# THIRD PARTY PARTICIPATION IN MERGER PROCEEDINGS UNDER THE THAI TRADE COMPETITION ACT BE 2560 (2017)*

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## Abstract

Literature on Thai competition law has repeatedly acknowledged the ineffectiveness of the Thai merger control regime. This issue has largely been attributed to the underdevelopment of the procedural rules surrounding merger reviews and the wide margin of discretion left to the Trade Competition Commission (hereinafter the TCC) in rendering decisions to prohibit anticompetitive mergers. However, the TCC has yet to issue a prohibition, even in the face of merger proposals that would seemingly have anticompetitive effects, i.e. substantially reduce competition or result in a monopoly in a market. In these controversial cases, affected third parties have been vocal in their criticisms of the TCC and its failure to afford an opportunity to participate in merger proceedings. This article explores this procedural aspect of Thai merger proceedings as regulated under the Thai Trade Competition Act B.E. 2560 (2017). More specifically, it aims to answer whether and to what extent third party participation is necessary during the Thai merger review proceedings and whether the current

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procedural rules in the Thai merger control regime accommodate adequate third party participation.

To answer these questions, the article considers the arguments in favour of and against third parties' participation and the legal gaps that currently exist under other Thai laws applicable to merger proceedings. A comparative study has also been done to compare the approaches adopted by the EU and the US and extract key takeaway points from their experiences to improve Thailand's merger proceedings in addressing third parties' participation.

**Keywords:** Thai merger control, Third party, Right to participate, Third party participation, Thai competition law, Trade Competition Commission

## 1. Introduction

Although mergers can contribute to the proper function of an economy and its efficiency, certain mergers are undesirable because they can be anticompetitive. They can cause harm to consumer welfare, reduce competition, limit outputs and increase the prices of products and services offered in a market.[1] Because of these effects, merger control regimes are developed to help competition authorities assess, identify, and prohibit these potentially harmful mergers before they are consummated. Merger control regimes, depending on the particular jurisdictions, will often entail a merger review in which competition authorities examine a proposed merger based on the information and evidence gathered to come to a decision on whether the merger proposed should be permitted or prohibited. However, competition authorities occasionally make errors and fail to prohibit anticompetitive mergers. These are known as 'false negatives.'[2] Under such circumstances, it is generally understood that third parties can be adversely affected.[3] The article will focus on two particular groups, consumers and competitors, as references used in the discussion surrounding the necessity of third parties' participation during Thai merger proceedings.

The article aims to answer whether and to what extent third party participation is necessary during Thai merger review proceedings and whether the current procedural rules in the Thai merger control regime accommodate adequate third-party participation. Firstly, in answering these questions, the article explains the current merger control regime under the

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[1] Keith N Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press 2003) 311–332.

[2] Fred S McChesney, 'Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law' (2003)52 Emory Law Journal 1401, 1413; Alan Devlin and Michael Jacobs, 'Antitrust Error' (2010) 52(1) William & Mary Law Review 75, 80.

[3] For example, see in Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013) 242; Jonathan B Baker, 'Market Concentration in the Antitrust Analysis of Horizontal Mergers' in Keith N Hylton (ed), *Antitrust Law and Economics* (Edward Elgar Publishing 2010).

Trade Competition Act B.E. 2560 (hereinafter the 2017 TCA) in Part 2. Then, Part 3 considers the necessity of third parties' participation in merger proceedings by presenting different arguments to be taken into account. Part 3 also delves into the legal limitations under other Thai laws which strongly indicate the necessity for third parties' participation to be stipulated under the 2017 TCA. Part 4 explores the EU's and the US' approach to third parties' participation in their respective merger regimes and draws out the lessons that Thailand can learn to improve its own approach.

## 2. Merger control under the Trade Competition Act BE 2560 (2017)

The current merger control is generally regulated by the 2017 TCA. Unlike its predecessor which generally prohibited anticompetitive mergers unless permitted, section 51 of the 2017 TCA consists of two different procedures, constituting a dual merger control regime: Firstly, the post-merger notification and secondly, the mandatory pre-merger notification. For the purpose of this article, the mandatory pre-merger notification will be focused on as it pertains to merger review proceedings.

The mandatory pre-merger notification under section 51 is supplemented by the Trade Competition Commission Notice on Rules, Procedures, and Conditions for Merger Approval B.E. 2561 (2018) (hereinafter the TCC's Notice on Merger Approval Rules). According to the Notice, the business operators requesting permission to merge must provide the TCC with information about the merger, including the merger plan, details of the merging parties, an analysis of the merger and its impact on competition. Having received the request, the TCC has 90 days to complete its consideration which takes into account reasonable business necessity, benefits to the promotion of businesses and harm to the economy and general consumers.[4] The time may be extended upon necessity.[5] Once a

[4] Thai Trade Competition Act B.E. 2560 (2017), s 52 para 1.

[5] Ibid.

decision is reached, the TCC shall provide justifications for granting or denying the merger request.[6] If the requesting parties do not agree with the TCC's decision, they have the right to file an administrative appeal within 60 days.[7]

In the case of a violation of the pre-merger notification, the TCC can issue an order demanding rectification. Other parties, namely persons suffering damage or consumers, are also entitled to file a lawsuit to claim damages.

The 2017 TCA does not provide for any participatory rights to third parties in merger proceedings. However, the TCC's Notice on Merger Approval Rules merely states that the TCC may summon any persons to provide information or opinion for supporting the consideration of the application.[8] Without any further rules, the TCC is left as the only unilateral party that can seek participation from third parties. Nevertheless, the past and current roles of third parties in mergers that have been approved by the TCC seem to suggest that the TCC has not made use of this provision to involve third parties in merger review proceedings.

## 3. The necessity of third parties' participation

### 3.1 The past and current roles of third parties in Thai merger

Upon looking at the past and more recent roles of third parties in Thai mergers, third parties have seemingly shown interest to express their opposition if a merger adversely affects them. What can also be observed is that, thus far, third parties can only formally take action *after* the approval merger. As such, it is proposed that the question of the necessity of third parties' participation arose because there is a discrepancy between the

[6] Ibid, s 52 para 4.

[7] Ibid, s 52 para 5.

[8] TCC's Notice on Merger Approval Rules, s 9(3).

actual interest third parties have shown in merger review proceedings and what the legal framework enables third parties to do.

One of the more prominent examples concerns the roles of consumers and competitors in the merger between CP Group (hereinafter CP) and Tesco Plc in the wholesale and retail sectors. Due to CP's position as a dominant player in the market, its merger fell within the purview of the mandatory pre-merger notification requirement overseen by the TCC. Despite the proposed merger's likelihood of anticompetitive effects, the TCC issued an approval decision, albeit with conditions that CP-Tesco must fulfil to address adverse effects on competition.[9] The controversy of this decision led to many criticisms against the TCC's merger proceedings, with the Foundation for Consumers and other consumer groups lodging an administrative appeal against the TCC for its decision.[10] The appeal sought to overturn the TCC's decision based on unlawfulness, specifically also

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[9] 'Phon Kham Winitchai Khong Khanakammakan Kan Khaengkhan Thangkan Kha Korani Kan Kho Anuyat Ruam Thurakit Rawang Borisat CP Retail Development Chamkad Lae Borisat Tesco Stores (Prathet Thai) Chamkad' [The Decision of the TCC in the case of a merger request between CP Retail Development and Tesco Stores] (*TCC,* December 2020) ('ผลคำวินิจฉัยของคณะกรรมการการแข่งขันทางการค้า กรณีการขออนุญาตรวมธุรกิจระหว่าง บริษัท ซี.พี. รีเทล ดีเวลลอปเม้นท์ จำกัด และบริษัท เทสโก้ สโตร์ส (ประเทศไทย) จำกัด' (TCC, ธันวาคม 2563))<https://www.prachachat.net/wp-content/uploads2020/12/%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> accessed 23 May 2021.

[10] 'Consumer groups sue Trade Competition Commission for approving CP-Tesco merger' *Thaiger* (16 March 2916) <https://thethaiger.com/news/business/consumer-groups-sue-trade-competition-commission-for-approving-cp-tesco-merger> accessed 22 July 2022; 'CP: Phak Prachachon Yuen Fong Sanpokkhrong Hai Phoekthon Mati Khana Kam Kan Khaengkhan Thangkan Kha Fai Khiao Thet Ko CP Kuab Ruam Kitchakan' [The People File a an Administrative Lawsuit to Revoke the Decision of the TCC in Allowing the CP Merger] *BBC* (15 March 2021) ('ซีพี: ภาคประชาชนยื่นฟ้องศาลปกครองให้เพิกถอนมติคณะกรรมการแข่งขันทางการค้าไฟเขียวเทสโก้ -ซีพี ควบรวมกิจการ' *บีบีซี* (15 มีนาคม 2564)) <https://www.bbc.com/thai/thailand-56398660> accessed 22 July 2022.

claiming that the TCC failed to afford the opportunity for consumers to participate during the merger proceedings. Competitors were similarly aware of the adverse consequences of the merger and were rather vocal about their opposition to the merger, though no formal actions were taken against the TCC.

Other examples of active roles of consumers and competitors can be seen in the complaint lodged by consumers in the merger case between UBC and UTV in the cable television sector during the previous TCA of B.E.2542 (1999)[11] and even more recently in 2022, AIS' objection to the merger between its competitors, TRUE and DTAC in the telecommunication sector.[12]

Despite the signs of active interest, it has been stated previously that the 2017 TCA does not grant any participatory rights to third parties. The examples above have shown that third parties have resorted to post-merger decision remedies. This article posits that these options provided to third parties are unaligned with their interest in being heard and being given the opportunity to object to mergers. Additionally, the lack of scrutiny by third parties during the TCC's merger proceedings gives rise to decisions being made that may not necessarily be well-informed or as informed as they could be.

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[11] Deunden Nikomborirak, 'Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries' (2006) 26(3) Northwestern Journal of International Law and Business 597.

[12] Na-ark Rojanasuvan (Reporter) and Thammarat Thadaphrom (Rewriter) 'AIS Opposes TRUE - DTAC Merger Deal' National News Bureau of Thailand (8 April 2022) <https://thainews.prd.go.th/ en/news/detail/TCATG220408102810537> accessed 22 July 2022; 'Deal TRUE-DTAC Yang Rathuek Board Kor.Sor.Tor.Chor. Jor Thok Eek Rob Lang AIS Yuen Nangsue Khatkhan' [TRUE-DTAC Deal Challenged After AIS Files Objection] (The Standard, 6 April 2022) ('ดีลควบรวม "TRUE-DTAC" ยังระทึก บอร์ด กสทช. จ่อถกอีกรอบ หลัง AIS ยื่นหนังสือคัดค้าน' (The Standard, 6 เมษายน 2565) <https://thestandard.co/true-dtac-joint-venture-deal-still-in-nbtc-board/> accessed 22 July 2022.

Consequently, the limited roles of third parties in merger proceedings in the past mark the start of the assessment as to the reasons why third parties are necessary for merger proceedings. As will be illustrated in the following sections, the major arguments in favour of including third parties' participation in merger proceedings revolve around the idea that their participation can contribute to competition authorities' decision-making process by providing supplemental information about a proposed merger and thus, help limit the competition authorities' failure to identify anticompetitive mergers. The key considerations on the issue are discussed in the following part.

## 3.2 Considerations in favour of third parties' participation in merger proceedings

### 3.2.1 Competition authorities can err in their decisions

The process of merger reviews entails conducting an ex-ante assessment of the merger proposed. During this process, the competition authorities make use of different types of evidence, such as factual evidence, economic evidence and opinion which will be taken into account to determine whether a merger should be approved or prohibited.[13] While the process aims to enable the competition authorities to carefully consider the information gathered, competition authorities can still err in their decision-making and fail to prohibit anticompetitive mergers due to the anticipatory nature of ex-ante assessments. After all, competition authorities cannot be certain whether mergers will be anticompetitive once consummated: They can only make an informed decision based on the information they have.

[13] Paul K Gorecki, Cormac Keating and Brendan O'Connor, 'The Role of Economic Evidence in Merger Control in the State: Current and Future Practice' (2007) 3(2) European Competition Journal 345.

However, there is an issue when the use of different types of evidence is not balanced. In this regard, ex-ante assessments which heavily rely on economic evidence have been said to be more problematic because they do not provide a holistic perspective of the potential effects of mergers. Thailand's merger control regime is argued to have an over-reliance on economic evidence as concluded from the listed factors that would be taken into consideration during merger reviews, namely 'business-related necessity, benefit in supporting a business operator, not causing severe damage to the economy, and no impact on the essential benefits consumers are entitled to as a whole.'[14]

Additionally, there is not much evidence in the TCC's decisions which indicates that it has taken into account other types of evidence. The challenge in identifying whether the TCC is prone to make decision errors is exacerbated not only due to the brevity of its justifications, lacking in the citation of evidence used, but also that the TCC is not obliged to conduct ex-post assessments which could confirm false negatives.

In pointing out that competition authorities can err in making decisions about approving or prohibiting mergers, it is argued here that the participation of third parties can be used as a source of information that can help the TCC make better-informed decisions.

### 3.2.2 Limited incentive for competition authorities to acquire information

In a research conducted by Dertwinkel-Kalt and Wey, it was found that there is a correlation between the merger decisions that competition authorities can render and the incentive to gather information.[15] Their research has found that a merger control regime within which the competition authority can make a compromising decision, i.e. render a

[14] 2017 TCA, sec 52 para 2; TCC's Notice on Merger Approval Rules, sec 10.

[15] Markus Dertwinkel-Kalt and Christian Wey, 'Evidence Production in Merger Control: The Role of Remedies' (2021) 59 Review of Industrial Organization 1.

conditional approval to a merger, in addition to an approval or a prohibition, reduces the incentive of the competition authority to gather information.[16] This is due to the reduced severity of the effects that could come from the competition authorities' errors. As Dertwinkel-Kalt and Winkel explain, a decision which is neither approval nor prohibition, containing remedial conditions 'represents a compromising choice which limits the negative effect of a false extreme decision, allowing for it reduce the agency's incentives to obtain information on the merger's efficiency type.'[17] Thailand's merger control regime falls within this category: The TCC can approve, prohibit or conditionally approve a merger (as can be seen in the TCC's decision on the merger between CP and Tesco). Under the assumption that this type of merger control regime does not create an incentive for the TCC to gather information, third parties' participation ought to be enshrined in the merger control regime to open the channel through which the information can be received by the TCC which would not have otherwise been sought after.

### 3.2.3 Challenges in reversing the effects of anticompetitive mergers

The extent to which the anticompetitive effects of mergers can be remedied determines the importance of the competition authorities' accuracy in their identification of anticompetitive mergers during the merger proceedings.

The challenges in attempting to reverse the effects of anticompetitive mergers highlight that it is preferred that competition authorities accurately identify and prohibit anticompetitive mergers rather than seek remedies upon the occurrence of anticompetitive effects. In simple terms, prevention is better than cure. While some have found that

[16] This does not negate the competition authority's reliance on information by the parties seeking merger approvals.

[17] Markus Dertwinkel-Kalt and Christian Wey, 'Evidence Production in Merger Control: The Role of Remedies' (2021) 59 Review of Industrial Organization 3.

anticompetitive effects of mergers are 'hardly catastrophic'[18] and are remediable, this has been contested by some empirical studies which have shown the ineffectiveness of remedies in addressing the adverse effects that have already occurred.[19]

### 3.2.4 Balancing interest tool

The participation of third parties is another source of information that can be used to supplement the competition authorities' evidence-gathering and fact-finding processes during merger proceedings as well as a tool that can also facilitate competition authorities in the weighing of different interests at play. According to Farrell, competition authorities 'find it worth seeking informed parties who (in the instance, and at least broadly) share their goals, in order to learn from the parties' judgments.'[20] Third parties' information is particularly important to balance the information obtained from the merging parties that may be self-serving.

## 3.3 Caveats to third party participation

The consideration of the necessity of third parties' participation is not without consideration for some issues, namely the risk of receiving unreliable information.

Information and opinion obtained from third parties may be biased on unreliable if they oppose a merger. For example, competitors of merging

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[18] Daniel A Crane, 'Rethinking Merger Efficiencies' (2011) 110(3) Michigan Law Review 347, 383.

[19] See, for example in Stephen Davies and Matthew Olczak, 'Assessing the Efficacy of Structural Merger Remedies: Choosing Between Theories of Harm?' (2010) 37(2) Review of Industrial Organization 83. Challenges concerning the reversal of anticompetitive mergers is pointed out in Scott A Sher, 'Closed but Not Forgotten: Government Review of Consummated Mergers under Section 7 of the Clayton Act' (2004) 45(1) Santa Clara Law Review 41, 81-82.

[20] Joseph Farrell, 'Listening to Interested Parties in Antitrust Investigations: Competitors, Customers, Complementors, and Relativity' (2004) 18 Antitrust 64, 65.

businesses may be incentivised to present the competition authority with information that may suggest anticompetitive effects. While consumers are perceived as more reliable, the information received may only be surface-level or does not accurately represent the market. Under this circumstance, the competition authorities must be critical of information received and the process of verifying information is especially crucial.

Furthermore, the potential abuse of rights may also be considered in association with granting third parties' the right to participate. Third parties who oppose a merger may also attempt to make use of participatory rights in order to cause procedural delays to the merger review proceedings to the detriment of the merging parties.

However, it is argued that these few reasons alone may not be compelling to entirely negate the possibility of allowing third parties' participation, especially in light of the contribution such participation can make in enabling a better decision-making process for competition authorities.

### 3.4 Legal gap and shortcomings of third party participation in Thai laws

Although there are arguments against third parties' participation, it is the legal gap in other Thai laws that makes it imperative that such participatory rights are embedded under the 2017 TCA.

Having established that consumers and competitors are not granted participatory rights under the 2017 TCA but have an interest in being included in merger proceedings, it is imperative to also examine whether their participatory rights can be derived from other applicable laws. It will be illustrated in this section that the necessity of third parties' participation is exacerbated by the legal gap in the provision of participatory rights in other applicable laws, namely the current Constitution and the Administrative Procedure Act BE 2539 (hereinafter the 1996 APA).

### 3.4.1 The Constitution

The Constitution contains many provisions which grant the people participatory rights. For example, section 41 states that a person has the right to be informed and have access to information, to present a petition to a state agency and to take legal actions against a state agency. The people also have the right to direct participation which is most prevalent in the form of political participation, such as introducing a bill or a constitutional amendment and voting. Along with these rights, the Constitution also imposes the obligation for the State to ensure participation in some cases. For example, section 58 obliges the State to carry out an impact assessment and hold a public hearing before the State permits a person to carry out any undertakings which may severely affect the essential interest of the people, the community or the environment.

Despite these provisions, the Constitution is found to lack a provision which directly grants the right to participate in State administrative proceedings, which also include merger proceedings. Interestingly, this has not always been the case. The past Constitution did contain a provision which granted the people a general right to participate in State administrative proceedings. Section 59 of the 2007 Constitution states that 'A person shall have the right to participate in the decision-making process of State officials in the performance of administrative functions which affect or may affect his rights and liberties.' However, this provision was never included in the current Constitution even though a similar one was drafted.[21] This goes to show that the drafter did not intend to extend a

[21] See Constitution Drafting Committee on the Intention of the Constitution, Table Summarising the Intention of the Sections in the Drafted Constitution of the Kingdom of Thailand (กลุ่มงานบริการเอกสารอ้างอิง สำนักกรรมาธิการ ๑ ฝ่ายเลขานุการคณะกรรมาธิการยกร่างรัฐธรรมนูญด้านจัดทำเจตนารมณ์, ตารางสรุปเจตนารมณ์รายมาตราของร่างรัฐธรรมนูญแห่งราชอาณาจักรไทย คณะอนุกรรมาธิการบันทึกเจตนารมณ์รัฐธรรมนูญและการจัดทำจดหมายเหตุการณ์ยกร่างรัฐธรรมนูญ ในคณะกรรมาธิการยกร่างรัฐธรรมนูญ) 73 <https://www.parliament.go.th/ewtcommittee/ewt/draftconstitution/ewt_dl_link.php?nid=496> accessed 31 July 2022.

general participatory right to its people in the context of administrative proceedings.

Due to this legal gap, consumers and competitors are not entitled to participate in merger proceedings on a constitutional basis.

### 3.4.2 The 1996 APA

The right to participate is granted to a 'participant' of administrative proceedings as defined by section 5 of the 1996 APA. According to section 5, four types of persons that may qualify as a participant: 1) an applicant who files an application with an official, 2) a person who challenges the application, 3) a person subject to the administrative act as a result from the request and 4) a person who participates in the administrative process as their rights may be affected by the administrative act. The 1996 APA's applicability to merger proceedings is rooted in the nature of merger decisions and merger proceedings as an administrative act and an administrative process, respectively.

The 1996 APA grants several rights to parties who are participants which also includes the right to adequate opportunity to be informed of the facts, to object and to provide their own evidence in the administrative process in section 30. This essentially corresponds to the aim of third parties' participation in merger proceedings, i.e. to be heard and be afforded an opportunity to object: If consumers and competitors can invoke this section as the legal basis to participate in merger proceedings, there would not be a necessity in enshrining participatory rights within the merger control regime under the 2017 TCA.

However, the applicability of this provision to third parties in merger proceedings depends on whether they fall within the meaning of 'participants' as defined by section 5. While consumers and competitors may fall within the second or fourth category of participant at first glance, the current interpretation of participant as adopted by scholars indicate the contrary.

The second category, 'a person who challenges an administrative act' has been interpreted as limiting to only persons who have been notified that they have the right to object as *provided by the law* under which the administrative decision is made.[22] Since the 2017 TCA does not impose an obligation for the TCC to notify third parties of the right to object, third parties are barred from relying on the rights granted under the 1996 APA to participate in merger proceedings.

A similar barrier is also found in the interpretation of consumers and competitors as persons affected by the administrative act, i.e. the merger decision. Thus, it seems that they would have more grounds to rely on the fourth category as parties whose rights would be affected. With that said, a major requirement to qualify as this type of participant is said to be that the persons must *already be parties to the administrative process*, i.e. merger proceedings, upon the competition administrative official's initiative.[23] Again, the TCC is not under any obligation to afford an opportunity for third parties to participate in merger proceedings---it merely has the discretion to do so as stated by the TCC's Notice on Merger Approval Rules.

[22] Woraphot Wisarutpitch, *Banthuek Kham Banyai Wicha Kotmai Pokkhrong Rueang Kho Kwamkid Lae Lakkarn Phuenthan Bang Prakaen Khong Kodmai Pokkhrong* [A Record of Lecture in Administrative Law on Observations and Some Fundamental Principles of Administrative Law] (Winyuchon 2019) (วรพจน์ วิศรุตพิชญ์, *บันทึกคำบรรยายวิชากฎหมายปกครอง เรื่อง ข้อความคิดและหลักการพื้นฐานบางประการของกฎหมายปกครอง* (วิญญูชน 2562)), 161.

[23] Jiraniti Havanont, Kham athibai Kodmai Pokkhrong Phak Thuapai [Administrative Law] (Thai Bar 2016) (จิรนิติ หะวานนท์, คำอธิบาย กฎหมายปกครอง (ภาคทั่วไป) (สำนักอบรมศึกษากฎหมายแห่งเนติบัณฑิตยสภา 2559)) 178.

## 4. The approaches to third parties' participation in the EU and the US: lessons for Thailand

### 4.1 The approaches of the EU and the US

#### 4.1.1 Third parties in the EU's merger control regime

The EU's merger control regime is marked by its comprehensive procedural rules that aim to safeguard and balance the interests of all the parties involved in merger proceedings. Under the EU's merger control regime, third parties have unequivocal rights to participate, especially in the form of the right to be heard. The right to be heard constitutes one of the most fundamental rights of the EU and thus, can be seen implemented through the EU's merger proceedings.

According to the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter the ECMR) and the Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings as consolidated by the Commission Implementing Regulation (EU) No 1269/2013 (hereinafter the IR), third parties are entitled to respond to information requests sent by the EU Commission, the agency responsible for the implementation of competition law in the EU, during merger investigations. Third parties may also take part in the state of play meetings and triangular meetings in which they can engage in an exchange of information with the EU Commission and other involved parties.[24] More notably, third parties have the minimal right to be heard in writing and are entitled to request to be heard in oral hearings as well.[25] In the latter case, the request will be subject to consideration by the EU Commission and the Hearing Office, an agency tasked with handling the procedural aspects of

[24] European Commission 'DG COMPETITION Best Practices on the conduct of EC merger control proceedings' (*European Commission*) para 35 <https://ec.europa.eu/competition/mergers/ legislation/proceedings.pdf> accessed 22 July 2022

[25] ECMR, art 18(4).

the EU's competition law. Despite this element of discretionary power, the EU Commission and the Hearing Officer are guided by a set of rules known as the Terms of Reference that must be complied with in its determination whether to accept or deny the request of third parties to be heard in writing.[26]

The involvement of third parties in the EU's merger proceedings is echoed in the extent of transparency in the EU Commission's decisions which often make clear any third parties' participation that has occurred during the merger proceedings, including the position of third parties expressed and the EU Commission's responses.[27]

### 4.1.2 Third parties in the US' merger control regime

In contrast with the EU's approach, the US's merger control regime as regulated by the Hart-Scott-Rodino Act does not confer any rights at all to third parties. However, third parties' roles in supplying information about the mergers notified to the competition authorities, the Federal Trade Commission (hereinafter the FTC) or the Department of Justice (hereinafter the DOJ), are well-recognised in practice.

Third parties are perceived as valuable sources of information.[28] Additionally, it has been noted that the US' merger proceedings rely on the input from consumers and competitors in gauging the potential effects of

[26] Decision of the President of the European Commission of 13 October 2011 on the Function and Terms of Reference of the Hearing Officer in Certain Competition Proceedings OJ L 275/29

[27] For example in COMMISSION DECISION of 6 February 2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (*Case M.8677 – SIEMENS/ALSTOM*) [2019] paras 14, 21, 26, 32, 75, 116, 246, 474, 526 <https://ec.europa.eu/ competition/mergers/cases1/20219/m8677_9376_7.pdf> accessed 22 July 2022.

[28] Ken Heyer, 'Predicting the Competitive Effects of Mergers by Listening to Customers' (Discussion Paper, September 2006) <https://www.justice.gov/atr/ predicting-competitive-effects-mergers-listening-customers> accessed 22 July 2022.

mergers. As such, third parties' voluntary initiative in producing documents is welcomed and manifested in the FTC's Protocol for Coordination in Merger Investigations, specifically about the coordination between the FTC and DOJ's State Attorneys General in identifying third parties to take part in merger investigations.

As such, it can be said that, while there is no legal basis or obligation for the FTC and the DOJ to involve third parties, they do have the discretion to extend participation opportunities to third parties as reflected by observations of their practice in merger review proceedings.[29]

### 4.2 Lessons Drawn from the experiences of the EU and the US

The EU and the US have had a long history in the development of their competition laws. Furthermore, the merger control regimes of the two jurisdictions share a commonality with Thailand in requiring pre-merger notifications when a merger potentially reduces competition substantially or leads to a monopoly. For these reasons, a comparative study is taken to explore how both of these jurisdictions have approached the issue of third parties' participation within their merger control regimes. The comparison has demonstrated that the EU and the US drastically differ in their approaches, with Thailand bearing more similarity to the US' approach for their non-obligatory nature of third party participation. Having said that, the US' merger control regime has shown more due regard for third parties' contribution in the practice of the FTC's and the DOJ's conduct in merger proceedings, whereas Thailand's merger control regime has not shown any third party participation, whether in the legal framework or practice. Given this difference, Thailand ought to model its third parties' participation after the EU's approach. This recommendation is substantiated by the lessons that Thailand can draw from the experiences of the EU and the US:

[29] See William E Kovacic, Petros C Mavroidis and Damien J Neven, 'Merger control procedures and institutions: A comparison of the EU and US practice' (2014) Graduate Institute of International and Development Studies Working Paper, No. 01/2014, 32 <http://hdl.handle.net/10419/122096> accessed 22 July 2022.

**4.2.1. Give meaning to third party participation through transparency**

The foregoing mentioned that in the Thai merger proceedings, the TCC neither has the obligation to reach out to third parties nor has it shown any signs of exercising its discretionary power to summon third parties to participate during merger proceedings. However, it must be noted that the imposition of third parties' participation in merger proceedings or making available participatory rights would not be meaningful if the competition authority does not make clear whether and how third parties have been involved.

**4.2.2 Include a minimum participatory right**

Neither the US nor Thailand have a minimum participatory right to third parties. On the contrary, the EU has the right to be heard entrenched in its merger proceedings. Under the EU's merger control regime, third parties are entitled to at least be heard in writing. As such, the EU's merger control regime has symmetry in that both the EU Commission and third parties may take the initiative to ensure third parties' participation. The existence of a minimum participatory *right* further serves as a firmer ground for scrutiny of the EU Commission's decision upon violation of the right to be heard.

**4.2.3 Supplement the right with more rules**

What is notable about the EU's approach to third parties' participation is the extensiveness of the legal framework which grants the right to participate as well as regulates the procedural aspects attached throughout different legal instruments that prescribe rules to supplement each other, i.e. the ECMR, the IR and the ToR. Through this approach, legal certainty that third parties have in their process to partake in merger proceedings is established. Additionally, the rules enable the EU Commission's discretionary power to be firmly limited within the bounds provided by the legal frameworks unlike the unlimited discretionary power

granted to the TCC under the TCC's Notice on Merger Approval Rules with regards to third parties.

#### 4.2.4 Ensure procedural balance

The extensive set of rules provided in the EU's merger control regime also safeguards the legitimate interest of other involved parties, ensuring procedural balance. This is most evident in the imposition of time limits for third parties' participation to ensure the merging parties' right to a timely procedure while also allowing sufficient time for the EU Commission to consult the parties involved. Furthermore, the right to confidentiality is granted to third parties as well as the merging parties during the mutual exchanges of information which, while securing business confidential information, is accompanied by the right to access sufficient information to prepare their comments for both third parties and the merging parties.

## 5. Conclusion and recommendation

From the findings of the thesis, as summarised by this article, it can be concluded that there is a necessity for third parties' participation considering the arguments in favour and a significant gap in Thai laws, namely the Constitution, administrative law and, especially, the 2017 TCA. Upon reflecting on the current practice of merger review proceedings under the 2017 TCA, insufficient measures to ensure participatory rights to third parties are recognised. In this vein, it was found that the 2017 TCA confers complete discretionary power for the TCC to determine whether third parties would be summoned to participate. This discretionary power is unguided by any rules and, to date, there is no indication that this provision has practical effects in providing adequate opportunities for third parties to be heard.

The comparison between the approaches of the EU and the US with respect to the manners in which they address third parties' participation in merger proceedings resulted in the identification of key lessons that Thailand can learn and use to improve its own approach to the issue. These

key lessons have also indicated that the EU's approach is significantly more developed as an extensive legal framework is structured in order to guarantee participatory rights of third parties, accompanied by other procedural safeguards that are made effective with transparency and establish procedural balance.

In light of this, the right of third parties to participate should be explicitly stipulated and guaranteed under the 2017 TCA, with supplemental procedural rules and safeguards to guide the TCC's implementation of the right enshrined in secondary legislation, namely, the TCC's Notice on Merger Approval Rules. The objective of this change is to make available the opportunity for third parties to actively and voluntarily make use of their participation right without complete reliance on the TCC exercising its power to summon third parties.

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