



Pre-Merger Notifications for M&A in Taiwan

Frequently Asked Questions

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1. **Is there a mandatory merger notification regime?** Yes.
2. **Is there a voluntary merger notification mechanism, and if so, what advantages does it offer?** Yes: even if a merger falls below the notification threshold the parties may seek a review of the proposed transaction (please refer to item 13 below), in order to eliminate or reduce the risk of a post-closing challenge.
3. **If there is a mandatory notification system, what types of transactions are caught?**

The mandatory notification system only applies to mergers. Mergers are defined in Article 6 of the Fair Trade Act 2002 as any situation where

 1. an enterprise and another enterprise are merged into one;
 2. an enterprise holds or acquires the shares or capital contributions of another enterprise to an extent of more than one-third of the total voting shares or total capital of such other enterprise;
 3. an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or properties of such other enterprise;
 4. an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business; or
 5. an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

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4. **If there is a mandatory notification system, what are the threshold tests, above which a notification is required and below which it is not?**

The threshold tests for the mandatory notification system are set out in Article 11 of the Fair Trade Act 2002. Advance notification is mandatory when:

1. as a result of the merger the enterprise(s) will have one third of the market share;
2. one of the enterprises in the merger has one fourth of the market share; or
3. sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority.

The current threshold limits for sub-paragraphs 3 (for non-financial holding companies) are stated by the Fair Trade Commission (“FTC”) to be, for the acquiring company, more than 10 billion New Taiwan dollars domestic sales revenues (approximately US\$304,878,049, as of September 2007), and for the target company, more than 1 billion New Taiwan dollars domestic sales revenues (approximately \$30,487,805, as of September 2007).

The threshold tests do not apply where (Article 11-1):

1. any of the enterprises participating in a merger already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger and merges such other enterprise.
2. enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise merge.
3. 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. an enterprise (pursuant to certain provisions in the Company Law and the Securities and Exchange Law) redeems its shares held by shareholders so that its original shareholders’ shareholding falls within the circumstances provided for in paragraph 2 of Article 6 (see item 3

above).

5. **Are there ways to minimize the required information filing?**

Yes. The applicants may apply to the FTC for a simplified procedure, which shortens the waiting time, in situations where:

1. The market share of the enterprises filing an application under Article 11-1, Sub-paragraph 3 of the Fair Trade Act (see item 4 above) conforms to either one of the following:
 - (1) The combined market share of the participating enterprises in a horizontal merger is less than 15% (this limitation does not apply in certain defined business environments);
 - (2) The combined market share of the participating enterprises in a vertical merger is less than 25% in each other's market.
2. The enterprises participating in a multi-disciplinary merger (as defined) are found to be without any probability of significant latent or potential mutual competition in each other's market.
3. A parent or holding company conducts an internal reorganization whereby either:
 - (1) one of the participating enterprises directly owns at least one-third share of another enterprise with stockholder voting rights or capital investment, amounting to less than 50%, and said participating enterprise merged with or acquired the other enterprise.
 - (2) the participating enterprises merged with or acquired the subsidiary of its subsidiary company, provided that the participating enterprise shall directly owns at least 50% stockholder voting rights or capital investment of the aforesaid subsidiaries.

However, this simplified procedure is not available where:

1. the nature of the merger involves significant public

interests.

2. one of the participating enterprises in the merger is a holding company (as defined).
3. it is difficult to identify the business environment required in paragraph 1(1) above, or to assess the market share of the participating enterprises.
4. the business environment described in 1(1) above has a high-level barrier to entry, a high level of market concentration, or there are other significant concerns regarding the detrimental effects of the limited competition.

If an application for the simplified procedure is unsuccessful, the parties must reapply under the general application procedure.

6. Are there fees with respect to merger notification?

There are no fees with respect to the merger notification.

7. What is the necessary nexus with the jurisdiction to require a filing?

According to Article 3 of the Principles on FTC Review of Overseas Merger Cases (2005), the FTC will take the following factors into consideration when deciding whether they have jurisdiction to require a filing:

1. The merger has a material impact on the domestic and foreign markets;
2. The nationality, locations and principal places of business of the two entities involved in the merger;
3. The intention to affect competition in the domestic market;
4. The possibility of the merger resulting in a conflict with the laws and policies of the country in which the parties are registered;
5. The ease with which an FTC decision could be enforced;
6. The impact of enforcing an FTC decision against a foreign

enterprise;

7. The effect of treaties, agreements and international organisations;
8. Other factors that the FTC deems important to any particular case.

However, if the parties in question do not have manufacturing channels, service-provision equipment or distributors, agents or other substantive distribution channels in Taiwan, the FTC will not have jurisdiction to require a notification. Nevertheless, in addition to those factors, the FTC will examine the actual impact of the merger to the domestic market; thus, regardless of whether sales in Taiwan exceed the thresholds, should the parties have substantive distribution channels in Taiwan, the FTC may still deem that it has jurisdiction over the transaction.

8. **If there is a mandatory notification system, are the parties required to wait a certain period of time before completing the transaction, or can the transaction proceed without a waiting period?**

Yes, there are waiting periods during which it is illegal to close the transaction.

9. **What are both the statutory and the practical time periods necessary in order to “clear” a transaction?**

Under the general application, the parties are required to wait 30 days from having received either (i) the FTC’s last written request for further documents, or (ii) the FTC’s written notification that the application is in order, before completing the transaction. Under the simplified procedure (see item 5 above), the waiting period is reduced to 14 days from receipt of the FTC’s last written request for further documents.

10. **What are the**

Under Article 40 of the Fair Trade Act 2002, failure to notify if

- consequences of failing to notify if a transaction is in excess of the relevant thresholds, or closing a transaction without notification, or before the expiry of the waiting period?**
- a transaction is in excess of the relevant thresholds or closing a transaction without notification or before the expiry of the waiting period carries an administrative penalty of between one hundred thousand New Taiwan Dollars (NTD100,000) and fifty million New Taiwan Dollars (NTD50,000,000) (approximately USD 3,048 and USD 1,524,390, respectively).
11. **Is there any deadline within which a notification must be filed, and what is the earliest time a filing may be effected?** A filing must be completed, at the latest, 30 days (general application), or 14 days (simplified procedure) before closing. A filing may be made even before there is a binding transaction, but there should be a high likelihood that the transaction will proceed.
12. **If the statutory waiting period expires without a challenge, is there any possibility of post-closing challenge?** No, there is no possibility of a post-closing challenge, provided that the procedure outlined above has been followed properly.
13. **Are there ways to protect a transaction from post-closing challenge?** If the parties deem their transaction does not need to be notified to the FTC, they can write beforehand to request the FTC's confirmation that this is indeed the case. Such a confirmation from the FTC will protect the parties from post-closing challenges. In the normal case, it will take approximately 10 days to obtain the FTC's confirmation.
14. **What is the nature of the Agency which reviews merger transactions, and what are its powers to move against anti-competitive**
- The FTC is established under the auspices of the Executive Yuan, a branch of the Taiwan government. The FTC has powers to prohibit a merger for which the application was not approved, to prescribe a period for such enterprise(s) to split, dispose of all or a part of the shares, to transfer a part of the operations or to remove certain persons from positions, or to make any other dispositions. In the event that an enterprise

- transactions?** violates a disposition made by the FTC, the FTC may order the dissolution of such enterprise(s) or the suspension or termination of their operations.
15. **What sort of information is required in a merger notification, and how long does it typically take to compile such information?** A substantial amount of information is required to prepare a filing. In a typical case, with counsel working diligently with client personnel, it takes several weeks to around a month to compile the information required for filing, principally because all information provided must be translated into the Chinese language if it is not already in Chinese.
- The major differences between the simplified procedure and the general application are that the simplified procedure requires the last 2 years' fiscal data and information on the enterprise's 3 main products and 3 main competitors, whereas the general application requires the last 5 years' fiscal data and information on the enterprise's 5 main products and 5 main competitors.
- Other than this, the type of information required in both cases includes: an outline of the participating enterprises' corporate structure and business, the substance of the merger; an outline of the relevant markets; information about any barriers to entry; an outline of the merger's potential beneficial impact on the overall economy and restraint on competition; and information on the enterprises' suppliers and customers.
16. **What level of confidentiality does a merger notification filing enjoy?** The filing is confidential, and will remain confidential until the FTC approves or disapproves the transaction or, in the case of general applications only, seeks the views of the public in respect of proposed transaction.
17. **Are there any rules of thumb or general guidance as to when mergers are likely to face challenge?** There are no general guidelines other than Article 11 of the Fair Trade Act 2002.
18. **What is the typical** Generally speaking it is advisable to contact the FTC to discuss

or recommended approach in dealing with the reviewing agency?

matters which are likely to pose competition issues at as early a stage as is possible.

19. **Other than antitrust/competition review, are there other investment controls or similar regimes to be aware of?**

Yes. Foreign Investment Approval must be applied for and granted by the Investment Commission for certain listed remittances, such as incoming investment to be made by a foreign company.

