THE SUBSTANTIAL LESSENING OF COMPETITION TEST FOR MERGERS UNDER THE TRADE COMPETITION ACT B.E. 2560: LESSONS FROM THE UNITED STATES, EUROPEAN UNION, JAPAN, AND SINGAPORE

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Abstract

Testing for a substantial lessening of competition is a concept that has been widely accepted and applied in the supervision of mergers, for example, in the United States, European Union, Japan, and Singapore, as well as in Thailand. However, this study reveals that the process to assess which mergers may result in a substantial lessening of competition is significantly different in Thailand in comparison to the other countries mentioned earlier. The detailed and complex process in foreign countries, results in the supervision of mergers based on the concept of substantially lessening competition being correct and efficient. This is different from the legal procedure of competition law in Thailand which is simple and explicit, but may lead to a distorted outcome, making the supervision of mergers according to Thailand competition law inefficient. Therefore, consideration should be given to improving the supervision of mergers, based on the concept of substantially lessening competition under the Trade Competition Act B.E. 2560 (2017), in order to apply procedures correctly, meet objectives, and follow best practices, as demonstrated in the competition law of the United States, European Union, Japan, and Singapore.

Keywords: Competition law, Merger control, Business combinations, Substantial lessening of competition.

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INTRODUCTION

For countries with liberalism or a capitalist economy, which use a market mechanism as a tool to effectively allocate resources in the economic system, it is necessary to have a significant law that empowers the state to intervene in the conduct of business operators and to protect the activation of market mechanisms, namely, competition law (Whish, 2018). Such law aims to control three significant types of behavior in conducting business that may harm competition in the economic system, i.e. agreements to restrict competition, abuses of a dominant position (monopolization), and mergers. The competition law in each country may be defined as the prescribed rules and factors used to consider the differences in business operators' behavior (Hovenkamp, 2017).

It is essential for the government to introduce a competition law to supervise mergers as they can easily make an impact on the market by reducing or eliminating competition (Supanit, 2012). Besides this, they may affect the market structure; in other words, mergers may increase the level of market concentration, leading to the increasing market power of business operators. Compared to the agreement to restrict competition, mergers can cause a more permanent change in the market structure, making it possible for mergers to negatively affect the economy and damage operators, consumers, or competitors in the market rather than the anti-competitive agreement (Jones, 2019). Therefore, in order to achieve the objectives of competition law in protecting competition and the functioning of market mechanisms, merger control provisions are essential.

The supervision of merger structure under competition law begins with the determination of a supervision system encompassing a pre-merger notification system or other systems, followed by the requirements or factors used to consider mergers, and the processes for implemention, including the power to enforce the law on mergers. All these issues are essential in generating a law which is able to supervise mergers efficiently (Lim & Clements, 2016). However, the major issue is the great complexity which effects the supervision of mergers through the determination of the criteria used to consider which mergers may result in a substantial lessening of competition, and which can in turn lead to determination of a final decision of whether a merger should take place or not. If such criteria are negligent or relaxed, merger supervision will not work as it should. On the other hand, if factors and criteria are set up too strictly, they will obstruct mergers and may consequently have a negative affect on economic development (Hovenkamp, 2005).

One concept of consideration criteria for mergers which is widely accepted and adopted in supervising mergers under competition law in many countries, is the concept of mergers that are likely to lessen competition substantially. Under this concept it is important to assess whether mergers may result in a substantial lessening of competition in a particular market by considering various factors (Buccirossi, 2008). This concept has gained acceptance as it can improve the efficiency of merger supervision by regulatory authorities which are able to comprehensively supervise mergers that may result in negative impacts on economic competition (Riesenkampff, 2004). In this regard, Thailand's competition law has also adopted such a concept for merger supervision.

Nonetheless, regarding the adaptation of this concept within the supervision of mergers in Thailand, there are two main points for consideration: 1) which factors should be used to assess the potential impacts from mergers; and 2) how to set the consideration criteria for each factor, since the determination of the factors and criteria for the consideration is crucial for enabling the law to be enforced (Trebilcock et al., 2003). Such issues are found in Thailand's competition law as the determination of factors and criteria in applying such a concept in Thailand results in the regulatory authorities being unable to efficiently supervise mergers that may negatively impact competition. Therefore, this research aims to study the experiences of various countries in determining the factors and criteria for applying the concept of testing mergers for their potential to cause a substantial lessening of competition, ultimately obtaining a guideline for improving the supervision of mergers under Thai competition law accordingly.

LITERATURE REVIEW

Generally, mergers bring about both positive and negative impacts on the economic system, as mergers may increase economic efficiency by producing economies of scale or allowing small business operators to better compete with large business operators (Gore, 2013). Meanwhile, mergers can decrease competition, especially horizontal mergers, which result in a decrease in the number of competitors in the market. Therefore, production becomes concentrated among a few manufacturers (Fulcher, 2020), leading to increases in the market power of those business operators. In addition, mergers can reduce the production process and operating costs, especially vertical mergers. Mergers can also enable the merging companies to benefit from economies of scale and use of more efficient production technology. As a result, the business operators can reduce their production costs, leaving other operators at a disadvantage regarding competition and creating barriers to entry for new operators (Khantawit, 1997). Therefore, the government is required to enact regulatory provisions for mergers according to competition law in order to prevent the potentially severe consequences of mergers outlined above.

The experience of supervising mergers in different countries has shown that the most effective measure to supervise mergers should be a structural control measure. This measure empowers the regulatory authorities to prevent business operators from merging their businesses if it may enable them to engage in various forms of anti-competitive behavior, which may have detrimental effects on consumers or competitors. However, provisions concerning the abuse of a dominant position or anti-competitive agreement limit the power of the regulatory authorities to only regulate the conduct of business operators after a merger. This causes many problems to the regulatory authorities in various countries, as the examination of anti-competitive behaviors following a merger, particularly by restrictive agreement, is tremendously difficult and costly. This is consistent with law enforcement statistics, which show very low detection rates for such behavior in multiple countries (Lasok & Holmes, 2012). In addition, by allowing business operators to merge their businesses independently, supposing that a business operator raises the price of their products or services after the merger, there may be cases where the competition law cannot be used to regulate this behavior, especially if the merger did not result in a dominant position as required by the laws of each country (Hovenkamp, 2017). All of the above reasons were reflected in the strict and elaborate regulatory system for mergers under the competition laws of foreign countries, although such systems will be burdensome for business operators.

The early supervision of mergers was based on the concept of a monopoly or market dominance. In other words, if the merger was likely to create a monopoly or strengthen its dominance over the market, the business operators would not be allowed to conduct a merger. However, the supervision of mergers using the concept of mergers that may result in a monopoly or market dominance makes the regulatory authorities unable to comprehensively supervise all mergers likely to harm competition (Werden, 2008).

More specifically, mergers unlikely to result in a monopoly or market dominance are still likely to cause damage to competitors, trade partners, or consumers, particularly regarding their unilateral effects and interdependence effects (Hylton, 2010). Firstly, the unilateral effects, which refer to a single business operator's ability to control prices or the quantities of products and services after a merger, primarily occur if the merged companies used to be competitors in the market before the merger. In this regard, the business operator does not need to encounter an opportunity to lose its revenue and profit from consumers who change to use the competitor's products or services after raising the prices of products or services (Elhauge, 2008). Secondly, the coordinated effects, which refer to a business operator’s ability to jointly raise prices, reduce production volume, or reduce the variety or quality of products and services, may lead to a lessening of competition in the market. Cooperation among business operators can occur through explicit collusion, implicit collusion, or parallel pricing (Scott & Berry, 2010).

From a practical perspective, these effects, which arise from mergers, cannot be employed interchangeably with other provisions or concepts to effectively supervise a merger (Kokkoris & Shelanski, 2014). Employing a cartel provision meets a legal standard requiring evidence to prove complicity among business operators. In a market where there is a small number of competitors, showing such evidence is quite tricky as a mutual agreement may occur in any form. Even regarding the application of the concept of collective dominance, the economic relationship must be proved, which seems to be very difficult (Geradin & Farrar & Petit, 2012). Therefore, to encourage regulatory authorities to supervise mergers which may impact competition, more comprehensively and efficiently, the concept of mergers that may lead to a substantial lessening of competition is accepted and applied in merger supervision. Under this concept, the regulatory authorities must only assess the impacts of mergers by considering the prescribed factors as described in the following article, without the restriction that those mergers must result in a monopoly or dominant position; such a concept is flexible enough to encourage the regulatory authorities to better control the occurrence of mergers that may harm competition in the market (Heimler, 2008).

The concept of mergers that are likely to substantially lessen competition occurred in 1914 in the United States of America, based on the experience of the enforcement of the United States antitrust law. In the beginning, this concept was not efficiently enforced due to confusion between antimonopoly legislation in the United States of America and a lack of appropriate principles regarding the relevant laws, as the regulatory authorities at that time determined the principles only by considering the competition among business operators who merged their businesses without considering the impacts on overall competition in the market (Bundeskartellamt, 2001). Only later, when the concept was continuously developed such that the economic principles were adopted as a guideline for determining the factors used to assess the impacts on overall competition in the market probably caused by mergers, the concept was applied to supervise mergers adequately (Posner, 2001).

Adopting economic principles in assessing the impact of mergers is an essential point, allowing the concept of mergers resulting in a substantial lessening of competition, to be used in successful enforcement. Evidently, a large number of competition law regulatory authorities have accepted and adopted the concept regarding the potential impacts of mergers on competition and have developed guidelines for determining the factors used to assess the impacts caused by mergers as a model to supervise future mergers according to their competition law in a comprehensive manner (Arai, 2019). The reason for this, is that the concept allows law enforcement to achieve a higher degree of tangibility, in turn allowing regulatory authorities to comprehensively supervise mergers which have potential to negatively impact competition in the market. This is different to the past legislation of most countries, which adopted the concept of monopoly and market dominance to supervise mergers, but was ultimately unable to be used effectively (Jones, 2019).

RESEARCH METHODOLOGY

This study was conducted using a qualitative research technique as the method to study, analyze, and compare, the substantial lessening of competition test for mergers and acquisitions under competition law, including significant experience in supervising mergers under the law enforced in 2020 of the United States, European Union, Japan, Singapore and Thailand. The procedures of the study were as follows:

1. Study documents comprised of provisions on the supervision of mergers under competition law, guidelines pursuant to competition law, books, articles, and research studies, including information related to experiences in the supervision of mergers following the concept of testing for a substantial lessening of competition from mergers under the competition law of the United States of America, European Union, Japan, Singapore, and Thailand.

2. Analyze and compare the tests for substantial lessening of competition according to the competition law of different countries, acquiring a standard for testing the substantial lessening of competition from a merger, used in merger supervision.

3. Interview experts associated with mergers according to competition law, i.e. committee members of the drafting of competition law and secondary legislation according to Thailand's competition law, officials from the Office of Trade Competition Commission, and lawyers from law firms associated with the intentions and purpose of the supervision of mergers according to Thai competition law and the outcomes of the enforcement of trade competition law for the supervision of mergers used at present.

4. Develop the study conclusions and suggestions for improving the supervision of mergers according to Thai trade competition law.

RESULTS

The findings from the study are divided into two parts. The first part relates to the standards used in the test for a substantial lessening of competition from mergers in foreign countries. The second part relates to the test for a substantial lessening of competition and developing a guideline for considering mergers likely to substantially lessen competition according to the current enforcement of Thai competition law.

The Substantial Lessening of Competition Test According to the Competition Law of Different Countries

The analysis and comparison of tests for substantial lessening of competition due to mergers according to competition law and their associated guidelines in the United States of America, European Union, Japan, and Singapore, has shown that standards and factors used to consider which mergers may result in a substantial lessening of competition in each country all have the same direction. Competition law regulatory authorities in each country have similarities in the guidelines used for considering whether or not to allow business operators to merge their business; business operators in those countries easily understand the processes and procedures of mergers according to competition law (Silva et al., 2011).

In each country, the regulatory authorities' processes for considering mergers start from consideration of the size of the firms to be merged, assessing the firms in the context of the assets or sales volume of each business operator. This excludes small businesses, an element of the process known as a safe harbor (Yang & Pickford, 2010). For example, according to the United States antitrust law, a business operator must seek permission for a merger only when the merger will enable the business operators to have combined assets worth more than US$ 94 million (Mucchetti et al., 2020). Following Japanese antimonopoly law, a business operator must seek permission for a merger when the business operators as merging companies had a combined turnover exceeding 20 billion yen in the previous year. Simultaneously, each business operator of the merged company must have turnover in the previous year exceeding 5 billion yen (Matsuthita & Davis, 1990)

In the case of business operators meeting the inclusion criteria, the regulatory authorities in each country utilize these criteria and factors as the standard against which potential mergers may be examined, determining which mergers may result in a substantial lessening of competition, which itself can be divided into six major factors, namely 1) changes in market structure, 2) anti-competitive effects, 3) purchasing power in the market, 4) market entry, 5) efficiency gains from mergers, 6) reasons related to the necessity of business operators. Each country's regulatory authorities consider all six factors to decide whether a merger should be permitted to take place or not (Lasok & Holmes, 2012).

Concerning changes in market structure, the regulatory authorities shall, in the first instance, consider how much a merger can change the market structure. It can be said that this is the most significant factor in assessing which mergers may result in a substantial lessening of competition (OECD, 2009). Namely, how much mergers can change a monopolistic competition market to become an oligopoly market or from an oligopoly market to become a monopoly market. In this regard, each country's regulatory authorities employ an economic index to assess the market concentration as a criterion for consideration. Some countries assess the market concentration by looking at the concentration ratio (CR), which is computed by summing the three to four largest firms' market shares. A perfect competition market shall have a concentration ratio close to 0%, while a concentration ratio of a monopoly market is 100% (Robin, 2007). For instance, according to Singapore competition law, a merger enabling a concentration ratio of the top three largest firms to be 70% or more is considered as a significant change to the market structure which tends to lessen competition substantially (Lim & Bull, 2015).

Another model for assessing market concentration is the Herfindahl-Hirschman index (HHI), which calculates the sum of the squares of every firm in the relevant market. HHI was adopted to assess competition levels in the market during the 1980s by the United States Department of Justice. A market with an HHI of less than 1,000 is regarded as highly competitive, while a market with HHI values between 1,000 and 1,800 is considered moderately competitive, and a market with HHI above 1,800 is regarded as uncompetitive (Hovenkamp, 2020). Therefore, from that time, the United States Department of Justice has carefully observed mergers of businesses in a market with HHI above 1,000 and have opposed mergers resulting in HHI above 1,800 (Golden, 1993). The HHI criteria have improved continuously until today, where a merger of markets with HHI values above 1,500 shall be closely monitored and there is opposition to mergers in which HHI values are higher than 2,500 (Roberts, 2014). The United States' method to assess the impact on the market structure is so popular that competition regulatory authorities of the European Union and Japan have applied it to their competition laws (DG Competition, 2004). Characteristics of changes in the market structure are concluded and shown in Table 1.

Table 1 Comparison Table of Characteristics and Types of Market

Characteristics	Perfectly competitive market	Monopolistic market	Oligopoly	Monopoly
Number of businesses by industry	High	High	Few	Only one
Barriers to market entry	No	No	Moderate	High
Price control by businesses	No	Some	Feasible	Feasible
oncentration ratio (CR)	Near to 0	Low	High	100
Herfindahl-Hirschman Index (HHI)	Near to 0	Less than 1,800	More than 1,800	10,000

Note. Adapted from "Foundations of microeconomics" by Robin, B., 2007.

Possible anti-competitive effects of mergers - Regulatory authorities should assess possible anti-competitive effects due to mergers. Possible anti-competitive effects can be divided into two types, as mentioned earlier; these are unilateral effects and coordinated effects. 1) Unilateral effects refer to situations in which a merger causes business operators to set the price of products or services to be higher without cooperating with other business operators. Unilateral effects can occur when a merger results in decision-making regarding the production of products or services to be under the control of any business operator, or can occur when buyers in the market lose their power of negotiation because the merger produces a smaller purchasing choice, such that product or service prices cannot be negotiated as usual. Though the merger does not give the business operator a dominant position, the merger may promote the business operator's market power enough to cause the outlined effects. 2) The coordinated effects, which arise when a merger eliminates competition between the merging firms, or the merger enables business operators to easily lessen competition in a particular market. Cooperation among business operators can occur on the basis of explicit cooperation or implicit cooperation. Finally, it affects those business operators to mutually raise prices, lessen production volume or reduce the variety or quality of the products and services in the market, similarly to unilateral effects. In cases where the consideration of mergers by regulatory authorities results in the determination of mergers which may harm competition regardless of unilateral effects or coordinated effects, those mergers shall be rejected (Shiau & Chen, 2011).

Factors related to the power of buyers in the market - In general, the competitive pressure of business operators can come not only from competitors in the product or service market but also from the power of buyers in the market, since buyers regularly have the power to change the business operators with whom they conduct transactions, especially regarding large buyers in a particular product or service market. Consequently, a merger that results in buyers losing their buying choices or lessening the negotiating power of buyers shall be taken as a factor into consideration. The regulatory authorities shall consider the strength of the power of buyers in the market. If buyer power is high, it shall drive business operators not to have behaviors resulting in anti-competitive effects, since buyers have enough negotiation power to change to buy products or services from other business operators. Therefore, if buyers in the market have high negotiation power, the chance that mergers shall cause anti-competitive effects shall be reduced even though business operators will have a high market share or the market will have a high concentration ratio after the merger. Consequently, mergers may be permitted, even though they may result in a high market concentration

(Goyder, 2003).

Factors related to market entry refer to the chances that other business operators shall enter into a merged product or service market. Usually, a market that business operators can enter into easily is a market that does not require a high investment, and there is no law being a barrier for market entry. Consequently, that merger shall temporarily enable business operators to increase market power because new business operators shall oppose any attempt to set prices higher than competitive prices by merging business. Therefore, mergers in a market that new business operators can enter into easily do not tend to harm competition in the market (Inoue, 2007). However, the regulatory authorities regard adequate market entry enableing mergers not to harm competition in the market as meeting all of three conditions: 1) time condition; other business operators must be able to enter into the market fast enough to allow consumers not to have an impact from any mergers. Regarding market entry that can prevent mergers from giving a negative impact, the regulatory authorities of the European Union and Japan specify that market entry must occur within two years from the date the merger takes place. 2) The possibility condition states that business operators entering the market shall operate their businesses without loss. 3) Sufficiency condition refers to the size of a new business operator entering into the market, stating that it should be big enough to prevent an impact that opposes the competition effects caused by mergers (Matsushita, 2004).

Factors related to efficiency gains from mergers - Considering the probable impacts caused by a merger, the regulatory authorities shall view whether the mergers shall give higher efficiency in the economic system or not. Mergers shall be efficient when they enable business operators to reduce production costs, meaning that they can produce a higher quantity of products or services, as well as a higher quality compared to when mergers do not take place. The regulatory authorities of each country determine the characteristics of efficiency gains from mergers as follows: 1) mergers should reduce the costs of production until the prices of products or services can be lowered within the right time, allowing consumers to have significant benefits; 2) mergers should be unlikely to have an impact on competition in the market.; 3) improved efficiency must actually occur, not from estimation. Business operators must prove to the regulatory authorities that improved efficiency may occur from the merger (Renckens, 2007).

For example, regarding the decision of the Office of Fair Trading of the U.K. (OFT) for the merger between Global Radio UK Limited and GCap Media plc (*Global/GCap*), the radio operators, presented to the OFT that this merger would be very effective. In other words, the merger would allow the two operators to become co-owners of radio stations, which would incentivize operators to package broadcasting for every radio station they own at a lower price, which corresponded to the actual performance observed, and which could only be achieved through such a merger. Therefore, the direct benefit to consumers from this merger, coupled with the divestiture of some radio stations currently owned by the business operator, allows the OFT to permit the operators of this merger even though the merger gives the operator a relatively high market share (Kokkoris & Shelanski, 2014).

Factors related to the necessity of business operators - In addition to those five factors, each country's regulatory authorities have an exception for mergers that have a high probably to result in a very high market concentration ratio or a negative impact. If it appears that business operators are unable to operate their businesses further due to operation failure, causing them to exit the market if the merger does not take place, the regulatory authorities shall consider such a case, ultimately permitting the business operators to merge their businesses. Reasons related to the necessity of business operators must consist of a critical condition, for example, where one of the business operators will need to exit the market very soon due to financial problems, and the merger is the method used to solve their problems; this is less likely to affect competition in the market (Wakui, 2018).

The Substantial Lessening of Competition Test According to Competition Law of Thailand

The assessment of the impacts from mergers through the concept of testing the likelihood of a substantial lessening of competition from mergers under competition law in foreign countries is full of thoroughness and complexity as at least six factors are employed in the consideration when assessing whether a merger is likely to lessen competition substantially or not. However, the assessment of the impacts from mergers within the concept of testing for a substantial lessening of competition from mergers under Thailand’s Trade Competition Act B.E. 2560 (2017) is simple, without intricate details, but with high tangibility, making the standard according to Thailand’s Trade Competition Act certain and explicit when enforced by the Trade Competition Commission (the Commission).

The test for substantial lessening of competition from mergers under the Trade Competition Act B.E. 2560 (2017) follows the Announcement of the Trade Competition Commission on Rules, Procedures and Conditions for Notification of Business Merging Result B.E. 2561, which specifies that the merged company must employ the combined turnover of the merging companies as an essential factor for making consideration. Specifically, if the combined turnover of the merging companies is one billion baht or more and does not result in a monopoly or having a dominant position, the merger shall be regarded as a merger leading to a substantial lessening of competition.

According to Thai competition law, business operators undertaking a merger that is likely to substantially lessen competition should report merger results to the Commission within seven days from the date the merger takes place. Providing that they do this, they are not required to wait for permission from the Commission before merging their businesses. This process is referred to as a post-merger control mechanism, rather than market structure supervision, which occurs in advance of mergers, and is described in the supervising model of mergers under other countries' competition laws.

However, the Commission has adopted the six factors used in assessing the impact of mergers under the competition laws of foreign countries as a basis for assessing the impact of mergers under the Trade Competition Act B.E. 2560. All of these factors appear in the Announcements of the Trade Competition Commission in the Criteria, Procedures and Conditions in Requesting for the Permission and the Permission for Business Merging B.E. 2561, which apply to mergers that may cause a monopoly or result in a dominant position in the market under Section 51 paragraph two of the Competition Act B.E. 2560. Therefore, the Commission has authority to take all six factors into account regarding their consideration of whether or not to allow business operators to merge their businesses when the merger may create a monopoly or dominant position in the market.

Nevertheless, in assessing the impact of mergers based on these factors, the Commission has not set clear criteria or details for considering each factor. Therefore, the determination of the factors for assessing the impact of the merger is based on an interpretation of the Commission without any framework or objective guidelines, making the consideration for granting or not allowing business operators to conduct a merger exclusively up to the discretion of the Commission.

An example of applying the six factors to assess the impact of mergers under the concept of a substantial lessening of competition according to the Trade Competition Act B.E. 2560 is the decision of the Commission on the merger between C.P. Retail Development Co., Ltd. and Tesco Stores (Thailand) Co., Ltd.

Considering market concentration under this decision, the Commission followed the standard under the competition law of different countries by taking the HHI index as a tool for consideration. The Commission ruled that the two operators' overlapping market is a small retail market with an HHI of 5,553.19 before the merger. It showed that the market was already highly concentrated, and the merger would increase the HHI by 1,390.90 to 6,944.09.

In considering possible anti-competitive effects of the merger,

the Commission looked at both unilateral and coordinated effects. The Commission assessed the unilateral effects by estimating the likelihood that the merging companies would abuse their market power, reducing or limiting competition in such a way that would adversely affect their trading partners or competitors. The Commission found that the bargaining power of the merging companies for purchasing goods and raw materials would substantially increase. Thus the merging companies are likely to use their increased market power and bargaining power to put pressure on manufacturers with less bargaining power. The merger will also allow the merging companies to benefit from economies of scale and gain a greater competitive advantage over their competitors.

The Commission assessed the potential coordinated effects by considering whether the merging companies were likely to collaborate with other business operators to reduce or limit competition or not. Based on the merging companies' market share, the Commission argued that the merging companies would have a market share of up to 83.05%, which is very different from other business operators, and therefore it would not have incentives to cooperate with other smaller business operators. The Commission thereby concluded that it is unlikely that the merging companies would form an anti-competitive agreement with other business operators.

In considering buyer powers, the Commission assessed buyers' purchasing options in the market as other countries' regulatory authorities do. It was found that the merger will leave fewer purchasing options to buyers, and thus may increase the power of the merging companies to control product prices. Nonetheless, the Commission argued that buyers still have the popular online shopping option.

In considering market entry barriers, the Commission adopted the laws relating to business operation and the cost of doing business as a basis for consideration. The Commission then concluded that the market involved in this merger had a low barrier to entry as it was a low-cost business, and there were no laws impeding the entry of new entrepreneurs. The Commission did not consider other critical criteria such as the possibility of new operators competing with the merged company, the time for new business operators to enter the market, or whether new business operators would be large enough to resist the potential impact of the merger. These criteria are essential in considering entry barriers under competition law in foreign countries.

To determine the efficiency arising from mergers, the Commission took the market share and competitive advantage of the business operator as a measure. The Commission then indicated that the merger would reduce the market's overall performance, without showing any description of how the efficiency arising from the merger would enable the merging companies to reduce their operating costs and increase or decrease the price and quality of their products or services.

To consider the necessity of the operator, the Commission took the intent of the acquired company, which wanted to focus on marketing in the U.K. under the reorganization plan as a basis, in conjunction with the outcome of this merger that would generate revenue and benefit for Thailand as the merging companies would not be required to send the profits back to the head office abroad like before. The Commission thereupon concluded that the merger was necessary and beneficial to promote the business without considering other essential conditions, such as whether this merger is the best solution to the operating problems regarding lessening its affects on the market. This consideration is totally different from the method of considering the necessity of business operators following strict competition laws in foreign countries.

In conclusion, the overview of this merger's impact was likely to show that the merger could create a change in the market structure and potentially affect the competition in the market, including consumers. However, since there were no clear and binding criteria for the Commission to assess the merger's potential impacts, for example, there was no explicit specification for the increase of market concentration which should be allowed by the Commission when permitting a merger; in the end, the Commission thereupon can, at its discretion, allow the business operators to undertake such merger.

In addition to the CP and Tesco merging decision, regarding other decisions on mergers published in March 2021, the Commission, at its discretion, allowed business operators to merge their businesses in all cases, even where these mergers were likely to have a significant impact on the market structure. These rulings show that, despite the introduction of a substantial lessening of competition approach to assessing the impact of mergers as part of merger supervision, it can be said that the implementation of the substantial lessening of competition concept under the Trade Competition Act B.E. 2560 is still primarily at the discretion of the Commission, due to the lack of binding criteria and a clear framework for considering the effects of mergers persented to the Commission.

DISCUSSION

With regard to the comparison between the standards for testing mergers according to a substantial lessening of competition under the Trade Competition Act B.E. 2560 and the standards under the competition laws of other countries as mentioned earlier, this has showed that the strength of the Thai standard is that it is highly tangible and explicit. While it is the only factor under consideration, the turnover of business operators can be used definitively to determine which mergers are likely to lessen competition substantially, leading to easy settlement. Since the Commission does not have a chance to use their discretion to consider other factors, the indicators used in Thailand are easy to understand leading to stable enforcement.

In addition, despite the merging companies' combined sales of one billion baht, being regarded as a merger that substantially lessens competition, the merging companies can still continue to merge independently without requesting permission from the Commission. The merging companies must only notify the outcome of such a merger to the Commission within seven days from the date of the merger. Based on interviews with a member of the drafting committee for the competition law of Thailand, the objective of this provision was to enhance convenience to business operators to operate their business smoothly and to give SME business operators exemption under this law, promoting the growth of SMEs in Thailand.

From the view of business operators, it was found that the law was seen to be an adaptation of the international concept, but with standards set differently from the international standards, sometimes making them suffer from confusion and misunderstanding at the beginning. However, because of the simplicity of such a standard, they could easily understand and follow the standard by only considering the turnover of their business and that of the proposed merged company without considering other complex factors. This can reduce the administration burden and procedural involvement in mergers.

According to the Commission's opinion as the regulatory authority according to the Trade Competition Act B.E. 2560, the tangible, certain, explicit, and easily-understood standards, makes law enforcement easy to carry out. Furthermore, the commission can speedily consider mergers as the only factor used in the consideration is the combined turnover of merging business operators, which can be easily assessed without complexity. This lies in contrast with the standards of foreign countries, whose regulatory authorities have a high burden in analyzing the impact from mergers, which can be called the heaviest burden for implementing the competition law in each country (Neils, Jenkins and Kavanagh, 2011).

However, when taking into consideration the application of testing for the substantial lessening of competition approach under Section 51 paragraph one and paragraph two of the Trade Competition Act B.E. 2560, it was found that regarding the supervision of mergers according to the substantial lessening of competition concept in Thailand there are three significant problems as follows:

First of all, the allowing of business operators to pursue a merger independently, without prior authorization from the Commission, even where the merger may substantially lessen competition. This makes the Commission unable to supervise mergers which may negatively impact competition comprehensively. The experience of merger supervision in other countries has shown that even mergers which do not create a monopoly or dominant market position can still impact market competition significantly. This gap is the main reason the competition laws of different countries require mergers which are likely to result in a substantial lessening of competition to be given permission before they may undertake a merger. Also, the implementation of post-merger control mechanisms, in other words, requiring the merging companies to notify the outcome of the merger to the Commission so that the Commission can observe their behavior after the merger, has been proven to be difficult and costly by the regulatory authorities of other countries, whereby such measures have been deemed inappropriate to be used as a regulatory system for mergers.

Secondly, since the standard is determined to be tangible, certain, explicit, and easily-understood, it does not have an appropriate level of detail to be used to assess whether a merger is likely to lessen competition substantially or not. Meanwhile, the Commission is not able to take other factors related to the assessment of the impact of the mergers into consideration. Consequently, there is a high chance to make a mistake in the impact assessment of mergers, as the estimated impact is unlikely to meet the actual impact. In reality, considering whether mergers are likely to lessen competition substantially or not should take into account all six of the essential factors mentioned earlier in a comprehensive manner, in order to assess the impact caused by mergers correctly (Ross and Baziliauskas, 2000).

It can be said that the standard of testing for a substantial lessening of competition from mergers according to the Trade Competition Act B.E. 2560 is an exception of mergers or a safe harbor. It is not a standard in accordance with the concept of a substantial lessening of competition shown in the competition law of other countries. The lawmakers' opinion that the growth of SMEs should be promoted is agreed. However, in formulating the method for promoting those entrepreneurs, it was necessary to take into account the objective of the law that aims to prevent mergers that could adversely affect market competition. It appears that the current approach to promoting SMEs might render the Commission unable to comprehensively supervise mergers that may have such an impact, which contradicts the objective of the substantial lessening of competition concept to assist regulatory authorities in comprehensively supervising mergers. In conclusion, considering only the turnover of business operators without other factors, especially changes in market structure caused by mergers, seems to be a guideline leading to failure in preventing the market structure from being affected by mergers.

Lastly, the current application of a substantial lessening of competition approach to assessing the impact of mergers without establishing clear and elaborate criteria for considering all factors, causes uncertainty and is an improper adaptation as its implementation still relies heavily on the Commission's discretion. The decision on the merger between CP and Tesco and other subsequent decisions offer empirical evidence that the adoption of the concept is not yet sufficient to prevent mergers that may negatively impact market competition. Due to the fact that these mergers will substantially affect the market, the Commission retained the independent power to exercise discretion in assessing the impact of mergers, but has allowed operators to conduct the mergers in any event.

Compared to competition law in foreign countries, the standard of testing for a substantial lessening of competition from mergers in the United States of America, European Union, Japan and Singapore is full of details as concluded in Table 2. Considering the turnover of merging companies is merely a starting point for merger supervision. In case the combined turnover of those business operators is higher than what is prescribed in the law of each country, the merging businesses must seek permission for a merger from the regulatory authorities. The regulatory authorities must consider various factors in detail by taking into account the change of market concentration, the unilateral and coordinated effects, buyers power, market entry barriers, the efficiencies arising from the merger, and the necessity of the business operators. There are also thorough criteria for considering each factor, leading to a correct and

Table 2 Comparison table of factors used in the assessment of merger impacts through testing for a substantial lessening of competition

Assessment factors	The United States	The European Union	Japan	Singapore	Thailand
The combined turnover	94 million USD	2,500 million EUR (≈ 3,020 million USD)	20,000 million JPY (≈ 187 million USD)	50 million SGD (≈ 37 million USD)	One billion THB (≈ 32 million USD)
Market concentration	HHI of 1,500	HHI of 1,000	HHI of 1,500	CR3 of 70%	No
Anti-competitive effects	Yes	Yes	Yes	Yes	No
Buyers power	Yes	Yes	Yes	Yes	No
Market entry	Yes	Yes	Yes	Yes	No
Efficiencies	Yes	Yes	Yes	Yes	No
Failing firm defense	Yes	Yes	Yes	Yes	No

accurate assessment of the impact of mergers consistent with the intention to protect market structure from being affected by mergers. Meanwhile, competition law can be used to control the use of power in considering mergers by each country's regulatory authorities in an appropriate manner.

CONCLUSION AND RECOMMENDATION

It can be said that the international standards for testing for a substantial lessening of competition from mergers that have been widely introduced into the competition law of various countries, particularly the United States of America, European Union, Japan, and Singapore, is most often provided with detailed and complex guidelines for the consideration. Specifically, merger supervision starts from consideration against any safe harbor criteria. Afterward, the regulatory authorities consider other factors accordingly, for example market structure, possible anti-competitive effects, buyers power, barriers to market entry, and the efficiency gains from mergers, including the necessity for potential mergers of business operators, in order to correctly assess which mergers may result in a substantial lessening of competition.

In contrast, the standard of testing for a substantial lessening of competition from mergers according to the Trade Competition Act B.E. 2560 is characterized as exclusion of mergers from legal implemention (i.e. safe harbor). The Commission makes consideration of mergers only from the turnover of the business operators. If the combined turnover of the merging companies is one billion baht or more, it shall be regarded as a merger resulting in a substantial lessening of competition. Though the criteria are relatively simple, this probably leads to inaccurate assessment of the impact caused by the mergers which does not comply with reality. It also means that the supervision of mergers may not meet the actual objectives of the law, i.e. to prevent mergers that would be a potential threat to the market competition, and to protect competition in the market, also preserving economic efficiency (Hovenkamp, 2017). This leads to failure in enforcing Thailand's competition law as in the past.

Therefore, in order to encourage the supervision of mergers under the Trade Competition Act B.E. 2560 through the concept of testing for a substantial lessening of competition from mergers to meet the actual objectives of the law, amendments should be made as follows:

To begin with, the supervision of mergers should be improved by providing opportunities for the Commission to grant or not grant permission for mergers only after thorough assessment of numerous factors and accurate determination of whether they may result in a substantial lessening of competition. Consequently, the Commission will be able to comprehensively prevent mergers that may harm competition in the market.

Next, the Commission should set the factors used in the impact assessment of mergers under Section 51 paragraph two to be used in assessing the impact of mergers under Section 51 paragraph one as well, enabling the Commission to correctly consider whether any merger could lead to a substantial lessening of competition or not. The addition of factors in assessing the impact of mergers under Section 51 paragraph one will not create additional burdens on small business operators or SMEs, as the Commission will still be required to consider the entrepreneurs' turnover before looking at additional factors. Therefore, the mergers of small business operators or SMEs with a combined turnover of less than one billion baht will still be exempt from any new law. Therefore, the growth of small business operators or SMEs will remain protected as it is now. At the same time, the Commission will be allowed to genuinely prevent mergers that may adversely affect competition, following the purpose of the law.

Finally, the Commission should set clear and detailed criteria for determining the factors used in assessing the impact of mergers and will be in accordance with the international standards that appear in the competition laws of different countries in the regulation of mergers. Consequently, the discretion of the Commission will be appropriately controlled. Furthermore, the consideration of mergers by the Commission will be more transparent and more precise.

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REFERENCES

Arai, K. (2019). *Law and Economics in Japanese Competition Policy*. Singapore: Springer.

Berry, M. N., and Scott, P. G. (2010). Merger Analysis of Failing or Exiting Firms under the Substantial Lessening of Competition Threshold. *Canterbury Law Review*, 16(1), 272-301.

Buccirossi, P. (2008). *Handbook of Antitrust Economics*. Massachusetts: The MIT Press.

Bundeskartellamt. (2001). *Prohibition Criteria in Merger Control - Dominant Position versus Substantial Lessening of Competition?*. Retrieved from https://www.bundes kartellamt.de/SharedDocs/Publikation/EN/Fachartikel/Prohibition%20Criteria%20in%20Merger%20Control%20-%20Dominant%20Position%20versus%20Substantial%20Lessening%20of%20Competition.pdf?__blob=publicationFile&v=3

DG Competition. (2004). *Best Practices on the Conduct of EC Merger Control Proceedings*.

Retrieved from https://ec.europa.eu/competition/mergers/legislation/proceedings.pdf

Elhauge, E. (2008). *United States Antitrust Law and Economics*. New York: Foundation Press.

Fulcher, J. (2020). *Capitalism : A Very Short Introduction* (2nd ed.). Oxford: Oxford University Press.

Geradin, D., Farrar, A. L., and Petit, N. (2012). *EU Competition Law and Economics*. Oxford: Oxford University Press.

Gore, D., Lewis, S., Lofaro, A., and Dethmers, F. (2013). *The Economic Assessment of Mergers Under European Competition Law*. Cambridge: Cambridge University Press.

Golden, B. (1993). The Evolution of Horizontal Mergers and the 1992 Merger Guidelines. *New England Law Review*, 28(1), 159-188.

Goyder, D. G. (2003). *EC Competition Law* (4th ed.). Oxford: Oxford University Press.

Heimler, A. (2008). Was the Change of the Test for Merger Control in Europe Justified? An Assessment (Four Years after the Introduction of SIEC). *European Competition Journal*, 4(1), 85-94.

Hovenkamp, H. (2005). *Black Letter Outline on Antitrust*. Minnesota: West Academic Publishing.

Hovenkamp, H. (2020). *Federal Antitrust Policy: The Law of Competition and Its Practice* (6th ed.). Minnessota: West Academic Publishing.

Hovenkamp, H. (2017). *Principles of Antitrust*. Minnesota: West Academic Publishing.

Hylton, K. N. (2010). *Antitrust Law and Economics*. Massachusetts: Edward Elgar Publishing.

Inoue, A. (2007). *Japanese Antitrust Law Manual: Law Cases and Interpretation of the Japanese Antimonopoly Act*. Alphen aan den Rijn: Kluwer Law International.

Jones, A., Sufrin, B., and Dunne, N. (2019). *EU Competition Law: Text, Cases, and Materials* (7th ed.). Oxford: Oxford University Press.

Khantawit, A. (1997). *Mergers and Acquisition*. Bangkok: Thammasat University Press. (in Thai)

Kokkoris, I., and Shelanski, H. (2014). *EU Merger Control: A Legal and Economic Analysis*. Oxford: Oxford University Press.

Lasok P., and Holmes, J. (2012). *Merger Control Worldwide*. New York: Cambridge University Press.

Lim, C. K., and Clements, S. (2016). *Competition Law in Singapore* (2nd ed.). Alphen aan den Rijn: Kluwer Law International.

Lim, C. K., and Bull, C. (2015). *Competition Law and Policy in Singapore* (2nd ed.). Singapore: Academy Publishing.

Matsushita, M. (2004). *International Trade and Competition Law in Japan*. Oxford: Oxford University Press.

Matsushita, M., and Davis, J. D. (1990). *Introduction to Japanese Antimonopoly Law*. Tokyo:

Yuhikaku.

Mucchetti, P., Pozen, S., Cornell, T., Lee, E., and Pak, J. (2020). *Merger control in the United States: overview*. Retrieved from https://uk.practicallaw.thomsonreuters.com/5-501-2849?transitionType=Default&contextData=(sc.Default)&firstPage=true

Niels, G., Jenkins, H., and Kavanagh, J. (2011). *Economics for Competition Lawyers*. Oxford: Oxford University Press.

OECD. (2009). *Policy Roundtables: Standard for Merger Review*. Retrieved from https://www.concurrences.com/en/glossary/merger-slc-src-sdc-tests

Posner, R. A. (2001). *Antitrust Law* (2nd ed.). Chicago: The University of Chicago Press.

Renckens, A. (2007). Welfare Standards, Substantive Tests, and Efficiency Considerations in Merger Policy: Defining the Efficiency Defense. *Journal of Competition Laws and Economics*, 3(2), 149-179.

Riesenkampff, A. (2004). The New E.C. Merger Control Test under Article 2 of the Merger Control Regulation. *Northwestern Journal of International Law & Business*, 24(3), 715-727.

Robert, T. (2014). When Bigger Is Better: Critique of the Herfindahl-Hirschman Index's Use to Evaluate Mergers in Network Industries. *Pace Law Review*, 34(2), 894-946.

Robin, B. (2007). *Foundations of microeconomics*. Bangkok: Pearson Education Indochina.

Ross, T. W., and Baziliauskas, A. (2000). Lessening of Competition in Mergers under the Competition Act: Unilateral and Interdependence Effects. *Canadian Business Law Journal*, 33, 373-426.

Shiau, D., and Chen, E. (2011). *Merger Control in Singapore: Law and Practice*. Singapore: LexisNexis.

Silva, S., Jacob, S., Seah, S., and Kuppanchetti, L. (2011). *Business Guide to Competition Law: Managing Your Risks*. Singapore: Sweet & Maxwell Asia.

Supanit, S. (2012). *Principle and rule of the Trade Competition Act of 1999*. Bangkok: Thammasat University Publishing. (in Thai)

Thanitcul, S. (2010). *Explanation and cases of the Trade Competition Act of 1999* (2nd ed.). Bangkok: Winyuchon Publishing House. (in Thai)

Trebilcock, M., Iacobucci, E. M., Winter, R. A., and Collins, P. (2003). *The Law and Economics of Canadian Competition Policy*. Toronto: University of Toronto Press.

Wakui, M. (2018). *Antimonopoly Law: Competition Law and Policy in Japan* (2nd ed.). Independently published.

Werden, G. J. (2008). Unilateral Competitive Effects and the Test for Merger Control. *European*

Competition Journal, 4(1), 95-101.

Whish, R., and Bailey, D. (2018). *Competition Law* (9th ed.). Oxford: Oxford University Press.

Yang, Q. G., and Pickfod, M. (2010). Safe Harbours in Merger Guidelines: What Should They Be? *Australian Economic Review*, 44(1), 13-35.