International Comparative Legal Guides

Merger Control 2020

A practical cross-border insight into merger control issues

16th Edition

Featuring contributions from:

A.M Wood and Company
(Inc. Abha Patel and Associates)
Accura Advokatpartnerselskab
Advokatfirmaet Grette AS
AixPartners UK LLP
AnesuBryan & David
Antitrust Advisory
Arthur Cox
Ashurst LLP
Bányaiová Vožehová, s.r.o., advokátní kancelář
Blake, Cassels & Graydon LLP
BUNTSCHECK Rechtsanwaltsgesellschaft mbH
COBALT
Constantina Mitsingas & Associates LLC
DeHeng Law Offices
Dittmar & Indrenius
DORDA Rechtsanwälte GmbH
Drew & Napier LLC

ELIG Gürkaynak Attorneys-at-Law
FORT
Hamilton
Ibarra Abogados
Ilyashev & Partners
King & Wood Mallesons
L&L Partners Law Offices
Lee and Li, Attorneys-at-Law
LEGA Abogados
LNT & Partners
LPA-CGR avocats
Marval O’Farrell Mairal
MinterEllison
MinterEllisonRuddWatts
Moraes Leitão, Galvão Teles,
Soares da Silva & Associados
Moravčević Vojnović | Partneri AOD
in cooperation with Schoenherr

MPR Partners | Maravela, Popescu & Roman
MSB Associates
Nagashima Ohno & Tsunematsu
Norton Rose Fulbright South Africa Inc
OLIVARES
Pinheiro Neto Advogados
Popov, Arnaudov & Partners
Portolano Cavallo
PUNUKA Attorneys & Solicitors
Schellenberg Wittmer Ltd
Sho & Kim
Sidley Austin LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Stibbe
URBAN FALATH GAŠPEREC BOŠANSKÝ
Wardyński & Partners
Yrarrázaval, Ruiz-Tagle, Ovalle, Salas & Vial
Zdolšek Attorneys at law

ICCLG.com
### Expert Chapters

1. **A Road Map to Assessing Local Market Mergers**  
   David Wirth & Tom Punton, Ashurst LLP

2. **Af Gammelt Jern Smedes Nye Våben: Vestager’s First Term in EU Merger Control and What to Expect Going Forward**  
   Frederic Depoortere, Giorgio Motta & Alexander K. Pascall, Skadden, Arps, Slate, Meagher & Flom LLP

3. **Economic Evidence in Retailer Mergers After Sainsbury’s/Asda: Death by GUPPI?**  
   Ben Forbes & Mat Hughes, AlixPartners UK LLP

### Q&A Chapters

<table>
<thead>
<tr>
<th>Page</th>
<th>Country</th>
<th>Firm and Contacts</th>
</tr>
</thead>
<tbody>
<tr>
<td>22</td>
<td>Algeria</td>
<td>LPA-CGR avocats: Rym Loucif</td>
</tr>
<tr>
<td>29</td>
<td>Argentina</td>
<td>Marval O’Farrell Maira: Miguel del Pino &amp; Santiago del Rio</td>
</tr>
<tr>
<td>36</td>
<td>Australia</td>
<td>MinterEllison: Geoff Carter &amp; Miranda Noble</td>
</tr>
<tr>
<td>45</td>
<td>Austria</td>
<td>DORDA Rechtsanwälte GmbH: Heinrich Kuehnert &amp; Lisa Todeschini</td>
</tr>
<tr>
<td>52</td>
<td>Bosnia &amp; Herzegovina</td>
<td>Moravčević Vojnović &amp; Partneri AOD in cooperation with Schoenherr: Srdana Petronijević &amp; Danijel Stevanović</td>
</tr>
<tr>
<td>61</td>
<td>Brazil</td>
<td>Pinheiro Neto Advogados: Leonardo Rocha e Silva &amp; José Rubens Battazza lasbech</td>
</tr>
<tr>
<td>68</td>
<td>Bulgaria</td>
<td>Popov, Arnaudov &amp; Partners: Hristo Kopenanov &amp; Emiliani Arnaudov</td>
</tr>
<tr>
<td>75</td>
<td>Canada</td>
<td>Blake, Cassels &amp; Graydon LLP: Julie Soloway &amp; Corinne Xu</td>
</tr>
<tr>
<td>84</td>
<td>Chile</td>
<td>Yrrrázával, Ruiz-Tagle, Ovalle, Salas &amp; Vial: Arturo Yrrrázával, Gerardo Ovalle &amp; Aníbal Vial</td>
</tr>
<tr>
<td>90</td>
<td>China</td>
<td>DeHeng Law Offices: Ding Liang</td>
</tr>
<tr>
<td>101</td>
<td>Colombia</td>
<td>Ibarra Abogados: Gabriel Ibarra Pardo &amp; Santiago Osorio Salazar</td>
</tr>
<tr>
<td>108</td>
<td>Croatia</td>
<td>Moravčević Vojnović &amp; Partneri AOD in cooperation with Schoenherr: Srdana Petronijević &amp; Zoran Soljaga</td>
</tr>
<tr>
<td>116</td>
<td>Cyprus</td>
<td>Constantina Mitsingas &amp; Associates LLC: Constantina Mitsingas</td>
</tr>
<tr>
<td>123</td>
<td>Czech Republic</td>
<td>Bányaiová Vožehová, s.r.o., advokátní kancelář: Lucie Dolanská Bányaiová &amp; Zuzana Kuhlánková</td>
</tr>
<tr>
<td>131</td>
<td>Denmark</td>
<td>Accura Advokatpartnerselskap: Jesper Fabricius &amp; Christina Heiberg-Grey</td>
</tr>
<tr>
<td>142</td>
<td>Estonia</td>
<td>FORT: Rene Frolov &amp; Liina Käis</td>
</tr>
<tr>
<td>150</td>
<td>European Union</td>
<td>Sidley Austin LLP: Ken Daly &amp; Steve Spinks</td>
</tr>
<tr>
<td>165</td>
<td>Finland</td>
<td>Dittmar &amp; Indrenius: Ilkka Leppihalme &amp; Katrin Puolakainen</td>
</tr>
<tr>
<td>177</td>
<td>France</td>
<td>Ashurst LLP: Christophe Lemaire &amp; Marie Florent</td>
</tr>
<tr>
<td>189</td>
<td>Germany</td>
<td>BUNTSCHECK Rechtsanwaltschaft mbH: Dr. Tatjana Mühlbach &amp; Dr. Andreas Boos</td>
</tr>
<tr>
<td>199</td>
<td>Greece</td>
<td>MSB Associates: Efthymios Bourtzalas</td>
</tr>
<tr>
<td>208</td>
<td>India</td>
<td>L&amp;L Partners Law Offices: Gurdev Raj Bhatia &amp; Kanika Chaudhary Nayar</td>
</tr>
<tr>
<td>218</td>
<td>Ireland</td>
<td>Arthur Cox: Richard Ryan &amp; Patrick Horan</td>
</tr>
<tr>
<td>228</td>
<td>Italy</td>
<td>Portolano Cavallo: Enzo Marasà &amp; Irene Picciano</td>
</tr>
<tr>
<td>237</td>
<td>Japan</td>
<td>Nagashima Ohno &amp; Tsunematsu: Ryohe Tanaka &amp; Kota Suzuki</td>
</tr>
<tr>
<td>245</td>
<td>Korea</td>
<td>Shin &amp; Kim: John H. Choi &amp; Sangdon Lee</td>
</tr>
<tr>
<td>252</td>
<td>Latvia</td>
<td>COBAL: Dace Silava-Tomsone &amp; Uģis Zeltiņš</td>
</tr>
<tr>
<td>260</td>
<td>Mexico</td>
<td>OLIVARES: Gustavo A. Alcocer &amp; José Miguel Lecumberri Blanco</td>
</tr>
<tr>
<td>267</td>
<td>Montenegro</td>
<td>Moravčević Vojnović &amp; Partneri AOD in cooperation with Schoenherr: Srdana Petronijević &amp; Danijel Stevanović</td>
</tr>
<tr>
<td>275</td>
<td>Netherlands</td>
<td>Stibbe: Floris ten Have &amp; Simone Evans</td>
</tr>
<tr>
<td>Country</td>
<td>Law Firm/Partner(s)</td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>-------------------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>New Zealand</td>
<td>MinterEllisonRuddWatts: Dr. Ross Patterson &amp; Kristel McMeekin</td>
<td></td>
</tr>
<tr>
<td>Nigeria</td>
<td>PUNUKA Attorneys &amp; Solicitors: Anthony Idigbe, Ebelechukwu Enedah &amp; Tobenna Nnamani</td>
<td></td>
</tr>
<tr>
<td>North Macedonia</td>
<td>Moravčević Vojnović i Partneri AOD in cooperation with Schoenherr: Srdana Petronijević &amp; Danijel Stevanović</td>
<td></td>
</tr>
<tr>
<td>Norway</td>
<td>Advokatfirmaet Grette AS: Odd Stemsrud &amp; Marie Braadland</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>Wardyński &amp; Partners: Andrzej Madala &amp; Marcin Kulesza</td>
<td></td>
</tr>
<tr>
<td>Portugal</td>
<td>Morais Leitão, Galvão Teles, Soares da Silva &amp; Associados: Carlos Botelho Moniz &amp; Pedro de Gouveia e Melo</td>
<td></td>
</tr>
<tr>
<td>Romania</td>
<td>MPR Partners</td>
<td>Maravela, Popescu &amp; Roman: Alina Popescu &amp; Magda Grigore</td>
</tr>
<tr>
<td>Russia</td>
<td>Antitrust Advisory: Evgeny Khokhlov &amp; Igor Panshensky</td>
<td></td>
</tr>
<tr>
<td>Serbia</td>
<td>Moravčević Vojnović i Partneri AOD in cooperation with Schoenherr: Srdana Petronijević &amp; Danijel Stevanović</td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>Drew &amp; Napier LLC: Lim Chong Kin &amp; Dr. Corinne Chew</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td>URBAN FALATH GAŠPEREC BOŠANSKÝ: Ivan Gašperec &amp; Marián Bošanský</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>Zdolšek Attorneys at law: Stojan Zdolšek &amp; Katja Zdolšek</td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td>Norton Rose Fulbright South Africa Inc: Rosalind Lake</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>King &amp; Wood Mallesons: Ramón Garcia-Gallardo</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>Hamilton: Mats Johnsson &amp; Martina Sterner</td>
<td></td>
</tr>
<tr>
<td>Switzerland</td>
<td>Schellenberg Wittmer Ltd: David Mamane &amp; Amalie Wijesundera</td>
<td></td>
</tr>
<tr>
<td>Taiwan</td>
<td>Lee and Li, Attorneys-at-Law: Stephen Wu &amp; Yvonne Hsieh</td>
<td></td>
</tr>
<tr>
<td>Turkey</td>
<td>ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak &amp; Öznur İnanılı</td>
<td></td>
</tr>
<tr>
<td>Ukraine</td>
<td>Ilyashev &amp; Partners: Oleksandr Fefelov</td>
<td></td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Ashurst LLP: Nigel Parr &amp; Duncan Liddell</td>
<td></td>
</tr>
<tr>
<td>USA</td>
<td>Sidley Austin LLP: James W. Lowe &amp; Marc E. Raven</td>
<td></td>
</tr>
<tr>
<td>Venezuela</td>
<td>LEĢA Abogados: Faustino Flamarique &amp; José Gregorio Torrealba</td>
<td></td>
</tr>
<tr>
<td>Vietnam</td>
<td>LNT &amp; Partners: Dr. Nguyen Anh Tuan, Tran Hai Thinh &amp; Tran Hoang My</td>
<td></td>
</tr>
<tr>
<td>Zimbabwe</td>
<td>AnesuBryan &amp; David: Simon Chivizhe &amp; Tafadzwa Masukume</td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td>Norton Rose Fulbright South Africa Inc: Rosalind Lake</td>
<td></td>
</tr>
</tbody>
</table>
1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Taiwan Fair Trade Commission ("TFTC") is the competent authority under the Taiwan Fair Trade Act ("TFTA") which is not only the regulatory body responsible for the execution of the TFTA, but also the agency of the authority which interprets the TFTA by rulings and stipulates the enforcement rules and relevant regulations of the TFTA.

1.2 What is the merger legislation?

The basic rule governing merger control in Taiwan is the TFTA, which was promulgated on 4 February 1991, became effective on 4 February 1992, and was last amended on 14 June 2017 with the newly amended Enforcement Rules of the TFTA ("Enforcement Rules") being announced on 2 July 2015. Moreover, the TFTC, as the enforcement authority of the TFTA, has stipulated several supplementary rules on merger control, including the Directions for Enterprises Filing for Mergers, the TFTC Disposal Directions (Guidelines) on Handling Merger Filings, and the TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers.

1.3 Is there any other relevant legislation for foreign mergers?

The TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers are stipulated for the purpose of handling merger filings related to foreign mergers. Despite the guidelines, the filing requirements (thresholds, timeframe, documents, etc.) for foreign mergers are the same as those for domestic transactions, though the TFTC will take the local effect into account when determining whether it will exercise the jurisdiction.

1.4 Is there any other relevant legislation for mergers in particular sectors?

No. However, under several of the TFTC’s guidelines on sectoral control of certain industries affecting public welfare, such as airlines, banking/finance, or 4C industries, the TFTC will take certain factors into consideration when reviewing a merger involving that particular industry.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a “merger” and how is the concept of “control” defined?

Under the TFTA, a “combination” that falls under the definition of combination, and which also meets certain thresholds as prescribed by the TFTA, requires 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. The term “control” is not further defined under the TFTA, and thus should be judged on a case-by-case basis.

2.2 Can the acquisition of a minority shareholding amount to a “merger”?

Acquisition of a minority shareholding will constitute a combination only if it falls under the combination defined under (ii), (iv) or (v) as set forth in question 2.1.

2.3 Are joint ventures subject to merger control?

The term “joint venture” is not defined under the TFTA. However, the TFTC ruled in 2002 that the establishment of a joint venture, whether it is a newly incorporated enterprise or an existing enterprise, will be subject to merger control if it constitutes a combination defined under the TFTA. Note that the TFTC does not further categorise a joint venture into different types based on its function or corporate structure. Therefore, an establishment of a joint venture is likely to be covered by the merger control rules, as long as it is classed as a combination under the TFTA and the parties thereof meet the filing thresholds.

2.4 What are the jurisdictional thresholds for application of merger control?

According to Article 11 of the TFTA, a notification must be filed with the TFTC prior to the closing of the proposed transaction if:
(i) as a result of the combination, any of the enterprises will acquire at least one-third of the market share;
(ii) any of the enterprises participating in the combination holds a market share of at least one-quarter before the combination; or
(iii) the preceding fiscal year’s turnover of an enterprise participating in the combination exceeded the amount set forth by the TFTC, i.e.,
   ■ the aggregate global turnover of all the enterprises to a combination in the preceding fiscal year exceeded NTD 40 billion (approximately EUR 1.2 billion), and each of at least two of the enterprises had a turnover in Taiwan of at least NTD 2 billion (approximately EUR 60 million) in the preceding fiscal year;
   ■ for combination among non-financial enterprises, one of the enterprises generated a turnover in Taiwan of at least NTD 15 billion (approximately EUR 450 million) in the preceding fiscal year while the other enterprise generated a turnover in Taiwan of at least NTD 2 billion (approximately EUR 60 million) in the preceding fiscal year; or
   ■ for a combination between financial enterprises, one of the enterprises generated an annual turnover of at least NTD 30 billion (approximately EUR 900 million), while the other enterprise generated an annual turnover of at least NTD 2 billion (approximately EUR 60 million).

When determining the turnover, Paragraph 2, Article 11 of the TFTA specifically stipulates that the turnover should be calculated on a “group/consolidated” basis, i.e., including the sales amount of an enterprise that is controlled by, controlling, or affiliated with the enterprise in the combination, and of an enterprise where both itself and the enterprise in the combination are controlled by the same enterprise or enterprises.

Article 6 of the Enforcement Rules further explains the “control/subordinate” relation under Article 11 Paragraph 2 of the TFTA above. To be specific:
(i) When enterprise A holds more than half of the shares in enterprise B, or if enterprise A directly/indirectly controls the business operation or the appointment or discharge of the personnel of enterprise B, enterprise A can be viewed as having control over enterprise B. Furthermore, in the event that the whole or the major part of the business or assets of enterprise B is assigned or leased to enterprise A, or where enterprise A operates jointly with enterprise B on a regular basis, or is entrusted by enterprise B to operate enterprise B’s business which results in enterprise A having controlling power over enterprise B, this situation can also be seen as a type of “control/subordinate” relation.
(ii) If a person or an organisation and/or its related persons hold a majority of the total number of outstanding voting shares or the total capital of another enterprise, it should be concluded that the “control/subordinate” relation exists among the aforementioned entities.
(iii) The “control/subordinate” relation is presumed to exist if a majority of the executive shareholders or directors in a company are simultaneously acting as the executive shareholders or directors in another company, or if a majority of the total number of outstanding voting shares or the total amount of the capital interest of a company and another company are held by the same shareholders.

It should be noted that for foreign companies, only the sales in Taiwan are relevant to calculating the turnover thresholds, which include the sales made “in” Taiwan by the parties’ affiliates, branch offices, or any entity defined by Paragraph 2, Article 11 of the TFTA, and “into” Taiwan by direct sales to Taiwanese customers.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes. This is because the TFTA does not limit the filing threshold assessment to the overlapping products only.

A foreign-to-foreign transaction will be subject to the Taiwan merger control regulations as long as it falls under the definition of combination as stated in question 2.1 and it meets any of the filing thresholds as provided in question 2.4.

However, according to the Guidelines on Handling Extraterritorial Mergers which was last amended in December 2016, the TFTC may decide to waive its jurisdiction over a pure foreign-to-foreign transaction after considering the following factors:
(a) whether there will be a direct, substantial, and reasonably foreseeable effect on the domestic market;
(b) the relative weight of the merger’s effects on the relevant market of Taiwan and the foreign countries;
(c) the nationalities, locations, and principal places of business of the combining enterprises;
(d) the explicitness and foreseeability of the intent to affect market competition in Taiwan;
(e) the likelihood of creating conflicts with the laws or policies of the home countries of the combining enterprises;
(f) the feasibility of enforcing administrative dispositions;
(g) the effect of enforcement on the foreign enterprise(s);
(h) international conventions and treaties, or provisions of international organisations; and
(i) whether any party has any production or service facilities, distributors, agents, or other substantive sales channels within the territory of Taiwan.

Thus, theoretically, parties to an extraterritorial combination may, based on their own assessment of the factors above, conclude that no filing is required in Taiwan due to lack of local effect arising from the proposed transaction, though, legally speaking, it is the TFTC which has the final say on this matter.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

The following circumstances can be exempted from filing a notification even if the filing thresholds are met:
(1) where an enterprise or its 100% held subsidiary combines with another enterprise in which it already holds 50% or more of the voting shares or capital contribution;
(2) where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise combine;
(3) 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. Note that “substantial part” is not further defined under the TFTA and thus should be judged on a case-by-case basis;
where an enterprise (a company limited by shares) 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; or
(5) where a single enterprise reinvests to establish a subsidiary and holds 100% shares or capital contribution of such a subsidiary.

Meanwhile, on 18 July 2016, the TFTC published a ruling to exempt the following types of transactions from the requirement to make a filing:
(1) A company merging with another company that it is under the control of the latter company or is its subordinate company.
(2) A company merging with another company where both are under the control of the same controlling company.
(3) A company transferring its part of (or entire) voting shares or capital contribution of a third company to another company that is under control of the latter company or is its subordinate company.
(4) A company transferring its part of (or entire) voting shares or capital contribution of a third company to another company that is under the control of the same controlling company.

As the TFTA is silent on this issue, whether a merger involving several stages should be subject to several or one combination notification should be reviewed and determined on a case-by-case basis.

3 Notification and its Impact on the Transaction Timetable

A notification is compulsory if the filing thresholds are met. There is no deadline for notification, but the parties cannot close the transaction before the TFTC grants clearance.

For an extraterritorial transaction, the TFTC may not exercise its jurisdiction when such combination has no direct, substantial and reasonably foreseeable effect on the Taiwan market (local effect). Therefore, the parties to an extraterritorial transaction can reasonably foresee that the TFTC may not exercise its jurisdiction when such combination has no direct, substantial and reasonably foreseeable effect on the Taiwan market (local effect).

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 NTD 200,000 (approximately EUR 6,000) and NTD 50 million (approximately EUR 1.5 million).

4.1 Where is the notification form prescribed by the TFTC?


4.2 What is the standard format for the Application Form (Chinese version)?

Yes, the parties need to fill in the application form and annexes prescribed by the TFTC. In a standard notification, the parties need to submit a combination notification form (“Application Form”) with the required documents and information. The standard format for the Application Form (Chinese version only) can be found on the TFTC’s official website: http://www.tftc.gov.tw/internet/main/doc/docList.aspx?uid=1112.
A simplified procedure in which the waiting period can be shortened is available for the circumstances below:

1. The enterprise files the notification for reaching the turnover threshold, but its respective market shares meet one of the following criteria:
   i. In a horizontal merger, the combined market shares after the merger are less than 20%.
   ii. In a horizontal merger, the combined market shares after the merger are less than 25% and the market share of one of the participating parties is less than 5%.
   iii. In a vertical merger, the combined market share in each individual market is less than 25%.

2. In the case of a conglomerate merger, the factors below are considered, and it is established 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.

3. 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. However, in certain situations, such as where the merger involves major public interest, or the entry barriers are high, the TFTC should have the power to request the parties to follow the general procedure even if they have met the above-mentioned criteria of simplified procedure.

There is no other informal way to speed up the clearance timetable.

3.10 Who is responsible for making the notification?

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 leased from, another enterprise(s) of the operations or assets, regularly runs operations jointly with another, or is commissioned by another enterprise to run operations; (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. Additionally, the Enforcement Rules provide that in a combination type of acquisition of shares or capital contributions of another enterprise, if a control/subordinate relation exists between the acquirers or the acquirers are under control of one or more entities, the filing party should be the ultimate parent company of the acquirers.

3.11 Are there any fees in relation to merger control?

No filing fee is required.

According to Article 18 of the Regulations Governing Public Tender Offers for Securities of Public Companies, the length of the public tender offer period cannot be fewer than 20 days or more than 50 days. However, the offeror may apply for an extension of the public tender offer period where there is legitimate justification. In that case, the extension period may not exceed a total of 30 days.

When the envisaged share acquisition is conducted by way of public tender offer, the public tender offer cannot be successfully closed without approvals from relevant competent governmental authorities, including the TFTC’s clearance over the transaction, if applicable. Therefore, the parties will need to observe the requirements on the tender offer period as explained above, and subsequently try to obtain clearance from the TFTC during that period.

Furthermore, the newly added Paragraph 10, Article 11 of the TFTA stipulates that the TFTC has to provide necessary information to and seek opinions from the target in a hostile takeover so as to ensure the target’s right to information and to express opinions. Adding this new requirement, it is foreseeable that the acquirer would be facing great time pressure to obtain the TFTC’s clearance if the hostile takeover is conducted via a public tender offer.

3.13 Will the notification be published?

During the review of a notification, the TFTC may seek the public’s opinion by publishing the basic information of the proposed transaction on its website if it determines to exercise its jurisdiction over the transaction. In that case, the parties’ names, products or services involved and a general description of the transaction type will be disclosed. Nonetheless, if the clearance comes with conditions where the TFTC will render competition assessment will be included. In that case, the extension period may not exceed a total of 30 days.

Tender Offers for Securities of Public Companies, the length of the public tender offer period cannot be fewer than 20 days or more than 50 days. However, the offeror may apply for an extension of the public tender offer period where there is legitimate justification. In that case, the extension period may not exceed a total of 30 days.

The general principle is that, after all relevant factors are considered (see more details below) and there is no suspicion of obvious competition restraints, the TFTC can then conclude that the overall economic benefits of the merger outweighs the disadvantages resulting from competition restraint. Otherwise, the overall economic benefits shall be further examined to determine whether the overall economic benefits of the merger outweighs the disadvantages resulting from competition restraint.
Though the efficiency argument is certainly considered by the TFTC when determining whether the proposed transaction will benefit the economy overall, there is no case precedent on how the TFTC weighs this factor.

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

As explained in question 3.13, if a combination notification is filed with the TFTC and the TFTC decides to exercise jurisdiction on the transaction, it will post a summary of the proposed transaction on its website for one week to seek comments from the public. In some cases where the TFTC considers that the transaction will have a great impact on the local market, it will hold a symposium or a public hearing to invite competitors, upstream and downstream enterprises, other competent authorities and scholars to provide their opinions.

According to the TFTA, while conducting investigations, the TFTC may proceed in accordance with the following procedures: (i) to require the parties and any related third parties to make statements; (ii) to notify relevant agencies, organisations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits; and (iii) to dispatch personnel for any necessary on-site inspection of the office, place of business, or other locations of the relevant organisation or enterprises.

If any person subject to an investigation refuses the investigation without justifications, or refuses to appear when called to answer queries before the TFTC or to submit books and records, documents, or exhibits upon request by the set time limit, an administrative penalty of no less than NTD 50,000 (approximately EUR 1,500), but no more than NTD 500,000 (approximately EUR 15,000) can be imposed on the person. If any person continues to withhold cooperation without justification upon another notice, the TFTC may continue to issue notices of investigations, and may successively assess an administrative penalty of no less than NTD 100,000 (approximately EUR 3,000), but no more than NTD 1 million (approximately EUR 30,000) each time until the person does not cooperate with the investigation, appear when called to answer queries, or submit books and records, documents, or exhibits upon request.

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

The regulatory process ends with the TFTC’s decision on the merger filing. The decision generally falls into four categories: (i) a waiver to the jurisdiction (for extraterritorial transactions where no local effect will arise therefrom); (ii) clearance without condition; (iii) clearance with conditions; and (iv) a prohibition on the combination.

Though the proposal of remedy mechanism is not provided in the TFTA, our experience suggests that the parties may present remedies at any time before the TFTC makes its decision. That is, during the waiting period of the TFTC’s review process, 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 be reset 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.

No case precedent suggests that the TFTC has ever imposed “structural” remedies (such as divestment of assets or disposal of shares) in foreign-to-foreign mergers. However, the TFTC has certainly attached behavioural remedies to only a few foreign-to-foreign mergers, most of which involve sensitive industries such as semiconductor or technology licensing.

The parties may submit a remedy proposal during the TFTC’s review process, as long as it is within the waiting period. Please refer to question 5.2 for details.
5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

Since the primary purpose for the remedies is that they must eliminate the anti-competition concerns, it is well-recognised by competition authorities of most jurisdictions that divestitures, which are a type of structural remedy, are the best way to achieve such a goal. In line with the above international practices, the TFTC seems to accept structural remedies for the divestitures (disposal of shares held by the party) and impose such remedies as conditions to its clearance. In fact, the public records suggest that the TFTC has indeed adopted the divestment approach in a transaction involving a cable television business.

In September 2012, the TFTC updated the Directions (Guidelines) on Handling Merger Filings (“Merger Guidelines”) to include its official standards for remedies. According to the Merger Guidelines, the remedies which the TFTC can impose as conditions are:

(1) Measures impacting the structural aspect: order the parties to take measures to dispose of the shares or assets in their holding, transfer part of their operations, or remove personnel from certain positions.

(2) Measures impacting the behavioural aspect: order the parties to continue to supply critical facilities or essential elements to businesses outside the merger, order the parties to license such businesses to use their intellectual property rights, and prohibit the parties from engaging in exclusive dealing, discriminatory treatment, and tie-in sales.

Despite the foregoing, the TFTC still reserves the right to impose other types of remedy on a case-by-case basis. Also, the Merger Guidelines point out that the TFTC may seek the parties’ opinions on the possible remedy before it makes the final decision.

5.6 Can the parties complete the merger before the remedies have been complied with?

It is acceptable for the parties to complete the merger prior to their compliance with the remedies, depending on the nature of that remedy. The TFTC will review the parties’ behaviour or divestment status periodically to ensure that the parties do not violate the conditions imposed by the TFTC.

5.7 How are any negotiated remedies enforced?

Since the remedies will serve as conditions to the TFTC's clearance, the parties will have to comply with the conditions. In cases of any violation discovered by the TFTC, the TFTC may impose the penalties including the prohibition of the combination, divestiture, transfer of the business acquired, and/or removal of personnel designated by the enterprises. The TFTC also has the power to impose an administrative fine of between NTD 200,000 (approximately EUR 6,000) and NTD 50 million (approximately EUR 1.5 million).

5.8 Will a clearance decision cover ancillary restrictions?

It is unclear as to whether ancillary restrictions (such as non-competition agreement) will be covered by a clearance since no case precedent is available.

5.9 Can a decision on merger clearance be appealed?

The TFTC's decision is an administrative decision, which can be appealed by the parties or any interested parties to the High Administrative Court within two months of receipt of the said decision.

The procedure of administrative litigation is akin to the procedure of civil litigation. The court will hear the case and both parties, i.e., the TFTC as the defendant and the parties subject to the decision as the plaintiff, will be in front of judges 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.

5.10 What is the time limit for any appeal?

The TFTC’s decision can be appealed by the parties or any interested parties to the court within two months of receipt of the decision.

5.11 Is there a time limit for enforcement of merger control legislation?

The statute of limitation for the TFTC to enforce merger control regulations is five years.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

For some cross-border transactions, the TFTC will indeed consult the agencies of the parties’ home countries while reviewing the filing. Also, the TFTC has entered into certain cooperation agreements or memorandums with at least the following countries for the application of competition regulations: Australia; Canada; France; Hungary; Mongolia; and New Zealand. Any communication between the TFTC and these countries can be anticipated.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

According to public information, the TFTC reviewed a total of 67 merger filing cases in 2018, and one case was prohibited.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

We are not aware of any proposal for reform of the merger control regime in Taiwan in the near future.

6.4 Please identify the date at which your answers are up to date.

These answers are up to date as of 1 September 2019.
7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

In July 2019, the TFTC announced that it plans to proceed with eight research projects in 2020 regarding the competition policy in the era of big data. One of the projects is related to merger control which involves the study of comparative laws on how to handle extraterritorial combinations. However, as its title suggests, the focus of the aforesaid study seems to be on the evaluation of whether the jurisdiction should be exercised by a competition agency when the present transaction is conducted outside its presiding territory, but not on the discussion of applying the current merger control rules to digital mergers.

Meanwhile, the TFTC has established a digital economy competition policy group in 2017 to research the related topics arising from technology innovation and industry development for digital change and to do some precautionary preparation for new competition issues. Nevertheless, though the TFTC Chairperson Huang has also mentioned the TFTC’s enforcement priority described above to the public several times, whether the update of the current competition law will include merger control regimes is not particularly specified.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

No (from what is available as public information).

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

According to the public information, the TFTC has never indicated it has difficulty in handling digital mergers based on the current merger control rules.
Stephen Wu is the partner leading the competition law practice group in Lee and Li. He is also the founding chairman and active member of the Competition Law Committee of the Taipei Bar Association. He has successfully represented domestic and international clients in handling numerous antitrust filing, cartel investigation and unfair competition cases. He has co-authored numerous articles and Taiwan chapters for many competition law publications and has been recognised as being among the world's leading competition lawyers by Who’s Who Legal – The International Who’s Who of Competition Lawyers & Economists since 2012. He is also active in the public policy reform projects in diversified practice areas, such as knowledge-based economics, corporate governance, M&A transactions, telecommunications and media convergence, venture capital, limited partnerships, industrial holding companies, and investors’ protection, etc.

Lee and Li, Attorneys-at-Law
8F, No. 555, Sec. 4, Zhongxiao E. Rd.
Taipei
Taiwan
Tel: +886 2 2763 8000 ext. 2388
Email: stephenwu@leeandli.com
URL: www.leeandli.com

Yvonne Hsieh is a senior counsellor of Lee and Li. She joined Lee and Li in 2000 and focuses her practice on mergers and acquisitions, international investment, antitrust and competition laws, securities investment, and telecommunication and broadcasting. She has handled several tender offer cases in Taiwan, and has assisted acquirers in privatising listed companies. She is very experienced in handling antitrust filings, and has successfully represented numerous clients in handling antitrust filing. She has been recognised as being among the world’s leading competition lawyers by Who’s Who Legal – The International Who’s Who of Competition Lawyers & Economists since 2013.

Lee and Li, Attorneys-at-Law
8F, No. 555, Sec. 4, Zhongxiao E. Rd.
Taipei
Taiwan
Tel: +886 2 2763 8000 ext. 2188
Email: yvonnehsieh@leeandli.com
URL: www.leeandli.com

Named by the Global Competition Review (“GCR”) as one of the elite firms in Taiwan for outstanding performance in the competition law practice, Lee and Li has been recognised as the leading advisor of competition law practice in Taiwan. Lee and Li has a practice group on antitrust/competition law with expertise and extensive experience in handling merger filing, cartel, antitrust and unfair competition cases for various industries. We provide effective representation and strategic advice, and have successfully represented local and international clients in most of the landmark cases before the Taiwan Fair Trade Commission. Lee and Li has unmatched capabilities and experiences in the antitrust practice in Taiwan, and has handled more than 30 merger filings within the past two years for various multinational companies. Lee and Li has also assisted many Taiwanese companies on other antitrust-related investigations and litigations.

www.leeandli.com
Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Law
Business Crime
Cartels & Leniency
Class and Group Actions
Competition Litigation
Construction & Engineering Law
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investments
Franchiae
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media and Internet Laws
Trade Marks
Vertical Agreements and Dominant Firms