

Merger Control

The international regulation of mergers and joint ventures
in 74 jurisdictions worldwide

Consulting editor
John Davies



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GETTING THE
DEAL THROUGH 

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CONTENTS

At the intersection of the global economy and national interests: foreign investment review and merger control meet	7	China	97
Robert Schlossberg and Christine Laciak Freshfields Bruckhaus Deringer		Nicholas French, Ninette Dodoo, Vivian Cao and Janet (Jingyuan) Wang Freshfields Bruckhaus Deringer	
Timelines	11	Colombia	104
Michael Bo Jaspers and Joanna Goyder Freshfields Bruckhaus Deringer		Carlos Esguerra Posse Herrera Ruiz	
Acknowledgements for verifying contents	27	COMESA	110
Albania	29	Janine Simpson and Nkonzo Hlatshwayo Webber Wentzel	
Günter Bauer, Denis Selimi and Paul Hesse Wolf Theiss		Croatia	113
Argentina	33	Günter Bauer, Luka Čolić and Paul Hesse Wolf Theiss	
Alfredo M O'Farrell, Miguel del Pino and Santiago del Rio Marval, O'Farrell & Mairal		Cyprus	119
Australia	39	Anastasios A Antoniou and Aquilina Demetriadi Anastasios Antoniou LLC	
Fiona Crosbie and Kon Stellios Allens		Czech Republic	124
Austria	47	Martin Nedelka and Radovan Kubáč Nedelka Kubáč advokáti	
Axel Reidlinger and Maria Dreher Freshfields Bruckhaus Deringer		Denmark	129
Belgium	54	Morten Kofmann, Jens Munk Plum, Erik Bertelsen and Bart Creve Kromann Reumert	
Laurent Garzaniti, Thomas Janssens, Tone Oeyen and Amaryllis Müller Freshfields Bruckhaus Deringer		Egypt	134
Bolivia	59	Firas El Samad Zulficar & Partners	
Jorge Luis Inchauste Comboni Guevara & Gutierrez SC – Servicios Legales		Estonia	138
Bosnia and Herzegovina	63	Raino Paron and Martin Mäesalu Ellex	
Günter Bauer, Paul Hesse and Amela Selmanagić Wolf Theiss		European Union	143
Brazil	68	John Davies, Rafique Bachour and Angeline Woods Freshfields Bruckhaus Deringer	
Marcelo Calliari, Daniel Andreoli and Joana Cianfarani TozziniFreire Advogados		Faroe Islands	151
Bulgaria	73	Morten Kofmann, Jens Munk Plum, Erik Bertelsen and Bart Creve Kromann Reumert	
Peter Petrov Boyanov & Co		Finland	154
Canada	78	Christian Wik, Niko Hukkinen and Sari Rasinkangas Roschier, Attorneys Ltd	
Neil Campbell, James Musgrove, Mark Opashinov and Joshua Chad McMillan LLP		France	159
Channel Islands	85	Jérôme Philippe and François Gordon Freshfields Bruckhaus Deringer	
Rob van der Laan OmniCLES		Germany	166
Chile	92	Helmut Bergmann, Frank Röhling and Bertrand Guerin Freshfields Bruckhaus Deringer	
Claudio Lizana and María José Villalón Carey		Greece	175
		Aida Economou Vainanidis Economou & Associates	

Greenland	180	Malta	266
Morten Kofmann, Jens Munk Plum, Erik Bertelsen and Bart Creve Kromann Reumert		Ian Gauci and Karl Sammut GTG Advocates	
Hong Kong	183	Mexico	272
Nicholas French, Ninette Dodoo and Ruth Chen Freshfields Bruckhaus Deringer		Gabriel Castañeda Castañeda y Asociados	
Hungary	192	Morocco	277
Gábor Fejes and Zoltán Marosi Oppenheim		Corinne Khayat and Maija Brossard UGGC Avocats	
Iceland	198	Namibia	282
Hulda Árnadóttir and Heiðrún Lind Marteinsdóttir LEX		Peter Frank Koep and Hugo Meyer van den Berg Koep & Partners	
India	203	Netherlands	286
Shweta Shroff Chopra, Harman Singh Sandhu and Rohan Arora Shardul Amarchand Mangaldas & Co		Winfred Knibbeler and Paul van den Berg Freshfields Bruckhaus Deringer	
Indonesia	209	New Zealand	292
HMBC Rikrik Rizkiyana, Anastasia PR Daniyati and Ingrid Gratsya Zega Assegaf Hamzah & Partners		Sarah Keene and Troy Pilkington Russell McVeagh	
Ireland	215	Nigeria	302
Helen Kelly and Eoin Kealy Matheson		Babatunde Irukera and Ikem Isiekwena SimmonsCooper Partners	
Israel	221	Norway	307
Eytan Epstein, Tamar Dolev-Green and Eti Portook Epstein, Knoller, Chomsky, Osnat, Gilat, Tenenboim & Co		Jonn Ola Sørensen, Simen Klevstrand and Øyvind Andersen Wikborg Rein	
Italy	227	Pakistan	312
Gian Luca Zampa Freshfields Bruckhaus Deringer		Waqas Mir Mohsin Tayebaly & Co	
Japan	236	Poland	317
Akinori Uesugi and Kaori Yamada Freshfields Bruckhaus Deringer		Aleksander Stawicki and Bartosz Turno WKB Wierciński Kwieciński Baehr	
Korea	242	Portugal	322
Seong-Un Yun and Sanghoon Shin Bae, Kim & Lee LLC		Mário Marques Mendes and Pedro Vilarinho Pires Gómez-Acebo & Pombo	
Latvia	247	Russia	329
Julija Jerneva and Janis Sarans VILGERTS		Alexander Viktorov Freshfields Bruckhaus Deringer	
Liechtenstein	252	Saudi Arabia	334
Heinz Frommelt Sele Frommelt & Partners Attorneys at Law Ltd		Fares Al-Hejailan, Rafique Bachour, Anna Biganzoli and Hani Nassef Freshfields Bruckhaus Deringer	
Luxembourg	257	Serbia	339
Alexandrine Armstrong-Cerfontaine and Bertrand Geradin King & Wood Mallesons		Günter Bauer and Maja Stanković Wolf Theiss	
Macedonia	260	Singapore	345
Vesna Gavriloska, Maja Jakimovska and Margareta Taseva Čakmakova Advocates		Lim Chong Kin and Corinne Chew Drew & Napier LLC	

CONTENTS

Slovakia	354	Ukraine	411
Günter Bauer, Luboš Frolkovič and Paul Hesse Wolf Theiss		Igor Svechkar and Alexey Pustovit Asters	
Slovenia	359	United Arab Emirates	416
Günter Bauer, Klemen Radosavljevič and Paul Hesse Wolf Theiss		Rafique Bachour and Anna Biganzoli Freshfields Bruckhaus Deringer	
South Africa	364	United Kingdom	421
Robert Legh and Tamara Dini Bowman Gilfillan		Martin McElwee, Alison Jones and Olivia Hagger Freshfields Bruckhaus Deringer	
Spain	374	United States	428
Francisco Cantos, Álvaro Iza and Enrique Carrera Freshfields Bruckhaus Deringer		Ronan P Harty and Stephen M Pepper Davis Polk & Wardwell LLP	
Swaziland	380	Uruguay	437
Kenneth J Motsa and Gabsile A Maseko Robinson Bertram		Alberto Foderé Foderé Abogados	
Sweden	383	Uzbekistan	441
Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg Mannheimer Swartling		Bakhodir Jabborov and Jamol Ryskiyev GRATA Law Firm	
Switzerland	388	Zambia	445
Marcel Meinhardt, Benoît Merkt and Astrid Waser Lenz & Staehelin		Sydney Chisenga Corpus Legal Practitioners	
Taiwan	393	The ICN in 2015	449
Mark Ohlson, Charles Hwang and Fran Wang YangMing Partners		Andreas Mundt Chair of the International Competition Network's Steering Group President of the Bundeskartellamt (Germany)	
Thailand	401	Quick reference tables	450
Pakdee Paknara and Patraporn Poovasathien Weerawong, Chinnavat & Peangpanor Ltd			
Turkey	405		
Gönenç Gürkaynak ELIG, Attorneys-at-Law			

Taiwan

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The principal legislation concerning mergers and acquisitions, unfair competition and monopoly in Taiwan consists of: the Fair Trade Law of 1991 (FTL), the most recent amendments to which were promulgated in February 2015; the Enforcement Rules to the FTL, last revised in July 2015; and the Fair Trade Commission Guidelines on Handling Merger Filings, first promulgated in July 2006 (the Guidelines), with the most recent amendment in April 2015. Article 10 of the FTL places mergers and acquisitions in the broader category of 'combinations of enterprises'. The 2002 amendments to the FTL and its related Enforcement Rules changed the filing process for combinations from an approval system to a notification system, and the Guidelines introduced a two-tier review system by classifying combination filings into 'simplified' and 'general' filings. The 2015 amendments to the FTL further brought significant changes including:

- (i) provisions requiring the inclusion of the turnover of the entire group in a conglomerate for the purposes of calculating turnover thresholds;
- (ii) provisions requiring aggregation of the shareholdings in the target of all of the companies in a conglomerate when calculating whether the definition of a combination is satisfied;
- (iii) provisions that an individual or group and related parties of the individual and group may be treated in the same manner as an enterprise for the purposes of determining common control over a group of companies;
- (iv) provisions delegating the Fair Trade Commission (FTC) to establish industry-specific turnover thresholds; and
- (v) provisions increasing the period by which the standard 30-day clearance waiting period may be extended from an additional 30 days to an additional 60 days (ie, a maximum 90-day period).

At the national level, the FTC is the government authority overseeing mergers and other types of combinations. The FTC is empowered to examine and investigate possible violations of the FTL and to take action against those who breach the FTL by imposing fines and other penalties. The FTC can also order the dissolution of any combinations that breach the provisions of the FTL. The FTC will investigate complaints against combinations effected without the consent of the FTC, but may also investigate matters on its own initiative.

2 What kinds of mergers are caught?

Transactions that fall under the broad category of 'enterprise combinations' under article 10 of the FTL and meet one of the jurisdictional thresholds set out below must be reported to the FTC in advance. A combination under the FTL occurs when an enterprise:

- merges with another enterprise;
- holds or acquires one-third or more of the total voting shares or capital stock of another enterprise;
- accepts the transfer of or leases the whole or a major part of the business or assets of another enterprise;
- operates jointly with another enterprise on a regular basis or is entrusted by another enterprise with the operation of its business on its behalf; or
- directly or indirectly gains control over the business operations or the employment and dismissal of the personnel of another enterprise.

In calculating the shares or capital contributions to determine whether there is a combination, the shares or capital contributions held or acquired by those enterprises that have a controlling or subordinate relationship with the participating enterprise shall be aggregated with those held or acquired by the participating enterprise (see question 4).

The Guidelines further categorise combinations into three different types, including horizontal (where the combining enterprises engage in horizontal competition), vertical (where the combining enterprises have an upstream-downstream relationship), and conglomerate (where the combining enterprises do not engage in horizontal competition and do not have an upstream-downstream relationship).

3 What types of joint ventures are caught?

The establishment of a joint venture company by two or more enterprises is considered an enterprise combination subject to the FTL, regardless of the type of joint venture. Hence, the jurisdictional thresholds discussed below would apply.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Article 6 of the Enforcement Rules to the FTL prescribes that the following conditions constitute 'controlling and subordinate relationships':

- where an enterprise holds or acquires more than half the total number of voting shares of, or contributes more than half of the total capital of, another enterprise;
- where an enterprise directly or indirectly controls the personnel, finances or business operations of another enterprise, and has controlling power over that other enterprise;
- where an enterprise is assigned by or leases from another enterprise the whole or a major part of the business or assets of such other enterprise, or where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business and where the enterprise assigning such business has controlling power over the other enterprise; or
- where a person or a group and their related persons hold a majority of the total number of outstanding voting shares of, or contributes more than half of the total capital of, another enterprise (see question 5 for a discussion of the persons and groups that would be considered 'enterprises' under the FTL's merger rules).

In addition, the following relationships between enterprises would be presumed to be controlling and subordinate relationships:

- where a majority of executive shareholders or directors of an enterprise concurrently act as executive shareholders or directors of another enterprise; or
- where the same shareholders hold a majority of the total number of outstanding voting shares of more than one enterprise, or contribute a majority of the total capital stock of more than one enterprise.

See question 2 for a description of situations where a notification is required in cases where there may not be a change in control.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Article 11 of the FTL sets forth the following three criteria, any one of which (subject to certain exceptions) triggers a requirement to notify the FTC before completion of a combination:

- if one of the participating enterprises to the combination has a market share of at least one-quarter;
- if, post-combination, the resulting enterprise will have a market share of at least one-third; or
- if the sales revenue during the previous fiscal year of any enterprise that is a party to the combination exceeds a figure set by the FTC. The current sales threshold promulgated by the FTC for the parties, where neither of them is a financial institution, is that a notification is required if one party to the combination had sales revenue in the immediately preceding fiscal year of at least NT\$15 billion and another party to the combination had sales revenue for the same year of at least NT\$2 billion; if both parties to the combination are financial institutions (eg, a bank, a securities company, an insurance company or a financial holding company), then the threshold is at least NT\$30 billion in sales revenue in the immediately preceding fiscal year for such financial institution, and the threshold for the other party is still NT\$2 billion. The FTC is authorised by the FTL to establish other new thresholds of sales revenue for certain industries as the need arises.

According to the Guidelines, a general filing is required to be made to the FTC (under the foregoing thresholds) unless special thresholds are met, in which case, a simplified filing can be made. A simplified filing generally requires a shorter waiting period and the submission of less information in the notification, such as fewer major products, competitors and customers covered and fewer years of market and economic information covered. Articles 7 and 8 of the Guidelines provide special thresholds and exceptions relating to simplified filings. A simplified filing is permissible where sales for the preceding fiscal year of the combining enterprises in the combination exceed the revenue threshold (article 11, paragraph 1, subparagraph 3 of the FTL) and the combined market share in any market in Taiwan of the enterprises participating in a horizontal combination is less than 20 per cent (provided that this excludes situations where the combined market share of the top two enterprises in a relevant market reaches two-thirds of the market, or where the combined market share of the top three enterprises in a relevant market reaches three-quarters of the market) or the combined market share in individual markets of the enterprises participating in a vertical combination is less than 25 per cent and one of these enterprises has no more than a 5 per cent market share in such markets; after taking into account major competition factors, the proposed conglomerate combination would not have a substantial negative effect on competition in the relevant markets of participating enterprises; or the following controlling or affiliated enterprises change their structure:

- an enterprise participating in the combination directly holds not less than one-third, but less than half of the total voting shares or total capital of, and subsequently combines with, the other enterprise;
- a consolidation between enterprises that already have a parent-subsidiary relationship and that are not exempt from filing requirements as set forth in article 12(1) of the FTL;
- the merging parties are all subsidiaries of the same parent company and are not exempt from filing requirements as set forth in article 12(2) of the FTL;
- an enterprise surrenders part or all of its voting shares or capital contribution in a third company to an enterprise with which it has a parent-subsidiary relationship; or
- an enterprise surrenders part or all of its voting shares or capital contribution in a third company to an enterprise that is also a subsidiary of the same parent company.

However, general filing may become applicable if the FTC determines that:

- the combination involves major public interest;
- one of the parties to the combination is a holding company as defined in either the Financial Holding Company Act or the Taiwan Stock Exchange Corporation Regulations for the Review of Stock Exchange Listing Applications by Investment Holding Companies;

- the scope of the relevant market or the market shares of the combining enterprises is difficult to determine; or
- the relevant market of the combining enterprises may incur major disadvantages resulting from competition restraint, such as high barriers to entry and high market concentration.

For the purpose of calculating the sales revenue thresholds noted above, the sales revenue of the participating enterprises to the combination shall be aggregated with the sales revenue of: (i) all enterprises that have control over the participating enterprise; (ii) enterprises that the participating enterprises have control over; and (iii) all enterprises that are controlled by the ultimate parent enterprises of the participating enterprises. For the definition of 'control' see question 4.

The FTL prescribes that an individual or a group, along with certain related parties of such individual or group, that holds more than half of the voting shares or total capital of any of the participating enterprises to the combination would be deemed an 'enterprise' with respect to the combination under the FTL. For the purposes of calculating the shareholdings or capital contributions of above individual or group, the shareholdings or contributions of the following related parties shall be included:

- the above individual, and the individual's spouse, and the individual's blood relatives within the second degree of kinship (related natural persons);
- an enterprise in which the related natural persons hold more than one-half of the total number of outstanding voting shares or total capital;
- an enterprise in which the related natural persons act as its chairman, president, or a director representing a majority of directors;
- the above group and its representative, manager, or any other person with representing authority, his or her spouse, and his or her blood relatives within the second degree of kinship (related persons in the group); and
- the above group and an enterprise in which a group or the related persons in the group hold more than one-half of the total number of outstanding voting shares or total capital. The FTC has also ruled that for foreign-to-foreign combinations, the sales figures apply only to sales in Taiwan, which would include sales by Taiwanese subsidiaries (including export sales from Taiwan) and export sales to Taiwan.

It is unlikely that a transaction not reaching these thresholds would be investigated for not filing a notification for combination.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Once any of the jurisdictional thresholds set out above are met, notification of the combination to the FTC is mandatory, unless the combination falls under one of the exceptions enumerated under article 12 of the FTL.

According to article 12 of the FTL, a combination is exempt from the requirement to notify where:

- one of the enterprises or its wholly-owned subsidiaries already holds 50 per cent or more of the enterprise with which it plans to combine;
- the same parent company holds 50 per cent or more of the shares in each of the enterprises which plan to combine;
- an enterprise plans to sell a distinct division to a newly established and wholly-owned enterprise;
- an enterprise plans to engage in a qualified stock redemption plan;
- an enterprise plans to invest in and establish a subsidiary in which it will hold all of the shares or contribute all of the capital; or
- other types of combinations promulgated by the FTC from time to time.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Yes. When the thresholds are met, a notification is required. However, in the process of reviewing the notification, the FTC may decide not to exercise jurisdiction pursuant to the Principles for Handling Applications of Extraterritorial Combinations (the Principles), the last amendment of which was promulgated in February 2015. The Principles apply not only to combinations involving foreign enterprises with no subsidiaries or branch offices in Taiwan, but also to combinations involving Taiwanese enterprises and foreign enterprises, and Taiwanese enterprises and Taiwanese subsidiaries, branches, or affiliated enterprises of foreign enterprises.

Taiwan does apply a local effects test. The Principles define an 'extraterritorial combination' as an article 10 enterprise combination involving two or more foreign enterprises that occurs outside Taiwan where the result of the combination has 'a direct, substantial, and reasonably foreseeable effect' on the Taiwanese market. Notes to the Principles published by the FTC state that the 'effect principle' was specifically modelled on corresponding US law. However, the Principles do not clearly define what constitutes a direct, substantial and reasonably foreseeable effect. Instead, an extraterritorial combination must file a notification with the FTC if one of the jurisdictional thresholds outlined in question 5 is satisfied. A direct, substantial and reasonably foreseeable effect is presumed if a combination meets one of the three thresholds.

The Principles also specify that sales revenue is to be calculated based on the sales in Taiwan of the combining enterprises (including export sales from Taiwan subsidiaries) plus the sales revenue of goods and services imported by Taiwan companies.

Once an extraterritorial combination meets jurisdictional thresholds, the Principles require the FTC to weigh certain factors based on international comity in determining whether to exercise jurisdiction. These factors include:

- the relative importance of the effects of the combination on Taiwan and foreign markets;
- the nationalities, locations and principal places of business of the combining enterprises;
- the explicitness of intent, and how far it can be foreseen, to affect market competition in Taiwan;
- the degree of conflict with the law or policy of the country of the combining enterprises;
- the possibility of administrative sanctions or compulsory execution;
- the effect of compulsory execution on the foreign enterprise or enterprises;
- international conventions and treaties, or provisions of international organisations; and
- other factors considered important by the FTC.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Although Taiwan has joined the World Trade Organization and generally moved towards the liberalisation of restrictions on foreign investment, it still prohibits or restricts foreign investment in a number of industries. According to the Negative List for Investment by Overseas Chinese and Foreign Nationals issued by the Industrial Development and Investment Centre of the Ministry of Economic Affairs, foreign investors should particularly be aware of investment caps or barriers to investment in sectors such as telecommunications, public transportation, military supplies, and accounting services.

According to the Enterprises Merger and Acquisition Law, foreign companies may merge with or assume all of the assets and liabilities of Taiwan companies subject to the Negative List for Investment by Overseas Chinese and Foreign Nationals.

According to the Financial Institution Merger Law, foreign financial institutions may merge with or assume all the assets and liabilities of financial institutions incorporated in Taiwan. Under the Financial Holding Company Law, foreign financial holding companies may obtain controlling ownership interests (up to 100 per cent) in financial subsidiaries of financial holding companies.

Investment in Taiwan funded from mainland Chinese sources was previously strictly prohibited. However, the Taiwan Ministry of Economic Affairs promulgated new regulations on 30 June 2009, with the most recent amendment in November 2013, with respect to investments from mainland China and the establishment of mainland Chinese companies' branch offices or agencies in Taiwan. So far, a considerable number of industries (including textiles, certain kinds of infrastructure industries, banks, securities firms, insurance companies and certain type II services (non-facility based) telecommunication services) are currently allowed to receive investment from mainland China.

In addition, the Taiwanese currency, the New Taiwan dollar, is not freely convertible. If a combination were to involve the inward remittance of more than US\$50 million or its equivalent by any company involved in the transaction, that company would be required to seek approval from Taiwan's central bank, on this and any other currency-related issue.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There are no specific rules on filing deadlines. However, notification must be filed at least 30 days prior to consummation of the combination. Sanctions for not filing include fines ranging from NT\$200,000 to NT\$50 million for each violation of the FTL (2015 FTL amendments increased the lower limit up from NT\$100,000 to NT\$200,000) and orders to cease or unwind the combination (see question 24). Fines have long been imposed for failure to file.

10 Who is responsible for filing and are filing fees required?

The following are responsible for filing:

- all enterprises participating in a combination where the combination consists of a merger, transfer or lease of the operations or assets of another enterprise or enterprises, regular joint operation of enterprises, or operation of another enterprise by agreement;
- the holding or acquiring enterprise, where it holds or acquires at least one-third of the shares or capital of another enterprise;
- the controlling enterprise, where it directly or indirectly controls the operations or employment and termination of personnel of another enterprise; and
- an individual or a group holding more than half of voting shares or contributing capital of the ultimate parent enterprise of the participating enterprise may be required to file a notification.

If the enterprises that are responsible for filing have not been incorporated, other enterprises participating in such combination must file.

Most commonly, the ultimate foreign parent companies of foreign enterprises involved in an extraterritorial combination are the parties that file the notification. For a foreign enterprise that has a branch or subsidiary in Taiwan, filing may be made by the Taiwan branch or subsidiary. However, the FTC may request information from the ultimate foreign parent enterprise as it deems necessary.

There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

A combination cannot take effect until 30 days after the FTC receives the complete notification materials; however, the FTC may shorten or extend the 30-day waiting period by providing written notification to the notifying enterprise of such change. This extension period cannot exceed 60 days. If no extension is granted to the original 30-day period and no objection to the combination is issued by the FTC by the end of the original 30-day period, the enterprises may combine 30 days after the FTC receives the complete notification. The FTC may shorten the original 30-day period if it determines that it has no objection to the combination. However, if the notifying enterprise agrees to the combination being further reviewed upon the expiration of the said extension period, the combination cannot take place.

Where the FTC extends the deadline, the enterprises may combine at the end of this extended deadline, or the parties may combine before the deadline if the FTC issues a decision allowing them to do so. The parties may not combine if the FTC issues an objection to the combination, or if false or misleading statements are found in the enterprises' notification.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

A combination that is required to be notified to the FTC may not legally be implemented if the FTC objects to the combination. If the combination is implemented anyway, the enterprises may be punished as described in question 24. If there is no FTC objection after the waiting period as described in question 11 has ended, the combination may take place.

One unresolved legal issue is whether a combination is void per se if it is not notified, or if it is to be deemed valid unless and until the FTC declares it to be illegal and thus void ab initio. One district court held that a combination that triggered the application requirement was void because no prior approval was obtained from the FTC. It should, however, be noted that this opinion was issued by a district court, and that this holding is without precedent. There continues to be a lack of consensus on this issue.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As far as we know, there has been no such case where sanctions were applied.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

There are no such solutions.

15 Are there any special merger control rules applicable to public takeover bids?

No special rules apply to public takeover bids. As discussed above, if the takeover falls within the definition of 'combination' and any of the jurisdictional thresholds is met, notification to the FTC is mandatory.

16 What is the level of detail required in the preparation of a filing?

The FTC requires the following information in a notification of an enterprise combination:

- a form describing the combination and the parties involved, the target closing date of the combination, contact information and domicile of the combining enterprises, and the name of the attorney and power of attorney, if applicable;
- basic information about each enterprise involved, including incorporation documents, business items, employment statistics, turnover for the previous fiscal year and total capital;
- the balance sheet and income statement of the preceding year for each enterprise involved;
- board resolution and share purchase agreements;
- a report detailing each combining enterprise's production or operating costs and the value and sales of the top five goods and the overlapping goods each sells in Taiwan for the three years prior to the date of the notification filing;
- an explanation of the benefits of the combination to the overall economy of Taiwan, including information on the relevant markets of the participating enterprises in terms of market shares, major competitors, level of competitiveness and difficulty of entry into the markets, as well as the impact of the combination on the relevant markets;
- a business plan for each combining enterprise;
- the status of the investment of each combining enterprise;
- the latest financial report and prospectus/annual report of combining enterprises which are listed on the Taiwan Stock Exchange or the Taiwan over-the-counter market;
- market structure information related to horizontal and vertical businesses in the relevant markets of the combining enterprises. Note that this may also include information regarding competitors' market information (market share, etc);
- any other documents that may be required by the FTC; and
- in the case of the establishment of a financial holding company by way of combination, contract documents.

17 What is the statutory timetable for clearance? Can it be speeded up?

As discussed in question 11, clearance takes 30 days or less from the time the FTC receives the complete notification materials or at the end of any extension period that may or may not be granted by the FTC. The FTC may shorten the clearance period when it has determined that it has no objection to the combination. The clearance period for a combination can vary significantly based on the complexity of the combination.

18 What are the typical steps and different phases of the investigation?

Under the FTC's internal rules and procedures, notifications of combinations are first submitted for initial review to the department of the FTC that deals with combinations. During the initial review, the department will coordinate with the Information and Economic Analysis Office of the FTC to examine whether the combination falls within the jurisdiction thresholds and whether all required documents have been submitted. If such combination does not fall within the jurisdiction thresholds, the FTC will issue a letter to indicate this fact. If all the required documents have

not been submitted, the FTC will issue a letter requesting supplementary information. After all required documents have been provided, the department will submit the case to the Commissioners' Meeting of the FTC. The commissioners will make the final decision on whether or not to reject the combination, or whether to extend or shorten the clearance period.

Also, pursuant to article 27 of the FTL, the FTC may require the parties or related third parties to make statements, or require relevant organisations or individuals to submit records, documents and any other necessary materials. The FTC may consult other Taiwan government authorities that regulate the industries of the parties to the combination. The FTC is also authorised to dispatch personnel to inspect the offices, place of business or other locations of relevant organisations. The 2015 amendments to the FTL authorised the FTC to seize evidence found during an investigation.

The commissioners may also ask the participants to appear in person at hearings or interviews. In addition, the FTC passed an internal rule in April 2002 to the effect that any combination notification filed with the FTC will be published on the FTC's website accompanied by a public request for opinions concerning the combination. However, the FTC will not make any answer or statement in response to such opinions. The FTC might choose not to make the combination case public if doing so would be contrary to any other existing laws.

Substantive assessment

19 What is the substantive test for clearance?

As noted in question 5, the three jurisdictional thresholds relate to market share and revenue of sales for the previous fiscal year in the relevant product and geographic markets. Revenue of sales generally refers to the total sales of an enterprise. Market share, on the other hand, is a more complex matter. To calculate the market share of an enterprise, the FTC must first identify the relevant market. To do this, the FTC will consider the following factors under the Principles for Deciding the Scope of the Relevant Market, enacted and promulgated in March 2015 (the Instructions):

- demand substitutability, meaning the ease with which a purchaser can obtain substitute products or services as the prices of the purchasers prior selections increase; and
- supply substitutability, meaning the ability of competing suppliers of products or services to provide substitutes when the original supplier raises its prices.

The Instructions suggest that the FTC will focus more on demand substitutability than supply substitutability.

According to the Instructions (article 3), the relevant market shall be determined by both the product market and the geographic market.

The product market means 'the scope of goods or services that, in terms of functionality, characteristics, purposes or prices, have a high degree of demand or supply substitution.' In applying demand substitutability and supply substitutability to determine the product market, pursuant to the Instructions, the FTC may take following factors into account:

- changes in prices of products or services;
- characteristics and uses of products or services;
- previous records showing that substitution between products or services has occurred;
- costs incurred by purchasers for turning to substituted products or services;
- degree to which purchasers turn to other products or services due to changes in prices of certain products or services;
- points of view of purchasers and competitors;
- relevant laws and regulations; and
- other relevant facts.

The geographic market means 'a region or scope in which the combining enterprises supply particular goods or services, and the trading counterpart can select or switch easily to other suppliers.' In applying demand substitutability and supply substitutability to determine the geographic market, pursuant to the Instructions, the FTC may take following factors into account:

- changes in prices of products or services in different areas and transportation costs;
- characteristics and uses of products or services;
- different transaction costs borne by purchasers in different areas;
- availability of products or services to purchasers;

- how purchasers decide to purchase products or services in different areas in response to changes in the prices of products or services;
- points of view of purchasers or competitors with respect to substitution of products or services in different areas;
- relevant laws and regulations; and
- other relevant facts.

In addition to the consideration of the product market and geographic market, the FTC may, depending on the case, examine how time influences the scope of the relevant market. The Instructions further provide examples of three approaches for determining the relevant market, which the FTC may use, on non-binding and non-priority bases: reasonable interchangeability of use analysis, cross-elasticity analysis and hypothetical monopoly test.

After the relevant market is identified, market share is calculated by considering the production, sales, stock, and import and export turnover of the enterprise in relation to the total market. As mentioned in question 5, article 11 of the FTL states that combinations in which one of the parties has a 'one-quarter market share' require notification to the FTC. In many jurisdictions, such market share tests apply only to markets in which the parties to a transaction have overlapping markets. This, however, is not the case under the FTL. Further, the FTC's position in its examination of notification filings is that the market share thresholds do not apply only to markets in which there is overlap.

It is the FTC's task to weigh the advantages of a possible combination against any negative effects it might have on the economy. If a combination would result in more positive than negative effects on the economy, the FTC cannot object to the proposed combination. However, where the FTC needs to make a decision on a notified combination, it may attach conditions or burdens so as to ensure that the overall economic benefit of the combination will be greater than the negative effects on competition.

A number of combinations that were approved by the FTC in recent years under the earlier version of the FTL involved combinations of enterprises whose markets had little overlap. This type of transaction is likely to have little impact on the enterprises' relevant markets and the FTC is generally well disposed to approving such combinations.

The Guidelines present more specific substantive tests for clearance relating to simplified and general filing cases.

For simplified filings, the FTC may determine that the overall economic benefit of the combination outweighs the disadvantages resulting from competition restraint in the absence of exceptions leading to the application of a general filing.

For general filings, the FTC may determine that the overall economic benefit of the combination outweighs the disadvantages resulting from competition restraint if there are no obvious concerns of competition restraint, after taking into account the factors relating to horizontal, vertical and conglomerate combinations contained in the Guidelines. In the event of obvious concerns of competition restraint, the FTC shall further assess the overall economic benefits to determine whether they outweigh the disadvantages resulting from competition restraint.

When a filing raises obvious concerns of competition restraint, the FTC will review the following considerations submitted by the filing enterprise regarding overall economic benefit from the combination: (i) consumer benefits; (ii) the combining enterprises have been in a disadvantaged position in trade; (iii) one of the combining enterprises is in extreme operational difficulties; and (iv) other concrete results relating to overall economic benefits (for (iii), this includes the enterprise being unable to repay its debts in the short-term; except through combination, the enterprise is unable to use other methods less restrictive to competition to remain in the market; and if unable to merge with another enterprise, the enterprise will have to withdraw from the market).

20 Is there a special substantive test for joint ventures?

There is no special substantive test for joint ventures.

21 What are the 'theories of harm' that the authorities will investigate?

For each category of combination, the Guidelines further set forth the following specific competition assessment factors that are used to determine whether there will be any harmful restraining effects on competition in the market.

Horizontal combinations

The FTC may take into consideration the following factors to assess the restraint on competition resulting from the combination.

Unilateral effects

After the combination, the combining enterprises can increase product prices or remuneration for services without being restrained by market competition (in such event, the FTC may assess the combination based on factors such as the market shares of the combining enterprises, homogeneity of the products or services, production capacity and import competition).

Coordinated effects

After the combination, the combining enterprises and their competitors restrict each other's business activities, or despite the absence of such restriction, the enterprises and their competitors take uniform actions, thus causing the market to be actually void of competition (if this occurs, the FTC may assess the combination based on factors including whether the market situation would be beneficial to concerted actions from enterprises, the degree of difficulty in monitoring violations and the effectiveness of punitive measures).

Degree of market participation

Including the possibility and timing of entry of potential competitors, and whether such entry would result in competition pressure on existing market players.

Countervailing power

The ability of trading counterparts or potential trading counterparts to restrict increases in product prices or remuneration for services by the combining enterprises.

Other factors that restrain competition

Further, the FTC will consider competition restraint to be obvious and shall further assess the overall economic benefits where: (i) the combined market share of the combining enterprises reaches half of the market; (ii) the combined market share of the top two enterprises in a relevant market reaches two-thirds of the market; or (iii) the combined market share of the top three enterprises in a relevant market reaches three-quarters of the market (for (ii) or (iii), the combined market share of the combining enterprises should reach 20 per cent).

Vertical combinations

The FTC may take into consideration the following factors to assess the restraint on competition resulting from the combination (such as vertical foreclosure): the possibility for other competitors to select trading counterparts after the combination; the degree of difficulty for enterprises not participating in the combination to enter the relevant market; the possibility for the combined enterprises to abuse their market power in the relevant market and other factors that may contribute to market blockage; the possibility of increased costs for competitors; and the possibility to implement concerted actions.

Conglomerate combinations (ie, involving neither vertical nor horizontal factors)

The factors used to assess restraint on competition resulting from horizontal or vertical combinations shall become applicable if the relevant market of the enterprises in a conglomerate combination possesses significant potentiality for competition that will cause a situation similar to a horizontal or vertical combination. The FTC may take into account the following factors to assess the significant potentiality for competition (eg, possible conglomerate effects):

- the impact of the elimination of legal restrictions on the combining enterprises operating businesses across industries;
- the possibility of the combining enterprises operating business across industries as a result of technological advancements;
- the original plans of the combining enterprises to develop business across industries outside of the combination; and
- other factors that affect the significant potentiality for competition.

Update and trends

Please see relevant questions for detailed explanations of the 2015 amendments to the FTL.

On 19 February 2014, The FTC decided not to oppose a combination between Microsoft Corporation (Microsoft) and Nokia Corporation (Nokia), but imposed two conditions in connection with its approval. The following is a brief on the FTC's decision:

Combination details

Microsoft would be assigned most of the business and assets of Nokia's device and service departments.

Vertical combination

The Microsoft operations related to the combination involved the development and licensing of Windows' mobile device operating system, while Nokia's consisted of the production of mobile devices. Therefore, the case was considered a vertical combination.

Competition analysis and concerns

- The possibility of Microsoft withholding the licensing of or increasing the licensing fees for the Windows mobile device operating system for competitors in the downstream market after the merger would be extremely low because Microsoft would like to see expanded use of the Windows mobile device operating system, which currently only holds a relatively small market share.
- The FTC believed that the combination would give Microsoft its own device manufacturing business and, thus, its dependence on

other mobile device manufacturers would decrease. This could, indeed, serve as an incentive for Microsoft to increase the licensing fees for certain key Android-reliant patents as a means of enticing downstream mobile device manufacturers to switch over from their use of Android to the Windows mobile device operating system.

- Nokia would retain its primary mobile device patents without actually producing mobile devices and, consequently, would not have to worry about being sued for patent infringement. This change would eliminate the need for Nokia to enter into cross-licensing arrangements with other mobile device manufacturers and would give Nokia an incentive to increase its licensing fees for mobile device manufacturers using its standard-essential patents.

In order to address the potential harm to competition brought about by the combination, the FTC attached two conditions for its approval of the combination:

- when licensing its patents, Microsoft may not alter pricing or employ any other discriminatory treatment as a means of restricting the freedom of mobile device manufacturers to choose their mobile operating systems; and
- Nokia shall adopt fair, reasonable, and non-discriminatory (FRAND) terms when licensing its standard-essential patents and shall also ensure that any enterprise acquiring any of its standard-essential patents shall abide by the aforesaid terms if Nokia should assign such patents to other enterprises.

22 To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the review process. In reviewing a notification of a combination, the FTC considers first and foremost whether the benefits of the combination for the overall economy are likely to outweigh the negative effects. According to the Guidelines, in cases where the combination filing is reviewed by simplified procedure or where the FTC believes that there are no obvious competition restraints, the FTC may decide that the overall economic benefits outweigh the disadvantages.

23 To what extent does the authority take into account economic efficiencies in the review process?

The operative principle is whether the overall benefit of the combination outweighs the disadvantages of restraining competition. The FTC will, however, examine economic efficiency issues more closely when there are strong disadvantages resulting from the proposed combination. Additionally, the FTC assigns less weight to efficiency benefits that accrue as an indirect result of a combination, or if the combination is not the only (or most important) way to achieve the efficiency benefit. The FTC may consider the following factors in conducting its analysis: increased efficiency with regard to the use of assets, lowered production and transport costs, economies of scale and diversification of services, whether there is a practical and effective savings plan, whether the combination lowers the variable costs of doing business, and the general impact of the combination on prices or services to consumers. The FTC only considers efficiency benefits that have been passed down to consumers in one form or another. As stated in question 19, the Guidelines added a provision that requires the FTC to consider the overall economic benefit of the combination even when obvious concerns arise regarding restraint on competition. The Guidelines state that when a filing raises obvious concerns of competition restraint, the FTC will review the following considerations submitted by the filing enterprise regarding overall economic benefit from the combination: (i) consumer benefits; (ii) whether the combining enterprises have been placed in a disadvantaged position in trade; (iii) if one of the combining enterprises is in extreme operational difficulties; and (iv) other concrete results relating to overall economic benefits (for (iii), this includes the enterprise being unable to repay its debts in the short term; except through combination, the enterprise being unable to use other methods less restrictive to competition to remain in the market; and if unable to merge with another enterprise, the enterprise will have to withdraw from the market).

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a combination occurs without the requisite notification or is disallowed by the FTC, the Commission may, in addition to imposing fines ranging from NT\$200,000 to NT\$50 million for each violation of the FTL, issue orders prohibiting the combination, set a deadline within which the enterprises must separate, require the disposal of acquired shares, require that business activities be transferred, or require that certain company officers or employees resign from their positions. Also, the FTC may order the dissolution of the enterprise or suspension of its operations if that enterprise fails to comply with its orders. The FTC may also pursue remedies beyond those enumerated above where warranted under the circumstances.

In addition to the fines stipulated in the FTL, the Administrative Penalty Act (APA) can also be applied if an enterprise is found to be in violation of the FTL.

According to the APA, if an enterprise is determined to have gained a benefit that exceeds the maximum statutory amount of the fine, the fine may be increased to represent the scope of the benefit gained. Further, if there has been a breach of duty due to an act of a director of an enterprise or of any other individual with the authority to represent an enterprise, the APA allows such director or individual to be separately fined if it is found that he or she has acted with intent or gross negligence. This fine can also be applied to the director or individual if the breach of duty is attributable to an act of a staff member, employee, or any other person with authority to act on behalf of the director or individual.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The February 2002 amendments to the FTL give the FTC the right to order additional conditions or burdens so as to ensure that the overall economic benefit of the combination will be greater than the disadvantages of restraining competition. For example, the FTC allowed one company to enter into a combination but forbade it from using its monopoly status to its advantage in the local market. While the FTC has the requisite power, it has yet to order a divestiture undertaking. Also note that the FTC is authorised to order the dissolution of the enterprise or the suspension of its operations if that enterprise fails to comply with its orders. For further information, see question 24.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Divestments or other remedies are enforced when enterprises combine without undergoing the mandatory waiting period, combine despite prohibition by the FTC, or fail to abide by conditions set by the FTC. The FTC can prohibit a combination or prescribe a period for such enterprise or enterprises to split, dispose of all or a part of the shares, transfer a part of the operations, remove certain persons from positions or make any other necessary dispositions. Enterprises that violate a disposition by the FTC within the prescribed period may be further ordered to dissolve, suspend or terminate their operations.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

The TFTC has imposed conditions and 'burdens' (a form of continuing obligations which may be imposed on a party to an administrative disposition under Taiwan's Administrative Procedure Act) in a number of foreign-to-foreign mergers.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The FTC will consider related arrangements to the extent that such arrangements restrict competition. Non-compete agreements, obligations to license industrial property, purchase and supply obligations, and other obligations, where known to the parties at the time of filing, must be disclosed and will be considered as relevant factors in the FTC's decision-making process. However, there are no specific provisions in law that address ancillary restrictions.

Involvement of other parties or authorities**29 Are customers and competitors involved in the review process and what rights do complainants have?**

The FTC is not legally required to solicit or accept the comments of customers or competitors of an enterprise that is filing a combination notification, nor is it required to hold public hearings as part of the review process. However, as mentioned in question 18, the FTC has internally decided to solicit opinions from the public. If customers or competitors are aware of a notification to the FTC, they may submit their views, but the FTC is under no statutory obligation to accept or take such views into account.

Additionally, the FTC may require related third parties to make statements or require relevant organisations or individuals to submit records, documents and other necessary materials. The FTC is also authorised to dispatch personnel to inspect the offices, place of business, or other locations of relevant organisations.

Under the FTL, if a party is injured by the actions of an enterprise that is acting in violation of the FTL, the injured party may seek injunctive relief as well as damages. A court may award treble damages. However, a party's ability to recover damages for injuries resulting from merger and acquisition activities is largely theoretical.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

As mentioned in question 18, any combination report filed with the FTC will be publicised on the FTC's website with a request for opinions from the public on the combination. The published information is general in nature, taking the form of a relatively brief announcement of the planned combination. The filings made to the FTC by the parties to the combination are not public. Similarly, opinions submitted by interested parties may only be reviewed by the FTC.

Beyond this, the review of a notification of a combination is an internal process kept within the FTC, except that the notifying enterprise or a related person may, as required for the advocacy or defence of legal rights and interests, request to read, transcribe, photocopy or photograph relevant materials or files, with some exceptions limited under the FTL.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

The FTL does not explicitly authorise cooperation with antitrust authorities in other jurisdictions; however, the FTC has communicated with antitrust authorities in other jurisdictions while conducting investigations in the past. Also, the FTC has entered into cooperative treaties with the antitrust authorities in Australia, Canada, France, Mongolia, Hungary, New Zealand and Panama.

FTC policy statements note that in recent years there has been a trend toward large combinations between multinational corporations, the parent companies of which are located in advanced industrialised countries. It is noted that while such combinations may improve the competitiveness of the parties in their respective home countries, due to the market power of such companies in other countries, it is necessary that the competition authorities coordinate and scrutinise the competitive impact of such transactions. Accordingly, it is the policy of the FTC to broadly interpret its jurisdiction in offshore transactions that may have a competitive impact in Taiwan.

Judicial review**32 What are the opportunities for appeal or judicial review?**

The 2015 amendments to the FTL allow an enterprise or person dissatisfied with an FTC decision to appeal the decision directly to the Taipei High Administrative Court and finally to the Supreme Administrative Court without first submitting to a review procedure by the Appeals Committee of the Executive Yuan, as previously required. This change was instigated after Taiwan's Grand Justice Council opined that decisions by an independent agency are exempt from review by its direct superior authority.

33 What is the usual time frame for appeal or judicial review?

According to Taiwan Code of Administrative Procedure, if the requirement to first appeal to the superior authority is waived by laws, parties dissatisfied with administrative decisions may file for judicial review within two months of receiving such decisions. Thus, after the FTL's 2015

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amendments (see question 32), parties dissatisfied with FTC decisions may file for judicial review directly within two months of receiving such decisions.

Judicial review could take anywhere from eight months to one-and-a-half years to reach a final resolution.

Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

According to the publicly accessible database maintained by the FTC, between January 2013, and January 2015 there were 10 cases of a party being penalised with an administrative fine of between NT\$50,000 and NT\$5 million for failing to file with the FTC. In many other cases, the FTC approved the combinations but set several conditions on the approvals. Those conditions varied depending on the type of combination, but included restrictions on the appointment of directors, supervisors and general managers for a certain period of time, restrictions on certain types

of actions that could have the potential to harm competition, restrictions on certain types of actions that could constitute abuses of market power, and the provision of certain business information, such as pricing arrangements, to the FTC for a certain period of time. In the past two years, the FTC has not rejected any combinations, but has recently begun increasingly imposing conditions on the approvals it grants to combinations.

According to a recent report issued by the Chair of the FTC in the Legislative Yuan, the FTC will be 'looking closely to the progress of investigations of international antitrust cases and will use those as references when enforcing the FTL' and will 'maintain open communication with other foreign agencies in charge of competition law in order to thwart international cartels and anti-competition activity.' In the future, decisions made by foreign agencies may be more likely to be scrutinised by the FTC.

35 Are there current proposals to change the legislation?

None.

Getting the Deal Through

Acquisition Finance	Domains & Domain Names	Licensing	Real Estate
Advertising & Marketing	Dominance	Life Sciences	Restructuring & Insolvency
Air Transport	e-Commerce	Loans & Secured Financing	Right of Publicity
Anti-Corruption Regulation	Electricity Regulation	Mediation	Securities Finance
Anti-Money Laundering	Enforcement of Foreign Judgments	Merger Control	Securities Litigation
Arbitration	Environment	Mergers & Acquisitions	Ship Finance
Asset Recovery	Executive Compensation & Employee Benefits	Mining	Shipbuilding
Aviation Finance & Leasing	Foreign Investment Review	Oil Regulation	Shipping
Banking Regulation	Franchise	Outsourcing	State Aid
Cartel Regulation	Fund Management	Patents	Structured Finance & Securitisation
Climate Regulation	Gas Regulation	Pensions & Retirement Plans	Tax Controversy
Construction	Government Investigations	Pharmaceutical Antitrust	Tax on Inbound Investment
Copyright	Initial Public Offerings	Private Antitrust Litigation	Telecoms & Media
Corporate Governance	Insurance & Reinsurance	Private Client	Trade & Customs
Corporate Immigration	Insurance Litigation	Private Equity	Trademarks
Cybersecurity	Intellectual Property & Antitrust	Product Liability	Transfer Pricing
Data Protection & Privacy	Investment Treaty Arbitration	Product Recall	Vertical Agreements
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