

Market dominance under the competition law

The Trade Competition Act B.E. 2542 (1999) (TCA) seeks to maintain a fair and open market by prohibiting business operators from exerting unfair influence through monopoly, exclusivity, price fixing, quantity fixing, tying/bundling, etc. If any two business operators act together to effect such conduct, they may be liable for violating the TCA, which carries a prison term of up to three years and/or a fine of up to six million baht per violation.

The TCA applies not only to any two or more business operators who are working together, but also to a single business operator acting alone if that single operator has "market dominance".

A "dominant business operator" is clearly defined by Ministerial Regulation issued on Jan 18, 2007 as (a) one with 50% or more of market share, or (b) one of the three largest operators within a market who together hold at least 75% or more of market share and individually hold at least 10% — regardless of whether the three operators act jointly to carry on anti-competitive activities. In either case, the operator must also have total sales for the previous year in the subject market of at least one billion baht.

For example, if Company A has 60% market share, Company B has 20%, and Company C has 11% and each has total sales of at least one billion baht, then Company C with only 11% may be treated

as market dominant.

Determining market share and documenting sales are relatively simple, which would make determining the "market dominant" businesses appear to be a simple task. Actually, the true difficulty lies in defining the market.

For example, consider a company that creates a new hybrid motorcycle that works on gas and electricity. What if it is the only company in Thailand that manufactures such hybrid motorcycles? If the market is defined as hybrid motorcycles, then this motorcycle company will have 100% market share. On the other hand, if the market is defined as all motorcycles, the company's market share may be as little as 1%. How the "market" is defined plays a very significant role in identifying which business operators are "dominant" and which are not.

The TCA does not provide any express definition for "market", leaving it to the Trade Competition Commission to define on a case-by-case basis.

One simple method for determining the market of any good or service is to consider whether it can be substituted by another good or service. If it can be substituted by another product, both

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shall be considered as being part of the same market. For example, in the soap market, a bar of soap can be substituted by liquid soap. Therefore, bars of soap and liquid soap may be categorised as one unified "soap" market.

The question becomes a bit more difficult when considering something like medicine. When a new and better chemotherapy treatment for cancer is discovered, what market should this be categorised under: (a) all medicines (very large group), or (b) all cancer medicines (smaller group), or (c) all chemotherapy treatments (even smaller group)?

In the US and the EU, the SSNIP (Small but Significant and Non-transitory Increase in Price) test has been offered as a valid method for defining a "market" for trade competition purposes. The SSNIP test looks at the "elasticity of demand" for a particular product versus other products. The SSNIP test asks: if a product's price were increased by 5%, would this significantly decrease the number of sales of the product? In the case of the hybrid motorcycle, if there was only one company that made this product and they raised their price by 5% — would customers continue to buy it or would they buy a cheaper gas bike

instead? A significant enough loss in customers caused by the price increase would suggest that the hybrid motorcycle does not constitute a market in itself.

Clearly there is a difference between cancer treatment and motorcycles. While a consumer may choose between a hybrid bike or a gas bike, medical treatments are usually given in conjunction — i.e. there is oftentimes no choosing between one or the other. A cancer patient will utilise all available treatments until the disease is successfully defeated. If the initial treatment works, the others become unnecessary.

The SSNIP test only contemplates market definition based on price and becomes less effective in defining markets where (a) the consumer is not choosing between products, and (b) price is of minimal importance in the consumer's choice.

Ultimately the determination of market dominance is not a simple numerical calculation but does, instead, turn on many different legal and economic factors that must be taken into account together.

Written by **Chaiwat Keratisuthisathorn, Attorney, and John Fotiadis, Consultant, Commercial Department, Tilleke & Gibbins International Ltd. Please send comments or suggestions to Marilyn Tinnakul at marilyn.t@tillekeandgibbins.com**