

China Market Entry:

Legal Options for Swiss Startups

进入中国市场：
瑞士初创公司的法律选择

In view of the complexity of the market, the challenges of a successful China market entry are manifold. For startups of all shapes and sizes, choosing the right legal set up is an early ground-breaking decision in establishing a presence in China.

鉴于市场的复杂性，成功进入中国市场的挑战是多方面的。对各式各样的初创公司来说，选择正确的法律设立模式将是其在中国立足的一项关键性决定。

In recent years, China's digital, consumer, and industrial market has increasingly come into the focus of Swiss startups, as they see huge potentials for their products and services in China. Particularly, if they are looking for venture capital in China, the Swiss startups often face the request of the Chinese venture capitalist to invest into a local Chinese entity rather than into the Swiss startup. One of the main reasons for this is that the Chinese investors do not want to deal with the administrative hurdles that the overseas direct investment and capital export control regulations entail. Another reason is that they only want to focus on the development of the Chinese market and do not want to use their investment for a market outside of China that they are not familiar.

In addition, Chinese local municipalities have started initiatives to attract foreign innovative startups by granting them substantial subsidies if they establish a legal entity in one of their especially dedicated zones. However, one of the key conditions to get such public subsidy usually is that the foreign startup establishes the local entity in the form of a joint venture with a majority shareholding of a Chinese partner. For those Swiss startups who want to develop sustainably the Chinese market, the question eventually arises how they shall establish their own presence in China.

近年来，中国的数字化、消费和工业市场受到越来越多来自瑞士初创公司的关注，因为他们看到其产品和服务在中国的巨大潜力。尤其是，如果要在在中国寻找风险投资公司，瑞士初创公司常常会面临来自中国风投公司的要求，即投资于中国本地实体而不是一家瑞士公司。这其中一个主要原因是，中国投资者不愿处理海外直接投资和资本出口管制法规带来的行政障碍。另一个原因是，他们只想专注于发展中国市场，不想投资于陌生的国外市场。

此外，中国当地市政当局已经启动了相关举措，来吸引外国创新企业，譬如其在某一特殊专用区域设立法律实体，将获得实质性补贴。然而，获得这种公共补贴的关键条件之一通常是，外国初创公司以合资企业的形式建立当地实体，且由中方持有多数股权。因此，对于有意持续发展中国市场的瑞士初创公司而言，终极问题是如何在中国建立自己的分支机构。

New Foreign Investment Law in 2020

Before making the decision how to establish the presence in China, the Swiss startup is advised to consult - as any other foreign investor who wants to establish a legal entity in China - the so-called Negative List for Access of Foreign Investment. The Negative List sets out all business activities that are either only possible with restrictions or completely banned for foreign investors. It is updated annually. The 2019 Edition of the Negative List sets out 40 business activities that are prohibited or restricted for foreign investment.

If the intended business activity of the Swiss startup is not included in the Negative List, it enjoys equal treatment with domestic investors in China. The Negative List-Concept for foreign investments will remain also under the new Foreign Investment Law that will enter into force on January 1, 2020.

In practice, the most important structures are either the wholly owned Chinese subsidiary by the foreign investor or a joint venture with a Chinese partner. It is also possible to establish a representative office for foreign investor who want to get to know the local market in China first. However, since apart from a very few exemptions a representative office is not entitled to conduct an active business that generates revenues, this legal form is not attractive for a Swiss startup.

100%-Subsidiary to replace WFOE

The most commonly used legal form of Swiss investors entering the Chinese market is the WFOE (Wholly Foreign Owned Enterprise), which under the current legislation is established in the legal form of a limited liability company. Under the new Foreign Investment Law, the legal term WFOE will not be used anymore. Instead the Swiss startup will from 2020 simply establish a limited liability company pursuant to Chinese company law held as a 100%-subsidiary.

The major advantage of establishing a 100%-subsidiary is that the Swiss startup has complete control over the Chinese company and the corporate governance. In addition, the startup does not have to share the profits with a partner. A simple holding structure is usually more attractive for Swiss and foreign venture capitalists (other than a Chinese investor) who finance the startup in Switzerland. A simple holding structure facilitates the evaluation of the Swiss startup in future financing rounds and a possible exit.

If no obstacles occur due to special requirements by the registration authorities during the establishment procedure, a standard trading or service company may be established within approximately two months, including the preparation of the documents. The establishment of a manufacturing company is more complex and time consuming, since the foreign investor must conduct an environmental impact assessment procedure before the company may be established.

From an intellectual property protection point of view, the risk of intellectual property theft is reduced since the startup keeps complete control over the daily process and operations. Nevertheless, it is also in this set-up structure important to protect its intellectual property and let the key employees sign confidentiality and non-competition agreements.

2020 年的新《外商投资法》

在决定如何在中国建立分支机构之前，建议瑞士初创公司——与任何有意于中国建立法律实体的外国投资者一样——查阅一份名为“外商投资准入负面清单”的文件。该负面清单列出了所有可能限制或完全禁止外国投资者从事的商业活动。该清单每年更新一次。2019 年负面清单列出了 40 项禁止或限制外商投资的商业活动。

如果瑞士初创公司的预期业务活动未列入负面清单，那么该公司将与中国境内投资者享有同等待遇。根据 2020 年 1 月 1 日即将生效的《外商投资法》，外商投资负面清单的概念将予以保留。

实际上，最重要的公司结构是外国投资者在中国的全资子公司或是与中国合作伙伴成立的合资企业。对于意在前期“试水”中国本地市场的外国投资者来说，设立代表处也是一个可能的选项。然而，除了极少的豁免外，代表处无权从事能够产生收益的业务，因此这种法律形式对瑞士初创公司并无明显吸引力。

“100% 全资子公司”取代“外商独资企业”

瑞士投资者进入中国市场最常用的法律形式是外商独资企业（WFOE），根据现行法律，外商独资企业是以有限责任公司为法律形式成立的。而在新《外商投资法》中，“外商独资企业”的提法将不再使用。从 2020 年起取而代之的将是瑞士初创公司依照中国公司法成立一家有限责任公司形式的 100% 全资子公司。

成立全资子公司的主要优势在于，瑞士初创公司对中国公司以及公司治理拥有完全控制权。此外，初创公司不必与合作伙伴分享利润。对于在瑞士给初创公司提供资金的瑞士和外国风投公司（中国投资者除外），简单的控股结构通常更具吸引力。简单的控股结构也将在今后的融资回合中为瑞士公司的评估和可能的退出提供便利。

在成立公司程序中，若不存在因注册机关提出特殊要求而引起的障碍，一般可以在大约两个月内（包括准备文件）成立一家标准的贸易或服务公司。成立一家制造公司的程序相对复杂且耗时更长，因为在公司成立前，外国投资者必须进行一个环境影响评估程序。

从知识产权保护的角度来看，因为初创公司可以完全控制日常流程和运营，降低了知识产权偷盗的风险。然而，在这种架构中，保护知识产权并让关键员工签署保密条款和竞业协议也很重要。

More complex Joint Ventures

The joint venture is the preferred option for a Swiss startup, if it wants to profit from Chinese subsidies or if it wants to receive finances from a Chinese venture capitalist who is primarily interested in the development of the Chinese market.

However, the set up becomes more complex, since the Swiss startup must first negotiate a joint venture agreement with the Chinese partner that is mandatorily governed by Chinese law. Typically, a startup would want to govern the following major items in the joint venture agreement with the Chinese partner: shareholding of the startup and the Chinese partner in the joint venture; total investment and registered capital of the joint venture; premium payment by the Chinese venture capitalist; deferred payment of the registered capital by the startup; constitution of the board of directors, supervisor, and management team; restrictions on transfer of shares; competencies of shareholders, board of directors, supervisor and executive management; minority shareholder's rights; profit distribution; call/put options; drag-along/tag-along terms; and the term of the joint venture.

Under the current legislation the joint venture is established as a limited liability company with the exception that the organ with the highest authority of a Sino-foreign joint venture is the board of directors. This unique feature will disappear under the new Foreign Investment Law. Furthermore, a joint venture may under the new Foreign Investment Law also be established as a joint stock company.

In a standard Sino-foreign joint venture the foreign know-how flows to the local Chinese partner, which is critical from an intellectual property protection perspective. In particular, where the Swiss startup obtains only funding from the Chinese partner, the joint venture company must establish a good corporate governance to ensure that the intellectual property is shielded from the board of directors, in which the investor will be represented.

Conclusion

Both the wholly owned subsidiary and the joint venture with a Chinese partner are viable options for a Swiss startup. However, the joint venture is more complex and needs more time to establish. Furthermore, the startup must on a case-by-case basis thoroughly examine how it can protect its intellectual property and take the corresponding measures.

更复杂的中外合资企业

如果合资企业想从中国的补贴中获利抑或有意接受来自对发展中国市场感兴趣的中國风投公司的融资，那么成立一家中外合资企业将是瑞士初创公司的首选。

然而，这种成立模式将更为复杂，因为瑞士公司必须首先与中国合作伙伴协商达成一项合资协议，该协议受中国法律管控。通常，初创公司希望与中方合作伙伴共同管理合资协议中的以下主要内容：初创公司和中方伙伴在合资企业里的股权分配；合资企业的总投资和注册资本；中国风投公司的溢价支付；初创公司推迟支付注册资本；董事会、监事和管理团队的章程；股份转让的限制；股东、董事会、监视和高管的权限；少数股东权益；利润分配；认购/认沽期权；领售权/随售权；以及合资企业的期限。

根据现行法律，合资企业以有限责任公司形式成立（但其最高权力机构为董事会）。新《外商投资法》出台，这一独特形式将会消失。此外，根据新《外商投资法》的规定，合资企业也可以以股份有限公司形式成立。

在典型的中外合资企业里，外国专业技术流向中国本地合作伙伴，这点在知识产权方面很有争议。特别是在瑞士初创公司仅获得来自中方合作伙伴的资金支持时，合资公司必须建立一个良好的公司治理机制，以确保知识产权不受董事会（董事会往往代表着投资者）的影响。

结论

对于瑞士初创公司而言，全资子公司和与中国伙伴合资都是可行的选择。但是，合资企业更为复杂，需要更多时间来建立。此外，初创公司必须逐案彻查其如何保护知识产权并采取相应的措施。

About the authors 关于作者



Lukas Zuest

LL.M. Head China Desk,
VISCHER AG
法学硕士，中国业务主管，
VISCHER AG

Zhao Luer/ 赵录儿

LL.M. Paralegal China Desk,
VISCHER AG
法学硕士，中国业务律师助理，
VISCHER AG

