CPI's Asia Column Presents:

Thailand: Coming into force a new Trade Competition Act

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CPI COMPETITION POLICY INTERNATIONAL

May 2018

A new Trade Competition Act (the "**Act**") has come into force in Thailand on 5 October 2017, replacing the previous law that was in place since 1999. Before the turn of the century, Thailand had been the first ASEAN nation to adopt a comprehensive competition law regime, albeit being under no external pressure to do so. By contrast, most of the neighbouring countries only came to pass competition laws in the following years because of more or less explicit requests from foreign governments or the International Monetary Fund.

Despite this Thai voluntarism, the first competition act proved to be relatively ineffective. Its implementation required lengthy court processes, resulting in just a few cases initiated over the years and ultimately, no successful prosecution. Acknowledging explicitly these shortcomings in the Act itself, the legislator adopted the new law with the aim to set up a more robust and flexible regime relying on an independent authority, operational merger control rules, and a deterrent set of administrative and criminal sanctions.

This article covers the new institutional and substantive framework, the revamped arsenal of sanctions and the challenges arising from the transition period.

I. A new agency with wide powers

The Act creates a new enforcement agency, the Trade Competition Commission ("**TCC**"), supported by the Office of the Trade Competition Commission ("**OTCC**") to run the day-to-day operations. Though the agencies' names are the same as under the previous law, the new TCC and OTCC contrast from their predecessors in so far as they are designed to be independent of government. Under the previous regime, they were only in effect government departments.

The TCC is a board of seven Commissioners selected for four-year terms. The conditions of eligibility and selection process are designed to ensure both subject matter expertise and independence. Appointment of the new TCC must be completed within 270 days of entry into force by 3 July 2018, period during which the previous TCC remains in operation. Efforts to appoint the Commissioners have not been successful so far.

The powers of the TCC include issuing regulations, notifications and guidelines to clarify certain aspects of the Act and to facilitate its implementation. A number of these regulations will have to be adopted within 365 days of the Act's entry into force. As of the date of this article, the TCC appointment has not been completed and though a number of regulations are in drafting stage, none has been finalised yet. This situation creates a level of legal uncertainty that warrants due consideration during the first year of the Act coming into force.

The TCC powers will also include classical enforcement powers, notably: considering complaints, making exemption and enforcement decisions such as imposing administrative sanctions, and asking the government to prosecute cases of a criminal nature.

The OTCC, a government agency which is not part of the civil service, is headed by a Secretary General who must be free of any conflict of interest (whether business or political) and comprises full-time staff. The OTCC will provide the TCC with administrative and operational support: it will analyse complaints, conduct investigations and make enforcement recommendations to the TCC.
To conduct its investigations, the OTCC will be empowered to issue interview summons to individuals and business operators, and to conduct dawn raids, i.e. enter and search business operators' premises after obtaining a search warrant. As such, the OTCC is entrusted with a wide range of investigative powers which is in line with many of its counterparts internationally.

However, it is noteworthy that the Act does not appear to provide leniency rules. Under such regime, participants in cartels would come forth to the authorities, providing evidence of the offence in exchange for full or partial immunity. It will be interesting to see if the absence of leniency hinders the effectiveness of the Act. In many other jurisdictions, such tool has proven to be a key contributor to successful enforcement.

II. Anti-competitive practices

The Act sets out a range of anti-competitive conduct which can be captured in to broad categories: unilateral conduct by dominant firms, and practices resulting from an agreement with third parties.

a. Unlawful exercise of dominant market power

The Act prohibits abuse of dominant market power, consistent with the approach under many overseas competition law regimes. The fact that a company holds a market dominant position is not illegal per se, and a violation is only established if a dominant company engages in abusive conduct.

In line with the previous law, the Act defines a dominant market position based on market share and turnover of the company as prescribed by the TCC. In this respect, and until the TCC publishes new thresholds and guidelines on dominance, the rules set under the previous regime remain in place. This means that a business operator is presumed dominant where (a) a single player has over 50% market share and has at least THB 1 billion turnover, or (b) the top three business operators have an aggregate market share of at least 75% and have at least an aggregate turnover of THB 1 billion. As a safe harbour, an operator whose market share is less than 10% or whose turnover is less than THB 1 billion is considered not to be dominant.

It is expected that the new implementing regulation on market dominance definition will continue to refer to (perhaps adjusted) market share and turnover criteria. However, the Act goes one step further, introducing another set of consideration, i.e. qualitative "competition conditions factors". These include the number of operators on a market, the amount invested, the distribution channels and the regulatory environment. It will be interesting to see how the new TCC guidance will elaborate on these criteria and in particular the weight they will be given in the assessment. Companies however should already start considering their own situation in light of these factors.

The Act goes on to list four types of unlawful exercise of a dominant market position: (i) unfairly setting the price of a good or service (which could include both excessive and predatory pricing); (ii) imposing unfair trading conditions (which could capture tying and bundling); (iii) refusing to deal; and (iv) interfering in another company's business without legitimate reason.

It is possible for an operator under Section 59 to seek a determination by the TCC as to whether the conduct it envisages engaging in is acceptable or not (subject potentially to certain conditions). This could be a welcome tool to increase legal certainty under the Act, to the extent the TCC's review of the application is speedy and effective.

b. Anti-competitive Agreements

Aside from unilateral conduct by dominant firms, the Act prohibits anti-competitive agreements which monopolise, reduce or restrict competition in a market. Specifically, the Act singles out under Section 54 the most egregious practices namely price-fixing, output restriction, bid-rigging and market sharing agreements between competitors.

Less egregious anti-competitive conduct includes a wide range of business practices: vertical restraints (Section 55); unfair trade practices such as obstruction of business, use of superior market or bargaining power or unfair trading conditions (Section 57); and arrangements with foreign operators resulting in monopolisation or unfair trade restriction (Section 58).

While the Act does not refer to restriction of competition by object or effect, now widely used in many other regimes, it is noteworthy that Section 56 opens the door to such distinction in practice. Indeed, it provides that vertical restraints (Section 54) may not violate the Act to the extent that they present sufficient efficiencies or are a regularly-used template of vertical contract such as a licensing agreement (and so long as the competition is not entirely eliminated and the consumer's share of the benefits is duly considered). The vertical restraint would also not run afoul of the Act if they are adopted as a result of a binding regulation.

Borrowing from the well-established "single economic unit" doctrine, the Act clarifies that there can be no anti-competitive conduct between business operators which are under common control. The concept of control remains to be elaborated in a TCC notification.

Finally, like for dominant firm conduct, businesses that enter into any of the above arrangements will be allowed to seek a formal determination by the TCC as to the validity of their agreement, possibly subject to conditions (Section 59).

Under the previous regime, all the above practices were criminal in nature, and punishable by imprisonment and/or fines. Enforcing these provisions proved challenging, as prosecutors struggled to bring enough evidence to court. The Act therefore seeks to address this issue by reducing the scope of offences that are criminal and creating a range of administrative sanctions.

III. Sanctions

First, under Section 60, the TCC is empowered to issue administrative orders which require business operators to cease, suspend or correct their conduct. This order is subject to appeal before the administrative courts within 60 days of receipt of the order.

Second, the most egregious conduct, namely abuse of market dominance and anti-competitive agreements under Section 54 (i.e., cartels between competitors), will be a criminal offence, punishable by a two-year prison sentence and/or a fine of up to 10% of revenues for the (presumably last) year of the offence. The TCC having made a finding under these provisions will need to ask the public prosecutor to launch proceedings against the business operator in order for these criminal sanctions to be imposed.

There is no guidance yet regarding which revenue is to be considered to determine the cap (i.e. Thai or global revenue; revenue of the group or only of the relevant sales). It is hoped this important topic will be addressed in due course in implementing regulation to increase legal certainty.

Third, the TCC will be empowered to adopt administrative sanctions against the “less egregious” violations under Sections 55, 57 and 58, with fines of up to 10% of revenues in the (presumably last) year of the offence, subject to appeal to the Administrative Court. No criminal sanction can be imposed.

Fourth, regarding individuals, the Act importantly clarifies that when an offence is committed under the instruction, or as a result of the conduct, of an individual (director, manager or employee in charge), such individual may be subject to a criminal or administrative sanction (as the case may be) of the same nature as the legal person. This provision is likely to be critical to ensure the Act’s deterrent effect.

Fifth, the Act acknowledges the possibility for plaintiffs to launch private actions for damages (either individually or collectively, supported by the Consumer Protection Commission). It is not entirely clear from the Act whether obtaining a finding of law as to a violation (either by TCC decision or the criminal court’s judgment) would be a prerequisite to launch an action. The language seems broad enough to welcome standalone actions, but a clarification through implementing regulation would be welcome.

IV. Merger control

In what is possibly this reform's most significant development, the Act introduces a dual merger control regime covering the whole economy, except for a few sectors which are subject to specific sectoral rules. The 1999 law provided merger control rules, but implementation regulations having never been adopted, they were never implemented (save for the energy, telecoms and broadcasting sectors).

The OTCC is currently developing drafting regulations based on which it will enforce the Act's merger provisions. The regulations will provide the form to be used to notify transactions. It is our understanding that until these regulations are adopted, no merger notification or approval will be required (because there is no form to do so yet). Parties involved in deals that will sign before, but close after, the adoption of these regulations should therefore act with caution, as there may be legal uncertainty during that gap. They may wish to consider consulting with the authority.

The new merger control regime concerns mergers and acquisitions of control (via shares/assets), including presumably acquisitions of minority interest (granting control). Though the situation of joint ventures is not explicitly set out, it is expected that they will be captured. However, it is not clear whether "non-full function" joint ventures would be subject to notification or approval. Contacts with the OTCC suggest that there is a general aspiration to refer to EU merger control for guidance, which may suggest that non-full function joint venture would not be captured. This remains to be confirmed.

The Act clarifies that internal reorganisations are not subject to filing requirement. However, other questions remain, such as whether a foreign-to-foreign transaction (with no change of shares' direct ownership in Thailand itself) would be captured. Other questions are addressed below.

The key features of this dual, mandatory merger control regime are as follows:

- *Post-merger notification of mergers or acquisitions that may "significantly reduce competition in any market"* (a concept that is not defined in the Act but expected to be defined in the implementing regulations) ("**Notification Process**").

    - The Notification must be made within 7 days from the date of the merger (likely to be understood as "from completion"). It is expected that the TCC will provide notification thresholds in the implementing regulations to be adopted in the coming year; as mentioned above, until such thresholds are formally announced, the OTCC would not expect to receive notifications.

    - It is further understood that the Notification Process would *not* result in a decision by the TCC. This leaves open the question of what would happen to transactions which have been completed and for which the TCC subsequently finds a significant competition concern. This may be left to be addressed through the rules on prohibition of abuse of a dominant market position.

  - Failure to notify the transaction would result in a relatively modest administrative fine (THB 200,000) as well as a fine per day (THB 10,000) for the duration of the violation.

- *Pre-merger approval of mergers or acquisitions that may result in a monopoly or create dominance ("*Approval Process*").*

  - Though the Act is not explicit, this Approval Process is to be read as being suspensory (no closing prior to approval). The TCC has 90 days (+15 days if needed) to approve (including with conditions), or prohibit a transaction.

  - Until new regulations are adopted, the concept of dominance should be read in light of the previous law – see section on abuse of dominant market power above.

  - Failure to obtain TCC's approval may result in the TCC being able to order a suspension or an adjustment to the transaction (the details of which will be further set out in implementing regulations) and/or a fine of up to 0.5% of the transaction's value.

  - It is our understanding that although dominance can be established under the old implementing regulations, parties are not expected to file for approval until the new implementing regulations are adopted.

  - There are a number of open questions regarding the Approval Process. To name only two: (i) will a transaction involving a previously dominant firm and therefore not "creating" a dominant player be subject to the Approval Process?; and (ii) will a transaction generating no increment in the dominant firm's market share be subject to the Approval Process? It is hoped the implementing regulations will address these scenarios to optimise legal certainty.

V. Transition and next steps for businesses active in Thailand

As mentioned above, the year that follows entry into force is filled with legal uncertainty. The Act does not refer to any grace period, yet the law is far from settled: the TCC is not appointed yet, and a large number of implementing regulations must be adopted to clarify or activate certain provisions of the Act. Until the TCC is up to speed and has adopted the various implementing regulations, the current Trade Competition Commission and existing subordinate regulations under the previous law remain in force. Relevant stakeholders have already voiced concerns that 365 days may not be sufficient to finalize the full suite of implementing regulations.

In any event, businesses active in Thailand would be wise to take the opportunity of this transition year to review carefully their practices and to make adjustments if necessary. Parties to mergers having a nexus with Thailand should also consider the timing of their transaction to determine whether it is likely to require a filing with the Thai authorities. In case of doubt, the parties may consider approaching the officials to discuss the matter.

The Thai government is determined to give teeth to this second iteration of their competition law and businesses should respond to this policy imperative with proactive compliance measures.