Global Private M&A Guide - Limited External Content - Malaysia

Quick reference guide

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# Due diligence, pricing and closing

**Typical due diligence issues**

The regulatory regime can appear disorderly due to the intricate interplay of rules and regulations that are subject to government policy relating to the industry in which the target company is operating.

Not all governmental policies are written, and guidelines or directives may not be publicly available for inspection. Therefore, it is common, as part of due diligence, to contact regulators to confirm the latest policy positions. It is also common for companies to hold "grandfathered" licenses that may not reflect the latest policy positions (for example, the shareholding structure may not reflect the latest equity conditions if an application for a new license is to be made today). This will present difficulties in a share sale that is likely to trigger regulatory approval as a result of the proposed share transfer.

It is important to inspect the internal documents of the target company and not to rely on public searches. Information obtained from searches conducted on public registers maintained by governmental or other regulatory authorities may not be current (due to delays in updating information) or may not be accurately recorded in those registers by the relevant authorities.

There is no official centralized database from which litigation searches may be conducted. However, searches may be conducted at the relevant court registers if the buyer has details of the relevant litigation proceedings.

**Pricing and payment and foreign exchange control**

*Share sale*

A resident is allowed to make or receive payment in Malaysian ringgit or foreign currency in Malaysia to or from a nonresident for the settlement of shares in a Malaysian company.

*Asset sale*

In an asset sale, unless the foreign buyer already has an existing entity in Malaysia, a foreign buyer must first incorporate a local company or, if the buyer is a foreign company, register a branch with the Companies Commission of Malaysia before undertaking the business of the transferred assets.

The registered branch of a foreign company is treated as a resident for exchange control purposes. Payment between residents for a Malaysian asset must be made in the Malaysian local currency (Malaysian ringgit) (even where the payment for the asset transfer is to be settled between foreign shareholders outside of Malaysia) unless the prior written approval of Bank Negara Malaysia (BNM), the central bank of Malaysia, has been obtained for such payment to be made in foreign currency.

**Signing/closing**

*Is a deposit required?*

Paying a deposit is common practice for a share sale or asset sale.

*Is simultaneous signing/closing common?*

Simultaneous signing and closing is not common for the following reasons:

Most industries are regulated and regulatory approvals are typically required for an asset sale or share sale. The approval process can often be lengthy and involve several regulatory bodies.

Licenses are not transferable and the buyer in an asset sale will have to apply for new licenses, permits or approvals to carry on the transferred business prior to closing.

Unless the foreign buyer already has an existing entity in Malaysia to acquire the assets, a new entity needs to be incorporated, which will result in a gap between signing and closing in an asset sale.

It is possible for signing and closing to occur simultaneously when no regulatory approvals or other conditions precedent are required.

# Approvals/registrations

**Foreign investment restrictions**

Malaysia does not have a foreign investment screening procedure. However, foreign investment is regulated by way of imposing foreign equity restrictions and/or “Bumiputera”/local participation requirements in Malaysia. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Merger control in Malaysia currently only applies to mergers in the aviation service market and communications market, and notification is voluntary. There are no specified jurisdictional thresholds for authorities to investigate a merger, but the Malaysian Aviation Commission (MAVCOM) is more likely to investigate a merger where the combined turnover in Malaysia, or worldwide, meets certain thresholds. Licensees under the Communications and Multimedia Act 1998 (CMA) may also apply for authorization, which allows for conduct including mergers that could potentially result in substantial lessening of competition. This process is separate from the voluntary merger assessment regime and an application can be submitted at different times or without it. For further information, see the more detailed section on "Antitrust/merger control".

**Other regulatory or government approvals**

Generally, government policy (rather than statute) limits acquisitions in specific industries, although certain Malaysian legislation sets caps on foreign equity participation in Malaysian companies operating in particular industries.

An example is that foreign business operators engaged in "distributive trade services" in Malaysia are recommended to obtain the approval of the Ministry of Domestic Trade and Cost of Living before commencing operations under its Guidelines on Foreign Participation in the Distributive Trade Services Malaysia 2020 (DTG). There are shareholding restrictions depending on the format of distribution (such as hypermarkets and convenience stores).

The DTG is not law and it represents the Malaysian government's current policy. Although there are no legal sanctions against noncompliance, the DTG is enforced administratively via the refusal to register new business branches of foreign companies or through licensing restrictions and the issuance of immigration passes by other regulatory authorities (such as the immigration department).

# Employment

**Share sale**

In a share sale, there is no change of employer, as the employees remain employed by the target company post-share sale. As such, no consent by employees is required.

**Asset sale**

There is no automatic transfer of employees in a business or asset sale in Malaysia, and an employer cannot unilaterally transfer an employee to another employer without the employee's consent. The employees must either resign or be terminated by the seller and offered new employment by the buyer.

If the employees are: (i) in West Malaysia or Labuan; and (ii) either earn MYR 4,000 per month or less, or are engaged in specified work (e.g., manual labor, supervising manual labor or operating a motor vehicle) regardless of wages), the payment of termination benefits may be required, under the Malaysian Employment Act. The provision of minimum termination notice or payment of salary in lieu (which applies to all employees in West Malaysia and Labuan) as prescribed under the Malaysian Employment Act may also be required, depending on the employee transfer route.

# Tax

**Share sale**

The following taxes are applicable on a share sale:

Stamp duty is payable on the share transfer form, as the instrument of transfer (and not the definitive agreement), at a rate of 0.3% of the consideration price or market value of the shares (calculated based on the net tangible assets value).

Real property gains tax (RPGT). Please see "Asset sale" below in respect of RPC Shares.

**Asset sale**

The following taxes are applicable in an asset sale:

Stamp duty is levied on the instruments of transfer (such as an asset transfer agreement or assignment agreement) at an ad valorem rate of 1% on the first MYR 100,000, 2% on the next MYR 400,000, 3% on the next MYR 500,000 and 4% on any amount in excess of MYR 1 million on the balance of the market value of the property or the consideration given for it, whichever is higher. The instrument of transfer must be submitted to the stamp office for adjudication within: (i) 30 days of the date of execution if executed in Malaysia; or (ii) 30 days after it was received in Malaysia if executed outside of Malaysia. The stamp duty must be paid within 30 days from the date of the notice of assessment issued by the stamp office.

RPGT is imposed on gains arising from the disposal of real properties or the disposal of shares in a real property company (i.e., where real property forms 75% or more of the tangible assets of such company) ("**RPC Shares**") at a sliding rate of 10% to 30% depending on the holding period of the real property and whether the seller is a company incorporated in Malaysia, a citizen or a permanent resident. Where RPGT is payable: (i) the buyer must retain 3% of the purchase price (7% if the seller is not a citizen, permanent resident or a company incorporated in Malaysia) and they must pay such amount to the Inland Revenue Board (IRB) within 60 days of the disposal of the real property or the RPC Shares ("**Date of Disposal**"); and (ii) both the seller and buyer must file returns for the RPGT in the forms prescribed by the IRB to the IRB within 60 days from the Date of Disposal. From 1 January 2022 onwards, the retention rate of 3% was increased to 5% for disposals by a company incorporated in Malaysia within three years from the date of acquisition of the real property or RPC Shares.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

# Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

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