

Thailand

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Section 1: REGULATORY FRAMEWORK

1.1 What legislation and regulatory bodies govern public M&A activity in your jurisdiction?

The primary legislation governing public M&A activity in Thailand are the Securities and Exchange Act (SEC Act), the Notification of the Capital Market Supervisory Board Rules, Conditions and Procedures for the Acquisition of Securities for Business Takeovers (CMSB Notification), and the Public Company Act. Only shares of public companies listed on the Stock Exchange of Thailand are subject to the tender offer process.

The primary regulatory bodies are the Securities and Exchange Commission (SEC), the take-over panel appointed by the Capital Market Supervisory Board (CMSB) and the Stock Exchange of Thailand.

1.2 How, and by what measures, are takeover regulations (or equivalent) enforced?

The regulatory bodies are the SEC, the Office of the SEC and the CMSB. The Office of the SEC has the authority to review tender documents where the take-over panel has the authority to grant waivers for the requirement to conduct mandatory tender offers.

Section 2: STRUCTURAL CONSIDERATIONS

2.1 What are the basic structures for friendly and hostile acquisition?

A hostile acquisition can be structured as a mandatory or voluntary tender offer. If the acquirer obtains shares of the target company up to or more than 25%, 50% or 75% of the total voting rights of the target company, the acquirer will be required to make a mandatory offer for all the securities of the target company. Alternatively, the acquirer can make a voluntary tender offer for all shares of the target company.

With respect to a friendly acquisition, in addition to a mandatory or voluntary tender offer structure, an acquirer may make a partial tender offer for less than 50% of the voting shares of the target company with an approval from a shareholders' meeting of the target company by a vote of not less than 50% of the total votes of the shareholders present at the meeting and having the right to vote. Approval of the Office of the SEC is required and certain other conditions are specified in the CMSB Notification.

2.2 What determines the choice of structure, including in the case of a cross border deal?

Key factors which an acquirer should keep in mind when choosing the structure of the deal are: (i) the nature of the acquisition (friendly or hostile); (ii) whether the acquisition is an asset or share acquisition; (iii) tax implications; (iv) regulatory requirements; and (v) corporate approval required for such a transaction.

2.3 How quickly can a bidder complete an acquisition? How long is the deal open to complete the bid?

According to the CMSB Notification, the tender offer period must be between 25 and 45 business days. Normally, the whole process will take at least six months.

2.4 Are there restrictions on the price offered or its form (cash or shares)?

The tender offer price must be given to all holders of the same class and issue of the target company's securities at the same price and form. The price can be specified in more than one form, provided that one of the forms must be monetary and the monetary value of a non-monetary form must be appraised by a financial advisor.

Furthermore, the tender offer price for shares must be determined in accordance with certain rules specified in the CMSB Notification. In essence, the tender offer price must not be less than the highest price paid for shares of such class by the acquirer, or any related party specified under the SEC Act, during the period of 90 days prior to the date on which the tender offer document is submitted to the SEC.

2.5 What ownership and other conditions determine whether the bidder makes the acquisition and can satisfactorily squeeze out or otherwise eliminate minority shareholders?

There is no squeeze-out concept under Thai law. Generally, the price offered is the primary key to successful acquisitions.

2.6 Do minority shareholders enjoy protections against the payment of the control premiums, other preferential pricing for select shareholders, and partial acquisitions, such as mandatory offer requirements, ownership disclosure obligations and best price/all holders rule?

Under the CMSB Notification, all securities holders of the target company must be treated equally and given accurate and complete information in a tender offer. The tender offer price given to all holders of the same class and issue of the target company's securities must be at the same price and form.

With respect to the ownership disclosure obligations, after acquiring or disposing of securities of any listed company resulting in an increase or decrease of the number of securities held by such person to a number up to or more than a multiple of 5% of the total number of the voting rights of such listed company, the owner of such securities is required to report the acquisition or disposal to the SEC.

In addition, the CMSB Notification imposes requirements following the making of the tender offer. The acquirer should not take any action: (i) for the six-month period from the closing date of the offer period, resulting in an acquisition of securities of the target company by such acquirer at a price which is higher than the price offered under the offer documents, subject to certain exceptions specified under the CMSB Notification; and (ii) for a period of one year from the closing date of the offer period, which is materially different from that specified in the offer document, unless an approval of the shareholders' meeting of the target company by a vote of not less than 75% of the total votes of shareholders having the right to vote and present at the meeting is obtained and the office of the SEC has been notified accordingly.

2.7 To what extent can buyers make conditional offers, for example subject to financing, absence of material adverse changes or truth of representations? Are bank guarantees or certain funding of the purchase price required?

A mandatory tender offer must be unconditional. However, the acquirer is permitted to cancel the tender offer in two situations:

- an occurrence of a situation or an action, after submission of the tender offer document but during the tender offer period, which causes, or may cause, severe damage to the status or assets of the target company, which does not result from the acts of the acquirer or any act for which the acquirer must be responsible; and
- 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 its share values,

provided that these events are stated clearly in the tender offer document and the office of the SEC has no objection to such cancellation.

In a voluntary tender offer, the acquirer can include a condition that the tender offer can be cancelled if the number of shares tendered is less than the number of shares specified by the acquirer.

2.8 How do buyers and sellers seek to maximize value through their price and other deal strategies?

Value is maximised by choosing the right structure for the deal and taking into account the key factors specified in 2.2.

Section 3: TAX CONSIDERATIONS

3.1 What are the basic tax considerations and trade-offs?

There are two main types of acquisition in Thailand: (i) purchase of shares; and (ii) purchase of business and assets. From a tax perspective, each type of acquisition has its own advantages. For example, in the acquisition of assets, the acquiring company may depreciate assets acquired based on their acquisition price and it is possible to acquire only parts of the business. However, in the acquisition of shares, the acquiring company may use available tax losses in the target company to offset future profits. The carry-forward of losses is not affected by a change in ownership. Thus, the acquiring company should explore the benefits and drawbacks of all options before acquiring a business in Thailand.

3.2 Are there special considerations in cross border deals?

Thailand has double taxation agreements with 56 countries, which provide favourable tax results and should be considered when planning the structure of the acquisition and investment or disinvesting in Thailand.

Section 4: ANTI-TAKEOVER DEFENCES

4.1 What are the most important forms of anti-takeover defences, including antitrust, national security or protected industry review, foreign ownership restrictions, employment regulation and other governmental regulation?

As discussed in 2.6, there are ownership disclosure obligations under Thai law. This allows the target company to closely monitor the trading of its securities and to be aware of a hostile takeover at an early stage, so that the target company will have sufficient time to implement anti-takeover defences.

White knight is one of the defences that may be employed by the target company in Thailand. The target company's management may find a friendly potential acquirer or an existing shareholder wishing to acquire more shares to make a bid, which is not forbidden under the CMSB Notification.

- *Foreign ownership restrictions*

In Thailand, foreign companies are prohibited from engaging in certain restricted businesses. Accordingly, a foreign acquirer may be barred if the target

company is engaging in a restricted business and the acquisition of the target company by such a foreign acquirer will render the target company a foreign entity.

The main legislation governing the business of foreign entities is the Foreign Business Act (FBA) which limits foreign participation in certain business activities including wholesale and retail, broker and agent and any type of service activities (including lending, lease, and consultancy). The FBA limits foreign ownership to 49.99% of shares in the target company conducting a restricted business. Approval of the Ministry of Commerce is required prior to conducting any such business. The target company may also apply for an investment promotion certificate from the Board of Investment for certain promoted businesses to benefit from a relaxation of this foreign ownership restriction.

Apart from the FBA, certain industries have specific regulations which may have separate requirements on foreign shareholding. For example, laws governing a commercial banking business or an insurance business have a foreign shareholding limitation of 25%, with certain exceptions. Also, the articles of association of a target company may have such restrictions.

- *Restrictions under the Land Code*

In addition, the Land Code of Thailand prohibits foreign entities from owning land unless, among other things, an investment promotion certificate is granted by the Board of Investment.

4.2 How do the targets use anti-takeover defences?

Please see 4.1.

4.3 How do the bidders overcome anti-takeover defences?

According to the CMSB Notification, during the offer period, an acquirer making a tender offer is entitled to amend the terms of the offer documents if there is a competing bidder, provided that the amendment is made to improve the terms of the offer, including a price increase. This will allow a hostile acquirer to propose a competitive offer document if the target company employs the white knight tactic.

4.4 Are there any examples of successful hostile acquisition?

There have been only a few successful hostile acquisitions in Thailand, mostly through the purchase of shares in the SET.

Section 5: DEAL PROTECTIONS

5.1 What are the main ways for a friendly bidder and target to protect a friendly deal from a hostile?

Generally, a friendly deal in Thailand involves a willing seller and a willing buyer where a binding contractual arrangement is made after the acquisition structure is concluded. Such contractual arrangement normally contains a protective mechanism; that is, an exclusivity arrangement between the acquirer and the major shareholder of the target, a lock-up agreement requiring major shareholders to tender their shares to the acquirer or a break-fee provision. With respect to the break fee, a Thai court will award damages based on the actual damages suffered by the non-breaching party as a result of a breach. Thai courts also have the discretion to reduce a break fee or any liquidated damages that are disproportionately high.

5.2 To what extent is deal protection limited, for example by restrictions on impediments to bidding competition, break fees or lock up agreement?

The break fee is regarded as liquidated damages in Thailand and may be reduced by the Thai court if it is disproportionately high.

Section 6: ANTITRUST REVIEW

6.1 What are the notification thresholds in your jurisdiction?

The Thai Trade Competition Act (TCA) prohibits a merger and acquisition that results in a monopoly or unfair competition. However, as of this date, the regulation providing the criteria for a merger and acquisition under this restriction has not been issued. This means that mergers and acquisitions in Thailand can be conducted without being subject to a general competition law. However, in specific business sectors such as telecommunications, a regulator has authority over antitrust and competition issues.

6.2 When will transactions falling below those thresholds be investigated?

N/A See 6.1.

6.3 Is a notification filing mandatory or voluntary?

N/A See 6.1.

6.4 What are the deadlines for filing, and what are the penalties for not filing?

N/A See 6.1.

6.5 How long are the review periods?

N/A See 6.1.

6.6 At what level does your authority have jurisdiction to review and impose penalties for failure to notify deals that do not have local competition effect?

N/A See 6.1.



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Section 7: ANTI-CORRUPTION REGIMES

7.1 What is the applicable anti-corruption legislation in your jurisdiction?

In Thailand, there is no specific anti-corruption legislation, except for the law concerning public bidding processes. Fraud and embezzlement are offences under the Criminal Code.

The SEC has guidelines concerning good corporate governance for listed companies in order to protect the interests of shareholders and enhance the efficiency, transparency and accountability of listed companies, including the principles of anti-corruption. Thus, many listed companies have established anti-corruption policies to guide the performance of executives and management.

7.2 What are the potential sanctions and how stringently have they been enforced?

Penalties depend on the seriousness of the offence.

Section 8: OTHER MATTERS

8.1 Are there any other material issues in place in your jurisdiction that might affect a transaction?

N/A

About the author

Kudun Sukhumananda's principal areas of practice are capital markets and securities, mergers and acquisitions, corporate, and banking and financial services. He has extensive experience in advising domestic and international clients on international and domestic offerings of shares and debentures, corporate mergers and acquisitions, investments, corporate and debt restructuring, joint ventures, and commercial transactions as well as property funds for public offering, REITs and infrastructure funds.

Previously, Sukhumananda was a senior associate at White & Case (Thailand). He is a guest lecturer on partnership and company law, bankruptcy and insolvency law and investment law at several Thai universities, and has been recognised as a leading lawyer by international legal publications.

Sukhumananda obtained an LLB degree (honours) from Chulalongkorn University, and an LLM degree from Columbia University School of Law, in the United States.