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Thailand

Law and Practice

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Weerawong, Chinnavat & Partners Ltd

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THAILAND

Law and Practice

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1. TRENDS

1.1 M&A Market

The COVID-19 pandemic has reduced activity to some extent, though M&A transactions still continue if there is a strategic purpose.

1.2 Key Trends

For the first time, the Thai Competition Act had an impact on M&A transactions as the requirement for pre-transaction approval came into effect for the first time. The largest transaction of the year, the THB330 billion (USD11 billion) disposal by the UK Tesco group of its Thai business to companies in the Charoen Pokphand group, required such an approval and the terms of the approval provided were contentious, with a strong minority opinion against the approval of the transaction.

1.3 Key Industries

Activity did not focus on any particular segment: retail was dominated by the huge Tesco transaction, and manufacturing and real estate also saw activity.

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), applying the Securities and Exchange Act (SEC Act) and regulations made under it. 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.

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. For these purposes a foreign entity includes a Thai incorporated company 50% or more of whose shares are owned by foreigners.

Businesses in the financial, securities and insurance sectors are exempt from the ownership requirements of the FBA, but are subject to foreign ownership restrictions under the specific legislation applicable to them.

In addition, pursuant to the Land Code, a foreign entity, including a Thai legal entity which is majority-foreign owned, 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. Any

merger that meets the requirements under the TCA and the relevant subordinate regulations issued thereunder is 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).

An important point to note in relation to the merger control rules under the TCA is that it divides regulated mergers into two categories:

- those that require approval (pre-merger filing) from the Trade Competition Commission (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. Conversely, if the merger may substantially lessen competition the merging entity (or merging entities) must notify the TCC within seven days after the completion of the merger.

2.5 Labour Law Regulations

The Labour Protection Act BE 2562 (2019) (LPA) 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. No employee consent is required on the sale of shares in a company.

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 most significant legal development is the coming into force of regulations under the Trade Competition Act of 2017

3.2 Significant Changes to Takeover Law

Some changes of detail in the regulations relating to exemptions from the requirements for mandatory tender offers. Previously it was possible to pass through a mandatory tender offer trigger point through a rights offering, and then be free to accumulate further shares until the next trigger point was reached: now passing through a tender offer trigger point by way of a rights offering does not immediately trigger a mandatory tender offer but the subsequent acquisition of any shares in the target will do.

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. A tender offer for all the shares in a listed company is mandatory when 25% of the total voting rights in the listed company are acquired.

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4.2 Material Shareholding Disclosure Threshold

If an acquirer reaches or passes through 5% or a multiple of 5% of the total voting rights of shares in the listed company (on the way up or on the way down), 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. The holdings of related persons of the acquirer and persons acting in concert with the acquirer, and their related persons, are aggregated for the purposes of determining whether the disclosure requirement is triggered. (Section 246 of the SEC Act)

A separate disclosure obligation arises if the acquirer acquires convertible debt securities or warrants and the number of shares which the acquirer would hold following conversion or exercise of warrants would exceed 5%, or a multiple of 5%, of the total voting shares of the target.

Directors, members of management, auditors and certain persons connected to them, including companies in which they have an interest exceeding 30%, are obliged to disclose details of any acquisition or disposal of shares, securities whose price is linked to the shares or listed derivatives (Section 59 of the SEC Act).

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

Under securities disclosure laws there is no requirement for disclosure unless the derivative is in the form of a convertible debt security or warrant. In the case of exchange traded derivatives any acquisition by directors, management, auditors and certain person or entities connected with them require disclosure.

Currently, there are no specific provisions on derivative transactions for competition purposes. 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

Shareholders have to make known the purpose of their acquisition and their intention regarding control of the company.

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 any 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.

In certain cases relating to the acquisition of a holding in a listed company the seller may insist that the purchaser simply relies on publicly available information.

The practice has not been affected by the COVID-19 pandemic.

5.4 Standstills or Exclusivity

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

5.5 Definitive Agreements

Tender offer terms are not commonly documented in a definitive agreement. If a tender offer is triggered by the acquisition of a controlling shareholding, the terms of the tender offer are purely a matter for the acquirer as the tender offer will occur after the closing of the sale of the controlling shareholder has occurred.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

There is no general rule for the time it takes to acquire or sell a business in Thailand. It is possible that a controlling stake may be sold comparatively quickly if the selling shareholder is able to dictate the terms on which acquirers acquire its holding (for example by restricting due diligence and giving limited representations and warranties).

Once the sale of a controlling stake has occurred, if a tender offer is triggered, the tender offer must

be open for between 25 and 45 business days though the timetable can be extended if a competing bidder emerges. It is possible to specify conditions to the making of the tender offer, such as competition approval, but conditions have to be satisfied within one year of announcement.

Governmental measures taken to address the COVID-19 pandemic have not created major practical delays or impediments to the deal closing process.

6.2 Mandatory Offer Threshold

Under securities regulations, the acquirer must conduct a tender offer for all the shares and, subject to certain exceptions, equity-linked securities of a target company upon acquisition of 25%, 50% or 75% of the total voting rights of the target company that is a listed company. Acquisitions by the acquirer, its related persons and its concert parties and their related person will be aggregated for this purpose.

A mandatory tender offer may be triggered not only by acquiring shares in the target but also acquiring shares in an intermediate or ultimate holding company which controls the target, under the chain principle.

6.3 Consideration

Cash is the most common form of consideration in a business combination. In a takeover offer, alternative forms of consideration can be offered but one has to be cash.

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 as to the level of acceptances and must offer to buy all the shares of the target company. Secondly,

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there is a “voluntary” tender offer, in which the acquirer may set an acceptance condition, 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.

In the case of any tender offer, an offeror may cancel a tender offer if an event or action occurs after the offer document has been filed with the SEC but during the offer period which causes or may cause serious damage to the status or assets of the offeree’s business, and the act or event does not result from the acts of the offeror or an act for which it is responsible. However the right to cancel must be stated in the offer document.

It is also possible to include a material adverse change condition in a voluntary tender offer and in 2020 Bangkok Dusit Medical Services terminated a tender offer for Bumrungrad Hospital after the target’s business was adversely affected by the COVID-19 pandemic.

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.

6.6 Requirement to Obtain Financing

A privately negotiated transaction can be subject to the availability of financing. However a takeover offer cannot be.

6.7 Types of Deal Security Measures

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

There are no new contractual considerations and tools for managing COVID-19 pandemic risk in the interim period or any changes in the regulatory environment which have impacted the length of the interim period.

6.8 Additional Governance Rights

Minority shareholders may protect their position in a shareholders’ agreement. However, care would need to be taken to ensure that a concert party relationship is not created between the parties to the shareholders’ agreement.

Partial tender offers can only be made with the approval of a shareholders’ resolution of the target and must be for less than 50% of a company’s shares.

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. There are statutory provisions which determine the price at which this delisting tender offer must be made.

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, although there is some doubt on the enforceability of an agreement to tender shares since the tender offer regulations provide that an accepting shareholder has the right to withdraw its acceptance for a certain period.

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) by submitting a statement of intention to make a tender offer on Form 247-3 to the SEC within one business day after such triggering.

In case of a voluntary tender offer, a bidder is required to submit a statement of intention to make a tender offer on Form 247-3 to the SEC within three business days after it has announced the tender offer. It will be deemed to have announced the tender offer in certain cases including notifying the directors of the target and shareholders holding 10% or more of the shares of the target. If it fails to file the form within this time it will be deemed to have announced an intention not to make a tender offer, meaning that it will be unable to proceed with a tender offer for one year.

7.2 Type of Disclosure Required

In the case of an issue of shares in a business combination to the target shareholders it would be necessary to prepare a registration statement and prospectus complying with the requirements of the SEC Act, unless the issue fell within the scope of private placements which are exempt. For completeness, it must be pointed out that

in the case of a statutory amalgamation which operates as a merger on the basis of A=B+C, no registration statement or prospectus is required.

7.3 Producing Financial Statements

For the tender offer, the bidder is required to produce and attach to the tender offer form audited financial statements prepared in accordance with Thai GAAP and consolidated financial statements (if the acquirer has subsidiaries) for the latest fiscal year as evidence to prove that it has sufficient funds to pay for the shares tendered for.

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 of their company, 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 their negligence, or failure to perform their functions. Directors do not have duties to a wider class of stakeholder.

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, though individual directors may not vote on matters where they have a conflict of interest.

8.3 Business Judgement Rule

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 a special 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, given the existence of large family- or insider-controlled shareholdings in most Thai listed companies, a hostile tender offer is unlikely to succeed.

9.2 Directors’ Use of Defensive Measures

In the period before a bid is made, there is generally no restriction on a target board’s taking defensive measures against a hostile takeover.

Once a bid is made the target is restricted from undertaking certain activities during the takeover period, including:

- offering new shares;
- acquiring or disposing of material assets;
- incurring debt;
- entering into or terminating a material contract not in the normal course of business;
- buying back shares; and
- declaring an extraordinary interim dividend.

9.3 Common Defensive Measures

There are no common defensive measures as hostile tender offers are very rare and unlikely to succeed due to large family- or insider- controlled shareholdings in most listed Thai companies.

9.4 Directors’ Duties

The directors’ use of defensive measures must be consistent with the directors’ fiduciary duties and duty to act in the best interests of their company.

9.5 Directors’ Ability to “Just Say No”

On receipt of a tender offer, the target’s directors have an obligation to provide information and a recommendation to shareholders, 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.

10. LITIGATION

10.1 Frequency of Litigation

Litigation is not common in connection with M&A deals, and essentially unknown on public tender offers. On privately negotiated transactions there may be litigation on issues of indemnity, breach of contract and warranty claims.

10.2 Stage of Deal

Litigation on privately negotiated transactions would generally be brought after closing.

10.3 "Broken-Deal" Disputes

Thus far, there has been no new lessons learned since early 2020.

11. ACTIVISM

11.1 Shareholder Activism

There is little, if any, shareholder activism in Thailand

11.2 Aims of Activists

This is not applicable in Thailand.

11.3 Interference with Completion

This is not applicable in Thailand.

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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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