

Client alert

December 2018

Recent release of subordinated legislation under Thai Competition Act 2017 anticipated to significantly enhance enforceability

The Trade Competition Commission recently published various notifications, which are supplementary to the Trade Competition Act B.E. 2560 (2017) (the "Act"). The highlights of the newly published notifications include those relating to the pre-merger approval, post-merger filing, and criteria for defining dominance¹. With the announcement of these notifications, it is anticipated that the Act should be able to be substantively functioned by early 2019.

The summaries of the key notifications are as follows:

1. Merger control regime

1.1 Definition of "merger by way of purchasing assets or shares in order to acquire control of policy or management of another business operator"

The acquisition of assets or shares of another business operator meeting the thresholds below will be deemed as the acquisition of control of policy or management of that other business operator according to the Act.

Type	Threshold
Assets Acquisition	More than 50 percent of the total value of normal operating assets in the previous financial year
Share Acquisition	Companies regulated by the Security and Exchange Law <ul style="list-style-type: none">▪ Directly or indirectly purchase or acquisition of shares, warrants, or other convertible securities that results in the total holding of 25 percent or more of the total voting rights of another business operator Companies not regulated by the Security and Exchange Law <ul style="list-style-type: none">▪ Directly or indirectly purchase or acquisition of voting shares that results in the total holding of more than 50 percent of the total voting rights of another business

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¹ The notifications include those relating to the pre-merger approval, post-merger filing, and criteria for defining dominance are now pending publication in the Government Gazette and will become effective on the day following the date of publication.



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Any purchase or acquisition by the following related persons will also be included when determining if the threshold is met:

- Spouse (in the case of an individual purchaser/acquirer)
- An individual or juristic person holding more than 30 percent voting shares in the corporate purchaser/acquirer
- A business operator having relationship in terms of policy or control with the purchaser/acquirer.

1.2 Post-merger filing

The post-merger filing obligation will be triggered when a merger "can potentially result in a substantive lessening of competition in a relevant market".

The merger which can "potentially result in the substantive lessening of competition" is defined as the merger in which any of the merging business operators' turnover or their aggregate turnover is equal to or more than Baht one billion, but which does not create a monopoly or result in the business operator having a dominant position.

If a post-merger filing obligation is triggered, the acquirer or the new business as a result of merger shall notify the Trade Competition Commission within seven days from the date of such merger.


1.3 Pre-merger approval

Any merger which results in a monopoly or a business operator holding a dominant position must first obtain an approval from the Trade Competition Commission.

A monopoly is defined as a situation where, in a market, there is only one business operator, with a turnover of Baht one billion or more, who has the power to freely determine the prices and quantity of its goods and services. The criteria for defining dominance is provided in section 2. below.

The application for the pre-merger approval requires comprehensive and detailed information on the merger, including, among others, business integration plan, market analysis, market concentration and impact on competition assessment.

The Trade Competition Commission must complete its consideration of the application within 90 days (extendable for another 15 days). If the business



operator disagrees with the Commission's decision, it can appeal to the Administrative Court within 60 days of the decision.

2. Criteria for defining dominance

The criteria for defining dominance under the Act imitate the criteria prescribed under the 1999 Trade Competition Act. The dominant business operator is defined as having a dominant position in the following situations:

1. it has a market share of 50 percent or more, and turnover of Baht one billion or more in the previous year; or
2. it is among the top three business operators with a combined market share of 75 percent or more, and individually has the turnover of Baht one billion or more in the previous year. All three business operators will be classified as dominant business operators, unless any one business operator has a market share of less than 10 percent in the previous year.

3. Guideline for determining the relevant market and market share

According to the Act, the term "market" refers to the relevant market of goods or services of the same nature or those which are substitutable. The scope of market is crucial as it is the basis of all competition law analysis. For instance, whether a business operator holds a dominant position, or whether a merger will result in a monopoly or any reduction of competition.

This Guideline provides more details on how the relevant market should be determined and how the market share should be calculated. Similarly international standards, the relevant market will be determined from both geographical and product market perspectives, taking into account demand and supply considerations. Market share will be assessed by percentage of sales volume, sales turnover, production volume, or production capacity.

4. Criteria for determining "Single Economic Entity"

Thai competition law recognizes the concept of a "Single Economic Entity", whereby multiple business operators having a policy or control relationship would be perceived as a single unit. For business operators constituting a single economic entity, the Act provides that:

- their market shares and turnovers will be combined for the purpose of determining dominance
- their merger will be deemed an internal restructuring, and will not be subject to any merger filing obligations

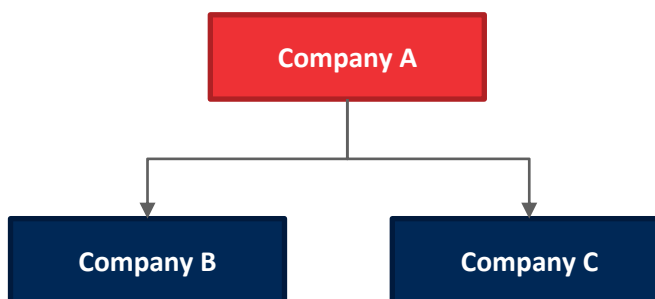


- their joint conduct will not be deemed a cartel-type conduct, which is prohibited

This Notification provides two main scenarios where the two (or more) business operators will be considered as having a relationship in terms of policy or direction control.

4.1 Policy relationship

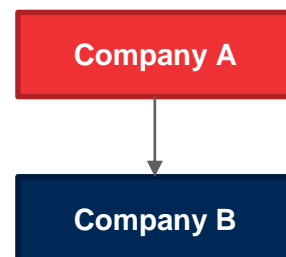
Two (or more) business operators have a policy relationship if they are under the common control of another business operator (e.g. sister companies). In the example below, Company B and Company C have a policy relationship because they are under the common control of Company A.



4.2 Relationship in terms of direction control

This refers to the situation where a business operator has control over another business operator by way of:

- holding more than 50 percent voting rights;
- having control over the majority of votes at the shareholders meeting either directly or indirectly; or
- having the power to appoint or remove at least half of the directors either directly or indirectly.



5. Guideline on abuse of dominant position practices, cartels, and unfair trade practices

The Trade Competition Commission also announced various guidelines for determining if a particular behavior is a violation of the Act. You will note that under these guidelines, the 10 percent market share seems to be the key threshold especially in determining (i) whether a joint conduct between business operators results in a breach of the collusive practices/cartel provisions; and (ii)



whether any unfair trade practice is conducted by a business operator that has the market power.

5.1 Guideline on abuse of dominant position practices

This Guideline explains the key elements of abuse of dominance, which include (i) the types of behaviors which can be abusive; and (ii) the consideration whether the behavior is fair and justifiable.

The examples of behaviors which could be considered an abuse of dominant position include predatory pricing, imposing certain restrictive trade terms on a business partner, having certain forms of discount schemes, and refusal to supply.

Whether the behavior is fair and justifiable is determined by taking into account various factors such as whether such behavior is conducted in the normal course of business, or whether the business partner is provided with a reasonable advance notice.

5.2 Guideline on prohibitive cartels

This Guideline provides examples of circumstances that may be considered an agreement among business operators, including decisions made at trade association meetings, unwritten forms of joint conduct, etc.

In addition, the Trade Competition Commission will consider any joint conduct by business operators **having in aggregate 10 percent or more market share** to be the joint conduct that reduces competition in the market.

5.3 Guideline on unfair trade practices

This Guideline clarifies the terms used in Section 57 of the Act, as well as provides factors for determining if a conduct of a business operator violates that Section. The key principles under this Guideline are summarized below.

5.3.1 There will be a violation of Section 57 if the practice cause damages to other business operators.

5.3.2 A business operator with **market share of 10 percent or more** will be assumed to have market power. Nevertheless, other relevant factors such as the number of players in the market, investment costs, access or necessary infrastructure, business operation networks, etc., will also be considered.

5.3.3 Whether a business operator has a "superior bargaining power" will be assessed based on the following:



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- another business operator relies on the supply of its goods or services, provided that the value of the transaction is at least 30 percent of the revenue derived from the sale of those goods or services.
- another business operator relies on the supply of its goods or services, provided that the value of the transaction is below 30 percent of the revenue derived from such sale of goods or services and any one of the following criteria is met:
 - the business operator has no option to obtain goods or services from other business operators; or
 - the costs for obtaining goods or services from other business operators will outweigh the benefits received from the existing business partner.

The Guideline also gives examples of conducts that could be considered unfair trade practices and an exertion of superior bargaining power, as well as a guideline for considering whether the practice is fair and reasonable which is same as those provided under the Guideline on the abuse of dominant position practices. These notifications, although called “guidelines” are issued under the provisions of the Trade Competition Act and, therefore, will have enforcement effects.

We will continue the series with more details on each of the aspects of the new Trade Competition Act, stay tuned.