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All change in M&A

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The government has published a Bill proposing far-reaching changes to Taiwan's M&A environment. Businesses need to familiarise themselves with the possible changes and follow its progress carefully

After gaining more than 10 years experience in facilitating and regulating M&A activity in Taiwan by adopting the Mergers and Acquisitions Act, the Taiwanese regulator proposed extensive amendments to the M&A Act in a Bill to the legislative authority in November 2013. The Bill is designed to resolve a number of issues which have arisen while implementing the M&A Act, as well as to further liberalise and facilitate mergers and acquisitions in Taiwan. Once enacted, the Bill would provide more flexibility for the types and structures of M&A in Taiwan, further protect the rights and interests of certain stakeholders, such as minority shareholders, employees, creditors, and apply the same tax benefits to spin-off transactions. When structuring M&A in Taiwan, businesses should monitor the legislative status of the Bill closely in order to take advantage of the relevant benefits and to comply with the new requirements as stipulated under the Bill.

More short-form M&A

To streamline corporate action in respect of M&A transactions, the Bill adds five short-form M&A transaction types that need not be approved at a shareholders' meeting. Instead, a board resolution adopted by a majority of directors present at a board meeting attended by two-thirds or more of the directors (special board resolution) of the participating companies would be sufficient. The newly-added short-form M&A transaction types are:

1. *Mergers between companies under common control:* Where the subsidiaries of the same parent company merge with each other and the parent company holds 90% or more of the outstanding shares in each participating subsidiary, the merger can be approved by the special board resolution of each subsidiary without being further approved by the shareholders' meeting of each subsidiary.
2. *Whale-minnow share exchange:* Where (i) the total number of the new shares to be issued by an acquiring company in a share exchange transaction as the consideration to exchange for the shares in the target company does not exceed 20% of the outstanding voting shares of the acquiring company; and (ii) the cash amount/asset value to be paid out by the acquiring company does not exceed 2% of the net value of the acquiring company, the share exchange may be approved by the special board resolution of the acquiring company, unless otherwise required by the Bill.
3. *Whale-minnow spin-off:* Unless otherwise required by the Bill: (i) where the value of the business to be spun-off by a company will not exceed 2% of its own net value and the company itself will receive all the consideration of the spin-off transaction, the spin-off may be approved by the special board resolution of such a company; and (ii) where the total number of the new shares to be issued by the company assuming the business of another company in a spin-off transaction does not exceed 20% of its own outstanding voting shares and the cash amount/asset value to be paid by such a company does not exceed 2% of the its net value, the spin-off may be approved by the special board resolution of such a company.

4. *Share exchange between parent company and subsidiary:* Where a parent company intends, by means of share exchange, to acquire a subsidiary of which the parent company owns 90% or more of the outstanding shares, this share exchange may be conducted with only a special board resolution of each company.
5. *Spin-off between parent company and subsidiary:* Where a spin-off transaction is to be entered into between a parent company and a subsidiary of which the parent company owns 90% or more of the outstanding shares, with the parent company being the company assuming the business to be spun-off and the subsidiary being the company receiving all of the consideration for the business, such a spin-off transaction may be conducted with only a special board resolution of each company.

Cash-out mechanisms

Under the current M&A Act, cashing out minority shareholders is only permitted when a merger transaction is conducted. Also, in a merger transaction, the consideration can be in various forms, including shares, cash, and other assets. For other types of statutory M&A as stipulated in the M&A Act, such as share exchange or spin-off transactions, the consideration is limited to only newly issued shares. The Bill proposes that in a share exchange or spin-off transaction, the consideration may also be shares, cash, or other assets. This provides flexibility for companies to structure share exchange or spin-off transactions. One possibility is to cash out minority shareholders in a share exchange transaction.

Abstentions

It is explicitly stated in the existing M&A Act that if a company (Company A) intends to merge with another company in which it holds shares (Company B), Company A does not need to abstain from exercising its voting right in the shareholders' meeting of Company B, when the shareholders' meeting of Company B is in the process of voting in the proposed merger. However, for the other types of statutory transactions, such as a share exchange or a spin-off transaction, the existing M&A Act does not have similar provisions. As such, it has always been questionable as to whether Company A may still vote in the shareholders meeting of Company B, when Company A and Company B are conducting a share exchange or spin-off transaction. In the situation where Company A controls a majority share in Company B, and abstains from voting in a shareholders' meeting that would mean that any proposed M&A will become impossible. This issue will be solved by the Bill. The Bill proposes to explicitly permit a corporate shareholder to vote in the shareholders meeting of another company, when the two companies are conducting share exchange or spin-off transactions.

Existing shareholders and employees

The Bill proposes that in the event that a surviving company issues new shares for a merger, or a parent company issues new shares for its subsidiary's merger with another company, the provisions provided in the Company Act and Securities and Exchange Act regarding the pre-emptive rights of employees and existing shareholders to subscribe to the new shares, or the obligation to allocate a certain ratio of the new shares for public offering shall not apply.

Raising the delisting threshold

Considering the need to protect the shareholders of a listed company, in the event that the listed company becomes delisted or dissolved as a result of a merger or acquisition transaction and the surviving or acquiring company is not a listed company, the threshold of the shareholders resolution of the listed company to be delisted or dissolved to approve the merger or acquisition transaction will be raised to require the affirmative votes of the shareholders who represent two-thirds or more of the total

outstanding shares issued by such a company. This means that the delisting threshold will be increased once the Proposed Amendment is enacted. Nonetheless, it is still not as rigid as in other jurisdictions such as Hong Kong.

Reporting obligations

Although an M&A resolution adopted by an interested director would not be necessarily detrimental to the shareholders' rights, the fairness and reasonableness of such a resolution will inevitably be questioned. The Bill proposes that when a director has a personal interest in an M&A resolution, such an interested director is obliged to explain to the board meeting and shareholders' meeting the essential aspects of such personal interest and the reasons of his support or opposition to the proposed M&A transaction.

Special committees

The Bill proposes that a special committee be set up by a public reporting company (if there is an audit committee, the same function shall be performed by the audit committee) to deliberate the fairness and reasonableness of an M&A transaction. During the deliberation of the special committee/audit committee, independent experts shall be appointed to provide opinions regarding the reasonableness of the consideration in the proposed M&A transaction. The conclusion of deliberation shall be submitted to the board meeting and shareholders' meeting. The formation and operation of the special committee, the qualification of the members of the special committee, and the determination of independence and appointment of the independent experts, will be stipulated by the authorities regulating public companies in due course.

Protection for minority shareholders

According to the Bill, when objecting shareholders have exercised their appraisal rights to request a company to buy back their shares in connection with an M&A transaction but have failed to reach an agreement on the buy-back price with the company, the company shall pay the amount it considers fair to the shareholders before filing a motion with the court for a ruling on the amount of the purchase price of the shares by an application listing all of the objecting shareholders who disagree on the price as counterparties. It was hoped that such a proposed amendment may improve the imperfections of current procedures such as the long process it takes to exercise the appraisal right to request a company to buy back the shares, the high transaction costs to shareholders and the price discrepancies between the rulings of the courts.

Shareholders information rights

According to the Bill, a merger agreement, share exchange agreement, split plan, content of a merger or acquisition resolution adopted in a board meeting, deliberation conclusion of the special committee and opinion of independent experts shall be sent to the shareholders along with the shareholders' meeting notice or to inform the shareholders of such information after the resolution has been adopted at the board meeting.

Protection of creditors

The impact on the creditors of companies conducting an acquisition transaction would be similar to that which arises in a merger or spin-off transaction. The Bill proposes to grant the creditors the right to access information and raise objections to an acquisition transaction.

Protection of employees

The Bill proposes that the remaining amount in the labour pension fund special account allocated by a company transferring all of its employees subject to the retirement benefit plan under the Labour Standards Act to another company in an acquisition or spin-off transaction, regardless of whether the amount has reached the threshold triggering suspension of allocation, shall be transferred to the labour pension fund special account of the surviving/acquiring company after the transaction. The Bill also proposes to remove the current provision which deprives an employee of his/her right to request severance pay if the employee has accepted continuous employment after the transaction but later refuses to stay on for personal reasons before the effective date of an M&A transaction.

Tax benefits

In the Bill, the types of consideration for a spin-off transaction would be the same as that which is required for an acquisition. As such, for the sake of implementing fair taxation, the tax treatment for a spin-off transaction should also be the same as that which is provided for an acquisition:

1. In order for a company to enjoy transaction tax (stamp tax, deed tax, securities transaction tax, business tax, and land value increment tax) exemption or deferral under a spin-off transaction, an existing or a newly-incorporated company, which acquires business operations as a result of a spin-off transaction, must issue new shares with voting rights as the consideration and such shares must be at a value not less than 65% of the total consideration.
2. In order for a company to enjoy corporate tax exemption under a spin-off transaction, the consideration paid shall be shares with voting rights from an existing or a newly incorporated company and such shares must be at a value not less than 80% of the total consideration, and the company receiving this share consideration must consequently transfer all the acquired shares to its shareholders.

In addition, by virtue of the amendment to the Income Tax Act, from January 1 2009 a company's losses can be carried forward for 10 years. In conformity with the Income Tax Act, in a merger or a spin-off transaction, losses can be carried over from each party to the merger or spin-off transaction in proportion to the percentage of shares that the party holds in the newly-incorporated or surviving company through the merger or the spin-off transaction for 10 years.

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Ken-Ying was recognised as a Leading Lawyer in the M&A field by *Asialaw* in 2013 and 2014, and by *IFLR 1000* in 2014. Ken-Ying also heads the Personal Data Protection practice group of Lee and Li.

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Patricia Lin's practice focuses on banking, securities, capital market, international corporate finance, financings (including syndicated financing, structured financing and aircraft/ship financing) and M&A. Patricia has assisted in many international capital markets transactions, including the issuance of global depositary receipts, American depositary receipts, Taiwan Depository Receipts, Euro-convertible bonds, Euro-exchangeable bonds and straight bonds.

Patricia is also an expert in M&A transactions in both general industries and highly regulated industries (such as financial industries and telecom industries). She has advised several local banks/financial holding companies/securities firms and foreign private equity funds/investors in connection with the proposed acquisition between the acquirer and local financial holding companies and banks (such as Cosmos Bank being invested in by GE Capital, Soros's investment in Taishin Financial Holding and Morgan Stanley's investment in Chinatrust Financial Holding). She also advised the Taiwan telecom company in the first investment from a mainland China company (China Mobile) and advised Forepi in the first PRC investment (San'an) and strategic alliance in the LED industry.