Chapter

Taiwan

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Taiwan Fair Trade Commission ("TFTC") is the competent authority under the Taiwan Fair Trade Act ("TFTA") which is not only the regulatory body responsible for the execution of the TFTA, but also the agency of the authority to interpret the TFTA by rulings and stipulate the enforcement rules and relevant regulations of the TFTA.

1.2 What is the merger legislation?

The basic rule governing merger control in Taiwan is the TFTA, which was promulgated on 4 February 1991, became effective on 4 February 1992, and was last amended on 23 November 2011. Moreover, the TFTC, as the enforcement authority of the TFTA, has stipulated several supplementary rules on merger control, including Directions for Enterprises Filing for Merger, TFTC Disposal Directions (Guidelines) on Handling Merger Filings, and TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers. The Legislative Yuan has passed the first-round review of the amended TFTA ("Draft TFTA") in May 2014. It is anticipated that the review of amendments can be finalised by the end of 2014 at the earliest and the new TFTA may come into force in 2015 (subject to the legislation schedule).

1.3 Is there any other relevant legislation for foreign mergers?

TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers is stipulated for the purpose of handing merger filings related to foreign mergers. Despite the guidelines, the filing requirements (thresholds, timeframe, documents, etc.) for foreign mergers are the same as those for domestic transactions, though the TFTC will take the local effect into account when determining whether it will exercise the jurisdiction.

1.4 Is there any other relevant legislation for mergers in particular sectors?

No. However, under several of the TFTC's guidelines on sectoral control of certain industries affecting public welfare, such as airlines, banking/finance, or 4C industries, the TFTC would take certain factors into consideration while reviewing a merger involving that particular industry.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, how is the concept of "control" defined?

Under the TFTA, a "combination" that falls under the definition of combination, and which also meets certain thresholds as prescribed by the TFTA, would require a prior notification to the TFTC. According to the TFTA, a "combination" is broadly defined to include: (i) mergers; (ii) holding or acquisition of one-third or more of the voting shares of or interest in another enterprise; (iii) a transfer or lease of the whole or a substantial part of an enterprise's business or assets; (iv) a contractual arrangement with another enterprise for joint operation on a regular and ongoing basis, or the management of another enterprise's business on a contract of entrustment; and (v) a direct or indirect control over the business operation or personnel management of another enterprise. The term "control" is not further defined under the TFTA and thus should be judged on a case-by-case basis.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Acquisition of a minority shareholding will constitute a combination only if it falls under the combination defined under (ii), (iv) or (v) as set forth in question 2.1.

2.3 Are joint ventures subject to merger control?

The term "joint venture" is not defined under the TFTA. However, the TFTC ruled in 2002 that the establishment of a joint venture, whether it is a newly incorporated enterprise or an existing enterprise, will be subject to merger control if it constitutes a combination defined under the TFTA. Note that the TFTA does not further categorise a joint venture into different types based on its function or corporate structure. Therefore, an establishment of a joint venture is likely to be covered by the merger control rules, as long as it is classed as a combination under the TFTA and the parties thereof meet the filing thresholds.

2.4 What are the jurisdictional thresholds for application of merger control?

According to Article 11 of the TFTA, a notification must be filed with the TFTC prior to the closing of the proposed transaction if:

(i) as a result of the combination, any of the enterprises will acquire at least one-third (1/3) of the market share;

(ii) any of the enterprises participating in the combination holds a market share of at least one-fourth (1/4) before the combination; or

(iii) the preceding fiscal year's turnover of an enterprise participating in the combination exceeded the amount set forth by the TFTC (i.e., for a combination between non-financial enterprises, one of the enterprises generated an annual turnover of at least NTD 10 billion (approximately EUR 250 million), while the other enterprise generated an annual turnover of at least NTD 1 billion (approximately EUR 25 million); for a combination between financial enterprises, one of the enterprises generated an annual turnover of at least NTD 20 billion (approximately EUR 500 million), while the other enterprise generated an annual turnover of at least NTD 1 billion (approximately EUR 25 million)).

When determining the turnover, the sales made "in" Taiwan by the parties' affiliates, branch offices or distributors and "into" Taiwan by direct sales to customers in Taiwan should be included.

For foreign companies, only the sales/market shares in Taiwan are relevant to calculating the thresholds, including the sales/market shares generated through cross-border trade and local sales of foreign companies, Taiwanese subsidiaries or branches.

In the Draft TFTA, a combination will be notifiable only when the parties meet the turnover filing threshold and the parties' market shares are no longer relevant in this regard (see question 6.2 for details on legislation status).

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. This is because the TFTA does not limit the filing threshold assessment to the overlapping products only.

2.6 In what circumstances is it likely that transactions between parties outside Taiwan ("foreign to foreign" transactions) would be caught by your merger control legislation?

A foreign-to-foreign transaction will be subject to the Taiwan merger control regulations as long as it falls under the definition of combination as stated in question 2.1 and it meets any of the filing thresholds as provided in question 2.4.

However, according to TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers, for an extraterritorial transaction, the TFTC will exercise its jurisdiction only when such combination has a direct, substantial and reasonably foreseeable effect on the Taiwan market. Therefore, theoretically, a filing obligation can be avoided in a foreign-to-foreign combination that meets the filing threshold based on the argument that it does not have local effect. However, it is the TFTC, not the participating parties, that has the discretion to determine whether the local effect exists in the proposed transaction.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The following circumstances can be exempted from filing a notification even if the filing thresholds are met:

(1) where an enterprise combines with another enterprise in which it already holds 50% or more of the voting shares or capital contribution;

(2) where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise combine;

(3) where an enterprise assigns all or a substantial part of its business or assets, or all or a substantial part of its business that could be separately operated, to another enterprise to be newly established and wholly owned by the former enterprise. Note that "substantial part" is not further defined under the TFTA and thus should be judged on a case-by-case basis; or

(4) where an enterprise (a company limited by shares) redeems its outstanding shares in order to convert them into treasury stock or because of minority shareholders' exercise of appraisal rights, causing the other shareholders' shareholdings to be increased to 1/3 or more of the voting shares in the enterprise.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The TFTA is silent on this issue and thus whether a merger involving several stages should be subject to several or one combination notification should be reviewed and determined on a case-by-case basis.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

A notification is compulsory if the filing thresholds are met. There is no deadline for notification, but the parties cannot close the transaction before the TFTC grants clearance.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

For an extraterritorial transaction, the TFTC may not exercise its jurisdiction when such combination has no direct, substantial and reasonably foreseeable effect on the Taiwan market (local effect). However, it is the TFTC, not the parties, that has the discretion to determine whether the local effect exists in the proposed transaction. Therefore, to be prudent, the parties to an extraterritorial transaction can usually still make the notification even if the TFTC eventually determines not to exercise its jurisdiction over the transaction.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

If a combination that meets a filing threshold is not notified, the TFTC may impose penalties including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises if the TFTC discovers such violation. The TFTC also has the power to impose an administrative fine between NTD 100,000 (approximately EUR 2,440) and NTD 50 million (approximately EUR 1.22 million). However, according to the Draft TFTA, the minimum fine will be raised to NTD 200,000 (approximately EUR 5,000) (see question 6.2 for details on legislation status).

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

An exception that allows parties to close the transaction prior to the TFTC's clearance is unavailable under the TFTA. Also, it is not clear whether the TFTC will accept the parties' proposal to temporarily carve-out transactions related to Taiwan, since no case precedent is available.

3.5 At what stage in the transaction timetable can the notification be filed?

There is no specific deadline for filing a notification. However, as the TFTC requests a definitive agreement or relevant board resolutions to be submitted with the notification to evidence the parties' intention to conduct the transaction, the earliest that the parties can make a filing is after the parties' board approves the proposed transaction or the signing of the definitive agreement.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

If the TFTC does not make any objection to the filing within 30 calendar days following the filing date (with complete documents and information), the parties to the proposed transaction are free to proceed with the merger. The TFTC may shorten the 30-day waiting period or extend the period up to 60 calendar days if it deems necessary. If the TFTC finds that the filing information or documents are incomplete, it may request the parties to make supplemental filing, and the clock will not start to run until the supplemental filing is duly made and the information submitted is satisfactory to the TFTC.

According to the Draft TFTA, the TFTC may extend the review period up to 90 calendar days if it deems necessary(see question 6.2 for details on legislation status).

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The sanctions for implementing a transaction prior to receiving clearance are the same as those applicable for the failure to file a notification (see question 3.3).

3.8 Where notification is required, is there a prescribed format?

Yes, the parties need to fill in the application form and annexes prescribed by the TFTC. In a standard notification, the parties need to submit a combination notification form ("Application Form") with required documents and information. The standard format for the Application Form (Chinese version only) can be found on the TFTC's official website: http://www.ftc.gov.tw/internet/main/doc/docList.aspx?uid=1112.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

A simplified procedure in which the waiting period can be shortened is available for the circumstances below:

1) The enterprise files the notification for reaching the turnover threshold, but its respective market shares meet one of the following criteria:
   i. In a horizontal merger, the combined market shares after the merger is less than 20%.
   ii. In a horizontal merger, the combined market shares after the merger is less than 25% and the market share of one participating parties is less than 5%.
   iii. In a vertical merger, the combined market share in each individual market is less than 25%.
2) In the case of a conglomerate merger, the factors below are considered and it is established that the parties do not have any major potential competition possibility between each other:
   i. the impact of regulation and control lift up on the merging parties' cross-industry operation;
   ii. the probability of cross-industry operation by the merging parties because of technology advancement; and
   iii. the original cross-industry development plan of the merging parties besides the merger.
3) The following merger between a controlling enterprise and its subordinate enterprise that changes the manners of their relations:
   i. One of the enterprises participating in the merger directly owns more than one-third and less than half of the voting shares or paid-up capital of the other merging party.
   ii. The controlling company merges with a subsidiary of its subordinate company. The above-mentioned subsidiary refers to a company in which the parent company holds 50% or more of its voting shares or paid-in capital.
   iii. A company merges with a subsidiary of another company, which is under the common control of the same controlling company.
   iv. A company surrenders its part or the entire voting shares or capital contribution of a third company to another company, of which it has a control and subordinate relationship.
   v. A company surrenders its part or entire voting shares or capital contribution of a third company to another company that is also subordinated to the same parent company.

However, in certain situations, such as where the merger involves major public interest, or the entry barriers are high, the TFTC would still request the parties to follow the general procedure even if they have met the above-mentioned criteria of simplified procedure.

There is no other informal way to speed up the clearance timetable.

3.10 Who is responsible for making the notification and are there any filing fees?

A combination notification should be filed by the following parties: (i) all the enterprises involved in the transaction, where an enterprise is merged into another, assigned by, or leased from, another enterprise(s) of the operations or assets, regularly runs operations jointly with another, or is commissioned by another enterprise to run operations; (ii) the holding or acquiring enterprise, where an enterprise holds or acquires shares or capital contribution of another enterprise; and (iii) the controlling enterprise, where an enterprise directly or indirectly controls the business operations or the appointment or discharge of personnel of another enterprise. If an enterprise required to file has not yet been established, the existing enterprises in the merger shall file the notification.

No filing fee is required.

3.11 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

According to Article 18 of the Regulations Governing Public Tender Offers for Securities of Public Companies, the length of the public tender offer period cannot be less than 10 days or more than 50 days. However, the offeror may apply for an extension of the public tender offer period where there is legitimate justification. In that case, the extension period may not exceed a total of 30 days.

When the envisaged share acquisition is conducted by way of public tender offer, the public tender offer cannot be successfully closed without approvals from relevant competent governmental authorities, including the TFTC's clearance over the transaction, if applicable. Therefore, the parties will need to observe the requirements on the tender offer period as explained above and then try to obtain clearance from the TFTC during that period.

3.12 Will the notification be published?

During the review of a notification, the TFTC may seek the public's opinion by publishing the basic information of the proposed transaction on its website if it determines to exercise its jurisdiction over the transaction. In that case, the parties' names, products or services involved and a general description of the transaction type will be disclosed. Furthermore, when the TFTC clears a transaction without imposing any condition, it will issue a news release summarising its decision. In the news release, in addition to the basic information of the parties and transaction structure, how the TFTC defines the market and its competition assessment will be included. Nonetheless, if the clearance comes with conditions where the TFTC will render a formal decision letter, the TFTC will not only issue a news release, but also publish the decision in full, which may cite paragraphs from the notification.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The general principle is that, after all relevant factors are considered (see more details below) and there is no suspicion of obvious competition restraints, then the TFTC can conclude that the overall economic benefits of the merger outweighs the disadvantages resulting from competition restraint. Otherwise, the overall economic benefits shall be further examined to determine whether the overall economic benefits of the merger outweighs the disadvantages resulting from competition restraint.

4.2 To what extent are efficiency considerations taken into account?

Though the efficiency argument is certainly considered by the TFTC when determining whether the proposed transaction will benefit the economy overall, there is no case precedent on how the TFTC weighs this factor.

4.3 Are non-competition issues taken into account in assessing the merger?

It is unclear whether non-competition issues will play a role in the TFTC's assessment since no case precedent is available.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

As explained in question 3.12, if a combination notification is filed with the TFTC and the TFTC decides to exercise jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek comments from the public. In some cases where the TFTC considers that the transaction will have a great impact on the local market, it will hold a symposium or a public hearing to invite competitors, upstream and downstream enterprises, other competent authorities and scholars to provide their opinions.

4.5 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

According to the TFTA, while conducting investigations the TFTC may proceed in accordance with the following procedures: (i) to require the parties and any related third parties to make statements; (ii) to notify relevant agencies, organisations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits; and (iii) to dispatch personnel for any necessary on-site inspection of the office, place of business, or other locations of the relevant organisation or enterprises.

If any person subject to an investigations refuses the investigation *without justifications*, or refuses to appear when called to answer queries before the TFTC or to submit books and records, documents, or exhibits upon request by the set time limit, an administrative penalty of no less than NTD 20,000 (approximately EUR 500), but no more than NTD 250,000 (approximately EUR 6,250) can be imposed on the person. If such person continues to withhold cooperation without justification upon another notice, the TFTC may continue to issue notices of investigations, and may successively assess an administrative penalty of no less than NTD 50,000 (approximately EUR 1,250), but no more than NTD 500,000 (approximately EUR 12,500) each time until the person does not cooperate with the investigation, appear when called to answer queries, or submit books and records, documents, or exhibits upon request.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The parties may request that the TFTC handles combination notifications confidentially without disclosing to the public the confidential information identified by the enterprises. If the enterprises have any special concerns regarding the public announcement made by the TFTC, they can also apply and provide reasons to the TFTC for not disclosing certain information regarding the combination transaction. However, the TFTC decides whether to agree with such application on a case-by-case basis. If the TFTC considers that the information of the transaction has an impact on the Taiwanese market, it will reject the non-disclosure request and make the announcement soliciting the public's comments.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

The regulatory process ends with the TFTC's decision on the merger filing. The decision generally falls into four categories: (i)

a waiver to the jurisdiction (for extraterritorial transactions where no local effect will arise therefrom); (ii) clearance without condition; (iii) clearance with conditions; and (iv) a prohibition on the combination.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Though the proposal of remedy mechanism is not provided in the TFTA, our experience suggests that the parties may present remedies at any time before the TFTC makes its decision. That is, during the waiting period of the TFTC's review process, the parties may propose remedies to the TFTC for its consideration on evaluating the economic cost and benefit of the proposed merger. If the proposed remedies would constitute a material change to the notification, and hence the TFTC would require additional information for its review, the TFTC may stop the clock and the waiting period will be reset only after the supplemental information is submitted. If the proposed remedies would not be a material change to the notification, the TFTC will take into account such remedies when rendering its decision on the merger notification before the expiration of the waiting period. To be more specific, the TFTC will consider whether it would grant its clearance with conditions referring to such remedies.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

No case precedent suggests that the TFTC has ever imposed remedies in foreign-to-foreign mergers.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties may submit a remedy proposal during the TFTC's review process, as long as it is within the waiting period. Please refer to question 5.2 for details.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Since the primary purpose for the remedies is that they must eliminate the anti-competition concerns, it is well-recognised by competition authorities of most jurisdictions that divestitures, which are a type of structural remedy, are the best way to achieve such a goal. In line with above international practices, the TFTC seems to accept structural remedies for the divestitures (disposal of shares held by the party) and impose such remedies as conditions to its clearance. In fact, the public records suggest that the TFTC has indeed adopted the divestment approach in a transaction involving a cable television business.

In September 2012, the TFTC updated the Directions (Guidelines) on Handling Merger Filings ("Merger Guidelines") to include its official standards for remedies. According to the Merger Guidelines, the remedies the TFTC can impose as conditions are:

(1) Measures impacting the structural aspect: order the parties to take measures to dispose of the shares or assets in their holding, transfer part of their operations, or remove personnel from certain positions.

(2) Measures impacting the behavioral aspect: order the parties to continue to supply critical facilities or essential elements to businesses outside the merger, order the parties to license such businesses to use their intellectual property rights, and prohibit the parties from engaging in exclusive dealing, discriminatory treatment, and tie-in sales.

Despite the foregoing, the TFTC still reserves the right to impose other types of remedy on a case-by-case basis. Also, the Merger Guidelines point out that the TFTC may seek the parties' opinions on the possible remedy before it makes the final decision.

5.6 Can the parties complete the merger before the remedies have been complied with?

It is acceptable for the parties to complete the merger prior to their compliance with the remedies, depending on the nature of that remedy. The TFTC will review the parties' behaviour or divestment status periodically to ensure that the parties do not violate the conditions imposed by the TFTC.

5.7 How are any negotiated remedies enforced?

Since the remedies will serve as conditions to the TFTC's clearance, the parties will have to comply with the conditions. In case of any violation discovered by the TFTC, the TFTC may impose the penalties including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises. The TFTC also has the power to impose an administrative fine between NTD 100,000 (approximately EUR 2,440) and NTD 50 million (approximately EUR 1.22 million). However, according to the Draft TFTA, the minimum fine will be raised to NTD 200,000 (approximately EUR 5,000) (see question 6.2 for details on legislation status).

5.8 Will a clearance decision cover ancillary restrictions?

It is unclear as to whether ancillary restrictions (such as non-competition agreement) will be covered by a clearance since no case precedent is available.

5.9 Can a decision on merger clearance be appealed?

The TFTC's decision is an administrative decision, which can be appealed by the parties or any interested parties for an administrative review within 30 days of receipt of the decision. Such administrative review will be conducted by the Executive Yuan's administrative review committee. Unless the committee deems it necessary, no hearing will be held by the committee, and the committee will decide the outcome of the administrative review by examining the appeal letter and relevant files only.

If the outcome of such review is unfavourable, the appellant may file for administrative litigation with the High Administrative Court against the TFTC's decision and the administrative review outcome within 30 days of receipt of the review outcome. The procedure of administrative litigation is akin to the procedure of civil litigation. The court will hear the case and both parties, i.e., the TFTC as the defendant and the appellant as the plaintiff, will be in front of judges in a formal legal proceeding.

The decision of the High Administrative Court can be appealed to the Supreme Administrative Court for legal review. The Supreme Administrative Court will not hold any hearing and will reverse the High Administrative Court's judgment only when the judgment is legally flawed.

5.10 What is the time limit for any appeal?

The TFTC's decision can be appealed by the parties or any interested parties for an administrative review within 30 days of receipt of the decision.

5.11 Is there a time limit for enforcement of merger control legislation?

According to the ROC Administrative Penalties Act, the statute of limitation for the TFTC to enforce merger control regulations is 3 years. Nevertheless, according to the Draft TFTA, this time limit will be extended to five years (see question 6.2 for details on legislation status).

6 Miscellaneous

6.1 To what extent does the merger authority in Taiwan liaise with those in other jurisdictions?

So far, no public evidence suggests that the TFTC has ever cooperated with foreign authorities while conducting the review of a combination notification. However, the TFTC has entered into certain cooperation agreements or memorandums with the following countries for the application of competition regulations: Hungary; Canada; Australia; New Zealand; France; and Mongolia.

6.2 Are there any proposals for reform of the merger control regime in Taiwan?

In December 2012, the Taiwan Executive Yuan (Cabinet) approved the Draft TFTA, which may be the most sweeping makeover since the TFTA came into effect in 1992. The Legislative Yuan has passed the first-round review of the amended TFTA ("Draft TFTA") in May 2014. It is anticipated that the review of amendments can be finalised by the end of 2014 at the earliest and the new TFTA may come into force in 2015 (subject to the legislation schedule). Of the proposed revisions, the most pertinent to merger control rules is the removal of the market share filing threshold, leaving the turnover filing threshold the only basis to determine the notifiability of a transaction.

6.3 Please identify the date as at which your answers are up to date.

The answers are up-to-date as of 21 August 2014.

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Lee and Li has unmatched capabilities and experiences in the antitrust practice in Taiwan and has handled more than 30 merger filings within the past two years for various multinational companies and assisted many Taiwanese companies on other antitrust related investigations and litigations.