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## **Taiwan M&A: Opportunities and challenges**

**Simplified procedures and tax policies account for the growing M&A transactions in Taiwan. With high expectations for an increase in PRC capital and proposed amendments to M&A legislation, this trend is bound to continue, but what transaction structures do foreign investors need to comply with?**

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While recovery from the 2008 financial crisis has been slow, M&A activities in Taiwan have continued to thrive. There have been large-scale M&A transactions involving multinationals and business enterprises, like AIG's sale of its local assets to Nan Shan Life and Mediatek's tender offer for M-Star, which consolidates two major integrated circuit design players in Taiwan. There is also the proposed acquisition of CNS network by Won Won Group, EQT Partners' acquisition of GTV and the sale of the Next Media group, all in relation to the mass media news industry. Foreign investors continue to acquire local companies targeting niche markets. Meanwhile, following the execution of the Economic Cooperation Framework Agreement (ECFA) between Taiwan and the People's Republic of China on June 29 2010, there have been high expectations that more PRC capital would flow into Taiwan for investment and M&A transactions.

### **Statutory M&A transactions**

To conduct M&A transactions in Taiwan, the Mergers and Acquisitions Act provides certain simplified procedures for taking corporate actions and conducting employee transfer. The M&A Act also offers certain tax neutral treatments. The authorities are proposing amendments to the M&A Act to further facilitate M&A transactions in Taiwan. It is anticipated that certain regulatory barriers will be removed after the amendments are enacted. Considering the current version of the M&A Act, to take advantage of the simplified procedures and the relevant tax treatments, the transaction structure must comply with the types of mergers and acquisitions prescribed in the Act.

### **Mergers**

#### Statutory merger

Special approvals of the board meetings and shareholders meeting of each of the parties participating in a statutory merger are required before the merger can take effect. A cross-border merger between a Taiwan company and a foreign company is permissible as long as, after the acquisition, the surviving company takes the form of a company limited by shares.

#### Whale-minnow merger

The approval of the surviving company's shareholders is not required if (i) the number of new shares to be issued by the surviving company to the shareholders of the dissolved company in a merger does not exceed 20% of the surviving company's total issued shares; (ii) the amount of cash or the value of the property to be delivered as the merger consideration does not exceed 2% of the surviving company's net worth; and (iii) the dissolved company is not insolvent.

#### Cash-out merger

In addition to issuing shares as a consideration in a merger transaction, under the M&A Act, a surviving company is allowed to use cash or the combination of shares, cash and other properties as the consideration in a merger.

#### Short-form merger

The M&A Act allows a parent company and its subsidiary to conduct a short-form merger, under which only the board approvals of the parent and the subsidiary would be required. To be eligible to conduct a short-form merger, the parent needs to hold at least 90% of the outstanding shares in the subsidiary.

### **Acquisitions**

#### General assumption of rights and obligations

This type of acquisition refers to a transaction in which a company (i) assumes all of the assets of another company (general assumption); (ii) transfers all of its assets to another company (general business transfer); (iii) transfers all or the major parts of the business or assets to another company (Article 185 of the Company Act); or (iv) assumes all of the business or assets of another company that would have a material impact on the company's operation (Article 185 of the Company Act). A special shareholders resolution is also required for the above acquisitions.

#### Parent-subsidiary acquisition

The second type of acquisition is for a company to transfer its assets or business to any of its 100% owned subsidiaries in exchange for new shares to be issued by the subsidiary to the parent. Another condition for this type of acquisition is that the consolidated financial statements of the parent and subsidiary are available at the time of the acquisition. Only the resolution of the board of directors is required to approve this type of acquisition. This provision also applies to cross-border parent-subsidiary acquisitions.

#### Share exchange

A company may be acquired by another company or a newly incorporated company (for example a holding company) by exchanging 100% of its shares with the holding company thereby becoming the wholly-owned subsidiary of the holding company. The share exchange of 100% shares does not require the consent of each shareholder and may be approved by a special shareholders resolution of the acquired company. A cross-border share exchange between a Taiwan company and a foreign company is permitted.

#### Demergers

According to the M&A Act, demerger refers to an activity where a company (Demerged Co) transfers part or its entire business unit, which can be operated independently to a newly incorporated, or an existing company (Demerger Co) and the Demerger Co issues new shares to the Demerged Co or the shareholders of the Demerged Co. A demerger requires a special shareholders resolution of the parties participating in the demerger.

### **Acquisition of listed companies**

If the Taiwan target is a listed company, in addition to the above transaction types, the following channels are available:

#### **Tender offer**

In Taiwan, a tender offer is available for acquiring listed shares. Pursuant to the Securities and Exchange Act (SEA), a mandatory tender offer bid would be required for an acquisition of 20% or more of the total issued shares of a public company within 50 days.

## **Market purchase**

### Trading-hours purchases

It is always an option to purchase shares of a listed company during normal trading hours. The procedure for an investor to do so and the applicable regulatory scheme varies with the qualifications of the investor. Of course, acquiring a listed company through market purchase could increase the cost of the acquisition, as the market price would rise during the market purchase.

### Block trade

If the number of shares to be acquired reaches either of the following thresholds, the acquisition of listed shares may be conducted through block trade: 500,000 shares or more of the same listed shares or a stock portfolio involving five or more different listed shares and totalling Ntd15,000,000 (\$516,500) or greater. A single trade involving less than 500,000 shares of the same listed shares but with a total trading amount of Ntd15,000,000 or more may also be conducted through the block trade mechanism. However, there is a price restriction for conducting a block trade.

### After-hours

In addition to normal on-exchange trades during normal trading hours and block trade, the Taiwan Stock Exchange (TSE) provides other trading alternatives depending on the circumstances of the relevant trades, including bid offerings, fixed-price purchases and public auctions. These alternatives are sometimes utilised by parties who have agreed to the purchase and sale of listed shares at an agreed price to consummate the sale and purchase.

## **Alternative purchase**

### Foreign investment approval

A foreign investor is allowed to purchase from a specific foreign shareholder its holdings in a listed company if the Investment Commission has approved both the selling shareholder's original investment in the listed company and the proposed purchase by the incoming foreign investor.

### Global depository receipts (GDRs)

A TSE-listed company may, with the prior approval of the relevant competent authorities, sponsor the issuance and sale to foreign investors of GDRs representing the issuer's deposited shares. Foreign investors therefore, may acquire interest in a TSE-listed company through the GDR approach.

### European convertible bonds (ECBs)

According to the relevant rules, a TSE-listed company may issue ECBs after the registration with the authorities becomes effective. Beginning from a designated starting date after the bond issuance date until 10 days before the expiration date, the bond holder may request for conversion at any time in accordance with the procedures of conversion set by the issuer. Thus, ECBs may also be a mechanism to acquire a listed company.

## **Private placement**

A TSE-listed company may issue new shares to specific persons as defined under the SEA by way of

private placement, which requires the approval of the shareholders at a shareholders' meeting. The total number of subscribers shall not exceed 35. The shares subscribed by way of private placement are subject to the lock-up requirements from one to three years.

Detailed regulations of the private placement, regarding the criteria of investors, the requirement for the shareholders approval of the issuing company and the pricing will apply, which could affect the eligibility for an investor to choose investing through the private placement mechanism.

### **PRC investment in Taiwan**

For a PRC investor to invest and conduct M&A transactions in Taiwan, most of the above channels and approaches would be available. The major difference is that the PRC investment in Taiwan is subject to a positive list prescribed by the Taiwan authorities, which sets forth industrial sector restrictions for certain industries and percentage of shareholding or amount of investment. There are basically two channels for making PRC investments in Taiwan, subject to the industrial sector restrictions and shareholding or investment amount restrictions. For the first channel, a PRC investor may, with the approval of the Investment Commission, acquire private companies or listed companies (for listed companies, the investment shall exceed 10% shareholding). The second channel is qualified domestic institutional investors (QDII) approved in China, may, after registering its status with the Taiwan authorities, acquire listed companies in Taiwan.

In 2012, our firm has handled a number of cases where PRC investors successfully invested in Taiwanese companies. For example, Fosun Group, the largest private investment group in China, made its first investment in Taiwan in November 2012 by subscribing 20% of the total shares of Vigor Kobo, Taiwan's leading food souvenir company. It is understood that this is the first case of equity investments in a Taiwan food company by a mainland enterprise. Through the investment, the parties will build up a strategic partnership assisting Vigor Kobo to expand its new niche business model, which integrates the tourism and food industries as popular and specialty souvenirs among the Chinese community, to different areas of China. Lee and Li represented Fosun Group in the equity investment project.

Another example, as announced in November 2012, is the proposed acquisition by San'an Optoelectronics, a PRC listed company, through its wholly-owned subsidiary of Formosa Epitaxy Incorporation, a Taiwan listed company. The acquisition proposes San'an to subscribe for private placed shares of Formosa Epitaxy.

The main issue to be noted for PRC inbound investment is that if the investor is not a QDII, they can only invest by obtaining an approval from the Investment Commission (the first channel as stated previously). However, a PRC investor that acquires shares through such a channel will not be permitted to conduct secondary market trading for those shares, except under certain limited circumstances. Therefore, such investors can only make investments in Taiwan in the primary market, mainly through the purchase in the private placement by an issuer. The regulations of and restrictions on private placement as mentioned would therefore play a major role in structuring PRC inbound investment and should be observed by PRC investors.

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