

The New Trade Competition Act Seeks to Eliminate Unfair Trade Practices and Monopolization
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Thailand did not have any competition law as such but the policy of free trade was enforced under the prescription of the Prices-Fixing and Anti Monopoly Act B.E. 2522 (1979). However this Act was considered by many experts as being inconsistent with the modern economic principles governing monopoly and restrictive practices. The new Trade Competition Act ("TCA") which was initially introduced in the National Assembly in 1992 has been published in the Official Gazette and entered into force on 1 May 1999. The basic principles of the Thai competition rules are now to be found in Sections 25, 26, 27, 28, 29 and 30 of the TCA. The TCA prohibits certain types of unfair trade practices and behaviours as well as provides, under certain conditions, for exemptions to be granted to some monopolistic positions and unfair trade practices. In this last respect, the new Trade Competition Commission ("TCC") has been criticised for having overly broad powers. The TCA covers all business activities owned by business operators with the exception of state enterprises, state-awarded concessions, agriculture and businesses granted a dispensation by the Ministry of Commerce.

I) Prohibited Monopoly and Unfair Trade Practices

They are general and absolute prohibitions on some monopoly and unfair trade practices.

A) Prohibited Monopoly

What is a monopolistic position ?

This is a technical legal concept. There is a monopolistic position where one or more business operators have market share and/or total sales revenue exceeding the level prescribed by the TCC under the approval of the Cabinet and which have been published in the Government Gazette. These business operators are then considered as having "power over the market".

How to assess whether a position is monopolistic ?

When analysing a business operator's market power, the TCC must first define the relevant market and then it must assess the business operator's dominance therein. According to Section 30 of the TCA, the TCC has power to remedy monopolistic positions where the market share of one business operator having power over the market share exceeds seventy five per cent. Unfortunately markets do not always have clear limits: there may be substitutes that are not perfect, in which case selecting a narrow definition will overstate the market power of a firm supplying a large proportion of the defined product. A wide definition, however, will indicate a smaller market share which understates it.

When a monopolistic position is condemned ?

Business operators having "power over the market" are prohibited from conducting any of the following acts :

(1) fix or maintain unfair purchase or selling prices;

· Examples of predatory pricing :

- A dominant firm which sells its products below average total costs with the effects of driving out its competitors and containing new entrants' market penetration.

- Selective discounting or price cutting used by established firms as a means of preserving their dominant position and to exclude a new competitor entered the market.

(2) set conditions by means of which, whether directly or indirectly, in an inappropriate and unfair manner, the undertaking's customer may not grant services, produce, purchase or distribute goods, or are foreclosed from buying or selling goods, granting or receiving services, or seeking credit from other undertakings;

(3) To limit, reduce or suspend services, production, purchases, distribution, delivery or importation into the Kingdom without reasonable grounds. To destroy or cause destruction of goods in order to reduce the supply level to less than that of the demand;

(4) to interfere with business operations of third persons without reasonable grounds.

B) Prohibited Unfair Trade Practices

Business operators are prohibited from :

a) joining with another business operator the effect of which is to lessen or eliminate competition in any market for goods or services in the following manners (section 27 of the TCA):

(1) fix a selling price of goods or services to be the same as the agreed price, or restrict volume of sales of goods or services;

(2) fix a buying price of goods or services to be the same as the agreed price, or restrict volume of sales of goods or services;

(3) enter into an agreement to control the market;

(4) enter into an agreement in order for one of the parties to obtain a bid to sell or purchase goods or services or to prevent a party from entering into a bid to purchase or sell goods or services.

b) imposing restrictions on competition by business operators outside of Thailand, having business relationship with the business operator based in Thailand, in the business operator's contract territory (Section 28 of the TCA):

Although the obligation on a supplier not to supply other resellers within the contract territory of its business operator may be enforceable, it is anti-competitive for a supplier to accept any restriction on its right to compete with its distributor by selling to end-users within the contract territory.

· Example :

"the exclusivity of the licence relates solely to the contractual relationship between the owner of the right and the licensee, whereby the owner merely undertakes not to compete himself with the licensee in accepting offers from end users on that territory and for that product".

c) Foreclosing competitors (section 29 of the TCA) :

Business operator is also prohibited from performing any unfair act and which results in "the destruction, damage, obstruction, hindrance or restriction of the operation of other business operator in order to prevent other business operator from operating business or to cause him to dissolve his business".

II) Exempted Monopoly and Restrictive Trade Practices

A) Exempted Monopoly

Article 26 of the TCA prohibits the existence or acquisition of a monopolistic position. Statutory provisions prohibit "merger between two business operators which may result in a monopoly or lessen competition" except as authorised by the Commission.

The term "merger" is defined in Section 26 of the TCA. It covers the three following situations :

"merger between manufacturers, distributors, manufacturer and distributor, or between service providers, which has as its effect for one business operator to cease to exist and for the other business operator to maintain its existence or which result in the creation of a new undertaking";

"acquisition of assets, whether in part or in whole, of one undertaking by another undertaking in order to control its business policy, operation or management";

"acquisition of shares, whether in part or in whole, of one undertaking by another undertaking in order to control its business policy, operation or management".

B) Exempted Unfair Trade Practices

According to Section 27 of the TCA, business operator is not prohibited from joining with another business operator the effect of which is to lessen or eliminate competition in any market for goods or services in the following manners, provided that there is a "business reason" :

(5) fix territorial markets in which each business operator shall distribute or reduce the distribution of goods or services or specifying customers to whom each business operator shall distribute goods or services without competition from other business operator;

(6) fix territorial market in which each business operator shall purchase goods or obtain services or specifying a person from whom such business operator may purchase goods or obtain services;

(7) fix the volume of goods or service which each business operator shall manufacture, purchase, sell or grant in order to limit the volume of goods or services to be less than the market demand;

(8) reducing the quality of goods or service below previous standards, and sell goods or provide services at the same or higher prices;

(9) appoint or designate a person as its sole distributor of goods or provider of services;

(10) impose exclusive and standards conditions or procedures for buying or selling of goods or services.

There is no legal definition of a "business reason" in the TCA, however it should be construed to cover restrictions which are necessary to the development of industry, handicraft, agriculture or commerce of the country.

C) Exemption Procedure

The Commission is given exclusive competence to grant exemption by Section 35 of the TCA.

Stage I - filing application for granting a permission

By virtue of Section 35 of the TCA, any business operator who wishes to apply for permission to perform any act under Section 26 or Section 27 (5) (6) (7) (8) (9) or (10) of the TCA shall file an application to the TCC. Each application shall at least state the reason and necessity for the restrictive trade practice, the course of action as well as the duration of action.

Stage II - Power of the TCC

Section 36 of the TCA requires the TCC to examine the application for granting a permission within ninety days from the day of its receipt. If the TCC, having conducted an investigation, is of the opinion that the restriction to the competition benefits the promotion of business, does not cause serious damage to the economy and does not affect material benefits due to the consumers, the TCC shall grant permission in writing to the said business operator.

Stage III - Appeal against the TCC's order

The business operator can appeal against the TCC's order to the Appeal Consideration Commission within thirty days of receipt of the order. The Appeal Consideration Commission's decision shall be taken within ninety days from the filing of the appeal. The decision given by the Appeal Commission shall be final.

Conclusion

Whether to notify an agreement or monopolistic position to the TCC is an important strategic decision, to be taken by management. There is no duty to notify, only not to infringe. According to Section 51 of the TCA: "Any person violating Section 25, Section 26, Section 27, Section 28, Section 29 shall be punished with imprisonment not exceeding three years or fine not exceeding six million baht". In addition if the offender liable for punishment under the TCA is a juristic person, the managing director, the managing partner or the person in charge of the operation of the business of such juristic person can also be condemned. Any person suffering damage attributable to violation of Section 25, Section 26, Section 27, Section 28, Section 29 is entitled to file a lawsuit against the violator to demand compensation within one year from the day the cause of action became known or should become known to the injured person.