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Merger Control: Experience of China for the Thai Legislation Reform

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Abstract

In light of the development of Thailand competition law system, merger control stands out as a crucial matter requiring attention from practitioners in the field. Despite over two decades of implementation, the progress of Thailand's competition law system appears limited in terms of applying theoretical foundations of competition law, imposing sanctions on business operators and effectively enforcing relevant laws and regulations to prevent anticompetitive activities and maintain an optimal level of market competitiveness. The decision in a landmark merger case within the small-sized retail market suggests that the regulator has not demonstrated effective adherence to the relevant laws and regulations. This deficiency has triggered public criticism, raising concerns about the transparency and efficiency of regulatory practices. On the other hand, Chinese merger control regulations exhibit a notably stringent and protective approach, reflective of the country's distinctive commitment to maintaining a socialist market economy within the framework of antimonopoly law enforcement. With approximately fifteen years of implementation, Chinese law has demonstrated remarkable efficacy in merger control, effectively managing dominant positions and maintaining a proper level of market concentration. The underlying promotion of a socialist market economy might suggest the strict application of nationalist or protectionist principles, potentially posing challenges for the involvement of foreign investors in the Chinese market. Nevertheless, the Chinese regulator has progressively embraced the concept of preserving fair competition while concurrently facilitating the participation of foreign investors in the Chinese market under proper control. This study aims to present a comprehensive overview of Thailand's merger control system, highlighting existing challenges within the current legal framework, and leveraging insights from China's experience to propose valuable lessons for Thailand's enhancement. Despite differing governance systems, both countries share a common objective in merger control, emphasizing the importance of maintaining appropriate market concen-

tration and competitiveness. China's experience in this field is anticipated to offer significant insights, serving as a valuable learning opportunity for Thailand to refine its own merger control regulations and enforcement procedures. This study will be organized into three parts. Part 1 will begin with an exploration of the merger control provisions outlined in the Trade Competition Act 2017 of Thailand. Subsequently, it will delve into a detailed case analysis of a landmark case that has garnered public criticism, shedding light on identified issues within this legislative framework. Part 2 will shift to an examination of merger control under the antimonopoly law of China. This section will include an analysis of a notable case within China's merger control regime. Subsequently, the section will derive and articulate valuable lessons discerned from the Chinese merger control era, offering insights that Thailand can incorporate for its own regulatory practices. Lastly, in Part 3, the study will synthesize the findings and draw conclusions from the entirety of the study.

Keywords

Merger Control, Trade Competition Act of Thailand, Antimonopoly Law of China, Protectionism and Theories of Harm

1. Introduction

In most of Southeast Asian countries, competition laws have been developed to align with standards mandated by international organizations. Notably, Indonesia ratified its law in 1999, driven by the necessity to meet conditions stipulated by the International Monetary Fund (IMF) in response to the 1996 Asia financial crisis. Singapore, on the other hand, enacted its law in early 2005, aiming to fulfill obligations outlined in the U.S.-Singapore bilateral free trade agreement. Likewise, Vietnam passed its law in June 2005 to honor commitments made during its accession to the World Trade Organization (WTO). In contrast, Thailand took a voluntary approach in establishing its national competition law. However, the effectiveness of law enforcement in Thailand has faced scrutiny, with criticism stemming from the absence of any cases reaching trial in the initial eighteen years following the implementation of the first Trade Competition Act in 1999 (the "1999 Act") (Nikomborirak, 2006).

The 1999 Act formed the Trade Competition Commission ("TCC"), having power to investigate, issue orders and decisions, and impose administrative sanctions against parties involved in anticompetitive agreements. In 2017, the 1999 Act was revised, leading to its repeal and the introduction of the Trade Competition Act 2017 ("2017 Act"). An analysis conducted by Posathorn Chuthamani revealed that the provisions within the 2017 Act have been crafted to better align with the prevailing economic circumstances compared to the previous one. Despite these improvements, certain substantive issues persist. Nota-

bly, the potential for political intervention remains a concern, given the Prime Minister's authority to appoint commissioners with the approval of the Council of Ministers. Additionally, a critical deficiency arises in the fact that the TCC has yet to engage in the systematic collection and public disclosure of market information. This omission poses a significant challenge in detecting activities that may contravene specific provisions, thereby presenting a noteworthy obstacle in effective enforcement (Chunthamani, 2019). Notably, in 2020, the TCC granted approval for the acquisition of Tesco Stores in Thailand and Malaysia by CP Group.[1] However, this decision faced public and non-governmental organization criticism due to concerns that it could result in the establishment of a business entity controlling around 75 percent market share in both retail and wholesale markets (Chandler, 2020). This merger case prompts an evaluation of the merger control provisions and discretionary powers of the TCC, with questions arising about whether the amalgamation of these elements would result in an outcome that aligns with the fundamental objectives of competition law.

The People's Republic of China adopted its antitrust law as a result of its obligations linked to membership in WTO of which China became a member in 2001. China officially enacted its Antimonopoly Law which came into effect in 2008 (the "AML"), driven by the overarching goal of aligning with the principles of a socialist market economy and fulfilling the responsibilities arising from its WTO membership. The foundational inspiration for this legislative framework was drawn from European Union law, reflecting the shared roots of both European Union law and Chinese law in the continental legal tradition. Nonetheless, the AML exhibits discernible traces of certain elements from the United States law, alongside influences from Japanese legal principles (Tomasek, 2018). Since the introduction of the AML, China has achieved notable advancements in investigating, adjudicating and penalizing instances of antimonopoly law violations. This progress is evidenced by the public disclosure of over a hundred enforcement actions and the imposition of substantial fines on entities found to be infringing provisions under the AML (Norton Rose Fulbright, 2021).

The AML provides restrictions on competition in China through monopoly agreements, the abuse of dominance, merger control and administrative monopolies. Administration enforcement authority rests with the State Administration of Market Regulation ("SAMR"), having significant power to investigate, adjudicate and dispose of a case, and sanction the AML infringements (Norton Rose Fulbright, 2021). Previously, China's antimonopoly laws had been enforced by three separate authorities, each with complete autonomy as to their respective area of enforcement: 1) the Anti-Monopoly Bureau of the Ministry of Commerce ("MOFCOM") was responsible for merger control; 2) the Price Supervision/Inspection and Anti-Monopoly Bureau of the National Development and Reform Commission ("NDRC") was responsible for regulating pricing and had

[1]Before acquisition, CP Group already had 12,225 convenience stores as well as a chain of Siam Makro wholesale stores as of March 2021.

responsibility for investigating and bringing enforcement actions for price-related violations of the AML and; 3) the Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration of Industry and Commerce ("SAIC") was responsible for non-price-related violations of the AML. On March 17, 2018, China's National People's Congress passed legislation to consolidate the existing three authorities into one which is today SAMR. Furthermore, the State Council's Anti-Monopoly Commission, which exercised a policy-making role that supplemented the enforcement by the MOFCOM, NDRC and SAIC, was also merged into SAMR (Gidley & Zhang, 2018).

Within the framework of the AML, a prominent focus has been directed towards merger control, reflecting the regulatory commitment to uphold competitiveness within the market. A pivotal instance in the scope of merger control is the significant decision made in 2009 to prohibit the proposed merger between Coca-Cola and Huiyuan. This decision exemplifies the regulator's proactive stance in scrutinizing mergers and underscores its dedication to preserving a competitive environment within the industry. In *Coca-Cola and Huiyuan*, MOFCOM placed a theory of harm, finding that Coca-Cola's dominance in the carbonated beverage market would allow Coca-Cola to obtain a dominant position in the fruit juice market, resulting in eliminating or restricting competition and harming consumers (Davis, 2010). Additionally, MOFCOM highlighted that the acquisition of Huiyuan by Coca-Cola would result in a substantial increase in market power within the fruit juice beverage sector. This heightened influence would stem from Coca-Cola's control over both its Minute Maid low fruit juice brand and the esteemed pure fruit juice brand, Huiyuan. Furthermore, MOFCOM expressed concerns that the merger could potentially eliminate small and medium-sized domestic enterprises from participating in the competitive landscape of the fruit juice industry. Notably, Huiyuan had demonstrated its ability to effectively compete against international counterparts, leading some scholars to assert that MOFCOM's decision to reject Coca-Cola's acquisition might be grounded in considerations of economic nationalism or protectionism (Davis, 2010).

On June 24, 2022, China's National People's Congress approved amendments to the AML, and these amendments officially took effect on August 1, 2022. Concurrently, SAMR has put forth proposed updates to key implementing rules and regulations for public commentary. These proposed updates pertain to various aspects, including cartels and vertical restraints, abuse of dominance, merger control and abuse of intellectual property rights. In the area of merger control, the amendments encompass the introduction of a stop-the-clock mechanism, a novel provision mandating SAMR to institute a classification system for its merger reviews, and revised thresholds for merger control. These changes are in response to unprecedented shifts in the Chinese economy and the evolving global political and economic landscapes.

In light of the merger control frameworks in these two jurisdictions, Part 1

and 2 below will provide a detailed analysis including recent developments in merger control provisions, a landmark case, and pertinent issues within the Thai legal context. Simultaneously, it will scrutinize the legislative framework and regulatory approaches employed by the Chinese authorities. The ultimate objective is to derive insights from the Chinese experience in this field, culminating in the development of a proposed conceptual framework for Thailand.

2. Methodology

The research methodology employed in this study will adopt an analytical framework, focusing on the examination of legislations, regulations and guidelines relating to merger control in Thailand and China. This research will employ an analytical approach for the literature review, drawing insights from published decisions, journal articles, law reviews, interviews and recent news concerning important cases, with a specific emphasis on the field of merger control in Thailand. The Chinese AML and associated guidelines will be presented as a reference model in this context. Eventually, this study aims to address a gap in the existing body of knowledge on Thai merger control provisions, leveraging the experiences and practices observed in China.

3. Part 1: Merger Control under the 2017 Act

The 2017 Act comprises six chapters, each delineating crucial aspects of its regulatory framework. The regulatory framework governing merger control schemes is under Sections 51 to 53 in Chapter Three, complemented by subsequent notifications from the TCC specifically addressing merger control matters. These collectively constitute the "Merger Control Rules" which include:

1) Notice on Rules for the Assessment of Undertakings under Common Policy Relations or Common Controlling Interests 2018;[2]

2) Notice on Criteria for the Assessment of Acquisition of Assets or Shares to Control Business Policy, Administration, Direction, or Management Deemed as Merger 2018;[3]

3) Notice on Rules, Procedures, and Conditions for Merger Approval 2018 (the "Merger Approval Rules 2018");[4]

4) Notice on Rules, Procedures, and Conditions for Notification of Merger Transaction 2018;[5] and

5) Notice on Criteria for Being an Undertaking with Dominant Position 2020.[6]

The 2017 Act, along with the Merger Control Rules, establishes a dual merger control regime for overseeing business operators' merger transaction. This framework encompasses both pre-merger approval and post-merger notification

[2]https://www.tcct.or.th/assets/portals/1/files/1_NoticeOnCommonControl.pdf
[3]https://www.tcct.or.th/assets/portals/1/files/6_NoticeOnShareAcquisition.pdf
[4]https://www.tcct.or.th/assets/portals/1/files/8_NoticeonMergerApproval.pdf
[5]https://www.tcct.or.th/assets/portals/1/files/NoticeOnMergerNotification.pdf
[6]https://www.tcct.or.th/assets/portals/1/files/NoticeonMarketDominance.pdf

requirements (Benjatikul & Saeiew, 2024).

A merger under Section 51 refers to any of the following transaction:

1) A merger involving a producer with another producer, a distributor with another distributor, a producer with a distributor, or a service provider with another service provider, that results in either maintaining the status of one business while terminating the status of the other, or giving rise to the formation of a new business;

2) The acquisition of all or a portion of assets from another business with the intention of exercising control over business administration policies, administration or management, as outlined in the Merger Control Rules; or

3) The acquisition of all or a portion of shares from another business, whether directly or indirectly, with the intention of exercising control over business administration policies, administration or management, as outlined in the Merger Control Rules.

In accordance with the Merger Control Rules, merger transactions involving either asset acquisitions or share acquisitions or a combination of both, fall under the merger control scheme only when the acquirer is poised to gain control over the other business operator through the transaction. The acquirer will be considered to have gained control if the transaction meets any of the following criteria:

1) An asset acquisition involving more than 50 percent of the total operating assets used in the normal business operations of the other business operator takes place;

2) An acquisition of shares with voting rights in a non-listed company exceeds 50 percent of the total voting shares of that company; or

3) An acquisition of shares, warrants or other securities convertible into shares of a listed company results in the acquirer holding 25 percent or more of the voting rights in that company.

Section 51, however, does not apply to a business merger intended for the internal restructuring of business operators with a connected relationship through policies or directorial power, as outlined in accordance with the Merger Control Rules.

With respect to the establishment of a dual merger control regime under Section 51 to 53, along with the Merger Control Rules, post-merger notification becomes imperative in cases where a merger holds the potential to significantly diminish competition within a specific market. In such cases, the acquiring entity or the surviving entities, as applicable, are mandated to formally notify the TCC, subsequent to the closure of the merger. This notification requirement is triggered in cases where the value of sales achieved by any of the merging parties of the cumulative sales value of the merged entities reaches or exceeds THB one billion within the relevant market. However, it is essential to note that this obligation does not apply to transactions leading to a monopoly or the establishment of a dominant market position. The submission of the post-merger notification

is mandated to occur within a timeframe of seven days following the completion of the transaction.

In terms of pre-merger permission, the acquirer or merging parties are obligated to secure the TCC's permission in situations where the proposed merger has the potential to result in a monopoly or a dominant position, as defined in the Merger Control Rules. Following the submission of the permission request, the TCC holds a timeframe of 90 days, with the possibility of an extension by an additional 15 days, to issue a decision. In the event of permission, the TCC may impose specific conditions. In cases where parties involved disagree with the TCC's decision, they maintain the right to initiate an appeal with the Administrative Court within 60 days from the date of receiving the decision (Benjatikul & Saeiew, 2024).

3.1. CP Group's Acquisition of Tesco[7]

3.1.1. Facts

According to the decision published on the official website of the TCC, C.P. Retail Development Company Limited ("CPRD") has submitted a request for permission to merger businesses with Tesco Stores (Thailand) Limited ("Tesco Thailand") to the TCC on July 31, 2020. This merger involves the consolidation of businesses between major enterprises and carries a high combined business value. CPRD, the acquirer, is a holding company, established on March 6, 2020 as part of the Charoen Pokphand Group or CP Group. CPRD intended to merge businesses with Tesco Thailand, the target company, by acquiring shares of Tesco Thailand, together with Tesco Stores (Malaysia) Sdn Bhd. The estimated business combination value at the time of the share purchase agreement was approximately USD 10.6 billion or around THB 338,000 million. CPRD has submitted a request for permission to merge businesses, including factual information and supporting documents as stipulated by the TCC. CPRD also informed the TCC that following the business merger, CPRD and Tesco Thailand will continue their business operations without the establishment of a new business entity.

3.1.2. Issues

1) Whether this merger between the acquirer and the target company is a merger that may result in a monopoly or the status of a business operator with market dominant power, requiring approval from the TCC before proceeding with the business merger, in accordance with Section 51 paragraph 2 of the 2017 Act.

2) The consideration of whether to grant permission for a business merger takes into account the necessity in accordance with business practices, the promotion of business activities, the prevention of severe economic damage, and the

[7]https://www.tcct.or.th/assets/portals/1/files/%E0%B8%9C%E0%B8%A5%E0%B8%84%E0%B8%B3%E0%B8%A7%E0%B8%B4%E0%B8%99%E0%B8%B4%E0%B8%88%E0%B8%89%E0%B8%B1%E0%B8%A2_CP-Tesco_18122563-final.pdf (in Thai).

avoidance of adverse effects on the general welfare of consumers, as stipulated in Section 52 Paragraph 2 of the 2017 Act.

3.1.3. Reasonings

1) According to the first issue, in defining the product market, the TCC has classified the wholesale and retail markets in Thailand based on previous studies, identifying two main types: the traditional wholesale and retail market, and the modern wholesale and retail market. Additionally, when categorizing by business type, the TCC has separated the retail market from the wholesale market and considered whether these two types of businesses can act as substitutes for each other. The TCC concluded that the retail and whole markets cannot be considered substitutes, both significantly in terms of demand and supply. Therefore, in assessing the business merger permission for this case, the consideration will be limited to the modern retail market only.

The modern retail market relevant to this merger can be classified into three types: hypermarket, supermarket and small-sized retail store. In terms of market overlap between the acquirer and the target company, the specific market is the small-sized retail market, which includes 7-Eleven of CP Group and Tesco Lotus Express. Prior to the merger, among small-sized retail businesses with the highest market share, 7-Eleven held the dominant position with a market share of 73.60 percent. Following closely were Tesco Lotus Express and Family Mart and Tops Daily of Central Group with market shares of 9.45 and 4.79 percent, respectively. The combined market share of the top three businesses in the market was 87.84 percent. Therefore, before the business merger, the small-sized retail market was dominated by businesses with significant market power, particularly 7-Eleven.

After the merger, 7-Eleven and Tesco Lotus Express would see an increase in their combined market share to 83.05 percent, making them leading small-sized retail businesses. Following them were Central Group (Family Mart and Tops Daily) and Mini Big C with market shares of 4.79 and 3.24 percent, respectively. The TCC concluded that after the merger, only 7-Eleven and Tesco Lotus Express would hold a dominant position in this market as Family Mart and Tops Daily, as well as Mini Big C, hold market shares below 10 percent. Therefore, they would not qualify as businesses with market dominant power, according to the criteria stipulated by the TCC. Furthermore, since the acquirer is not the sole business operator in this market, it would not lead to a monopoly, in accordance with criteria outlined in Section 3 of the Merger Approval Rules 2018.

Eventually, the TCC determined that the merger between the acquirer and the target company does not result in a monopoly, but constitutes a market dominant position of the acquirer. This conclusion is based on the examination of the revenue of the companies within CP Group, which function as quasi-single business units and generate revenue from the modern retail market. The combined revenue of the acquirer and the target company exceeds THB one trillion. This merger therefore must seek approval from the TCC, according to Section

51 Paragraph 2 of the 2017 Act.

2) According to the second issue, the TCC considered this issue based on the outcomes of the following 6 aspects, including: a) market concentration; b) entry into the market by new entrepreneurs and the expansion of competitor's production; c) impact on competition from combined businesses; d) impact on competition resulting from collaboration; e) impact on overall economics and consumer welfare; and f) other factors that may affect competition in the future.

The assessment of market concentration will be based on the Herfindahi-Hirschman Index or HHI, calculated by squaring the market share of each firm competing in a market and then summing the resulting numbers. This assessment considers the HHI after business consolidation and the change in HHI resulting from the consolidation. Prior to the merger, the HHI for the small-sized retail market was 5553.19 points, indicating a high level of existing market concentration. After the merger, the HHI would increase to 6944.09 points, indicating a further rise in market concentration. The change in HHI would be by 1390.9 points, representing a significant impact on competition.

According to the TCC's research, the small-sized retail market is considered to maintain low entry barriers into the market due to its relatively low costs. Furthermore, regarding the expansion of competitors, this market is a highly competitive market, evident in the continuous branch expansion by large business entities to meet the growing consumer demand. The TCC therefore concluded that business operators in this market still have opportunities for growth and the potential for branch expansion.

In terms of the impact on competition from combined businesses, manufacturers of products are dependent on conducting business with the merging parties and affiliated companies. This merger would result in the merging parties having more negotiating power in purchasing products from manufacturers. Furthermore, due to the comprehensive business networks of the merging parties, spanning from wholesalers to retailers, contributing to the promotion of a competitive business environment and enabling them to consistently capture market share. Consequently, there is an opportunity for consolidators to leverage their market power in setting purchasing conditions with trading partners. This includes using information on product purchases from manufacturers or suppliers to gain superior negotiating power, as well as employing other trade measures that are advantageous to themselves and their affiliated companies.

In terms of impact on competition resulting from collaboration, the merging parties would obtain a market share approximately 83.05 percent. This substantial portion may not provide sufficient motivation for the merging parties to collaborate with other competitors, in coordinating pricing, production quantities, distribution or service quality, and result in other non-participating competitors being impacted to the extent that they may eventually have to exit the market. Therefore, this merger is unlikely to have a significant impact on competitors, as the likelihood of the merging parties reaching agreements with other

competitors is very low.

Regarding the impact on overall economics and consumer welfare, the TCC concluded that although this merger may lead to a high market concentration, it is unlikely to reach a level that significantly impacts the overall economic system. On the other hand, this merger is anticipated to contribute to increased national revenue and generate additional employment opportunities, aligning with the expansion of production capacity to meet consumer demand through enhanced distribution channels. Additionally, while the merger may lead to a reduction in the number of business operators in the market, resulting in fewer choices for consumers to purchase from small-sized retail stores, it may also empower the merging parties to have more influence in determining product prices and quantities. However, consumers still have choices to purchase products through online channels in the e-commerce market, which continues to experience consistent market expansion and a continuous increase in the number of consumers participating.

Regarding other factors that may affect competition, this merger may have an impact on competition both in terms of its effects on small-medium enterprises (SMEs) and its effects on competition within the supply chain. The merger would result in the merging parties having greater negotiating power because of their comprehensive business network that spans from wholesale to retail.

3.1.4. Decision

The TCC, with a majority vote of 4-3, has granted approval for the merger under seven commercial conditions. The majority opinion asserts that the merger will enhance the market power of the involved parties, who are already significant players in the modern retail and wholesale markets. However, it is emphasized that the merger does not lead to a monopoly, as it aligns with a reasonable business rationale. While the potential merger is anticipated to reduce competition, it is deemed not to cause substantial harm to the economy or consumer interests, pursuant to the provisions of Section 51 and 52 of the 2017 Act.

The TCC has outlined seven commercial conditions as part of the merger approval, which include:

1) Imposing a three-year prohibition on future acquisitions within the modern trade sector, excluding e-commerce;

2) Mandating the merging parties to enhance sales volumes of agricultural and community products supplied by SMEs or OTOP[8] products, with a minimum increase of 10 percent annually for five consecutive years;

3) Restricting the exchange of specific trade data between the two merging parties;

4) Requiring Ek-Chai Distribution Co., Ltd. (a subsidiary of Tesco Thailand) to uphold contracts with existing suppliers and distributors for a duration of two

[8]One Tambon (meaning of sub-district) One Product. It is a local entrepreneurship stimulus program which aims to support the unique locally made and marketed products of each Thai sub-district all over Thailand.

years, with exceptions for contract amendments that may benefit these suppliers and distributors, subject to their consent;

5) Mandating the merging parties to actively promote products of and enhance trade terms with SMEs;

6) Implementing a temporary reporting obligation to the TCC for a three-year period; and

7) Requiring the merging parties to establish codes of conduct.

On the other hand, three dissenting commissioners expressed their concerns regarding the merger, suggesting that it could potentially result in a monopoly or exert undue influence on the economy. They pointed out that the merging parties operate across diverse industries within a broad spectrum of business and hold substantial market shares in the relevant markets. According to the dissenting view, the merger could profoundly affect competitors and consumers, potentially causing some competitors to exit the market. Consequently, this reduction in market competition could limit choices for consumers.

3.1.5. Concerns over the Decision

This decision has raised significant concerns about the TCC's integrity. Prior to this merger, CP Group had a substantial presence in various retail sectors in Thailand, operating nearly 12,000 7-Eleven convenience stores, as well as 134 Makro cash-and-carry stores, 610 CP Fresh Mart supermarkets and various e-commerce platforms.[9] The approval of this merger explicitly results in an augmentation of market power for a single conglomerate, enabling it to exert control over the retail market system. This outcome completely contradicts the promotion of competitiveness within a specific market.

Upon examining the reasoning section addressing the two identified issues, it becomes evident that the holding of the case contradicts the explanations put forth by the TCC. According to the first issue, the TCC's categorization of market types does not align with the dynamics of the modern retail market, where hypermarkets, supermarkets, convenience stores and e-commerce platforms are all channels that extensively distribute similar products to consumers (Panonond, 2020). Furthermore, even if a merging party has already secured a dominant position prior to the merger, the TCC permited this party to further increase its market share in the same market, which appears to deviate from the objectives of competition law. It is evident that the TCC demonstrated a lack of concern regarding preventive measures that could act as safeguards to prevent a single entity from exerting excessive control over the economic system within a market.

Significantly, according to the second issue, one of the primary reasons for the TCC's decision to reject the merger request could be attributed to the consideration of market concentration, as indicated by the result of the HHI. Pursuant to the decision, the TCC utilized the HHI calculation, aligning with Horizontal Merger Guidelines 2010 employed by the Federal Trade Commission ("FTC") of

[9]As of 25 November 2020.

the U.S. in evaluating market concentration. The HHI considers the distribution of firms' relative sizes in a market. It tends toward zero when a market consists of numerous firms of comparable size and rises to its maximum of 10,000 points when a single firm dominates the market. The HHI rises with a reduction in the number of firms in the market and an increase in the disparity in size among those firm. Under the Horizontal Merger Guidelines 2010, the HHI is calculated by summing the squares of individual firm's market shares, assigning proportionately greater weight to larger market shares. In HHI calculations, regulatory agencies evaluate both the post-merger HHI level and the increase in HHI attributable to the merger. The increase in HHI is equivalent to twice the product of the market shares of the merging parties.[10]

As shown in Table 1, the regulatory agencies apply the following general standards for the defined relevant markets:

- Small Change in Concentration: Mergers leading to an increase in the HHI of less than 100 points are unlikely to have adverse competitive effects and typically require no further analysis.
- Unconcentrated Markets: Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and usually necessitate no further analysis.
- Moderately Concentrated Markets: Mergers causing moderately concentrated markets with an increase in the HHI of more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
- Highly Concentrated Markets: Mergers resulting in highly concentrated markets with an increase in the HHI of more than 200 points will be presumed to likely enhance market power. This presumption may be rebutted by persuasive evidence demonstrating that the merger is unlikely to enhance market power.

According to the analysis of the TCC, before the merger, the HHI for this market was 5553.19 points, indicating a high level of existing market concentration. Following the merger, the HHI would rise to 6944.09 points, resulting in a change in HHI of 1390.9 points. This outcome signifies a significant increase in market concentration, surpassing the threshold specified by the FTC regulation that the TCC employed for its determination in this case. By approving this

Table 1. Guideline for assessing market concentration and challenging merger proposals.

Market Type (Concentration, HHI)	Post-Merger Change in Concentration		
	<100	100 - 200	>200
Unconcentrated (<1500)	No Challenge		
Moderately Concentrated (1500 - 2500)		Likely Challenge	
Highly Concentrated (>2500)			Certain Challenge

[10]https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf

merger, the TCC has demonstrated a departure from determining the case based on the theories of harm that the TCC itself employed in the reasoning part of its decision. Conversely, the TCC exerted considerable effort to identify compelling reasons to approve this merger request. Unfortunately, the rationale that this merger would not lead to a monopoly seems untenable and unpersuasive, considering that the merging parties would attain a market share exceeding 80 percent after the merger, effectively consolidating control over the entire market. Consequently, the potential for establishing a monopoly in this market in the future is explicitly high. Despite being aware of this, the TCC eventually proceeded with the approval of this merger.

Significantly, it is evident that the approval of the merger under scrutiny appears to deviate from the foundational academic principles of competition law. This deviation is notably discernible in the elevated level of the HHI points, explicitly signifying a considerable concentration within the market. Instead of prioritizing a comprehensive analysis of the changing market dynamics, the TCC chose to implement behavioral control measures post-merger (seven commercial conditions). In accordance with the stipulations outlined in the Merger Control Rules, especially within the Merger Approval Rules 2018, it is imperative for the TCC to initiate an assessment of the merger's impact based on an analysis of market structure. Behavioral control measures should subsequently be employed to ensure the stability of the market system. This decision prompts a critical inquiry into whether the TCC exercised its discretion in accordance with the Merger Control Rules and Section 51 of the 2017 Act.

3.2. Problems of the Provisions

The outcome in *CP Group and Tesco* suggests that the Thai competition law system, along with its associated regulations, encounters notable challenges and difficulties, particularly in the following aspects:

1) The TCC employed a theory of harm, conducting a thorough analysis and assessment of market concentration within the small-sized retail market. The pre-merger HHI revealed an existing high level of concentration at 5553.19 points. Subsequent to the merger, the HHI experienced a significant increase to 6944.09 points, representing a change in HHI of 1390.9 points. This outcome strongly suggests that the merger would explicitly restrict and decrease competition within this specific market. Approving this merger appears to contradict the fundamental objectives of competition law. The rationale provided by the TCC in support of its decision does not align with the established practices and obligations of the institution. The enforcement of competition law by the TCC emerges as a clear concern in relation to the outcome of this case. Moreover, the potential involvement of political intervention and corporate lobbying during the TCC's consideration and enforcement processes adds another layer of complexity, representing an ongoing issue within the Thai bureaucratic framework. Therefore, it is crucial to implement provisions that rigorously govern the en-

forcement processes conducted by the regulator, along with establishing legal standards for assessing actions in which political institutions and large corporations may become involved. This strict control is imperative for enhancing the efficiency of competition legislation.

2) According to the stipulations outlined in the Merger Control Rules, particularly within the Merger Approval Rules 2018, the existing provisions may grant the TCC an excessively broad discretionary power, lacking adequate restrictions to effectively limit its own opinion and enforce preventive measures with strict adherence. Despite a compelling indication favoring the rejection of the merger proposal as more appropriate and in alignment with relevant laws and regulations, the TCC persists in seeking alternative justifications such as an increase in the employment rate and the option to purchase from online platforms. These rationales are not directly pertinent to the TCC's obligations under competition legislation. This outcome highlights the potential consequences of wielding a broad discretion, which may lead to actions either surpassing or falling below the regulator's established standards. Such deviations have the potential to negatively impact the competition system, consumers, and the national economy as a whole.

4. Part 2: Merger Control under the AML

The AML comprises of eight comprehensive chapters. The regulatory framework governing merger control schemes is under Article 20 to 31 in Chapter Four. In the context of the AML, the term "concentration of undertakings" refers to situations wherein one operator acquires complete or partial control over another operator through specific practices. Article 20 precisely defines concentration of undertakings, including the following scenarios: 1) the merger of multiple operators; 2) the acquisition of controlling rights over another operator through equity or asset purchases by one operator; or 3) the procurement of controlling rights or decisive influence over another through contractual arrangements, among other means. Consequently, Article 20 extends its applicability to cover mergers, acquisitions and certain types of joint ventures (Wu, 2008).

Article 21 of the AML states that "Where a concentration of undertakings meets the threshold for declaration set by the State Council, the relevant business operators shall declare the same to the State Council's AML enforcement authority in advance. In the absence of such declaration, such concentration may not be carried out." The AML adopts a mandatory prior concentration notification system for cases that meet the stipulated notification thresholds. In cases where the concentration fails to meet these thresholds, neither prior nor subsequent notification is mandated. However, for concentrations meeting the notification criteria, compliance with the obligatory prior notification is imperative. Parties involved are strictly prohibited from breaching this obligation.

On August 3, 2008, the State Council disclosed the merger notification thre-

sholds that China would employ in executing its merger control framework. Undertakings are obligated to submit a report to MOFCOM before finalizing a concentration transaction if the transaction meets either of the following thresholds:

- If the combined global turnover for all entities involved in the transaction surpasses RMB 10 billion in the preceding fiscal year, and each of at least two parties records a turnover exceeding RMB 400 million in China during the same period; or
- In cases where the aggregate turnover within China for all transaction-involved parties exceeds RMB 2 billion in the previous fiscal year, and each of at least two parties individually attains a turnover exceeding RMB 400 million within China during the same fiscal year.[11]

The Notification Thresholds Regulation is supplemented by a series of ministerial regulations published by MOFCOM. These regulations provide clarification on various key aspects, including specialized turnover calculation method applicable to financial institutions, the exclusion of taxes and deductibles, the geographical allocation of turnover to the Chinese market, the delineation of entities whose turnover is considered relevant, and the handling of multiple concentrations involving the same parties (Lin & Zhao, 2012).

Pursuant to Article 25, upon the acceptance of a notification, MOFCOM is granted a 30-day timeframe to carry out a preliminary examination of the concentration and make a determination on whether to advance to an in-depth review of the proposed transaction. As stipulated in Article 26, the customary conclusion period for this review is 90 days. However, in particular situations, an extension up to 150 days is permissible. In the event that MOFCOM does not reach a decision before the expiration of either review period, the transaction is deemed cleared, allowing the involved parties to proceed with the implementation of their transaction.

In accordance with Article 27, the evaluation of a concentration of undertakings involves the consideration of various factors. These include, but are not limited to: 1) assessing the market share of the involved business operators within the relevant market and their capacity to influence market dynamics; 2) analyzing the level of concentration in the relevant markets; 3) evaluating the effects of the concentration on market entry and technological advancements; 4) evaluating the repercussions of the concentration on consumers and other entities within the business landscape; 5) appraising the influence of the concentration on national economic development; and 6) incorporating any additional factors that the AML enforcement authority of the State Council deems essential for comprehensive consideration.

According to Article 28, in cases where a concentration of undertakings demonstrates the potential to exclude or restrict competition, MOFCOM is mandated to decide on the prohibition of such concentration. However, if the in-

[11]These thresholds do not apply to banking, insurance, securities and futures.

volved business operators can prove that the concentration yields a greater positive impact on competition than negative effects, or when it aligns with the broader public interest, MOFCOM has the discretion to decide against the prohibition of such concentration. In cases where a transaction gives rise to concerns regarding competition, both the involved parties and MOFCOM have the opportunity to suggest remedies aimed at mitigating potential adverse effects. These remedies can take the form of either structural measures, such as divesting assets, or behavioral interventions, such as committing to terminate exclusive distribution agreements or licensing key technology or platform structure (Lin & Zhao, 2012).

On May 24, 2009, China's Anti-Monopoly Commission announced its Guidelines Concerning the Definition of Relevant Markets (the "Guidelines").[12] The Guidelines acknowledge that competitive behaviors, which include actions leading to, or likely resulting in, the elimination or restriction of competition, occur within a specific market scope. The definition of the market aims to delineate the boundaries within which business operators engage in competition with one another, as outlined in Article 2 of the Guidelines. The Guidelines additionally assert that the definition of the relevant market assumes an essential role in addressing fundamental issues, including the identification of competitors and potential competitors, evaluation of market share held by business operators and the level of market concentration, determination of the market positioning of business operators, scrutiny of the impact of their behaviors on market competition, assessment of the legality of such behaviors and the determination of legal liabilities in the event of illegality. Consequently, the delineation of the relevant market typically serves as the initial step in competition analysis and stands as an important element in the enforcement of the AML, as stipulated in Article 2 (Ju & Lin, 2020).

Consistent with global standards, the Guidelines mandate the identification of relevant products and geographical markets based on primarily demand substitution. In situations where factors related to supply substitution gain significance as contributors to competitive constraints, due consideration is also given to them. Furthermore, the Guidelines underscore the application of the hypothetical monopolistic test, commonly referred to as the SSNIP test, as a key approach in defining market boundaries (Ju & Lin, 2020).

On August 29, 2011, MOFCOM released the Interim Provisions on Assessment of the Impact of Business Operator Concentration on Competition ("Assessment Rules").[13] These provisions, complemented by the guidance available in the regulator's limited published decisions, highlight specific considerations that MOFCOM incorporates into its scrutiny process. Consistent with global standards, MOFCOM examines both unilateral and coordinated effects in the evaluation of horizontal mergers, while also assessing potential foreclosure effects in

[12]https://www.gov.cn/zwhd/2009-07/07/content_1355288.htm (in Chinese).
[13]http://www.mofcom.gov.cn/aarticle/b/c/201109/20110907723440.html (in Chinese).

the context of vertical or conglomerate mergers (Blewett & Bai, 2018).

The regulatory scrutiny involves many factors, with a focus on market dynamics. These factors include evaluating the market share, assessing the parties' positioning within the relevant market in comparison to competitors. The degree of market concentration is also a significant consideration, involving the reference to the HHI or the combined market shares of the largest firms in the industry or CRn Index. Furthermore, the regulator evaluates the impact of the transaction on consumers and other stakeholders, encompassing customers, suppliers and competitor. Additionally, considerations extend to the potential effects on competition, market access and technological progress. Post-transaction market competitiveness is a key area of examination. Significantly, the regulator also assesses the broader implications, scrutinizing the transaction's impact on national economic development. According to Articles 9 and 12 of the Assessment Rules, the regulatory examination extends to the determination of whether the business concentration under scrutiny is likely to yield efficiencies, including aspects such as economies of scale, as well as potential cost reduction. Furthermore, the regulator takes into account non-competition factors, including considerations related to social and public interests, as integral components of its investigative process (Blewett & Bai, 2018).

Under Article 30 of the AML, MOFCOM holds the discretion to prohibit a transaction if substantial concerns arise during its evaluation. The regulator has the option to approve a transaction contingent upon the implementation of remedies aimed at mitigating perceived adverse effects. It is mandatory for the regulator to publicly disclose any decision regarding the prohibition of a concentration or its approval with attached remedies.

In accordance with Article 31 of the AML, the law mandates a separate national security review (the "NSR") process when a foreign investor engages in the concentration of undertakings by acquiring a domestic Chinese company or through other means, particularly if the transaction raises concerns related to national security. Since 2011, China has systematically established and heightened the stringency of the NSR process for foreign investments. Within the NSR framework, a joint-ministerial committee, chaired by MOFCOM and NDRC under the leadership of the State Council, is responsible for scrutinizing foreign acquisition. This examination includes an evaluation of the impact on critical areas such as national defense, the stable operation of the national economy and the research and development capacity for key technologies crucial to national security. The joint committee possesses significant discretion to thoroughly scrutinize and potentially impose restrictions on transactions within China (Blewett & Bai, 2018).

Within the framework of the AML, specific provisions reveal a persistent convergence of industrial policy with competition policy, notably exemplified by Article 31 mandating the application of the NSR. Furthermore, Article 27, allowing for the consideration of a merger's impact on the development of the na-

tional economy, implies a connection to industrial policy and aligns with China's overarching development goals. As demonstrated in the forthcoming discussion, the consideration of industrial policy played an essential role in MOFCOM's decision-making process in the case involving Coca-Cola and Huiyuan (Lin & Zhao, 2012).

4.1. Coca-Cola's Proposed Acquisition of Huiyuan[14]

4.1.1. Facts

On September 3, 2008, Coca-Cola declared its intention to acquire Huiyuan Juice Group Ltd. ("Huiyuan"), a transaction valued at approximately USD 2.3 billion. At that time, Huiyuan stood as China's largest juice manufacturer, commanding approximately 40 percent share of the pure fruit juice market in the country. The announcement of this proposed merger triggered widespread concern among the Chinese public, who considered the prospect of a foreign brand acquiring a highly successful private domestic enterprise like Huiyuan. Despite Coca-Cola's significant presence as one of the leading brands in China, holding approximately 50 percent of the carbonated beverage market in the nation, Huiyuan occupies a unique position in the hearts of the Chinese people. It was perceived as a domestic success story, symbolizing effective competition with international rivals and instilling a sense of pride among the Chinese people (Davis, 2010).

In 2008, Coca-Cola successfully introduced Minute Maid Pulpy to the Chinese market, achieving a notable 40 percent growth in case volume for the Minute Maid brand within a year. Despite already holding an estimated 12 percent market share in the overall fruit juice market in China, primarily propelled by the success of its Minute Maid low juice concentrate brand, Coca-Cola had not established a presence in the pure juice market. The acquisition of Huiyuan would have instantly provided Coca-Cola with an approximately 40 percent share in the pure juice market, positioning the company prominently within this specific segment (Davis, 2010).

4.1.2. Decision

On March 18, 2009, MOFCOM issued a decision, prohibiting the proposal of this acquisition. The decision was based on six primary factors: 1) an assessment of the concentration of the operators involved in the relevant market, including their market share and control; 2) an examination of the market concentration within the relevant market; 3) an analysis of the potential impact of the merger on market entry and technological advancements; 4) an evaluation of the expected effects of the merger on consumers and other business operators; 5) a consideration of the anticipated impact of the merger on economic development; and 6) an assessment of the influence of the Huiyuan brand on the overall competitiveness of the fruit juice market.

[14]https://perma.cc/E4MK-N984 (in Chinese).

4.1.3. Reasonings

The decision reached the determination that the proposed acquisition would result in several negative anticompetitive effects. The first anticompetitive identified was the potential for Coca-Cola to expand its prevailing dominance in the carbonated drink market to the fruit-juice market. This extension of dominance was deemed to have a potential to restrict competition and harm the legitimate interests of consumers (Danzig, 2011).

The second effect was the acquisition granting Coca-Cola control over the widely recognized Minute Maid and Huiyuan juice brands, thereby substantially enhancing their market influence within the relevant fruit-juice market. This heightened market power, when combined with Coca-Cola's dominant position in the carbonated soft-drink market, was deemed capable of elevating barriers to entry and preventing potential competitors from entering into the fruit-juice market. This observation aligns with the principles delineated in Article 7 of the Assessment Rules, which articulates that concentration may lead to the elevation of market entry barriers in the relevant market (Danzig, 2011).

The final effect identified was that the concentration had the potential to marginalize small and medium-sized domestic producers of fruit juice, impeding their ability to compete and innovate within the Chinese domestic fruit juice market. This aspect aligns with the principles outlined in Articles 4 and 8 of the Assessment Rules, which address the capacity to eliminate or constrain competitors and the conceivable adverse impacts on innovation. Furthermore, this factor underscores the regulatory concern in China regarding the promotion of national economic development, a safeguard objective highlighted in Articles 3 and 11 of the Assessment Rules (Danzig, 2011).

Prior to the decision, MOFCOM engaged in discussions with Coca-Cola regarding potential remedies aimed at decreasing the anticipated negative impacts of the proposed merger. Throughout these deliberations, MOFCOM requested Coca-Cola to present feasible solutions for alleviating the identified impacts. In response, Coca-Cola provided its perspectives on the concerns raised by MOFCOM and proposed a remedial solution, subsequently refining it through further amendments. Following a comprehensive review, MOFCOM determined that the suggested remedial measures put forth by Coca-Cola did not effectively mitigate the adverse effects of the merger on competition. Based on these considerations and in accordance with the stipulations of Articles 28 and 29 of the AML, MOFCOM determined that the proposed merger would result in the elimination or restriction of competition. Consequently, it was concluded that this merger would negatively impact the effective competition within China's juice market and impede the healthy development of the nation's juice industry.

4.2. Merger Control under the New AML

Since the first introduction in 2007, the AML has played an essential role in upholding fair competition, enhancing the efficiency of economic operations, fostering high-quality development, and protecting the interests of consumers

and the public. However, due to unprecedented changes in the Chinese economy and global political and economic landscapes, certain provisions of the AML are no longer well-suited to meet present and future needs. In response to this change, the legislative body formally endorsed the initial amendment to the AML on June 24, 2022, and it came into effect on August 1, 2022 (referred to as the "AML 2022") (Ning et al., 2022).

The AML 2022 has instituted several changes in the merger control system, outlined as follows.

1) The AML 2022 introduces the "stop-the-clock" mechanism within the concentration of undertakings review procedure. In accordance with Article 32, enforcement agencies are empowered to suspend the calculation of the review period and formally notify relevant parties in writing under the following conditions: a) failure of the involved parties to submit documents and materials as per the relevant provisions, thereby impeding the progress of the review; b) emergence of new circumstances and facts with a substantial impact on the concentration review, rendering it unfeasible to proceed without their verification; and c) necessity for further evaluation of additional restrictive conditions related to the concentration, accompanied by a formal request for suspension from the involved parties.

This amendment will provide SAMR with increased time for the examination of mergers, particularly in cases involving remedy negotiations. Prior to this amendment, the maximum review period was set at 180 calendar days. However, SAMR, in practical scenarios, often faces challenges in concluding its review within the stipulated timeframe in conditionally approved cases, leading notifying parties to resort to the practice of "pull and refile." The amendment introduces a mechanism for SAMR to suspend the review clock during the evaluation process, offering a valuable tool to manage and extend the review period when necessary (Zhan, Song, & Wu, 2022).

2) The AML 2022 introduces a novel provision mandating SAMR to establish a classification system for its merger reviews, directing its scrutiny towards concentrations in crucial sectors aligned with national strategies and people's livelihoods, as outlined in Article 37. After the AML 2022 was passed, SAMR implemented a pilot program on July 15, 2022, outlining the delegation of a portion of its merger review responsibilities to five provincial-level market regulators, which are, Beijing Administration for Market Regulation ("AMR"), Shanghai AMR, Guangdong AMR, Chongqing AMR and Shaanxi AMR. These provincial-level market regulators bear the responsibility of reviewing assigned cases, submitting comprehensive review reports to SAMR, and offering review opinions in accordance with standardized rules. SAMR, in return, will base its decisions on these review reports and opinions. The implementation of this pilot program is anticipated to enhance the efficiency of SAMR's review processes, enabling the authority to allocate resources more effectively and focus on intricate cases and concentrations within critical sectors (Bai & Man, 2023).

3) On January 26, 2024, the State Council of China issued the Regulation on the Notification Thresholds for Concentrations between Undertakings ("Thresholds Regulation 2024")[15] with immediate effect on the same day. Significantly, this development represents China's first revision of its merger control thresholds, which were initially introduced 16 years ago. The Thresholds Regulation 2024 has elevated the turnover thresholds and grants SAMR the authority to scrutinize and suggest amendments to the merger control thresholds in the future. According to the Thresholds Regulation 2024, a merger control filing is triggered if either of the following two tests is met.

- The combined global turnover of all the entities involved in the concentration surpasses RMB 12 billion, an increase from the previous threshold of RMB 10 billion. Additionally, each of at least two of these entities must have generated turnovers in China exceeding RMB 800 million, increased from the previous threshold of RMB 400 million, in the preceding financial year.
- The aggregate turnover in China of all the entities involved in the concentration exceeds RMB 4 billion, an increase from the previous threshold of RMB 2 billion. Similarly, each of at least two of these entities must have individually generated turnovers in China exceeding RMB 800 million, elevated from the previous threshold of RMB 400 million, in the preceding financial year (Yin, 2024).

Furthermore, the Thresholds Regulation 2024 underscores SAMR's authority in initiate a review of a below-threshold transaction at any time if it has the potential to eliminate or restrict competition in China. The AML 2022 codified SAMR's authority to initiate a review of below-threshold transactions. In 2023, SAMR, for the first time, conducted a review and clearance of a below-threshold transaction, with remedies applied (in the case of Simcere and Tobishi, two Chinese companies in Healthcare sector). This serves as a noteworthy reminder that, particularly for deals of significant prominence, those with transformative impacts, or those involving sensitive sectors, a comprehensive substantive assessment is crucial to evaluate potential call-in risks (Yin, 2024).

The Thresholds Regulations 2024 also grants SAMR the authority to scrutinize and recommend modifications to the merger control thresholds in alignment with the state of economic development. This enables SAMR to suggest increases or decreases to the turnover thresholds to the State Council, potentially incorporating factors, such as inflation and GDP growth. The practical implementation of this provision by SAMR remains to be observed,[16] particularly whether SAMR will regularly propose changes to the thresholds, and the criteria it will consider when evaluating whether adjustments to the filing thresholds are warranted (Yin, 2024).

4.3. What Can Thailand Learn from the Chinese Experience?

Based on China's experience, despite the relatively short implementation period

[15]https://www.gov.cn/zhengce/content/202401/content_6928387.htm (in Chinese).
[16]As of January 2024.

of approximately fifteen years, the outcomes stemming from this legislation have had a profound impact on both the Chinese economy and foreign investors operating within its borders. The majority of proposed merger cases have received approval, with some being subject to specific conditions. Notably, the regulator has rejected only three proposed merger cases: 1) *Coco-Cola and Huiyuan* (2009); 2) *Maersk Line, CMA CGM, and MSC Mediterranean Shipping* (2014); and 3) *Huya and DouYu* (2021). In alignment with Chinese legal provisions and observed outcomes. The following sections describe key lessons that the Thai competition system can derive from the Chinese experience.

1) Protectionism

The decision in *Coca-Cola and Huiyuan* illustrates the exclusive application of a protectionist principle by the Chinese regulator. Despite the absence of a detailed analysis by MOFCOM considering the comprehensive structure of both business operators, the decision undoubtedly suggests that the potential outcome of the case may lead to a reduction in competition within this specific market. The decision also points to a specific rationale: the protection of a successful domestic brand to preserve its status as a Chinese company. While the concept of protectionism is not explicitly outlined in the legislation, it can be inferred from the distinctive Chinese concept of a socialist market economy, which prioritizes the broader national interest.

Despite criticism from foreign observers who argue that the decision diverges from competition law principles and excessively embraces a protectionist approach that might impede the expansion of foreign investors in China (Bush & Bo, 2011), the concept of protectionism could potentially serve as an effective tool in the context of Thailand's competition regime. In *CP Group and Tesco*, the concept of protecting smaller enterprises and consumers has been raised; however, the decision appears to contradict the regulator's stated intentions. Favoring a large business operator to acquire a larger market share in a specific market explicitly eradicates competitors and diminishes overall competition. If a protectionism principle were appropriately applied to safeguard competitiveness in the market, the outcome of this case would undoubtedly diverge significantly.

2) Application of Theories of Harm under Specific Analytical Rules

In analyzing landmark cases in both jurisdictions as outlined in this study, it is evident that theories of harm have been rigorously applied, especially in relation to the HHI calculation. Under the AML, the Assessment Rules explicitly highlight the HHI calculation as a significant factor that the regulator must prioritize. On the other hand, the Merger Approval Rules 2018 under the 2017 Act do not mandate a specific analysis for the regulator to calculate the degree of market concentration. Section 10 of the Merger Approval Rules 2018 provides that in the evaluation of a merger for approval, the TCC is obliged to weigh factors such as the reasonable necessity of the business, the potential benefits for promoting businesses, any potential harm to the economy, and the potential impairment to a fair share of the resulting benefits for general consumers. In cases where ap-

proval is granted, the TCC retains the authority to impose timelines or conditions for the merging entities to adhere to. Furthermore, the TCC is required to explicitly articulate the reasons or rationale underlying its decision to either approval or reject the application, covering both factual and legal aspects.

Section 10 of the Merger Approval Rules 2018 affords the regulator considerable discretion in the evaluation of cases, allowing for broad application without mandatory analytical rules. However, despite the absence of obligatory guidelines, the TCC still applied the HHI calculation in its decision-making process in *CP Group and Tesco*. This calculation explicitly resulted in a notably high concentration level. Nevertheless, the TCC exercised its discretionary power by asserting that the merger, in addition to the identified concentration, also brought forth other benefits. The regulator concluded that the merger did not lead to a monopoly but imposed behavioral control conditions. This broad discretion, however, results in an inherent contradiction within the decision. The identified rationales, including the HHI calculation, fail to seamlessly align with the final results, underscoring an inconsistency in the regulatory approach.

In light of the Chinese experience, it is advisable to introduce specific analytical rules, mirroring those outlined in the Assessment Rules under the AML, into Thai legislation. This incorporation is especially pertinent within the notices issued by the regulator, aiming to establish a framework that defines the scope, requirements, and rules governing the deliberation of cases. Additionally, such measures are essential for effectively limiting the discretion of the regulator, ensuring a more structured and transparent decision-making process.

3) Too Broad Discretionary Power

The decision-making process outlined in Section 52 of the 2017 Act offers the TCC a comprehensive framework for assessing the approval of a proposed merger. Notably, this provision lacks a clause that imposes restrictions on the regulator's ability to reject a case based on whether the conditions of merging parties align with specific rules or requirements. Section 52 stipulates that the TCC, when deliberating whether to grant permission, must consider factors such as reasonable necessity in the business, benefits to the promotion of business operations, the incapacity to cause serious damage to the economy and the inability to adversely affect important legitimate interests of consumers in general. Importantly, the TCC is obligated to provide comprehensive reasons for its decision, encompassing both legal and factual considerations, whether it is to grant or refuse permission. Once again, this provision mirrors Section 10 of the Merger Approval Rules 2018, emphasizing the broad discretion granted to the TCC without the imposition of specific rules or requirements to effectively constrain the regulator's discretion. Both sections underscore a similar approach, allowing for a considerable degree of flexibility in the decision-making process without a predefined set of rules or constraints.

On the other hand, in accordance with Chinese legislation, Article 34 of the AML 2022 introduces a specific clause outlining conditions under which the

regulator is obligated to prohibit a merger proposal. The Chinese provision stipulates that if a concentration of undertakings has or is likely to have the effect of excluding or limiting competition, the regulator is mandated to decide against such concentration. However, a noteworthy exception exists: if business operators can provide evidence that the concentration generates more beneficial effects on competition than adverse ones, or if it is in harmony with the general public interest, the regulator possesses the discretion to abstain from prohibiting such concentration. Article 34 alone offers a compelling rationale for the regulator to strictly reject a merger proposal, especially when it poses harm to competition without corresponding benefits to the general public. It is strongly recommended that this provision of the AML 2022 be incorporated into Thai legislation, specifically within the primary legislative framework. This incorporation would empower the regulator to rigorously evaluate and decide on cases in strict adherence to the provisions outlined in the primary legislation.

5. Part 3: Conclusion

Merger control holds substantial importance within the framework of Thai competition law. The ruling in *CP Group and Tesco* highlights a misalignment between merger provisions, the discretionary authority of the regulator and the fundamental objectives of competition law. This case underscores a risk of enabling a monopoly by a dominant business operator in the small-sized retail market. Therefore, it becomes imperative for the regulator to address whether its decision have contributed to the challenges faced by the general public. In light of the experience of China, *Coca-Cola and Huiyuan* serves as a notable illustration of the application of protectionist principles aligned with the Chinese industrial policy. China, with its distinctive socialist market economy policy, demonstrates a decision in *Coca-Cola and Huiyuan* that reflects the intent to safeguard the success of a domestic company, ensuring its continued status as a Chinese business entity, while also preserving a balanced level of competition within the fruit juice market.

The AML, amendments of the AML (AML 2022) and relevant guidelines underscore the pivotal influence of protectionism and theories of harm within the Chinese competition framework. The Assessment Rules, which furnish explicit analytical regulations and requirements, emerge as significant tools for the regulator to adopt and implement. This well-defined framework provides the regulator with distinct parameters, facilitating a decisive determination on whether to approve or reject a proposed merger. The clarity of this framework ensures that the regulator obtains a precise indication, accompanied by sound rationales, leading to alignment with the principles embedded in its competition legislation. The insights drawn from China's experience, as stipulated in this study, serve as valuable lessons for Thai legislation to contemplate. Consideration of these lessons in future law reforms could potentially enhance the suitability and effectiveness of the regulatory framework.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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