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# THAILAND

## Newsletter

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## Thailand: Clarification of Domestic Presence That Requires Merger Filing Reporting

### Introduction

The Trade Competition Act of 2017 (the "**TCA**") is the main legislation governing merger control in Thailand. Mergers of business entities in Thailand may be accomplished through share acquisitions, asset acquisitions, or corporate amalgamations (referred to as 'mergers'). The TCA can require either a pre-merger or post-merger notification filing by involved party(ies) depending on the impact the resultant entity may have on competition in the Thai market. The Trade Competition Commission of Thailand (the "**TCCT**") has recently issued clarifications (the "**TCCT Clarifications**") on the interpretation of 'domestic presence/Thai operator' that would require pre- or post-merger notification filings under the TCA.

### Historical background

#### a. Pre-clarification reporting requirements

Prior to the TCCT Clarifications issued by the TCCT on domestic presence/Thai operator, a merger had to be reported regardless of whether the merger took place offshore or onshore if market share and/or annual sales thresholds, defined in supplemental regulations issued under the TCA (the "**Supplements**"), were met. This meant that, subject to the Supplements, a merger occurring outside of Thailand could trigger local merger filing notification requirements if there was an impact on the Thai market.

#### b. Merger notification requirements

The TCA requires a merger filing notification in the following circumstances:

- Pre-merger notification requirements

The TCA requires an acquiring party and acquiree party to submit an application for a pre-merger approval to the TCCT if the resultant entity of a merger creates or enlarges a dominant market operator, as defined in the Supplements.



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- Post-merger notification requirements

The TCA requires an acquiring party/resultant party to submit a post-merger notification to the TCCT if the resultant entity of the merger materially reduces competition, as defined in the Supplements.

## Overview of the TCCT Clarifications

The TCCT Clarifications provide clearer interpretation of what constitutes a domestic presence that would give rise to reporting requirements under the TCA in the case of a merger. The TCCT Clarifications include the following changes:

- if one of the two companies/groups that are undertaking a merger does not have any corporate presence in Thailand, i.e., a Thai-registered subsidiary or domestic branch of a foreign-registered entity, then filing is not necessary as such party/group will not be interpreted as an operator under the TCA;
- examples of commercial characteristics and conduct that will not count as having a domestic presence include, but are not limited to:
  - direct export to a Thai trade partner or customer via traditional channels;
  - domestic sale via local unrelated distributors; and
  - direct export to a Thai trade partner or customers via online platforms.

The TCCT Clarifications effectively now require that in the majority of circumstances, both parties to a merger must have a corporate presence in Thailand to trigger the requirement for a merger notification filing. A domestic presence may be established by means other than those listed above, and this list is provided as an example, but should not be considered as exhaustive.

### Interpretation and penalties for violating reporting requirements

The TCCT Clarifications create leeway for merger notification filing requirements for many transactions that occur offshore and with an impact on the market in Thailand. Parties to mergers should keep in mind that as of the date of this publication, the TCCT Clarifications and discussions in this newsletter are based on our interpretation of the TCCT Clarifications, and not written legislation. As such, new precedent on what constitutes a domestic presence can be issued to override current interpretations.

It is important to be aware that penalties for violating merger reporting requirements can be significant. Liabilities for failure to undertake a post-merger notification filing are as follows:

- 1) a maximum statutory fine of THB 200,000; and
- 2) a maximum daily fine of THB 10,000 during the term of breach, which can be material in aggregate.

Liabilities for failure to undertake a pre-merger approval filing are as follows:

- 1) a maximum fine equivalent to 0.5% of the transactional value; and
- 2) possibility of an order for unwinding of business combination or any other conduct.

Other than the merging company itself, directors and/or the management of the merging company can also be liable to the same penalties.

## Conclusion

The TCCT Clarifications on domestic presence of entities in Thailand that would require merger filing notifications introduce significant changes compared with previous interpretations. However, operators should continue to seek advice from legal counsel prior to definitively concluding that a particular transaction falls outside of the reporting requirements in order to avoid significant penalties levied on the entity itself, and directors and/or the management.

If you have any questions in relation to the topic raised in this briefing, please contact the authors listed in the left-hand column.

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