

Chapter 40

THAILAND

Pakdee Paknara and Kallaya Laohaganniyom¹

I INTRODUCTION

The Trade Competition Act 1999 (TCA) is the legislation governing pre-merger filings in Thailand. The TCA established the Thai Trade Competition Commission (Commission) and its secretariat within the Department of Internal Trade, Ministry of Commerce. The TCA prohibits mergers of businesses that may result in a monopoly or unfair business competition, unless permission is obtained from the Commission.

The Commission has the authority to issue notifications prescribing the criteria and process under which a merger will be examined, and to set a minimum threshold of market share, sales volume, amount of capital, number of shares or amount of assets that will be subject to a pre-merger filing. However, as the details of the enabling notifications still remain under consideration, the merger control regime has not yet been implemented in Thailand.

Once the enabling notifications have been set by the Commission and published in the Government Gazette, a pre-merger filing and approval will be required for any merger or acquisition that may result in a monopoly or unfair competition in the market.

It is unclear when the enabling notifications will be issued; however, the 10 Member States of the Association of Southeast Asian Nations (ASEAN), including Thailand, have agreed to introduce national competition policies and laws by 2015. The establishment of competition law regimes is one of the goals noted in the ASEAN Economic Blueprint, with the intention of fostering a culture of fair business competition in the region.

¹ Pakdee Paknara is a partner and Kallaya Laohaganniyom is a senior associate at Weerawong, Chinnavat & Peangpanor Ltd.

II YEAR IN REVIEW

As noted above, in practice, merger controls have not yet been implemented in Thailand; as such, we cannot comment on any recent merger cases or legislative changes. The jurisdictional thresholds are currently being drafted by the Commission.

III THE MERGER CONTROL REGIME

i Commission

Before the enactment of the TCA, competition law was proscribed by the Price Fixing and Anti-monopoly Act of 1979 (1979 Act). The purpose of the 1979 Act was to prevent product supply shortages and to protect consumers from abusive pricing of products, but it did not address competition or market power issues. In 1999, the 1979 Act was repealed and replaced by two separate and distinct acts: the TCA, and the Act Concerning the Price of Goods and Services. One of the mandates of the Commission is to examine proposed mergers to prevent harmful effects on competition; however, the implementation regulations remain under consideration.

Specialised committees of the Commission

The Commission must appoint one or more specialised subcommittees of persons qualified and having experience in specialised fields, including a representative of the Department of Internal Trade, to provide opinions on:

- a* matters concerning conduct indicative of market domination; i.e., a merger of businesses or other reduction or restriction of competition stipulated in the TCA:
- Section 25 – abuse of market power in a dominant position;
 - Section 26 – mergers and acquisitions that may amount to a monopoly;
 - Section 27 – agreements and collusive practices that adversely affect competition;
 - Section 28 – exclusive distribution of imported products that impairs the opportunity of consumers to purchase such goods or services directly from business operators outside the kingdom; and
 - Section 29 – acts that are not free and fair competition, and that would have the effect of excluding or restricting other business operators from conducting business or causing cessation of business;
- b* the consideration of applications for permission to merge businesses or initiate the reduction or restriction of competition; and
- c* other matters to be considered at the request of the Commission and other acts to be performed as entrusted by the Commission.

ii Merger control provisions

The merger control provisions will apply to private sector business operators. The TCA exempts state enterprises, agricultural and other cooperatives, central and regional government agencies, and businesses covered by ministerial regulations.

A business operator is defined as a distributor; a producer of goods for distribution; an orderer or importer into Thailand of goods for distribution; a purchaser of goods for production or redistribution; or a service provider in the ordinary course of business.

Once the merger control regulations are implemented, a pre-merger filing and approval will be required for any merger or acquisition that may result in a monopoly or unfair competition in the market. The TCA does not specify the types of mergers that will be included in the merger controls, but they are likely to apply to horizontal mergers and vertical mergers. Certain transactions are specifically targeted in the TCA:

- a* the 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, where such merger will result in one business being maintained while the other is extinguished or a new business is formed;
- b* the purchase of all or part of the assets of another business for the purpose of controlling that business's administration policy, administration or management; and
- c* the purchase of all or part of the shares of another business for the purpose of controlling that business's administration policy, administration or management.

On 6 June 2013, the Commission approved the following pre-merger notification criteria:

- a* the merger of businesses that have an aggregate market share in any market for any goods or services prior to or after the merger of 30 per cent or more, and a total sales (turnover) or income in the preceding year of 2 billion baht or more; and
- b* the acquisition of shares with voting rights for at least 25 per cent of the total shares of a public company, or 50 per cent of a limited company, where the acquisition results 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.

Unfortunately, the above criteria have not yet been enacted by the Commission.

iii Control test

Section 26 of the TCA applies to mergers that result in a monopoly or unfair competition as prescribed by a notification issued by the Commission; however, a control test has not been established, and it is unclear whether the concept of 'decisive influence', 'material influence' or another level of control over the target will be adopted.

iv Joint ventures

Joint ventures are not prescribed in the TCA. However, if the nature of the joint venture, once implemented, involves business operations that fall within the scope of characteristics that may result in a monopoly or unfair competition as prescribed in Section 26, the merger control provisions may apply.

v **Application process**

To obtain permission to carry out a transaction that falls within the scope of the merger control regime, a business operator will be required to submit an application in accordance with the Commission's form, rules, procedures and conditions to be prescribed and published in the Government Gazette.

Although the details of the process have not been determined, the TCA stipulates that an application for approval must specify adequate reasons and the necessity of the proposed merger; the method of achieving the proposed merger; and the duration of the proposed merger.

The substantive test for clearance is that the merger:

- a* is reasonably necessary to the business;
- b* is beneficial to promote business;
- c* has no serious harm on the economy; and
- d* has no material effect on the due interest of consumers in general.

The Commission must complete its consideration of an application for a merger within 90 days. When a decision cannot reasonably be made within 90 days, the Commission may extend such time frame for up to 15 days.

If the Commission is of the opinion that a merger meets the criteria, conditions and the substantive test, it may issue an order granting permission for the merger. In any case, the Commission must specify reasons for an order granting or rejecting permission, both on questions of fact and questions of law. The Commission may fix the time or any condition for compliance by the business operator, and if the economic situation, facts or conduct relied on by the Commission in its consideration have changed, the Commission may amend, make addition to, or revoke such time or conditions at any time.

The TCA provides for three types of general enforcement measures: administrative orders, criminal lawsuits and actions for damages.

In the criminal context, the Office of the Commission monitors anti-competitive activity and receives complaints alleging violations of the TCA. After receiving a complaint from the Secretariat, the Commission will either conduct an investigation or refer the investigation to an *ad hoc* subcommittee. If it is found that a business operator is in violation of the TCA, the Commission may issue an order or send an opinion advocating criminal prosecution to the Attorney General, who may assign a public prosecutor to proceed with a criminal action.

vi **Penalties**

Penalties for violations of substantive provisions

If a business operator is required to obtain permission from the Commission before conducting a merger, but fails to do so, the business operator will be subject to imprisonment not exceeding three years or a fine not exceeding 6 million baht, or both. If the offence is repeated, the penalty will be doubled.

Penalties for violations of procedural provisions

The Commission may also order a business operator to suspend, cease, rectify or vary a merger considered to be in violation of the TCA. Any person who fails to comply with an order will be liable to imprisonment for a term of one to three years, a fine of 2 million to 6 million baht, or both, as well as a daily fine not exceeding 50,000 baht throughout the period of the violation.

vii Civil actions by consumers

The TCA will entitle any person who sustains damages arising from a violation of Section 26 to bring suit for compensation in a civil court of proper jurisdiction. The Consumer Protection Commission or an association established under the law on consumer protection may also bring a lawsuit for damages against the offending business operator on behalf of consumers or members of the association. In an action by consumers, the injured party may recover only actual damages, plus attorneys' fees and costs. The burden of proof is on the injured party to prove the business operator's actions caused damages to the business of the injured party.

IV OUTLOOK AND CONCLUSIONS

During 2013–2014, pre-merger filing controls have not been at the forefront of the government agenda. Other political issues are pending, and a new government will soon be elected; therefore, there has been no movement in this particular area. Given the lack of subsidiary legislation to implement merger controls, the TCA remains a paper tiger.

However, as previously mentioned, the 10 ASEAN Member States have agreed to introduce nationwide competition policies and laws by 2015 in fulfilment of the goals of the ASEAN Economic Blueprint. To date, several Member States – namely, Indonesia, Philippines, Singapore, Thailand and Vietnam – have enacted national competition legislation that includes prohibitions against anti-competitive mergers.

PAKDEE PAKNARA

Weerawong, Chinnavat & Peangpanor Ltd

Pakdee Paknara is a partner at Weerawong C&P. He has extensive experience in mergers and acquisitions, power and energy projects, real estate and construction, property funds, international trade, telecommunications, computer technology and software licensing, government bidding and tax-related transactions. He advises local and foreign clients on a wide variety of matters, and specialises in the preparation of documentation for complex commercial transactions, including the reviewing, drafting and negotiation of agreements such as supply, purchase and sale, service, management agency and employment agreements. Previously, he was a partner of White & Case (Thailand) Limited, before which he worked at a respected law firm in Bangkok as head of the commercial and international trade and tax practices. He obtained an LLB degree from Chulalongkorn University, and holds a master of science (taxation) degree from Golden Gate University, United States.

KALLAYA LAOHAGANNIYOM

Weerawong, Chinnavat & Peangpanor Ltd

Kallaya Laohaganniyom is a senior associate at Weerawong C&P. She has extensive experience in mergers and acquisitions, corporate, commercial and employment law. Previously, she was a senior associate at White & Case (Thailand) Limited, before which she was an associate in two respected law firms in Bangkok. She also worked as in-house counsel at one of Thailand's largest conglomerates. She specialises in the establishment and development of infrastructure projects, labour law, trade competition, the Consumer Protection Act, e-commerce licensing, the Foreign Business Act, and credit card and retail business transactions. She obtained LLB and LLM degrees (business) from Chulalongkorn University, and has an LLM degree (commercial law) from Chuo University, Japan. She is fluent in English and Japanese.

WEERAWONG, CHINNAVAT & PEANGPANOR LTD

22nd Floor, Mercury Tower
540 Ploenchit Road
Lumpini, Pathumwan
Bangkok 10330
Thailand
Tel: +66 2264 8000
Fax: +66 2657 2222
pakdee.p@weerawongcp.com
kallaya.l@weerawongcp.com
www.weerawongcp.com