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# Exclusivity under the Trade Competition Law

The Trade Competition Act seeks to maintain a fair and open market by prohibiting business operators from exerting influence through unfair trade practices, including exclusivity.

The TCA's prohibitions on exclusivity apply both in cases of market dominant operators (Section 25) and in cases of two or more non-dominant operators acting together (Section 27). For market dominant operators, TCA Section 25 contains broad language that implicitly prohibits exclusivity as a form of unfair interference. On the other hand, Section 27 expressly identifies and prohibits certain forms of exclusive agreements.

Exclusivity can take many forms: by geographic area, by customer, by supply, and by kind of goods/service. Each of these four types of exclusivity is expressly prohibited by the TCA.

Geographical exclusivity is common, particularly in franchise and distributorship agreements. For example, Franchiser A enters an agreement with Franchisee B providing that Franchisee B can only sell franchise goods/services within Bangkok; or Manufacturer A enters into an agreement making Company B its exclusive distributor/reseller in Thailand. Geographical exclusivity is expressly prohibited by TCA Sections 27 (5) and (6).

Customer exclusivity often occurs when a manufacturer also acts as a wholesaler/distributor. Oftentimes in such cases, the manufacturer will bar a new distributor from selling to the manufacturer's existing customers. Manufacturers, franchisers and large retailers may also restrict their suppliers from selling to their competitors. Customer exclusivity is expressly prohibited under TCA Section 27 (5).

This follows hand in hand with supplier exclusivity. Franchisers will often mandate that franchisees buy all their supplies from one designated supplier — one that will sell at a premium price and pass such premiums back to the franchiser. Supplier exclusivity is prohibited under TCA Section 27 (6).

Designating an exclusive seller for a certain kind of good/service is another common form of exclusivity, such as an exclusive dealership agreement. For instance, Car Manufacturer A designates Car Dealer C to be its exclusive authorised dealer in Thailand and bars any other parties from also applying for an authorised dealership or from purchasing goods or services other than through its dealer. Exclusivity by product or service is prohibited under TCA Section 27 (9).

Finally, Section 28 of the TCA bars any Thai operator with a relationship with a foreign operator from doing anything to prevent Thai consumers from buying directly from outside Thailand. This section of the law stems from the

automobile industry and the exclusive car dealership arrangements that previously existed. These exclusive distributorship agreements with the original foreign car manufacturers forbade the car manufacturer from selling the car directly to consumers in Thailand.

Although the TCA prohibits the exclusivity arrangements mentioned above, the law does allow business operators to have such arrangements when it is necessary for business. Firms can submit an application for special permission to the Trade Competition Committee. The committee may grant permission for such exclusivity arrangements by considering how it benefits the business and whether it will cause severe damage to the Thai economy or create significant benefits for consumers. However, since the enactment of the TCA in 1999, no published cases of this could be found.

A practical problem is how to enforce the TCA when foreign operators who maintain no presence in Thailand enter into prohibited exclusive agreements with domestic operators. In such circumstances, the Trade Competition Committee may only be able to ask for the foreign operator's co-operation to stop such unfair trade practices. While theoretically the Thai operator that enters into the agreement is jointly liable for any legal breach, it serves little purpose to prosecute them as they are most often as much a victim of such anti-competitive agreements as the general public. The typically have no choice but to accept such terms as mandated by powerful multinational operators, manufacturers and franchisers.

A more interesting question arises in the case of enforcement by the foreign operator of its own anti-competitive agreements. Since the TCA expressly forbids many of these exclusivity provisions, foreign operators may be surprised to find that such terms are legally unenforceable. Even when such agreements contain provisions that make foreign law applicable, the TCA's terms cannot be circumvented since these are matters of public order and good morals that cannot be defeated by agreement among the parties.

Yet, as a practical matter, even while technically such exclusivity provisions may be unlawful and unenforceable by foreign operators, Thai operators will normally respect them to avoid losing the franchise or distributorship agreements when they expire.

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