Global Public M&A Guide - Thailand

General Legal Framework

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# 2. General Legal Framework

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**2.1 Main legal framework**

M&A activities related to public companies are mainly governed by the following laws:

the Securities and Exchange Act B.E. 2535 (1992), as amended ("**SEC Act**"); and

the Public Limited Company Act B.E. 2535 (1992), as amended ("**PLCA**").

For M&A activities related to public companies whose shares are listed on the Stock Exchange of Thailand ("**SET**"), the following rules and regulations would also be applicable and should be taken into consideration when carrying out M&A activities:

the rules and regulations of the Securities and Exchange Commission ("**SEC**");

the rules and regulations of the Capital Market Supervisory Board ("**CMSB**");

the rules and regulations of the SET;

the rules and regulations of the Thai Securities Depository Co., Ltd.; and

the rules and regulations of the Thai Clearing House Co., Ltd.

**2.2 Key regulatory bodies**

The key regulatory bodies for public M&A are:

the SEC;

the SET; and

the Ministry of Commerce ("**MOC**").

**2.3 Other rules and principles**

While the aforementioned legislation contains the main legal framework for public M&A in Thailand, there are a number of additional rules and principles that are to be taken into account when preparing or conducting public M&A activities, such as:

(a) Foreign investment restrictions

There are several laws and regulations that govern the extent of foreign participation in business activities in Thailand. The main governing law is the Foreign Business Act, B.E. 2542 (1999) ("**FBA**"). The FBA limits the rights of foreign nationals and entities to engage in certain business activities in Thailand unless a foreign business license or a foreign business certificate from the MOC is obtained before the commencement of the business operation. The FBA defines "aliens" or "foreigners" as natural persons or juristic entities (companies, registered partnerships, etc.) who do not possess Thai nationality. The definition extends to companies registered in Thailand of which 50% or more of their share capital belongs to foreign individuals or juristic entities. Investors contemplating new business ventures must carefully consider the FBA before attempting to set up operations. A foreigner may operate a business in Thailand, unless the activity of that business is restricted under the FBA or is otherwise prohibited by other specific laws. The restricted businesses under the FBA cover almost all kinds of service businesses.

(b) Restrictions on foreign participation in specific sectors

In addition to the FBA, there are several statutes that impose conditions of majority ownership and management by Thai nationals in specific business sectors, examples of which are:

The Financial Institution Business Act B.E. 2551 (2008), as amended;

The Life Insurance Act B.E. 2535 (1992), as amended, and the Non- Life Insurance Act B.E. 2535 (1992), as amended;

The Thai Vessel Act B.E. 2481 (1938); and

The Employment Provision and Employment Seekers Protection Act B.E. 2528 (1985).

(c) Investment promotion

To promote investment in Thailand, the Board of Investment ("**BOI**") grants incentives to investors in areas beneficial to Thailand’s economic and social development. The BOI classifies incentive groups based on the importance of industries or activities as follows:

Group A1+: Upstream industries utilizing advanced technology and innovation, and targeted technology development activities (biotechnology, nanotechnology, advanced material technology), with technology transfer in collaboration with academic/research institutes.

Group A1: Knowledge-based activities focusing on R&D and design to enhance the country’s competitiveness.

Group A2: Infrastructure activities for the country’s development, and activities using advanced technology to create value, with minimal existing investments in Thailand.

Group A3: High technology activities important to the country’s development, with limited existing investments in Thailand.

Group A4: Activities with lower technology than A1–A3 but which add value to domestic resources and strengthen the supply chain.

Group B: Supporting industries that do not use high technology but are still important to the value chain.

The incentives granted by the BOI include both tax and non-tax privileges, such as land ownership, 100% foreign ownership for certain businesses, and exemptions from certain taxes and duties. However, these privileges often come with conditions including a minimum registered capital requirement or a minimum ratio of Thai national shareholders for certain promoted investment projects.

(d) Land ownership

The main regulation governing land ownership in Thailand is the Land Code, as amended (the "**Land Code**"). The Land Code generally specifies that land in Thailand can only be owned by Thai nationals or companies in which Thai nationals own 51 percent or more of the registered shares, **and** more than half of the shareholders are Thai nationals. In other words, it prohibits foreigners (e.g. foreign individuals or a company with either more than 49 percent of its registered shares held by foreigners, or a numerical majority of its shareholders being foreigners) from owning land in Thailand.

However, as exempted under the Land Code, foreigners may be able to own land if permitted by a treaty giving foreign land ownership rights, or with the permission of the Minister of Interior for specific purposes, such as for residential, commercial, industrial, agricultural, burial, public, charitable, or religious purposes in accordance with conditions and procedures prescribed in Ministerial Regulations. In addition, foreigners may be granted an approval or a permission to own land under specific laws (e.g. obtaining permission to own the land used for promoted businesses from the BOI, or permission to own land located in an industrial estate area from the Industrial Estate Authority of Thailand.

(e) Anti-trust Law

Under the Trade Competition Act B.E. 2560 (2017) ("**Trade Competition Act**") of Thailand, there are two merger filing thresholds – the pre-closing filing threshold and the post-closing notification threshold.

A pre-closing filing is mandatory and suspensory. It will be required where the transaction would result in the acquirer having dominance in a market in Thailand. The Thai regime sets the dominance threshold quite high. A company will be considered dominant in a market in Thailand if, in the previous year, it (a) has more than 50% market share or is one of the top three businesses in the market with a combined market share of more than 75% (provided that it has not less than 10% market share); and (b) has revenue of over Thai Baht 1 billion.

On the other hand, the post-closing notification is mandatory but not suspensory. A post-closing notification is required within 7 days of the closing if there is a horizontal overlap between the parties and in that overlapped market, the parties combined revenue in the previous year is more than Thai Baht 1 billion.

Transactions that may be caught under the Thai merger control regulations are share acquisitions resulting in the acquirer (and its group) holding more than 50% shares in the target (or 25% or more shares in a public company listed on the Stock Exchange of Thailand) and asset acquisitions whereby more than 50% of the normal operating assets (determined based on value of the assets described in the financial statement) of the transferor are transferred to the transferee.

The application for the pre-merger approval requires comprehensive and detailed information on the merger, including, among others, business integration plan, market analysis, market concentration and impact on competition assessment. The Trade Competition Commission (“**TCC**”) must complete its consideration of the application within 90 days (extendable for another 15 days). If the business operator disagrees with the TCC's decision, it can appeal to the Administrative Court within 60 days of the decision.

Under the Trade Competition Act, the merger of businesses includes:

a merger between a manufacturer and another manufacturer, a distributor and another distributor, a manufacturer and a distributor, or between a service supplier and another service supplier, which results in the continuity of one business and the termination of the other business, or the creation of a new business;

a purchase of the whole or part of the assets of another business in order to have control over its policies on business administration, administration or management, pursuant to the criteria prescribed by the TCC; and

a purchase of the whole or part of the shares of another business whether directly or indirectly in order to have control over its policies on business administration, administration or management, pursuant to the criteria prescribed by the TCC.

The above rules will, however, not apply to the merger of businesses for the purpose of the internal restructuring of business operators which have a relationship in terms of policy direction or control, pursuant to the criteria prescribed by the TCC.

**2.4 Recent reform**

In September 2019, the CMSB issued amendments to the tender offer rules which can be mainly summarized as follows:

**a limitation to the existing exemption for tender offer obligation** - a person (including the group under Thai securities law) who holds shares in a listed company up to or exceeding the tender offer trigger point (25%, 50% or 75% of voting rights in the listed company) as a result of the listed company (i) repurchasing its shares, or (ii) making a rights offer, is exempt from the tender offer obligation, but according to the 2019 amendment, if the shareholder who has been exempt from the tender offer obligation due to the share repurchase or the rights offer later acquires any amount of shares in such listed company while still holding shares above the trigger point, such shareholder will be required to make a tender offer; and

**an additional ground for waiver of tender offer obligations** - in the case where a person is required to make a tender offer due to an act of restructuring with specified characteristics but such person does not seek to takeover the company, the tender offer obligation may be waived on restructuring basis in accordance with the 2019 amendment, subject to discretion of the SEC.

In order to reduce administrative burdens on the private sector, in May 2022, the SEC increased flexibility in making a tender offer, by cancelling a requirement to submit hard copy documents and replacing it with online submission.

**2.5 Proposed reforms**

In 2022, the SEC started a "regulatory guillotine", i.e., a regulatory amendment project, to support the business sector by reducing unnecessary costs. The regulatory guillotine covers the takeover rules and other areas of capital market regulations. The proposed amendments have not yet been concluded.

In November 2024, the SEC launched a public hearing on proposed amendments to the principles regarding the takeover rules. The objective is to clarify and align the regulations with current conditions and international standards including reducing the burden on the private sector. The proposed amendments include, among others, adding general exemptions of the obligation to make a tender offer, which will help streamline the process for the private sector by eliminating the need to seek waivers from the relevant authorities. Please note that the proposed amendments remain in the public hearing phase and have not yet been finalized.

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