

OECD Implementation Workshop on Fighting Abusive RPTs

# **THE EPISTOMOLOGY OF RPTs: I KNOW IT WHEN I SEE IT!**

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# Challenges

Rules should be clear, but markets and transactions are dynamic and fluid.

RPTs happen all the time, and there's a need to encompass ALL for definitions but only deal with the ABUSIVE ones.

Can definitions be “unconstitutionally vague” when the defined conduct is punishable?

So, To Define or Not Define? (Clarity v. Flexibility... Erring on Overbreadth?)

# “I Know it When I See It!”

In the 1964 U.S. Supreme Court case of Jacobellis v. Ohio, on what constitutes “obscenity” and therefore not constitutionally protected freedom of speech:

“I shall not today attempt to further define the kinds of materials ... and perhaps I could never succeed in intelligently doing so. But I know it when I see it.”  
(emphasis added)

(Justice Potter Stewart, concurring opinion)

## “I Know it When I See It!” (cont’d)

This test has been applied to the challenge of defining “minorities” in the EU.

How difficult is it to define an “RPT”?

Certainly there are easy cases.

Challenges are the outliers.

Easier to describe or identify, even though full-blown definitions turn out to be difficult.

# Easier “Related Parties”

Insiders and/or “Responsible Persons”: (executive) directors, supervisors (statutory auditors), officers, etc.

Often defined or mentioned in company or securities legislation.

“Situational insiders/responsible persons”: e.g., bankruptcy trustee

# “Significant Stakeholders”?

Shareholders owning an entry level (5%, 10%, ?) of ownership can also be insiders,... often defined in corporate statutes.

Related party lending: Chinese Taipei’s Banking Law treats 3% ownership in borrower as trigger.

“Affiliates” in the relevant accounting convention...(in IASB, FASB, etc., and Chinese Taipei, Accounting Bulletin, No. 6)

What about state-owned enterprises and government-linked companies?

E.G., proposed mergers between two GLC banks, when the government controls both?

## “Significant Stakeholders”? (cont’d)

What about parent companies, subsidiaries, brother-and-sister companies in a 100% ownership relationship?

E.G., Chinese Taipei’s Financial Holding Company Law requires prior board approvals of RPTs involving them (e.g., FHCs renting corporate headquarters from subsidiary banks, insurers or securities firms), subject to a *de minimis* amount for triggers, and justifiable by public quotes or proof of arms’ length pricing.

# More Challenging Ones

“Held in Other’s Name”: spouses or minor children of insiders, or personal holding companies (securities law in Chinese Taipei)

“De Facto Responsible Persons” (securities offering rules in Chinese Taipei):

New trend: securities offerings blocked if “de facto responsible persons” of an issuer have received a non-appealable court conviction of 3 years of imprisonment or more for financial crimes

Proposal in Chinese Taipei to amend company legislation to tackle “shadow directors” by getting at the “family elders”.

The special (and difficult) case of “government-appointed directors”... who’s behind them? Senior officials? Directors General? Vice Ministers? Ministers? Premier? President?

# How about Friends and Associates?

Such status alone may not be sufficient to constitute an “RP”.

But see *In re Oracle Securities Litigation*:

Law professor at Stanford University held to be NOT independent enough in reviewing merger plans of Oracle, on which he sits as an outside director, because Stanford has received generous grants from Oracle.

# “Transactions”

All sorts to be included

Compensation, real-estate deals, borrowings, lending, share flotations (private placement), guarantees, etc.

Waivers of non-compete obligations; “Taking corporate opportunities”? (non-transactions!); Parent companies getting wholly-owned subsidiaries to declare dividends

# Catch-all as A Fall-back

Definitions often leave space through a catch-all.

The simple idea is indeed to CATCH ALL related party transactions.

“R”, “P” and “T” often require FACTUAL determinations

Courts as the FINAL arbiter

(The U.S. SEC has had a practice of refusing to issue no-action letters interpreting who is, or who is not, a “controlling person”, “executive officer”, etc. --- Sounds familiar?)

# From Regulating RPTs to Regulating or Monitoring Structure

Special chapter in Chinese Taipei's Company Law governing “Affiliated Companies” added in the mid-1990s inspired by Germany legislation and related thinking on company groups

Maintaining databanks on affiliated groups of companies

JCIC: Joint Credit Information Center, an inter-bank credit bureau in Chinese Taipei

TwSE: Taiwan Stock Exchange

“Corporate Group” (per a “soft” definition) lending and investment limits

# THANK YOU