Taiwan
Squeeze-out Guide
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INTRODUCTION

In Taiwan, as anywhere else, it is not easy to have a clear definition of what people call "squeeze-out mergers" especially nowadays that mergers can take many forms. As a U.S. court elaborates, the squeeze-out mergers refer to "the use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate minority shareholders from the enterprise or to reduce to relative insignificance their voting power or claims on corporate assets. Furthermore, it implies a purpose to force upon the minority shareholder a change, which is not incident to any other business goal of the corporation. Although the form of such freeze-out transaction may vary and is not confined to merger or consolidation, the policy considerations are generally the same." (Gabhart v. Gabhart, 267 Ind. 370, 370 N.E.2d 345, 353 (1977)). Basically in corporate law, any transaction where parties in control of a corporation engage in for the purpose of eliminating minority shareholders could be viewed as a "squeeze-out" or "freeze-out" transaction.

Taiwan is an emerging capital market in East Asia. Since 2004, M&A transactions shoot up dramatically and the average amount of all deals in each year is over USD 460 million. Undoubtedly, the procedure of M&A practices and the protective methods for minority shareholders are getting more and more noteworthy. Here, we will explore the legal basis of squeeze-out merger under the Taiwan legal system, while introducing the practices and current development of squeeze-out mergers in Taiwan.

SQUEEZE-OUT TRANSACTIONS UNDER TAIWAN LAW

Under the Taiwan Company Act, a supermajority of shareholders must provide their approval before a merger can be completed. A two-thirds majority is a common threshold for merger (see Article 316 of the Company Act). When the supermajority approves the deal, the minority shareholders are required to tender their shares even though they did not vote in favor of the deal. Article 4 Section 3 of the Business Mergers and Acquisitions Act (the "M&A Act") provides that the surviving company could compensate the minority shareholders by cash in lieu of its shares; in other words, the minority's shares are transformed into cash and those minority shareholders lose their influence on neither the target nor surviving company. This provision constitutes the legal basis for supermajority shareholders to exclude minority's positions in the target company. The minority shareholders are therefore, squeezed-out.

Nevertheless, it is not to say that dissenting minority shareholders are devoid of any right. Those shareholders who believe that their shares are worth significantly more than the terms offered at the merger may go to court to pursue their shareholder appraisal rights. According to Article 317 of the Company Act and Article 12 of the M&A Act, if the minority shareholders are not satisfied with the cash-out plan, they can request the company to buy back their shares at "fair price". In short, while the supermajority could exclude the positions of minority shareholders by cash, the minority shareholders have the appraisal rights to request a fair price.

To successfully pursue the appraisal rights, dissenting shareholders must follow proper procedures. Paramount among these procedures is the requirement that the dissenting shareholders object to the deal at the shareholders' meeting or board of directors' meeting, which determine this transaction (Article 19 of the M&A Act). The minority shareholders may then demand a cash settlement for the difference between the "fair price" of their shares and the compensation they would receive. Predictably, most of the companies resist these maneuvers since the payment of cash for the value of shares will pose problems relating to the positions of other stockholders. Therefore, the next step for dissenting minority shareholders would be to file a suit within 30 days after the settlement period (Article 187 of the Company Act), requesting the court to determine the fair price.

FAIR PRICE

As to the fair price, the court generally has varying methods toward listed companies and non-listed companies. For the listed companies, in many cases, the court holds that the fair price should be determined in accordance with the price at central trading market on the date of the shareholders' meeting, which resolves on the merger. However, some commentators argue that owing to the price limits set up by Taiwan Central Trading Market, the so-called "price" could not properly reflect a real price of the company's shares.

In the case of the non-listed companies however, the courts have split opinions. Some judges believe the fair price of the shares should be appraised by the net value of the companies; some judges would take several different factors into consideration, including market, performance, or future development; other judges use some stock appraisal methods, such Price/Earning Ration, Market Value, or Earning Values, etc

CURRENT CASE OF SQUEEZE-OUT TRANSACTION: TWO-STEP PLAN

Here we present a well-known case regarding a squeeze-out transaction and how a court has opted to protect minority shareholders. In 2006, the Carlyle Group tried to use a "triangular merger" and a "short-form merger" to acquire a large media company in Taiwan, attempting to squeeze-out the minority shareholders with a share price much lower than what it paid to majority shareholders.

FIRST STEP—TRIANGULAR MERGER

First of all, Carlyle established a new company called "Sheng-Ze" (the "S.Z.") as acquirer in this project; Carlyle could therefore successfully avoid legal risks occurring in this transaction. The target company ETTV then conducted delisting process to avoid the tender offer procedure provided by the Securities Exchange Act and Carlyle used S.Z. to acquire 90.32% shares of ETTV Media Company, at the price of TWD 32.5 per share. Once Carlyle obtained more than 90% of the shares of the target company, it crossed the threshold of short-form merger, and therefore, the target company's shareholders' meeting resolution in favor of this merger, was no longer needed (see Article 19 of the M&A Act). The resistance of minority shareholders was reduced, if not eliminated.

SECOND STEP—SHORT-FORM MERGER

As mentioned above, once the acquirer obtains more than 90% of theshares of the target company, the short-form merger could be exercised and the shareholders' meeting resolution is no longer necessary. Here, the Board of Directors of ETTV, which has been controlled by Carlyle and S.Z., determined the merger plan that each share of minority shareholders would be exchanged for cash at the price of TWD 26. Now, ETTV was merged into S.Z. and the minority shareholders were completely squeezed-out, each share at a low price.

Finally, the S.Z. was merged into Tong-Ho, its 100%-held subsidiary and this merger project was completed. Here is a flowchart illustrating the whole project:

THE APPRAISAL RIGHTS OF MINORITY SHAREHOLDERS

Many minority shareholders believed their shares should have been bought at least at the price of TWD 32.5, same as the majority shareholders'. They filed a suit against ETTV and claimed for a "fair price". ETTV argued that the price difference between the majority shareholders and the minority shareholders is due to the "control premium" and the minority shareholders' stocks are naturally less valuable. The Taipei District Court and Taiwan High Court maintain different opinions in this regard.

Taipei District Court found for the minority shareholders. Based on the principles of good faith and fairness, the Judge held that though this cash-out project is not illegal under the Company Act and the M&A Act, the fact remains that it is just not fair for those minority shareholders to sacrifice their shares at a lower price. Moreover, the so-called "majority shareholders" have the same common shares with the minority shareholders and even the number of the shares of each "majority shareholder" does not exceed that of the minority shareholders. Finally, as to the delisting of the target company, the Judge believed that it is an intentional behavior to circumvent the tender offer requirement for all listed companies. There is no reason to let the acquirer select some shareholders with higher stock price at the cost of the rest shareholders. The "Control Premium" should be shared by every shareholder fairly.

The Taiwan High Court, on the other hand, found that the majority shareholders should have the right of control premium. Regarding the equal opportunity rule held by Taipei District Court, High Court expressively refuted this argument and found that as the shares of majority shareholders have significant influence on the controlling power of the target company, they deserve a higher price. If the acquirer could obtain controlling power over the target company and therefore, lower its operation risks, it is not improper for the acquirer to pay majority shareholders control premium.

TIMELINE FOR APPRAISAL RIGHTS OF MINORITY SHAREHOLDERS:

Timeline	Action
R	Supermajority resolution of shareholders on the merger plan proposed by Board of Directors.
R+20 days	The object shareholders' request of share purchasing shall be brought in writing within 20 days after the adoption of resolution on the merger plan, stating therein the kinds and number of shares.
R+90	In case an agreement on the price of shares is reached between the shareholder and the company, the company shall pay for the shares within 90 days from the date on which the resolution was adopted.

R+60+30	In case no agreement is reached within 60 days of the date on which the resolution was adopted, the shareholder may, within 30 days from the date on which the 60-day period expired, apply to court for a ruling on the price

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CONCLUSION

In Taiwan, Article 4 of the M&A Act provides the legal basis to the acquirer to squeeze-out minority shareholders. The key point is “how to determine the price of squeezing-out”. Though minority shareholders have appraisal right to request a “fair price”, Taiwan courts have divided opinions on determining the price. Recent development shows that some judges hold that the acquirer should purchase the shares of minority shareholders at the same price as of the majority shareholder’s shares; nonetheless, other judges recognize that the controlling majority shareholders deserve a higher price (i.e., control premium) as their shares also go along with the controlling power. These split opinions are worthy of every practitioner’s attention in dealing with a squeeze-out plan.