

This article was published in the Mergers and Acquisitions Report 2016 on March 23, 2016.

Mergers and Acquisitions Report 2016 Taiwan

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Section 1: GENERAL OUTLOOK

1.1 What have been the key recent M&A trends or developments in your jurisdiction?

In 2015, there were a couple of hostile takeover cases in the major industries in Taiwan. The most high-profile was the tender offer of Siliconware Precision Industries (SPIL) by Advanced Semiconductor Engineering (ASE). ASE successfully acquired 25% shares in SPIL in 2015. In early 2016 it launched a second bid on SPIL. The other notable case was Waterland Financial Holdings' tender offer for COTA Commercial Bank in the middle of 2015. This attempt failed. This new trend for hostile takeovers has caught the attention of the local market and the authorities.

1.2 What is your outlook for public M&A in your jurisdiction over the next 12 months?

Given the success of the ASE-SPIL tender offer, there could be more hostile takeover cases in Taiwan in the future. Meanwhile, major Chinese companies are buying Taiwan major industries and assets, pending the review of the Taiwan government.

Section 2: REGULATORY FRAMEWORK

2.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?

The main statutes governing public M&A in Taiwan are: the Mergers and Acquisitions Act; the Company Act; the Securities and Exchange Act; and the Fair Trade Act. The Securities and Exchange Act also provides a set of rules governing the tender offer of public companies. Other statutes may also be relevant, such as the Labor Standards Act and tax laws and regulations.

The main regulatory body in charge of public M&A transactions is the Securities Futures Bureau (SFB) of the Financial Supervisory Commission (FSC). The other relevant regulatory bodies include the Fair Trade Commission, the authority in charge of anti-trust clearance, and the Investment Commission, which reviews foreign investment. If the target holds any special licence, the authority in charge of the special licence may need to review the transaction.

2.2 How, by whom, and by what measures, are takeover regulations (or equivalent) enforced?

No specific legislation governs takeovers. All of the above statutes and regulations could be relevant to a takeover. Given the recent ASE-SPIL hostile takeover case, the FSC is reviewing the relevant regulations in terms of how target companies can better handle a hostile takeover.

Section 3: STRUCTURAL CONSIDERATIONS

3.1 What are the basic structures for friendly and hostile acquisitions?

Acquisitions can be conducted through share purchase (tender offers), share subscription (private placements), and statutory share exchange. Sometimes, a back-end merger is implemented to buy out minority shareholders. Sometimes, a proxy fight is adopted to gain control over the target board.

3.2 What determines the choice of structure, including in the case of a cross-border deal?

Various factors determine the structure. Examples include: the purpose of the acquisition; the status and financial ability of the buyer; potential tax implications arising from the transaction; the buyer's holding or tax structure; and the target's status.

3.3 How quickly can a bidder complete an acquisition? How long is the deal open to competing bids?

The tender offer rules require the tender offer period to be between 10 to 50 days, with an extension of 30 days (subject to prior approval from the authority). The total time period depends on whether the tender offer requires government approval. The competing bidder would need to launch its offer before the fifth business day before the end of the tender offer period.

3.4 Are there restrictions on the price offered or its form (cash or shares)?

It is possible to pay cash, shares, or assets as the consideration for an M&A transaction in Taiwan, subject to various restrictions. According to a government ruling, the consideration to be paid to different shareholders may be of a different type or a different combination.

3.5 What level of acceptance/ownership and other conditions determine whether the acquisition proceeds and can satisfactorily squeeze out or otherwise eliminate minority shareholders?

Other than conducting a cash-out merger or a statutory share exchange, there is no other statutory squeeze-out mechanism under Taiwan law. To conduct a merger or statutory share exchange of a listed company to gain 100% ownership and delist the company, the buyer would need to control at least two-thirds of the outstanding shares according to the amended Mergers and Acquisitions Act.

3.6 Do minority shareholders enjoy protections against the payment of control premiums, other preferential pricing for selected shareholders, and partial acquisitions, for example by mandatory offer requirements, ownership disclosure obligations and a best price/all holders rule?

Control premiums are rare in Taiwan, especially when the acquirer intends to acquire up to 100% ownership in a public company within a short time period. In this situation, the law requires that the acquirer offer the same consideration to all shareholders; otherwise, the major shareholder of the target company, who also controls the management, would be exposed to a breach of fiduciary duty claim. In tender offers, the consideration paid to all of the shareholders responding to the tender offer must be the same. For mergers, statutory share exchanges, and demergers, according to a new ruling, it is possible to pay consideration to the shareholders in a different form or combination.

3.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?

A tender offeror is permitted to insist on the following closing conditions: (i) regulatory approval is granted; (ii) no material adverse change occurs; and (iii) the number of shares tendered reaches the minimum threshold. When launching the tender offer, the tender offeror is required to disclose the source of its funds to demonstrate its financial ability to close the deal. A bank guarantee is not required.

Section 4: TAX CONSIDERATIONS

4.1 What are the basic tax considerations and trade-offs?

In general, for mergers, de-mergers, and transactions for the acquisition of assets or shares (for which over 65% of the consideration is paid with shares with voting rights), all the taxes incurred during the transfer of business and assets are either exempted (except for land value incremental tax) or deferred (the land value incremental tax). Moreover, a fraction of the net operating losses incurred by the participants may not be carried over to the surviving /acquiring company thereafter.

4.2 Are there special considerations in cross-border deals?

In a merger, the consideration received by a shareholder of the dissolved company exceeding the acquisition cost of the underlying shares would be treated as dividends income and be subject to income tax. Hence a foreign shareholder would be subject to 20% withholding tax on the consideration unless the shareholder is from a jurisdiction with which Taiwan has entered into a treaty that provides for a reduced rate of withholding tax.

Section 5: ANTI-TAKEOVER DEFENCES

5.1 What are the most important forms of anti-takeover defences and are there any restrictions on their use?

The so-called poison pill mechanism is rarely seen in Taiwan. In practice, government intervention is often the most powerful anti-takeover defence. Laws and related regulations pertaining to anti-trust, protected industry reviews, protection of minority shareholders, and protection of employees, have been successfully used as anti-takeover defences in Taiwan.

5.2 How do targets use anti-takeover defences?

To prevent takeovers, the target company can seek protection from the government to deter the proposed transaction. A preliminary injunction may also be applied for as an anti-takeover measure or a takeover measure. However, it has become increasingly difficult to obtain such an injunctive order.

Recently, the so-called white knight was introduced as a defence in public tender offers in Taiwan. In the recent ASE-SPIL case, SPIL invited a white knight to deter ASE's acquisition but to no avail.

5.3 Is a target required to provide due diligence information to a potential bidder?

The disclosure of due diligence information, including the degree of the details to be disclosed, is normally subject to commercial negotiation between the parties. If the target is a public company, as it is already subject to certain disclosure requirements, the target is generally reluctant to disclose due diligence information in further detail. The target's board would also need to consider its fiduciary duty to the shareholders when determining the disclosure of due diligence information.

5.4 How do bidders overcome anti-takeover defences?

In the case of government intervention, the bidder would need to convince the government to approve the proposed takeover. If the bidder and the management are fighting for control of the board, the bidder may also seek a preliminary injunction against the actions taken by the management or file a law-suit against the management. But again, it may not be easy to obtain an injunctive order. In a tender offer transaction, the premium offered by the bidders would be one of the key factors in attracting the shareholders' attention and ensuring success.

5.5 Are there many examples of successful hostile acquisitions?

Other than the ASE-SPIIL and Waterland Financial Holdings–COTA Commercial Bank tender offer cases, there aren't many precedents dealing with hostile takeovers.

Section 6: DEAL PROTECTIONS

6.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile interloper?

There are no precedents relating to competing bids in local tender offers. To protect a friendly deal from being interrupted, the best tactic is to shorten the tender offer period, if possible. Once a tender offer is launched, the competing bidder must launch its bid no later than the fifth business day before the end of the tender offer period. Alternatively, the bidder must offer a purchase price with higher premium.

6.2 To what extent are deal protections prevented, for example by restrictions on impediments to competing bidders, break fees or lock-up agreements?

Deal protection is not limited by restrictions on impediments to bidding competition, break fees or lock-up agreements as there is no specific statute in that regard. However, practical barriers may exist. With regard to the break fee, the main concern would be the management's fiduciary duty to ensure that the amount is reasonable. There may be practical enforcement difficulties relating to the lock-up agreement, if the share certificates are not secured in advance.

Section 7: ANTITRUST/REGULATORY REVIEW

7.1 What are the antitrust notification thresholds in your jurisdiction?

An M&A transaction would be subject to the antitrust notification requirements in Taiwan if any of the following thresholds is met:

- Market share test: (i) if any of the parties acquires one-third or more of the market share as a result of the transaction; or (ii) any of the parties holds a market share of a quarter or more before the transaction;
- Turnover test: An M&A transaction between non-financial companies would be notifiable if one of the companies generated an annual turnover of at least NT\$15 billion, while the other company generated an annual turnover of at least NT\$2 billion in the previous year. Calculation of the turnover would be on a consolidated basis.

7.2 When will transactions falling below those thresholds be investigated?

Normally, the FTC will not initiate any investigation unless it is informed of any non-compliance. In a hostile takeover, it could be the management of the target company that informs the FTC to deter or stop the takeover. Sometimes, the FTC may make inquiries of the relevant parties based on news reports of an M&A transaction.

7.3 Is an antitrust notification filing mandatory or voluntary?

If an M&A transaction meets the notification threshold, notification is mandatory.

7.4 What are the deadlines for filing, and what are the penalties for not filing?

There is no specific deadline but if required, the anti-trust clearance needs to be obtained before the parties can close the transaction. Otherwise, the FTC may impose penalties such as prohibiting the transaction from proceeding, or ordering the acquirer to transfer the company or divest itself of the

assets it had acquired. The FTC can also impose an administrative fine ranging from NT\$200,000 to NT\$50 million.

7.5 How long are the anti-trust review periods?

Once the notification is submitted and the authority deems the information in the filing complete, there is a 30-day waiting period for the FTC to raise its objection. If the FTC does not object during the 30-day period, the clearance is deemed to be automatically obtained and the deal may be closed. The FTC can shorten the 30-day period or extend it up to a further period of 60 days.

7.6 At what level does your antitrust authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?

All cross-border or offshore transactions that meet the thresholds are subject to the notification requirements. However, in practice, the FTC would only exercise its jurisdiction when the deal has local competition effect. The question of whether there is any local competition effect is solely at the discretion of the FTC.

7.7 What other regulatory or related obstacles do bidders face, including national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?

Protected industry review, foreign ownership restrictions, and employment regulation could all be potential obstacles to a public M&A. With regard to PRC acquisition of Taiwan regulated industry, national security could also be one of the obstacles.

Section 8: ANTI-CORRUPTION REGIMES

8.1 What is the applicable anti-corruption legislation in your jurisdiction?

Under the Criminal Code and the Anti-Corruption Act, a government official would be held criminally liable if they accept a bribe either for actions within their power or breaching their duty. An individual who bribes a government official will also be subject to criminal liability. The above crimes will not be imposed on an employee of a private company that accepts a bribe from the company's supplier, although the employee may still be held criminally liable for breach of trust.

8.2 What are the potential sanctions and how stringently have they been enforced?

An individual guilty of bribery may be sentenced to imprisonment and made to pay fines.

SECTION 9: OTHER MATTERS

9.1 Are there any other material issues in your jurisdiction that might affect a public M&A transaction?

The amended Mergers and Acquisitions Act became effective on January 8 2016. While the amendment emphasises the protection of minority interests, it also allows more flexibility in deal structure. It is anticipated that M&A transactions may be structured differently and that we will see more different types of M&A in the near future.