DOING BUSINESS IN Taiwan

LCS & PARTNERS

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Business Structures:
What types of business structures are permitted?

There are essentially three choices of entity for a foreign investor to do business in Taiwan: a representative office, a branch or a local subsidiary company. A representative office is the simplest way to establish a business presence in Taiwan. As a legal agent of a foreign company, a representative office has no status as a legal person, but is permitted to engage in price negotiations, provide quotations, participate in tenders and sign procurement contracts, collect market information and conduct marketing activities on behalf of the head office; however, a representative office may not engage in income-generating business activities, and may not issue invoices in Taiwan.

A branch office of a foreign company is a profit-seeking business entity with its head office located overseas. According to the Company Act, a branch of foreign company has the same rights and obligations as a domestic company, and it is not an independent legal entity; the foreign head office jointly liable for all liabilities of its branch. The Company Act provides for several types of company, and the most common ones are (1) limited liability company, and (2) company limited by shares. The foregoing types of company possess legal person status, and the shareholders’ liability is limited to their capital contribution. A company limited by shares is a domestic company that is in many respects similar to a corporation in the United States and is probably the most common choice of entity for foreign investors setting up a subsidiary in Taiwan.

Asides from the two company types referred to above, the legislature has approved a new type of company named closely-held company limited by shares. The purpose of such company type is for the small company with limited number of shareholders. The advantage of using closely-held company limited by shares is the company may waive some mandatory regulations according to Company Act (e.g. right of first refusal of the employees), and the investor may include some special arrangements into the Articles of Incorporation. Notably, the shareholders’ liability of closely-held company limited by shares is also limited to their capital contribution.

Taxation: Briefly explain the country’s tax regime including rates and how rates differ based on business structures.

The corporate tax regime in Taiwan includes income tax, tax on repatriation earnings, and tax on undistributed retained earnings. The tax rate differs based on the business structures used. Currently, a company is subject to 17% income tax rate, 20% repatriation of earnings tax rate applied when dividends are paid to non-residents, and 10% of tax rate on undistributed retained earnings.

A branch of a foreign company is also subject to 17% income tax rate, but is exempt from tax on the repatriation of after-tax profits to its foreign parent company overseas. As a representative office may not engage in income-producing activities it is generally not subject to income tax. However, in the latest tax reform, which will be effective in 2019, the income tax rate for a company and a branch of a foreign company will increase from 17% to 20%, the tax rate on undistributed retained earnings will reduce from 10% to 5%, and the repatriation of earnings tax rate will be 21% when dividends are paid to a non-resident.
**Immigration:** Summarize immigration laws, including visas available for foreign employees.

The Employment Service Act (ESA) governs the employment of foreign nationals in Taiwan. Under the ESA, both foreign nationals who wish to legally work in Taiwan and their sponsoring employers have to meet certain requirements before the foreign nationals will be granted the necessary work permits.

Foreign nationals other than managerial representatives must meet certain criteria for a work permit. For most white-collar jobs, foreigners must have a degree from an accredited college and two-years related working experience.

A company or a branch seeking to hire foreign nationals must either have annual revenue exceeding NT$10M, generate commissions in excess of US$400,000, or have actual exports and imports in excess of US$1M. Companies existing for less than one year must have paid-in working capital exceeding NT$5M.

**Foreign Investment Review and Issues:** Does the government review and approve foreign investments? What factors are considered?

All foreign investors investing in a local company are required to obtain approval from the Ministry of Economic Affairs’ Investment Commission (MOEAIC). Other government bodies, such as the Department of Commerce of MOEA review applications for registration of branches or representative offices of foreign companies.

During the review process, matters concerning politically sensitive issues, such as funding coming from mainland China, and whether the transaction could require anti-trust review would also be considered. If the scope of business operation proposed to be engaged in Taiwan requires special approval or licenses or otherwise involves a sensitive sectors, other governmental agencies might be involved to review the investment application as well.

**Dealing with the Government:** Identify major issues when dealing with local and federal governments.

There are two types of governmental agencies in Taiwan. One is local government, e.g. Taipei City Government, the other is a central competent authority, e.g. Ministry of Economic Affairs. The issues which may arise will differ from case to case, but major issues may include whether any funds are being invested by PRC persons, labor issues, and antitrust issues.

**Dispute Resolution and Court Systems:** Summarize the court system, including the use of juries and arbitration.

The Judicial Yuan is the highest judicial organ of Taiwan, under which are ordinary, Intellectual Property (IP) and administrative court systems. The ordinary courts hear civil and criminal cases, the Intellectual Property court handles IP disputes while the administrative court hears public law matters such as tax. Taiwan currently does not use juries though a proposal to introduce “Lay Participate in the Criminal Trial System” is under consideration.

Ordinary courts consists of a three-tier court system, including district court for the first instance, high court as appellate court, and supreme court as the final tier.

The appellate procedure for IP disputes is more complex based on the nature of the disputes. For civil cases concerning IP matters, the first and second instance is governed by IP court, and the supreme court takes charge of the final instance; criminal cases relating to IP issues, the
ordinary district court takes care of the first instance, IP court is the appellate court for such cases, and the supreme court is the court of last resort. As for administrative disputes regarding IP law, the IP court is the court in first instance, and the supreme administrative court makes ultimate determination.

Meanwhile, the administrative courts consist of the high administrative court as first instance and supreme administrative court as the final instance.

Recourse to arbitration for dispute resolution is available under the Arbitration Act, which closely follows the 1985 UNCITRAL Model Law. Most arbitration cases in Taiwan are referred to the Chinese Arbitration Association, Taipei (CAA), which handles more than 200 domestic and international cases each year. The working languages of the CAA are Chinese and English.

**Foreign Corrupt Practices:**
What are the anti-corruption, anti-bribery and economic sanction laws which impact doing business in the country?

Bribing foreign officials is subject to the same penalty as bribing Taiwanese government officials according to Anti-Corrupt Act.

**Types of transaction:** How may businesses combine?

Businesses combine in several ways, including merger, consolidation and acquisition.

In merger, two or more companies merge into one company, and one of the parties survives and assumes all rights and obligations of the pre-existing companies. In consolidation, all participating parties are dissolved and a brand new company will be established and incorporated. Aside from this difference in nature, merger and consolidation are virtually similar; thus they are often collectively referred to as “merger.

Acquisition of a company could be accomplished by share acquisition, asset acquisition or business transfer with cash, the acquirers’ issued shares or other assets as consideration.

Typical factors affecting deal structure in other countries such as nature of acquired business, tax considerations, deal economics and third-party consents are also applicable in structuring a business combination in Taiwan.

**Competition Law:** How do laws impact competition?

The Fair Trade Act (FTA) governs monopolies, mergers, concerted actions and restrictive and unfair competitive practices in Taiwan, which is enforced and administered by the Taiwan Fair Trade Commission (TFTC). The business combinations indicated in the FTA (such as mergers) are subject to the review of the TFTC to prevent any local markets from being too concentrated. Any business combination meeting one of the following thresholds shall be notified to the TFTC before completion of such transaction:

1. As a result of the business combination, the enterprise(s) will have one-third of the market share in Taiwan; or
(2) One of the enterprises in the business combination has one-fourth of the market share in Taiwan; or
(3) If the Taiwan turnover of one party exceeds NT$15 billion (NT$30 billion if the parties are financial institutions) and the Taiwan turnover of a second party exceeds NT$2 billion; or
(4) If the combined global turnover of the parties in the business combination exceeds NT$40 billion and the Taiwan turnover of any two of the parties each exceeds NT$2 billion separately.

The TFTC has 30 working days from the receipt of a complete set of filing information to review the proposed business combination; however, the TFTC may extend the review period for another 60 working days if it deems necessary. Closing of such transaction must be suspended pending clearance in the event of any failure to notify the business combination, proceeding with the transaction despite the prohibition decision or breach of conditions in a conditional decision imposed by the TFTC, the TFTC may prohibit such merger, prescribe a period for the enterprises to split, to dispose of all or a part of the shares, to transfer a part of the operations, or to remove certain persons from positions, or make any other necessary dispositions. Further, an administrative fine of between NT$200,000 and NT$50 million may be imposed upon the enterprises.

**Employment Relations:**
Briefly summarize major laws impacting employment and employee relations.

The Labor Standards Act (LSA) and related regulations govern employee and employment relations in Taiwan. The LSA sets the minimum legal standards for employment, mandatory benefits, retirement programs, and termination and severance pay.

**Statutes and regulations:**
What are the main laws and regulations governing business combinations?

Depending on the structure of the transactions, business combinations in Taiwan are governed by several laws and regulations.

The Company Act provides the basic framework for transactions, including provisions regarding share swaps, mergers, and sales of assets. The Business Mergers and Acquisitions Act further governs share exchanges, spin-off and certain other acquisitions. The Securities Exchange Act is applicable when the transaction involves public companies, including tender offers. The Statute for Investment by Foreign Nationals and the rules thereunder regulate transactions involving foreign investments or dispositions. The Fair Trade Act sets thresholds and procedures for anti-trust review.

**Governing Law:**
What law typically governs the transaction agreements?

Parties are free to agree what law governs a transaction agreement. However, if such agreement is to be enforced in Taiwan, it remains subject to mandatory provisions under Taiwan law.
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<tr>
<th>Filings &amp; Fees:</th>
<th>Foreign parties to a business combination are required to obtain approval from the Investment Commission, and parties who meet certain anti-trust thresholds must also submit an application to the Fair Trade Commission. In addition, the Securities and Futures Commission and the stock exchanges review filings involving public companies. There are no specific government fees applicable to business combinations in Taiwan. Sales of the shares of public companies and certificated physical shares of private companies are subject to 0.3% securities transaction tax on the total transaction value.</th>
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<td>Information to be Disclosed:</td>
<td>For all types of company, upon the completion of a merger, the parties involved shall publish and inform their creditors of such transaction, and specify a period no less than 30 days to allow objection filed by the creditors. Public companies involving in a business combination shall publicly announce and report relevant information on the website designated by the Financial Supervisory Commission (FSC) in a format stipulated by regulations within 2 days counting inclusively from the approval of such transaction by the parties’ board of directors. In the event such transaction requires voting of shareholders, detailed information regarding the proposed transaction, including terms of the business combination, and evaluation report shall be announced to shareholders as well.</td>
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<td>Disclosure of substantial shareholdings:</td>
<td>Any person who acquires, either individually or jointly with another person(s), more than ten percent of the total issued equity shares of a public company shall, within ten days after acquisition of said shares file a report to the Financial Supervisory Commission (FSC) for public release. An increase or decrease amounting to one percent of the total issued shares of the public company, where the increase or decrease in the shareholding ratio also reaches one percent, shall be reported to the Financial Supervisory Commission (FSC). The aforesaid reporting and public announcement obligations shall be continued until the shares individually or jointly possessed are less than ten percent of the total issued and outstanding shares of such company. The disclosure requirements are not affected if the company is a party to a business combination.</td>
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<td>Duties of directors and controlling shareholders:</td>
<td>Directors and managers owe fiduciary duties to the company. In the case of a merger or acquisition, Taiwan law requires the board to handle the matter in the best interest of the company. For public companies, controlling shareholders which are not the directors but de facto conduct business of a director or de facto control over the management of the personnel, financial or business operation of such company and de facto instruct a director to conduct business shall be liable for the civil, criminal and administrative liabilities as a director; provided, however, that such liabilities shall not apply to the director appointed by the government for the purposes of economic development, promotion of social stability, or other circumstances which can promote public interests.</td>
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<td>Approval and appraisal rights:</td>
<td>Business combinations and share exchanges are required to be approved by a majority of the shareholders where more than two-thirds of the shareholders are present. In the case of a public company, mergers and share exchanges may alternatively be approved by two-thirds of the shareholders present at the meeting where more than one-half of the shareholders are present. Dissenters of the business combination may exercise dissenters' rights by objecting to the deal on or before the shareholder meeting that approves the transaction. Then the company and shareholders will have a 60-day period to reach an agreement on the fair value of shares. If an agreement cannot be reached within that period, the company must pay the amount it considers to be fair, and also petition the court for a ruling on fair value for all dissenters. The fees of petition and the compensation of independent appraisers that may be requested by court shall be borne by the company.</td>
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<td>Hostile transactions:</td>
<td>Targets of a hostile bid are likely to raise complaints to regulators. Taiwan corporate governance procedures can also make it difficult for a hostile acquirer to gain control of the target company’s board and management team in a timely manner, without the co-operation of the existing board.</td>
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<td>Break-up fees – frustration of additional bidders:</td>
<td>The transaction documents may establish the terms and conditions for break-up fees and reverse break-up fees. However, such arrangements are not very common for transactions involving public companies in Taiwan. The bidders are allowed to use a “no-shop” provision in the transaction documents to protect deals from third-party bidders, subject to the “fiduciary-out” provision that the target’s board of directors may propose. However, such arrangements are not very common for transactions involving public companies in Taiwan.</td>
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<td>Government influence:</td>
<td>Pre-approved from the Investment Commission of Ministry of Economic Affairs (MOEAIC) is required in the event the business combination involves foreign investors. In the reviewing process, MOEAIC has broad discretion, and historically, politically sensitive issues have been taken into accounts in the process of decision-making.</td>
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<td>Conditional offers:</td>
<td>Tender offers in Taiwan may have only a limited set of conditions. The buyer may specify a minimum number of shares that it requires to be tendered for the tender offer to be completed. The buyer may also petition to withdraw its tender offer if the target company experiences a material adverse change or if the buyer becomes bankrupt, provided that the regulator must approve such withdrawal. If the buyer needs to obtain an authority’s approval for the tender offer, it is required to expressly set out the details of such approvals as conditions to the tender offer. Other conditions to tender offers (such as financing conditions) are generally not permitted. For other types of mergers and acquisitions, the transaction documents may establish the terms and conditions for the transaction to complete.</td>
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| Financing: If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer’s financing? | In tender offers, the offeror shall prove the financial capability and source of funding to the Financial Supervisory Commission (FSC). In cash consideration, the offeror shall provide a performance bond or deposit guarantee issued by a financial institution. There are no typical obligations of the seller to assist in the buyer’s financing. If the seller is a public company, it’s obligated to appoint a review committee to investigate the financial capability, source of funding and fairness of the transaction. |
| Minority squeeze-out: May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process? | Minority shareholders may be squeezed out in Taiwan. Dissenters of the transaction may exercise dissenters’ rights to demand fair value for their shares. The company and shareholders will have a 60-day period to reach an agreement on the fair value of shares. If an agreement cannot be reached within that period, the company must pay the amount it considers to be fair, and also petition the court for a ruling on fair value for all dissenters. |
| Cross-border transactions: How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions? | The Statute for Investment by Foreign Nationals plays an important role in structuring cross-border transactions. In the act and regulations thereunder, Taiwan’s industries are divided into three groups for foreign investments, permissible, restricted and prohibited industries. Foreign investments are prohibited in industries concerning national security, such as defense and military, and postal service is also prohibited for foreign investment. Restricted industries consist of civil aviation, which requires foreign investment to be limited to a certain cap. Industries that are neither prohibited nor restricted are among permissible industries. For restricted and permissible industries, foreign investment approvals are required before the completion of the transactions. Unlike foreign investment in general, where investments are permitted as long as the industry is not prohibited or restricted investments from mainland China (ie. PRC) are only allowed in industries set out in a positive list for permissible industries. Such investments are subject to more stringent approval process than foreign investments, and the authority has broader discretion to decide whether to approve such investments. |
| Waiting or notification periods: Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations? | In business combinations, a company needs to notify its creditors and grant the creditors at least 30 days to object to the transaction. Also, at least 30 days before the completion of the merger, the acquirer must notify each employee of the target company that it wishes to retain and request their consent to transfer their employment to the surviving company. |
| Sector-specific rules: Are companies in specific industries subject to additional regulations and statutes? | Foreign investment in financial institutions, telecommunications or media industries and other sectors including but without limitation to mining, public transportation and other infrastructure projects might be subject to additional regulations or further approval imposed by relevant bodies. |
### Tax issues: What basic tax issues are involved in business combinations?

The basic tax issues involved in business combinations are usually regarding Securities Transaction Tax and Income Taxes. Sales of the shares of public companies and certificated shares of private companies are subject to 0.3% securities transaction tax on the total transaction value, unless any tax exemptions apply. Transactions may be subject to applicable income tax.

### Labor and employee benefits: What is the basic regulatory framework governing labour and employee benefits in a business combination?

The basic regulatory framework governing labour is set forth in The Labour Standards Act (LSA). Such act and regulations thereunder set minimum legal standards for employment conditions, mandatory benefits, retirement plans and termination and severance pay.

Unlike some jurisdictions, Taiwan is not an "at-will" jurisdiction; thus employees may not be terminated without cause. In business combinations involving the transfer of employees, the parties will need to evaluate the target employees’ willingness to agree to the transfer and the costs involved. The employees of the non-surviving company have the option to either transfer to the surviving company or terminate their employment with severance payment. The parties of transactions may be able to negotiate and draft voluntary resignations or other workarounds with the affected employees to address these issues.

### Restructuring, bankruptcy or receivership: What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Business combination transactions involving a target company that is undergoing restructuring procedures requires court approval under the Company Act and the Business Mergers and Acquisitions Act. In the event a company undergoing restructuring has plans to be acquired or merged, it shall state such information clearly in its restructure plan. While the aforementioned plan is adopted by parties in interest, the plan shall be further approved by court rulings before being executed, and the company shall report such court ruling to the competent authority.

If the parties to a business combination are financial institutions, approvals by the Financial Supervisory Commission (FSC) are required in accordance with the Financial Institutions Merger Act. In practice, acquisitions of a financial institution under government receivership are initiated by the receivership authority in a bidding process, and the terms and structure will be predetermined from the inception of the bidding process with limited room to negotiate.

### Anti-corruption and sanctions: What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

In Taiwan, bribery of government officials for preferential treatment relating to such officials’ duty in return is punishable under criminal law and the Anti-Corruption Act. The punishment differs based on whether or not such government official was requested to breach his or her duty. If the official is requested to breach his or her duty, the briber is subject to one to seven years imprisonment, and also a fine not exceeding NT$3M. In the case the official is not requested to breach his or her duty, the briber is subject to no less than three years imprisonment, and a fine of no more than NT$500,000.