ALLEN & OVERY

# The New Competition Law in Thailand Approved

**April 2017**

## Speed read

On 18 April 2017, the Thai National Legislative Assembly (**NLA**) submitted the draft Trade Competition Act B.E. 2560 (2017), which it had approved on 24 March 2017 (the **New Act**), to the Secretariat to the Cabinet. The Prime Minister of Thailand will now present the New Act to the King for royal assent, following which the New Act will be published in the Government Gazette of the Kingdom of Thailand, and become effective 90 days following the date of publication. The New Act is anticipated to come into force before December 2017. It will be followed by the adoption of implementing rules, which will be issued within 365 days from the effective date of the New Act. The New Act is meant to completely repeal the current Trade Competition Act B.E. 2542 (the **Current Act**) of 1999. Details of the New Act are substantially in line with the previous draft which we reported on in our last eBulletin of December 2016; the most dramatic change being the introduction of a dual merger control regime.

### THE REGULATORY BODY

As is the case in many jurisdictions, the authority in charge of enforcing competition rules in the country, the Competition Commission (the **Commission**), consisting of seven Commissioners, as well as the Office of the Trade Competition Commission (**OTCC**), a State entity which will be the administrative office of the Commission, will be independent from the government. This structural independence should help to avoid any political influence in the enforcement of the New Act. The New Act also allocates a separate budget for the OTCC and grants remuneration for the Commissioners.

Under the New Act, the authority will be granted extensive powers, but will also have to respect various duties. In particular, the Commission will have the power to impose administrative fines on business operators in breach of relevant offences under the New Act and to issue orders for a business operator to suspend, cease or change any contravening conduct. In terms of duties, the OTCC will be required to, among others, make publically available the outcome of the Commission's decisions on all claims, and hold public hearings for all secondary legislation to be published under the New Act.

### SCOPE OF APPLICATION OF THE NEW ACT

State-owned enterprises (SOEs) will no longer be exempted from the application of the New Act, subject to limited circumstances, where SOEs carry out activities by law or cabinet resolution for the necessity of national security, public benefit or infrastructure. As it is the case abroad, it is likely that these exceptions will be interpreted restrictively.

The New Act will not apply to businesses which are governed by specific legislation regulating competition within a certain sector. Currently, this would only concern businesses regulated either by the National Broadcasting and Telecommunications Commission, or by the Energy Regulatory Commission.

### ANTI-COMPETITIVE AGREEMENTS

The New Act distinguishes hard-core cartels and non hard-core arrangements. Hard-core cartels would only apply to agreements between competitors leading to price fixing, market allocation, output control or bid rigging.

Anti-competitive agreements between business operators that have 'a relationship in policy or control' will be exempt from both hard-core and non hard-core arrangements. This exemption seems intended to capture arrangements between companies that are part of the same group, as is usually the case abroad.

### ABUSES OF DOMINANCE

Under both the Current and the New Acts, the simple fact of being dominant is not sufficient to breach competition rules in Thailand; however, the New Act will clarify the scope of application of the abuse of dominance regime.

Under the Current Act, dominance of a business operator is presumed based on its market share in any relevant product or service market and on its turnover. The New Act suggests that the Commission could continue to consider market share and turnover criteria to presume dominance (see also below the level of market shares and turnovers presuming dominance in the context of merger control which links back to this dominance criteria), but the authority must also take into account other factors, relating to the competitive condition of the market (such as the number of competitors, distribution channels available, amount of capital of the business operator). This way of defining dominance would be more aligned with international practice.

The New Act also clarifies that, in considering a business operator's market share, the authority will consider the aggregated market share of the business operator and "all companies with a relationship in policy or control" (presumably companies within the same group).

The Commission will publish the criteria to determine whether companies have such a relationship within one year after the New Act comes into force.

Examples of abuses have not changed substantially. They include setting unfair prices, imposing unfair conditions on trading partners, suspending or reducing supply to be lower than market demand and unreasonably intervening in the business of other operators. Unfortunately, the New Act does not provide further guidance, despite the arguable need for clarification.

## UNFAIR TRADE PRACTICES

The New Act provides a list of unfair trade practices which, although still very broad, gives more clarity on the scope of this catch-all provision. The prohibited practices include (i) unfair obstruction of business operations; (ii) abuse of superior market or bargaining power (which, arguably, is a lower standard than "abuses of dominance"); (iii) imposing unfair trading conditions; and (iv) any other practices to be determined by the Commission.

## UNREASONABLE AGREEMENTS WITH OFFSHORE OPERATORS

The New Act also introduces a new anticompetitive misconduct: a prohibition against agreements between domestic and offshore operators, which would create monopoly or unfair trade restrictions *and* severely damage the economy and the consumers as a whole. The OTCC noted separately that this prohibition would be considered on a 'case by case' basis; however at this stage, its scope of enforcement remains unclear as one can find few comparable provisions in foreign competition rules.

## MERGER CONTROL

Noting that the merger control requirements do not apply to intra-group transactions (i.e. between companies with a relationship in policy or control), the New Act implements a dual merger control system as follows:

(i) **Pre-merger approval** – any merger or acquisition (i.e. "consolidation"), which may result in a "monopoly" or create "dominance", must obtain approval from the Commission. Although the New Act does not explicitly specify that approval must be obtained *prior* to closing of the deal, this is the interpretation retained by the OTCC and a logical interpretation to be given to the text of the New Act itself.

The NLA noted to the Secretariat of the Cabinet on 18 April 2017 that the approval requirement should normally exclude SMEs and should only be applicable to dominant business operators with at least 50% market share and at least THB 5,000 million (approx. USD145,391,100) turnover, reached by the business operator presumably in the previous year.

(ii) **Post-merger notification** – any consolidation which may "materially reduce competition" in any relevant market will have to be notified to the Commission within seven days from the date of completion of the transaction.

Importantly, at this stage, the New Act does not provide for any notification thresholds relevant to the meaning of a "material reduction of competition"; the Commission will define these thresholds within 365 days from the effective date of the New Act.

### Types of transactions that would be a 'consolidation'

It appears that not only mergers, acquisitions of all or part of shares and assets of another company could fall within the scope of the new merger control regime of Thailand, but also possibly joint ventures and acquisitions of minority shareholding could qualify as "consolidations" if they result in control. The implementing rules should make this clear.

### Application of merger control

The notification thresholds for post-merger notification, as well as the substantive rules and procedures relating to both the pre-merger approval and post-merger notification (the **Procedural Notification**) will be issued by the Commission within 365 days from the date the New Act becomes effective. The OTCC will also have the duty to identify the product/service markets, which have a tendency to be monopolised, as determined by the Commission from time to time. This database will be made publically available which should be helpful for business operators and practitioners to assess the risk of having to obtain pre-merger approval.

### Impact on M&A transactions

Business operators will need to assess which merger control system (i.e., pre-merger approval or post-merger notification) their transaction may fall under.

If a **pre-merger approval** is required, parties will need to carve out sufficient time to prepare any data and documents they are required to submit to the Commission, which will then have 90 calendar days (plus a possible extension of 15 calendar days) from the date of submission to issue its decision. As it is the case abroad, the Commission can impose conditions to its approval (presumably such as forcing the merging parties to divest part of their new group within a certain period of time).

Notably, since the pre-merger approval will be required if a "consolidation" may lead to monopoly or "dominance", it is unclear whether the pre-merger requirement will be immediately enforceable upon the Procedural Notification being published without waiting for the revised dominance thresholds or new guidance as to the definition of dominance, or if the existing dominance thresholds under the Current Act will continue to be effective until the new thresholds are issued.

**Post-merger notifications** are not without risk either, as the seven days deadline to notify the operation is extremely short, and commercial uncertainty can arise if queries are raised after a deal has been completed.

To note that at this stage, the New Act does not provide that the Commission may be required to issue any decision before the 90-calendar-day period set forth in the pre-merger approval regime or within a short period of time in the post-merger notification regime. It remains to be seen if the implementing rules will provide for shorter review period (often or colloquially called "Phase 1" reviews in other jurisdictions).

The applicant may appeal the decision to the Administrative Court within 60 calendar days of the day of adoption of the Commission's decision.

## SANCTIONS

One of the reasons why no business operators have ever been criminally sanctioned under the Current Act is because the competition authority must request the public prosecutor to consider prosecution, and only the public prosecutor has the discretion and authority to prosecute wrongdoers before the criminal courts. The New Act has dramatically changed this system, as the Commission will now be empowered to impose substantial administrative fines on its own, and to request the public prosecutor to prosecute wrongdoers before the Intellectual Property and International Trade Court of Thailand (the IPIT Court) when criminal sanctions are envisaged (i.e., to prosecute business operators, which entered into hard-core cartels or abuses of dominant positions). The ability of the Commission to impose administrative fines without court proceedings is one of the key provisions that will remove inefficiencies in competition law enforcement. In addition, if the public prosecutor refuses to prosecute the case, the president of the Commission may ask the Attorney General to consider the case, order for further evidence to be gathered if necessary and the case may then be prosecuted by the Attorney General.

| Behaviour | Criminal Sanctions (imposed by the IPIT Court) | Administrative Sanctions (imposed by the Commission) |
|---|---|---|
| Cartels/Anticompetitive agreements | **Hard-core**:<br>Up to two years imprisonment and/or a fine of up to 10% of the business operator's turnover of the year of the offence | **Non hard-core**:<br>Up to 10% of the business operator's turnover of the year of the offence |
| Abuse of dominance | Up to two years imprisonment and/or a fine of up to 10% of the business operator's turnover of the year of the offence | NA |
| Failure to obtain pre-merger approval | NA | Up to 0.5% of transaction value |
| Failure to notify post-merger | NA | Up to THB 200,000 (approx. USD 5,815) and a daily fine of up to THB 10,000 (approx. USD 290) per day throughout the period of the breach |
| Unfair trade practices | NA | Up to 10% of the business operator's turnover of the year of the offence |
| Unreasonable agreements with foreign operators | NA | Up to 10% of the business operator's turnover of the year of the offence |

Note: the USD currency exchange rate applied in the above table is at USD 1 = 34.39

## LIABILITIES OF DIRECTORS AND MANAGEMENT

Not only managing directors but also other persons "responsible for the operations of that legal entity" may be subject to the same criminal and administrative sanctions as the legal entity. This applies if the offence resulted from an order or an act, or an omission of order or act, which was the duty of that person.

## SUMMARY OF KEY ISSUES TO BE ADOPTED BY THE COMMISSION

As seen above, many of the provisions will be determined by the Commission by way of secondary legislation. These include (i) the notification thresholds for pre-merger approval; (ii) the Procedural Notification for pre and post-merger notification; (iii) the requirements of asset or share purchase arrangements, which would be considered as a notifiable "consolidation"; (iv) the thresholds for presuming dominance; and (v) the criteria for companies to belong to the same group.

## NEXT STEPS

Overall, the New Act will substantially alter the 1999 Thai antitrust regime, and will align it with international precedents and practices. Given the dramatic changes, it is imperative that business operators prepare for this New Act, including its merger control regime, by ensuring that management and employees are well informed of the changes and how it will impact their day-to-day business operations. A well-structured compliance program should be put in place, together with proper training, as experience abroad shows that the only way to avoid fines and sanctions is to ensure that employees and managers are not only trained but also respectful of the letter and the spirit of competition rules. The same will soon be true in Thailand.

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