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Merger control in Thailand - what you need to know

The Trade Competition Act BE 2560 (2017) (TCA), effective 4 October 2017, repeals the Trade Competition Act BE 2542 (1999). The TCA aims to improve enforcement of Thai competition law by introducing a number of new measures, including transforming the TCC into an agency independent from any government department.

Merger control in Thailand is governed by s51 of the TCA which divides regulated mergers into two categories: those which require approval (pre-merger filing) from the Trade and Competition Commission (TCC) and those which only require notification to the TCC (post-merger notification). Essentially, submission of a pre-merger filing will be required if the merger may result in the creation of either a monopoly, or a business operator with a dominant position. On the other hand, the merging entity must notify the TCC within seven days after the completion of the merger if the merger may substantially lessen competition.

For business sectors where merger control is regulated by specific legislation for that industry (ie, telecommunications and energy), the merger control provisions under the TCA shall not apply.

Definitions

Section 5 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'. Section 4 specifies four types of entity that are exempt from enforcement:

- central, provincial or local government agencies;
- state enterprises, public organisations, and other governmental organisations only for the duties specified by law or Cabinet resolutions, for the enhancement of national security, public benefit or the provision of utilities;
- farmers' groups or co-operative societies recognised by the law and operating businesses for the benefit of the occupation of farmers; and
- businesses where merger control is already regulated by specific legislation for that industry.

Pursuant to s51 of the TCA, the merger of businesses includes:

- 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.

Thresholds

Under the TCA, the threshold for pre-merger filing refers to a business operator having dominant market power as prescribed in the notification issued under the Trade Competition Act BE 2542 (1999): any single business operator having a market share in the previous year of 50% or more and which has a sales turnover of at least THB 1,000 million, or any top three business operators together that have a market share in the previous year of 75% or more and have a sales turnover of at least THB 1,000 million (excluding any business operator having a market share in the previous year of lower than 10% or a sales turnover of lower than THB 1,000 million). Any amendments to this threshold will be launched together with the regulations on applications and procedures for filing.

Thresholds for post-merger notification are to be set by notification. The TCC will define these thresholds within 365 days from the effective date of the TCA (October 2018).

Notification and clearance timetable

For a pre-merger filing, the TCC will then have 90 calendar days (plus a possible extension of 15 calendar days) from the date of submission to issue its decision.

A post-merger notification is required to be submitted within seven days after the transaction has been completed.

As no notifications regarding the submission of an application have been issued under ss51 and 81 of the TCA, there is no filing currently in practice.

Substantive assessment

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.

Involvement of other parties or authorities

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.

Any person suffering an injury due to a violation of the TCA can initiate an action for compensation from the offender. In addition, the TCA allows a consumer protection commission, organisation or foundation to initiate actions for compensation on behalf of consumers or members of such organisation or foundation within one year from the date that the injured party knows or should have had knowledge of the violation.

Sanctions

Section 60 of the TCA empowers the agency to order a business operator to suspend, cease, rectify, or vary the merger provided that there is evidence present which establishes a reasonable belief that a business operator violates or shall violate the merger control provision. Currently, no cases have arisen and there are no existing precedents.

In addition, for the failure of notification of merger filing, s80 provides for an administrative fine of up to THB 200,000 and a fine throughout the period of violation up to THB 10,000 per day. In the case of failure of obtaining an approval for merger filing, s81 provides for an administrative fine up to 0.5% of the value of the merger transaction.

Judicial review

Under the TCA, business operators are permitted to appeal (1) orders to suspend, cease, rectify or vary a merger that has not obtained approval from the TCC under s60 and (2) orders to grant (with conditions) or deny approval of a merger pursuant to s52 of the TCA.

A business operator may bring the case to the Administrative Court in accordance with the Act on Establishment of Administrative Courts and Administrative Procedure BE 2542 (1999), as amended within 90 days of receipt of the TCC decision.