

IN-DEPTH

Merger Control

TAIWAN



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Merger Control

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Taiwan

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Summary

INTRODUCTION

YEAR IN REVIEW

THE MERGER CONTROL REGIME

OTHER STRATEGIC CONSIDERATIONS

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

Taiwan established comprehensive regulation of antitrust and unfair competition activities when the Fair Trade Act was enacted in 1991 and made effective in 1992. There have been several amendments since, and the amendment in 2015 that modified more than 70 per cent of the provisions set forth in the original Fair Trade Act is one of the most significant amendments to date. The Fair Trade Act was most recently amended in June 2017 (the 2017 amendment), when the waiting period for a merger application was extended in a practical manner and additional procedures were added to merger control review.

Taiwan is active in the international community in respect of competition policy and law, and in particular in respect of merger control. Since 1997, the Taiwan Fair Trade Commission (TFTC) has created and maintained the Asia-Pacific Economic Cooperation Forum (APEC) Competition Policy and Law Database on behalf of the 21 member economies that comprise the APEC. The Database allows APEC's member economies to share experiences and exchange views on complex issues of competition policy and law. Additionally, the TFTC is a member of the International Competition Network (ICN), which was created in 2001 to provide competition authorities with an informal, specialist venue for maintaining regular contact with competition authorities in other jurisdictions and addressing practical competition concerns.^[2] Taiwan also regularly participates as an observer in discussions on competition law in the Organisation for Economic Co-operation and Development as well as regional forums, where it shares information and receives input from other jurisdictions.

Year in review

Recent TFTC reviews of extraterritorial mergers

SINTOKOGIO, Ltd and Elastikos (France) SAS

SINTOKOGIO, Ltd (SINTO) intended to acquire 100 per cent of the shares of Elastikos (France) SAS (Elastikos); thereby gaining control over Elastikos' business operations and personnel appointments. SINTO then filed a pre-merger notification for such contemplated acquisition with the TFTC. On 13 March 2024, the TFTC decided not to prohibit the proposed acquisition.

SINTO's main products were metal abrasives, sand blasting machines and their components, plastic moulding machines and their components, and dust collectors and their components, whereas Elastikos engaged in the manufacturing and sales of metal abrasives. Because both SINTO and Elastikos were engaged in the manufacturing and selling of metal abrasives, the proposed acquisition is considered a horizontal merger.

Upon review of the pre-merger notification, the TFTC found that the proposed acquisition is extra-territorial in nature as it occurred outside Taiwan and numerous manufacturers imported metal abrasives into Taiwan as part of its regular business practice. As such,

SINTO and Elastikos would continue to face competition from existing competitors even after the proposed acquisition. Moreover, SINTO and Elastikos would remain subject to market competition after the proposed acquisition, making it challenging for them to unilaterally increase the prices of their products in the market. The TFTC also noted that the main customers in the relevant market are manufacturers in the industrial manufacturing sector, who have considerable bargaining power with their counterparties and can easily seek alternative sources of supply within a reasonable time, thereby further restraining SINTO and Elastikos from any unilateral increase of their product price and preventing destruction of the market balance.

Given the foregoing, the TFTC concluded that because the effect of restricting competition resulting from the proposed acquisition is not significant, the TFTC will not prohibit the proposed acquisition.

Walsin Lihwa Corporation, Cogne Acciai Speciali SpA and Special Melted Products Limited

Walsin Lihwa Corporation intended to indirectly acquire more than one-third of the shares of Special Melted Products Limited (SMP) through its subsidiary, Cogne Acciai Speciali SpA (CAS), and to gain control of the business operations and personnel appointments at SMP. Walsin Lihwa Corporation filed a pre-merger notification with the TFTC. On 2 August 2023, the TFTC decided not to prohibit the proposed acquisition.

Walsin Lihwa Corporation and CAS, and SMP all engaged in the production and sale of products such as stainless-steel billets and straight bars, and CAS and SMP both engaged in the manufacturing and sales of products such as nickel alloy billet and straight bars; hence, the parties were horizontal competitors in the market. Moreover, billets were the main upstream raw materials for straight bars, which indicated a potential vertical supply relationship between the parties.

The TFTC found that as SMP mainly operated in the European and US markets and did not sell any products to Taiwan in 2022, nor did it have plans to do so in the future, the proposed acquisition would not affect the existing business of Walsin Lihwa Corporation in stainless steel billets, straight bars and the like within Taiwan. Walsin Lihwa Corporation would still continue to face competition from other domestic and overseas competitors in Taiwan. Furthermore, as Walsin Lihwa Corporation does not manufacture or sell nickel alloy billets and straight bars, the proposed acquisition would not affect the market structure for these products locally either.

As such, the TFTC concluded that the effect of restricting competition resulting from the proposed acquisition is not significant, and decided not to prohibit the proposed acquisition.

Recent proposed mergers prohibited by the TFTC

Between the promulgation of the Fair Trade Act in 1992 and February 2024, a total of 7,291 applications have been submitted for merger approval (for filings made before the amendments to the Fair Trade Act in February 2002) or merger notification (for filings made since February 2002, subsequent to the amendments to the Fair Trade Act). Of those filings, only 12 of the proposed transactions have been refused or prohibited by the TFTC, representing approximately 0.1 per cent of all applications; however, no statistics

are available in respect of those mergers that are approved or cleared subject to specific conditions. Such conditions are not uncommon, particularly in cases requiring more complex analysis and a detailed balance between overall economic benefits and restraints on competitiveness. Some conditions may be very cumbersome for the parties and, in effect, prohibit the completion of the deal.

In regard to mergers approved or cleared subject to specific conditions, the TFTC would continue to monitor whether the parties indeed comply with the conditions after the approvals or clearance. A notable case in this regard is: Dafu Media Co, Ltd (Dafu Media), Kbro Co, Ltd (Kbro), and 12 cable television system businesses owned by Kbro were parties to a merger cleared with conditions in 2010. Two of the merger conditions stipulated that the parties shall not operate jointly with other cable television system businesses without the TFTC's consent, nor sell television programmes jointly with other cable television system businesses. However, in January 2024, they were found by the TFTC to be violating both of these two conditions. The parties were ordered to rectify the violations, and each of Dafu Media and Kbro received a fine in the amount of NT\$50 million for that violation.

In 2023, 42 merger notifications were filed with the TFTC, none of which was prohibited. Since the start of 2024, 12 merger notifications have been filed to date, and none had been prohibited as at February 2024 according to the statistics available as at 20 March 2024.

Cashbox Partyworld Co, Ltd and Holiday Entertainment Co, Ltd

The only decision prohibited by the TFTC in 2019 was the acquisition contemplated by Cashbox Partyworld Co, Ltd of 100 per cent of the shares in Holiday Entertainment Co, Ltd, to control Holiday Entertainment's business operation or the appointment or discharge of its personnel. Cashbox Partyworld and Holiday Entertainment were the top two market share leaders offering, as their main business, audiovisual and singing services by providing customers with the equipment and venue for karaoke in Taiwan.

The proposed merger was approved by the TFTC subject to specific conditions in 2003, but it did not take place. After failing to complete the initial transaction, the parties applied to the TFTC again in 2006 for clearance but, to the parties' surprise, the TFTC prohibited completion of the contemplated transaction because the parties' market share had increased and the karaoke market was not the same as in 2003.

In 2019, the parties submitted a merger filing for the third time, in which they asserted a new and broader definition of the relevant market that included the markets of live platform, online karaoke, apps used for singing and portable mini karaoke booths (an independent space for a single person to sing karaoke, which is usually located in public areas such as department stores, cinemas or hotels). However, the TFTC concluded that the relevant market should cover only the provision of audiovisual and singing services. For the calculation of the parties' market share in the relevant market, the TFTC considered that the market share should be determined by the parties' revenues rather than the number of karaoke rooms authorised by upstream suppliers or the equipment for audiovisual and singing services provided by each entity, which was never suggested by the parties.

As such, the TFTC determined that the true market shares of the parties after the proposed acquisition would reach 45.35 per cent in the aggregate. Apart from the high market share, Cashbox Partyworld and Holiday Entertainment would no longer act as each other's

principal competitor. Hence, it would drastically increase the incentive for the parties to increase prices. Even if the parties agreed to commit to various post-merger commitments, including price maintenance for five years, no investment in overseas audiovisual or singing services for five years, and no abuse of their dominant market position, none of these commitments would be sufficient to remove the TFTC's concern of the potential anticompetitive conduct of the parties once the proposed acquisition occurred.

Therefore, the TFTC prohibited the proposed acquisition again on 21 August 2019, indicating that its harm to competition was not outweighed by the overall economic benefits. Cashbox Partyworld brought a lawsuit against the TFTC for this prohibition, which was rejected by the Taipei High Administrative Court on 26 November 2020. According to an official announcement from Cashbox Partyworld, it appealed this decision to the Supreme Administrative Court, but this appeal was withdrawn.

The merger control regime

When two or more enterprises merge or combine their businesses, greater efficiency is often achieved in their operations. Alongside this efficiency, however, a concentration in the market share will often occur. The objective of the TFTC in regulating mergers is to prevent enterprises from raising the concentration of a market to the extent that it weakens or impedes free competition in Taiwan through a proposed merger. To avoid these undesirable results, the Fair Trade Act requires parties intending to merge (as defined by the statute) to notify the TFTC when certain market thresholds are attained. The TFTC is then given an opportunity to review and, if necessary, prohibit or impose conditions on the proposed merger.

Covered transactions

Any transaction that is considered a merger^[3] under Article 10 of the Fair Trade Act is subject to pre-merger notification under Taiwan law. The following transactions are covered:

1. two enterprises merge into one;
2. an enterprise acquires the voting shares of, or makes capital contributions to, another enterprise equal to more than one-third of the total voting shares or capital of the other enterprise;
3. an enterprise obtains an assignment or a lease of all or substantially all of the business or assets of another enterprise;
4. an enterprise jointly operates a business with another enterprise regularly or agrees to operate another enterprise's business under a trust agreement; or
5. an enterprise directly or indirectly controls the business operations or the appointment or discharge of personnel of another enterprise.

Under the Fair Trade Act, when determining whether the one-third of voting shares and capital contributions threshold specified in Article 10(b) is met, all shares and

capital contributions of the subordinate companies controlled by the same company (or companies) as the merger participant must be included in the calculation.

In addition, the TFTC has promulgated the Working Guidelines for TFTC Providing Pre-Notification Consultancy Services in 2021. Under these Guidelines, enterprises may consult the TFTC once for each transaction on issues concerning pre-merger notification, such as whether a proposed transaction would be considered a merger, whether a proposed transaction is subject to pre-merger notification and the procedures applicable to the proposed transaction; however, the consultant's opinion is for reference only and has no binding effect.

Filing thresholds: market share and turnover

Under Article 11 of the Fair Trade Act, two types of thresholds have been set forth to determine whether a merger notification should be filed with the TFTC. The first is based on market share and the second is based on the amount of turnover generated in the preceding fiscal year by the parties to the proposed merger.

In determining market share, the TFTC will take into account the production, sales, inventory and data relating to the value and volume of imports and exports for the applicable enterprise and the particular market in which it operates. The market share threshold requires that the applicable party (or parties) files a merger notification with the TFTC under two circumstances:

1. if, as a result of the merger, the enterprises will possess one-third of the market share of the area in which they operate; or
2. if, regardless of the merger, one of the enterprises intending to merge possesses one-quarter of the market share of the area in which it operates.

Regarding the market share threshold, the TFTC is most concerned about having the chance to review mergers that will create a concentration in a particular market, which will be determined by the consideration of various factors (including sales, which is also the factor used for the second type of notification threshold). The large number of fairly broad variables included in the determination of market share ensures greater flexibility should the TFTC decide to exert its authority over notifiable mergers. In practice, the TFTC often consults statistical yearbooks published by government authorities to determine the applicable market.

'Turnover' is defined under the regulations to mean the total sale or operating revenue of an enterprise, which is conceptually the same as gross revenue. The turnover threshold requires that the applicable parties file a merger notification with the TFTC if sales for the preceding fiscal year exceed the threshold amount publicly announced from time to time by the TFTC. According to a rule the TFTC announced in March 2015, the threshold amount is met for non-financial enterprises if one party has sales in the preceding fiscal year in excess of NT\$15 billion and the other party has sales in the preceding fiscal year in excess of NT\$2 billion. For financial enterprises, the threshold amount is met if one party has sales in the preceding fiscal year in excess of NT\$30 billion and the other party has sales in the preceding fiscal year in excess of NT\$2 billion. In addition, based on a rule the TFTC announced in December 2016, the threshold amount is also met if the aggregate global

sales of all enterprises in the proposed merger in the preceding fiscal year exceeds NT\$40 billion and at least two of these enterprises each has sales in excess of NT\$2 billion in Taiwan in the preceding fiscal year. Other than the above sales revenue threshold amount set forth for financial and non-financial enterprises and all enterprises, the Fair Trade Act provides the TFTC with the discretion to decide different sales revenue threshold amounts by issuing an administrative order for enterprises in different industries.

In addition, the sales revenue of companies with controlling and subordinate relationships with the merger participants, and the sales revenue of subordinate companies controlled by the same companies as the merger participants, should be included when calculating the total sales revenue of an enterprise.

In June 2023, the TFTC proposed a draft amendment to remove the market share threshold, aiming to make the filing threshold clearer and to reduce compliance costs. This decision was made after considering foreign legislation and taking into account the advice of the Organisation for Economic Co-operation and Development.

Under the current Fair Trade Act, transactions that are exempt from merger filing include five additional types of transactions:

1. merger of an enterprise with another enterprise that has a controlling and subordinate relationship with that enterprise;
2. merger of an enterprise with another subordinate enterprise controlled by the same company as that enterprise;
3. transfer of all or part of an enterprise's outstanding voting shares or equity capital of a third party to another enterprise that has a controlling and subordinate relationship with the enterprise;
4. transfer of all or part of an enterprise's outstanding voting shares or equity capital of a third party to another subordinate enterprise controlled by the same company as that enterprise; and
5. merger of foreign enterprises to jointly establish or operate a joint venture outside the territory of Taiwan, and where the joint venture does not engage in economic activities within the territory of Taiwan.

The fifth type of transaction exempt from merger filing was newly added and became effective since 28 June 2023. According to the examples provided by the TFTC, this exemption applies where the joint venture's products are sold only outside of Taiwan or are sold only to its foreign parent company, without affecting the supply and demand of the relevant markets in Taiwan.

Standard for review: overall economic benefits in excess of competition restraints

The standard under which the TFTC must review any merger notifications is fairly expansive. Under Article 13 of the Fair Trade Act, the TFTC may not prohibit any filed merger if the overall economic benefits of the merger outweigh the disadvantages resulting from the competition restraints that it would cause. Therefore, the standard does not require an absolute bar on mergers causing competition restraints. Rather, the TFTC will

balance the restraints on competition with the overall benefit to the economy before determining whether a merger should be prohibited. Under regulations set forth by the TFTC, a non-exclusive list of factors to be considered are consumer interests, whether the parties to be merged had weaker positions in the market before the proposed merger, whether one of the merging parties is a failing enterprise and how closely related the concrete results of the proposed merger might be to the stated economic benefits.

At times, the overall economic benefits to Taiwan as a whole relative to the global market have been a factor in the TFTC's decisions. In 2000, a merger involving three of Taiwan's semiconductor foundries was proposed for review. In this transaction, Taiwan-Acer Manufacturing Corporation and Worldwide Semiconductor Manufacturing Corporation would both merge into and be survived by Taiwan Semiconductor Manufacturing Corporation (TSMC). After the combination, TSMC's share of the domestic foundry market would rise from 53 per cent to over 60 per cent, which would give TSMC, along with only one other remaining market participant, nearly 100 per cent of the domestic market. The TFTC recognised that competition in Taiwan's domestic foundry market would be restricted or hindered but that it was more important to 'the overall economic interests of the nation' for the combination to take place, as it would 'solidify Taiwan's leadership role in the foundry market, bring increased economies of scale to Taiwan's IC [integrated circuit] market, and give Taiwan a greater leadership role in the global IC market'.^[4] Additionally, the TFTC noted that upstream and downstream participants would also benefit from enhancement of the merged entity's global competitiveness and, therefore, has approved the merger on the basis that the overall economic benefits outweigh the drawbacks for the local market.

Waiting periods and time frames

Under the 2017 amendment, enterprises must not proceed to merge within 30 working days (as opposed to 30 calendar days before the 2017 amendment) of the date when the TFTC accepts the filing materials as complete, which, in practice, extends the waiting period for the merger control review. Should the TFTC in its discretion determine that the filing materials are incomplete and request that supplementary information be provided, the 30-working-day waiting period will restart on the date of submission of the supplementary information if it is deemed complete. This waiting period may be shortened or extended as deemed necessary by the TFTC in writing. In our experience, the waiting period is rarely shortened unless a special request is made to the TFTC relating to the timing pressures of the proposed deal; however, the TFTC, at its discretion and often for more complex transactions, will extend the waiting period, but any extension will not exceed the statutory limit of an additional 60 working days under the 2017 amendment.

Certain proposed transactions with limited market shares or not posing any potential significant competition restraints may be eligible for shortened waiting periods (expedited notifications). Additionally, supporting information filed with the notification form may include documents relating to production, sale and inventory for a shorter period.

Third-party challenge, external opinion and judicial review

Third parties do not have the right to access merger files in the TFTC's custody; however, during the seven-day TFTC public opinion solicitation period, third parties may challenge the proposed merger. Persuasive challenges may prompt the TFTC to request more

information from the merging parties and therefore, in some cases, delaying or breaking the deal. Under the 2017 amendment, the TFTC is also provided with the discretion to seek an external opinion and, if necessary, appoint an academic research institution to conduct industrial economic analysis to supplement its review of the merger application. In addition, the TFTC should provide necessary merger application information to the targeted enterprise in a hostile acquisition and consult with the targeted enterprise before a decision is made. Should parties be dissatisfied with the TFTC's decision, they have the right to file for an administrative litigation directly without first going through an administrative appeal within two months of the day after receiving the disposition letter.

Concurrent regulatory review

The National Communications Commission has concurrent merger control authority with the TFTC over the media sector. Pursuant to the agreement between these two agencies, the TFTC must first consult the Commission before substantively reviewing a merger filing of parties in the media sector.

Other strategic considerations

Requests for waiver

In certain cases, it might be difficult to determine whether a proposed transaction is a covered transaction, or to determine whether the filing thresholds have been met for various reasons (e.g., because the relevant market is not easily defined). In such cases, a request for a waiver may be made to the TFTC in the form of a letter; however, we have noticed that the TFTC has been prone recently to not respond to such requests for a waiver, as it appears to be less willing to bear the risks for a preliminary judgment before receipt of the complete filing materials.

Confidentiality

Unless qualified for expedited notification as described previously, the TFTC will post basic information on its website to gather public comments on the proposed transaction. This basic information will include the names of the merging parties and their relevant markets, the type of merger to be conducted as set forth in the Fair Trade Act, the period during which comments are accepted and the forum through which comments may be made to the TFTC. Furthermore, the TFTC has entered into agreements with certain foreign authorities, which will require the exchange of information in circumstances whereby the notification would affect the jurisdictions with which the agreements are entered. However, in a merger case, the TFTC will maintain the confidentiality of the filing if it determines that a filing is not necessary owing to a lack of jurisdiction or a failure to meet filing thresholds.

Parties to a proposed transaction still being negotiated may enquire whether a filing is necessary by submitting anonymous queries to the TFTC; however, at some point, if the parties intend to proceed with a transaction and if a filing is required, identifying details will need to be disclosed to the TFTC.

Parties will not have access to the TFTC's files during the review process in principle; however, as of the 2017 amendment, the TFTC is required to provide necessary merger application information to the targeted enterprise in the hostile acquisition and consult with the targeted enterprise. Also, in more complex cases and in the event that the parties have special requirements in respect of the review of their transactions, it is usually possible to successfully request special meetings with the TFTC to discuss the review and any relevant facts that are to be specially communicated. Additionally, parties may request that the TFTC maintain certain portions of its information in absolute confidentiality if these are clearly denoted pursuant to applicable laws.

Outlook and conclusions

Since the enactment of the Fair Trade Act, Taiwan has actively and conscientiously developed a full body of competition law to ensure that the basic principles of fair trade are followed. The merger control regime in Taiwan is robust, as demonstrated by the technical assistance that the TFTC provides to nearby jurisdictions such as Mongolia, Indonesia and Thailand.

In June 2023, the TFTC proposed a draft amendment to the Fair Trade Act to remove the market share threshold. The aim of this proposal is to improve clarity regarding the filing threshold and to reduce compliance costs. Whether this amendment will come into force and achieve the expected desirable outcomes is worth monitoring.

Endnotes

- 1 Victor I Chang and Margaret Huang are partners and Laura Teng is an associate at LCS & Partners. [^ Back to section](#)
- 2 As a member of the International Competition Network (ICN), the Taiwan Fair Trade Commission hosted the annual ICN Merger Workshop in 2009 and the ICN Cartel Workshop in 2014, which were attended by members from around the world. [^ Back to section](#)
- 3 Note that the transactions covered under the definition of 'merger' are more expansive than the generally accepted legal meaning afforded to that term in many jurisdictions, where a merger is generally understood to mean a legal mechanism by which one entity is absorbed into another with only one surviving entity. Under Taiwan law, and as may be seen in the English translations of the pre-merger notification forms, the concept of merger also includes the concept of business combinations or the acquisition of control using varying methods as described under the statutory definition. After a proposed transaction is determined to be a statutory merger as defined by the Fair Trade Act, the filing requirement then turns on whether certain market share or turnover thresholds are met. [^ Back to section](#)
- 4 Taiwan Fair Trade Commission, press release dated 10 January 2009. [^ Back to section](#)



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