

Legal Express

Merger Control in Thailand

June 2020

The Trade Competition Act (B.E. 2560) (2017) (the “TCA”) came into force on 5 October 2017 replacing its predecessor, the Trade Competition Act B.E. 2542 (1999), which had been in effect for almost 20 years with questionable enforcement and effectiveness. In particular, merger control provisions under the 1999 Act have never been put into real effect due to the lack of sub-regulations to set out necessary criteria.

The TCA, however, has introduced notable changes on those concerning abuse of dominance, restrictive agreements, unfair trade practice unreasonable agreements with offshore operators as well as an overhauled merger control regime.

Regulator

The Trade Competition Commission (the “TCC”) was formally appointed in December 2018 with the Office of the Trade Competition Commission as the administrative office. In this connection, the TCC is an independent authority with its main responsibility to regulate and promote competition and fair trade by laying down and implementing subregulations, supervising and monitoring business operations, receiving complaints of offences as well as imposing sanctions.

Application

The TCA applies to a broad range of business sectors and operators, including sellers, manufacturers, importers, resellers and service providers. However, the following businesses are excluded from its application:

- (a) central, regional, or local government administrations;
- (b) State-Owned Enterprises (SOE) , public organisations, or other government agencies, only in respect of activities conducted in accordance with applicable laws or the Cabinet resolutions strictly for the benefit of national security, public interest, common interest, or the provision of public utilities;
- (c) farmers’ group, cooperatives, or cooperative groups recognised under the laws for the benefit of vocation or farming; and

- (d) businesses that are specifically regulated under their own trade competition regulations (such as telecommunication and energy).

Merger Definition

Section 51 of the TCA and relevant subregulation define a merger of businesses which is subject to the TCA to include the following transactions:

Amalgamation	Asset Acquisition	Share Acquisition
A merger amongst producers, sellers, producers and sellers or service providers, which results in one business subsisting and the other ceasing to exist, or a new business coming into existence.	An asset acquisition of more than 50 per cent of the total value of assets used in the ordinary business operations of the other business operator in the preceding financial year.	A share acquisition, directly or indirectly, of: <ul style="list-style-type: none"> (i) 25 per cent or more of the total voting rights (including warrants, or other convertibles securities) in companies regulated by the securities and exchange law; or (ii) more than 50 per cent of the total voting rights in companies not regulated by the securities and exchange law.

For the purposes of determining whether or not any the above thresholds is met, all acquisitions by the following related persons of the acquirer shall be aggregated:

- (a) in case of an individual, his or her spouse; and
- (b) in case of a juristic person, (i) an individual or a juristic person holding more than 30 per cent of its shares with voting rights and (ii) a business operator having relationship in policy or directive power with the acquirer.

Further, a business restructuring and reorganisation between entities within the same business group (i.e. those having relationship in policy or directive power) is excluded from the “merger” definition and is therefore not subject to the merger control provision. Likewise, the formation of a greenfield joint venture company does not constitute a merger under the TCA.

Filing Requirements

Any merger which falls within the ambit of the TCA shall be tested against the prescribed market share and turnover thresholds in determining whether or not such transaction will be subject to a pre-merger approval or a post-merger notification as described below.

Pre-merger approval

A pre-approval from the TCC is required for a merger which would result in:

- (a) a monopoly, which is where there is only one business operator in the market who has the power to freely determine the price or quantity of its goods or services, and having a turnover of Baht one billion or more; or
- (b) a business operator having a dominant position, which meets any of the following criteria:
 - (i) a business operator having its market share in the previous year of 50 per cent or more and having a turnover of Baht one billion or more; or
 - (ii) any top three business operators having an aggregate market share in the previous year of 75 per cent or more and each having its turnover of Baht one billion or more (excluding those having market share in the previous year of less than 10 per cent).

The TCC will consider and make decision on the pre-approval application within 90 days, which may be extended for another 15 days.

Post-merger notification

A post-merger notification applies to a merger which may “substantially reduce market competition”, which is defined to cover the situation where the sum of any merging business operators’ turnover is Baht one billion or more, provided that it does not result in a monopoly or the business operator having a dominant position. In this connection, the notification shall be made to the TCC within seven days from the date of the merger.

Sanctions

Pursuant to the TCA, any failure to comply with the merger control regime may subject the violator and/or its responsible directors, managers or any person responsible for the operation to the following sanctions:

Pre-merger approval	<ol style="list-style-type: none"> 1. An administrative fine of not exceeding 0.5 per cent of the transaction value. 2. Any person who incurs damages from the violation of a pre-merger filing may take legal action for such damages against the business operator. 3. The TCC is empowered to order a suspension, cessation, or variation of the merger which is, or is expected to be, in violation of the pre-merger filing requirement.
Post-merger notification	An administrative fine of not exceeding Baht 200,000 and a daily fine of not exceeding Baht 10,000 during the violation period.

This document is solely intended to provide an update on recent development in Thailand legislation and is not purported to provide a legal opinion, nor a legal advice to any person.

Thanathip & Partners

17th Floor, Tonson Tower
900 Ploenchit Road, Lumpini
Pathumwan, Bangkok 10330
T. (66) 2089 8902

Should you wish to obtain specific legal advice, please contact:

Thanathip Pichedvanichok
(66) 2089 8989 | thanathip@thanathippartners.com

Nat Boonjunwetvat
(66) 2089 8988 | nat@thanathippartners.com

Karnjanick Chutima
(66) 2089 8958 | karnjanick@thanathippartners.com