

# Merger Control

Jurisdictional comparisons

Second edition 2014

- Foreword** Jean-François Bellis & Porter Elliott, Van Bael & Bellis  
**Foreword** Bernd Langeheine, Deputy Director-General, DG Competition, European Commission  
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Jean-François Bellis & Porter Elliott,  
Van Bael & Bellis

THE EUROPEAN LAWYER  
REFERENCE

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**Second edition 2014**

**General Editors:  
Jean-François Bellis & Porter Elliott,  
Van Bael & Bellis**



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# Foreword

**Jean-François Bellis & Porter Elliott, Van Bael & Bellis**

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There was a time not so long ago when very few countries in the world had merger control laws. In most jurisdictions, there was no need to notify a merger for prior approval before closing. How different the situation is today. It is estimated that upwards of 100 countries now have merger control laws, and in most of these countries, qualifying mergers, acquisitions and – in some cases – joint ventures must be notified and cleared by the local regulators before they can be implemented. Today, the need to obtain merger control approvals is often the number one factor delaying the closing of deals around the world.

Unfortunately, while more countries have merger control than ever before, there remains relatively little harmonisation, with each jurisdiction having its own rules on what types of transactions must be notified, what thresholds apply, what the procedure is and how long it takes. Even the substantive test for determining whether a notified transaction will be approved is not the same in every jurisdiction. With merger control authorities becoming tougher in their enforcement practices, the challenges facing merging companies have never been more daunting. This book aims to help.

With contributions from leading law firms covering 49 of the most important jurisdictions worldwide, this second edition of *Merger Control* endeavours to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether ‘carve-out’ arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for ‘gun-jumping’ offences.

Adopting the reader-friendly Q&A format that has been used successfully in other volumes of *The European Lawyer Reference Series*, including the first edition of *Merger Control* (2011), this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Whether notification is mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK). If mandatory, is the requirement to file based purely on the parties’ turnover (as in the EU and many other jurisdictions worldwide), or are there other factors that need to be considered, such as market share (eg, in Portugal, Spain and the UK), asset value (eg, in Russia and Ukraine) or the size of the transaction (eg, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes) and to include very detailed legal and economic analysis. By comparison, the US Hart-Scott-Rodino form is short and straightforward, and it can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and counsel navigating their way through the twists and turns of obtaining the required merger control approvals worldwide.

Compiling the second edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team of *The European Lawyer* for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Reign Lee for her editorial support, and Els Lagasse and Veerle Roelens for their secretarial assistance.

*Brussels, March 2014*

# Foreword

**Bernd Langeheine, Deputy Director-General,  
DG Competition, European Commission**

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Nowadays, an ever larger number of mergers need to obtain regulatory approval in several jurisdictions. The popularity of merger control is due to a general recognition that it is desirable to maintain a market structure which is conducive to effective competition and, therefore, crucial for a robust, innovative economic landscape. This is in the interest of consumers and market players at different levels alike.

As a consequence of globalisation, free trade and open markets merger control has become a key element of almost all competition law regimes around the world. Apart from problems related to costs and delays for closing the deal, multiple filings create a risk of inconsistent or even contradictory decisions. This is why all major competition authorities should cooperate closely on cases which require notification in several countries.

During 2011 and 2012, the European Commission, for example, worked together with other antitrust enforcers in about half of all cases for which an in-depth investigation was opened. The most notable example was the wide-ranging cooperation (ie with the US, Chinese, Japanese, Korean and Australian competition authorities) in the 'Hard-disk-drive cases' in 2011. Parties to a merger and their counsel generally have a keen interest in facilitating such cooperation in order to avoid conflicting decisions. This, in turn, requires knowledge about jurisdictional thresholds and other filing requirements as well as about the timelines of proceedings. This book provides a wealth of information on these and other relevant points for all important merger control systems around the world.

Competition rules and their enforcement will continue to be fragmented for lack of an international authority that would have jurisdiction over mergers and could take decisions for more than one country. There are, however, tendencies to avoid multiple filings at least at the regional level. In Europe, the situation is alleviated by the fact that, since 1990, there has been a merger control regime at the EU level under which mergers of a certain size that concern the competitive situation in several Member States are normally vetted by the European Commission. This is complemented by national rules on merger control which apply to all other relevant transactions, ie mainly those which are of a lesser size and which only concern one Member State.

In the EU, there are clear and explicit rules that lay down which (EU or national) authority has original jurisdiction over a merger. But there is also a mature system of referral mechanisms which mitigates the rigidity of the rules for case allocations and ensures that the best-placed authority deals with a particular merger. These referral provisions apply, in particular, where an operation needs to be notified in several Member States or where markets are wider than the national level and trade between Member States is affected.



The transfer of such cases from national authorities to the Commission will reduce the administrative burden for companies to the largest possible extent and avoid multiple filings. But the rules on referrals also foresee the transfer of merger cases from the EU level to a national authority in certain justified cases. A referral can take place upon the request of the parties, before an operation is notified or after notification at the request of a national competition authority. The application of these mechanisms has produced encouraging results over recent years. Between 2004 and the end of 2013, there were almost 280 referrals from national competition authorities to the EU Commission and approximately 130 in the other direction, ie to the national authority of a Member State. Nevertheless, one-stop shopping does not always work and there are still a large number of cases every year which are scrutinised by competition authorities in two or more EU countries (eg, 240 cases in 2007).

At the international level, the picture remains diverse. Intensive merger scrutiny in traditionally strong antitrust jurisdictions has been matched by new merger control regimes springing up in all parts of the world, most notably Asia and Latin America. Today, there are more than 100 merger control systems in force around the world which vary greatly not only with regard to notification requirements, but also with regard to other key elements such as timelines and filing fees.

Notifying parties and their lawyers continue to struggle with the proliferation of merger regimes and the ensuing divergences regarding procedures and substantive criteria or benchmarks. This situation is time-consuming and costly, in particular in cases where the actual impact of an operation in a given country is rather unimportant, but where low national jurisdiction thresholds nevertheless require a notification.

There are various discussion and coordination fora at the international level, such as the International Competition Network (ICN) or the Competition Committee of the Organisation for Economic Cooperation and Development which endeavour to produce more convergence of national merger control systems. Some progress has been achieved in the context of the ICN with the adoption of recommended practices on matters such as jurisdiction, procedure and even substantive assessment. Given the wide variety of underlying national circumstances (nature of the authority, administrative culture, enforcement powers) and the sensitivities often connected to issues of merger control, this remains, however, an undertaking which requires a lot of patience and which will only be crowned by success in the long term. In the meantime, the coexistence and parallel application of a large number of national merger control systems will continue.

Managing multiple filings with a variety of national competition authorities requires important skills in terms of legal knowledge, organisation and coordination. This book provides valuable insights and guidance with regard to these complicated processes and it will be of great assistance to corporations and their counsel.

*Brussels, March 2014*

# Taiwan

**Lee and Li** Stephen C. Wu, Yvonne Y. Hsieh & Wei-Han Wu

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## LEGISLATION AND JURISDICTION

### 1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

The basic rule governing merger control in Taiwan is the Taiwan Fair Trade Act (TFTA) which was promulgated on 4 February 1991, became effective on 4 February 1992 and was last amended on 23 November 2011. Moreover, the enforcement authority of the TFTA, the Taiwan Fair Trade Commission (TFTC) has stipulated several supplementary rules on the 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.

All relevant Taiwan merger control rules are available on the website of the TFTC ([www.ftc.gov.tw/internet/english/index.aspx](http://www.ftc.gov.tw/internet/english/index.aspx)).

Meanwhile, according to the proposed amendment to the TFTA, which is pending review by the Legislative Yuan (ie, the Congress), the two major proposed amendments relevant to merger control rule are for: (i) the market share thresholds for a combination notification to be removed so that the sales revenue will be the only basis to determine whether the prior notification for a proposed combination is required in Taiwan; and (ii) the maximum review period to be extended from 60 days to 90 days, as the TFTC needs more time to consult opinions from each relevant party in a transaction which may have a profound effect on the market.

### 2. What are the relevant enforcement authorities, and what are their contact details?

The TFTC is the competent authority under the 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.

The contact information of the TFTC is as follows:

12th–14th Floors, No. 2-2 Jinan Road  
Section 1, Zhongzheng District  
Taipei City 100, Taiwan (R.O.C.)  
T: 886-2-23517588  
E: [ftcpub@ftc.gov.tw](mailto:ftcpub@ftc.gov.tw)  
W: [www.ftc.gov.tw/internet/english/index.aspx](http://www.ftc.gov.tw/internet/english/index.aspx)

### **3. What types of transactions are potentially caught by the relevant legislation?**

In general, a combination affecting Taiwan is subject to the jurisdiction of the TFTC, even though it is a foreign-to-foreign transaction. Under the TFTA, a combination that falls under the definition of combination as well as 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.

### **4. Are joint ventures caught, and if so, in what circumstances?**

The term 'joint venture' is not defined under the TFTA. Therefore, it was previously arguable as to whether incorporation of a joint venture should be subject to merger control. However, the TFTC stated in its ruling in 2002 that the impact of a joint venture on competition is essentially the same as an acquisition regardless of whether an enterprise invests in an existing enterprise or incorporates a new enterprise. In other words, the establishment of a joint venture, whether it is a newly incorporated enterprise or an existing enterprise, will be subject to merger control review if it constitutes a combination under Article 6 of the TFTA.

Therefore, the establishment of a joint venture will be caught by the TFTA as a combination if it falls under any type of combination defined under the TFTA. For example, if a joint venture will be established by way of acquisition of one-third or more voting shares or major part of business or assets, such joint venture will be subject to the prior notification requirement. Furthermore, if the joint venture partners will jointly control the joint venture company by entering into certain definitive agreement, such joint operation will also fall within definition of the notifiable combination.

### **5. What are the jurisdictional thresholds?**

If any or all of the parties to a combination meet any of the following thresholds, a notification must be filed with the TFTC prior to the closing of the proposed transaction:

- as a result of the combination, any of the enterprises will acquire at least one-third of the market share;
- any of the enterprises participating in the combination holds a market share of at least one-quarter before the combination; or
- the preceding fiscal year's turnover of an enterprise participating in

the combination exceeded the amount set forth by the TFTC (ie, for a combination between non-financial enterprises, one of the enterprises generated an annual turnover of at least NT\$10 billion, while the other enterprise generated an annual turnover of at least NT\$1 billion; for a combination between financial enterprises, one of the enterprises generated an annual turnover of at least NT\$20 billion, while the other enterprise generated an annual turnover of at least NT\$1 billion).

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

#### **6. Are these thresholds subject to regular adjustment?**

No, the filing thresholds have not been amended since 2002.

#### **7. Are there any sector-specific thresholds?**

There is no sector-specific threshold except the special turnover filing threshold for a combination involving financial enterprises.

#### **8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?**

Filing is mandatory if the relevant thresholds are met.

#### **9. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?**

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

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

- where an enterprise combines with another enterprise in which it already holds 50 per cent or more of the voting shares or capital contribution;
- where enterprises of which 50 per cent or more of the voting shares or capital contribution are held by the same enterprise combine;
- 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; or
- where an enterprise 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 one-third or more of the voting shares in the enterprise.

**10. Are there special rules by which a notification of a ‘foreign-to-foreign’ transaction can be avoided even where the thresholds are met?**

As explained above, a foreign-to-foreign transaction is subject to the TFTC’s jurisdiction only when such transaction has direct, substantial and reasonably foreseeable effect on the Taiwan market. However, the TFTC has the final say to determine whether it will exercise the jurisdiction over a foreign-to-foreign transaction based on such local effect test.

**11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?**

No, the TFTC will not initiate a review of transactions which do not meet the thresholds for a notification. However, under a general rule, the TFTC can investigate and handle, upon complaints or *ex officio*, any alleged violation of the provisions of the TFTA.

**NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES**

**12. Is there a specified deadline by which a notification must be made?**

No, there is no specific deadline for filing a notification.

**13. Can a notification be made prior to signing a definitive agreement?**

The TFTA does not specifically prohibit a notification to be made prior to the signing of a definitive agreement. However, in practice, the TFTC will request a definitive agreement or relevant board resolution to be submitted with the notification to evidence the parties’ intention to conduct the transaction.

**14. Who is responsible for notifying?**

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 leases from another enterprise(s) of the operations or assets, regularly runs operation jointly with another, or is commissioned by another enterprise to run operation;
- (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.

**15. What are the filing fees, if any?**

There is no filing fee.

**16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?**

Yes, a clearance is required before the closing of the transaction. The waiting period is 30 days following the filing date (with complete documents and information). However, if the TFTC deems it appropriate, the 30-day waiting period may be shortened or be extended. When it does so, the TFTC must notify the filing parties in writing. If the TFTC decides to extend the period, it is entitled to do so only once up to a total of 60 days.

**17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?**

Such mechanism is not provided under the TFTA and it is unclear whether the TFTC will accept the parties' proposal to temporarily carve out transactions related to Taiwan since no case precedent is available.

**18. Are any other exceptions (carve-outs etc) available to allow parties to close/implement prior to approval?**

No exception which allows parties to close the transaction prior to the TFTC's clearance is available 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.

**19. What are the possible sanctions for failing to notify a transaction?**

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 NT\$100,000 and NT\$50 million.

**20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?**

The sanctions for implementing a transaction prior to receiving clearance are the same as those applicable for the failure to file a notification (response to question 19).

**21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?**

The sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision are the same as those applicable for the failure to file a notification (see question 19).

**22. What are the different phases of a review? Is there any way to speed up the review process?**

A transaction involving Taiwan is subject to the jurisdiction of the TFTC, even if the transaction is extraterritorial (ie, foreign-to-foreign). Under the

TFTA, a transaction that falls under the definition of a combination, as well as meeting certain prescribed thresholds, requires a pre-merger notification to be filed with the TFTC. Nevertheless, for the notification of extraterritorial transactions, the TFTC will first determine whether it will exercise its jurisdiction or not based on its evaluation on the local effect. That is, the TFTC will determine whether the proposed transaction would have a direct, substantial and reasonably foreseeable impact on the Taiwan market.

If a filing is required and submitted, the TFTC will make its decision based on an economic cost-benefit analysis. If the combination's advantages to the national economy outweigh its disadvantages, the TFTC will not make an objection. 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 deemed necessary.

The TFTC may include conditions or undertakings in any of its decisions on pre-merger notifications to ensure that the overall economic benefit of the merger outweighs any disadvantages resulting from competition restraints.

### **23. Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?**

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

- The enterprises file the notification for reaching the turnover threshold, but their respective market shares meet one of the following circumstances: (i) in a horizontal merger, the combined market shares after the merger is less than 20 per cent. However, the market share of the two largest enterprises in the relevant market reaches two-thirds or the three largest enterprises of the relevant market reaches three-quarters are excluded; or (ii) in a vertical merger, the combined market share in each individual market is less than 25 per cent.
- In the case of conglomerate merger, if the factors of consideration stated below are deliberated to conclude 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.
- The following type of mergers between affiliates:
  - (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 but such combination cannot be exempted from a filing

- pursuant to Item 1, Article 11-1 (ie, an enterprise combines with another enterprise in which it already holds 50 per cent or more of the voting shares or capital contribution);
- (iii) a company merges with a subsidiary of another company, which is under the common control of the same controlling company but such combination cannot be exempted from a filing pursuant to Item 2, Article 11-1 (ie, combination of enterprises, of which 50 per cent or more of the voting shares or capital contribution are held by the same enterprise);
  - (iv) a company transfers part or entire voting shares or capital contribution it owns in a third company to another company that has controlling or subordination relationship with it; and
  - (v) a company transfers part or entire voting shares or capital contribution it owns in a third company to another company that is also a subsidiary of the same parent company.

However, in the merger filings that meet the above-mentioned criteria for simplified procedure, the general procedure is still applicable in the case where the TFTC deems the merger has any of the following conditions:

- The merger involves major public interest.
- One of the merging parties is a holding company as defined by the Taiwan Stock Exchange Corporation Regulations for the Review of Stock Exchange Listings Applications by Investment Holding Companies or Financial Holding Company Act.
- There is a difficulty in delineating the scope of the relevant market or the calculation of market shares of enterprises participating in the merger.
- The relevant market for enterprises participating in the merger has high entry barriers, market concentration or other unfavourable and questionable circumstances that severely limit competition.

#### **24. What types of data and what level of detail is required for a notification?**

In a standard notification where the simplified procedure does not apply, the parties need to submit a combination notification form (Application Form) with required documents and information. In the Application Form, the parties are required to provide the following information:

- General introduction (including listing status, shareholding structure, major business and future plan, and offices and major business locations) and basic information of the parties.
- Description of the transaction, including:
  - (i) the background of the transaction;
  - (ii) the deal structure;
  - (iii) the estimate time frame and closing date;
  - (iv) the consideration; and
  - (v) the result of the transaction (ie, post-closing structure).
- Description of the relevant market, including:
  - (i) the product market;



- (ii) the geographic market; and
- (iii) horizontal and vertical competition status (including major competitors).
- Information relating to the possible obstacles in entering the relevant market, including the minimum capital, legal restriction, patents, intellectual property rights, material supply sources, ratio of fixed cost and tariff barrier etc.
- An economic analysis of the advantages that the proposed transaction would create to the benefit of each of the parties and overall economy in Taiwan.
- The investment status of the parties in Taiwan, such as subsidiaries and branches.
- The information as to the cost of production or other operational cost, selling prices, quantity and value of production, and sales of the major or related products and/or services of each party for the last three years.
- The horizontal competition information in connection with structure of the relevant market involving the parties.
- The market information in connection with the downstream and upstream industries.

**25. In which language(s) may notifications be submitted?**

The notification should be submitted in Chinese. Also, any documents in a foreign language should be translated (excerpt or full) into Chinese.

**26. Which documents must be submitted along with a notification?**

In addition to the information indicated in the responses to question 24, the following documents are also required:

- annual report of each of the parties of the preceding year (financial reports will be sufficient if no annual reports are available);
- power of attorney executed by each of the parties (authorising outside legal counsel to file the combination notification on behalf of them);
- certificate of incorporation of each of the parties;
- a copy of the definite agreement of the proposed transaction; and
- resolutions adopted by the board meetings approving the proposed transaction.

**27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?**

If the TFTC finds the documents submitted to be incorrect or misleading, it may prohibit on the combination. Meanwhile, for any incomplete information, the TFTC may issue notice to require supplementation or correction within a specified period of time, with the reasons stated for such requirement. If such supplementation or correction is not made within the specified time period or is so made but the submitted materials remain deficient, the filing will be rejected by the TFTC.

**28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?**

No pre-notification discussion is provided under the TFTA. However, the evidence suggests that parties in some cases indeed first consulted the TFTC for their informal and non-binding opinions on the transaction, such as what information the TFTC wishes to be provided in the notification. Note that such consultation is not customary because the TFTC is not always willing to discuss with the parties before a notification is actually made.

**29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?**

If any informal pre-notification consultation is held, it is unclear whether the TFTC owes confidentiality obligation to the parties, though in our view the risk of the TFTC leaking any confidential information is minimal.

**30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?**

Once the TFTA decides to exercise jurisdiction and has made its decision on the transaction, it will publish its decision letter on its website. Also, if deemed necessary, prior to the decision being made, the TFTA may seek a third-party's opinion on the proposed transaction, by either posting a notice on its website or conducting a public hearing. In this connection, the TFTA will at least disclose the names of the filing parties, the structure of the transaction and industry involved in its public notice.

The parties may request the TFTA to handle combination notifications confidentially without disclosing the confidential information identified by the enterprises to the public. If the enterprises have any special concerns regarding the public announcement made by the TFTA, they can also apply and provide reasons to the TFTA for not disclosing certain information regarding the combination transaction. The TFTA decides whether to grant the application on a case-by-case basis. If the TFTA considers that the information on 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.

**31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?**

While the TFTA publishes its decision, generally the following information will be mentioned in its decision letter:

- (i) name of the filing parties;
- (ii) structure of the transactions;
- (iii) the TFTA's decision and its conditions (if any); and
- (iv) the TFTA's reasons for the decision, which may include the definition of the product/geographic market, type of combination, market shares of each parties, competition analysis of the transaction.

However, as explained above, the parties may request the TFTA not to

disclose certain confidential information regarding the transaction.

## **SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES**

### **32. What is the substantive test for assessing the legality of a notified transaction?**

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 outweigh the disadvantages resulting from competition restraint. Otherwise, the overall economic benefits shall be further examined to determine whether they outweigh the disadvantages resulting from competition restraint.

### **33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?**

The TFTC will consider the following factors when assessing the competition restraints resulted from the different types of merger:

#### **Horizontal merger**

- *Unilateral effects*: the capacity of the merging parties to increase their product or service prices may increase when there is no more market competition pressure after the merger. Under such circumstances, assessment can be conducted in accordance with the market concentration before and after the merger, the market share of each of the merging party, the market share and supply-demand developments of businesses outside the merger and the reaction of buyers to price changes. If the merger involves a differentiated product or service, further assessment can be conducted to evaluate the level of substitutability of the product or service in question (whether a merging party is the next-best alternative of another for consumers, whether the clienteles are highly overlapped or the difference between the merging parties is merely a matter of choice, product positioning or price variation for consumers, or whether the merging parties market through the same channels) and the profit margin made before the merger.
- *Coordinated interaction*: after the merger, the merging parties and its competitors restrict business activities among themselves or, even without mutually restricting one another from competition, take concerted actions to render competition in the relevant market non-existent. The evaluation of whether the market condition is conducive for the enterprises to form concerted actions, the ease of monitoring acts of violation and the effectiveness of punishments is conducted to determine the coordinated effects.
- *Extent of entry*: the likelihood and timeliness of entry by potential

competitors, and whether such entry would exert competitive pressures on the existing enterprises in the market shall be examined.

- *Countervailing power*: refers to the ability of trading counterparts or potential trading counterparts to restrict the merging parties from raising the price of goods or the remuneration of services.
- Other factors affecting the result of competition restraints. Also, if a horizontal merger is suspected of competition restraints for meeting any of the following circumstances, the overall economic benefits shall be examined further:
  - The combined market share of the merging enterprises reaches 50 per cent.
  - The market share of the two largest enterprises of the relevant market reaches two-thirds.
  - The market share of the three largest enterprises of the relevant market reaches three-quarters. For circumstances stated in the above-mentioned second or third paragraph, the merger in which the combined market shares of enterprises participating in the merger have to reach to 20 per cent.

#### Vertical merger

- The probability of other competitors selecting their trading counterparts after the merger.
- The degree of difficulty for an enterprise not participating in the merger to enter the relevant market.
- The possibility that merging parties abuse their market power in the relevant market.
- Other factors that may result in market foreclosure.

#### Conglomerate merger review

- The impact on the merging parties' cross-industry operation if the applicable regulatory rules change afterward.
- The probability of cross-industry operation by the merging parties because of technology advancement.
- The original cross-industry development plan of the merging parties besides the merger.
- Other factors that affect the likelihood of material potential competition.

Meanwhile, if there is a likelihood of material potential competition in the relevant market of conglomerate merger and, thus, the effect of the horizontal or vertical merger will arise from such conglomerate merger, the factors affecting competition restraints in horizontal or vertical mergers should also be applicable.

### **34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?**

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

**35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?**

Some factors such as consumer interests; that the merging parties are originally in the weaker position in trading; one of the merging parties is a failing enterprise; or other concrete results related to overall economic benefits may also be taken into account by the TFTC.

**36. Does the relevant authority typically cooperate/share information with authorities 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.

**37. To what extent are third parties involved in the review process?**

When a combination notification is filed with the TFTC, the TFTC will post a summary of the proposed transaction on its website for one week to seek comments from the public if it decides to exercise jurisdiction on the transaction.

**38. Is it possible for the parties to propose remedies for potential competition issues?**

Although the proposal of remedy mechanism is not provided in the TFTA, our experience suggests that the parties may present remedies any time before the TFTC makes its decision. That is, during the TFTC's review process within the waiting period, 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 restart running 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.

**39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies etc)?**

The TFTC may attach conditions or required undertakings to its decisions on merger filings with the purpose of eliminating any likely competition restriction as a result of a merger so that the overall economic benefits are greater than the disadvantages from competition restriction. The types of

conditions or required undertakings are as follows:

- (i) *Measures regarding the structural aspect*: requesting the merging parties to take measures to dispose the shares or assets in their holding, transfer part of their operations or remove personnel from certain positions.
- (ii) *Measures regarding the behavioural aspect*: requesting the merging parties to continue to supply critical facilities or essential elements to businesses outside the merger, to license such businesses to use their intellectual property rights, not to engage in exclusive dealing, not to conduct discriminatory treatment or not to impose tie-in sales.

Depending on the specifics of each case, the TFTC may determine to attach other conditions or required undertakings that it sees fit without being subject to the regulation of the preceding paragraph. Also, before concluding its decision upon a merger filing, the TFTC may inquire the opinions of the merging parties regarding the conditions and undertakings to be attached.

#### **40. What power does the relevant authority have to enforce a prohibition decision?**

The power to enforce a prohibition decision is the same as the sanctions applicable for the failure to file a notification (responses to question 19).

### **JUDICIAL REVIEW**

#### **41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?**

The TFTC's decision is an administrative decision, which can be appealed by the parties or any interested parties for administrative review within 30 days after 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 after 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, ie, the TFTC as defendant and the appellant as plaintiff, will be in front of a judge 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.

#### **42. What is the typical duration of a review on appeal?**

As mentioned above, for the parties to a combination, it is possible to challenge the TFTC's decisions approving or prohibiting transactions by first filing an appeal to the Executive Yuan. If the Executive Yuan's decision

remains unfavourable, the appellant can appeal to the High Administrative Court and then to the Supreme Administrative Court for a final judgment.

The Executive Yuan should make a decision on the appeal within three months of receipt of the appeal. The above period can be extended once up to a total of five months. For a further appeal made to the courts, the reviewing period will be longer and may last for years, depending on the complexity of the case.

**43. Have there been any successful appeals?**

So far, the courts have never overruled the TFTC's decisions approving or prohibiting a combination. However, the Executive Yuan has twice revoked the TFTC's decision to prohibit combinations. These two revocations are related to the merger filing between two KTV companies: Cashbox Party World Ltd and Holiday KTV Ltd.

**STATISTICS**

**44. Approximately how many notifications does the authority receive per year?**

In 2012, there were 47 notified combination cases:

- (i) 26 of these cases were granted clearance;
- (ii) no case was prohibited; and
- (iii) 20 cases were withdrawn by applicants or the TFTC decided that it would not exercise jurisdiction over the transactions. The TFTC imposed sanctions in one case for the parties' violation of merger control rules under the TFTA.

**45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?**

Yes, the TFTC indeed prohibited some transactions, although only six transactions were prohibited in the past five years.

**46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?**

No public data is available to calculate such a percentage.

**47. How frequently has the authority imposed fines in the past five years?**

From 2008 to 2012, the TFTC imposed sanctions in 11 cases for the violation of merger control rules.

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# Merger Control

Provisions on merger control are a key element of almost all competition laws around the globe, from the United States to the European Union, from China to Brazil.

Today, the need to obtain merger control approvals is often the number one factor delaying the closing of M&A deals worldwide. While more countries have merger control laws than ever before, merger control regimes differ dramatically from one another, not only with regard to notification requirements, but also in other key elements such as timing and costs.

Managing multiple filings with a variety of competition authorities requires important skills in terms of knowledge, organisation and coordination.

This second edition of 'Merger Control' provides valuable insights and guidance to these complicated processes and will be of great assistance to corporations and their counsel.

