

# Thailand

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## Legislation and jurisdiction

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

The new Trade Competition Act BE 2560 (2017) (TCA), effective 5 October 2017, repeals the Trade Competition Act BE 2542 (1999). Merger control in Thailand is governed by section 51 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 (or merging entities) must notify the TCC within seven days after the completion of the merger if the merger may substantially lessen competition.

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 as well as an exception to the restructuring and reorganisation between a business operator and its affiliates. This is part of the pre-merger filing and post-merger notification requirement. As no notification pursuant to section 51 has been issued, the restrictions on mergers are not enforceable. Therefore, currently a merger in Thailand can be completed without being subject to permission or notification duty under section 51.

### 2 What kinds of mergers are caught?

Section 51 of the TCA applies to any merger by a 'business operator' that may result in the creation of either a monopoly, or a business operator with a dominant position; or may substantially lessen competition. 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'. 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, 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 cooperative 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 section 51 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.

The exception is mergers for the purpose of business restructuring and reorganisation between a business operator and its affiliates in a manner prescribed by the rules as published by the TCC.

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 or notify the TCC within seven days after the completion of the merger.

As the notification prescribing the minimum thresholds, rules, procedures and conditions for pre-merger filing and post-merger notification has not been issued, there is no approval or notification 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 the creation of either a monopoly, or a business operator with a dominant position; or may substantially lessen 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?

#### Pre-merger filing

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) which is applicable to any single business operator having a market share in the previous year of 50 per cent or more and having a sales turnover of at least 1 billion baht, or any top three business operators together having a market share in the previous year of 75 per cent or more and having a sales turnover of at least 1 billion baht (excluding any business operator having a market share in the previous year of lower than 10 per cent or having a sales turnover of lower than 1 billion baht). However, this threshold is in the process of being amended and the new threshold shall be launched together with the regulation on application and procedure for filing.

**Post-merger notification**

Jurisdictional thresholds for post-merger notification are to be set by notification, but no notifications have yet been issued. The TCC will define these thresholds within 365 days from the effective date of the TCA (October 2018).

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

Pre-merger filing is mandatory if the merger may result in the creation of either a monopoly or a business operator with a dominant position as prescribed in the notification issued by the TCC. An applicant who will perform a merger under section 51 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 sections 51 and 52 of the TCA. The only exception to the mandatory filing is a merger for the purpose of business restructuring and reorganisation between a business operator and its affiliates in a manner prescribed by the rules as published by the TCC.

Post-merger notification is also mandatory and the same exception as mentioned above also applies here.

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

Section 51 of the TCA does not extend to foreign-to-foreign mergers outside Thailand. The TCA aims to govern the mergers of business entities having their business in Thailand. In addition, the penalties for the violation of the merger control provision provided for in the TCA are administrative penalties, which are by their nature not exercised outside the territory of the Kingdom of Thailand.

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

The TCA does not address foreign investment. 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.

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

**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 sections 51 and 81 of the TCA. For a pre-merger filing, once the parties have submitted the required data and documents to the TCC, 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. On the other hand, 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 sections 51 and 81 of the TCA, there is no filing in practice.

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

In general, the parties to the transaction are responsible. However, currently there are no notifications specifying who must file. Filing responsibilities are subject to notifications to be issued within 365 days from the effective date of the TCA (October 2018) in accordance with sections 51 and 52 of the TCA.

The filing fee is 250,000 baht per transaction.

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

Pursuant to section 52 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.

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

Section 60 of the TCA empowers the TCC 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 (eg, merger without approval from the TCC). Currently, 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?**

See question 7.

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

See question 7.

**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 business operator who disagrees with the TCC's decision may appeal to the Administrative Court within 60 days following the TCC's decision according to the procedure specified in the Act on Establishment of Administrative Courts and Administrative Procedure BE 2542 (1999), as amended. The determination of the Supreme Administrative Court is final.

#### **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 the creation of either a monopoly, or a business operator with a dominant position; or may substantially lessen 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 the creation of either a monopoly, or a business operator with a dominant position; or may substantially lessen 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.

#### **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?**

See question 7.

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

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 the creation of either a monopoly, or a business operator with a dominant position as mentioned in section 51 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, organisation or foundation recognised by a customer protection commission to initiate actions for compensation on behalf of consumers or members of such organisation or foundation, as the case may be. 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 76 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 60 of the TCA and orders to grant (with conditions) or deny approval of a merger pursuant to section 52 of the TCA. A business operator who disagrees with the order may bring the case to the Administrative Court according to the procedure specified in the Act on Establishment of Administrative Courts and Administrative Procedure BE 2542 (1999), as amended. The determination of the Supreme Administrative Court is final.

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

The business operator must file an appeal to the Administrative Court of the First Instance within 90 days following receipt of the TCC's decision.

### 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 or post-merger notification is not required.

#### 35 Are there current proposals to change the legislation?

The TCA has just been promulgated on 7 July 2017 and shall be in full force and effect within 90 days therefrom (5 October 2017). Once

effective, the TCA shall replace the Trade Competition Act BE 2542 (1999), except for all subordinate regulations issued under the foregoing to the extent that they do not contravene or oppose the TCA until subordinate regulations under the TCA are issued in its place. The principles under the TCA regarding abuse of dominant position, mergers, collusive conduct and unfair trade practices remain generally the same. However, the TCA aims to improve enforcement of Thai competition law by introducing a number of new measures, including transforming the TCC (currently under the Ministry of Commerce) into an agency independent from any government department. Regarding the change in merger control provisions, see also question 1.

It is noteworthy that a number of subordinate regulations must be issued by the TCC for the merger control provisions of the TCA to be fully enforceable, (eg, the criteria for post-merger notification, the rules, new thresholds for dominant market power, procedures and conditions for pre-merger filing, definition of consolidation and possibly joint venture as well as the exceptions for the restructuring of 'affiliated' companies). The TCA stipulates that such subordinate regulations must be issued within 365 days from the date that the TCA comes into force.

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Thailand					
Voluntary or mandatory system	Notification trigger/filing deadline	Clearance deadlines (Stage 1/Stage 2)	Substantive test for clearance	Penalties	Remarks
<p>Merger control in Thailand is a mandatory system whereby any business merger that may result in the creation of either a monopoly, or a business operator with a dominant position, as prescribed in a notification from the Trade Competition Commission (TCC), is required to file an application to obtain prior approval from the TCC (pre-merger filing). In addition, the merging entity (or merging entities) must notify the TCC within seven days after the completion of the merger if the merger may substantially lessen competition (post-merger notification). At present, no such notification has been issued.</p>	<p>There is currently no notification trigger or filing deadline as the TCC has not issued any relevant notifications.</p> <p>The deadline for post-merger notification is seven days from the merger date.</p>	<p>The TCC must complete consideration of an application within 90 days. If it cannot be completed within this period, the TCC may extend it by 15 additional days.</p>	<p>The substantive test for clearance is that the merger:</p> <ul style="list-style-type: none"> <li>• is reasonably necessary in the business;</li> <li>• is beneficial to business promotion;</li> <li>• does no serious harm to the economy; and</li> <li>• has no material effect on the due interest of consumers in general.</li> </ul>	<p>Pre-merger filing:</p> <ul style="list-style-type: none"> <li>• administrative sanction: a fine of not exceeding 0.5 per cent of the total merger transaction;</li> <li>• civil penalty: any person who incurs damages from the violation of pre-merger filing by a business operator under section 51 may claim such damages.</li> </ul> <p>In addition, the TCC may issue an order to a business operator to suspend, cease or vary the merger which is in violation of the pre-merger filing requirement.</p> <p>Post-merger notification:</p> <p>Administrative sanction: a fine of not exceeding 200,000 baht and a daily fine of not exceeding 10,000 baht throughout the period of the violation.</p>	<p>At present, the merger of businesses in Thailand can be completed without any approval from the authority as no notifications regarding this matter have been promulgated.</p>