

Thailand merger control (2019)

Produced in partnership with Lexis Nexis

A conversation with Panuwat Chalongkuamdee, partner, Parithat Chamnongsilp, associate, and Pitchapa Tiamsuttikarn, associate, at Thai law firm Weerawong, Chinnavat & Partners Ltd, on key issues on merger control in Thailand.

1. Have there been any recent developments regarding the Thai merger control regime and are any updates/developments expected in the coming year? Are there any other 'hot' merger control issues in Thailand?

The Trade Competition Act B.E. 2560 (2017) (TCA) is currently the main legislation governing the merger control regime in Thailand.

With effect from 29 December 2018, any merger which meets the requirements under the TCA and the relevant subordinate regulations issued thereunder shall be subject to the merger clearance process as stipulated under the TCA. The application of the TCA also covers state-owned enterprises and public organizations, 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. The TCA does not apply to certain industries where merger control is already regulated by specific legislation for that industry (i.e. currently telecommunications, broadcasting and television, insurance, financial and energy sectors). Unlike the TCA, the merger regimes under the specific sectors have been established and developed since the issuance of the respective regulations. In 2018, we advised one of the leading power companies in Thailand in obtaining pre-merger filing approval from the Energy Regulatory Commission in respect of the share acquisition of another prominent power company. This transaction is expected to close in February 2019.

An important point to note in relation to the merger control rules is that the TCA 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 market 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 Office of the Trade Competition Commission (OTCC), an agency independent from any government department, is the regulatory body established under the TCA. The OTCC's powers and duties include undertaking the administrative work of the commission and the sub-commission, monitoring business operators for violations of the TCA, receiving complaints in respect of alleged violations of the TCA and making recommendations to the Trade and Competition Commission (TCC), the enforcement agency. 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 thereof, the Intellectual Property and International Trade Court and the Administrative Court shall have jurisdiction to decide on such matters.

2. Under Thai merger control law, is the control test the same as the EU concept of 'decisive influence'? If not, how does it differ and what is the position in relation to 'minority shareholdings'?

The merger control provisions of the TCA will apply to share/asset acquisition transactions that will result in the control of business administrative policies, administration and management (i.e. the "control test") with the exception of mergers for the purpose of business restructuring and reorganisation of business operators belonging to a single economic entity. See further details in question no. 4.

The criteria for determining 'controlling business administration policy, administration or management' are as follows:

1. asset purchases—the acquisition of more than 50% 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 thereof. The scope of assets shall include both tangible assets and non-tangible assets (e.g. leasehold right or intellectual property right).

2. share purchases—either:

2.1 *a listed public company*: the acquisition of shares, warrants, or other convertibles of 25% or more of the total voting rights of another business operator at the end of any date,

Remarks: 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 note merger control clearance as a condition precedent to a public takeover bid; or

2.2 *a private company and a non-listed public company*: the acquisition of more than 50% of the total voting rights of another business operator at the end of any date.

In counting the shares to be acquired by any undertaking under the foregoing paragraph:

- (i) in the case that an acquirer is a natural person, it shall include the acquisition by his or her spouse.
- (ii) in the case that an acquirer is a juristic person, it shall include the acquisition by a natural person or a juristic person holding shares in it of over 30% of the number of voting rights of that juristic person and by a business operator belonging to a single economic entity. See further details in question no. 4.

An acquisition of minority interests (i.e. acquisition of less than 50% of voting rights in a private or public non-listed company or less than or equal to 25% of voting rights in a listed public company) that do not meet the control tests as set out above are not caught under merger control provisions under the TCA.

3. Are joint ventures caught by the national merger control provisions (including non-structural, cooperative joint ventures)?

The regulations regarding joint ventures have not yet been issued. Therefore, the formation of a joint venture company is not currently regulated under merger control provisions.

4. What are the merger control thresholds and would a purely foreign-to-foreign transaction be caught?

Business Presence Test

Any merger (i.e. amalgamation, acquisition of shares or assets that meet the control test described in question no. 2) shall be within the jurisdiction of the TCA provided that the business operator(s) conducting a merger carry out business activities in Thailand through its business presence.

“Business Operator” means (i) a vendor, (ii) producer for sale, (iii) person who places an order or imports products into the kingdom for sale, (iv) buyer for production or resale of goods, or (v) service provider.

“Business Activities” means an operation carried out for benefit of trade in agriculture, industry, commerce, finance, insurance, and services, and shall include other operations as prescribed in any ministerial regulations.

Although not defined in the TCA, the OTCC views that “Business Presence” means a business operator having Business Activities in Thailand by itself or through its subsidiary (note: subsidiary is not yet defined), branch office, representative office, agents or dealers. Please note that export of products or services to Thailand directly to customers/end users shall not establish the “Business Presence” of a Business Operator under the business presence test.

For the purpose of verifying the business presence test, the undertakings concerned are:

1. For amalgamation: the merging parties;
2. For an acquisition of shares/assets: the acquirer and the target

Once the merger is considered within the scope of the TCA (i.e. the business presence test and control test are met), it shall be analysed against either of the following two thresholds to verify whether such merger triggers pre-merger filing or post-merger notification.

Jurisdictional Thresholds

Pre-merger filing

Jurisdictional thresholds for pre-merger filing refer to any merger which results in the creation of either:

1. *a monopoly*, a situation where there is only one business operator in any given market (i) possessing absolute power over determination of the price and supply of its products or services freely; and (ii) having a sales turnover of at least THB 1,000 million; or
2. *a business operator having dominant market power*, (i) any single business operator having a market share in the previous year of 50% or more and a sales turnover of at least THB 1,000 million; or (ii) or any top three business operators together having a market share in the previous year of 75% or more and a sales turnover of at least THB 1,000 million (excluding any business operator having a market share in the previous year of lower than 10% or a sales turnover of lower than THB 1,000 million).

In calculating a market share or a sales turnover for the purpose of identifying a business operator having dominant market power, such calculation shall include all of the market share and sales turnover in any product or service market of all entities in respect of the business operator in question belonging to a single economic entity.

Post-merger notification

Jurisdictional threshold for post-merger notification refers to any merger that may '*substantially lessen competition in any market*' which is defined as a merger where any business operator that is a party to the transaction, whether before or after such merger, has a sales turnover of at least THB 1,000 million in any market, *but* this does *not* result in the creation of either a monopoly or a business operator having dominant market power.

Restructuring or reorganization between affiliates

Mergers between business operators in the same business group that are recognized as a single economic entity are exempt from merger clearance (i.e. 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:

1. '*Relationship in Policy*' means a relationship between two business operators or more that have their own set of guidelines, policies, or procedures on business administration, direction or business management under the control of the same business operator with the directive power;
2. '*Directive Power*' means the power to control under any of the following situations:
 - (i) holding shares with voting rights in a business operator of more than 50% of the total voting rights in such business operators;
 - (ii) having the power to control the majority of votes in a meeting of shareholders of a business operator, either directly or indirectly;
 - (iii) having the power to control the appointment or removal of at least half of all directors or more of a business operator, either directly or indirectly; or
 - (iv) having the directive power under (i) and (ii) at every hierarchical level, starting from the directive power under (i) or (ii) of the business operator who is at the ultimate level of command.

Foreign-to-foreign transactions

The merger control provisions apply to all economic activity having an effect within Thailand. However, insofar as the merger control notifications are concerned, the thresholds are calculated in relation to combined sales turnover or market shares in relation to Thailand only. Accordingly, the merger control provisions are applicable to foreign-to-foreign mergers to the extent that the undertaking concerns have business presence in Thailand as described in the first part of question no.4.

5. Are there any specific issues parties should be aware of when compiling and calculating the relevant turnover for applying the jurisdictional thresholds?

Generally, in calculating a sales turnover for applying the jurisdictional thresholds set out in question no. 4, only the revenue generated from the sale of products or provision of services in a relevant market in Thailand shall be counted. Nevertheless, there are no established guidelines on this issue.

6. Where the jurisdictional thresholds are met, is notification mandatory and must closing be suspended pending clearance?

Both pre-merger filing and post-merger notification duties are mandatory, provided the jurisdictional thresholds are met. This means that, for transactions which trigger pre-merger filing requirements, the approval of the TCC must be obtained before the merger closes.

7. Is there any discretion to review transactions that fall below the notification thresholds?

None.

8. Is it possible to close the deal globally prior to local clearance?

Sanctions may be applied in any cases in which closing takes place before clearance is obtained. Please see question no. 6. However, while authorities have not provided an official statement in support of this, we think that it is possible to put in place 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.

9. Is there a deadline for filing a notifiable transaction and what is the timetable thereafter for review by the Trade Competition Commission?

Pre-merger filing

In order to obtain approval to carry out a transaction that falls within the scope of the merger control regime, the business operator will be required to submit an application in accordance with the TCC's form as well as supporting documents. See further details in question no. 10.

The TCC must consider an application for a merger within 90 days. In the case where a decision cannot reasonably be made within 90 days, the TCC may extend this for up to 15 days.

Post-merger notification

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

10. Who is responsible for filing a notifiable transaction (noting also whether there is a specific form/document used and an applicable filing fee)?

Pre-merger filing

1. Responsible parties

- 1.1 Amalgamation: the merging entities shall be jointly responsible for applying for pre-merger filing approval from the TCC before the completion date of the transaction.

- 1.2 Asset acquisition: an acquirer of assets shall be responsible for applying for pre-merger filing approval from the TCC before the registration date for a transfer of assets.
 - 1.3 Share acquisition: an acquirer of shares shall be responsible for applying for pre-merger filing approval from the TCC before the transfer date for a transfer of shares.
2. Application form and supporting documents
- (a) application form;
 - (b) merger plan and implementation timeline;
 - (c) 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;
 - (d) studies and analyses in respect of the merger transaction which shall at a minimum consist of:
 - (i) analysis on shareholding structure, controlling power of merging parties for the purpose of ascertaining the relationship in policy or directive power before and after the merger;
 - (ii) analysis on 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 consist of:
 - a. market structure before and after the merger transaction;
 - b. market scope;
 - c. market share of each of the merging parties before and after the merger transaction;
 - d. sales turnover of each of the merging parties before and after the merger transaction;
 - e. effect of the merger transaction in respect of the following items,
 - (aa) market concentration,
 - (bb) 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.
 - (cc) non-coordinated effect, meaning the effect as a result of each of the merged entity's gaining profit by increasing prices or a reduction in the quality of the product attributable to a reduction of competition,
 - (dd) coordinated effect, meaning the effect as a result of the business operators' tendency to jointly increase prices after the merger transaction,
 - (ee) effect on the economy or consumers as a whole,
 - (ff) other effects on competition in a market (if any),
 - f. efficiencies in a market after the merger transaction; and
 - (e) studies and analyses pursuant to Section 52 of the TCA as follows:

- (i) valid business-related necessity and benefit in promotion of business,
- (ii) damage to the economy, and
- (iii) consumer benefits as a whole.

3. Filing fee

THB 250,000 per transaction.

Post-merger notification

1. Responsible parties

- 1.1 Amalgamation: a new entity shall be responsible for post-merger notification to the TCC within seven days after the completion date of the transaction.
- 1.2 Asset acquisition: an acquirer of assets shall be responsible for post-merger notification to the TCC within seven days after the registration date for transfer of the assets.
- 1.3 Share acquisition: an acquirer of shares shall be responsible for post-merger notification to the TCC within seven days after the transfer date for transfer of the shares.

2. Notification form and supporting documents

- (a) notification form;
- (b) copy of documents submitted to the Ministry of Commerce, in the case of amalgamation;
- (c) copy of documents submitted to the Securities and Exchange Commission in the case of share acquisition by tender offer;
- (d) copy of definitive documents relating to share/asset acquisition e.g. share purchase agreement and appraisal report;
- (e) copy of minutes of executive committee's 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;
- (f) other particulars in respect of the merger transaction;
- (g) annual meeting reports and audited financial statements for the preceding year of each of the merging parties and for the previous three years;
- (h) copy of list of shareholders of each of the merging parties before and after the merger transaction; and
- (i) power of attorney (if any).

3. Notification fee

None

11. Please confirm/comment on the penalties for failing to notify or suspend transactions pending clearance and the Trade Competition Commission's record/stance in terms of pursuing parties for failing to notify relevant transactions (commenting, if relevant, on any statute of limitations regarding sanctions for infringements of the applicable law).

Pre-merger filing

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

1. administrative sanction—a fine of not exceeding 0.5% of the total merger transaction, and
2. civil penalty—any person who incurs damages from the violation of pre-merger filing by a business operator may claim for such damages.

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.

Post-merger notification

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 THB 200,000 and a daily fine not exceeding THB 10,000 throughout the period of the violation.

Remarks: In the case where a company is subject to an administrative fine as set out above, a director, manager or any person responsible for the operation of the company shall also be subject to the same provided that such person has the duty to instruct the company to comply with pre-merger filing requirement or post-merger notification but fails to do so resulting in the company violating the merger control provisions under the TCA.

Previous cases

As the merger control regulations were only issued and implemented at the end of 2018, there are no precedent cases.

12. Are there any other 'stakeholders' other than the Trade Competition Commission (for example, any 'sector regulators' who might have concurrent powers)?

1. The National Broadcasting and Telecommunications Commission regulates and supervises mergers among companies holding licenses in the telecommunications and broadcasting and television sector;
2. The Energy Regulatory Commission regulates and supervises mergers among companies holding licenses in the energy sector;
3. The Bank of Thailand regulates and supervises mergers among financial institutions; and
4. The Office of Insurance Commission regulates and supervises mergers among insurance companies.