长期合约的危险。这样的合约通常包括一项条款，实际上赋予其他第三方在目标公司控制权变更时终止合约的权利。这些“控制权变更”条款很明显对购买实体而言更是一个问题，但是剥离权益的公司应该知晓，根据现有安排，他们也有义务从相关第三方获得关于控制权变更的同意书。

对员工的责任：

据我们所知，根据阿拉伯联合酋长国的法令，卖方在终止其与员工之间的就业合同时，没有义务同员工协商。但是，最可取的做法是，卖方在考虑解雇员工或终止他们的就业合同时，把公司的内部政策和程序考虑在内。

迪拜国际金融中心：

迪拜国际金融中心的法律包含董事代表公司最大利益的责任。董事被要求根据人们对一

个审慎的人可以期望的谨慎和技能标准来履行他们的职责。

迪拜国际金融中心的债权法附表 3 也要求公司董事履行忠诚、保密、谨慎、技能和勤奋的信托责任，以及避免存在利益冲突和享有秘密利润的义务。关于员工，应遵守的法令规定包括迪拜国际金融中心法案 2005 年第 4 号劳动法及其任何修订。

9. 哪些情况下，目标公司须支付分手费？

据我们所知，在阿拉伯联合酋长国的私人交易中，分手费安排不像在英国那么普遍。

在岸：

据我们所知，并没有关于分手费安排的规章。不过，根据目前的监管体制，交易方可能会同意支付分手费，除非 SCA 另有规定。建议董事考虑他们作为在岸公司董事的一般责任。

迪拜国际金融中心：

类似地，根据迪拜国际金融中心的法律体制，并没有关于分手费的禁令。但是，关于此类安排，需要意欲给出邀约的公司通过公告的形式予以披露。同意为目标公司的董事支付分手费的范围基本上是以他们的职责为基础的。

10. 要约可否附加交易相关的条件？

许多在岸收购都是分开交流和完成的，因为需要从外部机构获得各种各样的审批和同意书。买方当然希望作为一个先决条件把某些条件在交易之前或之后包括进来。其中包括必要的弃权声明、审批和同意书，以及经济发展部或相关免税区管理局会批准股份转让，并出具一份表明所有权变更的修订许可证，因为没有它，目标公司将不被允许经营。

还有一些与目标公司经营所在的特定部门有关的附加条件。例如，关于银行业务或金融服务业务，需要获得阿拉伯联合酋长国中央银行批准。需要事先获得审批的其他部门包括教育、医疗保健和电信。邀约附加的条件则完全取决于部门，勤勉的买方应该寻求把对于目标公司非常必要的条件包括进来。

同时请参见下面的问题 11.

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

在岸：

据我们所知，目前没有法律法规规定从一个潜在投标人或购买者那里融资的最低水平。不过，在买卖协议中，可以就买方为相关交易融资的能力提出条件。但这将取决于相关各方的谈判力量。

迪拜国际金融中心：

在迪拜国际金融中心的法律体制中，尤其是根据 DFSA 接管规则手册第 2.4.4 条规则，投标人不得宣告一家公司打算投标，除非投标人及其财务顾问有适当的理由相信投标人能够并且愿意竞标。此外，关于一家公司意欲投标的公告必须包括由财务顾问或任何其他适当的第三方所做的确认，证实投标人有足够的资源完全接受标的。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

在岸：

据我们所知，在阿拉伯联合酋长国，没有习惯的或强制性的‘挤出’规则或程序。这意味着，投标人不能获得关于他们可收购目标公司 100% 股份的保证，除非所有股东都接受邀约。

迪拜国际金融中心：

在迪拜国际金融中心公司法中，是存在‘挤出’程序的，其中要约人可以依靠权利买断少数股东的股份。但是，要约人只有在已经收到公司已发行股本的 90% 时，才可以这样做。

13. 什么是完成业务合并之前必须遵守的等待期或通知期？

在岸：

在接管上市公司时，交易双方可以向市场做出联合声明。SCA 并没有规定具体的时间框架，但是 SCA 和相关的股票交易所会协助

交易双方设定合适的时间表。SCA 和相关的股票交易所将为招标提议一个时间表，让股东有合理的时间做出关于要约的知情决策。

迪拜国际金融中心：

在迪拜国际金融中心的框架下，若接管上市公司，则必须在公司意欲投标的公告发布之后的 21 天内，把要约文件发送给目标公司的股东。在派发要约的至少 24 小时前，必须把要约书提交给 DFSA。当发布了一家公司意欲投标的公告时，时间表即被触发，也就是：

(a) 在要约文件被派送之后至少 35 天内，要约必须保持有效；

(b) 一旦要约被公开宣布无条件接受，那么在要约原本的到期之日后，还需要开放不少于 14 天；

(c) 在要约被派送之后的 21 天内，目标公司的董事会需要向其股东出具一份目标传单，随附其关于相关投标的观点；以及

(d) 一旦投标公开宣布无条件接受，则额外允许 21 天来履行或放弃剩余的条件。如果在此期间未履行此类条件，则投标失效。

14. 是否有适用于被收购公司的行业特定规则？

如上面的问题 10 所提及，在很多行业中，收购交易都需要事先获得相关政府机构的批准。这主要取决于目标公司所处的相关行业。有自己特定的规则和限制的常见行业包括：

(a) 金融服务；

(b) 电信；

(c) 医疗保健；

(d) 教育；以及

(e) 公用事业部门。

15. 跨境交易是否受任何特殊法律要求的制约？

如在本指导文件中之前所讨论的那样，49/51 规则始终对在岸公司的外国投资者有重大限制。49/51 规则对国民有利，要求每一个根据联邦法案组建的在岸公司，不少于 51% 的股份资本由阿拉伯联合酋长国国民持有。因此，收购阿拉伯联合酋长国在岸公司的外国投资者可拥有的目标公司股份不得超过其总股份资本的 49%。但是，也有一些方法可以绕开这一规则；其中包括：

(a) 专门制定一些组织章程大纲及细则，为外国投资者提供关于在岸公司的更多控制权和权利；以及

(b) 股东协议，可规定股东的权利，为外国投资者提供关于阿拉伯联合酋长国在岸公司的更多控制权。

一些受监管的行业部门，包括建在规定区域之外的房地产，仍然是外商投资的禁区，而且 / 或者需要审批，此类审批非常耗时，而且通常难以获得。

据我们所知，在迪拜国际金融中心，没有关于外国投资者拥有股份的限制，不过，发生在特定部门的在岸或离岸收购，如航空公司、公用事业公司和银行，通常会额外受到所有权限制，因此需要从相关机构获得适当的同意书和 / 或许可证。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

阿拉伯联合酋长国劳动法（1980 年第 8 号）是在阿拉伯联合酋长国适用的就业立法。未来的收购者需要了解以下内容：

(a) 不是阿联酋人的所有在岸公司员工都需要按照联邦劳工部（以下简称为“部门”）的要求签署就业合同。就业合同需要在部门注册，以便于新员工获取劳工卡和居住签证。就业合同可以有额外的条款和条件作为补充，只要它们不与法律冲突即可；

(b) 阿拉伯语言是所有在岸公司就业合同的官方语言（在很多免税区，包括迪拜国际金融中心，就业合同用英语就足够了）；

(c) 阿拉伯联合酋长国的就业合同有两类：

(i) 有限期限（不超过两年的固定期限），就业合同必须包括一份终止通知书；或者

(ii) 无限期限，雇主可以在给出 1 到 3 个月通知的情况下根据无限期合同终止就业。

(d) 由于外派人员没有养老金计划，所以在就业合同终止时，员工有权利获得退职金。退职金是根据最后的基本工资，并考虑员工的服务年限；

(e) 现在，雇主被强制为雇员缴纳医疗保险；以及

(f) 关于员工工资，没有应支付的社会保险或所得税。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

在岸：

最近一直有关于放宽 49/51 规则，鼓励外商直接投资进入阿拉伯联合酋长国在岸公司的讨论。2016 年，阿拉伯联合酋长国经济部颁布了一项外商投资法草案；根据该法案，当局鼓励外商直接投资进入各个部门。这将如何影响对上市公司的并购，以及外国投资者可以对哪些部门进行 100% 的投资，还不清楚。

迪拜国际金融中心：

据我们所知，目前没有提议的提案或改革。

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

In Ukraine, laws and regulations that may apply to mergers and acquisitions are represented by a large number of generally applicable legislative acts that also govern other types of transactions; laws or regulations that specifically govern just mergers and acquisitions are very few. By way of example, legislation in the field of competition law and legislation governing shares and other securities, will also be relevant to mergers and acquisitions.

The applicable laws and regulations include the following:

(a) the Civil Code of Ukraine (2003);

(b) the Commercial Code of Ukraine (2003);

(c) Law of Ukraine No. 1576-XII 'On Commercial Companies' (1991);

(d) Law of Ukraine No. 514-VI 'On Joint Stock Companies' (2008);

(e) Law of Ukraine No. 2210-III 'On Protection of Economic Competition' (2001);

(f) Law of Ukraine No. 448/96-VR 'On State Regulation of the Securities Market in Ukraine' (1996);

(g) Law of Ukraine No. 2664-III 'On Financial Services and State Regulation of Financial Services Markets' (2001);

(h) Law of Ukraine No. 3480-IV 'On Securities and Stock Market' (2006);

(i) Law of Ukraine No. 3528-IV 'On Holding Companies in Ukraine' (2006);

(j) Order No. 33-p of the Antimonopoly Committee of Ukraine (the "**AMC**") on Approval of the Regulation 'On the Procedure for Document Filing to the Antimonopoly Committee of Ukraine for Prior Approval of Concentration of Business Entities' dated 19 February 2002;

(k) Order No. 49-p of the AMC on Approval of the Methodology 'On Determination of the Monopolistic (Dominant) Position of Undertakings in the Market' dated 5 March 2002;

(l) Regulation 'On the Procedure of Registration and Licensing of Banks, Opening of Separate Subdivisions' affirmed by Resolution No. 306 of the Management Board of the National Bank of Ukraine (the "**NBU**") dated 8 September 2011;

(m) Regulation No. 2531 of the National Commission for Regulation of Financial Services Markets (the "**Financial Services Commission**") 'On Approval of the Procedure for Granting Permit to Acquisition of Significant Interest in Financial Institutions' dated 4 December 2012;

(n) Decision No. 817 of the National Securities and Stock Market Commission of Ukraine (the "**Securities Commission**") 'On Approval of the Procedure and Conditions of Licencing to Perform Particular Types of Professional Activity in the Stock Market (the Securities Market)' dated 14 May 2013; and

(o) Decision No. 394 of the Securities Commission 'On the Procedure for Approval

of Acquisition of a Significant Interest in a Professional Participant of the Stock Market or Its Increase in Such Manner that the Aforesaid Person Will Possess or Control Directly or Indirectly 10, 25, 50 or 75 Percent of such Participant's Charter Capital or Related Voting Right in Its Governing Bodies' dated 13 March 2012.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

The regulator that usually plays a role in mergers and acquisitions is the AMC, which is the national competition authority. Because the financial thresholds for merger clearance in Ukraine are quite low, a Ukrainian merger clearance will usually be required. Moreover, there are no foreign exemptions in Ukraine and therefore, a transaction involving foreign entities with no presence in Ukraine, can nonetheless require obtaining a Ukrainian merger control clearance.

The Securities Commission is the national securities regulator and will play a role in merger and acquisitions involving Ukrainian joint stock companies. A Ukrainian joint stock company ('*aktsionerne tovarystvo*') (each, a "**JSC**") is a company that issues shares. Unlike a JSC, a Ukrainian limited liability company ('*tovarystvo z obmezhenoyu vidpovidal'nistyu*') (each, an "**LLC**") – which is the other common type of corporate entities in Ukraine – cannot issue shares and hence, is not regulated by the Securities Commission (LLCs issue equity in the form of so called participatory interests). Accordingly, where a transaction concerns an LLC, the Securities Commission will not be involved. On the contrary, a transaction in respect of a JSC (and in particular, any transfer or issue of shares and also changing officers of a JSC) will involve some interaction with the Securities Commission. Approval of the Securities Commission will also be required for an acquisition of a Ukrainian securities dealer or underwriter, or another professional participant of the securities market.

Depending on the industry where a merger or an acquisition takes place, the NBU or the Financial Services Commission can also play a role. For example, approval of the NBU is required for an acquisition of a Ukrainian bank, whilst the Financial Services Commission approves acquisitions of other financial institutions, such as insurance companies and factoring companies.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Ukrainian law does not use the terms 'hostile bid' or 'hostile takeover', hence they cannot be considered as being directly restricted or permitted. In Ukraine, executive and supervisory boards do not influence the shareholders' decision regarding disposal of their shares in a company to other persons, so traditional concepts of hostile bids do not apply.

Examples of hostile acquisitions of companies, in a broad sense, include a share issue leading to dilution of a shareholder's interest in a JSC and expelling a participant of an LLC on the grounds of failure to fulfil its obligations as a participant of that LLC.

The following rules, in particular, are relevant in the context of a takeover of a JSC:

(a) a person intending to acquire 10% or more of the shares of a JSC (a so called significant stake) is required to notify that JSC and the Securities Commission of the same, and such notification will need to be made at least 30 days prior to the intended acquisition;

(b) a JSC in which a significant stake is being acquired, is expressly prohibited from taking any measures to prevent that acquisition;

(c) a person holding 95% or more of the shares of a JSC has squeeze-out rights vis-à-vis the minority shareholders of that JSC (please see question 12 for more details); and

(d) a person that acquired more than 50% of the shares of a private JSC, or more than 50% but less than 75% and then 75% or more of the shares of a public JSC, is required to undertake a mandatory tender offer (the "**MTO**") process.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

There are certain restrictions applicable to takeovers and mergers of Ukrainian companies. Such restrictions are primarily contained in the following legislation:

(a) Law of Ukraine No. 2210-III 'On Protection of Economic Competition' (2001), which mandates obtaining a prior merger control clearance for certain types of transactions where the financial thresholds for a Ukrainian merger clearance are exceeded;

(b) Law of Ukraine No. 2121-III 'On Banks and Banking' (2000), which requires obtaining approval of the NBU for a direct or indirect acquisition of 10%, 25%, 50%, or 75% of the shares (each, a '**Qualifying Stake**') in a Ukrainian bank;

(c) Law of Ukraine No. 2664-III 'On Financial Services and State Regulation of Financial Services Markets' (2001), pursuant to which the Financial Services Commission's approval is required to acquire a Qualifying Stake in a financial institution other than a bank and other than a corporate investment fund (so such approval will be required in respect of, for example, insurance companies, leasing companies, credit unions, and pension funds). Without this approval, a purchaser of such financial institution will not be allowed to vote their shares in that financial institution;

(d) Law of Ukraine No. 3480-IV 'On Securities and Stock Market' (2006), based on which the Securities Commission approves an acquisition of a Qualifying Stake in professional participants of the securities markets, such as dealers and underwriters of securities;

(e) Industry-specific legislation, such as:

(i) Law of Ukraine No. 74/95-BP 'On Information Agencies' (1995) – this law caps foreign investment in an information agency at 35% of all shares in that information agency; and

(ii) Law of Ukraine No. 3759-XII 'On Television and Radio Broadcasting' (1993) – this law prohibits persons from those jurisdictions which under Ukrainian law qualify as offshore jurisdictions, from owning broadcasting companies in Ukraine; and

(f) Law of Ukraine No. 1644-VII 'On Sanctions' (2014) – certain restrictions can be applied to persons that have been sanctioned pursuant to this law; in particular, transactions with the shares of sanctioned persons may be banned and the sanctioned persons may be precluded from participating in privatisation tenders of Ukrainian state-owned companies or public procurement tenders in Ukraine.

5. What documentation is required to implement these transactions?

For an acquisition, a sale and purchase agreement is the main transaction document. The parties will also normally sign a confidentiality or non-disclosure agreement early in the negotiation process, and may sign a (non-binding) term sheet or a memorandum of understanding. An escrow agreement, providing for the retention of a portion of the purchase price, is also common. Depending on the specifics of each transaction, the parties may also sign assignment agreements in respect of existing debt, intellectual property rights, or other assets.

A transfer of shares in a JSC will not occur unless the transferee and the transferor give appropriate transfer orders to their respective custodian. The transfer orders are ancillary but necessary documents to have the shares transferred from the seller's account to the buyer's account. As regards an LLC, any change in the ownership of an LLC will need to be reflected in the LLC's charter ('*statut*'), which is the LLC's constitutional document. Hence, a necessary procedural step for an acquisition of an LLC is having a revised charter, with the name of the buyer in it, put in place. Because the charter is approved at a meeting of the participants of the LLC, it will be necessary to call and hold such meeting – this process will also need to be properly documented.

If the securities being acquired are shares in a JSC, a number of notices will have to be given to the Securities Commission; the process to be followed with the Securities Commission will depend on the percentage of shares being acquired. For example, where an acquisition concerns more than 50% of all shares, the buyer will have to go through the MTO process soon after closing of the original acquisition.

For a merger, which in Ukraine could be in the form of a merger ('*zlyttya*') or an accession ('*pryyednannya*'), apart from various ancillary documents, there will be a merger/accession agreement and a transfer act (the latter is a document setting out all outstanding liabilities of the ceasing company that will be assumed by the successor company). Both types of merger require approvals of the shareholders/participants, and also necessitate certain steps to be taken with the Securities Commission, such as registration of the share issue by the newly formed company.

6. What government charges or fees apply to these transactions?

Depending on the type of transaction, the following government charges or fees may apply:

(a) on a share issue, a state duty at the rate of 0.1% of the aggregate nominal value of the shares issued;

(b) on a sale of an LLC, a nominal fling fee for the registration of the revised charter of that LLC with the State Registrar;

(c) on applying for a merger clearance approval from the AMC, a filing fee in the amount of 1,200 times the individual tax-free allowance, currently 20,400 Ukrainian Hryvnias (or approximately, EUR 650);

(d) on a transfer of land, buildings, vehicles and certain other assets, a state duty at the rate of 1% of the purchase price administered by public notaries, or a notarial fee administered by private notaries (in the amount of not less than the state duty), plus a nominal filing fee for the registration of the buyer as the new owner in the relevant public registers (as applicable); and

(e) on a transfer of assets (other than those referred to in (d) above), a pension duty, at various rates, charged as a percentage of the purchase price;

There is no transfer duty payable on a transfer of shares in a JSC or of participatory interests in an LLC.

7. Do shareholders have consent or approval rights in connection with a deal?

Participants of an LLC and, to a lesser extent, shareholders of a JSC have certain rights which, depending on the percentage of equity held, may allow them to delay or prevent a deal.

A sale of participatory interests in an LLC to a third party is subject to the other participants' pre-emptive rights. Such pre-emptive rights are more similar to a right of first refusal, rather than a right of first offer, making it harder to sell participatory interests to a third party. As a general rule under the law (which can be changed in the LLC's charter), the participants will have one month to exercise their pre-emptive rights.

Moreover, a transfer of shares in an LLC to third parties may be altogether prohibited by that LLC's charter; in such case, an amended charter will have to be approved before the deal can be done, and this requires approval by participants holding more than 50% of all votes in that LLC. Finally, because any change in the ownership of an LLC is reflected in its charter, approval of the amended charter by the participants of the LLC will have to be obtained at closing of the deal.

Shareholders of a private JSC will not necessarily have pre-emptive rights on a transfer of shares to a third party, but for private JSCs with just a few shareholders, the JSC's charter will normally provide for pre-emptive rights.

Where a deal qualifies as a so called significant transaction of a JSC, approval of that JSC's shareholders will be necessary. In particular, a transaction with a value in excess of the value of 25% of the JSC's assets as per its latest annual accounts, must be approved by the JSC's shareholders. This, however, will be primarily relevant for the seller and not the target itself (i.e., where the seller is a Ukrainian JSC and it is disposing of its shares/participatory interests in another Ukrainian company).

Mergers of both types will require approval of the shareholders/participants.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Directors generally owe duties to the company itself and must act in its interests, in good faith and reasonably, and must not exceed their powers.

Under the Ukrainian derivative action rules, a shareholder who holds at least 10% of all shares in the company or shareholders who in aggregate hold 10% or more of all shares in the company, may bring a derivative action before a local Ukrainian commercial court on behalf of the company against a company's director, seeking to recover damages caused by that director's actions. A company director may be liable for, in particular, exceeding his/her powers, providing inaccurate information to the shareholders, or failing to act where his/her duties required to take action.

Controlling shareholders do not, under the law, owe duties to the stakeholders on a deal.

9. In what circumstances are break-up fees payable by the target company?

There is no specific regulation of break-up fees payable by target companies. Accordingly, general principles of contract law will apply where the target agreed to pay a break-up fee and where the agreement on the break-up fee is legally binding. The Ukrainian contract law allows contractual penalties so a penalty in the form of a break-up fee should in principle be enforceable in Ukraine.

10. Can conditions be attached to an offer in connection with a deal?

Based on the general principles of the Ukrainian contract law, an offer must contain all essential terms and express the intention of the offeror to be legally bound if the offer is accepted. The law is silent regarding any other, not-essential terms or conditional offers. Conditions precedent can, and often, are used, e.g. obtaining the Ukrainian merger control approval. Conservatively, only those actions or events which are beyond the control of the parties to the contract, can be used as conditions precedent; however, recent court practice seems to have departed from that conservative view.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

There is no specific regulation on this matter, either for private or public deals. There are some statutory rules relating to purchase price and settlements that apply as part of the MTO

process and the squeeze-out process. These include the requirement to pay a market price to the minority shareholders, to complete settlements within 30 days after the expiry of the acceptance period under an MTO offer and, in respect of public JSCs, to disclose the source of funds. During the squeeze-out process, an escrow account will need to be opened and used for the majority shareholder to transfer the purchase price for the minority shareholders' shares.

Also, under the industry-specific rules, buyers of Ukrainian banks and other financial institutions are required to disclose, to the relevant regulator, the source of funds to be used to finance the deal. Moreover, sufficient funds will need to be shown by an intended buyer of a Ukrainian bank, as per the methodology adopted by the NBU.

Based on the doctrine of the freedom of contract, the parties to the contract are free to agree on the method of deal financing and could, for instance, include a condition precedent to that effect.

Financial assistance is prohibited for JSCs. Specifically, a JSC is not allowed to give a loan in order to fund the purchase of its shares, or act a guarantor for the buyer under loan agreements concluded to finance the purchase of shares in that JSC, or issue shares for debt securities issued by the purchaser or for promissory notes.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

The squeeze out procedure was incorporated into Ukrainian law only in March 2017. According to Article 65-2 of the Law of Ukraine 'On Joint Stock Companies', the dominant shareholder (defined as a holder of 95% or more of all shares) may acquire the remaining shares through the following key steps:

(a) the dominant shareholder notifies the Securities Commission and the JSC itself of its acquisition of 95% or more of all shares in that JSC;

(b) the JSC arranges for an independent valuation of its shares and, within 25 business days after the receipt of the dominant shareholder's notice, approves the market value of the minority shareholders' shares;

(c) the dominant shareholder opens an escrow account, with the minority shareholders as the beneficiaries of the funds to be deposited into that escrow account;

(d) within 90 days of its initial notice, the dominant shareholder sends an irrevocable offer, addressed to the JSC, requiring the remaining shareholders to sell all of their shares to the dominant shareholder;

(e) the JSC publishes such offer on its website and sends copies of the same to the minority shareholders;

(f) the dominant shareholder transfers the purchase price to the escrow account, and the funds are subsequently distributed to the minority shareholders (or paid out in cash); and

(g) the custodian(s) of the shares being acquired will then arrange for the transfer of the shares to the account of the dominant shareholder.

13. What is the waiting or notification period that must be observed before completing a business combination?

The critical waiting/notification period that must be factored in within a deal timetable is that in respect of a merger control clearance from the AMC.

An application for a merger control clearance can be made fairly in advance of the proposed transaction, on a proviso that such clearance is generally valid for one year so the transaction would need to be closed within one year of the date of the AMC's approval.

The AMC will accept or reject an application within 15 calendar days from the day of the

receipt of the notification. If the AMC accepts the notification for review on substance, it must be considered within the following 30 calendar days. This brings the general notification period to 45 calendar days. However, if the AMC starts an investigation (a so-called Phase II review), the review process will be extended by up to additional 130 calendar days. For qualifying business combinations (e.g. where the combined market share of the parties does not exceed 15% in any Ukrainian market), there is a fast track procedure of up 25 calendar days in total.

14. Are there any industry-specific rules that apply to the company being acquired?

Industry-specific rules will apply to, in particular, the acquisition of a Ukrainian bank or a financial company other than a bank (e.g. an insurance company). An intended buyer of a Qualifying Stake in a bank will need approval of the NBU, whilst an acquisition of another financial company will require the Financial Services Commission's approval.

One of the very few restrictions on foreign investments relates to agricultural land. In a mergers and acquisition context, a Ukrainian company which is entirely owned by a foreign person may not own agricultural land in Ukraine.

15. Are cross-border transactions subject to certain special legal requirements?

Foreign investors in Ukraine generally have the same rights and obligations as Ukrainian persons.

On cross-border transactions, the parties have to be mindful of the remaining currency control restrictions, which were originally put in place in 2014 due to the market volatility and which are expected to be gradually abolished. In particular, there is a cap, currently in the amount of USD 5 million per month, on repatriation of dividends and sale proceeds by foreign investors.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Ukrainian labour regulations are historically pro-employee. In particular, the employer's right to terminate an employment arrangement is quite limited; a notable (and a relatively recent) exception to that rule is the shareholder's/participant's right to dismiss a company officer at any time.

Pursuant to the Ukrainian Code of Labour Laws (1971) art 36, in the event of a change in the ownership of the employing entity or a merger/accession involving the employing entity, the employment relationship continues. Employment in the context of a transaction could be terminated by way of a collective redundancy; this requires a minimum notice of two months.

At the same time, the employees generally do not have any consent rights on a business combination.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

In respect of the recent regulatory changes as applicable to M&A, earlier this year the laws were changed to introduce squeeze-out and sell-out rights, and escrow agreements. Some earlier changes include simplified corporate registrations rules, a derivative action right, and improved rules regarding independent/non-executive directors and related party transactions.

There are currently proposals to allow irrevocable powers of attorney and also shareholders agreement containing English law style mechanisms. Overall, a further improvement of the legislation is expected, particularly as part of the implementation of Ukraine's obligations under the EU-Ukraine Association Agreement.

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1. 您所在管辖区有哪些主要适用的并购法律法规？

在乌克兰，适用于收购和兼并的法律法规以大量的一般性适用的立法行为为代表，上述立法行为也规管其他类型的交易；专门适用于兼并和收购的法律或法规很少。举例来说，竞争法和适用于股票和其他证券的法律也与兼并和收购有关。

适用法律和法规如下：

(a) 《乌克兰民法典》(2003)；

(b) 《乌克兰商法典》(2003)；

(c) 乌克兰第 1576 号 -XII 号《商业公司法》(1991)；

(d) 乌克兰第 514-VI 号《股份公司法》(2008)；

(e) 乌克兰第 2210-III 号《保护经济竞争法》(2001)；

(f) 乌克兰第 448/96-VR 号《乌克兰证券市场国家管制法》(1996)；

(g) 乌克兰第 2664-III 号《金融服务和金融服务市场国家管制法》(2001)；

(h) 乌克兰第 3480-IV 号《证券和股票市场法》(2006)；

(i) 乌克兰第 3528-IV 号《乌克兰控股公司法》(2006)；

(j) 《申请乌克兰反垄断委员会事先批准企业兼并之文件提交程序法规》，该法规于 2002 年 2 月 19 日经乌克兰反垄断委员会 (“AMC”) 第 33-p 号命令批准；

(k) 《关于确定市场垄断（支配）地位的方法》，2002 年 3 月 5 日经 AMC 第 49-p 号命令批准；

(l) 《银行注册和许可及设立独立支行的程序的法规》，2011 年 9 月 8 日经乌克兰国家银行管理委员会 (“NBU”) 第 306 号决议确定；

(m) 全国金融服务市场管理委员会 (“金融服务委员会”) 2012 年 12 月 4 日第 2531 号《关于授予在金融机构中获得重大权益的许可证之程序的法规》；

(n) 乌克兰国家证券和股票市场委员会 (“证券委员会”)2013 年 5 月 14 日第 817 号《关于批准在股票市场（证券市场）进行特定类型专业活动的程序和条件的决定》；以及

(o) 《关于批准收购股票市场专业参与者重大权益或者以收购方式扩大在专业参与者管理机构中的权益（拥有或直或间接控制股票市场专业参与者 10%、25%、50% 或者 75% 的注册资本或相关投票权）之程序的决定》(证券委员会 2012 年 3 月 13 日第 394 号决定)；

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

管理兼并和收购的监管机构是 AMC，即国家竞争管理机构。由于在乌克兰，兼并审批的资金门槛相当低，因此在乌克兰进行的兼并通常需要兼并审批。而且，在乌克兰没有外国豁免，因此，涉及在乌克兰不设机构的外国实体的交易可能需要获得乌克兰合并控制许可。

证券委员会是国家证券监管机构，监管乌克兰股份公司的兼并和收购。乌克兰股份公司 (‘aktsionerne tovarystvo’) (“JSC”) 是发行股份的公司。与 JSC 不同，乌克兰有限责任公司 (‘tovarystvo z obmezhenoyu vidpovidal’ nistyu’) (“LLC”) ——乌克兰另

一种常见的公司类型——不能发行股票，因此不受证券委员会监管（LLCs 以所谓的参与权益形式发行股票）。因此，如果交易涉及有限责任公司，证券委员会将不参与。相反，股份公司的交易（特别是任何股份的转让或发行，以及股份公司的人员变更）将会受到证券委员会的某些监管。收购乌克兰证券交易商或承销商，或者证券市场中的其他专业参与者需要获得证券委员会的批准。

根据兼并或收购行业的不同，NBU 或金融服务委员会也会进行监管。例如，收购乌克兰银行需要获得 NBU 的批准，而收购其他金融机构（例如保险公司和保理公司）需要获得金融服务委员会的批准。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

乌克兰法律不使用“恶意收购”或者“敌意收购”的概念，因此不能直接被视为是被限制或被允许的。在乌克兰，行政和监督委员会不会影响股东出售其所持之公司股份的决定，因此传统的恶意收购的概念不适用。

从广义上讲，恶意收购公司的例子包括发行股票使得股东在 JSC 中的权益被淡化，以及以未能履行作为有限责任公司参与者的义务为理由驱逐参与者。

以下规则特别与收购 JSC 有关：

(a) 有意收购股份公司 10 % 或以上股份（所谓重大股份）的人士须通知股份公司及证券委员会，该通知需在预期收购的至少 30 天前作出；

(b) 明确禁止采取任何措施阻止对股份公司重大股权的收购；

(c) 持有股份公司 95 % 或以上股份之人士拥有将该股份公司少数股东挤出的权利（详情请参阅问题 12）；和

(d) 收购一家非上市股份公司超过 50 % 的股份，或者收购超过 50 % 但少于 75 % 的股份且随后收购上市股份公司 75 % 或超过 75% 的股份的人士须进行强制性投标（“MTO”）程序。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？(例如，反垄断或国家安全法)

乌克兰公司的收购和兼并有一定的限制。这些限制主要包含在以下法律中：

(a) 乌克兰第 2210-III 号《保护经济竞争法》(2001)，规定超过乌克兰兼并批准财务门槛的某些类型的交易须事先取得兼并控制许可；

(b) 乌克兰第 2121-III 号《银行和银行业务法》(2000)，要求直接或间接收购乌克兰银行 10 %、25 %、50 % 或 75 % 的股份（每个是“**符合条件的股份**”）需要获得 NBU 的批准；

(c) 乌克兰第 2664-III 号《金融服务和金融服务市场国家管制法》(2001)，根据该法，获得除银行和企业投资基金以外的金融机构的合格股权需要金融服务委员会的批准（因此收购保险公司、租赁公司、信用合作社和养老基金需要批准）。未经批准，该金融机构的收购方不得在该金融机构中投票；

(d) 乌克兰第 3480-IV 号《证券和股票市场法》(2006)，根据该法，证券交易委员会批准对证券市场专业参与者（如证券交易商和证券承销商）的合格股权进行的收购；

(e) 具体行业法律，例如：

  (i) 乌克兰第 74/95-O-75 号《信息机构法》(1995) ——该法律将外资在信息机构中持有股份的比例限定在 35%；和

  (ii) 乌克兰第 3759-XII 号《电视和无线电广播法》(1993) ——该法禁止来自被乌克兰法律认定为离岸法域的人士拥有乌克兰广播公司；和

(f) 乌克兰第 1644-VI 号《制裁法》(2014) ——对根据本法受到制裁的人可以适用某些限制；特别是与被制裁人员进行的交易可能被禁止，被制裁的人可能被禁止参与乌克兰国有公司的私有化招标或公共采购招标。

5. 进行这些交易时需要哪些文件？

对于收购，买卖协议是主要的交易文件。在谈判早期，双方通常也会签署保密或不公开协议，并可签署（不具约束力的）条款清单或谅解备忘录。规定保留部分购买价格的托管协议也很常见。根据每笔交易的具体情况，双方还可以就现有债务、知识产权或其他资产签署转让协议。

除非受让人和转让人向其各自的托管人发出适当的转让指令，否则股份公司不会发生股份转让。转让指令是辅助但必要的文件，使股份从被收购方帐户转移到收购方帐户。对于有限责任公司而言，有限责任公司所有权的任何变更都需要反映在有限责任公司的章程（'statut'）中，即有限责任公司的章程文件。因此，收购有限责任公司的一个必要程序步骤是修改章程，其中包含收购方的名称。由于章程是在有限责任公司参与者会议上批准的，因此需要召开和举行这样的会议——这个过程也需要适当的记录。

如果被收购的证券是股份公司的股票，则需要向证券委员会提交一些通知；证券委员会要遵循的程序将取决于被收购股份的比例。例如，如果收购超过 50% 的股份，则收购方在原始收购结束后需要完成 MTO 程序。

在乌克兰可以以并购（'zlyttya'）或加入（'pryyednannya'）的形式进行兼并，除了各种辅助文件，还需要并购 / 加入协议和转移行为（后者是一份列明将由继承公司承担终止公司所有未决债务的文件）。这两种兼并都需要股东 / 参与者的批准，并且还需要按照证券委员会的要求采取某些步骤，例如新成立公司的股票发行登记。

6. 这些交易须缴纳哪些政府费用？

根据交易类型，可能收取以下政府费用或规费：

(a) 发行股份时，税率为已发行股份总面值 0.1 % 的国家税费；

(b) 出售有限责任公司时，向国家登记处登记修改章程的象征性的申请费；

(c) 向 AMC 申请合并审批批准，申请费为个人免税补贴的 1200 倍，目前为 20,400 乌克兰格里夫纳（约 650 欧元）；

(d) 转让土地、建筑物、机动车和其他资产时，由公证人按照购买价格的 1% 征收的国家税费，或者由私人公证人征收的公证费（不少于国家税费），加上收购方在相关公共登记册中作为新所有者登记的象征性的申请费（如适用）；以及

(e) 资产转移（上述 (d) 项所述者除外）时，以不同税率按收购价格的百分比收取的津贴税；

转让股份公司股份或者有限责任公司的参与权益不需缴纳转让税。

7. 交易是否需要股东的同意或批准？

有限责任公司的参与者以及股份公司的股东在某种程度上拥有的某些权利，根据所持权益的百分比，这些权利可能使他们可以延迟或阻止交易。

向第三方出售有限责任公司的参与权益会受到其他参与者优先认股权的约束。这种优先认股权更类似于优先购买权，而不是优先报价权，该权利使得向第三方出售参与权益变得更加困难。根据法律的一般规定（可以在有限责任公司的章程中进行修改），参与者将有一个月的时间行使其优先认股权。此外，将有限责任公司的股份转让给第三方可能会被公司章程完全禁止；在这种情况下，修改后的章程必须在交易完成之前获得批准，这需要得到有限责任公司超过持有 50 % 投票权的参与者的批准。最后，由于有限责任公司所有权的任何变化都反映在其章程中，所以有限责任公司必须在交易结束时获得参与者对修改章程的批准。

非上市股份公司的股东未必享有对将股权转让给第三方的优先认股权，但对于只有少数股东的非上市股份公司，股份公司的章程通常会规定优先认股权。

如果一项交易符合所谓的股份公司重大交易，则该股份公司股东的批准将是必要的。特别是，根据最新的年度账目，价值超过股份公司资产 25 % 的交易必须经过股份公司股

东的批准。但是，这主要与被收购方有关，而非标的本身（即被收购方是乌克兰股份公司，并且正在处理其在另一家乌克兰公司的股份 / 参与权益）。

这两种类型的合并需要股东 / 参与者的批准。

8. 董事和控股股东是否对交易相关利益者负有任何责任？

董事一般对公司本身负有责任，必须善意地、合理地为了公司利益行事，并且不得超越其权力。

根据乌克兰派生诉讼规则，持有公司至少 10％股份的股东或者合计持有公司 10％以上股份的股东可以代表公司在乌克兰当地商事法院提起对公司董事的派生诉讼，寻求赔偿因该董事的行为造成的损失。公司董事可能会承担责任，尤其是因越权、向股东提供不准确信息，或者应采取行动而未能履行义务。

根据法律，控股股东对交易中的利益相关者负有责任。

9. 哪些情况下，目标公司须支付分手费？

没有具体法规规定目标公司应缴分手费。因此，当目标公司同意支付分手费而且有关分手费的合同具有法律约束力，则合同法的一般原则适用。乌克兰合同法允许合同违约金，所以在乌克兰，以分手费为形式的罚金原则上可以强制执行。

10. 要约可否附加交易相关的条件？

根据乌克兰合同法的一般原则，要约必须包含所有基本条款，并且表明如果要约被接受，要约人会受到法律约束的意向。法律对任何其他不重要的条款或有条件的要约没有规定。先决条件可以而且经常被使用，例如获得乌克兰的合并控制批准。保守地说，只有那些合同当事人无法控制的行为或事件才能作为先决条件；然而，最近的法庭实践似乎已经偏离了保守观点。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

无论是私人交易还是公共交易，这个问题没有具体的法规规定。有一些与收购价格和结算有关的法定规则作为 MTO 程序和挤出程序的一部分适用。这些包括要求向少数股东支付市场价格，在 MTO 要约接受期满后 30 天内完成结算，并且对于上市股份公司，要求公开资金来源。在挤出程序中，需要开设代管账户，用于大股东向少数股东转让收购价款。

此外，根据特定行业规定，乌克兰银行和其他金融机构的收购方需要向有关监管机构披露用于支付交易的资金来源。而且，根据 NBU 采用的方法，乌克兰银行的意向收购方需要足够的资金。

根据契约自由原则，合同当事人可以自由地就交易融资的方式达成一致，例如可以包括一个先决条件。

股份公司禁止财政资助。具体而言，股份公司不得为了资助收购方购买其股份而提供贷款，或者根据贷款协议作为收购方的保证人资助收购方购买其股份，或者为收购方发行的债务证券或本票发行股票。

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

2017 年 3 月，挤出程序才被纳入乌克兰法律。根据乌克兰《股份公司法》第 65-2 条，控股股东（定义为持有 95％或以上的股份）可能通过以下关键步骤获取剩余股份：

(a) 控股股东通知证券交易委员会及股份公司本身收购该股份公司 95％或以上的股份；

(b) 股份公司安排对其股份进行独立估值，并在收到控股股东通知后 25 个工作日内，同意少数股东股份的市值；

(c) 控股股东开立代管账户，将少数股东作为资金受益人置于该代管账户；

(d) 在首次通知后的 90 天内，控股股东向股份公司发送不可撤销的要约，要求其余股东将其全部股份出售给控股股东；

(e) 股份公司在其网站上公布此要约，并将其副本发送给少数股东；

(f) 控股股东将收购价款转入代管账户，并随后将资金分配给少数股东（或以现金支付）；和

(g) 被收购股份的保管人会安排将股份转移至控股股东的账户。

13. 什么是完成业务兼并之前必须遵守的等待期或通知期？

AMC 进行兼并控制许可的审查等待 / 通知期限必须在交易时间表内予以考虑。

兼并控制许可的申请可以在拟交易之前公正地进行，附带条件是这种许可通常有效期为一年，因此交易需要在 AMC 批准之日起一年内达成。

AMC 将在收到通知之日起 15 个日历日内接受或拒绝申请。如果 AMC 接受进行实质审查的通知，则其必须在随后的 30 个日历日内进行考虑。这使得一般通知期限变为 45 个日历日。但是，如果 AMC 开始调查（即所谓的第二阶段审查），则审查程序将再延长 130 个日历日。对于符合条件的企业兼并（例如，在乌克兰任何一个市场中，双方的合并市场份额不超过 15%），有一个总共 25 个日历日的快速程序。

14. 是否有适用于被收购公司的行业特定规则？

特定行业的规则将特别适用于对乌克兰银行或者银行以外的金融公司（例如保险公司）的收购。银行合格股份的意向收购方需要获得 NBU 的批准，而收购其他金融公司则需要金融服务委员会的批准。

对外资的限制之一是农业用地。在兼并和收购的情况下，一个完全由外国人拥有的乌克兰公司可能无法拥有乌克兰的农业用地。

15. 跨境交易是否受任何特殊法律要求的制约？

乌克兰的外国投资者一般与乌克兰人有相同的权利和义务。

就跨境交易而言，双方必须注意其他的货币管制限制，货币管理限制在 2014 年因市场波动而实施，预期会逐步取消。特别是，外国投资者汇回股息和销售收益目前有每月 500 万美元的上限。

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

乌克兰的劳工法规历来是亲职工的。特别是，雇主终止雇佣安排的权利是相当有限的；该规则的一个著名（也是相对最近的）例外是股东 / 参与者随时有权解雇公司高管。

根据《乌克兰劳动法典》(1971) 第 36 条，如果用人单位所有权发生变化或涉及用人单位的兼并 / 加入，雇佣关系仍会继续。就业在交易的背景下可以通过集体裁员终止；这需要至少两个月的通知。

同时，员工一般不具有对企业兼并的任何同意权。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

就适用于并购的近期监管变化而言，今年早些时候法律发生了变化，引入了挤出权和出售权以及托管协议。一些较早的变化包括简化的公司注册规则，派生诉讼权，以及改进的独立 / 非执行董事和关联方交易规则。

目前有建议允许不可撤销的授权书以及包含英国法律风格机制的股东协议。总体而言，预计法律将进一步完善，特别是为了履行乌克兰在《欧盟 - 乌克兰伙伴关系协定》中的部分义务。

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VB LAW
Your legal guide

1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

Generally, a transaction on mergers and acquisitions (M&A) is governed by the international treaties to which Vietnam is a member, the Law on Investment, the Law on Enterprises, the specialized laws (depending on the business lines of the target company) and other relevant laws (if any).

1. Pursuant to the Law on Investment, the M&A activities by an investor (either local investor or foreign investor) may be performed in the following forms of investment: capital contribution to an economic organization (which is an organization duly incorporated and operating under the laws of Vietnam), or purchase of shares or portion of capital contribution of such economic organization, or receipt of the transfer of an investment project or other cases of receipt of investment projects.[1]
2. The foreign investor may contribute capital to an economic organization in three (3) following forms:[2]
   (a) Purchase of shares on the initial public offering or of additional shares issued by shareholding companies;
   (b) Capital contribution to limited liability companies or partnerships; or
   (c) Capital contribution to economic organizations other than those as prescribed above.
3. The foreign investor may purchase shares or a portion of capital contribution of an economic organization in four (4) following forms:[3]
   (a) Purchase of shares in the target company (which is a shareholding company) from such target company or its shareholders;
   (b) Purchase of a portion of capital contribution of members of the target company (which is a limited liability company) to become a member of such target company;
   (c) Purchase of a portion of capital contribution of a capital contributing member of the target company (which is a partnership) to become a capital contributing member of such target company;
   (d) Purchase of a portion of capital contribution of members of other economic organizations not covered by three (3) aforementioned cases.
4. In addition to the form of investment, the capital contribution, or purchase of shares or portion of capital contribution made by the foreign investor must satisfy the conditions for (i) the ratio of ownership of charter capital of the target company (also known as the shareholding ratio) and (ii) the scope of operation, the participation by the Vietnamese party(ies) in implementation of investment activities and other conditions subject to international treaties of which the Socialist Republic of Vietnam is a member.

[1] Article 24 of the Law on Investment and Article 2.6 of Decree 118.
[2] Article 25 of the Law on Investment.
[3] Article 25 of the Law on Investment.

5. Depending on each business line of the target company, the transaction on M&A may also be governed by specialized laws and other laws relevant to such business line. Accordingly, the investor and the target company must fully satisfy conditions required by such laws. For example, if a local target company has a business line of real estate business and now it becomes a foreign-invested company (e.g. the foreign investor holds 51% of the charter capital of the target company), the operation on the real estate business of this target company may be restricted to certain operations permitted by the Law on Real Estate Business, instead of all operations permitted by law to a local company.

6. In Vietnam, land belongs to the entire people [of Vietnam] with the State as the representative owner and is under uniform management by the State. The State grants land use rights to land users in accordance with the Law on Land.[4]

   In the event that a local company has the right to use a land parcel under the laws of Vietnam and it now becomes a foreign-invested company (via the transaction on M&A), then the rights and obligations of the target company towards the land shall be subject to the controlling shareholding ratio of the foreign investor in such target company, in particular as follows:[5]

   (a) If the target company is an enterprise with 100% foreign owned capital or a foreign invested enterprise in which the foreign investor holds the controlling shareholding percentage in accordance with the legislation on enterprises, the target company only has certain rights and obligations towards the land, depending on the method of payment of land use fees and land rent;

   (b) If the target company is an enterprise in which the Vietnamese party holds the controlling shareholding percentage in accordance with the legislation on enterprises, such enterprise has the same rights and obligations as applicable to the [local] economic organizations (which includes enterprises, co-operatives and other economic organ izations prescribed in the civil legislation, excluding foreign-invested enterprises).

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

In normal cases, the People's Committee of provinces or cities is empowered to approve an increase of capital, a transfer of share or capital contribution and to issue amended licences to companies in their jurisdictions but outside of industrial parks, except for banks and insurance companies.

In cases where the transaction on M&A is performed in the form that the foreign investor receives the transfer of an investment project from a local company who is the investor of such project and the approval of the said investment project is subject to the authority of the National Assembly, the Prime Minister, or the provincial People's Committee, then the transaction on M&A may also be subject to the approval of the said authorities, the Ministry of Planning and Investment and/or other relevant Ministries (if any), as the case may be. [6]

The management authority of industrial parks does the same for companies located inside their industrial parks.

The State Bank of Vietnam and the Ministry of Finance shall be entitled to approve M&A

[4] Article 4 of the Law on Land.

[5] Article 183.4 of the Law on Land.

[6] Article 37 of Decree 118.

activities of commercial banks and insurance companies, respectively.[7]

Meanwhile, the State Securities Commission (SSC) and the Vietnam Securities Depository (VSD) shall take part in the management of M&A activities on securities trading floors.

In addition to the aforesaid authorities, subject to the business lines of the target company, other relevant competent authorities may get involved. For instance, with respect to the business line of international travel business, the Ministry of Culture, Sports and Tourism and the Vietnam National Administration of Tourism shall also play a key role; or in urban railway projects, the Ministry of Transport shall play the key role.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

The laws of Vietnam do not contemplate hostile bids as well as any restriction on hostile bids because the economic growth for companies in Vietnam has not fully developed.

In developing countries, hostile bids are made to make big profits out of listed companies whose market price are far below their book value and a successful hostile bid enables the acquirer to delist and dismantle the target company. Companies in Vietnam have not reached this state.

In Vietnam, a hostile bid, if any, is merely an expression. It occurs in both listed and unlisted companies in the sense that an acquirer uses different nominees to buy shares of a target company on the market or via the securities trading floors. In this way, the target company's management team is not aware of the takeover until the acquirer holds enough shares to summon an unordinary Shareholder General Meeting for changing the management. Parallel to the acquisition of shares as much as possible, the acquirer also approaches the company's minority shareholders to persuade them to support its proposal in the Shareholder General Meeting.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

Generally, M&A activity is encouraged and supported by the Vietnamese government. However, there are still several laws and regulations of Vietnam applicable to M&A activity to restrict certain takeovers and mergers, particularly as follows:

1. Regulations on competition

Any M&A transaction (known as economic concentration under the Law on competition) shall be prohibited if the participating companies have a combined market share of more than 50% in the relevant market, except in the following cases:[8]

(a) one or more of the companies participating in the transaction are presently at risk of being discovered or of becoming bankrupt;

(b) the transaction has the effect of extension of export or contribution to socio-economic development and/or to technical and technological progress.

In addition, if the companies participating in economic concentration have a combined market share in the relevant market from 30% to 50%, the legal representative of such companies must give a prior notice to the Vietnam Competition Agency (VCA). The proposed transaction shall be carried out only if the VCA issues a letter of confirmation certifying that the transaction is legitimate.

If the companies participating in economic concentration have a combined share in the relevant market of less than 30% or if the companies, after the M&A transaction, still fall within the category of small- and medium

[7] Article 29 of the Law on Credit Institutions and Article 69 of the Law on Insurance Business.

[8] Article 18 of the Law on Competition.

-sized enterprises as stipulated by law, they shall not be required to provide notification.[9]

2. Regulations on the ratio of ownership of foreign investors in Vietnamese enterprises

One of the important parts of the WTO Commitments of Vietnam is to provide the ratio of ownership of shares owned by foreign investors in specific service sectors, including but not limited to telecommunications, insurance, banking, transportation, movies, etc.

Under the laws of Vietnam, a foreign organization shall be entitled to own 100% of the charter capital of a securities business organization only if such foreign organization fully satisfies the requirements prescribed by laws, particularly as follows:

(a) it must conduct business operations in the sectors of banking, securities or insurance at least two (2) consecutive years immediately preceding the year of capital contribution to establish [the securities business organization] or of purchase of shares or of a capital contribution portion;

(b) the foreign regulator and the SSC of Vietnam have signed a unilateral or bilateral co-operative agreement for the purpose of exchanging information and coordinating in management, inspection and supervision of securities and securities market activities; and

(c) other relevant conditions required by laws.

Otherwise, the said foreign investor is only entitled to own less than 51% of the charter capital of a securities business organization.[10]

3. Regulations on investment

A foreign investor is permitted to unlimitedly own the charter capital of an economic organization, except in 3 following cases:[11]

(a) The ratio of ownership of foreign investors in listed companies, public companies, securities trading organizations and securities investment funds shall be subject to the regulations on securities;

(b) the ratio of ownership of foreign investors in State enterprises which conduct equitization or convert their ownership into another form is subject to the law on equitization and conversion of State enterprises;

(c) the ratio of ownership of foreign investors, which does not fall within the aforementioned cases provided in sub-section (a) and sub-section (b) above, shall be subject to other relevant laws and international treaties of which Vietnam is a member.

4. An economic organization must satisfy the conditions and carry out investment procedures in accordance with regulations applicable to the foreign investor upon [occurrence of] the investment in the form of capital contribution or purchase of shares or portion of capital contribution to an economic organization which belongs to one of the following cases:[12]

(a) 51% or more of its chapter capital is held by a foreign investor(s), or a partnership that has a majority of partners being foreign individuals in respect of economic organizations being a partnership (collectively, the "**FIE**");

(b) 51% or more of its chapter capital is held by the FIE;

(c) 51% or more of its chapter capital is held by a foreign investor(s) and the FIE.

If an economic organization with foreign-owned capital does not belong to the aforementioned cases, it shall satisfy the conditions and carry out the investment procedures in accordance with regulations applicable to local investors upon [occurrence of] investment in the form of capital contribution to an economic organization, or

[9] Article 20.1 of the Law on Competition.

[10] Article 71.9 and Article 71.10 of Decree 58.

[11] Article 22.3 of the Law on Investment.

[12] Article 25.3 and Article 23 of the Law on Investment.

purchase of shares or portion of capital contribution of an economic organization.[13]

5. Regulations on prohibited conducts and transactions in trading of securities

Regulations on trading of securities also provide conducts and transactions prohibited during acquisition and sale of shares via securities trading floor, which are mostly related to fraudulent acts or cheating, disclosure of false information, insider trading, collusion, market rigging and conducting professional securities business activities without consent from the SSC.[14]

5. What documentation is required to implement these transactions?

1. In the case of a merger of one or more companies into another company, the application files for the following purposes may be required:[15]
   (a) Registration for relocation of head office address of enterprise;
   (b) Registration for change of enterprise name;
   (c) Registration for change of membership of partnership;
   (d) Registration for change of legal representative of LLC or shareholding company;
   (e) Registration for change in charter capital or capital contribution ratio;
   (f) Registration for change of members of multiple member LLC;
   (g) Registration for change of owner of single member LLC;
   (h) Registration for change of owner of a private enterprise as a result of sale or donation of the enterprise or death or disappearance of the owner;
   (i) Registration for change of registered operational items of a branch, representative office or business location;
   (k) Notification of addition or change to business lines;
   (l) Notification of change in invested capital of owner of private enterprise;
   (m) Notification of change of founding shareholder of shareholding company;
   (n) Notification of change of shareholder being a foreign investor in an unlisted company;
   (o) Registration for change of registered tax items;
   (p) Notification of change of information about enterprise managers, notification of shareholder being a foreign investor, notification of a private placement of shares, notification of lease out of a private enterprise, and notification of change of information about authorized representatives;
   (q) Announcement of registered contents of enterprise;
   (r) Merger contract;
   (s) Resolution and minutes of meeting of the merged company on approval of the merger contract;
   (t) Resolutions and minutes of meetings of the merging companies on approval of the merger contract, except where the merged company is a member or shareholder owning more than 65% of the charter capital or voting shares of a merging company; and
   (u) Valid copy of the enterprise registration certificates or other equivalent documents of the merging companies and of the merged company.
2. In addition to the aforementioned documentation, depending on the nature of each specific M&A transaction, the target company may be required by law to perform

[13] Article 23.2 of the Law on Investment.
[14] Article 9 of the Law on Securities.
[15] Article 24.4 and Chapter VI (from Article 40 to Article 56) of Decree 78 and Article 195 of the Law on Enterprises.

necessary procedures for (i) transfer of the ownership of the property of the company, or (ii) conversion of the form of land use right, or (iii) the investment projects whose investor is the target company and/or (iv) other legal procedures required for the M&A transaction.

6. What government charges or fees apply to these transactions?

1. In an M&A transaction, the government charges or fees for the following purposes may be required:[16]
   (a) Registration for incorporation of an enterprise, change of the enterprise registration contents, or re-issuance of the enterprise registration certificate (the "**ERC**"). The government charge for such purposes is VND 200,000 each occasion;
   (b) New issuance, renewal, change of contents of the certificates of registration for operation of branches, representative offices, business locations of an enterprise. The government charge for such purposes is VND 100,000 per application file;
   (c) Provision of information about the ERC or the certificates of registration for operation of branches, representative offices, and business locations of an enterprise. The government fee for such purposes is VND 20,000 per copy;
   (d) Provision of information about the application file for enterprise registration; financial statements of all kinds of an enterprise. The government fee for such purposes is VND 40,000 per copy;
   (e) Provision of a consolidated report on an enterprise. The government fee for this purpose is VND 150,000 per report;
   (f) Provision of the enterprise registration contents [of an enterprise]. The government fee for this purpose is VND 300,000 per occasion; and/or
   (g) Provision of information of an enterprise under an account from 125 copies per month or more. The government fee for this purpose is VND 5,000,000 per month.
2. In addition to the aforementioned government fees and charges, depending on the nature of each specific M&A transaction, additional government fees and charges may be required by law to perform necessary procedures for (i) transfer of the ownership of the property of the company, or (ii) conversion of the form of land use right, or (iii) the investment projects whose investor is the target company and/or (iv) other legal procedures required for the M&A transaction.

7. Do shareholders have consent or approval rights in connection with a deal?

In case of a limited liability company (LLC), the internal approval of the Members' Council on the increase of capital and transfer of such increased capital to the acquirer shall always be required for the M&A transaction.[17]

In case of a joint stock company, the internal approval of the General Meeting of Shareholders (GMS)[18] shall always be required in case (i) the company needs to increase its capital by issuance of additional shares; and (ii) there is any transfer of the existing shareholder's ordinary shares in the event that the company has operated for three (3) years or less from the date of issuance of the enterprise registration certificate.[19]

[16] Circular No. 215/2016/TT-BTC

[17] Article 60 and Article 25 of the Law on Enterprises.

[18] Note: In nature, the General Meeting of Shareholders (GMS) may be understood as a council of shareholders of a joint stock company.

[19] Article 119 of the Law on Enterprises.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

It appears to us that this term is provided by the foreign laws instead of the laws of Vietnam. At present, the prevailing laws of Vietnam do not provide any official definition of "stakeholder".

9. In what circumstances are break-up fees payable by the target company?

In nature, a break-up fee is an indemnity that a party agrees to pay in the event that a proposed transaction is not completed. Usually, the parties participating in the M&A transaction shall agree upon various events as being the triggering event for the payment of the break-up fees.

The break-up fees payable by the target company may occur in the following circumstances:

(a) In case of the initial public offering (the "**IPO**") of securities and upon expiry of the period of suspension of the IPO as required by the SSC but the defects derived from the IPO have not yet been remedied, then the SSC shall rescind the offer tranche and prohibit the target company (as the issuing organization) from sale of such securities. In such case, the target company must (i) recall all issued securities, (ii) refund investors, and (iii) compensate investors for their losses in accordance with the undertakings made by the issuing organization to investors.[20]

(b) In case of discovery, in the context of due diligence, of a defect of the target company which had not been previously disclosed, provided that the target company is also a party to the M&A transaction, the break-up fees may not require the parties to conclude the deal.

(c) Other cases (if any) in which the target company is a party participating in the M&A transaction.

[20] Article 23 of the Law on Securities.

10. Can conditions be attached to an offer in connection with a deal?

In common practices, the conditions precedent shall be specified in the share acquisition agreement or the capital contribution transfer agreement. The parties may discuss and agree on the conditions precedent, provided that such conditions are not contrary to the law and conflict with social ethics.[21] Otherwise, the agreement on such conditions shall become null and void.

Most relevant conditions usually are amendments of licence and/or charter of the company or appointment of the acquirer's nominated representatives to managerial positions. Payment for acquisition of shares is usually made in accordance with completion of the conditions precedent and disbursement schedule.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

The financing in an M&A transaction may be made through various methods, including payment in the form of cash, share exchange, loan stock, convertible loan or preferred shares.

In the recent years, the most practicable method of financing in an M&A transaction in Vietnam was the payment in cash; the target companies were owned either by the Vietnamese or foreign parties.

In case of capital contribution, purchase of shares or portion of capital contribution of the target company: [22]

(a) If the foreign investor participates in management of the investment activities in Vietnam, the foreign investor must first open a direct investment capital account (DICA) with a licensed bank in Vietnam; or

[21] Article 3.2 of the Civil Code.

[22] Circular 19 and Circular 05.

(b) If the foreign investor does not directly participate in management and/or operating of the target company, the foreign investor must first open an indirect investment capital account (IICA) with a licensed bank in Vietnam.

Any transfer of capital into and out of Vietnam must be conducted via the aforesaid investment capital account, including remittance of capital into and repatriation of capital, profit and other lawful income back to their foreign country.

Certain M&A transactions which were spotlighted in 2017 include (i) ANZ Bank in Vietnam sold its retail operations in Vietnam to Shinhan Bank (Vietnam) Ltd. whereby ANZ Bank transferred 8 branches and transaction offices in Ho Chi Minh City and Ha Noi City as well as its employees specialized in retail operations to Shinhan Bank (Vietnam) Ltd; and (ii) Vietnam International Commercial Joint Stock Bank (VIB) took over the operations of the branch of Commonwealth Bank of Australia (CBA) in Ho Chi Minh City.[23]

Financing an M&A transaction via a convertible loan takes place in the following manner with this example: a shareholder named A, a foreign investor, owns 30% of the equity of XYZ company in which two other shareholders named B and C possess 35% and 35%, respectively. Shareholder A provides a convertible loan (which is a shareholder loan) to XYZ. At the time of repayment of the loan, if XYZ fails to repay the loan, the loan shall be converted into equity of shareholder A in XYZ company. Then, the equity of A will be increased, say, to around 40%. As a result, the equity of B and C will be reduced down to around 30% and 30%, respectively; or the value of the equity of XYZ will be increased in proportion to the value of the loan. In either case, A gets more shares in XYZ. If the value of the loan is large, the new equity of A shall constitute an M&A.

Share exchange, another practicable method of financing an M&A transaction, has been gaining popularity. Highlights included merger of Bien Hoa Sugar Joint Stock Company in 2017 by swap of 297,874,449 common shares with Thanh Thanh Cong Tay Ninh Joint Stock Company at the ratio of 1:1.02.[24]

In respect of a minimum level of financing, there is no requirement by law so far. However, this requirement may be agreed by the parties and specified in the share acquisition agreement or the capital contribution transfer agreement.

It should be noted that the document(s) evidencing the completion of payment for shares shall be required before the licensing authority issues the new enterprise registration certificate to record that the acquirer is a shareholder or a capital contributing member of the target company.

Also, in case of acquisition by the investors of the listed securities, a securities company (broker) may receive the orders for purchase or sale of securities from their clients only if such securities company obtains 100% of the sum of money [for purchase of securities] or 100% of securities [in case of sale of securities] and shall take necessary measures to assure the solvency of such clients when trading orders are executed.[25]

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

(a) A shareholder or a group of shareholders holding more than 10% of the total ordinary shares for a consecutive period of 6 months or more, or holding a smaller percentage as stipulated in the charter of the company, has the following rights:[26]

[23] Source of news: http://enternews.vn/diem-danh-10-thuong-vu-m-a-dinh-dam-nhat-2016-2017-114343.html

[24] Source of news: http://vneconomy.vn/tin-doanh-nghiep/bhs-thong-bao-hoan-doi-co-phieu-theo-hop-dong-sap-nhap-20170718095655432.htm

[25] Article 52.6 of Circular 210.

[26] Article 114.2 of the Law on Enterprises.

(i) To nominate candidates to the Board of Management (BOM) and the Inspection Committee (if any);

(ii) To examine and make an extract of the book of minutes and resolutions of the BOM, semi-annual and annual financial statements in accordance with the forms of the Vietnamese accounting regime, and reports of the Inspection Committee;

(iii) To request for convention of a meeting of the GMS in the special cases;

(iv) To request the Inspection Committee to inspect each issue relating to the management and administration of the operation of the company where it is considered necessary.

(b) In respect of the voting to elect members of the BOM and of the Inspection Committee, unless otherwise stipulated in the charter of the company, the said voting must be implemented by the method of cumulative voting whereby each shareholder shall have a total number of votes appropriate to the total number of shares it owns multiplied by the number of members to be elected to the BOM or the Inspection Committee, and each shareholder has the right to accumulate all or part of its total votes for one or more candidates.

Persons who are elected as members of the BOM or inspectors shall be determined on the basis of a descending vote count, starting with the candidate with the highest number of votes until the number of members required by the company charter have been elected. If there are two or more candidates who obtain the same number of votes for being the last member of the BOM or the Inspection Committee, such member shall be elected amongst the number of candidates having an equal number of votes or selected in accordance with the criteria in the regulations on election or the charter of the company.[27]

[27] Article 144.3 of the Law on Enterprises.

The provisions on accumulation of votes as mentioned above shall be applied to both listed and non-listed joint stock companies.[28]

13. What is the waiting or notification period that must be observed before completing a business combination?

We understand that you wish to mention statutory waiting period before completing the proposed M&A transaction as specified in Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) which is a set of amendments to the antitrust laws of the United States, principally known as the Clayton Antitrust Act. Under this Act, the acquiring person and the person whose business is being acquired must submit information about their respective business operations to the regulatory agencies and wait for a specific period before consummating the proposed M&A transaction. During the waiting period, the regulatory agencies shall review the proposed M&A transaction and may request for further information in order to help them assess whether the proposed transaction violates the antitrust laws of the United States or could cause an anti-competitive effect in the parties' markets.

The laws of Vietnam do not provide any regulations on the waiting or notification period before completing a business combination.

14. Are there any industry-specific rules that apply to the company being acquired?

The industry-specific rules shall be applicable, depending on the business lines of the target company and whether it is a listed company or not.

For example, if the target company has the business line of security (guard) service, the M&A transaction shall be subject to satisfaction by the

[28] Article 144.3 of the Law on Enterprises; Article 21.2 of the Model Charter (applicable to public companies) attached to Circular 95.

foreign investors of the conditions as specified in Decree No. 96/2016/ND-CP dated 1 July 2016.

If the target company becomes a public company after the M&A transaction and it wishes to perform the public offer of shares, it must satisfy the following conditions:[29]

(a) Such company must have, at the time of registration of the offer, a minimum amount of paid-up charter capital of VND 10 billion based on the value recorded in the accounting books;

(b) There must be an issue plan and a plan for utilization of the proceeds earned from the offer tranche, passed by the GMS;

(c) The business operational results must have been profitable, calculated up until the time of registration of the offer;

(d) There is an operational duration of one year or more from the date of the consolidation or merger, except in the following cases:

  (i) The business operations of the organizations participating in the consolidation or merger in the year immediately preceding the year of consolidation or merger were profitable, and at the same time there are no accumulated losses calculated up until the time of the merger or consolidation; or

  (ii) The organization formed after the consolidation or merger is formed pursuant to a restructuring plan approved by the Prime Minister.

(e) There are no debts which are overdue for more than one year in the case of a public offer of bonds; and

(f) There is an undertaking from the GMS (in the case of shares and convertible bonds) or from the BOM (in the case of bonds) to bring securities into trading in the formal market within one year from the selling tranche completion date.

[29] Article 18 of Decree 58 and Article 12 of the Law on Securities.

Specific rules are also set for M&A of banks and insurance companies.

15. Are cross-border transactions subject to certain special legal requirements?

The cross-border M&A transactions are understood as follows:

(a) An investment from a foreign company into Vietnam, including:

  (i) Foreign investors purchasing shares or capital contribution in local company; and

  (ii) Foreign investors purchasing securities listed by a public company via the Stock Exchange or Securities Trading Center.

(b) An investment of a company in Vietnam to a foreign country (or known as offshore investment).

In those types of transactions, the inflow investment from foreign companies to Vietnam is much higher than the outflow of Vietnamese companies. The reasons are: firstly, most Vietnamese companies are still in the first or second growth stage; only a small number of them are in the maturity stage but most still struggle with capital; and second, the foreign currency reserve of Vietnam is still small.

In this Section, we focus mainly on investment by Vietnamese investors into a foreign country because the cross-border M&A activity via the inflow investment into Vietnam has been presented in other sections hereof so far.

1. Forms of offshore investment[30]

Investors shall conduct offshore investment activities in the following forms:

(a) Establishment of an economic organization in accordance with the law of the investment recipient country;

(b) Performance of an offshore BCC contract;

(c) Purchase of all or part of the charter capital of an offshore economic organization to

[30] Article 52 of the Law on Investment.

participate in management and conduct business investment activities in a foreign country;

(d) Purchase or sale of securities or other valuable papers or investment via securities investment funds or other intermediate financial institutions in a foreign country; or

(e) Other investment forms in accordance with the law of the investment recipient country.

2. Power and authority to make decision on offshore investment policy (or known as in-principal resolution)[31]

(a) The National Assembly shall make the decision on the offshore investment policy in respect of the following projects: (i) projects with offshore investment capital of VND 20,000 billion (about USD 890,511) or more; and (ii) projects which require application of a special mechanism or policy which should be decided by the National Assembly.

(b) Except for the cases prescribed in sub-section (a) above, the Prime Minister of the Government shall make the decision on the offshore investment policy in respect of the following projects: (i) projects in the banking, insurance, securities, press, broadcasting, television or telecommunications sector having offshore investment capital of VND 400 billion (about USD 17.8 million) or more; and (ii) other cases which are not covered by the aforementioned cases and/or which has offshore investment capital of VND 800 billion (about USD 35.6 million) or more.

3. Conditions for issuance of an offshore investment registration certificate[32]

(a) The offshore investment activities conform to the principles for implementation of offshore investment activities as prescribed by the Law on Investment;

(b) The offshore investment activities are not in the industries or trades in which business investment is prohibited by the Law on Investment;

(c) The investor makes an undertaking to itself arrange for foreign currency or obtains an undertaking to arrange for foreign currency from an authorized credit institution for implementation of the offshore investment activities; where the amount of capital in foreign currency to be transferred abroad is equivalent to VND 20 billion or more and is not in the category of the projects subject to the in-principal resolution, the Ministry of Planning and Investment shall seek the opinions of the State Bank of Vietnam in writing;

(d) There is the offshore investment decision as prescribed in the Law on Investment; and

(e) There is a written certification of the tax authority of performance of tax obligations by the investor up to the date of submission of the investment project file.

4. Offer for sale of shares in a foreign country by Vietnamese joint stock companies

Although the law provides regulations on offer for sale of shares in a foreign country by Vietnamese companies (as mentioned below), it is not commonly used by Vietnamese joint stock companies in practice because of credibility.

In order to offer for sale of shares in a foreign country, Vietnamese joint stock companies must fully satisfy the following conditions:[33]

(a) The business line of the joint stock company is not included in the list of business lines in which participation of foreign parties is prohibited by the law of Vietnam and the participating ratio of foreign parties must be ensured in accordance with law;

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31 Article 54 of the Law on Investment.

32 Article 58 of the Law on Investment.

33 Article 28 of Decree 58.

(b) To obtain a resolution of the GMS approving the offer for sale of shares offshore and the plan for utilization of proceeds earned;

(c) To comply with the regulations on foreign exchange control;

(d) To satisfy the regulations of the investment recipient country; and

(e) To obtain the approval from the following competent state authorities: the State Bank of Vietnam in the case of credit institutions; the Ministry of Finance in the case of insurers; and the SSC in the case of securities companies, fund management companies and securities investment companies.

Then the joint stock company shall submit an application file for registration of offer for sale of shares in a foreign country to the SSC. Within 10 days from the date of receipt of all documents for reporting, the SSC shall give the issuing organization a written notice of whether or not to accept the said dossier together with reasons for acceptance or rejection.[34]

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

Upon merger, consolidation, division or separation, the succeeding employer (or known as the new employer in the case of M&A) is responsible to continue to employ the current number of employees and carry out the amendment and/or addition to their labour contracts. If the succeeding employer is unable to employ all current employees, the said employer must formulate and implement a labour usage plan.[35]

In cases of transfer of ownership or of right to manage or right to use an enterprise, or where an enterprise merges, consolidates, divides or separates, then the new employer shall continue (to rely on) and the representative of the labour collective (the grassroots trade union) shall rely on the labour usage plan to consider and select continuance of performance of, amendment of or addition to the old collective labour agreement, or shall conduct bargaining in order to sign a new collective labour agreement.[36]

Upon merger, consolidation, division or separation of an enterprise or co-operative, if the employer retrenches employees, such employer must pay severance allowances for job loss to the employees as follows:[37]

1. The employer shall pay a severance allowance for job loss to an employee who had regularly worked for the employer for 12 months or more. The severance allowance shall be one month's wages for each working year but at least two (2) months' salary.
2. The length of a working period for calculating a severance allowance for job loss means the total working time the employee actually worked for the employer minus the period for which the employee received unemployment benefits in accordance with the Law on Social Insurance and the working period for which the employer has already paid a severance allowance.
3. Wages for the purpose of calculating a severance allowance for job loss means the average wage pursuant to the labour contract for 6 months immediately preceding job loss.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

Below are some existing proposals to achieve the M&A regulations of Vietnam:

1. Develop the legal regulation system to capture the complex and diverse requirements of M&A reality in Vietnam, especially regulations on buy and sell options, offshore investment, global depository receipt to get access to foreign capital market, etc.

[34] Article 30 of Decree 58.
[35] Article 45 of the Labour Code.
[36] Article 86.1 of the Labour Code.
[37] Article 45.3 and Article 49 of the Labour Code.

2. The parties participating in an M&A transaction must submit "evidence for the completion of the transfer" to obtain the approval from the licensing authority on the transaction. However, such evidence sometimes can be achieved only after the licensing authority's approval, for instance, the acquirer shall make full payment only if the licensing authority approves the transaction.

3. Revise regulation on competition: It is provided that if the companies participating in an economic concentration have a combined market share in the relevant market ranging from 30% to 50%, the legal representative of such companies must give a prior notice to the VCA before carrying out the economic concentration. The proposed transaction shall be carried out only if the VCA issues a letter of confirmation certifying that the transaction is legitimate.[38] In fact, such provision is likely unenforceable due to lack of information to analyze market shares owned by the said companies. It is necessary to make it more measurable.

4. It is now hard for investors to find a specific law codified for M&A activities because the M&A activities can be a "project investment" or a "financial investment"; each is governed by different regulations. There has been a proposal that the M&A activity should be provided in just one legislation.

5. The current Law on Enterprises provides four types of re-organization of an enterprise pertinent to M&A, including consolidation, division, merger and separation while acquisition is only in practice, not in law. Thus, it should be codified.

[38] Article 20 of the Law on Competition.

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VB LAW
Your legal guide

1. 您所在管辖区有哪些主要适用的并购法律法规？

总体上说，兼并收购交易受到越南加入的国际条约、《投资法》、《企业法》、专门法律（根据标的公司所处行业而定）以及其他相关法律（如有）的约束。

1. 根据《投资法》，投资者（当地或外国投资者）的并购活动可以按照以下投资形式开展：向一个经济组织（依照越南法律组建和运营的组织）出资，或者购买此类经济组织的股份或者部分出资份额，或者受让投资项目（或投资项目组合）份额。[1]
2. 外国投资者可以按照以下三（3）种形式向经济组织出资：[2]
   (a) 购买股份公司首次公开发行的股份或者增发的股份；
   (b) 向有限责任公司或合伙企业出资；或者
   (c) 向上述以外的经济组织出资。
3. 外国投资者可以按照以下四（4）种形式购买经济组织股份或者部分出资份额：[3]
   (a) 从目标公司（为股份公司）或其股东处购买目标的公司股份；
   (b) 向目标公司（为有限责任公司）的成员购买部分出资份额，成为目标公司的成员。
   (c) 向目标公司（为合伙企业）的成员购买部分出资份额，成为目标公司的成员；
   (d) 购买上述三（3）项未涵盖的其他经济组织成员的部分出资份额。
4. 除了投资的形式，外国投资者出资或者购买股份（或部分出资份额）还需满足以下条件：(i) 对目标公司注册资本的占比（以下称“持股比例”），以及；(ii) 经营范围，越南参与方在投资活动中的参与程度以及越南社会主义共和国参加的国际条约的其他规定。
5. 根据目标公司所处的不同行业，并购交易也受到专门的法律和与此行业相关的其他法律管辖。因此，投资者和目标公司必须完全满足这些法律所规定的条件。例如，如果一个地方目标公司经营房地产业务，现已成为外商投资企业（例如，外国投资者出资标的公司注册资本的 51%），该目标公司的房地产业务可能会依据《房地产业务法》被限制在某些项目，而不能像当地公司一样可以根据法律从事全部项目。
6. 在越南，土地属于［越南］全体人民所有，国家是所有权人的代表，并对土地进行统一管理。国家依据《土地法》向土地使用人出让土地使用权。[4]

   如果一家当地公司根据越南法律拥有某个地块的使用权，现在该公司成为外商投资公司（通过并购交易），那么目标公司对该土地的权利和义务会受到外国投资者对该目标公司持股比例的影响，具体如下：[5]
   (a) 如果目标公司是一家 100% 外资企业，或者根据相关的企业法律规定是一家外商投资且外资控股的企业，那么根据土地使用费和土

1 《投资法》第24节以及《118号法令》第2.6节。
2 《投资法》第25节。
3 《投资法》第25节。
4 《土地法》第4节
5 《土地法》第183.4节。

地租金的支付方式，目标公司仅对该土地具有某些权利和义务；

(b) 如果根据相关的企业法律规定，目标公司由越南参与方控股，那么其具有与[当地]经济组织（包括民事立法中规定的企业、合作社和其他经济组织，但是不包括外商投资企业）相同的的权利和义务。

2. 有哪些主要的政府监管机构或组织规管兼并收购活动？

在通常情况下，各省或市人民委员会有权批准管辖区内工业园区以外的公司（银行和保险公司除外）增资、转让股权或出资，并向其颁发经修订的许可证。

如果并购交易按照外国投资者从当地公司（作为项目投资人）受让投资项目的形式开展，并且需要得到国会、总理或者省级人民委员会的批准的，那么根据情况，该并购交易还可能要获得计划和投资部以及其他相关部委（如有）的批准。[6]

工业园区管理当局对落户园区的企业提供相同的行政服务。

越南国家银行和财政部分别有权审批商业银行和保险公司的并购活动。[7]

与此同时，国家证券委员会和越南证券登记中心也参与对证券交易大厅的并购活动的管理。

除了上述监管机构，根据标的公司所处行业，也可能涉及其他监管机构。例如，在国际旅游业务中，文化、体育和旅游部以及越南国家旅游总局也起到关键作用；或者在地铁项目中，交通部也发挥重要作用。

3. 是否允许恶意收购？如果允许，恶意收购在您所在的管辖区很普遍吗？

由于越南企业的经济发展尚未充分，越南法律没有考虑敌意收购以及对敌意收购的限制。

在发展中国家，对市场价值远低于账面价值的上市公司进行敌意收购可以赚取巨大利润。成功的敌意收购可以使标的公司退市和注销。越南的公司还没有达到这一程度。

在越南，一份敌意收购（如有），也仅仅是一种表达而已。敌意收购可以针对上市公司和非上市公司，收购方通过不同的名义在市场上或者证券交易大厅购买标的公司的股份。通过这种方法，收购方控制了足够的股份，要求发起临时股东大会变更管理层，直到这时，管理团队才察觉这一收购。在收购尽可能多的股份的同时，收购方还与公司的小股东接触，说服他们支持其在股东大会的议案。

4. 有没有哪些法律对某些兼并收购有限制或监管作用？（例如，反垄断或国家安全法）

总体来说，越南政府鼓励和支持并购活动。但是仍然存在一些适用于并购活动的越南法律法规限制某些收购和兼并，具体如下：

1. 关于竞争的规定

除了以下情况，如果参与并购的公司兼并市场份额占相关份额的 50% 以上，那么该等并购交易（即《竞争法》规定的“经济体集中”）被禁止：[8]

(a) 参与交易的一家或多家公司目前有破产迹象或正处于破产阶段；

(b) 交易有助于扩大出口，有益于社会经济发展和／或技术进步。

此外，如果参与经济体集中的公司兼并市场份额为 30% 至 50%，那么其法定代表人应当提前报告越南竞争管理局。拟议的交易仅当竞争管理局出具确认函，确认其合法性后方能实施。

6 《第118号法令》第37节。

7 《信用机构法》第29节，以及《保险业务法》第69节。

8 《竞争法》第18节。

如果参与经济体集中的公司兼并市场份额小于 30%，或者在并购交易完成后仍然被依据法律认定为中小企业，那么其无需报告。[9]

2. 关于外国投资者对越南企业持股比例的规定

越南 WTO 委员会的一项重要职责，就是制定具体服务行业外国投资者持股比例，包括但不限于电信、保险、银行、交通、电影等。

根据越南法律，只有外国投资者完全满足法律要求，才能对证券经营组织的注册资本进行 100% 出资，具体规定如下：

(a) 在出资设立 [证券经营组织] 或购买其股份或部分出资之前的至少二（2）个连续年度必须在银行、证券或者保险行业从业；

(b) 外国的监管当局和越南国家证券委员会已经签署了旨在交换信息、协调管理，对证券及证券市场活动进行监督管理的单边或者双边的合作协议；以及

(c) 法律要求的其他条件。

此外，上述外国投资者对证券经营组织的出资不得超过注册资本的 51%。[10]

3. 有关投资的规定

外国投资者可以最大限度的对一个经济组织的注册资本出资，但是以下三种情况除外：[11]

(a) 外国投资者对上市公司、公众公司、证券交易组织和证券投资基金的持股比例受限于证券监管规定；

(b) 外国投资者对进行股份制改造或者改制的国有企业的持股比例受限于《国有企业股份制改造和改制法》；

(c) 上述（a）和（b）条没有覆盖的情形下，外国投资者的持股比例受限于其他法律及越南参加的国际条约。

4. 如果投资形式是属于以下情形的经济组织出资、购买股份或部分出资份额，那么经济组织必须满足适用于外国投资者的规定确定的条件，并且据此开展投资流程：[12]

(a) 外国投资者对注册资本出资达 51% 或以上的（如果基金组织为合伙企业，那么外国投资者是主要的合伙人）（以上统称“外商投资企业”）；

(b) 外商投资企业对注册资本出资达 51% 及以上的；

(c) 外国投资者和外商投资企业共同对注册资本出资达 51% 及以上的。

如果拥有外资投入的经济组织不属于上述情形，那么其在对经济组织出资、购买股份或部分出资份额时必须满足适用于当地投资者的规定，并且据此开展投资流程。[13]

5. 禁止某些证券交易行为的法规

证券交易规定也包括通过证券交易大厅收购和出售股份的被禁止的行为和交易，这多数与欺诈、披露虚假信息、内幕交易、串谋、操纵市场、从事未经国家证券委员会许可的专业证券业务活动相关。[14]

5. 进行这些交易时需要哪些文件？

1. 将一家或者多家公司兼并到另外一家公司的，需要以下申请材料：[15]

(a) 企业总部地址搬迁登记；

(b) 企业名称变更登记；

(c) 合伙企业合伙人变更登记；

(d) 有限责任公司或股份公司变更法定代表人登记；

(e) 注册资本或出资比例变更登记；

(f) 有限责任公司（多个股东）股东变更登记；

(g) 有限责任公司（单个股东）控制人变更登记；

9 《竞争法》第20.1节。
10 《第58号法令》第71.9节和第71.10节。
11 《投资法》第22.3节。
12 《投资法》第25.3节和第23节。
13 《投资法》第23.2节。
14 《证券法》第9节。
15 《第78号法令》第24.4节和第六章（第40节至56节）和《企业法》第195节。

(h) 私人企业控制人变更（因出售或捐赠企业，或者企业主死亡或失踪）登记；

(i) 分支机构、代理处或业务点的注册经营项目变更登记；

(k) 经营行业增加或变更通知；

(l) 私营企业控制人投资资本变更通知；

(m) 股份公司发起股东变更通知；

(n) 非上市公司股东变更为外国投资者的变更通知；

(o) 注册税目变更登记；

(p) 企业经理信息变更通知、股东为外国投资者的通知、私募发行股份的通知、私营企业出租的通知以及法定代表人信息变更的通知；

(q) 企业注册项目公告；

(r) 兼并协议；

(s) 被兼并公司批准兼并协议的相关会议决议及纪要；

(t) 兼并公司批准兼并协议的相关会议决议及纪要（除非被兼并公司为兼并公司拥有 65% 以上股份或投票权的股东）；以及

(u) 兼并公司和被兼并公司企业注册证明或其他等效文件的有效复印件。

2. 除了上述文件以外，根据每个并购交易的具体特点，目标公司可能要依照法律为以下事项履行必要流程：(i) 公司财产所有权转让，或 (ii) 土地使用权形式转换，或 (iii) 投资项目的投资者为目标公司的；和 / 或 (iv) 并购交易所需的其他法律事项。

6. 这些交易须缴纳哪些政府费用？

1. 在并购交易中，政府对以下因由收费：[16]

(a) 企业设立注册、变更企业注册内容或重新颁发企业注册证明的。政府为此类每个事项收取 200,000 越南盾；

(b) 企业分支机构、代表处、业务点的注册证明重新颁发、续期、变更内容（开设）。政府为此类每个申请文件收取 100,000 越南盾；

(c) 提供企业注册证明或企业分支机构、代表处、业务点的注册证明相关信息。政府为此类每个复印件收取 20,000 越南盾；

(d) 提供企业注册的申请文件、各种财务报表等信息。政府为此类每个复印件收取 40,000 越南盾；

(e) 提供企业综合报告。政府为此类每个报告收取 150,000 越南盾；

(f) 提供 [企业] 的注册内容。政府为此类每个事项收取 300,000 越南盾；以及 / 或者

(g) 每月提供某一账户项下企业信息超过 125 份的。政府为此每月收取 5,000,000 越南盾。

2. 除了上述政府收费之外，根据每个并购交易的具体特点，在履行以下流程时政府可能会额外征收费用：(i) 公司财产所有权转让，或 (ii) 土地使用权形式转换，或 (iii) 投资项目的投资者为目标公司的；和 / 或 (iv) 并购交易所需的其他法律事项。

7. 交易是否需要股东的同意或批准？

如果是有限责任公司，那么股东会关于增资和将此增资转让给收购方的内部批准文件对于并购交易来说总是必需的。[17]

如果是联合股份公司，那么股东大会[18]关于以下事项的内部批准文件总是必需的：(i) 公司需要通过新发行股份增资的；和 (ii) 公司自获得企业注册文件之日起存续未满三 (3) 年而现有股东需要转让普通股的。[19]

16 《第215/2016/TT-BTC号通告》。

17 《企业法》第60节和第25节。

18 注：本质上，股东大会可以视为联合股份公司股东会。

19 《企业法》第119节

8. 董事和控股股东是否对交易相关利益者负有任何责任？

在我们看来，这一部分适用于外国法律，而非越南法律。越南现行法律没有对“股东”进行任何官方定义。

9. 哪些情况下，目标公司须支付分手费？

实质上，解约金是在拟定交易未能完成的情况下一方同意支付的赔偿款。通常参与并购交易的各方会设定多种触发支付解约金的事项。

目标公司应付解约金的情形如下：

(a) 在首次公开发行股票的情况下，当根据国家证券委员会要求的首次公开发行股票暂停期到期时，如果首次公开发行股票的瑕疵还未修正，那么国家证券委员会可以撤销股票发行，禁止目标公司（作为证券发行机构）发行证券。在这种情况下，目标公司必须：(i) 撤回所有发行的证券，(ii) 向投资者退款，(iii) 根据发行机构向投资者所作的承诺弥补投资者损失。[20]

(b) 如果在尽职调查过程中发现目标公司之前未曾披露的瑕疵，且目标公司也是并购交易的参与一方，那么各方结束交易可不用支付解约金。

(c) 目标公司也是并购交易参与方的其他情形（如有）。

10. 要约可否附加交易相关的条件？

在通常惯例中，先决条件应当在收购协议或出资转让协议中列明。如果先决条件不违反法律和公序良俗，各方应当讨论并同意这些条件。否则，协议中的这些条件无效。[21]

最相关的条件通常是修改公司的执照和 / 或章程，或指定收购方指定的代表担任管理职务。收购股份的付款通常是根据先决条件的完成情况和付款时间表完成的。

[20] 《证券法》第23节

[21] 《民法》第3.2节。

11. 在交易文件中，如何处理融资问题？是否有规定要求达到最低融资水平？

并购交易的出资可以通过多种途径实现，支付方式包括现金、股份交换、信用贷款、可转换贷款或优先股。

在最近几年，越南并购交易融资实践最多的方式是现金支付；目标公司的持有人既有越南境内投资者，也有越南境外投资者。

在出资时，如果是购买标的公司股份或者部分出资份额的——[22]

(a) 如果外国投资者参与在越南的投资活动管理，那么其必须首先在越南持牌的银行开立直接投资资本账户；或者

(b) 如果外国投资者不直接参与目标公司的管理和 / 或运营，那么其必须在越南持牌的银行开立间接投资资本账户。

任何资本出入越南，必须经由上述投资资本账户，包括资本汇入，资本、利润和其他合法收入汇回外国。

2017 年有几个非常瞩目的并购交易，包括：(i) 越南的澳新银行将其在越南的零售业务出售给新韩银行（越南）有限公司。为此，澳新银行向新韩银行（越南）有限公司转让了其在胡志明市和河内市的 8 家分行和营业网点，以及零售业务的雇员；以及 (ii) 越南国际商务股份银行接手了澳大利亚联邦银行在胡志明市的分行业务。[23]

通过可转换贷款为并购交易提供资金，可以举例如下：股东 A 是外国投资者，持有 XYZ 公司 30% 的权益。XYZ 公司的另外两名股东 B 和 C，分别持有 35% 的权益。股东 A 向 XYZ 公司提供可转换贷款（是一种股东贷款）。在贷款到期日，如果 XYZ 公司未能偿付贷款，那么贷款将转换成 A 对 XYZ 公司的持股权益。因此，A 的股权将增加，假设达到 40%。由此，B 和 C 的股权将分别被稀释至 30%；或者，XYZ 公司的权益价值将增加贷款价值部分。在各种情况下，A 持

[22] 《第19号通告》和《第05号通告》。

[23] 新闻来源：http://enternews.vn/diem-danh-10-thuong-vu-m-a-dinh-dam-nhat-2016-2017-114343.html

有了 XYZ 公司更多的股权。如果贷款价值巨大，那么 A 获得的新权益将构成并购事件。

股份交换是另外一种可行的并购交易出资方式，并且越来越受欢迎。受关注的交易有 2017 年 Thanh Thanh Cong Tay Ninh 股份公司以 1:1.02 的换股比例，用 297,874,449 股普通股合并了 Bien Hoa 糖业股份公司。[24]

目前法律对最低出资没有要求。但是这一要求会经各方协商一致，并在股份收购协议或出资额转让协议中明确。

应当注意，在发证机构颁发新的企业注册证书以确认收购方为目标公司股东或出资者身份前，必须取得证明完成股份购买支付的文件。

此外，如果是投资者收购上市公司的情形，证券公司（经纪商）只有在其获得 100% 的资金（用于购买证券）或者 100% 的证券（用于出售证券）时，才可能会接受客户购买或者出售证券的指令，并采取必要措施确保指令执行时客户的偿付能力。[25]

12. 少数股东是否会被挤出？如果会，必须遵守哪些程序？

(a) 如果一名股东或股东团体持有总普通股超过 10%（或者持有公司章程规定的较小比例股份），并且连续持股期达到 6 个月及以上，那么具有以下权利：[26]

  (i) 提名理事会和监事会候选人（如有）；

  (ii) 审查并摘录理事会会议纪要和决议、符合越南会计制度的半年度和年度财务报表以及监事会报告；

  (iii) 对特别事项申请召开股东大会；

  (iv) 要求监事会审查其认为必要的与管理层及公司经营相关的各个事项。

(b) 关于选举产生理事会和监事会成员，除非公司章程另有规定，否则应当采取累计投票制，即每个股东拥有与其持股数量相等的投票数，每个股东都有权将其部分或全部选票投给一个或多个候选人。

应当按照得票多寡确定理事会和监事会成员，从得票最高的候选人开始，直至满足公司章程的全部成员都被选出。如果理事会或者监事会最后一个成员有两名或者多名候选人得票相同，这些得票相等的候选人将要重新选举，或者根据选择规则或公司章程选择。[27]

上市股份公司和非上市股份公司同样适用上述累计投票制。[28]

13. 什么是完成业务兼并之前必须遵守的等待期或通知期？

我们理解，贵方了解拟议并购交易完成前的法定等待期（在《1976 年哈特 · 斯科特 · 罗迪诺反垄断改进法案》中规定，该法案被视为对美国反垄断法律（主要是《克莱顿反垄断法》）的修订）。根据该法案，收购发及被收购方必须向监管部门上报各自业务信息，并在完善拟议的并购交易之前等待一段时间。在等待期内，监管部门将审查拟议的并购交易，并有可能要求进一步的信息以助其评估拟议交易是否违反美国的反垄断法律，或者造成所在市场限制竞争的情况。

越南法律没有规定业务兼并完成前要有等待期或通知期。

14. 是否有适用于被收购公司的行业特定规则？

根据目标公司所处行业适用行业特别规定，而不论其是否为上市公司。

例如，如果目标公司处于安全服务（保安）行业，那么并购交易将要满足 2016 年 7 月 1 日颁布的《96/2016/ND-CP 号法令》规定的外国投资者条件。

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24 新闻来源: http://vneconomy.vn/tin-doanh-nghiep/bhs-thong-bao-hoan-doi-co-phieu-theo-hop-dong-sap-nhap-20170718095655432.htm

25 《第210号公告》第52.6节。

26 《企业法》第114.2节。

27 《企业法》第144.3节。

28 《企业法》第144.3节；《第95号通告》后附的《章程范本》第21.2节（适用于上市公司）。

如果目标公司在并购交易之后成为公众公司，并有意公开发行股票，那么其必须满足以下条件：[29]

(a) 此等公司在注册发行股份时，最低实缴注册资本不低于 100 亿越南盾；

(b) 必须要有一个发行计划，以及发行股份募资使用计划，并获得股东大会通过；

(c) 截止到注册发行股份时，业务经营利润必须为正；

(d) 除非以下情况，否则兼并之日起一年内不得发行股份：

  (i) 参与整合或目标的业务组织的营业收入在整合或目标年份之前的一年利润为正，并且同时，在整合或目标时点无累计亏损；或者

  (ii) 整合或目标后成立的组织是根据由总理批准的重组方案组建的。

(e) 如果有债务延期超过一年的，那么不得公开发行债券；以及

(f) 需要股东大会承诺（股份或者可转换债券的情形）或理事会承诺（债券的情形）在证券发行完成一年之内可以在正规的市场交易。

银行和保险公司并购也有特殊规定。

15. 跨境交易是否受任何特殊法律要求的制约？

跨境并购交易理解如下：

(a) 外国公司向越南投资，包括：

  (i) 外国投资者购买当地公司的股份或出资份额；以及

  (ii) 外国投资者通过股票交易所或证券交易中心购买上市公司证券。

(b) 越南公司向外国投资（或称“离岸投资”）。

在这些交易类型中，外国公司向越南的投资额远大于越南公司向外的投资额。理由如下：首先，多数越南公司仍然处于第一期或第二期增长阶段；少数处于成熟阶段的也多缺乏资本；其次，越南的外汇储备较小。

在本节，我们主要关注越南投资者对外国的投资，因为在其他节已经陈述了通过跨境并购活动投资越南的情况。

1. 离岸投资的形式 [30]

投资者应当遵照以下形式进行离岸投资：

(a) 根据被投资国家的法律设立经济组织；

(b) 履行离岸 BCC 合同；

(c) 购买离岸经济组织全部或部分注册资本，在外国参与管理并从事业务投资活动；

(d) 通过外国投资基金或其他中介金融机构购买或出售证券或其他有价证券；或者

(e) 根据被投资国家法律确定的其他投资形式。

2. 制定离岸投资政策的监管机构：[31]

(a) 国民大会制定以下项目的离岸投资政策：(i) 离岸投资资本金达 20 万亿越南盾（折合 890,511,000 美元）或以上的；(ii) 需要由国民大会决定特别机制或政策的；

(b) 除了上述 (a) 小节的情形，政府总理可以制定以下项目的离岸投资政策：(i) 银行、保险、证券、媒体、广播、电视或电信行业的离岸投资，金额达到或超过 4,000 亿越南盾(折合 1780 万美元)的；以及 (ii) 上述未提及的其他情形和 / 或离岸投资金额达到或超过 8,000 亿越南盾（折合 3560 万美元）的。

3. 颁发离岸投资注册证明的条件：[32]

(a) 离岸投资活动符合《投资法》规定的离岸投资活动的实施原则；

(b) 离岸投资活动的行业或贸易不在《投资法》禁止的商业投资之列；

(c) 投资者自身承诺安排外汇，或者获得授权信用机构安排外汇的承诺，以实施离岸投资活动。如果汇出国外的外汇金额达到或者超过等额的 200 亿越南盾，并且不属于离岸投资政策规定的种类，那

29 《第58号法令》第18节和《证券法》第12节。

30 《投资法》第52节。

31 《投资法》第54节。

32 《投资法》第58节。

么计划和投资部要获得越南国家银行的书面意见。

(d) 获得《投资法》规定的离岸投资决定；以及

(e) 截止到报送投资项目文件之日，由税务机关出具的履行纳税义务的书面证明。

4. 越南联合股份公司在外国要约出售股权

尽管法律上有越南联合股份公司在外国要约出售股权的相关规定（下文有提及），但是越南联合股份公司由于信用的问题，在实践上并不常用。

为了在外国进行股份出售要约，越南联合股份公司必须完全满足以下条件：[33]

(a) 联合股份公司所处行业不在越南法律禁止外国人参与的行业之列，并且外国人持股比例要确保符合法律规定；

(b) 获得股东大会批准离岸要约出售股份及募资收益使用计划的决议；

(c) 遵守外汇管制规定；

(d) 满足被投资国家的规定；并且

(e) 获得以下国家级权力机构的批准：越南国家银行（审批信用机构）、财政部（审批保险公司）、国家证券委员会（审批证券公司、基金管理公司和证券投资公司）。

联合股份公司应当向国家证券委员会递交在国外要约发行股份的注册申请文件。国家证券委员会在收到文件后的 10 日内向发行机构出具书面意见，明确是否同意，并说明理由。[34]

16. 您所在管辖区的劳动法规对新的雇佣关系有何影响？

兼并、整合、拆分、分立完成后，继任的雇主（在并购情形下或称“新雇主”）负责维持当前的雇员数量，并对劳动合同进行修订和 / 或补充。如果继任的雇主无法雇佣当前的全部雇员，那么该雇主应当制定和实施一项新的劳动力使用计划。[35]

在转让所有权、管理权或企业使用权的情形，或者企业兼并、整合、拆分或分立的情形，新雇主应当继续遵循劳动力使用计划，劳工代表（基层工会）也应当依据劳动力使用计划考虑和选择继续履行原有的集体劳动合同、或者对其进行修订或者补充，或者为签署一项新的集体劳动合同而进行谈判。[36]

企业或合作社进行兼并、整合、拆分或分立完成后，如果雇主削减员工，那么必须向失业雇员支付遣散费，具体如下：[37]

1. 雇主应该向正式工作达 12 个月及以上的失业员工支付遣散费。遣散费的标准是月工资乘以工作年限，但最低为二 (2) 个月的月工资。
2. 计算遣散费的工作年限，应当用员工实际工作年限减去员工根据《社会保险法》获取失业金的年限以及员工已经获取遣散费的年限。
3. 计算失业遣散费的工资依据是失业前 6 个月的劳动合同。

17. 近期是否有任何影响并购活动的改革或调整监管的提案？

以下是满足越南并购法规的一些建议：

1. 建立法律法规系统，以掌握越南复杂多变的并购现实要求，特别是进入外国资本市场的买卖期权、离岸投资、全球存托凭证等方面的规定。
2. 参与并购交易的各方必须递交“完成转让的证明”，以获得发证机构对交易的批准。但有些时候，这些证明只有在发证机构批准后才能获得。例如，只有在发证机构批准交易的前提下，收购方才会全额付款。
3. 修改竞争规定：如果参与一个经济体集中的各公司兼并市场份额为 30% 至 50%，那么这些公司的法定代表人必须在经济体集中前报告越南竞争管理局。拟议的交易仅当竞争管理局出具确认函，确认其合法性后方能实施。[38] 实际

33 《第58号法令》第28节。
34 《第58号法令》第30节。
35 《劳工法》第45节。
36 《劳工法》第86.1节。
37 《劳工法》第45.3节和49节。
38 《竞争法》第20节。

上，由于缺乏分析这些公司市场份额的信息，这一条款无法执行。有必要将此变得更具度量性。

4. 投资者现在很难找到一个专门针对并购活动的具体法律，因为并购活动可以是“项目投资”，也可能是“财务投资”，分别适用不同的规定。有建议为并购活动制定一个法律。

5. 当前的《企业法》规定了与并购相关的四种企业重组形式，包括整合、拆分、兼并和分立，但是收购只在实践中出现，法律没有规定。因此，需要专门制定法律。

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Special Focus – One Belt One Road China Investment
特刊 - 中国的“一带一路”投资

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Introduction

Albania is situated in southeast Europe in the west of the Balkan Peninsula and covers an area of 28,748 sq. km. Albania borders Montenegro and Kosovo to the north and northeast, Macedonia in the east, and Greece to the south. Albania occupies an important strategic location in the Balkans with access to the Adriatic and Ionian Seas in the west. The terrain is mostly mountainous. The average altitude of 708 meters is about twice the European average. The country offers numerous beautiful landscapes, archaeological sites, historic castles and other tourist attractions. The climate is Mediterranean with hot dry summers and cool rainy winters. Albania is in the Central European time zone and is therefore one hour ahead of GMT.

The Albanian Institute of Statistics reports that the population of Albania on 1 January 2017 was 2,874,800 inhabitants.

Situated at a natural crossroad of Europe's major transit corridors, Albania boasts a strong strategic, economic and geographic position. Described as a reforming country with a focus on the ease of doing business, free markets, low taxation and powerful incentives, as well as a motivated, educated and cost-competitive work force, Albania is considered a vital and interesting country to invest in by international businesses. For some years, the Albanian economy has been moving quickly towards a more open and liberal model with inward investment playing a key role in the overall economic transformation.

Recent economic developments

According to the overview of the World Bank in Albania, Country Snapshot October 2017, the country's economy expanded 3.4% in 2016 supported by domestic demand. Private investment in two large FDI-financed energy projects and a recovery in private consumption drove growth, contributing 1.8% and 2.1% points respectively. Improvements in employment and credit growth also encouraged private consumption in 2017. The primary surplus of 0.7% of GDP helped lower the debt to GDP ratio for the first time since the global crisis, reaching 72.4% of GDP in 2016. Average annual inflation fell from 1.9% in 2015 to 1.3% in 2016, below the Bank of Albania's target +-1%.

Remittances are stable despite weak growth in source EU countries. Net FDI's increased to 8.9% of GDP from 8% in 2015, helped by inflows associated with energy projects. Also stronger growth stimulated job creation in 2016 where the employment grew by 2.5% points reaching 48.7%, driven by industry and services.

Albania's economic outlook is expected to improve over the medium term. Growth is projected at 3.5% during 2017-2019 driven by private investments and private consumption.

Foreign investment

Albania is a country that offers many investment opportunities to foreigners. The country has considerable natural resources, mainly oil, gas, coal, iron, copper, chrome, water and hydroelectric potential.

The privatization process in itself offers a wide range of options. Potentially high profit sectors

include mining and oil extraction, both of which are export-oriented industries. Albania is the only country in Europe with substantial reserves of chrome, which before 1990 made it the world's third largest producer of chrome ore. Nevertheless, significant capital investments and capacity upgrades are needed in order to modernize the old and outdated production methods. Other areas of interest include thermal and hydropower production, alternative sources of energy production, infrastructure, agriculture, light industry sectors such as textiles, leather and footwear, confectionary, and meat processing.

The privatization strategy explicitly seeks qualified foreign firms as strategic investors for these key sectors.

Tourism in Albania is a growing sector with more tourists visiting the country every year. Tourism also offers great investment prospects. Albania has spectacular mountain scenery, a beautiful and pristine coastline, and ancient history and culture. Tourism could be one of the main attractions for foreign investors.

It is expected that Albania will highly benefit from the Trans-Adriatic pipeline, which will generate one of that country's largest FDI projects, with important benefits for a number of industries, including manufacturing, utilities and transport. The pipeline will enhance Europe's energy security and diversity by providing a new source of gas. Albanian law, especially the Law on Foreign Investments, guarantees full legal protection for foreigners' investments. Private investments are not subject to nationalization or expropriation, unless specifically required by law for the public interest. Parties to a dispute may agree to submit claims to arbitration. Foreign investors also have the right to submit disputes to an Albanian court.

The Law on Foreign Investments provides "special state protection" for investments/projects exceeding EUR 10 million. Such protection is granted where a dispute arises between the foreign investor and a private party claiming title over the land where the project is or will be built and/or developed. This protection involves the state replacing the foreign investor in a court dispute and undertaking to compensate the claimant if the court rules in its favor.

Other legal incentives include:

(a) Equal treatment of foreign and domestic investors;

(b) Full profit and dividend repatriation, after taxation;

(c) Repatriation of funds from liquidated companies.

Statistics on foreign investment

By December 2016, Chinese investments in Albania amounted to $ 760 million, according to the Albanian Telegraphic Agency. Two big investments were recently made by Chinese companies in Albania - namely the acquisition of the oil company Bankers Albania and Tirana International Airport. In March 2016, the Canadian Banker's Petroleum Company announced the sale of oil exploration and production rights to the Chinese company Petroleum Geo-Jade. In April, the Chinese consortium "Keen Dynamics Limited", an association of companies, namely China Everbright Limited and Friedmann Pacific Asset Management Limited (Friedmann Pacific) announced the acquisition of the entire share capital of Tirana International Airport. This group will cover the airport management up to 2025, with an additional two-year possibility, until 2027 after the approval of the government. In the mining field, the company "Sichuan Jiannanchun", together with the Turkish company "Kurum", have received the concession of the Kalimash and Vlajini mines, the chrome enrichment factories in Kalimash and the copper enrichment plant in Golaj. Also, the Chinese company "Jiangxi Copper" has acquired 50% of the shares of "Beralb" company that exploits copper mines in Albania.

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Genc Boga is the founder and Managing Partner of Boga & Associates which operates in both jurisdictions of Albania and Kosovo. Mr. Boga's fields of expertise include business and company law, concession law, energy law, corporate law, banking and finance, taxation, litigation, competition law, real estate, environment protection law etc.

Mr. Boga has solid expertise as advisor to banks, financial institutions and international investors operating in major projects in energy, infrastructure and real estate. Thanks to his experience, Boga & Associates is retained as legal advisor on regular basis by the most important financial institutions and foreign investors.

He regularly advises EBRD, IFC and World Bank in various investment projects in Albania and Kosovo.

Mr. Boga is continuously ranked as leading lawyer in Albania by Chambers and Partners and IFLR 1000.

He is fluent in English, French and Italian.

The legal system

The Law on Foreign Investments attempts to create a hospitable investment climate. The law provides guarantees to all foreigners (either physical or judicial persons) willing to invest in Albania. Below we present a brief information on the foreign investment protection or particularities of Albanian legal framework:

(a) No prior government authorization is needed and no sector is closed to foreign investment;

(b) There is no limitation on the percentage share of foreign participation in companies – 100% foreign ownership is possible;

(c) Foreign investors have the right to expatriate all funds and contributions in kind of their investment;

(d) Albania's tax system does not distinguish between foreign and domestic investors;

(e) There are no restrictions on the purchase of private residential property;

(f) Foreign investments may not be expropriated or nationalized directly or indirectly and will not be subject to any measure or similar action, except for public purposes determined by law;

(g) Foreign investments will be treated in a non-discriminatory manner and paid immediately, in a fair and effective manner, in accordance with the law;

(h) In all cases and at all times investments will have an equal and unbiased treatment, and will have complete protection;

(i) There are limited exceptions to this liberal investment regime, most of which apply to the purchase of real estate:

  (i) Agricultural land cannot be purchased by foreigners and foreign entities, but may be rented for up to 99 years; and

  (ii) Constructible land may be purchased, but only if the proposed investment is worth three times the price of the land.

(j) Investors in Albania are entitled to judicial protection of legal rights related to their investments. The Albanian Civil Procedure Code outlines provisions regarding international arbitration;

(k) Albanian law recognizes a variety of legal forms for businesses entities – as explained below.

One Belt One Road Investment

Government support and initiatives

The Albanian Government welcomes any kind of initiative for strategic investments in Albania.

The Albanian government aknowledged that the initiative creates the necessary conditions for improving the infrastructure of the region, thus serving the idea of creating a "New Silk Road" linking Asia with Europe, and that Albania wants to see the actualization of the incoming projects. Albania is open in strengthening cooperation for the development of infrastructure, road, rail, port and airport under the principle of mutual benefit.

The Albanian government aims at boosting economic, trade and investment cooperation and creating better conditions for a sustainable growth of the economy and trade.

On many occasions, the Albanian government statements underlined the willing to increase the exports of Albanian products towards the Chinese market. The signature of an agreement to reduce the quarantine terms by the Chinese customs authorities for Albanian foodstuffs would facilitate their export or continuous communication between the relevant authorities realizing the growth of import-exports.

Albanian specialists of the economy have positively assessed the Chinese initiative and the impact it will have in Albania. "One Road Belt" together with the other Chinese initiative to establish the 16 + 1 Co-operation Mechanism between China and Central and Eastern Europe were considered by the government as two platforms that serve to strengthen Albania's relations with China, especially in the economic field.

The Albanian government has submitted to the Secretariat of the Council of Strategic Investments in 2012 -2013 the following projects that may be developed and invested in namely:

(a) A Project for a Container Terminal in Vlore (Soda River);

(b) A private sector project for the construction of a sugar factory in Maliq;

(c) The project of Tirana Tram.

The Albanian part has proposed funding from Chinese funds (or 16 + 1 Initiative), of some projects from the transport and infrastructure sector, energy, agriculture, economic zones, etc.

(a) Blue Corridor project

(b) Port of Shengjin project

(c) Development of the industrial park in Spitalle, Durres project

The Blue Corridor or the Adriatic–Ionian motorway is a project that will stretch along the entire eastern shore of Adriatic and Ionian seas, from Trieste in Italy to Greece via Croatia, Montenegro and Albania. The project is seen as a matter of national importance for both Albania and Montenegro. The MoU opens the possibility for the construction of the road segments Thumane (near Durres) - Peze - Mullet (near Tirana) and Peze (near Tirana) – Dushk (near Fier) in Albania. According to the Albanian Investment Development Agency in November 2015, Albania and Montenegro signed a MoU (with Chinese company Pacific Construction

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Renata is a Partner at Boga & Associates, which she joined in 1998. She is an authorised trademark agent and has ample experience in trademark filing strategy, portfolio management and trademark prosecution, and handles a range of international matters involving IPR issues. She manages anti-piracy and anti-counterfeit programmes regarding violation of copyright in Albania and assists international clients in all aspects of the IPR. She is also head of the IPR Committee of the American Chamber of Commerce in Albania and is active in all its activities vis-à-vis public authorities in matters of IPR in Albania.

For years, Renata has been recognised as a "Leading Individual" in "Intellectual Property" in *Chambers and Partners* and *Chambers Europe* – "Europe's Leading Lawyers for Business" (2010, 2011, 2012, 2013, 2016, 2017). According to *Chambers Europe*, Renata continues to be highly active, and assists a number of international corporations with trademark protection. She is also contributing to *World Trademark Review* magazine for Albania.

Renata graduated in Law at the University of Tirana in 1996 and also holds a Practice Diploma in International Intellectual Property Law (2006) and a Practice Diploma in Anti-Trust Law (2009) from the College of Law of England and Wales, UK.

Renata is fluent in English and Italian.

Group) that opens the way for the construction of the Blue Corridor motorway project. The joint application for financing the Feasibility Study of this highway was made on December 16, 2015, during the 14th round of the WBIF (Western Balkan Investment Framework) Instrument by the Albanian Government in cooperation with the Government of Montenegro. The total amount of grant awarded: Euro 2.5 million for Albania, 1.5 Million Euros for Montenegro – Financial Institution: EBRD / EIB.

Chinese companies have been invited by the government to assess investing in the construction of the industrial park, Spitalle, Durres, on the basis of the Public-Private Partnership. During the 4th China-CESEE summit, in East China's Suzhou city from November 24 to November 25, 2015, it was announced that Albania has obtained Chinese support for the development of an industrial park in the coastal city of Durres, including development of the port infrastructure.

It is expected that the Albanian government will launch tender procedures for the development of economic zones in Koplik (Shkoder) and Vlora.

Given the interest expressed by the Chinese government for the region as a whole for rail transport projects, another opportunity is the

concession of Albanian rail network. Following the completion of the economic assessment of the entire Albanian railway network (in February 2016, the EBRD-funded study was completed), the economically advantageous segments were assessed in this network.

Government bodies and bilateral trade treaties

Government bodies responsible for encouraging Chinese investments are the Line Ministries (ex. Ministry of Energy and Infrastructure, Ministry of Finance, Ministry of Tourism), agencies (ex. AIDA, Albanian Investment Development Agency, that perform the role of the assisting agent, and will follow all administrative procedures on their behalf from the moment an application is submitted until the strategic investment is completed), and the China-Albania Chamber of Commerce.

Albania and China have signed a bilateral Investment Treaty on February 13, 1993. The Tax Treaty was signed between the two countries on 01.01.2006.

Do these Bilateral Trade Treaties offer Investment Protection Mechanisms?

Yes. Under the Bilateral Investment Treaty Private, there is:

(a) equal treatment of foreign and domestic investors;

(b) full profit and dividend repatriation, after taxation;

(c) repatriation of funds from liquidated companies; and

(d) protection against nationalization or expropriation, unless specifically required by law in the public interest.

Key sectors for One Belt One Road Investment

Strategic investments might be in the following sectors:

(a) Energy and mining;

(b) Transport, telecommunications, infrastructure and urban waste;

(c) Tourism;

(d) Agriculture and fisheries;

(e) Economic zones; and

(f) Priority Development Areas.

Business set up, registration and approvals

The current Commercial Law governing business organizations in Albania (Law no. 9901 "On Entrepreneurs and Commercial Companies") entered into force on 21 May 2008. It is modeled on commercial legislation found in Germany, Italy and Great Britain. The Commercial Law constitutes the main body of legislation for business organizations and aims to harmonize Albanian law with the laws of other European countries and the acquis communautaire.

Types of business entities

The foreign investor has numerous options available to organize its business operations in Albania. This may be achieved either by establishing a locally incorporated company, a branch or a representative office. The registration of new entities in Albania, since 1 September 2007, is carried out by the National Registration Center ("NRC") established under law no. 9723, dated 3 May 2007 "On the National Registration Center", which aimed to implement a "one stop shop" system. As of 26 November 2015, a new law no. 131/2015 has been enacted "On National Business Centre". The said law aims to further facilitate doing business in Albania by offering the registration and licensing procedures through only one institution, which is the National Business Centre ("NBC"). Therefore, the National Business Centre will replace both the National Registration Centre and the National Licensing Centre.

According to the Albanian legal framework, the following business entities need to be registered with the NBC:

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Jonida is a Partner at Boga & Associates, which she joined in 2004.

She is a specialised business lawyer and assists clients on any business law aspects, including corporate, employment, taxation of corporations, competition law implications, mergers and acquisitions and intellectual property.

Jonida also assists banks and financial institutions in their day-to-day activity in Albania including regulatory compliance requirements.

In addition to her client related work, Jonida has published extensively on tax and anti-trust issues.

She is a member of ICC Commission on Arbitration and ADR and ICC Commission on Competition.

Jonida is a member of the Board of Directors of CSR Network Albania.

She graduated in Business Law ("Maîtrise en Droit des Affaires") at the University of Paris X Nanterre, Paris, France in 2002 and obtained a Master Degree in Business Law ("Diplôme d'Etudes Approfondies en Droit des Affaires"), in 2003 at the University of Paris X Nanterre, Paris, France.

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(a) Sole Entrepreneur – Tregtari

(b) Unlimited Partnership – Shoqeri Kolektive

(c) Limited Partnership – Shoqeri Komandite

(d) Limited Liability Company – Shoqeri me Pergjegjesi te Kufizuar

(e) Joint Stock Company – Shoqeri Aksionare

(f) Joint Ventures – Shoqeria e Thjeshte

Common business vehicles

The most comonly adopted business vehicles are the limited liability company and joint stock companies.

Limited Liability Company (SHPK)

This is the most common used legal form for conducting business in Albania. It can be established by one or more individuals or legal entities. Under normal circumstances, shareholders are held responsible for losses only to the extent of their contribution to the capital.

The minimum required capital for the limited liability company is ALL 100.

Contributions to the capital can be in cash or in kind by any asset, tangible or intangible.

Directors are nominated by the General Assembly of the shareholders for a period of no more than five years, though this term can be renewed. Ordinary decisions may be validly taken by the General Assembly of shareholders provided that a quorum representing more than 30% of the company's shares is present in the meeting.

Extraordinary decisions, such as changes to the bylaws, increase or decrease in share capital, mergers and acquisitions or distribution of profits, may be validly taken by the General Assembly of the shareholders upon a majority vote of 75% of the shareholders present in the meeting, provided that shareholders holding more than half of the total number of votes are present at the meeting.

Decisions of the General Assembly of shareholders are recorded in the minutes of the meeting, which are kept by the directors of the company.

Joint Stock Company (SHA)

The capital of a joint stock company is divided into shares, and, under normal circumstances, its shareholders are held responsible for losses only to the extent of their contribution to the capital. The minimum initial capital required is ALL 3.5 million for privately held companies with no public offering, and ALL 10 million for companies which are publicly listed.

The capital is fully subscribed when the shareholders have promised to transfer assets to the company in cash or in kind to an amount equaling the capital. At the point of subscription, for shares being paid for in cash, at least one quarter of the nominal value of the shares must be paid in cash. Payment of the remaining value can be made in installments with the agreement of the management bodies of the company. In kind contributions must be fully paid in at the time of subscription. The Commercial Law does not permit contributions by way of services.

Rights attached to shares may not be transferred before registration of the company with the NBC. All shares bear the same nominal value.

The joint stock company may have "ordinary shares" or "privileged shares". The latter may also have no voting rights and in any case, may not represent more than 49% of the registered share capital.

The Commercial Law provides for the adoption by joint stock companies of a flexible administration system. Joint stock companies may choose to adopt either a "one-tier" system (with a board of directors conducting both management and supervisory functions) or a "two-tier" system (with a board of directors and a separate supervisory board carrying out supervisory functions).

Once the incorporation documents and other accompanying documents are filed with the National Business Center, the latter completes the registration typically within two business days.

Key requirements for the establishment and operation of these vehicles

Before undertaking any decision to adopt a specific form for conducting business in Albania, the foreign investor might need to require local law advice. A specific investment might be subject to licensing (eg. banks or other financial institutions non-banks, audiovisual media companies, electronic communications operators) and the applicable law might require that a specific form of the legal entity or other requirements be complied with.

In general, the registration with the National Business Center requires submission of the following documents:

(a) Application form (standard form) filled in and filed by the legal representatives of the company or by a person authorized by a power of attorney;

(b) Articles of Incorporation and/or Bylaws of the new company;

(c) If the shareholder is a legal entity, also the following should be submitted:

  (i) Articles of Incorporation and Bylaws of parent company and any amendments;

  (ii) Recent extract from the Chamber of Commerce of the country where the shareholder is located, issued no more than 90 days before the date of the application, and confirming the registration of the shareholder in the Commercial Register of the country of origin; the company is not subject

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Gerhard is a Partner at Boga & Associates, which he joined in 2000.

His core practice area is litigation and alternative dispute resolution overarching a wide range of business issues in Albania.

Gerhard represents international clients in courts of all levels, in cases related mainly to banking and finance, real estate, taxation, competition, intellectual property and all sorts of other commercial/corporate disputes.

Additionally, he performed in a number of legal due diligences regarding real estate development issues, property disputes, banking issues, intellectual property, etc.

Gerhard is fluent in English and Italian.

to dissolution or bankruptcy; the composition of the managing bodies of the company.

(iii) Resolution of the board of directors or of any other body of the company (shareholder of the new company) authorized under its bylaws, to establish a new legal entity;

(d) Depending on the legal form of the business entity, additional and specific information may be required to be stated in the Articles of Incorporation/Bylaws or filed with the NBC.

To register a branch or representative office with the NBC the following documents are required:

Application form (standard form) filled in and filed by the representative of the branch/representative office or of the parent company or by a person authorized by a power of attorney issued by either of the above-mentioned persons;

(a) Articles of Incorporation and Bylaws of parent company and any amendments;

(b) Recent extract from the Chamber of Commerce of the country where the parent company is located, issued no more than 90 days before the date of the application, and confirming:

(i) the registration of the parent company in the Commercial Register of the country of origin;

(ii) that the company is not subject to dissolution or bankruptcy;

(iii) the composition of the managing bodies of the company.

(c) Resolution of the parent company's board of directors or of any other body of the company authorized under its bylaws, to establish the branch or representative office in Albania and appoint a legal representative (Manager) of the branch or representative office in Albania;

(d) Financial statements for the last financial year of the parent company and the auditor's report.

Registration requirements

Compulsory data for the registration of commercial companies are as follows:

Name

Form

Date of establishment

Founder Identification Data

Headquarters

The object, if it is defined

Duration, if determined;

Identification data of persons responsible for the administration and representation of the company in relation with third parties, powers of representation, as well as deadlines for their appointment.

Signature specimens of persons representing the company.

Share capital value, the number of shares, the nominal value of shares, the value and type of contributions of each shareholder, and whether the initial share capital is paid or not.

Government approvals

An investment in Albania is subject to prior approval of a state agency or authority (depending on the nature of activity) if required by the applicable law. For example, the following activities require obtaining of a prior approval from the above public authorities:

(a) Banking activities;

(b) Financial non-banking activities (including insurance and re-insurance);

(c) Audiovisual media activities;

(d) Electronic communications;

(e) Construction activities;

(f) Oil activities;

(g) Renewable energy;

(h) Mining activities;

(i) Transportation activities;

(j) Pharmaceuticals;

(k) Other activities

Competition clearance procedures

The Albanian Competition Authority ("ACA") is responsible for applying the merger control legislation in Albania.

A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more independent undertakings or parts of undertakings;

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of shares or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings; or

(c) direct or indirect control over one or more undertakings or part of the latter.

Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, particularly by:

(a) ownership or the right to use all or part of the assets of an undertaking; and

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

The merger control applies to mergers when all of the following turnover thresholds are met:

(a) the combined worldwide turnover of all participating undertakings is more than Leke 7 billion (approximately EUR 50 million) and the domestic turnover of at least one participating undertaking is more than Leke 200 million (approximately EUR 1.42 million); or

(b) the combined domestic turnover of all participating undertakings is more than Leke 400 million (approximately EUR 2.8 million) and the domestic turnover of at least one participating undertaking is more than Leke 200 million (approximately EUR 1.42 million).

In general, the aggregate turnover includes the income of the participating undertakings realised in the preceding financial year from the sale of products falling within the undertakings' ordinary activities, after deduction of taxes or fees directly related to the undertakings' turnover. In cases of mergers of credit or financial institutions, the turnover is the income resulting in annual or consolidated accounts deriving from interests, shares, bonds, equity interests, commissions, net profit from financial operations and other income, after deduction of taxes. For insurance undertakings, the turnover is the gross income of subscribed premiums which include all received and collected amounts as per insurance contracts, as well as reinsurance premiums, after the deduction of taxes.

When the merger consists of the acquisition of parts of one or more undertakings, for calculation of the seller/s' turnover, only the turnover corresponding to the parts which are the subject of the transaction shall be taken into account.

Specifically, when the participating undertaking is part of a group, its aggregate turnover is calculated by adding together the respective turnover of the members of the group (i.e. (i) the participating undertaking, (ii) its subsidiaries where the participating undertaking holds directly or indirectly more than half of the share capital or voting rights, or has the power to appoint more than half of the members of the supervisory board, the administrative board or other legal bodies representing the subsidiary, or has the right to manage the subsidiaries' affairs, (iii) its parent undertakings having the above-mentioned rights or powers, and (iv) the subsidiaries of its parent undertakings – those undertakings in which two or more undertakings as referred to under (i) to (iv) herein have jointly the rights or powers listed in (ii) herein). In cases where the participating undertaking is part of a group, the Competition Law excludes from the calculation of the turnover, the sale of products performed between undertakings that are part of the group.

The Competition Law provides that the merger should be notified within 30 days from the signature of the merger agreement, of the control acquisition or from the announcement of the public offer.

The Competition Law defines the procedure for assessment of mergers from the ACA into: (i) preliminary proceedings; and (ii) in-depth proceedings.

During the preliminary proceedings, the ACA shall examine the notification in order to find whether the transaction "reveals any sign that it would restrict the competition", especially through the creating or strengthening of a dominant position. When pursuing the in-depth proceedings, the ACA must assess whether the transaction significantly restricts the said competition.

During the preliminary phase, the ACA shall decide whether: (i) to initiate an in-depth procedure; or (ii) to give clearance of the merger, within two months after the confirmation of notification receipt (i.e. the period of two months shall begin on the working day following the confirmation of the ACA on the notification receipt or, if the information to be supplied with the notification is incomplete, on the day following the receipt of the complete information).

This period is extended by two weeks ("Extension Period") in cases where the said signs are revealed, but the ACA grants a conditional clearance if the concerned undertakings, no later than one month after notification, commit themselves to take measures to eliminate the restriction of competition.

In cases where an in-depth proceeding is initiated, the ACA shall have three months, starting from the commencement of the proceeding, to declare by means of a decision, if the merger (transaction) is prohibited, fully cleared or cleared with conditions and obligations.

In the event of a "clearance with conditions and obligations", the period of three months shall be extended by up to two months if the

participating undertakings, no later than two months from the date of commencement of the in-depth procedure, commit themselves to take measures to eliminate the restriction of competition.

If the ACA does not decide within the set deadlines (either for the preliminary phase or the in-depth phase), the Competition Law provides for the "silence-is-consent" rule, unless the ACA extends or suspends the above-mentioned time limits.

Free trade zones

The free trade zone of Albania's city of Koplik (Shkoder) is open to foreign investors. The zone, open for manufacturing, industrial and agro-processing activities as well as trading and storing goods, will be divided into three smaller districts in order to provide more investing options to foreign investors.

So far, enterprises from Macedonia and Turkey have shown interest in the strategic position of Koplik's economic and technological development zone because it provides links to the Balkan.

The free trade area, located in northern Albania, consists of 15 cadastral units and about 61 hectares of agricultural fields and pastures.

It will operate for a period of nine years for a symbolical price of 1 euro (1.11 U.S. dollars)

Tax obligations and incentives

Tax Treaty

China and Albania have entered into a tax treaty on avoidance of double taxation of income and capital.

The said tax treaty provides that the dividends, royalties and interest from loans paid from an Albanian entity are subject to taxation in Albania with a withholding tax rate of 10%. This tax rate shall be applicable for this type of income irrespective of the Albanian tax rate.

Corporate income tax

Companies with an annual turnover exceeding ALL 8 million are subject to a 15% tax rate of corporate income tax. If the annual turnover is between ALL 5 million and ALL 8 million, the entity is subject to the simplified corporate income tax rate of 5%. Entities with a total annual turnover below ALL 5 million are exempt from the simplified corporate income tax.

The determination of taxable base starts with the profit shown in the profit and loss account. The profit calculation should be made according to the current accounting legislation and relevant instructions issued by the Ministry of Finance.

Taxation of individuals

Under Albanian law, all individuals are liable to income tax. While residents pay tax on their worldwide income, non-residents pay tax only on income generated within the territory of Albania.

Residence

Individuals having their habitual residence in Albania or who reside in Albania for an aggregate period of more than 183 days in any tax year are considered Albanian tax residents.

Personal income tax rates

Wages, salaries and other compensation for employees are taxed as shown on the following page.

For other taxable income, a flat rate of 15% is applied.

Employment

Local employment regulations

Law 108/2013 dated March 28, 2013 "On Foreigners" and various decisions of the Council of Ministers regulate the employment regime in Albania. The law limits to 10% the number of foreigners hired by employers in Albania. In 2015, the Labor Code was amended to include

Monthly taxable income		Rate
Over (ALL)		Until (ALL)
0	30,000	Nil
30,000	130,000	13 percent of the amount over ALL 30,000
130,000	and above	ALL 13,000 + 23 percent of the amount over ALL 130,000

the temporary employment of foreigners in Albania.

Employment contracts

Employment contracts may be agreed or modified verbally or in writing between the employer and the employee. In the case of a verbal contract, the employer should draft a written document reflecting the agreement within 7 days.

As a general rule, under the Albanian Labor Code, employment contracts are valid for an unlimited term. However, an employment contract may be agreed for a limited term if the work to be carried out is temporary in nature and is to be performed over a predetermined period of time.

Under the Albanian Labor Code, an employment contract must include at least the following:

(a) the identity of the parties;

(b) the workplace;

(c) the general description of the job;

(d) the date of starting the job;

(e) the duration, when the parties enter into a contract of defined time limits;

(f) the duration of paid vacations;

(g) the notice period in case of termination of the contract;

(h) the constituent elements of the salary and the day on which it is given;

(i) the normal working weekly time;

(j) the collective contract in force;

(k) the probation period; and

(l) the types and procedures of disciplinary measures when no collective contract is in force.

Labor unions

The Confederation of Trade Unions of Albania (KSSH-CTUA) is the largest trade union organization in Albania.

Foreign employees

The authority empowered to issue work permits is the General Directorate of the National Labor Service or the Labor Office of the relevant territory, which is part of the Ministry of Youth and Social Welfare.

Foreigners working in the Republic of Albania, depending on the specific case, must obtain a work permit or a work registration certificate.

The following categories of foreign workers are exempted from either obligation:

(a) Citizens of those countries which are part of the EU and Schengen zone have the same employment rights as Albanian citizens, except where the legislation in force requires Albanian citizenship for the job;

(b) The working foreigner is only staying for one month in any one year in cases of:

  (i) foreigners who are negotiating an agreement or supervising a trade event stall;

  (ii) business visitors;

(iii) crew members of ships or aircrafts;

(iv) lecturers, researchers or foreign specialists who come into Albania pursuant to agreements between governments, governments and educational institutions or private sector parties and educational institutions;

(v) educators who come into Albania pursuant to bilateral governmental agreements or agreements concerning educational institutions;

(vi) employees of humanitarian organizations active in Albania pursuant to international programmes of cooperation.

The above documents might vary slightly depending on the type of work permit requested. The application file should be submitted to the General Directorate of the National Labor Service or the Labor Office of the relevant territory. The Directorate/Labor Office must notify its decision on issuance of the work permit within 30 working days from the date of submission of the documentation; in practice, the work permit is usually issued within one month.

The official fee to be paid for the work permit is ALL 6,000 (approx. EUR 45).

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简介

阿尔巴尼亚位于欧洲的东南部，巴尔干半岛西岸，国土面积 28,748 平方公里。阿尔巴尼亚北部和东北部毗邻黑山共和国和科索沃，东临马其顿，南接希腊。阿尔巴尼亚西临亚得里亚海和爱奥尼亚海，占据了巴尔干半岛的重要战略位置。阿尔巴尼亚境内的地形主要是山地。平均海拔 708 米，约为欧洲平均海拔的两倍。阿尔巴尼亚有很多优美的自然风景、考古遗址、历史城堡和其他旅游胜地。属亚热带地中海气候，有炎热干燥的夏季和凉爽多雨的冬季。阿尔巴尼亚位于中欧时区，因此比格林威治标准时间（GMT）早一个小时。

据阿尔巴尼亚统计局报告，阿尔巴尼亚在 2017 年 1 月 1 日的人口是 2,874,800 人。

阿尔巴尼亚坐落于欧洲主要交通走廊的天然十字路口，因而具有重要的战略、经济和地理地位。阿尔巴尼亚是一个正在改革的国家，改革重点包括经商便利性、自由市场、低税负和强有力的激励措施，以及有积极性、受过教育且具有成本竞争力的劳动力，被跨国企业当做进行投资的重要且令人关注的国家。多年来，阿尔巴尼亚的经济一直在朝着更开放和更自由的模式快速发展，其中对内投资在总体经济变革中起着关键作用。

近期经济发展

根据世界银行 2017 年 10 月份的国家快报对阿尔巴尼亚的综述，在国内需求的推动下，该国的经济在 2016 年增长了 3.4%。对两个大型 FDI 融资能源项目的私人投资以及私人消费的复苏，推动了增长，二者分别为经济增长贡献了 1.8% 和 2.1%。就业的改善和信贷的增长，也鼓励了 2017 年的私人消费。0.7% 的 GDP 基本盈余，帮助实现了负债 /GDP 比率自全球危机以来的首次下降，在 2016 年实现了占 GDP 的 72.4%。平均年度通货膨胀率从 2015 年的 1.9% 降至 2016 年的 1.3%，比阿尔巴尼亚银行的目标低 +-1%。

尽管来自欧洲国家的汇款增长缓慢，但总体而言汇款是稳定的。在与能源项目有关的资金流入的帮助下，FDI 净额从 2015 年占 GDP 的 8% 增长至占 GDP 的 8.9%。在 2016 年，强大的增长还刺激了工作岗位的创造，受工业和服务业的驱动，就业率增长了 2.5%，达到了 48.7%。

中期内，阿尔巴尼亚的经济前景还有望变好。受私人投资和私人消费的驱动，预计 2017-2019 年间的增长速度在 3.5% 左右。

外商投资

阿尔巴尼亚为外商提供了许多投资机会。该国拥有丰富的自然资源，主要包括石油、天然气、煤炭、铁、铜、铬、水资源和水力发电潜能。

私有化过程本身就提供了大量的选择。潜在的高利润部门，包括采矿和原油开采，都是以出口为导向的行业。阿尔巴尼亚是欧洲唯一一个有大量铬储存的国家，这让它在 1990 年之前成为世界第三大铬矿石生产国。不过，为了更新那些陈旧过时的生产方法，需要大量的资本投资和产能升级。其他关注领域包括热能和水力发电生产、替代性能源的生产、基础设施、农业、轻工业部门，如纺织、皮革和鞋类、糖果以及肉类加工。

私有化战略明确表示，要寻求符合资格的外国公司作为这些重要部门的战略投资者。

阿尔巴尼亚的旅游业也是一个蓬勃发展的部门，游览这个国家的游客每年都有增加。旅游业也提供了很好的投资前景。阿尔巴尼亚

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Genc Boga
执行合伙人，Boga & Associates

Genc Boga是Boga & Associates的创始人和管理合伙人，主要经营地点在阿尔巴尼亚和科索沃。Boga先生的专业领域包括商业和公司法、特许经营法、能源法、公司法、银行业和金融、税务、诉讼、竞争法、房地产、环境保护法等。

Boga先生拥有可靠的专业知识，可为主要在能源、基础设施和房地产领域开展项目的银行、金融机构和国际投资者担任顾问。因为他经验丰富，Boga & Associates经常被最重要的金融机构和外国投资者保留为法律顾问。

他定期为EBRD、IFC和世界银行在阿尔巴尼亚和科索沃的各种投资项目提供建议。

Boga先生连续不断地被钱伯斯法律评级机构 (Chambers and Partners) 和IFLR 1000评定为阿尔巴尼亚的领先律师。

他流利掌握英语、法语和意大利语。

有壮观的山脉风景，美丽且原始的海岸线，以及古老的历史和文化。对外国投资者而言，旅游业可能是具有吸引力的部门之一。

预计阿尔巴尼亚将大大受益于跨亚得里亚海的管道项目，它将产生该国最大的 FDI 项目之一，很多行业都会从中受益，包括制造业、公共事业和运输业。管道项目将通过提供新的天然气来源而提高欧洲的能源安全和多样化。阿尔巴尼亚的法律，尤其是关于外商投资的法律，保证对外商投资提供完全的法律保护。私人投资不会被收归国有或没收，除非根据法律为了公众的利益必须如此。产生纠纷的各方可以同意申请仲裁。外国投资者也有权利将纠纷提交至阿尔巴尼亚的法院。

外商投资相关法律为金额超过 1000 万欧元的投资 / 项目提供了“特殊状态保护”。当外国投资者与私人团体就项目已经或将要建设和 / 或开发的土地权利产生纠纷时，就会给予这样的保护。这种保护还涉及一种状态，即在法院纠纷中替代外国投资者，并且在法院做出有利于原告的判决时对其进行赔偿。

其他法律方面的激励措施包括：

(a) 平等对待外国和国内投资者；

(b) 全部利润和股息在缴税之后都可遣返回国；

(c) 遣返清算公司的资金。

关于外商投资的统计

据阿尔巴尼亚电信局称，截至 2016 年 12 月，中国在阿尔巴尼亚的投资已达 7.6 亿美元。最近，中国公司又在阿尔巴尼亚完成了两笔大额投资——也就是收购阿尔巴尼亚石油公司 Banker 和地拉那国际机场。2016 年 3 月，加拿大 Banker 石油公司宣布将石油勘探和生产权利出售给中国洲际油气股份有限公司。4 月份，中国财团“Keen Dynamics Limited”，一个由中国光大控股有限公司和富泰资产管理有限公司创建的合营公司，宣布收购地拉那国际机场的全部股份资本。该集团将接管机场的管理权至 2025 年，经政府批准，还可能延长 2 年至 2027 年。在采矿领域，“四川剑南春集团有限责任公司”与土耳其公司“Kurum”共同获得 Kalimash 和

Vlajini 矿、Kalimash 铬矿选矿工厂和 Golaj 铜矿选矿工厂的特许经营权。同时，中国公司“江西铜业”收购了“Beralb”公司 50% 的股份，要在阿尔巴尼亚开采铜矿。

法律体系

有关外商投资的法律在努力打造一种友好的投资环境。法律将保障所有愿意在阿尔巴尼亚投资的外国人（不管是自然人还是法人）。下面，我们提供了阿尔巴尼亚法律框架下关于外商投资保护或特殊之处的简要信息：

(a) 无需事先获得政府批准，并且所有部门都对外商投资开放；

(b) 对外商在公司中所占股份比例没有限制 – 100% 外商独资也是可以的；

(c) 外国投资者有权利遣返用于投资的所有资金和供款；

(d) 阿尔巴尼亚的税务体系并未对外国和国内投资者加以区分；

(e) 没有关于私人住宅财产购买的限制；

(f) 外商投资不会被直接或间接没收或国有化，而且不会被施以类似的任何措施或行动，除非是为了法律确定的公共目的；

(g) 根据法律，外商投资将得到非歧视性对待，并且会以公平和有效的方式立即付款；

(h) 在任何情况下，在任何时候，投资都将得到公平公正的对待，而且会得到完全的保护；

(i) 这种自由投资体制有几种有限的例外情况，大多数都与房地产购买有关：

  (i) 外国人和外国实体不得购买农田，但可以租赁长达 99 年；以及

  (ii) 可购买建设用地，但只有在拟议投资是土地价格三倍的情况下才可以。

(j) 阿尔巴尼亚投资者的投资相关法定权利将得到司法保护。阿尔巴尼亚的《民事诉讼法典》概括了关于国际仲裁的规定；

(k) 阿尔巴尼亚法律承认企业实体的各种法律形式 – 解释见后文。

一带一路投资

政府的支持和倡议

阿尔巴尼亚政府欢迎对阿尔巴尼亚进行战略投资的任何类型的倡议。

阿尔巴尼亚政府承认，一带一路倡议为改善地区内的基础设施创造了必要条件，进而服务于连接亚洲与欧洲的“新丝绸之路”的理念，而且阿尔巴尼亚希望看到外来投资项目得以实现。秉持着互惠互利的原则，阿尔巴尼亚致力于加强在基础设施、公路、铁路、港口和机场开发方面的合作。

阿尔巴尼亚政府旨在促进经济、贸易和投资合作，为经济和贸易的可持续增长创造更好的条件。

在很多情况下，阿尔巴尼亚政府的声明都强调愿意增加阿尔巴尼亚产品向中国市场的出口。中国海关当局签署的减少对阿尔巴尼亚食品进行检验检疫的协议，将促进它们的出口及相关机构为实现进出口增长所进行的持续沟通。

阿尔巴尼亚的经济专家对中国的倡议及其对阿尔巴尼亚的影响给予了积极评价。“一带一路”倡议，再加上旨在中国与中欧和东欧之间建立 16 + 1 合作机制的其他中国倡议，被政府认为是加强阿尔巴尼亚与中国之间关系的两个平台，尤其是在经济领域的关系。

阿尔巴尼亚政府向战略投资理事会秘书处提交报告，要在 2012 -2013 年开发和投资下列项目：

(a) Vlore（Soda 河）上的集装箱码头项目；

(b) Maliq 的糖厂建设私有部门项目；

(c) 地拉那有轨电车项目。

阿尔巴尼亚方提议，交通运输和基础设施部门、能源、农业、经济特区等的一些项目，可以从中国（或者 16 + 1 倡议）融资。

(a) 蓝色走廊项目

(b) 申晋港口项目

(c) 位于都拉斯（Durres）Spitalle 的工业园区项目的开发

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Renata Leka
合伙人，Boga & Associates

标起诉方面拥有丰富的经验，处理过涉及知识产权保护问题的大量国际事宜。她管理着关于违背阿尔巴尼亚版权法的一些反抄袭和防伪计划，并在关于知识产权的各个方面为国际客户提供协助。她还是美国商会驻阿尔巴尼亚知识产权委员会的负责人，积极参与它的各项活动，就阿尔巴尼亚的知识产权事宜与政府当局交涉。

多年来，Renata被钱伯斯法律评级机构和钱伯斯欧洲表彰为"知识产权先进个人"– 被评选为"欧洲主要的商业律师"（2010, 2011, 2012, 2013, 2016, 2017）。 据钱伯斯欧洲称，Renata非常活跃，积极协助国际公司开展商标保护活动。她还为阿尔巴尼亚的《世界商标评论》杂志供稿。

Renata于1996年毕业于地拉那大学法律系，并且还从英国英格兰及威尔士法律学院获得了国际知识产权法从业证书（2006）和反垄断法从业证书 （2009）。

Renata流利掌握英语和意大利语。

蓝色走廊或亚得里亚海 – 爱奥尼亚高速公路是一个沿着亚得里亚海和爱奥尼亚海的整个东海岸，从意大利的的里雅斯特（Trieste），经克罗地亚、黑山共和国和阿尔巴尼亚，直至希腊的项目。谅解备忘录提供了在阿尔巴尼亚 Thumane（都拉斯附近）- Peze - Mullet（地拉那附近）和 Peze（地拉那附近）– Dushk（非莫尔附近）进行公路建设的可能性。据阿尔巴尼亚投资发展机构称，阿尔巴尼亚和黑山共和国在 2015 年 11 月签署了一份谅解备忘录（与中国公司太平洋建设集团），开启了蓝色走廊高速公路项目的建设之路。2015 年 12 月 16 日，阿尔巴尼亚政府与黑山共和国政府合作在第 14 轮 WBIF（西巴尔干半岛投资框架）协议中为该高速公路的可行性研究申请了融资。给予的融资总金额：为阿尔巴尼亚提供 250 万欧元，为黑山共和国提供 150 万欧元 – 金融机构：EBRD / EIB。

阿尔巴尼亚政府一直邀请中国公司评估在公私合营的基础上投资建设都拉斯 Spitalle 工业园区的可行性。在 2015 年 11 月 24 日至 25 日于中国东部城市苏州召开的第 4 届中国 -CESEE 峰会上，阿尔巴尼亚宣布已经获得中国的支持，将在都拉斯沿海城市开发一个工业园区，包括港口基础设施的开发。

预计阿尔巴尼亚政府会为 Koplik（Shkoder）和 Vlora 的经济区的开发发起招标程序。

鉴于中国政府对整个地区的铁路运输项目的兴趣，还有一个机会就是阿尔巴尼亚铁路网络的特许经营。在完成了对阿尔巴尼亚整个铁路网络的经济评估（在 2016 年 2 月，完成了 EBRD- 资助的研究）之后，又对该网络内经济有利性参数进行了评估。

政府机构与双边贸易协定

负责鼓励中国投资的政府机构包括各行业主管部门（不包括能源和基础设施部、财政部、

旅游部）、机构（不包括 AIDA，即阿尔巴尼亚投资开发机构，这是一个起协助作用的机构，从提交投资申请到战略投资完成期间，要遵守它们所有的行政管理程序），以及中国 - 阿尔巴尼亚商会。

阿尔巴尼亚和中国已经在 1993 年 2 月 13 日签署了一份双边投资协定。两国在 2006 年 1 月 1 日签署了税收协定。

这些双边贸易协定有投资保护机制吗?

有。根据双边投资协定：

(a) 外国和国内投资者将得到平等对待；

(b) 全部利润和股息在缴税之后都可遣返回国；

(c) 遣返被清算公司的资金；并且

(d) 给予免被国有化或没收的保护，除非法律为了公众利益特别要求如此。

一带一路投资的主要部门

主要在下列部门进行战略投资：

(a) 能源和矿业；

(b) 交通运输、电信、基础设施和城市废弃物；

(c) 旅游业；

(d) 农业和渔业；

(e) 经济区域；以及

(f) 优先发展区域。

企业的设立、注册和审批

在阿尔巴尼亚，目前监管商业组织的商法（“关于企业和商业公司”的第 9901 号法律）于 2008 年 5 月 21 日生效。它是以德国、意大利和英国的商业立法为模板的。商法是商业组织立法的主体，旨在让阿尔巴尼亚的法律与欧洲其他国家的法律和欧洲共同体法律总汇保持一致。

企业实体的类型

在阿尔巴尼亚，外国投资者有很多选择来组织他们的企业经营。这可以通过在当地设立一家公司、一个分支机构或一个办事处来实现。自 2007 年 9 月 1 日以来，新实体在阿尔巴尼亚的注册，要由国家注册中心（“NRC”）来执行，该中心是根据 2007 年 5 月 3 日关于“国家注册中心”的第 9723 号法律成立的，旨在成立“一站式服务”体系。到了 2015 年 11 月 26 日，又颁布了一项关于“国家商务中心”的第 131/2015 号新法律。该法律旨在通过在一个机构，也就是国家商务中心（“NBC”）内完成注册和许可手续来进一步推动阿尔巴尼亚的商业便利性。因此，国家商务中心将代替国家注册中心和国家许可中心。

根据阿尔巴尼亚法律框架，下列企业实体需要在国家商务中心注册：

(a) 独资企业 – Tregtari

(b) 无限责任合伙公司 – Shoqeri Kolektive

(c) 有限责任合伙公司 – Shoqeri Komandite

(d) 有限责任公司 – Shoqeri me Pergjegjesi te Kufizuar

(e) 股份公司 – Shoqeri Aksionare

(f) 合资企业 – Shoqeria e Thjeshte

常见的企业形式

最常被采用的企业形式是有限责任公司和股份公司。

有限责任公司 (SHPK)

这是在阿尔巴尼亚开展业务最常用的法律形式。有限责任公司可以由一个或多个个人或法律实体成立。通常情况下，股东所承担的亏损仅限于他们所出的资金。

有限责任公司的最低资本要求是 100 阿尔巴尼亚列克（ALL）。

所出资本可以是现金或任何形式的资产，不管是有形的还是无形的。

董事须经股东全体大会任命，任职期间不超过五年，不过，任职期限可以连任。如果占公司股份 30% 以上的法定人数出席会议，则股东全体大会可有效做出普通决议。

对于特别决议，如公司章程细则的变动、股份资本的增加或减少、并购或利润分配，则

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Jonida Skendaj
合伙人，Boga & Associates

她是一名专业的商业律师，可在任何商业法方面为客户提供协助，包括公司组建、就业、公司税务、竞争法影响、并购和知识产权。

Jonida还协助银行和金融机构在阿尔巴尼亚开展它们的日常活动，包括对管理规章的合规要求。

除了与客户相关的工作之外，Jonida还发表了大量关于税务和反垄断问题的文章。

她是ICC仲裁委员会、ADR及ICC竞争委员会的成员。

Jonida 是阿尔巴尼亚CSR 网络董事会的成员。

她于2002年毕业于法国巴黎第十大学商业法（“Maîtrise en Droit des Affaires”）专业，并于2003年在法国巴黎第十大学获得商业法硕士学位（“Diplôme d’Etudes Approfondies en Droit des Affaires”）。

Jonida流利掌握法语、英语和意大利语。

需出席会议的股东占公司总投票权一半以上，且需要出席会议的股东 75% 的多数票，方可生效。

股东全体大会决议需要被记录到会议记录中，由公司董事保存。

股份公司 (SHA)

股份公司的资本被分成股份，而且，在正常情况下，股东所承担的亏损仅限于他们所出的资金。对于没有公开发行的私有公司，要求的最低初始资本是 ALL 350 万，对于上市公司，要求的最低初始资本是 ALL 1000 万。

当股东承诺以现金或等值实物形式将资产转让给公司时，资本即被完全认购。在认购时，对于以现金形式出资的股份，必须至少以现金的形式支付股份票面价值的四分之一。关于剩余价值的支付，可以在与公司管理层签署协议的情况下分期付款。以实物形式提供的资金必须在认购时全部支付。《商法》不允许以服务的形式出资。

在公司于国家商务中心登记注册之前，股份所附权利不可转让。所有股份都具有相同的票面价值。

股份公司可以有“普通股”或“优先股”。优先股可能没有投票权，而且，在任何情况下，都不能超过公司注册资本的 49%。

《商法》为股份公司的采纳提供了一种灵活的行政管理体系。股份公司可选择采纳“单层”体制（只有一个董事会，既行使管理职能又行使监管职能），也可选择“双层”体制（有一个董事会，还有一个单独的行使监管职能的监事会）。

在组建文件和其他随附文件被提交给国家商务中心之后，一般在两个工作日内就可完成注册。

设立和经营这些企业形式的重要要求

在决定于阿尔巴尼亚开展业务的特定形式之前，外国投资者可能需要寻求当地的法律建议。有些特殊投资可能需要获得许可（例如，银行或其他非银行金融机构、视听媒体公司、

电子通讯运营商），适用的法律可能要求特定的法人实体形式或需要遵守其他的要求。

通常，在国家商务中心注册需要提交下列文件：

(a) 公司的法定代表或委托书所授权之人填写和申报的申请表（标准表格）；

(b) 新公司的公司组织章程和 / 或细则；

(c) 如果股东是法人实体，还需要提交下列文件：

  (i) 母公司的公司组织章程和细则及其任何修订；

  (ii) 最近从母公司所在国家的商会摘录的，不超过申请日之前 90 天发布的文件，并确认股东已在其所在国家的商业登记处登记；公司没有被迫解散或破产；公司管理层的构成。

  (iii) 董事会或公司章程细则授权的任何其他机构（新公司的股东）关于设立新法人实体的决议；

(d) 根据商业实体的法律形式，可能需要在公司组织章程 / 细则中声明其他的具体信息或将其提交给国家商务中心。

要想在国家商务中心注册一个分支机构或办事处，需要提交下列文件：

母公司或其分支机构 / 办事处的法定代表或上述人员签发的委托书所授权之人填写和申报的申请表（标准表格）；

(a) 母公司的公司组织章程和细则及其任何修订；

(b) 最近从母公司所在国家的商会摘录的，不超过申请日之前 90 天发布的文件，并确认：

  (i) 母公司已在其所在国家的商业登记处登记；

  (ii) 公司没有被迫解散或破产；

  (iii) 公司管理层的构成。

(c) 母公司董事会或公司章程细则授权的任何其他机构关于在阿尔巴尼亚设立分支机构或办事处并任命阿尔巴尼亚分支机构或办事处法定代表（经理）的决议；

(d) 母公司上一个财务年度的财务报表和审计师报告。

注册要求

商业公司必须要登记的资料如下：

- 名称
- 形式
- 成立日期
- 创始人身份资料
- 总部
- 目标，如果有定义的话
- 存续期限，如果可以确定的话；
- 负责公司行政管理及代表公司与第三方交涉之人的身份资料，代表的权力，以及他们任命的截止日期。
- 公司代表的签字样本。
- 股份资本价值、股份数量、股份的票面价值、每一位股东所出资金的价值和类型，以及初始股份资本是否已付讫。

政府审批

如果可适用的法律有要求，那么在阿尔巴尼亚投资则需要获得国家机构或管理当局的事先批准（取决于活动的性质）。例如，下列活动需要获得政府当局的事先批准：

(a) 银行业活动；

(b) 非银行业金融活动（包括保险和再保险）；

(c) 视听媒体活动；

(d) 电子通讯；

(e) 建设活动；

(f) 石油活动；

(g) 可再生能源；

(h) 采矿活动；

(i) 交通运输活动；

(j) 制药；

(k) 其他活动

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Gerhard Velaj

执行合伙人，Boga & Associates

Gerhard 是Boga & Associates的合伙人，于2000年加入公司。

他的主要从业领域是诉讼和可替代争端解决方案，广泛涉及阿尔巴尼亚的各种商业问题。

在与银行业和金融、房地产、税务、竞争、知识产权和所有其他商务/公司争端有关的案件中，Gerhard可代表国际客户在各级法庭应诉。

另外，他参与了大量与房地产开发问题、财产纠纷、银行业问题、知识产权等有关的法律方面的尽职调查。

Gerhard流利掌握英语和意大利语。

竞争许可程序

阿尔巴尼亚竞争管理局（“ACA”）负责实施阿尔巴尼亚的并购监管立法。

如果因为下列原因，导致控制权持续变更，则被视为出现集中：

(a) 两个或多个独立企业或其中一部分的合并；

(b) 由已经控制了至少一个企业的一个或多个个人，或者由一个或多个企业，通过购买股份或资产、协议或任何其他方式收购一个或多个整个或部分其他企业的直接或间接控制权；或者

(c) 直接或间接控制一个或多个企业或其中一部分。

通过权利、协议或任何其他方式，不管是单独的还是综合的，在考虑过事实或相关法律之后，具有对企业施加决定性影响力的可能性，则构成控制，尤其是通过下列方式：

(a) 对企业的所有或部分资产拥有所有权或使用权；以及

(b) 使之对一个企业的组织构成、投票或决策具有决定性影响力的权利或协议。

当达到下列所有营业额门槛时，即对并购施以并购监管：

(a) 所有参与交易的企业的全球综合营业额超过 70 亿列克（大概 5000 万欧元），并且至少有一个参与交易的企业在国内的营业额超过 2 亿列克（大概 142 万欧元）；或者

(b) 所有参与交易的企业的国内综合营业额超过 4 亿列克（大概 280 万欧元），并且至少有一个参与交易的企业在国内的营业额超过 2 亿列克(大概 142 万欧元)。

一般而言，总营业额包括参与交易的企业在上一个财务年度中通过出售属于其正常活动的产品获得的收入，但须扣除与企业的营业额直接相关的税费。在信贷或金融机构并购的情况下，营业额指的是利息、股份、债券、权益、佣金、金融经营净利润或其他收入的年度或综合账户，在扣除税款之后的收入。对于保险公司，营业额指的是认购保费扣除

税款之后的总收入，其中包括根据保险协议收到和收取的总金额，以及再保险费。

当并购是收购一个或多个企业的某些部分时，要计算卖方的营业额，则应只考虑交易主体部分的营业额。

具体而言，当参与交易的企业是一个集团的一部分时，其总营业额的计算是把集团交易相关成员的各营业额加总在一起（也就是，(i) 参与交易的企业，(ii) 其子公司，其中参与交易的企业直接或间接持有股本或投票权的一半以上，或者有权力任命子公司监事会、行政管理委员会或代表子公司的其他法律主体成员的一半以上，或有权利管理子公司事务，(iii) 其母公司拥有上述权利或权力，并且 (iv) 其母公司的子公司 – 第 (i) 条至第 (iv) 条所提及的两个或多个企业对该子公司联合拥有第 (ii) 条所列之权利或权力）。在参与交易的企业是一个集团中的一部分时，《竞争法》排除了在同时身为一个集团的企业之间的产品销售营业额的计算。

《竞争法》规定，应该在并购协议、受监管的收购签署之日或公开上市声明之后的 30 天内，申报并购交易。

《竞争法》定义了竞争管理局对并购进行评估的程序：(i) 初步行动；以及 (ii) 深入行动。

在初步行动阶段，竞争管理局应检查通知，看交易是否“有限制竞争的迹象”，尤其是通过创建或加强主导地位来限制竞争的情况。在开展深入行动时，竞争管理局必须评估交易是否严重限制竞争。

在初步行动阶段，竞争管理局应确定是：(i) 启动深入行动程序；还是 (ii) 在确认收到通知之后的两个月内（也就是，两个月的期限应该从竞争管理局确认收到通知之后的那个工作日开始算起，或者，如果随通知提供的信息不完整，则应该从收到完整信息之后的那个工作日算起），对该并购授予许可。

在出现上述迹象之后，如果相关企业在发出通知之后不迟于一个月的时间，承诺自己采取措施消除竞争限制，那么上述期限可以延展两周，竞争管理局同意进行有条件地许可。

如果发起了深入行动，竞争管理局有从行动开始之日算起的三个月时间，通过决议的形式宣布并购（交易）是被禁止、完全许可还是附条件和义务的许可。

在“附条件和义务许可”的情况下，如果参与交易的企业在深入行动开始之后不迟于两个月的时间，承诺自己采取措施消除竞争限制，那么上述三个月的期限可予以延展，最长延展两个月。

如果竞争管理局没有在规定时间期限内做出决定（不管是初级阶段的决定还是深入阶段的决定），《竞争法》规定了“沉默即同意”规则，除非竞争管理局延展或推迟了上述时间界限。

自由贸易区

阿尔巴尼亚 Koplik（Shkoder）市的自由贸易区是对外国投资者开放的。在这个自由贸易区，可从事制造、工业和农业加工活动，以及商品交易和存储，它被划分成三个子区域，以便于为外国投资者提供更多的投资选择。

迄今为止，来自马其顿和土耳其的企业已经对 Koplik 经济和技术开发区连接巴尔干半岛的战略地位表现出了极大的兴趣。

位于阿尔巴尼亚北部的这个自由贸易区，由 15 个地籍单位，大概 61 公顷的农田和牧场组成。

它将以 1 欧元（1.11 美元）的象征性价格经营九年。

纳税义务与激励措施

税收协定

为避免对所得和资本进行双重征税，中国与阿尔巴尼亚签署了税收协定。

上述税收协定规定，阿尔巴尼亚实体支付的股息、版税和贷款利息都需要在阿尔巴尼亚缴税，代扣所得税税率为 10%。不管阿尔巴尼亚的税率是多少，这类收入都适用这个税率。

公司所得税

年营业额超过 ALL 800 万的公司要缴纳 15% 的公司所得税。如果年营业额在 ALL 500 万至 ALL 800 万之间，公司应缴纳的公司所得税税率为 5%。年度总营业额不足 ALL 500 万的实体，免征公司所得税。

应税基数的确定从损益账户变为盈利时开始。应根据当前的会计立法和财政部颁发的相关指示来计算利润。

个人税负

根据阿尔巴尼亚的法律，所有人都应缴纳所得税。尽管居民需要为他们在全世界的收入缴税，但非居民只需为其在阿尔巴尼亚境内产生的收入缴税。

居民纳税人

在阿尔巴尼亚有惯常居所，或者在任何税务年度内于阿尔巴尼亚居住超过 183 天的个人，将被视为阿尔巴尼亚的税务居民。

个人所得税税率

员工的工资、薪水和其他报酬应按如下税率纳税。{ 译者请注意 - 请为：…“按照下一页显示的税率纳税”提供一种可替代的译法，非常感谢 。

对于其他应税所得，适用 15% 的统一税率。

就业

当地的就业规章制度

2013 年 3 月 28 日生效的关于“外国人”的法律 108/2013，以及内阁所做的各项决议，是监管阿尔巴尼亚的就业体制的依据。法律将阿尔巴尼亚雇主雇佣外国人的数量限制为 10%。在 2015 年，《劳动法》被修订，把外国人在阿尔巴尼亚的临时就业也包括在内。

劳动合同

雇主与员工之间可以通过口头或书面的形式签署或修订劳动合同。如果是口头合同，雇主应该在 7 天内起草一份反映该合同的书面文件。

一般而言，根据阿尔巴尼亚《劳动法》，无限期劳动合同是有效的。不过，如果要完成的工作是临时性的，并且要在一段预先确定的时间期限内完成，也可以签署具有有限期限的劳动合同。

根据阿尔巴尼亚《劳动法》，劳动合同必须至少包括下列内容：

(a) 各方的身份；
(b) 工作地点；
(c) 关于工作的一般描述；
(d) 开始工作的日期；
(e) 持续时间，在双方签署有确定时间期限的合同的情况下，；
(f) 带薪休假的时间；
(g) 终止合同的通知期；
(h) 工资的构成要素以及哪天发放工资；
(i) 每周的正常工作时间；
(j) 生效的集体合同；
(k) 试用期；以及
(l) 在没有签署集体合同时，要采取的惩戒措施的类型和程序。

工会

阿尔巴尼亚的工会联盟（KSSH-CTUA）是阿尔巴尼亚最大的工会组织。

应税月收入	税率
ALL 30,000以下的	0
超过ALL 30,000，不足ALL 130,000的	金额超过ALL 30,000的部分，按13%的税率纳税
ALL 130,000及以上的	ALL 13,000+金额超过ALL 130,000的部分，按23%的税率纳税

外国员工

有权力发放工作许可证的机构是国家劳动服务总局或相关地区的劳工部，后者是青年和社会福利部的一部分。

根据具体情况，在阿尔巴尼亚共和国工作的外国人必须要取得工作许可证或工作登记证书。

下列类型的外国工人享有豁免权：

(a) 属于欧盟和申根协定区域国家的公民拥有与阿尔巴尼亚公民一样的就业权利，除非生效的法律要求由阿尔巴尼亚公民担任工作；

(b) 在下列情况下，在任何一年中只待一个月的外国工作人员：

  (i) 进行协议谈判或监管展览活动摊位的外国人；

  (ii) 商务游客；

  (iii) 船舶或飞机上的成员；

  (iv) 根据政府之间、政府于教育机构或者私有部门与教育机构之间签署的协议到阿尔巴尼亚来的讲师、研究人员或外国专家；

  (v) 根据双边政府协议或相关教育机构之间的协议来阿尔巴尼亚的教育工作者；

  (vi) 根据国际合作计划在阿尔巴尼亚活动的人道主义组织的员工。

根据所需工作许可证的不同类型，上述文件可能会有些许不同。申请文件应提交至国家劳动服务总局或相关地区的劳工部。总局/劳工部必须在文件提交之后的 30 个工作日内公布关于工作许可证发放的决定；在实践中，工作许可证通常是在一个月内发放的。

工作许可证的官方收费大概是 ALL 6,000（大约 45 欧元）。

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The Republic of Azerbaijan (hereinafter referred to as 'Azerbaijan') gained independence on 18 October 1991 which was affirmed by a nation-wide referendum in December 1991, when the Soviet Union officially collapsed on 26 December 1991. Azerbaijan is one of the most convenient routes from Northeast Europe to Central Asia and the Middle East. Situated on the shores of the Caspian Sea in Southwestern Asia, it shares borders with Russia, Georgia, Armenia, Turkey, and Iran. With one of the best transport infrastructures in the South Caucasus, including six international airports and the biggest port on the Caspian Sea (Baku International Sea Trade Port), Azerbaijan is a logistics hub for the Caspian region.

The first years of the independence were overshadowed by the Armenia-Azerbaijan Nagorno-Karabakh conflict which resulted in killing of an estimated 30,000 people and internal displacement of nearly 1,000,000 people.

Azerbaijan continued to build the structural formation of its political system after the conflict was frozen as a result of 1994 ceasefire and completed by adopting a new Constitution on 12 November 1995. Azerbaijani legal system is based on the civil law system and the Constitution has the highest legal force in the territory of Azerbaijan. In accordance with the Constitution, the Azerbaijani state is a democratic, legal, secular, unitary republic. State power in Azerbaijan is based on a principle of division of powers.

1. Legislative power

Legislative power is exercised by unicameral National Assembly ('Milli Majlis'). Milli Majlis consists of 125 members of parliament (MPs) that are elected based on majority voting system and general, direct and equal elections by free, personal and secret ballot. Elections to each seat of the Milli Majlis are held every five years. Every citizen of Azerbaijan who is not below 25 years old has the right to be nominated as an MP. Milli Majlis adopts Constitutional laws, laws and decrees regarding the questions of its competence.

2. Executive power.

Executive power belongs to the President of Azerbaijan. The President is elected for a 7-year term by general, direct and equal elections, by free, personal and secret ballot by the majority of more than the half of votes. The first vice-president and vice-presidents of Azerbaijan are appointed and dismissed by the President. The president is authorized to form the Cabinet of Ministers, a collective executive body accountable to both the President and Milli Majlis. The Cabinet of Ministers consists primarily of the Prime Minister, his deputies and Ministers. Ilham Aliyev is the incumbent President of Azerbaijan.

3. Judicial power.

Judicial power is exercised by courts of law of Azerbaijan. It is implemented through the Constitutional Court, Supreme Court, and appeal courts, ordinary and specialized courts of law of Azerbaijan. Judicial power is implemented by constitutional, civil and criminal legal proceedings and other forms of legislation provided for by law. Judges are independent, they are subordinate only to Constitution and laws of Azerbaijan, and they cannot be replaced during the term of their authority.

Economic environment

Azerbaijan's *Doing Business* overall ranking is 65 among 190 countries for 2017; also it ranks №5 for starting a business. For 2012, the gross domestic product (GDP) was AZN 52,282.9 billion; and per capita GDP AZN 5,587.87. For 2013, GDP was AZN 57 billion and per capita at GDP AZN 6,132.00. The figures for 2014 were as follows: GDP AZN 53,744 billion with per capita at AZN 5,670.00. GDP for 2015 was AZN 54,352 billion with per capita at AZN 5,600.41. The GDP for 2016 was at the rate of AZN 59, 987, 7 billion with per capita at AZN 6,180.73. In 2008 it started operating a one-stop shop that halved the time, cost and number of procedures to start a business. Today Azerbaijan is the member of the International Monetary Fund, the World Bank, the European Bank for Reconstruction and Development, the Islamic Development Bank and the Asian Development Bank. It is worth to note that Azerbaijan has been a regional member of *Asian Infrastructure Investment Bank* since 2015. On 1 February 2016 Azerbaijan became a party to United Nations Convention on Contracts for the International Sale of Goods as a part of the trend for stimulating foreign investment.

One Belt One Road Investment

The One Belt One Road initiative consists of two major projects: The Silk Road Economic Belt and the 21st-century Maritime Silk Road. The Republic of Azerbaijan is an active supporter of OBOR initiative.

In August 2015, the Trans-Caspian International Transport Route (TITR) was launched; the Nomad Express carrying goods from China (Shihezi) travelled through the port of Aktau and arrived at Baku. As for railroads, Azerbaijan has been a stalwart supporter and promoter of the Transport Corridor Europe-Caucasus-Asia (TRACECA) project initiated by the EU, conceived as the backbone of the Great Silk Road. The westward railroads boast the flagship Baku-Tbilisi-Kars railway (BTK railway), also known as the iron Silk Road.

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Ilgar Mehti is a founder and managing partner at EKVITA. He has about 15 years of experience on both sides of the profession: as in-house counsel in a major oil company and as an outside counsel working for a leading international law firm.

His main practice areas include oil and gas, infrastructure projects, corporate, employment and tax.

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Ilghar was admitted to practice law in Azerbaijan in 2000. He is also a member of IBA.

Azerbaijan officially demonstrated its support to OBOR by signing on December 10, 2015, a Memorandum of Understanding (hereinafter: MOU) on the construction of the Silk Road Economic Belt with China. During the negotiations on the MOU, parties concluded agreements on cooperation in the transport, railway transport and the civil aviation transport field. Accordingly, the Ministry of Transport, Communication and High Technologies of the Republic of Azerbaijan and "Azerbaijan Railway" CJSC are obliged to implement the provisions of the signed agreements.

Currently, the Port of Baku is taking steps to become a regional transport and logistics hub in Eurasia and to be part of the Silk Road Economic Belt. Azerbaijan invested to the construction of the brand new Alyat port, which is planned to be Free Trade Zone, 870 million manat (520 million USD). Estimated transhipment of the new port complex is: up to 10 million tons of cargo and 40 thousand TEU container at the first stage, up to 17 million tons of cargo and 150 thousand TEU containers at the second stage and up to 25 million tons of cargo, 1 million TEU containers at the third stage of the project implementation.

Also in 2016, the China-based Asian Infrastructure Investment Bank (AIIB), which is the one of investors of ODOR initiative, approved its biggest loan so far for the construction of a gas pipeline connecting Azerbaijan to Turkey and Southern Europe. The AIIB lent $600 million to the Trans-Anatolian Natural Gas Pipeline Project (TANAP) which, when completed, will transport natural gas from fields in Azerbaijan across Turkey and then onward to markets in South-eastern Europe. Although the loan only represents 10% of the total expected cost ($11.7 billion), the fact that AIIB is sponsoring the pipeline along with the World Bank and other private companies demonstrates China's interest in extending its influence in the Caucasus.

N°	Name of the treaty	Date
1.	Trade and economic agreement between the Government of the People's Republic of China and the Government of the Republic of Azerbaijan.	1993
2.	Agreement between the Government of the People's Republic of China and the Government of the Republic of Azerbaijan on scientific-technical cooperation.	March, 1994
3.	Agreement on cooperation in the sphere of tourism between the Government of the People's Republic of China and the Government of the Republic of Azerbaijan	7 March, 1994
4.	Agreement between the Government of the People's Republic of China and the Government of the Republic of Azerbaijan on mutual assistance in customs matters	March 17, 2005
5.	Agreement between the Government of the People's Republic of China and the Government of the Republic of Azerbaijan on trade and economic cooperation	March 17, 2005
6.	Agreement between the Government of the People's Republic of China and the Government of the Republic of Azerbaijan on technical and economic cooperation	July 18, 2011
7.	Protocol of the 4th meeting of the intergovernmental commission on Azerbaijan-China trade and economic cooperation	July 18, 2011
8.	Memorandum of Cooperation between the Ministry of Economic Development of the Republic of Azerbaijan and the Ministry of Commerce of the People's Republic of China	June 9, 2012
9.	Memorandum of Understanding between the Sino-European Association of Technical and Economic Cooperation and the Foundation for Export and Investment Promotion Azerbaijan	June 9, 2012
10.	Agreement on economic and technical cooperation between the Government of the Republic of Azerbaijan and the Government of the People's Republic of China	December 8, 2014
11.	Memorandum of Understanding between the Ministry of Economy and Industry of the Republic of Azerbaijan and the Ministry of Commerce of the People's Republic of China on promoting bilateral economic cooperation	December 10, 2015
12.	Memorandum of Understanding in the field of transportation between the Ministry of Transport of the Republic of Azerbaijan and the Ministry of Transport of the People's Republic of China	December 10, 2015

N°	Name of the treaty	Date
13.	Memorandum of Understanding on joint promotion of the "Silk Road Economic Belt" between the Government of the Republic of Azerbaijan and the Government of the People's Republic of China	December 10, 2015
14.	Agreement on civil aviation between the Government of the Republic of Azerbaijan and the Government of the People's Republic of China	December 10, 2015
15.	Agreement on cooperation in the field of railroad cooperation between the "Azerbaijani Railway" Closed Joint Stock Company of the Republic of Azerbaijan and the Government of the People's Republic of China	December 10, 2015
16.	Agreement on technical-economic cooperation between the Government of the Republic of Azerbaijan and the Government of the People's Republic of China	June 1, 2016
17.	Memorandum on mutual understanding between SOCAR and China National Petroleum Corporation (CNPC) in the field of oil-gas and petro-chemicals	May 16, 2016

Bilateral Trade Treaties existing between Azerbaijan and China

In addition to the abovementioned agreements, more than 60 documents, including 22 in the field of trade and economic relations (see table 1), were signed between Azerbaijan and China since the beginning of the diplomatic relationships between the countries. These documents cover various areas including taxation, investment and others. For example, the Government of the Republic of Azerbaijan and the Government of the People's Republic of China concluded an Agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income on March 17, 2005. Also, the Agreement between the Government of the People's Republic of China and the Government of the Azerbaijan Republic Concerning the Encouragement and Reciprocal Protection of Investments is significant, because it suggests mechanisms of protection of investments.

Trade turnover between Azerbaijan and China for the first half of 2017 amounted to $675.91 million. Compared to the same period of 2016, turnover between Azerbaijan and China increased 2.5 times. The inflows of foreign direct investment (FDI) to Azerbaijan amounted to US$4.0 billion in 2015, with China contributing US$1.4 million. As of the end of 2015, China's total stock of FDI to Azerbaijan exceeded US$63 million, up from US$11 million in 2006. Currently, Chinese companies participate in Azerbaijan's 12 projects worth over $640 million. In total, 77 companies with Chinese capital operate in Azerbaijan. Companies Huawei and ZTE are important stakeholders in Azerbaijani telecommunication market. The State Oil Company of Azerbaijan (SOCAR) has been cooperating with China National Petroleum Corporation (CNPC), from which it bought equipment used in the petrochemical sphere that worth more than $500 million. In addition, many companies have had successfully cooperated with Chinese counterparts such as XCMG, Sinotruk, etc. All of it demonstrates the strengthening of economic ties between states.

Setting up a business

Azerbaijani legislation defines "foreign investment" as any kind of property and proprietary rights, including the right to the results of intellectual activity and other intangible rights contributed by foreign investors for the purpose of deriving profit.

Foreigners can invest in a business venture in Azerbaijan in a number of ways, such as:

(a) Share participation in enterprises and organizations established in collaboration with Azerbaijani companies and individuals;

(b) Establishment of enterprises fully owned by foreign investors;

(c) Purchase of enterprises, buildings, equity shares in enterprises, other shares, bonds and securities, as well as other property which, according to the legislation, may belong to foreign investors;

(d) Acquisition of rights for the use of land and other natural resources.

There is no local content requirement and no specific requirements for the size of share or legal limitations for the foreign component in a company and investment. With the exception of certain licensed activities, there are no additional general approvals or permissions to be given apart from state registration for the start up.

The Civil Code of Azerbaijan and the Law on Protection of Foreign Investment provide for a number of different forms through which business activities may take place. They include the following:

(a) **Joint-stock companies (JSCs)** is established by at least one legal entity or an individual. A JSC shareholder's liabilities are limited to the amount of its shares' value. JSCs fall into two categories — "closed" and "open" JSCs. The shares of closed JSCs are not freely transferable and the company must have a minimum capital of AZN 2,000. The shares of open JSCs are not subject to the transfer restriction, but the company must have a minimum capital of AZN 4,000.

(b) **Limited liability companies (LLCs)** can be founded by one or more legal entity or individual with the founding members having a portion of capital/ interest in the LLC equal to the amount paid into the charter capital. Each owner's liability is limited to the amount invested in the LLC. LLCs do not issue shares. Participation interest in LLCs can be freely transferable to third parties, unless provided otherwise under the Charter of the LLC.

(c) **General and limited partnership** is established by at least two legal entities or individual entrepreneurs with all partners having unlimited liability. A limited partnership is established by at least two legal entities or individual entrepreneurs with at least one partner having unlimited liability.

(d) **Additional liability companies (ALCs)** are entities established by one or more individuals and/or legal entities contributing their shares to the charter capital. The legal structure of an ALC is similar to that of an LLC. The distinction between an ALC and an LLC is that the participants in the former may assume liability for the company in excess of their contributions as regulated by the charter.

(e) A **Cooperative** is a voluntary union of at least five individuals and legal entities for the purpose of satisfying the material and other needs of the participants through the consolidation of their material contributions. Depending on the purpose of their activity, cooperatives may be of different kinds, such as consumer cooperatives and condominiums.

State registry

All legal entities including Chinese ones operating in Azerbaijan are required to be registered. Without formal registration, a company may not do business in Azerbaijan (e.g., maintain a bank account, clear goods through customs, etc.). As a part of the ongoing business law reforms, a "One Stop Shop" principle was introduced effective 1 January, 2008. The registration procedures involving several governmental bodies (Ministry of Justice, Ministry of Taxes, Social Insurance Fund and Statistics Committee) have been eliminated, obligating businesses to register only with the Ministry of Taxes.

Upon submission of all required documents (for foreign participants/shareholders, these documents include, inter alia, notarized/apostilled extracts from the companies' register, company charters and documents on corporate governance), within 2 business days, the Ministry of Taxes issues an extract from the state register and a unique tax identification number.

The Ministry of Taxes accepts documents with an apostille issued abroad by member countries of the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents. The acceptability in Azerbaijan of an apostille certification issued in a particular foreign country, and vice versa, should be checked with the relevant authorities before proceeding with such certification.

Following state registration, a representative office or branch needs to obtain an official seal and to open bank accounts.

The state registration duty for banks, insurance companies and certain other types of companies is AZN 220 (USD 127.19); for ordinary companies it is AZN 11 (USD 6.35).

An "online registration" system of legal entities has been available since January 2012 for limited liability companies with local investment. Online registration has been exempted from state fees and is completely free. For e-registration, only the charter has to be attached to the electronic application. Application is made through the Ministry of Tax's web page. The time limit for online registration is 1 day. A hard copy can also be obtained from the Tax Office. Having a registration number is sufficient to start operation.

Documents required for paper registration of standardized LLCs include the following:

(a) Standard application form;

(b) Founding documents – the charter of the entity approved by the founder or his/her legal representative, minutes of the foundation meeting;

(c) Resolution of establishment;

(d) If the founder is an individual – copy of his/her identity card (notarization of the signature is optional);

(e) A document confirming the legal address of the entity (if leased it needs to be notarized, cost 2 AZN + 0.20 AZN if it is done in ASAN).

Limits on Foreign Control

Azerbaijan imposes above average restrictions on foreign equity ownership compared to countries in the Eastern European and Central Asia region. Restricted sectors on investment include those relating to national security and defense. The Government of Azerbaijan also exerts some measure of control over other key sectors, such as agriculture, communications, oil, and mining. According to Azerbaijan's laws, the state must retain a controlling stake in companies operating in the mining or oil and gas sectors. Thus, foreign (as well as domestic) capital participation is limited to a maximum of 49% ownership. Foreign ownership in the media sector is strictly limited as well. Unless any relevant international agreement with Azerbaijan provides otherwise, foreign shareholding in media companies is limited to 33% for newspaper publishers and is prohibited for TV broadcasting companies; currently, there are no such international agreements in place.

While restrictions on foreign equity ownership in the financial services sectors (banking and insurance) have already been abolished, there are still sector-wide limits for total foreign capital participation.

Currency regulation

The official currency of Azerbaijan is the Azerbaijani Manat (AZN). Foreign companies and individuals may have both AZN and foreign currency accounts at local banks. All settlements within Azerbaijan, including the payment of an employee's salary, should be made in AZN, with a few exceptions.

Permission from the Central Bank of Azerbaijan is required in order to collect revenues in foreign currency on the territory of Azerbaijan.

Both resident and non-resident entities of Azerbaijan have the right to open and close accounts in the national or any other foreign currency. Residents and non-residents may import and exchange currency in accordance with the procedures established by the Central Bank of Azerbaijan.

Foreign exchange regulations are less restrictive for non-residents largely due to the fact that non-residents' bank accounts outside Azerbaijan are not regulated by Azerbaijani currency control rules.

Under current legislation, disclosure of confidential bank account information is prohibited. Such information may be disclosed only on the basis of a court ruling or limited cases of requirement by public authorities in accordance with the laws.

Cash settlements

In order to ensure transparency of settlements and protection of consumer rights, a new law on non-cash settlements was adopted on 16 December 2016. According to the new law, the following settlements are to be conducted cashless:

(a) Payments by VAT payers of over AZN 30,000 per calendar month;

(b) Payments by other taxpayers of over AZN 15,000 per calendar month.

1% simplified tax is applied for cash withdrawals by legal entities and sole entrepreneurs from their bank accounts.

Free Trade Zone (FTZ)

The free trade zone is being created under an order signed by President Ilham Aliyev on March 17, 2016. It will be located in the Alat township of Baku's Garadagh district and will also include the new Baku International Sea Trade Port, an important mode in the New Silk Road connecting East and South with European markets and producers.

The port will act as a major logistics hub in the Caspian region, serving both European and Asian markets, as well as being part of an extensive international logistics network linking Europe and Asia which can be beneficial for Chinese investors.

Despite of the above mentioned FTZ, there are 7 industrial parks in the Azerbaijan.

Tax Obligations and Incentives

The Tax Code of the Republic of Azerbaijan adopted in 2001, currently has 223 articles and a number of old tax laws were abolished from it. The tax system in Azerbaijan consists of three taxation regimes:

(a) the statutory tax regime governed by the Tax Code;

(b) the tax regime established by the existing Production Sharing Agreements (PSAs);

(c) the taxation regime established by the two Host Government Agreements (HGAs) such as main Export Pipeline (Baku-Tbilisi-Ceyhan) HGA (BTC) and South Caucasus Pipeline (Shah Deniz Gas) HGA (SPC).

The statutory tax regime applies to all legal entities (both local and foreign) with the exception of those that are governed by a PSA or HGA,

each of which has its own tax rules. The PSA/HGA tax regimes also generally apply to relevant oil operating companies, foreign investors serving as contractor parties and all Foreign Service companies working with such parties.

Profit tax

Legal entities are taxed on profit, which is determined as gross income from economic activities less allowable deductions at a flat rate of 20%. Both resident and non-resident entities (through their permanent establishment) pay profit tax in Azerbaijan. The following entities are generally subject to profit tax in Azerbaijan:

(a) Azerbaijani companies, with or without foreign ownership;

(b) Branches of foreign legal entities;

(c) Representative offices of foreign enterprises undertaking commercial activities in Azerbaijan.

Taxable profit includes trading profit, capital gains, profit from financial activities and other profit sources. Residents, including entities with foreign investments, are taxed on worldwide profit. Non-residents are taxed only on profit from business performed in Azerbaijan.

An additional branch remittance tax of 10% applies to profit remittances from the branch to the head office. The taxable base is net profit after taxes.

Personal income tax

Residents of Azerbaijan are subject to income tax. Individuals who are present in Azerbaijan for more than 182 cumulative days during a calendar year, or those with a place of permanent residence, a center of vital interests or an habitual abode in Azerbaijan, or who have Azerbaijani citizenship, are considered to be tax residents of Azerbaijan.

Taxable income is defined as gross income received from all sources worldwide during the tax year, regardless where the income was earned or paid, less allowable deductions. Non-residents are subject to Azerbaijani income tax only on income received from Azerbaijani sources. The effective progressive tax rate ranges from 14% (for monthly income up to AZN 2,500) up to 25% (AZN 350 + 25% of the monthly amount exceeding AZN 2,500).

Individual entrepreneurs are taxed at a fixed rate of 20%. Wins at sports betting are subject to 10% personal income tax.

Withholding taxes

Foreign legal entities without a permanent presence in Azerbaijan are subject to withholding tax on income, which is derived from the following sources:

(a) Insurance premiums – 4%

(b) International communication and freight fees – 6%

c() Dividends and interest, including the interest element of financial lease payments – 10%

(d) Management fees and fees for other services performed or deemed to be performed on Azerbaijani territory but not connected with an Azerbaijani permanent establishment – 10%

(e) Rents and royalties – 14%

(f) The remittance of profit, derived from a permanent establishment in Azerbaijan to the head office is subject to a branch remittance tax – 10%

(g) Payments to offshore countries – 10%

The rate of withholding tax varies under the existing double tax treaties, depending on the contents of a particular treaty. Double tax treaty between Azerbaijan and China signed in 2005 sets out the rates of withholding tax as dividends at 10%, interest at 0/10% (0.1% ?) and royalties at 10%.

Incentives for agricultural producers

Taxpayers producing agriculture products are exempt from profit tax, VAT, and property tax until the end of 2018.

Only mark-ups applied in the retail sale of agricultural products produced in Azerbaijan are subject to VAT.

Incentives for residents of industrial and technology parks

Businesses operating in industrial and technology parks are eligible for certain privileges and exemptions. The privileges include the following:

(a) Exemption for 7 years from the date of registration in these parks from profit/income, land, and property tax for resident legal entities and private entrepreneurs;

(b) VAT exemption for import of equipment for construction, scientific research works, and other activities in these parks for 7 years or an indefinite period, depending on the nature of these activities.

The Law on the Special Economic Regime for Export-Oriented Oil and Gas Activities

This law avails the following tax incentives to contractors and subcontractors (excluding foreign subcontractors without PE in Azerbaijan):

(a) Local companies are permitted to choose between (i) profit tax at a rate of 20% or (ii) 5% WHT on gross revenues;

(b) Foreign subcontractors are taxable only by a 5% WHT;

(c) 0% VAT rate;

(d) Exemption from dividend WHT and taxation on branch's net profits;

(e) Exemption from customs duties and taxes;

(f) Exemptions from property tax and land tax.

In order to derive these benefits, the relevant taxpayer should obtain a special confirmation certificate from the Ministry of Industry and Energy.

Employment regulations

Employment relations in Azerbaijan are regulated by the Labor Code and other relevant legal acts which provide minimum standards for provision of labor rights. Foreign and stateless employees have the same labor rights and duties with Azerbaijani citizens during the time they work in Azerbaijan, unless otherwise provided by international agreements of Azerbaijan. Only the employees who have employment contracts with a legal entity of a foreign country concluded in that country, but work in Azerbaijan are not subject to Azerbaijani labor law. There is no agreement between China and Azerbaijan on employment relations, so regulations mentioned below are applied for Chinese citizens as well.

Employment relations are established with the provision of an employment contract between employer and employee. The contract becomes valid only after registration at the electronic database of the Ministry of Labor and Social Protection of the Population of the Republic of Azerbaijan. Employment contracts may be entered into for a fixed or indefinite term. A probation period not exceeding 3 months may be stated in the contract.

Regular working day and working week must not exceed 8 and 40 hours respectively. For certain groups of workers, a shorter working time may be provided by law. Overtime work or work on non-working days may be applied with restrictions provided by law and must be duly compensated.

Everyone has a right to get a wage not lower than minimum wage defined by state, which is currently 116 manats per month.

Minimum paid annual leave is 21 days, but for certain groups of workers a longer period is mandated by law. Employees also have rights to social leave (maternity leave), sick leave, educational or scientific creativity leave and unpaid leave under conditions provided by law.

Employers must provide social insurance, insurance from unemployment and insurance against occupational illness and workplace injury of the employees.

Employees may voluntarily establish trade unions to protect their rights and interests from employers and state bodies. Employers may also form their common representative bodies to represent their interests.

Migration

All foreigners and stateless persons firstly must obtain a visa in order to enter the territory of Azerbaijan unless Azerbaijan has an agreement with the country they come from providing otherwise, or a visa is required according to Azerbaijani legislation. In order to get a visa they have to apply to diplomatic missions or consulates of Azerbaijan Republic in relevant states. Electronic application is also possible. Between Azerbaijan and China, the visa-free regime applies only for citizens holding diplomatic or service passports.

Depending on the number of entries, entry visas are divided into single entry and multiple entry visas. Entry visas are valid up to 90 days for single entry/exit, and up to 2 years for multiple entry/exit.

Visa issued for business visit may define a period of stay in the country up to 180 days, while it is 90 days for labour visas. In order to issue these types of visa, the embassies and consulates of Azerbaijan in different countries require a special letter (telex) approved by the MFA based on the Letter of Invitation issued by the inviting company in Azerbaijan.

The Asan Visa system has been introduced in 2016 in order to simplify the electronic visa system. Electronic visas are issued only to the citizens of the countries, the list of which has been approved by the Ministry of Foreign Affairs of the Republic of Azerbaijan (MFA), and to stateless persons permanently residing in those countries. Electronic visa application is made through https://evisa.gov.az/en/ portal and 2 types of electronic visas differ:

- Standard visa (issued within 3 days)
- Urgent visa (issued within 3 hours)

An electronic visa is for only single entry and valid for 90 days. The duration of stay in the country may not exceed 30 days.

Foreigners and stateless persons temporarily staying in the Republic of Azerbaijan for more than 10 days (including cases when they change residence within the country) should apply to the State Migration Service of the Republic of Azerbaijan online or by directly applying to regional migration departments within 10 days after arriving in the country.

Expatriates travelling to Azerbaijan to take employment here have to obtain work (WP) and temporary residence permits (TRP). These permits are issued by the State Migration Service for the period of up to one year. The term of validity can be extended every time for another period of up to one year.

It is prohibited by law to employ expatriates without WP. Permanent residents, persons engaged in entrepreneurship activities in Azerbaijan, staff of diplomatic missions, consulates and international organizations, heads and deputy heads of organizations established by international agreements, persons employed by relevant executive authorities, persons on secondment in certain statutorily listed areas for no more than 90 days a year, heads and deputy heads of branches and representative offices of foreign legal entities in Azerbaijan, heads and deputy heads of legal entities founded in Azerbaijan by a foreign legal entity or a foreign individual and some other categories of foreign nationals do not require WP.

Azerbaijani law also provides 8 categories of activity (mining industry; processing industry; power, gas, steam and conditioned air supply; information and communication; finance and insurance; education; transport; water supply, waste water and waste treatment) not requiring a

work permit for engaging expatriates to work for up to 90 cumulative days within one calendar year.

The Cabinet of Ministers confirms the quota of expatriate workers 3 month before beginning of every calendar year. The quantity of work permits given or prolonged during a calendar year cannot exceed this quota.

Permission card for temporary residence in the territory of the Republic of Azerbaijan is a document authorizing foreigners and stateless persons to reside in Azerbaijan temporarily, exit from and return back to the Republic of Azerbaijan under a visa-free regime during its validity period, and certifying the identities and registration of those persons upon the place of residence. Grounds for obtaining TRP are:

- Work Permit;
- Directors and deputies of branches and representative offices;
- Marriage to Azerbaijani citizen;
- Close relationship with Azerbaijani citizens;
- Directors and deputies of LLC with at least one foreign founder/shareholder (legal entity or physical person);
- Investment of at least 500.000 manats;
- Possession of real estate amounting to 100.000 manats or funds in the same amount in the bank and etc.

China Investor Protection

The state provides guarantee for the protection of all investments, including foreign investments.

Protection of Chinese investment is provided by the corresponding legislation of the Azerbaijan Republic, as well as the Agreement between China and Azerbaijan concerning Encouragement and Reciprocal Protection of Investments. Investors, including foreign ones, are provided with an equal legal regime that excludes discrimination based measures that prevent from managing, using and liquidating investments, and also determining the terms and conditions of taking the results of deposited wealth and investment out of the republic.

Provided further legislation of the Azerbaijan Republic worsens the conditions of investment depositing, the legislation that was in force at the moment of deposition of investment is applied for the period specified in the contract on investment activity.

Investments are not to be nationalized without compensation, confiscated and no other similar measures are to be applied on the territory of Azerbaijan. Such measures may be applied by full payment of damages on real value, including lost profits, only on the basis of legislation acts of Azerbaijan. The order of payment of damage is determined by the given legislation.

The purchase of bank deposits, the contribution of shares and other securities deposited or acquired by investors, payments for purchased property or right for lease, excluding amounts used or lost as a result of their own actions or actions conducted with their participation, are to be returned to investors.

Investments may be insured, and in cases specified by the legislation must be insured.

If there are disputes in connection with investment in Azerbaijan, Chinese investors are entitled to apply to Azerbaijani courts unless the disputes cannot be settled through negotiations within six months. They can also be sued in Azerbaijani courts. Foreign individuals and legal entities may apply to Azerbaijani courts for protection of their rights and have the same procedural rights and obligations with Azerbaijani citizens and legal entities.

If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations, it may be submitted at the request of either Azerbaijan or China to arbitral tribunal which is constituted of arbitrators appointed by each party and from a third State which has diplomatic relations with each party. This is not applicable if the investor concerned has resorted to the procedure specified in the previous paragraph.

Withdrawal of investment makes the investor responsible for the damage caused to other participants of that investment.

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司法管辖区： 阿塞拜疆
律所： EKVITA
作者： Ilgar Mehti

阿塞拜疆共和国（以下简称“阿塞拜疆”）于 1991 年 10 月 18 日取得独立，并于 1991 年 12 月经由全国公投予以确认，时值 1991 年 12 月 26 日苏联正式倒台。阿塞拜疆是从东北欧到中亚与中东最为方便的路径。坐落于西南亚的里海岸边，其与俄罗斯、格鲁吉亚、亚美尼亚、土耳其以及伊朗等国接壤。具有南高加索地区最好的交通基础设施之一，其中包括六个国际机场以及里海最大的港口（巴库国际贸易港口），阿塞拜疆是里海地区的一个物流中心。

亚美尼亚与阿塞拜疆之间所发生的纳戈尔诺 - 卡拉巴赫冲突使其独立的最初几年蒙上了阴影，造成大约 3 万人丧生，国内近 100 万人流离失所。

由于 1994 年停火而使冲突被冻结之后，阿塞拜疆继续建立其政治体系的结构性组织，并于 1995 年 11 月 12 日正式通过一部新的“宪法”而予以完成。阿塞拜疆的法律制度以民法法系为基础，且宪法在阿塞拜疆境内具有最高的法律效力。根据《宪法》规定，阿塞拜疆国家是一个民主的、合法的、长期的、统一的共和国。阿塞拜疆的国家权力系建立在职权分立之原则的基础之上的。

1. 立法权力。

立法权由单院制的国民议会（简称“议会”）予以行使。议会由 125 名议会成员（简称“议会议员”）予以组成，其中议会议员系基于多数表决制以及以自由、个人且无记名的投票方式进行的普遍、直接与平等的选举。针

EKVITA

Ilghar Mehti
执行合伙人, **EKVITA**

Ilgar Mehti是EKVITA的创始人与执行合伙人。其在执业的两个方面具有约15年的工作经验，即作为一家大型石油公司的内部律师以及作为一家国际顶级律师事务所的外聘律师。

其主要的业务领域包括石油与天然气、基础设施项目、公司、就业以及税务。

其拥有巴库州立大学（阿塞拜疆）的法律学士与硕士学位。他还具有美国西北大学法学院的法学硕士学位以及西班牙IE商学院的工商管理证书。

Ilghar于2000年获准在阿塞拜疆进行执业，其同时也是国际律师协会（IBA）的成员。

对议会每个席位所进行的选举每五年举行一次。每名 25 岁以上的阿塞拜疆公民均有权被提名为议会议员。议会通过了关于其权限问题的宪法性法律、法律以及法令。

2. 行政权力。

行政权力属于阿塞拜疆总统。总统通过普遍、直接且平等的选举予以选举产生，每届任期 7 年，其中选举通过自由、个人且无记名的投票方式，以超过半数的多数选票予以确定。阿塞拜疆的第一副总统和其他副总统由总统予以任命和免除。总统被授权组建内阁，其中内阁为同时对总统和议会负责的集体行政机构。内阁主要由总理、其副总理以及部长予以组成。伊尔哈姆 · 阿利耶夫是阿塞拜疆的现任总统。

3. 司法权力。

司法权力由阿塞拜疆法院予以行使。其通过阿塞拜疆的宪法法院、最高法院、上诉法院、普通法院以及专门法院予以实施。司法权力通过宪法性、民事性与刑事性法律程序以及法律所规定的其他立法予以实施。法官是独立的，他们只服从于阿塞拜疆的宪法与法律，且他们不能在其任职期间予以取代。

经济环境

2017 年，阿塞拜疆的营商环境在 2017 年 190 个国家中的总体排名为第 65 名，且其创业排名位居第五位。2012 年，其国内生产总值（GDP）为 522, 829 亿马纳特，人均国内生产总值为 5,587.87 马纳特。2013 年，其国内生产总值为 570 亿马纳特，人均国内生产总值为 6,132 马纳特。2014 年的相关数据如下：国内生产总值为 537, 440 亿马纳特，人均国内生产总值为 5,670 马纳特。2015 年的国内生产总值为 543, 520 亿马纳特，人均国内生产总值为 5,600.41 马纳特。2016 年的国内生产总值为 599,870 亿马纳特，人均国内生产总值为 6180.73 马纳特。在 2008 年，其开始运营一站式服务，使得开办企业的时间、成本与程序数量均予以减半。今天，阿塞拜疆是国际货币基金组织、世界银行、欧洲复兴开发银行、伊斯兰开发银行以及亚洲开发银行的成员。值得注意的是，自 2015 年以来，

阿塞拜疆一直是亚洲基础设施投资银行的区域成员。2016 年 2 月 1 日，阿塞拜疆成为《联合国国际货物销售合同公约》的缔约国，作为刺激外国投资之趋势的一部分。

“一带一路”投资

“一带一路”倡议由两个主要项目予以组成：丝绸之路经济带与 21 世纪海上丝绸之路。阿塞拜疆共和国是“一带一路”倡议的积极支持者。

2015 年 8 月，“跨里海国际运输线路”（TITR）予以启动；从中国（石河子）运载货物的 Nomad Express 通过阿克套港，抵达巴库。至于铁路方面，阿塞拜疆一直是由欧盟予以发起的“欧洲 - 高加索 - 亚洲交通走廊”（TRACECA）项目的坚定支持者与推动者，被视为“丝绸之路”的中坚力量。西向铁路以旗舰“巴库 - 第比利斯 - 卡尔斯”铁路（BTK 铁路）而著称，其也被称为“铁的丝绸之路”。

阿塞拜疆于 2015 年 12 月 10 日签署了《关于建设中国丝绸之路经济带的谅解备忘录》（以下简称“《谅解备忘录》”），正式表示其对“一带一路”的支持。在该《谅解备忘录》的谈判过程中，双方就运输、铁路运输以及民航运输领域的合作达成了协议。相应地，阿塞拜疆共和国的运输、通讯与高科技部与“阿塞拜疆铁路”封闭式股份公司，有责任实施协议所签署的规定。

目前，巴库港正在采取措施，以成为欧亚大陆的区域性运输与物流枢纽，并成为“丝绸之路经济带”的一部分。阿塞拜疆投资建设全新的阿里亚特港口，该港口计划为自由贸易区，8.7 亿马纳特（5.2 亿美元）。该新港口综合体的预计转运量为：第一阶段达到 1000 万吨的货物吞吐量，4 万的 TEU 集装箱；第二阶段达到 1700 万吨的货物吞吐量，15 万的 TEU 集装箱；在该项目实施的第三阶段达到 2500 万吨的货物吞吐量，100 万的 TEU 集装箱

同样在 2016 年，作为“一带一路”倡议投资者之一的常驻中国的亚洲基础设施投资银行（AIIB）批准了其迄今为止最大的一笔贷款，用于建设连接阿塞拜疆与土耳其和南欧的天然气管道。亚洲基础设施投资银行向跨安纳托利亚天然气管道项目（TANAP）提供了 6 亿美元的贷款，该项目建成后将把天然气从阿塞拜疆的油气田运送到土耳其，然后再转运至东南欧的市场。虽然这笔贷款仅占总预期成本（117 亿美元）的 10%，但亚投行与世行以及其他私营公司共同赞助这一管道的事实表明，中国有兴趣扩大其在高加索地区的影响力。

阿塞拜疆和中国之间所存在的双边贸易条约

除上述协定或协议之外，自两国间外交关系开始以来，阿塞拜疆和中国之间签署了 60 多个文件，其中包括经贸关系领域的 22 个文件（见表 1）。这些文件涵盖包括税收、投资等在内的各个领域。例如，阿塞拜疆共和国政府和中华人民共和国政府于 2005 年 3 月 17 日就所得税方面的避免双重征税与防止偷漏税达成的协议。此外，《中华人民共和国政府和阿塞拜疆共和国政府关于鼓励和相互保护投资的协定》具有重大意义，因其提出了保护投资的机制。

2017 年上半年，阿塞拜疆和中国之间的贸易额达到 6.7591 亿美元。与 2016 年同期相比，阿塞拜疆和中国两国间的交易额增长了 2.5 倍。 2015 年，阿塞拜疆的外国直接投资（FDI）流入额达到 40 亿美元，其中中国出资 140 万美元。截至 2015 年底，中国对阿塞拜疆的外商直接投资总额超过了 6300 万美元，高于 2006 年的 1100 万美元。目前，中国企业参与阿塞拜疆的 12 个项目，价值超过 6.4 亿美元。共计有 77 家具有中国资本的公司在阿塞拜疆经营。诸如华为和中兴通讯是阿塞拜疆电信市场的重要利益相关者。阿塞拜疆国家石油公司（SOCAR）一直与中国石油天然气集团公司（CNPC）合作，其从该合作中收购了价值 5 亿多美元的石油化工领域的设备。此外，许多公司已经与中国同行进行了成功的合作，譬如徐工集团、中国重型汽车集团有限公司等等。所有这些都表明了两国之间经济联系的强化。

编号	条约名称	日期
1.	《中华人民共和国政府和阿塞拜疆共和国政府之间的经济贸易协定》	1993
2.	《中华人民共和国政府和阿塞拜疆共和国政府关于科技合作的协定》	1994年3月
3.	《中华人民共和国政府和阿塞拜疆共和国政府关于旅游领域合作的协定》	1994年3月7日
4.	《中华人民共和国政府和阿塞拜疆共和国政府关于海关事务互助的协定》	2005年3月17日
5.	《中华人民共和国政府和阿塞拜疆共和国政府关于经贸合作的协定》	2005年3月17日
6.	《中华人民共和国政府和阿塞拜疆共和国政府关于技术经济合作的协定》	2011年7月18日
7.	《阿中经贸合作政府间委员会第四次会议议定书》	2011年7月18日
8.	《阿塞拜疆共和国经济发展部与中华人民共和国商务部合作备忘录》	2012年6月9日
9.	《中欧技经合作联盟与阿塞拜疆出口和投资促进基金会谅解备忘录》	2012年6月9日
10.	《阿塞拜疆共和国政府和中华人民共和国政府间经济技术合作协定》	2014年12月8日
11.	《阿塞拜疆共和国经济工业部和中华人民共和国商务部关于促进双边经济合作的谅解备忘录》	2015年12月10日
12.	《阿塞拜疆共和国运输部与中华人民共和国运输部交通运输领域的谅解备忘录》	2015年12月10日
13.	《阿塞拜疆共和国政府与中华人民共和国政府共同推动“丝绸之路经济带”的谅解备忘录》	2015年12月10日
14.	《阿塞拜疆共和国政府和中华人民共和国政府之间关于民用航空的协定》	2015年12月10日
15.	《阿塞拜疆共和国“阿塞拜疆铁路”封闭式股份公司与中华人民共和国政府在铁路合作领域的合作协议》	2015年12月10日
16.	《阿塞拜疆共和国政府和中华人民共和国政府间技术经济合作协定》	2016年6月1日
17.	《阿塞拜疆国家石油公司与中国石油天然气集团公司 (CNPC) 在石油天然气和石油化工领域的谅解备忘录》	2016年5月16日

设立企业

阿塞拜疆立法将“外国投资”定义为任何形式的财产与财产权利，包括对知识产权活动之成果所享有的权利以及外国投资者为获得利润而出资的其他无形权利。

外国人可以通过以下几种方式投资于阿塞拜疆的企业，譬如：

(a) 参与同阿塞拜疆公司和个人合作建立的企业与组织；

(b) 设立外商独资企业；

(c) 购买企业、建筑物、企业股权、其他股份、债券与证券、以及其他依照法律可属于外国投资者的财产；

(d) 获得使用土地和其他自然资源的权利。

对于公司与投资中的外国组成部分的股份规模或法律限制没有本地内容要求，也没有具体要求。除了某些许可的活动之外，设立企业不存在国家注册之外的任何额外的一般性批准或许可。

《阿塞拜疆民法典》和《外国投资保护法》规定了许多不同形式的商业活动。这些商业活动包括如下：

(a) 股份公司（JSC）由至少一个法人或个人予以建立。股份公司股东的责任仅限于其股份的价值。股份公司分为两类：即“封闭式”与“开放式”的股份公司。封闭式股份公司的股份不能自由予以转让，且此类公司必须具有 2,000 马纳特的最低资本金。公开股份公司的股份不受转让限制，但此类公司必须具有 4,000 马纳特的最低资本金。

(b) 有限责任公司（LLC）可以由一个或多个法人实体或个人予以创立，其中创始成员在有限责任公司中拥有一定的资本 / 利益，其金额相当于所支付的注册资本。每个所有者的责任仅限于其在有限责任公司中所投资的金额。有限责任公司不发行股份。有限责任公司中的参与权益可以自由转让给第三方，除非“有限责任公司章程”另有规定。

(c) 普通合伙与有限合伙企业至少由两个法人或个人企业家共同予以设立，其中所有合伙人均具有无限责任。有限合伙企业至少由两个法人实体或者个体企业家予以组建，其中至少有一个合伙人具有无限责任。

(d) 附加责任公司（ALC）是由一个或多个个人和 / 或法人实体通过向注册资本进行出资而予以设立的实体。附加责任公司的法律结构与有限责任公司的法律结构相似。附加责任公司与有限责任公司之间的区别在于，根据公司章程之规定，前者的参与者所承担的企业责任可能超过其出资金额。

(e) 合作社是至少由五个个人和法人实体予以组成的自愿联盟，其目的是通过其参与者的实物出资的合并来满足参与者的物质以及其他需要。根据他们的活动目的，合作社的性质可能各有不同，譬如消费者合作社与共管公寓。

国家登记

包括在阿塞拜疆经营的中国企业在内的所有法人实体都必须进行注册登记。在未进行正式登记注册的情况下，公司不得在阿塞拜疆开展业务（例如，维持银行账户、通过海关清关等等）。作为正在进行的商业法改革的一部分，从 2008 年 1 月 1 日起开始实行“一站式”原则。

涉及若干政府机构（司法部、税务部、社会保险基金以及统计委员会）的注册登记程序已经予以取消，仅要求企业向税务部进行注册登记。

在提交所有必要的文件（对于外国参与者 / 股东而言，这些文件包括经公证或附注的公司注册登记摘录、公司章程以及公司治理文件等）之后，在 2 个工作日内，税务部会从国家注册登记簿中出具一个摘录以及一个唯一的税务识别号。

税务部门接受由《1961 年取消外国公文合法化要求的海牙公约》的成员国在国外予以出具的带有附注的文书。对于由某一特定国家予以出具的带附注证书在阿塞拜疆的可接受性，在进行该等认证之前，其应由有关当局进行核查，反之亦然。

进行了国家注册之后，代表处或者分支机构需要取得公章并开立银行账户。

银行、保险公司以及某些其他类型的公司的国家注册税是 220 马纳特（127.19 美元）；对于普通公司来说，其为 11 马纳特（6.35 美元）。

自 2012 年 1 月起，针对本地投资的有限责任公司开始实施法人实体的“在线注册登记”制度。在线注册登记已经予以免除国家费用且是完全免费的。对于电子注册而言，只有公司章程需要附加到电子申请之中。申请通过税务部的网页做出。在线注册的时间限制为 1 天。也可以从税务局获得纸质版申请。有一个注册号码即足以开始进行操作。

标准化有限责任公司的纸质注册登记所需的文件如下：

(a) 标准申请表格；

(b) 设立文件：经由创始人或其法定代表予以批准的实体章程，设立会议之会议记录；

(c) 设立决议；

(d) 在创始人为个人的情况下，其身份证的复印件（对签名进行公证不是必需的）；

(e) 确认该实体的法定地址的文件（在租用的情况下，需要经过公证，其费用为 2 马纳特，若在 ASAN 进行公证，则须额外付 0.20 马纳特）。

对外控制的限制

与东欧和中亚地区的国家相比，阿塞拜疆对外国股权所施加的限制在平均水平之上。限制投资领域包括涉及国家安全和国防的领域。阿塞拜疆政府还对农业、通讯、石油以及采矿等其他关键部门采取了一些控制措施。根据阿塞拜疆的法律规定，国家必须保留在矿业或者石油与天然气部门进行经营的企业控股权。因此，外国（以及国内）的资本参与最多只限于 49% 的所有权。媒体部门的外国所有权也受到严格的限制。除非与阿塞拜疆之间的任何相关国际协定另有规定，否则媒体公司中的外资持股对于报纸出版限于 33%，并且禁止在电视广播公司中的外资持股；目前，还没有这样的国际协定。尽管对金融服务业（银行业与保险业）中的外资股权限制已经予以取消，但对外资参与总量还是具有行业范围内的限制。

货币管制

阿塞拜疆的官方货币是阿塞拜疆马纳特（AZN）。外国公司与个人在本地银行可同时拥有马纳特账户和外币账户。阿塞拜疆境内的所有清算，包括支付雇员的工资，都应使用马纳特进行，只有少数例外情形。

为在阿塞拜疆境内收取外币收入，则须取得阿塞拜疆中央银行的许可。

阿塞拜疆的居民与非居民实体均有权使用本国或者任何其他外币来开立与关闭账户。居民与非居民可以按照阿塞拜疆中央银行所制定的程序进口与兑换货币。

外汇管制对非居民的限制较少，这主要是因为阿塞拜疆以外的非居民银行账户不受阿塞拜疆货币管制规则的管制。

根据现行立法之规定，禁止披露机密银行账户信息。该等信息只能在法庭判决的基础上予以披露，或者根据法律规定而在公共当局要求的少数情况下予以披露。

现金结算

为确保结算的透明度以及保护消费者权益，于 2016 年 12 月 16 日通过了一项新的非现金结算法律。根据该项新法律之规定，下述结算将以无现金的方式进行：

(a) 增值税纳税人对每个自然月超过 30,000 马纳特的费用所进行的支付；

(b) 其他纳税人对每个自然月超过 15,000 马纳特的费用所进行的支付。

对法律实体和独资企业从其银行账户所进行的现金支取实行 1% 的简化税。

自由贸易区（FTZ）

自由贸易区是根据总统伊尔哈姆·阿利耶夫于 2016 年 3 月 17 日予以签署的命令而创建的。其将位于巴库加拉达地区的阿拉特镇，且还将包括新巴库国际贸易港，该港口为新

丝绸之路中连接东欧和南欧市场与生产者的一种重要模式。

该港口将成为里海地区的主要物流中心，为欧洲和亚洲市场提供服务，同时其也是连接欧洲和亚洲的广泛国际物流网络的一部分，这对中国投资者有利。

除了具有上述自由贸易区，阿塞拜疆还有 7 个工业园区。

税收义务与激励措施

2001 年通过的《阿塞拜疆共和国税法》目前有 223 条规定，且其从该项法律中废除了一些旧的税法规定。阿塞拜疆的税制由三个税收制度予以构成：

(a) 由《税法》予以管理的法定税收制度；

(b) 由现行《产品分成协定》（PSA）予以确立的税收制度；

(c) 由两个《东道国政府协定》（HGA）予以建立的税收制度，例如主要的《出口管道（巴库 - 第比利斯 - 杰伊汉）东道国政府协定》（BTC）与《南高加索管道（沙赫德尼兹气田）东道国政府协定》(SPC)。

法定税收制度适用于所有的法律实体（包括本地与外国法律实体），但受《产品分成协定》或者《东道国政府协定》予以管辖的法律实体（每个实体都有其自己的税收规则）除外。《产品分成协定》/《东道国政府协定》税收制度一般也适用于相关石油公司、作为承包方的外国投资者以及与这些方面合作的所有外国服务公司。

利得税

对法定实体的利润予以征税，该等税金对经济活动总收入减去可抵扣金额后得到的金额按照 20 % 的固定税率予以征收。居民与非居民实体（通过其常设机构）均须在阿塞拜疆缴纳利得税。以下实体一般须在阿塞拜疆缴纳利得税：

(a) 阿塞拜疆公司，而无论其是否具有外国所有权；

(b) 外国法人实体的分支机构；

(c) 在阿塞拜疆从事商业活动的外国企业的代表处。

应税利润包括交易利润、资本收益、金融活动以及其他利润来源所得利润。包括外商投资企业在内的居民对其全球利润予以纳税。非居民只对其从阿塞拜疆的业务中所得的利润予以纳税。

对分支机构向总部所汇转的利润适用 10 % 的附加分支机构汇款税。应税基础是税后净利润。

个人所得税

阿塞拜疆居民需缴纳所得税。在一个自然年度内在阿塞拜疆累计居住 182 天以上的人，或者在阿塞拜疆具有永久居所、重要利益中心或习惯居所的人，或者拥有阿塞拜疆公民身份的人均被认为是阿塞拜疆的税务居民。

应纳税所得额被定义为在纳税年度从全球所有来源所收到的总收入（而无论该收入系在何处取得或支付）减去所允许的扣除额。非居民只对其从阿塞拜疆来源所收到的收入缴纳阿塞拜疆所得税。有效的累进税率范围从 14 %（针对 2,500 马纳特以上的月收入）到 25 %（350 马纳特 + 月收入超过 2,500 马纳特的部分的 25 %）。

个人企业家的税率固定为 20 %。体育博彩所赢得的金额适用 10 % 的个人所得税。

预提税

在阿塞拜疆没有常设机构的外国法人实体需要对其从下述来源所取得的收入缴纳预提税：

(a) 保险费：4 %

(b) 国际通讯与运费：6 %

(c) 股息与利息，包括融资租赁付款的利息部分：10 %

(d) 管理费以及在阿塞拜疆领土内予以履行的或者被视为在阿塞拜疆领土内予以履行的、但与阿塞拜疆常设机构无关的其他服务的费用：10 %

(e) 租金与版税：14 %

(f) 将在阿塞拜疆的常设机构所取得的利润汇转至其总部须缴纳分支机构汇款税：10%

(g) 向离岸国家所进行的付款：10%

现行双重征税条约项下的预扣税之税率各有所不同，具体取决于特定条约的内容。阿塞拜疆与中国于 2005 年予以签署的双边税收协定规定，分红的预提税税率为 10%，利息的预提税税率为 0/10%（0.1%？），版税的预提税税率为 10%。

公司 - 税收激励

对农业生产者的激励

生产农产品的纳税人在 2018 年底以前免征利得税、增值税以及财产税。

只有在阿塞拜疆生产的农产品之零售中所产生的加价才需缴纳增值税。

对工业与科技园区居民的激励

在工业与科技园区进行经营的企业有资格获得某些特权与豁免。该等特权包括以下内容：

(a) 自在这些园区进行注册登记之日起 7 年内免除居民法人和私营企业主的利得 / 所得、土地以及财产税；

(b) 对于用于在这些园区的建筑、科学研究以及其他活动的进口设备在 7 年内或者在不确定的期限内免除增值税，具体取决于这些活动的性质。

《关于出口导向的石油与天然气活动的特别经济制度法》

该项法律对承包商与分包商（在阿塞拜疆没有常设机构的外国分包商除外）提供以下税收激励：

(a) 本地公司可以在（i）20% 税率的利得税或者（ii）针对总收入的 5% 的预提税中进行选择；

(b) 外国分包商仅需缴纳 5% 的预提税；

(c) 0% 的增值税税率；

(d) 免除股息的预提税以及分支机构净利润的税收；

(e) 免除关税与税收；

(f) 免除财产税与土地税。

为了获得这些利益，相关纳税人应该获得工业与能源部的特别确认证书。

就业条例

阿塞拜疆的就业关系受《劳工法》以及其他相关法律法规的约束，这些法律规定了提供劳工权利的最低标准。除阿塞拜疆所签署的国际协议另有规定外，外国和无国籍雇员在阿塞拜疆工作期间与阿塞拜疆公民享有同样的劳工权利和义务。只有那些在他国与外国法人实体签订雇佣合同、但在阿塞拜疆工作的雇员不受阿塞拜疆劳动法的约束。中国和阿塞拜疆之间不具有关于雇佣关系的协定，因此前面所提到的条例也适用于中国公民。

劳资关系是建立在雇主和雇员之间所签订的雇佣合同之上的。只有在阿塞拜疆共和国劳动和社会保障部电子数据库中登记之后，合同才具有效力。雇佣合同可以是有固定期限的，也可以是无固定期限的。

合同中可以规定一个不超过 3 个月的试用期。

正常工作日与工作周分别不得超过 8 小时与 40 小时。对于某些群体的工作人员而言，法律可能会规定较短的工作时间。加班或者在非工作日工作可能会受到法律所规定的限制，且必须给予适当的补偿。

人人均有权获得不低于国家所规定的最低工资的工资，目前的最低工资水平是每月 116 马纳特。

最低带薪年假是 21 天，但是对于某些群体的工作人员而言，法律可能会规定更长的期限。员工还有权享有社会休假（产假）、病假、教育或科学创造假以及法律所规定的无薪假。

雇主必须提供社会保险、失业保险以及雇员的职业病与工伤保险。

员工可以自愿组建工会，以保护他们相对于雇主与国家机构的权利和利益。雇主也可以组建他们共同的代表机构来代表他们的利益。

移民

所有的外国人和无国籍人必须首先获得签证才能进入阿塞拜疆境内，除非阿塞拜疆与其来源国之间所签署的协定另有规定，或者根据阿塞拜疆立法规定要求签证。为了获得签证，这些人须向有关国家的阿塞拜疆共和国外交使团或领事馆申请签证。电子申请也是可能的。在阿塞拜疆和中国之间，免签证制度只适用于持有外交或者公务护照的公民。

根据入境的次数，入境签证分为单次入境和多次入境签证。单次入境 / 出境的入境签证之有效期最多为 90 天，而多次入境 / 出境的入境签证之有效期则长达 2 年。

签发的商务签证可能会限定在该国 180 天的停留时间，而劳务签证的这一时间则为 90 天。为了签发这些类型的签证，阿塞拜疆驻各国的使领馆要求阿塞拜疆邀请公司发出邀请函，由外交部在该邀请函基础之上予以批准特别信函（电传）。

Asan 签证系统已于 2016 年予以推出，以简化电子签证系统。电子签证只发给阿塞拜疆共和国外交部予以批准的国家的公民以及永久居住在这些国家的无国籍人士。电子签证申请是通过 https://evisa.gov.az/en/ 门户网站进行提交，且两种类型的电子签证有所不同：

- 标准签证（3 天内予以签发）
- 紧急签证（3 小时内予以签发）

电子签证只能入境一次，且其有效期为 90 天。在该国停留的时间不得超过 30 天。

暂时在阿塞拜疆共和国停留 10 天以上的外国人和无国籍人士（包括其在该国境内变更居留的情况）应在网上向阿塞拜疆共和国国家移民局提出申请，或者在抵达该国后的 10 天内直接向区域移民部门提出申请。

前往阿塞拜疆就业的外派人员必须取得工作许可（WP）与临时居留许可（TRP）。这些许可均由国家移民局予以签发，期限最长为一年。有效期可以予以延长，但每次延长的期限不得超过一年。

法律禁止雇用没有工作许可的外籍人士。永久居民、在阿塞拜疆从事创业活动的人员、外交使团人员、领事馆和国际组织的工作人员、根据国际协议予以设立的组织的正副负责人、有关行政部门予以雇用的人员、在某些法定区域进行时间不超过 90 天的借调人员、外国法人实体在阿塞拜疆的分支机构和代表处的正副负责人、由外国法律实体或外国个人在阿塞拜疆予以成立的法人实体的正副负责人以及其他类别的外国国民不要求工作许可。对于在一个自然年度内从事外派工作的时间累计不超过 90 天的情况，阿塞拜疆法律还规定了 8 类不需要工作许可的活动（采矿业；加工业；电力、燃气、蒸汽以及调节性空气供应；信息与通信；金融与保险；教育；运输；供水、废水以及废物处理）。

内阁部长在每个自然年度开始前的 3 个月确认外派工人的配额。在一个自然年度内给予或延长的工作许可数量不得超过这一配额。

在阿塞拜疆共和国境内暂住的许可证是授权外国人和无国籍人暂时居住在阿塞拜疆、在其有效期内根据免签证制度离境并返回阿塞拜疆共和国的文件，也是证明这些人在居住地的身份与登记的文件。获得临时居留许可的理由如下：

- 工作许可；
- 分支机构和代表处的董事与代表；
- 与阿塞拜疆公民结婚；
- 与阿塞拜疆公民的关系密切；
- 至少具有一名外国创始人 / 股东（法人或自然人）的有限责任公司的董事与代表；
- 至少 50 万马纳特的投资；
- 拥有价值 10 万马纳特的房地产或者在银行具有等额的资金等等。

中国投资者保护

国家为所有投资（包括外国投资）提供保障。

中国投资的保护由阿塞拜疆共和国的相应立法以及《中国和阿塞拜疆之间关于鼓励和相互保护投资的协定》予以提供。向包括外国投资者在内的投资者提供一个平等的法律制度，其不包括对投资的管理、使用与变卖

进行妨碍的歧视性措施，且其确定了将存款与投资带出阿塞拜疆共和国境外的条款与条件。

如果阿塞拜疆共和国的进一步立法使投资汇入的条件发生恶化，则对于在关于投资活动的合同中所规定的时间期限，应适用在投资汇入之时所有效的立法。

投资不得被无偿国有化，不得被没收，且不得在阿塞拜疆境内适用其他类似措施。该等措施只有在阿塞拜疆的立法行为的基础上，方可通过以实际价值全额赔偿损失（包括利润损失）的方式予以适用。损害赔偿的命令由特定立法予以做出。

购买的银行存款，投资者存入或取得的股份出资及其他证券，为购买的物业或者租赁权而支付的款项，不包括因其自身的行为或者因其参与的行为而使用或损失的金额，均应退还给投资者。

投资可以投保，且在法律所规定的情况下必须予以投保。

在发生与在阿塞拜疆所进行的投资有关的争议的情况下，中国投资者有权向阿塞拜疆法院提出申请，除非该争议在六个月内不能通过谈判予以解决。此类争议也可在阿塞拜疆法院提起诉讼。外国个人和法人实体可以向阿塞拜疆法院申请保护其权利，并且与阿塞拜疆公民和法人实体具有相同的程序权利与义务。

在涉及征收补偿之数额的纠纷在谈判后的六个月内不能予以解决的情况下，可以应阿塞拜疆或中国的要求将其提交仲裁庭，仲裁庭由各方指定的、来自与各方具有外交关系的第三国的仲裁员组成。若相关投资者已经采取了前段所规定的程序，则该规定不予适用。

撤回投资使得投资者应对该投资的其他参与者因此而遭受的损害承担责任。

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Introduction

Size, population, location and key bordering jurisdictions

The area of Bangladesh is 56,977 sq. miles or 147,570 sq. k.m. Bangladesh lies in the north eastern part of South Asia between 20 0 34' and 26 0 38' north latitude and 88 0 01' and 92 0 41' east longitude. The country is bordered by India on the west, north and north-east, Myanmar on the south-east and the Bay of Bengal on the south (Bangladesh Bureau of Statistics, *Statistical Year Book of Bangladesh 2016*, 36th Edition).

The population of Bangladesh is about 160 million with a growth rate of 1.32% per annum (Bangladesh Investment Development Authority, *Investment in Bangladesh Handbook and Guidelines*).

The capital of Bangladesh is Dhaka. The currency of Bangladesh is Bangladesh Taka.

Recent economic progress and development expectations

Bangladesh has been achieving steady economic growth for decades. According to the government's economic development vision, the "Vision 2021", the government envisages raising economic growth rate to 10% in 2017 and sustaining it till 2021. Increasing investment is considered as a key variable for attaining such growth.

Bangladesh offers a liberal investment climate. The Foreign Private Investment (Promotion and Protection) Act, 1980, which deals with promotion and protection of investment in Bangladesh, ensures equal treatment for local and foreign investors. Bangladesh offers a competitive location for doing business in terms of costs, inputs, human resources, market access, investment facilitation, etc.

Significant foreign investments are being made in Bangladesh in various sectors including energy, telecommunication, infrastructure development, etc.

Statistics on foreign investment

Gross Foreign Direct Investment (FDI) inflows during the fiscal year 2015-16 reached US$ 2502.41 million. The size of disinvestment (including capital repatriation, reverse investment, loans to parents, and repayments of intra-company loans to parents) during the fiscal year 2015-16 was US$ 498.88 million which was 19.93% of gross FDI inflows. Hence, net FDI inflow in Bangladesh during the fiscal year 2015-16 was US$ 2003.53 million. Gross FDI inflows during the quarters July-September, October-December, January-March and April-June of the fiscal year 2015-16 were US$ 738.71 million, US$ 676.16 million, US$ 547.28 million and US$ 540.26 million, respectively (Statistics Department, Bangladesh Bank, Foreign Direct Investment in Bangladesh; Survey Report January-June 2016).

Brief overview of the legal system

(a) CIVIL COURTS

Jurisdiction of the civil courts in Bangladesh may be broadly classified into three categories:

(i) Territorial jurisdiction – Courts (except the Supreme Court of Bangladesh) have their own territorial limits beyond which they cannot exercise jurisdiction.

(ii) Pecuniary jurisdiction – The pecuniary jurisdiction of the civil courts is set out in the Civil Courts Act 1887 (the "1887 Act"). Under the Code of Civil Procedure, 1908 s 15 ("CPC"), every suit must be instituted in the Court of the lowest grade competent to try it.

(iii) Jurisdiction as to subject matter – Different courts have been empowered to decide different types of suits. Under the CPC s 9, the Courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Under the 1887 Act s 3, the following are the classes of Civil Courts (in descending order):-

(i) the Court of the District Judge;

(ii) the Court of the Additional District Judge;

(iii) the Court of the Joint District Judge;

(iv) the Court of the Senior Assistant Judge; and

(v) the Court of the Assistant Judge.

In respect of subordination of the civil courts, the CPC s 3 provides as follows:

> "3. For the purposes of this Code, the District Court is subordinate to the High Court Division, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court Division and District Court."

Thus, the District Court is subordinate to the Supreme Court of Bangladesh. The Supreme Court of Bangladesh has two Divisions, namely-

(i) High Court Division; and

(ii) Appellate Division.

The Appellate Division has jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division. It has rule making power for regulating the practice and procedure of each division and of any court subordinate to it. The High Court Division has both appellate as well as original jurisdiction. It hears appeals from orders, decrees, and judgments of subordinate courts and tribunals. It has original jurisdiction to hear Writ Petitions (i.e. judicial review applications) under Article 102 of the Constitution. It has other original jurisdiction under statutes, inter alia, in respect to company and admiralty matters. The High Court Division has superintendence and control over all courts and tribunals subordinate to it.

There are certain specialised courts established by various statutes for specific matters, including the Money Loan Court, Bankruptcy Court, Customs Excise and VAT Appellate Tribunals and the Labour Court.

CRIMINAL COURTS

The classes of criminal courts have been set out in the Code of Criminal Procedure 1898 s 6 ("CrPC").

Besides the Supreme Court and the Courts constituted under any law for the time being in force, other than CrPC, there are two classes of Criminal Courts in Bangladesh, namely:-

(a) Courts of Sessions; and

(b) Courts of Magistrates.

There are two classes of Magistrate, namely: -

(a) Judicial Magistrate; and

(b) Executive Magistrate.

There are four classes of judicial Magistrate, namely: -

(a) Chief Metropolitan Magistrate in Metropolitan Area and Chief Judicial Magistrate in other areas;

(b) Magistrate of the first class, who in Metropolitan area, is known as Metropolitan Magistrate;

(c) Magistrate of the second class; and

(d) Magistrate of the third class.

Each of these courts has different sentencing powers.

One Belt One Road Investment

How is the government supportive of One Belt One Road Investment?

The Bangladesh government is supportive of One Belt One Road Investment and Bangladesh officially became a part of OBOR in 2016 after the visit by the Chinese President Xi Jinping.

Have there been any announcements or proposals as a result of the One Belt One Road initiative?

In 2016, after the visit by the Chinese President Xi Jinping, the two countries (Bangladesh and China) signed several deals worth US$21.5 billion. However, some reports say that all these deals are still in paper only due to bureaucratic complexities.

Which government bodies are responsible for encouraging China Investment?

There is no specific government body dedicated to encouraging Chinese investment. In general, the Bangladesh Investment Development Authority (BIDA) is responsible for encouraging foreign investment. Established under the Bangladesh Investment Development Authority Act 2016, BIDA is the principal investment promotion and facilitation agency of Bangladesh.

What Bilateral Trade Treaties exist between your jurisdiction and China?

A bilateral investment treaty exists between Bangladesh and China. Various other treaties and MOUs exist between Bangladesh and China including the Memorandum of Understanding on Chinese Support in the field of Electric Power (2012), and the Agreement on Economic and Technical Cooperation (2014).

The BIT with China provides Chinese investors guarantees of fair and equitable treatment, full protection and security in respect of unreasonable and discriminatory measures, national and most favoured nation treatments as well as protection against expropriation.

One Belt One Road Investment will attract construction industries building roads, airports, and sea-ports.

Many of China's labour-intensive export processing units have been shifting to other countries. Bangladesh can be a good destination for Chinese private investment.

There are increasing commitments to significant Chinese Investment in Bangladesh in various sectors including energy and infrastructure development. Government-to-government investments are taking place and the China Development Bank and the China Export Import Bank are mobilising large amounts of capital to Bangladesh.

In 2016, after a visit by the Chinese president Xi Jinping, the two countries (Bangladesh and China) signed several deals worth US$21.5 billion. However, it has not been reported in public media that the proposed investments are part of OBOR.

Business Set Up, Registration and Approvals

What are the most common business vehicles?

A foreign entity has the option of setting up business in Bangladesh either as:

(a) a company; or

(b) a branch office; or

(c) a liaison office.

Companies and branch offices are permitted to engage in commercial and trading activities and thereby earn income locally. However, a liaison office would not be able to engage in any such activities. It would only be permitted to carry out promotional activities in Bangladesh for its principal.

Large investments and investments in the infrastructure and industrial sectors, for example roads, power, energy, manufacturing or assembling, are usually through a locally incorporated company.

How long do they take to set up?

If all the documents are in order, it would take about 1-2 months to set up a company, branch or liaison office. For commercial operation of an entity, the time may vary depending on what other licences are required, which in turn depends on the nature of activities to be carried out by the entity.

Key requirements for the establishment and operation of these vehicles?

The procedure to set up branch office and companies are different (discussed below). In respect of branch/liaison offices, the office shall have to bring inward remittance of at least US$ 50,000 within 2 (two) months from the date of issue of permission letter by the BIDA as establishment cost and 6 months operational expenses. The BIDA permission for a branch/liaision office are required to be renewed from time to time.

A company is incorporated in Bangladesh under the Companies Act 1994 upon issuance of the certificate of incorporation by the Registrar of Joint Stock Companies and Firms ("RJSC"). Under the Companies Act 1994, a private limited company must have at least two shareholders and two directors. There is no minimum capital requirement for a subsidiary company. A Bangladesh company may have 100% foreign ownership. It is possible for one single entity/person to hold all the shares in a company except for one share, which must be held by another entity/person in order to fulfil the requirement of minimum two shareholders.

Both companies and branch offices have to comply with various filing requirements with the regulators.

What are the registration requirements?

Company: Before applying for registration with RJSC, it is necessary to obtain "Name Clearance" for the proposed company.

The RJSC would issue a Name Clearance Certificate for the proposed name upon satisfaction that it does not closely match or resemble with any of the already taken names (registered, booked or under the process of registration of the same entity type).

Prior to submission of application for registration, sponsors of a proposed company must open an account with any bank in Bangladesh in the name of the company by submitting a copy of the Name Clearance Certificate issued by the RJSC. After opening the bank account, the price of the shares would have to be remitted from abroad to that account and a bank encashment certificate would have to be obtained.

The promoters of the company would have to prepare the Memorandum and Articles of Association of the company. Thereafter the necessary special adhesive stamps would have to be collected from the treasury by depositing money through treasury challan (receipt) in Bangladesh Bank (treasury officials affix the stamps on the Memorandum and Articles of Association and put seals and signature on the stamps). The value of stamp duty and registration fees will depend upon the authorized capital of the company.

Thereafter, the application for registration with the RJSC would have to be filed with the necessary documents, prescribed forms and schedules, stamps and fees.

The company would also need to obtain a trade licence from the relevant City Corporation, VAT Registration Certificate and Tax Identification Number from the tax authority.

Branch/liaison office - In order to set up a branch/liaison office in Bangladesh, approval of various regulatory authorities is necessary. The permission for setting up a branch office needs to be obtained from the BIDA. A notification would need to be made with the Bangladesh Bank (i.e. central bank of Bangladesh) under the Foreign Exchange Regulations Act 1947 ("FERA"). The office would need to be registered with RJSC. It would also need to obtain trade license from the relevant City Corporation, VAT Registration Certificate and Tax Identification Number from the tax authority. Depending on the activities to be carried out by the branch

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Sharif Bhuiyan

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He is the author of *National Law in WTO Law: Effectiveness and Good Governance in the World Trading System* (Cambridge: Cambridge University Press, 2007, paperback, 2011), co-editor (with Philippe Sands and Nico Schrijver) of *International Law and Developing Countries* (Leiden/Boston: Brill Nijhoff, 2014; South Asian edition, 2017) and author of many articles in internationally published books and journals.

Bhuiyan practises in a wide range of areas, including, admiralty, arbitration, aviation, banking, competition, corporate and commercial, employment, energy, insurance, intellectual property, securities, taxation, technology and telecommunication. He acted as lead counsel in several international commercial arbitrations involving substantial claims and parties and arbitrators of multiple nationalities and as lead Bangladesh counsel in many cross-border projects and transactions, including multibillion dollar transactions, in the energy, infrastructure, telecommunication and various other sectors.

He is consistently ranked as a top tier legal practitioner by international practitioners' directories, *Chambers Global* and *Chambers Asia Pacific*. Bhuiyan also acts as a consultant in various matters, including as a consultant for the World Bank.

office, permission from other regulators would also be required.

Under what circumstances is Chinese Investment subject to government approvals?

No government approvals are necessary specifically for Chinese investment. It is subject to the same regulations and requirements like any other investment.

What is the process and timeline for such approvals?

Not applicable.

Any processes that can block China Investment?

There are no processes that can block China investment. So long the investment is made in compliance with the laws of Bangladesh and investment brought in through proper banking channel, the Chinese Investment would not be blocked.

There are certain restrictions in some sectors. According to the Industrial Policy, there are certain sectors which are considered to be "reserved" (no investment is possible in such sectors) and some are "controlled". If the company concerned falls within the controlled sector, the government may impose certain ownership restrictions. The controlled sector includes exploration, extraction and supply of natural gas/petroleum, crude oil refinery, etc.

What sectors are heavily regulated or restricted?

According to the Industrial Policy, 2016 there are certain sectors which are considered to be "reserved" (no private investment is possible in such sectors) and 21 sectors are "controlled". The controlled sectors include exploration, extraction and supply of natural gas/petroleum, crude oil refinery, bank/financial institution in the private sector, insurance company in the private sector, telecommunication service (mobile/cellular and land phone), satellite channel, cargo/passenger aviation, etc.

Reserved sector (public sector) industries:

According to the Industrial Policy 2016, there are certain sectors which are considered to be "reserved" (no private investment is possible in such sectors). The following areas are reserved for public sector investment:

a) Arms and ammunition and other defence equipment and machinery

b) Forest Plantation and mechanized extraction within the bounds of reserved forests

c) Production of nuclear energy

d) Security printing (currency notes) and minting.

What are the competition clearance procedures (filing, process and notification)?

Competition is governed by the Competition Act 2012 (the "Competition Act"). The purpose of the Competition Act is to prevent, control and eradicate collusion, monopoly and oligopoly, combination (as defined below), abuse of a dominant position in the market, anti-competitive practices and to encourage and ensure competitive business environment to promote economic development of Bangladesh.

The Competition Act is applicable to all business organisations which are engaged in the business of buying and selling, manufacture, supply, distribution and storage of any product or services for commercial purposes. However, the law is not applicable to goods and services which are not open to the private sector and are regulated by the Government for the interest of national security.

Under the Competition Act, the following acts are not permitted:

- Anti-competitive agreements (s 15);
- Abuse of dominant position (s 16); and
- Certain combinations (s 21).

"Combinations" has been defined as acquisition, taking control over or merger. Any combination that causes, or is likely to cause an adverse effect on competition in a market for goods or services, is prohibited. Combinations may be allowed subject to the permission of the Competition Commission.

The relevant regulatory authority in respect of the Competition Act is the Bangladesh Competition Commission (BCC). The BCC is not yet fully operational.

Are there any foreign currency controls China Investors should be aware of?

The foreign exchange regime is strictly regulated in Bangladesh and remittance of funds abroad requires general or special permission from the central bank of Bangladesh (i.e. the Bangladesh Bank).

The FERA s5 provides as follows:

"5. (1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Bangladesh Bank, no person in or resident in Bangladesh shall–

(a) make any payment to or for the credit of any person resident outside Bangladesh;

(b) draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person resident outside Bangladesh;

(c) make any payment to or for the credit of any person by order or on behalf of any person resident outside Bangladesh;

(d) place any sum to the credit of any person resident outside Bangladesh;

(e) make any payment to or for the credit of any person as consideration for or in association with-

(i) the receipt by any person of a payment or the acquisition by any person of property outside Bangladesh;

(ii) the creation or transfer in favour of any person of a right whether actual or contingent to receive a payment or acquire property outside Bangladesh…"

Some general exemptions/permissions have already been provided by Bangladesh Bank in the Guidelines for Foreign Exchange Transactions (the "FX Guidelines"). For example, subject to some restrictions, certain remittances are permitted through proper banking channel, such as remittance of dividends, technical fees, etc.

Are there Special Economic Zones or Free Trade Zones?

There are Special Economic Zones and Export Processing Zones.

Special Economic Zones ("SEZ") – Under the Bangladesh Economic Zones Act, 2010, the Bangladesh Government is empowered to grant benefits to a SEZ or any area of it, including but not limited to the following:

(1) Acquisition of land:

The Bangladesh Government may acquire any land if required for an economic zone or for infrastructure for such zones such as roads, bridges, etc. and the land acquired is deemed to be required for public interest.

(2) Tariff benefits:

The Government may provide tariff benefits to an SEZ or any area of it, for a specified period, and introduce special arrangement to facilitate import and export operations of the organizations established in the SEZ.

(3) Financial benefits:

The Government can provide such financial incentives and benefits to the industrial units within the SEZ as is provided to the industrial units in Export Processing Zones ("EPZ").

(4) Arrangements in relation to clearances, certificates, permits, etc.:

Arrangements can be made: (i) to facilitate the economic zone developers and industrial units in respect of legal documents which include permission for economic zone selection, declaration of economic zones, clearances, certificates, certificate of origin, permit for repatriation of capital and dividends, resident and non-resident visas, work permits, construction permits etc. through a one-stop service; and (ii) to allot or lease plots suitable for setting up industries

(5) Exemption from certain Laws:

The Government may exempt a SEZ or an organization in SEZ from certain Acts or pass an order that certain provisions shall be subject to such

modification or amendments as specified therein (including Foreign Exchange Regulation Act, Income Tax Ordinance, Building Construction Act, etc.).

Export Processing Zones (EPZ) – Under the Bangladesh Export Processing Zones Authority Act 1980 ("BEPZA Act"), EPZs in Bangladesh enjoy various fiscal and non-fiscal incentives.

Under the BEPZA Act, the EPZs were established to set up and operate export processing zones in Bangladesh with a view to providing a congenial investment climate free from procedural complications. EPZs are export-oriented industrial enclaves that provide infrastructural facilities, administrative and support services to the investors along with rewarding incentives including fiscal incentives (concessionary tax, duty free import of machinery and raw materials, etc) and non-fiscal incentives (full repatriation facilities of dividend and capital at the event of exit, warehouse and secured bonded area, etc).

A total of eight EPZs are in operation now (Dhaka, Mongla, Ishwardi, Uttara, Comilla, Adamjee (Narayanganj), Karnaphuli and Chittagong).

Where and how do these aid China Investment?

Chinese investment can take advantage of various fiscal and non-fiscal incentives provided to SEZ and EPZ.

Tax Obligations and Incentives

What tax incentives or structures that favour China Investment?

A tax holiday is allowed for various industrial undertakings and physical infrastructure facility subject to fulfilment of certain conditions.

Chinese investors can take advantage of the Double Taxation Avoidance Treaty with China.

Taxation in Bangladesh

In Bangladesh, the law governing income tax is contained in the Income Tax Ordinance, 1984 (the "**ITO**"), the Income Tax Rules, 1984 (the "ITR") and the byelaws made thereunder.

What are the rates of corporation tax, personal incomes tax and withholding tax?

The highest rate of personal income tax is 30%.

Publicly traded companies generally are taxed at the rate of 25%. Banks, insurance companies and financial institutions are taxed at the 42.5% rate, with a lower rate of 40% available if the company is publicly traded. Mobile phone operator companies and cigarette manufacturing companies are taxed at the 45% rate. All other companies are subject to a 35% rate.

The rates of withholding taxes depend on the head of income.

Are there any tax agreements between your jurisdiction and China?

Bangladesh and China have entered into an agreement for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income (September 12, 1996).

Employment Contracts

What are the local employment regulations?

In Bangladesh, the legislation which primarily governs employment is the Labour Act, 2006 (the "Labour Act"). The Labour Act, however, is only applicable to employees who fall within the definition of "worker". The Labour Act s 2(65) defines "worker" as follows:

> "any person including an apprentice employed in any establishment or industry, either directly or through a contractor, to do any skilled, unskilled, manual, technical, trade, promotional or clerical work for hire or reward, whether the terms of employment be expressed or implied, but does not include any person employed mainly in a managerial or administrative capacity" [unofficial translation from Bangla].

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She practises in a wide range of areas, including corporate and commercial matters, mostly in the energy and natural resources, construction and infrastructure, transport, manufacturing and industrials sectors. She also specialises in arbitration, employment and telecommunication.

The employment of employees who do not fall within the above definition of "worker" is governed by their contract of employment. Such employees are entitled to the benefits set out in their contract of employment.

In case of workers, the terms of employment are governed by both the Labour Act and the contract of employment. If the contract of employment of a worker contains any provision which is less favourable to the worker than that set out in the Labour Act, the provision set out in the Labour Act prevails. The benefits set out by the Labour Act include the following:

(1) Severance benefit (at the time of retrenchment, discharge, dismissal for misconduct, termination of employment by employer, termination of employment by employee, retirement, etc);

(2) Death benefits;

(3) Maternity benefit;

(4) Extra-allowance for overtime;

(5) Interval for rest or meal;

(6) Weekly holiday;

(7) Casual Leave;

(8) Sick Leave;

(9) Annual Leave;

(10) Festival Holiday;

(11) Compensation for injury by accident arising out of and in course of employment;

(12) Workers' participation in company's profits (for companies engaged in industrial undertakings and not applicable for NGOs);

(13) Provident Fund (optional unless three-fourths of the total number of workers make a demand in writing).

The Labour Act also makes special provisions relating to health, hygiene, safety and welfare of the workers.

There are specific regulations for employees working in the Export Processing Zone. In exercise of the powers conferred under the Bangladesh Export Processing Zones Authority Act 1980 s 3A, the Bangladesh Export Processing Zones Authority ("BEPZA") issued certain directives on service matters concerning workers and officers employed in companies operating within the export processing zones of Bangladesh.

Trade Unions: Under the Labour Act, workers, without distinction whatsoever, shall have the right to form trade unions primarily for the purpose of regulating the relations between workers and employers or workers and workers and, subject to the constitution of the union concerned, to join trade union of their own choice.

Are visas required for foreign employees? What is the application process like?

For obtaining a new work permit, a foreign investor /employee must arrive in Bangladesh with 'PI', 'E1' or 'E' visa from Bangladesh Diplomatic Mission abroad with a recommendation from the Board of Investment. "P1" visa is for foreign investors in the private sector; "E1" visa is generally for persons arriving in Bangladesh for the supply, installation, maintenance or supervision of equipment and software, etc.; and "E" visa is for employees, consultants or experts etc. After arriving in Bangladesh, a foreigner will not be able to change the visa category.

A work permit for foreign nationals is a prerequisite for employment in Bangladesh. After arrival in Bangladesh, the employee is required to apply for a work permit from the Board of Investment (or BEPZA or NGO Affairs Bureau, depending on the nature of the employer).

Necessary security clearance has to be obtained from the Ministry of Home Affairs after the issuance of a Work Permit and the duration of visa would be extended up to the period of the Work Permit.

Are there any quotas on foreign employees?

The number of the expatriate employees in an industrial enterprise should not exceed a 1:20 (foreign: local) ratio at any time during regular production and the ratio for commercial offices is 1:5 (foreign: local).

Do any of these regulations differ in special investment zones?

There are specific regulations for employees working in the Export Processing Zones. In exercise of the powers conferred under the Bangladesh Export Processing Zones Authority Act 1980 s 3A, BEPZA has issued certain directives on service matters concerning workers and officers employed in companies operating within the export processing zones of Bangladesh.

China Investor Protection

What protection mechanisms are available to China Investors?

The Foreign Private Investment (Promotion and Protection) Act, 1980 (the "**Investment Act**") provides for fair and equitable treatment to foreign private investment and ensures full protection and security of foreign private investment in Bangladesh. Foreign private investment is defined as "investment of foreign capital by a person who is not a citizen of Bangladesh or by a company incorporated outside of Bangladesh, but does not include investment by a foreign Government or an agency of foreign Government."

The Investment Act s 7 provides as follows:

> "7. (1) Foreign private investment shall not be expropriated or nationalised or be subject to any measures having effect of expropriation or nationalisation except for a public purpose against adequate compensation which shall be paid expeditiously and be freely transferable.
>
> (2) Adequate compensation for the purpose of sub-section (1) shall be an amount

equivalent to the market value of investment expropriated or nationalised immediately before the expropriation or nationalisation."

What contract enforcement options are available?

Contracts can be enforced through the civil courts. Alternatively, the parties can agree to settle disputes by arbitration. In case of arbitration, the parties are free to choose the rules of arbitration, the seat and the language of the arbitration. The Arbitration Act, 2001 governs recognition and enforcement of arbitral awards including foreign arbitral awards.

Are there any penalties for withdrawing from an investment?

There are no penalties for withdrawing from an investment.

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介绍

国土面积，人口，地理位置与重要国境线

孟加拉的国土面积为 56,977 平方英里或者 147,570 平方公里。孟加拉位于南亚东北部，介于北纬 20° 34’至 26 ° 38’、东经 88 ° 01’至 92 ° 41’之间。该国东、西、北三面与印度毗连，东南邻缅甸，南邻孟加拉湾（孟加拉统计局，《孟加拉统计年鉴》2016 年第 36 版）。

孟加拉人口约 1.6 亿，年增长率为 1.32%（孟加拉投资发展局《孟加拉投资手册及指南》）。

孟加拉首都为达卡。孟加拉的法定货币为孟加拉塔卡。

近期经济成果与发展展望

几十年来，孟加拉一直保持着经济的稳定增长。根据孟加拉政府的经济发展愿景——“愿景 2021”，政府希望将 2017 年的经济增长率提高至 10% 并维持到 2021 年。实现经济增长的重要因素是增加投资。

孟加拉提供了自由的投资环境。1980 年出台的《外国私人投资（鼓励 / 保护）法》，鼓励和保护在孟加拉进行投资的外商并确保给予国内外投资者平等的待遇。在成本、投入、人力资源、市场准入、投资便利化等方面，孟加拉为营商提供了富有竞争力的区位条件。

孟加拉国在能源、电信、基础设施建设等各个领域都有大量的外国投资。

外国投资相关数据

2015 至 2016 财年，外商直接投资（FDI）流入总额达 25.0241 亿美元。2015 至 2016 财年的撤资规模（包括资金撤回母国、逆向投资、向母国发放贷款以及向母国偿还公司内部贷款）为 4.9888 亿美元，占 FDI 流入总额的 19.93%。因此，2015 至 2016 财年，孟加拉 FDI 净流入额为 20.0353 亿美元。2015 至 2016 财年的七月至九月、十月至十二月、一月至三月以及四月至六月等季度期间，FDI 流入总额分别为 7.3871 亿美元、6.7616 亿美元、5.4728 亿美元及 5.4026 亿美元（来自统计局、孟加拉银行《孟加拉外商直接投资》；《2016 年上半年调查报告》）。

法律制度概述

(a) 民事法院

孟加拉民事法院的管辖权大致可以分为三类：

(i) 属地管辖 – 法院（孟加拉最高法院除外）有其自身的地域限制，不得超过该限制行使管辖权。

(ii) 标的额管辖权 – 民事法院的标的额管辖权详细规定于 1887 年《民事法院法》（以下简称 1887 年法案）。根据 1908 年《民事诉讼法典》第 15 条（以下简称“CPC”），各诉讼必须从有权审判该案件的最低级别的法院开始。

(iii) 标的物管辖权 – 不同的法院有权裁决不同类型的诉讼。根据 CPC 第 9 条，法院应当有权审理具有民事性质的一切诉讼案件，明示或默示被禁止审理的诉讼案件除外。

根据 1887 年法案第 3 条，民事法庭分为下列类型（按降序排列）：

(i) 地区法官法庭；

(ii) 增设地区法院法庭；

(iii) 联合地区法官法庭；

(iv) 高级助理法官法庭；

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Sharif Bhuiyan

创始合伙人，Dr. Kamal Hossain and Associates

Sharif Bhuiyan，剑桥大学法学硕士、博士，是一名孟加拉最高法院高等法庭及上诉法庭的辩护律师。他是Dr Kamal Hossain & Associates 律师事务所的创始合伙人，是《法律及人权研究前沿》的荣誉董事（2007-2014年），国际法协会《国际贸易法》委员会的联合起草人（2009-2014年），并且是剑桥大学国际法劳特帕赫特中心的客座研究员（2006年）。

他是《WTO法下的国内法：世界贸易体系中的效力与善治》的作者（剑桥：剑桥大学出版社，2007年出版，平装，2011年版），《国际法和发展中国家》的合著人（与Philippe Sands及Nico Schrijver合著）（莱顿/波士顿：Brill Nijhoff出版社，2014年；南亚版，2017年），并且在全球发行的书籍和期刊上发表了诸多文章。

Bhuiyan的执业领域广泛，包括海事、仲裁、航空、银行、竞争、企业和商事、就业、能源、保险、知识产权、证券、税务、技术与通信。他在涉及重大索赔且当事方及仲裁员来自多国籍的若干国际商事仲裁中担任首席律师，在诸多跨境项目和交易中担任首席孟加拉顾问，包括能源、基础设施、电信和其他行业的数十亿美元的交易。

他一直被国际从业者名录、钱伯斯全和钱伯斯亚太地区评为顶级法律执业者。Bhuiyan还担任诸多事项的顾问，包括担任世界银行的顾问。

(v) 助理法官法庭。

关于民事法院的隶属问题，CPC 第 3 条规定如下：

> “3. 在本法典中，地区法院隶属于高等法院，并且低于地区法院的各级民事法院以及各小额诉讼法院隶属于高等法院以及地区法院。”

因此，地区法院隶属于孟加拉最高法院。孟加拉最高法院划分为两个部分，即 -

(i) 高等法庭；

(ii) 上诉法庭。

上诉法庭有权审理并裁决对高等法庭判决、裁定、命令或者宣判的上诉。为规范隶属于其的各部门及任何法庭的审判实践及程序，其拥有制定规则的权力。高等法庭既拥有普通管辖权，又拥有上诉管辖权。其审理对隶属法院及法庭命令、裁定、判决的上诉。根据《宪法》第 102 条，其有审理令状申请书（即司法审查申请）的普通管辖权。根据法规其拥有其他的管辖权，除其他事项外，包括公司事务和海事事务。高等法庭对隶属于其的所有法院与法庭实施监督和控制。

经各种法规为特殊标的设立了某些专门法院，包括货币贷款法院、破产法院、海关和增值税上诉法庭和劳动法院。

刑事法院

刑事法院的类型详细规定于 1898 年《刑事诉讼法典》（以下简称“CrPC”）第 6 条。

除了最高法院以及目前有效的任何法律（除CrPC之外）所建立的法院之外，在孟加拉还有两种刑事法院类型，即：

(a) 会议法院；

(b) 治安法院。

治安法官有两类，即：

(a) 司法裁判官；

(b) 执行法官。

司法裁判官有四类，即：

(a) 首都地区治安法官和其他地区的首席司法裁判官；

(b) 在大都市地区的第一级治安官，称为都市地区地方治安法官；

(c) 第二级治安法官；

(d) 第三级治安法官。

上述各法院各有不同的量刑权。

“一带一路”投资项目

政府如何支持“一带一路”投资?

孟加拉政府支持“一带一路”投资，并且在中国国家主席习近平访问后，于2016年正式成为“一带一路”的一部分。

是否存在“一带一路”倡议所促成的任何通告或提议?

在2016年中国国家主席习近平访问孟加拉后，两国（孟加拉与中国）签署了多项协议，价值215亿美元。但是，一些报道称仅因为官僚主义的复杂性，所有的这些协议仍然流于纸面。

哪些政府机构负责促进中国投资?

不存在专门的旨在促进中国投资的政府机构。一般来说，孟加拉投资发展局（简称“BIDA”）负责促进外国投资。BIDA根据2016年《孟加拉投资发展机构法》建立，是孟加拉投资促进与便利化的主要机构。

您所在的国家与中国之间签署了哪些双边贸易协定?

孟加拉和中国之间签署了诸多双边投资条约。孟加拉和中国之间还存在其他各种条约和谅解备忘录，包括中国支持电力领域的备忘录（2012年），以及经济技术合作协定（2014年）。

与中国签订的双边投资协议为中国投资者提供了公正和公平待遇，针对不合理及歧视性予以充分保护与保障，国民待遇及最惠国待遇，以及反征收保护。

“一带一路”投资将吸引建筑业进行道路、机场与海港的建设。中国的许多劳动密集型出口加工单位已转移到其他国家。孟加拉可能是中国私人投资的好去处。

在包括能源和基础设施建设在内的诸多领域，中国在孟加拉进行重大投资的承诺日益增加。政府对政府的投资正在进行，并且中国国家开发银行和中国进出口银行正在向孟加拉国调动大量资本。

在2016年，中国国家主席习近平访问孟加拉后，两国（孟加拉与中国）签署了多项协议，价值215亿美元。但是，公共媒体尚未报道拟议投资项目属于“一带一路”的一部分。

企业设立，登记与审批

有哪些最常见的商业载体?

外国实体有权在孟加拉国设立如下企业：

(a) 公司；

(b) 分支机构；

(c) 联络处。

允许公司及分支机构从事商业和贸易活动，从而在当地获得收入。但是，联络处无法从事任何此类活动。联络处只被允许在孟加拉为其总部开展宣传活动。

大型投资以及基础设施和工业领域的投资，如道路、电力、能源、制造业或装配等，通常都由在当地设立的公司进行。

这些载体的设立需多久?

文件合规的前提下，设立一家公司、分公司或联络处大约需要1-2个月的时间。就一个实体的商业运作而言，时间可能因所需的各项许可而有所差别，而这又取决于该实体拟开展的活动的性质。

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Maherin Khan

高级律师，Dr. Kamal Hossain and Associates

Maherin Khan是一名出庭律师，是孟加拉最高法院的辩护律师，并且是Dr. Kamal Hossain & Associates律师事务所的高级律师。她于2006年获英国伦敦大学的法学学士学位，2008年获得英格兰与威尔士律师执照，并且在英国牛津大学获得国际人权法硕士学位。

Maherin Khan的执业领域广泛，包括企业与商业事务，特别是能源与自然资源、基础设施建设、交通、制造业和工业领域。她还精通于仲裁、就业与通信领域。

这些载体建立和运营有哪些重要要求?

设立分支机构的程序与公司不同（下文将对此进行讨论）。就分公司 / 联络处而言，该办公室应当自 BIDA 签发许可函之日起的 2（两）个月内汇入至少 50000 美元的汇款作为建立成本即 6 个月的运营费用。BIDA 对分支机构 / 联络处的许可都必须随时更新。

根据 1994 年《公司法》，股份公司和企业注册处（以下简称“RJSC”）签发设立证明后，一家公司即可在孟加拉设立。根据 1994 年《公司法》，一家私人有限公司须至少有两名股东以及两名董事。对附属公司没有最低注资要求。一家孟加拉公司可 100% 外资控股。一个单独实体 / 个人可以持有一家公司一股之外的所有股份，该部分股份必须由另一实体 / 个人持有以满足至少存在两个股东的要求。

公司及分支机构均须遵守向监管者进行申报的诸多要求。

登记有哪些要求?

公司：在向 RJSC 申请登记之前，有必要为拟议公司获得“名称许可”。

如果拟议名称满足与任何已使用名称（已登记、已预核或正在办理登记的同类型企业）不重复或相似的条件，RJSC 将向该公司签发一份名称许可。

在注册申请提交之前，拟议公司的发起人必须通过提交 RJSC 签发的名称许可证书的副本，以该公司的名义在孟加拉的任何银行设立一个帐户。设立银行账户后，股份的价格必须从境外汇入到账户并且须获得银行兑现证明。

公司的发起人必须置备公司的组织大纲及章程。此后，须在孟加拉银行存入一笔款项，凭财政局原始收据（收据）从财政局获取必要的特殊印花邮票（财政局官员将邮票贴在组织大纲及章程上，并且在邮票上加盖公章并签名）。印花税及注册费的数额将取决于该公司的授权资本。

此后，向 RJSC 申请登记，须提交必要的文件、规定的表格与清单、邮票及费用。

该公司还需要获得相关市政公司的贸易牌照、增值税登记证以及税务机关的税务识别号码。

分支机构 / 联络处 – 在孟加拉设立分支机构 / 联络处，需通过若干监管机构的审批。需从 BIDA 获得设立分支机构的许可。根据 1947 年《外汇条例》（以下简称“FERA”），需向孟加拉银行（即孟加拉中央银行）进行通知。需向 RJSC 登记该办公室。还需获得相关市政公司的贸易牌照、增值税登记证以及税务机关的税务识别号码。根据分支机构所进行的活动，可能还需要获得其他监管者的许可。

在何种情形下中国投资项目须进行政府审批?

对于中国投资项目，不存在特殊的政府审批。其须遵守与任何其他投资项目相同的规则与要求。

该等审批的程序及时间进度如何?

不存在。

是否存在任何阻碍中国投资项目的程序?

不存在任何可能阻碍中国投资的程序。只要投资项目遵守孟加拉法律，并且投资通过正当的银行渠道流入，中国投资项目不会被限制。

一些行业存在某些限制。根据《产业政策》，某些行业被认为属于“被保留”行业（在该等行业不允许私人投资）以及某些行业属于“受管制”行业。如果所涉公司落入受管制行业，政府可以设定特定所有权限制。受管制行业包括勘探、开采以及供应天然气 / 石油、原油精炼等等。

哪些行业受到高度管制或者限制?

根据 2016 年《产业政策》，某些行业被认为属于“被保留”行业（在该等行业不允许私人投资）以及 21 个行业属于“受管制”行业。受管制行业包括勘探、开采和供应天然气 / 石油、原油精炼、私营部门的银行 / 金融机构、私营部门的保险公司、电信服务（移动 / 蜂窝电话和陆地电话）、卫星频道、货运 / 客运航空等等。

被保留行业（公共部门）：

根据 2016 年《产业政策》，某些行业被认为属于“被保留”行业（在该等行业不允许私人投资）。下列领域保留给公共部门进行投资：

a) 武器弹药以及其他防卫设备和机械；
b) 在保护林界限内的造林和机械化开采；
c) 核能生产；
d) 防伪印刷（纸币）和铸币。

有哪些竞争许可程序（申报、审核及通知）

竞争按照 2012 年《竞争法》（以下简称“《竞争法》”）的要求。《竞争法》旨在防止、控制和消除共谋、垄断和寡头垄断、组合（定义见下文）、滥用市场支配地位、反竞争行为，以及鼓励和确保富有竞争力的商业环境以促进孟加拉的经济发展。

《竞争法》适用于所有为商业目的而买卖、制造、供应、分销和储存任何产品或服务的商业组织。但是，该法不适用于禁止私营部门进入并且因国家安全利益受政府管制的货物和服务。

根据《竞争法》，下列行为不被允许：

- 反竞争协议（第 15 条）；
- 滥用市场支配地位（第 16 条）；以及
- 某些联合行为（第 21 条）。

“联合”被定义为收购、接管或合并。任何导致或可能对商品或服务市场产生不利影响的联合都是被禁止的。经竞争委员会许可，方可进行联合。

与《竞争法》有关的相关监管机构是孟加拉竞争委员会（以下简称“BCC”）。BCC 尚未完全进入运行。

是否存在中国投资者应该知晓的外汇管制?

外汇制度在孟加拉受到严格管制，国外资金汇款需要孟加拉中央银行（即孟加拉国银行）的一般或特别许可。

FERA 第 5 条规定如下：

> “5. (1) 除非根据孟加拉国银行对本副条有条件或无条件地授予任何一般或特别豁免，孟加拉境内任何人或居民不得 –
>
> (a) 向或为任何在孟加拉以外居住的人士进行任何付款；

(b) 起草、签发或协商任何汇票或本票，或者承认任何债务，以便为孟加拉境外任何人的利益产生或转让获得付款的权利（不论是实际发生的还是或偶然的）；

(c) 向居住于孟加拉境外的任何人、奉命为任何人的债权或者以任何人的名义进行任何付款；

(d) 将任何款项记入孟加拉境外的居民的贷方；

(e) 向任何人或者为任何人的债权进行任何付款的行为系作为下列事项的对价或与之有关 -

(i) 任何人收到付款或在孟加拉以外的任何人取得财产的收据；

(ii) 为任何人创造或转让一项实际存在的或者或有的权利，以获得付款或获得孟加拉境外财产 …”

孟加拉银行已在《外汇交易准则》（以下简称“外汇准则”）中规定了一些一般豁免 / 许可。例如，在受到某些限制的情况下，允许通过正当的银行渠道进行某些汇款，如股息、技术费等的汇款。

是否存在特别经济区或者自由贸易区?

存在特别经济区与自由贸易区。

特别经济区（以下简称“SEZ”）– 根据 2010 年《孟加拉经济区法》，孟加拉政府有权对 SEZ 或其任何区域授予优惠条件，包括但不限于下列优惠：

(1) 征收土地：

孟加拉政府可为经济区或者为该等区域兴建公路、桥梁等基础设施而征收土地，并且所征收的土地被视为公共利益所需的土地。

(2) 关税优惠：

政府可在特定期限内向特区或其任何区域提供关税优惠，并为在 SEZ 内设立的组织提供特别安排以便利进出口业务。

(3) 财政优惠：

政府可以向 SEZ 内的工业单位提供与出口加工区（以下简称“EPZ”）内工业单位一样的财政激励措施及优惠条件。

(4) 与许可证、证明、允许等有关的安排：

安排旨在：(i) 在法律文件方面通过一站式服务便利经济区开发商和工业单位，包括经济区选择的许可，经济区的公布，许可证、证明、原产地证书，为资本和股息返回母国的允许，居民和非居民的签证、工作许可证、施工许可证等；以及 (ii) 分配或租赁适合组建公司的地块。

(5) 某些法律的豁免：

政府可以豁免特区或特区内某一组织的某些行为，或者发布命令规定某些条文须作特别修改或修订（包括《外汇条例》、《所得税条例》、《建筑法》等）

出口加工区域（EPZ）– 根据 1980 年《孟加拉出口加工区机构法》（以下简称 BEPZA 法），孟加拉 EPZ 享受诸多财政和非财政性激励措施。

根据 BEPZA 法，EPZ 的建立是为了在孟加拉建立和运营出口加工区，以提供良好投资氛围、避免陷入程序困难。EPZ 是外向型工业区，向投资者提供基础设施、管理和支持服务以及奖励措施，包括财政激励措施（特许税，设备和原材料的免税进口等等）和非财政性激励措施（退出时股息和资本全部返回母国，仓库和保税区等等）。

目前共有八个 EPZ 在运营中（达卡，勐拉，依苏瓦迪，乌托拉，库米拉，阿达姆吉（纳拉扬甘杰），戈尔诺普利河以及吉大港）。

这些措施将在何处并如何协助中国投资项目?

中国投资项目可以利用向 SEZ 以及 EPZ 提供的诸多财政和非财政性激励措施。

纳税义务及激励措施

有利于中国投资的税收激励政策或结构有哪些?

凡符合一定条件的工业企业和有形基础设施都可以享受减税优惠。

中国投资者可以利用与中国签订的避免双重征税协定。

孟加拉的税收

在孟加拉，规定所得税的法律包含在 1984 年《所得税条例》（以下简称“ITO”）、1984《所得税规定》（以下简称“ITR”）以及据此颁布的规则。

公司税、个人所得税和预扣税的税率是多少?

个人所得税最高税率是 30%。

公开上市的公司一般税率为 25%。银行、保险公司和金融机构按 42.5% 的税率纳税，如果公司是公开交易的公司，税率降低至 40%。移动电话运营商公司和卷烟制造公司按 45% 的税率缴税。所有其他公司都按 35% 的税率缴税。

预扣税的税率取决于收入的高低。

在您国家与中国之间是否存在任何税收协定?

孟加拉和中国已签订避免双重征税和避免收入偷漏税协议（1996 年 9 月 12 日）。

劳动合同

有哪些当地劳动规则?

在孟加拉，主要规定劳动关系的法律是 2006 年《劳动法》（以下简称“《劳动法》”）。但是，《劳动法》仅可适用于符合“劳动者”定义的雇员。《劳动法》第 2（65）条对“劳动者”的定义如下：

> “为雇佣或获得报酬之目的，直接或者间接通过承包商从事任何技巧性、非技巧性、手工的、技术性的、贸易的、促销性或者文书性工作的任何人（包括被雇佣于任何机构或行业的学徒），不论其劳动待遇是明示还是暗示的，均属于劳动者，但是不包括主要为管理或行政能力而雇佣的任何人。”[孟加拉语的非正式译本]。”

不属于上述“劳动者”定义的雇员的雇佣关系受其雇佣合同的约束。此类雇员有权享受其雇佣合同中规定的福利。

在劳动者的情形中，雇佣条款受《劳动法》和劳动合同的约束。如果劳动者的劳动合同中含有对劳动者不太有利的规定，则以《劳动法》中的规定为准。《劳动法》规定的福利包括以下内容：

(1) 遣散费（在裁员、开除、因不当行为而解雇、雇主终止雇佣关系、雇员终止雇佣关系、退休等情形时）；
(2) 死亡抚恤金；
(3) 生育津贴；
(4) 加班津贴；
(5) 休息或用餐时间；
(6) 周假；
(7) 临时假期；
(8) 病假；
(9) 年假；
(10) 节假日；
(11) 在就业过程中因意外事故造成的损害赔偿；
(12) 工人参与公司的利润分配（针对从事工业活动的公司而言，不适用于非政府组织）；
(13) 公积金（可选，除非占劳动者总数四分之三的人提出书面要求）

《劳动法》还对劳动者的健康、卫生、安全和福利作出特别规定。

针对出口加工区内的工作人员有特殊规定。有关在孟加拉出口加工区内经营的公司所雇劳动者以及管理人员的服务事宜，孟加拉出口加工区管理局（以下简称“BEPZA”）会发出某些指令，行使 1980 年《孟加拉出口加工区机构法》第 3A 条授予的权力。

工会：根据《劳动法》，劳动者应当无差别地享有组建工会的权利，工会的主要目标是为了规制劳动者与用人单位或者劳动者与劳动者之间的关系，并且有权在遵守有关工会章程的前提下根据自己的选择加入工会。

外籍员工需要签证吗? 申请程序如何?

为了获得新的工作许可证，外国投资者 / 雇员必须从孟加拉驻外使馆获得投资委员会签发的“PI”、“E1”或“E”签证以及投资委员会的推荐函才能进入孟加拉境内。“P1”签证是针对私营部门的外国投资者；“E1”签

证一般针对进入孟加拉境内从事设备和软件等的供应、安装、维修或监督工作的人员；以及“E”签证针对雇员、顾问或专家等等。在抵达孟加拉境内后，外国人不能改变签证类别。

外国国民的工作许可证是在孟加拉就业的先决条件。到达孟加拉后，员工须向投资委员会申请工作许可证（或向 BEPZA 或 NGO 事务局，这取决于雇主的性质）。

工作许可证签发后，必须从内政部获得必要的安全许可，并且签证期限将延长到工作许可证的期限。

外籍员工有限额吗?

一家工业企业在正常生产期间，外籍员工数量不应超过 1:20（外籍：本国），并且商业办事处的比例为 1:5（外籍：本国）。

这些规定在特别投资区是否有不同之处?

针对在出口加工区内工作的劳动者有专门规定。在行使 1980 年《孟加拉出口加工区机构法》第 3A 条授予的权力时，BEPZA 已就有关在孟加拉国出口加工区经营的公司雇用的工人和官员的服务问题发表了若干指示。

中国投资者保护

中国投资者有何保护机制?

1980 年《外国私人投资（促进和保护）法》（以下简称“《投资法》”）规定了对外国私人投资的公正和公平待遇，并确保对外国私人投资在孟加拉的充分保护和安全。外国私人投资被定义为“非孟加拉公民或在孟加拉境外注册的公司的外国资本投资，但不包括外国政府或者外国政府机构的投资”。

《投资法》第 7 条规定如下：

> “7. (1) 外国私人投资不应被征收或国有化，或者受到任何具有征收或国有化影响的措施，但为了公共目的支付适当补偿除外，且该等补偿应当迅速支付且可自由转让。
>
> (2). 对第 (1) 副条之目的支付的适当补偿应当相当于征收或国有化之前所征收或国有化的投资款项的市场价值。”

有哪些合同强制执行的选择?

合同可以通过民事法院强制执行。或者，当事人可以同意通过仲裁解决争议。仲裁时，当事人可以自由选择仲裁规则、仲裁所在地和仲裁语言。《仲裁法》第 2001 条规定承认和执行包括外国仲裁裁决在内的仲裁裁决。

撤资有处罚吗?

没有处罚。

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Kazakhstan: the buckle in "belt and road"

Kazakhstan has high ambitions in the China's Belt and Road initiative, as it is geographically an ideal junction between China and the West and its interest in the Belt and Road is indisputable, with the Kazakh government already involved in Nurly Zhol (the Path of Light), a USD 9 billion domestic economic stimulus plan to develop and modernize roads, railways, etc.

Kazakhstan's economy has been suffering from oil price declines since late 2013 and its future economic growth, therefore, depends on the development of infrastructure and regional trade. The country aims to become the largest business and transit hub of the Central Asia region, a bridge between Europe and Asia. It considers China's Belt and Road initiative as a means to this end.

Kazakhstan is important for the energy security of China. Its oil, gas, coal and uranium reserves are among the 10 largest in the world, and it has a strategic geographical location to control oil and gas flows from Central Asia to the East and the West. Its geographical proximity, the safety of transportation routes and the absence of any hostile rivals in the region are the main advantages of Kazakh energy for China. That is why, even years before President Xi Jinping's official declaration of the Silk Road Economic Belt initiative in 2013 in Astana, China had already begun to invest heavily in oil & gas infrastructure in Kazakhstan.

As of end of 2014 from 27 billion USD of Chinese foreign direct investment (FDI) in the CIS, 23.6 billion USD have been made in Kazakhstan, whereas Russia received only 3.4 billion USD, that is seven times less.

One of the major Chinese investments so far in Kazakhstan is the Kazakhstan–China Oil Pipeline project, which is China's first direct oil import pipeline allowing oil import from Central Asia. It runs from Kazakhstan's Caspian shore to Xinjiang in China. The pipeline is owned by the China National Petroleum Corporation (CNPC) and the Kazakh oil company KazMunayGas. At the end of 2015, oil transportation through the Atassu-Alashankou pipeline in the direction of China constituted 11.8 million tons of oil.

Another important pipeline for China's energy security project is the 3,666km Central Asia –China Gas Pipeline, that forms the backbone of infrastructure connections between Turkmenistan and China. Chinese-built, it runs from the Turkmenistan/Uzbekistan border through Kazakhstan to Jingbian in China and cost USD7.3 billion.

Potential problems

There may be some roadblocks for Chinese FDI in Kazakhstan. A Chinese investor planning an investment project in Kazakhstan, as in any other emerging nation, may have to face an unsettled legal and regulatory environment, and uncertainty about the continuity of existing laws and enforceability of contracts. Uncertainty regarding enforceability of international arbitration clauses in disputes with quasi-sovereign entities and/or state bodies because of the recently adopted Arbitration Law, in particular, poses particular risks to foreign investors.

Major Chinese energy investments made in Kazakhstan so far, therefore, can be distinguished by specific approaches that Chinese investors have taken in terms of obtaining additional legal protections in one form or another, which otherwise are not provided for in the general law. For instance, just to make the China Oil Pipeline and the Central Asia China Gas Pipeline projects bankable, unprecedented international treaties between Kazakhstan and the PRC have been signed and ratified by the Kazakh parliament, which created specific legal frameworks for these particular two projects and which prevail over any conflicting Kazakhstan legislation.

The author believes, however, that such a unique foreign investment model could prove problematic and not acceptable for Kazakhstan if expanded for implementation of all future investments under the Belt and Road initiative.

China already controls up to 30% of the oil industry of Kazakhstan. Since 2000, Kazakhstan has moved from being fully dependent on Russia for oil and gas exports towards more diversification, but now there are concerns that Kazakhstan has become dangerously dependent on China. To address this, Kazakhstan has developed legal tools to be able to prevent further expansion of Chinese, Russian or any other country's control in its energy sector, if needed, including the state's priority right to purchase/permission to transfer so-called "strategic assets" and the state's priority right to purchase/permission to transfer in the area of subsoil use. This may be an obstacle for some energy projects initiated by China under the Belt and Road initiative.

Focus on Kazakhstan

Kazakhstan has climbed the World Bank's Ease of Doing Business index and is now ranked 35th. The World Bank also ranks it as one of the 20 most attractive countries in the world for investors. With the intention of promoting industrialization and diversification of its economy, the law in Kazakhstan provides a system of benefits and preferences – for example, tax and customs duties exemptions and even compensation by the government of up to 30% of the costs relating to construction, assembly and acquisition of equipment – that supports direct investments in certain areas, including transportation, infrastructure, agriculture, manufacture of refined petroleum products, as well as the generation of electric power.

In 2013, feed-in tariffs and guaranteed off-take have been introduced to facilitate development of renewable energy projects, and in 2015 the PPP Law was adopted, which provides a good legal framework for public-private partnership (PPP) projects in any sector of economy.

Chinese FDI under the Belt and Road initiative, therefore, must be implemented in Kazakhstan under the general legislation framework, which is already very investor-friendly.

Seizing opportunities

Kazakhstan needs to think of alternates for growth by diversifying and innovating itself instead of relying solely on natural resources. The Belt and Road initiative provides a unique opportunity for Kazakhstan to attract Chinese money and technologies, become one of the largest transit hubs in Eurasia, and to venture into exports of organic foods to China.

Kazakhstan has a good legal system for attracting FDI and with its massive privatization programme, the nation aims to reduce the presence of the state in the economy to 15% by 2021. Multiple IPOs, in particular, are scheduled for next few years on a stock exchange of the so-called Astana International Financial Centre (hereinafter the "AIFC"), a new financial center to be based on English law and that would have a number of unprecedented privileges for participants, such as exemption from taxes for 50 years, free movement of capital, modern infrastructure, free office lease for 2 years and a special visa regime for foreigners. AIFC is scheduled to start working from 2018.

Shaimerden Chikanayev

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Shaimerden received his LL.M. from the Duke University School of Law (USA), his specialist degree (JD equivalent) in Law from the Eurasian National University Faculty of Law (Kazakhstan) and completed non-degree course of studies for foreign diplomats in the China Foreign Affairs University (PRC).

Therefore, Kazakhstan has a chance to become the best country within the Belt and Road initiative for Chinese companies to invest in, and the door for China to the Eurasian Economic Union, a single market of 183 million people.

Structure of the law

Kazakhstan's legal system (save for the AIFC as discussed above) is a civil law system similar to the systems in most other former Soviet jurisdictions. Its regulation is established by the Constitution, various codes, laws, edicts, decrees (having the force of law), regulations, instructions, orders and other normative acts of Kazakhstan.

Dispute resolution

The Kazakhstani court system consists of three levels: the Supreme Court of Kazakhstan; local regional courts and courts with equivalent regional court status (e.g, the Almaty City Court, Astana City Court) and local city and district courts. Also, in 2015, investment panels were established in Astana City Court and the Supreme Court for resolution of disputes involving investors. Finally, it also worth mentioning, that special AIFC's court is expected to start operating from 2018, which would resolve (i) disputes between the center's participants (companies registered on the AIFC territory), (ii) disputes about transactions conducted in the AIFC and on the basis of AIFC law and (iii)

disputes referred to the AIFC's court by the parties concerned. The AIFC's court will consider disputes on the basis of English procedural law. The judgments issued by this AIFC's court will be directly enforceable in Kazakhstan.

Kazakhstan courts will not generally enforce judgments of foreign courts unless Kazakhstan has a treaty with the relevant foreign country on mutual recognition and enforcement of judgments. Kazakhstan has such treaties only with few countries, namely, the CIS countries, Turkey and China. However, there is no such treaty, for instance, between Kazakhstan and UK, the US, Ireland or any other Western country. Accordingly, judgments of courts in Western countries generally will not be enforceable in Kazakhstan. Thus, it generally is not recommended to submit disputes to English courts, unless the Kazakhstani counterparty has material assets outside Kazakhstan against which an English court judgment may be enforced.

Foreign arbitral awards, however, are generally enforceable in Kazakhstan as a matter of law. Kazakhstan is a member of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and, if a foreign arbitral award is obtained in another member country, such award should generally be enforced by Kazakhstani courts without a review of the merits, subject to compliance with qualifications set out in the Convention and certain procedural rules of Kazakhstani law. Please note, however, that in practice the enforcement of foreign arbitral awards in Kazakhstan can be difficult.

Legal presence in Kazakhstan

To create a legal presence in Kazakhstan, foreign investors may either establish a branch/representative office or establish a Kazakhstani legal entity. There are two major legal entity types of commercial organizations that are most frequently used for business in Kazakhstan due to convenient governance structure and liability limitation that is normally sought by shareholders (participants) namely: a limited liability partnership and joint stock company.

Limited liability partnership ("LLP")

A LLP is a legal entity that can be founded by one or several persons and/or legal entities. A LLP enjoys full civil capacity: it can own property that is separated from the property of its participants, enter into transactions and act as both plaintiff and claimant in litigation proceedings.

Charter capital of a LLP is divided into participatory interests (i.e. shares); participants (i.e. shareholders) of a LLP are not liable for the obligations of a LLP and generally bear the risk of losses of a LLP connected with its activity within the value of their contributions. For small businesses there is no minimum capital amount. For medium and large business, currently, the minimum amount is equivalent to approximately USD 675.

The only case when the "corporate veil" can be pierced is when the bankruptcy of a LLP has been triggered by its participants. In such cases relevant participant is liable together with a LLP to its creditors if a LLP does not have enough property (i.e. bears subsidiary liability).

A LLP is liable for its obligations with all belonging to the LLP property and is not liable for obligations of its participants.

Joint stock company ("JSC")

A JSC is a legal entity that issues shares to raise funds for its activities. The shares can be common and preferred.

The legal status of a JSC is similar to a LLP. A JSC enjoys full civil capacity: it can own property that is separated from the property of its shareholders, enter into transactions and act as both plaintiff and claimant in litigation proceedings.

Since charter capital of a JSC is divided into shares (common and privileged), the shareholders' risk of losses connected with JSC's activities is limited by the value of their shares, except in certain cases, e.g. when the bankruptcy of a

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Later, she had worked for Kazakhstan Government in the Ministry of taxes and participated in drafting first tax Code of Kazakhstan. Prior to joining GRATA International, she had worked for more than 10 years as an in-house (later head of Legal Department) in National Welfare Fund "Samruk-Kazyna" Group.

Gulnur received her LL.M. from the Peking University (PRC), her bachelor degree in law from the Karagandy National University Faculty of Law (Kazakhstan). Gulnur focuses her practice on Corporate Law, M&A, Construction, Litigation and Labour law.

LLP has been triggered by its shareholders. The minimum charter capital requirement for a JSC is approximately USD 340,000.

A JSC is liable for its obligations with all belonging to the JSC property and is not liable for obligations of its shareholders.

Some companies can be established in form of JSCs only: for example, banks and insurance companies.

Foreign Investment Restrictions

Existing legislation of Kazakhstan provides for certain forms of restrictions on foreign ownership of certain assets (e.g. essentially only Kazakhstani citizens and local legal entities with foreign ownership less than 50% may privately own plots of farmland) and the volume of foreign investments in specific sectors of the economy (e.g. mass media, telecommunications, banking, insurance, etc.). Also, investment by a foreign or local investor in certain types of entities or assets requires governmental approval. The above restrictions also apply in the event of foreclosure on the relevant company.

Taxation

Severance tax is payable in respect of extraction of mineral resources in Kazakhstan. The basis for this charge is the volume of extracted mineral resources. The rule for determining the basis of calculation of the severance tax for each type of the mineral resources is specifically stipulated separately. There are also the following main taxes that shall apply to subsurface use operations: (i) signature bonus (this bonus is a fixed payment for the right to conduct subsurface use operations in the contract area); and (ii) commercial discovery bonus (this bonus is payable for each commercial discovery and is based on the actual volume of discovered mineral deposits approved by the authorised state agency).

As for general tax regulation, in accordance with the Tax Code these are principal taxes applicable to a Kazakh legal entity:

- The corporate tax rate is 20 %.
- The current rate for VAT is 12 % on taxable turnover and taxable import.
- The current rate for individual income tax is 10 %, withheld by employers from payments to employees.
- The current rate of social tax is 11%, withheld by employers from payments to employees.
- The general rate of property tax is 1.5 % on the average book value of the property classified, immovable property, or investments in immovable property.
- Land tax rates depend on the land category.
- Tax rates for vehicles depend on the type of the vehicle and its engine volume.
- Export rent tax (this tax applies to exported crude oil, gas condensate and coal).

Kazakhstan has entered into bilateral treaties to avoid double taxation with 52 countries, including double-taxation treaty with China dated 12 September 2001.

It worth mentioning that from 1 January 2018 a new tax code is expected to take legal effect that is designed to replace the current Tax Code.

Investment Preferences

Under the Entrepreneurial Code, an investor may be entitled to obtain investment preferences designed to encourage investments in certain industries. The Entrepreneurial Code defines an investment as any kind of property (except for goods designated for personal consumption), including matters of financial leasing, as well as rights to such matters, being contributed to the charter capital of a legal entity or to increase of fixed assets to be used in the course of entrepreneurial activity, as well as fixed assets produced or received within the framework of a public-private partnership agreement.

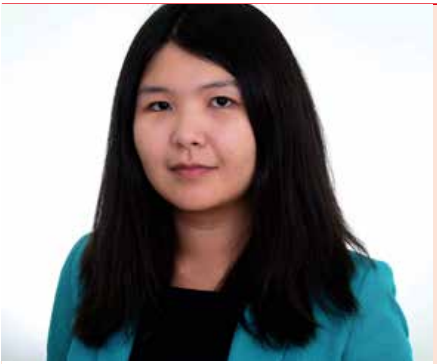
The principal state body overseeing investments in Kazakhstan is the Committee on Investments within the Ministry of Investment and Development. Among other things, the Committee on Investments is charged with negotiating and concluding investment contracts with investors pursuant to the Entrepreneurial Code. In June 2014 the Government created the position of investment ombudsman, i.e., a government official whose purpose was to review and try to resolve investment issues and disputes between investors and the state. The ombudsman is not intended to have any binding powers and can only recommend a solution. The Committee on Investments is supposed to provide administrative assistance to the investment ombudsman.

The Entrepreneurial Code provides most foreign investor investment guarantees expected by them, such as: stability of contracts (with certain exceptions), free use of income, transparency of state investment policy, stability of tax and foreign labor law in relation to priority investment contracts, reimbursement of losses in the event of nationalization and requisition, and certain others.

With the intention of promoting industrialization and diversification of Kazakhstan's economy, the Entrepreneurial Code creates a system of benefits and preferences which supports direct investments in certain areas. These areas include, for instance, generation of electric power. The full list of eligible areas is provided in the Government Decree No. 13 dated 14 January 2016 "On certain issues of implementation of measures of state support of investments".

For the purposes of determining eligible investment preferences, investment projects are divided into the following categories:

1. an ordinary investment project, which is aimed at creation of new and extension and modernization of existing production facilities;
2. a priority investment project, which: (a) is to be implemented in certain limited areas (i.e. this list of eligible areas for priority investment projects is different from the ordinary



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investment projects' list of eligible areas) by a newly established local entity that derives at least 90% of its income from this project; and (ii) anticipates investments of not less than, roughly, USD 13.9 million; and

3. a strategic investment project, which is a project that can have a strategic impact on the economic development of the Republic of Kazakhstan and is included in a special Government list and for which the investment contract was signed before 1 January 2015.

The following investment preferences are available for ordinary investment projects:

1. an exemption from customs duties (for a period up to five years) and from VAT on imported equipment and components, and raw materials required for investment projects;
2. exemption from VAT on importation of raw and/or other materials under the investment contract (effective from 1 January 2017); and
3. state in-kind grants, i.e. assets (land plots, buildings, facilities, machines and equipment, computers, measuring and controlling instruments and devices, vehicles (save for automobiles), production and household tools) which are granted for gratuitous use for the duration of the contract; if the investor complies with its commitments these assets become the property of the investor. The value of these grants cannot exceed 30% of the total planned investment into the fixed assets of the local entity.

The following investment preferences are available for priority and strategic investment projects (in addition to those available for ordinary projects):

1. tax preferences in the form of corporate income tax, land tax and property tax exemptions (for up to 10 years); and
2. an investment subsidy of compensation by the Government of up to 30% of the costs relating to construction, assembly and

acquisition of equipment (the subsidy should be approved by a separate Government resolution in each case);

3. stability of tax laws;
4. stability of labor laws; and
5. assistance to contract holders on a one-stop-shop basis from the Committee on Investments with respect to liaison with various state agencies.

To receive these investment benefits, a local company (for priority contracts this must be a newly established local company) must sign an investment contract with the Committee on Investments setting forth the investment commitments of the investor, the duration of the investment project, and the benefits granted. The investment contract should be registered by the Committee in order to be valid. In addition to these benefits, the Tax Code gives local companies an automatic right to accelerated for straight-line tax depreciation of fixed assets (either before they are put into operation or within three years afterwards) when certain conditions are met. The taxpayer is not required to make any specific new investments (other than to acquire the assets) or to enter into an investment contract in order to obtain this right. The Government has also introduced a number of financial support measures for entities that carry out activities in certain sectors (these largely correspond to the priority types of activity discussed above). The financial support measures include subsidizing interest rates on loans and issuance of state guarantees for bank loans.

Currency control and repatriation of profit

Generally, foreign currency exchange transactions are carried out without restrictions. Certain types of currency transactions are subject to either a registration regime (e.g. a loan from foreign lender in excess of USD500,000 and with a time frame of more than 180 days needs to be registered with the National Bank) or a notification regime. No specific tax is imposed by Kazakhstan legislation on foreign currency exchange operations.

No restrictions are applicable and no authorisation is generally required for repatriation of funds from the Republic of Kazakhstan. Profit repatriation is normally effected through dividend mechanics. A resident distributing dividends has to withhold tax at source on payment of dividends, at a rate of 15%, unless the rate is reduced by an applicable double-taxation treaty.

Equipment import restrictions

The importation of project equipment is generally subject to the requirements of the customs legislation (e.g. payment of applicable customs duties and taxes, etc.). However, certain benefits are established by the legislation with respect to imports of specific equipment and machinery, depending on specifics of imported goods. The project company may need to obtain a number of licences depending on the kinds of activity the project company will be involved in, including for import of certain goods (e.g. explosives) according to the list approved by the Government of Kazakhstan. It also shall be noted that in order to protect domestic producers of goods and the national economy as a whole, the Government of Kazakhstan may enact export or import bans, import or export quotas and safeguard measures against imports. Import quotas are enforced by means of licensing.

Foreign employee restrictions

When hiring foreign citizens or stateless persons, a Kazakh employer (i.e. project company) has to obtain a work permit for each foreign specialist, including the top management of Kazakhstan incorporated companies. There are a number of exemptions from the general requirement to obtain a work permit. Foreigners holding a residence permit, foreign citizens and stateless persons holding the position of head of a branch or a representative office of a foreign

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company or those travelling to Kazakhstan for business purposes for an aggregate period not exceeding 120 calendar days per year do not need a work permit.

Licenses and regulatory approvals

There are various government approvals required for companies operating in certain sectors of the Kazakh economy. For instance, a company may be required to obtain a licence from the relevant state authority in order to be able to carry out a particular type of activity (e.g. exploitation of the main gas pipeline). Such licences, generally, cannot be held by a foreign entity. Other approvals may be required, including, inter alia, approvals for construction, etc.

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哈萨克斯坦：“一带一路”的纽带

哈萨克斯坦对中国的”一带一路”倡议抱有很大雄心，因为就地理位置而言，哈萨克斯坦是中国和西方国家之间理想的连接点，其对“一带一路”的兴趣无可讳言。哈萨克斯坦政府已经实施了光明大道工程（Nurly Zhol），这是一项斥资 90 亿美元的国内经济刺激计划，旨在建设公路、铁路等基础设施，并对其进行现代化改造。

2013 年末以来，哈萨克斯坦的经济一直遭受石油价格下跌的影响，因此，未来的经济增长将依赖基础设施和区域贸易的发展。哈萨克斯坦志在成为中亚地区最大的商业和交通枢纽，成为贯通欧洲和亚洲的桥梁。它认为中国的 一带一路 倡议是实现这一目标的有效方式。

哈萨克斯坦对中国的能源安全至关重要。其石油、天然气、煤炭和铀的储量均排世界前十，它拥有战略性的地理位置，可以控制从中亚到东亚、西亚地区的石油和天然气运输。国土接壤、运输路线安全，以及该地区无敌对势力，这些是哈萨克斯坦向中国供给能源的主要优势。这也恰好可以说明，为什么早在 2013 年习近平主席于阿斯塔纳正式宣布“丝绸之路经济带”战略的前几年，中国就已开始在哈萨克斯坦大规模投资石油和天然气基础设施建设。

截止 2014 年底，中国在独联体国家的对外直接投资额为 270 亿美元，其中 236 亿美元投资于哈萨克斯坦，而投资俄罗斯的只有 34 亿美元，哈萨克斯坦是俄罗斯的 7 倍。

中国在哈萨克斯坦的主要投资项目之一，是哈萨克斯坦——中国石油管道项目。这是中国首个可以从中亚直接进口石油的管道。它从哈萨克斯坦的里海海岸一直延伸至中国的新疆。管道的所有权归属于中国石油天然气集团公司（中石油）和哈萨克斯坦国家石油和天然气公司。截止 2015 年底，通过阿塔苏——阿拉山口管道向中国输送的石油已达 1,180 万吨。

其他对中国能源安全具有重要意义的管道还包括中亚——中国天然气管道，它全长 3,666 公里，是连接土库曼斯坦与中国的基础设施支柱。它由中国建造，从土库曼斯坦和乌兹别克斯坦边境出发，经哈萨克斯坦到中国境内的靖边，耗资 73 亿美元。

潜在问题

中国对哈萨克斯坦的对外直接投资可能存在障碍。计划在哈萨克斯坦投资项目的中国投资者，可能会面临不稳定的法律和监管环境，以及不确定的现行法律存续和合同执行，这在其他任何新兴国家中都会遇到。近期通过的《仲裁法》，在处理具有主权国家特征的政治实体和 / 或国家机构的纷争中，其国际仲裁条款的执行具有不确定性，这尤其为外国投资者带来了风险。

到目前为止，中国在哈萨克斯坦的主要能源投资项目，都经由特别措施予以区别对待。由此，中国投资者通过各种形式获得了额外的法律保护，而这些措施在一般法律中是不提供的。例如，为了使银行接受中国石油管道、中亚——中国天然气管道项目，哈萨克斯坦和中华人民共和国签署了史无前例的国际条约，并由哈萨克斯坦议会批准通过。这份条约是为这两个特定项目特别制定的法律框架，优先于任何与之冲突的哈萨克斯坦法律。

然而，笔者认为，如果未来“一带一路”倡议下的所有投资项目都沿用这一独特的对外

投资模式，那么对哈萨克斯坦来说，可能会存在诸多问题，难以接受。

中国已控制了哈萨克斯坦 30% 的石油工业。自 2000 年以来，哈萨克斯坦的石油和天然气出口，已经从完全依赖俄罗斯变得更多元化，但是现在有人担心，哈萨克斯坦已经严重依赖中国。为了解决这一问题，哈萨克斯坦运用法律工具，防止中国、俄罗斯或其他国家进一步控制其能源行业。如有需要，也可对所谓的“战略资产”以及底土使用区域给予国家优先购买或许可转让权。这可能成为中国推进 一带一路 倡议下某些能源项目将面临的阻碍。

聚焦哈萨克斯坦

哈萨克斯坦在世界银行的经营便利指数排名中有所上升，现排名第三十五位。世界银行还将它列为全球 20 个对投资者最具吸引力的国家之一。哈萨克斯坦有意推进工业化和经济多元化，其法律提供了收益和优惠方案。例如：税收和关税豁免，甚至政府最多可补贴建造、安装和购买设备成本的 30%，这为某些领域的直接投资（包括交通、基础设施、农业、精炼石油产品制造以及发电）提供了有力支撑。

2013 年，为促进可再生能源项目的发展，哈萨克斯坦引入了“上网电价”和“包销”。2015 年通过了《公私合作法》，为公营部门和私营机构的合作项目提供了良好的法律框架。

因此，中国在“一带一路”倡议下的对外直接投资，必然能在哈萨克斯坦予以实施，因为哈萨克斯坦总体的法律框架已对投资者十分有利。

抓住机遇

哈萨克斯坦需要思考发展的替代方案，要通过多样化和创新，而非单纯依靠自然资源。“一带一路”倡议为哈萨克斯坦吸引中国资金和技术提供了独特的机会，使其成为欧亚大陆最大的交通枢纽，并可向中国出口有机食物。

哈萨克斯坦拥有吸引对外直接投资的良好法律体系。其庞大的私有化计划旨在使国家在经济中的占比到 2021 年减至 15%。特别是未来几年，预计会在阿斯塔纳国际金融中心（以下简称 AIFC）的证券交易所多个 IPO（首次公开发行股票）上市项目。AIFC 是在英国法律的基础上组建的全新的金融中心，参与者将享受前所未有的优惠，例如，免征税款 50 年、资本自由流动、现代化基础设施、免费租赁办公室两年，以及外国人专享的签证制度。AIFC 计划于 2018 年投入运行。

因此，哈萨克斯坦有望成为中国企业在“一带一路”倡议下的最佳投资目的国，以及中国进入欧亚经济联盟这一包含 1.83 亿人口的单一市场的门户。

法律架构

哈萨克斯坦的法律体系（除上述与 AIFC 相关的法律）是与多数前苏联国家相似的民法体系。它通过哈萨克斯坦宪法、各种法典、法律、法令、法规（具有法律效力）、规定、指示、命令和其他行为规范进行管理。

争端解决机制

哈萨克斯坦法院体系包含三个层次：哈萨克斯坦最高法院、地区法院和与地区法院地位等效的法院（例如，阿拉木图市法院、阿斯塔纳市法院），以及地方市、区法院。此外，2015 年，阿斯塔纳市法院和最高法院成立了投资事务委员会，以解决涉及投资者的纠纷。最后，值得一提的是，AIFC 特别法院预计于 2018 年投入运行，它将受理：(i) 金融中心参与者（在 AIFC 区域注册的公司）之间的纠纷；(ii) 根据 AIFC 法律在金融中心进行的交易纠纷；(iii) 由当事人向 AIFC 法院提出的其他纠纷。AIFC 法院将根据英国程序法处理纠纷，其作出的判决可在哈萨克斯坦境内直接强制执行。

除非哈萨克斯坦与相关境外国家已达成互相承认和执行判决的协议，否则哈萨克斯坦法院一般不执行国外法院的判决。哈萨克斯坦仅与少数几个国家达成了这样的协议，即独联体国家、土耳其和中国，而未与英国、美国、爱尔兰或其他任何西方国家达成该协议。因此，西方国家的法院判决一般无法在哈萨克斯坦执行。故而不建议将纠纷提交英国法

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沙默登·希坎那耶夫 (Shaimerden Chikanayev) 是格拉塔国际律师事务所 (GRATA International) 的合伙人，并负责事务所的"全球银行和金融"业务。希坎那耶夫先生的业务重点是金融领域和并购交易，包括项目融资和资本市场、基础设施交易、以及多个行业的试行与重组。在加入格拉塔律师事务所之前，他曾在杜威路博律师事务所 (Dewey & LeBoeuf) 阿拉木图办公室担任律师，也在欧洲复兴开发银行伦敦办公室担任过法务。他在基础设施法规方面学识渊博，并在关税体系改革、能源、公共事业和自然垄断行业法规，以及哈萨克斯坦法律和指令的起草、为各类股东了解和熟悉立法修订和新的法律、获得哈萨克斯坦各级政府的审批等方面具有丰富的经验。

沙默登在杜克大学法学院 (美国) 获得法学硕士学位，在欧亚国立大学法学院 (哈萨克斯坦) 获得专家学位 (相当于法学博士)，并在中国外交学院 (中国) 完成了外交官学习的非学位课程。

院，除非哈萨克斯坦的交易方在境外有有形资产，且英国法院的判决可在该地强制执行。

但是，国外的仲裁裁决一般都可在哈萨克斯坦执行。哈萨克斯坦是《1958 年关于承认和执行仲裁裁决的纽约公约》的成员国。如果另一成员国作出某项仲裁裁决，那么只要满足《公约》设定的条件和哈萨克斯坦的程序规定，该裁决即可在哈萨克斯坦执行，且无需重新审查案情。但是，请注意，具体实践中，在哈萨克斯坦执行国外的仲裁裁决会比较困难。

在哈萨克斯坦设立合法实体

为在哈萨克斯坦设立合法实体，国外投资者可设立分支办事处 / 代表处或哈萨克斯坦法律实体。考虑到治理结构便利和责任有限，股东（参与者）在哈萨克斯坦开展业务，最常使用的两种商业组织形式为有限责任合伙企业和联合股份公司。

有限责任合伙企业

有限责任合伙企业是由一人或多人和 / 或法人设立的法人实体。有限责任合伙企业享有完全民事行为能力：它可拥有独立于参与者的资产、从事交易，并在诉讼中充当原告或被告。

有限责任合伙企业注册资本的最小单位为出资份额（即股份）；其参与者（即股东）不对企业的负债负责，通常只承担不超过其出资额的企业损失。对小企业来说，没有最低出资要求。对于中大型企业，目前最低出资额大约 675 美元。

只有在参与者导致了企业破产时，"公司面纱"才会被刺破。在这种情况下，如果企业

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后来，她在哈萨克斯坦税务部工作，参与起草了哈萨克斯坦的第一部《税法典》。在加入格拉塔律师事务所之前，她在主权财富基金——萨姆鲁克·卡泽纳集团（Samruk-Kazyna）担任法务工作已经超过10年（后期担任法务部门负责人）。

姑玲在北京大学（中国）获得法学硕士学位，在卡拉干达国立大学法学院（哈萨克斯坦）获得法学学士学位。她的业务重点是公司法、并购、建造、诉讼和劳动法。

没有足够的资产（即，承担附属责任），那么该参与者应当承担连带责任。

有限责任合伙企业对所有属于企业的义务均负有责任，对其参与者的义务不负任何责任。

联合股份公司

联合股份公司是通过发行股票筹集资金来开展业务的法律实体。股票可以是普通股和优先股。

联合股份公司的法律地位与有限责任合伙企业类似。联合股份公司享有完全民事行为能力：它可拥有独立于股东的资产、从事交易，并在诉讼中充当原告或被告。

联合股份公司注册资本的最小单位为股份（普通股和优先股），除非在某些情况下，例如公司股东导致公司破产，否则股东承担公司亏损的最高限额为其出资额。联合股份公司的最低注册资本约 340,000 美元。

联合股份公司对所有属于公司的义务均负有责任，对其股东的义务不负任何责任。

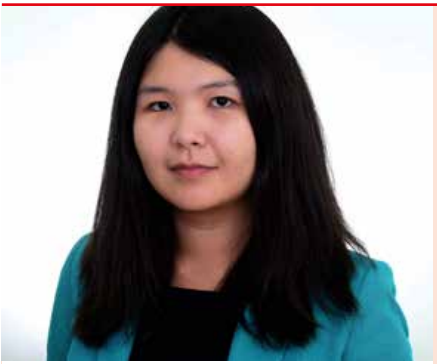
某些企业仅能以联合股份公司的形式设立，例如银行和保险公司。

外国投资限制

哈萨克斯坦现有法律对外资持有某些资产（例如：基本上只有哈萨克斯坦居民和外资持股不超过 50% 的本国法人实体才可持有私人农场土地）和在特定经济领域的外国投资额（例如：大众媒体、电信、银行、保险等）有各种限制。此外，国外或本国投资者投资某些特定企业或资产需要得到政府批准。上述限制也适用于相关企业丧失抵押品赎回权的情况。

税负

在哈萨克斯坦开采矿产资源应缴纳开采税，计税基础是开采的矿产资源量。各类矿产资源开采税的计算方法，都各有相应的具体规定。针对底土使用，有两个主要税种：(i) 签字费（这项费用是基于合同区的底土使用权的固定费用）；(ii) 商业探明费（这项费用应在每次探明商业储量时支付，并根据经



洛拉·阿卜杜哈耶科娃（Lola Abdukhalykova）是格拉塔国际律师事务所银行和金融团队的律师。她的业务方向是银行和金融，包括银行和企业贷款；项目融资；公营部门和私营机构合作以及基础设施交易。

洛拉在伦敦玛丽王后大学获得法学硕士学位，在哈萨克斯坦国立大学（阿拉木图）获得学士学位（优秀）。

Lola Abdukhalykova
律师，
GRATA International

授权的国家机构核准的实际矿物储量计算费用）。

至于一般的税收规定，根据《税收法典》，有以下适用于哈萨克斯坦法律实体的主要税种：

- 公司所得税，税率 20%。
- 增值税，应税营业收入和应税进口额的现行增值税率为 12%。
- 个人所得税，由雇主代扣代缴，现行税率为 10%。
- 社会税，由雇主代扣代缴，现行税率为 11%。
- 财产税，对分类的财产、不动产或对不动产的投资进行征收，税率为平均账面价值的 1.5%。
- 土地税，根据土地种类征收。
- 机动车税，根据机动车类型和发动机排气量征收。
- 出口税（该税适用于出口原油、液化天然气和煤炭）。

哈萨克斯坦已与 52 个国家签订了避免双重征税的双边条约。其中，与中国的签订日期为 2001 年 9 月 12 日。

值得一提的是，从 2018 年 1 月 1 日起，一部新的《税法典》将产生法律效力，取代现行《税法典》。

投资优惠

根据《创业法案》，投资者可获得一定的投资优惠，这些优惠旨在鼓励投资某些特定行业。《创业法案》将投资定义为任意形式的财产（除了用于个人消费的商品），包括金融租赁资产、对这些资产享有的权力（如向法律实体出资，或增加用于企业活动的固定资产），以及在公营和私营资本合作协议框架下生产或接收的固定资产。

监管对哈萨克斯坦投资的主要国家机构是投资和发展部下设的投资委员会。除其他事项

迪娜拉·奥特琴是（Dinara Otegen）格拉塔国际律师事务所银行和金融团队的初级律师。她的业务方向是银行和金融、企业并购，以及公司法。

迪娜拉在银行和金融交易（重点是资本市场和公司法）、代表国外客户为其对当地企业进行并购交易进行尽职调查、哈萨克斯坦共和国境内支付系统注册咨询等方面具有经验。

Dinara Otegen
初级律师，
GRATA International

外，投资委员会主要负责根据《创业法案》与投资者谈判和订立投资合同。2014 年 6 月，政府设立了投资监察专员的职位，即由专门的政府官员审查、解决投资问题以及投资者与国家之间的争端。监察专员没有任何约束力，只能提出解决建议。投资委员会应向投资监察专员提供行政协助。

《创业法案》为大多数国外投资者提供了他们所期望的投资保证：例如，合同的稳定性（但有一些例外）、收入自由使用、国家投资政策透明、与优先投资项目合同相关的税收和劳动法律的稳定性、发生国有化和征收事件时的损失补偿，等等。

为了促进哈萨克斯坦经济的工业化和多样化，《创业法案》创立了一套支持直接投资某些特定领域（例如，发电）的利益和优惠制度。符合条件领域的完整清单刊于 2016 年 1 月 14 日的第 13 号政府令："关于实施国家支持投资措施的若干问题"。

为确定符合条件的投资优惠，可将投资项目分为以下几类：

1. 一般投资项目，旨在新建生产设施，以及对现有生产设施进行扩展和现代化改造；
2. 优先投资项目，具有以下特点：（1）通过新建的地方企业在某些有限领域（优先投资项目与普通投资项目的投资领域清单不同）实施的项目，且企业 90% 以上的收入需源于该项目；（2）预计投资额不低于 1390 万美元；
3. 战略投资项目，即对哈萨克斯坦共和国经济发展具有战略影响的项目，已列入政府特别清单，并于 2015 年 1 月 1 日前签署了投资合同。

下列投资优惠适用于一般投资项目：

1. 免除关税（期限最长为五年）、进口设备和零部件以及投资项目所需原材料的增值税；

2. 免除进口投资合同项下原材料和 / 或其他材料的增值税（自 2017 年 1 月 1 日起生效）；
3. 国家以实物方式补助：例如，允许在合同期限内无偿使用资产（土地、建筑物、设施、机器设备、电脑、测控仪器和设备、车辆（除汽车）、生产和生活工具）；如果投资者遵守承诺，那么这些资产可转为投资者的财产。这些补助的资产价值不得超过向地方企业固定资产投资总额的 30%。

下列投资优惠适用于优先投资项目和战略投资项目（包含对一般投资项目的优惠，额外增加）：

1. 税收优惠：减免企业所得税、土地税和财产税（最长 10 年）；
2. 政府对建造、安装和购置设备费用的投资补贴，最多补贴费用的 30%（补贴应根据个案由政府单独决定）；
3. 稳定的税法；
4. 稳定的劳动法；
5. 在联络各国家机构方面，投资委员会为合同持有人提供一站式服务。

为享受这些投资利益，地方公司（如果是优先投资项目，那么必须是新成立的地方公司）必须与投资委员会签订投资合同，约定投资者的投资承诺、投资项目期限和准予的利益。投资合同应由该委员会登记后生效。除了这些利益外，《税法典》还规定，在满足特定条件时，地方公司可自动对（在投产前或投产后三年内的）固定资产进行直线加速折旧。纳税人无须作任何特定的新投资（购买资产除外）或订立投资合同，即可享受这项权利。政府还为在某些行业开展经营活动的企业提供财政支持措施（这些措施大体与上文讨论的项目优先级类型一致）。财政支持措施包括利息补贴，以及为向银行贷款提供国家担保。

外汇管制和利润汇回

一般来说，换汇交易并无限制。某些类型的外汇交易需要登记（例如，从国外借贷超过 50 万美元，且贷款期超过 180 天，则需要在哈萨克斯坦国家银行登记）或通知。哈萨克斯坦关于外汇兑换业务的法律中没有规定具体的税收。

资金从哈萨克斯坦汇回，一般来说没有任何限制，无须征得授权。利润汇回通常通过股息机制进行。哈萨克斯坦居民（含法人）分配股息时，需按照 15% 的税率代扣代缴税款，除非适用的双重征税条约规定降低税率。

设备进口限制

进口项目设备一般须符合海关规定（例如支付合适的关税和税款等）。但是，法律规定，进口特定的设备和机器可以享受一定的优惠，这需视进口商品的具体情况而定。根据哈萨克斯坦政府核准的清单，项目公司可能需要依据其参与的活动种类申请若干许可证，包括进口某些特定商品（例如炸药）。还应指出，为保护国内生产商和整体国民经济，哈萨克斯坦政府可制定进出口禁令、进出口配额和针对进口的保护措施。进口配额通过许可证方式执行。

雇佣外国劳工限制

当雇佣外国公民或无国籍人士时，哈萨克斯坦雇主（即项目公司）必须为每一位外国专家，包括哈萨克斯坦法人公司的高级管理人员申请工作许可证。也有一些例外情况可免除申请工作许可。例如，持有居留证的外国人、在国外的哈萨克斯坦分公司或代表处担任最高负责人的外国公民或无国籍人士、或者每年来哈萨克斯坦出差累计不超过 120 天的外国人，不需要工作许可证。

许可证和监管审批

公司在哈萨克斯坦某些行业开展经营需获得各种政府审批。例如，某公司可能需持有有关国家机构的许可证，才能开展特定类型的活动（如使用主要的天然气管道）。一般来说，外国企业不能持有这种许可证。其他必需的审批还包括建造审批等。

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VB LAW
Your legal guide

I. Introduction

Vietnam (with an official name of the Socialist Republic of Vietnam) is the easternmost country on the Indochina Peninsula in Southeast Asia with 33,123,078 hectares of natural land and an estimated population of 93.7 million inhabitants. Vietnam is bordered by China to the north, Laos and Cambodia to the west, Gulf of Thailand to the south and the sea to the east of Vietnam (which is the marginal sea of Pacific Ocean).

Up to October 2017, the GDP growth rate of Vietnam is estimated to increase by 6.41% from the former period. It is expected that GDP will reach 6.5% in 2018.

With regard to the foreign direct investment (FDI), the total capital invested in Vietnam (including new investment, investment expansion and share purchase by foreign investors) is USD 33.09 billion until November 2017, increased by 82.8% from the former period (based on the data publicly disclosed by the Ministry of Planning and Investment).

For business registration, there are approximately 116,000 enterprises newly established nationwide until November 2017 with a total registered capital of VND 1,100 trillion, increased by 14.1% in the quantity of enterprise and by 41.9% in the registered capital.

Up to 20 November 2017, there are 2,293 FDI projects issued with investment registration certificates, with USD 19.8 billion which is raised by 52% from 2016, in which the sector of production and distribution of electricity takes USD 8.37 billion, representing 25.3% of the total investment capital. It should be noted that the projects for build-operation and transfer (BOT) in power sector made FDI increase by 82.2%.

In 2017, there were about 61 nations and territories having investment projects in Vietnam in which China is in second place with total investment capital of USD 721.7 million (increased by 4 times from the previous year). Remarkably, the speed of the FDI capital flow from China to Vietnam is faster than other investors in Vietnam like the United States of America, Japan, Malaysia and so forth. This capital flow focuses on certain sectors such as textile and garment, leather footwear, real property, construction, power cables, thermal power stations and minerals. The Chinese FDI capital has been spread out among 47 provinces and cities of Vietnam in which Ho Chi Minh city, Ha Noi city and Binh Duong province are the top 3 regions with the most attraction from Chinese investors.

According to the General Department of Customs, Vietnam presently has nine (9) telephone export markets with a large turnover in USD in which the exports to Chinese market increased from USD 706 million (in October 2016) to USD 3.94 billion (in October 2017). The weighted-average increase in the telephone exports to Chinese market reaches VND 244.5 billion per day equivalent to USD 10.78 million per day.

Up to October 2017, the total turnover on imports from China was about USD 46.8 billion in which chemicals make up USD 1 million; plasticine products make up USD 1.5 million; cloth of all kinds make up approximately USD 4.9 million; steel of all kinds make up about USD 3.4 million; computers and electronic products make up USD 5.6 million; and machinery,

equipment and tools make up approximately USD 8.9 million.

By November 2017, the bilateral trade value between Vietnam and China reached USD 73.2 billion, an increase of 27.3% from the former period. Especially, the investment and trade value between Yunnan (China) and certain provinces of Vietnam reached USD 2.7 billion in 2016 and USD 2.4 billion in September 2017.

At present, Vietnam has not yet attained a comprehensive and complete legal system. Vietnam is still on the way to improve and perfect its legal framework.

II. One Belt One Road Investment

Although the government of Vietnam has not yet given any official announcement or proposal on the One Belt One Road (OBOR) initiative, at present Vietnam has held certain conferences on cooperation of economic corridors with China and has approved certain master plans for development of the said economic corridors.

In particular, the Prime Minister of Vietnam approved (i) the master plan for development of the economic corridor by 2020 (including Lang Son province, Ha Noi city, Hai Phong city and Quang Ninh province) on 11 July 2008; and (ii) the master plan for development of the economic corridor by 2020 with a vision up to 2030 named "Nanning - Singapore Trans-ASIA Corridor" which includes Lang Son province, Ha Noi city, Ho Chi Minh city and Moc Bai international border-gate at Tay Ninh province, and which will go across 21 provinces and cities of Vietnam on 13 March 2015.[1]

At present, Vietnam and China have entered into twelve (12) bilateral trade agreements on cooperation of various sectors and aspects, including scientific and technical sectors, economic sector, protection and encouragement of investment between Vietnam and China, prevention and avoidance of double taxation and tax fraud, trading of commodities at the border region of both countries, assurance of quality of imports and exports, commercial sector and aviation services. Furthermore, Vietnam is also a member of the ASIAN-China Free Trade Agreement (ACFTA).

The investment sectors currently attractive to the Chinese investors include manufacture of industrial products and renewable energy.

Until June 2017, Vietnam has 325 industrial parks and processing zones and 3 high technology (hi-tech) parks nationwide.

III. Business Set Up, Registration and Approvals

1. Shareholding ratio

One of the important things that the foreign investors should note is the ratio of ownership of equity or shares (the "shareholding ratio") held by the investors in a company incorporated under the laws of Vietnam.

Under the prevailing Law on Investment, a foreign investor is permitted to unlimitedly own the charter capital of an economic organization, except in 3 following cases: [2]

(a) The ratio of ownership of foreign investors in listed companies, public companies, securities trading organizations and securities investment funds shall be subject to regulations on securities;

(b) the ratio of ownership of foreign investors in State enterprises which conduct equitization or convert their ownership into another form is subject to the law on equitization and conversion of State enterprises;

(c) the ratio of ownership of foreign investors, which does not fall within the aforementioned cases provided in sub-section (a) and sub-section (b) above, shall be subject to other relevant laws and international treaties of which Vietnam is a member.

[1] Decision 98 and Decision 343.

[2] Article 22.3 of the Law on Investment.

2. Power and authority to approve an investment project

Depending on the sector and the scale of investment, an investment project may be subject to the approval of the National Assembly, the Prime Minister, the provincial People's Committee (or the industrial park authority).

The National Assembly shall have the power and authority to approve five (5) following kinds of investment projects: [3]

(a) Nuclear power plants;

(b) Conversion of the land use purpose of a national park, natural conservation zone, landscape protection zone, forest for scientific research or experiment of 50 hectares or more; upstream protective forest of 50 hectares or more; protective forest as windbreaker, shelter from flying sand or breakwater or for reclamation from the sea or for environmental protection with an area of 500 hectares or more; and forests for production with an area of 1,000 hectares or more;

(c) Projects using land with a requirement for conversion of the land use purpose for wet rice cultivation on two harvests in an area of 500 hectares or more;

(d) Projects for relocation and resettlement of 20,000 people or more in mountainous areas or 50,000 people or more in other areas; and

(e) Projects which require application of a special mechanism or policy decided by the National Assembly.

The Prime Minister shall have the power to approve eleven (11) following kinds of projects:

(a) Relocation and settlement of 10,000 people or more in mountainous areas and 20,000 people in other areas;

(b) Construction and commercial operation of airports; and air transportation;

(c) Construction and commercial operation of national seaports;

(d) Exploration, production and processing of petroleum;

(e) Business of betting and casinos;

(f) Production of cigarettes;

(g) Development of infrastructure in industrial zones, export processing zones and functional areas in economic zones;

(h) Construction and commercial operation of golf courses;

(i) Projects with a scale of investment capital from VND 5,000 billion or more;

(j) Projects of foreign investors in the following sectors: business of sea transportation; business of telecommunications services with network infrastructure; afforestation; publication, press; and establishment of a scientific and technological organization or a scientific and technological enterprise with 100% foreign-owned capital; and

(k) Other projects subject to the power and authority of the Prime Minister as stipulated by law.

If an investment project is NOT subject to the approval of the National Assembly or the Prime Minister, it may be subject to the approval of either (i) the provincial People's Committee if the project is located outside the industrial park, processing zone, hi-tech zone and economic zone; or (ii) the authority of the said zones if the project is located inside the said zones.

3. Necessary licenses and certificates

In almost all cases, the foreign investors need to have two (2) certificates, namely the investment registration certificate (IRC) which contains details of the investment project and the enterprise registration certificate (ERC) which contains details of the company operating the investment project, in order to implement their investment projects in Vietnam.

Depending on each business line which the investor has registered for operation in Vietnam, if such business line falls within the

[3] Article 30 of the Law on Investment.

list of conditional business lines (including 243 conditional business lines in total at present), the investor shall be required to satisfy the conditions by law for such business line before operating such business line. In order to prove so, a sub-license may be required. The sub-license may exist in the form of a license, a certificate of eligibility [for doing a specific business line], a practising license, a letter of confirmation, or a letter of approval, as the case may be, all of which are issued by the competent authority.

4. Investment incentives

The foreign investors may enjoy investment incentives in three (3) forms, including (i) preferred corporate income tax (CIT) rate, exemption and/or reduction of CIT; (ii) exemption from import duty in case of imports for creation of fixed assets of the investment projects; and (iii) exemption or reduction of land rent or land use fee. The investment incentives shall be applicable to investment projects with the business lines, scale and location as stipulated by law.

5. Currency control

Within the territory of Vietnam, all transactions, payments, listings, advertisements, quotations, setting prices, and recording prices in contracts and agreements and other actions made by residents and non-residents must NOT be effected in foreign exchange (or must be made in VND currency only), except in 17 cases permitted by State Bank regulations. [4]

At certain border regions subject to the bilateral agreements between Vietnam and China, the sale and purchase of goods by the residents at such border regions may be made in VND (Vietnamese Dong) or CNY (Chinese Yuan Renminbi).

6. Common business vehicles

In Vietnam, trucks and vans are the most common vehicles for transport of goods from a region to another one. If the investors purchase trucks and vans from local sellers for the purpose of freight transport, the investor may rapidly set up a group of business vehicles. If the investor wishes to import the used trucks for freight transport, it should be noted that the period of use (from the year of production to the year of import) must not exceed 5 years.

Furthermore, Vietnam has a large and potential network of rivers. Thus, the goods may be transported via 31 sea ports and 8,106 inland waterway docks.

IV. Tax obligations and incentives

1. Corporate income tax (CIT)

In general, enterprises are presently subject to the corporate income tax (CIT) rate at 20%. In respect of enterprises operating in oil and gas industry, they are subject to the CIT rate at 32% to 50% while enterprises operating in precious natural resources industry (e.g. platinum, gold, silver, tin, wolfram, antimony and gemstones) shall be subject to the CIT rate at 40% or 50%, depending on the location of the investment project.

The prevailing Law on CIT of Vietnam offers certain key incentives to enterprises which fully satisfy the conditions by law, including (i) incentive on CIT rate at 10% during 15 years and (ii) incentive on the duration for tax exemption and/or tax reduction.

(a) CIT rate at 10% during 15 years

This incentive shall be applicable to – [5]

(i) new investment projects in geographical areas with special difficult socio-economic conditions (located in 54 provinces and cities of Vietnam) and in economic zones and hi-tech zones;

[4] Article 22 of the Ordinance on Foreign Exchange and Article 4 of Circular 32.

[5] Article 13 of the Law on CIT.

(ii) new investment projects for scientific research and technological development; application of hi-tech on the list of hi-tech for which incentives are granted for investment in development under the Law on High Technology; hi-tech incubation and hi-tech incubator enterprises; venture investment in the development of hi-tech on the list of hi-tech for which incentives are granted for investment in development under the Law on High Technology; investment in construction and commercial operation of hi-tech incubation and hi-tech incubator enterprises; investment in development of specially important State infrastructure in accordance with law; manufacture of software products; manufacture of composite materials, various types of light building materials and of rare materials; production of recycled energy, clean energy and energy from destruction of waste; development of biological technology; and protection of the environment;

(iii) high-tech enterprises and of agricultural enterprises applying high-tech in accordance with the Law on High-Tech;

(iv) new investment projects in manufacturing sectors (except for manufacture of lines of goods subject to special consumption tax (also known as excise tax in other countries) and except for mineral mining projects) which satisfy either of the following criteria: (A) the project has a minimum investment capital of VND 6,000 billion and draws down [or disburses] capital no later than three (3) years from the date of issuance of the IRC and has a minimum total turnover of VND 10,000 billion VND per year no later than three (3) years after the date on which it [first] has turnover; or (B) the project has a minimum investment capital of VND 6,000 billion and draws down [or disburses] capital no later than three (3) years from the date of issuance of the IRC and employs more than 3,000 employees; and

(v) new investment projects for manufacture of supportive industrial products prioritized for development, including products supporting high technology sector and products supporting the industries of textile and garment, footwear, electronic spare parts, automobile assembly and mechanical sector, provided that such products were not domestically produced as at 1 January 2015, or if domestically produced, they meet the quality standards of the EU or equivalent.

(b) Duration for tax exemption and/or tax reduction

The enterprises which are entitled to the incentive on CIT rate at 10% during 15 years (as mentioned above), high-tech enterprises and agricultural enterprises applying high technology shall enjoy (i) CIT exemption for a maximum period of 4 years and (ii) 50% reduction of the amount of CIT payable for a maximum period of 9 subsequent years. [6]

(c) Carrying-forward of losses

Any enterprise which suffers a loss may carry forward such loss fully and consecutively for a maximum period of 5 years. Losses from the transfer of real estate and transfer of the investment projects can be offset against profits from other business operations.

2. Personal income tax (PIT)

The prevailing Law on PIT classifies the taxpayers into residents and non-residents. Depending on each kind of income, taxpayers shall pay the PIT in accordance with the following tax rates:

[6] Article 14.1 of the Law on CIT.

(a) PIT rates on employment income (income from salary and remuneration) of residents

The PIT in this case shall be based on the progressive tax tariff.

Tax bracket	Potion of annual assessable income (million VND)	Portion of monthly assessable income (million VND)	Tax rate
1	0 – 60	0 – 5	5%
2	60 – 120	5 – 10	10%
3	120 – 216	10 – 18	15%
4	216 – 384	18 – 32	20%
5	384 – 624	32 – 52	25%
6	624 – 960	52 – 80	30%
7	Greater than 960	Greater than 80	35%

(b) PIT rates on other income of residents

N°	Assessable income	Tax rate
1	Income from capital investment	5%
2	Income from (copyright) royalties and franchises	5%
3	Income from winnings or prizes	10%
4	Income from inheritances and gifts	10%
5	Income from capital assignment	20%
6	Income from assignment (or sale) of securities	0.1%
7	Income from assignment (or sale) of real property	2%

(c) PIT rates on income of non-residents

N°	Assessable income	Tax rate
1	Employment income	20%
2	Income from capital investment	5%
3	Income from (copyright) royalties and franchises	5%
4	Income from winnings or prizes	10%
5	Income from inheritances and gifts	10%
6	Income from capital assignment	0.1%
7	Income from assignment (or sale) of real property	2%

3. Foreign Contractor Tax (FCT)

The Foreign Contractor Tax (or known as withholding tax in other countries) is not a separate tax and normally it is a combination of (i) the CIT or PIT, and (ii) the value added tax (VAT). This kind of tax shall be applicable to the five (5) following groups of entities:

(a) Foreign business organizations with or without a permanent establishment in Vietnam, and foreign business individuals whether they are residents or non-residents of Vietnam doing business in Vietnam or having income arising in Vietnam on the basis of a contract, agreement or undertaking between such foreign contractor and a Vietnamese organization or individual or between such foreign contractor and a foreign subcontractor to perform part of the work of the former contractor's contract;

(b) Foreign organizations and individuals supplying goods in Vietnam in the form of on-the-spot import and export and having income arising in Vietnam on the basis of a contract signed by such foreign organization or individual with an enterprise in Vietnam (except for the case of processing and exporting goods back to a foreign organization or individual) or carrying out distribution of goods in Vietnam or supply of goods on international commercial terms – Incoterms whereby the seller shall bear risks relating to goods entering into the territory of Vietnam;

(c) Foreign organizations and individuals conducting all or part of business or distribution activities for goods or provision of services in Vietnam when the foreign organization or individual remains the owner of the goods delivered to Vietnamese organizations and is responsible for costs of distribution, advertising, marketing, quality of services or quality of goods delivered to Vietnamese organizations or for fixing selling prices of goods or prices for provision of services; including the case in which a number of Vietnamese organizations are authorized or hired to carry out part of distribution services or other services relating to the sale of goods in Vietnam;

(d) Foreign organizations and individuals entering into negotiation and signing of contracts in their name via a Vietnamese organization or individual; and

(e) Foreign organizations and individuals exercising the export right, the import right or distribution right in the Vietnamese market, purchasing goods for export or selling goods to Vietnamese business entities in accordance with the commercial law.

Under the legislation on Foreign Contractor Tax (FCT), there are three (3) methods of payment of the FCT, including Declaration Method (applicable to foreign contractors satisfying the full conditions by law), Direct Method (applicable to foreign contractors failing to satisfy the full conditions by law) and Hybrid Method (applicable to foreign contractors satisfying certain conditions by law).

The FCT rates under the Direct Method are summarized on the following page [7]

4. Environmental protection tax

The environmental protection tax (EPT) is applicable to the production and importation of certain goods which are deemed detrimental to the environment, the most significant of which are petroleum and coal. The EPT rates are regulated as shown on the page overleaf.

5. Double taxation agreement

It should be noted that Vietnam and China entered into the Agreement on Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income on 18 October 1996. Accordingly, this Agreement shall be applicable to (i) personal income tax, corporate income tax and levy on repatriation of profit in Vietnam and (ii) personal income tax, income tax applicable to foreign-invested

[7] Article 12 and Article 13 of Circular 103.

FCT rates under the Direct Method

N°	Business lines	Rate for calculation of VAT
1	Services, machinery and equipment leasing business, and insurance; construction and assembly and installation where the tender did not include supply of materials, machinery and equipment	5%
2	Production, transportation, services attached to goods; construction and assembly and installation where the tender included supply of materials, machinery and equipment	3%
3	Other business activities	2%

N°	Assessable income	CIT rates on assessable turnover
1	Trading: distribution and supply of goods, raw materials, supplies, machinery and equipment; distribution and supply of goods, raw materials, supplies, machinery and equipment associated with services in Vietnam (including supply of goods in the form of on-the-spot import and export) (except for processing of goods for foreign organizations and individuals); supply of goods on delivery terms (international commercial terms – Incoterms)	1%
2	Services, lease of machinery and equipment, insurance, lease of drilling platforms	5%
	Except for: Services of managing restaurants, hotels and casinos	10%
	Derivative financial services	2%
3	Lease of aircraft, aircraft engines, aircraft spare parts and sea going vessels	2%
4	Construction and installation where the tender includes or excludes supply of raw materials or machinery and equipment	2%
5.	Other production or business activities and transportation (including sea and air transportation)	2%
6	Assignments [transfer] of securities, certificates of deposit, offshore reinsurance and commission for ceding reinsurance	0.1%
7	Loan interest	5%
8	Income from royalties	10%

N°	Goods	Unit	Tax rate (VND)
1	Petrol, diesel, grease, etc.	litre/kg	300 - 3,000
2	Coal	ton	10,000 - 20,000
3	HCFCs	kg	4,000
4	Plastic bags (excluding plastic bags used for packaging or which are "environmentally friendly")	kg	40,000
5	Restricted use chemicals	kg	500 - 1,000

enterprises and foreign enterprises, and local income tax in China.

V. Employment contracts

1. Probation Contract

Under the prevailing Labour Code, the employer and the employee may reach an agreement on probation and it shall be made in the form of a separate agreement with certain compulsory provisions as required by law.

The employer may put the employee on probation ONLY on one occasion for one job and the probationary period must not exceed (i) 60 days for working in a position requiring high level specialized or technical expertise; (ii) 30 days for working in a position requiring intermediate level specialized or technical expertise or for technical workers and professional staff; or (iii) 6 days for other work.

Upon expiry of the probationary period, if the probationary work done by employee satisfies the requirements as agreed by the parties, the employer must enter into an employment contract with the said employee. During the probationary period, the employer and the employee have the right to rescind the probation contract without giving prior notice and without making compensation to the other party if the probationary work done by the employee does not satisfy the requirements agreed by the parties.

The salary of the employee during the probationary period shall be agreed by the parties but it must be at least 85% of the salary of the same job.

2. Employment Contract

There are three (3) kinds of employment contract, including (i) employment contract with an indefinite term, (ii) employment contract with a definite term (with a duration from 12 months to 36 months), and (iii) seasonal or specific job employment contract (with a duration of less than 12 months). [8]

With regard to certain managerial positions in a company (i.e. Director, General Director, Chief Accountant and other managerial positions as stipulated in the Charter [9] of the said company), the approval of the competent body of the said company shall be required (e.g. the Members' Council in case of a limited liability company with two members or more; or the Board of Management (BOM) in case of a shareholding company). For other position(s) in a company, the Director or the General Director has the power and authority to enter into the employment contract with the employee holding such

[8] Article 22 of the Labour Code.

[9] The "Charter" under the Law on Enterprises of Vietnam may be known as the Memorandum and Articles of Association or by-laws under the laws of other countries.

other position(s), unless otherwise provided by the Charter of the company. [10]

3. Expatriate employee

The prevailing laws of Vietnam do not provide any quotas on foreign employees. Nonetheless, the employment of expatriate employees must follow the regulations by law and the expatriate employee must satisfy the conditions by law.

Particularly, local enterprises are only permitted to recruit expatriate employees to work in the positions of managers, executives, experts and technicians if Vietnamese employees have not yet been able to satisfy the requirements for production and business.

Before foreign enterprises recruit a foreign citizen to work in the territory of Vietnam, they must give an explanatory statement of their need on employment of workers to the competent authority, and obtain the written consent from the competent authority.

The expatriate employees shall be exempt from the work permit in the following cases (they must obtain the certificate of exemption from work permit): [11]

(a) A capital contributing member or the owner of a limited liability company;

(b) A member of the Board of Management of a shareholding company;

(c) The head of a representative office or of a project of an international organization or non-governmental organization in Vietnam;

(d) Entering Vietnam for a period of less than 3 months in order to offer services;

(e) Entering Vietnam for a period of less than 3 months in order to resolve an incident [breakdown] or technically or technologically complex situation arising and affecting, or with the risk of affecting production or business which Vietnamese experts or foreign experts currently in Vietnam are unable to deal with;

(f) A foreign lawyer issued with a certificate to practice law in Vietnam in accordance with the Law on Lawyers;

(g) In accordance with provisions of an international treaty of which Vietnam is a member;

(h) A student or a student training in Vietnam is permitted to work in Vietnam, but the employer must provide a 7 day prior notice to the provincial State administrative authority for labour;

(i) Internal transfer within an enterprise and within the scope of the eleven (11) services on the List of Commitments on Services of Vietnam with WTO namely: business services; information services; construction services; distribution services; education services; environment services; financial services; medical health services; tourism services; culture and entertainment services; and transportation services;

(j) Coming to Vietnam to provide expert and technical consultancy services or to undertake other tasks servicing the work of research, formulation, evaluation, monitoring and assessment, management and implementation of a program or project using official development aid (ODA) in accordance with provisions or agreements in an international treaty on ODA signed by the competent authorities of both Vietnam and the foreign country;

(k) Issued with an operational licence in the information and press [sector] in Vietnam by the Ministry of Foreign Affairs in accordance with law;

(l) Appointed by a foreign agency or organization to come to Vietnam to teach or to conduct research in an international school managed by a foreign diplomatic office or organization in Vietnam, or certified by the Ministry of Education and Training to come to Vietnam to lecture or conduct research in

[10] Article 56, Article 64 and Article 149 of the Law on Enterprises.

[11] Article 172 of the Labour Code and Article 7 of Decree 11.

an educational and training establishment in Vietnam;

(m) Volunteers with certification from a foreign diplomatic office or international organization in Vietnam;

(n) Coming to Vietnam to work as an expert, manager, executive director or technician for a working period under 30 days and for a total cumulative period not exceeding 90 days in any one (1) year;

(o) Coming to Vietnam to implement an international agreement signed by a central or provincial level agency or organization in accordance with law;

(p) Students currently studying at a school or training establishment overseas and who have an agreement on practical training at an agency, organization or enterprise in Vietnam;

(q) Relations of members of a foreign representative agency in Vietnam who are working, after the Ministry of Foreign Affairs (MOFA) has so permitted, except where an international treaty of which Vietnam is a member contains some other provision;

(r) People with service passports working for a State agency, political organization or socio-political organization; and

(s) Other cases as decided by the Prime Minister on a proposal from the Ministry of Labour, or other cases pursuant to Government regulations.

Except for the aforesaid cases, the expatriate employees must have the work permit (with a maximum period of 2 years) in order to work for a company in Vietnam. This work permit shall be required and presented when the expatriate employee performs procedures for entry into Vietnam and exit from Vietnam and at the request of the competent authority.

Foreign citizens working in Vietnam without a work permit shall be deported from the territory of Vietnam. The employers who employs foreign citizens without work permits to work for them shall be dealt with in accordance with law.

When expatriate employees stay in or exit from Vietnam, they must register for temporary residence and/or temporary leave with the local police department.

4. Trade Union

The executive committee of the grassroots trade union (collectively, "Trade Union") shall act as the organization representing the collective of employees at the grassroots level (at the company). [12]

The Trade Union plays the role of representing and protecting the legitimate and lawful rights and interests of trade union members and workers; of participating, negotiating, signing and supervising implementation of collective labour agreements, wage scales, payrolls, labour rates, regimes on payment of wages and bonuses, internal labour rules and democratic regimes [regulations] at enterprises, agencies and organizations; assisting in resolution of labour disputes; and in discussions and co-ordination with employers to formulate an harmonious, stable and progressive labour relationship at enterprises, agencies and organizations. [13]

The establishment of the Trade Union is based on a free-will basis. In the event that an enterprise has 5 Trade Union members or the employees of the enterprise voluntarily apply for the Trade Union and the conditions for establishment of a Trade Union are fully satisfied in accordance with the Law on Trade Union, the Trade Union may be set up. [14]

When a grassroots Trade Union is properly established in accordance with the law, employers must recognize it and create favourable conditions for its activities. While the grassroots Trade Union has not yet established, the directly senior-level trade union shall undertake the roles and responsibility of the grassroots Trade Union. [15]

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12 Article 3.5 of the Labour Code.
13 Article 188.1 of the Labour Code.
14 Article 5 of Decree 98.
15 Article 188.3 and Article 189.3 of the Labour Code.

VB LAW
Your legal guide

Ngo Duy Minh
Deputy Director, VB LAW

Leading the team of over twenty lawyers, legal consultants, and legal assistants is Mr. Ngo Duy Minh, Deputy Director of VB LAW. With more than 20 years of legal practice, Mr. Minh has been recommended by various international legal guides including IFLR1000, Legal 500, Asia Law Profiles and Chambers and Partners for dispute resolution & litigation, corporate and M&A, banking & finance, intellectual property and real estate & construction.

VI. Investor protection

1. General policy

Under the prevailing Law on Investment, the investors are permitted to make at their discretion decisions on business investment activities; to get access to and use credit funds and support funds and use land and other resources in accordance with the laws.

The State of Vietnam (i) recognizes and protects the ownership of assets, investment capital and income and other lawful rights and interests of investors; (ii) provides equal treatment between investors; has policies to encourage and creates favourable conditions for investors to conduct business investment activities, and sustainably develop economic industries; and (iii) respects and implements international treaties relating to business investment of which Vietnam is a member.

2. Assurance of the State to the rights of the investors

Lawful assets of investors shall not be nationalized nor confiscated by administrative measures. Where the State acquires compulsorily or requisitions an asset of an investor for the reason of national defence and security, in the national interest, in emergency circumstances or for prevention of or fighting a natural calamity, such investor shall be compensated or paid in accordance with the law on compulsory acquisition and requisition of assets and other relevant laws. [16]

The State shall NOT force investors to perform the following actions: [17]

(a) To give priority to the purchase or use of domestic goods or services; or to purchase or use goods from a domestic producer or services from a domestic service provider;

(b) To export goods or services at a fixed percentage; to restrict the quantity, value or type of goods or services which may be exported or of goods which may be produced domestically or services which may be provided domestically;

(c) To import goods at the same quantity and value as goods exported, or to compulsorily self-balance foreign currency from sources obtained from exported goods in order to satisfy their import requirements;

(d) To achieve localization ratios in goods domestically produced;

[16] Article 9 of the Law on Investment.
[17] Article 10 of the Law on Investment.

(e) To achieve a stipulated level or value in their research and development activities in Vietnam;

(f) To supply goods or provide services in a particular location, whether in Vietnam or overseas;

(g) To establish the head office at a location upon request of the competent State agency.

3. Repatriation of profit and assets of the investors

After a foreign investor has fulfilled its financial obligations to the State of Vietnam in accordance with law, the investor shall be permitted to remit overseas the following assets: [18]

(a) Invested capital and proceeds from liquidation of its investments;

(b) Its income derived from business investment activities;

(c) Other monies and assets lawfully owned by the investor.

4. Bilateral agreement

Vietnam and China entered into the bilateral agreement on encouragement and protection of investment on 2 December 1992 (the "Agreement"). Accordingly, the contractual party to the Agreement shall help and facilitate the citizens of each party in procedures for visas and licenses pertinent to the investment activities. The investors of each party may repatriate the amounts of investment and their incomes as specified in the said Agreement.

It should be noted that if an international treaty of which Vietnam is a member contains the provisions which conflict with the provisions of the Law on Investment, then the provisions under such international treaty shall prevail. [19]

[18] Article 11 of the Law on Investment; Article 12 and Article 13 of the Ordinance on Foreign Exchange.

[19] Article 4.3 of the Law on Investment.

Legal bases

N°	Legal documents
1	Law No. 67/2014/QH13 passed by the National Assembly on 26 November 2014 on investment, as amended by – (i) Law No. 04/2017/QH14 passed by the National Assembly on 12 June 2017 on support for small- and medium-sized enterprises; (ii) Law No. 03/2016/QH14 passed by the National Assembly on 22 November 2016 on amendment and supplementation to Article 6 and Appendix 4 of the List of conditional business lines stipulated in the Law on Investment; and (iii) Law No. 90/2015/QH13 passed by the National Assembly on 23 November 2015 on hydro-meteorology (collectively, "**Law on Investment**")
2	Ordinance No. 28/2005/PL-UBTVQH11 of the Standing Committee of the National Assembly dated 13 December 2005 on foreign exchange control, as amended by Ordinance No. 06/2013/UBTVQH13 of the Standing Committee of the National Assembly dated 18 March 2013 (collectively, the "**Ordinance on Foreign Exchange**")
3	Circular No. 32/2013/TT-NHNN of the State Bank of Vietnam (SBV) dated 26 December 2013 providing guidelines for implementation of regulations on restricting the use of foreign exchange within the territory of Vietnam, as amended by Circular No. 16/2015/TT-NHNN of the SBV dated 19 October 2015 (collectively, "**Circular 32**")

Legal bases (continued)

N°	Legal documents
4	Law No. 14/2008/QH12 passed by the National Assembly on 12 June 2008 on enterprise income tax, as amended by – (i) Law No. 32/2013/QH13 passed by the National Assembly on 19 June 2013; and (ii) Law No. 71/2014/QH13 passed by the National Assembly on 26 November 2014 (collectively, the "**Law on CIT**")
5	Circular No. 103/2014/TT-BTC of the Ministry of Finance (MOF) dated 6 August 2014 providing guidelines for performance of tax obligations of foreign organizations and individuals doing business in Vietnam or earning income in Vietnam ("**Circular 103**")
6	Labour Code No. 10/2012/QH13 passed by the National Assembly on 18 June 2012, as amended by Civil Proceedings Code No. 92/2015/QH13 passed by the National Assembly dated 25 November 2015 (collectively, "**Labour Code**")
7	Law No. 68/2014/QH13 passed by the National Assembly on 26 November 2014 on enterprises ("**Law on Enterprises**")
8	Decree No. 98/2014/ND-CP of the Government dated 24 October 2014 providing regulations on establishment of political organizations and socio-political organizations at enterprises of all economic sectors ("**Decree 98**")
9	Decision No. 343/QD-TTg of the Prime Minister dated 13 March 2015 on approval of the master plan for development of the economic corridor by 2020 with a vision up to 2030 (named Nanning – Singapore Trans-ASIA Corridor) which includes Lang Son province, Ha Noi, Ho Chi Minh city and Quang Ninh international border-gate ("**Decision 343**")
10	Decision No. 98/2008/QD-TTg of the Prime Minister dated 11 July 2008 on approval of the master plan for development of the economic corridor by 2020, including Lang Son province, Ha Noi city, Hai Phong city and Quang Ninh province ("**Decision 98**")
11	Decree No. 11/2016/ND-CP of the Government dated 3 February 2016 providing detailed regulations on implementation of a number of Articles of the Labor Code regarding foreign workers in Vietnam ("**Decree 11**")

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VB LAW
Your legal guide

一、导言

越南（正式名称是：越南社会主义共和国）是东南亚印度支那半岛最东端的国家，自然土地面积 33123078 公顷，人口估计为 9370 万人。越南北接中国，西临老挝和柬埔寨，南邻泰国湾，东部与太平洋边缘海洋相临。

截止至 2017 年 10 月，越南的国内生产总值预计比前期增长 6.41％。预计 2018 年国内生产总值将增长 6.5％。

在外国直接投资方面，截止至 2017 年 11 月，投资于越南的资本总额（包括新投资、扩大投资和外国投资者购买的股份）为 330.9 亿美元，比前期增长 82.8％（基于投资规划部公开披露的数据）。

工商注册方面，截止至 2017 年 11 月，全国新注册公司约为 11.6 万家，合计注册资本 1100 万亿越南盾，公司数量增长 14.1％，注册资本增长 41.9％。

截止至 2017 年 11 月 20 日，签发投资登记证的外国直接投资项目达 2,293 个，总投资额为 198 亿美元，比 2016 年增长 52％。其中电力生产和配送部门达到 83.7 亿美元，占比达到总投资资本的 25.3％。值得一提的是，电力行业“建设- 经营- 转让”（BOT）项目使外国直接投资增长 82.2％。

2017 年，在越南拥有投资项目的国家和地区约有 61 个，其中中国列居第二，投资总额为 7.217 亿美元（是去年的 4 倍）。值得注意的是，从中国流向越南的外国直接投资资本的增长速度快于在越南投资的其它国家，比如美国、日本、马来西亚等。这种资本流动主要集中在服装纺织、皮鞋、不动产、建筑、电缆、热电站和矿产等行业。来自中国的外国直接投资遍布越南的 47 个省市，其中胡志明市、河内市和平阳省是最受中国投资者青睐的前三大地区。

根据海关总署的资料，越南目前有 9 个电话出口市场，成交额巨大，其中对中国市场的出口额从 7.06 亿美元（2016 年 10 月）上升到 39.4 亿美元（2017 年 10 月）。对中国市场的电话出口加权平均增长是每天 2445 亿越南盾，相当于每天 1078 万美元。

截止至 2017 年 10 月，从中国进口总额约为 468 亿美元，其中化学品占 100 万美元；橡皮泥产品达 150 万美元；各类布匹约占 490 万美元；各类钢材约为 340 万美元；电脑和电子产品占 560 万美元；机械、设备和工具约合 890 万美元。

截止至 2017 年 11 月，越中双边贸易额达到 732 亿美元，同比增长 27.3％。尤其是云南（中国）与越南某些省份的投资贸易额在 2016 年达到了 27 亿美元，2017 年 9 月达到了 24 亿美元。

目前，越南尚且没有全面完善的法律体系。越南仍然在改进和完善其法律框架。

二、一带一路投资

尽管越南政府尚未就一带一路（OBOR）倡议提出任何官方公告或建议，但目前越南已经召开了一些在经济走廊建设方面与中国进行合作的会议，并批准了上述经济走廊发展的总体规划。

特别是越南总理于 2008 年 7 月 11 日批准了（i）2020 年经济走廊发展总体规划（包括郎山省、河内市、海防市和广宁省）；（ii）2020 年经济走廊发展总体规划及 2030 年展望，即“南宁——新加坡横跨亚洲走廊”，包括郎山省、河内市、胡志明市和泰宁省的慕

Ngo Duy Minh

副主任, VB LAW

Ngo Duy Minh先生是VB律师事务所副主任，领导着由二十多名律师、法律顾问和法律助理组成的团队，有着二十多年的法律实践。由于其力作《争议的解决与诉讼》、《企业与并购》、《银行与金融》、《知识产权和房地产及建设》，Minh先生获得了IFLR1000、法律500强、亚洲法律概况以及钱伯斯等各种国际法律指导机构的推荐。

白国际边境大门，这个走廊计划在 2015 年 3 月 13 日贯穿越南的 21 个省市。[1]

目前，越南和中国已经签署了十二（12）份双边经贸合作协议，涉及科技行业、经济行业、保护和鼓励双边投资、防止和避免双重征税和税收欺诈、两国边境地区商品贸易、保证进出口商品质量、商业部门和航空服务等诸多方面的合作。此外，越南也是《中国——东盟自由贸易协定》（ACFTA）的成员国之一。

目前对中国投资者具有吸引力的投资领域包括工业产品制造和可再生能源。

截止至 2017 年 6 月，越南在全国拥有 325 个工业园区和加工区以及 3 个高科技园区。

三、企业的设立、注册和批准

1. 持股比例

外国投资者需要注意的重要一点就是投资者在依据越南法律设立的公司中持有的股权比例（以下称“持股比例”）。

根据现行的《投资法》，除了以下三种情况之外，外国投资者可以对一个经济组织的注册资本无限出资[2]：

(a) 外国投资者对上市公司、公众公司、证券交易机构和证券投资基金的持股比例，按照《证券法》的规定执行；

(b) 外国投资者对进行股份制改革或改变所有权的国有企业的持股比例，按照国有企业股改和改制的法律规定执行；

(c) 外国投资者的持股比例不属于上述（a）和（b）情况的，应遵守其他相关法律规定和越南签署的国际条约。

2. 审批投资项目的权力机构

根据投资的行业和规模，投资项目可能需经国民大会、总理、省人民委员会（或工业园区管理局）批准。

国民大会有权批准以下五类投资项目[3]：

(a) 核电厂；

(b) 以下土地使用目的的变更：50 公顷及以上的国家公园、自然保护区、景观保护区、科学研究或试验用地；50 公顷及以上的上游防护林；500 公顷及以上的防风林、防沙林、防波堤、围海造田、环境保护；1000 公顷及以上的生产用林；

(c) 需要变更 500 公顷及以上的两熟水稻种植土地使用目的的项目；

1 《第98号决定》和《第343号决定》

2 《投资法》第22条第3款

3 《投资法》第30条

(d) 需要对山区 2 万及以上人口进行搬迁安置或者对其他地区 5 万及以上人口进行搬迁安置的项目；和

(e) 需由国民大会决定的特殊机制或政策的项目；

总理有权批准下列十一类项目：

(a) 需要对山区 1 万及以上人口进行搬迁安置或者对其他地区 2 万及以上人口进行搬迁安置的项目；

(b) 机场的建设和商业营运；和航空运输；

(c) 国家海港的建设和商业营运；

(d) 石油的勘探、生产和加工；

(e) 投注和赌场业务；

(f) 香烟生产；

(g) 工业区、出口加工区以及经济区的功能区进行基础设施开发；

(h) 高尔夫球场的建设和商业营运；

(i) 投资规模在 50000 亿越南盾以上的项目；

(j) 外国投资者在以下领域的项目：海运业务；具有网络基础设施的电信业务；造林；新闻出版；建立纯外资的科技组织或科技企业；和

(k) 法律规定的符合总理权力和权限的其他项目。

如果投资项目无需国会或总理审批，那么可以由：(i) 如果项目位于工业园区、加工区、高新技术和经济区之外，那么由省人民委员会审批；或 (ii) 如果项目位于上述区域之内，那么由上述区域的管理当局审批。

3. 必要的许可证和证书

在几乎所有情况下，外国投资者在越南开展其项目投资都需要有两 (2) 个证书，即包含投资项目细节的投资登记证 (IRC) 和包含投资项目公司详情的企业注册证 (ERC)。

根据投资者在越南注册的业务种类，如果该业务种类属于受限制的业务种类 (目前总共包括 243 种业务种类)，那么投资者在从事此类业务之前，需要符合法律规定的条件。为了证明这一点，可能需要一个从属证书。根据情况，该从属证书可以是许可证、(从事特定业务种类的) 资格证书、执业许可证、确认书或者批准书的形式，所有这些由主管当局签发。

4. 投资优惠

外国投资者可以享受三 (3) 种形式的投资优惠，包括 (i) 优惠的企业所得税 (CIT) 税率，免征和 / 或减征企业所得税。(ii) 投资项目进口固定资产时免征进口关税；和 (iii) 免征或减征土地租赁或土地使用费。投资优惠措施适用于在业务种类、规模和所在地方面符合法律规定的投资项目。

5. 外汇管制

在越南境内，除了国家银行规定允许的 17 种情况之外，居民和非居民的所有交易、付款、上市、广告、报价、定价、合同和协议的记录价格以及其他行为不得以外汇进行 (或必须以越南盾货币进行)：[4]。

在中越双边协定规定的某些边境地区，边境地区居民的货物买卖可以用越南盾或人民币进行。

6. 普通商务车辆

在越南，卡车和带篷货车是从一个地区到另一个地区运输货物最常用的工具。如果投资者为了货运目的从当地卖方购买卡车和货车，那么投资者可以迅速建立起商务车队。如果投资者希望进口二手卡车用于货物运输，应注意使用期限 (从生产年份到进口年份) 不得超过 5 年。

此外，越南拥有一个庞大且具有潜力的河流网络。因此，货物可以通过 31 个海港和 8,106 个内陆水道码头运输。

四、纳税义务和优惠措施

1. 企业所得税 (CIT)

一般来说，目前的企业所得税 (CIT) 税率为 20%。石油天然气企业的企业所得税税率为 32% -50%，珍贵自然资源行业 (铂、金、银、锡、钨、锑、宝石等) 的企业，根据投资项

[4] 《外汇交易法令》第22条和《第32号通知》第4条。

目所在地的不同，企业所得税税率为 40％或 50％。

越南现行的企业所得税法对那些完全符合法律规定的企业提供了一些基本的优惠措施，包括（i）在 15 年内企业所得税税率为 10％的优惠，和（ii）对免征和 / 或减征的期限实行优惠。

(a) 15 年内企业所得税税率为 10%

这一优惠措施适用于：[5]

(i) 在社会经济条件特别困难的地域（位于越南 54 个省市内）以及经济区和高新区的新投资项目；

(ii) 新的科研和技术开发投资项目；根据《高新技术法》，实施高新技术清单（根据《高新技术法》可以获得投资奖励）中的项目；高科技孵化器和高科技孵化器企业；对高新技术清单（根据《高新技术法》可以获得投资奖励）中的高新技术进行风险投资；对高科技孵化器和高科技孵化器企业的建设和商业运营投资；依法对特别重要的国家基础设施发展投资；软件产品制造；制造复合材料、各类轻型建筑材料和稀有材料；生产可再生能源、清洁能源和垃圾分解所产生的能源；生物技术开发；和环境保护；

(iii) 高新技术企业和依照《高新技术法》应用高新技术的农业企业；

(iv) 制造业新增投资项目（制造属于特殊消费税（也称他国消费税）类型的产品除外和矿产品开采项目除外），且需满足下列标准之一的：（A）该项目的最低投资额为 60,000 亿越南盾，并从投资登记证（IRC）签发之日起三（3）年内出资到位，且从初次获得营业额之日起不迟于三年（3）年，最低总营业额为每年 100,000 亿越南盾；或（B）项目最低投资额为 60,000 亿越南盾，并从投资登记证（IRC）签发之日起三（3）年内出资到位，且雇员超过 3,000 人；和

(v) 优先发展的制造支持类工业产品的新增投资项目，包括支持高新技术产业的产品和支持服装纺织、鞋类、电子零配件、汽车装配、机械等行业的产品，前提是该产品截止到 2015 年 1 月 1 日没有在国内生产，或者在国内生产了，符合欧盟质量标准或同等标准。

(b) 免征和 / 或减征的期限

有权享受十五年期间企业所得税税率 10％的企业（如上所述），高新技术企业和采用高新技术的农业企业，可享受：(i) 最长为期 4 年的企业所得税免除，和 (ii)) 最长不超过 9 年的企业所得税减半征收。[6]

(c) 递延亏损

亏损企业，最多可以连续五年损失全额结转。房地产转让和投资项目转让造成的损失，可以通过其他业务的利润抵扣。

2. 个人所得税（PIT）

现行的个人所得税法把纳税人分为居民和非居民。根据各种收入情况，纳税人应按照下列税率缴纳个人所得税：

3. 外国承包商税（FCT）

外国承包商税（或称他国预提税）不是单独的税，通常是：(i) 企业所得税或个人所得税，和 (ii) 增值税（VAT）的组合。这种税收适用于下列五（5）类实体。

(a) 在越南有无常设机构的外国商业组织，以及外国商业人士，无论他们是否是越南居民，在越南营业或在越南根据该外国承包商和越南组织或个人之间，或在该外国承包商和外国分包商之间的合同、协议获得收入，履行该承包商合同职责的；

(b) 外国组织和个人在越南以现场进出口的形式提供商品，由于该外国组织或个人与越南企业签订合同而获得收入（加工和出口货物返回外国组织或个人的情况除外），或者按国际贸易术语解释，在越南进行货物配送或货物供应，卖方应承担货物入境越南的风险；

(c) 外国组织和个人在越南从事全部或部分的商品经营或配送、或者提供服务，外

[5] 企业所得税法第13条

[6] 个人所得税法第14条第1款

（a）居民的就业收入（工资收入和薪酬收入）的个人所得税税率

这种情况下的个人所得税应以累进税率为基础。

税率等级	年度应税收入（百万越南盾）	月度应税收入（百万越南盾）	税率
1	0 – 60	0 – 5	5%
2	60 – 120	5 – 10	10%
3	120 – 216	10 – 18	15%
4	216 – 384	18 – 32	20%
5	384 – 624	32 – 52	25%
6	624 – 960	52 – 80	30%
7	超过 960	超过 80	35%

（b）居民其他收入的个人所得税税率

序号	应税收入	税率
1	资本投资所得收入	5%
2	版权和经销权所得收入	5%
3	奖金和奖品所得收入	10%
4	继承和接受馈赠所得收入	10%
5	资本转让所得收入	20%
6	证券转让（或销售）所得收入	0.1%
7	不动产转让（或销售）所得收入	2%

（c）非居民收入的个人所得税税率

序号	应税收入	税率
1	就业收入	20%
2	资本投资收入	5%
3	版权和经销权收入	5%
4	奖金和奖品收入	10%
5	继承和接受馈赠收入	10%
6	资本转让收入	0.1%
7	不动产转让（或销售）收入	2%

国组织和个人是商品所有者，并负责配送、广告、营销、服务质量，或确定商品销售价格或所提供服务的价格所产生的费用；还包括这种情况：还有许多越南机构被授权或受雇来进行部分配送服务或其它与在越南销售货物相关的服务；

(d) 外国组织和个人通过越南组织或个人以自己的名义进行谈判和签订合同；和

(e) 在越南市场行使出口权，进口权或经销权的外国组织和个人，按照商业法购买出口货物或向越南商业实体出售货物。

根据外国承包商税（FCT）的法律，外国承包商税有三（3）种支付方式，包括申报法（适用于依法满足所有条件的外国承包商），直接法（适用于不能满足法律规定所有条件的外国承包商）和混合法（适用于依法符合特定条件的外国承包商）。

直接法的外国承包商税税率汇总如下[7]：

直接法的外国承包商税税率

序号	业务种类	增值税计算率
1	服务、机械设备的出租业务、和保险；投标书中没有包括的资料供应与机械设备的建设和安装	5%
2	附加于商品上的生产、运输、服务；投标书中包括的资料供应与机械设备的建设和安装。	3%
3	其它商务活动	2%

直接法的外国承包商税税率

4. 环保税

环保税（EPT）适用于某些对环境有害的商品的生产和进口，其中最重要的是石油和煤炭。环保税税率的规定见次页。

[7] 第103号通知的第12条和第13条。

环保税

5. 双重征税协议

值得注意的是，越南和中国于 1996 年 10 月 18 日签订了《对所得避免双重征税和防止偷漏税的协定》。因此，本协定适用于（i）在越南，个人所得税，企业所得税并对利润汇回本国征税，和（ii）在中国，个人所得税，

适用于外商投资企业和外国企业的所得税，以及当地企业所得税。

五、就业合同

1. 试用期合同

根据现行的《劳动法》，用人单位和劳动者可以就试用期达成协议，需按照法律规定的强制性条款另行签订协议。

一个职位，雇主只能一次雇佣一名试用人员，且试用期不得超过（i）60 天（在需要高水平专业或技术专长的岗位上工作）（ii）30 天（针对需要中级专业或技术专长的岗位或技术工人和专业人员）；或（iii）6 天（针对其他工作）。

试用期满后，如果试用员工表现满足双方当事人约定的条件，用人单位必须与该员工签订劳动合同。在试用期内，如果试用员工表现不能满足双方当事人约定的条件，用人单位和劳动者都有权解除试用期合同，不必提前通知也不必向对方赔偿，

在试用期内，员工的工资应由双方当事人约定，但至少应为同一工作工资的 85％。

2. 雇佣合同

有三种类型雇佣合同，包括（i）无限期雇佣合同，（ii）固定期限雇佣合同（12 个月至 36 个月），和（iii）季节性或特定职位雇佣合约（不少于 12 个月）。[8]

对于公司的某些管理职位（即该公司章程[9]规定的董事、总经理、总会计师及其他管理职位），须经上述公司的主管机构批准（例如，

[8] 《劳动法》第22条。

[9] 越南《企业法》规定的“章程”可以视为其他国家的法律规定的“公司章程”。

序号	应税收入	基于应税营业额的企业所得税税率
1	贸易：货物、原材料、供应品、机械设备的供应与配送；与在越南提供服务相关的货物、原材料、供应品、机械设备的供应与配送（包括以现场进出口的形式供应货物）（为外国组织和个人加工货物的情况除外）；按照交货术语提供货物（按照国际贸易术语解释）	1%
2	服务、机械设备租赁、保险、钻探平台租赁	5%
	除外：饭店、旅馆和娱乐场所的经营服务	10%
	衍生金融服务	2%
3	航空器、航空器发动机、航空器零部件和海船的租赁	2%
4	投标书中包括或者排除供应的原材料或机械设备的建设与安装	2%
5.	其它生产或经营活动和交通运输（包括航海和航空）	2%
6	证券转让、存款单、境外再保险和再保险佣金（分保手续费）	0.1%
7	贷款利息	5%
8	版权收入	10%

环保税

序号	货物	单位	税率（越南盾）
1	汽油、柴油、润滑油等	升 / 千克	300 - 3,000
2	煤炭	吨	10,000 - 20,000
3	氢氯氟碳化合物	千克	4,000
4	塑料袋（排除包装塑料袋或者“环境友好”型塑料袋）	千克	40,000
5	限制使用的化学品	千克	500 - 1,000

对于有两位及以上理事会成员的有限责任公司来说是理事会；对于股份制公司来说是管理委员会（BOM））。除非公司章程另有规定，否则，董事或总经理有权与其他职位的雇员签订雇佣合同。[10]

[10] 《公司法》第56条、第64条和第149条。

3. 外籍员工

越南现行的法律不提供任何外国雇员配额。但是，外籍员工的聘用必须遵循法律规定，外籍员工必须符合法律规定的条件。

特别是，如果越南员工尚未达到生产经营要求，那么当地企业只允许招聘外籍员工担任经理、执行官、专家和技术人员。

在外国企业招聘外国公民在越南境内工作之前，必须向主管机关说明其需要雇用工人的情况，并经主管机关书面同意。

外籍员工在下列情况下应免领工作许可证（必须领取免除工作许可证的证明）[11]：

（a）出资人员或有限责任公司的拥有人；

（b）股份制公司的理事会成员；

（c）办事处负责人或者越南国际组织或非政府组织的项目负责人；

（d）为提供服务，进入越南不超过 3 个月；

（e）进入越南不超过 3 个月，为了解决事件（故障），或者为了解决已经产生并正在影响，或者有影响生产和经营的风险，并且越南专家或目前在越南的外国专家无法解决的工艺上或技术上的复杂情况。

（f）持有依据《律师法》颁发的证书，在越南执业的外国律师；

（g）根据越南加入的国际条约的规定；

（h）允许在越南的学生或进行培训的学生在越南工作，但雇主必须提前 7 天通知省级国家劳动行政管理部门；

（i）属于“企业内部转让”和“越南与世贸组织服务承诺清单”中的十一（11）项服务范围内，即：商业服务；信息服务；建设服务；销售服务；教育服务；环境服务；金融服务；医疗卫生服务；旅游服务；文化娱乐服务；和交通运输服务；

（j）依据越南和外国主管当局签署的官方发展援助（ODA）国际条约中的条款或协定，来越南提供专家和技术咨询服务，或者为官方发展援助的项目承担其他任务，如提供研究、制订方案、评估、监测与评价、管理与实施等服务；

（k）持有外交部依法签发的越南信息和新闻（部门）经营许可证；

（l）由外国机构或组织任命来越南任教或在越南外交办公室或机构管理的国际学校进行研究，或由教育和培训部认证来越南讲学或在越南的教育和培训机构进行研究；

（m）获得外国驻越南外交机构或国际组织认证的志愿者；

（n）作为专家、经理、执行董事或技术人员在越南工作，在任何一（1）年内，一段工作期不超过 30 天，总累计时间不超过 90 天；

（o）前往越南执行由中央或省级机构或组织依法签署的国际协定；

（p）在海外的学校或培训机构学习的学生，以及与越南的机构、组织或企业签有实习协议的学生；

（q）在外交部（MOFA）的许可下，越南外国代表机构的工作人员进行往来，越南作为成员国的国际条约另有规定的除外；

（r）有服务护照的人员为国家机构、政治组织或社会政治组织工作；和

（s）总理根据劳动部的建议决定的其他情况，或根据政府规定的其他情况。

除上述情况外，外籍员工必须持有工作许可证（最长有效期为 2 年）才能在越南的公司工作。外籍员工办理出入境手续时，应主管机关的要求应出示该工作证。

未经工作许可在越南工作的外国公民，应从越南驱逐出境。聘用未取得工作许可的外国公民的用人单位，要被依法处理。

当外籍员工在越南逗留或离开时，他们必须在当地警察局登记临时居住和 / 或临时离境情况。

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11 《劳动法》第172条和《第11号命令》第7条。

4. 工会

基层工会（以下统称“工会”）执行委员会是代表基层（公司内）职工的集体组织。[12]

工会起着代表和保护工会成员和职工合法权益的作用；参与、协商、签订和监督集体劳动协议的执行、工资标准、工资单、劳动率、支付工资和奖金的制度、企业和组织机构的内部劳动规章和民主制度［规定］；协助解决劳资纠纷；并与雇主进行商讨和协调，以便在企业和组织机构内部形成和谐、稳定和进步的劳资关系。[13]

工会的建立是以自愿为基础。如果企业有五名工会成员，或者企业的职工自愿申请成立工会，并且设立条件完全满足“工会法”的要求，可以设置工会。[14]

当基层工会依法成立时，用人单位必须予以承认，并为其活动创造有利条件。在基层工会尚未建立之时，直接的上级工会应承担基层工会的职责。[15]

六、投资者保护

1. 一般政策

根据现行《投资法》，投资者可以自行决定商业投资活动；依法获得和使用信贷资金、支持资金、土地使用权等资源。

越南国家（i）承认并保护资产所有权，投资资本和收益以及投资者的其他合法权益；（ii）在投资者之间提供平等待遇；有鼓励政策，为投资者开展商业投资活动创造有利条件，可持续地发展经济产业；（iii）尊重和执行与商业投资相关的且越南已经签约的国际条约。

2. 国家对投资者权利的保证

投资者的合法财产不得被国有化，也不得采取行政措施予以没收。国家为了国防与国家安全、国家利益、紧急情况、防治自然灾害而强制收购或者征用投资人财产的，国家应当按照强制收购或者征用法等相关法律给予补偿或者赔偿。[16]

国家不得强制投资者采取以下行为：[17]

（a）优先购买或使用国内商品或服务；或者购买或使用国内生产商的商品或国内服务提供商的服务；

（b）按固定比例出口货物或服务；限制可以出口的商品或服务的数量、价值或种类，或者可以在国内生产的商品或可能在国内提供的服务的数量、价值或种类；

（c）以与出口商品相同的数量和价值进口商品，或者从出口货物取得的货源中强制自行平衡外汇，以满足其进口要求；

（d）实现国内产品的国产化率；

（e）在越南的研发活动中达到规定的水平或价值；

（f）在越南或海外特定地点提供货物或提供服务；

（g）根据主管国家机构的要求，在某地设立总部。

3. 投资者的利润和资产汇回本国

外国投资者依法履行对越南国家的财务义务后，允许投资者向境外汇出下列资产：[18]

（a）投资资本和清算投资收益；

（b）来自商业投资活动的收入；

（c）投资者合法拥有的其他款项和资产。

4. 双边协议

越南和中国于 1992 年 12 月 2 日签署了《鼓励和保护投资双边协定》（以下称“协定”）。因此，协定的签署方应协助和为双方公民办理有关投资活动的签证和执照提供便利。双方投资者可按上述协议的规定将投资总额和收入汇回本国。

应该注意的是，如果越南是其成员的国际条约包含与《投资法》条款相抵触的规定，那么以该国际条约的规定为准。[19]

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12 《劳动法》第3条第5款。
13 《劳动法》第188条第1款。
14 《第98号命令》第5条。
15 《劳动法》第188条第3款和189条第3款。
16 《投资法》第9条。
17 《投资法》第10条。
18 投资法第11条；外汇法令第12条和第13条
19 投资法第4条第3款。

序号	法律根据
1	关于投资的《第 67/2014/QH13 号法律》已由国民大会于 2014 年 11 月 26 日通过，并有以下修订： i. 关于支持中小型企业的《第 04/2017/QH14 号法律》已由国民大会于 2017 年 6 月 12 日通过； ii. 关于对第 6 条和第 4 附录投资法规定的受限制业务种类清单的修订与补充的《第 03/2016/QH14 号法律》已由国民大会于 2016 年 11 月 22 日通过；和 iii. 关于水文气象的《第 90/2015/QH13 号法律》已由国民大会于 2015 年 11 月 23 日通过（以下统称为《投资法》）
2	国民大会常务委员会 2005 年 12 月 13 日的关于外汇控制的《第 28/2005/PL-UBTVQH11 号法令》，已经由国民大会常务委员会 2013 年 3 月 18 日的《第 06/2013/UBTVQH13 号法令》对其加以修订（以下统称为《外汇法令》）
3	越南国家银行（SBV）2013 年 12 月 26 日的为贯彻限制越南境内外汇使用规定提供指导方针的《第 32/2013/TT-NHNN 号通知》已经由越南国家银行（SBV）2015 年 10 月 19 日的《第 16/2015/TT-NHNN 号法令》对其加以修订（以下统称为《第 32 号法令》）
4.	关于企业所得税的《第 14/2008/QH12 号法律》已由国民大会于 2008 年 6 月 12 日通过，并有以下修订： i. 《第 32/2013/QH13 号法律》已由国民大会于 2013 年 6 月 19 日通过；和 ii. 《第 71/2014/QH13 号法律》已由国民大会于 2014 年 11 月 26 日通过；（以下统称为《企业所得税法》）
5.	财政部 2014 年 8 月 6 日的《第 103/2014/TT-BTC 号通知》为在越南经商或获得收入的外国组织和个人履行纳税义务提供指导方针（《第 103 号法令》）
6.	《第 10/2012/QH13 号劳动法》已由国民大会于 2012 年 6 月 18 日通过，2015 年 11 月 25 日的《第 92/2015/QH13 民事诉讼法》对其加以修订（以下统称为《劳动法》）
7.	关于企业的《第 68/2014/QH13 号法律》已由国民大会于 2014 年 11 月 26 日通过（以下称《企业法》）
8.	政府于 2014 年 10 月 24 日的《第 98/2014/ND-CP 号命令》对所有经济行业的企业建立政治组织和社会政治组织作出规定（《第 98 号命令》）
9.	总理于 2015 年 3 月 13 日的《第 343/QD-TTg 号决定》批准了《2020 年经济走廊发展总体规划》及《2030 年展望》（即“南宁——新加坡跨亚洲走廊”），包括郎山省、河内市、胡志明市和广宁国际边境大门（以下称《第 343 号决定》）

序号	法律根据
10.	总理于 2008 年 7 月 11 日的《第 98/2008/QD-TTg 号决定》批准了 2020 年前经济走廊发展总体规划，包括郎山省、河内市、海防明市和广宁省（《第 98 号决定》）
11.	政府于 2016 年 2 月 3 日的《第 11/2016/ND-CP 号命令》对贯彻劳动法中众多有关在越南的外国工作者的条款作出详细规定（以下称《第 98 号命令》）

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