

A LEGAL INSTRUMENTALISM LENS: EXAMINING THE “NON-INTERVENTION” PHENOMENON IN MERGER CONTROL UNDER THAI COMPETITION LAW

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Abstract

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Thailand’s Trade Competition Act (TCA), enacted in 1999, has been in effect for 26 years without prohibiting mergers and acquisitions (M&A) transactions, raising questions about its effectiveness in merger control. Existing research primarily attributes TCA’s ineffectiveness to political factors, such as interference and lobbying by large capital groups, but offers limited analysis from a legal instrumentalism perspective. This study addresses this gap by examining why Thailand has yet to see any prohibited M&A transactions through the lens of legal instrumentalism. This study employed a mixed research methodology combining doctrinal legal research and the case study method. Doctrinal analysis is used to examine the legal principles, regulations, and interpretations related to merger control in Thailand, while selected cases are employed to demonstrate the ineffectiveness of the enforcement of Thailand’s merger control. The main research findings include: 1) the TCA is used more as a tool to promote economic growth than to safeguard market competition; 2) ambiguities in the substantive review standards create space for legal instrumentalism, while political interference within law enforcement agencies further influences the application of the law. This study also provides corresponding suggestions.

Keywords: Thailand, Merger Control, Legal Instrumentalism, Non-Intervention

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1. INTRODUCTION

Thailand was the first Association of South East Asian Nations (ASEAN) member state to implement a competition law (Trade Competition Commission Thailand [TCCT], n.d.-a). For enterprises, mergers and acquisitions (M&A) are an effective way to reorganize resources, thereby achieving economies of scale. However, M&A may also lead to a reduction in the number of competitors in the market, thereby damaging market competition order. Merger control

is a preventive mechanism that, through prior review of M&A transactions, prevents deals that could harm market competition.

Thailand introduced its first Trade Competition Act (TCA) in 1999. However, for the 18 years following its implementation, no cases were brought to trial (Nikomborirak, 2005). As a result, Thailand enacted a new TCA in 2017. Chapter 3, Sections 51–53 of the National Legislative Assembly (NLA, 2017) outline the requirements for merger notifications, reviews, responsibilities, and other related matters. Following this, the number of merger review cases

received by the TCCT gradually increased. As of January 31, 2026, TCCT had issued 158 judgments in M&A (TCCT, n.d.-b).

In 26 years since Thailand's first TCA in 1999, no M&A has been blocked. This shows the "non-intervention" phenomenon in Thai merger control. Under Thai competition law, regulators have broad discretion to assess M&A deals. They may choose not to impose strict conditions, even if transactions cause high market concentration or create anti-competitive effects. As a result, most deals proceed unimpeded.

However, the "non-intervention" phenomenon does not necessarily mean there are no monopoly issues in the market. Instead, it suggests that Thailand's competition law may be applied to pursue policy objectives beyond market competition. As a result, despite potential monopoly concerns, merger control has not led to any prohibited M&A transactions. Therefore, the research question this paper addresses is:

RQ: From a legal instrumentalism perspective, why has Thailand's merger control not resulted in a single prohibited M&A transaction to date?

This paper is divided into five sections. Section 1 provides an introduction. Section 2 reviews the literature. Section 3 describes the research methodology. Section 4 presents the results and discussion. The last Section 5 includes conclusions, limitations, and recommendations.

2. LITERATURE REVIEW

To clarify the research gaps addressed, the literature review is organized into three sections. The first examines non-legal factors shaping Thai merger control, notably political interference. The second distills research on shortcomings in Thai merger control. Building on these, the third spotlights this paper's innovative research perspective.

Most scholars argue that government interference and corporate lobbying primarily account for the TCA's collapse (Poapongsakorn, 2002). Political groups often rely on the support of large capital groups to maintain long-term rule; in turn, political groups protect large capital. This alliance of interests benefits both sides but harms the public (Khwa-unla, 2024). Additionally, Nikomborirak (2005) lists three main reasons for the TCA's failure: 1) strong political intervention; 2) lack of due process in law administration; and 3) little interest or support from non-government groups, such as non-governmental organizations (NGOs), academics, and the media.

In addition, some scholars have discussed in depth the shortcomings of various stages of merger control in Thailand, including relevant M&A filing procedures, assessment of anti-competitive effects, and remedies in merger control. To begin with, in the merger notification process, Saichuea (2023) specifically argues that current merger control and anti-competitive agreement regulations do not adequately address pre-merger information exchanges and thus require urgent clarification. In a similar vein, Nidhi-u-tai (2021) stresses the necessity of third-party involvement in the merger process but notes that no laws currently guarantee such participation. Moving to the assessment of anti-competitive effects,

Jongpaisalsakul and Thanitcul (2021) analyzed the concept of substantially lessening competition (SLC). They concluded that although procedures in Thailand are simple and clear, this can paradoxically lead to distorted outcomes, making Thai merger control less efficient (Jongpaisalsakul & Thanitcul, 2021). Building on this, other scholars have argued against the use of market share thresholds in Thailand. While these thresholds can highlight competitive concerns from mergers, they also create significant challenges and costs for merging parties (Veteiburana, 2023). Furthermore, the Competition Commission is required to consider merger efficiencies. However, due to the lack of clear standards or guidelines, this assessment depends entirely on the Commission's discretion (Jongpaisalsakul, 2021).

Thirdly, turning to remedies for merger control, Thongnoi (2017) argued that divestiture is the strongest structural remedy for competition law violations, but criticized its use. Notably, TCA has never implemented a divestiture order in any applicable cases (Thongnoi, 2017). Furthermore, Poapongsakorn (2002) has pointed out two significant limitations: first, since the law stipulates that all prohibited behaviours are criminal offences, competition enforcement agencies must bear a high burden of proof. However, these agencies generally lack sufficient investigative and evidence-gathering capabilities, making it difficult to enforce the relevant laws in practice effectively. Second, and of particular concern, is that state-owned enterprises (SOEs) and industries with franchise rights are excluded from the scope of this law, which further weakens the credibility and practical effectiveness of the competition law.

There is already a considerable body of literature on the application of legal instrumentalism in jurisprudence. For example, some scholars have used it to explain the Hukou legislation in Beijing and Shenzhen (Fu & Pasquali, 2015). In addition, Afrasiabi and Mostafazadeh (2015) have also studied Iranian criminal law from an instrumentalist perspective. In a similar vein, Brandariz (2022) analyzed emerging trends in border criminology using instrumentalism, while Osborn (2012) examined decisions of the US Federal Circuit through both formalism and instrumentalism. However, despite these contributions, a notable gap remains: no scholar has yet analyzed competition law — particularly Thai competition law — from the perspective of legal instrumentalism. Although Van den Bergh (2002) has previously mentioned that the European Community (EC) treaty itself views legal rules as tools for achieving economic goals, this observation has not been elaborated within the context of competition law. By filling this gap, the present research offers original insight by applying legal instrumentalism to Thai competition law, broadening the ongoing discourse on its application.

3. RESEARCH METHODOLOGY

This study was conducted between June and November 2025. The main research methods used are doctrinal legal research and case study analysis. Doctrinal legal research, also called the "black letter" methodology, focuses on literal interpretation of the law. This allows researchers to analyze legal

rules in detail through cases, statutes, or ordinances (Jain, 1975). Its primary sources are secondary materials, such as legal texts, commentaries, and cases. These include the NLA (2017) and Trade Competition Commission Notices from 2018 and 2020, including the TCCT (2018a, 2018b, 2020). This method uses legal reasoning or rational deduction (Jain, 1975). This approach is often used to clarify legal meaning, provide understanding of established rules, and offer interpretations that can guide courts, lawyers, and legislators. The Doctrinal Legal Research includes the following steps: the first step is to define the research problem or question; the second step is to collect legal texts, statutes, judicial opinions and secondary sources such as legal journals and reviews; the third step is to analyze legal texts to explain the meaning and scope of legal rules and principles; the fourth step is to synthesize legal principles to form a coherent understanding of the law. The author looks for patterns, similarities, and differences in legal concepts. The last step is to conclude. This step may involve proposing revisions to legal theories or proposing new frameworks (Agrawal, 2024). In addition to doctrinal analysis, the study adopts a case study approach. Landmark M&A cases are selected from the TCCT website. One case was conditionally approved (CP Group and Tesco Lotus), and one was unconditionally approved (Company A and Company Y). Both generated significant controversy but were ultimately approved. This research conducts an in-depth analysis of the official reasons issued by the regulatory agency and public opinion. It identifies how the TCA was used to rationalize or conceal specific purposes or political outcomes.

4. RESULTS AND DISCUSSION

4.1. Legal instrumentalism and legal formalism

4.1.1. Definition of legal instrumentalism

The origin of legal instrumentalism is relatively recent, dating back roughly two centuries (Tamanaha, 2004). Legal instrumentalists hold that law is a means to an end, or a tool for the social good (Tamanaha, 2004). Summers (1980) explains that law is formulated for specific outcomes or objectives, which lie outside the legal domain. However, some scholars argue that there is no single perspective or method that can be described as legal instrumentalism. Instead, they suggest that various forms of instrumentalism exist, and that their merits and drawbacks must be assessed in specific contexts rather than generalized across the board (Vermeule, 2007). Van Aeken (2025) once said, *“Although [the several definitions of the word ‘instrumentalism’] may sound very neutral, just the mere referring to the word instrumentalism causes blood pressure to rise amongst many socio-legal scholars (...). The multifaceted critique of instrumentalism has gradually taken over most of the socio-legal thinking about law. It became almost ‘academically incorrect’ not to discredit instrumentalism”* (pp. 67–68, p. 73).

Legal instrumentalism is contrasted with legal formalism. To better comprehend legal instrumentalism, it is helpful to first understand legal formalism. However, legal formalism is more

difficult to define than legal instrumentalism. For instance, some scholars have proposed that the viewpoint of legal formalism should include the following three points: 1) the law provides a sufficient basis for deciding any case that arises; 2) there are no “gaps” within the law, and there is but one sound legal decision for each case; 3) the law is complete and univocal (Lyons, 1980). Furthermore, formalism involves two types of errors: 1) “deductivism”, which overemphasizes logical deduction from existing rules and treats it as the sole content of law, leading to doctrinal rigidity; and 2) legal conservatism, which manifests in two ways: first, by neglecting the actual operation of law within the legal system; and second, by overlooking law as part of a broader social system and as a tool to make that system more coherent, effective, and just (Quevedo, 1985).

Legal instrumentalism and legal formalism differ significantly in their reasoning and in the logic of their application of the law. Specifically, legal formalism views law as complete and clear, advocating its mechanical application through syllogistic deduction. By contrast, legal instrumentalism views law as incomplete, requiring policy considerations, value judgments, or consequential analysis in legal reasoning (Lyons, 1980). Thus, according to legal instrumentalism, legal reasoning becomes consequence-driven, policy-oriented, and purposive in interpretation. On the other hand, formalism emphasizes the certainty and neutrality of legal rules, maintaining that adjudicators should mechanically apply them according to their established meaning, with little regard for their consequences.

4.1.2. Legal instrumentalism and rule of law

Legal instrumentalism is, to some extent, in tension with the rule of law. When law is viewed as a tool, individuals and groups within society seek to seize it, filling, interpreting, and applying it in ways that serve their own purposes (Tamanaha, 2004). Consider one highly influential definition of the rule of law: “Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge” (Hayek, 2005, p. 57). The rule of law, therefore, requires that law consist of binding, predictable rules that apply equally to all. This expectation marks the crucial point of divergence between the rule of law and legal instrumentalism. In addition, Tamanaha (2007) highlights four points of conflict between legal instrumentalism and the rule of law. First, the rise of instrumentalism weakens the classical understanding that law is constrained by independent legal limits. Second, instrumentalism amplifies conflicts over competing conceptions of the social good. Third, purposive and pragmatic forms of judicial reasoning, driven by desired outcomes, risk eroding the stability of binding legal rules. Finally, growing skepticism about the possibility of judicial objectivity challenges the foundation of the rule of law.

4.1.3. Legal instrumentalism and competition law

Traditional competition law has focused on economic efficiency and maximizing consumer welfare (the consumer welfare standard). However, it is now also used as a tool to achieve social objectives beyond efficiency. This shift is reflected in three main aspects.

First, competition law functions as a tool to promote the development of small and medium-sized enterprises (SMEs). Through antitrust enforcement, it safeguards small firms' ability to participate fairly in market competition and prevents large enterprises from squeezing them out. For example, the US Robinson-Patman Act of 1936, often referred to as the "Magna Carta of small business" (American Economic Liberties Project, 2022, p. 1), was originally enacted to protect small retailers from the competitive pressure exerted by large chain stores. Although it is often criticized in modern economic analysis for being inefficient, it clearly reflects the instrumental intention of using antitrust law to protect the survival of specific social groups.

Second, it serves as an industrial policy tool. This is shown in case studies on industrial policy in the US, the European Union (EU), and China (Sokol, 2015). For example, whereas European competition law aims to promote market integration rather than solely efficiency (Sokol, 2015), in developing or emerging markets, competition law can instead protect domestic strategic industries or support "national champions".

Third — and most seriously — there is the politicization of antitrust enforcement. Competition authorities face increasing political pressure, undermining their independence and potentially harming the legitimacy of the field. A typical example is the Trump administration's removal of Federal Trade Commissioners Rebecca Slaughter and Alvaro Bedoya, both democrats, which has cast doubt on the independence of the Federal Trade Commission (FTC) and triggered uncertainty about its subsequent enforcement actions (Ezrachi, 2025).

4.2. Merger control under the Trade Competition Act of Thailand

The NLA (2017) was passed to curb anticompetitive conduct and to use the merger control mechanism in the act to prevent potential market concentration from M&A. Section 17 of the Trade Competition Act (NLA, 2017) grants the TCCT the power to replace the former Trade Competition Commission. Established as an independent law enforcement agency, not administratively subordinate to any ministry, the TCCT holds the authority to formulate rules, monitor competition, handle cases, impose penalties, make recommendations to the government, and manage its own affairs (NLA, 2017).

4.2.1. The purpose of the Thailand Trade Competition Act

Although the NLA (2017) of Thailand does not contain a separate provision explicitly stating the "Legislative purpose", it can be inferred from the overall structure of the law and the "Notes"

on the final page that its legislative purposes are mainly threefold: 1) to protect the free and fair market competition mechanism; 2) to enhance the efficiency of competition regulation and the independence of regulatory authorities; 3) to safeguard the interests of consumers.

First, protecting a free and fair market competition mechanism. In this context, a "market competition mechanism" refers to the legal and regulatory structures that ensure businesses compete on a level playing field without unfair advantages. The "Notes" of the Trade Competition Act (NLA, 2017) explicitly state: "...rendering the regulations on business operation to have free and fair competition are not as efficient as it should be. Therefore, it is appropriate to improve measures in regulating competition to become more efficient..." (NLA, 2017, p. 26). This passage clearly indicates that the establishment and maintenance of free and fair competition is the primary legislative purpose of the Act. In addition, throughout the provisions prohibiting abuse of market dominance, restricting horizontal and vertical collusion, and reviewing merger transactions, the Act repeatedly emphasizes that business operators must not engage in conduct that "reduces or restricts competition" (NLA, 2017, p. 17).

Second, enhancing the efficiency of competition regulation and the independence of regulatory authorities. During the implementation of the TCA (1999), TCCT lacked independence and regulatory effectiveness (NLA, 2017). The "Notes" of the TCA (NLA, 2017) explicitly state: "...regulation regarding competition at present is under the power of the Office of Trade Competition Commission, an office established inside the Department of Internal Trade, Ministry of Commerce, making the work process inflexible and lacking independence, rendering the regulations on business operation to have free and fair competition are not as efficient as it should be" (NLA, 2017, p. 26). This statement clearly reflects the legislators' intention to strengthen the regulatory body's independence and enforcement capacity under the new law, thereby improving the operational capability of the entire competition policy system. It should be emphasized that this notion of "efficiency" does not refer to "economic efficiency", but rather to the responsiveness and institutional effectiveness of the regulatory mechanism at the level of administrative enforcement.

Third, protecting consumers' interests. In the TCA (NLA, 2017), the term "consumer" appears 10 times, reflecting the law's strong emphasis on consumer rights protection (NLA, 2017). Notably, in the provisions on merger control (Section 52), concerted agreements (Section 56), and the standards for assessing legitimate conduct or contracts with foreign business operators (Section 58), the law explicitly requires consideration of "impact on consumers" (Section 56, p. 18). Particularly significant is the special provision that, if monopolistic conduct results in harm to consumer interests, the Consumer Protection Committee, or associations and foundations recognized under the "Consumer Protection Act", are entitled to bring damage actions on behalf of consumers (NLA, 2017).

4.2.2. Notification thresholds

The TCA (NLA, 2017) of Thailand establishes a merger review system combining both post-notification and pre-approval mechanisms. Under this system, if a merger may 'substantially lessen competition', companies must submit a post-merger notification to the TCC within seven days of the merger's completion (NLA, 2017). A merger meets this threshold if: 1) at least one undertaking involved has annual sales revenue of at least 1,000 million baht, or 2) the combined sales revenue of the merging undertakings is at least 1,000 million baht, and the merger does not result in a monopoly or a dominant market position (TCCT, 2018b).

Second, for mergers that may lead to a monopoly or dominant market position, pre-approval must be obtained before completing the transaction (NLA, 2017). A monopoly occurs when a business operator is the sole player in the relevant market with the power to independently set prices and quantities, and holds sales revenue exceeding THB 1 billion (TCCT, 2018a).

Moreover, a business operator holds a dominant market position if: 1) it holds a market share of 50% or more and annual sales revenue of at least one billion baht in the preceding year; or 2) the three largest undertakings together account for at least 75% market share. However, condition two is not applied if any of these undertakings has less than a 10% market share or sales revenue below one billion baht in the preceding year (TCCT, 2020).

For post-merger reporting, the threshold is annual sales revenue of one billion Thai Baht, making the filing requirements relatively lenient for M&A activity. For pre-merger approval, both sales revenue and market share are considered: an individual firm must have at least 50% market share and sales over 1 billion baht, or the top three firms must have at least 75% combined market share (with each firm over one billion baht and above 10% market share). This pre-approval threshold is stricter. The TCCT does not distinguish between global and domestic sales in these calculations. Notably, the TCA evaluates competition concerns within the filing process, while regulators in other countries often assess competition after the filing (Organisation for Economic Co-operation and Development [OECD], 2025a).

4.2.3. Substantive analysis

Neither the TCA nor the TCCT's internal regulations has established clear substantive review standards for the prior review of M&A transactions. However, based on the TCA's notification thresholds, it can be inferred that Thailand's merger control adopts two standards: SLC and creating a monopoly or dominant position (CMDP). From a legislative logic perspective, these two standards reflect a progressive relationship regarding anti-competitive effects. The former refers to a relatively lighter degree of harm to competition, usually meaning that the market structure is significantly weakened but not yet subject to full control; the latter refers to a more severe degree of anti-competitive effect, namely when a merger directly results in a monopoly by a single operator or establishes a sustainable dominant position among a very small number of operators. From the perspective of the substantive examination criteria for injury to

competition, the TCCT primarily examines a firm's sales revenue and market share. However, the analysis seems to focus on market structure rather than on reducing competition (OECD, 2025a).

In terms of the specific content of the investigation, the information and documents that merging parties must submit when notifying them of a transaction suggest the elements the agency will consider. These include market definition, market concentration, barriers to entry, unilateral and coordinated effects, the impact of the transaction on general economic welfare and consumers, and efficiencies arising from the merger (TCCT, 2018a). In addition, the TCCT should also consider the following aspects to authorise a merger: 1) business-related necessity; 2) benefit in supporting a business operator; 3) not causing severe damage to the economy; 4) no impact on the essential benefits consumers are entitled to as a whole (NLA, 2017). However, there is no guidance on how the TCCT assesses these elements. It is clear that TCCT's method of substantive analysis is unique. It not only focuses on the substantive examination methods adopted by most countries, but also adds factors that it values.

4.3. Case-based observation and discussion

After systematically reviewing the relevant laws and regulations on M&A in Thailand in the previous section, it is clear that Thai law can prohibit large-scale M&A at the formal level. Next, this section will discuss TCCT's law enforcement practices. Specifically, this section discusses one conditionally approved and one unconditionally approved merger case published by TCCT: the merger between CP Group and Tesco Lotus, and the merger between Company A and Company Y. In practice, the TCCT website typically only publishes a summary of the final ruling and discloses very limited details of the case, such as not disclosing the names of the parties or their industries. The CP Group-Tesco Lotus case is one of the few cases with a relatively detailed analysis of the reasons for the case and the publication of the parties' names. Although TCCT did not publish the names of the parties involved in the Company A and Company Y case, its case analysis was relatively detailed and therefore selected.

TCCT conducts merger reviews in two stages. In the first stage, as in most jurisdictions, TCCT undertakes a substantive assessment of mergers, including market definition, market concentration, barriers to entry, unilateral and coordinated effects, the impact on economic welfare and consumers, and potential efficiency gains. Building on this assessment, the second stage considers additional factors: business-related necessity, benefits for business development, avoidance of significant economic harm, and impact on essential consumer benefits. Notably, the outcome of the review is ultimately determined by the second stage analysis (NLA, 2017).

4.3.1. Substantive analysis of the cases

Merger between CP Group and Tesco Lotus

On November 6, 2020, the Office of Trade Competition Commission (OTCC) narrowly approved the merger proposal between CP Retail Development

and Tesco Stores with a vote of four in favour and three against. Following the merger, the consolidated market share of 7-Eleven, operated by CP Group, and Tesco Lotus Express would increase to 83.05% (TCCT, n.d.-c.).

The TCCT defined the relevant market as the small-scale retail market within Thailand. It then measured market concentration using the Herfindahl-Hirschman Index (HHI) in accordance with the US FTC's standards. After the merger, the HHI of Thailand's small-scale retail market increased from 5,553.19 to 6,944.09, with a change of 1,390.90. Based on this result, the TCCT preliminarily determined that the merger could have a significant anticompetitive effect. Next, the TCCT examined market entry conditions and concluded that entry barriers in the relevant market were relatively low. There were no legal or policy restrictions. This allowed new entrants to access the market with relative ease (TCCT, n.d.-c.).

Generally, when assessing the anticompetitive effects of a merger, it suffices to examine either the unilateral or coordinated effects. If a firm has market dominance and can unilaterally raise prices, it does not need to cooperate with competitors. In such cases, assessing coordinated effects becomes unnecessary. However, the TCCT examined both types of effects simultaneously in this case. For unilateral effects, the TCCT held that the merger might enhance the merged entity's bargaining power in procurement. This could exert pressure on suppliers, especially small- and medium-sized ones. Regarding coordinated effects, the TCCT considered that although the merged entity would hold a clearly dominant position, the remaining competitors would have relatively small market shares. Therefore, coordination on price, output, or sales strategies was unlikely. As a result, the TCCT concluded that the merger was unlikely to facilitate collusion or significantly harm suppliers or consumers (TCCT, n.d.-c.).

Next, regarding the impact of the merger on the overall economy and consumers, the TCCT found that although the merger increased market concentration, it would not seriously harm the overall economy. The merger, through a corporate acquisition, could increase national fiscal revenue while maintaining distribution channels. It could also expand exports and create additional sales opportunities for SMEs, local producers, and community retailers. The merger could potentially generate more jobs, expand production capacity, meet consumer demand, and improve product quality and price competitiveness. The merged entity might increase investment in technology and innovation, thereby promoting business optimization. Although the merger might reduce consumers' shopping choices, e-commerce still provides an alternative channel. The TCCT initially defined the relevant market as the offline small-scale retail market, but later argued that e-commerce did not compromise consumers' freedom of choice. This explanation contradicts its earlier market definition. For efficiency assessment, the TCCT held that while the merger enabled the firms to sustain a competitive advantage and potentially increase profits, their profit-maximization strategy could cause a decline in market efficiency (TCCT, n.d.-c.).

Merger between Company A and Company Y

On September 30, 2020, Company A submitted a merger approval application to the TCCT, proposing a corporate merger with Company Y (TCCT, n.d.-d.). The TCCT defined the relevant market as the heavy and medium-duty truck (HD&MD) market in Thailand. It was found that, before the merger, Company A and Company Y held market shares of XX.XX% and X.XX%, respectively, ranking second and third in the HD&MD market. The combined market share of the top three firms (CR3) was 91.50% before the merger and increased to 94.11% afterward. Upon analysis, the TCCT concluded that, following the completion of the merger, the top three firms in this market met the criterion that "if the combined market share of the three largest operators in a given product or service market reaches or exceeds 75% in the previous fiscal year, those three operators shall be deemed to possess market dominance" (TCCT, 2020). Accordingly, as the combined market share of the top three firms exceeded 75%, they were recognized as collectively holding a dominant market position. The third-ranked firm, however, was exempted from this determination because its individual market share did not reach 10% (TCCT, n.d.-d). In this context, the notion of market dominance should be understood as joint market dominance, since it is not exercised by a single firm. As in the previous case, TCCT conducted a two-step analysis of this merger.

Based on the US HHI standards, the TCCT found that, following the merger, the HHI of the HD&MD market reached 4,208.91, with a Δ HHI of 331.67. Accordingly, TCCT preliminarily determined that the merger might have a significant impact on market competition. Subsequently, the TCCT identified capital investment as the primary entry barrier in the truck industry, while noting that Thailand's legal framework and import-export environment remain relatively open. Therefore, TCCT classified the entry barriers in the truck industry as moderate and anticipated that the merger would have only a limited effect on existing and potential competitors. Regarding the assessment of unilateral effects, TCCT observed strong competitors in the market, one of which had previously held a market share exceeding 80%. On one hand, the merging firms possessed limited bargaining power over suppliers; on the other hand, customers could easily switch to alternative manufacturers, particularly as large buyers enjoy substantial bargaining leverage. Consequently, the TCCT concluded that the likelihood of the merged entity unilaterally abusing its dominant market position was low (TCCT, n.d.-d).

With respect to coordinated effects, the TCCT considered that, following the merger, the likelihood of the merging firms jointly abusing their market dominance, together with other operators — including competitors or producers of goods and raw materials, was low. Although in theory, firms might cooperate to exert pressure on smaller competitors or customers remaining in the market, the possibility of coordination with suppliers of goods or raw materials to create such pressure was deemed highly unlikely (TCCT, n.d.-d). In addition, the TCCT held that neither the overall economy nor

consumer welfare would be adversely affected. The rationale was that the merger could generate economies of scale, reduce the costs of raw material procurement and research and development (R&D) investment, while accelerating technological innovation. Consumers, in turn, might benefit from upgraded, high-performance trucks offered at reasonable prices. Finally, with respect to efficiency assessment, the TCCT noted that, in theory, an oligopolistic market structure may allow market leaders to gain a dominant position, potentially leading firms to pursue profit maximization at the expense of market efficiency. On the other hand, the merger could yield positive effects through economies of scale, primarily in two areas: first, cost reductions from centralized procurement of components and equipment; and second, improved efficiency and innovation capacity in technological R&D through resource integration and synergy (TCCT, n.d.-d).

4.3.2. Trade Competition Commission Thailand final ruling reasoning

Merger between CP Group and Tesco Lotus

TCCT believes this merger is reasonable. Tesco Holdings Limited aims to sell its Tesco Lotus business in Thailand and other Asian countries and plans to restructure operations to refocus on its UK home market (TCCT, n.d.-c.). TCCT's understanding of the merger's reasonableness appears to be based on the parties' perspective, not on an independent assessment of the merger's necessity or reasonableness.

TCCT also states that this merger will boost business benefits. The applicant's proposed merger would keep the proceeds in the country, supporting economic growth. Domestic company acquisition, compared to foreign acquisitions, helps maintain local sales channels, expand exports (such as to Malaysia), promote production and employment, and spur economic growth. It benefits SMEs by improving product quality and international competitiveness, and by building confidence in attracting foreign investment. However, because the applicant operates across modern wholesale and retail sectors for all consumer goods, market power is more concentrated. This may hurt competition and limit competitors' access to goods or services. Still, the TCA (NLA, 2017) can regulate these possible negative effects (TCCT, n.d.-c.).

TCCT next considers that this merger did not cause significant economic harm. The merger increases the applicant's dominance in the modern small retail market but does not meet the 'monopoly' standard. This standard means that a single company independently sets prices and supply, with annual sales exceeding THB 1 billion (TCCT, n.d.-c.). TCCT's logic seems far-fetched and appears to defend the parties involved. No country would say a merger causes no substantial economic harm just because it does not result in a monopoly. TCCT argues that the merger is commercially reasonable and promotes business. Although it may significantly reduce competition, they claim it will not cause serious economic damage. It will not result in massive layoffs in modern wholesale and retail, which make up about 50% of gross domestic

product (GDP) and 1.1 million jobs. It also ensures stability in the Tesco Lotus supply and value chain, preventing production interruptions. The move helps mitigate COVID-19's effect on liquidity and the investment environment. Furthermore, it does not harm substantial consumer interests (TCCT, n.d.-c.).

Finally, TCCT believes there is no significant harm to consumer interests. Consumer choice is reduced, but multiple options remain. However, concentrated market power may risk abuse, such as unfair pricing, harsh conditions, supply restrictions, interference with competition, or collusive price increases (TCCT, n.d.-c.). Despite knowing these risks, TCCT approved the merger by a 4-3 vote. To prevent monopoly and market abuse, TCCT added six extra conditions to the merger.

Merger between Company A and Company Y

The TCCT considered that the merger offered both business-related necessity and benefits in promoting business development. After the merger, the firms would be able to integrate technological resources. They could also jointly conduct R&D of new technologies. This would enhance their competitiveness in the global high-end technology market (TCCT, n.d.-d). Next, the TCCT thinks the merger would not result in significant economic harm. Although the merger would increase market share and industry concentration and could somewhat weaken competition, the acquired firm was relatively small, with a market share of only 4.16%. Therefore, the overall competitive landscape would not undergo a fundamental change (TCCT, n.d.-d). Finally, the TCCT concluded that the merger would not materially harm consumers. Consumers had substantial bargaining power regarding price, quality, and product characteristics. The two leading market players would continue to compete post-merger. The merged entity, through expanded economies of scale, would enable consumers to access more advanced technological trucks at lower prices (TCCT, n.d.-d).

4.4. "Non-prohibited cases" from the perspective of legal instrumentalism

This section will utilize the theories from Section 2 to explore how the TCA has become a tool for Thailand to achieve its non-competitive policy objectives.

4.4.1. Thailand uses the Trade Competition Act as a tool to boost economic growth rather than to protect market competition

From the perspectives of the TCA's legislative design and the TCCT's enforcement practices, Thailand's competition policy objectives exhibit a diverse character, encompassing not only the maintenance of a competitive order and the protection of consumer interests, but also the promotion of national economic development and the support of SME growth. However, in practice, the TCCT places greater emphasis on advancing economic development goals rather than strictly safeguarding market competition. This orientation toward specific objectives can lead to the following consequence: even if a merger affects market competition, the TCCT may be lenient if it is deemed beneficial to the national economy.

In the two cases discussed above, TCCT repeatedly emphasized the merger's importance for economic development. For instance, in the merger between CP Group and Tesco Lotus, the TCCT highlighted that the merger would retain revenue domestically, promote production and employment, and thereby contribute to overall economic growth. Moreover, the merger was not expected to result in large-scale layoffs in the modern wholesale and retail sector and could help mitigate the impact of the COVID-19 pandemic on economic liquidity and the investment environment (TCCT, n.d.-c.). Similarly, in the merger between Company A and Company Y, the TCCT underscored that the merger could achieve economies of scale, reduce the costs of raw material procurement and R&D investment, and accelerate technological innovation (TCCT, n.d.-d). This is also why TCCT initially determined that the two mergers could have significant anti-competitive effects, but ultimately allowed the mergers.

Exemptions for SOEs and certain industries demonstrate that Thailand's competition law considers national economic goals. The central government owns most, if not all, of the 52 SOEs. As of 2023, they had assets of US\$448 billion and revenue of US\$161 billion, making up 32.7% of GDP (OECD, 2025b).

4.4.2. The ambiguity of substantive review standards provides room for legal instrumentalism

Thailand's merger control adopts two standards: SLC and CMDP. These standards serve a dual function: firstly, as criteria for judging merger applications; and secondly, as standards for substantive review. However, in actual assessments, the TCCT primarily relies on market share and sales revenue, leading to overlap between the application and substantive review standards. This assessment method emphasizes the application of merger application standards but lacks a clear, standardized legal definition of the substantive review standards.

The ambiguity of substantive review standards creates a core problem: regulators struggle to gauge competitive effects when assessing M&A. As a result, they cannot clearly distinguish between mergers that should be prohibited, those that can be conditionally approved, and those that can be unconditionally approved. This lack of clarity is seen in the vague definitions of the term substantially lessening competition SLC in Section 51 of TCA, which gives enforcement agencies considerable discretion.

In both cases mentioned above, TCCT acknowledged in its efficiency assessment that mergers would lead to a decline in market efficiency. However, they were not subsequently prohibited because business was necessary and beneficial to the national economy and consumers. This outcome inevitably raises the question: under the current system, what level of anti-competitive effect is considered sufficient to veto a merger?

4.4.3. Political interference exists within law enforcement agencies

Although Thailand's competition law system has undergone multiple legislative and institutional adjustments, its enforcement has long suffered from limited independence. The main reason is that Thai

competition enforcement has been heavily influenced by political and administrative forces in its institutional setup, resource allocation, and procedural operations, thereby weakening its capacity for independent enforcement. For example, under the Price Control and Anti-Monopoly Act (1979), the law can only be applied after enterprises are first identified as 'controlled enterprises' by the Department of Internal Trade (Nikomborirak, 2005). This mechanism makes competition enforcement highly dependent on administrative decisions rather than on an objective assessment of market competition conditions.

The TTCC's lack of independence has long been a major challenge for competition enforcement in Thailand. Although the TTCC was established by the TCA (1999), the Secretary of Commerce chairs it, so the executive branch continues to heavily influence its actions. This executive control limits TCC's independence as a competition enforcement agency, making it hard for it to avoid government economic policies, industry support, and corporate lobbying. For example, strong opposition from major companies stopped the TCC from implementing threshold regulations for the pre-merger notification system for a long time (Nikomborirak, 2005). Likewise, the TCC approved CP Group's acquisition of Tesco Lotus despite competition concerns. These cases show how regulatory agencies must balance market competition with macroeconomic, employment, or industrial policies, and how extra-institutional pressures, like lobbying and policy protection, shape politically sensitive cases. Since the TCA (NLA, 2017), the TCCT is more independent, but transparency and procedural fairness issues persist.

4.5. Suggestions

In response to legal instrumentalism in the TCA during its implementation, this paper proposes three key revisions. First, enhance the emphasis on the 'competition' objective. Given Thailand's status as a developing country, its M&A policy tends to support corporate consolidation to promote economic growth and industrial development, a policy choice that is somewhat reasonable within the development context. However, it is crucial to avoid blindly pursuing economic development while neglecting the importance of market competition. Therefore, legislative and enforcement objectives should achieve a balance between 'promoting economic development' and 'maintaining market competition', preventing economic growth objectives from overriding competition policy objectives. Additionally, ensure that the same competition law rules apply to all businesses, regardless of their ownership, location, or legal form, including SOEs engaged in economic activities (OECD, 2025a).

Second, clarify the standards for substantive merger control review. The Thai TCA uses two standards: SLC (requiring only post-merger reporting for Advisory and Assistance Services (A&As) with minimal competitive impact) and "resulting in a dominant position in a market" (requiring prior review for transactions that could lead to market dominance and harm competition). Thailand could consider adopting the EU's Significant Impediment to Effective Competition (SIEC) standard for substantive review, as set out in the EU (2004).

Article 2(2): “A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market”. The SIEC test moves beyond focusing solely on dominance and considers any significant impediment to competition, even in the absence of dominance. Thus, mergers that do not create dominance but significantly reduce competition may still be prohibited.

Third, establish transparent procedures to minimize political interference. Make all decisions public, including party names, legal basis, and sanctions, while keeping protected information confidential. Create an independent advisory group of economic and legal experts to provide non-political opinions on large mergers and major abuses, making procedural cover-ups of interference more difficult. To address the longstanding influence of Thailand’s ‘chaebol groups’, clarify that committee members and law enforcement personnel must not have financial or familial ties to companies under review, and require a cooling-off period for those who have worked with or consulted for relevant companies.

5. CONCLUSION

This research explains the “non-intervention” phenomenon of Thailand’s TCA merger control from the perspective of legal instrumentalism. Tamanaha (2006) precisely summarized the root danger of legal instrumentalism as follows: “In situations of sharp disagreement over the social good, when law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible; to fill in, interpret, manipulate, and utilize the law to serve their own ends” (p. 1). In practice, Thailand positions its competition law as a tool to promote national economic development and protect consumer interests, rather than to maintain

market competition. From a competition law theory perspective, only by protecting competition can market efficiency be improved, thereby achieving the goals of consumer benefits and national economic development. Thailand’s current practices, to some extent, downplay the importance of competition. While this approach may have positive effects on economic growth in the short term, in the long run, a market lacking sufficient competition will ultimately weaken the foundation of national economic development.

This paper also has certain limitations. Assessing the actual effectiveness of Thailand’s merger control hinges on understanding three key aspects: first, industry background and market structure data; second, the theoretical framework and methodological basis adopted by enforcement agencies; and third, the enforcement measures taken by these agencies in specific cases (Kwoka, 2012). Without this crucial information, it is difficult to determine whether an adverse outcome stems from biased regulatory decisions or unforeseen factors. Merger control research also faces the long-standing counterfactual challenge — what would happen if the two companies did not merge? What would occur if the regulatory agency did not (or prevented) the merger, or did not (or took specific remedial measures) (Duso et al., 2011)? While this paper systematically reviews the theoretical framework and enforcement measures for merger control, the lack of industry-level data prevented the use of the “merger retrospectives” method — which compares commodity price changes before and after M&A while controlling for other variables — to verify the accuracy of the conclusions (Kwoka, 2012). This limitation may, to some extent, affect the explanatory power of the research results. Therefore, future research could begin with an empirical analysis of the impact of corporate mergers on national economic development and commodity prices to further verify and refine the findings of this paper.

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