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Competition Litigation: New Rules for Criminal and Administrative Actions

On January 17, 2020, Thailand’s current Trade Competition Commission (TCC) again showed their proactive approach to enforcement by issuing guidelines for competition litigation under the Trade Competition Act B.E. 2560 (2017). This act prohibits anticompetitive actions, abuse of dominant market power, cartels, collusion, restrictive agreements or arrangements, and unfair trade practices. The new rules give clear guidance to both the TCC and the public, and will help competition litigation proceed more quickly in order to protect free and fair trade in Thai markets.

Involved Parties

The new rules, which focus on complaints, investigations, and procedures for criminal and administrative actions, specify the role, duty, and rights of the following parties:

- ▶ Claimant – The filer of a complaint (civil or criminal) or report to the TCC concerning a potential violation of the Trade Competition Act.
- ▶ Respondent – The alleged wrongdoer.
- ▶ Accused – The person accused by the TCC of committing a criminal offense regardless of whether the action results in imposition of an administrative penalty.

The rules also clarify that the TCC can initiate an investigation even when no complaint is filed.

Filing a Complaint

The claimant, who may be an injured party or witness to the wrongdoing, may file a complaint with the TCC in writing or by email, in person to a TCC officer, or by telephone. An officer receiving a verbal complaint needs to record it—along with testimony of any accompanying witnesses—and collect the claimant’s signature. Complaints must give the facts and evidence, and written complaints also require the claimant’s signature. Once the complaint is filed, the TCC can proceed with the investigation regardless of subsequent withdrawal or change of circumstances, such as death of the claimant.

The new rules also seem to empower the TCC with a police-like ability to investigate criminal actions. The TCC’s authority in criminal complaints used to be limited to filing a criminal complaint with the inquiry police (the section of the Royal Thai Police tasked with inquiring into criminal cases), who would then investigate the matter and submit a prosecution or non-prosecution suggestion to the public prosecutor. Under the new rules, if a criminal offense is found, the TCC has to ask the inquiry police (or other officers under other laws) to transfer the criminal case under the Trade Competition Act to the TCC. The TCC can

order and summons a person to be interviewed.

Investigation

After receiving a complaint, the secretary of the Office of the TCC (OTCC) may assign an officer to investigate the facts and gather evidence in order to identify the wrongdoer. This process is limited to 30 days from receipt of the complaint, after which the secretary must determine whether the complaint has grounds. The TCC will then issue an order to either dismiss a groundless complaint or to proceed with making a formal accusation according to the relevant criminal or administrative proceedings.

The TCC will appoint a subcommittee to investigate the criminal offense, and must inform the accused of this appointment. The subcommittee can be challenged for conflict of interest if a member has a close connection or conflict with the claimant, the respondent, or the accused.

The subcommittee will commence their work without delay, and the committee’s duties will mirror those of the inquiry police: ordering the accused and witnesses to be interviewed and collecting all evidence related to the wrongdoing. The rules also require the subcommittee to inform the accused of the offense according to the Criminal Procedure Code and give the accused 15 days to reply. The rules prohibit revealing the name, address, or identifying information pertaining to the claimant or witnesses.

The accused may reply to the criminal charge verbally or in writing. The accused is allowed to present witnesses or evidence, or to ask the subcommittee to call in a witness or evidence. The subcommittee may deny the request if they believe it is a delay tactic, is made in bad faith, or concerns irrelevant witnesses or evidence.

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Guilt under the Trade Competition Act

If the subcommittee finds the accused guilty, it will suggest a criminal or administrative penalty to the TCC. If the subcommittee suggests a fine under section 79 of the Trade Competition Act, the accused must plead guilty—or, for the purposes of a settlement offer, decline to accept guilt—and pay the fine within the specified time. The criminal case can be revoked under the Criminal Procedural Code, but only if the accused pleads guilty first.

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Interim Orders

The interim order is a new tool that enables the TCC to protect competition more efficiently. An interim order is made during the course of the subcommittee's investigation, without the court's involvement, in order to remedy damage, and prevent further damage, in the public's interest.

The subcommittee can recommend that the TCC issue an interim order forcing an accused business operator to suspend, cease, or change their operations for a specified duration if there is reasonable cause to believe that the accused is involved with a violation of section 50 (abuse of a dominant market position), section 51 paragraph 2 (merger or acquisition to dominate the market), section 54 (formation of a serious cartel), section 55 (reduction of competition), section 57 (unfair trade practices), or section 58 (collusion with a foreign business operator for monopoly or unfair trade impacting the economy and the public interest as a whole).

To solve the above problems, administrative penalties were imposed in the current act for the following offenses:

Violation	Administrative Penalty
<ul style="list-style-type: none"> Mergers and acquisitions that may significantly reduce competition (s. 51 p. 1) 	Fine of up to THB 200,000 and additional daily fines for as long as the violation exists, up to a maximum of 10,000 days
<ul style="list-style-type: none"> Merger or acquisition that may lead to monopoly or market dominance (s. 51 p. 2) Violation of an officer's order in relation to a merger or acquisition (s. 53) 	Administrative fine of up to half the total value of the merger or acquisition
<ul style="list-style-type: none"> Cartel with other business operators (s. 55) Unfair trade practice (s. 57) International collusion (s. 58) 	Administrative fine of up to 10% of revenue in the year of the violation, capped at THB 1 million in the first year of business operation
<ul style="list-style-type: none"> Noncompliance with an interim order demanding the wrongdoer suspend, cease, correct their action (s. 60) 	Administrative fine of up to THB 6 million and additional fines of up to THB 300,000 daily for as long as the violation exists

The TCC's order is considered an administrative order under the law of administrative procedures. If the wrongdoer insists on not paying the administrative fine, the TCC can file a complaint with the Administrative Court to enforce it. If the court agrees with the TCC, it will order the confiscation of the wrongdoer's assets for a public auction and sale in order to pay the administrative fine.

The wrongdoer can also oppose the TCC's administrative order by filing a complaint requesting the Administrative Court to revoke the TCC's order. If the Administrative Court considers that the TCC's order is not lawful, it will be revoked.

Investigation for an Administrative Action

In general, the TCC can impose an administrative fine on the wrongdoer under the Trade Competition Act. However, the new rules specify that, in a complicated administrative case, the TCC may appoint a subcommittee to give its opinion on the offense. An administrative case can be challenged by the accused in the Administrative Court, which may impose an administrative order or fine.

Although specific required qualifications have not been given in the new rules, members of the subcommittee for administrative cases must be government officers or former government officers with knowledge and experience in administrative law, economics, law, accounting, or other subjects necessary for considering the case. Members should also have experience in administrative procedures or governmental administration.

The new rules also set a 90-day time limit for the secretary or the subcommittee to receive the complaint. Once appointed, the subcommittee must also offer their opinion on the administrative offense and the administrative fine within 90 days, with a maximum extension of an additional 30 days. After 120 days, either the secretary or the TCC may allow additional extensions, at its discretion, on a case-by-case basis. An order to impose an administrative penalty must be made in writing and must give a detailed explanation of the offense and relevant legal provisions, as well as the administrative penalty being imposed. The TCC must also inform the wrongdoer of their right to appeal the order to the Administrative Court.

Summary

The TCC's new rules on complaints, investigations, and procedures for criminal and administrative actions provide comprehensive guidelines to claimants, accused parties, OTCC officers, and the TCC themselves. By allowing the TCC to act as the inquiry authority in a criminal case, as well as an administrative authority that can issue an administrative order or interim order even before filing the case with the court, the rules assure the public that free and fair competition will be protected more effectively and efficiently than before. With the TCC now taking a more proactive posture in regulating and enforcing the Trade Competition Act, business operators should be ready to fully comply with the Trade Competition Act by being sure to avoid any potentially anticompetitive acts. 🚀

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