Thailand Trade Competition Act B.E. 2560: The New Merger Control (1)

"พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560 : การกำกับการควบรวมกิจการฉบับใหม่ (ตอนที่ 1)"

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เนื่องจากพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560 เพิ่งมีผลใช้บังคับได้ไม่นาน ประกาศต่างๆ ของคณะกรรมการแข่งขันทางการค้าที่เกี่ยวกับการควบรวมกิจการเพิ่งถูกประกาศในราชกิจจานุเบกษาเมื่อวันที่ 28 ธันวาคม พ.ศ. 2561 ที่ผ่านมา ผู้เขียนจึงเขียนบทความนี้เพื่อสื่อสารกับผู้อ่านที่สนใจกฎหมายการควบรวมกิจการภายใต้พระราชบัญญัตินี้ โดยแบ่งออกเป็นสองตอนคือตอนที่ 1 เกี่ยวกับการควบรวมกิจการที่อาจก่อให้เกิดการลดการแข่งขันอย่างมีนัยสำคัญภายใต้มาตรา 51 วรรคหนึ่ง และตอนที่ 2 เกี่ยวกับการควบรวมกิจการที่อาจก่อให้เกิดการผูกขาดหรือการเป็นผู้ประกอบธุรกิจที่มีอำนาจเหนือตลาดภายใต้มาตรา 51 วรรคสอง ในตอนที่หนึ่งนี้ ผู้เขียนได้เปรียบเทียบกับแนวปฏิบัติที่แนะนำโดย International Competition Network (ICN) และแนวทางการกำกับดูแลการควบรวมกิจการของสาธารณรัฐสิงคโปร์ และสาธารณรัฐไต้หวัน จากการศึกษาพบว่าการควบรวมกิจการภายใต้มาตรา 51 วรรคหนึ่งไม่มีความสอดคล้องกับแนวทางของ ICN และสาธารณรัฐสิงคโปร์และไต้หวัน โดยเฉพาะอย่างยิ่งนิยามของคำว่า "ลดการแข่งขันในตลาดอย่างมีนัยสำคัญ" ซึ่งมีผลกระทบต่อความสามารถของคณะกรรมการแข่งขันทางการค้าในอันที่จะกำกับดูแลการประกอบธุรกิจอย่างเสรีและเป็นธรรม

คำสำคัญ: การลดการแข่งขันอย่างมีนัยสำคัญ การกำกับการควบรวมกิจการ Consumer Welfare กฎหมายการแข่งขันทางการค้า

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Abstract

The Trade Competiton Act B.E. 2560 has recently come into force. The Commission Notifications related to merger control was published in the Royal Gazette on 28 December 2018. The author wrote this article to communicate with the readers who are interested in merger control under this Act. The article is divided into two parts. Part one is about the mergers which may result in a substantial lessening of competition under Section 51 paragraph one. Part two is about the mergers which may result in a monopoly or a dominant business operator under Section 51 paragraph two. In part one, the author compare the said provisions with the International Competition Network Recommended Practices, Singapore and Taiwan merger control. The study shows that the mergers under Section 51 paragraph one is not compatible with the ICN, Singapore, and Taiwan, especially, the definition of 'a substantial lessen of competition.' This issue affects the Commission's capability to regulate business operations to maintain free and fair competition.

Keywords: Substantial Lessening of Competition, Merger Control, Consumer Welfare, Competition Law

Introduction

This article aims at providing the readers who are interested in Competition law of Thailand on the new merger regulations enacted under the Trade Competition Act B.E. 2560 (2017) (TCA). The TCA entered into force on 5th October 2017. This article is the first of the two-part article. It focuses on the voluntary notification of a merger under Section 51 paragraph one. The second part of the article will focus on the merger clearance and permission granted by the Trade Competition Commission (Commission) under Section 51

paragraph two. This article also takes into consideration the following notifications[1] concerning merger regulations as follow:

1. Notification of the Trade Competition Commission on Criteria for Acquisition of Assets or Shares to Control Policies, Business Administration, Directorate, or Management which Considered a Merger B.E. 2561 (2018) (Control Notification)

2. Notification of the Trade Competition Commission on Criteria, Procedures, and Conditions of Notification of the Merger B.E. 2561 (2018) (Notify Notification)

3. Notification of the Trade Competition Commission on Guidelines on the Determination of Market Definition and Market Shares B.E. 2561 (2018) (Market Definition Notification)

4. Notification of the Trade Competition Commission on the Classifications of Business Operators Related to Each Other Due To Policies or Commanding Power B.E. 2561 (2018) (Single Economic Entity Notification)

5. Notification of the Trade Competition Commission on the Criteria of Business Operator Having a Dominant Position B.E. 2561 (2018) (Dominance Notification)

The legislative intent of the TCA is taken into consideration when examining the TCA and the Notifications mentioned above. However, the author's lack of access to specific meeting minutes of the Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ...(Ad Hoc Committee) compromises the scrutiny of the TCA thoroughly. Apart from the legislative intent, the author also takes into consideration the Recommended Practices for Merger Notification and Review Procedure (ICN Merger Review) and Recommended Practices for Merger Analysis (ICN Merger Analysis) by the International Competition Network (ICN), Taiwan Fair Trade Law, and Singapore Competition Act.

The ICN is an international platform where competition authorities, international organizations, non-governmental advisers, and private practitioners voluntarily cooperate to share their best practice and encourage the proper and efficient enforcement of competition law around the world. Although the ICN has no jurisdiction over its members,

[1] All titles of the notifications are the author's own translation based on unofficial translation of the Trade Competition Act B.E. 2560 which used by the Trade Competition Commission. They are not official titles.

its recommended practices are well received and followed by many national competition authorities.[2] The Commission is also a member of the ICN. Taiwan and Singapore merger control are referred to because both countries have a certain degree of influence on the drafting of the current TCA.[3] Their merger controls are well-developed.

This article consisted of five parts: First, it shortly introduces the current merger control regimes in Thailand. Second, it examines the scope of mergers and acquisitions under the general merger control of the TCA as prescribed in Sections 51 paragraph one. Third, it discusses the objectives of the merger and acquisition to control another business operator. Fourth, criteria for a post-merger notification under Section 51 paragraph one is scrutinized using a hypothetical scenario and application of Singapore and Taiwan merger controls to compare with the TCA. Fifth, analysis and a conclusion will be made.

1. THE CURRENT MERGER CONTROL REGIMES IN THAILAND

In Thailand, there are two regimes of merger control. The first regime is a general merger control under the TCA which has only come into force for the very first time in the history of Thai competition law on 29 December 2018.[4] Although the TCA entered into force on 5 October 2017, the notifications on merger regulations have only been published in the Royal Gazette on 28 December 2018. The second regime is a merger control under sector-specific regulators. Thus far, only two sectoral regulators have enacted the law on merger regulations namely the National Broadcasting and Telecommunications Commission (NBTC) and the Energy Regulatory Commission (ERC).

The NBTC has recently published the latest merger regulation "the Notification of the NBTC on Merger Regulatory Measures for Broadcasting and Telecommunications

[2] Apiradee Springall, Does ASEAN need a Supranational Approach to Its Competition Law and Policy to Create a Highly Competitive AEC? Case Studies on Abuse of Dominance in Singapore and Thailand, (PhD. In Law, Department of Law, University of Essex, 2017), pp 112-115.

[3] Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ..., National Legislation Assembly, 'The 21st Meeting Minute' dated 31 January 2017, Bangkok, p. 5.

[4] Though the repealed Trade Comeptition Act B.E. 2542 also contained previsions on merger control, the previous Commisisions had never enacted merger control regulations which enable the enforcement of the Act. Thus, the merger provisions in the 2542 Act had never been in force.

Business 2018" which entered into force on 21 August 2018. The ERC has published "the Regulation of the Energy Regulatory Commission on Establishment of Criteria to Prevent Merger, Competition Lessening or Restriction in Energy Services B.E. 2552 (2009)" which took effect on 14 January 2010. Other sectoral regulators such as the Insurance Commission and the Civil Aviation Authority of Thailand were not established to oversee the competitiveness of the industries they regulate. Therefore, when undertakings operating in the aviation business or insurance business wish to merge, they must comply with the general merger regulations under the TCA.[5]

2. THE SCOPE OF MERGERS AND ACQUISITIONS UNDER THE TCA

According to Section 51 paragraph four of the TCA, a merger includes 1. Merger among producers, sellers, service providers, or between a producer and a seller which results in one business entity merged into another or creating of a new business entity; 2. Wholly or partially acquisition of other business' assets to control its business administrative policies, directorate, or management; 3. Wholly or partially acquisition of other business' shares whether direct or indirectly to control its business administrative policies, directorate, or management.

Although Section 51 paragraph four does not define a merger and an acquisition, it provides examples of possible transactions which could be enforceable under the law. The provisions include a horizontal merger, a vertical merger, a conglomerate merger, and hostile acquisitions or takeover. It does not explicitly include joint ventures, unlike Section 54(5) of the Singapore Competition Act 1999 (SCA).[6] Under the current TCA approach, the author opines that a joint venture would fall under the application of the law if it is created for an indefinite time. If created temporarily under the cooperation between two or more

[5] Section 4(4) of the TCA provides that the Act is not applicable to businesses which are subject specific laws on competition. This means sectoral regulators have jurisdiction on competition law issues over the businesses they oversee, unless the laws regulating their sectors do not provide such provisions. In such case, the businesses in question will be subject to competition regulations under the TCA.

[6] Section 54(5) provides that *"The creation of a joint venture to perform, on a lasting basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (2)(b)."*

business undertakings for a specific purpose or for a limited time while the joint venture partners still exist, it does not fall within the scope of the TCA. This interpretation is also in line with the ICN Merger Review which encourages the national competition authorities (NCAs) to limit their merger laws *"only to transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure."*[7] For the Taiwan Fair Trade Law (FTL), Article 10(4) defines a merger as where an enterprise operates jointly with another enterprise regularly or is entrusted by another enterprise to operate the latter's business.

The TCA does not apply to a merger of businesses which are sectorally regulated on the competitiveness of the industries such as telecommunication and energy sector as mentioned above as prescribed in section 4(4).[8] It also does not apply to the mergers which state-owned enterprises and public organizations engage in due to the law or resolutions of the Cabinet which are necessary for the benefit of maintaining national security, public interest, the interests of society, provision of public utilities and infrastructures.[9]

There was a debate in the Ad Hoc Committee whether a merger should explicitly include the merger at parent companies level which results in the acquisition of subsidiaries that have a market share threshold as prescribed by the Trade Competition Commission (Commission). The concern was that if the holding company and parent company are not expressly stipulated in the provisions, it could have created a loophole in the enforcement. However, the Ad Hoc Committee has concluded that the merger regulation under the TCA aims at controlling the conducts of the undertakings, not the structure of the market. Finally, this proposition was dropped in the Ad Hoc Committee.[10]

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[7] ICN, ICN Recommended Practices for Merger Notification and Review Procedures, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf, (last visited 14 April 2019).

[8] Section 4(4) "This Act shall not apply to the operation of the followings:

...(4) businesses that are specifically regulated under other sectoral laws having jurisdiction over competition matters."

[9] Section 4(1).

[10] Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ..., National Legislation Assembly, 'The 16th Meeting Minute' dated 13 January 2017, Bangkok, pp.9-10.

In the author's opinion, the concern is theoretically valid. There could be a potential problem in the interpretation and application of the merger regulations to cover the holding company. According to the Stock Exchange of Thailand, a holding company means a company incorporated to mainly engage in and earn revenues from holding shares or stocks in other company. It does not engage in any business transactions on its own. It may hold stocks or shares in companies incorporated domestically or internationally. Its primary shareholding purpose is not to manage the investment as an investment company, but to own and control its subsidiaries.[11] This definition may disqualify a holding company from being 'a business operator' under the TCA, Section 5. Section 5 defines a business operator as *'a vendor, producer for sale, person who places an order or imports products into the Kingdom for sale, buyer for production or resale of goods, or service provider in the business.'*

According to the definition provided in the TCA mentioned above, a holding company does not appear to be subject to the enforcement of the TCA because it does not engage in the business operation. Although Section 51 paragraph four (3) allows the interpretation of the acquisition of shares to control the management of the acquired company, still the subject of the TCA is business operators. Thus, a merger of two holding companies or an acquisition of a holding company by another holding company may not be subject to the provisions of merger regulation under the TCA. However, this concern may not be valid in practice where firms usually merge at the subsidiaries level rather than the holding company level for better control of the business.

3. THE OBJECTIVES OF THE MERGER AND ACQUISITION WHICH FALLS UNDER THE TCA

Even the transaction in question meets the criteria of a merger and acquisition explained above, not every acquisition are subject to the merger control of the TCA. The acquisition which is subject to the law must be carried out to control the acquired business

[11] Stock Exchange of Thailand, 'Incorporation as a Holding Company', https://www.set.or.th/th/products/listing2/files/Holding_Company_20170228.pdf, (last visited 18 April 2019).

operator's policy, business administration, management, or directorate. The Commission prescribed what constitutes 'control' in the Control Notification as follow:[12]

1) In case of acquisition of assets to control another business operator under Section 51 paragraph 4(2), the acquiring business operator must acquire more than 50% in value of the assets used in the ordinary course of business of the acquired business operator in the previous financial year. Such value is the book value as of the date the parties agree to purchase or the date of the purchase as the case may be.

2) In the case of acquisition of shares under Section 51 paragraph 4(3), there are two categories:

2.1) An acquisition under the law of securities and securities exchange, at once or over some time, of at least 25% of shares, share warrants, or other securities which are convertible into shares with voting right held by the acquired business operator.

2.2) An acquisition of more than 50% of the shares with voting rights of the acquired business operator under the Civil and Commercial Code. In the determination of the percentage of the shares acquired, if the acquiring party is natural persons, the shares acquired by their spouses shall be added to determine the total amount of shares the acquiring party holds too. If the acquiring party is a juristic person, its acquisition of 50% of shares shall include the acquisition of shares in the acquired business operator by a natural person or a juristic person who hold more than 30% of its shares with voting rights and by the undertaking which forms a single economic entity with it.

In the latter case, the Commission has published a Single Economic Entity Notification which entered into force on 2 November 2018. In this Notification, two business operators are 'related to each other due to policies …' when both of them are under the control power of the same controlling business operator. Such control includes control in the firms' policy, administration, directorate, or business management.[13]

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[12] Clause 4 of the Notification of the Trade Competition Commission on Criteria for Acquisition of Assets or Shares to Control Policies, Business Administration, Directorate, or Management which Considered a Merger B.E. 2561 (2018).

[13] Notification of the Trade Competition Commission on the Classifications of Business Operators Related to Each Other Due To Policies or Commanding Power B.E. 2561 (2018) clause 3.

'Control power' for the Single Economic Entity criteria means a controlling power under any of the following circumstances:

a) The controlling business operator holds more than 50% of shares with voting right in the controlled business operator.

b) The controlling business operator has the control, either directly or indirectly, over majority voting rights in the controlled business operator's shareholders' meeting.

c) The controlling business operator can control, whether directly or indirectly, the appointment or removal of at least half of the directors of the controlled business operator.

d) The controlling business operator has the controls under a) or b) in one controlled business operator and that business operator also has the controls under a) or b) in another controlled business operator. These steps are taken into account every linkage of the controlling company with every level of its controlled business operators.

It is clear that the object of the acquisition of assets or shares must be to control the acquired business operator. Hence, acquiring less than the threshold prescribed in the Control Notification automatically disqualify the acquisition in question from being subject to the TCA. As a consequence, the parties do not need to notify or request permission from the Commission. On the other hand, this requirement of 'control of policy, business administration, management, or directorate' does not appear in a merger of two independent business operators. It means that a merger or a joint venture formed permanently would only be subject to the TCA if it meets requirements set in the Notifications.

4. POST-MERGER NOTIFICATION UNDER SECTION 51 PARAGRAPH ONE

After having considered if the transaction in question is a merger under Section 51 paragraph four, the parties concerned need to consider whether their transaction results in 'substantial lessening of competition in the relevant market.' A merger or an acquisition which results in a substantial lessening of competition in the relevant market shall be notified to the Commission within seven days from the date of the merger. The Commission

has enacted the Notify Notification to prescribe the definition of 'substantial lessening of competition in the relevant market.'

Any merger or acquisition which lessens competition in the relevant market does not need to notify the Commission, only those 'substantially lessen of competition' do. It is interesting that the Commission opines that even a merger or acquisition which causes a substantial lessening of competition is acceptable to proceed without any review by the authority prior to the completion of the concentration.

4.1 Background of the Drafting of Section 51 paragraph One

According to the meeting minutes of the Ad Hoc Committee, in many occasions, the Committee debated as to when the merger or acquisition which results in a substantial lessening of the competition should receive permission to do so or does a post-merger voluntary notification suffice for such merger clearance?

At first, it appeared that the original Bill of the TCA B.E. 2560 shifted from a pre-merger clearance under the TCA B.E. 2542 to a post-merger voluntary notification. The reason for the change was the promotion of SMEs by the government. Application for a pre-merger clearance is considered a burden to the business operators. Hence, the post-merger voluntary notification was chosen. The original Bill of the TCA B.E. 2560 emphasized on control of the conducts of the undertakings rather than market structure. The post-merger notification allows the Commission to monitor such acts and facilitate business activities.[14]

However, in the 15th meeting of the Ad Hoc Committee, the approach of post-merger notification caused some concern in the Committee. Some Committee members proposed a modification to the original Bill. The proposals were, for example, only the merger which results in a monopolistic market is prohibited and must receive pre-merger permission, while the merger which results in a dominant position must notify the Commission before the completion of the merger. The then Deputy Director-General of the Department of Internal Trade opposed such proposals. His argument was the Ministry of

[14] Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ..., National Legislation Assembly, 'The 6th Meeting Minute' dated 29 November 2016, Bangkok, pp.9-10.

Commerce together with the Council of the State, and the private sectors reached a consensus that a merger must be allowed in all cases. The Commission could only impose some post-merger conditions on the merger. He added that the consensus was not to authorize the Commission to review the mergers.[15]

Nevertheless, the majority of the Ad Hoc Committee seemed to disagree with the then Deputy Director-General, because the meeting minutes of the next meetings show that the Committee had agreed that the Commission is authorized to review some mergers. The proposals have changed from a pre-merger voluntary notification of the merger which results in a substantial lessening of competition in the relevant market least 60 days before the merging date[16] to the prohibition of any merger which results in monopoly or substantial lessening of competition in a relevant market unless the Commission grants pre-merger permission.[17] This approach is compatible with the ICN Merger Analysis, the FTL, and the SCA.

At the 22nd meeting, the Ad Hoc Committee had approved the drafted Section 51, 51/2, and 51/3 drafted by the expert of the Ministry of Commerce and the representative from the Council of State. The then drafted version of these sections was as follow:[18]

Section 51 *A merger which results in monopoly or substantial lessening of competition in a product or service market as prescribed by the Commission is prohibited, unless the Commission grants the permission to do so.*

The Commission's notification under paragraph one shall specify the minimum amount of market share, revenues, capitals, shares, or assets to which this Section applies. The Commission shall review the criteria set in such notification at least once within three years after the date of the publication of the notification.

The merger under paragraph one includes:

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[15] Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ..., National Legislation Assembly, 'The 15th Meeting Minute' dated 10 January 2017, Bangkok, pp.10-12.

[16] Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ..., National Legislation Assembly, 'The 16th Meeting Minute' dated 13 January 2017, Bangkok, pp.8-9.

[17] Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ..., National Legislation Assembly, 'The 16th Meeting Minute' dated 13 January 2017, Bangkok, p. 6.

[18] The author's personal translation from Thai to English.

(1) The merger between producers and producers, sellers and sellers, producers and sellers, or service providers and service providers which cause one business to remain existent and the extinguish of another, or creation of a new business.

(2) The acquisition of other business' assets, wholly or partially, to control the latter's policy, business administration, directorate, or management.

(3) The acquisition of other business' shares, wholly or partially, to control the latter's policy, business administration, directorate, or management.

An application for the permission and the permission granted under paragraph one shall comply with criteria, procedures, and conditions set out by the Commission. The application for the permission shall at least elaborate the reasons and necessity of the merger, procedures to be taken, and the time frame of the merging procedures.

The provisions of paragraph one do not apply to the merger to internal restructure of business operators connected by policy or control power as prescribed by the Commission.

Section 51/1 *In consideration to granting permission under Section 51, the Commission shall finish reviewing within ninety days from the date of the application. In case of necessity, such period can be extended not over fifteen days. In this regard, the Commission shall record the reasons and the necessity of such extension in the notification.*

The Commission shall take into consideration the reasonable business necessity, benefits to business promotion, unsubstantially damage caused to the economy, and unprejudiced to consumers' welfare when consider granting permission.

Should the Commission grants the permission, the Commission may fix a period or impose any conditions with which the business operators receiving permission shall comply.

The Commission shall indicate its reasons in granting or not granting such permission, both in the question of fact and the question of law and sign the names of the Committees who consider the merger. Section 58 paragraph shall be applied mutatis mutandis.

The notified business operator of the Commission's order, but disagrees with it, is entitled to file a claim to the Administrative Court within 60 days from the date of the notification.

Section 51/2 *The business operators granted the permission to merge shall comply with the period and conditions fixed by the Commission.*

In the case of violation or noncompliance of the order under paragraph one, the Commission is vested with the power to revoke in whole or in part of the permission granted. The Commission may assign a specific period to comply with its order.

However, at the 24th meeting, the Ad Hoc Committee modified the drafted Section 51 above by moving the Commission's revision duty under paragraph two to paragraph six instead, and also moved the exemption of merger control for internal restructuring merger between businesses considered as a single economic entity under paragraph five to paragraph three. There was no substantial modification of the drafted Sections 51, 51/1, and 51/2. The author only has access to the meeting minutes until the 24th meeting. Therefore, it is not known to the author the reason the finalized Section 51, 52, and 53 materially differ to a certain degree from the drafted version cited above.

The drafted version of merger control prohibits a merger which may result in a monopoly, or a lessening of competition in a relevant market which is in line with the ICN Merger Analysis which encourages jurisdictions to identify, prevent, and remedy only mergers which are likely to harm competition significantly.[19] Under this approach, if a merger causes significant harm to market competition, it should be remedied or at least prevented. The drafted version was also in line with the Singapore merger control under Section 54 of the SCA and Taiwan merger control under Article 11 of the FTL.

Nevertheless, the finalized Section 51 paragraph one of the TCA does not require remedy or prevent the merger that constitutes a significant lessening of competition. The TCA allows the establishment of such a merger. The merged business operators are free to conduct a self-assessment whether their merger and acquisition result in a

[19] ICN, Recommended Practice for Merger Analysis, https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-for-merger-analysis/, (last visited 17 April 2019).

substantial lessening of competition. Whether yes or no, they are free to merge. If yes, they are required to notify the Commission within seven days after the date of the merger. If not, they are free to merger without giving any notification to the Commission. Therefore, the significance of the anticompetitive effect of the merger is for the business operators to understand if they have to notify the Commission.

Another material change in the drafted version to the final version of Section 51 was the removal of the Commission's duty to review the criteria of monopolistic and dominant merger and acquisition. It is not known to the author why the National Legislative Assembly passed this law with such change. In Taiwan, the FTL allows the Fair Trade Commission (FTL Commission) to review the turnover thresholds for a merger as appropriate, and the FTL Commission has updated the thresholds periodically, which seems like a reasonable approach.

4.2 Definition of 'Substantially Lessening of Competition' Under the Notify Notification 2018

Clause 3 of the said Notification define *'A merger which may results in substantially lessening of competition in a relevant market'* as a merger or an acquisition in which one business operator's or the merging business operators' total sales revenues is at least one billion Baht, and which does not result in a monopoly or having a dominant position. The calculation of the sales revenue of the merging partners in a relevant market mentioned above shall add the sales revenues of business operators which considered as a single economic entity with the merging firms as well.

The Notify Notification solely rely on the total sales revenue to determine whether there is a risk to lessen competition in the relevant market significantly. There is no notion of market power (the ability to raise price above competitive level for a significant period), or lessen competition on factors such as price, quality, service, innovation. The Notification does not refer to comparison the competitiveness of the market pre and post-merger. There is no reference to unilateral effects or coordinated effects, the effect on market access, the barrier to entry and exit, expansion, countervailing buyer power or economic efficiency. This approach significantly differs from the ICN Recommended Practices, Singapore SCA, and Taiwan FTL.

As mentioned earlier in this article that one of the legislative intents of this Act is to promote and strengthen the SMEs to be able to compete in the market. The legislators, therefore, use one billion Bath benchmark to keep any transaction that falls below that threshold from the application of this Act. While this rationale is understandable, there appears to be a significant imbalance between consumer welfare and competitiveness of the SMEs or business operators in general.

However, one may anticipate such imbalance because, in the Ad Hoc Committee's meetings, there is very little mentioning of 'consumers' let alone consumer welfare. In fact, from all meeting minutes in the author's possession, there was only one time the Committee mentioned 'consumers.'[20] It will not be too far from the truth to conclude that consumer welfare was not on the agenda of the legislators when drafting this Trade Competition Act. The evidence which supports this claim is the fact that the law on merger control intentionally disregard consumer welfare when it comes to transactions engaging by the SMEs and business operators who are not a monopoly or dominant undertakings.

As long as their merged transactions are less than one billion Baht, they do not have to notify the Commission of their mergers. Even where their concentration is worth more than one billion Baht, they can complete their merger and only have to notify the Commission of the transaction. In both cases, the Commission will not review the impact on the market structure, innovation, price, quality, market entrance and exit, and access to the essential facility. These factors affect consumer welfare. They could cause less choice, worse quality, less innovation, and higher price of products and services.

A) Application of a Hypothetical Merger Case to the Merger Control

To provide a clearer picture to the application of Section 51 paragraph one of the TCA, let us use a hypothetical case. According to available online data collected by Euromonitor International on market share in drinking yogurt and liquid cultured milk in

[20] Ad Hoc Committee for the Consideration of the Trade Competition Bill B.E. ..., National Legislation Assembly, 'The 6th Meeting Minute' dated 10 January 2017, Bangkok, p.10.

Thailand in August 2017[21], the total turnover in this market was 30,196 million Baht. The market-leading brands identified as follow:

1. Dutch Mill 38.6% of market share and a total turnover of 11,655.65m Baht
2. Yakult 20.5% of market share and a total turnover of 6,190.18m Baht
3. CP-Meiji 11.7% of market share and a total turnover of 3,532.93m Baht
4. Foremost 7.7% of market share and a total turnover of 2,325.09m Baht
5. Others 14.7% of market share and a total turnover of 4,438.81m Baht

According to the definition of a business operator with a dominant position under clause 3 of the Commission's Dominance Notification, this market has no dominant incumbent, either single or collective. Because a single dominant incumbent is an incumbent, who has at least 50 percent of market share and a total turnover of at least one billion Baht in the preceding year in the relevant market. In the case of collective dominance, the top three firms are collectively dominant when they have at least 75 percent of market share, and each of the three incumbents has at least one billion Baht of total turnover in the preceding year in the relevant market.[22] Nevertheless, according to the concentration ratio of the top 3 companies (CR3), this market is a highly oligopolistic market because its CR3 exceeds 70% - it is 70.8%. The market concentration analyzed under the Hirfindahl-Hirchman Index (HHI) for 2017 is 2,106.39 (38.6x38.6 + 20.5x20.5 + 11.7x11.7 + 7.7x7.7).

If Yakult merged with CP Meiji, the post-merger HHI would have been 2,586.09 (38.6x38.6 + 32.2x32.2 + 7.7x7.7). The delta would have been 479.7. The merger between Yakult and CP Meiji place them in second place in the market, and the CR3 would have been 78.5. However, the merged entity would have had a market share of only 32.2% and would not have been identified as an incumbent with a dominant position under the Dominance Notification. For a collective dominance, the Dominance Notification excludes any business operator whose market share is less than 10 percent from the calculation. In

[21] Food Intelligence Center Thailand, Cultured Milk and Drinking Yogurt Market Share 2017, http://fic.nfi.or.th/MarketOverviewDomesticDetail.php?id=177, (last visited 30 April 2019).

[22] Trade Competition Commission, Notification of the Trade Competition Commission on the Criteria of Business Operator Having a Dominant Position B.E. 2561 (2018), clause 3.

this hypothetical scenario, Foremost only had 7.7 percent of market share, so it will not be included.

i) Application of Section 51 Paragraph One of the TCA

According to the Notify Notification, the hypothetical merger between Yakult and CP Meiji would have resulted in a substantial lessening of competition because the total turnover of both parties exceeds one billion Baht and the newly merged entity would not have constituted a monopoly or a dominant incumbent. In this case, the merging parties can complete their merger and notify the Commission within seven days from the date of the merger. The Commission will not have the chance of reviewing this transaction prior to the completion of the merger.

None of the companies listed above is an SME, yet they enjoy the same protection as the TCA intended to provide to the SMEs – they are free to merge without having to conduct a self-assessment, which they can certainly afford, to determine if the economic efficiencies outweigh the anticompetitive effects that their merger could have caused on the market.

ii) Application of Article 11 of the FTL

On the contrary, should this scenario occur in Taiwan, the merger will be subject to the scrutiny of the FTL Commission because of Article 11 of the FTL 2015. Article 11 paragraph one of the FTL requires any mergers which fall into one of the following criteria shall apply with the FTL Commission for a pre-merger clearance:

1. As a result of the merger, the merged undertaking will have at least one-third of the market share; or

2. One of the merging participants already have one-fourth of the market share; or

3. The combined worldwide sales revenues in the preceding fiscal year exceed 40 billion NT$ and the domestic sales revenue of each of at least two merging parties in the same year exceed 2 billion NT$; or

4. For non-financial institutions, total domestic sales revenue in the preceding fiscal year of one of the merging parties exceed 15 billion NT$ and the total domestic sales revenue of the other in the same year also exceed 2 billion NT$; or

5. For financial institutions, total domestic sales revenue in the preceding fiscal year of one of the merging parties exceed 30 billion NT$ and domestic total sales revue in the same year of another one of the merging parties exceed 2 billion NT$.[23]

Under the FTL, the hypothetical case between Yakult and CP Meiji will fall under the review of the FTL Commission under the 1st and the 2nd criteria. They cannot merge unless the FTL Commission clears their merger. In order to review the transaction, Article 13 requires that the FTL Commission is satisfied that the overall economic benefit from the merger outweigh the disadvantages resulted from competition restraint. Also, it allows the FTL Commission to impose any conditions on the merging participants.

In this scenario, Yakult and CP Meiji may submit a proof of overall economic benefits to outweigh the anticompetitive effects. The overall economic benefits include:

1. Efficiency which can be achieved in a short period, cannot be achieved without the merger, and which can reflect on consumers' interests
2. Consumers' interests
3. One of the merging parties was a weaker competitor
4. Failing firm defense
5. Other concrete evidence of other economic benefits to be expected.[24]

Additionally, the hypothetical horizontal merger in question will be further assessed if it involves one of the following conditions:

1. When the aggregated market share of the merged entity reaches at least 50 percent of the total market; or
2. The top two competitors in the relevant market have two-thirds of the total market share; or

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[23] Fair Trade Commisison, Notice of the Fair Trade Commission, https://www.ftc.gov.tw/upload/530fef1f-6053-4268-8219-4db5291c6cb1.pdf, (last visited 28 April 2019).

[24] Fair Trade Commission, Fair Trade Commission Disposal Direction (Guidelines) on Handling Merger Filing, https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=656&_docid=2719, (last visited 28 April 2019).

3. The top three competitors in the relevant market have three-quarters of the total market share.[25]

Taiwan merger control correlates with the ICN Merger Analysis in using market share to help measure market concentration. It does not rely only on sales revenues. In its Guidelines on Handling Merger Filing,[26] the FTL Commission takes into account the unilateral and coordinated effects, market entry, and countervailing power before allowing a horizontal merger to continue.

In 2005, the FTL Commission cleared the merger between Carrefour and Tesco. The merged entity exceeded the market share and total turnover threshold prescribed by the FTL, hence, the filing of the merger report. The filing allowed the FTL Commission to weigh and review the disadvantages and advantages of the merger on the market and consumers. The FTL Commission found that the merger would not pose a significant impact on market structure and competition. However, the FTL Commission imposed two conditions upon the parties: 1) they shall not restrict their trading counterparts from engaging in businesses with particular enterprises; 2) they shall not make improper price decision, support, change, or conduct businesses to hinder fair competition with other enterprises, or abuses their relative advantage position in the market.[27]

iii) Application of Section 54 of the SCA

If this hypothetical merger occurred in Singapore, the transaction would have been subject to the revision of the Competition and Consumer Commission of

[25] Fair Trade Commission, Fair Trade Commission Disposal Direction (Guidelines) on Handling Merger Filing, https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=656&_docid=2719, (last visited 28 April 2019).

[26] Fair Trade Commission, Fair Trade Commission Disposal Direction (Guidelines) on Handling Merger Filing, https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=656&_docid=2719, (last visited 28 April 2019).

[27] The Fair Trade Commission Decision, Summary of Carrefour Co., Ltd. and Tesco Co., Ltd. are merging and filing a merger report with the Fair Trade Commission according to Article 11 of the Fair Trade Law, https://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=_692&docid=2153 (last visited 30 April 2019).

Singapore (CCCS). Under Section 54 of the SCA, any mergers which have resulted in or may be expected to result in a substantial lessening of competition are prohibited. Singapore merger control is a voluntary based regime. The undertaking may or may not notify their merger transaction to the CCCS.[28]

According to the CCCS Guidelines on Merger Procedures 2012 (CCCS Merger Guidelines), the CCCS unlikely to investigate any merger involving small companies, i.e., each merging party having a total turnover in Singapore in the preceding financial year of less than 5 million SG$ and a combined global turnover of all parties in the preceding financial year is less than 50 million SG$. The hypothetical merger between Yakult and CP Meiji would have a total turnover exceeding the said threshold and is subject to the revision of the CCCS.

The CCCS considers the following thresholds as likely to giving rise to a substantial lessening of competition in the market:

1. The merged business operator will have a market share of at least 40 percent; or

2. The merged business operator will have a market share of between 20 to 40 percent, and a post-merger combined CR3 is at least 70 percent.

If the parties doubt whether their proposed merger could raise anticompetitive effect concern, they can apply to the CCCS for its advice whether the CCCS would view the proposed merger if carried out, is likely to lessen the competition substantially. [29] However, under the TCA merger control, such advice is not available because the TCA allows any mergers resulting in a substantial lessening of competition to be carried out. Thus, the advice on this matter is unnecessary.

According to the mentioned CCCS Merger Guidelines, the hypothetical merger between Yakult and CP Meiji is likely to result in a substantial lessening of competition because the proposed merger would have had 32.2 percent of market share and post-merger combined CR3 of 78.5 percent. The parties concerned could have filed a

[28] CCCS, CCCS Guidelines on Merger Procedures 2012, https://www.cccs.gov.sg/legislation/competition-act, (last visited 20 April 2019).

[29] Section 55A(1) of the Singapore Competition Act.

merger clearance with the CCCS for a merger clearance. This would have allowed the CCCS to review the transaction. Should the CCCS determine there is a reasonable risk of a substantial lessening of competition, it could have blocked the transaction. If not, it could have cleared the transaction.

In case Yakult and CP Meiji decided not to notify the CCCS of this merger, and the CCCS found that this merger violated Section 54 of the SCA, there could have been two possible consequences:

1. It may result in a divestiture all or part of the business under Section 69(2)(e)(ii) of the SCA.

2. The CCCS may impose a financial penalty on the parties under Section 69(2)(d) of the SCA.

Nonetheless, if the economic efficiencies arising or that may arise from this merger outweigh the adverse effects due to the substantial lessening of competition in the relevant market, Section 54 will not be applied, and the CCCS will grant a merger clearance.[30] According to the CCCS Merger Guidelines, economic efficiencies increase rivalry in the market and enhance the merged undertakings' ability and incentive to compete. In order to claim the gain of economic efficiencies, the merging undertaking must be able to provide concrete evidence that the efficiencies will be timely, likely to prevent a substantial lessening of competition, the efficiencies would not occur without the merger.[31] The CCCS analyses the net economic efficiencies into great details. It looks into supply-side, demand-side, and dynamic efficiencies. In conclusion, the SCA approach is compatible with the ICN Merger Analysis.

5. ANALYSIS AND CONCLUSION

As the author applies the hypothetical merger between Yakult and CP Meiji to the FTL and SCA, it is clear that under both laws this merger would have been subject to the laws, and the FTL Commission and the CCCS could have reviewed and prevented such

[30] Section 55 and the Fourth Schedule of the Singapore Competition Act.

[31] CCCS, CCCS Guidelines on Merger Procedures 2012, https://www.cccs.gov.sg/legislation/competition-act, (last visited 20 April 2019).

merger. This allows both authorities to weigh the disadvantages and advantages of the merger in question which eventually allows them to exercise their power to oversee the market competition and consumer welfare more fully.

On the contrary, the TCA allows any mergers resulting in a substantial lessening of competition to be carried out without the Commission's revision. As long as the merger does not result in a monopoly or a dominant position, it will be allowed without any revision. The undertakings do not need to conduct a proper self-assessment. They do not have to take into account whether the advantages from their mergers would outweigh the anticompetitive effects which could occur or not. The Commission does not have to conduct any merger analysis the same fashion the CCCS and the FTL Commission do.

Another problem with the enforcement of Section 51 paragraph one is when a merger causes a substantial lessening of competition in Thailand, the TCA treats it as no problem at all. According to the current law, it is not a problem that in a highly oligopolistic market such as this hypothetical case to have a merger which causes high market concentration. Nobody could be a victim of this practice. The TCA does not allow any of the public and the business sectors to claim for any damages which they may have suffered. The TCA treats the damage as non-existence. The only punishment business operators, whose mergers result in a substantial lessening of competition, will receive is an administrative fine if they fail to notify the Commission within seven days from the date of the merger. There will be no consequence whatsoever should they hinder market competition as long as they do not become a monopoly or a dominant incumbent. The Commission also has no power to impose any condition on the mergers under Section 51 paragraph one. This power could be exercised only in the case of mergers under Section 51 paragraph two.[32]

Besides, Section 57, unfair trade practices prohibition, does not apply to the merger in question unless the merged business operator conduct unfair trade practices after the merger. In such a case, the injured party would have been other business operators, not the consumers. Perhaps the legislators are confident in the application of this Section to curb anticompetitive behaviors of the SMEs or other business operators who have market

[32] Trade Competition Act B.E. 2560, Section 52 paragraph three.

power but not qualified as a monopoly or a dominant incumbent. However, this Section only protects other business operators, not consumers. Its purpose is to promote free and fair competition, not consumer welfare. Thus, the promotion of SMEs and the creation of a national champion prevail over consumer welfare. Perhaps, the legislators may highly likely consider consumer welfare is better protected through the enforcement of other legislation such as the Consumer Protection Act. The discussion on this matter, unfortunately, falls outside the scope of this article. It should be addressed and discussed on another occasion, possibly in another article.

Regarding the penalty and damages, according to Section 69 of the TCA, anyone who might be affected by the merger under Section 51 paragraph one is not entitled to damages. This Section only allows injured persons under Section 50, 51 paragraph two, Section 54, Section 55, Section 57, or Section 58 to claim for damages. Moreover, the Commission is not authorized to order the merged firms under this Section to divest or demerge because Section 60 only allows such remedies in the case of Section 51 paragraph two. If only the Commission has reasonable grounds to believe that the merger under Section 51 paragraph one is, in fact, a merger under Section 51 paragraph two, then the Commission can exercise its power under Section 60. However, it is doubtful how the Commission could come to such a conclusion if the Commission does not have the chance to analyze or review the mergers.

The Commission must regulate business operations to maintain free and fair competition.[33] How could the Commission fulfill its duty if there is no analysis of any merger to be taken in the case of Section 51 paragraph one? Of course, many proposed mergers under this Section could be cleared before the merger would take place. Still, the public can learn from the Commission how it considers the matters at hand, how it interprets the law, and how it applies to the case. Even the final decision is to allow the proposed merger which yields the same result as when the merging parties only notify the Commission of their proposed merger, the pros of this approach is not only to the public but also the officers and the Commission too. The more practices it gets, the better it becomes.

[33] Trade Competition Act B.E. 2560, Section 17 (3).

The drafted Section 51 was a much better and more compatible with international practices such as the ICN, FTL, and SCA than the enacted version. Who knows what the National Legislative Assembly had in mind when received the last drafted version from the Ad Hoc Committee and turned it into the Section 51 which is currently in force now.

The new Commission did not enact any of the Notifications. The old Commission proposed all current Notifications to date under the old law. Nevertheless, they are as helpful as they can be. The Thai general merger control regime has just begun. The Commission should publish guidelines to support the law and help the public understand how the Commission interprets the law and provides comprehensive guidance as soon as possible. A few Notifications on merger hardly suffice to serve their purposes. There are still many questions regarding merger control that need clarification, and relying on calling the officers at the Office of Trade Competition is not a very practical and efficient option. It is better to have publicly available comprehensive guidance that people can have access to any time.

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