

# TRADE COMPETITION ACT: APPLICATION AND PITFALLS

**T**he Trade Competition Act (TCA) applies to all enterprises and business activities in Thailand, with certain enumerated exceptions, such as state enterprises, co-operatives, agricultural and co-operative groups and government agencies. If you are a business operator in Thailand, especially a market-dominant one, the TCA governs how you do business.

The TCA regulates abuse of dominance, anti-competitive agreements, unfair trade practices and interference with consumer purchases from foreign suppliers. Upon passage of a ministerial notification setting review thresholds, the TCA will also allow for the review of mergers by the Trade Competition Commission (TCC). This article will focus primarily on two areas of concern for commercial entities — abuse of dominance; and anti-competitive agreements.

In a previous column, we wrote about determining market dominance under the TCA. In brief, the TCC has defined market dominance as having a greater than 50% market share in the previous year or being one of the top three producers with a total market share of at least 75% in the previous year and, in either case, having at least one billion baht in turnover. There is an exception to both the turnover and market share thresholds for small entities that are inadvertently caught by the provision. In the previous column, we discussed issues relevant to determining one's market.

Businesses operators should consider whether they have market dominance in any particular market. If a merger is contemplated, it is also important to consider this question regarding the potential merger partner as well as the merged entity. Note that the law does not make market dominance illegal, but rather imposes additional obligations on those business operators that dominate the market.

Among other actions, a market-dominant business operator is prohibited from (1) unreasonably setting or maintaining purchasing or selling prices; (2) unreasonably imposing certain restrictions on other business operators with whom it does business; (3) suspending, reducing or restricting services, production, purchases, distribution, deliveries or imports without justifiable cause; (4) destroying or damaging goods in order to reduce the quantity below market demand; and (5) interfering in the business operations of others without justifiable cause. Although these are significant and broad restrictions, it is important to note that most are phrased in terms of taking action either unreasonably or without justifiable cause.

It is not only those dominating the market that must concern themselves with the TCA. Regardless of market dominance, all businesses governed by the TCA are prohibited from contracting with other business operators to form a monopoly or otherwise reduce or restrict competition.

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The TCA describes a number of examples of agreements that would be considered formation of a monopoly or otherwise involve reducing or restricting competition. These include agreements that (1) set sales prices or restrict sales volumes; (2) set buying prices or restrict purchase volumes; (3) provide for market dominance or control; (4) provide for bid rigging; (5) restrict distribution by geographic area or by customer lists; (6) restrict customer purchases by geographical area or vendor lists; (7) restrict manufacturing, purchasing or distribution such that quantity would fall below market demand; (8) reduce quality; (9) appoint exclusive distributors; or (10) set conditions or procedures in connection with purchase or distribution to provide for uniform or agreed practices.

In considering whether a particular agreement is against the law and depending upon the particular offence, the TCC may apply a "rule of reason" analysis in which it considers the agreement and its effect on the market; or a "per se" concept in which the TCC will review only the agreement. In certain circumstances, a business may apply for and be granted advance permission from the TCC to enter into certain categories of otherwise restricted agreements.

Businesses should heed all applicable provisions of the TCA, as violations may result in civil litigation. Those alleging injury including business competitors may bring suit against an alleged transgressor. The TCA also provides some capacity for the Consumer Protection Commission to bring action on behalf of consumers as well as for consumer groups to bring action on behalf of their members.

In addition, a primary function of the TCC is to receive complaints about potential violations of the TCA. Since the TCA was enacted in 1999, there have been 76 complaints, with their number varying from year to year. If a complaint is filed, the TCC may investigate and order the errant company to undertake remedial action. If a violator does not follow the TCC's order, the case may be referred to a public prosecutor.

From time to time, public discourse turns to revamping the TCA. Even if such reforms do not come to pass for some time, the current Act contains a number of compliance requirements to which business operators should give their careful attention.

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