

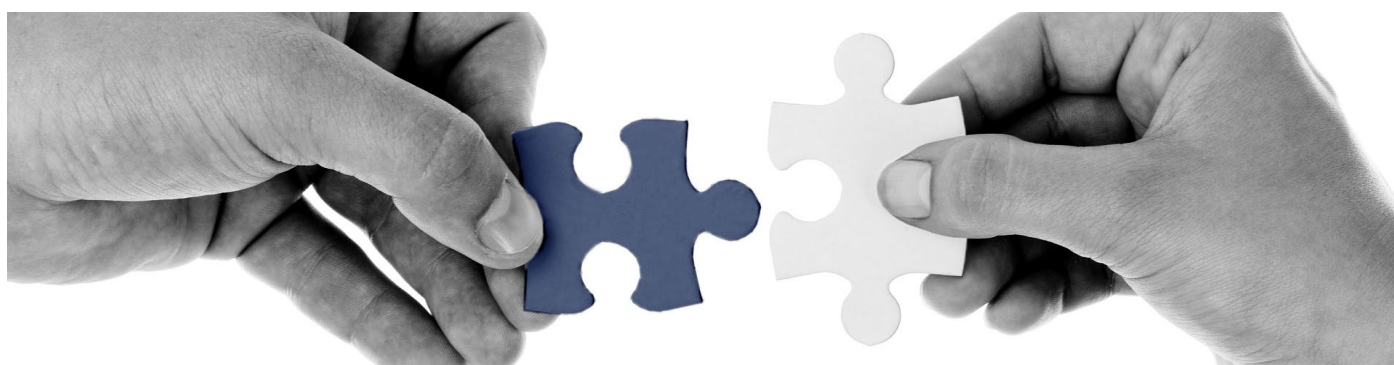
SPI Newsletter

KEY PLAYERS BE ALERT: THE NEW MERGER RULES ARE HERE

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Pre-Merger Approval and Post-Merger Notification

Following the enactment of the new Trade Competition Act B.E. 2560 (2017) (“**TCA**”) on 5 October 2017, the Trade Competition Commission (“**TCC**”) has issued several important notifications regarding merger control under section 51 of the TCA (“**Merger Rules**”). The Merger Rules cover a number of important matters, in particular setting out the criteria for mergers that will be governed under the TCA, and prescribing the criteria and conditions for pre-merger approval and post-merger notification. This is the first time in Thailand’s history where subordinate legislation has been introduced to govern mergers (there were never any similar rules issued under the previous Trade Competition Act B.E. 2542 (1999)).



Which mergers are governed by the TCA?

Merger and Amalgamation, Acquisition of Assets, and Acquisition of Shares

Mergers governed under the TCA include:

- (i) 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 the merger results in one business being maintained while the other is dissolved or a new business being formed (“**Merger and Amalgamation**”);
- (ii) an acquisition of the entire or partial assets of the acquired business for the purpose of controlling the policies on business administration, direction, or management of the acquired business according to criteria set out by the TCC (“**Acquisition of Assets**”); and
- (iii) purchase of the entire or partial shares of the acquired business (direct or indirect) for the purpose of controlling the policies of administration, direction, or management of the acquired business according to criteria set out by the TCC (“**Acquisition of Shares**”).

The Notification Re Criteria in Considering the Acquisition of Assets or Shares to control Policy on Business Administration, Administration, or Management which constitutes Mergers B.E. 2561 (2018) (“**TCC Notification**”) which came into effect on 29 December 2018, prescribes the criteria for determining an Acquisition of Assets and an Acquisition of Shares which constitute a merger subject to control measures under the TCA (“**Merger**”). We set out the relevant criteria under the TCC Notification:

Acquisition of Assets

- The acquisition of assets used in an ordinary business operation of another business operator which accounts for more than 50% of the total value of assets used in an ordinary business operation of such business operator within the preceding financial year of such business operator.

Acquisition of Shares

- The direct or indirect acquisition of shares that results in the holding of more than 50% of the total voting rights in another business operator; and
- The direct or indirect acquisition of shares, warrants, or other convertible securities that results in the holding of 25% or more of the total voting rights in another business operator who is regulated by the Securities and Exchange Act.



To calculate the prescribed threshold in the case of an Acquisition of Shares, the number of shares acquired by related persons of the acquirer (e.g. spouse, or an individual or juristic person holding more than 30% voting shares in the acquirer, or a business operator having a relationship in terms of policies or control with the acquirer) must also be counted.

Does the merger require pre-approval?

Monopoly and Market Dominance

If the Merger meets one of the above thresholds and there is a possibility that the Merger may result in ‘a monopoly’ or ‘a business operator with market dominance’, pre-merger approval must be obtained from the TCC.

Under the TCC Notification RE Criteria, Procedures, and Conditions for Merger Approval B.E. 2561 (2018) (“**Pre-Merger Approval Notification**”), ‘monopoly’ is defined as a situation where there is only one business operator in a market who has the power to freely determine the prices and quantity of its goods or services and having a total turnover of THB 1 billion or more.

‘A business operator with market dominance’ is defined under the TCC Notification RE Criteria in Considering the Market Dominant Business Operator B.E. 2561 (2018) as:

- A business operator in any market who has a market share of 50% or more and a total turnover of THB 1 billion or more in the preceding year; or
- Each of the top three business operators in any market who have a combined market share of 75% or more, and who each have a total turnover of THB 1 billion or more in the preceding year, with the exclusion of any business operator who has less than 10% market share in the preceding year.

When calculating the market share and the total turnover in any market of a business operator, the market share and the total turnover in any market of business operators who have relationships with each other in terms of policies or management power must also be counted, and it must be regarded that each business operator who has such relevant market share is a business operator with market dominance.

However, there is a transitional provision in the Pre-Merger Approval Notification which provides that any Merger approved by the shareholders' meeting or the board of directors' meeting or the agreement in relation to the Merger which was signed prior to 29 December 2018 shall be exempted from the pre-approval requirement.



Does the merger require post-notification?

Merger – significantly reduces competition in the market

If the Merger meets one of the above thresholds, and there is a possibility that 'the Merger may significantly reduce competition in the market', notice of the result of the Merger must be given to the TCC within seven days from the date of Merger under the TCC Notification RE Criteria, Procedures, and Conditions for Post-Notification of Merger B.E. 2561 (2018) ("**Post Notification**").

Under the Post Notification, 'the Merger which may significantly reduce competition in the market' refers to any Merger resulting in any business operator or the business operator wishing to merge having a total turnover of THB 1 billion or more but does not create a monopoly or a business operator with market dominance. The Post Notification prescribes that when calculating the total turnover of the business operator, the total turnover in any market of business operators who have relationships with each other in term of policy or management power must also be counted.

It is important to note that if the Merger falls under the pre-approval requirement, the post-notification shall no longer be applicable to the Merger. However, unlike the Pre-Merger Approval Notification, there are no transitional provisions in the Post Notification.

Are any transactions exempted?

Merger within the same group

If the Merger is for the purpose of internal restructuring with a business operator who has a relationship 'in terms of policies' or 'management power', the Merger will be exempted from both pre-approval and post-notification requirements under the TCA.

The definition of such relationships are further detailed in the TCC Notification RE Criteria in Considering Business Operators who have Relationships with Each Other in terms of Policy or Management Powers B.E. 2561 (2018):

- 'Relationship in terms of policies' refers to when two or more business operators are under the common control of the same business operator in relation to guidelines, policies, management and business administration.

- 'Relationship in term of management power' refers to one of the following:
 - (a) holding shares with more than 50% voting rights in another business operator;
 - (b) having direct or indirect control over the majority votes at the shareholders' meeting of another business operator; and
 - (c) having direct or indirect control over the appointment or removal of at least half of the directors of another business operator.

The criteria in (a) and (b) are applied throughout the chain.

What should a business operator or service provider do?

Due to the infancy of the Merger Rules, we anticipate that there will be certain clarifications required to interpret and implement the Merger Rules.

Firm deal but contract not signed

The terms sheet, MOU or LOI, as well as the transaction agreement should contemplate the pre-merger approval from the TCC (if applicable) as a condition precedent and post-notification as a post-closing (if applicable).

Looking for a deal

The market share and the potential required pre-merger approval should be taken into consideration at the outset as part of the transaction which might impact on the timing of the transaction.

For more information or to enquire about the specific implications on your business, please contact us.

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