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Thailand: Evaluation of enforcement regime sets the stage for new legislation

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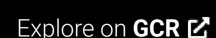

Thailand: Evaluation of enforcement regime sets the stage for new legislation

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Summary

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IN SUMMARY

Thailand's competition law is undergoing wholesale review and revision to make enforcement more efficient and predictable. This should include removing criminal penalties, which can be cumbersome. Revisions should also clarify the standards used to judge anticompetitive behaviour and ensure investigations are focused on harm to competition. Further, business would benefit from increased transparency in how the Trade Competition Commission operates, including access to information during investigations and clearer legal reasoning in decisions. Finally, the revisions should consolidate competition enforcement under a single regulator for all sectors.

DISCUSSION POINTS

- Shift from criminal to administrative
- Focus on harm to competition
- Transparency in investigations
- Disclosure of case law
- Single pre-merger filing system
- Consolidated competition law regulator

REFERENCED IN THIS ARTICLE

- Trade Competition Act BE 2542 (1999)
- Trade Competition Act BE 2560 (2019)
- Trade Competition Commission of Thailand
- National Broadcasting and Telecommunication Commission
- Energy Regulatory Commission
- The Trade Competition Commission's report on the effectiveness of the Trade Competition Act BE 2560 (2017)
- The Trade Competition Commission's five-year plan from 2023 to 2028

INTRODUCTION

The trajectory of competition law in Thailand has taken various turns since the introduction of competition law concepts and principles since the 1940s, starting from the Excess Profit Prevention Act BE 2490 (1947), to the Price Fixing and Anti-Monopoly Act BE 2522 (1979), through to the previous Trade Competition Act BE 2542 (1999) and up until the current Trade Competition Act BE 2560 (2017) (the Act). The trajectory has historically ticked upwards through public sentiment, and followed by a significant slope downwards with respect to enactment or enforcement as a result of various factors. The culmination of Thailand's first comprehensive antitrust regime in the form of the 1999 version of the Act led to the creation of a 'tiger without teeth', and a nominal regime lacking in substance: of 84 complaints to the previous iteration of the Trade Competition Commission of Thailand, the regulatory authority

administering the regime, 81 were terminated by resolution of the authority and another three sent to the prosecutor, eventually ending in orders not to pursue prosecution.

Against this backdrop, the National Council for Peace and Order under the administration of Prayuth Chan-ocha proposed the current iteration of the Act to position Thailand as a trading nation under its 'Thailand 4.0' economic initiative. The Act was intended to provide a framework for effective competition law enforcement in line with international standards, with various provisions taken from the European Union, Japan, Singapore, South Korea and the United States. Since its inception, the Trade Competition Commission of Thailand (the Commission) has established itself as an active authority, and the general outlook for enforcement has been promising, as we see the growing sophistication of the Commission, its increased familiarity with economic concepts and general willingness to investigate and regulate competition law. As of May 2022, the Commission has received a total of 133 complaints for anticompetitive behaviour, and total of 79 merger filings (of which seven have been pre-merger approvals), with a total of 14 fines (including for both behaviour and merger control). Thailand's economic structure is oligopolistic and fertile for competition law enforcement and we are positive that this trend of growing recognition and enforcement of antitrust rules remains ticking upwards.

The Act is now undergoing extensive review as part of a five-year plan to amend the substance of the Act to fit with the state of business and enforcement. Studies are currently being undertaken by the administrative office of Commission (TCCT), which has set up various focus groups and sub-committees, and has itself prepared a report on the evaluation of the effectiveness of the Act thus far, together with parliamentary committees. The Commission has also recently released its five year strategy for 2023 to 2028 independent of the legislative refresh. We set out below the key legislative and enforcement developments.

AREAS FOR IMPROVEMENT: THE VIEW FROM PRIVATE PRACTICE

Removal Of Criminal Sanctions

Currently, the Act imposes criminal sanctions, including a maximum term of two years for imprisonment, for violations of abuse of dominance and collusion between competitors. After receiving a total of 41 complaints under abuse of dominance and 12 complaints under collusion between competitors (as of 3 May 2022), it appears the TCCT recognises that criminal sanctions entails the application of criminal law procedures, which has given risen to a number of enforcement issues. The key enforcement issues faced by the TCCT are the increased evidentiary requirements under criminal procedure, and the extended length of investigations: an act under the Criminal Procedure Code can only constitute a criminal offence if it is proved 'beyond reasonable doubt', which constitutes a much higher standard than a 'balance of probability' test. However, the context of competition law cases is economic by nature, and therefore typically much more complex and involves large amounts of information. This is compounded by the burden of proof in criminal cases resting with the claimant, with the TCCT having limited access to information (as most information is contained with the respondent).

There has been debate around this issue and it appears large portion of the private sector has suggested the removal of criminal law sanctions. We recognise that there is no international consensus on the adoption of criminal sanctions, as this will be contingent on moral and societal norms between jurisdictions. While we can understand the original rationale behind imposing criminal sanctions – 'nothing catches an executive's attention as effectively as

the threat that she might have to serve jail time'[1] – competition law is set within the economic context, which creates a mismatch with general criminal principles under Thai law. Criminalisation in the Thai business context only occurs where there has been an act outside usual course business activity, such as fraud or defamation, which has been committed with criminal intent (mens rea). Acts constituting abuse of dominance, such as refusal to deal, are ultimately designed to gain profit or market share and not deserving of criminal sanctions within the Thai legal framework (although to be clear, still illegal). Further, the imposition of a criminal sanctions over administrative sanctions should not be contingent on the market size of the corporate entity – particularly where a director is uncertain of their dominant status ex ante – but should be contingent on the act undertaken that constitutes a breach.

Importantly, the transposition of criminality to the Act has required the presence of police officers and prosecutors as part of an investigation under the Act. This means the investigation process is undertaken under a criminal law procedure, without due consideration given to economic theory or legal and business rationales. We think the enforcement of competition laws is better served through a process with dedicated experts familiar with antitrust, economic and business principles.

A Clear And Coherent Theory Of Harm

The law with respect to unilateral anticompetitive behaviour, whether through abuse of dominance, unfair trade practices, does not require any exclusionary or exploitative effect to competition or consumers (in the case of unfair trade practices, only a showing of damages to another business operator is required). For example, the abuse of dominance provision under the Act merely prohibits the application of a dominant position under four umbrella restrictions without any consideration of such action's effect on a market. This differs significantly from international practice – for example, abuse of dominance under European Union law requires some degree of 'incompatib[ility] with the internal market in so far as it may affect trade between Member States', to which our understanding is that the concept of 'trade' under settled European Union case law generally comprises instances where practices affect the competitive structure of a market.

We suggest making it clear under any revision that any anticompetitive behaviour prohibited by the Act requires an element of exclusionary abuse to competition or downstream exploitative abuse to consumers. The problem is that the wording under law and sub-regulations that sets out illegal conduct is so broad that any act undertaken by a business operator could on a reasonable interpretation of law or sub-regulation be deemed to constitute illegal conduct. The absence of a sensible 'effects' analysis leads to investigations that do not strike at the heart of the intention and purpose of the Act – we have in the past encountered theories of harm proposed by the TCCT that have designated a business operator as dominant and accused such operator of abusing its dominance without any clear indicator as to the anticompetitive or exploitative effects on consumers. Further, the absence of an effects analysis means the Commission is more likely led to construe harm in the form of civil loss or inconvenience to another business operator.

The result of this is that complaints to the TCCT are not grounded in competition principles, resulting in wasted resources and time on the part of the TCCT in investigating these cases, and on the part of the private sector in having to defend against these cases. Importantly, it has increasingly led to the TCCT as an agency aimed at protecting small business operators, rather than a competition law authority. We posit that the inclusion of a consideration of

either exclusionary or exploitative effect will lead to more convincing enforcement under stronger theories of harm.

PROVISION OF MARKET DEFINITION IN INVESTIGATIONS

In investigations, the TCCT will conduct a market study to determine whether a respondent is dominant and subject to the provision relating to abuse of dominance. During the issuance of its accusations to respondents, it will provide only the name of the market the TCCT thinks it is active in (without any description) and a number setting out its market shares. The TCCT has been unwilling to provide information relating to the information it possesses against a respondent.

We think this requires urgent change, which deviates significantly from international norms. Due process demands both the protection of the respondent's right of defence and further promotes the transparency of the system. This is particularly the case for criminal investigations. This would allow respondents to access all information and evidence the TCCT has in making claims against it, save for business secrets and internal documents, which may be redacted. Market studies, which are academic and non-sensitive by nature, are not typically provided by the TCCT from respondents. It is incumbent on the respondent to produce its own market study entirely independent of the TCCT's, for a final decision by the Commission on which one it finds more convincing on its merits. The provision of the market study would ensure the comprehensiveness of the TCCT's own internal procedures and considerations, and it would enable respondents to better clarify and meaningfully inform the Commission regarding potentially relevant market factors. The nature of evidence in business cases often lies in complex economic data, market trends, consumer behaviours and business strategies, and it would only benefit the investigation process that a thorough review is undertaken.

DISCLOSURE OF CASE LAW

In the case of the Commission's decisional practice, the Commission's approach has been to redact all information relating to the parties and the Commission's reasoning. This means that the TCCT redacts all details and confines its publication to a single page, such that no information is provided other than the Commission's final decision on whether a breach has occurred. However, the wording of the Act that constitutes potential illegal conduct is very broad, and any act undertaken by a business operator could on any reasonable interpretation of law be deemed to constitute illegal conduct. Within this context, the redaction of case law means there is a thick shroud over the Commission's thinking, reasoning and application of law, which serves as an effective handbrake on the development of competition law.

We recognise that disclosure is a matter of the Commission's discretion – it already has legal authority to provide for disclosure – but given its current stance, we think the most appropriate change would be to enact explicit disclosure requirements at the level of statute. As an observation with respect to the positioning of the Commission: in the case of investigations, the Act essentially places the Commission as both an inquiry official with powers similar to police, and as the judge, jury and executioner, complete with the power to decide whether a breach has occurred. As such, the Commission has significant power and authority, and the Commission can bolster its reputation and standing within public opinion if it uses this power in a manner that is clear and transparent. Such transparency would be beneficial to all parties, ranging from the private sector to the Commission itself.

REVISIONS TO THE MERGER CONTROL REGIME

Thailand's merger control consists of two types of filings. The first are pre-merger approvals, which are suspensory and require approval from the authority. The second are post-merger notifications which are non-suspensory and must be made within seven days of closing. The key distinction between the forms depends on the market share of the parties.

There are a number of issues with a bifurcated approach between suspensory, pre-closing phases and non-suspensory, post-closing phases. The decision as to the type of filing at the time of filing is taken by the parties, who are meant to self-assess the merger and the relevant markets. In practice, there is a high degree of uncertainty, together with an element of risk for parties when submitting post-merger notifications. First, there is no avenue for any binding decision from the TCCT or the Commission as to the type of filing that needs to be made. Second, the nuances and details of the Thai merger control regime have not yet been finalised and still open to interpretation. An example involves conglomerate mergers where no horizontal overlap exists but certain markets may meet the revenue threshold – it remains unclear whether a filing is to be made, and there is a level of inconsistency in the case law. Further, the difference between a pre- and post-merger regime as it relates to timeline and cost for transaction parties is significant, and it creates the unwanted incentive of parties looking to find justifications for qualifying for post-merger notifications.

One proposal we endorse is to adopt a purely pre-merger regime, with the overall framework of the regime containing two phases, whereby most mergers should be cleared at the relatively shorter first phase, with complex mergers with significant effects to competition undergoing a fuller review at the second phase. Certain mergers may also qualify for a simplified merger regime provided certain criteria are met. We understand this is generally the approach taken overseas according to the OECD[2] . While this increases the administrative burden for the TCCT, we think the agency has matured significantly over the past years and is much better equipped to undertake this.

A COMPETITION LAW REGULATOR FOR COMPETITION LAW ISSUES

The Act currently provides for an exemption to its application for 'businesses that are specifically regulated under other sectoral laws having jurisdiction over competition matters'. Currently, the TCCT interprets the current legal framework as containing exemptions in the energy sector, which are regulated by the Energy Regulatory Commission, and the telecommunications industry, which are regulated by the National Broadcasting and Telecommunication Commission.

While the rationale of the exemption can be understood, the vague and broad wording results in uncertainty in practice. It is unclear in what instances business operators are to deal with which agency – for example, whether a transaction is exempt from the TCCT's merger control filing process if it involves a conglomerate merger where one of the active markets has specific sector regulation but has other businesses not subject to such sector regulation. Importantly, sector regulators do not have specialist knowledge in competition law. To the extent specialist knowledge of a particular industry is needed, the TCCT should be able to avail itself of the expertise of the sector regulator. Interaction between two agencies would be particularly helpful in defining markets, obtaining industry statistics and formulating theories of harm. Further, having a single point of contact for competition law for business operators reduces transaction costs and uncertainties for the private sector.

We would note the approach currently being taken with respect to regulation of the digital economy. Presently, the regulation of digital platforms has at least three regulatory agencies.

First, the Commission, which has specific rules for food delivery platforms, and will also apply general competition law principles to digital platforms in other industries. Second, the Electronic Transactions Development Agency (ETDA), which has specific regulations imposing notification requirements on digital platforms relating to the scope and nature of their businesses. Third, the Strategic Transformation Office (STO), which is currently proposing statute for the digital economy. While a draft of the new act has not yet been released for public, the STO a set of 10 guiding principles to be contained in the new act. One such principle is the idea of protecting fair competition in the digital economy through an ex ante approach. Interestingly, the STO's approach is to designate the Commission as the regulatory with respect to fair competition in this space, with the act contemplating requiring the Commission to designate gatekeepers in the market and the various obligations they will be subject to. We understand the proposed act has proved to be contentious among private sector businesses, and it remains to be seen what form the new act will take.

Endnotes

[1] William Kolasky, 'Criminalizing Cartel Activity: Lessons from the U.S Experience':

https://www.coleurope.eu/sites/default/files/uploads/event/kolasky_-_criminalizing_cartel_activity_8-04.pdf.

[2] OECD, 'OECD Competition Trends 2021, Volume II, Global Merger Control': https://web-archive.oecd.org/2021-02-24/580592-oecd-competition-trends-2021-vol2.pdf

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