

# **Competition Law in Asia Pacific**

**A Practical Guide**

*Edited by*

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*The authors wish to thank Nicholas Lai for his valuable assistance in completing this chapter*

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# Chapter 12

## Thailand

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### **PART 1: OVERVIEW – LEGISLATION AND REGULATORY AUTHORITIES**

#### **1.1 Thai competition law regime**

The Trade Competition Act B. E. 2542 (1999) (**the Act**) came into effect on 22 March 2000.

#### **1.2 Scope of application – entities**

The Act applies to a ‘business operator’ which is defined in Section 3 to mean ‘a distributor, producer for distribution, orderer or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business.’

Section 4 of the Act excludes the following entities:

- central, provincial or local administration;
- state enterprises;
- farmer’s groups, co-operatives or co-operative societies recognised by law and having as their object the operation of businesses for the benefit of farmers; and
- other businesses prescribed by Ministerial Regulation under Section 4(4). No exemptions have been granted to date.

### 1.3 Scope of application – extraterritoriality

The Act does not explicitly cover extraterritoriality except in Section 28 which prohibits an agreement between a business operator in Thailand and an overseas business operator that restricts ‘opportunities to purchase goods or services for personal consumption directly from business operators outside the Kingdom.’ One commentator has noted that this provision was introduced to allow wealthy Thais to directly import expensive cars and so bypass assembler cum distributors in Thailand appointed by the manufacturers.

### 1.4 Regulatory authorities

#### *Trade Competition Commission*

Section 6 of the Act establishes the Trade Competition Commission (**TCC** or **Commission**) which administers and enforces the Act. The TCC is part of the Department of Internal Trade (**DIT**) that in turn comes under the Ministry of Commerce (**MOC**). The Board of the TCC comprises the Minister of Commerce as Chairman, The Permanent Secretary of the MOC as Vice Chairman and between eight and twelve persons with experience in business administration, commerce, economics, law or public administration. Members are appointed by Cabinet for two years but cannot serve more than two consecutive terms. At least half of the Members must come from the private sector.

#### *Office of the Trade Competition Commission*

Section 18 of the Act also establishes an Office of the Trade Competition Commission (**OTCC**) which carries out the administrative tasks of the TCC and Appeal Committee, monitors business, conducts studies, receives complaints and conducts preliminary examinations into potential breaches of the Act for submission to the TCC.

#### *Sectoral regulators*

Sectoral regulators have the power to deal with anti-competitive conduct in their sectors. These include:

- the Insurance Commission which regulates life and non-life insurers;
- the Bank of Thailand and The Ministry of Finance for banks and financial institutions;
- the National Telecommunications Committee; and
- the Securities and Exchange Commission for listed public companies.



But there is some overlap as sectoral regulators may have concurrent powers to regulate anti-competitive conduct under the Trade Competition Act in their own sectors. For example, Section 21 of the Telecommunications Business Act B.E. 2544 (2001) says:

‘In operating the telecommunications business, the Commission shall, **in addition to the law on business competition** [emphasis added], prescribe specific measure according to the nature of telecommunications business, to prevent the licensee from committing any act that leads to monopoly, reduction or restriction of competition in supplying the telecommunications service in the following matters:

- (1) cross-subsidization;
- (2) cross-holding in the same category of service;
- (3) abuse of dominant power;
- (4) anti-competitive behaviour;
- (5) protection of small-sized operators.’

## **1.5 Key reference table of anti-competitive conduct provisions**

The table overleaf provides an overview of the primary anti-competitive conduct prohibitions under the Act, along with relevant penalties, exceptions and defences.

## **1.6 Regulations and notifications**

The Minister of Commerce has the power to issue Ministerial Regulations and Notifications under section 5 of the Act.

The Commission has the power to make recommendations to the Minister with regard to the issuance of Ministerial Regulations under the Act (Section 8(1)).

The Office of the Competition Commission has the power to prescribe regulations for the purpose of the work performance of the OTCC (Section 18(2)).

Under the Thai legal system, a Notification is law issued by governmental agencies, particularly various Ministries, for the purpose of providing detail to the Act so that it can be implemented or enforced.

Only two Regulations/Notifications have been issued under the Act:

- (a) Guidelines governing practices between wholesalers, retailers and manufacturers or distributors dated 8 October 2006 issued by the OTCC under section 18(2) (see paragraph 7.3); and

**Anti-competitive conduct prohibitions** (extends over double-page spread)

<i>Prohibition summary</i>	<i>Primary section references (Trade Competition Act)</i>	<i>Criminal enforcement</i>
Horizontal arrangements between competitors (non-merger)		
Agreements between business operators to do an act amounting to monopoly or which reduces or restricts competition in any market for goods or services	Section 27	<p>1. In the case where the Commission submits to the public prosecutor the opinion for prosecution (Section 16).</p> <p>2. Any person who violates Section 27 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding THB 6 million or both (Section 51).</p>
Vertical arrangements between suppliers and acquirers (non-merger)		
Business operators behaving unfairly which has the effect of destroying, impairing, obstructing, impeding or restricting the business operations of other business operators, or preventing other persons from carrying out their business or causing them to cease business.	Section 29	<p>1. In the case where the Commission submits to the public prosecutor the opinion for the prosecution (Section 16).</p> <p>2. Any person who violates Section 29 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding THB 6 million or to both (Section 51).</p>
Anti-competitive arrangements		
No relevant prohibitions.		
Misuse of market power		
Anti-competitive acts by a business operator with market dominance	Section 25	<p>1. In the case where the Commission submits to the public prosecutor the opinion for the prosecution (Section 16).</p> <p>2. Any person who violates Section 25 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding THB 6 million or to both (Section 51).</p>

<i>Civil enforcement</i>	<i>Primary exceptions/defences</i>	<i>Comp Law in the Asia Pacific</i>
<p>Sections 30-31 give the Commission power to order a business operator with more than 75% market share to suspend, cease or vary its market share; to issue orders where a violation of sections 25-29 have occurred and to provide for rights of appeal.</p> <p>The Commission will issue a written order only in the case where it considers that a business operator <i>violates</i> Section 25-29, <i>not</i> in the case where it considers that a business operator <i>might</i> violate Section 25-29 (Section 31).</p>	<p>An appeal against the order of the Commission under Section 31 may be submitted to the Appellate Committee by the person receiving the order within thirty days (Section 46).</p> <p>It is possible to apply for permission to engage in conduct in breach of certain provisions of Section 27 (Sections 27 and 35).</p>	<p>See paragraph 3.1.</p>
<p>Sections 30-31 give the Commission power to order a business operator with more than 75% market share to suspend, cease or vary its market share; to issue orders where a violation of sections 25-29 have occurred and to provide for rights of appeal.</p> <p>The Commission will issue a written order only in the case where it considers that a business operator <i>violates</i> Section 25-29, <i>not</i> in the case where it considers that a business operator <i>might</i> violate Section 25-29 (Section 31).</p>	<p>An appeal against the order of the Commission under Section 31 may be submitted to the Appellate Committee by the person receiving the order within thirty days (Section 46).</p>	<p>See paragraph 7.2.</p>
<p>Sections 30-31 give the Commission power to order a business operator with more than 75% market share to suspend, cease or vary its market share; to issue orders where a violation of sections 25-29 have occurred and to provide for rights of appeal.</p> <p>The Commission will issue a written order only in the case where it considers that a business operator <i>violates</i> Section 25-29, <i>not</i> in the case where it considers that a business operator <i>might</i> violate Section 25-29 (Section 31).</p>	<p>An appeal against the order of the Commission under Section 31 may be submitted to the Appellate Committee by the person receiving the order within thirty days (Section 46).</p>	<p>See paragraph 6.2.</p>

## Chapter 12 – Thailand

<i>Prohibition summary</i>	<i>Primary section references (Trade Competition Act)</i>	<i>Criminal enforcement</i>
Business operators interfering with agreements between residents of Thailand and those overseas.	Section 28	<p>1. In the case where the Commission submits to the public prosecutor the opinion for the prosecution (Section 16).</p> <p>2. Any person who violates Section 28 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding THB 6 million or to both (Section 51).</p>
<i>Mergers/acquisitions</i>		
Mergers that may result in monopoly or unfair competition	Section 26.	<p>1. In the case where the Commission submits to the public prosecutor the opinion for prosecution (Section 16).</p> <p>2. Any person who violates Section 26 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding THB 6 million or to both (Section 51).</p>

<i>Civil enforcement</i>	<i>Primary exceptions/defences</i>	<i>Comp Law in the Asia Pacific</i>
<p>Sections 30-31 give the Commission power to order a business operator with more than 75% market share to suspend, cease or vary its market share; to issue orders where a violation of sections 25-29 have occurred and to provide for rights of appeal.</p> <p>The Commission will issue a written order only in the case where it considers that a business operator <i>violates</i> Section 25-29 <i>not</i> in the case where it considers that a business operator <i>might</i> violate Section 25-29 (Section 31).</p>	<p>An appeal against the order of the Commission under Section 31 may be submitted to the Appellate Committee by the person receiving the order within thirty days (Section 46).</p>	<p>See paragraph 7.2.</p>
<p>Sections 30-31 give the Commission power to order a business operator with more than 75% market share to suspend, cease or vary its market share; to issue orders where a violation of sections 25-29 have occurred and to provide for rights of appeal.</p> <p>The Commission will issue a written order only in the case where it considers that a business operator <i>violates</i> Section 25-29 <i>not</i> in the case where it considers that a business operator <i>might</i> violate Section 25-29 (Section 31).</p>	<p>An appeal against the order of the Commission under Section 31 may be submitted to the Appellate Committee by the person receiving the order within thirty days (Section 46).</p> <p>It is possible to apply for permission for a merger (Sections 26, para 1 and 35).</p>	<p>See paragraph 8.2.</p>

- (b) A Notification dealing with the criteria for market domination under section 3 dated 8 February 2007 issued by the Minister under section 5, section 8(1) and section 3 (see paragraph 2.4).

At the time of writing, the OTCC had commissioned an economics professor from Thammasat University to draft merger guidelines under section 26. However, no draft guideline has been made public as yet.

Guidelines are not legally binding and are for information purposes only. Guidelines only function as a warning to businesses. However, business operators generally do pay attention to Guidelines.

Most Thais are not familiar with regulations. Following the establishment of two independent regulatory regimes (Security Exchange Commission and National Telecommunication and Broadcasting Commission) regulations have been issued in order to implement Acts relating to securities, telecommunications and broadcasting businesses.

## **PART 2: OVERVIEW OF FUNDAMENTAL CONCEPTS**

### **2.1 Introduction**

Section 2 defines terms such as business, finance, goods, services, prices, business operator and business operator with market domination. The key terms are ‘market’, ‘business operator’ and ‘market domination’; these terms are discussed in this Part.

### **2.2 ‘Market’**

The term ‘market’ is not defined in the Act.

### **2.3 ‘Business operator’**

‘Business operator’ means ‘a distributor, producer for distribution, orderer or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business.’

### **2.4 ‘Market domination’**

Section 3 of the Act states that a ‘business operator with market domination means one or more business operators in the market of any goods and services who have the market share and sales volume above that prescribed by the Commission with the approval of the Cabinet (sometimes called the Council

of Ministers) and published in the Government Gazette, having regard to the market competition.’

At the time of writing, a Notification dated 8 February 2007 prescribed the market shares and sales volumes for the purposes of section 3 as follows:

- (a) For a single business operator, a market share in the previous year greater than 50% and a turnover of at least THB 1 billion.
- (b) For the top three business operators, a market share in the previous year greater than 75% and a turnover of at least THB 1 billion. But business operators with less than 10% market share or less than THB 1 billion turnover are not considered to be dominant.

### **PART 3: CARTELS (AGREEMENTS BETWEEN COMPETITORS)**

#### **3.1 Overview**

Section 27 of the Act prohibits agreements between business operators entered into to either establish market dominance or control or to restrict competition.

#### **3.2 Prohibitions**

Section 27 of the Act prohibits both horizontal and vertical agreements that create a monopoly or reduce or restrict competition. The following kinds of agreements between business operators are prohibited:

- (a) fixing the sale price of goods or services or restricting the volume of goods or services sold – s. 27(1);
- (b) fixing the buying price of goods or services or restricting the volume of goods or services bought – s. 27(2);
- (c) agreeing to establish market dominance or control – s. 27(3);
- (d) bid-rigging – s. 27(4);
- (e) agreeing to set territorial or customer resale restrictions – s. 27(5);
- (f) agreeing to restrict, by territory or customer, from whom each business operator can buy – s. 27(6);
- (g) setting output restrictions – s. 27(7);
- (h) agreeing to reduce quality (whether at a lower price or the same price) – s. 27(8);
- (i) agreeing to appoint a sole distributor – s. 27(9); and
- (j) agreeing to set uniform conditions or practices of sale or purchase – s. 27(10).

### **3.3 Elements of the prohibition**

There is no guidance from the OTCC dealing with Section 27. However, there are forms, available from the OTCC's website, for business operators who wish to seek approval to undertake acts under Section 27(5)-(10), for example to appoint one product dealer in a specific geographic area (see paragraph 3.10 for further information about this process).

### **3.4 Remedies and sanctions**

Under Section 31 of the Act, the Commission has 'the power to issue a written order requiring the business operator to suspend, cease, rectify or vary such act.' Under section 46, a business operator may appeal the written order to the Appellate Committee (for more information, see paragraph 9.3).

Under section 51 of the Act, any person who violates Section 27 'shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million THB or to both, and in the case of a repeated commission of the offence, shall be liable to the double penalty'.

### **3.5 Leniency/immunity programs**

The Commission has not introduced a leniency or immunity program as yet but is considering one. The OTCC commissioned a team of law professors from Chulalongkorn University to conduct comparative research on leniency programs in 2013.

### **3.6 Extraterritorial application**

There is no explicit extra-territorial application of the cartel law and, to date, there have been no cases dealing with the issue.

### **3.7 Application to state/government entities**

Section 4 says the Act shall not apply to central, provincial or local governments, to 'State enterprises under the law of budgetary procedure'; to farmers' groups, co-operatives etc. and business exempted by Ministerial Regulation.

No businesses have yet been exempted by Ministerial Regulation, but the OTCC proposes that 'listed public companies' (i.e. state enterprises) should not be exempted from the Act because they compete directly with private companies.



### **3.8 Treatment of related bodies corporate**

There are no provisions specifically dealing with related companies.

### **3.9 Treatment of joint ventures**

There are no provisions specifically dealing with joint ventures.

### **3.10 Other exceptions**

Section 27 allows for a business operator to apply to the Commission under Section 35 for permission to engage in the agreements prohibited by s. 27(5)–(10) where it is ‘commercially necessary that the acts ... be undertaken within a particular period of time’.

Section 35 requires that ‘adequate reasons and specific necessity for the act’ be given and that the ‘intended procedures’ and duration be specified in the application.

Section 36 provides that the Commission must normally give its decision within 90 days (extendable by up to 15 days) and Section 37 provides that the Commission may grant permission if the application ‘is reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy, and has no effect on material and due interests of general consumers’.

### **3.11 Sector/industry-specific regulation/exceptions**

There are no specific industry-specific regulations or exceptions for cartel conduct apart from the general exceptions described above.

### **3.12 Enforcement action**

No penalties have been imposed so far under the Act.

#### ***Price fixing***

Under Section 18 the Commission has the power to monitor business operators. In 2000, the Competition Commission found that the prices of Thai-made television sets with 25-inch screens or bigger were higher than similar imported sets. The Commission thought this could be due to a price-fixing cartel. After an investigation, the Commission concluded that the price difference could be explained by differences in the costs of parts used in production and there was no evidence of a cartel.

### ***Market sharing***

In 2003 the Commission investigated four battery producers for possible market sharing. The Commission concluded that this was unlikely as the distribution channels were diverse and offered consumers choice. Imported batteries were not foreclosed from the market in general except for an exclusive agreement between the largest battery producers and the major convenience store chain – which could potentially foreclose part of the market. The OTCC monitors this arrangement.

## **PART 4: RESTRAINTS IN VERTICAL AGREEMENTS**

Refer to Part 3 for prohibitions on vertical agreements that create a monopoly or reduce or restrict competition. There are no further laws.

## **PART 5: OTHER ANTI-COMPETITIVE AGREEMENTS**

There are no additional laws.

## **PART 6: ABUSE OF DOMINANCE/MARKET POWER**

### **6.1 Overview**

This Part considers Section 25 of the Act relating to the prohibition on business operators abusing their market domination.

### **6.2 Prohibition**

Section 25 of the Act provides ‘a business operator having market domination shall not act in any of the following manners:

- (a) unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;
- (b) unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;

- (c) suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand;
- (d) intervening in the operation of business of other persons without justifiable reasons.'

### **6.3 Elements of the prohibition**

#### ***'Market domination'***

Business domination can be either single or collective market domination. As mentioned in Part 3 above, there are two elements to determining market domination: a market share and a sales volume dimension.

For a single firm market domination the firm (business operator) must have a market share of 50% or more and a turnover of at least THB 1 billion.

For joint dominance, the top three business operators must have a combined market share in the previous year of at least 75% and a turnover, each, of at least THB 1 billion each. Business operators with less than 10% market share or turnover of less than THB 1 billion are not considered dominant.

Section 30 of the Act gives the Commission 'the power to issue a written order instructing a business operator who has the market domination, with market share of over seventy-five per cent, to suspend, cease or vary the market share.' However, the Commission has not issued guidelines nor taken any action under this section.

### **6.4 Remedies and sanctions**

Under section 30, the Commission has the power to issue a written order requiring a business operator who has market domination with a market share of more than 75% to suspend, cease or vary the market share.

Under section 31, where the Commission considers that a business operator violates section 25 (amongst other sections), the Commission may issue a written order requiring the business operator to suspend, cease, rectify or vary such act. Business operators have the right to appeal to the Appellate Committee under section 46 (for further information, see paragraph 9.3).

### **6.5 Collective dominance**

Market domination may be joint or collective – please see paragraph 6.3 above.

## **6.6 Price discrimination**

Price discrimination is not expressly prohibited under the Act, However, a non-binding Guideline issued by the TCC applicable to retail and wholesale businesses sets out a framework identifying types of conduct that will be considered unfair trade practices under section 29. One of those types of conduct is discriminatory treatment among trading partners by fixing different conditions or prices (see paragraphs 1.6 and 7.8 for further information).

## **6.7 Misuse of market power and access to natural monopoly infrastructure/facilities**

This is not relevant to this jurisdiction.

## **6.8 Misuse of market power and intellectual property rights**

This is not relevant to this jurisdiction.

## **6.9 Sector/industry-specific regulation/exceptions**

There are no sector/industry-specific exemptions.

## **6.10 Enforcement action**

There have been no successful actions taken. Complaints under Section 25 have failed because Cabinet had not approved the market share and turnover amounts to determine market domination. One example is the Singha beer case.

### ***Singha Beer case – tying***

Formerly, both beer and whiskey (really a rum) were produced by statutory monopolists in Thailand (Singha in beer and Surathip in whiskey). In 1992 the beer market in Thailand was liberalised followed by the whiskey market in 2000. Surathip entered the beer market with its Chang beer to compete with the former statutory beer monopolist, Singha. Surathip began producing a high-alcohol beer that sold at a lower price than Singha. Singha's market share dropped from 85% in 1996 to 69% in 1997. In reply, Singha also introduced a low-priced, high-alcohol beer called Lao. Surathip then tied its beer to whiskey sales. All wholesalers of whiskey were required to buy a certain quantity of Chang beer for each bottle of whiskey bought.

The Commission established a Sub-Committee who found that Surathip had breached Section 25(2) i.e. unreasonably fixing compulsory conditions of sale. However, Section 25 had not then come into force as Cabinet had not set the market share and turnover conditions for market dominance. The Sub-Committee also considered whether the conduct violated Section 27(3) – agreements seeking market domination or control and Section 27(10) – fixing distribution conditions to achieve uniform or agreed practices. The Sub-Committee found that the prohibited agreement must be between business operators who compete in the same product market and at the same stage of production. However, whiskey and beer were found to be in different product markets and at different stages of production. The Commission accepted the Sub-Committee’s findings and stated that Surathip’s conduct was ‘inappropriate’.

## **PART 7: OTHER PROHIBITIONS ON UNILATERAL CONDUCT**

### **7.1 Overview**

This section outlines the other prohibitions on unilateral conduct in the Act.

### **7.2 Prohibitions**

There are two other prohibitions on unilateral conduct.

Under Section 28 of the Act, ‘a business operator who has business relations with business operators outside the Kingdom, whether it is on a contractual basis or through policies, partnership, shareholding or any other similar form, shall not carry out any act in order that a person residing in the Kingdom and intending to purchase goods or services for personal consumption will have restricted opportunities to purchase goods or services directly from business operators outside the Kingdom.’

Under Section 29 of the Act, ‘a business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business.’

### **7.3 Elements of the prohibition**

There is no Guideline or other guidance from the Commission on section 28.

Tensions between major retailers, their smaller competitors and suppliers led to a Regulation under Section 29 that was modelled on that of Japan. The

regulation, dated 8 October 2006, covers trade practices between wholesalers, retailers and manufacturers or distributors. For further detail, see paragraph 7.8.

#### **7.4 Remedies and sanctions**

The maximum penalty for an infringement of Section 28 is imprisonment of not more than three years or a fine of not more than THB 6 million or both.

The maximum penalty for an infringement of Section 29 is imprisonment of not more than 3 years or a fine of not more than THB 6 million or both.

For more information about enforcement, see Part 9.

#### **7.5 Extraterritorial application**

See paragraph 1.3 above.

#### **7.6 Application to state/government entities**

See paragraph 1.2 above.

#### **7.7 Enforcement action**

A number of cases under section 29 have failed due to a lack of guidance about the meaning of ‘free and fair competition’ as well as the high evidentiary standards required for a criminal prosecution. The AP Honda case provides one example:

##### ***AP Honda***

This case started in 2001 when Kawasaki Motor Enterprises, Thai Suzuki Motor and Thai Yamaha Motor complained to the Commission that AP Honda had coerced its distributors to only sell AP Honda’s bikes and exclude other brands. AP Honda is reported to have a market share of between 70-80 % of the relevant market at that time – which raises a question as to why action was not taken under Section 25 – the abuse of dominance section – rather than Section 29.

On 30 April 2003, the TCC determined that AP Honda had violated Section 29. The Commission forwarded the case to the Office of the Attorney General who refused to take action – without reasons being given – and instead referred it back to the Commission. The Commission formed a new investigative sub-committee, which, on 31 March 2010, confirmed its original 2003 decision. The Commission again asked the Office of the Attorney

General to take action against AP Honda in court. However, for the second time, the Office of the Attorney General refused to prosecute AP Honda and again referred the matter back to the Commission for further investigation or finding more facts.

Deunden Nikomborirak, a well known economist at the Thailand Development Research Institute has commented that the Commission's decision to take action under section 29 rather than section 25 against Honda suggests:

‘[t]he fact that this case was handled differently from the whiskey and beer abuse of dominance case raised suspicions of selective enforcement of the competition law in favour of powerful local businesses and against foreign companies with little or no political connections.’<sup>1</sup>

## **7.8 Key recent developments and proposals for reform**

In 2002 a Sub-Committee of the Commission found that five foreign retailers had breached Section 29 of the Act by treating their suppliers unfairly by giving preference to their own subsidiaries, insisting on up-front fees and discounts to place goods favourably, and forcing suppliers to produce the retailer's own brand products.

The Commission did not send the case to the Office of the Attorney-General but instead produced Guidelines on Section 29, which were consistent with the complaints by the Thai suppliers against the foreign retailers. Obviously the Guidelines were to protect suppliers (mainly Thai business operators) against unfair competition from new foreign entrants – even if the foreign advantages were based on greater efficiency.

The Guidelines only apply to the wholesale and retail sectors and so are not of general application. The unfair practices described in the Guidelines include:

- (i) unfairly setting low prices;
- (ii) unequal treatment of suppliers or an unreasonable refusal to purchase;
- (iii) obtaining information or technology from a supplier and using it to produce own-brand products to compete against the other suppliers;
- (iv) using superior economic strength to impose restrictions on other business operators such as, *inter alia*, requiring suppliers to pay the retailers advertising costs for other products, requiring suppliers to pay the salary costs of retailers or wholesalers, imposing resale price maintenance etc.

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1. Deunden Nikomborirak ‘The Political Economy of Competition Law: The Case of Thailand’ (2006) *Northwestern Journal of International Law & Business* 597 at 605.



## **PART 8: MERGERS**

### **8.1 Overview**

Section 26 prohibits a business merger ‘which may result in monopoly or unfair competition as prescribed and published in the Government Gazette by the Commission unless the Commission’s permission is granted.’

The Commission must ‘specify the minimum amount or number of market share, sale volume, capital, shares or assets in respect of which the merger of business is governed thereby.’

Under Section 26 a merger ‘shall include:

- (a) A merger made by a producer with another producer, by a distributor with another distributor, by a producer with a distributor, or by a service provider with another service provider, which has the effect of maintaining the status of one business and terminating the status of the other business or creating a new business;
- (b) A purchase of the whole or part of assets of another business with a view to controlling business administration policies, administration and management.
- (c) A purchase of the whole or part of shares of another business with a view to controlling business administration policies, administration and management.’

### **8.2 Application to offshore acquisitions**

There is no distinction made between domestic and foreign mergers. There is no explicit extra-territorial application of the law and to date no decisions have been made by the courts.

### **8.3 Competition assessment**

While it seems clear that mergers that result in only one firm are prohibited, ‘unfair competition’ is not defined and suggests that non-economic grounds will also be considered.

### **8.4 Filing requirements and thresholds**

Currently, Thailand has a voluntary notification system. The Commission has the power to investigate proposed acquisitions at the request of a party under Section 8(8) and Section 35.



The OTCC has the power to bring proposed acquisitions (for example, as the result of media speculation) to the Commission's attention by virtue of section 18(3). However, in practice, in the absence of any Notification by the Commission prescribing market share, sales volume, amount of capital, number of shares or amount of assets under section 26 paragraph 2, section 26 is not effective.

At the time of writing, the OTCC had commissioned an professor of economics from Thammasat University to draft merger guidelines under section 26. However, no draft guideline has been made public as yet.

## **8.5 Clearance/approval procedures, stages and timetables**

An application for permission from the Commission for the merger is conducted in accordance with Section 35, which requires adequate reasons. Generally, notifying parties give reasons based on the elements set out in section 37 (see below).

Section 36 requires the Commission to complete its consideration of the application within ninety days – extendable by a further fifteen days.

Under Section 37, the Commission must form the opinion that the merger 'is reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and has no effect on material and due interests of consumers' before granting permission.

## **8.6 Remedies**

Where the Commission considers that a business operator violates Section 26 (among other sections), it has the power under Section 31 to issue a written order requiring the business operator to suspend, cease, rectify or vary such act. The Commission can impose conditions and can revise those conditions as circumstances change. Business operators may appeal against such orders under Section 46.

See Part 9 for further information.

## **8.7 Appeals**

Appeals against the Commission's decision can be made to the Appellate Committee under Section 46. For more information, please see paragraph 9.3.

## **8.8 Use of expert economists**

We would expect that economists would play an important role in the merger review process.

## **8.9 Enforcement action**

### ***UBC Cable Television (2000)***

This related to a merger between two cable television business operators who together had 100% of the market. The Mass Communications Authority approved the merger because of the deteriorating financial position of both companies due to the high cost of buying foreign programs following the collapse of the baht during the Asian financial crisis in 1997. The merger was approved subject to the continuation of a low-priced package. UBC, the merged company, then asked for regulatory approval to vary its offerings, including not offering the low-priced package to new subscribers. Approval was given and then consumers complained to the Competition Commission that the changes were unreasonably high.

The Commission appointed a Sub-Committee who found that, post merger, UBC had a monopoly in the national cable television market and was protected by high barriers to entry. However, the Sub-Committee found the higher prices charged were reasonable due to increased costs following the fall of the baht. But the refusal to supply the low-priced package to new customers was possibly a violation of Section 25(3) -reducing or restricting services without a justifiable reason. However the Sub-Committee concluded that despite the merger, UBC was still operated as two separate legal entities and so was not a business operator with market domination under Section 3. Being two separate entities the Sub-Committee found that there could be a violation of Section 27, which deals with anti-competitive agreements (note that at the time the thresholds for dominance had not be determined by Cabinet).

However, when the Sub-Committees report was presented to the Commission, the Commission disagreed that there were two separate entities and concluded that UCB was a single business operator – so Section 27 was relevant, not Section 25. As the criteria for market domination had not been determined by Cabinet the only course of action was refer the complaint to the Mass Communications Authority.

## **PART 9: ENFORCEMENT**

### **9.1 Regulator's enforcement powers and tools**

#### ***Powers and duties of the Commission***

Section 8 gives the Commission the following powers and duties:

- (a) to make recommendations to the Minister to issue Ministerial Regulations;
- (b) to issue Notifications prescribing market shares and sales volume in relation to market domination;
- (c) to consider complaints;
- (d) to prescribe rules regarding the collection and taking of goods for analysis;
- (e) to issue Notifications prescribing market shares, sales volume, amount of capital, number of shares or amount of assets in relation to the purchase of assets in a merger;
- (f) to give Orders for the suspension, cessation, correction or variation of business operator activities for a breach of the Act;
- (g) to issue Notifications prescribing the form, rules, procedures and conditions for giving permission for what would be otherwise breaches of the Act;
- (h) to give permission for what would be otherwise breaches of the Act;
- (i) to invite persons to give facts, explanations, advice or opinions;
- (j) to monitor and accelerate an inquiry sub-committee's inquiry under the Act;
- (k) to prescribe rules for work performance of competent officials under the Act;
- (l) to perform other acts provided by the law to be the powers and duties of the Commission; and
- (m) to consider taking criminal proceedings on behalf of the injured person(s).

### ***Specialised sub-committees***

Section 12 gives the Commission power to appoint one or more specialised sub-committees (of between four and six persons) to give advice to the Commission.

Under Section 13 the sub-committee may give advice on market domination, mergers, restriction of competition, giving permission for mergers and other matters at the request of the Commission. The sub-committee has the power to issue written summons requiring relevant persons to give statements or furnish documents.

Under Section 14 the Commission may appoint one or more subcommittees to consider whether an offence has been committed. One member of the sub-committee must have knowledge and experience in criminal matters – such as a police official or public prosecutor.

Section 18 provides for the OTCC in the Department of Internal Trade, Ministry of Commerce, (the Director-General of the OTCC is the Secretary-

General of the OTCC) which carries out the administrative work of the Commission, its sub-committees and also for an Appeal Committee.

### ***Information gathering***

Section 19 details the investigation powers of the Commission. They include the powers to:

- (a) require any person to give statements, facts or written explanations, to furnish accounts, records, documents or any other relevant evidence
- (b) with a warrant enter the premises of a business operator to collect accounts, records, documents or other evidence, goods or samples for analysis. Entry may be carried out without a warrant in the following circumstances:
  - (i) where a flagrant offence is being committed;
  - (ii) where after a person has committed a flagrant offence the person tried to escape; or
  - (iii) where there are reasonable grounds for suspecting that the delay in getting a search warrant will lead to evidence being removed, concealed, destroyed or transformed.

Section 20 requires relevant persons to give reasonable assistance to the competent official.

## **9.2 Remedies**

### ***Commission may make orders***

Under Section 31 the Commission may order the business operator to suspend, cease, rectify or vary acts in violation of Sections 25-29. For this purpose, the Commission may prescribe rules, procedure, conditions and a time limit for compliance. See paragraphs 3.4, 6.4, 7.4 and 8.6.

### ***Penalties***

The penal provisions of the Act are provided for in Sections 48-55. All violations are punishable by a term of imprisonment or a fine or both.

Violations of either the substantive prohibitions (Sections 25-29) or failure to comply with the terms and conditions imposed by the Commission under Section 35 for permission to engage in conduct that would otherwise violate Section 26 or 27(5), (6), (7), (8), (9) or (10) may lead to:

- imprisonment for a maximum term of three years;
- a maximum fine of THB 6 million; or
- both.

The penalty can be doubled for a repeated offence.

In addition any person who does not comply with a Commission Order under Sections 30 or 31, or with the decision of the Appeal Committee under Section 47 may be liable to a term of imprisonment of one to three years or to a fine of two million to THB 6 million and a daily fine of a maximum of THB 50,000 covering the time of the offence (section 52).

### ***Misleading or obstructing the TCC***

Other violations subject to imprisonment or a fine include failure to comply with a summons (section 48), the obstruction of Commission officers in the course of their duties (section 49) and failure to assist a Commission officer under section 20 (section 50).

### ***Liability of directors and other individuals***

Where an offence is committed by a legal person such as a company, the managing director, managing partner or the person responsible for the operation of the business of the juristic person in such matters will also be liable for the penalty unless he or she can prove that the violation has committed without his or her consent, or that reasonable actions had been taken to prevent the commission of the offence (Section 54).

There have not been any successful cases under this provision so far. There is a debate as to whether section 54 is constitutional since the managing director, managing partner or the person responsible for the operation of the business of the juristic person may be innocent of the infringement.

## **9.3 Relevant courts/tribunals**

### ***Appeals to the Appellate Committee***

Section 42 establishes an Appellate Committee that consists of not more than seven qualified Members with knowledge and experience in law, economics, business administration or public administration appointed by the Council of Ministers. Members are appointed for a term of four years.

Under Section 44 the Appellate Committee has the power to:

- (a) prescribe its own rules and procedures;

- (b) make a decision against the Order of the Commission under Section 31 (where a business operator has breached the Act) or Section 37 (where a business operator has been refused permission to continue to carry out the otherwise prohibited act); and
- (c) issue written summons requiring persons to give statements, furnish documents etc.

Section 47 prescribes that the rules and procedures should be prescribed and published in the Government Gazette and that appeals shall be decided within ninety days, which can be extended by 15 days ‘by reason of necessity’.

The decision of the Appellate Committee is final. However, an appeal may be made to the Administrative Courts of First Instance, under the Administrative Procedure Act.

## **9.4        Litigation – matters of procedure**

### ***Limitation period***

Given the possibility of imprisonment, the limitation period under Thailand’s Criminal Code applies. Section 95(3) of the Criminal Code applies which provides a limitation period of 10 years for offenses punishable with imprisonment for one to seven years.

### ***Claims for damages/ private party litigation***

Section 40 provides that a person who suffers an injury as a consequence of a violation of section 25, 26, 27, 28, or 29 may initiate an action to claim compensation from the violator. The section also gives the Consumer Protection Commission or an association under the law on consumer protection to initiate an action for claiming compensation on behalf of consumers or members of the association, as the case may be.

There is a one-year limitation period commencing from the date the person suffering the injury has or ought to have had knowledge of the ground for action (section 41).