

Informed Counsel

Analysis of Recent Legal Developments in Southeast Asia



c o n t e n t s

- 1 **New Trade Competition Law**
Thailand's updated Trade Competition Act promises more stringent enforcement mechanisms against unfair and monopolistic trade practices.
- 3 **New Customs Act**
Thailand has introduced long-awaited changes to its Customs Act, improving fairness and clarity for those involved in the customs clearance process.
- 4 **Draft Vietnam Labor Code**
Vietnam's Labor Code is under review, and the latest draft appears set to affect contracts, termination, transfer, remuneration, and more.
- 5 **Director's Liability in Thailand**
A new law repeals the strict-liability-presumption clause for directors in 76 separate laws, shifting the burden of proof for criminal offenses.
- 6 **Combating Online Infringement**
The Copyright Act and the Computer Crime Act provide IP owners with channels for tackling online infringement.
- 7 **Appeals Procedure**
Intellectual property cases in the Thai courts will be subject to new appeals procedures, which may lengthen the time required to reach final judgment.
- 9 **Shortening Patent Pendency**
Modified examination procedures may provide a solution to the serious backlog of patent applications in Thailand.
- 10 **Cambodia Patent Registration**
It is now possible to obtain granted patents in Cambodia in a much faster time frame, based on several recent agreements with other governments.
- 11 **Indonesia Trademark Regulation**
A regulation supporting the implementation of Indonesia's new Trademark Law helps to clarify the new procedures.
- 12 **Tilleke & Gibbins Updates**
Our firm has been recognized with top rankings from Asian Legal Business and Managing Intellectual Property, and has again been named "Employer of Choice" in Thailand.

Thailand's New Trade Competition Act: A Step Toward More Stringent and Effective Enforcement

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Thailand implemented its main competition law, the Trade Competition Act (TCA) B.E. 2542 in 1999, and was the first country to do so in the ASEAN region. The 1999 TCA focused primarily on prevention of unfair trade practices, and restricted the formation of cartels and the conducting of monopolistic trade activities. However, over the course of the past 18 years, no prosecution has ever been brought against any business operator who breached the TCA, and therefore, enforcement of the TCA is renowned for being lacking, ineffective, and impractical.

In 2016, a new draft Trade Competition Act was introduced and approved by the Cabinet. In early 2017, the draft was proposed and duly approved by the National Legislative Assembly, and is currently awaiting the required royal endorsement. Once granted, the new law will be published in the *Government Gazette* within this year, and, upon taking effect 90 days after its publication, the new TCA will repeal the current TCA. Business operators in Thailand should expect a number of key changes under the new TCA, as discussed below.

Regulatory Authority

The new TCA is expected to improve the autonomy and impartiality of the Office of the Trade Competition Commission of Thailand (OTCC), the existing regulatory authority under the Act. The OTCC is currently a part of the Ministry of Commerce. Under the new TCA, the OTCC will become a separate independent legal body with its own budget and workforce, and will have the power to impose various sanctions, including financial penalties, and issue cease-and-desist orders to suspend, cease, or amend any anticompetitive conduct.

Who Is Covered

The new TCA will apply to the following entities:

- ▶ **In-scope:** Business operators in the industrial, commercial, financial, insurance, and service sectors, or other businesses to be prescribed by the OTCC, all fall within the scope of the law.
- ▶ **Limited scope:** Unlike the current TCA, the new TCA will not exclude state enterprises entirely, and these are exempted only for activities performed in accordance with a Cabinet resolution or law, or for the benefit of national security, public interest, or public utility.
- ▶ **Not applicable:** Government agencies, agriculture cooperatives, and businesses with sector-specific anticompetition regulations (e.g., telecommunications and energy) will fall outside the scope.

Abuse of Market Dominance

The key concept behind the new TCA remains unchanged from the current TCA, as the law does not prevent entities from gaining market dominance. Rather, the TCA's prescribed restrictions are intended to prevent abuse of dominant positions to exploit competitiveness or monopolize the market.

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New Trade Competition Act (from page 1)

The new TCA will generally prohibit entities with market dominance from conducting the following activities:

- ▶ Unfairly fixing or maintaining the purchase or selling price levels of goods and services;
- ▶ Unfairly setting conditions that require other business operators, who are its trading partners, to limit their provision of services, or their manufacturing, purchase, or sale of goods, or to limit their opportunities to buy or sell goods, provide or receive services, or procure credit from other business operators;
- ▶ Suspending, reducing, or limiting the provision of services, or the manufacturing, purchasing, sale, delivery, and importation of goods, without reasonable grounds, as well as destroying or causing damage to the goods to reduce the quantity so it falls below market demand; and
- ▶ Intervening in the business operations of others without reasonable grounds.

Not only will the new OTCC prescribe criteria for identifying an entity's market dominance, such as market share and annual turnover, but the new TCA will also require consideration of competition factors in the specific market, such as capital amount of the business operator, number of competitors in the relevant market, and access to distribution channels.

Operators with Common Control

Recognizing that businesses can be conducted by a single company or a group of companies, the new TCA also adopts the concept of operators with common control, and it becomes a vital factor for several considerations. On the one hand, when considering a market dominant position, the market share and annual turnover of business operators "that have a relationship in terms of policy or control" must be collectively considered as a whole. On the other hand, cartels or collusions in some certain circumstances may be exempted from the application of the law if such arrangements are made among business operators "that have a relationship in terms of policy or control." The OTCC will subsequently be required to issue criteria and conditions to facilitate the determination of "a relationship in terms of policy or control."

Restrictions on Merger

Under the new TCA, mergers, acquisitions, amalgamations, entire and partial business transfers, joint ventures, and direct or indirect share acquisitions may fall within the definition of a "business merger."

- ▶ **Approval requirement:** The new TCA sets out a general framework for merger requirements, whereby prior approval from the OTCC is required if it is possible that a merger transaction could result in a market monopoly or create market dominance. However, no definition for market monopoly is provided in the new TCA.
- ▶ **Notification requirement:** Any merger that causes a significant reduction in market competition, in accordance with the criteria to be prescribed by the OTCC, must be reported to the OTCC within seven days from the date of the merger.

A merger of business operators "that have a relationship in terms of policy or control" are not subject to this approval or the notification requirements.

It remains to be seen whether, and when, the new independent OTCC will issue these criteria. The concept of restrictions on mergers is already available in the current TCA, but has never been enforced due to the absence of subordinating legislation relating to M&A criteria.

Anticompetitive Agreements

The following anticompetitive practices between business operators **in the same market** are prohibited:

- ▶ Fixing the purchase or selling price, or any trade conditions which will affect the price of goods or services;
- ▶ Limiting the quantity to be manufactured, bought, sold, or provided as agreed;
- ▶ Setting the terms or conditions in a collusive manner to enable one party to win a bid or tender, or to prevent one party from participating in a bid or tender; and
- ▶ Designating the locality where each business operator will sell, or reducing the sale or purchase in such locality, or designating the purchasers or sellers to whom each business operator will sell or purchase goods or services, whereby other business operators will not be permitted to purchase or sell such goods or services.

Business operators must not collaborate to conduct the following anticompetitive practices **in any market**:

- ▶ Setting certain conditions, such as fixing the purchase or selling price, or setting any trading conditions which will affect the price of the goods or services between business operators who are not competitors within the same market;
- ▶ Reducing the quality of goods or services so that it is lower than the previously manufactured, sold, or serviced levels;
- ▶ Appointing or assigning any person to be the exclusive seller of goods or services within the same type or category;
- ▶ Setting conditions or practices in respect to the purchase or sale of goods or services so that they are the same as agreed upon; and
- ▶ Any kind of mutual agreement as prescribed by the OTCC.

Exemptions could be available for franchise arrangements, distributorship arrangements, and business operators "that have a relationship in policy or control."

Overseas Agreements

Agreements with overseas business operators which will result in a monopoly or unfairly limit trade competition, and lead to a significant adverse impact on the economy or the benefits of consumers, are prohibited.

Damages for Breach of the TCA

If a TCA violation causes damage to another person, the damaged person is permitted, under the new TCA, to initiate a compensation claim. In this regard, the Office of Consumer Protection Board can initiate the claim on behalf of the claimant. The statute of limitations on such a claim is one year, commencing from the date on which the damaged person is aware of, or should have been aware of, the violation.

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New Trade Competition Act (from page 2)

Current class action law also makes it possible for affected parties to form a class to claim for damages, especially in the case where the market-dominant operator is found to have abused their dominance and caused damage to other business operators.

Penalties for Violating the New Trade Competition Act	
Violation	Maximum Penalty
Pre-merger approval	0.5% of the total value of the merger transaction
Post-merger notification	THB 200,000; and THB 10,000 per day during the violation period
Abuse of market dominance	2 year-imprisonment; or 10% fine in respect of the total revenue; or both
Anticompetitive agreements in the same market (hardcore cartel)	(if the offense is made in the first year of operation, the fine shall not exceed THB 1 million)
Anticompetitive agreements in any market (non-hardcore cartel)	
Restricted agreements with overseas business operators	10% fine in respect of the total revenue (if the offense is made in the first year of operation, the fine shall not exceed THB 1 million)
Unfair trade practices	

Subordinate Legislation

The OTCC is required to issue subordinate legislation, as prescribed in the new TCA, within 365 days from the date on which the new TCA becomes effective.

Thailand Needs the New TCA

The longstanding status of the current TCA as “a tiger without teeth” has inhibited the nation’s economic growth. The government hopes the new TCA will help overcome obstacles to creating a fair and efficient market economy in Thailand, and lead to the creation of a level playing field between market players, especially for new startups and SMEs. Businesses should be aware of, and prepare for, major changes ahead, as the newly proposed law may become effective by the end of 2017. 🐯