

ALLEN & OVERY

2019: The Beginning of Merger Control in Thailand

On 28 December 2018, seven notifications were published in the Government Gazette, three of which were the long-awaited implementing rules on merger control (the **Merger Control Rules**), officially bringing Thailand into one of the 100-plus jurisdictions having a merger control regime in force.

WHEN DID THE MERGER CONTROL RULES COME INTO FORCE AND IS THERE ANY GRACE PERIOD?

The Merger Control Rules have been enforceable from the day after the notifications were published in the Government Gazette, ie from 29 December 2018 onwards. Although there is no set grace period, the transitional provision provides that if, by that date, any transaction had already been approved by the shareholders or directors, or there is an executed agreement setting out the terms of the transaction (such as a share sale and purchase agreement), then these transactions are exempted from pre-closing approval requirement.

Notably, the same transitional provision is not present in the rules on post-closing notification. Therefore, any transaction that has not yet closed but is subject to post-closing approval requirement must be notified to the Thai Trade Competition Commission (the **Commission**) within seven days after completion.

RECAP OF THE THAI MERGER CONTROL REGIME

The Trade Competition Act B.E. 2560 (2017) (the **Competition Act**), under which the Merger Control Rules were issued, introduced a dual merger control regime as previously reported in our *e-Alert in July 2017*. The Merger Control Rules consist of (i) the description of transactions which are deemed to be a ‘consolidation’ that may be a notifiable transaction, (ii) rules and procedures for pre-closing approvals, and (iii) rules and procedures for post-closing notifications.

Pre-closing Approval – Any merger or acquisition (ie a “*consolidation*”), which may result in a “*monopoly*” or create “*dominance*”, must obtain approval from the Commission before the transaction can be completed. The Merger Control Rules now give more clarity around the definition of monopoly and provides for new dominance thresholds as follows:

- A “Monopoly” is where there is only one business operator in a given market, which has the power to freely determine the price or quantity of its goods or services, and has a turnover of at least THB1 billion.
- A business operator is presumed to be dominant in a relevant market if:
 - (a) it has, in a relevant market, at least 50% market share and turnover of at least THB1bn in the previous year; or

(b) it is one of the top three operators having at least 75% market share in aggregate in any relevant market and a turnover of at least THB1bn in the previous year.

- The new dominance thresholds make clear that the market share and turnover is calculated based on the market shares and turnover of the group company (“all companies with a relationship in policy or control”) rather than the one business operator as a single entity. The details of how to determine whether entities are part of the same group under the Competition Act are provided under a notification issued by the Commission on 1 November 2018.

Post-closing 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. The Merger Control Rules of last December provide that a transaction would be deemed to materially reduce competition if (i) the turnover of at least one business operator or of the consolidating parties in aggregate in a given market is at least THB1bn; and (ii) the consolidation does not result in a monopoly or dominance. This definition will presumably require many transactions to be notified post-closing in Thailand; it will be interesting to see if this requirement will be maintained over the years.

WHAT TRANSACTIONS DO THE MERGER CONTROL RULES APPLY TO?

Before considering whether a transaction meets the pre-closing approval or post-closing notification thresholds, companies will first need to consider whether the transaction constitutes a ‘consolidation’ being subject to the Merger Control Rules.

As previously reported, the Merger Control Rules cover consolidations by way of both asset sale and share acquisitions, ie:

- (a) an acquisition of shares or other convertible securities¹ resulting in the purchaser holding up to 25% or more of the total voting rights in a listed company;
- (b) an acquisition of more than 50% of the shares with voting rights in a non-listed company; or
- (c) an asset acquisition of more than 50% of the total operating assets relevant to the normal course of business of another business operator.

¹ It is unclear whether the OTCC will follow the tender offer practice whereby the tender offer is not triggered upon acquisition of the convertible securities, but will only be triggered when the convertible securities are exercised at any point resulting in a combined shareholding of 25% or more. As drafted, it can be interpreted that the transaction is considered a ‘consolidation’ upon acquisition (not exercise) of the convertible securities.

Given the way in which the Merger Control Rules are drafted and based on the Commission's comments during the public hearing on the Merger Control Rules that was held on 5 September 2018, it appears that greenfield² joint ventures will not be captured by the Merger Control Rules. However, the creation of a joint venture, for instance by acquiring a minority shareholding of an existing target, would still be caught by the Merger Control Rules.

As previously mentioned, intragroup restructuring transactions are exempted from Merger Control Rules.

SUPPORTING DOCUMENTS TO BE SUBMITTED TO THE COMMISSION

The supporting documents required for the post-closing notification includes, depending of the type of transaction, copies of the corporate registrations document submitted to the Department of Business Development, Ministry of Commerce in case of share acquisitions in a non-listed company, copies of tender documents submitted to the Office of the Securities and Exchange Commission of Thailand in case of share acquisitions in listed companies, copies of transaction documents including share purchase agreements, asset purchase agreements and minutes of board or shareholders' resolution approving the transaction and shareholders list before and after closing.

Quite logically, the supporting documents required for the pre-closing approval application is substantially more detailed, including the consolidation plan, details of the consolidating parties (including market shares), a study and analysis report on the proposed consolidation which includes (among others) details on the relevant market definition, market structure and analysis on how the proposed consolidation will affect the relevant market.

As of today, there is no notification form that the parties would need to complete and little guidance as to the market information that will need to be provided. Companies will be advised to apply global best practice when filing their transactions to the OTCC.

SOME CLARIFICATIONS LEFT UNANSWERED

As drafted, there are still questions left unanswered in the Merger Control Rules that will require further guidance from the Commission. For example, when turnover is considered in assessing whether the notification threshold is satisfied, it is unclear if the relevant turnover data should be the group's turnover in its previous *fiscal* year,

whether the numbers will need to be based on audited accounts only, or whether it refers to the previous *calendar* year. It is also unclear at times whether the turnover relates to the turnover generated in the relevant market only, or turnover of the group company as a whole.

One of the questions raised during the public hearing was whether the application pack for notification or approval can be submitted in English or only in Thai, especially the supporting documents which will likely be originally produced in English in international or cross-border transactions. It is also unclear if English documentation can be submitted, whether any notarisation or consularisation is required. These questions, although administrative in nature, can have a substantial impact on timing and deal management.

THE NEW THAI TRADE COMPETITION COMMISSION

The Thai Cabinet approved the members of the Commission in September 2018, as reported in our *e-Alert in October 2018*. On 27 December 2018, the Chairman of the Commission (Mr. Sakon Waranyuwattana) and Deputy Chairman of the Commission (Mr. Kritsada Piampongson) were appointed following nomination and voting by the Commission on 24 December 2018. The new Commission, consisting of seven commissioners, started their first day in office on 2 January 2019, together with 50 new employees of the Office of the Trade Competition Commission (**OTCC**).

THE 2018 GPSC/GLOW LANDMARK CASE

The Competition Act makes clear that transactions that are subject to sector-specific merger control rules are not subject to the merger control regime set up by the Competition Act. This is the case, for instance, for deals between energy licensees, which are subject to the Energy Regulation Commission (ERC)'s merger control review pursuant to Section 60 of the Energy Business Act B.E. 2550 (2007). As the ERC's ruling in GPSC/Glow of 26 December 2018 shows (*see link*), merger control requirements must be taken from now on extremely seriously in Thailand. In this landmark case, the energy regulator imposed for the first time remedies as a condition for approving the transaction, and we think it is not a coincidence that this has happened in the year the Competition Act came into full effect. Substantial lessons can be drawn from this first Thai merger control case; it will be interesting to know if the OTCC will follow the practice of its sister agency. One thing is sure: the tone is clearly set.

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² i.e. the creation of a new joint venture between parties.