

Competition law fact sheet

Thailand

March 2021





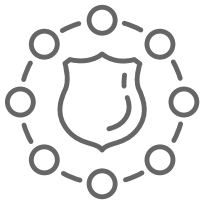
Main features of the law

Prohibition on restrictive agreements, concerted practices, abuses of a dominant position and unfair trade practices

Merger control regime

Wide investigation powers

Criminal and administrative sanctions



Enforcement trends

Limited enforcement action to date outside of unfair trade practices and merger control

Substantive provisions

Main rules

The Trade Competition Act B.E. 2560 (2017) (the Act) is administered by the Trade Competition Commission (the TCC), which is itself assisted by the Office of the Trade Competition Commission (the OTCC), its administrative office. The Act prevents restrictions of competition through the prohibition on monopoly and unfair trade practices. In particular, the Act:

- prohibits joint actions between business operators which monopolise, reduce or restrict competition (anticompetitive agreements and practices) (Sections 54 and 55 of the Act);
- prohibits the abuse of a dominant position (Section 50 of the Act);
- regulates mergers which may substantially reduce competition (Section 51 of the Act); and
- prohibits unfair trade practices (Section 57 of the Act).

Anticompetitive agreements and practices

The Act prohibits joint actions (including written or verbal agreement, decision of industry associations, concerted practices) between business operators which monopolise, reduce or restrict competition. The Act distinguishes on the one hand joint actions between business operators competing with each other in the same market which cause “serious damage to competition” (i.e. hardcore horizontal agreements and practices), and on the other hand joint actions between business operators in a market which cause “damage to competition” (i.e. non-hardcore horizontal and vertical agreements and practices).

The Act (Section 54, as supplemented by the TCC’s *Notification on guidelines for considering joint actions of business operators which led to a monopoly or caused a reduction or restriction of competition in the market (2018)* (the Guidelines on Restrictive Joint Actions)) stipulates the following specific prohibition against hardcore horizontal agreements and practices between competing business

operators, which are subject to criminal penalties:

- directly or indirectly fixing purchasing or selling price, or any trading conditions that affect the price of goods or services (i.e. price fixing);
- limiting the quantity of goods or services that each business operator will produce, purchase, sell or provide (i.e. quantity limitation);
- knowingly establishing an agreement or conditions for a business operator to win an auction or not to enter an auction (i.e. bid-rigging); and
- allocating areas in which each business operator will sell (i.e. market allocation).

The Act (Section 55, as supplemented by the Guidelines on Restrictive Joint Actions) prohibits the following non-hardcore restrictive joint actions between business operators (either horizontal or vertical agreements or practices), which are subject only to administrative sanctions:

- price fixing, quantity limitation and market allocation by business operators which are not competitors in the same market (i.e. vertical restrictive agreements, which would likely capture resale price maintenance conduct if the statutory language were interpreted in a manner consistent with similar foreign regimes);
- reducing the quality of goods or services to a condition lower than that previously sold;
- appointing or assigning sole distributorship of a product or services;
- setting conditions or practices relating to the purchase or sales of products or services; and
- entering into other anti-competitive joint agreements in manners as prescribed by the TCC (to date there has been no specific guidance issued by the TCC on what this prohibition entails).

Non-hardcore joint actions may benefit from exemptions on several grounds (under Section 56 of the Act), for instance if it can be shown that such arrangements are necessary for the purpose of developing production, distribution of goods, or the promotion of technical or

economic progress and that they do not cause a significant restriction of competition in the market (i.e. the combined market shares of the relevant business operators must not exceed 10 per cent, as stipulated in the Guidelines on Restrictive Joint Actions).

Abuses of a dominant position

The Act (Section 50, as supplemented by the TCC's *Notification on guidelines for considering the prohibition of business operators' market dominance (2018)*) prohibits a business operator from abusing its dominant position by engaging in the following conduct:

- setting unfair purchasing or selling prices (e.g. predatory pricing, pricing below cost, price discrimination, margin squeeze, excessive pricing);
- imposing unfair conditions on trading partners which limit (i) the service, production, purchase or sale of the product; (ii) the opportunity to purchase or sell products, receive or provide services; or (iii) the opportunity to procure loans from other business operators (e.g. fidelity discounts, exclusive dealing, quantity forcing, tying, resale price maintenance, refusal to supply);
- suspending, reducing, or limiting service provision, production, sale, delivery, or import without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than market demand; or
- intervening in others' business operation without justifiable reasons.

According to the TCC's *Notification on rules for a business operator with power over a market (2018)*, a business operator is considered to be of a dominant position when:

- the business operator has 50 per cent or more market share in the relevant market, and with sales of one billion baht (approx. US\$30 million) or more in the past year; or
- the three largest business operators have a combined market share of more than 75 per cent, and each has sales of one billion baht (approx. US\$30 million) or more in the past year.

Merger control

The Act (Sections 51 to 53, as supplemented by the TCC's *Notification on criteria, procedures, and conditions in requesting for the permission and the permission for business mergers (2018)* and the TCC's *Notification on rules, procedures and conditions for notification of business merger results (2018)*) implements a dual merger control regime:

- Post-merger notification is required for mergers that may cause a substantial reduction of competition in a particular market. Parties must notify the merger to the TCC after closing in relation to transactions where any of the merging parties achieves sales exceeding one billion baht (approx. US\$30 million) in the relevant market, and which do not cause a monopoly or result in a dominant position. A post-merger notification must be filed within seven days after the transaction has been completed.
- Pre-merger clearance is required to be obtained from the TCC when a merger may result in monopoly or creation of a dominant position, namely (i) the parties' combined market share is of at least 50 per cent; or (ii) the top three competitors in the market have a combined market share of 75 per cent; and each achieved sales in excess of one billion baht (approx. US\$30 million) in the past year. The TCC has 90 days (extendable by 15 days) from the date of filing to issue a decision, and may impose any conditions for clearance. Parties who disagree with the decision of the TCC may appeal to the Administrative Court within 60 days from the date of decision.

Prohibition of unfair trade practices

The prohibited practices (under Section 57 of the Act, as supplemented by the TCC's *Notification on guidelines for considering actions that are damaging to other business operators (2018)*) include:

- unfair obstruction of business operations;
- abuses of a superior market or bargaining power (which, arguably, is a lower standard than "abuses of a dominant position");
- imposing unfair trading conditions; and
- any other practices to be determined by the TCC.

Sanctions

Infringements of the Act can attract both administrative and criminal sanctions. As of February 2021, the TCC had imposed several administrative fines but had not attempted to seek criminal penalties.

Administrative sanctions

In respect of non-hardcore arrangements, unfair trade practices and agreements with offshore operators, administrative sanctions may be imposed by the TCC (see Section 82 of the Act). Fines of up to 10 per cent of the annual turnover in the year of the infringement may be imposed.

Administrative sanctions can also be imposed on violation of the merger control provisions (see Sections 80 and 81 of the Act):

- violation of post-merger notification requirement: an administrative fine of not more than two hundred thousand baht (approx. US\$6,000) and a further fine of not more than ten thousand baht (approx. US\$300) per day for the period the violation occurred; and
- violation of pre-merger clearance requirement: an administrative fine of not more than 0.5 per cent of transaction value of merger.

Criminal sanctions

Criminal sanctions will only apply to hardcore horizontal arrangements or abuses of a dominant position (see Section 72 of the Act). The maximum criminal sanction is two years' imprisonment and a fine of 10 per cent of the annual turnover in the year of the offence.

Extraterritorial effect

Consistent with competition law regimes elsewhere, an agreement made or a conduct that occurred in a foreign country will be caught by the Act as long as it affects the Thai market. The Act (Section 58) also expressly prohibits agreements between domestic and offshore operators which could create a monopoly or unfair trade restrictions and cause severe damage to the Thai economy and consumer as a whole.

Enforcement regime

Public and private enforcement

Public enforcement

The competition authority responsible for enforcing the Act is the TCC, as well as the OTCC, its administrative office.

The TCC has the power to investigate, issue orders and decisions and impose administrative sanctions against parties involved in anticompetitive agreements, abusive practices, unfair trade practices or unreasonable offshore agreements. It also has power to investigate, approve and reject mergers and acquisitions as well as imposing administrative sanctions on failing to notify reportable transactions.

For criminal sanctions the TCC shall refer the case to the public prosecutor for prosecution before the Intellectual Property and International Trade Court. If the district public prosecutor issues a non-prosecution order, the TCC may request the case to be further considered by the Attorney General.

Private enforcement

The Act (Article 69) provides that a third party who suffered damages as a result of infringement of the Act shall have the right to file a civil action for damages against the infringer before the Intellectual Property and International Trade Court. The Consumer Protection Commission or other associations recognised under the law on consumer protection may file class action on behalf of consumers or members of the associations. The Act requires that such action be filed within one year from the date the person suffering damages knows or should have known the cause of such damage.

Leniency

There is no recognition of leniency in the Act or any implementing regulations.

Investigation powers

The TCC has broad investigation powers under the Act, similar to those of police officers under the Thai Criminal Procedure Code. It can issue subpoenas requesting any persons to provide both oral and written information, and conduct raids on premises of the business operators or other relevant persons to search and seize evidence for examination (see Section 63 of the Act).

Sanctions for non-compliance with the TCC's investigations can lead to imprisonment of up to one year and fines of up to 20,000 Baht (approx. US\$650) (see Sections 73 and 74 of the Act).

Recent enforcement trends

Since the Act had come into force, the enforcement actions of the TCC have mainly focused on the prohibition of unfair trade practices. As at February 2021, the TCC has published three decisions where it imposed administrative fines against violations of the rules against unfair trade practices under the Act, totalling a sum of around 6.7 million baht (approx. US\$223,000). The TCC has also imposed fines totalling 12 million baht (approx. US\$403,000) for a case of abuse of a dominant position under the previous law of 1999. For the other published decisions which did not lead to further actions or sanctions, the TCC explained that there were neither a violation of the Act, nor that the subject matter was within their authority.

In terms of merger control, based on publicly available information since the merger control provisions came into force in 2019, at least 23 transactions have been notified post-merger to the TCC, while at least three cases have been cleared (one of which, the CP-Tesco merger, was conditionally approved).

Key information

Relevant legislation

Trade Competition Act B.E. 2560 (2017)

Competition authority

Trade Competition Commission/the Office of Trade Competition Commission

5th floor, Car Parking 5th floor Building(BC),
The Government Complex,
120 Chaeng Wattana Road, Thungsong-hong,
Laksi, Bangkok 10210
Thailand

Tel: +66 2199 5400

Fax: +66 2143 7715

Email: info@otcc.or.th

Website: www.otcc.or.th

Relevant officials

Members of the Trade Competition Commission

- Professor Sakon Varanyuwatana (Chair)
- Mr Krisda Piampongsant (Deputy Chair)
- Mr Santichai Santawanpas (Spokesman)
- Mr Somchart Sroythong
- Mr Somkiat Tankrittawat
- Pattama Teanravisitsagool
- Mr Raksakecha Chaechai

Secretary-General of the Trade Competition Commission

- Mr Somsak Kiatchailak

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