

M&A in Taiwan: An Overview and Outlook

Dennis CHOU

Marcus CLINCH

John EASTWOOD

Nathan KAISER

July 2011

Opening up to M&A

Cross-border acquisition activities involving foreign buyers will rise

Merger and acquisition (M&A) deals in Taiwan continue to attract ever-increasing attention from local and international media. This has been spurred, in part, by long-expected consolidation within the financial sector. We have already seen concluded deals whereby three major foreign players (Standard Chartered, Citigroup, Carlyle Group) each acquired, in part or in total, a local bank. Strategic projects in the technology and media sectors have been further fueling attention and interest.

We expect a substantial increase in cross-border acquisition activities involving foreign buyers. Taiwan lifted foreign investment restrictions on publicly listed companies in 2003 with amendments to the Regulations Governing Investment in Securities by Overseas Chinese and Foreign Nationals. Taiwan also, however, signed an Economic Cooperation Framework Agreement with the People's Republic of China in 2010 that lifts or should lift many of the prohibitions on investment capital from the PRC. Though parties enjoy substantial freedom to structure M&A deals as they wish, this article will focus on acquisitions of publicly listed companies in Taiwan by share acquisition, i.e. share deals, as this has become the main transaction method chosen by parties.

Legal framework, regulatory and supervisory bodies

Taiwan law shares much in common with other code-based systems

Taiwan is a civil law jurisdiction that shares many similarities with other code-based systems in continental Europe and within Asia. Its Civil Code, Code of Civil Procedure, and Company Act have been based heavily on those from Germany while other parts of the system reflect historical Japanese and Chinese influences. Taiwan's Administrative Procedure Law, which directly addresses major issues such as the discretionary powers of the authorities and generally provides full legal recourse against any government action and decision, has again been heavily influenced by its German equivalent.

This has some clear upsides. Tactful lawyering can often help the local court and administrative authorities reach international-quality solutions to problems by helping them see how their counterparts overseas (notably still German courts, legal scholars, and authorities) have interpreted similar provisions of the law. Foreign investors, however, coming from common-law systems with well-established and binding precedents should note that Taiwan can lack the clear guidance and interpretation they will have come to expect in their home jurisdictions.

History also weighs in

Taiwan retains the remnants of a Chinese bureaucracy heavy on government oversight and approval along with the substantial regulatory powers associated with it. Taiwan's legal system has made major improvements since the martial-law era ended in 1988.



One must still, however, consider whether a planned deal will be seen as a routine matter or something that may rouse strong local passions. For although the reasons for such delays or inaction may never be explicitly stated by the officials involved, projects deemed to go against the financial or political interests of existing interests may face persistent hurdles or delays. A party that has also fallen afoul of the authorities can find its transaction inexplicably held up.

One should consider the speculation surrounding the failed efforts of Jason Chang (張虔生), chairman of Advanced Semiconductor Engineering Inc (ASE), who teamed up with private equity firm, the Carlyle Group, to acquire ASE in 2007. It has been suggested that the Chen administration frustrated efforts by the Carlyle Group to acquire ASE out of a fear that it would lose a full one percent of the Taiwan exchange capitalization to a new vehicle. And that vehicle was likely to focus on manufacturing in the PRC to the perceived detriment of Taiwan. Another noticeable case happened in June of 2011; the disapproval from the Investment Commission of a TWD46.78 billion (USD1.62 billion) management buyout proposal for Taiwan's top passive electronic component maker, Yageo Corp., which is broadly suspected that the intention of the deal was to remove Yageo's listing from the Taiwan Stock Exchange, a move that would wipe TWD27 billion from the market's value. These two cases show no improvement in revising rules regulating M&A to prevent major shareholders from taking advantage of small shareholders when it comes to management takeover.

M&A activities in Taiwan fall under the scope of the Company Act (governing many general corporate matters of corporations, or in Taiwan's legal terminology "companies limited by shares"), the Enterprise Mergers and Acquisitions Act (Merger Act also referred to as the M&A Act, broadly covering the handling of M&A issues), the Securities and Exchange Act (SEA; covering publicly listed companies), the Regulations Governing Tender Offers for Purchase of the Securities of a Public Company, and the Fair Trade Act (FTA; covering the competition law issues that may arise in the consolidation of market share or aggregation of turnover as the result of M&A activity). The rules and regulations of the relevant securities exchange on which the target's stock lists must also be considered. And where an acquisition involves financial institutions or financial holding companies, the Act Governing Mergers of Financial Institutions and the Financial Holding Company Act may also apply.

Government and the exchanges work together

The acquisition of a publicly listed Taiwan company will be overseen by the Financial Supervisory Commission (FSC) and the Securities Futures Bureau (SFB) on the governmental side. The Taiwan Stock Exchange and/or GreTai Securities Market provide the oversight for the transaction on the exchange side. The FSC has been moving back to a less interventionist stance – a trend signaled with its 2007 end to an administrative ban, widely believed to be lacking any legal basis, on the opening of new bank branches.



One-stop-shop for foreign investors

The Ministry of Economic Affairs' (MOEA) Investment Commission and the Central Bank of China (CBC) among others will play a role in the approval of the foreign investment and review of the structure. Investments by foreign companies may also raise issues under the Statute for Investment by Foreign Nationals, the Statute for Investment by Overseas Chinese, and the Guidelines and Review Procedures for Investment or Technical Cooperation from Abroad. The commission has moved now to a more efficient one-stop shop model for the foreign investor. Future amendments to the relevant laws may move to simple post-registration rather than the current prior approval requirements. It should be noted that if the acquisition meets certain thresholds under Article 11 of the FTA, prior merger notice and approval may be required from the Fair Trade Commission (FTC).

Transaction types

Share purchase and share swap are the most common forms

Companies and investors considering M&As in Taiwan have several choices on how to structure the transaction. An overview of a couple of common acquisition methods follows:

1. Share purchase

The share purchase remains the main means of acquisition in Taiwan and notably for foreign investors. The reason for the latter is that solely domestic mergers can currently make use of a share swap with more ease. Share purchase deals feature a 0.03 percent securities transaction tax on the consideration. This will be implemented as a withholding, withheld by the buyer from the purchase price. The capital gains taxation of the seller is a bit more complicated: at least in principle, capital gains are tax-free both for individual and company shareholders, except when the so-called Alternative Minimum Tax (AMT) applies depending on the specific personal circumstances of the seller.

Taiwan's Legislative Yuan (Congress/Parliament) amended the Income Tax Act lowering the corporate income tax rate from 25 percent to 17 percent in 2010. The corporate tax cut became effective retroactively from 1 January 2010 for calendar year taxpayers or as of FY 2011 for fiscal year taxpayers.

Transparency is on the rise

Disclosure and corporate governance of listed companies in Taiwan, both in law and in practice, has been increasing over the past decade. Taiwan, for example, adopted the Investor and Futures Trader Protection Act in 2002. The Act further sets out procedural details regarding obligations and related liabilities, for example, based on company prospectuses. Although the risks of hidden liabilities may exist, careful research and due diligence help reduce those to an acceptable minimum. And recent third-party opinions



with regard to pricing suggest that for foreign investors there will be no related country-specific price reductions with regard to acquisitions in Taiwan. The standard of third-party reports for due diligence by Taiwan's service providers has increased significantly and can be relied upon to a far greater degree than in the past.

Takeover attempts are difficult to hide from the FSC or the target's major shareholders
Article 43-1 of Taiwan's Securities and Exchange Act (SEA) negates stealth in the acquisition of a Taiwanese public company as its reporting requirements ensure plenty of warning for any takeover attempt. The Article requires that any person who acquires (either solely or in aggregate with others) more than 10 percent of the total shares of a public company and the holding percentage shall file a statement with the FSC within 10 days of such an acquisition, and laying out the plan for the acquisition. Also increases or decreases in ownership percentage of one percent or more require further reports to be filed within two days of such transactions. With regards to these requirements, the Taiwanese authorities take the same expansive view as the U.S. SEC and most European supervision authorities. Shares bought in cooperation with family, friends, business partners, or companies controlled by the interested party will all be counted into one relevant percentage regardless of any written agreement regarding such concerted share purchase. The consequences of breaching the reporting requirements can include criminal sanctions for the responsible individuals.

Corporate governance winning slowly
Criminal sanctions should lead to a continuing increase in compliance on issues of corporate governance. There has been a number of high-profile cases linked to a lack of corporate governance including accounting fraud by directors and major shareholders, allegations of insider trading by political or other heavyweights, and an alleged massive breach of reporting obligations by major domestic financial institutions. The authorities have been taking matters more seriously as well as can be seen in the 2008 Rebar Group scandal. Four senior executives and members of the Wang family had bail set at a combined amount of TWD600 million (approximately USD19 million). And during that same month, a massive joint operation between the FSC and prosecutors led to suspected insider trading at the highest level within Cosmos Bank. Both reflect a clear sign of new, tougher times that should offer reassurances to foreign investors eyeing the Taiwan market.

Public tender offers must be made for fast acquisitions of shares
Any person or group that wants to acquire more than 20 percent of the outstanding shares of a target company within 50 days under the FSC's Regulations Governing Tender Offers for Purchase of the Securities of a Public Company ("Tender Offer Regulations") must make a public tender offer. The tender offer requires a report to the FSC followed by the public announcement of the offer, after which the offeror will have between 10 (minimum) to 50 (maximum) days to bypass the normal securities markets to buy up shares, although the offeror can report to the FSC an extension of up to 30 days.



During the time of the tender offer, the offeror and his affiliates cannot make purchases on the stock exchange of the target company's stock. Absent massive changes in the target or the offeror being subject to bankruptcy proceedings, SEA Article 43-5 makes it relatively difficult to stop or change a tender offer once it is underway. To be more specific, the offeror may not lower the offer price or the proposed number of securities nor shorten the public tender offer period.

2. Share-swaps

Easy for locals, less so for foreigners

This method opened up with the Merger Act and can be used relatively easily in acquisitions involving two local companies. A lack of corresponding amendments, however, to the laws governing inward investment by foreign nationals and listing requirements imposed on foreign parties makes this a less attractive option for foreign companies – though not an unused one. The first successful cross-border share swap took place with a Singaporean company. Taiwan also continues to maintain foreign exchange controls that can add an additional hurdle. Article 34 of the M&A Act, however, does offer various tax advantages for proceeding via a share swap including an exemption from VAT, deed tax, security exchange tax, and stamp tax, along with a deferral of land value incremental tax.

An area for reform

Increased action in Asia and within Taiwan by foreign private equity companies should hopefully lead to the further lifting of hurdles on cross-border share-swaps by the Taiwanese authorities. It is hoped that the currently considered changes to the tax regime will include measures to clarify a number of tax questions for foreign investors. In February 2008, the Ministry of Finance (MOF) had already promised the processing of tax ruling requests within one to three months, considered a first step in the right direction crucial for the foreign investor eager to obtain certainty for its critical shareholders abroad. This would be a sharp improvement to the current situation where once unreasonably high transaction thresholds were cleared, no clear time lines were provided and sometimes requests remained pending with no ruling at all, lest providing such clarity deprive authorities of the ability to maintain discretionary (or arguably arbitrary) power for the future.

Proxy fights

Not always offering the desired result

The Company Act governs the solicitation and use of proxy voting powers. Additional and far more specific guidance on the solicitation and use, however, may be found in the SFC's Regulations Governing the Use of Proxies for Attendance at Shareholder Meetings of Public Companies ("Proxy Use Regulations").



The solicitation of proxies can, under Article 3 of the Proxy Use Regulations, be achieved in a variety of ways. These include public announcements, advertisements, signs, broadcasts, letters, telephone, announcement forums, informational forums, personal visits, inquiries, or other similar means. Article 8 sets out the information that must be included in a solicitation of proxies. The following information must be provided: there has to be clear information on the proposals to be determined; the purpose for soliciting the proxies; the names, management philosophies, and background information on any directors or supervisors proposed to be elected; full information on the proxy solicitor and its shareholdings; full information on anyone mandated to assist with the solicitation; and full details on how to submit the proxy.

The Proxy Use Regulations arose, in part, to address the abusive practice of obtaining proxies from individual shareholders in exchange for relatively minor consideration.

Buying of proxy votes strictly prohibited

Article 11 of the Proxy Use Regulations specifically prohibits obtaining a proxy “in exchange for money or other interest”. Two exceptions have been provided. The first applies to shareholder-meeting souvenirs (relatively cheap knick-knacks, for which in actual daily practice, people trading proxies will form long lines to get). The second applies to reasonable fees paid by a proxy solicitor to a company mandated to handle solicitation matters.

In the same context, and from a corporate law point of view, the strong penchant of Taiwan’s Company Act for registered shares, as opposed to bearer shares, may also be noted (cf. Company Act Article 166) – in this respect, Taiwan is for once ahead of an international trend set in motion essentially by the FATF Recommendations issued in 2003. In addition, the management of the share roster is subject to strict rules (Company Act 169), and specifically so with regard to an upcoming shareholder meeting.

Foreign acquirers enjoy similar means of action as local acquirers

Recent years have seen domestic proxy fights in the areas of telecommunications and notably the banking/financial industry. These battles, for example, often saw parties attempt to gain control of the board of directors by silently approaching the other major shareholders - while at the same time publicly denying such overtures. These domestic tussles also often involved additional elements such as government involvement based on government shareholdings, as well as allegedly, direct pressure on key individuals. Such battles would usually be won or lost on negotiated deals between the major shareholders. A foreign hostile investor would have the same options and courses of action open to it as a domestic aggressive acquirer. And an attempt by a foreign investor to obtain management control would need to be played out along the same lines as an attempt by a domestic investor.

Who can be a director?

Foreigners are allowed to be directors in Taiwan – and so are Companies

Proxy fights typically arise regarding major decisions such as the delisting of a company or over the election of the board of directors. Taiwan no longer has restrictions regarding the nationality or domicile of directors or supervisors: for example, two out of eight board members of TSMC, the world's largest independent semiconductor foundry, do not hold Taiwanese citizenship. Foreign investors can and will have a say in the strategy and management of a target company. Taiwan's Company Act also allows companies to be directors of another company. A shareholder/foreign investor in a Taiwanese company, itself being a juridical entity instead of a natural person, may choose to obtain – or attempt to obtain – a seat on the board as the company. That juristic person holding a seat on the board must then under Article 27 appoint a natural person (i.e. an individual) to represent it at meetings and to exercise its rights on the board. This corporate board member option does not appear in Germany's company legislation, the original basis of Taiwan's Company Act, nor in the U.S. jurisdiction of Delaware, a favorite jurisdiction for incorporation.

Registration procedures are a grey area

The Company Act, as well as other regulations, remains surprisingly silent on the details of the registration procedures for such legal persons as directors. A casual reference does appear in Article 192-1 of the Company Act. The official application forms to be submitted to the government as well as the official extracts from the company registry do though clearly note for composition of the board the “represented juristic person (shareholder)” on one side, and the “number of represented shares” behind each appointed individual on the other side.

Fairly high levels of transparency

Details on the major shareholders of any registered company – whether listed or not – will be a matter of public record. The Ministry of Economic Affairs maintains a public online database providing relatively current company information or an interested party may obtain a copy of a company's up-to-date basic information from the MOEA for a small fee.

Excursus: Non-compete obligations for board directors

An interesting solution

Article 209 of the Company Act prohibits directors from engaging in activities that compete with the company unless a qualified majority of shareholders approve of the conflict. This applies equally to individual as well as to corporate members of the board. Damage and gains provisions in the Article, however, greatly raise the significance of the prohibition for corporate board members. And most notably, gains by a director obtained from “illicit competition” may be considered to be the gains of the company. This opens the director and corporate shareholder up to further claims.



Article 209 had frequently been neglected, in practice, not only by many foreign investors in the past but also by many domestic ones including industry players and conglomerates. The courts, however, did and have not. Relevant court decisions have so far maintained the prohibition to compete and the resulting damage claims even if both the target company, board of directors, and other shareholders had knowledge of the competition at the time of appointment. The courts have even extended this to cases where the competing activities had been further documented by valid and ongoing cooperation or sales contracts between the target company and the competing shareholder/director.

Foreign acquirers should conduct a legal review when seeking board membership

Until the courts adopt a broader and more commercially realistic interpretation than a foreign investor wishing to gain a strategic seat on the board of a target company in the same or similar industry will need to proceed with caution. An investor would need to proceed with a legal review of its own current and future business activities with regard to the target company and determine whether formal approval from the other shareholders would be required. A failure to do so could open the corporate shareholder up to legal claims in Taiwan.

Voting in a new board of directors

Minority shareholders line up behind existing management

The ultimate goal in most proxy fights will be to obtain management control of the company. The majority of minority (small percentage) shareholders tend, however, to vote for the existing management bloc absent abysmal performance. The existing management bloc can also obtain support from these shareholders where there is dissatisfaction by co-opting the position of the opposition by proposing reforms or the introduction of “new blood”.

Staggered boards are possible in Taiwan

A company’s articles of incorporation set the term that a director may serve. Terms will vary from company to company but Article 195 of the Company Act sets the maximum term at three years. Though there has been limited legal discussion to date and no examples among the major listed companies, it appears that the law would allow companies to arrange for staggered boards (i.e., boards in which not all directors come up for election concurrently). The lack of hostile merger activity in Taiwan in the preceding decades and the actual limited effect of such staggered boards in preventing hostile takeovers likely has negated an interest or desire to considering such an option.

A listed company may now under Article 192-1 of the Company Act opt to adopt a roster-based nomination system for its directors by amending its articles of incorporation. The Article provides that if the company has adopted a roster-based nomination system then any shareholder with more than one percent of the outstanding shares of a company can propose a slate of directors for election. The likelihood, in practice, though of that slate being approved would most likely still depend upon the percentage shareholdings of the proponent.

Article 192-1 has not been adopted by the majority of companies

A proponent would have to provide the director candidates' names, education backgrounds and past work experience, along with a letter of understanding issued by each candidate consenting to act as director if elected. Candidates must have clean backgrounds - as Article 192-1 references the Article 30 requirements that a director must have no recent convictions relating to organized crime, breach of trust or fraud, or breach of public trust. Present-time bankruptcy troubles and misuse of credit instruments will also act as a bar. The current board of directors or other convener (e.g., shareholders calling for a special shareholder meeting under some circumstances) must screen the list of candidates. The results of their examination must be kept in writing. Taiwan only added Article 192-1 in 2005. And it has not been subject to widespread adoption – perhaps, in part, as its adoption would likely run contrary to the interests of the existing board members.

Slap on the wrist

The list of director candidates and their qualifications has to be provided by public notice 40 days before a regular shareholder meeting and 25 days before a special shareholder meeting. The results of the screening also must be provided to the nominating shareholders, along with reasons for any disqualifications. These disclosure requirements, however, lack teeth and can be considered cosmetic at best. Fines for breaches run between TWD10,000 to TWD50,000 (approximately USD300 to USD1,500).

Number of votes exercisable in respect of one share shall be the same as the number of directors to be elected

Without a substantial amount of the outstanding shares, an acquirer has to struggle with the target's voting setup. One must factor in the target company's articles of incorporation, its own percentage of ownership, the number of seats up for election, the composition of potentially opposing shareholder voting blocks, and whether the acquirer has successfully solicited proxies. There will then also be other factors that can arise that need to be considered in what can become a rather difficult exercise at times. Article 198, however, safeguards the minority shareholders' interests, subject to the provisions in the target's articles of incorporation. Article 198 provides that in the process of electing directors, the number of votes exercisable in respect of one share shall be the same as the number of directors to be elected, and the total number of votes per share may be consolidated for the election of one candidate or may be split



for election of two or more candidates. In other words, this voting mechanism allows for votes to be stacked up to allow the concentrating of one's votes to obtain a number of seats on the board roughly corresponding to the ratio of shares held to the total of outstanding shares.

If sufficient shares have been acquired, i.e. 50 percent after a public offer, the new majority shareholder may call a special shareholders meeting without the one year waiting period stipulated in Article 173 of the Company Act -- whereas any shareholder (or group thereof) who has held three percent or more of the company's outstanding shares for at least one year may call a special shareholder meeting.

Note that where a successful tender offer has left, an acquirer with more than 50 percent of the company's outstanding shares can call a special shareholders meeting as an exception to that one-year rule. If the current directors do not give notice for the special meeting within 15 days of such a request, the applying shareholder may, with approval from the competent authority (MOEA) convene its own special shareholder meeting. We note though that the time required to obtain that approval will in practice take between one to two months.

30-day notice for regular shareholder meeting, 15 days for a special meeting

Article 172 of the Company Act requires 30 days public notice for a regular (i.e. annual) shareholder meeting of a public company and 15 days for a special or "extraordinary" shareholder meeting. The agenda of the meeting shall be included with the notice, and in addition all matters pertaining to M&A transactions, changes to the articles of incorporation, or to the discharge or election of directors and supervisors must each be separately announced in an itemized manner in advance.

Limited use of poison pills in Taiwan

A director may be discharged at any time by a resolution adopted at a shareholders' meeting subject to qualified voting requirements. The default provisions of Article 199 of the Company Act require two-thirds of the company's outstanding shares present, so long as a majority or more of the outstanding shares are represented. Where higher quorum or supermajority requirements are set in the articles of incorporation, such higher requirements will prevail. It is obvious that the mere possibility of such higher thresholds is at the heart – if not the consequence – of many listed companies in Taiwan still being in the firm hands of their founder and close family members, as the Rebar scandal documented several years ago.

Article 199 further requires that if a director has been discharged without good cause being established that the director may make a claim against the company for any and all damages suffered as a result of the discharge. This would, in principle, be the director's compensation for the remainder of his or her term. This could serve to set up "management poison pills" triggering high damage payments for directors who have



been removed. The effect, however, of this defensive mechanism has limited effect. And it could further, in fact, be noted as good cause for termination as it could under certain circumstances be seen as a type of breach of fiduciary duty by a director.

Figure 1

Change of board of directors process

a) General overview			
Days	Normal	Days	Contingency*
<15	Completion of tender offer or share purchase; request for special shareholder meeting		
25	Directors must give notice of special meeting with list of director candidates and their qualifications, notice of discharge	30~60	Majority shareholder can ask MOEA for approval to convene special shareholder meeting
		25	MOEA approval granted
	Special shareholder meeting held Shareholders get 1 vote per share per director seat available for election; majority vote to approve discharge of directors if two-thirds of outstanding shares attend, two-thirds vote required if meeting only attended by majority of outstanding shares		

b) The nomination process			
Days	Normal		
	Board of directors issues public notice re: accepting nomination of director candidates		
≥10	Submission of written candidate roster by shareholders with at least 1%		
Na	Board review candidates		
Na	Board issues a public notice of the director candidates		
25 or 40	25 days: special shareholder meeting vote on candidates 40 days: regular shareholder meeting vote on candidates		

Source: CLSA Asia-Pacific Markets, *If no notice issued

Figure 2

Shareholder	% of Shares	No. of votes	Scenario 1			Scenario 2		Scenario 3	
A	51%	153	100 Votes to 1 director	53 votes left for other directors	Half of votes, i.e. 76 to two directors		No votes left for other directors	Half of votes, i.e. 76 to two directors	No votes left for other directors
B	30%	90	Combined 147 votes, half of them: 73 to each of two directors	No other votes left.	Combined votes 77 against one of A's candidates		70 votes left for other director	90 votes for third director	No votes left
C	10%	30						All votes for fourth candidate by B and C in common	

D	9%	27							
Outcome:		Total of 300 Votes / Shares	1 director appointed by A, two directors appointed by B, C, D in common		1 director appointed by A, 2 directors appointed by B, C, D in common			2 directors appointed by A, 1 director appointed by B, no director appointed by C/D	

Source: CLSA Asia-Pacific Markets

Defenses against hostile takeover

Examination of potential defenses is useful

The majority of recent hostile takeover attempts in Taiwan appear to have suffered as much at the hands of regulators as from overt American-style battles for shares and shareholder votes. Future attempts will likely continue to show more classical features. An examination of how some of the more common strategies find use in Taiwan or could fare under the laws of Taiwan would thus be useful. Such defensive measures may be proactive or reactive or a combination thereof.

Early warning systems

High levels of transparency allow for effective monitoring

Any listed company has easy access to the tools for the monitoring of shareholding and trading patterns. Registered shares dominate and Taiwan enjoys a relatively sophisticated stock exchange. The result is detailed trading information available online at any time. As noted above, the reporting provisions in Article 43-1 of the SEA do not provide much room for the stealthy acquisition and accumulation of shares. Taiwan has, however, been steadily expanding the allowed scope and nature of derivative instruments. The FSC has been attempting to maintain control over the situation but it seems unlikely that it will be able to stay ahead of the situation - the FSC has been seen as notoriously slow-moving at times. Derivatives have been used in other jurisdictions to circumvent reporting requirements for what amounts to concerted share purchases to gain management control. It may only be a question of time before similar maneuvers find use in Taiwan, notably by savvy investors from overseas private equity firms.

Poison pill/preferred stock plans

Share issuance is tightly regulated in Taiwan

Tighter corporate governance in such overseas jurisdictions as the U.S. has seen poison pill defenses falling out of favor. The defense should still be considered under the laws of Taiwan. Some poison pill arrangements rest on the board's authority to issue rights plans without shareholder approval. Taiwan, however, tightly regulates the issuance of shares and, as such, any poison pill would need to be planned well in advance of a hostile takeover bid. And the issuance of shares and naturally preferred shares would need the approval of shareholders per Article 130 paragraphs 2 and 4 of the Company Act.

The same holds true for authorized capital. A company's authorized capital will be decided by the shareholders but can be issued at a later time by the board – Article 157. The result being that such a pre-emptive mechanism would require shareholder approval at some stage and would thus represent a referendum on the poison pill itself.

Capital structures with preferred stocks are rarely used

A review of listed companies in Taiwan shows that dual capitalization structures remain a rarity though a possibility under the Company Act - preferred stocks may have both higher or lower voting rights compared to common stock. Poison pills generally as well as preferred stock mechanisms in particular have not found wide spread adoption in Taiwan.

Issuance of new shares

An unlikely strategy

The issuance of new shares can be another common and related defense in some jurisdictions. The Company Act requires under Article 156 that all shareholders be treated equally and Article 267 requires that original shareholders (including of course the acquirer) be allowed to subscribe to the new shares in proportion to their original shareholding. Issuing new shares would then increase the number of shares while only producing a limited deterrent. The issuance of new shares would increase the cost for the acquirer to obtain a certain percentage of the target company's shares. If existing shareholders did not subscribe then it would have the net effect of increasing the acquirer's ownership percentage of the company.

An interesting exception

The Company Act does allow a company to grant subscription rights to its employees. The right may be exercised at the sole discretion of the directors and does not require shareholder approval. This mechanism could perhaps be used for poison pill arrangements, i.e. short-term changes to capital structure in view of an incoming hostile takeover. We note, however, that such use has not yet been seen in practice and would need to be looked at carefully for details of implementation if used at all.



The target's own acquisitions

A more viable defense

Increasing the size of the company via stock-swaps or other rapid-fire mergers could be a viable defense mechanism. It would, of course, be reliant on suitable candidates being found and available to increase the overall size of the company. Taiwan International attempted this in 2005 when faced with overtures from CDFH. The company acted quickly and approached three smaller companies. It managed to pick up First Securities and Far East Securities but failed in its bid to get Global Securities Finance.

Supermajority voting provisions

Classic defense technique

Specific supermajority provisions may be included for specific issues in the corporate charter of companies. This classic defensive mechanism could thus be incorporated: for example, decisions on liquidation, the lease or sale of significant assets, transactions with interested parties, and the like. Changes to the company articles of incorporation may also be subject to increased majority requirements under Article 159 paragraphs 1 and 3.

Staggered boards

Possible, but remains unused in Taiwan

Another strategy incorporating changes to the company's articles of incorporation would be provisions in the charter that require the staggering of boards over time. Taiwan does not, at first sight, contain any specific rule on the possibility of such staggered boards. The only consideration being that a director may only be elected for a maximum term of three years. It does not appear though that staggered boards have neither been implemented in listed companies in Taiwan, nor has the legal feasibility been substantially discussed. As with other potential issues under Taiwan's increasingly sophisticated Company Act, only a judicial precedent or an explanatory notice by the MOEA will clarify the matter.

Golden parachutes

Increasing the acquirer's cost

A target company unwilling to be taken over may set up director compensation schemes that include triggers for substantial payments to the directors – or golden parachutes. Such measures would thus indirectly increase the costs of the acquisition.

The relationship between a company and its directors will be defined by both the Company Act and the Civil Code. A company and its directors will enjoy a mandate relationship under the Civil Code and, in line with its German roots, parties to a mandate relationship have broad liberty to contract. The setup of golden parachutes for

specific situations such as early termination or even specific triggers will thus likely not run afoul of the Civil Code mandate provisions.

More attention paid to fiduciary duty in Taiwan

U.S. courts have found certain golden parachute arrangements to be in breach of the fiduciary duty owed by the directors to the shareholders though such cases remain rare. How the courts in Taiwan would rule on hypothetically similar arrangements remains unclear at this stage. Any challenge would likely be based on existing case law regarding directors' remuneration and the reasoning set out by the U.S. courts. It should be noted that, as a general rule, the notion of enforcing corporate governance by way of civil claims for a breach of a fiduciary duty by director or even by an entire board has been receiving broader attention in Taiwan. The depth and clarity of court decisions on the issue will, therefore, be on the increase. The government has, however, already taken steps to address remuneration.

Article 196 of the Company Act states that, the remuneration of directors "shall be determined by the shareholders' meeting if it is not prescribed in the article of incorporation and cannot be ratified by the shareholder's meeting". Article 14-6 of the SEA further requires now that listed companies establish a remuneration committee to be responsible for salary, stock options, and any other substantive incentive measures for directors, supervisors, and individuals at the management level. Criminal sanctions have also increased in importance as cooperation between the FSC and prosecutors has increased and become more efficient: for example, the investigation regarding insider trading and violation of securities regulations within Cosmos Bank in January 2008. This case represents a substantial improvement over the dismal track record of cooperation between the two government branches during the hostile merger attempts in 2005.

Buybacks of treasury shares

Buybacks are allowed in Taiwan, although there are a number of limitations

The buyback of shares by the company represents one of the more active means of defense available to a target. A buyback changes the capital structure of the company, the amount of shares available on the open market, and the balance sheet. Taiwan does allow, in principle, for a buyback of a company's own shares but with some limitations: Articles 167 and 167-1. First, a buyback must be limited to 5 percent of the outstanding shares. Second, these shares would get offered first to employees. This potentially places shares with a block of voters that should be friendlier to management and traditionally resistant to significant changes due to concerns such as layoffs.

Sudden taking on of massive debt

A very plausible scenario in Taiwan

A targeted company may also decide to assume more debt. This would obviously affect its balance sheet and possibly make the target less attractive to a potential acquirer. Such an active defense strategy would have more room under the laws of Taiwan – both corporate and tax - due to a lack of thin capitalization requirements.

Capital Reduction

Capital reduction could have an effect upon the desirability of a target under certain circumstances. Article 168 does, however, require that such a reduction be put to a shareholder vote. This requirement could significantly delay or negate the effectiveness of the measure if used against a tender offer that has already been launched or about to be launched.

A capital reduction, once commenced, would tend to temporarily increase the price of a publicly listed stock. Investors would anticipate the upcoming cash payout but knock the price back down once the cash has been made. The end price could be lower than the normal previous trading price if the reduction is significant. A capital reduction could be successfully timed for the period during an ongoing tender offer to inflate the price. The upcoming capital reduction would though be well known in advance and factored into the market's pricing of the stock and of the tender offeror's bid. The tender offer period can also be extended 30 days to perhaps catch the price as it corrects following a payout.

It should be kept in mind that a hostile takeover should not be much of a surprise to the target. Hostile takeover attempts have been a relatively new phenomenon in Taiwan and there would likely be gentler overtures or market purchases that may signal a takeover attempt well in advance. It should thus be noted that where a target has a large pool of quickly liquefiable assets then an early capital reduction could greatly reduce the attractiveness of the target company to private equity acquirers who might have originally planned on paying off their financing with such an asset pool.

A capital reduction in such a case might work well in conjunction with the use of a white knight to consolidate management-friendly holdings in a private placement. Under Article 43-6 of the SEA, a supermajority vote of shareholders would be required – a quorum of more than half the shares represented, with a two-thirds vote in favor to approve the placement.

Use of a Share Swap

A share swap brought about under Article 156 (5) may be a more agile way to dilute the acquirer's holdings. It would only require a supermajority vote from within the board of directors. Essentially, the board of directors could vote to issue new shares and use the equity to swap with a friendly company (e.g., white knight) for its shares.

Note however that this is subject to the restriction that the newly issued shares cannot exceed the total authorized capital of the company set in the articles of incorporation; changing the authorized capital would require taking the matter back for shareholder approval.

Regulatory headaches

Government can easily step in

The Taiwan government's regulatory and supervisory bodies would have many opportunities to intervene if they did not favor the planned-for merger. Taiwan lifted the majority of foreign investment restrictions on most industries when it joined the WTO. A few exceptions remain - telecommunication, transportation, television and satellite broadcasting, accounting and legal services, certain defense-related industry sectors, and a few others. Investment from the PRC has also though been traditionally subject to prohibitions or tight restrictions. The signing of ECFA in 2010 should, however, see the opening up of industries to PRC investment.

Abundance of red tape

Domestic and cross-border transactions and the resulting corporate actions required to carry them out remain subject to one kind or another of government intervention, registration, or declaration. Acts that in other jurisdictions may be considered purely private corporate acts may be subject to government approval despite no material conditions being set out for obtaining approval. This reflects the remnants of a "bureaucrazy" based on historical Chinese traditions and renewed attempts to cut red-tape over the past few years have only rarely shown any success. Expectations though for change or reducing these hurdles remain high.

The "Foreign Investment Approval" (FIA) reflects one area where improvement has been seen. The MOEA's subordinate unit, the Foreign Investment Commission (FIC), issues the FIA. An approval is required for nearly every single FDI transaction into Taiwan (though for example qualified investor schemes excepted). The FIA procedure has now been reworked to become a "one-stop shop," and although problem-free project approvals can sometimes be obtained in as few as two working days, nothing can still be taken for granted at this stage

This one-stop-shop has many departments

An issue rests with the fact that behind the one-stop shop lies a plethora of different government agencies including the important and influential Central Bank (Central Bank of China) under the MOF. In cases where either the technicalities of the transaction (those using only slightly exotic forex mechanisms) or other considerations, such as government policy with regard to the industry (financial or high-tech industries) give rise to concerns then the few days of approval may sometimes turn into a lengthy process of the FIC “requiring additional documents and additional information”.

This recurrent phenomenon can be seen as an often badly disguised attempt to avoid taking a decision that (in the eyes of that particular authority) would not be in the interest of either the government itself, or else in the interest of another related powerful party or group. Practice, and in line with what is customary for other government agencies, rarely sees a straightforward negative decision. An obvious “thumbs-down” would usually be avoided lest a loss of face as a consequence of a successful administrative appeal.

Drowning in a sea of paperwork

The constant request for additional documentation will be of material importance. A foreign investor will often be denied a decision after some time due to their filing “insufficient application documents and information”. This lack of decision deprives them the opportunity to challenge the slow or not forthcoming approval process. The authorities shift the responsibility for the lack of approval to the applicant. It should be noted though that with meticulous preparation, good advance contact with the authorities, and close interaction with them throughout many problems can be solved outside of the formal procedure and within a pre-formal decision stage. The Council of Economic Planning and Development (CEPD) has also though recognized the need for improvement, and in October 2007, the Executive Yuan submitted draft changes to the relevant laws. The changes would provide for substantial simplification and reduction of the paperwork required that would also reduce government influence on foreign investments into Taiwan.

The issues faced at times when dealing with the FIC hold true for dealings with the Fair Trade Commission (FTC) and FSC as well (see below for more details). FTC approval can be required for mergers on a competition law basis though the current thresholds for market share and relevant revenues remain reasonably high. The effect of the high thresholds being that most but not all of substantial cross border transactions would be exempt from review from the outset (see below for more details on the FTC process).

FSC is still an immature body

The FSC is a relatively new agency and, as such, its decision-making and practice remain the least stable. The FSC has also been plagued by personnel problems, internal management problems, and several investigations over corruption. It has also been faulted for a meandering policy with regard to the future development of the financial industry in Taiwan and for parts of its policy having a weak, or absent, legal basis at times. As a consequence, M&A transactions in the financial industry during the past few years often turned out to be more centered on media hype of initial proceedings, rather than actually and successfully completed procedures. With recent changes though of the key officials in charge and with optimism on the rise after the 100 percent acquisition of two local banks by foreign financial institutions within one year, several other foreign financial institutions have expressed an interest in acquiring a local Taiwan bank for complementing their market coverage and distribution channel portfolio.

In the situation of a tender offer, although the FSC has no right to approve, it has a strong under-the-table influence on other authorities. The recent Yageo tender offer plan is an example. It is said that the most important reason an FIC deal is rejected is that there are potential concerns regarding delist actions afterwards.

In the limelight – Employment and Labor issues are an important aspect of M&A

The Council of Labor Affairs or the respective local authorities, such as the Taipei City Department of Labor, as well as the media will often become involved to ensure the protection of employee interests during larger M&A transactions. Involvement tends to follow heightened media attention and the perceived endangerment of employee rights. These agencies tend to be employee rather than union focused – though non-unionized employees can enjoy as much or more power than their unionized counterparts overseas. And for example, the government's attempts to privatize banks which were (or rather *are*) technically bankrupt had to be shelved a number of years ago due to employee protests. Employment issues remain a crucial element to M&A transactions and this has been reflected by the increased legal provisions applicable to employment in M&A transactions.

Most of these provisions operate with the objective of clarifying mutual rights and obligations: for example, Articles 15 - 17 of the M&A Act and Article 20 of the Labor Standards Act (LSA). Taiwan also has the Protection for Employee Mass Redundancy Act which addresses the situation of merger transactions involving potential mass layoffs. That Act brings into play provisions that lead to stringent formalities to be followed as soon as relatively low thresholds have been reached as well as under various related guidelines and regulations.

The media industry is also a sensitive area

Industry-specific regulators must also be considered carefully. A timely and somewhat notorious example can be found with the information industry and the ongoing political and legal quarrels of the National Communication Commission (NCC). Its importance was underlined shortly after being set up in relation to a foreign investment from Hong Kong. The investment occurred under a quite unfortunately and vaguely worded section of the applicable law and involved one of the biggest networks in Taiwan. The threat of the cancellation of its television broadcast license for “illegal investment” quickly came to the forefront.

Overall, however, many fundamental principles of administrative law have already been codified and apply to all authorities on the island. This resulted from the growing needs of local and foreign businesses along with changes to the political environment that led to the adoption in 1999 of the Administrative Procedure Act. The Act closely follows in spirit and in word similar laws from Germany and Switzerland. As one of the more practical examples, Article 51 of the law requires authorities, unless other written law applies, to take a decision on any application or request filed within two months with only one extension of two months available to the authorities. Article 51 has already been successfully used up to the Ministry level – doing away with initial concerns and reactions that the upper echelons of government would find a way to be excused from its provisions.

Just say no to the media

Limiting speculation

One of the more effective takeover defenses remains for the management to “just say ‘No’”. This also holds true in Taiwan - where public and media involvement can be high, and public relations-savvy management may sway both employees (which may hold investments through widespread stock-option plans) and the broad base of small investors to support an anti-takeover stance.

The media itself has a major role to play in the coverage and playing out of corporate dramas. With the release of the martial-law era restrictions on the press, Taiwan’s numerous television and radio news programs, magazines, and newspapers face tight competition as they jockey within one relatively small geographic area to get as many scoops as they can.

Leveraging the media to gain public support

Many Taiwanese individuals and groups remain savvy and cynical enough to use this basic economic need of the local media for all it is worth. What may appear to be a “tempest in a teapot” to a foreign corporate takeover team can quickly blow up into hundreds of tearful employees or even third parties carrying protest signs at all hours of the day and night to demand solutions. This often then ultimately plays into the hands of politicians eager to jump into the spotlight. Careful and prompt management of these

situations remains essential, as numerous multinationals have found to their detriment when they hoped these media circuses would simply blow over on their own. The last thing an acquiring company wants is to have locally elected officials determine that a series of public hearings to be held over the coming weeks and months reflects the ideal solution to something that could have been wrapped up by the next morning's weather news if handled properly initially.

De-listing from an exchange

Lower percentage of votes required in Taiwan

Many acquirers may or will want to de-list a public company. The newest Company Act (effective July 2011) specifies that it must be done with majority vote to approve if the meeting is attended by two-thirds of outstanding shares; two-thirds vote if the meeting is only attended by a majority of outstanding shares. This threshold represents a lower one for de-listing in other countries like Hong Kong or Singapore due to the fact that there is no recusal provision in de-list voting on shareholder meetings in Taiwan. There can, however, be many factors that can complicate this evaluation. The failure of acquiring ASE in 2007, and Yageo in 2011, both show the attitude of the government toward the de-listing of public companies. Also, after the Yageo case, the FSC has already started considering raising the threshold for tender offers or amending the Business Mergers and Acquisitions Act to add the recusal provision.

Shareholder freezeouts

Acquirer may wish to clear away remaining target shareholders

A takeover of some very large companies with diverse shareholder groups may mean that a controlling share will be acquired for only a smaller fraction of the target's outstanding shares. It can though, for a variety of reasons, be desirable for an acquirer to clear away remaining target shareholders. Most importantly, it can eliminate the costs of public ownership and allow the capturing of gains from synergy that might not benefit all shareholders equally. On this latter point, it can be far too expensive to present the veneer of shareholder equality required by law.

Options for freezeouts exist

That said, there remain some options for freezeout mechanisms to work in Taiwan. The majority though appear to center on motions brought forward at a shareholder meeting involving approval of a "merger" (i.e., another step beyond the acquisition of controlling share), of "dissolution", or other transactions essentially involving the sale of the business or assets to an entity solely run by the takeover group. Under the default provisions of Article 316 of the Company Act, such approvals can be reached at a shareholder meeting attended by two-thirds of the outstanding shares via a majority vote, or else via a shareholder meeting attended by a majority of outstanding shares in which two-thirds vote in favor. Supermajority voting rules may exist in some articles of incorporation for individual companies, but Article 316 would be the default.



Article 316-2 allows a shareholder company holding 90 percent or more of the outstanding shares to merge/consolidate with the target company by a simple majority at the board of directors meetings of both companies. Given that many acquirers have their own structure plans for their projects, such a “parent” entity may well be yet another downstream subsidiary holding company tailor-made for the task and for the ultimate parent’s overall tax strategies. Paragraph 2 of Article 316-2 provides for a buyout of objecting shareholders who exercise appraisal rights, giving minority shareholders 30 days to object and demand a “fair price”. If the company and its minority shareholders cannot reach an agreement on this within 60 days, then under Paragraph 3, the objecting shareholders can apply to the courts to determine this.

Article 19 of the M&A Act, however, provides further guidance on the approval of a merger involving an acquirer with 90 percent or more of the outstanding shares. After adoption of the merger resolution by the board of directors of the target company, the details of the resolution and entries required to appear in the merger agreement must be published within 10 days. A notice shall be served to each of its shareholders stating that any shareholder who has an objection against that resolution, may submit a written objection requesting the subsidiary company to buy back, at the then prevailing price, the shares of the subsidiary company he holds.

Figure 3

Shareholder freezeout process

a) With 50 > 90% of outstanding shares				
	Days	Normal	Days	Contingency*
<15	Completion of tender offer or share purchase; request for special shareholder meeting			
10~15	Directors must give notice of special meeting	30~60	Majority shareholder can ask MOEA for approval to convene special shareholder meeting	
		10~15	MOEA approval granted	
	Special shareholder meeting held Majority vote to approve merger if meeting attended by two-thirds of outstanding shares; two-thirds vote if meeting only attended by majority of outstanding shares			

b) With ≥ 90% of outstanding shares			
Days	Normal		
10	Completion of tender offer or share purchase At first post-purchase BoD meeting, adopt merger resolution		
30	Publication of details of merger agreement Notice sent to each shareholder giving opportunity to send written objection		
	End of objection period Buy-out of objector shares at the then-prevailing price		

Source: CLSA Asia-Pacific Markets, * If no notice issued

Competition law matters

Antitrust issues are an important consideration

If antitrust concerns exist, then an acquisition of a Taiwanese company may give rise to the merger control rules under the Fair Trade Act (FTA), administered by Taiwan's Fair Trade Commission (FTC). Under Article 6, mergers are broadly defined beyond typical mergers and acquisitions to include joint operations or control of business.

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 (approximately USD3,000-USD1.66 million) for each violation of the FTL and, potentially, orders to cease or to unwind the merger.

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

1. As a result of the merger the enterprise(s) will have 1/3 of the market share;
2. One of the enterprises in the merger has 1/4 of the market share; or
3. Sales for the preceding fiscal year of the two companies in the merger exceeds the threshold amounts publicly announced by the competent authorities.



Market share may be difficult to quantify for some industries

The threshold amounts are TWD10 billion (approximately USD300 million) in sales volume for an acquiring enterprise (raised to TWD20 billion for financial institutions) and, as a cumulative condition, TWD1 billion (approximately USD30 million) for the acquisition target. Volume of sales generally relates to the total sales of an enterprise within Taiwan. 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.

Exemption under four conditions

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

1. Where any of the enterprises participating in a merger already holds no less than 50 percent of the voting shares or capital contribution of another enterprise in the merger and merges with such other enterprise.
2. Where enterprises of which 50 percent or more of the voting shares or capital contribution are held by the same enterprise merge.
3. Where an enterprise assigns all or a principal part of its business or assets, or all or part of any part of its business that could be separately operated, to another enterprise newly established by the former enterprise solely.
4. Where an enterprise, pursuant to the proviso of Article 167, Paragraph 1 of the Company Act or Article 28-2 of the Securities and Exchange Law, redeems its shares held by shareholders so that its original shareholders' shareholding falls within the circumstances provided for in Article 6, Paragraph 1, Subparagraph 2 herein.
5. 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.

Tender offer mechanics

Any acquirer planning to get 20% of the outstanding stock of a Taiwan publicly listed company within 50 days is required to make a tender offer, but it is worth looking briefly at some of the issues of how these are done under the Regulations Governing Tender Offers for Purchase of the Securities of a Public Company (Tender Offer Regulations, or TOR).



Offer must be well disclosed

Under Article 9 of the Tender Offer Regulations, an offeror must before commencing the tender offer provide the FSC with a public tender offer prospectus, the mandate contract entered into between the acquirer and its mandated institution (the securities firm, bank or other institution responsible for facilitating the tender-offer details) and the power of attorney for the offeror's designated representative for litigious and non-litigious matters if the offeror does not have a Taiwan location. On the reporting date, the offeror also has to give the target company a copy of that report and supporting documentation; before the public tender offer begins, the offeror also has to publicly announce the public tender report form, information on the mandated institution, and the website where the prospectus and other related information can be accessed.

Four requirements must be satisfied for public announcement

Within seven days of its receipt of its copy of the public tender offer documents from the offeror, in order to comply with Article 14 of the Tender Offer Regulations, the target company needs to issue a public announcement to be recorded by the FSC of the following:

1. The types, number and amount of shares held by the current directors and supervisors and any shareholders with more than 10 percent of the target company stock;
2. The recommendation to the company shareholders on the tender offer, including the names and reasoning of each objecting director;
3. whether there have been any major changes in the company's financial condition since the delivery of its most recent financial statements as well as the content of such changes; and
4. The types, number and amount of shares of the offeror company held by the current directors, supervisors or major (more than 10 percent) shareholders.

Once a tender offer is underway offeror cannot suspend it without approval from FSC

Once the tender offer starts, the period has to be at least 10 days and no more than 50, although the offeror can report to the FSC and publicly announce an extension of up to 30 days under Article 18 of TOR. Under Article 43-5 of the SEA, once a tender offer is underway, the offeror cannot suspend the tender offer except with the approval of the FSC where: The target company has major changes in its financial or business condition and the offeror has presented evidence of the changes (perhaps having received such information under the target company disclosure rules noted above); where the offeror experiences a fundamental change in circumstances, such as bankruptcy, death, judicial interdiction, or court-ordered reorganization; or other approved circumstances.

Under Article 19 of TOR, once the conditions of the tender offer have been achieved, the offeror shall again make a public announcement and report and must send notice to the mandated securities firm or bank. The standard for determining success is simply that the minimum number of shares set for acquisition in the tender offer has been reached. Under Article 43-5 of the SEA, if the offeror fails to acquire the proposed number of shares within the tender period or if the tender is suspended, then the offeror cannot carry out another tender offer on the same target unless it has “legitimate reasons” and prior approval from the FSC. Such “legitimate reasons” are perhaps a bit vague, as Article 24 of the Tender Offer Regulations defines this broadly as situations where the target board consents to another public tender or “other legitimate reasons”.

Vague language allows room to move

This situation leaves open the possibility for a “white knight” style defense in which a competing bidder opens up a contemporaneous public tender offer at a slight premium that pulls away shares from the other’s tender. Such a second competing offer may or may not reach its goals. It may well though succeed in stripping the initial public offeror’s necessary shares, thus sticking the initial offeror with a one-year period in which it cannot effectively launch another public tender offer bid without the approval of the board of directors or special dispensation from the SFC or force it to increase its tender compensation.

Under Article 7 of TOR, a competing bid has to be made at least five days prior to the expiry of the original offer. Note that under SEA Article 43-2, the original offeror is not blocked from increasing its offer for tender subscriptions (conversely it cannot decrease the compensation or the number of shares sought), but the offeror will have to give the same increased compensation to all shareholders who tender their shares. Under Article 19 of TOR, the offerees can switch out their pledged shares with a written notice so long as no announcement has been made by an offeror that it has satisfied its tender offer objectives, an element that can lead to a bidding war of sorts between willing competing offerors.

50%-plus shareholding tilts the scale

If after the tender offer the offeror has more than 50 percent of the total shares, the offeror can request a special meeting of shareholders without any of the restrictions of Article 173 paragraph 1 of the Company Act regarding the holding of 3 percent of the target’s shares for more than one year.

If the supply exceeds demand and the offeror gets too many eager tender-offer participants, then the share purchase will go forward on a pro-rata basis, returning the deposited shares not purchased to the relevant offerees under Article 23 of the TOR. For listed securities, distribution of the stocks shall be done according to the proportion of the amounts reported by the individual sellers up to a limit of 1,000 shares. Any remaining leftover stocks shall be bought in random order.



* * * * *
* * *
*

DISCLAIMER

This publication is not intended to provide accurate information in regard to the subject matter covered. Readers entering into transaction on the basis of such information should seek additional, in-depth services of a competent professional advisor. Eiger Law, the author, consultant or general editor of this publication expressly disclaim all and any liability and responsibility to any person, whether a future client or mere reader of this publication or not, in respect of anything and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.