

# Regional Headquarters Schemes by China's Ministry of Commerce and the Shanghai Municipal Government: Differences, Limitations, and Possible Combinations

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## I. Introduction

As large multinational companies ("MNCs") are continuously extending their Chinese market presence, many are considering moving their Asian-Pacific Headquarters to China. In attempting to attract MNCs' Regional Headquarters to Mainland China, the Chinese central government is not only faced with competition from regional hubs, such as Singapore and Hong Kong, but also from internal rivals, such as the Shanghai and Beijing municipal governments.

This article analyzes recently passed regulations on the establishment of Regional Headquarters by MNCs in China at national and municipal level. The focus will be on Shanghai's set of regulations, issued in 2002 and 2003, as well as on the People's Republic of China ("PRC") Ministry of Commerce's Holding Company Provisions, which introduced Regional Headquarters as a new investment vehicle at national level in February 2004. Particular emphasis will be placed on the latest revision of the national rules in November 2004, the difference in approval requirements and business scope of national and municipal Regional Headquarters and the two distinct forms of Regional Headquarters (Investment/Management Company) in Shanghai Municipality.

## II. Regional Headquarters at National Level

### A. Legal Antecedents: Holding Company Structures in China since the 1980s

Soon after Deng Xiaoping had proclaimed China's new Open Door Policy in 1978, foreign direct investment began to soar in China, despite initial setbacks such as the Baoshan steel plant controversy and other disputes involving technology import contracts.<sup>2</sup> By the mid-1980s, some MNCs had already established a number of foreign-invested enterprises ("FIEs") in the Chinese market. As the existence of such multiple investments created a need for coordination and centralization of respective business activities, foreign investors began to experiment with different Holding Company structures and subsequently sought approval of these structures from the Ministry of Foreign Economic Relations and Trade (MOFERT) and from its successor, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC).<sup>3</sup> Although the concept of Holding Companies was alien to PRC Law at the time, some foreign investors were able to obtain approval for their Holding Company structures on the basis of internal ministry regulations in the late 1980s and early 1990s.<sup>4</sup> Approvals were granted by labeling said company structure with various designations such as umbrella enterprise [伞形企业], group company [集团公司], holding company [控股公司] or investment company [投资公司].<sup>5</sup>

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<sup>2</sup> See Jerome Alan Cohen / Stuart J. Valentine, Foreign Direct Investment in the People's Republic of China: Progress, Problems and Proposals, in: 1 J. Chinese L. 161 (1987), p. 165; see also David A. Sneider, The Baoshan Debacle: A Study of Sino-Japanese Contract Dispute Settlement, in: 18 N.Y.U. J. Int'l L. & Pol. 541 (1985-1986), p. 542.

<sup>3</sup> Daniel C. K. Chow, A Primer on Foreign Investment Enterprises and Protection of Intellectual Property in China, Den Haag, 2002, p. 166.

<sup>4</sup> See Philip Rapp, FIE Holding Companies, in: 1 Doing Business in China (People's Republic of China) II-4.1 (Freshfields Bruckhaus Deringer eds., 2004), at II-4.4.

A legal framework for the establishment of foreign-invested Holding Companies was eventually put into place in 1995, when MOFTEC issued the *Establishment of Companies with an Investment Nature by Foreign Investors Tentative Provisions* ("Tentative HC Provisions")<sup>6</sup>. Various supplementary regulations were enacted in the following years with the original Holding Company rules undergoing revisions in March and June 2003, as well as in February and November 2004. Since 1995, over 300 foreign-invested Holding Companies have been established under the national regulations,<sup>7</sup> most of them in Beijing and Shanghai.<sup>8</sup>

In June 2003, the title of the Holding Company regulations changed to *Provisions on the Establishment of Investment Companies by Foreign Investors* ("HC Provisions"),<sup>9</sup> but it was only in February 2004 that the Ministry of Commerce (MOFCOM) introduced the new investment vehicle of a Regional Headquarters. As Regional Headquarters provisions had already been in place for some time at the municipal level in Beijing and Shanghai, the new national rules appeared as an attempt by MOFCOM to profit from the large success of this new investment vehicle among foreign investors.

## B. Regional Headquarters under MOFCOM's Holding Company Provisions

Despite the difference in name, Regional Headquarters established under the MOFCOM rules are essentially a qualified form of Holding Companies. Accordingly, MOFCOM did not issue a separate set of regulations governing the approval of Regional Headquarters, but instead added the relevant norms to the existing provisions on Holding Companies. Hence, in order to establish a Regional Headquarters, foreign investors first have to go through the approval process for Holding Companies before being able to apply for the Regional Headquarters status. In view of this correlation, the following analysis will cover several aspects applying to both Holding Companies and Regional Headquarters.

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<sup>5</sup> Nicholas C. Howson / Laurence L. Li, *Investment/Holding Companies in China - Chinese and U.S. Tax Issues: Part I*, in: 9 J. Int'l Tax'n 22 (1998), p. 24 n.1.

<sup>6</sup> 关于外商投资举办投资性公司的暂行规定, Chinese and English text in: China Law Reference Service, Volume 2 - Business Vehicles, *Asia Law & Practice Publishing Ltd.*, Hong Kong, 2003, Ref. 2330/95.04.04

<sup>7</sup> Lester Ross / Grace Chen, *Revising the Foreign-invested Holding Company Rules*, in: 3/1/05 China Law and Practice 47 (2005), p. 47.

<sup>8</sup> Shannon Cheung, *Cash Management in China: An Overview and Future Outlook*, in: HSBC's Guide to Cash and Treasury Management in Asia Pacific 2004 276 (HSBC eds., 2003), p. 277; Matthew Wong, *China: Foreign Investment: Establishing an HQ*, in: *China Economic Review*, Nov. 1, 2002, p. 17, available at 2002 WL 8836244.

<sup>9</sup> 关于外商投资举办投资性公司的规定, for the latest (November 2004) version of the HC Provisions in Chinese and English see China Law & Practice, March 2005, p. 36.

## 1. Legal Form

Holding Companies and Regional Headquarters can take the form of a Wholly Foreign-Owned Enterprise ("WFOE") or Equity Joint Venture ("EJV").<sup>10</sup> Nevertheless, most MNCs have so far refrained from setting up EJV Holding Companies and have mostly chosen to centralize their business activities in China through a WFOE Holding Company.<sup>11</sup> The strong preference for WFOE Holding Companies can partly be explained by the initial absence of Chinese companies with a truly nationwide reach, market presence, and acceptance across the country's varied regions.<sup>12</sup> Another reason is the fact that many foreign investors will avoid joint venture structures on the basis of strategic considerations when it comes to establishing a Holding Company abroad. The rationale behind setting up a Holding Company usually consists of a need to create a centralized management structure for existing joint ventures and WFOEs in order to generate economies in management, distribution, advertisement etc. As the incorporation and management of different Sino-foreign joint ventures already provides for potential conflicts with the different Chinese joint venture partners, establishing an EJV Holding Company would undermine the endeavor even further by creating an additional need for coordination between the Sino-foreign EJV Holding Company partners themselves.

## 2. Approval Requirements

### a. Financial Requirements

The motive for allowing MNCs to set up Holding Companies in China is described in Article 1 HC Provisions. The rules are designed to "promote foreign investment", in particular the "import of advanced foreign technology and management experience". This intention is further highlighted by the title of the regulations which uses the term "Investment Company" instead of the more common designation "Holding Company". In order to establish a Holding Company under the HC Provisions, foreign investors therefore have to live up to high requirements regarding their financial strength and prove a strong commitment to investment in China.

According to Article 3 § 1 (1) HC Provisions, a MNC either has to have a total asset value of no less than US\$ 400 million in the year prior to the application and have already established at least one FIE in China with a capital contribution of more than

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<sup>10</sup> Article 2 HC Provisions.

<sup>11</sup> Howson / Li (supra note 5), p 25 n.3

<sup>12</sup> Id.

US\$ 10 million of registered capital actually paid in or, alternatively, have established more than ten FIEs in China with a capital contribution of more than US\$ 30 million of registered capital actually paid in. If a Holding Company is set up by more than one foreign investor, at least one of them (with a major shareholding) has to satisfy said requirements.<sup>13</sup> In the rare case of an EJV Holding Company the Chinese partner has to meet the criteria of a total asset value of RMB 100 million Yuan in the year prior to the application.<sup>14</sup>

The latest revision of the HC Provisions in November 2004 has brought about a slight attenuation of the approval benchmarks described above. With respect to the first alternative of an asset value of US\$ 400 million and the establishment of at least one FIE, MOFCOM has dropped the prerequisite that the foreign investor have proposed three or more investment projects prior to the application. This deletion reduces the market entry barriers for foreign investors vested with the necessary financial resources but without immediate and concrete large-scale investment plans at the time of setting up their PRC Holding Company.

In dropping said prerequisite, MOFCOM yielded to criticism regarding the old wording of Article 3 HC Provisions. In its previous version, Article 3 HC Provisions required foreign investors to have established at least three investment projects prior to the application for establishing a Holding Company. The reference to "investment projects" was noteworthy insofar as MOFCOM also used the term "foreign-invested enterprise" in the same Article twice. It was hence unclear whether a foreign investor could actually satisfy this criterion by proposing three investment projects with a foreign equity investment of less than the general 25% benchmark of foreign ownership for FIEs.<sup>15</sup> As MOFCOM silently deleted the relevant passage in the latest version of the HC Provisions, it appears that the ambiguous wording had indeed been the result of neglectful drafting rather than a deliberate differentiation between FIEs and investment projects.

### b. Registered Capital Requirements

Article 3 § 1 (3) HC Provisions sets the minimum registered capital for Holding Companies at US\$ 30 million. When MOFTEC issued the first version of its Tentative HC Provisions in 1995, the US\$ 30 million threshold constituted a considerable shift from the relatively low minimum registered capital

requirement of US\$ 10 million which MOFTEC had previously applied to Holding Company structures on the basis of its internal approval guidelines.<sup>16</sup> However, despite the wording of Article 3 HC Provisions, the actual amount of paid in registered capital will eventually turn out to be even higher for foreign investors due to the requirement in Article 8 HC Provisions that the Holding Company use at least US\$ 30 million of its registered capital for investments in China and for acquisitions from domestic shareholders. As a Holding Company will always require a sufficient amount of capital for its own operations, foreign investors will need to inject a corresponding amount of registered capital above the US\$ 30 million threshold in order to enable the Holding Company to engage in other business activities.<sup>17</sup>

### c. Regional Headquarters Status

In order to transform a Holding Company into a Regional Headquarters, the parent company has to live up to even higher standards. The parent company must either have paid in registered capital of at least US\$ 100 million or, alternatively, have paid in registered capital of at least US\$ 50 million with the total sum of assets of its invested enterprise amounting to no less than RMB 3 billion Yuan and the profits amounting to no less than RMB 100 million Yuan as of the year prior to the application.<sup>18</sup> Furthermore, the Holding Company is required to have established at least one research and development center<sup>19</sup> and must have used at least US\$ 30 million of its registered capital for investments in China, and acquisitions from domestic shareholders in accordance with Article 8 HC Provisions.<sup>20</sup> The November 2004 revision of the HC Provisions has brought a partial relaxation insofar as foreign investors now only have to establish one research and development center instead of two as previously required.<sup>21</sup>

### 3. Business Scope

Regional Headquarters are entitled to the business scope available to Holding Companies and to a range of additional business activities only open to Regional Headquarters.

<sup>13</sup> Article 3 § 2 HC Provisions.

<sup>14</sup> Article 3 § 1 (2) HC Provisions.

<sup>15</sup> See *Howson / Li* (supra note 5), p. 26 n.8.

<sup>16</sup> See *Howson / Li* (supra note 5), p. 25.

<sup>17</sup> *Chow* (supra note 3), p. 170.

<sup>18</sup> Article 22 (1) i HC Provisions.

<sup>19</sup> Article 22 (1) iii HC Provisions.

<sup>20</sup> Article 22 (1) ii HC Provisions.

<sup>21</sup> Article 22 (1) iii HC Provisions

### a. Permitted Activities for Holding Companies

Among the long list of permitted activities for Holding Companies, the following items appear to bear the greatest significance for foreign investors.<sup>22</sup>

- investing in sectors in which foreign investment is permitted in general;<sup>23</sup>
- balancing foreign exchange among invested enterprises, with the consent and under the supervision of an administration of foreign exchange for an invested enterprise when appointed in writing (subject to the unanimous resolution of the board of directors) by such an enterprise;<sup>24</sup>
- acting as a distributor in the domestic and foreign markets for the products produced by an invested enterprise when appointed in writing (subject to the unanimous resolution of the board of directors) by said invested enterprise;<sup>25</sup>
- acting as an agent or distributor in or by way of establishing an export procurement organization (including an internal unit), exporting domestic goods in accordance with relevant state provisions and applying for tax rebates in accordance with relevant provisions;<sup>26</sup>
- purchasing the products of an invested enterprise and, after effecting system integration, selling such products domestically and abroad;<sup>27</sup>
- providing after-sale services to imported products produced by its parent company.<sup>28</sup>

### b. Permitted Activities for Regional Headquarters

Once the Regional Headquarters status has been awarded, a company may also engage in the following activities.<sup>29</sup>

- import and sale (excluding retail) of products of multinational companies and their controlled affiliates;<sup>30</sup>
- import of raw and supplementary materials, spare parts and components;<sup>31</sup>
- providing outsourcing services for enterprises inside and outside China;<sup>32</sup>

- providing logistics and distribution services;<sup>33</sup>
- subject to the approval of the China Banking Regulatory Commission ("CBRC"), establishing finance companies to provide relevant finance services for Holding Companies and their invested enterprises;<sup>34</sup>
- subject to the approval of the Ministry of Commerce, engaging in overseas project contracting and overseas investment, establishing leasing companies and providing related services;<sup>35</sup>
- entrusting other domestic enterprises to produce or process its products or the products of its parent company and sell these products in China and abroad;<sup>36</sup> and
- other approved businesses.

### c. Import and Distribution Rights

Since the promulgation of the first Holding Company rules in 1995, the ability of Holding Companies has always been limited to acting as a trading agent for their subsidiary FIEs. By restricting Holding Companies' business scope to such services, Chinese lawmakers were apparently attempting to prevent Holding Companies from engaging in transactions with unrelated entities.<sup>37</sup> One possible explanation for this limitation is the fact that if a Holding Company could import and sell products from offshore, such competition could harm the Chinese partners of its subsidiary FIEs engaged in manufacturing the same kind of product.<sup>38</sup>

Having caused much disappointment among foreign investors over the years, said restrictions have finally been lifted but only for Holding Companies meeting the strict requirements for Regional Headquarters. Pursuant to Article 22 HC Provisions a Regional Headquarters may now import and sell products of a MNC. When MOFCOM introduced Regional Headquarters as a new investment vehicle in February 2004, the wording of the HC Provisions appeared to suggest that a Regional Headquarters may sell those products in China without having to apply for a business license with explicit reference to wholesale or retail activities.<sup>39</sup>

<sup>22</sup> See Articles 10 and 15 HC Provisions.

<sup>23</sup> Article 10 (1) HC Provisions.

<sup>24</sup> Article 10 (2) ii HC Provisions.

<sup>25</sup> Article 10 (2) i HC Provisions.

<sup>26</sup> Article 15 (2) HC Provisions.

<sup>27</sup> Article 15 (3) HC Provisions.

<sup>28</sup> Article 15 (7) HC Provisions.

<sup>29</sup> See Article 22 (2) HC Provisions.

<sup>30</sup> Article 22 (2) ii HC Provisions.

<sup>31</sup> Article 22 (2) iii HC Provisions.

<sup>32</sup> Article 22 (2) iv HC Provisions.

<sup>33</sup> Article 22 (2) v HC Provisions.

<sup>34</sup> Article 22 (2) vi HC Provisions.

<sup>35</sup> Article 22 (2) vii HC Provisions.

<sup>36</sup> Article 22 (2) viii HC Provisions.

<sup>37</sup> Pitman B. Potter, MOFTEC's New Regulations on Holding Companies: They Open up New Opportunities (But Only to Very Large Players), in: 17 NO. 5 E. Asian Executive Rep. 7 (1995), p. 8.

<sup>38</sup> Rapp (supra note 4), at II-4.11.

<sup>39</sup> Peter Corne, New Rules Beef up Holding Companies: But Who is Buying?, in: 3/1/04 China Law and Practice 25 (2004), p. 26.

In order to clarify the extent of Regional Headquarters' distribution rights and to bring the HC Provisions in line with the recently promulgated *Administration of Foreign Investment in the Commercial Sector Procedures* ("Commercial Sector Procedures"),<sup>40</sup> MOFCOM amended the HC Provisions in November 2004 to explicitly rule out any retail activities by Holding Companies or Regional Headquarters.<sup>41</sup> According to Article 11 HC Provisions Holding Companies and Regional Headquarters now have to comply with the Commercial Sector Procedures and shall amend their business scope to include specific distribution activities if they wish to engage in such fields.

The latest modification of the HC Provisions has also shed more light on the limitations of Regional Headquarters' import rights. In its February 2004 version, the wording of Article 22 HC Provisions left room for interpretation as to whether Regional Headquarters could import products only from their respective parent company or also from offshore affiliates and other MNCs. The expression "跨国公司的产品" was sometimes translated as "products of the multinational company" and sometimes as "products of multinational companies".<sup>42</sup> In order to prevent any misunderstanding, the HC Provisions used to stipulate that the term was referring to the "parent company of the group to which the foreign investor establishing the Holding Company" belonged.<sup>43</sup>

Despite a partial relaxation of import restrictions, the February 2004 version of the HC Provisions still barred Regional Headquarters from performing the function that Holding Companies in western countries perform for their corporate group. Such functions consist in using Regional Headquarters as single trading agents for the centralized purchasing of raw materials and the centralized selling of products from different FIEs and offshore subsidiaries of the group.<sup>44</sup> Employing common sales personnel through their Regional Headquarters to sell the group's products allows MNCs to enjoy significant economies of scale. In response to the widespread criticism of said import restrictions,<sup>45</sup> MOFCOM eventually changed the

relevant provisions in November 2004. Under the latest version of the HC Provisions, Regional Headquarters are granted import and distribution rights not only for products of their parent company but also for products of offshore affiliates controlled by the respective parent.<sup>46</sup>

#### d. Central Treasury Functions

MNCs in western economies use Holding Companies to lend to subsidiary FIEs and to transfer funds among subsidiaries in the form of intracompany loans, thereby avoiding the need for incurring outside debts to finance their operations when surpluses exist within the group.<sup>47</sup> When MOFTEC issued its first set of Holding Company regulations, the wording of Article 7 Tentative HC Provisions seemed to herald the introduction of similar functions for Holding Companies in China. The initial euphoria soon gave way to a more realistic evaluation, however, as the "providing of financial support" proved to be conditioned by an additional approval of the People's Bank of China (PBOC). The PBOC was quick in promulgating its *Interim Measures for the Administration of Group Finance Companies* in September 1996, which stipulated the requirement for Holding Companies to establish a separate Group Finance Company when engaging in financial services.

Despite the fact that the name of the regulations changed to *Administration of Finance Companies of Enterprise Groups Procedures*<sup>48</sup> in June 2000, and that the authority for approving such Group Finance Companies now lies with CBRC, the requirement for establishing a separate Finance Company remains unchanged, even after the latest revision of the procedures in July 2004.<sup>49</sup> Due to the very high capital benchmarks for establishing such Group Finance Companies, few foreign investors have so far been able to obtain the necessary approval from CBRC.<sup>50</sup>

Regional Headquarters are now granted the option of establishing finance companies to provide central treasury functions to the group in China.<sup>51</sup> Although it has been suggested that such finance companies will be subject to leaner regulations by CBRC in the future,<sup>52</sup> there is no indication so far that Regional Headquarters will indeed be able to

<sup>40</sup> 外商投资商业领域管理办法, issued by MOFCOM on April 16, 2004 with effect from June 1, 2004, Chinese-English in: CCH *Asia Pacific* (Editor): CCH China Laws for Foreign Business - Business Regulation, Volume 3 (Hongkong 1985 ff.) ¶13-660.

<sup>41</sup> See Article 15 (9) and 22 (2) ii HC Provisions.

<sup>42</sup> The difference in translation is due to the fact that there is no distinction between singular and plural forms in the Chinese (Mandarin) language. Rather, the decision whether a certain form is used in its singular or plural form has to be made based on the circumstances of each individual case.

<sup>43</sup> See Article 21 HC Provisions in its February 2004 version.

<sup>44</sup> Rapp (supra note 4), at II-4.11.

<sup>45</sup> See, e.g., Corne (supra note 39), p. 25.

<sup>46</sup> See Article 22 (2) HC Provisions.

<sup>47</sup> Chow (supra note 3), p. 176.

<sup>48</sup> 企业集团财务公司管理办法.

<sup>49</sup> Chinese and English text in: CCH Asia Pte. Limited (eds.), *China Laws for Business - Business Regulation*, (Loose-leaf - Hong Kong, since 1985) at 8-360.

<sup>50</sup> Rapp (supra note 4), at II-4.22; Chow (supra note 3), p. 176.

<sup>51</sup> See Article 22 (2) HC Provisions.

<sup>52</sup> See Corne (supra note 39), p. 26.

avoid the high approval requirements set by the *Administration of Finance Companies of Enterprise Groups Procedures*. CBRC's latest revision of the procedures in July 2004 has broken very little new ground, particularly with respect to the stringent financial requirements.<sup>53</sup>

### C. Conclusion

The introduction of Regional Headquarters as a new investment vehicle at the national level has opened new possibilities for foreign investors to coordinate and centralize their business activities in China. The most significant new business activity among the list of new items introduced in February 2004 was the possibility for a Regional Headquarters to import and sell products from its parent company. The November 2004 revision of the HC Provisions has removed another major obstacle in this regard by extending Regional Headquarters import rights to offshore affiliates controlled by the parent company. A factor which will continue to deter foreign investors from establishing a Regional Headquarters at national level, however, are the high capital requirements set by MOFCOM making this new investment vehicle only available to very large MNCs.

## III. Regional Headquarters in Shanghai Municipality

### A. Legal Antecedents: Regional Headquarters structures in Beijing and Shanghai since the 1990s

Many years before MOFCOM launched its Regional Headquarters initiative in 2004, local governments in Shanghai and Beijing had already introduced the Regional Headquarters scheme at municipal level.<sup>54</sup> This time lag can partly be explained by the fact that pressure for issuing such legislation was much higher on local governments than on MOFTEC/MOFCOM due to the strong competition between the two municipalities and other major cities in the area such as Hong Kong and Singapore.<sup>55</sup>

First attempts were made in Shanghai in the early 1990s, when the Shanghai government experimented with the concept of a so-called Group Company [集团公司].<sup>56</sup> Such Group Companies were

designed to perform management functions without actually holding any investments themselves and were conceived to act as a kind of dragon head for foreign investors in the Chinese market. However, due to strong resistance from the central government in Beijing this first experiment soon came to an end.

The Beijing government went ahead with its own set of rules in January 1999, when it issued the *Beijing Municipality, Encouragement for Multinational Companies Establishing Regional Headquarters in Beijing Several Provisions*.<sup>57</sup> The Provisions put forward some preferential policies, such as an exemption from local income tax, support for import and export rights and support for the establishment of sales agencies and finance companies. Despite their innovative character, the Beijing Regulations were criticized for falling short of legislative standards.<sup>58</sup> The rules remain unclear with respect to several fundamental issues, such as the exact preconditions for establishing a Regional Headquarters or the performance of services for affiliate companies outside of China.<sup>59</sup>

In order to position itself as a regional hub for corporate headquarters against Beijing on the one hand, and Singapore and Hong Kong on the other hand, the Shanghai Municipality issued an equivalent version of regulations in July 2002, the *Shanghai Municipality, Encouraging the Establishment of Regional Headquarters by Foreign Multinational Corporations Tentative Provisions*<sup>60</sup> ("RHQ Tentative Provisions"). Unlike the Beijing government, the Shanghai municipal government was quick in issuing Implementing Rules<sup>61</sup> to its RHQ Tentative Provisions in March 2003, which provided guidance with respect to various issues left open for interpretation in the RHQ Tentative Provisions. The Shanghai legislation appeared to be the result of a rather well prepared legislative effort. Prior to issuing the RHQ Tentative Provisions, the Shanghai government had apparently set up a special task force in charge of assessing the various legislative alterna-

<sup>53</sup> See *Stephen M. Harner*, *Enterprise Group Finance Companies Subject to New Rules*, in: 9/1/04 *China Law and Practice* 35 (2004), 36.

<sup>54</sup> *Wendy YunFang Guo*, *China Lures Foreign Holding Companies*, in: 15 *International Tax Review* 44 (2004), p. 44.

<sup>55</sup> *Winston Zhao / Lucy Li*, *Issues in Shanghai's Regional HQs Legislation*, in: 9/1/03 *China Law and Practice* 70 (2003), p. 70.

<sup>56</sup> *Bernd-Uwe Stucken*, *Establishment of Real and Virtual Holding Company Structures*, Address Before the German Chamber of Commerce in China, Shanghai (Apr. 20, 2004).

<sup>57</sup> *北京市关于鼓励跨国公司在京设立地区总部的若干规定*, summary of main contents at: *Asia Law & Practice Publishing Ltd.* (eds.), *China Law Reference Service* (Hong Kong, Loose-leaf, 1986 - Present), Volume 2 - Business Vehicles, Ref. No: 2300/99.01.29/BJ.

<sup>58</sup> See, e.g., *Guo* (supra note 54), p. 44.

<sup>59</sup> *Wong* (supra note 8), p. 17.

<sup>60</sup> *上海市鼓励外国跨国公司设立地区总部的暂行规定*, Chinese and English text in: *Asia Law & Practice Publishing Ltd.* (eds.), *China Law Reference Service* (Hong Kong, Loose-leaf, 1986 - Present), Volume 2 - Business Vehicles, Ref. No: 2300/2002.07.20/SH.

<sup>61</sup> *上海市鼓励外国跨国公司设立地区总部的暂行规定实施细则*, *Shanghai Municipality, Encouraging the Establishment of Regional Headquarters by Foreign Multinational Corporations Tentative Provisions Implementing Rules* ("RHQ Implementing Rules"), Chinese and English text in: *Asia Law & Practice Publishing Ltd.* (eds.), *China Law Reference Service* (Hong Kong, Loose-leaf, 1986 - Present), Volume 2 - Business Vehicles, Ref. No: 2300/2003.03.01/SH.

tives for Regional Headquarters regulations and had sent out delegations overseas, including to Singapore<sup>62</sup>.

By the end of the year 2004, already 86 MNCs had opted for setting up their Regional Headquarters under the Shanghai rules.<sup>63</sup> Among the first companies to establish a Regional Headquarters in Shanghai were General Electric and Unilever<sup>64</sup> and many of the big MNCs have followed suit, including Exxon Mobil, Kodak, Honeywell and Johnson & Johnson.<sup>65</sup> In order to take advantage of available tax rebates, most foreign investors have chosen Shanghai's Pudong New Area as their Regional Headquarters' place of registration.<sup>66</sup>

While Beijing has traditionally been the main target for MNCs wanting to establish a Regional Headquarter in Mainland China, Shanghai has now overtaken Beijing in attracting the highest number of MNCs' Regional Headquarters. In the year 2004, 30 new Regional Headquarters were approved in Shanghai compared to a mere seven in Beijing.<sup>67</sup> However, despite the relative popularity of Shanghai's RHQ Tentative Provisions among foreign investors the city still cannot seem to match the success of its competitors Hong Kong and Singapore.<sup>68</sup> The more favorable investment climate and lower legal requirements for Holding Companies in these two cities are still keeping many foreign investors from moving their Regional Headquarters in Asia to Mainland China.

## B. Regional Headquarters under Shanghai's RHQ Regulations

### 1. Legal Form

#### a. WFOE or EJV

Unlike its national counterpart the Shanghai RHQ Tentative Provisions only appear to be providing for the possibility of a Regional Headquarters to be established as a Wholly Foreign-Owned Enterprise without making any explicit reference to an (Equity) Joint Venture structure.<sup>69</sup> This comes as a surprise insofar as China has traditionally preferred foreign direct investment through Joint Ven-

tures, rather than through WFOEs. Since the beginning of the Open Door Policy, China has striven to obtain greater access to advanced science, technology, management skills and international distribution channels.<sup>70</sup> Considering that such skills and knowledge are only transferred to Chinese companies if they are a partner in a Sino-foreign Joint Venture, the preference for Joint Venture structures on the Chinese side appears as a natural choice. The reluctance of Chinese lawmakers to accept WFOE structures is also reflected in the development of PRC legislation in general. Only in recent years, and only as a result of the WTO accession requisites, have many areas of the Chinese economy been made accessible for WFOEs through a revision of the Foreign Investment Industrial Guidance Catalogue and other relevant laws and regulations.

There are several possible explanations for the omission of EJVs in Article 2 RHQ Tentative Provisions. Firstly, a Regional Headquarters usually serves a different purpose to a regular FIE. While standard FIEs are established to function as manufacturing, retailing/wholesaling or trading vehicles, a Regional Headquarters' main purpose consists of performing a coordinating and centralizing function for the MNC's multiple investments in China. The prospect of a transfer of technology or advanced science to the Chinese Joint Venture partner therefore does not come into play when forming a Regional Headquarters.

Secondly, the exclusive reference to WFOE structures may simply emanate from practical considerations on the part of the Shanghai municipal government. As mentioned above,<sup>71</sup> very few investors opt for Joint Venture structures when establishing a Holding Company at national level highlighting a general preference for WFOE Holding Companies among MNCs. As Article 2 RHQ Tentative Provisions furthermore stipulates that enterprise forms other than WFOEs may be approved by the Shanghai government on a case by case basis, the unlikely scenario of a foreign investor wanting to establish a Regional Headquarters as an EJV also appears to be provided for.

#### b. Holding Company, Management Company, other FIE forms

Regional Headquarters in Shanghai may be established in the form of Holding Companies or Management Companies [ 管理性公司 ].<sup>72</sup> As the wording of Article 2 RHQ Tentative Provisions

<sup>62</sup> Rongwei Cai, Shanghai Bound: New Regulations to Attract Regional HQs, in: 9/1/02 China Law and Practice 86 (2002), 86.

<sup>63</sup> Ross / Chen (supra note 7), p. 48.

<sup>64</sup> Operational Functions of Regional Headquarters Expanded, *Xinhua News Agency - CEIS*, Sept. 18, 2003, available at 2003 WL 56899381.

<sup>65</sup> Cheung (supra note 8), p. 279; Mitchell Dudek / Alex (Feng) Wang, FDI in Shanghai, in: 12/1/04 China Law and Practice 71 (2004), 71.

<sup>66</sup> Shanghai Welcomes Regional Headquarters, in: EuroBiz, June 2004, at 66, available at <http://www.sinomedia.net/eurobiz/v200406/event0406.html>.

<sup>67</sup> Ross / Chen (supra note 7), p. 49.

<sup>68</sup> Cai (supra note 62), p. 86.

<sup>69</sup> See Article 2 RHQ Tentative Provisions.

<sup>70</sup> Cohen / Valentine (supra note 2), p. 166.

<sup>71</sup> See II.A.1.

<sup>72</sup> Article 2 RHQ Tentative Provisions.

“may take such corporate forms as [...] etc.”) seems to indicate that these two forms are mere examples of legal structures available for Regional Headquarters, the question arises whether foreign investors could establish Regional Headquarters in forms other than Holding or Management Companies and whether it would even be possible to transform an existing FIE into a Regional Headquarters.<sup>73</sup> Transforming an existing FIE into a Regional Headquarters could prove to be an attractive option for foreign investors as such Regional Headquarters could presumably continue to engage in the same business activities as the original FIE, e.g. in manufacturing, trading, etc., while at the same time assuming the role of a Regional Headquarters for the corporate group.

With respect to the first question of whether a Regional Headquarters could be established in a legal form other than a Holding or Management Company, the wording of the RHQ Tentative Provisions points to part of the answer. Article 5 RHQ Tentative Provisions only names two ways of establishing a Regional Headquarters: Either an existing Holding Company applies for the Regional Headquarters status or a foreign investor who has not yet established a Holding Company applies for the establishment of a Regional Headquarters in the form of a Management Company. Although this seems to contradict the exemplary character of the enumeration in Article 2 RHQ Tentative Provisions, it has to be taken into account that there are different possible interpretations of Article 2 RHQ Tentative Provisions. Besides the interpretation that Regional Headquarters may be established in forms other than Holding and Management Companies, the wording could equally be understood to mean that in addition to taking the form of WFOE Holding and WFOE Management Companies, Regional Headquarters may also be established as EJV Holding and EJV Management Companies without opening the possibility for a basic structure other than Holding or Management Companies. This interpretation is supported by the fact that while Article 2 RHQ Tentative Provisions makes reference to “wholly-owned investment companies” and “wholly-owned management companies”, Article 5 only refers to “investment companies” and to a “management company” while omitting the denomination “wholly-owned”. As mentioned above,<sup>74</sup> this interpretation would also be more in line with the interests of Chinese lawmakers by providing a possibility for granting approval to the traditionally preferred investment structure of Sino-foreign Joint Ventures. Article 2 and 5 RHQ

Tentative Provisions are therefore mostly understood as only giving MNCs the choice between establishing a Regional Headquarters as a Holding or Management Company.<sup>75</sup>

With respect to the second question of whether foreign investors could transform an existing FIE into a Regional Headquarters in the form of a Management Company, the wording of the RHQ Tentative Provisions is not entirely clear. Article 2 RHQ Tentative Provisions stipulates that in order to exercise their management and service functions Regional Headquarters must be established in Shanghai Municipality, thereby appearing to rule out the possibility for any FIE established elsewhere in China to be inside the scope of the Shanghai rules.<sup>76</sup> Besides this geographical containment, however, there is no explicit guidance provided as to whether the Management Company must be a newly established FIE or not. Article 5 RHQ Tentative Provisions simply stipulates that an “application may be made for the establishment of Regional Headquarters in the form of a management company”. However, when read in combination with the preceding sentence of Article 5 RHQ Tentative Provisions, the term “establishment” appears to be delivering an indication regarding the correct interpretation of the Article. In the preceding sentence of Article 5 RHQ Tentative Provisions it is stipulated that Holding Companies may apply for “recognition” as Regional Headquarters thereby implying that Holding Companies have to have already been established when applying for the Regional Headquarters status. The deliberate distinction between the “recognition” and the “establishment” of a Regional Headquarters provides a strong indication for the conclusion that a Management Company may not be set up by transforming an already existing FIE into a Regional Headquarters. Hence, it seems that the only FIEs that may be transformed into a Regional Headquarters are Holding Companies registered in the Shanghai Municipality.<sup>77</sup>

## 2. Definition

Article 2 RHQ Tentative Provisions defines a Regional Headquarters as a MNC’s only head office that, through investment or by authorization, exercises management and service functions for enterprises in a region consisting of more than one

<sup>73</sup> See *Cai* (supra note 62), p. 87.

<sup>74</sup> See III.B.1.a.

<sup>75</sup> See *Danian Zhang / John Grobowski / Jeffrey Wilson*, Shanghai Announces Regional Headquarters Regulations, in: Baker & McKenzie China Practice Group 1 (2002), p. 1, available at <http://www.baker-net.com/BakerNet/Locations/Asia+Pacific/Publications/Shanghai+Announces+Regional+Headquarters+Regulations.htm>; *Stucken* (supra note 56).

<sup>76</sup> See *Yuping Wang*, Establishing a Regional Headquarters in Shanghai, in: 6/1/03 China Law and Practice 65 (2003), 66.

<sup>77</sup> *Wang* (supra note 76), p. 66.

country. The requirement of the Regional Headquarters being the MNC's only head office in a region consisting of more than one country highlights the intention of the Shanghai Municipal Government to position Shanghai in direct competition with other Chinese cities as well as with non-Chinese cities in the Asian-Pacific region.<sup>78</sup> Said precondition constitutes a clear deviation from the benchmarks set by MOFCOM's HC Provisions which provide for the possibility of Regional Headquarters to be established even in cases where a MNC has already set up another Regional Headquarters in the Asia-Pacific region or where a MNC's Asian-Pacific investments are limited to China.

The RHQ Tentative Provisions do not provide further guidance as to which forms of enterprises fall into the scope of the term "head office". It is thus unclear whether MNCs that have established a Holding Company in other cities would be considered as already having set up a head office in a place other than Shanghai. To begin with, it is obvious that a foreign investor that has set up a Holding Company under MOFCOM's HC Provisions will not be granted approval for establishing a Regional Headquarters in the form of a Management Company in Shanghai, given that Article 5 RHQ Tentative Provisions limits the options for such Holding Companies to being recognized as a Regional Headquarters in the form of a Holding Company.

It is less apparent, however, whether Article 2 RHQ Tentative Provisions would allow a foreign investor that has set up a Holding Company in a municipality or city other than Shanghai to establish an additional Regional Headquarters as a Management Company in Shanghai. Although this is sometimes referred to as a feasible option under the Shanghai rules,<sup>79</sup> the rationale behind Articles 2 and 5 RHQ Tentative Provisions seems to point to a different interpretation. As mentioned above,<sup>80</sup> Article 5 RHQ Tentative Provisions only gives foreign investors the choice between setting up a Regional Headquarters directly in Shanghai and transferring an existing Holding Company to the Shanghai Municipality to be recognized as a Regional Headquarters. As this highlights the Shanghai government's intention to prevent foreign investors from keeping an additional Holding Company elsewhere in China and in the entire Asia-Pacific region, it seems unlikely that the Shanghai Municipal Commission of Foreign Economic Relations and Trade ("SMERT")<sup>81</sup> would

grant approval for the establishment of a Management Company in such cases. Hence, the option of setting up a Regional Headquarters in the form of a Management Company only appears to be available for MNCs that have not yet set up a Holding Company anywhere in China.<sup>82</sup>

The RHQ Tentative Provisions do not address the question of whether Hong Kong, Macao, and Taiwan are considered parts of China for the purpose of determining if an enterprise has been established inside or outside of China. Hong Kong, Macao, and Taiwan are only mentioned in Article 15 RHQ Tentative Provisions stipulating that the establishment of Regional Headquarters by MNCs from said areas shall be handled with reference to the RHQ Tentative Provisions. In view of Article 15 RHQ Tentative Provisions and the absence of any explicit reference or classification in Articles 2 and 5 RHQ Tentative Provisions, some authors have come to the conclusion that MNCs' enterprises in Hong Kong, Macao, or Taiwan would not be counted for the purpose of the provisions.<sup>83</sup>

It is not entirely clear, however, in what way Article 15 RHQ Tentative Provisions could support this interpretation. The rationale expressed in Article 15 RHQ Tentative Provisions is that investors from said areas shall be treated as foreign investors if they choose to establish a Regional Headquarters in Shanghai. Since MNCs from Hong Kong, Macao, or Taiwan are thus treated as companies from abroad it seems more coherent to assume that a foreign investor's enterprise established in one of these areas would also be considered as a foreign enterprise for the purpose of the provisions. Moreover, the wording of Article 15 RHQ Tentative Provisions coincides with many other PRC laws on foreign investment which usually treat Hong Kong, Macao, and Taiwan as regions abroad.<sup>84</sup> It therefore appears more likely that the requirement of enterprises established outside of China will be satisfied even if a MNC's only Asian-Pacific FIE outside of Mainland China has been established in Hong Kong, Macao, or Taiwan.

### 3. Approval Requirements

#### a. Approval Authority

All required documents must be submitted to SMERT for approval and a decision shall be rendered within 30 days after the date SMERT received the application documents.<sup>85</sup> Article 4 RHQ Tenta-

<sup>78</sup> Wang (supra note 76), p. 66.

<sup>79</sup> Wang (supra note 76), p. 66.

<sup>80</sup> See III.B.1.b.

<sup>81</sup> 上海市对外经济贸易委员会 .

<sup>82</sup> Zhao / Li (supra note 55), p. 70.

<sup>83</sup> See, e.g., Cai (supra note 62), p. 87.

<sup>84</sup> See, e.g., Article 29 HC Provisions

tive Provisions stipulates that SMERT shall be in charge of the examination and approval of Regional Headquarters and shall coordinate the administrative work of the relevant departments. In practice, however, SMERT has decided to delegate this authority to the Shanghai Foreign Investment Committee ("SFIC") which has general approval authority over foreign-invested enterprises in Shanghai.<sup>86</sup> As some companies have already experienced a swift approval process of as little as seven days instead of the legally prescribed 30 days,<sup>87</sup> the delegation of approval authority to SFIC has apparently helped to streamline the approval process.

### b. Additional Approval by MOFCOM

After the RHQ Tentative Provisions were issued on July 2002, there was initial confusion regarding the need for central government approval of Regional Headquarters set up in Shanghai in the form of Holding Companies. Article 5 RHQ Tentative Provisions was seen by some as being unclear about the question of whether such Regional Headquarters should also satisfy the requirements laid down in the national Holding Company rules.<sup>88</sup> However, the wording of the RHQ Tentative Provisions does not appear to leave much room for interpretation in this regard. According to Article 5 RHQ Tentative Provisions foreign-invested Holding Companies may apply for "recognition" as Regional Headquarters. Since the Article evidently refers to already existing Holding Companies, a prior approval by MOFCOM for the establishment of a Holding Company under the national HC Provisions seems to be indispensable for obtaining the status of Regional Headquarters under the Shanghai rules. A Holding Company established in a city other than Shanghai could presumably not apply for "recognition" as a Regional Headquarters in the form of a Holding Company as the RHQ Tentative Provisions clearly stipulate that the place of establishment must be Shanghai Municipality.

Nevertheless, the prerequisite of prior central government approval only applies to Regional Headquarters in the form of Holding Companies. With respect to Management Companies Article 5 RHQ Tentative Provisions stipulates that in case no Holding Company has been established, application may be made for the establishment of a Regional Headquarters in the form of a Management Company.

Hence, foreign investors wishing to set up their China/Asia Regional Headquarters in Shanghai can choose between two options. One alternative is to first establish a Holding Company under MOFCOM's HC Provisions and subsequently apply to SMERT for the status of Regional Headquarters in the form of a Holding Company under the RHQ Tentative Provisions. The other option is to turn directly to SMERT and establish a Regional Headquarters in the form of a Management Company under the RHQ Tentative Provisions without obtaining prior approval by MOFCOM.

### c. Common Requirements

Regardless of whether a Regional Headquarters is established as a Holding or a Management Company, a foreign investor must comply with the following requirements:<sup>89</sup>

- the applicant should have independent legal person status;
- its parent company's total assets must be no less than US\$ 400 million;
- its parent company's total cumulative investment in China shall be no less than US\$ 30 million; and
- it should have invested in, or have been authorized to manage no less than three enterprises in China or abroad, and should have management and service responsibilities over such managed enterprises.

In order to provide evidence of its total assets the parent company may submit a copy of its financial statement.<sup>90</sup> Of the three enterprises named in Article 5 RHQ Tentative Provisions only one has to be established outside of Mainland China.<sup>91</sup> It appears, however, that this requirement is currently not enforced by SMERT.<sup>92</sup>

Article 5 RHQ Tentative Provisions further stipulates that MNCs which do not meet the conditions described above may nevertheless obtain approval for setting up a Regional Headquarters if the foreign investment is made in a targeted area (such as high technology<sup>93</sup>) and if the MNC has made "outstanding contributions" to the region's economic development. Given the very general drafting of the latter condition, SMERT disposes of a large scope of discretion, thereby adding a degree of legal uncertainty for MNCs that do not meet the legal requirements. It appears that providing

<sup>85</sup> Articles 7 and 8 RHQ Tentative Provisions, Articles 1 and 2 RHQ Implementing Rules.

<sup>86</sup> Zhang / Grobowski / Wilson (supra note 72), p. 3.

<sup>87</sup> Shanghai Welcomes Regional Headquarters (supra note 66), p. 66.

<sup>88</sup> Cai (supra note 62), at 87.

<sup>89</sup> See Article 5 RHQ Tentative Provisions.

<sup>90</sup> Cai (supra note 62), p. 87.

<sup>91</sup> Zhang / Grobowski / Wilson (supra note 75), p. 1; Wang (supra note 76), p. 65.

<sup>92</sup> Wang (supra note 76), p. 66.

<sup>93</sup> Zhang / Grobowski / Wilson (supra note 75), at 2.

advanced technology, management expertise or new products is not sufficient a contribution to qualify as “outstanding” in the eyes of SMERT.<sup>94</sup> In order to go beyond the normal contribution of an FIE, and meet the prerequisite of an “outstanding” contribution to the region’s economy, a MNC will presumably have to provide evidence of large-scale investments in Shanghai.<sup>95</sup>

#### d. Registered Capital Requirement

For Management Companies there is an additional requirement of a minimum registered capital of US\$ 2 million.<sup>96</sup> Since Regional Headquarters in the form of Holding Companies may only be set up by Holding Companies established under the national HC Provisions, the minimum registered capital for Holding Companies in Shanghai is set by Article 3 HC Provisions at US\$ 30 million. This difference in registered capital constitutes a remarkable divergence from the national rules for Regional Headquarters. Especially smaller and medium-sized MNCs that have previously been hindered from establishing a Holding Company or Regional Headquarters in China due to the high capital requirements involved are now provided with an alternative corporate investment structure. As Management Companies only require local approval, this investment vehicle also bears the advantage of a swifter approval procedure.

#### 4. Business Scope

Regional Headquarters in Shanghai may engage in the following business activities:<sup>97</sup>

- investment and operational decision making;
- marketing services;
- capital operations (i.e., treasury functions) and financial management (i.e., accounting functions);
- technical support and research and development;
- information services;
- employee training and management; and
- other operational, management and service activities permitted under other laws and regulations.

Those Regional Headquarters that exercise investment management functions may establish centralized internal fund management systems to centrally manage their own funds.<sup>98</sup> For this pur-

pose, Regional Headquarters may enter into a three-party agreement with a commercial bank and the controlled enterprises.<sup>99</sup>

The RHQ Tentative Provisions and the RHQ Implementing Rules do not explicitly limit the business scope of Regional Headquarters for either Holding Companies or Management Companies. However, there are several indications that the actual business scope for Regional Headquarters in the form of Management Companies will turn out to be narrower than the one for Regional Headquarters in the form of Holding Companies. To begin with, the considerable difference in capital requirements of US\$ 2 million on the one hand and US\$ 30 million on the other hand makes it rather unlikely that both enterprise forms will indeed be able to engage in exactly the same business activities.<sup>100</sup> Adding to this aspect is the fact that Holding Companies will have the approval of both MOFCOM and SMERT, whereas Management Companies will only be authorized by the Shanghai regulations without meeting the requirements set by the national HC Provisions. In view of these differences, it can be expected that SMERT would come under pressure from the central government if it issued identical business licenses for both enterprise forms, given that this would undermine the national requirements for exercising the complete range of Regional Headquarters functions.

With respect to the possibility for Regional Headquarters to perform investment management functions, the wording of Article 13 RHQ Tentative Provisions appears to suggest that such functions will only be available to “investment” companies, i.e. for Regional Headquarters in the form of Holding Companies. It is hence expected that Regional Headquarters in the form of Management Companies will not be granted approval for engaging in treasury functions and general investment activities as stipulated in Articles 6 (1) and 13 RHQ Tentative Provisions and Art 4 RHQ Implementing Rules.<sup>101</sup> There has indeed already been a reported case where SMERT has issued a business license for a Management Company without including these services in the business scope.<sup>102</sup>

Despite the wording of the Shanghai rules, even Regional Headquarters in the form of Holding Companies may not be able to fully engage in treasury and investment functions, however. The reference to centralized internal fund management systems in Article 13 RHQ Tentative Provisions

<sup>94</sup> Wang (supra note 76), p. 66.

<sup>95</sup> Zhang / Grobowski / Wilson (supra note 75), p. 2.

<sup>96</sup> See Article 5 RHQ Tentative Provisions.

<sup>97</sup> See Article 6 RHQ Tentative Provisions.

<sup>98</sup> Article 13 RHQ Tentative Provisions.

<sup>99</sup> Article 4 RHQ Implementing Rules.

<sup>100</sup> Zhao / Li (supra note 55), p. 70.

<sup>101</sup> Wang (supra note 76), p. 66; Zhao / Li (supra note 55), p. 70.

<sup>102</sup> Zhao / Li (supra note 55), p. 70.

appears to suggest that Regional Headquarters could allocate funds among enterprises in a way similar to that of a Group Finance Company, but without the requirement to establish a separate legal entity.<sup>103</sup> Such a provision bears an apparent potential for conflict with CBRC's *Administration of Finance Companies of Enterprise Groups Procedures*.

In order to circumvent such conflicts, the national HC Provisions stipulate in Article 13 that a Holding Company may only provide financial services for its invested enterprises with prior approval of CBRC, which has replaced the PBOC in regulating the banking sector. Similarly, Article 22 HC Provisions lays down that a Regional Headquarters may only engage in financial services for its invested enterprises if it establishes a group finance company with the approval of CBRC. In contrast, the Shanghai regulations do not make any reference to the CBRC or the group finance company regulations. As mentioned earlier,<sup>104</sup> such group finance companies are rarely established due to the considerably high capital requirements. It is therefore unlikely that CBRC will tolerate Regional Headquarters in Shanghai engaging in financial services without its prior approval.

## 5. Preferential Treatment

The Shanghai regulations offer a range of additional benefits for Regional Headquarters to enhance the city's competitiveness:<sup>105</sup>

Regional Headquarters with research and development functions are eligible for the same preferential treatment as high and new technology enterprises. Such preferential treatment may include a 15% corporate income tax rate and certain tax holidays;<sup>106</sup>

Regional Headquarters established in Pudong New Area are eligible for the incentives available in that area. The benefits available in Pudong are mostly tax-related and provide for refunds of income tax, business tax, value added tax (VAT) and corporate income tax paid during the first years following the registration;<sup>107</sup>

In addition, Article 9 of the *Pudong New Area, Shanghai Municipality, Encouraging the Establishment of Regional Headquarters by Foreign Multinational Corporations Tentative Provisions Implementing Proce-*

*dures*<sup>108</sup> (2002) stipulates that research centers and technology development centers set up in Pudong by Regional Headquarters may enjoy additional benefits in accordance with the *Shanghai Municipality Encouraging the Development of Enterprise Technology Development Departments in Pudong New Area Several Opinions*<sup>109</sup> ("Pudong Opinions"), promulgated in the year 2000. Item 1 of the Pudong Opinions defines Enterprise Technology Development Institutions as institutions dedicated to scientific research, development and testing work and related technical fields, or the development of technology, processes and products and related technical services within an enterprise. Available benefits for such institutions include a lump sum financing ranging from RMB 500,000 to 1.2 million Yuan.<sup>110</sup> Such institutions will furthermore enjoy preferential tax policies as well as conveniences in staff relocation and overseas travel,<sup>111</sup>

Regional Headquarters providing training and education for their employees are eligible for subsidies. In practice, the subsidies will emanate from individual income tax receipts collected from the Regional Headquarters' personnel;<sup>112</sup>

Regional Headquarters are encouraged to set up procurement and logistics centers. Upon approval such centers may obtain import and export rights and enjoy VAT rebates on the export of goods. Regional Headquarters will apparently be required to set up separate legal entities and will not be able to establish such centers internally.<sup>113</sup> It also appears that import and export rights will only be granted to Regional Headquarters in the form of Holding Companies or Regional Headquarters that have set up a purchase or distribution center and not to Regional Headquarters in the form of Management Companies.<sup>114</sup> Even for such Regional Headquarters, the import/export benefit may prove to be difficult to obtain in practice as such rights usually require central government approval.<sup>115</sup> After the promulgation of the national *Provisions on the Administration of Establishing Foreign-Invested Export Procurement Centers*<sup>116</sup> in

<sup>103</sup> Zhang / Grobowski / Wilson (supra note 75), p. 2.

<sup>104</sup> See ILB.3.d.

<sup>105</sup> See Articles 11, 12 and 14 RHQ Tentative Provisions, Articles 3 and 5 RHQ Implementing Rules.

<sup>106</sup> Zhang / Grobowski / Wilson (supra note 75), p. 3.

<sup>107</sup> Shanghai Welcomes Regional Headquarters (supra note 66), p. 66; Wang (supra note 76), p. 67.

Item 4 Pudong Opinions.

<sup>108</sup> 浦东新区关于《上海市鼓励外国跨国公司设立地区总部的暂行规定》的实施办法, Chinese text available at: <http://www.zhaoshang-sh.com/pdzs/zszc07.htm>.

<sup>109</sup> 上海市关于鼓励浦东新区企业技术开发机构发展的若干意见, Chinese text available at: <http://www.techinfo.gov.cn/pd/zhence/f.asp>.

<sup>110</sup> Item 4 Pudong Opinions.

<sup>111</sup> Item 6 to 20 Pudong Opinions.

<sup>112</sup> Shanghai Welcomes Regional Headquarters (supra note 66), p. 66; Wang (supra note 76), p. 67.

<sup>113</sup> Wang (supra note 76), p. 67.

<sup>114</sup> Cai (supra note 62), p. 88.

<sup>115</sup> Zhang / Grobowski / Wilson (supra note 75), p. 3.

<sup>116</sup> 关于设立外商投资出口采购中心管理办法, Chinese text available at: <http://www.jincao.com/fa/law09.73.htm>, English text available at: [http://investchina.sina.com/display\\_law.php?l\\_id=8&en\\_f=en](http://investchina.sina.com/display_law.php?l_id=8&en_f=en).

November 2003, Regional Headquarters will now presumably run into even greater complications when applying for import and export rights in Shanghai Municipality;

Expatriate personnel of the Regional Headquarters may enjoy preferential treatment in the form of simplified and swifter visa and entry/exit procedures.<sup>117</sup>

With respect to the tax rebates referred to above, such rebates may be claimed every three, six or twelve months.<sup>118</sup> The tax bureau will inform Regional Headquarters about the required documentation for such claims and will provide Regional Headquarters with special computer software for drafting the refund claim.<sup>119</sup> Regional Headquarters will furthermore be able to deduct their payroll as operating costs when calculating their operating profits, apparently without any restriction on the amount of the deduction.<sup>120</sup>

### C. Conclusion

The introduction of Shanghai's Regional Headquarters regulations has added an attractive new investment vehicle to the menu available to foreign investors. The various incentives offered in Shanghai combined with the strategic location of the city will certainly continue to encourage foreign investors to set up their Regional Headquarters for China and Asia in the Shanghai Municipality. Especially for smaller MNCs, the low capital requirements for Management Companies offer a cheap and simple way to establish their Regional Headquarters without having to meet the stringent requirements at national level.

Despite these advantages, some of the listed incentives and business activities do not seem to be obtainable for foreign investors in practice. Important items, such as import and export rights, require central government approval or are subject to the authority of the central government administration. With respect to Management Companies, it appears that the actual business scope granted by SMERT is considerably narrower than the one for Holding Companies. This might also explain the relatively low popularity of the Management Company option compared to the Holding Company scheme among foreign investors so far.

The further success of Shanghai's RHQ Regulations will therefore largely depend on the coopera-

tion of the various central government authorities. Moreover, it remains to be seen how the promulgation of the national HC Provisions will affect the attitude of the central government towards municipal Regional Headquarters legislation in general.

### IV. Dual Regional Headquarters Status

Considering the differences in business scope conferred by MOFCOM's HC Provisions and the regulations in Shanghai, a combination of both investment vehicles would certainly be a tempting option for foreign investors. Although the question of blending the two forms has not been addressed in the legal discussion so far, such a construction does seem to be possible in theory.

In order to reap the full range of benefits offered to Regional Headquarters by MOFCOM and the Shanghai government, a MNC could first establish a Holding Company under MOFCOM's HC Provisions. As a second step, the newly created Holding Company could apply to be recognized as a Regional Headquarters in the form of a Holding Company under Shanghai's RHQ Tentative Provisions. In theory, the FIE should then be able to apply for the Regional Headquarters status under MOFCOM's HC Provisions, thereby obtaining a dual Regional Headquarters status.

The reason why MOFCOM could, in principle, grant a second Regional Headquarters status is the fact that the Regional Headquarters status conferred by the Shanghai rules is not identical with the one granted by the national rules. A FIE established under MOFCOM's HC Provisions continues to be a simple Holding Company in the eyes of MOFCOM and the national rules even after its transformation to a Regional Headquarters under Shanghai's RHQ Tentative Provisions. This is due to the fact that a Regional Headquarters status obtained under the Shanghai rules neither enables a Holding Company to engage in business activities offered by the HC Provisions

In practice, however, it will presumably prove very difficult to obtain a second Regional Headquarters status from MOFCOM. By allowing a MNC to engage in business activities listed in both the national and municipal regulations, MOFCOM would in fact be granting a considerably broader business scope than prescribed by the national rules. As this would hence contradict MOFCOM's own legal framework, it is unlikely that investors will succeed in using Shanghai's RHQ Tentative Provisions as a means to circumvent the national restrictions on Regional Headquarters' business scope.

<sup>117</sup> Article 14 RHQ Tentative Provisions, Article 5 RHQ Implementing Rules.

<sup>118</sup> *Shanghai Welcomes Regional Headquarters* (supra note 66), p. 66.

<sup>119</sup> *Id.*

<sup>120</sup> *Wang* (supra note 76), p. 67.

In order to avoid resistance by MOFCOM, a Holding Company could first apply for a Regional Headquarters status under the HC Provisions and subsequently request the status of a Regional Headquarters under the Shanghai rules. Nevertheless, it is equally improbable that the Shanghai government will allow for its RHQ Tentative Provisions to be undermined and for two classes of Regional Headquarters with diverging business scopes to operate under its rules. The Shanghai authorities could furthermore argue that after its transformation from a Holding Company into a Regional Headquarters under the HC Provisions the applying FIE no longer satisfied the prerequisites of a Holding Company as required by Art. 5 RHQ Tentative Provisions.

In view of the practical hurdles involved, the theoretical option of a dual Regional Headquarters status therefore does not seem to be available as an additional investment vehicle for MNCs.

## **V. Comparative Evaluation**

In comparison, the national Regional Headquarters scheme provides for a significantly broader business scope than the Regional Headquarters rules in Shanghai where the list of business scope items appears rather short. The national rules have also gained some ground regarding possible interactions between Regional Headquarters and offshore affiliates. As MOFCOM's February 2004 rules limited Regional Headquarters to business relations with their respective parent company, the Shanghai regulations used to have a comparative advantage by offering foreign investors a way to create a Regional Headquarters for all of their Chinese and offshore subsidiaries in the Asia-Pacific region, although there appeared to be restrictions in practice. By extending Regional Headquarters' import rights in November 2004, MOFCOM has eliminated one major disincentive for establishing a Regional Headquarters under the national rules. Adding to the appeal of the national rules is the fact that, unlike the Shanghai regulations, they do not require that a MNC's Regional Headquarters in China be the only one in the entire Asian-Pacific region and that a MNC hold investments elsewhere in the region. With respect to central treasury functions, both schemes appear to be offering the same limitations, given that the requirements for performing such functions continue to be set by the rigid CBRC rules for Group Finance Companies.

One of the biggest shortcomings of the national rules is its high capital requirements, which are contrasted by the low benchmarks for Management Companies in Shanghai. The requirement of a paid in registered capital of US\$ 100 million / US\$ 50

million on the one hand and a registered capital of a mere US\$ 2 million for Management Companies on the other hand will certainly lead many MNCs to consider Shanghai as an alternative place for setting up their Regional Headquarters. However, the cost advantage of the Shanghai rules is partly outweighed by the legal uncertainty regarding the actual possibility of Regional Headquarters in the form of Management Companies to engage in the same business activities as Regional Headquarters in the form of Holding Companies and to enjoy all of the benefits listed in the regulations.

Another drawback of the Shanghai scheme is the fact that there is no indication so far as to whether the current legal regime for Regional Headquarters will be maintained. As the incentives and benefits listed in the Shanghai regulations are said to be phased out in the near future, it is unclear whether such benefits will be extended or whether the current regulations will be replaced by another scheme altogether. Despite ongoing rumors that the Shanghai municipal government will be forced to modify its Regional Headquarters scheme to include equally stringent requirements as the national rules, there appears to be no indication of any imminent changes so far.<sup>121</sup> In the long run, the fate of the Shanghai rules will depend on the degree to which MOFCOM and the central government will tolerate Regional Headquarters schemes at municipal level in general, and how the relevant authorities will handle the various unclear issues in practice.

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<sup>121</sup> *Ross / Chen (supra note 7), p. 48.*