

Merger Control

The international regulation of mergers and joint ventures
in 72 jurisdictions worldwide

Consulting editor
John Davies



2017

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Merger Control 2017

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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 1996
Twenty-first edition
ISSN 1365-7976

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Thailand

Pakdee Paknara and Pattraporn Poovasathien
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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

Merger control in Thailand is governed by the Trade Competition Act BE 2542 (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.

The TCA empowers the TCC to enforce the merger control provisions. In addition, the TCC is responsible for prescribing notifications (subordinate legislation) to enforce the provisions of the TCA, including issuing notifications concerning the specific process by which certain mergers will be examined. In this regard, the TCC is empowered to set a minimum threshold of market share, total sales, amount of capital, the 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. As no notification pursuant to section 26 has been issued, the restrictions on mergers are not enforceable. Therefore, currently a merger in Thailand can be completed without being subject to permission under section 26.

2 What kinds of mergers are caught?

Section 26 of the TCA applies to any merger by a 'business operator' that 'may result in monopoly or unfair competition'. Section 3 of the TCA defines a business operator as a 'distributor, producer for distribution, orderer or importer into Thailand for distribution, purchaser for the production or resale of goods, or service provider in the course of business'. There are, however, four types of entity as specified in section 4 of the TCA that are exempt from enforcement under the TCA, which are:

- central, provincial or local government agencies;
- state enterprises;
- farmers' groups or cooperative societies recognised by the law and operating businesses for the benefit of the occupation of farmers; and
- businesses exempted by ministerial regulations.

Pursuant to section 26 of the TCA, the merger of businesses include the following:

- 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 being formed;
- the purchase of all or part of the assets of another business for the purpose of controlling business administration policy, administration or management; and
- the purchase of all or part of the shares of another business for the purpose of controlling business administration policy, administration or management.

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

As the notification prescribing the minimum thresholds has not been issued, there is no approval required from the TCC.

3 What types of joint ventures are caught?

Joint ventures are not prescribed in the TCA. However, whether joint ventures will be caught depends upon whether the nature of the joint ventures involves business operators that fall within the merger of businesses' characteristics that may result in monopoly or unfair competition as mentioned in question 2.

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Control is not defined by the TCA, and the TCC has not issued a notification defining control.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Jurisdictional thresholds are to be set by notification, but no notifications have yet been issued.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Filing will be mandatory if the merger may result in a monopoly or unfair competition as prescribed in the notification issued by the TCC. An applicant who will perform a merger under section 26 of the TCA will be required to submit an application to the TCC in accordance with the form, rules, procedures, and conditions prescribed by the TCC pursuant to section 35 of the TCA. In addition, section 35 of the TCA requires the contents of an application for approval of a proposed merger of businesses, must specify, at least, the following:

- the reasons and necessity for the proposed merger;
- the method of achieving the proposed merger; and
- the duration of the proposed merger.

The TCC has not issued any notifications on the filing application or the minimum thresholds for mergers. Therefore, pre-merger filing is not required, and there is no notification prescribing any exceptions.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Section 26 of the TCA makes no distinction between a domestic and foreign business operator. Accordingly, it is currently unsettled whether foreign mergers will be subject to the TCA. However, we note that the new draft of the TCA will state that foreign mergers will be caught if such merger will result in a monopoly or unfair competition in Thailand.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

The TCA does not address foreign investment or special sectors. The Foreign Business Act BE 2542 (1999) (FBA) is the principal legislation that regulates foreign investment in Thailand. The FBA regulates three categories of activities, as stated in lists 1 to 3. A foreign national (as defined in the FBA, including, but not limited to, a company that is not registered in Thailand or a company registered in Thailand but for which half or more of its total issued shares are held by, or half or more of its total capital is owned by, foreign nationals) is not allowed to operate a business set out in list 1, such as a newspaper business, farming, forestry and dealing in

land. A business in list 2 can be operated only with the permission of the Minister of Commerce, with the approval of the Cabinet. The businesses in list 2 include, among others, those involving national safety or security, businesses relating to the arts and traditional culture, and folk handicrafts, or businesses having an impact on natural resources or the environment. Foreigners may operate businesses set out in list 3 with the permission of the director general of the Department of Commercial Registration, and with the approval of the Foreign Business Committee of the Ministry of Commerce. The businesses set out in list 3 include those in which Thais are not considered ready to compete with foreign nationals, including, for example, construction, accounting, engineering, retail and wholesale, and the provision of services. There are some sectors and industries that have specific laws limiting foreign ownership and commerce. These sectors include, among others, banking, insurance and telecommunications.

These restrictions are not universally applied to all foreign persons. Treaties between Thailand and certain countries may provide exceptions for certain foreign nationals. For example, certain exceptions apply to persons from the United States under the Thai-US Treaty of Amity and Economic Relations. Exceptions to the FBA may also be granted by the Board of Investment or by the Industrial Estate Authority of Thailand to promote investment in certain areas with special privileges.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Deadlines and sanctions for non-compliance are subject to the provisions set out in section 35 of the TCA. As no notifications regarding the submission of an application have been issued under section 35 of the TCA, there is no filing in practice.

10 Who is responsible for filing and are filing fees required?

Currently there are no notifications specifying who must file or the filing fees. Filing responsibilities and filing fees are subject to notifications to be issued in accordance with sections 26 and 35 of the TCA.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Pursuant to section 36 of the TCA, the TCC must complete consideration of an application for a merger within 90 days. When a decision cannot reasonably be made within 90 days, the TCC may extend for up to 15 days. No merger of businesses can be completed before it has been approved by the TCC.

When granting permission, the TCC may set a time period or other conditions for the business operator to comply with. If there is any change in the economic situation or the facts or the actions on which the TCC has based its decision, the TCC may amend, add conditions to or cancel the time period or conditions at any time.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

As the relevant notifications have not been issued, section 26 of the TCA is still not enforceable, no cases have arisen and there are no existing precedents.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The relevant notifications have not been issued. Therefore, section 26 of the TCA is still not enforceable, no cases have arisen and there are no existing precedents.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

This is not applicable as the relevant notifications have not been issued.

15 Are there any special merger control rules applicable to public takeover bids?

There are no special rules in the TCA. Takeovers in Thailand are subject to the Securities and Exchange Act BE 2535 (1992), as amended (the SEC Act) and the relevant takeover notifications. Parties involved in public takeover bids should refer to the SEC Act and the relevant notifications.

16 What is the level of detail required in the preparation of a filing?

The notifications regarding pre-merger filings have not been issued. Therefore, there is no provision prescribing what is required for a filing. See also question 6.

17 What is the statutory timetable for clearance? Can it be speeded up?

As mentioned in question 11, the TCC must complete consideration of an application for a merger within 90 days. However, if a decision cannot reasonably be completed within such period, the TCC may extend it by up to 15 days. There is no provision in the TCA for speeding up the application process.

18 What are the typical steps and different phases of the investigation?

No notifications or guidelines for the merger approval process have been issued. According to the present steps as specified in the TCA, the general investigation consists of an application by the business operator for permission to merge, followed by a decision by the TCC within 90 days, with an extension of up to 15 days. The TCC's decision may be submitted to the Appellate Committee for appeal within 30 days following the TCC's decision. The Appellate Committee must consider and decide appeals within 90 days following receipt of the appeal. The decision of the Appellate Committee is final under the TCA. See question 32 for more detail.

Substantive assessment

19 What is the substantive test for clearance?

The substantive test for clearance is that the merger:

- is reasonably necessary in the business;
- is beneficial to business promotion;
- poses no serious harm to the economy; and
- has no material effect on the due interest of consumers in general.

20 Is there a special substantive test for joint ventures?

No. As long as the joint ventures are business operators that fall within the merger of business characteristics that may result in monopoly or unfair competition, the same test as mentioned in question 19 will be applied.

21 What are the 'theories of harm' that the authorities will investigate?

The TCA primarily sets out broad provisions for any merger that results in a monopoly or unfair competition as prescribed in a notification by the TCC. At present, the notification has not been promulgated, and there is no specific provision on this matter.

22 To what extent are non-competition issues relevant in the review process?

See the substantive test for clearance in question 19.

23 To what extent does the authority take into account economic efficiencies in the review process?

Economic efficiency is given a prominent role under the TCA as a criterion for approval of a merger of businesses, if a merger of businesses meets the criterion of the substantive test for clearance as mentioned in question 19.

Remedies and ancillary restraints

24 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If a business operator fails to comply with the TCA, including relevant notifications, the TCC has the power to suspend, cease, rectify or vary the merger. Additionally, in approving a merger of businesses, the TCC may set a time period or any condition for compliance upon approval. Even after approving a merger, the TCC may amend, add conditions to, or revoke the time period or conditions at any time when, in its opinion, economic conditions, or the facts or actions on which the TCC based its decision have changed.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible as, in granting permission, the TCC has broad powers to specify the time or any condition for compliance.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

There is no specific condition or timing prescribed under the TCA. The notification has not been issued, and there is no guideline issued in relation to conditions and timing. As mentioned in question 25, the TCC has the power to fix the time or any condition for compliance, and may specify any relevant condition or timing.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There are still no provisions or precedents on this matter.

28 In what circumstances will the clearance decision cover related arrangements?

There is no specific provision, notification or guideline on this matter. However, the TCC has authority to, among other things, issue regulations or notifications relating to a merger that may result in monopoly or unfair competition as mentioned in section 26 of the TCA.

Involvement of other parties or authorities**29 Are customers and competitors involved in the review process and what rights do complainants have?**

Pursuant to the authority of the TCC under the TCA, the TCC is empowered to invite any person to give facts, explanation, advice or opinions. Therefore, customers and competitors may be invited to provide information as required.

In addition, any person suffering an injury due to a violation of the TCA can initiate an action for compensation from the offender. Therefore, any persons (including customers and competitors) who suffer due to such a violation are then entitled to file complaints. Furthermore, the TCA specifically allows a consumer protection commission or organisation to initiate actions for compensation. The actions must be submitted to the court within one year from the date that the injured party knows or should have had knowledge of the violation.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The TCA does not require any public disclosure of the process. However, as the TCC is entitled to set the rules, procedures and conditions in applying for approval, this will not be known until the relevant notifications are promulgated.

Commercial information is protected from disclosure by section 53 of the TCA. Any person who discloses restricted or confidential information concerning the business or operation of a business operator can be

subject to imprisonment of not exceeding one year, or a fine not exceeding 100,000 baht, or both, if the information was acquired or known as a result of compliance with the TCA. Persons are exempt from the disclosure provision if the information is disclosed in the course of performance of a government service or for the purpose of an inquiry or trial. In addition, if the disclosed information is regarded as a trade secret under the Trade Secret Act BE 2544 (2001), the violator is subject to a penalty under the Act, and the violator is required to pay compensation for misconduct at actual damages under the tort provision that the injured person incurred.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

Thailand has signed economic partnership agreements with certain countries and such agreements establish collaboration on antitrust issues. Thailand is also a member of the International Competition Network (ICN) for mergers and other competition issues. However, the ICN does not facilitate cooperation in enforcement, only in establishing best practices for enforcement of competition rules.

Except for the agreements as referred to above, there is no specific agreement on this issue.

Judicial review**32 What are the opportunities for appeal or judicial review?**

Under the TCA, business operators are permitted to appeal two types of actions by the TCC: orders to suspend, cease, rectify or vary a merger that has not obtained approval from the TCC under section 26 of the TCA; and orders to grant (with conditions) or deny approval of a merger pursuant to section 37 of the TCA. A business operator who disagrees with the order may submit an appeal to the Appellate Committee for reconsideration. The determination of the Appellate Committee is final under the TCA.

Where the business operator is still unsatisfied with the Appellate Committee's decision, he can challenge such decision before the Administrative Court according to the procedure specified in the Act on Establishment of Administrative Courts and Administrative Procedure (1999), as amended.

No notifications under section 26 have been issued, therefore, the merger can be completed without permission as set out under section 26, no cases have arisen and there are no existing precedents.

33 What is the usual time frame for appeal or judicial review?

Appeal to the Appellate Committee must be made within 30 days following the receipt of the TCC's decision, and the Appellate Committee's decision must be made within 90 days following the filing of the appeal. Also, the business operator must file an appeal to the Administrative Court of the First Instance within 90 days following receipt of the Appellate Committee's decision.



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Enforcement practice and future developments

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

No enforcement actions have been taken, as the notification is still not issued, and pre-merger filing is not required.

35 Are there current proposals to change the legislation?

In February and March 2016, the Cabinet passed resolutions approving, in principle, a new draft of the Trade and Competition Act (the New Act). Although the general principles regarding abuse of dominant position, mergers, collusive conduct and unfair trade practices remain the same, the New Act aims to overhaul the TCA by transforming the TCC into an independent agency. Of particular relevance to mergers is the fact that the New Act plans to criminalise overseas mergers that result in monopolies or unfair competition in Thailand. Further, the New Act also plans to increase the penalty to a fine of an amount not exceeding 20 per cent of the offender's income during the year of the offence, but will remove the imprisonment penalty for mergers.

The New Act is currently being reviewed by the Council of State after which it will be sent to the National Legislative Assembly for further consideration and enactment. Despite this, there is no clear timeline on when the New Act will come into effect.

Getting the Deal Through

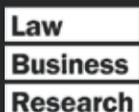
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Merger Control
ISSN 1365-7976



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