

Merger Control 2020

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Lexology Getting The Deal Through is delighted to publish the twenty-fourth edition of *Merger Control*, which is available in print and online at www.lexology.com/gtdt.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the consulting editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his and the firm's continued assistance with this volume.



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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

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

Merger control in Thailand is primarily governed by the Trade Competition Act BE 2560 (2017) (TCA) and the relevant subordinate legislation is overseen by the Trade and Competition Commission (TCC). Section 51 of the TCA divides regulated mergers into two categories: those that require prior approval (pre-merger filing) and those that require subsequent notification (post-merger notification). With effect from 29 December 2018, the 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 dominant market power'. On the other hand, a post-merger notification will be required if the merger may result in the 'substantial lessening of competition in a market'.

The TCC is supported administratively by the Office of the Trade and Competition Commission (OTCC), whose powers and duties include undertaking administrative works of the TCC and sub-commissions, monitoring violations of the TCA, receiving complaints in respect of alleged violations of the TCA and making recommendations to the TCC, as the enforcement agency. In case of disputes over alleged violations of offences under the TCA, civil claims for damages, or appeals of administrative orders issued in connection thereof, the Intellectual Property and International Trade Court or the Administrative Court has jurisdiction.

Scope of legislation

2 | What kinds of mergers are caught?

Overview/scope

The TCA has a broad and general application and, with certain exclusions and exceptions outlined below, applies to any 'merger' by a 'business operator' that may result in (i) the 'substantial lessening of competition in a market'; or (ii) the creation of a 'monopoly' or a 'business operator with dominant market power'. However, activities of the following types of persons are excluded from the scope of application of the TCA:

- central, provincial or local government agencies;
- state enterprises, public organisations and other governmental organisations (but only for actions specified by law or undertaken pursuant to cabinet resolutions necessary for the benefit of maintaining public order, public benefit or the procurement of utilities);
- farmers' groups or cooperatives or societies recognised by law that have the objective of undertaking business for the benefit of the farming occupation; and
- business sectors where competition is regulated by industry-specific legislation.

Business operator or operators who are involved in a merger that triggers the pre-merger filing or post-merger notification requirement (see

further details in question 5) must either obtain approval from the TCC or notify the TCC, as the case may be.

Definition of mergers

The definition of a 'merger' under the TCA means any of the following:

- 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, which will result in one of the businesses being maintained and the other extinguished, or a new business being formed (statutory mergers or amalgamations);
- the purchase of all or part of the assets of another business 'for the purpose of controlling business administration policy, administration or management' (asset acquisitions); and
- the purchase of all or part of the shares of another business 'for the purpose of controlling business administration policy, administration or management' (share acquisitions).

For the definition of 'for the purpose of controlling business administration policy, administration or management', see question 4.

Definition of business operators

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'.

Because the TCA aims to regulate transactions that affect Thailand, the OTCC's interpretation is that a merger by a business operator shall be caught under the TCA if that business operator or operators engage in business activities or commerce in Thailand. Accordingly, legal entities incorporated outside Thailand will also be subject to the application of the TCA if the legal entity has a 'business presence' in Thailand (ie, operates business in Thailand, through a branch office, a representative office, or a subsidiary in Thailand that is a 'single economic entity' with the legal entity in question).

For the purpose of verifying the business presence of a business operator or operators conducting a merger, in case of amalgamation, both merging parties must be a company incorporated under the laws of Thailand. For an acquisition of assets or acquisition of shares, the acquirer and the target must have a business presence in Thailand.

Exceptions

The only exceptions for section 51 are mergers implemented for the purpose of business restructuring and reorganisation between a business operator and its affiliates that are a 'single economic entity' under the TCA. Single economic entity is defined as two or more business operators that have a relationship in policy or directive power, where:

- 'relationship in policy' means a relationship between two or more business operators 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; or

- 'directive power' means the power to have control under any of the following situations: (i) holding shares with voting rights in a business operator of more than 50 per cent of the total voting rights in such business operator; (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 that is at the ultimate level of command.

3 | What types of joint ventures are caught?

There are no separate rules for joint ventures and the OTCC's interpretation is that the establishment of a new joint venture company does not fall under the definition of a 'merger' under the TCA and is therefore not subject to the TCA. However, where the creation of a joint venture company involves an amalgamation, asset or share acquisition constituting a 'merger', this will be subject to the application of the TCA.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

In respect of a share or asset acquisition transaction, it will only constitute a 'merger' under the TCA if such acquisition is for 'the purpose of controlling business management policy, administration or management'. The TCC prescribes that a share or asset acquisition is for 'the purpose of controlling business management policy, administration or management' if:

- in the case of asset acquisition: the value of the assets acquired from the other business operator exceeds 50 per cent of the total value of assets used in the ordinary course of business of the selling business operator; or
- in the case of share acquisition:
 - a listed public company: securities constituting at least 25 per cent of the total voting rights (at close of any day) of the acquired entity are acquired; or
 - a private and non-listed public company: shares constituting more than 50 per cent of the total voting rights (at close of any day) of the acquired entity are acquired.

Acquisitions by affiliated persons

In the case of a share acquisition by a natural person, any acquisition of securities or shares by his or her spouse shall be deemed as securities or shares acquired by the acquirer.

In the case of a share acquisition by a juristic person, any acquisition of securities or shares by other juristic persons or natural persons who hold more than 30 per cent of voting rights of the acquirer and is also a single economic entity of the acquirer shall be deemed as securities or shares acquired by the acquirer.

An acquisition of assets or shares that does not satisfy the above criteria will not constitute a merger under the TCA.

Thresholds, triggers and approvals

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

The threshold for pre-merger filing is a merger that may result in the creation of either:

- 'a monopoly', defined as a situation where there is only one business operator in any market possessing absolute power to determine of price and supply of products or service freely; and such business operator has a sales turnover of at least 1 billion baht; or
- 'a business operator with dominant market power', defined as (i) any business operator having a market share of 50 per cent or more and having a sales turnover of at least 1 billion baht, in the previous year; or (ii) any of the top three business operators that together have an aggregate market share of 75 per cent or more and a sales turnover of at least 1 billion baht, in the previous year (excluding any business operator having a market share in the previous year of lower than 10 per cent or having a sales turnover in the previous year of lower than 1 billion baht).

Post-merger notification

The threshold for post-merger notification is a merger in which the sales turnover of any one business operator, or of all relevant business operators undertaking a merger in any market, amounts to 1 billion baht or more and that does not result in a 'monopoly' or result in a 'business operator with dominant market power'.

There are no circumstances where the pre-merger filing or post-merger notification, as the case may be, is required if the relevant thresholds are not met.

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

In case of a regulated merger, the pre-merger filing and post-merger notification are mandatory. The only exceptions to the mandatory filing are (i) mergers for the purpose of business restructuring and reorganisation between a business operator and its affiliates that are a single economic entity; or (ii) mergers that do not fall within the scope of application of the TCA.

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

Based on the OTCC's interpretation, foreign-to-foreign transactions may be subject to the TCA if the relevant business operators have a business presence in Thailand (see question 2).

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

The Foreign Business Act BE 2542 (1999) (FBA) is the principal legislation that regulates foreign investment in Thailand and specifies that 'foreigners' may not engage in certain types of business without the relevant approval from the competent Thai authority. Therefore, foreign investors will also need to comply with the provisions of the FBA, as well as those of the TCA.

In addition, for business sectors where competition is regulated by industry-specific legislation and industry-specific regulators, such industry-specific legislation will apply instead of the TCA. Currently, the following industries have specific industry legislation relating to

competition: broadcasting and televisions, telecommunications, energy, insurance and financial institutions.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 | What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Pre-merger filing

The relevant business operator or operators must submit a pre-merger filing before the closing date (ie, the effective date of the amalgamation, asset acquisition or share acquisition) and the merger cannot be consummated until the approval from the TCC has been obtained. If a business operator is required to submit a pre-merger filing and fails to do so, the business operator may be subject to:

- administrative sanctions: a fine of not exceeding 0.5 per cent of the total value of the transaction may be imposed by the TCC; or
- civil penalties: any person who incurs loss or damage from the violation of pre-merger filing requirements by a business operator may claim civil damages against the business operator.

In addition, the TCC may order the relevant business operator or operators to suspend, cease or vary the merger transaction that was conducted in violation of the pre-merger filing requirements. In cases where the business operator fails to comply with this order, it may be subject to an additional administrative fine of not exceeding 6 million baht and a daily fine of not exceeding 300,000 baht throughout the period of violation.

Post-merger notification

The relevant business operator must submit the post-merger notification within seven days of the closing date (ie, the effective date of the amalgamation, asset acquisition or share acquisition). If a business operator is required to submit a post-merger notification and fails to do so, the business operator may be subject to an administrative sanction of a fine of not exceeding 200,000 baht and a daily fine of not exceeding 10,000 baht throughout the period of the violation.

There is no enforcement practice for non-compliance with a pre-merger filing or post-merger notification within the stipulated deadline, as merger control has only recently been implemented in Thailand.

10 | Which parties are responsible for filing and are filing fees required?

Pre-merger filing

- Amalgamation: the entities that will amalgamate shall be jointly responsible for submission of the pre-merger filing.
- Asset acquisition: the acquirer of assets shall be responsible for submission of the pre-merger filing.
- Share acquisition: the acquirer of the shares shall be responsible for submission of the pre-merger filing.

The filing fee is 250,000 baht per transaction.

Post-merger notification

- Amalgamation: the newly created entity shall be responsible for submission of the post-merger notification.
- Asset acquisition: the acquirer of assets shall be responsible for submission of the post-merger notification.
- Share acquisition: the acquirer of shares shall be responsible for submission of the post-merger notification.

There is no fee for submission of the post-merger notification.

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

There is no concept of waiting periods under the TCA where the parties can close merger transaction upon the lapse of the specified period. In the event that a pre-merger filing is required, the merger transaction may not be consummated until the approval from the TCC has been obtained. The TCA stipulates that the TCC must complete consideration of a pre-merger filing within 90 days of submission. If the TCC cannot reasonably make a decision within this 90-day period, the TCC may extend the consideration period for an additional 15 days. In granting approval, the TCC may set a specific time period or other conditions with which the business operator or operators must comply.

Pre-clearance closing

12 | What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

See question 9. As the merger control provisions of the TCA only came into effect on 29 December 2018, currently there have been no cases in which sanctions have been imposed by the TCC.

13 | Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

As the merger control provisions of the TCA only came into effect on 29 December 2018, currently there have been no cases in which sanctions have been imposed by the TCC.

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

In the event that a pre-merger filing is required, there are currently no mechanisms in place that would allow for closing prior to approval by the TCC.

Public takeovers

15 | Are there any special merger control rules applicable to public takeover bids?

In addition to the TCA, an acquisition of shares of a company listed on the Stock Exchange of Thailand will be subject to the Securities and Exchange Act BE 2535 (1992), as amended; in particular, with respect to the public disclosure and tender offers.

Documentation

16 | What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The TCC has prescribed a list of documents and information it requires for consideration of a pre-merger filing and post-closing notification.

Pre-merger filing

- Application form (prescribed by the TCC) requiring, inter alia, general information on the relevant business operators and their businesses.
- Merger plan and implementation timeline.
- Details of the merging parties and the target company that shall, as a minimum, consist of the shareholding structure, voting rights, sales turnover and market share.

- Studies and analysis in respect of the merger transaction that shall, as a minimum, consist of:
 - analysis of shareholding structure, controlling power of merging parties for the purpose of ascertaining the relationship in policy or directive power before and after the merger;
 - analysis of the market for products or services relevant to the merging business operators for the purpose of ascertaining the effect as a result of the merger, that shall as a minimum consist of:
 - market structure before and after the merger transaction;
 - scope of market;
 - market share of each of the merging parties before and after the merger transaction;
 - sales turnover of each of the merging parties before and after the merger transaction;
 - effect of the merger transaction in respect of the following items:
 - market concentration;
 - market entry and expansion, taking into consideration the relevant factors such as laws and regulations of the government, logistic costs, access to patent rights of existing technologies, or access to raw materials or other resources necessary for production, etc;
 - non-coordinated effects, meaning the effect as a result of each of the merged entity's profit gained by increasing prices or a reduction in the quality of the products attributable to a reduction of competition;
 - coordinated effects, meaning the effect as a result of the business operators' tendency to jointly increase price after the merger transaction;
 - effect on the economy or consumers as a whole;
 - other effects on competition in a market (if any); and
 - efficiencies in a market after the merger transaction; and
- Studies and analysis in respect of valid business-related necessity and benefits in the promotion of business, damage to the economy, and consumers' benefits as a whole.

Post-merger notification

- Notification form (prescribed by the TCC) requiring, inter alia, general information on the relevant business operators and their businesses.
- Copy of documents submitted to the Ministry of Commerce, in case of amalgamation.
- Copy of documents submitted to the Securities and Exchange Commission (if applicable).
- Copy of definitive documents evidencing the share or asset acquisition (eg, share purchase agreement and appraisal reports).
- Copy of the minutes of the executive committee's meeting or shareholders' meeting in which the merger transaction is approved of each of the merging parties or documents evidencing each of the merging parties' intention to enter into the merger transaction.
- Other details in respect of the merger transaction.
- Copy of the minutes of the annual general meeting and audited financial statements for the preceding year of each of the merging parties for the previous three years.
- Copy of the list of shareholders of each of the merging parties before and after the merger transaction.
- Power of attorney (if any).

Business operators who intentionally provide false or misleading information to the TCC may be subject to criminal penalty under the Criminal Code for submission of false information to government officials. In addition, the approval for pre-merger filing can be revoked by the TCC if

it becomes aware of such false or misleading information. Furthermore, any person whose right or interest is adversely affected by the approval of the TCC may file a case to the Administrative Court for revocation of such approval.

All information and documents submitted to the TCC must be in hard copy in Thai language (or translated into Thai).

Investigation phases and timetable

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

No pre-consultations are required before submission of an application for a pre-merger filing and the TCA does not specify a process for pre-consultations. However, business operators may request an unofficial meeting with the OTCC to discuss the applicable merger control processes and the OTCC's initial views and assessment. However, the OTCC may not provide a definitive assessment and the opinion of the OTCC is not binding and subject to change by the TCC.

Generally, the relevant business operators must prepare and submit all of the required information (outlined above) to the OTCC. After acceptance of the pre-merger filing, the TCC shall undertake the following steps:

- the Secretary-General proposes the application for approval of the merger to the Chairman of the TCC within seven days from the date of receipt of the application for approval for further consideration by the TCC;
- the TCC may require additional information from a business operator or operators conducting a merger by issuing a letter requesting information or inviting the applicant to offer clarification; and
- the TCC may serve notices of invitation to relevant business operators or third parties to offer opinions and information in support of the consideration.

18 | What is the statutory timetable for clearance? Can it be speeded up?

The TCC must complete its consideration of a pre-merger filing within 90 days of submission. When a decision cannot reasonably be made within 90 days, the TCC may extend the period of consideration by up to 15 additional days.

There is no provision in the TCA that allows the pre-merger approval process to be expedited.

SUBSTANTIVE ASSESSMENT

Substantive test

19 | What is the substantive test for clearance?

The substantive test for clearance is that the merger:

- is reasonably necessary for the business;
- is beneficial to business promotion;
- poses no serious harm to the Thai economy; and
- has no material effect on the due interest of consumers in general.

There is currently no precedent on special circumstances or other exceptions.

20 | Is there a special substantive test for joint ventures?

There are no separate rules for joint ventures.

Theories of harm

- 21 | What are the 'theories of harm' that the authorities will investigate?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on what theories of harm the TCC will apply or consider. However, it is expected that, in addition to the substantive test in the answer to question 19, the TCC will consider factors such as the potential for coordinated effects, non-coordinated effects, barriers to market entry, expansion and foreclosure to newcomers.

Non-competition issues

- 22 | To what extent are non-competition issues relevant in the review process?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on this issue. See the substantive test for clearance in the answer to question 19.

Economic efficiencies

- 23 | To what extent does the authority take into account economic efficiencies in the review process?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on this issue. However, it is expected that economic efficiency will be given prominent consideration in determining whether a merger will satisfy the substantive test outlined in question 19.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

- 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 subordinate legislation or orders of the TCC, in addition to the imposition of administrative fines, the TCC is empowered to suspend, cease, rectify or vary the merger. Additionally, in approving a merger, the TCC may set a time period or any condition for compliance.

Remedies and conditions

- 25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

It is possible to remedy the competition issues and in granting approval for a merger the TCC may specify the time period or any condition for compliance. As the merger control provisions of the TCA only came into effect on 29 December 2018, there is no precedent or case study on this issue.

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

There is no specific provision, notification, guideline or precedent on this matter. 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?

There is currently no track record as the merger control provisions only came into force on 29 December 2018.

Ancillary restrictions

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

There is currently no specific provision, notification or guideline on this matter.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

- 29 | Are customers and competitors involved in the review process and what rights do complainants have?

In considering a pre-merger filing, 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 damage because of a violation of the TCA can initiate an action for compensation from the offender. Therefore, any persons (including customers and competitors) who suffer damage as a result of such violation are entitled to file complaints.

Furthermore, the TCA specifically allows the Consumer Protection Board, or organisation or foundation recognised by the Consumer Protection Board 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 relevant court within one year from the date that the injured party first knew or should have known of the violation.

Publicity and confidentiality

- 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.

Confidential information is protected under section 76 of the TCA, which states that, '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 Secrets Act BE 2544 (2001), the offender may be subject to a penalty under the Trade Secrets Act, and required to pay compensation for misconduct and injury suffered by the injured party.

Cross-border regulatory cooperation

- 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.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

In respect of the merger control provisions, business operators may appeal two types of orders of the TCC: (i) orders to suspend, cease, rectify or vary a merger that has not obtained approval pursuant to section 60 of the TCA; and (ii) orders to grant (with conditions) or deny approval of a merger pursuant to section 52 of the TCA. In case of disagreement with a decision or order of the TCC, a business operator may file a case to the Administrative Court. Any appeal of a decision of the Administrative Court may be submitted to the Supreme Administrative Court and the determination of the Supreme Administrative Court will be final.

Time frame

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 60 days following receipt of the TCC's decision.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 | What is the recent enforcement record and what are the current enforcement concerns of the authorities?

As the merger control provisions of the TCA only came into effect on 29 December 2018, there have been no enforcement actions since the merger control provisions have come into effect.

Reform proposals

35 | Are there current proposals to change the legislation?

By the end of 2018, several subordinate regulations under the TCA were issued by the TCC to enforce the provisions with respect to prohibited behaviours which may be harmful to competition, including the rules, procedure and application process for merger control. Since the implementation of the merger control regime, the interpretation by the OTCC of certain criteria and requirements for pre-merger filing and post-merger notification is still unclear, which causes difficulties in practical handling. No written guideline or direction with respect to the merger control clearance process has been published by the TCC.

The TCC has clarified during a public event that proposed amendments to the current subordinate regulations are under consideration. To date, no official legislative proposals have been issued by the TCC.



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