

TAIWAN MERGER CONTROL: A BRIEF OVERVIEW

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INTRODUCTION

With economic recoveries, corporate minds often turn to thoughts of merger. Companies that have survived hard economic times think about what bargains they can strike with regards to market share and key technologies, or even to complete previously unfinished business. With Taiwan a regional technology hub with strong cross-strait ties to mainland China manufacturing, Taiwan often shows up on multijurisdictional merger-control hit lists. Following is a brief of some things to consider with regards to Taiwan's merger-control scheme and its notification and approval requirements.

THRESHOLDS FOR MERGER NOTIFICATION

Merger control in Taiwan is regulated under the Fair Trade Law (FTL), under which the competent authority for antitrust matters, including merger control, is the Fair Trade Commission (FTC). Under FTL Article 6, mergers are broadly defined beyond typical mergers and acquisitions to include joint operations or control of business.

FTL Article 11 sets certain thresholds with regard to the merger as well as the related companies. If a merger meets these thresholds, a notification should be submitted 30 days prior to the implementation of the merger – i.e., a pre-merger notification. If such notification is not filed, the parties may face fines ranging from TWD 100,000 to 50,000,000 for each violation of the FTL and, potentially, orders to cease or to unwind the merger.

Mergers of companies outside of Taiwan may in principle also be covered by Taiwan merger rules, based on the FTC's "Guidelines for Handling Extraterritorial Merger Cases" ("Guidelines"). The Guidelines stipulate, among others, that the threshold requirements shall be assessed based on revenues generated within the territory of Taiwan, and/or on the amount of services imported from a foreign enterprise into Taiwan. In principle, and according to the Guidelines, only those mergers will be looked at that will have a "direct, substantial, and reasonably foreseeable effect" on the Taiwan market. The FTC for such determination may evaluate a variety of economic and factual circumstances. Finally, the Guidelines stipulate that the ultimate foreign controlling parent company shall be the responsible entity for filing of the pre-merger notification.

FTL Article 11 covers the triggers for an obligation to file a notification if:

- as a result of the merger the enterprise(s) will have 1/3 of the market share;
- one of the enterprises in the merger has 1/4 of the market share; or
- sales for the preceding fiscal year of the two enterprises in the merger exceeds

the threshold amounts publicly announced by the competent authorities.

The threshold amounts are TWD 10 billion in sales volume for an acquiring enterprise (raised to TWD 20 billion for financial institutions) and, as a cumulative condition, TWD 1 billion for the acquisition target. Volume of sales generally relates to the total

sales of an enterprise within the Taiwan territory. Defining the relevant market share may sometimes be more difficult to determine, depending on the industry involved, and such definition may thus become a key element in a pre-merger legal due diligence.

EXCEPTIONS FROM NOTIFICATION

Under FTL Article 11-1, a merger is exempt from the notification requirement if either one of the following conditions is fulfilled:

- one of the enterprises already has 50% or more of the enterprise with which it plans to combine;
- the enterprises being combined are already subsidiaries of the same parent company;
- an enterprise is selling a distinct division to a newly established enterprise; or
- one of the enterprises plans to engage in a qualified stock redemption plan.

A notification may sometimes be avoided by sending an informal request to the FTC, asking that the authority decline jurisdiction without the filing of a notification. Such “pre-pre-notification” may lead to a substantially quicker result than the formal notification process.

CONCLUSION

Companies undergoing multi-jurisdictional merger control analysis may want to prepare information regarding their Taiwan entities, sales figures and market shares. With this information, the analysis can often be handled quite quickly, and at least there are good options for a relatively informal declining of jurisdiction by the FTC should preliminary analysis indicate that one of the enumerated thresholds has been met. Where the FTC does exercise approval authority, we have also found the FTC flexible in accepting international viewpoints on the effects of a proposed merger.

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