

# Understanding the system

## Chatri Trakulmanenate of Weerawong Chinnavat & Peangpanor summarises Thailand's rules on mergers and acquisitions

The principal legislation governing public takeovers in Thailand is the Securities and Exchange Act B.E. 2535 (A.D. 1998), as amended (SEC Act), and the Notification of the Capital Market Supervisory Board (CMSB) No. ThorJor. 12/2554 Re: Rules, Conditions and Procedures for the Acquisition of Securities for Business Takeovers (CMSB Notification).

For foreign investors, there should not be any unusual characteristics under the SEC Act, nor any unique notifications and regulations on takeovers. Thailand has adopted laws and regulations mainly from the US and other similarly developed financial markets.

According to the CMSB Notification, only shares of a public company listed on the Stock Exchange of Thailand are subject to the tender offer process.

### The mandatory takeover threshold

The triggering threshold that gives rise to an obligation to make a mandatory tender offer is 25%, 50% or 75% of the total voting rights of the target company. Once the acquisition of shares reaches or passes the tender offer threshold, the acquirer is required to conduct a mandatory tender offer of all shares, including securities convertible or exercisable into shares (for example warrants or convertible debentures) of such target company.

It is important to note that the so-called chain principle can apply when calculating the takeover threshold: In the case where the acquirer acquires a significant degree of control (by holding shares conferring 50% or more of the total voting rights or having the power to control the management or operation, for example) of a juristic person (immediate holding entity) who is a shareholder of the target company, either directly or indirectly through his holding in, or control of, other juristic persons (immediate entity) through to the immediate holding entity, such acquirer is required to conduct a mandatory tender offer of all shares, including securities convertible or exercisable into shares of such target company if his holding in the target company, when combined with those held by each immediate entity, the immediate holding entity and their related persons triggers the tender offer threshold.

In determining whether the number of shares held by the acquirer triggers the tender offer threshold, shares held by his related persons and persons acting in concert with him will be included for the calculation.

Related persons are those specified under section 258 of the SEC Act to include:

- (i) a spouse or minor child;
- (ii) a natural person who is a shareholder of the acquirer in an amount exceeding 30% of the total voting rights of such acquirer (such voting rights also include his person's spouse and minor child);
- (iii) a juristic person who is a shareholder of the acquirer in an amount exceeding 30% of the total voting rights of such acquirer;
- (iv) a shareholder in a juristic person under (iii) and shareholders at all levels of upward shareholding beginning from the shareholder in a juristic person under (iii), where the shareholding at each level exceeds 30% of the total number of voting rights of the shareholder in the immediately lower level (in the case where the shareholder of any level is a natural person, the voting rights of his shareholders' spouse and minor child will be included);
- (v) a juristic person in which the acquirer or the persons under (i)–(iii) collectively hold shares in an amount exceeding 30% of the total number of voting rights of such juristic person;
- (vi) a juristic person in which the juristic person under (v) hold its shares and shareholders in all levels of downward shareholding, beginning from the shareholder in the juristic person under (v), providing that shareholders in each level exceeds 30% of the total number of voting rights

“The chain principle can apply when calculating the takeover threshold”

- of the juristic person in the immediate lower level;
- (vii) an ordinary partnership in which the acquirer or the person under (i)–(vi) or the limited partnership under (viii) is a partner;
  - (viii) a limited partnership in which the acquirer or the person under (i)–(vi) or the ordinary partnership under (vii) is an unlimited liability partner; and
  - (ix) a juristic person over which the acquirer has the power of management in respect of investment in securities.

Persons acting in concert, meanwhile, are those who have a mutual intention to exercise their voting rights in the same direction or who allow others to exercise their voting rights for the purpose of achieving the common control of the voting rights or of the business and have a relationship or act together in the manner as specified below, which among others:

- Having an agreement to exercise his voting rights in the same direction or an agreement to any party to exercise the voting rights of another party or an agreement to jointly manage the business;
- Having an agreement restricting the rights to sell securities in case where there is a tender offer on such securities or having an agreement to maintain or to change the securities holding ratio in a business (the standstill agreement);
- Soliciting other person by himself or through his assignee for the purpose of acquiring or disposing the securities at the same time or nearly at the same time;
- Having the same source of funds or acting by any means to facilitate the obtaining of the source of funds to conduct the purchase of, or to perform any other acts for acquisition of the securities of a business either for his own account or for another person's; and
- Giving of securities to other person other than by way of gratuitous transfer in respect of an ordinary partnership between parent and *sui juris* child.

#### Other types of offer

In addition to the mandatory tender offer, there are also voluntary tender offers and partial tender offers.

A voluntary tender offer is an offer made voluntarily by an acquirer who does not hold any shares of the target company that triggers the tender offer threshold, but wishes to control such target company. In doing so, the acquirer must tender for the entire share capital of the target company.

## “The acquirer must report the total number of shares held to the Office of the SEC”

In the case where an acquirer wishes to hold the target company's shares in the amount of less than 50% of the total voting shares, he can do so upon the target company's shareholders' approval and approval from the Office of the Securities and Exchange Commission (SEC), and subject to certain other conditions as specified in the relevant notification.

(This article focuses only on mandatory tender offers.)

#### Steps to acquire the target

The key steps for an acquirer whose acquisition triggers the tender offer threshold are as follows.

First, the acquirer must report the total number of shares held to the Office of the SEC, including a statement of intention to make a tender offer (if required) and the tender offer document (which attaches the tender offer acceptance form) to the Office of the SEC within the specified period.

Once the tender offer document is submitted to the Office of the SEC, the acquirer must immediately send the tender offer document together with the tender offer acceptance form to the securities holders of the target company, the target company and the Stock Exchange of Thailand. It must then advertise the tender offer in at least two Thai newspapers and one English newspaper for at least one or three consecutive days (as the case may apply).

Upon the effectiveness of the tender offer document (which is the following business day of the date of submission of the tender offer document), the acquirer must commence the tender offer within three business days following the date on which the tender offer document has been submitted to the Office of the SEC, with a tender offer period of not less than 25 business days but not more than 45 business days.

Finally, the acquirer must submit the final report on the result of the tender offer to the Office of the SEC, with a copy to the Stock Exchange of Thailand, within five business days following the end of the tender offer period.

There is no squeeze-out concept under Thai law.

#### Conditions to an offer

A mandatory tender offer must be unconditional. However, the acquirer can cancel the tender offer in two circumstances as allowed by the CMSB Notification, provided that these circumstances are stated clearly in the

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tender offer document and the Office of the SEC has no objection to such cancellation.

The first circumstance is where there arises a situation or an action after submission of the tender offer document but during the tender offer period which causes or may cause a severe damage to the status or assets of the target company, which does not result from the action of the tender offeror or an action for which the tender offeror must be responsible.

The second is where the target company undertakes any action after the acquirer submits the tender offer document but during the tender offer period, which results in a significant decrease in the share value.

However, if the tender offer is a voluntary tender offer, the tender offeror can add a condition such that he can cancel the tender offer if the number of tendered shares are less than the number the tender offeror specifies as a condition for the offer.

### Risk and protection

In terms of execution risk, the only risk regarding the mandatory tender offer is that the tender offeror may not obtain the number of shares they would prefer, and may end up being a minority shareholder of the target company.

There is no singular protection for foreign buyers if they are required to conduct the mandatory tender offer. However, in such a case, a foreign buyer needs to be concerned about the target company being considered a foreign company as it will be restricted from engaging in certain businesses. Also, to ensure properly structured transactions it is recommended that foreign investors consult experienced legal counsel at an early stage in the merger and acquisition process.

The main legislation that restricts a foreigner in doing businesses in Thailand is the Foreign Business Operations Act B.E. 2542 (A.D. 1999) (FBA). The FBA prohibits a foreign company, i.e. (a company in which at least half of the share capital is owned by non-Thai nationals) from engaging in certain businesses.

The businesses under the FBA are divided into three categories.

Category 1 businesses are not allowed to be operated by a foreigner – these include, among others, newspapers and other media, farming, real property trading and extraction of Thai herbs.

Businesses in Category 2 must obtain permission from the Minister of Commerce, with the approval of the cabinet – these are businesses involving national safety and security, or affecting arts, culture, traditional customs and folk handicrafts, natural resources or environment which are, among others, manufacturing and sale of firearms and components of war equipment, transportation, trading of Thai antiques and handicrafts, manufacturing of sugar, mining, and so on.

Category 3 businesses must obtain permission from the director-general of the Commercial Registration Department of the Ministry of Commerce with the approval of the Foreign

Business Operations Committee – these include, among others, professional services (legal, accounting, engineering and architecture), construction, brokerage and agency, certain wholesale and retail and other business services.

In the case where a foreigner is required to conduct a mandatory tender offer and in order to avoid the target company being classified as a foreign entity, the foreign tender offeror must find a Thai partner to be a co-tender offeror. Once the tender offer is completed, they can allocate the number of shares derived from the tender offer to ensure that a foreigner will not hold shares which will trigger the status of the target company as a foreign entity. Such Thai partner must be a third party who has no relationship with the foreign tender offeror, otherwise, he will be deemed an agent or a nominee of such foreign person, in which case the shares held by him will be treated as shares held by a foreigner.

Apart from the FBA, certain businesses have specific regulations which may have a separate requirement on foreign shareholding. For example, laws governing a commercial banking business or an insurance business have a foreign shareholding limitation of 25%, unless falling into certain exception categories. Also, the Articles of Association of a target company may have such restrictions.

### Regulatory bodies

There have been some regulatory changes during the past year on takeovers. The main reason has been to improve the regulations to ensure fairness and reasonableness both in terms of the tender offeror and the securities holders of the target company. Samples of key amendments are the issuance of the CMSB Notification to replace the then existing notification, the amendment of regulations relating to the person deemed to be acting in concert with the acquirer, and the tender offer price in certain situations.

In Thailand, the Takeover Panel has a number of powers and responsibilities. It can give an order relating to the request for a waiver not to make a tender offer for all securities of the target company, and give an order relating to tender offer rules, as well as any other order under its power and responsibilities as specified by the notification governing acquisition of securities for business takeovers.

The Panel may also make orders relating to taking or omitting any actions which may affect a tender offer as specified by the relevant notifications; give opinions or advice to the CMSB and Office of the SEC in matters relating to acting in concert and any other matters relating to acquisition of securities for business takeovers; and call any persons to give facts, explanations, recommendations and opinions or to submit supporting documents for consideration as necessary.

The Panel consists of experts and practitioners in business takeovers selected from persons on the CMSB appointed list. The CMSB appointed list can be divided into four groups: (i) those who may be the chairman of the Panel; (ii) experts in the area of finance; (iii) experts in the area of law; and (iv) a

representative of the SEC who acts as a Panel member and secretary to the Panel.

When there is a matter that needs to be considered by the Takeover Panel, the secretary-general of the Office of the SEC will select five persons from the list who are suitable for determining such matters, one from group one, three from group two and/or three and one from group four to form a Panel.

### Antitrust provisions

Merger control in Thailand is governed by the Trade Competition Act B.E. 2542 (A.D.1999) (TCA). Section 26 of the TCA prohibits mergers of businesses that may result in monopoly or unfair competition, as prescribed by the Trade Competition Commission (TCC), unless permission is obtained from the TCC.

The TCA empowers the TCC to enforce the merger-control provisions. In addition, the TCC is responsible for prescribing notifications to enforce the provisions of the TCA, including issuing notifications concerning the specific process by which a certain merger will be examined. In this regard, the TCC is empowered to set a minimum threshold of market share, total sales, amount of capital, number of shares or quantity of assets which will be subject to prohibition under this section. This is part of the pre-merger notification requirement. As no notification pursuant to Section 26 has yet been issued, the restrictions on mergers are not yet enforceable. Therefore, a merger in Thailand can be completed without being subject to permission under Section 26.

Pursuant to Section 26 of the TCA, the merger of businesses includes:

(i) the merger of a manufacturer and another manufacturer, a distributor with another distributor, a manufacturer with a distributor, or a service provider with another service provider, where the mergers will result in one business being maintained while the other is extinguished or a new business is formed;

(ii) the purchase of all or part of the assets of another business for the purpose of controlling business administration policy, administration or management; and

(iii) the purchase of all or part of the shares of another business for the purpose of controlling business administration policy, administration or management.

Once the transaction is determined to be within the scope of the merger of businesses, a transaction will be evaluated against the criteria set by the TCC. A business operator who is involved in the merger of businesses which triggers the minimum threshold as prescribed in the notification by the TCC must obtain approval from the TCC.

As the proposed minimum thresholds have not yet been issued, there is no approval required from the TCC.