

Merger Control

The international regulation of mergers and joint ventures in 73 jurisdictions worldwide

2013

Consulting editor: John Davies



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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 (1999) (the TCA). Section 26 of the TCA prohibits mergers of businesses that may result in monopoly or unfair competition, as prescribed by the Trade Competition Commission (the 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 to enforce the provisions of the TCA, including issuing notifications concerning the specific process by which a certain merger will be examined. In this regard, the TCC is empowered to set a minimum threshold of market share, total sales, amount of capital, 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 yet been issued, the restrictions on mergers are not yet 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 shall 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 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, a 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 proposed minimum thresholds have not yet been issued, there is no approval required from the TCC.

3 Are joint ventures 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 yet issued a notification defining control.

5 What are the jurisdictional thresholds?

Jurisdictional thresholds are to be set by the notification, but no notifications have been issued yet. Therefore, there are currently no jurisdictional thresholds.

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

Filing is 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 is 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. In addition, section 35 of the TCA requires an application for approval of a proposed merger of businesses, the contents of which must specify at least the following:

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

Please note that the TCC has not yet issued any notification on the application (nor the minimum thresholds on the merger of businesses). Therefore, pre-merger filing is not required yet, 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. As a result, section 26 applies to any merger that may 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, and no notifications for the act are in force yet. The Foreign Business Act (1999) (the FBA) is general legislation that regulates foreign investment in Thailand. The FBA regulates three categories of activities, as stated in lists 1 to 3. A foreigner (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 foreigners) is not allowed to operate a business set out in list 1, such as the press, 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 security, Thai art and culture, and 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. The businesses set out in list 3 include those in which Thais are considered unready to compete with foreigners such as construction, accounting, engineering, retail and wholesale and any service business, and so on. There are some sectors and industries that have specific laws limiting foreign ownership and commerce. These sectors include, among others, banking, insurance, telecommunications and land.

These restrictions are not universally applied to all foreign persons. Treaties may provide exceptions for certain foreign nationals. For example, certain exceptions apply to persons from the United States under the US-Thai Treaty of Amity and Economic Relations. Exceptions to the laws may also be granted by the Board of Investment or by the Industrial Estate Committee 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 deadline stipulated. In any case, if a filing is not made for a merger of businesses covered by section 26, a person would be liable to a term of imprisonment of not exceeding three years, or a fine of not exceeding 6 million baht, or both. A repeat offender is liable to double the penalty. If the person violating the TCA is a legal entity, the managing director, the managing partner, or the person responsible for the operation of the offender in the matter will be liable for the same penalty, unless it can be proven that the offence had occurred without his or her knowledge or consent, or such person exercised reasonable care to prevent the occurrence of the offence. Also, the TCC may issue a written order requiring the business operator to suspend, cease, rectify, or vary such an act, and may prescribe rules, procedures, conditions, and time limits for compliance. Non-compliance of such order is subject to imprisonment of between one and three years or a fine of between 2 million baht and 6 million baht, with a daily fine of not more than 50,000 baht during the non-compliance period.

- 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 notification to be issued in accordance with sections 26 and 35.

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

Pursuant to section 36, 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?

Please see question 9. As the relevant notifications are still not issued, section 26 is still not enforceable, and no case has arisen and no precedent is in existence.

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

There are no solutions to permit closing before clearance in a foreign-to-foreign merger.

- 14** 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 (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.

- 15** What is the level of detail required in the preparation of a filing?

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

- 16** What is the timetable for clearance and 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 for up to 15 days. There is no provision in the TCA for speeding up the application process.

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

No notifications or guidelines for the merger of businesses approval process have been issued yet. 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. Please see more details in question 31.

Substantive assessment

18 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;
- has no serious harm on the economy; and
- has no material effect on the due interest of consumers in general.

19 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 businesses characteristics that may result in monopoly or unfair competition, the same test as mentioned in question 18 will be applied.

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

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

21 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Please see substantive test for clearance in question 18.

22 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 18.

Remedies and ancillary restraints

23 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 the opinion of the TCC, economic conditions, the facts or the actions on which the TCC has based its decision have changed.

24 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 a broad power to specify the time or any condition for compliance.

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

There is no specific condition and timing prescribed under the TCA. The notification is still not yet issued, and as yet there is no guideline issued under these conditions and timing. As mentioned in question

24, the TCC has the power to fix the time or any condition for compliance, and may specify any relevant condition or timing.

26 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.

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

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

Involvement of other parties or authorities

28 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 violator. Therefore, any persons (including the customers and the competitors) who suffer due to such a violation are then entitled to file complaints. Furthermore, the TCA specifically allows consumer protection commission or organisations 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.

29 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 (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.

30 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.

Update and trends

The Constitutional Court in its decision No.12/2555 dated 28 March 2012 on the Direct Selling and Direct Marketing Act B.E 2550 (the Act) ruled that the provision which assumes the guilt of the managing director, the manager, or the person responsible for the operation of a legal entity which violated the law to be liable for the same penalty as that legal entity unless it can be proven that he or she did not participate in the offense, is contrary to section 39 paragraph 2 of the Constitution Act (which states that 'in criminal cases, it shall be assumed that the accused person or defendant is not guilty'), and is therefore not enforceable. As the TCA has a provision similar to that of the Act, it is highly likely that such a provision of the TCA would not be enforceable. However, it is up to the court to decide this issue.

Judicial review**31** 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 the merger that has not obtained approval from the TCC under section 26; and orders to grant (with conditions) or deny approval on merger of businesses pursuant to section 37. The 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.

In the case that 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.

32 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.

Enforcement practice and future developments**33** What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

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

34 What are the current enforcement concerns of the authorities?

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

35 Are there current proposals to change the legislation?

The proposal on pre-merger notification has been submitted to the relevant authority, but no notifications have been issued yet.



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