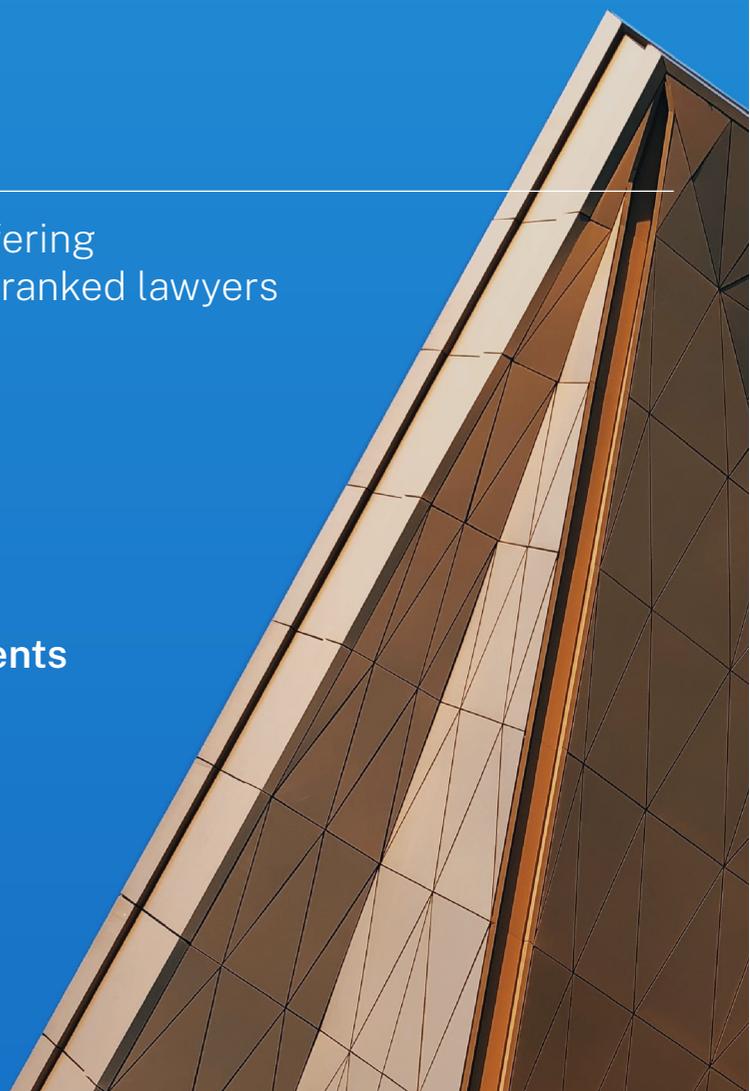

CHAMBERS GLOBAL PRACTICE GUIDES

Merger Control 2023

Definitive global law guides offering
comparative analysis from top-ranked lawyers

**Thailand: Law & Practice
and
Thailand: Trends & Developments**

Pranat Laohapairoj
Chandler MHM Limited



THAILAND



Law and Practice

Contributed by:
Pranat Laohapairoj
Chandler MHM Limited

Contents

1. Legislation and Enforcing Authorities p.5

- 1.1 Merger Control Legislation p.5
- 1.2 Legislation Relating to Particular Sectors p.5
- 1.3 Enforcement Authorities p.5

2. Jurisdiction p.5

- 2.1 Notification p.5
- 2.2 Failure to Notify p.5
- 2.3 Types of Transactions p.5
- 2.4 Definition of “Control” p.6
- 2.5 Jurisdictional Thresholds p.6
- 2.6 Calculations of Jurisdictional Thresholds p.6
- 2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds p.6
- 2.8 Foreign-to-Foreign Transactions p.6
- 2.9 Market Share Jurisdictional Threshold p.6
- 2.10 Joint Ventures p.6
- 2.11 Power of Authorities to Investigate a Transaction p.6
- 2.12 Requirement for Clearance Before Implementation p.7
- 2.13 Penalties for the Implementation of a Transaction Before Clearance p.7
- 2.14 Exceptions to Suspensive Effect p.7
- 2.15 Circumstances Where Implementation Before Clearance Is Permitted p.7

3. Procedure: Notification to Clearance p.7

- 3.1 Deadlines for Notification p.7
- 3.2 Type of Agreement Required Prior to Notification p.7
- 3.3 Filing Fees p.7
- 3.4 Parties Responsible for Filing p.7
- 3.5 Information Included in a Filing p.7
- 3.6 Penalties/Consequences of Incomplete Notification p.8
- 3.7 Penalties/Consequences of Inaccurate or Misleading Information p.8
- 3.8 Review Process p.8
- 3.9 Pre-notification Discussions With Authorities p.8
- 3.10 Requests for Information During the Review Process p.8
- 3.11 Accelerated Procedure p.8

4. Substance of the Review p.8

- 4.1 Substantive Test p.8
- 4.2 Markets Affected by a Transaction p.9
- 4.3 Reliance on Case Law p.9
- 4.4 Competition Concerns p.9
- 4.5 Economic Efficiencies p.9
- 4.6 Non-competition Issues p.9
- 4.7 Special Consideration for Joint Ventures p.9

5. Decision: Prohibitions and Remedies p.9

- 5.1 Authorities' Ability to Prohibit or Interfere With Transactions p.9
- 5.2 Parties' Ability to Negotiate Remedies p.9
- 5.3 Legal Standard p.9
- 5.4 Typical Remedies p.9
- 5.5 Negotiating Remedies With Authorities p.10
- 5.6 Conditions and Timing for Divestitures p.10
- 5.7 Issuance of Decisions p.10
- 5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions p.10

6. Ancillary Restraints and Related Transactions p.10

- 6.1 Clearance Decisions and Separate Notifications p.10

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation p.10

- 7.1 Third-Party Rights p.10
- 7.2 Contacting Third Parties p.10
- 7.3 Confidentiality p.10
- 7.4 Co-operation With Other Jurisdictions p.11

8. Appeals and Judicial Review p.11

- 8.1 Access to Appeal and Judicial Review p.11
- 8.2 Typical Timeline for Appeals p.11
- 8.3 Ability of Third Parties to Appeal Clearance Decisions p.11

9. Foreign Direct Investment/Subsidies Review p.11

- 9.1 Legislation and Filing Requirements p.11

10. Recent Developments p.11

- 10.1 Recent Changes or Impending Legislation p.11
- 10.2 Recent Enforcement Record p.11
- 10.3 Current Competition Concerns p.11

Chandler MHM Limited is one of the largest and oldest full-service law firms in Thailand, with over 100 lawyers covering all areas of law. It has a dedicated team with extensive experience advising on antitrust and trade competition matters. Its experience covers the full spectrum of the applicable regulations, including abuse of dominance, general misconduct, severe and non-severe cartels, merger control and offshore arrangements. The Chandler MHM team offers the full spectrum of professional services within the realm of antitrust and trade competition law,

including internal audits of business units to identify gaps, creation and revision of internal manuals for employees to prevent inadvertent breaches, merger control review and filing, internal training and workshops, general advice, revision of contracts for compliance while ensuring retention of commercial advantages and original desired positions, defence against allegations by counterparties and advice on investigations by the Office of Trade Competition Commission.

Author



Pranat Laohapairoj is a partner in Chandler MHM's antitrust practice and has been with the firm since 2012. He has worked with Thai and international clients on merger and

acquisitions, antitrust, corporate, anti-corruption, compliance and data protection. In respect to antitrust and trade competition, he advises on merger reviews and filings, internal

audits of businesses to identify gaps, contract review for compliance, training, internal misconduct investigations and defences against allegations by counterparties and the Office of Trade Competition Commission. He regularly works with local and offshore entities, and his experience spans multiple sectors. Pranat is admitted to the Bar of the State of New York.

Chandler MHM Limited

17th and 36th Floors
Sathorn Square Office Tower
98 North Sathorn
Silom
Bangrak
10500
Bangkok
Thailand

Tel: +662 009 5163
Fax: +662 009 5080
Email: Pranat.l@mhm-global.com
Web: www.Chandlermhm.com

CHANDLER MHM

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant merger control legislation is Section 51 of the Trade Competition Act B.E. 2560 (2017) (the “Act”), as well as supplementary announcements from the Trade Competition Commission of Thailand (TCCT), the overseeing regulator of the Act. The TCCT will often look to internationally recognised precedents from other major jurisdictions when adjudicating any issue.

1.2 Legislation Relating to Particular Sectors

There are a few specific provisions regarding merger control that exist within other industries, such as telecommunications and energy, that technically may be used in place of (but practically alongside with) the merger control provisions of the Act. Merger control for all other industries is governed by the Act. Other areas of trade competition (misconduct, cartels, etc) are also solely governed by the Act.

1.3 Enforcement Authorities

The TCCT is the primary regulator. The TCCT may ask other regulators for opinions during any process.

2. Jurisdiction

2.1 Notification

If the prospective merger transaction is deemed as reportable under the Act (whether as a pre-merger approval filing or a post-merger notification filing), it must be filed with the TCCT. The operators have the burden of deciding whether their transaction is reportable or not.

2.2 Failure to Notify

If a transaction requires approval and the parties breach this requirement, the parties can be fined up to 0.5% of the transaction value, and in theory the transaction may be unwound. If a transaction requires post-merger notification and the parties breach this requirement, the parties can be fined up to THB200,000 plus THB10,000 per day during the time such breach is ongoing. Directors and other natural persons responsible for such breach may also be fined alongside the juristic parties. Please note that the TCCT has almost always imposed fines on both the juristic parties and their responsible natural persons.

2.3 Types of Transactions

A merger under the Act is defined as corporate amalgamation, acquisition reaching or passing 25% of voting rights in any Thailand-listed company, acquisition of 50% of voting rights in any other type of company, or acquisition of 50% of operating assets.

Generally, if a merger will result in a new or enhanced dominant player, or an acquisition of a dominant player, the parties must undertake a pre-merger approval filing. However, if a merger will only result in a substantial reduction of competition, then the acquiring or resultant party must only undertake a post-merger notification filing. Internal reorganisation is exempt from filing.

A dominant player is defined as any business with 50% of market share and THB1 billion in annual sales for any market (normally the domestic market), or a to-three operator with combined 75% of market share and by itself having THB1 billion in annual sales and at least 10% of market share for any market (normally the domestic market). Substantial reduction of competition is

defined as having THB1 billion in annual sales for any market (normally the domestic market).

2.4 Definition of “Control”

See 2.3 **Types of Transactions** for changes that trigger merger filing. See 2.7 **Business/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds** for corporate linkage (control) that mandates group calculation.

2.5 Jurisdictional Thresholds

See 2.3 **Types of Transactions**.

2.6 Calculations of Jurisdictional Thresholds

See 2.3 **Types of Transactions**. Normally, market share is viewed through sales, but can also be viewed through production volume and production capacity. Normally, sales and market share calculations are done at the domestic level, but there are cases of exceptions where the geographical area is smaller (such as for products with special characteristics, like ice) or larger than domestic (such as for products that may cross borders more easily).

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Calculation of sales and market share figures are always done on a group-wide basis and will include all entities within such group that are under the same control of the ultimate controlling entity, with control defined as having a majority of voting rights or vote control (multiple levels), or the ability to appoint half of the directors (one level). For the review of the merger transaction, sales and market share of both sides of the transaction will be reviewed together.

2.8 Foreign-to-Foreign Transactions

Based on the current interpretation, foreign-to-foreign transactions are covered by the Act only if both sides have corporate presence in Thailand as well as local sales/effect. Having corporate presence in Thailand is only the first step of the review, and the parties will have to hit the market share and sales figure threshold as well.

2.9 Market Share Jurisdictional Threshold

See 2.3 **Types of Transactions** for market share information. Even if there is no overlap in any particular market, a filing may be required if the sales threshold and/or the market share threshold are met.

2.10 Joint Ventures

A joint venture by way of a new incorporation is not technically subject to the merger control provision of the Act. However, if the process of setting up such joint venture touches upon asset transfer or share acquisition, then the merger filing requirement may be triggered.

2.11 Power of Authorities to Investigate a Transaction

The TCCT has complete discretion to investigate under the Act, request documents and interviews, and apply fines or actions if deemed appropriate. This includes situations where a transaction may not hit the threshold, but the TCCT feels that it wishes to confirm such fact. There is no statute of limitation on the TCCT's ability to investigate as it can revisit the issue at any time even after the closing of the transaction.

2.12 Requirement for Clearance Before Implementation

If the transaction requires pre-merger approval, then the merger cannot take place until approval is granted.

2.13 Penalties for the Implementation of a Transaction Before Clearance

See 2.2 Failure to Notify. Penalties have been applied in the past and many cases have been issued as precedents, including cases of foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect and there is no precedent indicating otherwise.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

There are no circumstances where the authorities will permit closing before clearance and there is no precedent indicating otherwise. The only way to close a transaction without clearance is to ensure that relevant businesses are carved out in a way that will not trigger any requirement to file.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

See 2.2 Failure to Notify. If the parties must obtain a pre-merger approval, then the approval must be obtained before the transaction is closed. If, however, the acquiring or resultant party only needs to undertake a post-merger notification filing, then such filing must be done within seven days from the transaction date. Any breach will result in penalties being incurred, which have been applied in the past.

3.2 Type of Agreement Required Prior to Notification

The TCCT normally does not check the depth of intention, but the parties must submit an agreement or parts thereof that address the merger transaction for their review.

3.3 Filing Fees

There is no filing fee for a post-merger notification filing, but there is a THB250,000 filing fee for pre-merger approval filing.

3.4 Parties Responsible for Filing

Both sides of the transaction (normally the parties attempting the transaction) will be responsible for filing the pre-merger approval filing, but sometimes the parent entities of the parties to the transaction can file in their place and the officers have accepted this minor deviation in the past. Furthermore, in the past, a couple of cases were filed with only the signature of the acquiring side and the officers have also accepted this minor deviation. For post-merger notification filing, only the acquiring or resultant entity needs to file the document.

3.5 Information Included in a Filing

Post-merger notification filing is much less detailed than pre-merger approval filing, but both will generally require the transaction agreement (or at least relevant parts thereof), financial statements, market share and sales figures, details of shareholders and types of businesses, products and services, and economic and commercial rationale for the transaction, as well as a defence stating why such merger should not be accepted. All applications and attachments must normally be in Thai or translated into Thai, unless the applicant is specifically exempt from this requirement by the officers in charge.

3.6 Penalties/Consequences of Incomplete Notification

If an application is incomplete on the face of it, the filing will not be formally accepted. However, if an application has been formally accepted but later the officers find any part to be incomplete or have additional follow-up questions, the parties will have to submit additional information, documents and details in order to receive final acknowledgement or approval, as the case may be.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the parties are suspected to have filed something that may be incorrect, incomplete or misleading, the officers will require follow-up explanations, and if it is subsequently proven that such was done deliberately, then the officers will undertake further investigation or may propose that the TCCT reject the application for merger.

3.8 Review Process

For post-merger notification filing, the parties will need to informally submit the draft application for the officers' review and then wait for their acquiescence before undertaking the transaction. This is to avoid any complication after the closing. The review period varies from weeks to months, depending on the complexity of the case. After the transaction is completed, the parties can then submit the application within seven days.

For pre-merger approval filing, the parties will need to informally submit the draft application for the officers' review as well. The officers will normally ask as many questions as they need until they are satisfied that the presentation to the TCCT will be smooth. This can take between a couple of months to many months, depending on the complexity of the deal and workload of

the officers. After the officers provide their acquiescence, the parties can then formally submit the application to them. The authority will then have in total 105 days to review and provide an answer, which can be unconditional approval, conditional approval or rejection.

3.9 Pre-notification Discussions With Authorities

Parties can engage in pre-notification discussions with the authorities and this is highly encouraged. The process will be treated confidentially.

3.10 Requests for Information During the Review Process

Operators can expect the officers to come back with follow-up questions during the review period, and this will not stop the clock or suspend any part of the process, meaning the parties are highly encouraged to do their best to provide additional information, as lack of information will likely lead to a negative result.

3.11 Accelerated Procedure

There is no short form or fast track for review.

4. Substance of the Review

4.1 Substantive Test

The authority will review the case from a holistic standpoint, including review from the perspectives of competitors, suppliers and vendors, service providers, customers and the public as a whole. The authority will review details from both the supply and demand side, vertical and horizontal relationships, and co-ordination and non-coordination.

4.2 Markets Affected by a Transaction

The authority will look at all markets that hit the THB1 billion threshold, and will often look at other markets below the threshold as well. There is no precedent on a de minimis level below which competitive concerns are deemed unlikely, as long as such market already hits the threshold.

4.3 Reliance on Case Law

The authorities will rely on their own precedents and those from other major jurisdictions. Normally the TCCT will accept precedents from the EU, the US, Japan, Korea and Singapore.

4.4 Competition Concerns

The authority will look at all competition concerns from a holistic point of view. There is no clear precedent to pinpoint weight or to discard any of these areas.

4.5 Economic Efficiencies

The authority will normally consider economic efficiencies as the position rationale to counter negative impact, but this does not mean that the efficiencies will automatically override all other issues.

4.6 Non-competition Issues

The authority will normally consider all non-competition areas, except for the environment, which has not historically been addressed. Employment has also been discussed but to much lesser extent when compared to industrial policy, national security or other public interest issues. Generally, the authority is given complete discretion to consider any of the non-competition areas it deems fit. Please note that non-competition concerns from the perspective of foreign direct investment is addressed under the Foreign Business Operation Act, which is a separate law under a separate overseeing authority. Separate licensing may be required.

4.7 Special Consideration for Joint Ventures

See 2.10 Joint Ventures. A joint venture is technically exempt.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The authority has complete power to prohibit the transaction if it falls under their mandate. Any breach of this order can result in a fine or unwinding. The TCCT normally will issue a letter demanding explanation or mandating stoppage to the prospective merger, a breach of which will render the parties liable under the Act.

5.2 Parties' Ability to Negotiate Remedies

The parties can negotiate for remedies, although the channel to do so may be more limited than in other jurisdictions. It is normally easier for the parties to propose this at the very outset.

5.3 Legal Standard

There is no legal standard that remedies must meet in order to be deemed acceptable. This is all at the discretion of the TCCT.

5.4 Typical Remedies

Remedies have rarely been used, but those that have been used are an increase of participation of certain groups within the industry, moratorium on contractual change with vendors and suppliers, indefinite prohibition of sharing of certain data between the merging parties, etc.

5.5 Negotiating Remedies With Authorities

See 5.2 Parties' Ability to Negotiate Remedies.

The parties are recommended to propose remedies since the beginning as it may be difficult to propose this during the review process by the TCCT. In theory, the authority can unilaterally impose a remedy as a condition to their approval. In practice, they may discuss with the parties beforehand.

5.6 Conditions and Timing for Divestitures

There is no standard timing and this will entirely depend on the TCCT. If the remedies are not fully complied with, the parties will be deemed to have breached the order of the TCCT on the merger, and the TCCT can revoke the approval for the merger, meaning the parties will need to unwind the transaction. Generally, all conditions must be met as mandated by the TCCT before the merger can take place, unless such conditions are planned for any period after the closing.

5.7 Issuance of Decisions

A formal decision will be provided to the parties, whether it is an unconditional approval, a conditional approval, or a rejection. Relevant parts of the decision may be issued to the public as a precedent, but commercially sensitive information will normally be redacted from the publication.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

As long as a transaction falls under its mandate because of thresholds having been reached, regardless of whether it is a domestic or foreign-to-foreign transaction, the TCCT will oversee the case. The TCCT has historically imposed fines on foreign-to-foreign transactions before, but there is no evidence of any outright prohibition.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The decision will cover all related arrangements, if such have been made known to the authority in the filing. If any part of the transaction is not made known to the authority, such will not be covered by the decision and the parties can be at fault if the authority later learns of such part of the undisclosed arrangements, and such part somehow breaches the law on its own.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

Any party can submit their opinion if they know about the pending case, and the TCCT may sometimes invite other parties to submit their opinion as well. However, these parties do not have any other right to stop the process of the TCCT, unless they find a valid cause of action to be filed with the Administrative Court.

7.2 Contacting Third Parties

The authority can contact third parties and has historically done so. Normally this is done via a written notice or questionnaire. There is no precedent that the authority has market-tested any remedies offered by the parties.

7.3 Confidentiality

Normally all details are kept strictly confidential. Only parts of the filing that do not contain commercially sensitive information may be published as a precedent.

7.4 Co-operation With Other Jurisdictions

There is no clear evidence that the authority has historically shared details of specific transactions with other jurisdictions, but this has been indicated by the authority as one of their powers and intended courses of action. The authority, if wishing to do so, does not need the permission of the filing parties.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

The parties can technically resubmit the case if they can change the facts of the case or remedies, to simply ask for the TCCT's reconsideration. The parties can also appeal to the Administrative Court if they have a solid ground to argue so within 60 days after the date of decision.

8.2 Typical Timeline for Appeals

There has not been any case of appeal within the merger control realm. The parties must appeal within 60 days after the date of decision.

8.3 Ability of Third Parties to Appeal Clearance Decisions

In theory third parties can appeal to the Administrative Court if they have solid grounds that the decision was made in error. None of these attempts have been successful.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is no foreign direct investment or foreign subsidies legislation in the jurisdiction. There are, however, different licensing requirements based on foreign ownership thresholds for different industries, but these do not concern antitrust or trade competition aspects of the operation or acquisition. Separate licensing may be required in any case.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

There have been no recent changes to legislation or regulations, or proposals to change these. All current interpretations have been reflected as outlined above.

10.2 Recent Enforcement Record

Based on public records, no pre-merger approval transaction has been prohibited, but there were around six transactions that were investigated and subject to fines, all for not filing within seven days of the transaction date for post-merger notification filing.

10.3 Current Competition Concerns

There is no current concern or trend within the merger control realm that can be specifically pinpointed.

Trends and Developments

Contributed by:
Pranat Laohapairoj
Chandler MHM Limited

Chandler MHM Limited is one of the largest and oldest full-service law firms in Thailand, with over 100 lawyers covering all areas of law. It has a dedicated team with extensive experience advising on antitrust and trade competition matters. Its experience covers the full spectrum of the applicable regulations, including abuse of dominance, general misconduct, severe and non-severe cartels, merger control and offshore arrangements. The Chandler MHM team offers the full spectrum of professional services within the realm of antitrust and trade competition law,

including internal audits of business units to identify gaps, creation and revision of internal manuals for employees to prevent inadvertent breaches, merger control review and filing, internal training and workshops, general advice, revision of contracts for compliance while ensuring retention of commercial advantages and original desired positions, defence against allegations by counterparties and advice on investigations by the Office of Trade Competition Commission.

Author



Pranat Laohapairoj is a partner in Chandler MHM's antitrust practice and has been with the firm since 2012. He has worked with Thai and international clients on merger and

acquisitions, antitrust, corporate, anti-corruption, compliance and data protection. In respect to antitrust and trade competition, he advises on merger reviews and filings, internal

audits of businesses to identify gaps, contract review for compliance, training, internal misconduct investigations and defences against allegations by counterparties and the Office of Trade Competition Commission. He regularly works with local and offshore entities, and his experience spans multiple sectors. Pranat is admitted to the Bar of the State of New York.

Chandler MHM Limited

17th and 36th Floors
Sathorn Square Office Tower
98 North Sathorn
Silom
Bangrak
10500
Bangkok
Thailand

Tel: +662 009 5163
Fax: +662 009 5080
Email: Pranat.I@mhm-global.com
Web: Chandlermhm.com

CHANDLER MHM

Possible Regulatory, Administrative and Enforcement Trends to Curtail Conduct of Dominant Players

Thailand had its general election on 14 May 2023, and the results were anything but anticipated. The populist Puea Thai Party, itself outside the current governing coalition, was expected to win the election in a major comeback landslide, but only came in second after the ballots were counted. The parties within the current governing coalition all had outcomes that were much worse than they expected, while the Move Forward Party, a self-proclaimed liberal populist party populated by young idealists and technocrats, came in first in a completely unexpected win. As of the date of writing of this article (6 June 2023), a new government has not yet been formed and the parties are still undergoing negotiations to form a government.

The Trade Competition Act

The Trade Competition Act B.E. 2560 (A.D. 2017) of Thailand (the “Act”) was enacted in 2017 and is the second version of the antitrust and trade competition law in Thailand. Its predecessor is the Trade Competition Act B.E. 2542 (A.D. 1999),

which was enacted in 1999 and saw very little usage due to a lack of necessary supplementary regulations and will of the government and the public to put the law to use. During the 18 years of its existence, the 1999 law only saw action a few times, with all of the cases dropped due to lack of evidence or governing support. The Act is the reincarnation of the 1999 law, with most of the provisions transposed from the 1999 law onto the Act almost verbatim, but with minor differences regarding categorisations and re-classifications of penalties and other minor details. The Act was deemed ready to change the competition landscape in Thailand to promote more holistic competition within the economy and enhance understanding between different stakeholders and the governing authority; while extinguishing, or at least limiting, unnecessary hindrances to trade that had (and to some extent nowadays still have) existed because of historical trade practices and unique cultural conduct. These practices and conduct, such as arrangement, exclusivity, resale price maintenance, unfair poaching, cost imposition, etc, have largely been banned in countries that have enacted their version of antitrust and trade com-

petition law, and Thailand was deemed ready to follow suit.

Criticism of the Act

The Act has been in effect for only some years, but regardless of the overall positive background and well-intended nature of its incarnation as previously outlined, it has already been met with criticism. The Act itself has been promulgated with positive intentions to regulate competition by prohibiting or limiting unfair practices from operators of all sizes, but focused on the large ones, and by promoting good practices, fair dealings and pro-competitive supplementary regulations. The words of the Act and its supplementary regulations and announcements, in any case, are plain and simple and do not afford any deviation of treatment towards different groups of operators. Despite this fundamental and perceptible equality afforded by the Act to all sectors and operators, some groups within the public have loudly complained that the primary governing body of the antitrust and trade competition regulation – the Trade Competition Commission of Thailand (TCCT) and its administrative arm the Office of Trade Competition Commission (OTCC) – along with other government bodies that deal with trade competition and related issues on an ad hoc basis, such as those overseeing telecommunication, agriculture and alcohol, have historically been too lenient towards big businesses. Notably, when certain cases of high-profile prospective merger applications were granted and some of the public voices did not agree with such approval, or when big businesses faced investigations and parts of the public felt that they received an unfair level of leniency from the investigating authorities compared with when smaller operators were put in a similar position, or when new operators within certain industries faced increased procedural and administrative difficulties in entering the market, whether due

to licensing issues or other types of pre-operation routine checks. Regardless of the merit and evidence of such criticisms, parts of the public have been outspoken about these perceived attempts by the authority to be lenient towards and protect big businesses at the expense of the small and medium-size operators and the public at large.

Impending reform

The Move Forward Party has been very clear since its inception that it wants to promote operators of all sizes, not just large players, and wants to do so under and with the basis of complete transparency and unyielding fairness. It has consistently pushed its agenda to open up different industries for more competition, notably the alcoholic beverage industry, which has been one of its key targets due to the heavy concentration of operators. Even without actual administrative power, party members have already put certain cases of allegations of corruption involving business operators and government officials into the national spotlight, all of which have put many business operators and government officials in an uneasy position. Now it can be anticipated that its unexpected win and subsequent forming of a government will bring about, or at least will result in attempts to bring about, many sweeping changes in Thailand.

Besides social, education, military and administrative reforms, one can also expect a shift in the way big businesses are treated. Big businesses operating in Thailand will likely now have to conclude that the leniency that in some cases might have historically been afforded to them may now be much harder to come by, as government authorities may in the near future feel the watchful eyes of the new government as well as the added weight that may come in the form of new regulations. The TCCT and

the OTCC, along with other governmental and quasi-governmental entities and their officers, will be forced to be more careful at how they treat small and medium-size businesses in comparison to large operators. On the other hand, big businesses operating in Thailand should also be more careful about how they exert influence on government entities, as doing so may put the government entities at unease. This will ultimately mean that overall, big businesses may feel more practically curtailed in what they can do, as new regulations and administrative practices may provide a more balanced playing field for smaller and medium-size operators, and overseeing governmental entities may feel more pressured to take actions against all types of operators that otherwise may fall through the cracks due to oversight, regardless of the merit of such actions. Therefore, big businesses operating in Thailand are recommended to take a careful review of their internal protocols and procedures, training materials, commercial terms in the contracts, and the actual commercial practices on the ground, and to amend as many points and practices that may be questionable as possible to avoid taking unnecessary risks that in the past may have been more manageable from a practical perspective.

Enforcement areas

The possible shift in the treatment trend above comes hand-in-hand with the current overall upwards enforcement trend by the TCCT and the OTCC under the Act. To summarise, the Act addresses three primary areas of trade competition: (i) merger control and filing, (ii) unilateral misconduct by one operator against a trade partner, vendor, customer, etc, and (iii) cartel activities. Although the Act itself has been supplemented by numerous Announcements by the TCCT, there are still a myriad of issues within the Act that have yet to be clearly codified. In

this regard, the TCCT has allowed the OTCC to publish cases that have been finally adjudicated or settled by the TCCT for public viewing and understanding. To date, the OTCC has published a total of 139 cases, the majority of which concern merger control and procedures, while the minority are about unilateral misconduct, such as unfair trade conditions, exclusivity, prohibitions, etc. Only seven cases are about cartel arrangement and discussions.

Merger control

For merger control and procedures, 2022 and 2023 have been largely positive years as many precedents have been formed and published for public viewing, and these have cleared up many of the previously ambiguous procedures and scope of coverage of reportability. Almost half of the cases that have been published are examples of filings that were not necessary to be filed under the Act. The precedents have provided a set of corporate and business characteristics that business operators wishing to undertake a merger can review against themselves to see if their merger transaction will need to be filed with the TCCT. In the past, operators often had to consult with the OTCC on a case-by-case basis whether their merger transaction needed to be filed, but now operators should be able to review their own circumstances and come up with a clearer answer. Despite this positive development, the operators must also be mindful that the TCCT and the OTCC have been much more active and assertive. So far, based on available information and precedents, six merger transactions have been investigated, and their responsible parties have been fined in the last two years. Although the fines are not financially debilitating compared to fines levied by relevant authorities in other jurisdictions, their existence serves as a reminder that the TCCT and the OTCC are taking unfiled merger transactions very seriously.

More notable is the fact that half of the fined transactions were involuntarily discovered by the authority. This means that the TCCT and the OTCC have sufficiently morphed from largely passive regulatory bodies waiting for complaints during their early years into active players who seek out information from both conventional sources, such as news and business reports, and unconventional sources, such as complaints and whistle-blowers. This conclusively means that operators planning to undertake any merger transaction with effect in Thailand need to be more vigilant and, if possible, abide by the requirements of the Act to avoid investigation by the OTCC and the TCCT. In particular, offshore operators need to bear in mind that even though the Act itself may not have the practical force to reach beyond Thai borders and capture any breaching offshore operators and bring them back to face their scrutiny in Thailand, it is best to not upset the TCCT, as they have absolute discretion to undertake investigation of any business, meaning the offshore operators' Thai operations can be put under the TCCT's radar and face future risks if their offshore parents decide to blatantly breach the requirements of the Act. Furthermore, it may be difficult for management of any offshore entity to have to explain internally and to their shareholders why there is a pending fine in Thailand, regardless of whether such fine can really be applied against the company.

Unilateral misconduct

For unilateral misconduct, 2022 and 2023 saw only a handful of cases, and the trend of enforcement is on a gradual incline. However, the authority focused its efforts on digital platforms, specifically food and product delivery applications and franchises. The authority even announced that there have been numerous complaints from restaurants and partner-riders, whereby their rates of compensation have been unfairly reduced

and business opportunities unfairly restricted, and that the TCCT and the OTCC would focus their efforts on discussion with, and investigation of, these mega-platforms. A few precedents concerning these platforms have been issued in 2022 and 2023, but none resulted in any prosecution or fine, as lack of evidence from the complainants necessitated the TCCT to drop many cases. Other cases not concerning digital platforms have also been dropped due to lack of clear evidence of monetary impact on the complainants or insufficient severity of misconduct.

This provides two valuable lessons for us. We now know that the TCCT is generally exceptionally conservative in its prosecution, and perhaps rightly so, as any case that does not contain strong evidence will likely be dropped instead of being dragged out for more investigation. On the other hand, hindered operators need to maintain immaculate records of operations and as such must include unequivocal commercial and monetary impact caused by misconduct of a trade partner, or their case will not be properly entertained by the TCCT and the OTCC. Although most cases have been dropped, their preliminary investigations serve to remind all operators that the TCCT and the OTCC are ramping up their efforts at investigation and ensuring legal compliance. Operators are reminded that it is perhaps more economically sensible to strictly abide by the Act's requirements rather than risk facing expensive and possibly lengthy investigation by the TCCT and the OTCC.

Cartels

The trend of enforcement for cartels is somewhat different from those of the first two areas of law. Discussions and arrangements between direct competitors were historically prevalent within the Thai economy, and to some extent continue to happen. The Act was enacted partly

to combat this anti-competitive behaviour, which has an immense negative impact on end-users and business operators, as well as unknowingly inhibiting the ability of business operators who engage in any particular cartel activity to improve their operation, as there would be less need for such operators to improve their products, services and technology. Since its inception, the Act has been used to deal with numerous cases within the merger control and unilateral misconduct areas, but the number of cases involving cartel activities is comparatively small. The actual number of cartel cases that went through the investigatory process of the OTCC remains confidential, but so far only seven cases involving cartel activities have been published for public review, compared with numerous cases for merger control and unilateral misconduct. Out of these seven cases, only one ended with an actual fine against the participants, while others were simply dropped because there was lack of unequivocally clear evidence that a cartel was established.

Useful examples are cases that involved publication of prices by nationally recognised trade associations. Although the TCCT recognised that some of these prices have been followed by the association members on certain occasions, the lack of routine adherence and mechanism of enforcement against deviation played a major role when the TCCT decided that there was not enough evidence to pursue the involved parties. This appears to be a lenient approach

when compared to enforcement in other jurisdictions, but it may stem partly from the intention to slowly ease the public into the law. Despite a low number of case precedents for cartel activities, operators should be mindful that breach of cartel regulation is generally more serious than committing unilateral misconduct (unless you are a dominant player in any market) or breaching a merger filing requirement, as a cartel activity, if and once properly proven, may carry a term of imprisonment. Furthermore, despite the fact that tangible results of a cartel discussion play an important role within the decision-making process of the TCCT when adjudicating the case, cartel activities are much more clear-cut than other types of misconduct and can be more easily adjudicated against when discovered.

Conclusion

Overall, we have recently seen many developments within the area of antitrust and trade competition within Thailand, both through the attempts and procedures of the cases that were eventually dropped and cases that resulted in fines. At the same time, rules have been promulgated and interpretations outlined to the public, thus making it easier to delineate the line between compliance and non-compliance. This ongoing enforcement trend will likely be accelerated by the new liberal government once it is formed, and operators, especially the large ones, need to monitor the situation and take necessary actions within organisations to pre-emptively counter these new practical risks.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com