

NO&T Thailand Legal Update

January, 2024 No.28

Conditions to Pre-Merger Approvals under the TCA

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Background

Since the enactment of the Trade Competition Act of 2017 (the “TCA”) and the issuance of the sub-regulations regarding merger control in December 2018, the Thai merger control regime has been strictly enforced by the Trade Competition Commission of Thailand (the “TCC”). The regulated merger which falls under the purview of the TCC may be subject to approval prior to the completion of the merger or the obligation to notify the merger after completion. Unlike merger transactions which trigger the post-merger notification obligation, clearance must be obtained from the TCC before implementation or consummation for merger transactions which require pre-merger approval.

Pre-merger Approval Cases in Thailand

In the case where pre-merger approval is required, the TCC has the power to block the transaction as well as impose conditions on the merging parties. As a result, there are three possible outcomes for the merging parties filing for pre-merger approval: (a) approval granted with no condition, (b) approval granted with condition(s), and (c) approval not granted.

While most regulated mergers are subject to the post-notification obligation, few have triggered the requirement to file for pre-merger approval. Based on the information published on the TCC’s website as of November 2023, there were a total of nine merger cases which have sought for the pre-merger approval from the TCC since 2018, the latest being the recently published approval decision for the significant acquisition transaction of year 2023 in Thailand’s petroleum sector between Bangchak Corporation PCL and ESSO (Thailand) PCL (currently named Bangchak Sriracha PCL). Notably, all nine merger cases were approved by the TCC.

Types of Conditions to Pre-merger Approval

As stated above, the TCC has the authority to set conditions on the merging parties (and companies within the group) upon granting approval for the merger transaction. Conditions to pre-merger approval may be imposed as remedial measures if the merger transaction has a significant impact on the market or supply chain. Currently, out of the nine pre-merger approval cases, only three have been cleared with conditions.

The TCA does not provide the scope of conditions or remedies that can be imposed. In practice, the TCC will consider two types of measures: structural and behavioral measures, both of which may be imposed in a conditional merger clearance decision by the TCC.

1. Structural measures

Structural measures seek to address competitive concerns on the market structure or corporate structure of the merging parties. Examples of structural remedies used by international antitrust authorities include divestiture of assets or businesses and disposal of shareholdings.

In Thailand, the TCC has never imposed structural measures that require the merging parties to divest their

assets or businesses¹ or change their shareholding ratio to create a new competitor in the relevant market or enhance the competitiveness of existing competitors. However, it has previously set other types of structural measures in two significant merger cases. One is a landmark merger case in the retail industry in 2020 where the TCC prohibited the merging parties and their group companies from entering into a merger with other modern retailers and wholesalers for 3 years (excluding e-commerce market). The other is the merger case in the petroleum sector mentioned above. In this case, as the government authority was already controlling one of the major petroleum players in Thailand, the TCC prohibited the increase of the government authority's shareholdings in the merging parties to ensure free competition in the Thai petroleum industry.

2. Behavioral measures

Behavioral measures focus on the conduct of the merging parties to address competitive concerns after the merger. Based on the previous conditional merger approvals, the TCC applies more behavioral remedies than structural remedies. The common type of behavioral remedies imposed by the TCC relates to the vertical conduct of the merging parties with suppliers or customers in the supply chain.

For example, the behavioral measures previously imposed by the TCC in the recent merger case in the petroleum sector include requirements for the merging party to, among other requirements:

- (i) not purchase crude oil from a single supplier more than 50% of the amount it requires for a period of five years from the date of the merger in order to prevent the merging party from becoming too dependent on a single supplier as a measure to allocate risk of energy security and increase diversity in crude oil procurement in the Thai petroleum sector. Additionally, the merging party is required to annually report its crude oil procurement to the TCC;
- (ii) maintain the terms and conditions in agreements between customers in the petroleum products wholesale market and the merged party until the contract term has expired. Any amendments made to the conditions prior to the expiration of the relevant term requires the prior consent of the customer; and
- (iii) maintain the terms and conditions in agreements between station dealers and the merged party until the contract term has expired. Any amendments made to the conditions prior to the expiration of the relevant term requires the prior consent of the station dealer. The station dealer may terminate the agreement by advance notice within 90 days from the date of the merger if there are facts to prove that it is affected by the merger.

In the merger case in the retail industry in 2020, the merged party was also required to maintain the terms and conditions in agreements with its suppliers for a period of two years unless the amendment made to the conditions was beneficial to the supplier and received the prior consent of the supplier. Also, the merging party and its group companies operating in the retail and wholesale modern trade market were prohibited from sharing and exchanging market information relating to manufacturers and suppliers.

The TCC also gives importance to small and medium-sized enterprises (SMEs) in Thailand. In this regard, the TCC has imposed a condition for the merging party in the retail industry to increase sales of products from SMEs at the rate of 10% per year for a period of five years. In another merger in the logistics sector, the TCC also required the merging party to provide cooperation and report on the promotion of SMEs' businesses for a period of two years.

Compliance with Merger Conditions

The merging party must comply with the measures imposed by the TCC as conditions for merger approval, otherwise the TCC has the authority to revoke its merger approval order pursuant to Section 53 of the TCA. In addition, the merging party not complying with conditions for merger approval shall be subject to an administrative fine of not more than 0.5% of the transaction value of the merger pursuant to Section 81 of the TCA. In this regard, the merging party has an obligation to submit reports to the TCC as one of the conditions of the merger approval, which allows the TCC to monitor the business operation as well as compliance with the merger conditions imposed. The TCC also publishes its monitoring results in relation to the business operators' compliance with the imposed remedies on its website, which is available to the public.

¹ However, in 2018, the Energy Regulatory Commission, which is the sectoral regulator of the merger control regime in the energy sector, imposed a divestment condition on the merger between energy businesses which required the target company to divest its entire stake in one of its subsidiaries before or at the same time as the merger.

Conclusion

As the TCA does not set the scope of the TCC's power to impose remedial measures upon granting merger approval, business operators should be mindful of the potential remedies that may be imposed on the merger transactions which fall under the pre-merger approval requirement under the TCA.

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