Rödl & Partner

POOLING FORCES

M&A IN ASEAN

New Structures for a New Normal

Content

Though Covid-19 will not last forever, the pandemic will have a lasting impact on businesses worldwide.

The global crisis caused by the outbreak disrupted established structures, and entrepreneurs in South-East Asia expect a rather U-shaped recovery, with a period of slower economic activity likely to considerably extend into 2021.

Executives with a futureoriented perspective will now focus on successfully navigating their business through and beyond the pandemic. This can involve the transformation or reshaping of industries where demand may return but require an alteration of operations and business models. Re-organization and re-structuring of global supply chains, promotion of digital transformation and speed of automation as well as the effective management of workforce are just some of the key issues that need to be focused on.

The involuntary and unprecedented global deceleration caused by the pandemic might as well be used as an opportunity to consolidate, to readjust the entrepreneurial focus and take targeted corporate action to shed non-core assets and concentrate on acquisitions with a long-term perspective.

In this publication we take a look at the various and quite different M&A options available throughout ASEAN's jurisdictions.

Our profile in ASEAN

Rödl & Partner has been present in Asia-Pacific since 1994 and has, like their clients, expanded significantly in the region. We are present in all relevant markets and provide legal, tax, accounting and audit services, allowing our clients to benefit not only from a comprehensive view on their business operations, but also from a deep cultural understanding of the Asia-Pacific region.

The Association of Southeast Asian Nations, ASEAN, with its' member states Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, continues to grow increasingly popular among European companies as an alternative or additional investment location besides China and India.

The declared objective to create a single market with over 600 million residents, i.e. the ASEAN Economic Community (AEC), is continuously being pursued. In addition to the free movement of goods – which has already been largely established with the introduction of preferential customs duties for most product groups – the free movement of capital and services as well as the free movement of workers are supposed to be gradually increased as well.

Located at our nine offices in Southeast Asia's seven biggest markets as well as in an ASEAN-Desk in Germany, multilingual professionals specialised in structuring foreign investments in the region team up international and local expertise to offer you comprehensive assistance with regard to all issues relating to law, taxation, business process outsourcing and auditing.

Please feel free to approach us anytime to discuss how we can best assist you in the ASEAN region.

MARKET ENVIRONMENT

Since his first office term, President Joko Widodo has been initiating various regulatory reforms and deregulation policies targeting legal complexities and bureaucratic hurdles, which showed some positive impact on the M&A market in Indonesia. One important measure with relevance for corporate proceedings has been the introduction of the online single submission system as main reference for business licensing, and gateway for government services at various ministerial, agency and regional levels. This was followed by a new Investment Coordinating Board (Badan Koordinasi Penanaman Modal or BKPM) Regulation No. 6 of 2018 as amended by BKPM Regulation No. 5 of 2019 on the implementation of capital investment licensing and facilities, and BKPM Regulation No. 1 of 2020 on integrated electronic business licensing, which i.a. eases the process for merger approval.

Further efforts to simplify business licensing mechanisms have been made with the enactment of an omnibus legislation amending a broad range of specific laws and regulations. In general, non-public M&A transactions still appear to dominate the market; reasons for this could be the complex regulatory framework and procedures for public M&A, which often lead to more time-consuming and costly transactions. In terms of deal volume, fintech currently appears to be the most active sector, particularly the peer-to-peer lending business. In terms of deal value, however, M&A on industry and energy sectors still lead most of the transactions.

MERGER & ACQUISITION IN INDONESIA

I. WHAT ARE THE COMMON DEAL STRUCTURES IN INDONESIA?

The most common type of acquisition in Indonesia is the purchase of shares in a company, either from a selling shareholder or from the company itself. A foreign entity may either acquire all shares or, depending on equity restrictions, enter into a joint venture in an Indonesian company with a local partner. Foreign investors may not create a legal partnership.

Asset acquisitions are also quite common for the transfer of business units. Other methods include mergers or amalgamations, where the target company is dissolved into the surviving company and therefore ceases to exist.

II. HOW IS A SHARE TRANSACTION STRUCTURED IN INDONESIA?

The statutory framework for the combination of businesses through a limited liability company is generally provided in Law No. 40 of 2007 on the Limited Liability Company, and several implementing regulations, such as Government Regulation No. 27 of 1998 on Mergers, Consolidation and Acquisition of Limited Liability Companies. Under this framework, the requirements pertaining to M&A in Indonesia commonly follow a certain deal protocol.

The first step is the acquisition/merger announcement published by the acquirer and the target company or the merging companies, as the case may be, in newspapers. If the acquisition is conducted through the company itself, i.e. acquisition by subscribing newly issued shares instead of purchasing the existing shareholder's shares, then the parties must prepare an acquisition plan (“rancangan pengambilalihan”) which will be part of the announcement. A valuation of the merger shares is conducted to determine their fair market value. Then an extraordinary general meeting of shareholders of the target company or each of the merging companies is held, in which a quorum of at least ¾ of the total number of shares with voting rights is present (unless otherwise stipulated in the articles of association or a specific regulation), and in which approval needs to be obtained from shareholders holding at least 75 percent of the number of votes cast.

Further the approval of creditors, or other third parties if required by law or pursuant to agreements, in respect of the proposed transaction and a waiver of their rights for claims to be settled prior to the effectiveness of the merger or acquisition is required. From administrative side, the approval of the relevant agencies having competence over the merging or acquired company or companies (such the Financial Services Authority or the Ministry of Law and Human Rights which oversees all limited liability companies, no matter the sector) and the consent of any relevant industry regulator, depending on the target company's business, needs to be obtained.

III. WHAT ARE THE MAIN TAX DRIVERS TO BE CONSIDERED?

In a share-deal from a buyer's perspective, there is no tax on an entity that acquires shares. Shares acquired from unrelated parties are booked at purchase price. Shares acquired from a related party must be booked at market price. In a share acquisition, the buyer usually takes over the target with all related liabilities and unpaid taxes. The Directorate General of Taxes (DGT) is mainly responsible for enforcing taxes on corporate transactions. Under Indonesian tax legislation, the Tax Office may conduct an audit within 5 years from the filing date of any tax return. The tax authorities may also re-open a closed tax audit in case new documentation or information is obtained. Therefore, beyond a proper tax due diligence, the buyer requires extensive indemnities and warranties to mitigate hidden risks.

In a share deal from a seller's perspective, capital gain received by a resident entity in a share deal is combined with the company's taxable profit from its main business. The combined net profit is subject to 22 percent Corporate Income Tax for 2020 and 2021, whilst the 20 percent corporate income tax applies for 2022 onwards. For the individual, capital gain is subject to a maximum of 30 percent Income Tax rate.

The sale of unlisted shares by a foreign company is subject to a final tax of 5 percent of the gross proceeds unless provided differently in a tax treaty. Consequently, the seller is liable for the tax even where the shares are sold at a loss.

In an asset deal from a buyer's perspective, for income tax purposes, acquired assets can be treated deductible through depreciation. Goodwill having a useful life exceeding one year may be treated as deductible expenses through amortization.

Regarding Land & Building taxation, a company acquiring the asset is subject to 5 percent duty on land & building acquisition.

In an asset deal from a seller's perspective, VAT of 10 percent is imposed in general. However, this does not apply to transfer of assets (i) which are non VAT-able, (ii) which do not relate to the company's business or (iii) between dissolving and surviving entities which both are respectively registered as VAT-able entrepreneurs.

Capital gain arising from a company transferring assets is subject to corporate income tax. However, such transfer may be done based on book value, provided that DGT approval is obtained (tax neutral merger, consolidation or expansion). Certain conditions need to be met.

Generally, tax losses may be carried forward for up to 5 years or, for certain business sectors, up to 10 years. Under the current tax regulations for business mergers, consolidations and expansions, however, carried forward losses of an Indonesian target cannot be offset against future losses of the acquiring company or merged entity. Such losses would expire at the time of acquisition.

Regarding Land & Building taxation, a company transferring assets is subject to 2.5 percent income tax on the value of transferred assets.

IV. ARE THERE RESTRICTIONS FOR FOREIGN DIRECT INVESTMENT?

Foreign investment in Indonesia is generally regulated under specific investment laws and regulations, which are currently revised by an omnibus law. If a foreign buyer intends to acquire shares in an Indonesian company, a certain ownership limitation or specific licensing requirements will be applicable and monitored by the Investment Coordinating Board (BKPM) for a range of industries.

Other industries under specific regulation, such as banking, finance and telecommunications, are subject to the authority of specific government agencies, e.g. the Financial Services Authority (*Otoritas Jasa Keuangan* or OJK), Bank Indonesia or the Ministry of Communication and Informatics.

V. PLEASE OUTLINE COMMON RISKS AND OPPORTUNITIES WHEN ENTERING THE INDONESIAN MARKET VIA M&A?

Sudden change of government policies and regulations may influence M&A deals, especially when impacting financing strategies or deal structuring. Indonesia also has a quite complex regulatory and government monitoring system, hence the administrative requirements should not be underestimated by the parties. Respective challenges in many sectors include, among others, considerable inconsistencies between national and provincial regulations as well as variant interpretations of regulatory requirements, which have been addressed in the omnibus law of 2020.

However, these challenges will continue to exist at least until the implementing regulations of the omnibus law are issued, and a certain administrative practice has developed. But these efforts can eventually be rewarded with the opportunity of tapping into one of the biggest markets in the region, especially if investment plans come with a broad time horizon.

VI. WHICH VALUATION METHODS ARE COMMONLY UTILIZED IN THE MARKET?

There is no mandatory rule as to share valuation in Indonesia. However, it can be said that the DCF (Discounted Cash Flow) approach is regarded as widely accepted with regard to share valuation. Generally this is based on a best assumption taken by the valuation firms, which may differ from one to another as to their parameters. These include company growth rate, interest / discounted rate, internal rate of return, industry expectation, etc.

Challenges are seen in the valuation of specific industries such as start-ups in the internet / digital technology sectors as these appear quite different from conventional knowledge such as the aforementioned DCF.

VII. HAVE ANY M&A RELATED INVESTMENT OR TAX FACILITATIONS BEEN ENACTED IN YOUR JURISDICTION IN LIGHT OF THE CURRENT PANDEMIC?

One major hurdle in attracting investors to Indonesia is the contradictory legislation, at the central government level as well as regionally, which has caused certain confusion and delays in the implementation of foreign investment projects. Taking this into account, the Indonesian government has enacted the so called omnibus law which entered into force on 2 November 2020, with various implementing legislation to be issued subsequently. This legal instrument aims at attracting investment and stimulating the economy, particularly amid a current decline caused by the global pandemic, through i.a. simplifying the licensing process and harmonizing various business related laws and regulations that are deemed to be obstructive to foreign investments. On the other hand, the omnibus law on Taxation offers specific tax incentives and tax exemption on qualified dividends. Such incentives aim at reducing tax expenses of investors and encouraging them to reinvest the extra gains in Indonesia.

Previously, some Corporate Income Tax (CIT) rate changes have also been issued in 2020, which, however, were not a direct part of the omnibus law, though standing in context with it. The reduction was introduced in an earlier Law, i.e. Law Number 2/2020 of 16 May 2020. The Law was passed in anticipation of the economic slow-down caused by the ongoing pandemic. Accordingly, for the financial year 2020 and 2021, the CIT rate amounts to 22 percent. Qualifying listed companies, which means a minimum of 40 percent of shares are traded in the Indonesia stock exchange, are entitled to a 3 percent extra reduction, i.e. a CIT rate of 19 percent. For the financial years 2022 and onwards, the CIT rate will be 20 percent. Qualifying listed companies are again entitled to a 3 percent lower rate, i.e. of 17 percent.

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MARKET ENVIRONMENT

Malaysia has shown an impressive economic growth since the 1990s; recent (pre-covid) growth rates of 4 to 5 percent show that the country has by now developed a more mature economy of a considerable size. Together with Singapore, Thailand and Indonesia it is one of the leaders in the ASEAN region. Besides the traditional production of crude oil, gas and palm oil, Malaysia has by now a well-established manufacturing sector, including electronics, pharmaceuticals and telecommunication. Competitive businesses operate in the services sector including outsourcing and — due to the country's strategic location — also logistics.

The current M&A market in Malaysia appears to be optimistic and is driven by inbound foreign investments. The weakening Ringgit continues to make valuation of Malaysian companies interesting to investors. The government plans to increase public investment in particular into infrastructure in order to support an economy facing covid-related challenges, but concerns in respect of private consumption, traditionally a big driver of the Malaysian economy, remain valid particularly in the light of fluctuating oil prices.

Nevertheless, there is continuing interest in investments into insurance and financial services, education, logistics and healthcare. The market may also benefit from available corporate restructuring legislation, and enable investors to consider structured takeovers of companies in financial difficulties.

MERGER & ACQUISITION IN MALAYSIA

I. WHAT ARE THE COMMON DEAL STRUCTURES IN MALAYSIA?

Corporate deals in Malaysia can have the structure of a share deal (acquisition of a company) or asset deal (acquisition of a business as a going concern or specific assets).

Currently there is no legal framework in Malaysia governing mergers beyond the already mentioned asset deal in the form of an acquisition of a business as a going concern. Companies in financial difficulties may also be purchased out of a scheme of arrangement by way of a takeover, which means that only the consent of 75 percent of the shareholders is required for such transaction. Additional regulations apply to deals involving public companies.

II. HOW IS A SHARE TRANSACTION STRUCTURED IN MALAYSIA?

As Malaysia is a Common Law jurisdiction, the structure of a “share deal” follows the pattern known from England, Singapore and other Common Law countries.

At the beginning of the process, there is usually some preliminary valuation followed by commercial discussions resulting in a Confidentiality and Exclusivity Agreement, followed by a non-binding Term Sheet. The following corporate due diligence usually covers legal, compliance, tax and financial matters. On the basis of the due diligence report, the purchase price is firmed-up and the Share Purchase Agreement (SPA) as well as any ancillary documents negotiated. The SPA is then executed (signing) and — upon satisfaction of any conditions precedent — the shares in the target transferred (completion) followed by the relevant registrations with the Companies Commission of Malaysia.

III. WHAT ARE THE MAIN TAX DRIVERS TO BE CONSIDERED?

There is no statutory concept of a merger in Malaysia, and a merger typically involves an acquisition of a business, i.e. its assets and liabilities. When structuring a transfer of business or transfer of assets, from a tax perspective, Income Tax, Capital Gains Tax and Stamp Duty implications should be considered.

The pros and cons of structuring a transaction as a transfer of business or transfer of assets depends on various factors including the tax risks and tax attributes of the target entity. In a transfer of shares, the acquirer may be exposed to the inherent tax liabilities and tax risks of the target. However, in a transfer of business, such tax risks should not exist. In addition, in a transfer of shares, the tax attributes, i.e. unabsorbed tax losses, unutilized tax depreciation, and tax incentives of the target entity will remain with the target entity. In a transfer of business, the tax attributes remain with the target entity and will not be transferred to the acquirer.

Malaysia does not have a comprehensive form of capital gains tax. As such, the transfer of assets and shares can generally be done with minimal tax exposure. However, Malaysia does have a limited form of capital gains tax, known as Real Property Gains Tax ("RPGT"), which is charged on gains arising from the sale of real property, i.e. land and buildings situated in Malaysia or shares in a real property company ("RPC").

Stamp duty in Malaysia is chargeable based on the instruments executed in a transaction. In a share transfer, stamp duty is payable at the rate of 0.3 percent on the higher of the consideration paid or market value of the shares. However, in a business transfer, stamp duty ranges from 1 percent — 3 percent on the market value of the dutiable property transferred under the instrument.

For the acquirer, transaction costs incurred during the transaction are generally not tax deductible, unless the expenses are incurred for the purchase of trading stock. It is important, where possible, to quantify the tax costs that could be incurred and to minimize any potential tax exposure.

IV. ARE THERE RESTRICTIONS FOR FOREIGN DIRECT INVESTMENT?

Foreign direct investment legislation is generally considered liberal in Malaysia as compared to other countries in Southeast Asia. Restrictions mainly exist in areas considered strategic such as defense, oil and gas or energy. Beyond these areas, restrictions are usually enforced by way of imposing local or Bumiputera (Malays or the indigenous people of Malaysia) equity requirements as conditions for licenses required to operate in certain industries.

Main examples here are tour operators, oil and gas, construction, retail and distribution, logistics and certain insurance providers. Local content requirements are also present in public renewable energy tenders. Finally, suppliers of government linked companies are also frequently bound by a qualification procedure which requires Bumiputera equity participation.

V. PLEASE OUTLINE COMMON RISKS AND OPPORTUNITIES WHEN ENTERING THE MALAYSIAN MARKET VIA M&A?

Due to the comparatively liberal FDI environment, Malaysia offers plenty of M&A opportunities. Logistics, healthcare and electronics manufacturing are sectors traditionally of interest for foreign investors wishing to acquire a business or company rather than setting up a greenfield investment. Currently, the ongoing covid pandemic results in valuations being adjusted upwards and downwards, offering opportunities for buyers and sellers alike.

As one can expect, there are also areas to be observed with due caution: real property acquisitions may be subject to state consents, a change of ownership of company may affect the validity of license conditions. The effect of an M&A transaction on financings granted by banks also needs to be considered carefully, as Malaysian banks tend to adopt a comparatively conservative approach to financing risks, in particular when foreign ownership is involved.

VI. WHICH VALUATION METHODS ARE COMMONLY UTILIZED IN THE MARKET?

Commonly, depending on the transaction, its size and the relevant industry, three main valuation methods are applied to companies:

Market Valuation: this method compares the target company to similar companies that have been sold recently. This method only provides an estimate and a very rough pricing of a company. This method may not be available to smaller businesses and businesses which lack comparative figures.

Net Assets Valuation: this valuation method refers to the figures contained in the historical financial statements of the target company. Commonly, the assumptions are verified through the following financial due diligence exercise.

Return Of Investment Valuation: this valuation approach is based on the assumptions done in view of potential future profits and market conditions using qualitative measurements like for example the "SWOT Analysis". Similarly, the Discounted Cash Flow method looks into future cashflows subject to relevant adjustments.

VII. HAVE ANY M&A RELATED INVESTMENT OR TAX FACILITATIONS BEEN ENACTED IN YOUR JURISDICTION IN LIGHT OF THE CURRENT PANDEMIC?

To spur economic recovery through investments, a special tax incentive has been introduced for new companies and existing companies which relocate or set up their manufacturing operations in Malaysia, as well as companies operating in selected services sectors, i.e. companies adapting IR4.0 and digitalization technology with investments that contribute a significant multiplier effect. Companies meeting the qualifying conditions will be eligible for a 0 percent — 10 percent corporate income tax rate for up to 10 years (new companies); or 10 percent corporate income tax rate for up to 10 years (existing companies with new services segment).

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MARKET ENVIRONMENT

Though Myanmar has been opening up to the world since the end of 2010, with a transitional process from military rule towards a parliamentary democracy and an open economy, latest developments unfortunately point into a different direction. With the state of emergency having been declared on 1 February 2021, it needs to be seen how Myanmar's political situation will progress in the near future.

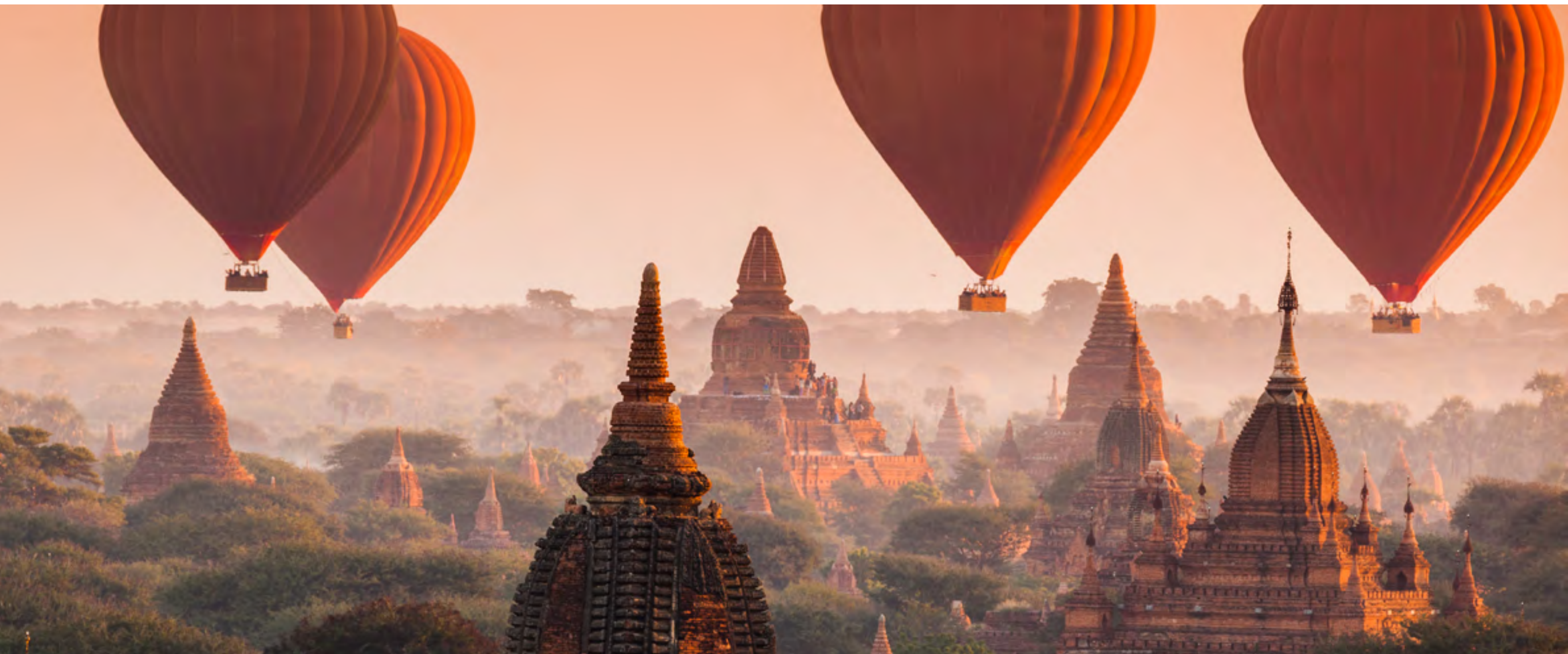
There is no question that both, the political upheavals and the effects of the pandemic will, among others, have a noticeable impact on the economic situation of the former Burma, at least in the medium term. We are, of course, still here for you in these very difficult times. If you have any questions about ongoing or planned local projects or need expert support, please feel free to contact us any time.

To date, major growth sectors include the telecommunications, garment, construction, insurance, pharmaceuticals, manufacturing, agriculture, infrastructure and electricity sectors.

Myanmar has been a member of the WTO since 1995, and recently established a new trademark registration platform in line with the WIPO standards. Between 2016 and 2020, the country exhibited a stable average growth rate of 6.3 percent. Myanmar's competitive edge lies in its labor force with a relatively low wage level, a partially developed market of 54 million prospective customers and almost barrier-free access to further parts of Asia thanks to the country's membership in the Association of Southeast Asian Nations (ASEAN). In addition, Myanmar — having the status of a developing country – is enjoying the EU tariff preferences under the Generalized System of Preferences. This guarantees duty free import to the EU of products manufactured in Myanmar.

Amongst many changes in the regulatory framework, as for example the new Corporate Law (2017) and the new Tax Administration Law (2019), online systems for registrations and tax payments have been implemented, and the overall investment conditions have been improved significantly.

While under the previous corporate law it was virtually impossible for foreign investors to invest into Myanmar companies by acquiring shares, since August 2018, the new Myanmar Companies Law allows for foreign investors to buy into local companies.



MERGER & ACQUISITION IN MYANMAR

I. WHAT ARE THE COMMON DEAL STRUCTURES IN MYANMAR?

The most common type of acquisition in Myanmar are share purchases and asset deals.

II. HOW IS A SHARE TRANSACTION STRUCTURED IN MYANMAR?

Share deals are usually based on cash consideration only.

III. WHAT ARE THE MAIN TAX DRIVERS TO BE CONSIDERED?

The main tax drivers to be considered are the Commercial Tax (in Myanmar equivalent to VAT) as well as the Corporate Income Tax, which could potentially have the biggest impact on the M&A. In this regard it is important to duly check until which financial year the tax assessments have been concluded and the demand notes (final tax clearance certificate for a financial year) have been issued, as only with the demand note, the actual tax liability may be revealed. Furthermore, the evidence of monthly and quarterly Commercial Tax and Corporate Income Tax filings for the present financial year should be analyzed to evaluate compliance and the actual filed amounts.

In addition to the above mentioned, the Personal Income Tax as well as the Social Security Contribution filings of the employees should be analyzed to determine compliance with the actual filing obligations and possible liabilities also with regard to potential penalties.

In addition to the tax risks inherent in an M&A transaction, it is important to consider the transaction costs involved. Myanmar imposes a Capital Gains Tax on the sale, exchange or transfer of capital assets at the rate of 10 percent, or 40 percent – 50 percent for companies engaged in upstream oil and gas activities. Depending on the instruments executed for the M&A transaction, there would likely be Stamp Duty implications which will differ depending on the instrument of transfer.

IV. ARE THERE RESTRICTIONS FOR FOREIGN DIRECT INVESTMENT?

The major restriction is the prohibition to acquire real estate. Long term leases also require prior governmental approval. Further restrictions include steep minimum capital investment requirements for trading licenses.

Under the new companies law, however, as long as foreign investors take up no more than 35 percent of the shares, a company will still be considered as local company.

V. PLEASE OUTLINE COMMON RISKS AND OPPORTUNITIES WHEN ENTERING THE MYANMAR MARKET VIA M&A?

Tax compliance and good corporate governance are still common risks. But there are well known companies with a strong market position and long established distribution networks which are opening up to foreign investment for the first time.

Despite the risk of tax liabilities, Myanmar has a comparably high growth rate of around 7 percent, and is attracting FDIs also with tax incentives for certain investments and through special economic zones with optimized infrastructure and supply of electricity.

The transition process and political reforms are continuing more or less stable in a rather market-oriented direction, but, amongst other challenges, internal conflicts at the borders of the country are not entirely resolved yet. The current government has been reelected in November 2020 without significant military invention being reported, which is seen as an important indicator for the direction of the development of the country.

VI. WHICH VALUATION METHODS ARE COMMONLY UTILIZED IN THE MARKET?

Valuation can be done at market value, i.e. where it is valued by a third party professional valuation service provider. Alternatively, the valuation can be based on a multiple average of EBITDA. The valuation can be negotiated and agreed by both parties.

However, for tax purposes, i.e. capital gains tax and stamp duty, where the tax authorities are not satisfied with the valuation submitted by the taxpayer, the tax authorities may require that the valuation based on market value be used for the purpose of calculating capital gains tax and stamp duty.

VII. HAVE ANY M&A RELATED INVESTMENT OR TAX FACILITATIONS BEEN ENACTED IN YOUR JURISDICTION IN LIGHT OF THE CURRENT PANDEMIC?

Not until the current date or to our knowledge.

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MARKET ENVIRONMENT

Singapore's role as investment and finance hub in the Asia-Pacific region is also reflected in its important role in M&A transactions in the region. The city state's sound and predictable legal system, its world-class banking and finance landscape, a competitive tax system and its openness to foreign investors make it an interesting place for M&A activities.

According to the Institute for Mergers, Acquisitions and Alliances, the announced M&A transactions in Singapore in 2019 had a value of over USD 43 billion. In the pandemic year 2020, this value has dropped to an amount of over USD 27 billion (October 2020), and follows the sagging regional trend for M&A transaction in Southeast Asia. 2021, depending on the development of covid-19 and the corresponding governmental response, could become an interesting year for M&A activities in the region and in Singapore. The post-pandemic environment is likely to be a buyer-friendly market, where the focus will be on comprehensive due diligence exercises and the risk mitigation within contracts.

M&A transactions post covid-19 in Singapore will come with new challenges and opportunities. Changes in the employment framework with regards to retrenchment might impose difficulties for transactions concerning target companies with excess manpower. The introduction of restrictions to ipso facto clauses, which would usually allow contractual parties to terminate or modify commercial contracts in case of certain triggering events such as restructuring, provide certainty in the area of distressed M&A transactions where the target depends on certain key suppliers.

M&A activities in Singapore are likely to be seen in a variety of industries. In particular the start-up and technology sector could become a relevant sector of transactions. Asset holding companies in different industries, focusing on assets in the ASEAN region, might make Singapore the center stage for future deals in the region.

MERGER & ACQUISITION IN SINGAPORE

I. WHAT ARE THE COMMON DEAL STRUCTURES IN SINGAPORE?

The deal structure in Singapore would be determined by the commercial background of the transaction and the parties intention. As many transactions in Singapore involve asset holding companies, where assets are located outside of Singapore (i.e. shares in a manufacturing entity in other ASEAN countries etc.), share deals are the most common deal structures.

The Companies Act of Singapore does not only allow acquisitions of shares in another company, but also governs mergers (amalgamation) of two or more companies in Singapore. Where the deal is entirely on-shore, asset deals might be considered, depending on the assets involved and the level of indebtedness of the target company.

II. HOW IS A SHARE TRANSACTION STRUCTURED IN SINGAPORE?

Essentially, based on the Companies Act, the transfer of shares requires the execution of an instrument of transfer (share transfer form) and the notification of the registrar, the Accounting and Corporate Regulatory Authority of Singapore ("ACRA"). The transfer is only effective once the Register of Members under ACRA has been updated. However, since the share transfer form only refers to the parties, the amount of shares and the consideration, and does therefore not stipulate further terms of the transaction, parties usually enter into a Share Purchase Agreement ("SPA"). The SPA would usually reflect the findings of any due diligence exercise and would contain the usual provisions, among others conditions precedent, closing proceedings, purchase price adjustment mechanism, representations and warranties, etc.

Singapore is also an established place for private equity and angel investors. Convertible Loan Agreements, another form of share transactions, are used to provide financing to new business ventures and to secure equity.

Share transactions also occur in form of contribution inkind or share swap agreements in Joint Ventures or other business collaborations.

III. WHAT ARE THE MAIN TAX DRIVERS TO BE CONSIDERED?

A transfer of shares in a Singapore company is subject to Stamp Duty. Stamp duty for shares applies to the share transfer form and is payable to the Commissioner of Stamp Duties, amounting to 0.2 percent of the total consideration or the net asset value of the shares, whichever is higher. In certain situations (transfer of assets between associated entities), a stamp duty relief might be possible. However, as such relief is a comprehensive and burdensome exercise, it may not always be practicable.

Profits from the sale of shares are generally not taxable in Singapore if they are capital in nature. However, profits might be taxed as other income in case the transaction is made as part of the normal business of the acting party.

Another relevant tax implication might lie in unutilized items which, subject to further conditions, may be carried forward and deducted from future income. However, such deduction is only possible if the company satisfied the shareholding test. That is the case when there is no substantial change in its ultimate shareholders and their shareholdings at the relevant dates.

IV. ARE THERE RESTRICTIONS FOR FOREIGN DIRECT INVESTMENT?

Foreign direct investment is in general unrestricted in Singapore. Restrictions only apply in certain areas, such as real estate or media.

V. PLEASE OUTLINE COMMON RISKS AND OPPORTUNITIES WHEN ENTERING THE SINGAPORE MARKET VIA M&A?

Considering that Singapore is open to foreign direct investment, there is no particular legal advantage of an M&A investment into Singapore over a green field investment. However, as it might also be the case in other jurisdictions, commercial reasons, such as the purchase of an existing business operation, might make a M&A investment preferential.

VI. WHICH VALUATION METHODS ARE COMMONLY UTILIZED IN THE MARKET?

In an M&A, target companies can be valued using three main approaches i.e. market approach, income approach and asset-based approach, depending on the purpose of acquiring a company.

The three main approaches can be done using Price-Earnings (P/E) Ratio compared to the ratios of the companies of same industry, Enterprise-Value-to-Sales Ratio (EV/Sales) to get a base estimate of price to purchase a company's sales, Market Value and Guideline Publicly-Traded Comparable Method (adjusted for discounts for lack of marketability and control premiums), Liquidation Value, Replacement Cost and Discounted-Cash-Flow Method (with major consideration for terminal value, growth rate and discount rate). The aforementioned methods are not exhaustive.

VII. HAVE ANY M&A RELATED INVESTMENT OR TAX FACILITATIONS BEEN ENACTED IN SINGAPORE IN LIGHT OF THE CURRENT PANDEMIC?

Singapore has introduced the Mergers and Acquisitions Allowance in 2010, where under certain circumstances an allowance may be granted to the acquiring company. The Mergers and Acquisitions Allowance has been extended in the budget 2020 until 2025.

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Thailand

MARKET ENVIRONMENT

Thailand's M&A year 2020 started reasonably solid, with some significant transactions in real estate, infrastructure and construction, energy, as well as food and beverages. Then, the developing covid-19 crisis impacted investor confidence, and we saw shallow M&A activity during the summer. Starting September and October, the pace picked up again, especially with deals in telecommunication and media, as well as – again – energy and real estate. Many deals in 2020 happened on a local level, which can be explained mainly by the travel restrictions in light of the pandemic. Overall, the analysts expect slightly below pre-covid-19 M&A activity for the end of the year and the first half of 2021.

In general, foreign investors have to deal with investment restrictions under the Thai Foreign Business Act (FBA). Simplified, the FBA requires foreign investors to obtain specific permissions for many business activities in Thailand. Thus, international M&A activity in Thailand can in some cases be complicated due to these restrictions.

Foreign investment (as 100 percent solutions or as a partner in a Joint Venture) is, however, possible in many areas. Particularly attractive at the moment are the energy and infrastructure sectors, as well as industrial manufacturing. For German investors, Thailand has traditionally been a destination for mechanical engineering as well as automotive investments. Since Thailand keeps pushing its digitalization agenda ("Thailand 4.0"), we see potential opportunities in the areas of automation and robotics.

MERGER & ACQUISITION IN THAILAND

I. WHAT ARE THE COMMON DEAL STRUCTURES IN THAILAND?

Thailand utilizes the same common deal structures as other jurisdictions, share and asset deals. Both types of deal structures are common in practice. The general rules apply: While the share deal is straight forward, the asset deal allows for the acquirer to choose certain assets and protects the acquirer from potential liabilities. Thus, if the target is experiencing financial difficulties or the acquirer is uncertain of potential liabilities, an asset deal should be considered.

II. HOW IS A SHARE TRANSACTION STRUCTURED IN THAILAND?

Transfer of shares is reasonably easy and can be done within one day. Most commonly, shares are issued as name certificates for shares. However, shares can be issued as certificate to the bearer.

Shares entered in name are transferred by written agreement and affixed signature of transferor and transferee. At least one witness is required (the Articles of a company can require multiple witnesses). The transfer is subsequently registered in the register of shareholders, which includes the name and address of the transferee. Please note that the share transfer is invalid against the company and third parties unless registered in the register of shareholders. Shares entered to the bearer are transferred by delivery of the certificate.

III. WHAT ARE THE MAIN TAX DRIVERS TO BE CONSIDERED?

For asset deals, the Thai Revenue Code provides provisions allowing to transfer an entire business to the acquirer. In this case, the transaction will be deemed at the net book value, eliminating a potential risk of a taxable gain for Corporate Income Tax purposes. In addition to that, the sale of the assets will not be subject to VAT.

Currently, Thai law allows for amalgamation, meaning companies A and B form company C and companies A and B are dissolved in the process. The amalgamation process is exempted from Corporate Income Tax. However, since companies A and B are dissolved in the process, any losses carried forward are lost, too.

A new reform will add a merger provision allowing for similar benefits as the amalgamation.

IV. ARE THERE RESTRICTIONS FOR FOREIGN DIRECT INVESTMENT?

Foreign direct investment is subject to the Foreign Business Act. The FBA restricts the ability of foreigners to engage in certain business activities. Thus, most foreigners engaging in sales or providing services will have to either obtain a Foreign Business License or be granted an investment promotion. In case of a successful application, foreigners may run the business as 100 percent foreign-owned.

While an investment promotion (if suitable) is generally the more comfortable option and infers additional benefits (such as easier access to visas and work permits for foreign employees and, in some cases, interesting tax incentives), it is only available for "new" projects. Thus, if the acquirer simply tales over an existing business, the chances for a promotion are low. Further structuring will be necessary.

V. PLEASE OUTLINE COMMON RISKS AND OPPORTUNITIES WHEN ENTERING THE THAI MARKET VIA M&A?

The implications of the FBA are the most relevant risk for foreign investment. Thus, the market entry has to be planned carefully. A majority foreign-owned investment will have to deal with the investment restrictions.

Furthermore, in practice, we see issues arising regarding cultural differences, and differences regarding the business strategy may create controversy, especially in cases of Joint Ventures. Meticulous planning is vitally important.

Thus, in many cases, setting up a new entity will be the safer option. However, if the target holds valuable permissions (for example a BOI promotion), an acquisition via a share deal should be considered. In case of asset deals, the acquirer should review if the license is transferrable (not all licenses are).

VI. WHICH VALUATION METHODS ARE COMMONLY UTILIZED IN THE MARKET?

Generally, all internationally accepted valuation methods are common in the market, including Dicsounted Cashflow analysis (DCF) and comparable company analysis with trading multiples like P/E ratio or EBIT-multiple.

VII. HAVE ANY M&A RELATED INVESTMENT OR TAX FACILITATIONS BEEN ENACTED IN THAILAND IN LIGHT OF THE CURRENT PANDEMIC?

The Thai Board of Investment (BOI) has implemented a series of measures to mitigate the impact of the covid-19 pandemic on businesses, including steps to encourage rapid investment especially in the manufacturing of medical equipment — but also other areas. Measures include easing certain restrictions and requirements, as well as extending deadlines and speeding up approval processes.

Additional or more attractive tax breaks are also offered in some sectors, for example an additional 3 years of a 50 percent Corporate Income Tax reduction fur qualified investments in the medical sector, following the regular tax break of 3-7 years under respective BOI promotions.

Besides these measures from the BOI, there have been several tax reductions implemented by the Thai Revenue Department on a temporary basis, such as reduction in Withholding Tax rates or higher tax allowances for companies not laying off staff in order to ease the impact from the current pandemic. Such measures are not specifically M&A focused.

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MARKET ENVIRONMENT

The transition from a centrally planned economy to an opened market, socialist-oriented economy thanks to the Doi Moi economic and political reform in 1986, has fueled an impressive growth with rising economic indicators in Vietnam. Since its accession to the World Trade Organization in 2006 (the WTO Commitments), markets have been extensively opened to foreign investors.

In recent years, Vietnam has emerged as a promising destination for many regional and international investors thank to its strong annual economic growth (currently of around 6 to 7 per cent), and underlying factors that contribute to such progress — namely a stable political system, a young and dynamic workforce, a low wage economy and a growing middle class. In 2020, despite significant impacts of the unprecedented and ongoing covid-19 pandemic, Vietnam is among a few countries that are likely to experience a positive GDP growth, contrary to most economies. Vietnam is also estimated to be the fourth largest economy in ASEAN this year, behind Indonesia, Thailand and the Philippines.

While concerns about the investment environment still exist, the Vietnamese mergers and acquisitions (M&A) market has seen an increasing number of financial and strategic investments, leading to a sharp rise in the total transaction value. There has been a growing trend in inbound M&A activities instead of domestic ones — pursuant to public data, inbound M&A occupied more than 75 per cent of the total deal volume in 2018. Favorable sectors for M&A are retails and consumer goods, pharmaceuticals and life sciences as well as real estates. While many investments in Vietnam continue to be strategic, and targeted for longterm growth, international private equity investors have also started to become strong players in the market.

This brochure intends to provide an overview of the major legal and tax issues for prospective investors to consider upon entering the Vietnamese market through M&As.

MERGER & ACQUISITION IN VIETNAM

I. WHAT ARE THE COMMON DEAL STRUCTURES IN YOUR JURISDICTION?

The three common options for M&A structures in Vietnam include: (i) acquisition of shares or capital contribution (in a locally-targeted joint stock company (JSC) or a limited liability company (LLC) respectively); (ii) acquisition of assets; and (iii) merger. Share or equity acquisition is the most common structure in the Vietnamese market, as certain types of assets (in particular land and fixtures) may not be sold to foreign investors, and foreign investors need to set up a new company to acquire the target company's asset.

Besides, common features of M&A transactions comprise put option and call option, drag-along right and tag-along right, classes of preference shares, corporate restructuring for holding companies and/or subsidiary group structures as well as convertible instruments.

II. HOW IS A SHARE TRANSACTION STRUCTURED IN YOUR JURISDICTION?

Investors may acquire shares or capital contribution from existing shareholders or members of the targeted JSC or LLC, purchase shares newly issued by the target JSC, or inject further capital in the LLC.

Transaction documents for share or equity acquisitions would include a conventional sale and purchase agreement or a share subscription agreement, as well as a shareholders´ agreement. Investors may need to obtain regulatory approvals prior to acquiring shares / capital. For instance, the transaction is subject to M&A approval from the provincial licensing authority if[1] (i) the purchase of share or equity leads to 51 per cent or more of foreign ownership in the target company[2], or (ii) the target company operates in a sector restricted to foreign investment (such as education, distribution, etc.). Antitrust approval should be taken into consideration where M&A transaction meets a statutory threshold for pre-merger notification.

Besides, convertible loans are also common investment structures to acquire shares due to restrictions on investment in certain sectors and lengthy regulatory approving proceedings.

[1] Under the new Law on Investment ("LOI"), effective as of 1 January 2021, M&A approval will be required in case the target company holds land use right certificate(s) referring to land located in areas deemed vital for national security (e.g. islands and in border as well as coastal communes, wards and towns).

[2] This will be changed to more than 50 per cent under the new LOI.

III. WHAT ARE THE MAIN TAX DRIVERS TO BE CONSIDERED?

The main tax implication relating to M&As in Vietnam is capital gains tax, which may either be corporate income tax (CIT) or personal income tax (PIT), applicable for the acquisition of shares or capital contribution in Vietnamese companies. Capital gains from the sale of shares or equity in an LLC or non-public JSC are generally subject to the standard CIT rate of 20 per cent, irrespective of onshore/offshore seller. For gains from the sale of shares in a public JSC, Vietnamese corporate sellers will be subject to CIT at the rate of 20 per cent on capital gains, while foreign corporate sellers will be subject to 0.1 per cent of CIT on gross sales proceeds. For individual sellers, special tax rates have to be observed.

In asset deals, the gain derived from the sale of assets is considered as income, hence, subject to the standard CIT rate of 20 per cent. The transfer of most assets is also subject to value-added tax (VAT) at the standard rate of 10 per cent. In addition, certain kinds of assets would be subject to stamp duty and/or import duty under specific circumstances.

IV. ARE THERE RESTRICTIONS FOR FOREIGN DIRECT INVESTMENT?

In general, foreign investors are permitted to own charter capital in Vietnamese enterprises without being subject to any limits. Exceptions are applicable though for companies in certain service sectors in which foreign ownership is restricted or conditional under WTO Commitments, or which is subject to sector-specific legislations, such as banking, education, distribution, etc.

Of note, for industry sectors which are not explicitly set out in the WTO Commitments or otherwise specifically legislated, Vietnamese licensing authorities in practice often exercise discretion in determining whether or not to grant necessary regulatory approvals for M&A transactions in such sectors.

V. PLEASE OUTLINE COMMON RISKS AND OPPORTUNITIES WHEN ENTERING THE VIETNAM MARKET VIA M&A?

The complicated nature of Vietnam's law and tax regimes remains the major challenge. In relation to the seller´ s and buyer's expectations, the valuation of assets represents another issue, as sellers tend to be overoptimistic about their companies, hence overcharge without thoroughly taking into consideration all potential post-completion risks of an M&A transaction. Furthermore, investors may be confronted with issues related to management and accounting standards upon entering the M&A market in Vietnam.

On the other hand, the rapidly expanding market of Vietnam offers a number of assets, such as a progressing integration into the global economy through participation in numerous free trade agreements, or affordable labor supply, which has made foreign investment in the country worthwhile. Moreover, the government carried out divestments in a number of Stateowned enterprises, providing a valuable opportunity for foreign investors looking to acquire shares in locally well-known brands, such as Petrolimex, Viglacera, Vinatex, etc.

VI. WHICH VALUATION METHODS ARE COMMONLY UTILIZED IN THE MARKET?

The most common methods to estimate a company´ s value in Vietnam are Discounted Cash Flow, earnings multiples and assessment based on value of assets and liabilities in one's balance sheet. Discounted cash flow is in practice the most reliable way to evaluate a company due to the absence of comparable data from listed or recently transacted companies in Vietnam.

VII. HAVE ANY M&A RELATED INVESTMENT OR TAX FACILITATIONS BEEN ENACTED IN YOUR JURISDICTION IN THE LIGHT OF THE CURRENT PANDEMIC?

The Vietnamese government has taken various tax relief measures to combat the impacts of the covid-19 pandemic, such as extended deadlines for VAT and PIT payments, or a possible application for a 30 per cent CIT reduction. Other than that, no specific M&A-related investment incentives or policies have been enacted to encourage M&A activities in the country.

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