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Corporate M&A

Thailand

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Weerawong, Chinnavat & Partners Ltd

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1. Trends

1.1 M&A Market

M&A activity continued to flourish in Thailand throughout 2019. The establishment and promotion of the Eastern Economic Corridor (EEC) as Thailand's new flagship investment zone by the government has further boosted the economy (see **3. Recent Legal Developments**). The EEC will be an important regional hub for trade, investment, regional transportation and a strategic gateway for Asia. Furthermore, there are numerous mega-projects recently completed or currently underway relating to infrastructure in Thailand which are Public-Private Partnerships (PPP). The promotion of investment in the EEC and PPP projects stimulates macro-economic growth in Thailand, and there are several M&A projects involving both direct and indirect investment.

However, due to the outbreak of COVID-19, which emerged at the end of 2019 and has continued to spread globally causing a disruption in economies, international trade and businesses in general, it is expected that M&A activities will slow down this year. The outbreak may impact M&A transactions and the parties to M&A transactions should carefully examine the terms of their transaction documents, especially on:

- material adverse change;
- pre-completion undertaking;
- delayed completion;
- breach of representation and warranty; and
- exit right.

In addition, while the full impact of the COVID-19 outbreak on businesses is not clear at the moment, and the outbreak is likely to spread in the coming days, this incident could be viewed as example of the unforeseen/unexpected situation which significantly impact the operations of many businesses, entrepreneurs, investors as well as all relevant parties should also take this occasion to revisit the current provision/language in the existing agreement(s), whether the Material Adverse Effect and/or force majeure clause(s) in the agreement covers the risk or damages that could arise from this incident or not, and what would be the most reasonable remedies or options for relevant parties who are affected from this incident.

1.2 Key Trends

Both inbound and outbound investments continued to grow in the latter part of 2019 as major Thai and international companies engaged in many M&A activities as well as initial public offerings (IPO).

2019 has been another busy year for all of Weerawong C&P's practice groups, but particularly noteworthy have been pro-

jects co-ordinated by our Public Private Partnership (PPP) and M&A practice groups relating to high-speed transport links, port development projects, and high-value real estate, energy and consumer chain acquisitions and joint ventures.

PPP

There were two PPP agreements of significance involving the Government of Thailand, Office of the Eastern Economic Corridor.

The first was the agreement to develop the THB220 billion (USD7.2 billion) high-speed rail project linking Suvarnabhumi, Don Mueang and U-tapao airports. The high-speed rail link is the biggest PPP concession project in Thailand and the first concession granted on a high-speed train project. This is a cornerstone project of the Eastern Economic Corridor (EEC) and, when implemented, the EEC will be developed as a major hub for trade and investment in order to develop Thailand's economy under the "Thailand 4.0" initiative.

The second agreement was signed by the Industrial Estate Authority of Thailand and Gulf MTP LNG Terminal for the Third Phase of the Map Ta Phut Port Project valued at THB55.4 billion (USD1.8 billion). The Third Phase of the Map Ta Phut Port Project is an infrastructure project for the petroleum industry and is designed to facilitate the annual shipment of 19 million tonnes of natural gas and liquid cargo. The Gulf MTP LNG Terminal is a joint venture between Gulf Energy Development and PTT Tank Terminal. The PPP agreement was signed in October 2019.

M&A

Significant M&As include:

- Global Power Synergy Public Company Limited, the power flagship of the PTT Group, and its USD 757 million investment and development of a 250 MW Energy Recovery Unit for the production and sale of power and 175 ton-per-hour steam from petroleum pitch under the Clean Fuel Project of Thai Oil Public Company Limited. The deal was signed in May 2019.
- Global Power Synergy Public Company Limited's acquisition of a majority stake in Glow Energy Public Company Limited from Engie Global Developments B.V. and the subsequent tender offer. The transaction is valued up to THB139 billion (USD4.1 billion) This was a landmark transaction, the largest acquisition in Thailand's energy sector till date. The deal closed in March 2019.
- F&N Retail Connection Co Ltd (a joint venture between ThaiBev and Fraser and Neave) and its joint venture with Maxim's group of Hong Kong, whereby the joint venture company, Coffee Concepts Thailand, acquired all existing

Starbucks outlets in Thailand and became the country's sole franchisee for 40 years. The USD650 million (approximately, THB20 billion) acquisition closed in May 2019.

- PTT Oil and Retail Business Public Company Limited (PTTOR), an affiliate of PTT Public Company Limited, a state-owned, SET-listed oil and gas company and one of the largest corporations in Thailand, and the acquisition and joint operation of petroleum terminals and service stations with the Kanbawza Group, a major Myanmar-based conglomerate, in Myanmar in May 2019.
- Asset World Public Company Limited in the corporate restructuring and offering of shares under Securities and Exchange Commission regulations, and international offering under Regulation S of the US Securities Act and listing of its shares on the Stock Exchange of Thailand (IPO). With a total market capitalisation value at IPO price of THB185,742 million (USD6.2 billion), this is the largest listed company in the entire history of the Stock Exchange of Thailand to date. Raised funds will be used to expand the company's hotel and other commercial property projects.

1.3 Key Industries

Significant M&A activity occurred primarily in relation to infrastructure, such as high-speed transport links, port development projects, high-value real estate, energy and consumer chain acquisitions and joint ventures.

2. Overview of Regulatory Field

2.1 Acquiring a Company

A share acquisition is the primary means of acquiring a company. It is less complicated and has fewer legal implications than asset sales.

2.2 Primary Regulators

The primary regulator in the acquisition of shares of public companies listed on the Stock Exchange of Thailand (SET) is the Securities and Exchange Commission (SEC). The filing and disclosure obligations for such share acquisitions are outlined in the governing laws and regulations.

With respect to merger control, generally, the Trade Competition Commission (TCC) has the authority to oversee and regulate M&A activities in the generic industries that are not governed by specific laws in Thailand. The duties and obligations for filing or requesting an approval of a merger are provided in the governing laws and regulations that were updated in 2018.

In addition, M&A activity in certain industry sectors is regulated by specific regulators; for example, the insurance business is regulated by the Office of the Insurance Commission, banking

and financing businesses are regulated by the Bank of Thailand, and telecommunications is regulated by the National Broadcasting and Telecommunications Commission (NBTC).

2.3 Restrictions on Foreign Investments

In general, foreign investment is governed by the Foreign Business Act (FBA), international treaties and privileges granted by the Board of Investment. Pursuant to the FBA, a foreign entity is prohibited from conducting certain businesses in Thailand unless a Foreign Business Licence is obtained from the Ministry of Commerce. In certain sectors, Thais have the ability to compete with foreigners so the related businesses have recently been exempt from the requirement to obtain a Foreign Business Licence.

These businesses include those in the financial, securities and insurance sectors. Nonetheless, such businesses may be subject to other specific laws governing the foreign shareholding proportion. In addition, pursuant to the Land Code, a foreign entity is prohibited from owning land in Thailand unless, among other things, an Investment Promotion Certificate is granted by the Board of Investment.

2.4 Antitrust Regulations

The Trade Competition Act BE 2560 (2017) (TCA) is currently the main legislation governing the merger control regime in Thailand.

With effect from 29 December 2018, any merger that meets the requirements under the TCA and the relevant subordinate regulations issued thereunder shall be subject to the merger clearance process as stipulated under the TCA. The application of the TCA also covers State-owned enterprises and public organisations, but exemptions have been provided for duties specified by law or Cabinet resolutions, for the enhancement of national security, public benefit or the provision of utilities.

The TCA does not apply to certain industries where merger control is already regulated by specific legislation for that industry (ie, currently the telecommunications, broadcasting and television, insurance, financial and energy sectors). Unlike the TCA, the merger regime under the specific sectors has been established and developed since the issuance of the respective regulations. In 2018, this firm advised one of the leading power companies in Thailand in obtaining pre-merger filing approval from the Energy Regulatory Commission, in respect of a share acquisition of another prominent power company. This transaction is expected to close in February 2019.

Pre- and Post-merger filing and notification

An important point to note in relation to the merger control rules is that the TCA divides regulated mergers into two cat-

egories: those that require approval (pre-merger filing) from the TCC and those that only require notification to the TCC (post-merger notification). Essentially, submission of a pre-merger filing will be required if the merger may result in the creation of a monopoly or a business operator with a dominant market position. On the other hand, the merging entity (or merging entities) must notify the TCC within seven days after the completion of the merger if the merger may substantially lessen competition.

The OTCC

The Office of the Trade Competition Commission (OTCC), an agency independent from any government department, is the regulatory body established under the TCA. The OTCC's powers and duties include undertaking administrative works of the Commission and the sub-commission, monitoring business operators for violations of the TCA, receiving complaints in respect of alleged violations of the TCA and making recommendations to the TCC, the enforcement agency. In the case of disputes over alleged violation of offences under the TCA, civil claims for damages, or appeals against administrative orders issued in connection thereof, the Intellectual Property and International Trade Court, and the Administrative Court shall have jurisdiction to decide on such matters.

2.5 Labour Law Regulations

The new Labour Protection Act BE 2562 (2019) (LPA), which replaced and repealed the previous Labour Protection Act BE 2541 (1998) and became effective in 2019, requires that for the transfer of employees in a merger or amalgamation of businesses, each employee has the right to choose and consent whether they would like to transfer employment to the new employer or not. If the employee does not consent to such transfer, its existing employer will have to terminate the employment and provide severance pay to such employee.

2.6 National Security Review

There is no national security review for acquisitions in Thailand.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

The merger control regime in Thailand came into effect and was implemented at the end of December 2018 (see **2.4 Antitrust Regulations**). Additionally, in May 2019, the new Labour Protection Act BE 2562 (2019) (LPA) became effective. Under the new LPA, several employee benefits have been increased. For example, employees whose employment period is more than 20 years will be entitled to receive from 300 days to 400 days wages if employment is terminated by an employer; the mater-

nity leave period is increased from 90 days to 98 days for each female employee; a new personal leave of three paid-working days per year is available, and the transfer of an employee (in a case of business merger or amalgamation) requires the consent of such employee.

3.2 Significant Changes to Takeover Law

There has been no significant change in takeover laws in the past three years. There is no takeover legislation under review that could result in significant changes in the next 12 months.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Stakebuilding is commonly employed prior to launching an offer; the strategy is subject to the level of control the acquirer wishes to attain. Pursuant to the tender offer rule, a tender offer is mandatory when 25% of the total voting rights in the listed company is acquired, so acquirers usually seek less than 25% of shares.

4.2 Material Shareholding Disclosure Threshold

An acquirer must disclose certain information to the SEC (provided that the company is a listed company on the SET) once it acquires at least and every 5% of the total voting rights of the target company. There is no disclosure requirement threshold under the laws for companies not listed on the SET.

Obligations of Acquiring Shareholders

Once an acquirer acquires at least 5% of the shares in a company, the acquirer has the duty to disclose such information by submitting a report on the acquisition or disposition of the securities (Form 246-2) to the SEC within three business days after such acquisition. Upon acquiring 25%, 50% or 75% of the total voting rights of the target company, the acquirer must state the purpose of the acquisition and its intention regarding the control of the target company by submitting the announcement of the intention to make a tender offer form (Form 247-3) to the SEC within one business day after the acquisition that reaches the 25%, 50% or 75% threshold and the tender offer form (Form 247-4) to the SEC within seven business days after the submission of the announcement of the intention to make a tender offer form (Form 247-3).

The securities laws provide that in determining the above thresholds (5% or 25%, 50%, 75%), securities held by the following persons must also be taken into account:

- related persons, such as a spouse, a minor, or a person holding more than 30% of the total voting rights of the bidder,

including shareholders holding more than 30% in all levels of shareholding;

- persons acting in concert of the bidder; eg, persons with a mutual intention to exercise their voting rights in the same direction as the bidder, or who allow other persons to exercise their voting rights for the purpose of achieving common control, or act in any manners prescribed by the SEC notifications; and
- related persons of the persons acting in concert.

4.3 Hurdles to Stakebuilding

Public companies are legally prohibited from restricting the transferability of their shares, although they are allowed to impose such restrictions as are necessary to ensure compliance with any foreign ownership restrictions to which they may be subject.

4.4 Dealings in Derivatives

Dealings in derivatives are allowed.

4.5 Filing/Reporting Obligations

Securities Laws

The disclosure requirements under the SET's disclosure regulations and the SEC's tender offer rules apply to the acquisition or disposal of securities that have voting rights attached to them. In this sense, the acquisition or disposal of the derivatives in which the underlying assets have not yet been converted into shares (in the listed company) would not be subject to the filing/reporting obligations.

Competition Laws

Currently, there are no specific provisions on derivative transactions. Whether the acquisition of derivatives will be subject to a pre-filing/notification obligation under the TCA depends on the transaction structure. For example, if the closing of the derivatives transaction will not result in any transfer of the underlying shares, such transaction will not trigger merger clearance in Thailand.

4.6 Transparency

Securities Laws

Shareholders have to make known the purpose of their acquisition and their intention regarding control of the company (see 4.2 Material Shareholding Disclosure Threshold).

Competition Laws

Of relevance to a public takeover, merger control will apply to a share acquisition in the listed public company when criteria of the control test are met (ie, when any shareholder acquires the shares, warrants, or other convertibles by up to 25% or more of the total voting rights in another business operator at the end of any date pursuant to the terms and conditions under

the relevant regulations issued under the TCA). Accordingly, the acquiring shareholder must proceed with the merger clearance process with the TCC (ie, submission for pre-merger filing approval or notification post-notification, as the case may be). In the case of pre-merger filing approval, the applicant shall provide details of the parties to the transaction, transaction structure and timeline, as well as the intention or purpose of the share acquisition.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

As a general rule, the SET Information Disclosure Guidelines require the disclosure of a deal only when the deal is confirmed. In practice, therefore, a company should disclose the deal once the definitive agreement is signed. However, there are exceptions under which the company could prematurely disclose such information regarding a deal; for example, in the event that incorrect information that affects the stock price is leaked to the public.

5.2 Market Practice on Timing

Market practice on the timing of disclosure does not differ from legal requirements.

5.3 Scope of Due Diligence

Full-scale due diligence – including legal, financial, accounting, HR and other relevant information – is required, except in certain circumstances where limited scope due diligence is preferable to the acquirer.

5.4 Standstills or Exclusivity

Generally, standstills and exclusivity agreements are demanded in the negotiation phase.

5.5 Definitive Agreements

Documenting a tender offer in a definitive agreement is permissible and commonly employed.

6. Structuring

6.1 Length of Process for Acquisition/Sale

The acquisition process usually takes more than two to six months to reach closure.

6.2 Mandatory Offer Threshold

Under securities regulations, the acquirer must conduct a tender offer upon acquisition of 25%, 50% or 75% of the total voting rights of the target company that is a listed company.

6.3 Consideration

Cash is the most common form of consideration in a business combination.

6.4 Common Conditions for a Takeover Offer

There are two types of tender offer. Firstly, there is a “mandatory” tender offer, which is triggered once the acquirer acquires 25%, 50% or 75% of the total voting rights of the target company. The mandatory tender offer must be unconditional and must offer to buy all the shares of the target company. Secondly, there is a “voluntary” tender offer, in which the acquirer may set conditions, usually a minimum percentage of shares it wishes to acquire. In this case, if the acquirer makes the tender offer, but the number of shares falls short of the minimum percentage, the acquirer may withdraw the tender offer.

Business combinations can be used as a condition, often as a condition precedent, in the financing agreement.

6.5 Minimum Acceptance Conditions

The minimum acceptance condition is usually set at a certain percentage of the total voting rights. The relevant control threshold in Thailand is more than 50% of the total voting rights. However, an acceptance condition is available only in a voluntary tender offer.

In the case of a mandatory tender offer, the offeror can only withdraw the offer if circumstances for which the offeror is not responsible occur within the offering period and have caused or may cause serious damage to the status or assets of the offeree’s business, or an action is taken by the company during the offering period that results in a significant decrease in the share value.

6.6 Requirement to Obtain Financing

See **6.4 Common Conditions for a Takeover Offer**.

6.7 Types of Deal Security Measures

Security measures such as break-up fees, non-solicitation provisions, and non-disclosure and confidentiality provisions are among the most commonly employed measures.

6.8 Additional Governance Rights

Minority shareholders may protect their position in a shareholders’ agreement.

6.9 Voting by Proxy

Shareholders can vote by proxy in Thailand.

6.10 Squeeze-Out Mechanisms

There is no squeeze-out mechanism under Thai law. In practice, after completion of a tender offer there are typically a small

number of shareholders who cannot be traced or who have refused to sell. As long as these shareholders still hold shares in the target, delisting may not be achieved and the basic rights of these shareholders (including notice of, and to attend, speak and vote at general shareholders’ meetings) must be respected. If a resolution to delist the target is passed following completion of a tender offer, this resolution triggers the making of a mandatory offer to the dissenting minority shareholders.

6.11 Irrevocable Commitments

It is common for the potential acquirer to enter into an agreement to tender with the principal shareholder. Since a squeeze-out mechanism does not exist, the potential acquirer normally commences the negotiation and concludes the agreement with the principal shareholders prior to conducting the tender offer. Once an agreement is entered into, there is no exit mechanism for the shareholder unless the parties agree otherwise.

7. Disclosure

7.1 Making a Bid Public

The bid must be made public when the acquirer triggers the minimum tender offer threshold (ie, at 25%, 50% and 75% of the total voting rights) within one business day after such triggering.

7.2 Type of Disclosure Required

The bidder has to disclose the information in accordance with the tender offer rules; that is, by submitting the announcement of the intention to make a tender offer form (Form 247-3) and the tender offer form (Form 247-4) must be disclosed to the SEC.

7.3 Producing Financial Statements

For the tender offer, the bidder is required to produce and attach the reviewed financial statements in accordance with the country’s accounting principles and the consolidated financial statements (in the case of having a subsidiary) of the latest fiscal year in the tender offer form as evidence proving that it has sufficient funds to purchase shares in the target company.

7.4 Transaction Documents

It is not necessary to disclose the transaction documents in full, only a summary of the transaction is required in the process of a tender offer.

8. Duties of Directors

8.1 Principal Directors' Duties

Directors have fiduciary duties to the company and the company's shareholders, and must perform their duties responsibly, with due care and loyalty. Directors must also comply with all laws, the objectives and articles of association, the resolutions of the board of directors' meetings and the resolutions of the shareholders' meetings, in good faith and with care to preserve the interests of the company. A director is liable for any damage to the company resulting from his or her negligence, or non-execution of agency.

8.2 Special or Ad Hoc Committees

It is not common practice in Thailand for boards to establish special or ad hoc committees in business combinations.

8.3 Business Judgement Rule

There is no corporate judicial review in Thai law. However, when considering an alleged breach of care in relation to a fiduciary duty, the court often uses the "business judgement rule" standard.

8.4 Independent Outside Advice

The board of directors usually seeks advice from financial advisers and legal counsellors in the case of a business combination. A decision made by a board of directors based on the advice of these professional advisers will be considered to be a decision made with due care.

8.5 Conflicts of Interest

Under Thai corporate law, a shareholder who has an interest in any matter is not allowed to vote on such matter. Failure to abide by this restriction does not render the resolution void. However, the resolution may be challenged in the appropriate court.

A director who has an interest in any matter is not allowed to vote on such matter. Failure to abide by this restriction does not render the resolution void. However, in the case that such failure causes damages to the company, the company is entitled to claim compensation from the director.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are permitted in Thailand. However, this tactic is rarely employed since there is no squeeze-out mechanism available under Thai law.

9.2 Directors' Use of Defensive Measures

To date, the Thai government has not issued any rules prescribing the use of "poison pills". However, the obligation imposed on the target's directors to provide information and a recommendation to shareholders applies separately in respect of each offer, and the directors are under a general duty to act in the best interests of the company.

The board of the target must:

- notify all known shareholders of the receipt of the offer and its terms;
- give its opinions on the status of the company's business and a forecast of the future results of its operations (disclosing the assumptions on which the forecast is made) and the accuracy of the information concerning the company's business given in the offer;
- disclose any relationship or agreements between any director of the target and the bidder;
- recommend whether shareholders should accept or reject the offer; if the board's recommendation is not unanimous, the recommendation of each director must be given separately; and
- appoint an independent adviser to advise the shareholders on the terms of the offer and whether to accept or reject it; the adviser is required to give its recommendation "with due care in accordance with professional standards, taking account of the interests of the minority shareholders".

9.3 Common Defensive Measures

See 9.2 Directors' Use of Defensive Measures.

9.4 Directors' Duties

Directors' use of defensive measures would have to be consistent with the board of directors' general duty to act in the best interests of the company and the company's shareholders. While the use of poison pills is almost unknown in Thailand, as most takeovers usually have the support of the target company's board of directors, it would be possible for the board of directors of a target company to adopt the "Pac-Man" defence of making a counter-offer to that of the bidder or to solicit a higher offer from a "white knight". Listed companies are prohibited by law from restricting the transferability of their shares with the exception of foreign ownership restrictions to which they may be subject.

9.5 Directors' Ability to "Just Say No"

Directors themselves cannot "just say no" and prevent a business combination. The directors must present the proposal for a business combination to the shareholders' meeting. It is at the discretion of the shareholders' meeting to refuse or accept the deal.

10. Litigation

10.1 Frequency of Litigation

Litigation is common in connection with M&A deals, especially on the issues of indemnity, breach of commitments and warranty claims.

10.2 Stage of Deal

Litigation usually occurs in the post-merger stage.

11. Activism

11.1 Shareholder Activism

Shareholder activism is not a significant force in Thailand.

11.2 Aims of Activists

See 11.1 Shareholder Activism.

11.3 Interference with Completion

See 11.1 Shareholder Activism.

Weerawong, Chinnavat & Partners Ltd represents purchasers, sellers, advisers, lenders and financial intermediaries in domestic and cross-border M&A, LBOs and divestments. The firm acts for Thai and international clients on corporate transactions of all kinds, including acquisitions of listed companies, private equity investments and M&A of companies engaged in activities across the full breadth of the Thai economy. It also assists Thai companies on their expansion elsewhere in Asia

and around the world. The firm advises clients on acquisition financing, regulatory issues, international tax matters, competition law, IP issues, real estate matters, and labour and environmental issues that involve complex cross-border M&A. For its many private equity clients, the firm adds value through its extensive experience in structuring bids, negotiating and drafting acquisition and financing documentation, and structuring exit strategies for investors.

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