The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving pharma and high-technology companies, we have added to this year's edition chapters focusing on the US and EU enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter discussing the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, India and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Greece, Portugal, Ukraine and the US). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun jumping' fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EU model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are to be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the Authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/ Complete* transaction). Norway is a bit unusual, in that the Authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include as a reportable situation the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EU and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The UK also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a standalone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multijurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the US and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the International Merger Remedies chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or the US. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
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Chapter 38

THAILAND

Pakdee Paknara and Pattraporn Poovasathien[1]

I INTRODUCTION

The Trade Competition Act 1999 (TCA) is the legislation governing pre-merger filings in Thailand. The TCA established the Thai Trade Competition Commission (Commission) and its secretariat within the Department of Internal Trade, Ministry of Commerce. The TCA prohibits mergers of businesses that may result in a monopoly or unfair business competition, unless permission is obtained from the Commission.

The Commission has the authority to issue notifications prescribing the criteria and process under which a merger will be examined, and to set a minimum threshold of market share, sales volume, amount of capital, number of shares or amount of assets that will be subject to a pre-merger filing. However, as the details of the enabling notifications still remain under consideration, the merger control regime has not yet been implemented in Thailand.

Once the enabling notifications have been set by the Commission and published in the Government Gazette, a pre-merger filing and approval will be required for any merger or acquisition that may result in a monopoly or unfair competition in the market.

It is unclear when the enabling notifications will be issued; however, the 10 Member States of the Association of Southeast Asian Nations (ASEAN), including Thailand, have agreed to introduce national competition policies and laws by the end of 2015. The establishment of competition law regimes is one of the goals noted in the ASEAN Economic Blueprint, with the intention of fostering a culture of fair business competition in the region.

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II YEAR IN REVIEW

As noted above, in practice, merger controls have not yet been implemented in Thailand; as such, we cannot comment on any recent merger cases or legislative changes. The jurisdictional thresholds are currently being drafted by the Commission.

III THE MERGER CONTROL REGIME

i Commission

Before the enactment of the TCA, competition law was proscribed by the Price Fixing and Antimonopoly Act of 1979 (1979 Act). The purpose of the 1979 Act was to prevent product supply shortages and to protect consumers from abusive pricing of products, but it did not address competition or market power issues. In 1999, the 1979 Act was repealed and replaced by two separate and distinct acts: the TCA, and the Act Concerning the Price of Goods and Services. One of the mandates of the Commission is to examine proposed mergers to prevent harmful effects on competition; however, the implementation regulations remain under consideration.

Specialised committees of the Commission

The Commission must appoint one or more specialised subcommittees of persons qualified and having experience in specialised fields, including a representative of the Department of Internal Trade, to provide opinions on:

a matters concerning conduct indicative of market domination; i.e., a merger of businesses or other reduction or restriction of competition stipulated in the TCA:
- Section 25: abuse of market power in a dominant position;
- Section 26: mergers and acquisitions that may amount to a monopoly;
- Section 27: agreements and collusive practices that adversely affect competition;
- Section 28: exclusive distribution of imported products that impairs the opportunity of consumers to purchase such goods or services directly from business operators outside the kingdom; and
- Section 29: acts that are not free and fair competition, and that would have the effect of excluding or restricting other business operators from conducting business or causing cessation of business;

b the consideration of applications for permission to merge businesses or initiate the reduction or restriction of competition; and

c other matters to be considered at the request of the Commission and other acts to be performed as entrusted by the Commission.

ii Merger control provisions

The merger control provisions will apply to private sector business operators. The TCA exempts state enterprises, agricultural and other cooperatives, central and regional government agencies, and businesses covered by ministerial regulations.

A business operator is defined as a distributor; a producer of goods for distribution; an orderer or importer into Thailand of goods for distribution; a purchaser of goods for production or redistribution; or a service provider in the ordinary course of business.

Once the merger control regulations are implemented, a pre-merger filing and approval will be required for any merger or acquisition that may result in a monopoly or unfair competition in the market. The TCA does not specify the types of mergers that will be included in the merger controls, but they are likely to apply to both horizontal mergers and vertical mergers. Certain transactions are specifically targeted in the TCA:

a the merger of a manufacturer with another manufacturer, a distributor with another distributor, a manufacturer with a distributor, or a service provider with another service provider, where such merger will result in one business being maintained while the other is extinguished or a new business is formed;

b the purchase of all or part of the assets of another business for the purpose of controlling that business's administration policy, administration or management; and

c the purchase of all or part of the shares of another business for the purpose of controlling that business's administration policy, administration or management.

On 6 June 2013, the Commission approved the following pre-merger notification criteria:

a the merger of businesses that have an aggregate market share in any market for any goods or services prior to or after the merger of 30 per cent or more, and a total sales (turnover) or income in the preceding year of 2 billion baht or more; and

b the acquisition of shares with voting rights for at least 25 per cent of the total shares of a public company, or 50 per cent of a limited company, where the acquisition results in the business of a company or both companies having an aggregate market share of 30 per cent or more in any market of any goods or services before or after the acquisition, and a total sales volume (turnover) or income in the previous year of at least 2 billion baht.

Unfortunately, the above criteria have not yet been enacted by the Commission.

iii Control test

Section 26 of the TCA applies to mergers that result in a monopoly or unfair competition as prescribed by a notification, and it is unclear whether the concepts of 'decisive influence' or 'material influence', or another level of control over the target, will be adopted.

iv Joint ventures

Joint ventures are not prescribed in the TCA. However, if the nature of the joint venture, once implemented, involves business operations that fall within the scope of characteristics that may result in a monopoly or unfair competition as prescribed in Section 26, the merger control provisions may apply.

v Application process

To obtain permission to carry out a transaction that falls within the scope of the merger control regime, a business operator will be required to submit an application in accordance with the Commission's form, rules, procedures and conditions to be prescribed and published in the Government Gazette.

Although the details of the process have not been determined, the TCA stipulates that an application for approval must specify adequate reasons and the necessity of the proposed merger; the method of achieving the proposed merger; and the duration of the proposed merger.

The substantive test for clearance is that the merger:

a is reasonably necessary to the business;
b is beneficial;
c has no serious harm on the economy; and
d has no material effect on the due interest of consumers in general.

The Commission must complete its consideration of an application for a merger within 90 days. When a decision cannot reasonably be made within 90 days, the Commission may extend such time frame for up to 15 days.

If the Commission is of the opinion that a merger meets the criteria, conditions and the substantive test, it may issue an order granting permission for the merger. In any case, the Commission must specify reasons for an order granting or rejecting permission, both on questions of fact and questions of law. The Commission may fix the time or any condition for compliance by the business operator, and if the economic situation, facts or conduct relied on by the Commission in its consideration have changed, the Commission may amend, make addition to, or revoke such time or conditions at any time.

The TCA provides for three types of general enforcement measures: administrative orders, criminal lawsuits and actions for damages.

In the criminal context, the Office of the Commission receives complaints alleging violations of the TCA. After receiving a complaint from the Secretariat, the Commission will either conduct an investigation or refer the investigation to an *ad hoc* subcommittee. If it is found that a business operator is in violation of the TCA, the Commission may issue an order or send an opinion advocating criminal prosecution to the Attorney General, who may assign a public prosecutor to proceed with a criminal action.

vi Penalties

Penalties for violations of substantive provisions

If a business operator is required to obtain permission from the Commission before consummating a merger, but fails to do so, the business operator will be subject to imprisonment not exceeding three years or a fine not exceeding 6 million baht, or both. If the offence is repeated, the penalty will be doubled.

Penalties for violations of procedural provisions

The Commission may also order a business operator to suspend, cease, rectify or vary a merger considered to be in violation of the TCA. Any person who fails to comply with an order will be liable to imprisonment for a term of one to three years, a fine of 2 million to 6 million baht, or both, as well as a daily fine not exceeding 50,000 baht throughout the period of the violation.

vii Civil actions by consumers

The TCA will entitle any person who sustains damages arising from a violation of Section 26 to bring suit for compensation in a civil court of proper jurisdiction. The Consumer Protection Commission or an association established under the law on consumer protection may also bring a lawsuit for damages against the offending business operator on behalf of consumers or members of the association. In an action by consumers, the injured party may recover only actual damages, plus attorneys' fees and costs. The burden of proof is on the injured party to prove the business operator's actions caused damages to the business of the injured party.

IV OUTLOOK AND CONCLUSIONS

During 2014 and 2015, pre-merger filing controls have not been at the forefront of the government agenda. Other political issues are pending, and a new government will soon be elected; therefore, there has been no movement in this particular area. Given the lack of subsidiary legislation to implement merger controls, the TCA remains a paper tiger.

However, as previously mentioned, the 10 ASEAN Member States have agreed to introduce nationwide competition policies and laws in fulfilment of the goals of the ASEAN Economic Blueprint. To date, several Member States[2] have enacted national competition legislation that includes prohibitions against anti-competitive mergers.

2 Indonesia, Philippines, Singapore, Thailand and Vietnam.

Appendix 1

ABOUT THE AUTHORS

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Pakdee Paknara is a partner at Weerawong C&P. He has extensive experience in mergers and acquisitions, power and energy projects, real estate and construction, property funds, international trade, telecommunications, computer technology and software licensing, government bidding and tax-related transactions. He advises local and foreign clients on a wide variety of matters, and specialises in the preparation of documentation for complex commercial transactions, including the reviewing, drafting and negotiation of agreements such as supply, purchase and sale, service, management and employment agreements. Previously, he was a partner at White & Case (Thailand) Limited, prior to which he worked at a respected law firm in Bangkok as head of the commercial and international trade and tax practices. He obtained his LLB degree from Chulalongkorn University and an MSc (taxation) degree from Golden Gate University, US.

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