

## **Thai Trade Competition Act 1999: Challenges and Recommendations to the Law Reform**

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### **Abstract**

Trade Competition Act 1999 is an important tool, which is used to monitor business conducts and prevented anti-competitive behaviors. It is like the ‘rule of the game’ aiming to create level-playing field and fair competition in the market. In some jurisdiction, competition law is regarded as economic constitution. However, the Trade Competition Act cannot play an important role as an economic constitution like other jurisdictions because there are a variety of challenges in the context of interpretation, application and enforcement of this act. A controversial exemption of state enterprises under the law on budgetary procedure from the application of this act, a vagueness in the interpretation of the definition "business operation" and an equivocality of the right to exercise extraterritorial application are considered the problems in this act. While there is some inappropriateness in some main prohibitions, for example too high burden of proof of Section 29 to be the catch-all-provision and imposing imprisonment sanction to some provisions is still debatable about its appropriateness, the enforcement mechanism is widely criticized about its ineffectiveness. There are many constraints found in both competition authority and commission. No leniency program facilitating the enforcement of cartels as well as the lack of human and financial resources are factors affecting the enforcement of competition law in Thailand. Regarding the commission, an inability of the commission to work full time and too many representatives from private sectors are challenges that Thailand is required to overcome; otherwise, the competition law will be far behind from achieving its goals.

**Keywords:** Thailand, Competition Law, Law Reform

### **Introduction**

This article has an objective to assess challenges of the Thai Trade Competition Act (1999) in functioning as the main tool to level playing field and protect competitive process in order to ensure the fair competition environment. The pursuit of fair competition brings about many benefits including economic efficiency and development of consumer welfare.<sup>26</sup> This paper will be divided into three parts. The first part is an identification of challenges and problems found in Thai Trade Competition Act. The second part offers some overall recommendations to policy and law makers to what extent this act should be improved in order to fully function as the ‘rules of the game’ protecting the competition process. The last part presents the conclusion of this article and the important factor influencing the law reform.

### **Identification of Challenges and Problems found in Thai Trade Competition Act**

This part explores challenges, problems and limitations in many aspects of this act; namely, scope of application, substantive, interpretation and enforcement aspects, including

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<sup>26</sup> ASEAN Regional Guidelines on Competition Policy, Chapter 2.2, 3

competition authority. Only main challenges in the aforementioned aspects are selected to identify in this part.

### Scope of Application

State enterprises under the law on budgetary procedure being exempted from the application of this act<sup>27</sup> is regarded as a controversial issue. Particularly, this exemption makes some state-owned enterprises engaging in commercial economic activities and directly competing with private companies not being monitored under this act. Some of these state-owned enterprises were privatized and turn to be public companies doing business to make profit and competing directly in the same market with private companies, for example, Thai Airways International Public Company Limited and PTT Public Company Limited. By having this exemption means, these state-owned enterprises do not play by the same rule with their competitors, which are private companies. This exemption is contrast with the principles and objectives of competition law, which is supposed to have general application and level playing field for all market players to protect competitive process, not competitors.<sup>28</sup> It also shows inequality in the application. Comparing to other ASEAN Member States, state-owned enterprises in Indonesia and Vietnam are not excluded from the application of their competition laws.<sup>29</sup>

### Substantive Law and its Interpretation

Trade Competition Act has been applicable in Thailand for almost two decades. However, merger control in Thailand cannot enforceable despite having specific provision about merger control in Section 26 of this act. Delay in prescribing a secondary law concerning merger thresholds is the vital factor, which makes the merger provision has long been unenforceable in practice until now. Time-consuming procedures and the strong disagreement about the imposed thresholds specified in the Draft Merger Thresholds are reasons behind this delay.<sup>30</sup> This delay makes the merger control inapplicable and tends to cause many consequences in the future because without the control some mergers could lead to monopoly or significantly lower the competition in that specific market. Merger can be used as a backdoor to gain market shares and market powers. The kind of delay in prescribing secondary laws seems to be common under this act. The secondary regulation concerning dominant threshold was also introduced eight years after the first day of the application of this act, which shows another serious delay rendering the abuse of dominant provision; Section 25, unenforceable during that period.

Furthermore, there are some unclearness in the interpretation of Thai competition law. No provision explicitly mentions about the right to apply this act extraterritorially. An equivocality of the right to exercise extraterritorial application is another problem of this act. Without extraterritorial application, Thailand limits the enforcement of competition law only to internal anti-competitive conducts, which is not an effective and up-to-dated way of enforcing competition law in globalized economy.<sup>31</sup> Becoming a part of ASEAN economic

<sup>27</sup> Thai Trade Competition Act, Section 4

<sup>28</sup> ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.2, 6; Healey (2011)

<sup>29</sup> Law of The Republic of Indonesia No.5 of 1999 Article 1 point 5 and Law on Competition (No 27-2004-QH11), Article 2

<sup>30</sup> Interview with Santichai Santawanpas, Former-Deputy Director-General, DIT, Ministry of Commerce (19 May 2015)

<sup>31</sup> Kim (2003 cited in Wimonkunararak, 2013)

community, a growing number of internal trades is expected.<sup>32</sup> The higher number of international trades, the higher chance of foreign anti-competitive conducts occurring outside the state boundaries but cause adverse effects inside. (Gal, 2010: 100) The enforcement of Trade Competition Act will not be effective if Thailand is unable to expand its jurisdiction to cover anti-competitive conducts occurring outside its territory and committed by person outside its allegiance but do cause detrimental effects inside.<sup>33</sup> Resorting extraterritorial application is an important tool for injured states to combat foreign anti-competitive conducts, which cause transnational effects in the context of no global competition agreement and enforcement mechanism. (Sweeney, 2007: 1-2) Comparing to other ASEAN Member States, Singapore<sup>34</sup>, Malaysia<sup>35</sup> and Indonesia<sup>36</sup> are able to apply their competition laws extraterritorially. If Thailand adheres to the territoriality principle, Thailand cannot seek for remedial strategies to deal with foreign anti-competitive behaviors while other ASEAN members can.

Another vagueness in the interpretation is found in the definition of 'business operation'<sup>37</sup> whether it includes affiliated companies or not. There are different views towards this ambiguity. Some adhere to the principle of legal entity and believe that affiliated companies have separated legal entities from their parent company. Consequently, affiliated companies should not be included. Whereas, other economists and lawyers opine that 'business operation' should be interpreted to include affiliate companies because they are directly or indirectly controlled by the parent company or complying with directions imposed by the parent company or having interlocking directorates. This kind of vagueness is problematic because it affects the interpretation whether which firm is considered possessing dominant position. Possessing dominant position is a prerequisite condition of Section 25; abuse of dominant position. It seems to be that excluding affiliate companies from the scope of 'business operation' is inappropriate because it is incompatible with the common practices of private companies nowadays, which tend to separate into different legal entities.

Too High burden of proof of Section 29<sup>38</sup> to be the catch-all-provision is another challenge of this act in practice. There are two prerequisite conditions to satisfy in Section 29. First, there must be an act that is not free and fair competition. Second, unfair trade practices must produce actual effect of destroying, impairing, obstructing, impeding or restricting

<sup>32</sup> The data in 2015 indicates that intra-ASEAN trade is approximately 25% of total trade, growing around 10.5% per annum. The growing is expected to reach 30% of total ASEAN trade 2020. For more detail See. Hunter (2015)

<sup>33</sup> Extraterritorial application is an important tool to make competition law enforcement more effective. The question about effectiveness of small and developing countries in exercising extraterritorial application is another story. For more details on this issue See Gal (2009); Wimonkunarak (2013)

<sup>34</sup> Singapore Competition Act explicitly prescribed extraterritorial application in section 33 and section 47

<sup>35</sup> Malaysia Competition Act 2010 explicitly mentions extraterritorial application in section 3

<sup>36</sup> The Law No.5 does not explicitly mention the extraterritorial application. However, the case law shows the adoption of the single economic entity principle, which allows the extraterritorial. See Supreme Court Decision No. 04K/KPPU/2005, KPPU Decision Case No. 07/KPPU-L/ 2007 (Temasek case); Toha (2015: 21-22)

<sup>37</sup> Thai Trade Competition Act, Section 3 "business operation" means a distributor, manufacturer for distribution, orderer or importer into the Kingdom for distribution or purchaser for manufacture or redistribution of goods or a person engaging in the business of service providing

<sup>38</sup> Thai Trade Competition Act, Section 29 "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."

business operation of other business operators or preventing other persons from carrying out business or causing their cessation of business. The requirement of actual effect in this section imposes too high burden of proof, which is incompatible with the objective of this section in being the catch-all provision. Unlike the equivalent unfair trade practices provision in Article 19 and Article 2(9)<sup>39</sup> of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade in Japan, which actual effect is not necessary because unfair trade practices tend to impede fair competition, which designate by Fair Trade Commission is enough.

### **Enforcement and Competition Authority**

The enforcement mechanism is widely criticized about its ineffectiveness. The distinctive indicator is no single case has been brought to the court during 17 years since the first day of application until now. (OTCC Annual Report, 2014: 37) There are variety of factors behind this. The groups of factors affecting the ineffectiveness enforcement mechanism will be divided into three groups: content of the competition law and law enforcement agency; competition authority and commission

First, main prohibitions under this act have criminal sanction, which is imprisonment and criminal fine.<sup>40</sup> Therefore, all criminal principles and procedures are adopted to competition cases including proof beyond reasonable doubt. Strong and adequate evidence is required in order to impose criminal sanction and prove beyond reasonable doubt, which is difficult in practice.<sup>41</sup> The lack of power to bring the lawsuit is another challenge because even the commission decides that a conduct breaches competition law but the case will be referred to prosecutor to review the whole case all over again. This process is time-consuming and nothing guarantee that the prosecutor will agree with the commission.<sup>42</sup> This used to be the big issue baring the first potential case that was supposed to be the landmark case bringing to the court. There is nothing wrong for imposing criminal sanction for hardcore cartels because they cause detrimental effects to economics. However, it is inappropriate to put violators in jail for other prohibitions, particularly merger and unfair trade practices. Merger is a kind of investment that are common and favorable because it has lower risks than starting a whole new business. No OECD Member State imposes imprisonment for violating merger provision. (Thanitcul et al., 2013) Unfair trade practices cause only economic damages so imprisonment is considered too high sanction. Criminal sanctions not only make the process of law enforcement more difficult but also makes Thai competition law incompatible with the internal best practices.

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<sup>39</sup> Act on Prohibition of Private Monopolization and Maintenance of Fair Trade Article 19 “No entrepreneur shall employ unfair trade practices.”

Article 2(9) “The term “unfair trade practices” as used in this Act means any act falling under any of following items, which tends to impede fair competition and which is designated by the Fair Trade Commission: (i) Unjustly treat other entrepreneurs in a discriminatory manner; (ii) Dealing with unjust consideration; (iii) Unjustly inducing or coercing customers of a competitor to deal with oneself; (iv) Dealing with another party on such conditions as will unjustly restrict the business activities of the said party; (v) Dealing with another party by unjust use of one's bargaining position; (vi) Unjustly interfering with a transaction between an entrepreneur in competition with it in Japan with oneself or a corporation of which oneself is a stockholder or an officer and another transaction counterparty; or, in case such entrepreneur is a corporation, unjustly inducing, instigating, or coercing a stockholder or an director of such corporation to act against the interests of such corporation”

<sup>40</sup> Thai Trade Competition Act, Section 51

<sup>41</sup> Interview with Santichai Santawanpas, Former-Deputy Director-General, DIT, Ministry of Commerce (19 May 2015)

<sup>42</sup> Thai Trade Competition Act, Section 16

No leniency program facilitating the enforcement of cartels is another issue. Because the nature of cartels is highly secrecy between cartelists, it is difficult for competition authority to find adequate evidence to crack cases. The leniency program is, thus, created to deal with this problem by attracting one or more of cartelists to betray the rest of their fellows in return of no sanction imposed or reduction of fines. After implementing leniency program, it can be seen the notable success in cartel prosecution in many jurisdictions. (Aubert, Kovacic and Rey, 2006) Without the leniency program, competition authority lacks the important tool to help enforcing complicated cartel cases.

Second, there are many challenges found in law enforcement agencies. The lack of human and financial resources is another challenge. Inadequacy of resources is a common problem among young competition agencies. The nature of competition law needs specialized skills because of the requirement of complex legal and economic analysis. It is difficult to find these skilled workers in countries that do not have mature competition law. Even there is some of them but the low government official salary in Thailand is not attractive enough comparing to the compensations from private sectors. Only 43 officials work in the Office of Thai Trade Competition (OTCC).<sup>43</sup> This number is considered very low comparing to the number of officials working in competition agencies in other jurisdictions. Indonesia started applying competition law in the same year as Thailand; however, data in 2010 showed that there were 456 officials working in the Indonesian competition agency (KPPU). (OECD, 2010) Furthermore, competition authority receives extremely limited budget from government; 5,000,000 baht or approximately 142,500 USD annually excluding salary. This sum of money is considered insufficient to fulfill all obligations of competition authority effectively, including investigation, compensation for commissioners and competition advocacy. Institutional structure of OTCC is not independent because it is set up within the Department of Internal Trade, Ministry of Commerce. By being a part of Ministry of Commerce makes OTCC vulnerable to political intervention and corporate lobbying through policies and reduction of budgetary support. (UNCTAD Secretariat, 2011: 7) Nipon Poapongsakorn believes that throughout the existence of this act and process of enforcement of competition law faces political intervention, especially during investigation process. (Paopongsakorn, 2002: 185, 201) The more independence the competition agency belongs, the more effective and well-functioning it can be in case handling. (UNCTAD Secretariat, 2011: 7) Structure of commission also faces big challenges in terms of over representatives from private sectors. Section 6 of this act allow the selection of commissioners from experts in private sectors. Most of these experts selected are from large businesses since they occupy the Federation of Thai Industries and the Thai Chamber of Commerce. Some of them are executives of big business or engaging in the dominant firms in Thailand. (Thanitcul et al, 2013) This represents a clear conflict of interest because these commissioners work as regulators and also market players at the same time. Therefore, it is not surprising that the impartiality of Thai Trade Competition Commission is in doubt in the eyes of the outsiders. This kind of structure not only impedes performance in enforcing competition law by increasing more risk of intervention and influence from the private companies, but also affects the level of transparency, which is the important factor to build credibility of the competition agency. Commissioners are also criticized about their inability to work full-time. Commissioners either bureaucrats or experts from private sector have their full-time job. This affects the performance of the commission as a whole. Their meetings are also hardly organized. During 2001-2007, the commissioners' meetings were organized only nine times. (Nikomborirak, 2006: 601) These figures are considered too low comparing to the meetings of commissioners in other competition agencies. In practice, commissioners tend to work

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<sup>43</sup> Interview with Wattanasak Suriam, Director of Trade Competition Bureau (2014)

only when they have case or meeting, which is considered as an *Ad Hoc*. Working as an *Ad hoc* is less than working as a part time job. (Thanitcul et al, 2013) This low number of meetings obviously shows the bad effect towards their performance in the consideration of complaints as well as other kinds of duties specified in Section 8.<sup>44</sup> The composition of 16 commissioners is another impediment in arranging each meeting. According to Professor William Kovacic, the perfect number of commissioners in one commission is only 5. Having more than 5 commissioners will make it more difficult for commissioners to work together and make decisions. The higher number the commissioners is, the higher difficulty and time-consuming they will get. In his view if the number of commissioners increase into 15, it will be hardly possible to work together effectively. (Thanitcul et al, 2013) With all these stated factors, they seem to be significant problems impeding the enforcement in Thailand.

The table below shows the comparison of main competition laws issues between Thailand, Singapore and Vietnam.

Competition Law's issues	Thailand	Singapore	Vietnam
<b>Scope of Competition Law Application</b> Including State-owned Enterprises	<b>X</b>	Subject to Section 33 (4) whether state-owned enterprises are regarded as government or statutory body or any person acting on behalf of the government or that statutory body, as the case may be, in relation to that activity, agreement or conduct or not	<b>✓</b>

<sup>44</sup> Trade Competition Act, Section 8. The Commission shall have the powers and duties as follows:

1. to make recommendations to the Minister with regard to the issuance of Ministerial Regulations under this Act;
2. to issue Notifications prescribing market share and sales volume of any business by reference to which a business operator is deemed to have market domination;
3. to consider complaints under section 18(5);
4. to prescribe rules concerning the collection and the taking of goods as samples for the purposes of examination or analysis under section 19(3);
5. to issue Notifications prescribing the market share, sales volume, amount of capital, number of shares, or amount of assets under section 26 Paragraph two;
6. to give instructions under section 30 and section 31 for the suspension, cessation, correction or variation of activities by a business operator;
7. to issue Notifications prescribing the form, rules, procedure and conditions for an application for permission to merge businesses or jointly reduce and restrict competition under section 35;
8. to consider an application for permission to merge businesses or jointly reduce or restrict competition submitted under section 35;
9. to invite any person to give statements of fact, explanations, advice or opinions;
10. to monitor and accelerate an inquiry sub-committee in the conduct of an inquiry of offences under this Act.
11. to prescribe rules for the performance of work of the competent officials for the purpose of the execution of this Act;
12. to perform other acts prescribed by the law to be powers and duties of the Commission;
13. to consider taking criminal proceedings as in the complaint lodged by the injured person under section 55.

<b>Substantive Law and Interpretation</b> Merger Control	Yes, in Section 26 but it is unenforceable in practice because of no secondary law prescribing merger thresholds	✓	✓
Extraterritorial Application	Unclear	✓	Unclear
<b>Enforcement and Competition Authority</b> Effective Enforcement	<b>X</b>	✓	Gradually developing
Independent Competition Authority	<b>X</b> Competition authority was established under Department of Internal Trade, Ministry of Commerce	<b>X</b> Competition authority was established under Ministry of Trade and Industry	<b>X</b> Competition authority was established under Ministry of Trade
The Lack of Resources	✓	<b>X</b>	✓
Leniency Program	<b>X</b>	✓	<b>X</b>

### Recommendations to the Law Reform

In this part will provide overall recommendations to overcome challenges identified in the part I and make the Trade Competition Act functions more effectively. In order to successfully reform this act and its enforcement, political will and strong competition advocacy are necessary. The law reform cannot be achieved if lacking political support. Political will can make a top-down approach possible. The top-down approach is more efficient in driving the law reform than the bottom-up approach for the time being in Thailand taking into account the lack of strong competition culture and competition awareness in all stakeholders in pushing the law reform. Thai Trade Competition Act requires an urgent amendment in many areas in order to boost the function of the competition rules, for example competition law should have general application, including state-owned enterprises. There should be good rationales in exempting state-owned enterprises from the application of competition law, for instance state-owned enterprises exercising sovereign power or concerning security of states or national interests. Extraterritorial application should be introduced to this act in order to combat anti-competitive conducts with transnational effects. The definition of business operation should be amended to explicitly include affiliated companies. Otherwise, firms will be divided into many affiliated companies in order to have different legal personality and be able to escape from being monitored as a dominant firm. Section 29 is designed to be a sweeping clause to prohibit any unfair trade practices that do not fall in the scope of Section 25, 26, 27 and 28 but they are considered not free and fair in nature. Lowering burden of proof under Section 29 will help deterring these

unfair trade practices more effectively in order to ensure the protection of competitive process. Thailand should follow the standard of equivalent prohibition in Japan Antimonopoly Act that merely tendency to cause bad effect to competition is enough to satisfy prerequisite under this provision in order to make it easier for competition authority to detect these unfair trade practices. Furthermore, limited capability of OTCC in enforcing this act, in terms of inexperienced human resources and inadequate budget, should be taken into account before imposing high burden of proof. If Thai competition authority cannot catch unfair trade practices that are the least complicated conducts comparing to other main prohibitions, this will emphasize its failure in enforcing competition law in Thailand. Then its confidence in the eyes of the public may be hardly regained. Imposing criminal sanction in competition cases<sup>45</sup> is another reason why it is quite difficult to successfully prove beyond reasonable doubt. Even though criminal sanction is vital to create deterrence, it should be applied only to some anti-competitive conducts. Hard-core cartels in section 27(1) -(4) causes detrimental effects to the economy; therefore, criminal sanction should be maintained. Whereas, administrative sanctions should be applied to other main prohibitions; Section 25, 26, 27(5)-(10), 28 and 29 instead of criminal sanctions.

Enforcement in Thailand is the highest challenge that needs to be developed urgently. In order to develop enforcement mechanism, the inadequacy of specialized human resource and budget needs to be solved. Inexperienced manpower affects ability in case handling. Training programs and experience sharing both within the competition agencies and between competition agencies could solve this problem. More incentive in term of job security and welfare should be provided in order to draw experienced and specialized manpower. Although adequate power in enforcing the law is equipped<sup>46</sup>, enforcement rate in Thailand is not impressive. Comparing with Vietnam that applied competition law in 2005, which is six years behind Thailand, five decisions have been issued during 2006 to 2014. (Vietnam Competition Authority Report, 2014) Therefore, leniency program is another tool to help increasing cartel enforcement. It is widely accepted that the application of the leniency program is significantly increase the level of cartels detection. Lately, the leniency program not only levels up the cartel enforcement rate in Singapore but also helps the Singapore competition authority (CCS) caught the international cartel; the ball bearing case. (Competition Commission Singapore, 2014) Institutional structure of competition authority is within the ministry of commerce makes it vulnerable to political intervention and corporate lobbying. A steady rise of independent competition agencies in both developed and developing countries over the last 20 years is partly to avoid these kinds of intervention and helps ensuring and promoting transparency, accountability, justice and professional focus. (UNCTAD Secretariat, 2011: 7) It might be hardly possible for Thailand to alter into perfectly independent competition authority in the short period of time. As long as it is gradually become more and more independent authority, it is considered the good sign of Thailand.

Regarding recommendations to what extent to solve problems found in the commission, to lessen the wide critique about impartiality of commissioner, which are from private sectors, their number should be lowered from 6 to 2 not to over represent private views in decision making of commission. More impartial commissioners, particularly legal and economic scholars, and the decrease of numbers of commission to only those who are appropriate and can sacrifice time for working as commissioners could be a good idea for reorganizing the commission. Lower number of commissioners means more opportunities to arrange the meetings to fulfill the commission's obligations. Finally, competition advocacy

<sup>45</sup> Trade Competition Act, Section 51

<sup>46</sup> Thai Trade Competition Act, Section 13, 14, 15, 19, 20, 21, 22, 23 and 24

plays an important role in supporting the law reform and developing competition law in Thailand in the long run. It is necessary to educate Thai people about the benefits of competition in order to build competition culture and create fair competition environment. Therefore, advocating benefits of competition and initiating competition compliance programs with business sectors are the important task that OTCC cannot ignore.

## Conclusion

It is expected that the law reform will be able to solve problems and lessen limitations, which are regarded as challenges in this act. Otherwise, competition law cannot fulfill its objectives in leveling playing field and bringing about free and fair competition in practice. Political will is required to successfully reforming the competition law in the short run. Political will not only urge the law reform but it is the necessary factor in the implementation and enforcement of competition policy and law. The shortage of financial and human resources in OTCC will not be solved if there is no political will to support. However, in the long run competition advocacy comes to play its role in raising competition awareness in all stakeholders and building competition compliance and competition culture in Thailand.

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