

CHAPTER 22 TRADE REGULATION AND MONOPOLIES

In this chapter, we consider two statutes that are intended to regulate certain commercial activities. The Trade Competition Act is intended to regulate trade practices that are considered to be unfair and also to regulate monopolies in business. The Price of Goods and Services Act enables the government to issue regulations to control the supply or prices of commonly used goods and services.

Trade Competition Act The Trade Competition Act came into force on 22 March 2000.

Regulatory authority The Act sets up the Trade Competition Commission as the regulatory authority to oversee policy, implement the Act and draft regulations and orders under the Act.

Application The Act applies to all business activities owned by business operators. It does not apply to state enterprises, state-awarded concessions, agriculture, and businesses exempted by regulations.

Prohibited monopolies and unfair trade practices The Act distinguishes between actions taken by business operators having a dominant market position and other business operators. There are greater restrictions placed on businesses that have dominant market position. A business operator with dominant market position means a situation where one or more business operators have market share and total sales revenue, exceeding the level permitted under the Act.

The Commission also has power to order the suspension, stoppage or changing of the market share of a business operator having dominant market position when that share exceeds 75%.

Restriction of business operators with dominant market influence A business operator with a dominant market position is prohibited from conducting any of the following:

1. To fix or maintain unfair purchase or selling prices, such as to sell its products below average total costs with the effect of driving out competitors and preventing new market entries, or to engage in selective discounting or price-cutting as a means of preserving dominant position and to exclude a new competitor from entering the market.
2. To set conditions by means of which the business's customers may not offer services, produce, purchase or distribute goods, or are prevented from buying or selling goods, offering or receiving services, or seeking credit from other undertakings.

3. To limit, reduce or suspend services, production, purchases, distribution, delivery or importation into Thailand, without reasonable grounds, or to destroy or cause destruction of goods in order to reduce supply to be less than demand.
4. To interfere with the business operations of third parties, without reasonable grounds.

Unfair trade practices Business operators with or without a dominant market position may not join with another business operator, the effect of which is to reduce or eliminate competition in any market for goods or services by:

1. Fixing the sale price of goods or services so as to be the same as an agreed price, or restricting the volume of sales of goods or services;
2. Fixing the purchase price of goods or services so as to be the same as an agreed price, or restricting the volume of sales of goods or services;
3. Entering into an agreement to control the market;
4. Entering into an agreement to enable one of the parties to obtain a bid to sell or purchase goods or services or to prevent a party from entering into a bid to purchase or sell goods or services;
5. Imposing restrictions on competition by business operators outside Thailand, that have relationships with business operators in Thailand, or in a business operator's contract territory; or
6. Performing any unfair act which results in the destruction, damage, obstruction, hindrance or restriction of the operations of other business operators, in order to prevent other business operators from operating their businesses or to cause an operator to dissolve his business.

Monopolies and unfair trade practices The Act prohibits the existence or acquisition of a monopolistic position. No merger may take place between two business operators which may result in a monopoly or reduce competition. The term "merger" is defined as follows:

1. A merger between manufacturers, distributors, manufacturer and distributor, or between service providers, which causes one business operator to cease to exist and the other business operator to maintain its existence, or which results in the creation of a new undertaking.

2. The acquisition of the assets, in part or in whole, of one undertaking by another undertaking in order to control its business policy, operations or management.
3. The acquisition of the shares, in part or in whole, of one undertaking by another undertaking in order to control its business policy, operations or management.

Exemptions Generally, the Act prohibits a business operator from joining with another business operator if the effect is to lessen or eliminate competition in the market. However a business operator may apply for an exemption, if the type of anti-competitive practice falls into the following categories:

1. designating a locality in which each business operator may sell or reduce the sale of goods or services, or designating customers to whom each business operator shall sell goods or services without competition from other business operator.
2. designating a locality in which each business operator shall purchase goods or obtain services or designating a person from whom such business operator may purchase goods or services
3. determining the quantity of goods or services that each business operator may manufacture, purchase, sell or offer, in order to limit the volume of goods or services so as to be less than market demand.
4. reducing the quality of goods or services so as to be lower than that manufactured, sold or serviced previously, by selling the same goods at the old or higher prices.
5. appointing a person to be the exclusive seller of goods or services of the same kind or category.
6. determining conditions or practices with respect to the purchase or sale of goods or services so that they may be of the same type, as agreed upon.

Application for exemption The Commission is given authority to grant an exemption. A business operator seeking may apply to the Commission, stating the reasons and necessity for the restrictive trade practice, the method of proceeding and the duration of the activity. The Commission has a duty to examine the application within 90 days. If after review, the Commission is of the opinion that the restriction to the competition benefits the promotion of business, does not cause serious damage to the economy and does not affect material benefits to consumers, the Commission shall grant permission for such practice.

If permission is refused, there is a right of appeal to the Appeal Committee, exercisable within 30 days of receipt of the order. The Appeal Committee's decision must be given within 90 days.

Enforcement The Act sets out a range of fines and imprisonment for breaches of duties imposed by the Act. If the offender is a juristic person, the managing director, managing partner or person in charge of the business can be made personally liable.

The Trade Competition Act in practice Since the Act was passed, the Commission has struggled to define what constitutes a *dominant market position*. This is perhaps not surprising, when one considers that Thailand generally adopts a *laissez faire* attitude to the operation of business activities.

Definition of dominant market position The Commission ruled in 2007 that a *dominant market position* will exist regarding any goods or services, where:

1. A business operator had a market share in the previous year exceeding 50% and turnover of at least 1,000 million Baht, or
2. Where the top three business operators had a combined market share in the previous year exceeding 75% and at least 1,000 million baht turnover. This is except where a business operator had a market share of less than 10% or turnover of less than 1,000 million baht in the previous year.

Guidelines for unfair conduct in the retailing and wholesaling industry In 2003, the Commission issued guidelines to exclude certain conduct in the retailing and wholesaling industry that was deemed to constitute unfair trade practices, as follows:

1. Unfairly low sales prices, where sales are made at a price lower than those stated in invoices, unless such a sale is reasonably necessary in the business: for example, where the product's life is about to expire, or the product is used seasonally and is out of date.
2. Unfair exercise of dominant bargaining power in a way that may destroy, impair, impede or restrict the business operations of other business operators or prevent others from carrying on business or causing cessation of business. This would include:
 - (a) Compulsion to purchase: for example, forcing its trade partners to pay advertising expenses to promote their products with no effect on their sales; forcing them to apply for business to business e-commerce services or forcing them to use its own distribution service

- (b) Requesting the dispatch of sales people to its shop with the intention of reducing its own business expenditure.
- (c) Forcing its trade partners to share its benefits with no proper reason, for example a request to share profits.
- (d) Unfair coercion of its trade partners to sell goods or supply services up to a certain required quantity without proper reason.
- (e) Unfair determination of terms and conditions that may cause its trade partners to be disadvantaged but at the same time to be beneficial to itself, for example, fixing entrance fee for goods, discounts, rebates, discount for compensation for loss and discounts for advance payment.
- (f) Determining terms and conditions or special agreements that may restrict its trade partners' business opportunities: for example, prohibiting its trade partners from selling products to its competitors.
- (g) Requiring its trade partners to comply with its resale price maintenance strategy unless the resale price is an unconditionally suggested price.

3. Adopting discriminatory treatment between trade partners, by fixing different terms and conditions or prices for different trade partners, or refusing to do business with some trade partners without proper reason, e.g. deleting a trading partner's products and replacing them with its own products.

4. Any conduct to acquire a trading partner's business information, business secrets, or technology and unfairly use these to compete with the trading partner as a free ride. e.g. where it produces products with similar features or packaging as those of its trading partner and sells them side by side on shelves expecting consumers to believe that the products belong to other suppliers or where it discontinues its trading partner's products in order to make its own brand available on the shelves.

5. Unfairly forcing or inducing its trade partners not to do business with its competitors. E.g. by creating misunderstandings, offering unreasonable business profits and forcing tied purchasing.

Prices of Goods and Services Act (1992)

Purpose This Act enables controls to be imposed on the price of goods and services. It applies to all businesses, including agriculture, industry, commerce and services.

Enforcement Enforcement of the Act is through a central Commission on Prices of Merchandise and Services or Provincial Commissions on Prices of

Merchandise and Services. These Commissions in turn come under the supervision of the Department of Internal Trade of the Ministry of Commerce.

Exclusion The Act does not apply to activities of central or local government.

Powers In order to control the purchase price, distribution price or cases of unfair trade, the Cabinet has authority to prescribe any goods or services as controlled goods or services.

The Cabinet has, amongst other things, power to:

1. prescribe the volume, storage place, cost, expenses, production plan, plan for import, plan for export, purchase plan, distribution plan, plan to change the price or other detail or discount in distribution, production process and method of distribution of controlled goods or services;
2. prescribe the storage or increase the volume of reserve of controlled goods and prescribing area and place for reserve of controlled goods;
3. prohibit or permit the export or import into any area the controlled goods;
4. order a business operator to improve efficiency in production, to import into Thailand, purchase, distribute or store controlled goods or services, including to stop or to reduce the expense prescribed as excessive;
5. arrange for rationing in the purchase and distribution of controlled goods or services;
6. order the sale of controlled goods or services according to the volume and price prescribed, including ordering the sale to the authority or any person as prescribed;
7. prohibit the sale gift, use, transfer or change the condition of controlled goods or services in excess of the volume prescribed;
8. prescribe measures to protect hoarding of controlled goods or services or possession of controlled goods in excess of the volume prescribed.

A business operator may not do any thing with intent to cause the price to become lower or higher than appropriate or cause upheaval to the price of any goods or services.

No person may hoard controlled goods in excess of the volume prescribed or keep controlled goods in a place other than that notified to a competent official, nor take out controlled goods for distribution or offer for sale as normal or refuse

to distribute or delay the distribution or delivery of the controlled goods, without good reason.

No operator of controlled services may cease to provide normal services or refuse to provide services or delay services, without good reason.

Priorities for enforcement The Department of Internal Trade maintains a list of products the prices of which are regulated under the Act. As at October 2006, the list is divided into three parts, as follows:

Sensitive List – this consists of gasoline oil, diesel oil, milk powder, fresh milk, wiring/cabbling and delivery services.

Priority Watch List – this consists of sugar, fertilizer, animal feed, tyres, cement, galvanised iron, steel rods, steel sections, steel sheets (hot/cold rolled and stainless) and repair services.

Watch List – this lists 204 other products and services in every day use.

Enforcement The Act provides for a system of fines and imprisonment for breach of particular duties imposed. Where the offender is a juristic person, the managing director, managing partner or person responsible for management may face personal liability.

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