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Taiwan's thriving M&A market

Ken-Ying Tseng, Robin Chang, Lihuei Mao, and Patricia Lin of Lee and Li explain the effect of amended regulations and prospectus guidelines on Taiwan's M&A market

Although the economy is still slowly recovering from the 2008 financial crisis, M&A activities have continued to thrive in Taiwan. There have been several large-scale M&A transactions involving huge conglomerates and business enterprises. Foreign investors continue to acquire local companies targeting niche markets. Meanwhile, following the execution of the Economic Cooperation Framework Agreement 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.

In 2012, there were a number of successful investments by PRC investors into Taiwanese companies. For example, Fosun Group, the largest private investment group in China, made its first investment in Taiwan in November 2012 by subscribing for 20% of the total shares of Vigor Kobo, Taiwan's leading food souvenir company. It is understood that this was the first case of equity investment in a Taiwanese food company by a mainland enterprise.

Since February 2012, there have been some amendments to the Company Act (applicable to all types of mergers and acquisitions), but their impact on the technicalities of M&A in Taiwan should be limited. With regard to mergers and acquisitions concerning public companies and listed companies, while there has been no amendment to the relevant Securities Exchange Act (SEA), there were some significant amendments to the Regulations Governing Tender Offers for Purchase of the Securities of a Public Company (TO Regulations) and Guidelines for Information to Be Published in Public Tender Offer Prospectuses (TO Prospectus Guidelines) in July 2012.

Amendments to the Company Act

Articles 197 and 154 of the Company Act were amended in January 2013.

The purpose of the amendment to Article 197 is to clarify the rule for automatic discharge of directors. For public companies, if after the election but before the inauguration, a director transfers more than half of the shares that he/she owned at the time he/she was elected as a director of the company, his/her directorship will be automatically discharged. This rule no longer applies to private companies.

Article 154 of the Company Act was amended to incorporate the doctrine of piercing the corporate veil (PCV Doctrine). The amendment came into effect on February 1 2013. Pursuant to the new Article 154, a shareholder will be held responsible for abusing the company's status as a legal person thereby causing the company to incur specific debt, which is obviously difficult for the company to repay; the shareholder will be responsible for repayment of the debt where the situation is material and in case of necessity.

Before the amendments to Article 154 of the Company Act, in principle, a shareholder's liability would be limited to the amount that he/she contributed to the company, given that a company is deemed a legal entity independent from its shareholders. Now, the amended Article 154 would allow the creditors of a company to claim against the shareholders of the company under the situation prescribed in Article 154. Given the broad description in the amended Article 154 in regard to when and how a shareholder will be deemed as "abusing the company's status as a legal person", it would be difficult to determine to what extent a shareholder would be held liable for the liabilities of the company. Also, as there is a lack of precedents, it is uncertain, at this stage, as to how the PCV Doctrine will be developed by the court.

TO Regulations and Prospectus Guidelines

The Financial Supervisory Commission (FSC) of the Executive Yuan amended the TO Regulations and TO Prospectus Guidelines with respect to the equal treatment to shareholders, the condition precedent to government approval and the full disclosure requirements in 2009, and further amended the same in 2012.

The most important amendment to the TO Regulations in 2012 is that the target company, after receiving the tender offer notification, now has to form an independent review committee to review the fairness and reasonableness of the transaction, and announce the committee's review result and recommendation to the shareholders within seven days of the receipt of the notification.

The review committee must have at least three members and be composed of the independent directors. If the target company has no independent directors or fewer than three independent directors, the members must be elected by the board. The qualifications and requirements for the members of the review committee must be the same as those of the independent directors. The resolution of the committee has to be passed by at least half of the members, and not only the result but also the reasons for and against the tender offer must be recorded in the minutes.

All the information to be disclosed must be posted to the Market Observation Post System (MOPS). If an acquirer is not a public company, the tender offer agent must, on behalf of the acquirer, disclose the information on the MOPS.

Due to the new disclosure mechanism, a section exclusively for the tender offer transactions was established, which provides a fast channel for searching of tender offer transactions.

Subject to paragraph 2, article 43-5 of the SEA, the amended TO Regulations in 2012 reiterated that if the authority finds that the contents of the tender offer report or announcement violate any law and/or regulation and orders the acquirer to revise the tender offer report or announcement for the protection of the public interests, the tender offer period will re-start after the acquirer's submission of the revised tender offer report or announcement. The acquirer has to make the public announcement of the revised documents and notify the relevant authorities as it had done for the initial tender offer. On the other hand, the target company is required to have the board and review committee review the revised tender offer terms and conditions and publish the review result and recommendation on the MOPS .

The amended TO Regulations state that foreign companies that are listed on the Taiwan Stock Exchange or traded on the GreTai (OTC) Securities market or the GreTai Securities emerging market

may be acquired through a tender offer. All the tender offer documents have to be served on the litigious and non-litigious agent of the foreign companies in Taiwan.

If a foreign company that has issued depositary receipts in Taiwan is a target in a tender offer in its home country, the acquirer must notify the foreign company's litigious and non-litigious agent in Taiwan who must then make a public announcement on the MOPS .

If an acquirer obtains a loan to pay the tender offer consideration, it must disclose the source of the fund, the identities of the lender and the borrower, and the collateral. In the event that the target company's assets will be used as collateral, the impact on the target company arising from the financing arrangement must be specified.

The acquirer will have to disclose all the agreements relating to the tender offer signed by the acquirer or its affiliates with the target or its directors, supervisors, managers, shareholders holding more than 10% of its shares, and other related persons within two years on or before the launch of the tender offer. Besides the main terms and conditions contained therein, a copy of each of the executed agreements must be provided to the authorities and disclosed to the public.

If an acquirer plans to delist the target company, it is required to explain the delisting plan, especially whether it has any plan to re-list the target company in Taiwan or overseas. In addition, the fairness opinion issued by an independent expert to support the acquirer's tender offer consideration must include the valuation methods and other information as requested by the authorities.

M&A regulations and regulatory bodies

In Taiwan, the Mergers and Acquisitions Act (M&A Act) was specifically enacted to govern mergers and acquisitions, including takeovers, while the Company Act (applicable to all kinds of companies) and the SEA (applicable to public companies) governs all general matters which may be relevant to mergers and acquisitions. With regard to takeovers, the SEA, the main statute governing tender offers and the TO Regulations and TO Prospectus Guidelines, which are promulgated by the FSC pursuant to the authorisation of the SEA, prescribes all the details concerning conducting tender offers in Taiwan. The Financial Institutions Merger Act and the Financial Holding Company Act also apply to the mergers and acquisitions of financial institutions.

The MOEA is the regulatory body in charge of the interpretation and application of the M&A Act and the Company Act and matters regarding formation of corporate entities and registration of companies. A part of the MOEA's function is similar to that of the Department of Commerce of the US. The FSC is the regulatory body in charge of the M&A activities of financial institutions and public companies and is also the supervisory body of the financial industry and securities transaction/market.

A merger or acquisition meeting any of the thresholds provided in the Fair Trade Act (FTA) would be subject to the combination notification requirement. The Fair Trade Commission is the regulatory body in charge of notifications of combinations (mergers or acquisitions, for example) in Taiwan. In cross-border or global transactions, the Fair Trade Commission oftentimes respects the decision of the antitrust regulator of jurisdictions such as the EU or US.

Recently, regulators in Taiwan have been emphasising and strengthening investor protection in M&A deals as well as the implementation of insider trading regulations. Equal protection of selling shareholders (tender offerees) has become a critical issue and the Securities and Futures Bureau pays special attention to this issue in every tender offer transaction.

Achieving takeovers

In Taiwan, there is no statutory squeeze-out mechanism. A majority shareholder has no right to force the minority shareholders to sell out their shares. The only way to achieve squeezing-out is to conduct a cash merger or share exchange with redemption of preferred shares. As such, a tender offer with a back-end cash merger has become a popular method for takeovers of public companies in Taiwan since 2007.

In addition, the M&A Act provides various other methods for takeovers, including short-form merger, de-merger, share exchange, and assets and business acquisition. In the case of a merger, the consideration may be paid in stock, cash or a combination of the two. Following the promulgation and implementation of the M&A Act and other implementation regulations, the regulatory framework and regulatory approval process with respect to takeovers has become more transparent and predictable.

Pursuant to the tender offer rules, any person who, individually or jointly with others, intends to acquire shares accounting for 20% or more of the total issued shares of a public company within 50 days must do so through a tender offer.

Equal treatment

As stated, the regulatory body of takeovers now emphasises the principle of equal treatment of the selling shareholders in tender offer transactions, which has been set forth in Taiwan's Securities Transaction Act. The rule prohibits a tender offeror from entering into agreements with certain selling shareholders who participate in the tender offer to offer special rights to such selling shareholders and therefore resulting in a difference in the terms and conditions for the tender offer among different shareholders. The regulatory body once provided an example for illustration purposes: if a selling shareholder is allowed to invest in the tenderor or its affiliate in a tender offer transaction, such a shareholder must complete the investment before it tenders its shares to the tender offeror; or the source of funds for such shareholder to make such investment can not be from the proceeds that it is to receive from tendering its shares to the tender offeror.

Conditions precedent

A tender offeror needs to specify a lower threshold and an upper threshold for the number of shares that it intends to acquire as the conditions to the tender offer, and a tender offer will only be closed if the number of shares being tendered reaches the lower threshold. In addition, in the event that there is any required government approval concerning a tender offer, obtaining that government approval would be a condition that has to be satisfied before a tender offeror publicly announces the success of a tender offer. The rule requires that a tender offeror make a public announcement and notify the competent authority within two days of the satisfaction of the conditions of the tender offer. In addition, the rule specifically states that a tender offeree may withdraw his/her agreement to sell before the

tender offer is approved by all competent authorities even if the number of shares being tendered has reached the minimum number of shares for acquisition in the tender offer as set by the tender offeror.

Material adverse change clauses are also commonly seen as the condition precedent to the conclusion of a tender offer (only limited to a material adverse change in the financial and business conditions of the target company), as well as a condition precedent to closing in a private transaction. Neither the securities authorities nor the court has elaborated the term "material adverse change", however, so the relevant authorities may at their discretion determine whether there is a material adverse change in the financial and business conditions of the target company on a case-by-case basis. In practice, the securities authorities would be extremely reluctant to agree to any suspension of a tender offer driven by commercial reasons. Thus far, there have not been any cases where material adverse change has resulted in failure of tender offer or large private deals.

For deals that are not conducted by way of tender offer, there have been many kinds of conditions precedent based on the parties' needs and requirements. For example, in 2009, the China Mobile and Far Eastone deal was conditioned upon the future relaxation of the relevant regulatory restrictions.

Hostile versus voluntary

In general, the relevant laws and regulations in Taiwan governing takeovers do not differentiate between hostile and voluntary takeovers. In the case of a tender offer, the board and the Review Committee of the target company would have to respond to a tender offer bid as well as to provide recommendation to its shareholders within seven days after being notified of the tender offer pursuant to the tender offer rules. This provides an opportunity for public shareholders to be aware of the position taken by the target board and the Review Committee toward a takeover bid.

Hostile takeovers are allowed, but there are some procedural hurdles that render hostile takeover a less preferable approach, as compared with voluntary takeover. Among others, it may be a time-consuming process to reorganise the target board and management team in the absence of an agreement with the key members of the target board.

Penalties

Except as otherwise exempted by relevant laws and regulations, a tender offer is required for an acquisition of 20% or more of the total issued shares of a public company within a period of 50 days. Any person who violates this requirement is subject to criminal liability.

With respect to the combination notification requirement, failure to make the required notification may result in an administrative fine of not less than NT$100,000 ($3,370) and up to NT$50 million. In addition, the Fair Trade Commission may prohibit the combination, prescribe a period for the parties to split, dispose of all or part of the shares, transfer part of the operations, remove certain persons from their positions, or make any other necessary dispositions.

Other disclosure requirements

The launch and the completion of the tender offer have to be announced on the MOPS.

Within seven days after receiving the tender offer prospectus, the target company must submit the relevant information to the relevant agencies, including the Securities and Futures Bureau, the Taiwan Stock Exchange or the GreTai Securities Market, and Securities and Futures Investors Protection Center, and the target company, and provide the following information on the MOPS: (i) the shareholding of the incumbent directors, supervisors and shareholders holding more than 10% of the total issued shares; (ii) recommendation to the shareholders for the tender offer and the directors objecting to the tender offer along with the reasons for its recommendation; (iii) any material adverse change to the company's financial conditions after submission of the latest financial reports; (iv) the shares held by the incumbent directors, supervisors, and shareholders holding more than 10% of the total issued shares in the acquirer or its affiliates; and (v) other important information.

Reporting thresholds

Pursuant to article 43-1 of the SEA, any person who, individually or jointly with others, has acquired shares accounting for more than 10% of the total issued shares of a public company must, within 10 days after the acquisition, make a report to the competent authority to disclose the purpose of such acquisition, the funding source and other matters prescribed by the competent authority. This reporting requirement applies to any subsequent change of the items reported.

Note that for the takeover of banks, the reporting threshold has been lowered to 5%. Any person or related party who, individually, jointly or collectively holds more than 5% of a bank's total outstanding voting shares, must report such shareholding to the FSC within 10 days of its acquisition of such shares. Thereafter, as long as such person or related party holds at least a 5% interest in the bank, reporting will also be required whenever there is an accumulated increase or decrease in excess of 1% of the bank's total outstanding voting shares in such person's or related party's shareholding.

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