

Article 5

Mergers & Acquisitions



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1. What is Mergers & Acquisitions?

Mergers and Acquisitions (hereafter referred to as “M&A”) is an arrangement between two or more business operators, who want to expand their investment in an existing market of goods or services, or a new market, either maintaining an existing company or establishing a new company, by purchasing or trading shares, increasing the capital or acquiring assets of other company, resulting in alteration of the ownership structure and management structure, enlarging and financially strengthening the enterprise. M&A tends to be a more common practice in business expansion.

1) Why do business operators combine their enterprises?

M&A can led to rapid growth of the business operators, generate revenues, increase market share, and reduce costs by means of economies of scale and economies of scope, due to increase in production of goods/services. It can fortify the bargaining power of the business as yield more profits. M&A can accelerate growth of the business operators as well as reduce the number of competitors in the market. Horizontal M&A deals with technologies and intellectual properties, and enjoys tax benefits, as well as engages knowledgeable, proficient and experienced human resources in the enterprise. For example, Facebook's acquisition of Instagram or Google's acquisition of YouTube, which immediately enlarged the enterprises of both Facebook and Google without requiring them to start developing their own applications, and yielded benefits from the larger customer bases, etc.

2) Reasons for regulating M&A

M&A may also lead to reduction of competition in the market and increase in market concentration, because the market share is distributed to a smaller number of business operators, especially in a case of M&A in an oligopoly market, whose barriers to entry are high. Moreover, M&A of an upstream or downstream business operator, or business operators in unrelated markets may lead to an unfair competitive advantage. Therefore, the State stipulated the structural control provisions, in order to prevent reduction of competition in the market, as Section 51 of the Trade Competition Act B.E. 2560 (2017). The aforementioned Section requires M&A to be regulated in 2 cases as follows:

2.1) M&A, which may substantially reduce competition in a market under these criteria, must notify the outcome of such M&A to the Trade Competition Commission within 7 days from the date of merging;

2.2) M&A, which may cause a monopoly or result in a dominant position in a market, must obtain permission from the Trade Competition Commission.

2. What does M&A mean?

The Trade Competition Act B.E. 2560 (2017), defines M&A as follows:

1) M&A taking nature of the enterprises of the merging business operators into consideration – If business operators, who engage in similar enterprises which compete in the same market, merge together, such as, M&A between manufacturers or between distributors, it is referred to as horizontal M&A, for example, M&A between two glass manufacturers. Further, if business operators in different markets, which not compete with each other, merge together, it is referred to as conglomerate M&A, for example, M&A between a glass manufacturer and a chemical manufacturer, or automobile manufacturer, or fertilizer manufacturer, etc. As to M&A of business operators, who are trade partners in the same supply chain, as upstream-midstream-downstream enterprises, it is referred to as vertical M&A, for example, M&A between LINE MAN (a food delivery service provider on a platform of social application) and Wongnai (a restaurant reviewing and ranking service provider on a platform of social network), etc.

The organizational structure after M&A may keep the existing companies or may dissolve the existing companies and establish a new one, for example, a merger between PTT Chemical Public Co., Ltd., and Aromatics and Refining Public Co., Ltd., after the merger, PTT Global Chemical Public Co., Ltd., was established to operate integrated enterprises, etc.

2) M&A taking acquisition of assets integral to normal business operations of another entity, either in whole or in part (not less than 50% of the value of the assets to be sold by the entity), into consideration (contemplating the book value on the date of agreement or acquisition) – To control policies on business administration, management or supervision, for example, a case where Grab Holdings Inc., purchased all the assets of Uber Technologies, Inc. Nevertheless, in a case where Company A purchases a vacant land plot, which is not used, from Company B, it is not M&A by acquisition of an asset under the law on trade competition, etc.

3) A Merger by Purchasing or Acquiring Shares, Warrants or Other Securities, the Rights to Which May Be Converted into Shares, either Directly or Indirectly – A merger by acquiring shares and the said securities of another public limited company, which is governed by the law on securities, and gaining at least 25% of the total volume of all the voting shares of the other business

operator, who is the said public limited company, or, in another case, purchasing or acquiring voting shares of a limited company, and gaining at least 50% of the total volume of all the voting shares of the other business operator, who is the limited company, provided that the volume of shares shall include both the previously held shares and the newly purchased or acquired shares, in order to control policies on business administration, management or supervision.

In a case where the outcome of the merger has already been notified or permission for the merger has already obtained, as a result of purchase or acquisition of shares, gaining the volume larger than the threshold stipulated above, and shares of the same company are subsequently purchased or acquired, the Trade Competition Commission must also be notified.

For your information, you can find additional details in the Announcement of Trade Competition Commission Subject: Rules for Consideration in Assets or Shares Purchase to Control Policy on Business Administration, Management or Supervision over Business Merging B.E. 2561 (2018).

3. M&A, which may substantially reduce competition in a market, is contemplated in the approaches as follows.

1) M&A, which may substantially reduce competition in a market, means a case of M&A where one merging business operator has its turnover before M&A in an amount of at least 1,000 Million Baht or has its turnover after M&A in one market in an amount of at least 1,000 Million Baht, but does not cause a monopoly, leaving only one business operator in the market, or result in the business operator holding a dominant position, either as the sole or one of the top three in the market.

2) How to notify the outcome of M&A?

After business operators finish M&A, the Trade Competition Commission must be notified about the outcome of M&A within 7 days from the date of merging, meaning the day on which one entity and the other entity is dissolved, or the day on which the new entity is established, or the day on which transfer of the title to the asset is registered, or the day on which the shares are transferred, according to the method of M&A, which the business operators choose to use.

To notify the outcome of M&A, the merging business operators must fill a form and submit the supporting documentary evidence as required by the Trade Competition Commission, such as copies of documents, which are filed to Department of Business Development in a case of M&A, copies of documents concerning purchase of the shares or assets, minutes of meeting of the session in which the resolution to M&A

is passed, documentary proof of intention to M&A, other particulars relating to M&A, etc. Additional details can be found in the Announcement of the Trade Competition Commission Subject: Rules, Procedures and Conditions for Notification of Business Merging Results B.E. 2561 (2018).

3) What are consequences of violation?

In M&A, which is required to notify its outcome to the Trade Competition Commission, fails to notify the outcome within 7 days from the date of merging, the juristic person shall be subject to an administrative fine of not more than 200,000 Baht and a further fine of not more than 10,000 Baht per day for the duration or the period the violation occurred, and the director, who orders or causes the juristic person commit to offense, or a manager or person, who is responsible for operations of the juristic person, or in a case where that person has the duty to instruct or perform some conduct but fails to instruct or perform the conduct, causing that juristic person to commit the offense, such person shall also be subject to a punishment as prescribed for that particular offense.

4. M&A, which may cause a monopoly or result in a dominant position in a market, is contemplated in the approaches as follows.

M&A, which may cause a monopoly or result in a dominant position in a market, must obtain permission from the Trade Competition Commission prior to M&A.

1) M&A, which may cause a monopoly, means a case where M&A may become a single business operator in a market, which can freely set prices and quantities of its goods and services, and have the turnover in an amount of at least 1,000 Million Baht.

2) M&A, which may result in a dominant position, means a case where M&A may hold a dominant position, in terms of either single dominance or collective dominance, under the Announcement of the Trade Competition Commission Subject: Rules for Business Operator Holding Dominant Position B.E. 2561 (2018).

3) How to apply for permission to M&A?

If M&A may cause a monopoly or result in a dominant position, the merging business operators are required to seek permission from the Trade Competition Commission. Once the Trade Competition Commission grants the permission, the business operators can proceed with M&A.

To apply for permission to M&A, the business operators must fill information in a form and submit the required documents, including, but not limited to, a business plan and schedule of operations; particulars of objectives of M&A and members of M&A; results of the competition impact assessment and study; business necessities assessment and study; negative impact on the economy; and impact on significant rightful benefits to general consumers. Additional details can be found in the Announcement of the Trade Competition Commission Subject: Criteria, Procedures and Conditions in Requesting for Permission and the Permission to Merger B.E. 2561 (2018).

The Commission shall complete the consideration within 90 days after receiving the request from the business operators, but the period can be extended for no more than 15 days, if necessary. Once the Trade Competition Commission completes the consideration, the permission may be either granted or not, or the permission may be granted with conditions. Further, if the business operators fail to comply with the conditions, the Trade Competition Commission may revoke the permission to M&A, either in whole or in part. Furthermore, if the business operators disagree with the decision of the Trade Competition Commission, the business operators are entitled to lodge the case to the Administrative Court within 60 days after receiving such order.

4) What are consequences of violation?

In a case where M&A is required to obtain permission but fails to apply for the permission, the business operators shall be subject to an administrative fine of not more than 0.5 percent of transaction value of M&A, and the director, who orders or causes the juristic person commit to offense, or a manager or person, who is responsible for operations of the juristic person, or in a case where that person has the duty to instruct or perform some conduct but fails to instruct or perform the conduct, causing that juristic person to commit the offense, such person shall also be subject to a punishment as prescribed for that particular offense.