

THAILAND



Law and Practice

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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 trade matters, competition law, IP issues, real estate matters, and labour 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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1. Trends

1.1 M&A Market

After a quiet start to the first quarter of 2022, the M&A market benefited from the easing of COVID-related restrictions by the Thai government in the latter half of the year, when a number of significant M&A transactions were signed or completed. Notwithstanding the economic downturn caused by the COVID-19 pandemic, businesses appeared to have embraced M&A as part of their growth strategy, as challenging conditions often create opportunities for buyers to secure better deals and lessen competition. By the end of 2022, M&A activity seemed to have returned to pre-pandemic levels.

1.2 Key Trends

As the situation in Thailand gradually returned to normal after the pandemic, businesses have branched out beyond their areas of expertise and usual operations and sought M&A opportunities in new sectors through diversification and asset allocation. This has given rise to a number of strategic joint ventures, venture capital investments, and other strategic alliances, especially in technology, e-commerce, renewable energy, healthcare, and life sciences. Another new trend that arose during the height of the COVID-19 pandemic was digital disruption, and this continues to drive much of the M&A activity in Thailand even now. Investors, including listed companies and financial institutions, have once again been drawn to the technology industry, particularly e-commerce, fintech, and data centres, keen to diversify their business portfolios to adapt to the current business trends and provide greater synergies, whether as an operator or a service provider.

1.3 Key Industries

The industries that were worst affected during the COVID-19 pandemic in the past few years, including hospitality, aviation, food and beverage, manufacturing and real estate, had gradually recovered from the impact of COVID-19. However, the financial services, telecommunications, media, and technology (TMT), and energy sectors have continued to dominate M&A activity by value in 2022 and become the standout performers in the Thai market. Consumer habits, shaped by COVID-19 restrictions, particularly in how they acquired or consumed goods and services, have been a key driving force behind the significant level of M&A activity we saw in 2022. There were a number of high-profile deals in 2022, including the following:

- The merger of Total Access Communication Plc. (DTAC) and True Corporation Plc., two telecom giants in the market, was acknowledged by the telecom regulator in 2022 after the plan was announced the year before. The merger was completed on 1 March 2023.
- A landmark reorganisation of the financial business group of Siam Commercial Bank Public Company Limited (SCB) was completed in the first half of 2022, which involved a tender offer for SCB shares by a new parent company (SCBX), delisting of SCB shares, and the listing of the new SCBX shares on the Stock Exchange of Thailand (SET). The tender offer for SCB shares by SCBX was overwhelmingly accepted by shareholders and the total offering amount was THB 33.6 billion. SCBX now serves as the “mother ship” of the group.
- Citi completed the sale of its consumer banking business in Thailand to United Overseas Bank (Thai) Public Company Limited (UOB), as part of a broader sales agreement covering consumer banking across Malaysia, Thai-

land, Vietnam and Indonesia (but not including Citi's institutional businesses). Whilst the transaction highlights Citi's intention to exit consumer banking across 14 markets in Asia, Europe, the Middle East and Mexico, it also broadens and reinforces UOB's franchise in the ASEAN region.

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 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, insurance business is regulated by the Office of the Insurance Commission, banking and financing businesses are regulated by the Bank of Thailand (BOT), and telecommunications business 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 or other specific exemptions apply. For these purposes a foreign entity includes a Thai-incorporated company with 50% or more of its shares owned by foreigners.

Businesses in the financial, securities, and insurance sectors which are licensed or approved by the Thai regulators 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-incorporated company with more than 49% of its shares owned by foreigners or with a majority of its shareholders (by headcount) being foreigners, are 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 2017 Trade Competition Act BE 2560 (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

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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, 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 prior approval (pre-merger filing) from the Trade Competition Commission (TCC); and
- those that only require notification to the TCC after the closing (post-merger notification).

Essentially, the 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 2019 Labour Protection Act BE 2562 (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 he or she would like to transfer employment to the new employer or not. If the employee does not consent to such transfer and the employer no longer hires such employee, the employment will be deemed as terminated, hence the employee is entitled to severance pay.

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 (including merger control) under the 2017 Trade Competition Act.

Another important legal development in Thailand is the recent addition of a new form of merger under Thai law. With effect from 7 February 2023, parties to M&A deals in Thailand now have two options for consolidating private companies:

- amalgamation: a consolidation where two or more companies are combined, which results in one new separate company being formed; and
- merger: a consolidation where two or more companies are merged, which results in only one company remaining; the new merger scheme will provide greater flexibility for business acquisitions and reduce legal obstacles in business/asset transfer deals in Thailand.

3.2 Significant Changes to Takeover Law

There have been no significant changes to takeover law in Thailand in the past 12 months and to our knowledge no takeover legislation is under review in a way that could result in significant changes in the coming 12 months apart from the following which were implemented in 2022 to lessen the burden for tender offerors:

- the revocation of the requirements for tender offerors to submit copies of their tender offer

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documents and relevant documents to SET and the requirements for tender offerors to publish their tender offers in a local newspaper;

- the additional option for tender offerors to submit documents to shareholders via electronic means; and
- the new requirement for tender offerors to submit relevant reports, applications and documents to SEC via electronic means where paper-based submission is no longer allowed.

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%, 50% or 75% of the total voting rights in the listed company are acquired.

4.2 Material Shareholding Disclosure Threshold

If an acquirer reaches or exceeds 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 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 or securities whose price is linked to the shares or listed derivatives (Section 59 of the SEC Act).

4.3 Hurdles to Stakebuilding

The reporting thresholds under Thailand's takeover rules apply to all publicly listed companies uniformly. For other hurdles, public companies (whether listed or not) 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 or persons or entities connected with them requires 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, tax, 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 shares 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 or limited conditions precedent).

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 consecutive business days though the timetable can be extended if a competing bidder emerges. It is possible to specify conditions to the making of a voluntary tender offer (not a mandatory tender offer), such as regulatory 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 persons 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 that controls the target, under the chain principle rule.

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 remaining shares of the target company. Secondly, 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 common to include a material adverse change condition in a voluntary tender offer.

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 tender offer (whether mandatory or voluntary) cannot.

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 SEC 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 must be respected. These rights include receiving notice of, attending, speaking, and voting at general shareholders' meetings. 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 shareholders. 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 shareholders 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 SEC within one business day after such triggering.

In the 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 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.

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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. In 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

No new lessons have been learned in 2022.

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.