Bangkok Post The world's window on Thailand

CORPORATE COUNSELLOR

Trade laws prohibit anti-competitive practices

Published: 28/11/2014 at 06:00 AM
Newspaper section: Business

Competition law, which is also called antitrust law in the United States, trade practices law in Australia and Britain, or anti-monopoly law in Russia and China, may go by many names, but what most competition laws generally have in common are these three elements:

Prohibition of anti-competitive practices, such as price gouging or predatory pricing, by which a company could surreptitiously attain a position of dominance in a market, or deny companies that are already dominating a market, or conduct abusive behaviour against competitors and consumers.

Prohibition of agreements or practices that repress free trade and competition between companies, as is usually the case with so-called cartels, which are agreements between competitors to fix prices or to deny a new competitor entry into a market.

Supervision of the mergers and acquisitions of companies, including some joint ventures.

In today's economy, it is not uncommon for two or more companies to merge in order to lower their costs by removing duplicate departments or operations (economies of scale); to increase the size of their raw material orders (thereby obtaining bulk-buying discounts); and to increase their market share.

Apart from the commercial considerations of potential financial and structural benefits influencing a decision to merge, management must also take into account the so-called merger control rules of anti-competition law.

Any merger or acquisition, which usually means one company buying out another company's shares, always involves the concentration of economic power in the hands of fewer entities than before.

Legal control of mergers and acquisitions of large corporations, including joint ventures, is therefore necessary to protect consumers from companies obtaining too much market power, which in turn could enable them to raise their prices to an unreasonable level.

The difference between a merger control regime and rules against anti-competitive practices is that the former works proactively. It requires the merging entities or joint ventures to apply for permission with the relevant competition authorities of the affected jurisdictions before a merger takes place.

If the competition authority finds that such a merger would lead to a market-dominant position and significantly impede or substantially lessen effective competition, it can either demand remedies, such as divesting part of the merged business allowing access to facilities, or it can prohibit the merger altogether.

Merger regulation began in the United States under the Clayton Antitrust Act of 1914, in the European Union with Merger Regulation 139/2004 (known as the ECMR) in 2004 (although different member states had their own national merger control laws long before that), and in Japan with Law No.54, the Anti-Monopoly Act in 1947.

The duty to notify the competition authority in an affected jurisdiction about an intended merger is triggered at specific threshold amounts.

In Japan, the Japan Fair Trade Commission must be notified of an intended merger if the aggregate domestic sales in Japan of all corporations within the same combined business group of one of the merging companies exceed ¥20 billion (about 5.58 billion baht), and if the aggregate domestic sales of all corporations within the same combined business group of one of the other merging companies exceeds ¥5 billion.

In the European Union, the European Commission must be notified if all the entities related to the intended merger have a combined worldwide turnover of more than €2.5 billion (102 billion baht); each of at least two of the entities concerned has EU-wide turnover exceeding €100 million; and each of at least two of the entities has national turnover of more than €25 million, unless each entity achieved more than two-thirds of its EU-wide turnover in one and the same member state.

Thailand has also introduced a merger control regulation in Section 26 of its Trade Competition Act of 1999. It states: "A business operator shall not carry out a business merger which may result in monopoly or unfair competition as prescribed and published in the Government Gazette by the Trade Competition Commission unless the commission's permission is obtained. The publication by the commission under paragraph one shall specify the minimum amount or number of market share, sales volume, capital, shares or assets in respect of which the merger of business is governed thereby."

Unfortunately, to this day, the commission has not specified these threshold amounts. As a result, the country has no merger control regime that is enforced in practice.

It should be noted, however, that the commission did approve a draft rule for merger thresholds in June 2013. It remains to be seen whether these thresholds will be adopted by 2015, in time for the Asean Economic Community.

This article was prepared by Ahmet Yesilkaya, a consultant in the corporate and commercial department at Tilleke & Gibbins. Please send comments to Andrew Stoutley at andrew.s@tilleke.com