

Thailand

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

Merger control in Thailand is generally governed by the Trade Competition Act BE 2560 (2017) (TCA) and relevant regulations.

The Trade Competition Commission (TCC) is in charge of issuing regulations on merger control, reviewing and making decisions on pre-merger filing and post-merger notification, as well as imposing fines and sanctions, such as suspension, cessation or variation of mergers.

The Office of the Trade Competition Commission (OTCC) is in charge of administrative functions of the TCC, monitoring business operators for violations of the TCA, receiving complaints in respect of alleged violations of the TCA and making recommendations to the TCC.

In the case of a dispute of an alleged offence under the TCA, civil claims for damages or appeals of administrative orders issued in connection therewith, the Intellectual Property and International Trade Court and the Administrative Court shall have jurisdiction to decide on those matters.

The application of the TCA also covers state-owned enterprises and public organisations, but exemptions have been provided for duties specified by law or cabinet resolutions for the enhancement of national security, public benefit or the provision of utilities. However, the TCA does not apply to certain industries where merger control is already regulated by specific legislation for that industry (currently, the telecommunications, broadcasting and television, insurance, financial and energy sectors).

Scope of legislation

2 | What kinds of mergers are caught?

Mergers that are under the jurisdiction of the TCA include:

- amalgamations;
- acquisitions of shares:
 - the acquisition of shares, warrants or other convertibles of 25 per cent, or more of the total voting rights of a listed public company at the end of any date; or
 - the acquisition of more than 50 per cent of the total voting rights of a private company and a non-listed public company at the end of any date. In counting the shares to be acquired by any undertaking: (1) if the acquirer is a natural person, it shall include the acquisition of shares in such business operator by his or her spouse, and (2) if the acquirer is a juristic person, it shall include the acquisition of shares in that business operator by a natural person or a juristic person holding shares in it of more than 30 per cent of the voting rights of that juristic person and by a business operator belonging to the single economic entity; and

- acquisitions of assets: the acquisition of more than 50 per cent of the total value of assets of another business operator relating or connected to the ordinary business operations of that other business operator in the preceding financial year. The scope of assets shall include both tangible assets and intangible assets (eg, leasehold rights or intellectual property rights).

Exemptions

Mergers between business operators in the same business group that are recognised as a single economic entity are exempt from merger control (ie, pre-merger filing and post-merger notification).

A 'single economic entity' refers to the case where business operators have a relationship in policy or directive power, where:

- 'relationship in policy' means a relationship between two or more business operators whose guidelines, policies or procedures on management, administration or business operations are under the 'directive power' of the same business operator; and
- 'directive power' means the power to control by any of the following means:
 - holding shares with voting rights in a business operator of more than 50 per cent of the total voting rights in such business operator;
 - having the power to control the majority of votes in a meeting of shareholders of a business operator, either directly or indirectly;
 - having the power to control the appointment or removal of at least half of all directors of a business operator, either directly or indirectly; or
 - having the directive power under the first two bullet points at every hierarchical level, starting from the directive power under the first or second bullet point of the business operator who is at the ultimate level of command.

3 | What types of joint ventures are caught?

The formation of a joint venture company is not currently regulated by the merger control provisions of the TCA. However, the creation of a joint venture by acquiring an existing business may be deemed an indirect acquisition of shares or assets of the target company.

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

Mergers that are under the jurisdiction of the TCA are amalgamations, acquisitions of shares and acquisitions of assets that meet the requirements of the TCA. The TCA does not consider other interests.

Thresholds, triggers and approvals

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

Thresholds for pre-merger filing

Pre-merger filing is required for any merger that results in the creation of either:

- a monopoly, a situation where there is only one business operator in any given market:
 - possessing absolute power over the determination of the price and supply of its products or services; and
 - having a sales turnover of at least 1 billion Thai baht; or
- a business operator having dominant market power:
 - any single business operator having a market share in the previous year of 50 per cent or more and a sales turnover of at least 1 billion Thai baht; or
 - any top-three business operators together having a market share in the previous year of 75 per cent or more and a sales turnover of at least 1 billion Thai baht each (excluding any business operator having a market share in the previous year of less than 10 per cent).

Thresholds for post-merger notification

Post-merger notification is required for any merger in which the sales turnover of any one business operator, or of all business operators conducting a merger in aggregate, amounts to 1 billion Thai baht or more and that does not cause a monopoly or result in a business operator having dominant market power.

There are no circumstances where pre-merger filing or post-merger notification, as the case may be, is required if the relevant thresholds are not met.

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

Pre-merger filing and post-merger notification are mandatory. The only exceptions to mandatory filing are mergers for the purpose of business restructuring and reorganisation between a business operator and its affiliates that are part of a 'single economic entity'; or mergers that do not fall within the scope of application of the TCA.

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

The merger control provisions apply to all economic activity having an effect within Thailand. Currently, albeit unofficially, the OTCC is of the view that the merger control provisions are applicable to foreign-to-foreign mergers to the extent that the relevant business operators have a business presence in Thailand – an operator conducting a merger to carry out business activities in Thailand by itself or through its subsidiary, branch office or representative office. Export of products or services to Thailand directly to customers or end users does not establish a business presence.

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

The Foreign Business Act BE 2542 (1999) (FBA) is the principal legislation that regulates foreign investment in Thailand and specifies that foreigners may not engage in certain types of business without the relevant approval from the competent Thai authority. Therefore, foreign investors will also need to comply with the provisions of the FBA, as well as those of the TCA.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

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

Pre-merger filings

The business operator must receive approval from the Trade Competition Commission (TCC) before completion of the merger.

If a business operator is required to obtain permission from the TCC before conducting a merger and fails to do so, the business operator will be subject to:

- an administrative sanction – a fine not exceeding 0.5 per cent of the total value of the merger transaction; and
- a civil claim – any person who incurs damage from a violation of pre-merger filing regulations by a business operator may claim for damages.

If a company is subject to an administrative fine as set out above, a director, manager or any person responsible to ensure that the company complies with merger control provisions shall also be subject to the same.

In addition, the TCC may order a business operator to suspend, cease or vary the merger if it has sufficient evidence to believe that such business operator is in violation of the pre-merger filing requirement.

Post-merger notifications

The merging parties must notify the TCC within seven days after the completion of the merger.

If a business operator is required to notify the TCC after conducting a merger and fails to do so, the business operator will be subject to an administrative sanction, which is a fine not exceeding 200,000 Thai baht and a daily fine not exceeding 10,000 Thai baht throughout the period of the violation.

If a company is subject to an administrative fine as set out above, a director, manager or any person responsible to ensure that the company complies with merger control provisions shall also be subject to the same.

Precedent cases

There are currently no precedent cases where the TCC held business operators in violation of merger control provisions. However, the TCC has been very active in enforcing the merger control regime, which can be seen from its actions, such as providing opinions to the press about anticipating transactions that it believes would require pre-merger filing, for example, the acquisitions of Tesco Thailand and Bumrungrad International Hospital.

- 10 | Which parties are responsible for filing and are filing fees required?

In an amalgamation, the merging entities shall be jointly responsible for post-merger filing, and the new entity shall be responsible for post-merger notification. In an asset acquisition, the acquirer of assets will be responsible, and in a share acquisition, the acquirer of shares will be responsible.

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

For pre-merger filing, the TCC must consider an application for a merger within 90 days of its submission. In the case where a decision cannot reasonably be made within 90 days, the TCC may extend this for up to 15 days. A transaction cannot be closed until clearance.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

Pre-merger filings

The business operator must receive approval from the TCC before completion of the merger.

If a business operator is required to obtain permission from the TCC before conducting a merger and fails to do so, the business operator will be subject to:

- an administrative sanction – a fine of not exceeding 0.5 per cent of the total value of the merger transaction; and
- a civil claim – any person who incurs damage from a violation of pre-merger filing regulations by a business operator may claim for damages.

If a company is subject to an administrative fine as set out above, a director, manager or any person responsible to ensure that the company complies with merger control provisions shall also be subject to the same.

In addition, the TCC may order a business operator to suspend, cease or vary the merger if it has sufficient evidence to believe that such business operator is in violation of the pre-merger filing requirement.

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

Sanctions apply to foreign-to-foreign mergers that are under the jurisdiction of the Trade Competition Act BE 2560 (2017) (TCA). A precedent on the imposition of sanctions has not yet been set.

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

While the authorities have not provided an official statement in support of this, we think that it is possible to put in place either hold-separate or ring-fencing arrangements, or both, to allow merging parties to close a transaction outside Thailand, if this can be done without implementing the merger in Thailand. This should be preconsulted with the Office of the Trade Competition Commission (OTCC) case by case.

Public takeovers

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

There are no special merger control rules applicable to public takeover bids. Where public takeovers fall within the TCA's definition of a 'merger', the parties have to comply with the merger control provisions; the parties can, however, make note of merger control clearance as a condition precedent to a public takeover bid.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

Pre-merger filings

The documents to be submitted are:

- the application form;
- the merger plan and implementation timeline;
- details of the merging parties and the target company, which shall at a minimum consist of the shareholding structure, voting rights, sales turnover and market share;

- studies and analyses in respect of the merger transaction, which shall comprise:
 - analysis of the shareholding structure and controlling power of merging parties, for the purpose of ascertaining the relationship in policy or directive power before and after the merger;
 - analysis of the product or service market in connection with the merging parties, for the purpose of ascertaining the effects arising from the merger, which shall at a minimum comprise:
 - market structure before and after the merger transaction;
 - market scope;
 - market share of each of the merging parties before and after the merger transaction;
 - the sales turnover of each of the merging parties before and after the merger transaction;
 - the effect of the merger transaction in respect of market concentration, market entry and expansion (taking into consideration the relevant factors, such as government laws and regulations, logistical costs, access to patent rights of existing technologies, or access to raw materials or other resources necessary for production, etc), non-coordinated effects (meaning effects as a result of each of the merged entities gaining profit by increasing prices or a reduction in the quality of the product attributable to a reduction of competition), and coordinated effects (meaning effects as a result of business operators' tendency to jointly increase prices after a merger transaction);
 - the effect on the economy or consumers as a whole and other effects on competition in the market (if any); and
 - efficiencies in the market after the merger transaction; and
 - studies and analyses relating to business-related necessity and benefit in the promotion of business, damage to the economy and consumer benefits as a whole.

Post-merger notifications

The documents to be submitted are:

- the notification form;
- a copy of the documents submitted to the Ministry of Commerce, in the case of an amalgamation;
- a copy of the documents submitted to the Securities and Exchange Commission, in the case of a share acquisition by tender offer;
- a copy of the definitive documents relating to the share or asset acquisition (eg, share purchase agreement and appraisal report);
- a copy of the minutes of the executive committee meeting or shareholders' meeting, where the merger transaction is approved, of each of the merging parties, or documents evidencing the parties' intention to enter into the merger transaction;
- other particulars in respect of the merger transaction;
- annual meeting reports and audited financial statements for the preceding year and the previous three years of each of the merging parties;
- a copy of the list of shareholders of each of the merging parties before and after the merger transaction; and
- the power of attorney (if any).

All information and documents submitted to the TCC must be in hard copy in the Thai language (or translated into the Thai language).

Business operators who intentionally provide false or misleading information to the TCC may be subject to criminal penalties under the Criminal Code for the submission of false information to government officials. In addition, approval for pre-merger filing can be revoked by the TCC if it becomes aware of such false or misleading information. Furthermore, any person whose right or interest is adversely affected by

the approval of the TCC may file a case with the Administrative Court for revocation of that approval.

Investigation phases and timetable

17 | What are the typical steps and different phases of the investigation?

For pre-merger filing, the process starts when the relevant business operators submit an application to the OTCC. The OTCC will verify the completeness of the application and forward the completed application to the TCC within seven days from the date of receipt of the application. The TCC may require additional information from business operators conducting a merger by issuing a letter requesting information or inviting the applicant to offer clarification; the TCC may serve notices of invitation to relevant business operators or third parties to offer opinions and information in support of the consideration.

For post-merger notification, there is no description of how the TCC and the OTCC investigate a post-merger notification. However, they have the authority to request additional information and clarification. They may also serve notices of invitation to relevant business operators or third parties to offer opinions and information in support of the consideration.

No preconsultations are required before submission of an application for a pre-merger filing or post-merger notification and the TCA does not specify a process for preconsultations. However, business operators may request an unofficial meeting with the OTCC to discuss the applicable merger control processes and the OTCC's initial views and assessment. However, the OTCC may not provide a definitive assessment and the opinion of the OTCC is not binding and is subject to change by the TCC.

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

For pre-merger filing, the TCC must complete its consideration of a pre-merger filing within 90 days of submission. When a decision cannot reasonably be made within 90 days, the TCC may extend the period of consideration by up to 15 additional days. There is no provision in the TCA that allows the pre-merger approval process to be expedited.

For post-merger notification, there is no statutory timetable for the TCC to verify the notification.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The Trade Competition Commission (TCC) must consider whether the merger:

- is reasonably necessary for the business;
- is beneficial to business promotion;
- poses no serious harm to the Thai 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.

Theories of harm

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

There is no precedent or case study on what theories of harm the TCC will apply or consider. However, from the list of analyses required in the submission of a pre-merger application, it is expected that the TCC will

consider factors, such as the potential for coordinated effects, non-coordinated effects, barriers to market entry, expansion and foreclosure to newcomers.

Non-competition issues

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

There is no precedent or case study on this issue. The TCC must consider whether the merger:

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

Economic efficiencies

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

There is no precedent or case study on this issue. However, it is expected that economic efficiency will be given prominent consideration in determining whether a merger will satisfy the substantive test.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

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

If a business operator fails to comply with merger control requirements, the Trade Competition Commission (TCC) is empowered to impose fines. In the case where pre-merger filing is required, the TCC may, as well, suspend, cease, rectify or vary the merger.

The TCC is also empowered to set any conditions for approval of the merger.

Remedies and conditions

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

It is possible to remedy competition issues, and, in granting approval for a merger, the TCC is empowered to specify the time period and any conditions for compliance. There is no precedent or case study with regard to this issue.

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

There is no specific provision, notification, guideline or precedent on this matter.

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

There is currently precedent where the authority has required remedies in foreign-to-foreign mergers.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There is currently no specific provision, notification or guideline on this matter.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

In considering a pre-merger filing, the Trade Competition Commission (TCC) requested the applicant to provide information about its customers and competitors. The TCC is further empowered to invite any person to provide facts, explanations, advice or opinions. Therefore, customers and competitors may be invited to provide information. In addition, any person suffering damage due to a violation of the Trade Competition Act BE 2560 (2017) (TCA) can initiate an action for compensation from the offender. Therefore, any persons (including customers and competitors) who suffer damage as a result of that violation are entitled to file complaints. Furthermore, the TCA specifically allows the Consumer Protection Board, or organisations or foundations recognised by the Consumer Protection Board, to initiate actions for compensation on behalf of consumers or members of such organisations or foundations, as the case may be.

Publicity and confidentiality

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.

Confidential information is protected the TCA. Any person who discloses restricted or confidential information concerning a business or operations of a business operator may be subject to imprisonment of a period not exceeding one year, or a fine not exceeding 100,000 Thai 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 Secrets Act BE 2544 (2001), the offender may be subject to a penalty under the Trade Secrets Act, and required to pay compensation for its misconduct and the injury suffered by the injured party.

Cross-border regulatory cooperation

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

Thailand has signed economic partnership agreements with certain countries and those 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.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The Trade Competition Commission (TCC)'s orders to suspend, cease, rectify or modify a merger that has not obtained approval; and orders to grant (with conditions) or deny approval of a merger are subject to judicial review. A business operator may file a case with the Administrative Court. Any appeal of a decision of the Administrative Court may be submitted to the Supreme Administrative Court and the determination of the Supreme Administrative Court will be final.



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Time frame

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

Business operators to whom orders to suspend, cease, rectify or vary a merger, or grant or deny approval of a merger are directed, must file an appeal to the Administrative Court of First Instance within 60 days following receipt of the TCC's decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

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

There are currently no precedent cases where the Trade Competition Commission held business operators in violation of merger control provisions.

Reform proposals

35 | Are there current proposals to change the legislation?

No.

UPDATE AND TRENDS

Key developments of the past year

36 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

There are currently no precedent cases where the Trade Competition Commission (TCC) held business operators in violation of merger control provisions. However, the TCC has been very active in enforcing the merger control regime, which can be seen from its actions, such as providing opinions to the press about anticipating transactions that it believes would require pre-merger filing, for example, the acquisitions of Tesco Thailand and Bumrungrad International Hospital.