

Snapshot: A quick Q&A on M&A in Thailand

1. What is the general legal framework governing M&A of a private company in Thailand?

For most private M&A activity conducted in Thailand, involving an acquisition or a disposal of shares or assets, there isn't any specific law that regulates the implementation of such transactions and the parties can rely principally on the terms of the sale and purchase agreement negotiated between the parties. However, where a formal legal merger is proposed (referred to as an "amalgamation" under Thai law), being a merger of two (or more) Thai companies where the merged companies are dissolved and a new company is established, the Civil and Commercial Code ("**CCC**") is the legislation that sets out the process and legal requirements.

In addition, there are certain specific laws that need to be considered before an M&A transaction is agreed as they can impact how the transaction needs to be structured and what consents or approvals may need to be obtained. We address this briefly in this section as well as in the answers to Question 2 and 3 below.

The Trade Competition Act B.E. 2560 (2017) ("**TCA**"), which has a broad scope, needs to be considered where the proposed transaction involves:

- (i) a merger of a manufacturer with another manufacturer, a distributor with another distributor, a manufacturer with a distributor, or a service provider with another service provider, resulting in one of the businesses remaining and the other extinguished, or a new business being formed;
- (ii) a purchase of more than 50% of the total value (based on the accounts of the preceding financial year) of the assets used in the target's business; or
- (iii) a purchase of shares representing more than 50% of the total voting rights of a private company, or a purchase of shares, warrants or other convertible securities representing 25% or more of the total voting rights of a public listed company.

For further detail on merger control please see the answer to Question 3 below.

Apart from the TCA, there is legislation that may impact M&A transactions in a number of specific industries, including telecommunications, insurance, financial institutions and the energy sector.

2. What ownership restrictions might impact a foreign acquirer?

The Foreign Business Act ("**FBA**") imposes restrictions on the ability of "foreigners" to engage in restricted businesses ("**Restricted Businesses**") in Thailand. The definition of "foreigners" includes foreign individuals, foreign established companies, and a company established in Thailand in which 50% or more of its shares are held by foreign individuals or companies ("**Foreign Company**"). Under the FBA, some Restricted Businesses are exclusively reserved for Thai nationals and companies.

Certain businesses are exempt from the FBA, including commercial banking business, representative offices, regional offices, life insurance and non-life insurance businesses, securities business and a service business where a government unit or state enterprise is a counter party.

In addition, certain Restricted Businesses can be operated by a Foreign Company upon obtaining either a foreign business license ("**FBL**") or a foreign business certificate ("**FBC**"), as applicable, from the Ministry of Commerce ("**MOC**").

The FBA classifies Restricted Businesses into three lists as follows:

- (i) the first list sets out the businesses that a Foreign Company is forbidden to operate, such as newspapers, rice farming, livestock farming and land trading;
- (ii) the second list sets out the businesses that a Foreign Company cannot operate unless an approval is granted from the Cabinet, such as the production of wood carvings, Thai musical instruments, gold and silverware; and
- (iii) the third list sets out the businesses that a Foreign Company cannot operate unless an approval is granted by the MOC, such as architectural and engineering services, guided tours, advertising business, hotel business, wholesale and retail business, and other service businesses.

Therefore, if a transaction will result in a target company becoming a Foreign Company and such company wishes to operate a Restricted Business, it may be required to obtain an FBL or an FBC. Where the MOC grants an FBL, a foreigner can own up to 60% of the share capital in a target company operating businesses in the second list and up to 100% of the share capital in a target company operating businesses in the third list.

An application for an FBC (which involves a simpler and quicker application process) instead of an FBL can be made if an investment approval for the project/business has first been obtained from the Thai Board of Investment, the target business operates in an industrial estate under the authority of the Industrial Estates Authority of Thailand or has been registered pursuant to an investment promotion treaty which Thailand has entered into.

Apart from the FBA, other specific laws may contain foreign ownership restrictions for specific business sectors, such as telecommunications, energy, financial institutions and insurance.

3. Are there any merger control clearances or notifications required?

Yes, a pre-merger approval is required for an acquisition or a legal merger (referred to as a Merger in the TCA) that creates either:

- (i) a "monopoly", where there is only one business operator, who has absolute power to determine prices and amounts of its products or services, which has a sales turnover of at least THB1 billion; or
- (ii) a business operator with "dominant market power", which means either (i) one business operator with a market share of at least 50% and a sales turnover of at least THB1 billion in the preceding year, or (ii) any top three business operators together having an aggregate market share of at least 75% and a sales turnover of at least THB1 billion each in the preceding year (excluding any business operator with a market share in the previous year of less than 10%).

If a Merger results in a monopoly or a business operator with dominant market power, such Merger cannot be completed until an approval from the Trade Competition Commission ("TCC") is granted. The TCC is required to complete its consideration of an application within 90 days, with the possibility to extend for a further 15 days. In granting an approval, the TCC may set certain conditions to be satisfied and a period of time for such conditions to be satisfied.

To obtain a pre-merger approval from the TCC, business operators must show and the TCC must be satisfied that the Merger (i) is reasonably necessary for the business (ii) is beneficial to business promotion (iii) poses no serious harm to the Thai economy; and (iv) has no material effect on the interests of consumers in general.

If a business operator does not agree with the TCC's order to approve or deny a Merger request, the TCC's order can be appealed within 60 days from the day a business operator receives such order.

A post-merger notification is required for a business operator conducting "a Merger which may result in a significant reduction in competition in any market". This means a Merger which results in the sales turnover of a business operator, or of all the merged business operators altogether, of at least THB1 billion, but does not cause a monopoly or result in a business operator having dominant market power.

A post-merger notification must be submitted to the TCC within seven days from the day the Merger has been completed.

4. What are the common acquisition methods?

The deal structures for M&A transactions in Thailand generally take the form of a purchase of the shares or assets of a target business. Legal mergers under the CCC (referred to above) do take place but are less common.

A share transaction is more straightforward than an asset deal and, generally, can be completed more swiftly than an asset deal as the consents from third parties are likely to be minimal, for example change of control provisions in business contracts. However, for a share transaction, it is important to check the articles of association of the target company for any restrictions on the transfer of shares.

An asset transaction, generally, requires a longer completion time as it will often involve more third party consents, and require registrations or a recording to complete the transfers of certain assets. Some business operation licenses may not be transferrable and a buyer may need to re-apply for such licenses. Contracts and liabilities are not automatically transferred with the assets and the parties will have to specifically identify what will be transferred upon closing. Also, employees are not automatically transferred with the sale of a business.

Both an asset and a share transaction would typically follow a similar structure seen in many other jurisdictions, where the buyer will conduct due diligence on the target company to identify any red flag or deal-breaker issues. A sale and purchase agreement that contains, among other things, provisions for conditions precedent, warranties and indemnities, pricing and/or price calculation, closing mechanics, etc., will be prepared and negotiated. The time taken to complete an M&A transaction in Thailand depends very much on the preparedness of the parties and the complexity of the structure, and typically can range from several weeks to many months.

As Thai law only recognizes legal ownership, and not beneficial ownership, the buyer will only acquire the legal interest in the target shares or assets upon closing of the transaction.

5. What are the specific issues relevant to M&A transactions involving public companies?

In addition to the TCA, an acquisition of shares in a public company listed on the Stock Exchange of Thailand is governed by the Securities and Exchange Act and the Notification of the Capital Market Supervisory Board re: Rules, Conditions and Procedures for the Acquisition of Securities for Business Takeovers.

An acquisition of shares by any person that results in such person acquiring shares that represent or exceed the threshold of (i) 25%, (ii) 50%, or (iii) 75% of the total voting rights in a listed company requires that person to make a mandatory tender offer for all the remaining securities of the listed company.

Also, any acquisition or disposal of shares by a person (together with related persons and/or concert parties) that reaches or crosses a threshold of 5% of the voting rights in a listed company is required to be reported to the SEC.

6. How has COVID-19 impacted the M&A landscape?

COVID-19 has definitely had an impact on M&A activity in Thailand as certain industries have been severely affected by the pandemic, such as tourism, hospitality and aviation. However, as a result of lockdowns, difficulties in doing business during the pandemic and a change in consumers' behavior, there has been a growth in certain industries, such as the manufacturing of medical devices, online delivery services and e-commerce.

7. What are the expected key trends for M&A activity going forward/for the rest of 2022?

Starting in the second half of 2021 and expected to continue for the rest of 2022, there has been an increase M&A deal volumes compared with 2020, particularly in certain sectors. E-commerce, fintech, digital assets, online delivery and other tech focused M&A transactions are predicted to be the fastest growing M&A areas in Thailand, driven by the prolonged COVID-19 pandemic and the general need of businesses for digitalization/transformation.

As consumers' interest has shifted from traditional to online sales and services, a number of businesses are considering acquiring technology businesses to facilitate or enhance the supply of their own goods or services. Cross-sector M&A is also being seen as currently several non-tech companies are interested in expanding into the tech business sector. Acquisitions of start-ups or young companies with innovative technologies by major multinational companies may continue in order to boost innovative offerings to their customers.

Now that Thailand has removed lockdowns and travel restrictions, the tourism, travel and hospitality sectors have started to recover and it is expected that transaction volume in these sectors may accelerate, although sentiment may be cooled by the difficulties currently being faced by the world economy.



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