Chapter 62

THAILAND

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I OVERVIEW OF M&A ACTIVITY

Thailand's economy has matured and is growing in certain sectors, albeit gradually,[2] as businesses position themselves for the predicted economic growth in South East Asia. Mergers, acquisitions and joint ventures continue to play a significant role in inbound and outbound business expansion throughout Thailand and South East Asia.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

When companies are considering inbound acquisition opportunities in Thailand, the principal considerations investors need to be aware of are the restrictions on the business activities that can be undertaken by foreign entities.

The cornerstone piece of legislation relating to foreign investment and M&A transactions in Thailand is the Foreign Business Act 1999 (FBA). The operation of businesses in Thailand by foreign nationals is restricted by the FBA under the administration of the Ministry of Commerce (MOC). The FBA restricts (and in some cases forbids) foreign nationals from engaging in a wide range of business activities, including most service businesses. For the purpose of the FBA restrictions, a 'foreigner' is classified as a foreign individual, a company incorporated outside Thailand, or a company incorporated in Thailand that is majority-owned by foreign individuals or foreign companies.

Schedule 3 of the FBA sets out three lists of business categories in which the participation of foreign nationals is either prohibited or restricted. Foreign nationals are prohibited from participating in the businesses specified in List 1, which includes antiques trading, broadcasting, farming and forestry. Foreign nationals are restricted from participating in businesses specified in List 2 unless they obtain a foreign business licence (FBL) from the Minister of Commerce and approval from the Thai Cabinet. List 2 includes activities related to national safety, agriculture, arts and culture, natural resources and the environment. Finally, foreign nationals are restricted from participating in the businesses specified in List 3 unless they obtain an FBL from the Director-General of the Department of Business Development with the approval of the Foreign Business Committee. List 3 comprises a total of 21 categories of restricted businesses in which Thais are not yet ready to compete with foreigners, including accountancy, engineering, construction (with certain exceptions), retailing and wholesaling (with certain exceptions), advertising, hotel operation (excluding hotel management), tour guiding, sale of food and beverages, and the catch-all category 'other services'.

A foreigner engaging in a restricted business under the FBA can obtain a foreign business certificate (as opposed to an FBL) by obtaining a promotion certificate from the Thailand Board of Investment (BOI), or may be eligible under an international treaty, such as the Treaty of Amity between the United States and Thailand. Generally, the administrative process for obtaining a foreign business

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[2] Thailand Economic Outlook 2015, Dr Songtham Pintho, Bank of Thailand.

certificate is less onerous than for an FBL.

i Investment law

The Office of the Board of Investment of Thailand oversees various tax and non-tax incentives and privileges applicable to foreign investment in Thailand. Some of the investments include those that would otherwise be restricted to foreign nationals under the FBA. This incentive alone is attractive to many foreign investors, as it allows foreign investors to operate the foreign majority-owned business in Thailand and obviates the need to apply for an FBL.

Incentives offered by the BOI to eligible foreign investors may include exemptions from or reduction of corporate income tax up to a maximum of eight years, exemptions from or reductions of import duties on machinery and raw or essential materials, permission to operate business as a majority foreign-owned company, or acquisition of land for use by foreign corporations.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

In December 2014, the BOI announced comprehensive changes to its investment incentive programme in BOI Notification No. 2/2557 regarding policies and criteria for investment promotion. The notification revised the structure of investment promotion policies and criteria to support the BOI's current vision on investment promotion.

i Rationale for change

In setting forth the rationale for revising Thailand's investment promotion strategies, the BOI cited the need for Thailand to become more competitive in key industries prior to the commencement of the ASEAN Economic Community (AEC), including the direction of Thailand's development under the National Economic and Social Development Plan and the country's development policies for the agricultural, industrial and services sectors, in order to enhance the country's competitiveness and achieve sustainable development in the long run.

ii BOI incentives

The Board stipulates two types of incentives: activity-based incentives and merit-based incentives. The Board classifies two groups of incentives based on activities.

Group A consists of activities that will receive corporate income tax incentives, machinery and raw materials import duty incentives, and other non-tax incentives. The corporate income tax exemption available for Group A ranges from three to eight years depending on the activities. The maximum corporate income tax exemption is eight years without being subject to a corporate income tax exemption cap.

Group B consists of activities that will receive only machinery and raw materials import duty incentives and other non-tax incentives.

Merit-based incentives are additional to the activity-based incentives and will include three elements:

a Competitiveness enhancement: For example, research and development, donations to technology and human resource development funds, educational institutes, specialized training centers, research institutes or governmental agencies in the science and technology field in Thailand, IP acquisition, licensing fees for commercializing technology developed in Thailand, advanced technology training, development of local suppliers and product and packaging design. An additional one to three years of corporate income tax incentives will be granted if the qualified investment or expenditure is not less than the specific ratio (from 1 to 3 per cent) of the project's combined total revenue for the first three years, or not less than the specific amount of expenses (whichever is less).

b Decentralisation: Three additional years of corporate income tax exemption and other tax privileges will be granted to projects located in 20 provinces with low per capita income.

c Industrial area development: Projects located within industrial estates or promoted industrial zones will be granted one year of corporate income tax exemption.

The total period of corporate income tax exemption for each project will, in no event, exceed eight years in total.

In order to promote production efficiency and develop competitiveness, the BOI will grant an exemption from import duty on the following machinery throughout the period of investment promotion:

a machinery used for research and development;

b machinery used for pollution prevention or treatment; and

c machinery used for manufacture in the promoted projects.

In 2014, applications were submitted to the BOI for new investment projects worth approximately US$60 billion, which is the highest value of new investment projects since the BOI was formed. Over 50 per cent of the investments related to mass infrastructure such as power plants, eco-car and food processing.[3]

In the first four months of 2015, the BOI maintained its target by approving 350 billion baht worth of projects. The BOI expects 60 per cent of the approved projects this year to be related to modern industry.[4]

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

The M&A deal flow, both inbound and outbound, remained relatively steady in 2014–2015. The following are some of the most significant transactions during the past year.

The Siam Commercial Bank PCL (SCB), one of the country's largest and most venerable financial institutions, sold a 60.86 per cent equity stake in Siam Commercial Samaggi Insurance PCL (SCSMG), a major general insurance company in Thailand, to ACE Group, a global insurance and financial services firm based in the United States. This transaction is significant in demonstrating the rapid expansion and growth of the insurance market in Thailand.

Hess Corporation, an American-based integrated oil company, sold its assets in Thailand to PTT Exploration and Production Plc (PTTEP), Thailand's biggest publicly listed oil and natural gas explorer. The subsidiaries, PTTEP Offshore Investment Co, Ltd. and PTTEP International Ltd signed share purchase agreements to acquire a 100 per cent equity stake in Hess Thailand Holdings II Ltd and Hess Exploration Thailand Co Ltd.

The deal is part of the PTTEP growth strategy to boost oil and gas assets in Thailand, and is valued at US$1 billion. The acquisition gives PTTEP a further 15 per cent stake in an offshore natural gas project in the Gulf of Thailand and a further 35 per cent stake in an onshore gas field in the northeast of the country. The transaction also sees PTTEP taking over the operatorship of the onshore gas field. PTTEP acquired 100 per cent of the shares in Hess Thailand Holdings II (HTH), which in turn owns Hess (Thailand) (HTL), and 100 per cent of the shares in Hess Exploration (Thailand) (HETCL).

TCC Land Co, Ltd sold six hotels to a Singapore-based real estate investment trust, Frasers Hospitality Real Estate Investment Trust. The sale included hotel properties along with the operating companies, as well as master lease and tenancy agreements. The deal is valued at S$1.658 billion.

The hotels sold in Singapore, Australia, Malaysia, UK and Japan included the Intercontinental Singapore, The Westin Kuala Lumpur and the ANA Crowne Plaza Kobe.

This was the first SGX-ST listed global-listed hotel and serviced residence group. It is also the largest global hospitality portfolio by number of rooms, including hotels and serviced residences in Asia, Australia, and the UK.

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3 *Prachachat Business News*, 5 January 2015.

4 *The Nation News*, 2 July 2015.

Great Pacific Properties Ltd, a subsidiary of TCC Land International Ltd, and its affiliates entered into a US$818 million transaction with The Sumitomo Mitsui Banking Corp (SMBC) to establish the Thai Hotel Investment Freehold and Leasehold Property Fund, for the purchase of 12 real estate properties in prime tourist areas in Bangkok and other provinces, such as Phuket, Samui and Chiang Mai.

Sub Sri Thai, owner of Greyhound cafes in Thailand and Hong Kong and exclusive franchisee of Au Bon Pain, Dunkin' Donuts and Baskin-Robbins in Thailand, sold its 99 per cent stake in Industrial Enterprise to Sime Darby Plantation Europe and Sime Morakot Holdings (Thailand). The deal was valued at 815 million baht.

Rexel General Supply and Services (Thailand) Co, Ltd acquired 4 Knights International Co, Ltd, which holds a leading position in the trading of electrical products in the downstream oil and gas onshore sector with branches in Bangkok and Rayong, key regions in Thailand for onshore activities, for the sum of 253.8 million baht. The transaction reinforces Rexel's position in the oil and gas sector and strengthens the group's presence in South-East Asia.

PICNIC amalgamated with World Gas to form WP Energy Public Company Limited (WP). World Gas's LPG market share rose to 23 per cent from 16 per cent. The company ranks as Thailand's second-largest LPG trader, up from third, behind leader PTT Plc (38 per cent).

SGX-ST-listed Jardine Cycle & Carriage Ltd, a member of the Jardine Matheson Group, acquired 57.27 million ordinary shares representing approximately 24.9 per cent of the issued share capital of Siam City Cement Public Company Ltd, Thailand's second largest cement manufacturer, from Holcim subsidiary Thai Roc-Cem Ltd for US$615 million.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

The Thai government instituted several schemes to promote Thailand as a regional hub for trading, financial services and investment, such as the tax schemes for International Headquarters (IHQ) and International Trading Centers (ITC). IHQ and ITC activities have been included in the new investment promotion strategies.

An IHQ is a company established in Thailand to carry on managerial services, technical or supporting services or financial management of its associated enterprises in Thailand or in overseas countries. An ITC is a company established in Thailand to engage in the business of buying and selling goods, raw materials and parts, as well as providing services related to international trade to foreign juristic entities.

In May 2015, the Revenue Department announced Royal Decree Nos. 586 and 587 to provide tax incentives for IHQ and ITC businesses, respectively. The main incentives are summarised as follows.

There is a 15 per cent personal income tax rate on the income of expatriates who work for IHQs and ITCs.

A reduction of corporate income tax rate from 20 to 10 per cent for IHQs on net profits derived from the provision of the qualifying managerial service, technical support or financial management services and royalty income received from Thai affiliates.

A corporate income tax exemption for 15 accounting periods for IHQs on income derived from qualifying managerial service, technical support or financial management services provided to, and royalty, dividend income received from affiliates incorporated under foreign law as well as gains derived from the transfer of shares in such companies.

A corporate income tax exemption for 15 accounting periods for IHQs and ITCS on income derived from the overseas procurement of goods and sales, provided the goods are not imported into Thailand, and international trade-related services with overseas companies (for example, procurement of goods, warehousing and transportation of goods, and insurance).

A corporate income tax exemption on qualified dividends distributed and interest paid by an IHQ to a foreign company, as well as an exemption from the specific business tax on any income derived by an IHQ from loans granted to affiliates.

IHQs and ITCs must meet a number of requirements to receive the above incentives. For example, the company must have paid-up capital of more than 10 million baht and annual operating expenses of at least 15 million baht; provide services to affiliates incorporated under foreign law; and obtain approval from the Director-General of the Revenue Department.

IHQ and ITCs are now replacing regional operating headquarters and international procurement offices that are no longer listed as BOI eligible activities. Since IHQs and ITCs are eligible for relaxed criteria (for example no minimum number of service recipients in foreign countries is required) without reducing tax privileges, IHQs and ITCs are currently attractive to various investors in Thailand.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

In Thailand, the most common form of financing for an acquisition depends on whether the loan is a leveraged loan or a simple acquisition loan. Basically, banks require the assets that have been acquired to serve as the security for the loan itself. The security that is required in the case of a share acquisition is a share pledge and, in the case of an asset acquisition, the mortgage of the asset or real property, for example, hotel, building or land. As always, the secured assets will also be subject to a negative pledge. Financial covenants will be required from the borrower to ensure that the borrower is able to service the debt. In leveraged finance, the financial covenant will be applied to the target that has been acquired as the loan is given on the financial strengths and credit-worthiness of the target, and the dividend from the target will be a source of repayment. Private equity plays a significant role for both the acquirers and the sellers.

VII EMPLOYMENT LAW

The Labour Protection Act (as amended (LPA)) aims to protect the employee by allowing him or her to maintain employment privileges following a merger. The LPA provides that in a merger, all rights and duties of the employees will be assumed by the new employer.

However, this could be an issue if an employee does not want to work for the new employer. When the existing employer ceases to operate and wages are no longer paid to the employee, the contract with the employee will terminate. The existing employer will be responsible for severance pay and any other termination payment to the employee, such as payment in lieu of advance notice, etc.

VIIII TAX LAW

Tax law developments in Thailand during the first half of 2015 include the following.

i Reduction in the corporate income tax rate for SME

The cabinet has approved a reduction in the corporate income tax rate for companies or juristic partnerships that have paid-up capital not exceeding 5 million baht at the end of the last accounting period, and income from sales and services in the accounting period not exceeding 30 million baht. This measure applies to accounting periods starting on or after 1 January 2015, in respect of which the corporate income tax rates are as follows.

<table>
<tr><th>Net profits</th><th>Current rates</th><th>Proposed rates</th></tr>
<tr><td>0 – 300,000 baht</td><td>Exempt</td><td>Exempt</td></tr>
<tr><td>> 300,000 – 1 million baht</td><td>15%</td><td rowspan="2">15%</td></tr>
<tr><td>> 1 million – 3 million baht</td><td rowspan="2">20%</td></tr>
<tr><td>Over 3 million baht</td><td>20%</td></tr>
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ii Increase in expense deduction for research and development

The Thai Cabinet has approved the Ministry of Finance's proposal to amend the rules governing deductions for research, development and innovation expenses to allow 300 per cent of qualifying expenses for research and development (increased from 200 per cent). This tax incentive will be available for five years from 1 January 2015 through 31 December 2019.

IX COMPETITION LAW

Merger control in Thailand is governed by the Trade Competition Act (1999) (TCA). Section 26 of the TCA prohibits mergers of businesses that may result in a monopoly or unfair competition, as prescribed by the Trade Competition Commission (TCC), unless permission is obtained from the TCC. To date, however, no implementing legislation for Section 26 of the TCA has been enacted.

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 and approved. 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 that will be subject to prohibition under this Section. This is part of the pre-merger notification requirement.

Since 1999, no notifications have been approved by the TCC under Section 26 of the TCA and, accordingly, the restrictions on mergers under that Section are not currently in force. However, on 6 June 2013, the TCC approved certain pre-merger notification requirements in respect of the following:

a the merger of businesses that have an aggregate market share in any market for any goods or services before or after the merger of 30 per cent or more, and had total sales (turnover) or income in the preceding year of 2 billion baht or more; and

b the acquisition of shares with voting rights accounting for at least 25 per cent of the total shares of a public company, or 50 per cent of a limited company, and the acquisition resulting in the business of a company or both companies having an aggregate market share of 30 per cent or more in any market of any goods or services before or after the acquisition, and a total sales volume (turnover) or income in the previous year of at least 2 billion baht.

Although this approval by the TCC represents some progress in the long-awaited issuance of notifications enabling the merger controls finally to come into force, the process is far from complete and, accordingly, the provisions of Section 26 is still not in force.

There are details to be ironed out. The TCC will task the legal subcommittee to draft the merger notification thresholds and details of the criteria for pre-merger filings in respect of particular businesses. Once these detailed notifications are approved by the TCC, they must be published in the Government Gazette and a date must be set for them to come into force. If a merger covered by such notification is made on or after the effective date of the notification, the merger must be approved by the TCC before it can take place.

At the time of writing, it is not known when these notifications will be drafted, approved by the TCC and published in the Government Gazette.

X OUTLOOK

Merger and acquisition activity in Thailand continues at a steady rate as domestic and foreign businesses expand in the region. In 2014–2015, a number of long-awaited large-scale infrastructure projects, economic stimulus measures, energy prices, and the development of the ASEAN Economic Community (AEC) created opportunities in various industry sectors, including energy, construction, insurance, real estate and infrastructure funds. Although it is perhaps too early to predict what will happen for the remainder of 2015, observers remain cautiously optimistic that there will be continued economic growth in both the public and private sectors of Thailand and the member states of the AEC.

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