

FDI and M&A Legal Guidelines in Koreaⁱ

Foreign Direct Investment (Greenfield investment)

- 1. What are the principal laws and regulations applicable to FDI in the Korean jurisdiction? Are there special rules for certain foreign investors, including state-owned enterprises (SOEs)?**

The major laws and regulations applicable to foreign direct investment in Korea mainly include the *Foreign Investment Promotion Act* (hereinafter referred to as “FIPA”) and its enforcement decrees and rules, the *Rules on Foreign Investment*, the *Foreign Exchange Transactions Act* and its enforcement decrees and rules, and the *Foreign Exchange Trading Provisions* and its enforcement decrees and rules, etc.

There are no special rules which apply to state-owned enterprises (SOEs) in relation to FDI in Korea. However, the Ministry of Trade, Industry and Energy (also known as the MOTIE) of the Republic of Korea has published a catalogue of prohibited and restricted industries for foreign investment in accordance with the FIPA (see response to question 1.3 for details). Therefore, when investing in Korea, foreign investors need to first assess whether their investment plans fall under the catalogue thereof.

- 2. Are there any governmental and regulatory approvals required for FDI? If so, please give brief details (such as trigger threshold, relevant authorities and timing requirements)?**

(A) Prior-declaration

(a) Foreign exchange declaration

In accordance with the FIPA and related regulations, the following circumstances constitute foreign investments and shall be subject to prior declaration to the Minister of Trade, Industry and Energy:

- (i) for foreign investors who invest more than KRW 100 million and own more than 10% of the total voting shares or total amount of contribution issued by Korean legal persons.
(It should be noted that for those whose foreign investments are less than KRW 100 million can also establish legal persons, but in such cases they shall declare such capital transactions with the Minister of Strategy and Finance pursuant to Article 18 of the *Foreign Exchange Transaction Act* and its relevant provisions).
- (ii) for foreign investors who invest more than KRW 100 million but execute contr laws of dispatching senior executives or supply contr laws over 1 year or contr laws for technology transfer with Korean legal persons.
- (iii) for a long-term loan of more than 5 years from a Korean foreign-invested company’s

overseas parent company or a company having a capital contribution relationship therewith, or individual investors and the enterprises having capital contribution relationship therewith.

- (iv) for an investment by foreigners in a non-profit organization in the fields of science and technology, and the amount and percentage of the investment are above the legal requirement.
- (v) for a foreign invested company that uses its undistributed earnings to the construction of a new factory or extension of its factory.
- (vi) for an investment in other non-profit legal persons established for academic, artistic, medical, educational and other purposes as defined by the Committee on Foreign Investment as foreign investments (where the amount and proportion of investment by foreigners is above the legal requirement).

(b) National core technology declaration

In accordance with the *Act on Prevention of Divulgence and Protection of Industrial Technology* and other related regulations, if a foreigner intends to acquire a company that possesses Korea's national core technology, such company shall obtain prior approval from or make a declaration to the Minister of Trade, Industry and Energy of ROK.

(B) Post-declaration

According to the FIPA, a foreigner who intends to make a foreign investment by any of the following means may report thereon within 60 days from the acquisition of stocks, etc.:

- (a) where the foreigner acquires shares issued by a public company.
- (b) Where the foreign investor acquires stocks, etc. issued upon capitalizing reserves of the relevant foreign-invested company, revaluation reserves thereof, or other reserves prescribed by other statutes or regulations;
- (c) where the foreign investor acquires shares of the surviving or newly-established company after the completion of the merger, share exchange, transfer, or division; or shares of the foreign-invested company using shares held by the foreign investor at the time of the merger, share exchange with another company, or division of the foreign-invested company;
- (d) where the foreign investor acquires of the surviving or newly-established company after the completion of the merger, share exchange or transfer, or with shares held by the foreign investor at the time of the merger, share exchange or transfer with another company or spin-off of the foreign invested company concerned, etc.

- (e) where the foreigner acquires shares of a foreign-invested company registered under Article 21 of FIPA by means of purchase, inheritance, testamentary gift, or gift from a foreign investor;
- (f) where the foreign investor acquires shares by means of capital contribution from the share dividends received; or
- (g) where the foreigner acquires shares using convertible bonds, exchangeable bonds, stock depository receipts, and such similar ones as bonds or receipts that may be converted into, taken over as, or exchanged for shares, etc.

3. Are there any industry sector controls on foreign investment?

The Korean government regulates the access of foreign investment with a “negative list”, which is divided into two categories, namely, prohibited and restricted. It should be noted that the FIPA authorizes the Ministry of Trade, Industry and Energy of Korea to update the lists of business prohibited and restricted from foreign investment under the *Rules on Foreign Investment*.

Schedule I attached to the *Rules on Foreign Investment* which was updated on June 17, 2021 by the Ministry of Industry and Energy of Korea provides a list of industries in which foreign investment is prohibited and Schedule II provides a list of industries in which foreign investment is restricted.

The main prohibited industries include postal services, central banks, financial market management, other financial support services, legislatures, law enforcement authorities, administrative agencies, courts, prosecutors, police, fire departments, education, artists, experts, religious or political groups etc.

Korea adopts a licensing approach to restricted areas and imposes equity restrictions in some industries. The main restricted industries include agriculture, animal husbandry, power generation, publishing and distribution, broadcasting and media, transportation, power transmission and distribution, and telecommunications. For example, in the beef cattle breeding industry, a license can only be granted if the proportion of foreign investment is less than 50%.

In addition to the aforementioned prohibition or restriction according to the *Rules on Foreign Investment*, various special laws and regulations regarding, including but not limited to, capital market, real estate transactions, banking, telecommunications, maritime transportation and aviation, also stipulates prohibition or restriction on foreign investment. For example, according to the Article 187 of the Enforcement Decree of *Financial Investment Services and Capital Markets Act* (hereinafter referred to as “*Capital Market Act*”), except as otherwise prescribed and publicly notified by the Financial Services Commission, no foreign investor shall directly or indirectly acquire equity securities issued by a Public-purpose Corporation on his/her or its own account in excess of the following limits: (i) the limit stipulated in the

articles of incorporation of that public-purpose corporation; (ii) 40 percent of the total number of equity securities of the relevant issue.. Public-purpose Corporation refers to corporation in key industries for Korean national economy such as national backbone industries designated by the Financial Services Commission after consultation with the heads of relevant departments and reporting to the State Council (Article 152 (3) of the Capital Market Act).

4. Are there any government stock requirements for special industries?

Based on the current understanding, there is no situation in Korea in which the government uses resources or powers in specific industries in exchange for equity interests without making investment.

5. Are there any localization requirements (e.g. minimum ratio of local employees, minimum ratio of local procurement) for FDI in your jurisdiction?

Korean labor-related laws and regulations do not require foreign invested companies to hire Korean employees. Instead, foreign-invested companies shall only submit the estimated number of new employees when making foreign exchange declaration with the Korean Ministry of Trade, Industry and Energy (which is non-binding).

6. Are there any exchange control restrictions in terms of remittance of capital, profits and dividends?

Any capital transaction payments such as profits generated from shares acquired by foreign investors, or the sale price of shares shall not be remitted abroad until a declaration is made to the relevant authorities pursuant to the FIPA or *Foreign Exchange Transactions Act*.

If a foreigner does not make a legal declaration in accordance with the relevant foreign exchange laws and regulations, the foreigner will need to make a non-compliant declaration before recovering the money generated by the foreigner's acquisition of shares, etc. Therefore, the foreign investor is advised to make a report and make its investment in Korea in accordance with relevant foreign exchange laws and regulations.

7. What are the most common types of corporate legal entities established for FDI? For each type of corporate legal entities, please introduce the internal corporate governance structure. What types of corporate legal entities are recommended for partially or wholly foreign owned corporate legal entities?

According to the Korean laws, three types of corporations can be established: subsidiary, branch, and liaison office. The main differences among the three types of corporations as follows:

Comparison	Subsidiary	Branch	Liaison office
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Matters			
Status of a Legal Personality	Yes	No	No
Scope of Business	Investment may be made in any industry other than those in which foreign investment is prohibited	Investment may be made in any industry other than those in which foreign investment is prohibited	Liaison with the headquarter (i.e. foreign investors) to carry out market research, research and development, advertising and information gathering (no operation activities)
Legal Liabilities	independently responsible for their own civil liabilities.	Extend to headquarters	-
Taxes	Tax levied on the income generated inside and outside Korea of subsidiaries	Tax levied on the income generated inside Korea of branches	-
Notes	Type employed when planning a large scale operation in Korea	Type employed when planning small scale business in Korea	Type employed for the purpose of Korea market survey prior to the establishment of subsidiaries or branches

Besides, the Korean *Commercial Act* recognizes five types of corporations: Partnership, Limited Partnership, Limited Liability Company, Limited Company, and Corporation. The most common types in Korea are Corporation (equivalent to a joint stock limited company in China) and Limited Company (equivalent to a limited liability company in China).

The Korean *Commercial Act* requires that there shall be no less than three directors in a Corporation, but only one if the registered capital is less than KRW 1 billion; The Corporation is required to have supervisors except the registered capital is less than KRW 1 billion. The Corporation can be listed in the Korea Stock Exchange.

The Korean *Commercial Act* requires that Limited Company shall have at least one director. Limited Company is not required to have a supervisor, neither. Limited Company can not be listed on any Korea Stock Exchange.

8. What is the procedure of registration and incorporation of foreign-owned companies?

The procedures for the establishment of subsidiaries mainly include the following five steps:

Procedures	Contents	Relevant Authorities
Foreign Exchange Declaration	Declaring affairs on Foreign Investment	Designated foreign exchange banks (entrusted by the foreign exchange administrations; just select the banks with headquarters in Korea)
Remittance	Remitting by a foreign investor of the entire capital of its subsidiary to a temporary account	Designated foreign exchange banks (temporary accounts opened in the name of foreign investors)
Registration of Establishment	Obtaining <i>Certificate of Registered Particulars</i> (equivalent to a China's Business License)	Authorities with jurisdiction (Court Registry)
Business Registration	<i>Certificate for Business Registration</i> (equivalent to China's Tax Registration Certificate)	Tax authorities with jurisdiction (tax authority)
Registration of Foreign-invested Company (If the investment amount is more than KRW 1 billion)	Register as a foreign-invested company	Designated foreign exchange bank

The procedure for establishing a branch is basically similar to the procedure for establishing a subsidiary (except for remittance, the branch does not need to have capital, so no remittance is required).

The procedure for establishing a liaison office is: Registration of Establishment of liaison office - Business Registration.

9. What are the documents and materials that the foreign investors need to prepare for that purpose? Is notarization or certification required?

The documents and materials that foreign investors need to prepare vary according to the practice of designated foreign exchange banks, generally including but not limited to the following documents:

- (a) Relevant materials of foreign investors (including but not limited to business licenses and other qualification materials);
- (b) Relevant materials of newly established companies in Korea (including but not limited to personal materials of executives, articles of association, resolutions of shareholders' meetings, etc.);
- (c) Other additional documents (including but not limited to documents related to the object of capital contribution; other documents related to the acquisition of shares)

Some of the required documents must be apostilled. In case of non-signatory nations, after general notarization, they must be notarized by the Korean consulate located in their home country.

10. How long does it normally take to complete the entire registration and incorporation process?

When the materials (including notarization and certification) are complete, the company establishment procedure can be completed in about 3-7 working days. However, in practice, the whole process takes about 1-2 months because of the notarization certification and material supplementation.

M&A laws and regulations & regulatory approvals

- 1. What are the principal laws and regulations applicable to M&A transactions in relation to listed and private company in your jurisdiction? What are the major issues dealt with in such laws and regulations?**

Public M&A transactions

With regard to the M&A procedures, if the Korean target company is a listed company, in order to protect the trust of investors in the market, the requirements of reporting obligation when holding 5% shares, tender offer and collection of voting rights, etc. as provided in the *Capital Market Act* shall be applied.

Private M&A transactions

With regard to the M&A procedures, if the Korean target company is a private company, the procedures for company acquisition provided in the *Commercial Act* shall be applicable.

Laws and regulations applicable jointly to the listed company and private company

With regard to the concentration of undertakings during the M&A, the Fair Trade Commission of Korea is responsible for reviewing whether the M&A will result in a market monopoly or limitation on other companies' improvement of competitiveness according to the the *Monopoly Regulation and Fair Trade Act*.

- 2. Are there any foreign investment review required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).**

Whether it is a non-listed company or a listed company, it involves foreign exchange declaration, and it is necessary to review whether it involves national core technology declaration or approval, prohibited or restricted foreign investment industry, and operator centralized declaration. For foreign exchange declaration and national core technology declaration or approval, please refer to *Foreign Direct Investment (Greenfield investment) 2.*; for industries that foreign investment is prohibited or restricted, please refer to *Foreign Direct Investment (Greenfield investment) 3.*; for the operator centralized declaration, please refer to *M&A laws and regulations & regulatory approvals 3.* If the Company is a listed company, based on the above questions, it is also necessary to examine whether it involves disclosure obligations under the *Capital Market Act* or other applicable laws and regulations governing listed companies.

3. Are there any merger control required in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements).

According to the *Monopoly Regulation and Fair Trade Act*, if companies with total assets or sales of more than KRW 300 billion at the end of the previous fiscal year (including foreign companies, hereinafter referred to as “acquirers”, when calculating total assets or sales include relevant data of its domestic and foreign affiliates) acquires a company with total assets or sales of more than KRW 30 billion (hereinafter referred to as the “acquiree”, when calculating the total assets or sales, including data relating to affiliated companies of the acquiree both before and after the operator centralized declaration) holding more than 20% of the shares with voting rights, the acquirer shall make the declaration of business combination to the Fair Trade Commission.

The business combination above-mentioned is subject to post-declaration in principle. However, if the total assets or sales of the acquirer and its affiliates in the previous year exceed KRW 2 trillion or more, a prior declaration is required. In this case, the declaration obligation must be fulfilled before the date of acquisition of the shares, and no delivery is allowed until the Fair Trade Commission accept the declaration.

When deciding whether to accept the business combination declaration, the Fair Trade Commission shall mainly take whether the acquisition of such shares will restrict or impede the competition in the Korean market as the criteria, and the declaration shall be accepted within one to two months unless there are special circumstances.

4. Are there any other governmental and regulatory approvals required for foreign buyers in M&A? If so, please give brief details (such as trigger threshold, relevant authority and timing requirements)?

For equity transactions, please refer to Section 2.1 for details.

Regarding real estate transactions, according to the *Act on Report of Real Estate Transactions, Etc.*, foreign individuals, foreign legal persons, and foreigners shall obtain prior approval before acquiring land restricted by this law; foreign individuals, foreign legal persons, foreigners (hereinafter “foreigners, etc.”) shall declare with the relevant department of the Korea’s Ministry of Land, Infrastructure and Transport within 60 days from the date of signing the contract for the acquisition of real estate in Korea; if the owner of land owned by a legal person or group established according to Korean laws or Koreans is changed to foreigners, etc., such legal person or group shall, within six months from the date of change, declare with the relevant department of the the Ministry of Land, Infrastructure and Transport.

M&A in relation to listed company

1. What are the principal methods of acquisition?

By and large, listed companies are acquired in the same way that unlisted companies are acquired.

The Korean *Commercial Act* prescribed special regulations applicable to listed companies, including but not limited to:

- (a) a listed company may grant a stock option within the limit determined by *Enforcement Decree of the Commercial Act* within the scope of 20 percent of the total number of stocks issued and outstanding.
- (b) According to the scale of assets of listed companies, in principle, more than one-quarter of the directors will serve as outside directors (Note: Outside directors need to meet the conditions provided in the Korean *Commercial Act*).
- (c) Listed companies shall adopt a resolution of their general meeting of shareholders to appoint full-time supervisors in accordance with the *Enforcement Decree of the Commercial Act*.
- (d) A listed company shall set up a supervisory committee according to the scale of its assets.

2. In what circumstances (if any) is a mandatory bid obligation incurred?

No. The laws of Korea do not provide listed companies with compulsory bidding obligations.

3. Is there a minimum price at which the offer must be made?

According to the relevant provisions of the *Commercial Act* of Korea, when a corporation issues shares two years after its establishment, it can issue shares below par upon the approval of the court and special resolution of the general meeting of shareholders. In principle, the issuance shall be conducted within one month from the date of receiving the approval of the court.

4. How can the function of the board of directors of the target impact a proposed acquisition?

With respect to the issuance of new shares, unless otherwise provided in the Korean *Commercial Act* or the Articles of Association, the Board of Directors shall decide on specific matters such as the type and number of new shares, the issue price and date of payment, and the method of subscription.

With respect to the subscription of old shares, the company may restrict the transfer of shares to be subject to the permission of the board of directors by means of a provision in the articles of

association. If, in violation of such articles, shares are transferred without the permission of the Board of Directors, the transfer of such shares shall have no legal effect on the company.

5. What key documentation is needed in the acquisition?

The conditions for a share transfer to be legally effective are that: it requires the execution of a share transfer agreement (as agreed between the parties) and delivery of a share certificate (in lieu thereof if the company has not already issued a share certificate).

The conditions for transferee's claim to the company for its acquisition of the shares are that: the name and address of the transferee must be stated in the register of shareholders.

6. Do acquisition documents require pre-approval by any regulatory body prior to publication?

For the share transfer involved in the filing of foreign exchange, filing or approval of national key technologies (if any) and filing of concentration of undertakings (if any), such transfer agreement and relevant documents shall be submitted to regulatory authorities.

M&A in relation to private company

1. Are there any special rules in relation to the transferring of a business (compare with the simple share or asset acquisition)?

In accordance with relevant provisions of the Korean *Commercial Act*, a special resolution shall be adopted at the shareholders' meeting if the company intends to transfer all or part of its business or accept all or part of other companies' business which will materially affect the operation of the company.

2. Do labor unit, works councils and other stakeholders (other than the vendors of the target) play a role in M&A?

If it involves the special resolution of the shareholders' meeting, such resolution shall be approved by the shareholders holding more than one-third of the total number of shares in issue and more than two-thirds of the shareholders attending the shareholders' meeting.

If the target company has an association, in practice, negotiation with the association may be involved.

3. What are the principle minority shareholder rights given by law?

The minority shareholders shall have the right to request to acquire their equity interest in connection with share exchange, transfer or acquisition of the business of the company, etc., the right to request to acquire their equity interest from the majority shareholder, the right to apply for convening shareholders' general meetings (3%) and the right to apply to the court to select and appoint inspectors to examine the documents submitted by directors and the supervisor's reports in accordance with the Korean *Commercial Act*.

ⁱ *The series on the investment and M&A laws in the member countries of RCEP is launched by DeHeng Law Offices. In each article of the series, a leading local law firm is invited to offer an overview of investment and M&A laws in the jurisdiction.*

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