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# Corporate M&A 2013 - Thailand : Trends & Developments

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Contributed by Weerawong, Chinnavat & Peangpanor Ltd

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## The Thai market

Despite the recent global economic downturn and local political fluctuations, Thailand's economy continues to be strong, with expectations for an upward trend into the future. Last year alone, the country experienced significant growth in merger and acquisition activity, both in the number of deals and volume. In order to quantify the significance of this growth, it's useful to consider results of recent UBS research. UBS statistics show the total value of merger and acquisition activity in Thailand increasing from an average of USD3.7 billion per year in 2002-2009 to an average of USD13.1 billion per year in 2010-2012, and hitting a record of USD18.7 billion last year. At the same time, major market sectors in Thailand are known to be highly concentrated. Several key factors arguably contribute to this market characteristic; one is lack of enforcement regarding competition law.

## The Trade Competition Act

In terms of core priorities, it could be said that for some time the Royal Thai Government has regarded the issue of free and fair competition as less pressing than other items on the political and economic agenda. In 1999, the Thai government passed the Trade Competition Act B.E. 2542 (the 'TCA'), with the aim to ensure the economic stability and allocative efficiency of Thai markets. Merger control is one of the issues governed by the TCA. Section 26 of the TCA prohibits mergers of businesses that may result in monopoly or unfair competition, except in the case where permission is obtained from the Trade Competition Commission (the 'TCC') based on the criteria prescribed by the TCC.

The TCA has given the TCC responsibility to prescribe sub-legislations (in a form of TCC notification) regarding the enforcement of Section 26 of the TCA, including the responsibility to issue notifications concerning the specific process by which a certain merger will be examined. The TCC may also set out a minimum threshold of market share, total sales, amount of capital, number of shares, or quantity of assets of a merger, which will be subject to prohibition under this section. Furthermore, pursuant to Section 26 of the TCA, the merger of businesses which fall under the following criteria shall be deemed regulated mergers:

- (i) the merger of a manufacturer and another manufacturer, a distributor with another distributor, a manufacturer with a distributor, or a service provider with another service provider, where the mergers will result in one business being maintained while the other is extinguished or a new business is formed;
- (ii) the purchase of all or part of the assets of another business for the purpose of controlling business administration policy, administration or management; and
- (iii) the purchase of all or part of the shares of another business for the purpose of controlling business administration policy, administration or management.

Once a transaction is determined to be within the scope of a regulated merger, the transaction will be evaluated against the criteria set by the TCC. A business operator who is involved in the merger of businesses which trigger the minimum threshold, as prescribed in the notification by the TCC, must seek to obtain an approval from the TCC.

However, at the time of writing, no notification pursuant to Section 26 has been issued by the TCC. Without criteria such as a minimum threshold to identify the regulated merger, or a procedure by which the TCC examines a merger, Section 26 is unenforceable. Therefore, it can be concluded that, currently, mergers in Thailand can be implemented without being subject to a general competition law.

### **Merger Control in Telecommunications**

The regulatory 'holiday' discussed above does not apply to the telecommunications sector. The National Telecommunications Commission (the 'NTC'), a now-defunct national regulatory agency for the telecommunications sector, promulgated sector-specific regulations regarding merger control. There are three main notifications in place. They are:

1. the NTC Notification on Measures to Prevent Monopolistic and Unfair Competition Practices in Telecommunications B.E. 2549 (2006) (the 'Competition Code');
2. the NTC Notification on Market Definition and Relevant Markets in Telecommunications B.E. 2551 (2008) (the 'Market Definition Code'); and
3. the NTC Notification on Merger and Cross-Holding Rules and Procedure B.E. 2553 (2010) (the 'Merger Code').

It should be noted that the NTC was abolished in late 2010, and the National Broadcasting and Telecommunications Commission (the 'NBTC'), the successor of the NTC, was subsequently formed and mandated with the authority to regulate broadcasting and telecommunications sectors. Following the succession, the above regulations remain fully in effect and are now under the supervision of the NBTC.

### **The Competition Code**

The Competition Code was promulgated with an aim to ensure that telecommunications licensees compete under the principle of free and fair trade. Pursuant to Section 8 of the Competition Code, a telecommunications licensee is prohibited from holding or acquiring more than 10% of the total voting rights, or to own wholly or partly the assets of other licensees in the same business, either directly or indirectly, so that it could have controlling power over other licensees' policy or business. However, the acquirer may seek permission for such actions from the NBTC. The NBTC will not permit an acquisition if it might prevent or restrict competition or a monopoly might be formed with respect to telecommunications. In the case that permission is granted, the NBTC may set certain conditions for the acquirer to follow to prevent undesirable effects to competition. This regulation specifically addresses the case where one telecommunications operator might gain 'controlling power' over another licensee which, in effect, could restrict the level of competition in the market.

### **The Merger Code**

These issues become more sophisticated regarding the Merger Code, where special rules will be applied to the following circumstances:

1. a licensee or its 'controlling shareholder' merges with the other licensee (a case where one licensee will cease to exist);
2. a licensee or its 'controlling shareholder' acquires wholly or partly the assets of other licensee; or
3. a licensee or its 'controlling shareholder' acquires (a) more than 30% of the total voting rights, either directly or indirectly, of another licensee, or (b) significant control over another licensee so that it could dictate the other licensee's policy, governance, management or operation.

The 'controlling shareholder' means a shareholder or any person which:

- (a) holds, directly or indirectly, more than 25% of the total voting rights of the licensee; or
- (b) is able to appoint or discharge a director; or
- (c) is able to dictate the licensee's policy or management; or
- (d) is de facto responsible for the management of the licensee.

### **Merger petitions**

In the event that a business combination falls under any of the aforementioned circumstances, the acquirer must file a merger petition to the NBTC at least 60 days prior to the execution of the combination agreement. Pursuant to Section 8 of the Merger Code, the NBTC will only grant permission to execute a merger which does not cause 'market dominance'. To determine whether there is market dominance, the NBTC uses the Herfindahl–Hirschman Index ('HHI') to identify the level of concentration in a 'relevant market'. The following cases are deemed to indicate that the merger causes market dominance and hence shall not be allowed:

1. the pre-merger HHI is lower than or equal to 1,800 and the post-merger HHI is higher than 1,800, where the difference of HHI between pre- and post-merger is more than 50; or
2. the pre-merger HHI is higher than 1,800 and the post-merger HHI has been increased by more than 100.

### **Post-merger issues**

The Merger Code further requires the NBTC to periodically examine the effect on competition for two years after permission to merge has been granted. To prevent double filing, a licensee who filed the petition pursuant to the Merger Code shall not be required to obtain permission under Section 8 of the Competition Code. Also, the short form petition is also available for a merger in which the amount of the deal falls below a certain threshold.

A 'relevant market' is defined using methodology specified by the Market Definition Code. The NBTC will take into consideration the supply substitutability, demand substitutability, barrier to entry, and the structure of the market. Economic tools such as the Hypothetical Monopolist Test (SSNIP Test), Own-Price and Cross-Price Elasticity of Demand are utilised to assist the NBTC to define a relevant market, so that the NBTC could determine whether a merger would prevent or restrict competition in a certain market. Additionally, the Market Definition Code sets out a list of pre-defined markets in order to, inter alia, streamline the process of the NBTC in reviewing a merger petition. The pre-defined markets are domestic fixed-line retail service, domestic mobile retail service, international telephony retail service, low-speed internet retail service, high-speed internet retail service, domestic fixed-line wholesale service, domestic

mobile wholesale service, international telephony gateway service, and international internet gateway service.

### **The scope of merger control**

The scope of application of the Merger Code is broader than the Competition Code in terms of merger control. Where the Competition Code focuses mainly on the relationship between licensees, the Merger Code examines multiple layers of control over the licensee as well as the characteristics of a market. The Merger Control and the Market Definition Code employ economic tools to determine the effect of a merger in the telecommunications sector. It is also worth noting that the Competition Code and the Merger Code do not exempt the licensee from the application of the TCA. The TCA, once the criteria under Section 26 are set, will concurrently apply to merger activities in the telecommunications sector.

### **Summary**

In summary, with the existing competition legal framework, merger and acquisition activity in Thailand is projected to remain robust. However, the lack of enforcement pursuant to the general competition law does not necessarily mean that merger and acquisition activities are unregulated. The problem of trade law vacuum is currently being addressed by sector-specific regulators. The telecommunications regulator, for example, is gradually adopting the fair trade principle into its legislative regime so that regulatory gaps are minimising rapidly. Therefore, investors can expect more sector-specific competition laws in the future.