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Reforming Thailand's Trade Competition Commission

Thailand's Trade Competition Act has long been perceived as a paper tiger since its conception in 1999. With the release of the new Trade Competition Bill, which may be amended, and the Trade Competition Commission pointing out violations by energy drink manufacturers, things may be about to change.

Recently, a competitor of an energy drinks operator reportedly filed a complaint with the Commission. In the Commission's report, the business operator, which enjoyed a market dominant position, had refused to supply retailers that were selling energy drinks produced by its competitors. This is a potential breach of several sections of the Trade Competition Act. Specifically, the business operator allegedly unreasonably fixed compulsory conditions, which restricted opportunities to purchase or sell goods from other business operators, in violation of Section 25 of the Act. This can also be considered as an unfair trade practice in violation of Section 29 of the Act. In the event that the energy drinks manufacturer is found guilty, penalties including a maximum imprisonment term of three years and/or a fine not exceeding THB 6 million may be imposed.

The reported facts in this energy drinks case are similar to a widely reported motorcycle distribution case, in which the period of prescription expired in 2013. Three companies filed a complaint against a company that allegedly violated the Act in exercising its market dominance by imposing restrictive sales conditions. One complainant was a sole agent/manufacture of motorcycles. The complaint claimed that the complainants were required to sell only the alleged violator's motorcycle brand. The Commission found that the alleged violator's actions breached Section 29 of the Act. Later on, in early 2013, the Office of the Attorney-General issued a notice to the Commission instructing that the claim should not be filed against the alleged violator because of insufficient evidence, and the alleged violator's actions did not directly affect sales of the motorcycles. The matter was concluded.

The recent energy drinks case differs from the motorcycle case, because in the energy drinks case, the new Commission has shown its determination to enforce the Act. Under the watchful eye of the current Commission, we may see more vigorous enforcement of the Act.

Attorney-General and Public Prosecutor Enforcement Roles

Public prosecutors play a crucial role in enforcing the Act. If the public prosecutor opts not to prosecute the case, the Commission's Chairperson can veto the public prosecutor's non-prosecution order. The Commission's Chairperson would then provide the criminal file, together with his or her opposing opinion, to the Attorney-General for a final decision.

Legislative Efforts to Reform the Commission's Structure

Major provisions concerning the Commission's organization have been introduced in the draft Trade Competition Bill. Under Section 5 of the current Act, many Ministries have

influence over the Commission (e.g., in financial matters), and therefore make joint decisions. However, under the new Bill, the Prime Minister is the sole person in charge of selecting members of the Commission, with the Cabinet's approval.

Separation from the Private Sector

Previously, Section 6 of the Act required that at least half—6 out of 12—of Commission members were appointed from the private sector (e.g., nominations by the Thai Chamber of Commerce and the Federation of Thai Industries). As a result, many private enterprises could become engaged in the workings of the Commission. However, this requirement has been removed from the Bill.

Term and Removal

Under Sections 15-16 of the Bill, each member will have a maximum of two terms, and each term will last six years. Also, there is an additional provision whereby the Senate will have the power to remove any member from their position should there be any violations of anti-corruption law. This provision supports the impartiality of the Commission.

Commission's Leverage against Non-Prosecution Orders

Section 27 of the Bill ensures that certain leverage is provided to the Commission against non-prosecution orders rendered by the Attorney-General. Additional power, other than the power to veto, is provided to the Commission so that if the Attorney-General finds that the opinion of the Commission is insufficient to pursue court proceedings, the Attorney-General will inform the Commission of the insufficient grounds to allow the Commission to address these issues at once. In this event, the Chairperson of the Commission and the Attorney-General will form a joint working group, with an equal number of appointed representatives from each side, in order to complete the evidentiary requirements. Finally, the Attorney-General will proceed to file the case in court.

The Commission now has higher leverage against the Attorney-General to pursue cases that are worthy of being filed in court, without having to rely on the absolute discretion of the Attorney-General.

Budget and Finance

Under Sections 33-35 of the Bill, additional monetary support is provided to the Commission, which is independent from the general government budget. Independent funding would empower the Commission to conduct investigations and market analysis more effectively, which require a lot of financial resources.

Independence of Secretariat

The Secretariat—the chief of the Commission who is responsible for the Commission's performance of duties—as well as the Secretariat's parents, spouse, children, or parents of the spouse will not have conflicts of interest with the Commission under Sections 49 and 51 of the Bill. The Secretariat is not allowed to hold any position in any company for two years after their removal from a position. In addition, under Section 38(3) of the Bill, there is a special provision requiring the Secretariat to be able to perform his or her duties on a full-time basis.

Reforming the Commission is as important as reforming the trade competition laws. Under the new Bill, the Commission should become more independent. Legislative efforts are now focused on ensuring the law can be enforced, and the Commission has suggested that cases for breaching competition law could reach the court for the very first time in the near future. 🏛️