

BCCT LEGAL BRIEFING

THE NEW THAI COMPETITION ACT
WHAT BUSINESS NEEDS TO KNOW

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Competition
Consulting Asia

Why New Act is a Game Changer – 1

- Independent enforcer for first time – OTCC staff to more than double this year
- But Impact Depends on Implementing Regulations – Public Consultation Expected in Two Months
- Coverage greater including some SOEs (Petroleum Authority, PTT Exploration and Production, Communication Authority, Telecommunication Authority, Tobacco Factory, Thai Airways, Airport Authority, Krungthai Bank and the Government Pharmaceutical Organisation)
- Civil penalties (also applies to directors and managers) for first time for:
 - S 51 - Merger offences (before and after notification provisions) – definition of mergers includes buying of assets and shares
 - S 55 - Soft-core arrangements between business operators in different markets (mainly covers vertical contracts e.g. distribution arrangements, IP licenses) with certain exceptions in s 56
- Criminal penalties (also applies to directors and managers) – streamlined prosecution arrangements (if public prosecutor decides not to proceed, TCC can appeal to A-G (s 25) – on application of Public Prosecutor criminal penalties may be imposed by the Intellectual Property and International Trade Court e.g. for
 - S 50 - Abuse of dominance
 - S 54 - Hard-core cartels (price-fixing etc.. in same market)

Why New Act is a Game Changer – 2

- S 57 – Unfair conduct – more concrete examples given (unfair obstruction of other businesses, abuse of **superior** market or bargaining power, imposing unfair trading conditions and other practices proscribed by TCC) – note no market power requirement here unlike s 50 abuse of dominance
- S 58 – Contracts etc.. with foreigners which results in a monopoly or unfair trade restriction which impacts seriously on the economy and the interests of consumers – note BOTH impact on economy as well as unfairness
- S 59 – Commission can give decisions in advance
- S 60 – Under s 60 the Commission can issue written Orders to stop conduct breaching sections 50, 51 para 2, 54, 55, 57 and 58 – likely to be very important
- S 63 – Extensive investigative powers including powers to enter premises and search
- S 79 - Commission can settle cases – could operate like leniency programs elsewhere

The Old Trade Competition Act BE 2542 (1999)

- The Trade Competition Act BE 2542 prohibited five types of conduct:
 - unlawfully exercising market dominance;
 - merger of businesses that may create monopoly or unfair competition;
 - collusion to create monopoly or restriction of competition;
 - domestic business operator colluding with an overseas business operator against a person who lives in a country where there is a restriction of goods, to purchase their goods; and
 - unfair trade practices.
- Enforced by the Trade Competition Commission (“TCC”) with the Office of Trade Competition Commission (“OTCC) as Secretariat (OTCC within Department of Internal Trade)
- The TCC comprised
 - Commerce Minister as Chairman and the
 - Permanent Secretary of the Ministry of Commerce as Deputy-Chairman.
 - Others included the Permanent Secretary of the Ministry of Finance and the Director-General of the Department of Internal Trade
 - Members from the public and private sectors

Old Enforcement

- From 1999 to 2014 – only 93 complaints (19% market dominance; 24% collusion; 57% unfair trade practices)
- No violations found
- OTCC provided details of five major cases in 2013 – tied sales of liquor and beer (but criteria for market dominance not determined); monopoly TV membership business – went to public prosecutor); exclusive distribution of motorcycles – Office of the Attorney-General issued notice to TCC that claim should not be filed against company; cancellation of application for registration of eight new drug formulas; complaint that the Agent Association of Printed Goods had engaged in unfair trade practices – TCC decided no violation)
- The names of companies in these five cases were not disclosed – because the OTCC could be sued for defamation
- Some commentators say zero enforcement resulted from:
 - Political inference.
 - Also possible that as all offences are criminal and so subject to high standard of proof so that appeals against prosecution would be successful – particularly where judges not experienced in economics – now appeals go to new court and TCC can appeal directly to A-G i.e. go over public prosecutor

New Competition Act – Institutional Changes

- Section 6 establishes a **reformed TCC**
 - Only seven TCC members (compared to the former 15 members)
 - The new TCC members must work fulltime whereas the former members worked on an ad hoc (not part time) basis.
 - The new TCC members are now professionally compensated
- Section 27 establishes an **independent OTCC** to carry out the administrative functions – headed by a Secretary- General (not the Director-General of the Department of Internal Trade) - appointed by the Chairperson of new TCC with approval of other members
- **Administrative Orders** – in past TCC reluctant to issue written orders to suspend, cease, rectify anti-competitive acts because legally it is the Criminal Court who decides on a violation. Section 60 fixes this by giving powers to the TCC to issue written orders to suspend, cease, rectify or vary conduct if the TCC has reasonable evidence a business operator is violating or will violate sections 50, 51 para 2, 54, 55, 57 or section 58 of the new Act expected to be important

Changes to Substantive Provisions

- **Cartels** new Act distinguishes between “hard core cartels” and “soft core cartels”.
 - **Hard core** cartels include: price fixing; limiting the volume or supply of goods or services; bid rigging; or market division – i.e. agreement in same market subject to criminal penalties
 - **Soft core** cartels – agreements between business operators in different markets e.g. vertical contracts (distribution, IP licensing etc..) - limited to an administrative fine imposed by the TCC.
- **New merger regime:**
 - TCC must approve merger **in advance** if the merger might lead to a monopoly or dominant position
 - TCC must approve mergers that result in a substantial reduction in competition within seven days
- **Unfair trade practices** - section still broad but provides more precision including:
 - Unfair obstruction of other businesses
 - Abuse of superior market or bargaining power
 - Imposing unfair trading conditions
 - Any other practice proscribed through a TCC notification
- **Agreements between domestic and overseas business operators** that would create a monopoly or unfair trade restrictions and which severely damage the economy and the benefit of consumers are prohibited. This provision is unusual by international standards. Little guidance on this provision has been provided.

Administrative and Criminal Penalties

- New (for first time) **administrative penalties** (imposed by TCC not courts) for
 - Soft-core cartels
 - Provisions on mergers and acquisitions
 - Unfair trade practices
- **Criminal penalties**
 - reduced from three to two years imprisonment for abuse of dominance and hard core cartels
 - Under 1999 Act all offences were criminal and so the TCC would ask the Public Prosecutor (Attorney-General?) to bring an alleged criminal offence in the Criminal Court (those seeking compensation would bring an action to the Civil Court)
 - Under section 26 of the new Act – both criminal offences and private rights of action seeking compensation are to be brought to the Intellectual Property and International Trade (IPIT) Court – likely to be important because judges in the IPIT Court are more likely to have been trained overseas and better understand economics and competition law

Determining Markets and Dominance

- Section 50 “no market dominant business operator shall engage ... “
- “market’ means a market that is connected with goods or services of the same kind or that can be used to replace each other, taking into the characteristics, the price, or the objectives of usage of goods or service, and the areas for the sale of goods or the providing of service.
- “market dominant business operator” means one or several business operators in any market who has a **market share and a total sales exceeding the criteria prescribed by the Commission, taking into consideration any one or several market competition conditions factors**, as the case may be, however, the Commission shall review the criteria of market share and the total sales at least once a year within three years from the date of issue of its notice.
- “**competition condition factors**” means the number of business operators in a market, the amount of investment money, access to significant production factors, distribution channels, the business operation network, the necessary structure for business operation, the government regulations, and other factors as prescribed by the Commission.

Mergers – Section 51

- A business operator who has merged businesses **which may significantly reduce competition in any market** which is in line with the bases prescribed by the Commission shall notify the result of merger to the Commission within seven days from the date of merger of business.
- A business operator **who is to merge business which may cause a monopoly or which may make it become a market dominant business operator** must obtain **(PRIOR)** permission from the Commission.
- A notice under paragraph one **shall specify also the minimum level of market share, total sales, amount of capital, number of shares, or quantity of assets - so must define relevant market for competition law purposes**
- Mergers including merging of businesses; buying of assets “so as to control its policy ...”; buying of shares to control;
- Does not include mergers for internal restructuring etc.

Unlawful Collaboration e.g. Cartels

“**Section 54.** It is prohibited for any business operator to engage in any acts jointly with other business operators **competing in the same market** which results in a monopoly or a reduction of competition or a restriction of competition in said market in any of the following ways”: fixing prices; limit quantity; bid-rigging; geographic or buyer/seller restrictions,

“**Section 55.** No business operator shall engage jointly with other business operators in any act which is a monopoly or a reduction of competition or restriction of competition in any market in any market in any of the following ways:” price-fixing (RPM); limiting output; geographic or buyer/seller restrictions; quality reduction; appointing exclusive seller. That is: mainly covers **vertical agreements**.

Section 56. The provisions of Section 55 shall not apply to the following cases:

- (1) Acts between business operators who have relations with each other in term of policy or management powers according to the bases prescribed by the Commission.
- (2) (2) An agreement in a business with the **objective** of manufacturing development, distribution of goods, and promotion of technical or economic progress.
- (3) An agreement in the form of a business contract between business operators of different levels, whereby a party is the **provider of rights to use goods or services, trademarks, business operation methods, or business operation support**, and the other party is the receiver of such rights and has the duty to pay for the said rights, by fees, or any other considerations in return as specified in the contract.

Unfair Competition

Section 57. No business operator shall engage in any acts which causes damage to other business operators in any of the following descriptions:

- (1) Restrict the business operations of other business operators **unfairly**.
- (2) Use superior market power or bargaining power **unfairly**.
- (3) Set trade conditions which are a restriction or an impediment to business operation of other persons **unfairly**.
- (4) Other acts as prescribed by the Commission

NOTE: (1) and (3) **does not require market power** – could be penalized even if small firm – but question whether small firms can restrict business operations or impede others

Section 58. No business operator within Thailand shall execute a juristic act or a contract **with a business operator abroad** without reasonable grounds which **causes a monopoly or a trade restriction unfairly and which sends serious impacts to the economy and the interest of the consumers as a whole.**

Defining Markets for Competition law Purposes

- Traditionally market definition is used to determine whether firms have market power e.g. can a firm increase price substantially above cost? If a firm can then it means the firm has market power or put another way there are no **substitute** products that consumers can substitute
- So markets include all competing (substitute) products - bananas might compete with apples – if the price of bananas goes up then some consumers might substitute apples – if enough do so then they are (price) substitutes in the eyes of consumers - see ‘toothless fallacy’ in *United Brands* in EU
- Note: in economics this is a price-elevation test – it is not concerned with product characteristics like colour – left to consumers to decide.
- **BUT** S 5 of the new Act says:
 - “market” means a relevant market of goods or services which are of the same type or substitutable when considering qualifications (**characteristics???**), prices, or purposes of use of the goods or services and the area where such goods are sold or such services are provided;
- Can only assume that the TCC will use the same approach as in other jurisdictions

1. What Should Businesses Do Now?

- Remember competition law can be used as sword or shield – so
 - Business can complain to the TCC that another business operator is behaving anti-competitively or unfairly
 - Use Competition Act to defend against competitor complaints or conduct
- You should understand the markets you operate in for competition law purposes
 - S 50 “dominant position in a **market**”
 - S 51 – after merger notify TCC “which may substantially reduce competition in a **market**”; before merger “which may cause a monopoly or result in a dominant position in a **market**”
 - Hard-core cartel – ‘ business operators competing with each other in same **market**:
 - S 55 “which are not competitors in the same **market**” e.g. vertical agreements - cannot set price, limit quantities, allocate territories except where the joint agreement is for “the purpose of developing production, distribution of goods, and promotion of technical or economic progress.” (section 56) – like Europe but here only applies to verticals

2. What Should Businesses Do Now?

- Because it can impose administrative penalties and issue written Orders to change conduct, TCC may initially focus on
 - Mergers – markets need to be defined, data required
 - Distribution agreements (i.e. involving more than one market) – economics important to justifying practices – economists mainly concerned with *foreclosure* of input or distribution channels e.g.
 - Resale price maintenance
 - Exclusive territories
 - Most favoured nation clauses e.g. online hotel booking promise to meet competitors price
- But focus will depend on complaints
- Enforcement will also depend on number of professional staff – OTCC will double in size soon
- Remember managers and directors can also be penalized for both criminal and administrative offences
- So companies need to develop their own compliance programs
- Remember TCC is only interested in anti-competitive impact in Thailand

Competition Law in Mainland Southeast Asia

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