Global Private M&A Guide - Limited External Content - Taiwan

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# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

Due diligence investigations remain an essential tool for assessing and reducing the risks inherent in a M&A transaction in Taiwan. In the absence of complete knowledge of the operations, the scope of assets and the extent of liabilities of the target, due diligence investigations give the prospective buyer an opportunity to assess the target's legal and financial state of affairs. They also facilitate the consideration of structuring issues. Accordingly, thorough due diligence is vital in most M&A transactions in Taiwan.

**Pricing and payment**

There are no legal requirements to carry out a valuation or follow a particular valuation model for determining the purchase price for companies or assets in Taiwan. However, for public deals where the buyer or the seller is a public company, it is legally required to engage an independent expert to provide a fairness opinion on the purchase price.

**Signing/closing**

**Is a deposit required?**

The payment of a deposit may be required for share and asset deals in Taiwan, but it is not very common in recent market practice.

**Is simultaneous signing/closing common?**

For cross-border M&A transactions, signing and closing do not occur simultaneously due to the requirement to seek prior foreign investment approval from the Investment Commission.

## Approvals/registrations

**Foreign investment restrictions**

Taiwan has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet the relevant criteria need to be notified to the relevant authority and cleared before they can be completed. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Taiwan's merger control regime is mandatory and suspensory. The filing thresholds include tests based on domestic market share, domestic turnover and global turnover. Notification must be made within 30 working days after the competition authority accepts complete filing materials, extendable to 60 working days if necessary. Transactions cannot be implemented without approval. For further information, see the more detailed section on "Antitrust/merger control".

**Limited fundraising instruments**

Prior to the amended Company Act that become effective on 1 August 2018, the types of securities that could be issued by a Taiwanese private company were very limited (common shares, preferred shares and straight bonds). A private company could not issue convertible bonds, exchangeable bonds, stock options or warrants from investors for fundraising.

Since the 1 August 2018 amendment, a Taiwanese private company is now allowed to privately place convertible bonds and corporate bonds with warrants (Article 19 of the Company Act) besides the common shares, preferred shares and straight bonds above.

**Foreign exchange control**

Taiwan's foreign exchange control regulations are very strict, and the main regulator, the Central Bank of the Republic of China (Taiwan) (CBC) is very powerful and quite conservative. If the investment or repatriation amount is big and may have a huge impact on the exchange rate of New Taiwan dollars, the CBC may limit the daily conversion quota (such as only USD 5 to 10 million per business day) or even ask the foreign investor to enter into a swap transaction, which may be costly.

The CBC could also ask the foreign investor to keep the foreign currency without converting into New Taiwan dollars, despite the transaction agreement that has been made between the foreign investor and the sellers.

## Employment

Consents from employees are required during a merger, spin-off or asset/business transfer. If any of the employees do not consent to the transaction, the employer must pay severance and terminate the employment agreement.

## Tax

**Acquisition through an Asset Deal**

**Corporate Income Tax:** In asset deals, a foreign investor must establish or use a Taiwanese company for an asset acquisition, receiving assets and liabilities at fair market value. Acquired fixed and intangible assets are subject to depreciation or amortization, and reasonable financing costs are deductible. The Profit-Seeking Enterprise (PSE) income tax rate in Taiwan is 20%.

**Value Added Tax (VAT):** The sale of tangible, movable assets generally incurs VAT at a standard rate of 5%. For exported goods and services, the rate is 0%. VAT on sales must be charged to customers and paid on acquisitions, with the difference remitted monthly or bi-monthly. Refunds are available under certain conditions.

**Transfer Tax:** A special tax (named land value increment tax), based on government-regulated prices, is levied and payable by the seller. Additionally, capital gains from real estate transactions are taxed at higher rates for properties held for less than five years, payable by the seller.

**Transfer of Tax Liabilities:** Tax liabilities associated with the assets typically remain with the seller, unless a different agreement is reached.

**Acquisition through a Share Deal**

**Corporate Income Tax:** The Alternative Minimum Tax Act (AMTA) is crucial, stipulating that PSEs with Alternative Minimum Taxable Income (AMTI) over TWD 600,000 are subject to a 12% alternative minimum tax (AMT). This includes various types of income such as capital gains, tax incentives, and offshore banking unit income.

**VAT and Transfer Tax:** N/A

**Tax Credits and Other Tax Benefits:** Transactions triggering the "house and land transactions income tax 2.0" might occur when the value of real estate in Taiwan constitutes more than 50% of share or capital value. However, transactions involving shares of listed or OTC-listed companies are exempt.

**Tax Losses Preservation:** N/A

**Transfer of Tax Liabilities:** All existing tax liabilities of the purchased company are inherited by the buyer in share deals. Thorough due diligence is vital due to statutes of limitation of generally five or seven years.

**Transaction Costs:** For Taiwanese companies acquiring shares, transaction costs related to the acquisition are not deductible.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

Mergers and acquisitions in Taiwan can be effected through an asset purchase, share purchase or merger. The Business Mergers and Acquisitions Act (BMAA) only applies to M&A between companies limited by shares (CLSs) and mergers between CLSs and limited companies (LCs) where the CLS becomes a surviving entity. The BMAA does not apply to M&A between LCs. The following provisions focus on the CLS, as it is the most commonly used by foreign investors.

There are two types of mergers: statutory merger and simple parent-subsidiary merger. A statutory merger of two CLSs is possible under Article 316 of the Company Act or under Articles 18 to 21 of the BMAA. The surviving company can be one of the existing companies or it may be a new company but, in either case, it must be limited by shares. Statutory mergers offer a number of benefits. For instance, generally, a statutory merger does not require any third-party consents or transfers. Additionally, following the enactment of the BMAA, statutory mergers have been generally accomplished with certain tax incentives (see below).

If the target company is to be liquidated after the acquisition of its shares or assets, a statutory merger is preferable as it will not attract indirect taxes related to the transfer of assets. Further, the surviving entity can, in some cases, continue to enjoy the favorable tax attributes of the extinguished entity, such as an exemption from income tax (e.g., for strategically important industries) and investment tax credits.

Regarding a simple parent-subsidiary merger, if an acquiring company owns 90% or more of the outstanding shares of a target company, the merger can be consummated following a simple approval from the boards of the merging companies. This is because there are fewer shareholders requiring protection since the major shareholders will be acquiring the company (Article 19 of the BMAA). Article 316-2 of the Company Act provides similar procedures for simple parent-subsidiary mergers.

The main process of the statutory merger involves conducting the board meeting and shareholders' meeting, executing the merger agreement, issuing a public notice and notifying creditors and contracting parties, notifying employees, closing on the record date and processing the company amendment registrations. If a party to the merger is an approved foreign invested company, prior approval from the IC is necessary.

Share purchases and statutory mergers are more common than asset purchases.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The Company Act recognizes four types of locally incorporated companies. Two of these, CLSs and LCs, provide all shareholders with limited liability. The other two (both unlimited liability companies) result in greater shareholder liability and so are rarely used. Among the four business vehicles, a CLS is the most commonly used by foreign investors for M&A deals.

## What are the different types of limited liability companies?

An LC can have one or more shareholders. The capital of an LC is not divided into shares. Each shareholder of the LC holds the amount of capital contribution that the shareholder contributes to the LC's capital.

Shareholders of an LC may transfer their "capital contribution" upon the consent of the majority of the other shareholders. Directors may transfer their capital contribution with the written consent of two-thirds of voting rights of other shareholders. A shareholder who does not consent to a transfer has a priority right to purchase the transferred capital. However, if the shareholder elects not to purchase the transferred capital, then they are deemed to have consented to the transfer. An LC must have one to three directors elected from the shareholders or persons other than the shareholders. If more than one director is appointed, a chairperson may also be elected. A vice-chairperson may also be elected. There is no nationality requirement for the chairperson and vice-chairperson, except they cannot be People's Republic of China (PRC) nationals.

The names of the shareholders must be provided in the articles of incorporation. Each director or shareholder has one vote. However, the shareholder vote may be based on the amount of capital contribution if so provided in the articles of incorporation.

A CLS is a limited liability company with at least two shareholders (or sole corporate shareholder). The capital of the CLS is divided into shares. A CLS shall have at least one director and, except where this CLS has only one corporate shareholder and the CLS's articles of incorporation do not require a supervisor, one supervisor. A shareholder's transfer of all or part of its shares by a shareholder does not need consent by the company or other shareholders, and other shareholders do not have a priority right to purchase shares to be transferred. The chairperson elected by and from the directors is the statutory representative of the CLS. A vice-chairman may also be elected. There is no nationality requirement for the chairperson and vice-chairperson, except they cannot be PRC nationals.

The names of the shareholders do not need to be provided in the articles of incorporation. The voting right is based on the number of shares owned by a shareholder.

## Is there a restriction on shareholder numbers?

There is generally no limitation on the number of shareholders of an LC or a CLS. There is a specific type of CLS under the Company Act, called a close company, which should be a non-listed company with no more than 50 shareholders. The close company is allowed to stipulate share transfer restrictions in its Articles of Association. However, this type of company would generally not be the target of an M&A transaction.

## What are the key features of a share sale and purchase?

Under current law, share purchases may be effected by any of the following methods:

Traditional share purchase: Existing shares of a private company can generally be sold and purchased free of legal restrictions (although the seller may be restricted by contractual obligations toward third parties).

There is a 0.3% securities transaction tax and a 12% alternative minimum tax for corporate shareholders. The main drawback of a share purchase transaction is that it involves a sale of the target company together with all its liabilities, including contingent or undisclosed liabilities.

Statutory share swap: A company may acquire 100% of the outstanding shares of a target company by issuing new shares to swap with all of the target's outstanding shares (Article 29 of the BMAA). The seller will be exempt from the 0.3% securities transaction tax.

## What are the key features of an asset sale and purchase?

Unlike a share purchase, an asset purchase has historically involved a higher tax cost. While a traditional asset purchase is still viable in certain circumstances, the BMAA has broadened the landscape with other options.

Traditional asset purchase: Until recently, sellers were less inclined to agree to a traditional asset sale because this attracted higher tax costs. Buyers, however, preferred an asset purchase because the liabilities of the target were rarely automatically transferred and buyers could contractually exclude the transfer and assumption of specific assets or liabilities of the target company that they did not wish to assume. The prior consent of third parties may be required before certain assets or contracts of liabilities can be transferred. With the enactment of the BMAA, new options have emerged that are favorable to both parties, giving the buyer certain opportunities to pick and choose while keeping the seller's taxes low.

Statutory acquisition of assets: A statutory acquisition of assets is now permitted under Article 27 or 28 of the BMAA. These articles deal with the following transactions:

A general assumption of assets and liabilities (as defined in Article 305 of the Civil Code).

A transfer of the whole or essential part of a company's assets or business (as defined in Article 185(1)(ii) of the Company Act).

The assumption of all of the assets or business of another company, which has a significant effect on the buyer's own business (as defined in Article 185(1)(iii) of the Company Act).

A wholly owned subsidiary issuing new shares as consideration for the acquisition of the whole or essential part of the parent company's assets or business (as defined in Article 28 of the BMAA).

Under the BMAA, consideration for an asset acquisition may be cash, shares and/or other assets.

The BMAA permits exemptions of VAT, deed tax, stamp duty, and securities transaction tax and deferral of land value increment tax for certain qualifying transactions.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

Yes, for larger companies or larger transactions. In most cases, a letter of intent or term sheet is not legally binding on both parties.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity**: It is not uncommon to include exclusivity provisions in term sheets.

**Break fee**: Normally, the term sheet will provide that each party is responsible for its own fees and costs incurred if the transaction does not proceed due to reasons not attributable to a party.

**Confidentiality**: It is fairly common to include confidentiality provisions in term sheets.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Before the definitive agreement is entered into, there may be an additional confidentiality agreement but it is not common to enter into separate agreements during this period. It is common for the definitive agreement to contain exclusivity, break fee and confidentiality provisions and supersede the term sheet.

## Is there a duty or obligation to negotiate in good faith?

Yes. Before an agreement is concluded, a party may seek indemnification from the other party for the damages caused to the requesting party if the requesting party, without negligence, believes the agreement can be concluded, and such damages are caused by reasons that are attributable to the requested party's bad faith.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Fairly common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Cash free/debt free, working capital and NAV are all fairly common.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: This is usually the target company.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely.

## Is an earn-out common?

Frequency/market practice: Fairly common; earn-outs are more common in private equity transactions when the sellers continue to manage the target company after closing. They are less common where the seller is completely exiting. Earn-outs are commonly capped.

## Is a deposit common?

Frequency/market practice: Rarely.

## Is an escrow common?

Frequency/market practice: Rarely.

## Is a break fee common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Fairly common.

## Is the MAE general or specific?

Frequency/market practice: Usually general.

## Is the MAE quantified?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: Fairly common.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Waterfall provisions and the like are rarely used.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Fairly common; the contents of the restrictions vary in transactions.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; we generally get this for private deals.

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Rarely, unless there is a significant gap between signing and closing. Notification of breach is fairly common.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Materiality qualifiers are commonly seen but are often not quantified (other than specific warranties, e.g., contract value).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: Knowledge qualifiers are growing. They are often limited to the actual knowledge and due enquiry of a specified list of senior management.

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Rarely; sophisticated sellers try to omit this representation; but if pressured, it is limited to fraud or an intention to mislead.

## Is disclosure of the data room common?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common; repetition at completion is common.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Fairly common.

## Is a bring-down certificate at closing common?

Frequency/market practice: A bring-down certificate is common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True and accurate in all material respects is common but often carves out for fundamental representations that must be absolutely true.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely; double materiality is usually avoided.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: The buyer will ask for 100% but it is possible to negotiate down. Tax or specific areas of concern may be carved out from the limitation.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: Both are seen regularly, depending on the parties' level of sophistication.

## What are the common exceptions to the cap?

Frequency/market practice: Key warranties are often excepted (e.g., title, capitalization and authority). Often, tax and specific areas of concern (environmental) are also excepted, sometimes with specific higher caps. Separate caps can be negotiated.

## Is a deductible or basket common?

Frequency/market practice: It is fairly common to have these limitations.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: A cap of 1.5-2 years is common. For tax, 5-7 years' liability is common.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Yes, mainly fraud, tax and environmental warranties.

## Is warranty insurance common?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Rarely.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: It is becoming more common.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: It is becoming more common.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: This is not required by law, but sometimes incorporated into contracts by express terms.

## Is there an exclusion of consequential damages?

Frequency/market practice: Fairly common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes

## What is the common governing law?

Frequency/market practice: Taiwanese law.

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Both are common; if an offshore entity is involved in the transaction, it often requests arbitration outside Taiwan, e.g., in Singapore.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: Each agreement holder is responsible for the stamp duty levied on the agreement. The stamp duty for a movable properties transfer agreement is TWD 12 per agreement. The stamp duty for a real property transfer agreement is 0.1% of the purchase price.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is fairly common to have a tax indemnity, usually included in the purchase agreement.

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