



<< Left
Nutavit Sirikan
Attorney-at-Law
nutavit.s@tilleke.com

<< Right
Athistha Chitranukroh
Partner
athistha.c@tilleke.com

Thailand's TCC Clarifies Merger Control

On December 28, 2018, the Trade Competition Commission (TCC) published notifications related to merger control under Section 51 of the Trade Competition Act B.E. 2560 (2017) (TCA) in the *Government Gazette*. They came into effect on the following day, December 29, 2018.

Among other things, the notifications provide much-needed definitions for key terms relating to merger control, including:

1. **Monopoly**—a sole business operator in a certain market, with a turnover of THB 1 billion or more, that has the power to independently determine the prices and quantity of their products or services.
2. **Market dominance**—the thresholds remain materially similar to the previous corresponding notification issued under the Trade Competition Act BE 2542 (1999), which are as follows:
 - a. Any business operator in a certain market for a product or service, which acquires a market share of 50 percent or more, and which has a turnover of THB 1 billion or more in the previous year; or
 - b. The first three business operators in a certain market for a product or service, which acquire a total combined market share of 75 percent or more in the previous year, and each of which has a total turnover of THB 1 billion or more, with the exception of a business operator whose market share in the past year was below 10 percent.
3. **Merger transaction that causes a substantial lessening of competition in a certain market**—a merger transaction in which the total turnover of any, or all, of the business operators which are to be merged in a certain market is THB 1 billion or more, but which does not result in a monopoly, or in a business operator having a dominant position.
4. **Date of the merger**—the date on which one of the parties to a merger ceases to exist, or on which a new business is formed; the date on which the transfer of ownership is registered; or the date on which shares are transferred as stipulated in Section 51 paragraph four (1), (2), or (3) of the TCA.
5. **Merger**—the notification sets forth the following criteria for share or asset acquisitions that result in a sufficient change in the control of policy, business administration, direction, or management to be deemed “mergers” under Section 51 of the TCA:
 - Acquisition of another business's assets exceeding 50 percent of the total value of assets used in that business's normal operations during the previous fiscal year.
 - Acquisition of shares, warrants, or other securities which may be converted to right shares resulting in more than 25 percent of the total voting rights belonging to another business governed under securities and exchange law.
 - Acquisition of shares with more than 50 percent of the total voting rights of other business operators.

The notification also adopts some key concepts that had previously been lacking, including “acting in concert” and “concert parties” for share acquisitions. Acquisitions by spouses must therefore now be considered collectively, as must acquisitions by holders of more than 30 percent of total voting rights and business operators related to each other in respect of policy or commanding power.

A similar key concept recognized in the notifications is that of a “single economic unit,” which is common in economics. This concept allows the market share and the turnover of several businesses or entities that have a relationship in terms of policies or control to be considered for the purpose of calculating their collective market share and the turnover. In turn this can be used to determine whether that unit has a dominant position or causes a substantial lessening of competition.

In addition to defining key terminology, the notifications also set out the rules, criteria, and conditions for pre-merger approval and post-merger notification.

Pre-Merger Approval

Parties entering into a merger that may result in a monopoly, or in a business operator having market dominance, must submit an application and required documents to the Office of Trade Competition Commission (OTCC) for prior approval from the TCC. Accompanying documents may include the merger plan, timeline, details of the parties, study report detailing the economic impact of the transaction, other analysis of the effect of the proposed merger, etc. The TCC may summon the applicant or other parties to clarify the details of the proposed merger transaction, provide further opinions, or provide other relevant information.

The OTCC will present the application to the TCC within seven days after it is submitted. The TCC must consider the documents and render a decision within 90 days of receipt. The deadline can be extended by up to 15 days. The OTCC must then report the TCC's decision to the applicant within seven days from the date of the TCC's decision, and the applicant may appeal the TCC's decision to the Administrative Court within 60 days of receipt of the OTCC's notification.

The regulation provides that pre-merger approval will not be required for mergers that have been approved by a meeting of the shareholders or the management, or for those in which the merger agreement was executed before December 29, 2018.

Post-Merger Notification

Any merger that may result in a substantial lessening of competition must be reported to the OTCC by submitting a form, determined by the Secretary-General, in person or by registered mail, within seven days of the completion of the merger. In addition, the notifications require the submission of a number of supporting documents, including: copies of the application and all documents submitted to the Department of Business Development and the Securities and Exchange Commission in support of the merger transaction; share and asset purchase agreements and related documents; and minutes of the meeting of shareholders or management resolving the merger.

The notices bring some important clarity to a merger control regime that many have been awaiting eagerly for some time, and are likely to be a significant benefit to the business environment in Thailand. That said, the requirements impose substantial obligations on those entering into commercial transactions, which may cause a substantially higher level of market concentration. Companies planning to enter into such transactions should ensure that they are fully compliant with the requirements before they proceed. 🐼