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

Common deal structures

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# 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.

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