Antitrust Chronicle

SUMMER 2015, VOLUME 2, NUMBER 2

ASEAN Competition Law: Part I

CPI COMPETITION POLICY INTERNATIONAL

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
August 2015 (1)

Introduction to CPI Special Issue on ASEAN Competition Law

R. Ian McEwin
University of Malaya

Introduction to CPI Special Issue on ASEAN Competition

R. Ian McEwin[1]

Southeast Asia is a region of considerable ethnic differences, levels of economic development, regime types (although all are authoritarian), state administrative capacity, and general institutional development. Despite these considerable differences, the Association of Southeast Asian Nations ("ASEAN") in December 1997 adopted a Vision 2020 that envisaged "a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services investment and freer flow of capital, equitable economic development and reduced poverty and socioeconomic disparities." In 2003, ASEAN leaders signed the Declaration of ASEAN Concord II aimed at developing an ASEAN Economic Community ("AEC") by 2020—brought forward to 2015 at the 12th ASEAN Summit in the Philippines.

In November 2007, at the 13th ASEAN Summit in Singapore, ASEAN Governments signed the ASEAN Charter, which outlined ASEAN Member States commitments to economic integration. A *Blueprint* was laid out to accelerate the economic integration.[2] As part of its goal of achieving a "highly competitive economic region" the *Blueprint* included commitments to develop a competition policy (as well as other goals such as strengthening consumer protection, regional co-operation in intellectual property rights, co-operation in infrastructure development, etc.).

In a major change of direction, the Singapore Summit also committed to moving away from a soft-law approach of political commitments towards an "adherence to rules-based systems for effective compliance and implementation of economic commitments."[3] For competition policy the *Blueprint* noted:

> 41. The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some (but not all) ASEAN Member Countries (AMCs). There is currently no official ASEAN body for cooperative work on CPL to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on CPL.[4]

The *Blueprint* also said that all ASEAN Member Countries would endeavor to introduce competition policy by 2015. As of August 2015 all countries in ASEAN[5] have adopted a competition law, apart from Cambodia—which is very close.

---

[1] Dr. R. Ian McEwin holds the Khazanah National Chair of Regulatory Studies, University of Malaya.

[2] ASEAN Economic Community Blueprint, *available at* http://www.asean.org/archive/5187-10.pdf.

[3] *Id.* at 21.

[4] *Id.* at 32.

[5] Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

As part of the Action Plan, in 2010 the ASEAN Secretariat published the *ASEAN Regional Guidelines on Competition Policy* that had been developed by the ASEAN Experts Group on Competition ("AEGC").[6] The *Regional Guidelines* were to "serve as a general framework guide for the AMSs as they endeavour to introduce, implement and develop competition policy in accordance with the specific legal and economic context of each AMS."[7] The *Regional Guidelines* also noted that the "Regional Guidelines serve only as a reference and are not binding on the AMSs."[8]

While the *Regional Guidelines* claim to "take into account the varying development stages of competition policy in the AMSs"[9] the *Regional Guidelines* were written by a European law firm and are based on European Community competition law with little account taken of the economic conditions and institutions in Southeast Asia and the appropriateness of a general model of competition law for the region. Partially as a result of this approach, the *Regional Guidelines* have only served as a general guide and have not been followed in detail by any Member State.

The eight papers in this special issue describe the current state of play in all ASEAN countries except for Brunei Darussalam and the Lao PDR. These are two of the three countries that have not yet finalized and made public their competition laws. Brunei has approved a competition law but not disclosed it as yet. Their law is likely to follow the approach followed in Singapore and Malaysia, which are both based on European competition law. Given Brunei's small population, and as its major industries are covered by competition codes in regulation, there would not seem to be much scope for a general law—perhaps simply a cartel law should be sufficient.

The National Assembly of the Lao PDR approved changes to the Prime Ministerial Decree of 2004 on July 16, 2015, which are currently being finalized before final approval. The 2004 Decree was based on Thai competition law, but in several drafts that I was involved with there was a move to incorporate some of the market share presumptions in the Vietnamese competition law—but as the law has not been finally approved and translated, this is only speculation.

In his article, David Fruitman speculates about the final version of competition law in Cambodia. As he points out there has been a long gestation period (In 2004, Cambodia committed, as part of its accession to the WTO, to enact a competition law by 2006). But the law is close and while Fruitman does not have the benefit of the latest draft his analysis of a previously released draft should provide good guidance on the likely final outcome.

Myanmar is the last ASEAN country that needed to introduce a completely new competition regime by the 2015 deadline. It has passed its competition law (Competition Law No. 9/2015) but it has yet to come into effect. Even when it comes into force there will be a two-

[6] ASEAN Secretariat, *ASEAN Regional Guidelines on Competition Policy,* (August 2010), *available at* http://www.asean.org/archive/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf.

[7] *Id.* at 1, ¶1.2.1.

[8] Id. at 1, ¶1.2.2.

[9] Id. at 2, ¶1.3.1.

year grace period before enforcement commences. As Minn Naing Oo & Daren Shiau point out, guidelines and regulations are urgently needed to provide more clarity in a number of areas. For example, a literal interpretation of the Act suggests that many of the prohibited practices are *per se* illegal. It is also not clear whether the Act will apply to state-owned enterprises. So while the Act has met the 2015 ASEAN deadline, much more work needs to be done before competition law becomes operational in Myanmar.

The next six papers describe how ASEAN competition laws established before 2015 have worked out and are, in some cases, being restructured. Deswin Nur outlines what has been happening in Indonesia, especially its problems in penalizing cartels. It is proposed that the Act be amended to give the KPPU greater powers to conduct dawn raids and to allow for the admission of circumstantial evidence. Of more importance, perhaps, is that existing competition law has now spurred a concern with broader competition policy issues. In January 2015, the National Development Plan included competition policy. The proposed changes include strengthening the KPPU as well as other general policies including the harmonization of competition policies. Expect some interesting changes with a greater level of enforcement.

Sakda Thanitcul points out that Thailand's competition authority has failed to penalize anyone for anticompetitive activities despite having had a trade competition law since before the turn of the century. As a result, a Sub-Committee of the Thai Law Reform Commission was formed to recommend changes to the Trade Competition Act. The Sub-Committee presented recommendations to the Prime Minister, National Legislative Council, and the National Reform Council in November 2014. They included some important changes including an extension of the Act to state-owned enterprises competing with the private sector and making the Prime Minister responsible for the Act's administration—an improvement on the current situation where there is overlapping ministerial responsibility. It is also recommended that the Trade Competition Commission become independent and have full-time Commission Members and that the Commission provide more detailed guidelines on provisions dealing with abuse of dominance, criminal offenses, etc.

LUU Huong Ly assesses the role that competition law in Vietnam has played in its move from a centrally planned economy to greater reliance on markets. She concludes that enforcement has been poor so far. Of particular concern is the large number of state-owned enterprises—at the time competition law was enacted all monopolies were state-owned. However, they continue to engage in anticompetitive practices to maintain their market dominance. Vietnam introduced competition law in 2004 to join the World Trade Organization; unfortunately, since then there has been little political will to enforce competition law.

Kala Anandarajah and Dominique Lombardi describe the introduction of competition law in Singapore; a law regarded by many as having had a highly successful implementation. The Competition Commission of Singapore ("CCS") recently celebrated 10 years of operation. The authors point out that the Act does give the CCS power to settle or to accept commitments (except for the voluntary merger regime) but there "is nevertheless an overriding power accorded to the CCS to do anything incidental to its functions under the Act." It seems likely that there may be changes in store in this area. The CCS also has a strong outreach program and provides assistance to new competition law regimes in the region.

Anand Raj, Cynthia Lian, and Wen-Ly Chin examine competition law in Malaysia since its introduction in 2012. The Malaysian Competition Commission ("MyCC") has been very active despite the lack of a merger provision. Penalties in Malaysia are potentially very high (up to 10 percent of worldwide turnover) yet, despite these potentially high fines, the authors note that actual penalties so far have been relatively minor. One interesting feature of the MyCC's enforcement so far has been the focus on allegations of abuse of dominance, unlike many other new regimes that focus on anticompetitive agreements. For the future, they note that the oversight of the Ministry of Domestic Trade, Co-operatives and Consumerism "remains influential in the MyCC's operations" and that the MyCC needs to become more independent.

After more than 20 years since a competition-related bill was first filed in the Philippines, and four years after the OFC endorsed an updated and consolidated version for legislative ratification, President Benigno S. Aquino III signed the Philippine Competition Act ("PCA") on July 21, 2015. Geronimo Sy explains how the new Act strengthens competition reforms and, in particular, analyzes the challenges that the new Philippine Competition Commission will face going forward in dealing with the system of strong sector regulators that the Philippines has also embraced.

In all, competition law will evolve gradually in ASEAN. While there are many differences between the competition laws, increasing regional integration is likely to lead to greater uniformity and the development of institutional mechanisms to deal with cross-border competition disputes—but these developments are highly unlikely to lead to an ASEAN competition law regulator with supranational powers. ASEAN competition regimes are very much a work in progress.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
August 2015 (1)

The Ongoing Development of Competition Law in Cambodia

David Fruitman
DFDL

The Ongoing Development of Competition Law in Cambodia

David Fruitman[1]

I. INTRODUCTION

When asked to contribute to this publication, while honored, I was quite nervous about having been given responsibility to describe developments in one of ASEAN's last competition law holdouts. While the Royal Government of Cambodia has committed on numerous occasions to meeting its ASEAN commitments in this area and significant resources, efforts, and expertise has been applied, thus far, the development of competition law in Cambodia has not produced the sought after results.

This article will first review the modern history of the development of competition law in Cambodia and outline some of the motivating and guiding influences. While my original brief for this article suggested an extensive description of the current legislation, as there is no enacted competition law or publicly circulated "final" draft, this article will focus on the key features of the last publicly circulated draft legislation. Where possible, the article will also note comments made by government officials in relation to that draft. Unfortunately, from a timing perspective, I was recently informed that the most recent draft will soon be made publicly available, but I suspect this will happen well after the deadline for this article. Finally, the article will look ahead and try to provide some perspective on the potential impact of competition law in Cambodia once implemented.

II. HISTORY OF COMPETITION LAW IN CAMBODIA

The development of competition law in Cambodia predates both Cambodia's commitments under the ASEAN Economic Community Blueprint and even its World Trade Organization ("WTO") Accession obligations. While some refer as far back as Article 56 of the 1993 Constitution of the Kingdom of Cambodia, which provides for the adoption of a market economy determined by law, as the motivating factor behind the development of completion law in Cambodia it seems more appropriate to link ongoing development efforts to more recent international sources. The first comprehensive competition law draft of which I am aware was prepared with the assistance of international experts from Korea in 2001-2002. While this legislation was not enacted, the Government did pass legislation around that time that often seems to arise when competition law matters are considered in Cambodia. Article 22 of the Law Concerning Marks, Trade Names and Acts of Unfair Competition in February, 2002 (with the Sub-Decree on Implementation passed in July, 2006)[2] ("Trademark Law") provides as follows:

> Any act of competition contrary to honest practices in industrial, commercial, service matters shall be considered as act of unfair competition.

[1] Regional Competition Counsel/Senior Advisor, DFDL, based in Cambodia.

[2] Royal Decree № NS/RKM/0202/06 (Feb. 07, 2002).

Article 23 of the Trademark Law goes on to list certain acts that "in particular shall be deemed to constitute acts of unfair competition." These activities focus on what we would commonly consider deceptive marketing practices or misleading representations. Given the lack of clarity under Cambodian law in relation to the scope of application of Article 22 of the Trademark Law, this Article has regularly been cited in relation to competition-related issues arising in Cambodia as it is not clear that it will be restricted to these specific forms of unfair trade practices. To my knowledge, there has been no judicial or regulatory application of this Article that provides guidance as to whether it would apply to more general competition concerns.

Moving ahead a few years, the next significant effort to enact a competition law in Cambodia derives from its accession in October 2004 to the WTO. As part of its accession, Cambodia committed to enacting a competition law by 2006.[3] By 2005, the European Union ("EU") and the United Nations Conference on Trade and Development ("UNCTAD") were both providing support for this endeavor with various studies as well as meetings with government and stakeholders. The Ministry of Commerce ("MOC") established a Working Group on Competition Law and Policy in 2005 with representatives from relevant Ministries and the Council of Ministers. As an outside observer at the time, it appeared that Cambodia was moving forward to meet its WTO Accession commitment.

In 2006, with technical assistance from UNCTAD, a competition law was drafted and an English version was circulated. As stated recently by a government official, this draft was written in plain language to be more easily understood by stakeholders at the time who had limited experience with competition law issues. The English language version of the draft included explanatory notes and addressed economic concentrations, abuse of dominance and various forms of co-ordinated behavior. This draft raised a number of concerns including:

- potentially excluding significant industries from the general competition regime (e.g. telecommunications, banking, agriculture);
- incorporating general commercial issues into the competition law (e.g. mandatory invoicing of all commercial transactions); and
- not explicitly dealing with substantive aspects of the competition regime (e.g. determination of a dominant position).

While there was a public consultative process in relation to this draft, and the Cambodian government announced intentions to enact a competition law, in 2010, it formally announced that there would be a delay.

Perhaps the most important external motivating force on the development of competition law in Cambodia has proven to be the ASEAN Economic Community ("AEC"). In 2003, the ASEAN Member Countries had agreed to establish the ASEAN Community, including the AEC, by 2020. After witnessing rapid changes in the global trading environment, in 2007 the ASEAN Member Countries committed to accelerating the establishment of the AEC to 2015 and, to that effect, adopted the AEC Blueprint. Article 41 of the AEC Blueprint states:

[3] *See* the Report of the Working Party on the Accession of Cambodia (WT/ACC/KHM/21 15 August 2003).

> The main objective of the competition policy is to foster a culture of fair competition. Institutions and laws related to competition policy have recently been established in some (but not all) ASEAN Member Countries (AMCs) (ed: Footnote omitted). There is currently no official ASEAN body for cooperative work on CPL to serve as a network for competition agencies or relevant bodies to exchange policy experiences and institutional norms on CPL.
>
> *Actions:*
>
> *i. Endeavour to introduce competition policy in all AMC by 2015;*
>
> *ii. Establish a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and coordinating competition policies;*
>
> *iii. Encourage capacity building programmes/activities for AMC in developing national competition policy; and*
>
> *iv. Develop a regional guideline on competition policy by 2010, based on country experiences and international best practices with the view to creating a fair competition environment.*

While the debate of what Article 41 actually requires is beyond the scope of this article, given the recent legislative initiatives in Brunei, Laos, Myanmar, and the Philippines, it appears that there is a consensus among ASEAN Member Countries that the AEC Blueprint requires the enactment of a generally applicable competition law. To my understanding, subsequent to the UNCTAD initiatives in this area, numerous international sources provided offers of assistance to Cambodia to assist in the development of this legislation. The Asian Development Bank ("ADB") began the process of assisting the Cambodian government with drafting a competition law in 2009. The ADB started with a blank slate, but over the course of this project, the draft legislation was extensively revised. While it appears that the ADB may no longer have been actively involved at the time, the Cambodian government appeared to be focusing on that draft in its further work on the competition law. In mid-2013, public announcements were made in regards to the potential inclusion of a leniency policy. In later 2013/early 2014, a draft competition law labeled Version 4.8 was released to stakeholders for public comments.

In January 2015, with assistance from the AANZFTA Competition Law Implementation Programme, a seminar was organized by the MOC to provide further background on competition law concerns and provide an update on the current status of the draft competition law. At this event, it was confirmed that the government had reviewed the comments received in relation to Version 4. It was noted that the current version at that time, which was identified as Version 5.3, was based more on the ASEAN Guidelines on Competition Policy and Law and reflected the numerous consultation processes. At that time, on inquiring about obtaining a copy of the most recent draft, I was informed that it was not yet ready for public dissemination. More recently, I was told that the MOC was waiting for authorization from the Council of Ministers to circulate the most recent draft legislation.

The Cambodian government has stated that it expects to enact a competition law in compliance with its AEC commitments, which may be interpreted as by enactment by the end of 2015. That being said, once the current draft has been finalized, it will still be required to be approved by the Council of Ministers, adopted by the National Assembly and Senate, and then promulgated by the King. It is not clear how long this enactment process will take and, it is

expected that implementing legislation as well as regulations expanding on various provisions of the competition law will be required in order to fully implement the enacted competition law. Essentially, while there is no reason to doubt that the Cambodian government will be able to enact a general competition law in 2015, it is not clear when this law will be fully implemented and effective.

III. THE DRAFT LEGISLATION

As noted above, one of the mandates for this article was to describe the existing or pending competition law; however, since, at the time of writing, neither Version 5.3 nor any later version of the draft legislation has been publicly circulated, with apologies, the descriptions below are based on Version 4.8. While it is expected that at least some of these descriptions are already out of date, as this is, to my knowledge, the last publicly circulated draft, it will provide some context with respect to the proposed legislation. Where the Cambodian government has suggested issues arising in Version 4.8 are being addressed, note of this will be made.

A. Scope

Article 3 of Version 4.8 sets out the scope of the proposed competition law to incorporate an effects test based on actual harm to competition in Cambodia that explicitly contemplates application of the law to conduct that may originate outside of the Kingdom of Cambodia. In addition, the law is intended to apply broadly to any person conducting a business including Public Utilities and those in government monopoly sectors subject to certain listed exceptions. Despite this restriction of application to businesses, as noted below, Version 4.8 also contains provisions specifically applicable to public authorities that regulate business conduct.

B. Relevant Definitions

Article 4 of Version 4.8 sets out a number of definitions used throughout the competition law. For these purposes three of the most pertinent are:

- Dominant position means a situation of market power, where a business, either individually or together with other business operators, is in a position to unilaterally affect the competition parameters in the relevant market for a good(s) or service(s).
    - Supplementing this definition, Article 17 sets out specific market share thresholds that deem a business to be dominant where its market share is:
        - 50 percent or greater;
        - 35-49 percent unless the business can prove that it does not have market power; or
        - less than 35 percent if the business has market power.
    - Article 17 also deems joint dominance to exist where two to four businesses act together to restrain competition and have a combined market share of 75 percent or greater.
- Market Power means the power of a business to control prices, or to exclude competition, or to behave to an appreciable extent independently of its competitors, customers, or suppliers.

- Public Utility means a business operator providing services of general economic interest that provide essential services to the public, and that are subject to regulation by any level of Government in Cambodia.

C. Regulatory Authorities

Version 4.8 contemplates two regulatory bodies—the Competition Commission and the Directorate. The Commission is contemplated as being initially composed of five representatives of various Ministries and the Council of Ministers and four members appointed by the Prime Minister based on the recommendation of the Minister of Commerce (each of the latter to possess relevant qualifications). After five years, Article 6 provides that all nine members would be directly appointed by the Prime Minister based on the Minister of Commerce's recommendations.

Under Article 9, the Commission is tasked with issuing decisions and orders against violators of the competition law, including imposing fines and non-criminal sanctions; issuing regulations; conducting competition studies; supervising the Directorate; and exercising other powers related to promoting competition in Cambodia. One power delegated to the Commission in Version 4.8 that seems somewhat unusual is the power to establish rules concerning the Commissioners' conflict of interest.

While more specific procedures related to the Commission will be outlined below, it is interesting to note that Version 4.8 provides that the Commission's meetings will be private although all of its final actions will be made public.

Much of the Version 4.8's implementation appears to be left to the Commission's regulation issuing power including defining terms; determining rights and obligations of parties participating in hearings; establishing criteria for remedies and sanctions; and, perhaps most importantly, implementing a merger regime including establishing the criteria for determining what mergers are permitted and a merger notification regime (which may also include notification fees as determined by the Commission).

Version 4.8 contemplates the Directorate as having two distinct tranches of authority. A Director-General for Investigation and Enforcement is to be appointed by the Prime Minister with responsibility for all investigative and enforcement provisions of the competition law and also to represent the Commission in court; a Director-General for Dispute Resolution is to be appointed by the Commission and be responsible for all dispute resolution functions of the Directorate. Many of the details in relation to the organization and functioning of the Directorate are left to sub-decree.

In addition to conducting competition and other relevant studies, a power assigned to the Directorate that may prove important is to draft advisory opinions on the application of the competition law to specific business practices or regulatory measures if it is determined that such an opinion would be in the public interest. After review of a proposed advisory opinion, the Director-General for Investigation and Enforcement would have the power to reject it, issue it as a non-binding staff opinion, or forward it to the Commission with a recommendation that it be issued as a formal opinion. In the latter case, it is not clear on whether this opinion would therefore bind the Commission and be effective as a general statement of the application of

competition law in Cambodia and, if so, how this opinion might be revised over time if market circumstances evolve such that the opinion is no longer appropriate.

Based on recent statements of government officials, it seems that the independence of the regulator is still being considered in more recent drafts of the competition law with the principal options being an independent regulatory authority or direct supervision of the regulator by the MOC. On a practical basis, in the context of the Cambodian economy and political structure, it is hard to predict what the implications of these different models will be on the effective implementation of the competition law.

D. Prohibited Activities

1. Horizontal Agreements

Version 4.8 addresses horizontal agreements in two ways; under Article 15, businesses in a horizontal relationship are prohibited from engaging in specified conduct such as agreeing to:

- directly or indirectly fix the prices, or limit quantities or types, of goods or services,
- limit technological development,
- allocate exclusive rights to sell within designated territories or to designated customers, or
- exclude businesses that are not parties to the agreement from any market.

In contrast, Article 16 provides a more general prohibition against any other agreement between businesses in a horizontal relationship if such agreement significantly prevents, restricts, or distorts competition unless the parties can prove that the resulting pro-competitive gains outweigh any anticompetitive effects.

Version 4.8 provides a number of exemptions to the provisions of Article 15 based on the nature of the coordinated behavior including:

- adopting voluntary health, safety, or compatibility standards;
- non-competition agreements between buyers and sellers of a business;
- joint purchasing, production, or marketing where the parties to the agreement can demonstrate that these activities will not significantly reduce competition; and
- joint research if the parties to the agreement can demonstrate that they lack access to capital to conduct research individually and each party may separately market any products resulting from the research.

2. Abuse of a Dominant Position

Article 18 of Version 4.8 prohibits businesses from significantly preventing, restraining, or distorting competition for any good or service, although there is no explicit limitation on this prohibition to businesses in a dominant position other than the title of the provision itself. Similar to the approach taken under Article 15, an apparently exhaustive list of potentially abusive conduct is provided including tied selling, selling below costs, and refusing access to an essential facility. In contrast to Article 16, there does not appear to be any defense where the pro-competitive gains of the impugned conduct exceed the anticompetitive effects.

Pursuant to Article 20, Version 4.8 also prohibits a dominant business from various forms of price discrimination. However, an exemption is provided where the price

discrimination is a reaction to a competitor's price or is in response to changing market conditions.

3. Vertical Agreements

In Article 19, Version 4.8 prohibits agreements between businesses in a vertical relationship that are similar to the examples provided if they have the effect of significantly preventing, restraining, or distorting competition unless the parties can prove that the pro-competitive gains from the conduct outweigh the anticompetitive effects. The examples provided include resale price maintenance, market restrictions, bundling, and exclusivity requirements.

An exemption is made to the Article 19 prohibition with respect to various potential restrictions and obligations imposed through a franchise agreement. However, oddly enough, Version 4.8 also includes a requirement for franchisors to compensate franchisees for loss of certain unrecovered investments where a franchise agreement is terminated for reasons other than the failure to meet the requirements of the franchise agreement.

In addition, an exemption is made for recommended minimum resale prices provided that it is made clear that any such recommendation is non-binding and, if the product has a stated price, the words "recommended price" appear next to the stated price.

4. Unfair Trade Practices

Article 21 prohibits certain forms of misleading representations by businesses such as false or deceptive statements about itself or its products or similar misrepresentations in relation to the goods of competing businesses.

5. General Exemptions

General exemptions to the prohibited conduct provisions are provided for collective bargaining agreements between workers and employers and for SMEs (defined as independent small businesses whose profits are tax-exempt).

Based on recent public comments, it appears that a general exemption is also being considered for state-owned enterprises ("SOE"). This is somewhat surprising as Version 4.8's broadly defines the scope of the competition law and includes specific provisions addressing even the regulatory activities of public authorities. While SOEs do not play as important a role in Cambodia as compared to some of the other AMCs, given regional issues in relation to the conduct of SOEs, this potential exemption will require careful consideration.

E. Public Sector

Despite the scope of Version 4.8 being expressly limited to entities doing business, the draft also addresses potential anticompetitive effects originating from the public sector. Article 65 prohibits a number of activities by public authorities that prevent, restrict, or distort competition such as discriminating between businesses, requiring trade with specific businesses, requiring businesses to associate in order to exclude other businesses, and a very broadly worded prohibition against adopting practices that hinder lawful business activities. On its face, it is not clear that the Article 65 prohibition is restricted to situations where the anticompetitive effects are determined to be substantial or significant nor does there appear to be any balancing of anticompetitive effects against pro-competitive gains or other government objectives.

Pursuant to Article 66, Version 4.8 limits the scope of government regulation of pricing, production, and tendering to defined authorized monopolies and businesses that produce or supply defined public utility products or services.

Finally, Article 67 permits the Directorate to review measures taken or proposed by other public authorities and, should it determine that potential anticompetitive effects are not justified, it may refer the matter to the Commission for further consideration (although it is not clear what actions the Commission could take in this regard). Article 67 also provides for the creation of an inter-agency forum including the Directorate and sector specific public authorities to coordinate concurrent functions, share best practices and expertise, and determine whether specific inquiries would be best conducted jointly by the relevant authorities.

F. Penalties

Version 4.8 contemplates a variety of penalties with imprisonment contemplated for individuals who contravene certain provisions relating to the investigation of matters or dispute resolution panels. Such conduct by individuals may also be subject to fines, and businesses engaging in similar conduct may be subject to significantly larger fines.

Articles 70 and 71 address remedies in relation to the substantive prohibitions of the competition law, which may include, among other remedies:

- warnings,
- fines against businesses or individuals,
- sale or transfer of assets (including licensing or transfer of intellectual property), and
- compensation for harmed businesses.

G. Procedures

1. Investigation and Enforcement

Under Article 31 of Version 4.8, the Director-General for Investigation and Enforcement is to send a written communication informing a person that he is under investigation or is a potential witness. The communication will state that the recipient must preserve all documents relating to the investigation. Destruction of documents after receipt of such notice may lead to imprisonment for individuals.

Some of Version 4.8's more notable investigatory provisions include:

- a person submitting evidence of a violation may request that her identity be kept confidential although she may be required to testify before a dispute resolution panel;
- the Director-General for Investigation and Enforcement may grant immunity from fines to an informant that provides significant evidence of a substantive violation;
- voluntary requests for information or access to premises are explicitly contemplated;
- warrants may be granted by a judge of a competent court to conduct a search and seizure of relevant evidence; and
- warrants may also be issued by the Director-General for Investigation and Enforcement for production of documents, testimony, or to search and seize evidence if he believes that delay incurred by obtaining a warrant from a judge would adversely affect an investigation or make it likely that the evidence would be tampered with or destroyed.

After an investigation is completed, if the Director-General for Investigation and Enforcement has reason to believe that the competition law has been violated, an enforcement action is commenced by filing a formal complaint with the Director-General for Dispute Resolution. The complaint must be filed within 15 days of an investigation being concluded. A copy of the complaint is to be provided to the person charged and, once the complaint is assigned to a Dispute Resolution Panel, made public. The complaint is to specify the alleged violations, summarize the relevant evidence, and the potential remedies being sought. The Director-General for Investigation and Enforcement may also require alleged violators to admit or deny specific factual matters relevant to the charges and that they respond within 15 working days unless written consent is obtained from the chief enforcement officer to extend this period.

After receiving a complaint, an alleged violator must file a formal answer with the Dispute Resolution Panel admitting or denying each allegation of fact and law within 15 working days of receiving the complaint. By written agreement with the Directorate's chief enforcement officer, this time period may be extended. The answer shall also be copied to the chief enforcement officer and be made public.

Where an alleged violator of the competition law agrees to a voluntary resolution of the matter, the Director-General for Investigation and Enforcement may file a proposed Commission Decision, proposed Commission Statement on Remedies and Sanctions, and a proposed Commission Order with a recommendation that the Dispute Resolution Panel accept the voluntary resolution of the matter.

Prior to commencement of a hearing, a person alleged to have violated the law may request the Dispute Resolution Panel to order third parties to submit documents or provide evidence. The relevant Directorate officials are to be copied on such request and, if the order is granted, be provided copies of all obtained documents and be able to observe any interviews obtained pursuant to the order. Both witnesses and alleged violators may request the chief enforcement officer to restrict the scopes of warrants where they can demonstrate that the required information is irrelevant to the investigation, unnecessary, unduly burdensome, or requires the submission of privileged information that is not subject to disclosure even as confidential business information.

2. Dispute Resolution Panels

Dispute Resolution Panels are charged with the authority to conduct hearings, order alleged violators to attend hearings and file answers, order witnesses to appear, testify, and provide documents, and to draft proposed Commission decisions, Commission orders, and statements on remedies.

Decisions of Dispute Resolution Panels are to be determined by majority vote and the Director-General for Dispute Resolution may be president, or a member, of such a panel. Version 4.8 requires each Dispute Resolution Panel to have at least one member with five years' experience in Cambodia as a judge, an arbitrator, or a lawyer who has litigation experience; and knowledge of Cambodian competition law. Each Panel must also have at least one member possessing experience in the management of a business, or training in business or economics, and training or experience in the protection of consumer rights. Finally each Panel shall also have one member who is not otherwise a government employee. Panel members are prohibited from

participating in a matter in which the member or his relatives has an economic interest and from accepting payments or gifts from any business that might be prosecuted under the competition law.

A hearing of the Dispute Resolution Panel is to commence within 30 days of the Director-General for Dispute Resolution having received the complaint unless the Commission has agreed to extend this period by an additional 30 days. Despite this stated period, hearings are not to commence before the alleged violator has had a reasonable opportunity to interview potential witnesses, examine documents, and prepare its defense.

Presentations of arguments, witnesses, and exhibits, except where documents contain confidential business information, are to be open to the public. Hearings are to be concluded within 90 days unless the Commission grants a 30-day extension. Version 4.8 provides detailed proposed stages for the process of the hearing, which sets out the roles of the parties in Article 45 and also provides general principles on handling confidential business information in hearings.

In relation to proceedings of Dispute Resolution Panels, Article 48 prohibits:

- knowingly lying or misleading the Panel about relevant matters,
- failing to submit documents or other evidence pursuant to an Order,
- withholding or falsifying documents or other evidence submitted voluntarily or under order,
- failing to appear or testify when ordered, or
- disrupting Panel proceedings.

Internal discussions of the Panel are not public. Once the Dispute Resolution Panel comes to a conclusion on a hearing, it is to draft its written conclusions as a proposed decision of the Commission. The conclusions are to be sent to the Director-General for Dispute Resolution who will submit them to the Commission within 30 days of the conclusion of the hearings.

3. Competition Commission

The Commission may make an interim order where an investigation is not yet completed if, on application by the Director-General for Investigation and Enforcement, it has reasonable grounds to believe there has been, or there is likely to be, a violation of the prohibitions against agreements between businesses in horizontal relationships and it is necessary to act urgently to prevent serious and irreparable harm or to protect the public interest in a declared emergency. Such interim order may require suspension of an allegedly infringing agreement, desisting from any allegedly infringing conduct or doing, or refraining from doing, any act other than the payment of money. Before making such an order, the Commission must give the parties subject to the order at least seven days' notice within which to make written representations.

In the normal course, the Commission may adopt, modify, or reject a Dispute Resolution Panel's recommendations after a non-public hearing at which the recommendations are considered. The Commission shall make its decision by majority vote within 30 days of receiving the Panel's recommendations. If the Commission modifies the proposed Commission Decision, Commission Statement on Remedies and Sanctions, or Commission order written by the Panel, it may add a statement providing reasons for the modifications. If the Panel's recommendations

are rejected, the Commission may issue a statement of reasons for its rejection and may refer the matter back to the Dispute Resolution Panel with instructions.

A person subject to a Commission Order may petition the Commission to reopen, modify, or revoke all or part of an Order. The merits of such petition will be investigated by the Directorate, which shall make recommendations to the Commission. The Commission may also, on its own initiative, correct obvious unintentional errors in an Order.

4. Courts

Version 4.8 provides that the Commission's Decision, Statement, and Order on Remedies and Sanctions may be appealed to a competent court within 30 days of the receipt of notice of the Commission's actions. The appeal from a Decision must demonstrate that the Commission's findings are inconsistent with the meaning of the competition law or not supported by the evidence arising from the Panel hearing. An appeal from an Order and Statement on Remedies may also demonstrate that the provisions will not remedy the determined violation.

If a court upholds an appeal, it shall return the matter to the Commission to modify the appealed Decision, Statement, or Order to be consistent with the court's decision.

The Commission may seek assistance from a competent court to enforce compliance with an order.

Based on comments by government officials, it appears that the appeal process is still being evaluated and there is a potential for judicial review of both the facts and law of Commission decisions as well as potentially consideration of procedural fairness. In addition, it seems that a specialized competition tribunal is being considered for this purpose.

IV. REACTION TO VERSION 4.8 OF THE PROPOSED COMPETITION LAW

Based on statements from the MOC, during the consultation processes most respondents expressed support for the introduction of competition law in Cambodia and, according to other government statements, almost all parties consulted agreed that Cambodia needs a competition law.

Some of the concerns identified in relation to the circulated drafts include:

- the need for a more clearly defined scope for the competition law (particularly given Cambodia's lack of experience in this area);
- more consideration of market definition and determination of dominance;
- concerns with broad prohibitions against horizontal conduct given the underdeveloped nature of the Cambodian market;
- the investigatory powers of the Director-General for Investigation and Enforcement (with particular reference to the power to issue warrants);
- whether the law will be considered criminal or civil given the differing implications of each; and
- potential overlapping jurisdiction and expertise between Directorate officials and police.

A number of issues were also identified in relation to the application of the competition law to specific sectors, with particular reference to electricity and telecommunications.

V. GOING FORWARD

Given the number of concerns identified in review of Version 4.8 and the known efforts to revise the competition law since that version was released, speculation on the details of the competition law to be enacted in Cambodia does not seem productive. However, as the MOC has stated that the current draft is based on ASEAN guidelines, and given the national and international expertise and efforts being brought to bear on this, I remain cautiously optimistic. Hopefully the concerns raised with Version 4.8 have informed the development of Version 5.3 and, if applicable, later drafts and the Cambodian government has had the opportunity to learn from the experiences of other ASEAN Member Countries.

That being said, it seems likely that key aspects of Cambodian competition law will be left to regulation or sub-decree, so it will be difficult to judge the potential impact of the competition regime based solely on the enacted legislation. While the competition law may be enacted in 2015, it is not clear when the fundamental sub-decrees and regulations will be issued. It may be therefore be some time before even the initial implementation of Cambodia's competition law can be properly evaluated.

Given Cambodia's lack of experience in competition law and policy, I am personally hoping that Cambodia resists the urge to leap into competition enforcement. Instead, I think it would be valuable for Cambodia to take a phased approach similar to what has been observed in certain other ASEAN Member Countries. This could be accomplished by specifically phasing in certain prohibitions over a period of time (perhaps commencing with cartels and misleading representations—both fairly easily comprehended by the business community and consumers) and incorporating an initial period in which the prohibitions would not be enforced so that the competition authorities can focus on institutional development and education and advocacy initiatives among Cambodian stakeholders (including other arms of the Cambodian government).

Significant discussions on post 2015 ASEAN Competition have been focused on ASEAN level cooperation, coordination, and even potential convergence. For ASEAN Member Countries, like Cambodia, who are at an early stage in the development of competition law and policy, this seems premature. While there is certainly scope for Members with more developed regimes to share their experience and expertise, it seems that the first post 2015 focus for countries like Cambodia should be on establishing a solid foundation for their domestic competition law and policy regime.

In addition to developing their expertise and promoting a competition law environment, it will take time for the Cambodian government to determine what policies and strategies will be most effective in a Cambodian context and one can expect that amendments and adjustments to the competition regime will be required within a five-to ten-year period. While businesses are apparently optimistic about the potential competition law, it remains to be seen how they will react when the competition regime is applied not only to conduct that affects them but also to market practices in which they regularly participate. The attitudes and practices of these stakeholders may adjust in unexpected ways that will have to be addressed as the competition regime develops.

From a Cambodian perspective, there are significant other issues beyond the scope of this article that need to be addressed in order to ensure the effective implementation of Cambodia's competition regime such as the appropriate role of government in the economy and justice system, transparency issues and the balancing of competing policy interests among others. When one considers these broader issues along with concerns such as lack of available expertise, allocation of scarce government resources, concerns with the availability of market data and more, one gets a perspective on the challenges to the implementation of an effective competition regime in Cambodia in the immediate future. However the path to such implementation will likely start with the enactment of the competition law and the chance to review it in its current form is eagerly awaited.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
August 2015 (1)

Overview of Competition Law in Myanmar

Minn Naing Oo & Daren Shiau
Allen & Gledhill (Myanmar) Co., Ltd

www.competitionpolicyinternational.com

Overview of Competition Law in Myanmar

Minn Naing Oo & Daren Shiau[1]

I. INTRODUCTION

On February 24, 2015, Myanmar became the sixth and latest member of the Association of Southeast Asian Nations ("ASEAN") to enact its competition law (Pyidaungsu Hluttaw Law No. 9 /2015) (the "Competition Law No. 9/2015").[2] The Competition Law No. 9/2015 will come into force at a time determined by the President of Myanmar.

II. BACKGROUND TO THE INTRODUCTION OF COMPETITION LAW NO. 9/2015

The introduction of the Competition Law No. 9/2015 follows Myanmar's accession to the ASEAN chair in 2014, for the first time since it became an ASEAN member state in 1997.

ASEAN member states had, in adopting the ASEAN Economic Community Blueprint ("AEC Blueprint") in 2007, committed to endeavor to introduce competition policy in all ASEAN member states[3] by 2015. The ASEAN Regional Guidelines on Competition Policy (published in August 2010) (the "Regional Guidelines") recommends that competition law regimes should be aimed at, *inter alia*, preventing: (i) anticompetitive business practices, (ii) abuse of market power, and (c) anticompetitive mergers.[4] The AEC Blueprint was likely a leading factor towards the introduction of the Competition Law No. 9/2015 in Myanmar.

The move to enact the Competition Law No. 9/2015 in Myanmar can also be seen as part of the economic reforms being introduced in Myanmar. As stated in Chapter 2 (Objectives) of the Competition Law No. 9/2015, and in public statements made by the Myanmar government, one of the main objectives of passing the Competition Law No. 9/2015 is to safeguard against any adverse effect to public interest caused by monopolistic practices or price manipulation, by an individual or group, that endangers fair competition in economic activities, for the purpose of the development of the national economy.

The Competition Law No. 9/2015 is underpinned by basic principles such as, *inter alia*, enabling Myanmar to become a domestic and regional economically developed community through the development of a free and fair competition environment that supports international inflows and investments. These principles and objectives reflect the Myanmar government's goals under its Fifth Five-Year Plan (FY2011/12 to 2015/16), which includes achieving an annual

[1] Minn Naing Oo is a Partner at Allen & Gledhill LLP and the Managing Director of Allen & Gledhill (Myanmar) Co., Ltd. based in Yangon, Myanmar. Daren Shiau is Partner at Allen & Gledhill LLP and Head of the Competition and Antitrust Group.

[2] All references to the Competition Law No. 9/2015 in this article are based on the official English translated version of the Competition Law No. 9/2015 from the Attorney-General's Office.

[3] The ASEAN member states are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

[4] ASEAN Secretariat, ASEAN Regional Guidelines on Competition Policy (2010) Article 2.1

gross domestic product ("GDP") growth of 7.7 percent and a 30 to 40 percent increase in GDP per capita from 2010.[5]

The Competition Law No. 9/2015 is not, however, the first piece of competition legislation in Myanmar. Prior to the enactment of the Competition Law No. 9/2015, the Constitution of the Union of Burma (1948) included a general prohibition on anticompetitive practices (Chapter II),[6] which had not to date been implemented in practice.

III. COMPETITION LAW NO. 9/2015: KEY PROHIBITIONS

The key prohibitions in the Competition Law No. 9/2015 are similar to those in the competition laws of established jurisdictions, and are primarily along the lines of:

1. **Prohibitions against anticompetitive acts** (Chapter 7 of the Competition Law No. 9/2015): such as fixing purchase or selling prices, collusion in tenders or auctions, abuse of dominance, agreements to restrict competition in the market, and/or restrictions on sharing of markets or resources, production, market acquisition, technology, and development of technology and investment;
2. **Prohibition against monopolization of markets** (Chapter 8 of the Competition Law No. 9/2015): such as through controlling the purchase price or selling price of goods or fees of services, restricting services or production, or specifying compulsory terms and conditions directly or indirectly for other businessmen with the aim(s) of controlling prices; suspending, reducing or restraining services without any appropriate reasons; or restraining or controlling the area where goods or services are traded to prevent entry and to control market share;
3. **Prohibition of unfair competition** (Chapter 9 of the Competition Law No. 9/2015): such as deception of consumers, disclosure of business secrets, coercion between businessmen, defamation of another business, carrying out advertising and sales promotion for purposes of unfair competition, discrimination among businessmen, and/or sale at prices below cost of production; and
4. **Prohibition on collaboration among businesses** (Chapter 10 of the Competition Law No. 9/2015): includes mergers, consolidations, acquisitions, and joint ventures which raise market dominance, intend to lessen competition to a single or only a few businesses, or exceed the market share limit specified.

There is a statutory 90-day waiting period during which the Myanmar government is required to introduce rules and regulations to implement the Competition Law No. 9/2015. As of July 2015, such rules and regulations had not yet been introduced.

In the Guidelines on Developing Core Competencies in Competition Policy and Law for ASEAN (the "Core Competencies Guidelines"), the ASEAN Secretariat cautions that transitional

[5] Organisation for Economic Co-operation and Development, ECONOMIC OUTLOOK FOR SOUTHEAST ASIA, CHINA AND INDIA 2015: STRENGTHENING INSTITUTIONAL CAPACITY (2015)

[6] Myanmar's 1948 Constitution states that "private monopolist organizations, such as cartels, syndicates and trusts formed for the purpose of dictating prices or for monopolizing the market or otherwise calculated to injure the interests of the national economy, are forbidden."

economies may unintentionally overlook acquiring a clear understanding of how competition law fits within their own economic and industrial framework, as such countries often adopt competition law following international commitments.[7] The Core Competencies Guidelines recommends conducting a comprehensive analysis of the effect of a country's intended competition law in order to tailor the law to that country's specific characteristics.[8] In this regard, while the essence of the prohibitions in the Competition Law No. 9/2015 appears similar to those in established jurisdictions, it remains to be seen how the prohibitions will be interpreted and enforced by the Myanmar Competition Commission.

IV. COMPETITION LAW NO. 9/2015: INSTITUTIONAL ARRANGEMENTS

The Competition Law No. 9/2015 will be administered and enforced by the Myanmar Competition Commission, which will be an independent body formed by the Union Government Cabinet of the Republic of the Union of Myanmar (the "Cabinet") and will comprise a Chairman, Vice-Chairman, Secretary, and experts and suitable individuals from relevant Union Ministries, government departments, government organizations, and non-governmental organizations. It is not clear when the Myanmar Competition Commission will be formed, the size and/or composition of the Myanmar Competition Commission, or the qualifications and experience the Myanmar government will require for its members.

The Competition Law No. 9/2015 provides for the Myanmar Competition Commission to form a committee to carry out its functional duties, including investigating conduct that may infringe the Competition Law No. 9/2015 (the "Investigation-Committee"). The Ministry of Commerce of the Union of the Republic of Myanmar (the "Ministry of Commerce") will undertake the office functions of the Myanmar Competition Commission, the Investigation-Committee, and any other committees and working groups formed by the Myanmar Competition Commission and the Investigation-Committee, respectively. The Ministry of Commerce may also, subject to the approval of the Cabinet, issue necessary rules, regulations, and bylaws in the implementation of the prohibitions in the Competition Law No. 9/2015.

Further information on establishing the Myanmar Competition Commission, including information on its relationship with the judiciary in Myanmar and the Investigation-Committee, respectively, is expected to be provided in the rules to implement the Competition Law No. 9/2015. As currently provided in the Competition Law No. 9/2015, the expected relationship between the Myanmar Competition Commission and the judiciary in Myanmar will likely arise from the coordination between the two to offer leniency to eligible individuals (see section V below).

V. LIKELY IMPACT OF THE COMPETITION LAW NO. 9/2015 ON BUSINESSES IN MYANMAR

The Competition Law No. 9/2015 has been received with some curiosity by the business community. As this is a new law, and as businesses operating in Myanmar have had no experience operating within the framework of such legislation, there is a lack of understanding

[7] ASEAN Secretariat, GUIDELINES ON DEVELOPING CORE COMPETENCIES IN COMPETITION POLICY AND LAW FOR ASEAN (2012).

[8] *Id.*

among the business community of the law. However, there is a desire among at least some companies to understand how it works. The government conducted consultations in the course of the drafting of the law and, together with the apex business chamber, it will be doing more to raise awareness among the business community.

While there is no clarity yet on how the Myanmar Competition Commission will interpret and implement the Competition Law No. 9/2015, there are several noteworthy implications of the Competition Law No. 9/2015 on businesses operating in Myanmar.

A. Prohibitions and Substantive Assessment

1. The Competition Law No. 9/2015 does not distinguish between vertical and horizontal agreements

The general prohibition against anticompetitive acts (Chapter 7 of the Competition Law No. 9/2015) does not distinguish between vertical and horizontal agreements. Conventional thinking in relation to antitrust principles is that vertical agreements are generally less harmful to competition than horizontal agreements. One issue to monitor in relation to competition law in Myanmar is whether common vertical agreements, such as resale price maintenance, exclusive distribution, tying or bundling, and single branding may constitute *per se* infringements of the Competition Law No. 9/2015.

2. The Competition Law No. 9/2015 does not specify whether an effects-based approach or *per se* approach will be taken

In the absence of further guidelines, rules, or regulations on the implementation of the Competition Law No. 9/2015,a literal interpretation of the Competition Law No. 9/2015 suggests that the black list of activities set out in the Competition Law No. 9/2015 will be prohibited on a *per se* basis.

For instance, this may have the consequence that any contract that restricts competition could be *per se* prohibited. There is a question of whether the Myanmar Competition Commission will, in its guidelines, rules, or regulations, stipulate the market share or effects-based thresholds in the investigation of potential infringements.

The geographic scope of the Competition Law No. 9/2015 is also unclear. In particular, the Competition Law No. 9/2015 does not include express guidance on whether the provisions will apply to entities or conduct outside of Myanmar, such as in the case of foreign-to-foreign transactions, or whether a local effects test will be used to determine the geographic scope of the Competition Law No. 9/2015.

3. There appears to be a *per se* prohibition of transactions exceeding a market share limit

The Competition Law No. 9/2015 prohibits collaboration where the total market share of the collaborating businesses exceeds a market share limit to be specified by the Myanmar Competition Commission (Chapter 10 of the Competition Law No. 9/2015). It is unclear at this stage whether the Myanmar Competition Commission will apply a substantial lessening-of-competition test and take into account efficiency gains in implementing the Competition Law No. 9/2015 in relation to mergers and acquisitions.

B. Notification and Exemptions

4. The Competition Law No. 9/2015 refers to a notification regime and a prescriptive list of exemptions

The Myanmar Competition Commission has the powers to specify the necessary forms, procedures, and other terms for businesses in applying for permission to collaborate or to restrain competition (Chapter 5 of the Competition Law No. 9/2015), but no guidelines have been published yet.

The powers of the Myanmar Competition Commission to grant approval appear to be limited to, *inter alia*, exemptions for a specified period in relation to agreements with an aim of (i) reducing the expense to consumers (Chapter 7 of the Competition Law No. 9/2015), (ii) maintenance of other businesses or creation of new businesses (Chapter 8 of the Competition Law No. 9/2015), and/or (iii) aiding small- and medium-sized businesses where the collaboration involves firms that are at the risk of collapsing or of bankruptcy, or where the collaboration has an effect on export promotion, supports the development of technique and technology, or establishes entrepreneurial businesses (Chapter 10 of the Competition Law No. 9/2015).

There has been no published list of exemptions by the Myanmar government as of July 2015. Nonetheless, the ASEAN Secretariat noted in the Core Competencies Guidelines that exemptions are calibrated for some country-specific needs or characteristics that are occasionally justified by industrial policy objectives, which may conflict with competition law objectives.[9] The Core Competencies Guidelines recommends that the use of exemptions and their impact should be carefully weighed against the objectives pursued and the likely impact of these exemptions on the overall effectiveness of the competition law framework.[10] The Myanmar government may have reference to such recommendations by the ASEAN Secretariat in formulating the list of exemptions.

C. Directions and Penalties

5. The Competition Law No. 9/2015 provides for directions to be issued to reduce operational volume if specified market-share limits are exceeded

The Myanmar Competition Commission has powers under the Competition Law No. 9/2015 to direct a business, or a business group, to reduce its operational volume if the market share of such business or business groups exceeds, or is deemed by the Myanmar Competition Commission to be exceeding, the level of market share specified as adversely affecting competition in the market by the Myanmar Competition Commission.

It is not clear whether such directions will arise from, and whether a breach of the prescribed market-share limits will constitute, a *per se* infringement of the prohibitions in the Competition Law No. 9/2015, such as the prohibitions against anticompetitive acts (Chapter 7 of the Competition Law No. 9/2015), monopolies (Chapter 8 of the Competition Law No. 9/2015), or unfair competition (Chapter 9 of the Competition Law No. 9/2015).

[9] *Id.*
[10] *Id.*

6. Penalties include the suspension of operation

The Myanmar Competition Commission has the powers to impose a prescribed fine, which can range from MMK 5 million (approximately U.S. $5,000) to MMK 15 million (approximately U.S. $15,000) (Chapter 12 of the Competition Law No. 9/2015), for infringements of the Competition Law No. 9/2015. More importantly, the penalties that can be imposed also include the suspension of a business' operations temporarily or permanently.

7. The Competition Law No. 9/2015 allows for criminal sanctions to be imposed on individuals

Individuals directing a business may be convicted, together with the relevant business, unless such person can prove that the infringing conduct was not entered into intentionally or negligently. In additional to financial penalties, any person convicted of violating a prohibition under the Competition Law No. 9/2015 may be penalized with imprisonment between one to three years (Chapter 12 of the Competition Law No. 9/2015).

D. Leniency Regime

8. The Competition Law No. 9/2015 refers to a leniency regime being put in place

The Competition Law No. 9/2015 provides for the Myanmar Competition Commission to coordinate with a relevant court of law or law office to provide leniency and exemption to a person who discloses their participation in a violation of the prohibitions against anticompetitive acts (Chapter 13 of the Competition Law No. 9/2015). To assess the level of leniency to be granted, the relevant court of law may take into account the time and type of cooperation by any businessman (Chapter 13 of the Competition Law No. 9/2015).

E. Rights of Private Action

9. The Competition Law No. 9/2015 provides for rights of private action

Any person convicted under the Competition Law No. 9/2015 may also be sued under civil procedure for damages by an aggrieved person. It would appear that such right of private action can only take place after the Myanmar Competition Commission has arrived at an infringement finding.

F. Appeals

10. Rights of appeal

There is a right of a final appeal to the Myanmar Competition Commission against any order or decision of the Investigation-Committee or other committees to the Myanmar Competition Commission (Chapter 11 of the Competition Law No. 9/2015).

G. Transitional Period

The basic framework for the Competition Law No. 9/2015 appears to take into account international best practices of sophisticated competition law jurisdictions. However, there are still many areas that require elaboration. The Myanmar government has stated that there will be a two-year grace period to educate the business community about the Competition Law No. 9/2015 and raise awareness, providing some lead time for businesses to update their compliance

practices. There are no official stipulated start dates for the two-year grace period at this point, and it is not clear whether agreements, business practices, or collaborations that take place during the two-year grace period will be subject to investigation by the Myanmar Competition Commission.

H. State-owned Enterprises

It is not clear from the Competition Law 9/2015 whether state-owned enterprises would fall under the definitions of "Business" and "Businessman" and accordingly, be regulated under the Competition Law No. 9/2015. The State-Owned Economic Enterprises Law (SLORC Law No. 6/97) grants the Myanmar government the right to carry out various major economic activities across multiple sectors, including oil and gas, telecommunications, banking, and insurance. Other jurisdictions with full or partial exemptions for state-owned enterprises include Cyprus, Hungary, Iceland, and Thailand.

In view of the powers of the Myanmar Competition Commission to exempt businesses essential for Myanmar's benefit and small- and medium-sized businesses under the Competition Law No. 9/2015, there is potentially room for certain state-owned enterprises to be exempted by the Myanmar Competition Commission. This will likely only become clearer once the rules and regulations to implement the Competition Law No. 9/2015 are introduced by the Myanmar government.

VI. MYANMAR'S COMPETITION LAW REGIME: A COMPARISON WITH OTHER COMPETITION LAW REGIMES IN ASEAN MEMBER STATES

Competition law regimes in the ASEAN member states vary across multiple dimensions to meet their differing objectives. Table 1 summarizes the competition law frameworks currently in place within ASEAN.

Table 1: ASEAN – Varying competition law regimes (as of May 2015)

	Indonesia	Malaysia	Myanmar	Singapore	Thailand	Vietnam
Competition legislation	Law of the Republic of Indonesia Number 5 Year 1999 concerning the prohibition of monopolistic practices and unfair business competition.	Laws of Malaysia Act 172 Competition Act 2010.	Competition Law No. 9/2015.	Competition Act, Chapter 50B, of Singapore.	The Trade Competition Act, B.E. 2542 (1999).	The Competition Law No. 27/2004/QH11.
Year of enactment	1999	2010	2015	2004	1999	2004
Objectives of the competition legislation[11]						
Efficiency	✓	✓		✓	✓	✓
Consumer Welfare	✓	✓	✓[12]			✓

[11] Cassey Lee & Yoshifumi Fukunaga, *ASEAN Regional Cooperation of Competition Policy*, ERIA Discussion Paper Series, ERIA-DP-2013-03 (2013), with the exception of Myanmar. The summary on Myanmar is based on the official English translated version of the Competition Law No. 9/2015 from the Attorney General's Office.

[12] Chapter 2 (Objectives) of the Competition Law No. 9/2015.

	Indonesia	Malaysia	Myanmar	Singapore	Thailand	Vietnam
Economic development		✓	✓[13]		✓	
Competitiveness	✓(firm-level)			✓(economy-level)		
Free and fair trade	✓		✓[14]		✓	
Institutional structure						
Competition authority	The Commission for the Supervision of Business Competition ("KPPU").	The Malaysian Competition Commission ("MyCC").	The Myanmar Competition Commission.	The Competition Commission of Singapore ("CCS").	The Office of Thai Trade Competition Commission ("TCC").	The Vietnam Competition Authority (the "VCA") and the Vietnam Competition Council (the "VCC").
Commission members	Nine, including the Chairman and Vice Chairman.[15]	Nine, including the Chairman.	To be prescribed by the Cabinet.	Nine, including the Chairman.	Minister of Commerce as Chairman, Permanent-Secretary for Commerce as Vice-Chairman, Permanent-Secretary for Finance, and not less than eight, but not more than 12, qualified persons.	11 to 15 members in the VCC.
Case statistics						
Number of published cases[16]	Mergers: 201 Anticompetitive practices: 401	Mergers: Not applicable Anticompetitive practices: 6	To be enforced.	Mergers: 49 Anticompetitive practices: 25	Mergers: 0 Anticompetitive practices: 0	Mergers: 29 Anticompetitive practices: 5
Competition law framework						
General prohibitions	Anticompetitive agreements, abuse of a dominant position, and mergers that lessen competition.	Anticompetitive agreements and abuse of a dominant position.	Anticompetitive acts, unfair competition, monopolization of markets, and collaboration among businesses.	Anticompetitive agreements, abuse of a dominant position, and mergers and acquisitions that substantially lessen competition.	Anticompetitive agreements, abuse of a dominant position, anticompetitive mergers, and unfair trade commercial practices.	Anticompetitive agreements, abuse of a dominant position, anticompetitive mergers, and unfair business practices.
Vertical agreements	*Per se* illegal.	*Per se* illegal.	To be prescribed.	Excluded, unless amounts to abuse of a dominant position.	Unclear.	Unclear.
Merger control regime						
Notification thresholds	Post-merger assets of more than IDR 2.5 trillion (or IDR 20 trillion for	No merger control regime.	No published jurisdictional thresholds yet.	Post-merger market share of more than 40 percent, or post-merger market	No published jurisdictional thresholds yet.	Combined market share between 30 to 50 percent If combined

[13] *Id.*

[14] Chapter 3 (Fundamental Principles) of the Competition Law No. 9/2015.

[15] As at May 26, 2015.

[16] As at May 26, 2015, with the exception of Vietnam (as at December 2014).

	Indonesia	Malaysia	Myanmar	Singapore	Thailand	Vietnam
	banks), or post-merger turnover of more than IDR 5 trillion.			share of more than 20 percent and post-merger combined marker share of three largest firms of more than 70 percent.		market share is more than 50 percent, the merger is prohibited unless exempted.
Mandatory or voluntary notification	Mandatory post-completion within 30 days if thresholds are met.	No merger control regime.	To be prescribed by the Myanmar Competition Commission.	Voluntary.	Mandatory if thresholds (not yet published) are met.	Mandatory if thresholds are met.
Penalties						
Individual liability	No	No	Yes	No	Yes	Yes
Criminal liability	Yes	No	Yes	No	Yes	No
Financial penalties	Range from approximately U.S. $75,000 to U.S. $2 million.	Up to 10 percent of the worldwide turnover of an enterprise over the period during which the infringement occurred.	Range from approximately U.S. $5,000 to U.S. $15,000.	Up to 10 percent of the turnover of the business of an undertaking in Singapore for each year of infringement for a maximum period of three years.	Up to approximately U.S. $200,000, and up to U.S. $400,000 for repeated offences.	Up to 10 per cent of the total turnover of the infringing organization or individual for the preceding financial year.
Appeals						
Appeal process	Appeals can be made to the district court within 14 working days after defendants have become aware of or been notified about the KPPU's decision and to the high court for criminal investigations. Both the KPPU and the defendants may appeal against a district court decision to the Supreme Court.	Appeals can be made to the Competition Appeal Tribunal (the "CAT") within 30 days of the MyCC decision. The CAT's decision is final and binding on the parties to the appeal, but may be subject to judicial review by the High Court.	Right of a final appeal to the Myanmar Competition Commission against any order or decision of the Investigation-Committee within 60 days of receipt of such order or decision.	Appeals can be made to the Competition Appeal Board ("CAB") within two months from the date of the CCS' infringement decision. Parties may appeal CAB decisions to the High Court and then to the Court of Appeal.	Appeals can be made to the Appellate Committee within 30 days of the TCC's decision. The Appellate Committee's decision is subject to appeal to the Administrative Courts of First Instance.	Decisions issued by the council dealing with a competition case may be appealed before the VCC. Decisions issued by the head of the VCA may be appealed before the Ministry of Industry and Trade.

VII. IMPACT ON ASEAN INTEGRATION

Competition law is often cited as one of the mechanisms facilitating regional economic integration by addressing anticompetitive conditions and regional market barriers. Successful examples of competition law facilitating economic integration include the experiences of, among others, the European Union and the Australia-New Zealand Closer Economic Relations Trade

Agreement.[17] Similarly, competition policy is one of the focal policy areas of the AEC Blueprint in furthering the objectives of establishing a region of equitable economic development, which is fully integrated into the global economy.

The development of competition law principles in Myanmar in line with the adoption of international best practices may provide confidence to foreign investors intending to conduct business in Myanmar, especially where the relevant rules are philosophically consistent with those which foreign investors are likely to be most familiar with. At the same time, as noted in the Core Competencies Guidelines, it is critical for transitional economies to customize competition laws to that country's specific features, which will have an impact on the manner in which Myanmar-based firms operate.

The ASEAN Secretariat has been working to establish a framework to ensure regional consistency in the development of competition laws, for nearly the last two decades. Harmonization across the ASEAN countries, which are at different stages of economic development, is generally viewed as a challenging and a long-term goal.[18]

As of May 2015, all of the ASEAN member states have either introduced competition laws, or have draft competition bills that are yet to be passed. As discussed in Section VI, ASEAN member states appear to have adopted and customized competition laws to best suit their respective economic needs, and there is not necessarily a single competition law regime to adopt. While there is no one-size-fits-all approach to competition law regimes in ASEAN, and each jurisdiction's regime has been customized to its domestic circumstances, the unifying trend across the various regimes is that universally acknowledged anticompetitive forms of activities and conduct, namely anticompetitive agreements, abuse of dominance, and anticompetitive mergers and acquisitions, are generally prohibited.

The Competition Law No. 9/2015 in Myanmar, if effective, accordingly goes towards facilitating Myanmar's economic integration into the ASEAN region, and thereby advances the AEC objectives, through, among others:

i. a reduction in the barriers to entry and other impediments to free trade;

ii. a sound competition law and policy which provides investors with confidence of a level playing field and, thereby, helps to attract foreign investment; and

iii. encouraging overall economic development in Myanmar through a competitive process.

With six months to the end of 2015, of the ASEAN member states only Brunei, Cambodia, and the Lao PDR remain with general competition laws in draft form. It remains to be seen whether the objective of introducing comprehensive competition policies in all ASEAN member states by 2015 will be met, which would be the first step towards establishing a single economic market.

---

[17] Pornchai Wisuttisak & Nguyen Ba Binh, *ASEAN Competition Law and Policy: Toward Trade Liberalization and Regional Market Integration*, International Conference on International Relations and Development (2012).

[18] Ashish Lall & R. Ian McEwin, *Competition and Intellectual Property Laws in the ASEAN "Single Market"*, THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS (Sanchita Basu Das, Jayant Menon, Rodolfo Severino, & Omkar Lal Shrestha, eds. 2013), Asian Development Bank and Institute of Southeast Asian Studies, Singapore.

VIII. CONCLUSION

One of the challenges ahead affecting the overall effectiveness of the Competition Law No. 9/2015 on economic growth is the Myanmar government's ability to overcome a host of practical challenges expected in its implementation. Commentators have recognized that a common challenge in many ASEAN nations, particularly transitional economies, is the lack of adequate competition law expertise, and legal and institutional infrastructures to administer the legislation.[19]

For the new competition law regime to be effective, the Myanmar Competition Commission will need to balance policy considerations with competition law principles, and clearly articulate the rules and regulations needed to implement the law, including investigative powers, enforcement procedures, and transparency. It is still too early to foresee how the competition law landscape in Myanmar might evolve in the near future.

[19] Michal Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement* 60 UNIV. TORONTO L.J. 239 at 243–5 (2010).

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
August 2015 (1)

Understanding the Competition Law and Policy of Indonesia

Deswin NUR

Commission for the Supervision of Business Competition (KPPU), Indonesia

www.competitionpolicyinternational.com

Understanding the Competition Law and Policy of Indonesia

Deswin NUR[1]

I. INTRODUCTION

The urgency of having a national competition law in Indonesia was first addressed in the 1980s, responding to major economic reforms. At that stage, Indonesia opened herself to globalization and started to promote foreign investment. It was then that the idea for a comprehensive competition policy was elevated for public discussion. Debates by scholars, enterprises, and the government occupied national newspapers. The question was: Does Indonesia need a competition law? It was a never-ending debate. No one ever won it. Drafts on national competition law prepared by the government and opposing political parties continued for many years.

Then the global crisis hampered the Indonesian economy in 1997-1998. With a vulnerable economic structure caused by concentrated industries, the crisis cracked the backbone of our long-standing and smooth development. The lack of a competitive environment caused "the big" to fail. Indonesia needed fresh funds to get her back on her financial feet. The International Monetary Fund offered to lend funds, but required Indonesia to put together a national reform agenda to obtain those funds. This agenda included the need to introduce competition law, as well as other provisions dealing with consumer protection, anticorruption, and the holding of a general election.

Indonesia raised the level of discussion about national competition law and put it on the agenda in the first quarter of 1999. We understand that if you rush something, you may not achieve an optimum result. That is what happened with competition law. It was clear to some people that the legislative outcome of this new competition law was more a political compromise and a result of intense negotiation rather than a coherent, undisputed piece of legislation.

A key point for the success of competition law is commitment. Commitment comes from awareness of the law and acknowledgement of its importance. To ensure awareness and acknowledgement of its importance, targeted outreach or advocacy activities should take place to promote interest among relevant parties. However, the problem is advocacy takes time and money. It is not cheap to engage in outreach activities. It takes time to build confidence by parties to agree on the introduction of something big like competition law.

Another way to introduce competition law is through foreign commitment, like bilateral or multilateral agreements. In the Indonesian case, many activities took place in helping with the drafting of competition law. But it was only our cooperation with international organizations

[1] The writer currently holds the position of Head of Foreign Cooperation Division at the KPPU (Komisi Pengawas Persaingan Usaha). The opinions herewith are those of the writer and do not necessarily reflect those of the KPPU.

that was able to force the introduction of competition law. In ASEAN, we have learned that the ASEAN Economic Community has become a trigger for the development of competition law in some countries, like Myanmar and Brunei Darussalam. Indonesia and Thailand were driven by financial commitments from international organizations as a result of the Asian Financial Crisis. China was driven by their membership at World Trade Organization. So we needed an international momentum to trigger the adoption of a national competition law.

II. UNIQUE FEATURES OF INDONESIAN COMPETITION LAW

Rules on competition existed in Indonesia for many years before 1999. In the Civil Law, for instance, Article 382 says that for those who gain, conduct, or expand their trade or their own company from unjust behavior that harms the public, or where their behavior will cause damages to their competitors because of unjust competition, can be imprisoned for one year and four months maximum or pay a fine of nine hundred rupiah. So in Indonesia the concept of competition law was already accepted. However, this law did not provide a complete coverage of anticompetitive practices, since it was purely a criminal law. Comprehensive competition law was systematically introduced by the Law No. 5 Year 1999 (on the Prohibition of Monopolistic Practices and Unfair Business Competition).

Law No 5 consists of 11 Chapters and 53 Articles. It is quite short. The law was produced as an initiative from the Parliament. The structure can be defined as six big rules, namely (i) prohibited agreements, (ii) prohibited behaviors, (iii) abuses of dominant position, (iv) defining and strengthening the commission, (v) case-handling procedures and sanctions; and (vi) exclusions and exemptions.

Regarding the first three rules, the **prohibited agreement** sections define types of unfair agreements like cartels, price-fixing, price discrimination, market allocation, boycott, and many more. The basic requirement is that they involve more than one enterprise.

Prohibited behaviors in unilateral conduct were defined by international practice and consist of prohibited acts by single enterprises. The assessment of the market power of such enterprise is crucial in proving unilateral conduct. Prohibited behavior in unilateral conduct includes exclusive agreements, bundling, market control, bid-rigging, conspiracy, resale price maintenance, and monopoly practices.

Abuses of dominant position defines the type of behavior that relates to the use and the creation of a dominant position. So it talks about the threshold for being dominant, abuse of dominant behaviors, interlocking directorates, share-ownership, mergers, and acquisition. Indonesia uses a 50 percent market share for single dominance threshold, and 75 percent for group dominance. Merger and acquisition are part of the chapter on abuses of dominant, due to its role in increasing market structure and share. M & A is regulated further in the Government Regulation No. 57 Year 2010 on Merger and Acquisition that may lead to Unfair Business Competition.

Overall, Indonesian competition law has multiple objectives, namely public interest, national economic efficiency, equal opportunity, preventing unfair competition, and promoting effective and efficient business. To avoid confusion among these objectives, the commission tries

to put the improvement of the people's welfare and their standard of living as their main objectives.

An additional feature of Indonesian competition law is the existence of a list of articles that do not reflect international practices, for instance, the provision regarding cartels (Article 11). Based on the applicable competition law, cartels are mentioned only with respect to control over the marketing and production of certain products or services, and use a rule of reason approach. In other most countries, cartel offenses such as price-fixing are *per se* offenses; Indonesia should follow this practice and not put the sin of cartels as a general rule of reason.

Competition law in Indonesia has been in place for about fifteen years. In the early years, the KPPU needed to let the public know of their existence and how competition law benefited society. Vigorous enforcement was initiated, putting aside our institutional arrangements. Cartel and bid-rigging became the big issues, occupying almost all (70 percent) of our enforcement activities. During this time it was believed that aggressive enforcement was the way to advocate businesses.

This priority has changed somewhat, and bid-rigging cases have dropped to less than 60 percent. Other types of violations are being examined, including anticompetitive practices such as exclusive dealing, monopoly, and price-fixing. The KPPU has moved to stop anticompetitive practices while focusing on strategic sectors like food, energy, financial services, health and education, logistic, and infrastructure.

Regarding mergers and acquisitions, KPPU has also been more active. It received 52 merger notifications and four consultations in 2014. Most of the mergers took place in agriculture (16 percent), financial services (16 percent), and telecommunications (10.7 percent). Two examples are: (i) a case on delaying notification for the acquisition of PT HD Finance Tbk by PT Tiara Marga Trakindo; and (ii) an acquisition of a 95 percent share of PT Axis Telekom Indonesia (AXIS) by PT XL Axiata Tbk (XL). This action increased XL's market share to 26 percent, causing Indonesian telecommunication to be dominated by three operators (XL, Telkomsel, and Indosat) with joint market share of 89.5%.

Regarding **strengthening the Commission,** the KPPU is moving toward amending Law No 5 with the aim to improve its enforcement power. The first proposed amendment is the improvement of the legal powers of the commission, especially in conducting dawn-raids. It is extremely difficult to find hard evidences in cartel agreements without being able to seize documents at the (reported party) premises. So, if a competition agency is able to find it without a dawn-raid, then the reported party is ignorant of the law, or someone else provides it to the KPPU. Therefore, having dawn-raid authority will clear half of the problems involved in investigating possible cartel infringements.

A second proposed amendment is the legalization of circumstantial evidence in competition litigation. It will put into Law No 5 what the KPPU has actually been using for the past fifteen years. Other programs like corporate compliance and leniency programs are important, but it seems Indonesia will act on them without waiting for an amendment. Therefore, it can be said that Indonesia has been conducting effective competition enforcement in the absence of strong enforcement legislation. Providing escalated powers through the new

(amended) competition law will help bring complete enforcement powers to ensure more effective enforcement.

III. INSTITUTIONAL SETTING

Komisi Pengawas Persaingan Usaha (KPPU) or the Commission is the only institution that deals with competition law issues in Indonesia. It was introduced through Law No. 5/1999 and by the Presidential Decree No. 75 Year 1999. It is based in Jakarta, the capital, but can establish representative offices throughout major cities in Indonesia. Currently the KPPU has five representative offices that are spread through five major islands in Medan, Batam, Surabaya, Balikpapan, and Makassar. There was a representative office in Manado until two years ago, but after some years of operation it was shut down due to shifting priorities and low (area) performance.

The KPPU consists of nine Commissioners, including a Chairman and a Vice Chairman. They are elected by the Parliament with a recommendation from the President for a five-year term. The term is renewable for one time. KPPU has been assigned three main tasks in the competition law: they enforce the law, provide advice on competition policy, and review mergers and acquisitions. Since 2008, the Law No. 20 Year 2008 concerning Micro, Small, and Medium-sized Enterprises ("MSME") assigned the KPPU with an additional task to supervise business partnerships between MSME and large-sized enterprises. In doing its job, the KPPU can receive complaints, conduct research and investigations, summon any parties related to investigations, require assistant from police investigators, issue decisions, and impose sanctions.

An interesting fact about the Commission is that they cannot reject complaints or prioritize the complaints. In the absence of a dismissal procedure, the Commission is obliged to follow up every complaint submitted to it, regardless of the gravity and the urgency of other complaints.

A second fact is that the level of sanctions is relatively low and has not changed for the past fifteen years. This level may not provide a sufficient deterrent effect to enterprises. Sanctions in many instances are ineffective due to the limitation of the maximum fine amount, as stipulated in the law. However the KPPU has tackled this issue by imposing non-financial sanctions that create a similar deterrent effect to infringements. These include a prohibition against participating in public procurement for a certain period of time, peer pressure, and media coverage (social deterrence). All of these deter business actors from continuing anticompetitive practices.

IV. NEW AUTHORITY IN MSME

As mentioned above, the KPPU was given a new mandate by the Law No. 20 Year 2008 concerning the Micro, Small, and Medium-sized Enterprises (MSME) and further instructed through Government Regulation No. 17 Year 2013 to supervise partnerships between MSME and Large-sized enterprises. The objective is to promote a constructive business climate and to provide opportunity to MSMEs, as this supervision in considered an attempt to help with competition law objectives. This supervision is conducted using proper coordination with other government agencies. The law also gives the KPPU a right to impose administrative sanctions on large and medium-sized enterprises violating the law.

One of the objectives of this supervision is to identify fraud. The other is to prevent any abuse of their bargaining position by large-sized enterprises with MSMEs, as included in their partnership agreement. Ownership structure is also part of the supervision, since it is prohibited for large-sized enterprises to own and or control MSMEs, and for medium-sized enterprises to own and or control small and micro-sized enterprises.

Prior to the MSME law, KPPU found it was difficult to supervise abuses of superior bargaining positions by large-sized enterprises, since this responsibility was not reflected in the competition law. Provisions within competition law cannot reach abuse of superior bargaining position in low market share enterprises. Partnership supervision by the competition agency is relatively new to Indonesia, and thus the KPPU is making a proactive effort to achieve buy-in for its initiatives to protect MSMEs when entering partnerships. The KPPU is authorized to impose administrative sanctions in term of fines and license revocation (in coordination with other authorities).

To effectively supervise partnerships, the commission needs to look at many elements of the partnership agreement, especially those relating to institutional issues like human resources and budgets. Staff competency in reviewing contracts has improved, as has cooperation with other relevant parties, in particular, the government. Intensive outreach activities are to be established to gain public awareness, both at the national and regional levels. Currently the internal regulation relating to this activity is being finalized, and expected to be approved before the summer end. Meanwhile, opportunities for outreach activities have been realized.

V. INTERACTION WITH REGULATORS

Competition policy is a cross-sector policy. It affects sectoral policies that directly affect market competition. Competition policy is usually part of a common regulatory-making process. The only way for a competition agency to deal with competition policies is through policy advice. In some countries, mostly Commonwealth, competition policy advice is entrusted to the legislators/regulator, which react to specific requests.

This doesn't work in Indonesia. Article 35 of competition law provides KPPU with the main authority to provide policy advice to the government and other regulators on competition policy. This is a voluntary process; any government agency can request input or comments from the KPPU on pre-existing regulations.

A sound competition policy is a critical element of Indonesia's competitiveness agenda but, to date, competition has not been mainstreamed into general economic policies, and legislators/regulators do not see the necessity to undertake competition impact analyses. As a result, new legislation/regulations can create restrictions to competition while the KPPU is often marginalized in the policy-making process. Currently, the level of government acceptance of advice provided by the KPPU is relatively low (around 47 percent). So the record indicates that promoting competition policy in Indonesia is not an easy task; further, the record raises issues of policy coordination, which is weak in Indonesia.

The Coordinating Ministry of Economic Affairs coordinates all economic policies in Indonesia. They supervise the work of fourteen ministries handling economic issues. Hence, they play a vital role in shaping the Indonesian economy, including on competition policy.

The Ministry is becoming a closer collaborator with the KPPU on competition-related issues, and this collaboration is increasing as ASEAN market integration approaches. Given the importance of an effective competition policy, the Ministry has established a specific unit to deal with competition policies. This unit has become the main conduit for the voice of the KPPU to the other ministries. It has been agreed that the KPPU shall be consulted on any economic policy being discussed at the coordinating ministry that might affect competition.

Indonesia is lucky to have achieved an important milestone with the approval of the National Development Plan (on January 5, 2015) that includes competition policy as an important factor to help promote investment. The Government has agreed to implement strategic goals on competition policy as follows: (i) repositioning and strengthening of the competition agency (KPPU); (2) prevention of anticompetitive practices and enforcement of the competition law; (3) supervision of defined sectors, including food commodities, energy, finance, health and education, and infrastructure and logistics; (4) enhancing government policy harmonization toward fair competition principles; and (5) supervision of partnerships between MSME and Large enterprises.

While endorsing the national development plan, the KPPU has also been endorsing a competition policy checklist for several regional governments. This checklist will serve as a guide for local governments in their policy making process. It is expected that through this checklist, the objective of achieving sound competition principles across all economic policies will be improved. In early 2015, the KPPU entered into formal cooperation with the Director General on Regional Development at the Ministry of Home Affairs to implement competition policy in all regional governments.

VI. RELATION WITH THE JUDICIARY

Existing competition law does not provide the KPPU with strong enforcement powers, like dawn-raids, document seizures, non-sanction to non-cooperative parties, and/or an ability to execute sanctions. These are the powers that would enable KPPU to obtain hard evidence. Without such powers, cartel (including bid-rigging) enforcement suffers. It was even worse when the KPPU had a short time frame, which forced the KPPU to make quick final decisions. This situation creates business uncertainty.

The KPPU uses several different kinds of evidence in making a case at a hearing, including direct evidence such as testimony, documents and other information, and expert statements. Indirect evidence has been another tool used to prove the existence of anticompetitive violation or agreements. Indirect evidence or circumstantial evidence is evidence, which leads to, but does not by itself, prove specific conclusions. It can take the form of communication or economic evidence. In Indonesia, as in other countries, circumstantial evidence has gained a significant place.

Since the beginning of the KPPU's enforcement activities, circumstantial evidences has been widely used in competition cases; for instance, the conspiracy on the privatization of one of Indonesia's state-owned enterprises (in 2000) and the cross ownership in a telecommunication case (in 2006). Both decisions were overturned by a District Court, and then affirmed by Supreme Court. At first, there was opposition to the use of circumstantial evidence from legal practitioners and judges. Most of them valued actual facts and questioned the use of indirect

evidence in competition enforcement. They seemed to believe that the KPPU made decisions on the basis of circumstantial evidence alone. However, in fact, the KPPU uses at least two types of evidence in each case, one of which is based on hard evidence. Circumstantial evidence is then used to support the hard evidence.

In the cooking oil and fuel surcharge cartel cases, the KPPU adopted a statistical methodology used in eleven similar cases that had been published in international journals and has been regarded as jurisprudence by courts across Europe and the United States. In this context, the KPPU applied statistical methodologies on such cartel cases and found convincing arguments to support their cases. However, they had to prove that the cartel agreements had been brought to the implementation stage. KPPU managed to provide minutes of a meeting by the business association to confirm their price-fixing conduct, and so secure the cases. Thus, the statistical test, followed by the implemented agreement of price-fixing, confirmed the existence of the cartels. This changed judicial perspectives, although some legal practitioners argued that KPPU enforcement relied too much on economic approaches.

The question for effective enforcement is not whether "more" or "less" economics should be used, but rather what kind of economics and especially how the economic analysis should be used. The current change in the practice of Indonesian competition policy is all about the way in which economic principles and economic evidence are brought to bear in the context of decision making. The assessment of decision making in light of economic principles that are robust and empirically tested, as well as reliance on a number of empirical methodologies that help identify a theory of harm, is at the core of this approach. But the KPPU always keeps in mind that strong evidence means non-deniable defenses.

It has not been an easy task, but the KPPU has managed to get there. Courts have started to become aware of the use of circumstantial evidences. Nowadays, most appeals on KPPU decisions are affirmed by Courts. It's well believed that this is due to the result of long and sweaty efforts by the KPPU in convincing public and judiciary on the validity of new approaches in competition enforcement. International best practices have become an important guide toward an effective enforcement system in Indonesia.

VII. EXCLUSION AND EXEMPTION

Indonesian competition law supports giving priority to economic development through exemptions and exclusions. The Law is applicable to all sectors and enterprises in Indonesia, but exclusion is provided for specific cases defined by Article 50 of the law. These exclusions provide an application of competition law to several situations including: (i) behavior to implement certain laws; (ii) agreements on standard setting, research and development, franchise, patent, and others items that are the result of innovation; (iii) agent contracts; and (iv) business acts of cooperatives and small-sized enterprises.

An exemption is provided by Article 51 to enterprises doing their business activities, as defined by certain laws, in a sector that affects the interests of people at large. Some define this as an exemption to public service obligations or activities by a natural monopolist. The natural monopolist may not just be a state-owned enterprise, but can include other enterprises as long they are required by certain laws to provide public service obligations. For example, if an enterprise was asked by the government through a law to build public facilities for a rural area,

they may become a monopolist in that area, and they may be given a condition that the enterprise shall provide equal access to the facility to other enterprises that wish to cooperate with them.

VIII. How Does the Public Perceive Competition Policy?

Gaining public support on competition is a challenge for competition authorities, especially in Indonesia. Implementation is complicated because its introduction has required a cultural change in both the community and in businesses. Among the public, competition has often been considered to be a bad thing. Society is not accustomed to competition; traditionally, in Indonesia, the public's culture is to work together in resolving problems (amicably). In this context, businesses always conducted various meetings to discuss and solve a problem with their competitors. As such, business associations frequently became the means to solve competition disputes but, in turn, business associations have created some of the competition cases handled in Indonesia. For example, a cartel carried out by the domestic tire manufacturers was terminated by the KPPU earlier this year.

Studies conducted by the Commission on business awareness in the Jakarta Metropolitan area during 2009 showed that only 26 percent of businesses were aware of the existence of the Indonesian competition law. Later studies on public and business awareness conducted by the Commission in 2014 showed that business awareness had increased to 60 percent, while the public (community) awareness had reached 57.5 percent. In general, about half of the respondents (55 percent) saw the benefits of a competitive climate and more business opportunities in Indonesia. Therefore, it can be seen that Indonesia now shows a high rate of public and business awareness after fifteen years of implementing competition law and policy.

The Commission understands that the acceptance of competition law and policy will result from an effort to change the culture of community and businesses. Therefore, in line with the implementation of the national development plan 2015-2019, the Commission and the government will start implementing a mandate to mainstream competition policy through changing community attitudes. To do so, the Commission is preparing a formal cooperation with the ministry in charge of higher education to include competition law and policy as a compulsory curriculum in all universities and government education agencies. It is hoped that this step will create a culture of its own and be able to change the mindset of society regarding competition.

IX. HOW DO WE SEE THE ASEAN INTEGRATION?

Indonesia places high expectations about what ASEAN will be after integration. People are optimistic to see how ASEAN will work with zero tariffs and free movement of goods, services, and investments within the group. However, there is still some skepticism raised by experts who foresee that a single ASEAN Economic Community ("AEC") is still a work in progress. It is undeniable that ASEAN is an exciting, diverse, and vibrant region for businesses, as it boasts a combined population of more than 600 million people, with 60 percent below the age of 30. The group is also on track to become the world's fifth largest economy, with the world's third largest market.

The problem is that ASEAN is well known with its diversity and sensitivity on different issues and sectors. At least four features differentiate ASEAN with other regions, namely different economic movements, cautious pragmatism, consensus-based decision-making, and resistance to common external trade regimes.

Indonesia is one of the founding countries of ASEAN, along with Thailand, Singapore, Malaysia, Brunei, and the Philippines. Indonesia is the first country with a fully implemented competition policy and law regime in ASEAN. Indonesia has initiated many regional forums in competition for ASEAN, starting from ASEAN Consultative Forum on Competition ("ACFC"), which later transformed to the ASEAN Experts Group on Competition, and the ASEAN Competition Conference, which serves as a common platform for multi-stakeholders in competition policy. Indonesia has recorded a tremendous positive implication for results from competition policy and has really perceived a great deal of trust for better competition policy and law in the region.

What the KPPU wants to pursue now is international cooperation. Cooperation is believed to be important as a means both of improving the effectiveness of the agency and for producing consistent outcomes in similar circumstances. Indonesia and the KPPU currently define several needs for cooperation. For example, the KPPU sees a need for building a knowledge hub with academicians, building a competition culture with the public, creating policy harmonization with governments, complying with businesses, improving the quality of studies with other information-related institutions, and working with other law enforcers for effective enforcement. International cooperation falls within the larger attempt to improve the quality of studies and effective enforcement to meet domestic priorities.

To pursue international cooperation in competition law and policy for ASEAN is not an easy task. Therefore, Indonesia may start by promoting national or group cooperation as the champion or role model for cooperation in competition. Indonesia is aimed at becoming such a champion, and has as its strategy to serve as a regional knowledge hub for competition policy. Moreover, Indonesia will initiate a bottom-to-top approach for cooperation in competition enforcement, and initiate a top-to-bottom approach for cooperation in competition advocacy. It shall continuously adapt to changes and move together with other sector policies at both the national and regional levels.

X. CONCLUSION

After 15 years of activity, competition policy and law has become an important pillar of Indonesia's economy. Such an instrument has been adapted throughout many government policies, including those of central and local economic policies. Since the beginning of KPPU, many activities have been put in place to prove its commitment for an effective competition law. Benefits of competition have been proved to improve opportunities for the growth of the business environment in this country. Direct and indirect benefits have been acknowledged by the society.

Throughout its journey, KPPU has been dynamic in adjusting itself to address ongoing challenges. Many improvements have been made in term of case proceedings, policies, and institutional processes. Advocacy and outreach activities have been massively executed. These activities have led to a high public and business awareness of competition law and policy.

Through higher education competition will become an increasingly important element in Indonesian knowledge and consciousness, forming its own community that will play an important role as a strategic partner in disseminating and promoting business competition.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

August 2015 (1)

Competition in Thailand

Dr. Sakda Thanitcul
Chulalongkorn University, Thailand

www.competitionpolicyinternational.com

Competition in Thailand

Dr. Sakda Thanitcul[1]

I. INTRODUCTION AND HISTORY

Thailand was the first ASEAN nation to enact a trade competition law on the initiative of the Ministry of Commerce in 1991, during Anant Panyarachoon's government. This law was not forced on Thailand by the International Monetary Fund or any other country. The Trade Competition Act BE 2542 (1999) is a development from the Excessive Trade Profiteering Act BE 2490 (1947), which has been amended from time to time.

In the old days, price control was imposed at the end-user price point, i.e. the retail price. Subsequently, the wholesale price was also made subject to price control. However, once Thailand's trading system developed, many market structures became oligopolies and monopolies. As a result, the retailer would distribute goods based on the prices determined by their originators, which caused the consumers to purchase goods at a high price at all times. This solution to the high price of the goods was thus unsuccessful. As a result, the Excessive Trade Profiteering Act BE 2490 (1947) was replaced by the Price Control and Monopoly Prevention Act BE 2522 (1979) to prevent business operators from monopolizing, e.g. by reducing the goods supplied in order to cause a shortage of goods and then hiking up the price of such goods thereafter.[2]

In 1991, during Anant Panyarachoon's Government, problems arose in relation to the trade competition law. For example, certain large-sized automobile manufacturers stopped the import of their own-brand vehicles. The question then was whether or not such an act was an exercise of monopolistic power. As a result, there were more debates on the issue of free trade.[3] This prompted the Department of Internal Trade to issue an order to appoint a Working Committee on the Drafting of the Trade Competition Law in the year 1991. This Working Committee spent many years before it completed the drafting of such a Bill. The Trade Competition Bill was submitted for the Cabinet's consideration many times before it was finally approved. Thereafter, this Bill was forwarded to the Parliament.

However, before this Bill passed the required readings, the Parliament was dissolved. In the year 1998, during Chavalit Yongjaiyuth's government (Tom Yum Kung Economic Crisis),

---

[1] Professor of Law, Chulalongkorn University, Bangkok, Thailand. He served as a Member of the Trade Competition Commission for three terms (4 May 2004 – 3 August 2007 – 3 November 2009 and 7 December 2010 – 29 April 2013). He would like to express his sincere thanks to Miss Luxsiri Supakijjanusorn of Siam City Law Offices Limited, who translated this paper into English.

[2] Siripol Yodmuengjaroen, former Secretary of Commerce and Director-General of the Department of Internal Trade, stated *"then there is the Trade Competition Act BE 2542"* in the *"Comprehensive Learning on Trade Competition Matter"* Paper published on the 72nd Anniversary of the Establishment of the Department of Internal Trade, pages 9-10.

[3] *Id.*, 10.

the Bill was again forwarded to the Parliament for its deliberation. However, Parliament again was dissolved before the Bill was passed.[4]

The process restarted in 1998, during Chuan Leekpai's government. Section 87 of the Constitution of the Kingdom of Thailand BE 2540 (1997), which was in effect at the time, required the State to support the free economic system by reliance on a fair market supervision mechanism.[5] This caused Chuan Leekpai's government to expedite the passing of the law through the Parliament. Moreover, in the year 1999, the Trade Competition Law was passed into law and the Price Control and Monopoly Prevention Act BE 2522 (1979) was repealed.[6]

The Chairman of the Working Committee on the Drafting of the 1999 Trade Competition Law used the trade competition laws of South Korea and Germany as models in drafting Thailand's Trade Competition Bill as they were (i) well-drafted and (ii) suited to Thailand economic conditions.[7] Thailand constitutes a small sized market, with only a few firms in many markets. For example, such markets as the soap, detergent, vegetable oil, and instant noodle industries had only about 8-15 market players. Oligopolistic markets, which had around 2-6 market players, included the cement, beer, soda, mirrors, and glass industries. Therefore, it was felt appropriate to control business operators with market power or dominant market operators.

The 1999 Law was based on the principle that any person with monopolistic power or market dominance, who can control the price and supply of the goods in any particular goods market, does not necessarily violate the law. However, there is a violation of the law when such market power is exercised in an unlawful manner that causes damage.[8]

The Trade Competition Bill was submitted to Parliament for its deliberation in 1998. During the process of consideration by the Senate Committee, many amendments to the provisions of the Ministry of Commerce's proposed Bill were suggested, including the addition of Section 30 to empower the Trade Competition Commission to issue an order instructing a business operator having a market dominance, with market share of over 75 percent, to suspend, cease, or change that market share. As a result, the Trade Competition Act is a law that both controls market behavior and market structure.[9]

---

[4] *Id.*

[5] The Constitution of the Kingdom of Thailand BE 2540 (1997), Section 87 prescribes that: "the State shall encourage a free economic system through market mechanism, to ensure and supervise fair competition, protect consumers and prevent direct and indirect monopolies; as well as repeal and refrain from enacting laws and regulations controlling businesses which do not correspond with the economic necessity, and shall not engage in an enterprise in competition with the private sector unless it is necessary for the purpose of maintaining the security of the State, preserving the common interest or providing public utilities."

[6] Pullop Ratanachantra, Thailand's Trade Competition Law, 46 CHULALONGKORN REV. 21 (Jan – March 2012.

[7] Siripol Yodmuengjaroen, *supra* note 2 at 10.

[8] *Id.* 11-12.

[9] *Id.* 12.

II. THE ESSENCE OF THE COMPETITION ACT: COMPETITION BEHAVIOR WHICH IS PROHIBITED BY LAW OR WHICH MAY BE CONDUCTED UPON PERMISSION

The essence of the Trade Competition Act BE 2542, which prescribes certain prohibited behavior for business operators to conduct, or which may be conducted upon permission, is contained in five categories, as follows:

1. unlawfully exercising market dominance (section 25);
2. merger of businesses that may create monopoly or unfair competition (section 26);
3. collusion to create monopoly or restriction of competition (section 27);
4. domestic business operator colluding with an overseas business operator against a person who lives in a country where there is a restriction of goods, to purchase their goods; and
5. unfair trade practices.

The Office of the Trade Competition Commission ("OTCC"), which acts as the Secretariat of the Trade Competition Commission, has issued Guidelines to determine which behavior is in violation of such legal provisions. These Guidelines are detailed in Appendix A.

III. ENFORCEMENT ORGANIZATION AND ENFORCEMENT MEASURES UNDER THE LAW

A. Enforcement Organization

1. Management, Mission, and Goals

The Trade Competition Commission ("TCC") is the organization that enforces the Trade Competition Act BE 2542 in Thailand. The TCC is comprised of a Commerce Minister, Permanent Secretary of the Ministry of Commerce, Deputy-Chairman, Permanent Secretary of the Ministry of Finance, and members from the public sector and private sector—which must not be less than eight persons but no more than twelve persons—as well as the Director-General of the Department of Internal Trade, its Member and Secretary.

Their power and duties in considering a complaint under section 18(5) are to monitor and expedite a Sub-committee that will investigate a violation pursuant to the TCC. There could also be criminal punishment as requested by the injured person according to Section 55, as published in the Government Gazette. Rules for notification on the Form, Criteria, Method, and Conditions of the Application for the Permission for Merger or Collusion to Reduce or Restrict Competition, including the Consideration of the Application, are contained in section 35.[10]

Their mission is to supervise and promote trade competition and promotion of morality and ethics in operating a business. Their targeted goals are to: 1) to ensure that business has free competition and there is corporate governance in business operation; and 2) to create a system to supervise and promote the knowledge on effective trade competition.

2. Sub-committees

The Sub-committees appointed by the TCC are: (a) Sub-committee on Specific Matters (under section 12); and (b) Sub-committee on Investigation (under section 14).

[10] OTCC, Annual Report BE 2556, page 6.

3. The OTCC

The OTCC is an organization, established within the Department of Internal Trade, Ministry of Commerce, with the Director-General of the Department of Internal Trade as the supervisor and the person responsible for OTCC's duties.[11] See Appendix B for an organizational chart. The Deputy Director-General of the Department of Internal Trade, who has more than 15 years of experience in the enforcement of the Trade Competition Act, has summarized the enforcement of the Trade Competition Act BE 2542;[12] see Appendix C for the summary.

B. Results of Enforcement of Law Within the 15-Year Time Period (October 1999 To March 2014)[13]

The Secretariat of the Office of Trade Competition has tracked the trade behaviors of six targeted groups of business operators of goods/services (80 goods/services). This includes the following groups: consumer goods, petroleum products, petrochemical and chemical-agricultural product, automobile, construction material group, and services and other goods.

Since the law began to be enforced, there have been 93 claims for consideration by the TCC. These claims are divided into three different behaviors: (i) the unlawful exercise of market dominance (section 25)—18 claims or 19.35 percent; (ii) collusion behavior which results in monopoly, reduction or restriction of competition (section 27) 22 claims or 23.66 percent; and (iii) behavior of unfair trade practices (section 29) – 53 claims or 56.99 percent.

The following summarizes the TCC's considerations and decisions:

Action	Number
No violation was found	**83**
Found to be a violation, which was passed to the office of the Attorney-General, who decided not to file a charge	**1**
Pending	**9**
Total	**93**

Regarding the work of the past 15 years, it can be said that TCC has "failed" as the TCC has never been able to punish any violator. An independent academic with expertise on competition law summarizes:

> To conclude, past actions of the TCC faced many challenges that arise from the lack of enforcement by the political division. This is because the political division shares major benefits with large scale businesses, who are capitalists that support large size political parties. This includes the failure to issue rules and regulations

[11] *Id.*

[12] Mr. Santichai Saratawanpad, unpublished seminar supplementary report, Faculty of Law, Chulalongkorn University, page 50.

[13] Siripol Yodmuengjaroen, *supra* note 2 at 93.

which are necessary for enforcement of the law. Also, the lack of meetings means there is high backlog of pending matters. The examination does not comply with the law, nor does it comply with discrimination in legal enforcement. This caused the law to be toothless.[14]

III. MOST IMPORTANT COMPETITION CASES IN THE PAST 15 YEARS

Among the 93 cases and complaints listed above, the most important and most difficult cases were the following five, which led to the consideration of the TCC on whether or not such cases violated the Trade Competition Act BE 2542.

For the first time, the OTCC used the information of these five cases to compile and publish public information in 2013. This is for the celebration of the 72nd Anniversary of the Department of Internal Trade. [15]

A. Tied-in Sales of Liquor & Beer

1. Matter of Complaint

In the year 2000, Company A was a large beer manufacturer who requested fairness because its competitor, Company B, had used its group company liquor as a tie-in with its beer. This is a clear and intentional violation of the Trade Competition Act BE 2542, section 25(2) and section 29.

2. Examination of Facts

The TCC appointed a Sub-committee to study the complaint and find the facts, which can be summarized as follows:

The two major companies in Thailand which manufacture beer are Company A, which manufactures the S Brand beer and Company B, which manufactures the C Brand beer (Company B is in the same group as Company M, which was the only Company under the Government's Concession). Later, the Government liberalized alcohol production and sales through the Department of Industrial Factories and the Excise Department. They conducted an open bid for alcohol production plant sales. The winning bidder won 12 plants. The Existing Concessioner had five plants while the newcomers had seven plants.

The Group of C Brand Beer and Liquor's manufacturers, authorized dealers, and authorized sub-dealers has cross-shareholding and shares the same authorized signatory in the same group, which has many companies in this group. Furthermore, the previous 14 alcohol producers (year 1999) and Brand C's authorized dealers and sub-dealers shared the same office addresses.

S Brand beer has a sole authorized distributor, which is in the same group as the manufacturer. This distributor is a juristic person without relation to the manufacturer in any way.

[14] Wanrak Mingmaneepakin, Summary Report on Legal Reform Structure to Reduce Monopoly and Promote Competition in Thailand's Economy of Dr Duenden Nikombrirak, page 10, only available in Thai.

[15] Siripol Yodmuengjaroen, *supra* note 2 at 48-66.

The fact-finding process showed how the actual selling of the liquor and beer periodically demonstrated characteristics of forced sales, although in some period there was the freedom to choose. There was a choice of not being tied-in with liquor purchases, but the price would be higher than the tied-in price. There was also the specification of the diverse range of the proportion of liquor—beer for brand C. During the Songkran (Thai New Year) celebration, there were very strict conditions and a forced tied-in condition enforced by sending notifications to the customers in writing, sometimes verbally. At other times there would be indirect coercion, e.g. if there was no tied-in purchase of both liquor and beer, there would be delayed delivery or no delivery at all.

3. Legal issues

The Sub-committee reported the results of its study after it had considered the following issues:

Consideration of section 25(2): the Sub-committee was of the opinion that the condition of tied-in sales of liquor and beer did actually occur at the level of sub-dealers and wholesalers of the beer and liquor, and many sub-dealers and wholesalers were affected. It was an exercise of stronger bargaining power that restricted customers' freedom of choice.

However, the TCC has yet to identify the market share and the sales turnover of such business in order to determine who the Market Dominant Operator is, stating there were insufficient facts to show whether any of the sub-dealers and wholesalers of the beer and liquor were the Market Dominant Operator.

The Sub-committee also considered other legal provisions, i.e. section 27(3), (10) and section 29 of the Trade Competition Act BE 2542 and there was the majority opinion that the beer and liquor tied-in sale was a specifically fixed behavior. There was also clear prohibition of section 25(2). In principle, however, it should not be a violation of sections 27(3) and (10) and section 29, as under the following reasoning.

Regarding the consideration of sections 27(3) and (10), there needs to be collusion between the business competitors who have a chance to compete against each other in the same product market. Also, the colluding business operators need to be in the same level of manufacturing and sales in order to cause the monopoly or reduction of competition in the market. Furthermore, according to preliminary academic studies of the beer market; it is a different market from the liquor market. The Sub-committee, according to the majority opinion, found that there were insufficient facts to conclude that there was a collusion to monopolize the market according to section 27(3). This is because the monopoly or market control requires absolute holding of market share or the ability to fix the price and supply of the sales volume. After considering information on the amount of sales and value of beer during the period of 1998 to 2000, there was no clear indication of monopoly, market control or uniform practice for sale and purchase according to section 27 (10). Therefore this action did not reduce market competition but only made a difference on the market share.

They also considered section 29, which restricts an act that would destroy, obstruct, prevent or restrict business operations, or stop other business operators from operating business, or to cease business operation. Normally, the buyer has the freedom to trade and, in practice, the

buyer may not trade with the seller. By implication, the tied-in sale of beer and liquor is a general behavior within free trade, which does not specify the Relevant Market. However, such act constitutes unfair trade practices. Such conduct is mentioned under section 25(3); and from normal dealing and trading, the seller intends to increase sales turnover and increase market share to be higher than other persons. This is not an indication that it constitutes an act to destroy, obstruct, prevent or restrict other persons.

However, certain members of the Sub-committee were of the opposite opinion, i.e. that section 29 is comprehensive and covers all cases. Moreover, the tied-in sale of Brand C beer represented an act to destroy, obstruct, prevent or restrict other persons and cause damage. It was free but not fair trade and thus a violation of section 29.

4. Decision of the TCC

The TCC passed a resolution that the tied-in sale of beer and liquor on the part of the sub-dealer and wholesaler, and the coercive behavior against the customers in such sale and purchase restriction, was prohibited by section 25(2) of the Trade Competition Act BE 2542. However, as there is yet to be any Market Dominant Operator criteria (unpublished law), thus section 25(2) was not applicable to the case. The TCC acted as follows:

1. Informed the sub-dealer that the tied-in sale of Brand C beer and liquor was not appropriate and may violate section 25(2), and that they should therefore end such act; and
2. The Department of Internal Trade shall especially track the market behavior of the group of the manufacturers and sellers of beer and liquor and further report to the TCC.

B. Monopoly in the Television Network Membership Business and Increase of Service Fee

1. Complaint matter

The Foundation for Consumers complained that the consumers were unfairly treated by a merger of the television network membership businesses and were restricted from entering the videotape movie business.

2. Fact Finding

The TCC appointed a sub-committee to study the facts concerning the merger of the AB Group companies to monopolize the business and the increase of the service fee, including whether such business operator was considered as being a state enterprise which is not subject to the Trade Competition Act BE 2542. The facts were found as follows:

The television network membership businesses were the business/concession of MCOT (Mass Communication Organisation of Thailand (now converted to MCOT Public Company Limited (MCOT)). The concession was granted by the Cabinet with MCOT as a contractual party with five business operators; however, only two were operational, Company A and Company B (one business operator has ceased operation but the other two have not yet operated).

Companies A and B started business in 1998 in order to reduce competition and the payments of royalty to foreign content developers, in order to resolve losses, which has been approved in its restructuring of shareholders by MCOT.

The format of the merger was in a form of share swap between these two companies which were then separate entities but had the same service mark of "AB." The merger of these companies did not affect the concession agreement with MCOT. However, Company A then became the majority shareholder of Company B with 98 percent of all shares held. Also, for Company A, Company C became the major shareholder of Company B with 41 percent of all shares held. They share the same set of authorized signatories.

After the merger of Companies A & B ("Company AB"), the monthly service fee of the Gold Package was increased from Baht 890 to Baht 1,060 (with MCOT's approval). This price increase was allegedly caused by the floating exchange rate and from studies of the balance sheet and profits and losses of both companies.

Relevant Service Market: Considering the substitutability (the customer service fee base, characteristic/quality of goods, and convenience in using such services), it can be concluded that the television network membership business is a different market from the general television business (Channels 3, 5, 7, 9, 11 and ITV), satellite, video rental, and cinema markets.

Geographical Market: Considering the technology of broadcasting and the criteria of the State's supervision, it can be concluded that the geographical market is Thailand's market and that smaller business operators could not compete. This is due to technological and capital requirements, which made the television network membership business a monopoly market with a 100 percent market share.

Entry barriers against newcomers. Company AB has market dominance for the following reasons: (i) high sunk costs, e.g. the cost in the lease or infrastructure of the network system and high advertisement costs; (ii) the license application process is uncertain, and (iii) a lack of organization and rules governing the telecommunication business, which means that a newcomer could not lease or invest in fiberglass network infrastructure.

3. Office of the Attorney-General

The Office of the Attorney-General, having considered the Joint Venture Agreement between Company AB and MCOT, was of the opinion that the television network membership business was the business of Company AB; not MCOT. This is because Company AB was the sole investor in the business, in which it had to recover the expenses in its operations and be solely responsible for the members. MCOT was not a part of this.

Also, Company AB was not a State Enterprise pursuant to section 4 of the Budget Procedure Act BE 2502, as it did not have any shareholding by the government of more than 50 percent of both companies. Therefore, the television network membership business of Company AB was not exempt pursuant to section 4(2) of the Trade Competition Act BE 2542.

A World Bank representative, two economics professors, and one law professor who looked at the case were of the opinion that Company AB, which has a joint management and executive board as well as the same authorized signatories are, by implication, in unity and this

constitutes a Market Dominant Operator pursuant to section 25 of the Trade Competition Act BE 2542.

4. Legal Issues

Behavior: Company exercises market dominance by forcing the bundling of products, as all members have to take the Gold Package with the highest number of channels and highest fee rate.

Impact: The impacted consumers were those consumers that, after the merger, had higher service fees from changing from the old system of MMDS into the satellite and cable system. Membership costs for Company AB prior to the merger and after the merger had increased. It can also be observed that such merger did not result in any cost savings.

Therefore, it appears that Company AB had a monopoly over the market of television membership business and, after the merger, Company AB acted differently from prior to the merger. This affected the previous members' and new members' expenses significantly. Moreover, the merger did not result in improved services.

5. Decision of the TCC

The business operation of Company AB constituted unified behavior. First, Company A (existing) started with a majority shareholding in Company B (existing) at 98 percent. There was also the same executive board and authorized signatories, which meant there was no collusion violating section 27 (1) of the Trade Competition Act BE 2542.

Furthermore, Company AB had a 100 percent market share of the television membership and thus was a Market Dominant Operator. However, the adjustment of the higher service fee was not a violation of section 25 (1) of the Trade Competition Act BE 2542 because it was necessary to combat the losses and the devaluation of the Baht currency. Moreover, after the merger and price increase, Company AB still suffered losses.

As an adjustment of the package and monthly service fee had to gain approval from MCOT, the first grantor of the concession, MCOT was thus notified as the supervisor of the service fee rate at a fair level. There shall also be more packages to provide more choices to the consumers so as not to violate the Trade Competition Act BE 2542.

C. Competition Restriction in the Motorcycle Business

1. Matters of complaints

Companies B, C, and D filed a complaint against Company A, which exercised market dominance by proposing that sole agents of Companies A, B, and C change to sell only Company A's brand of motorcycle.

2. Fact findings

In the year 2002, the TCC passed a resolution to appoint an Expert Sub-committee on the Motorcycle Business to consider this market dominance complaint. In that year, motorcycle manufacturers A, B, C, and D had market shares of 70, 15, 10, and 3 percent, respectively.

There were two types of sales channels for the motorcycles: (1) Sole Agent to sell the products to the Dealer; and (2) Manufacturer sells to the Dealer directly; then the Dealer sells the

products through another two channels, i.e. sub-dealers and consumers. From 1997-2002, the number of Sole Agents of Company A increased, while the number of Sole Agents of Companies B, C, and D decreased.

The alleged behavior, which may fall into unfair trade practices, was a special offer provided to those Sole Agents who sold other brands to now sell only Brand A. If there were Sole Agents who decided not to sell Brand A, then Brand A would set up a competing Sole Agent in the same area.

3. Legal Issues

An Expert Sub-committee on the Motorcycle Business having studied and analyzed the facts concluded that Company A engaged in unfair practices, as stated above. These practices were deemed not to be free and fair competition. Such an act is a violation of section 29 of the Trade Competition Act BE 2542.

4. Decision of the TCC

The TCC agreed with the findings that such an act was not free and fair competition and appointed an Investigative Sub-committee to conduct a legal investigation. This Sub-committee agreed that Company A's act was not free and fair competition and that there should be a claim filed against Company A.

However, the Office of the Attorney-General issued a notice to the TCC's Chairman on March 28, 2013 that a claim should not be filed against Company A because evidence was insufficient and Company A's actions did not directly affect the sale of the motorcycles. The Office argued that the purchaser of the motorcycle, whichever brand, considers the quality and features of the motorcycle, as well as the price. Therefore, whichever motorcycle brand is most popular depends only on the freedom and choice of consumers.

D. Cancellation Of The Application For Registration Of New Drug Formula

1. Matters of complaints

A group consisting of the Consumers Association, AIDS Association, HIV/AIDS Infected Person Network, and Private Developmental Organisation of AIDS filed a complaint against Company A, which wished to cancel a application for the registration of a new drug formula and for 10 generic drugs. This meant that sales agents in Thailand would not be able to import drugs from a parent company in the United States, which would limit Thai consumers' choice of drugs. This would be a violation of sections 25(3) and 28 of the Trade Competition Act BE 2542.

2. Fact findings

The TCC appointed the Expert Sub-committee on the Treatment Drug to study the following facts.

The application cancellation arose from a request from the parent company of Company A overseas, which requested its sales agent in Thailand to cancel the registration of a drug formula, making the import of ten items impossible. These ten items consisted of (1) five new patented drugs and (2) non-patented generic drugs that would compete against drugs already sold in Thailand. The importers consist of three companies: Company A, Company M, and Company R.

Company A's drug had Thai sales turnover in 2006 of Baht 355 million, from an overall value of the AIDS virus drug of Baht 2.877 billion. Moreover, in the year 2007, the Ministry of Public Health had instructed Compulsory Licensing ("CL") with the Brand K drug. This made the Government Pharmaceutical Organization ("GPO") source the imported drug from India, which caused the Brand K price to decrease significantly. This may be the reason why the parent U.S. company made the decision to cancel its drug registration.

There are two types of AIDS virus drug formulas, i.e. (1) Basic drug formula, which had a market share of 64 percent; and (2) Drug resistance formula (Brands K and A), which had a market share of 36 percent. Therefore, once Brand A was registered, it could be used as a substitute for Brand K. The AIDS virus drug market In Thailand has two characteristics: (1) the drug resistance formula market is an oligopoly market with only three business operators (sellers); and (2) the drug of each company was not substitutable—thus Brand K held a monopoly in the market with the sales turnover in Thailand in the year 2006 of Baht 355 million.

The issue that the Sub-committee raised concerned the cancellation of one registered drug, HIV treatment drug A (the drug resistance formula), because the HIV treatment drug has three groups, such as the Protease Inhibitor or PI for the drug resistance formula.

3. Legal Issues

Two Legal Issues: Section 25(3) defines two legal issues, i.e. market share and sales turnover, which constitute a Market Dominant Operator. Upon consideration of the Brand A drug market structure, it was found that there it was not imported for sale; however, due to the application for registration and the later withdrawal of such application, the TCC took the following two approaches in determining the Relevant Market:

- Approach no. 1: Relevant Market of Drug K belongs to the Protease Inhibitors (PI) group (drug resistance group), which is Company A and Brand A in the PI group, by considering whether or not they are in the same Relevant Market.
- Approach no. 2: Relevant Market is the Protease Inhibitors (PI) group, which has five business operators, in which Company A has two items of drug (Brands K and N).

From considering these two Relevant Market approaches, it appears that Company A did not fall into the Market Dominant Operator category as its sales turnover had not reached Baht 1 billion.

Two Opinions: The Sub-committee has the choice of two opinions, as follows:

First, it could perceive a violation of section 28. To do so, there should be three true factors: (i) there was a relationship between Company A in Thailand and Company A in the United States; (ii) there was a cancellation of the drug formula on a direct order from the parent company; and (iii) such act directly caused a person in Thailand who wished to purchase the goods (drug) to use to have limited options in the purchase of goods from a business operator outside Thailand.

Second, it could perceive that there was not constitute violation of section 28, i.e. that the three factors above did not exist. The Sub-committed found that only the first and the second factors existed, not the third factor. i.e. no direct restriction of the option to purchase goods or

services from a business operator outside Thailand. Furthermore, a high volume of drugs imported into Thailand should first have its formula registered with the FDA Office.

4. Decision of the TCC

The TCC came to a unanimous resolution that the cancellation of Company A's drug formula did not violate sections 25(3) and 28 of the Trade Competition Act BE 2542 because of the following reasons:

Section 25(3): Company A had sales turnover of less than Baht 1 billion in the year 2006. Moreover, Company A had not received the registration certificate for the drug formula; thus it had no goods in the market. Therefore, there were no reasonable grounds to assume that Company A was reducing the goods volume to be lower than market demand. Furthermore, the TCC unanimously decided that Company A did not constitute a Market Dominant Operator pursuant to sections 25(3) and 3 of the Trade Competition Act BE 2542.

Section 28: The Company's cancellation of the formula registration with the FDA Office was not deemed to be an act to restrict a Thai consumer from purchasing a good from a person outside Thailand. This is because the application to register the drug formula is a matter of an FDA regulation that determines drug safety. Furthermore, it did not appear that there was a direct purchase order from the consumers in Thailand to the parent company in the United States. Moreover, drug use in Thailand is administered in hospital with the prescription coming from a responsible doctor only so the drug would be prescribed by a specialist only. From such facts, the TCC was of the unanimous opinion that Company A's behavior did not violate section 28 of the Trade Competition Act BE 2542.

E. Restriction In Publication Business

1. Matters of Complaint

Company K is an agent in the publication business and filed a complaint that the Agent Association of Printed Goods (Agent Association) and Modern Trade had conducted unfair trade practices. The basis was a notice sent to a compilation company, which was a large-scale distributor company and publishing house, ordering it to stop selling products to Company K, thereby restricting Company K's trade.

2. Fact Findings

The facts can be summarized as follows:

The printed media business is a type of consignment industry. There are approximately 200 publishing houses, publishing both magazines and books. Publications are sent to eight compilation companies to be distributed nationwide to agents. There are approximately 400 agents who send the products to stalls and book retail stores. If there is a remaining stock of books, the trader compiles and returns them to the publishing houses, receiving returns of a certain percentage of the regular price stated on the book cover.

The complainant, Company K, was an agency that worked on an assignment basis with the eight compilation companies for magazines. Approximately 45 percent of the total volume of goods received from 40 publishing houses was sold, and the remaining stock (55 percent) was to be delivered to Company C in Bangkok and suburban areas. Company C would receive

approximately 20 percent of the books directly from Company K and would receive the remainder from members of the Agent Association in each province. Furthermore, Company K had Company D, its group company, to compile the packages. Companies K and D, because of good administrative and management systems, has strong growth, which has the reduced market share of its competitors.

Trade behavior: Normally, each publishing house would deliver these goods to the compilation companies, and the compilation companies would compile and deliver to Company K and the Agent Association. Both Company K and the Agent Association then would deliver to Company C. The business operation of the printed media comprises of the manufacturing stage, compilation stage, and consignment stage. Company K operates within the wholesale stage and Company C operates within the retail stage.

It was alleged that the Agent Association demanded more benefits from Company C but Company C did not adhere to such demand by the Agent Association. The members of the Agent Association then stopped delivering goods to Company C in all provinces outside Bangkok. Company C then bought more goods from Company K to deliver to such provinces. This meant that the Agent Association's goal was not achieved; the Agent Association then sent a notice to the Publishing House and other compilation companies, requesting them not to deliver to Company K or else the Agent Association would not accept the goods for distribution to the retail stores.

The eight compilation companies and the publishing houses which had previously sold to Company K stopped selling pursuant to such notice by the Agent Association; thus, Modern Trade and Company K could not deliver to Company C and other customers.

Damages which Company K incurred was the loss of revenue from previously received goods.

3. Legal Issues

From the facts, it can be found that the members of the Agent Association and Modern Trade jointly worked with the compilation companies and the publishing houses to restrict the business operation of Company K, thus causing damage. This may constitute a violation of section 27(3) on collusion to reduce or restrict competition, as well as section 29 on unfair trade practices.

4. Decision of the TCC

The TCC, in its meeting on February 4, considered and appointed an Investigative Sub-committee. The Investigative Sub-committee considered and opined that the action of the members of the Agent Association, which acted in concert to stop delivery of all the books to Company K, was a collusion to stop delivery between geographical areas. It was not collusion between the members and the package compilation companies with an intention to create a monopoly, reduce or restrict competition in the printed media business, nor was it an unfair trade practice which constituted a violation of sections 27 and 29 of the Trade Competition Act BE 2542. Therefore, the accused was not in violation of the laws and there should not be a claim filed against the accused for such matters.

Later, the TCC, in its meeting on June 27, 2012, concurred with the investigative report and opinion of the Investigative Sub-committee, and submitted its report to the Office of the Attorney-General. The Office of the Attorney-General passed an order to not file a claim against the Agent Association and Modern Trade.

IV. THAILAND'S LEGAL REFORM ON TRADE COMPETITION LAW

The Law Reform Commission of Thailand is of the opinion that the Trade Competition Act and its enforcement have serious problems and it is necessary to pass reforms in order to come into accord with changing economic conditions and to ensure readiness to enter the ASEAN Economic Community. Therefore, the Commission appointed a Sub-committee on the reform of trade competition law and the prevention of monopoly for the purpose of making guidelines on drafting a trade competition law to replace the Trade Competition Act BE 2542.

After two years of studies, the Sub-committee provided its recommendations on the drafting of a new Trade Competition Bill, as well as supplementary explanation on reasons for drafting the Trade Competition Bill (sections) for the Law Reform Commission's consideration. After such consideration and revision, the Law Reform Commission, represented by the President of the Law Reform Commission, submitted the memorandum of opinion and recommendations on the drafting of the trade competition law and the Trade Competition Bill to the Prime Minister, National Legislative Council, and the National Reform Council on November 28, 2014.

A. Important matters in the Trade Competition Bill

Plans to improvement the organizational structure of the TCC aim to ensure its independence by reducing intervention and dominance by the big business groups that are connected to political parties. Furthermore, to ensure effectiveness of the TCC's performance, it will be required that the TCC will work full-time. This is because, even though 15 years have lapsed, as described above, there has never been any case filed pursuant to this Act, by the State at the Court, despite having had nearly a hundred complaints. Furthermore, there needs to be a broader application of the law against a State Enterprise that directly competes against the private sector.

These changes would mean a better application of the law, as well as a reduction of backlog, delays, and repetitiveness of the legal procedure. Cases would only be filed at the Court of Justice. Furthermore, there would be additional definitions to categorize the type of offender to ensure effective enforcement against the offender. Moreover, there would be additional measures such as a leniency period to allow an offender to provide useful information to the proceedings that would allow for reduction or exemption of the punishment.[16]

Material content of each Chapter of the Trade Competition Bill is attached as Appendix D.

[16] Law Reform Commission of Thailand, the Reform…Private Law for the Fair and Secure Economy, pages 38-39.

V. CONCLUSION

Thailand was the first ASEAN nation to bring a trade competition law into force in 1999. However, even though there have been nearly a hundred complaints over the past 16 years, to date there has yet to be any case filed, in relation to the Act, to the Court by any public attorney, This shows that there is serious problem in Thailand's enforcement of the trade competition law. It is thus crucial that there be prompt revision of the substantive content concerning the enforcement organization and process of legal enforcement.

I have the hope that the Prime Minister, National Legislative Council, and Law Reform Commission will intend to use the memorandum and suggestions on drafting the Trade Competition Law, enforcement organization, and process of legal enforcement to revise the Trade Competition Act BE 2542, in order for such Act to ensure supervision of free and fair trade competition as the law intends.

APPENDIX A:

The Office of the Trade Competition Commission ("OTCC"), which acts as the Secretariat of the Trade Competition Commission, has issued the following Guidelines to determine which behavior is in violation of such legal provisions, as follows:

A. Unlawfully Exercising Market Dominance (Section 25)[17]

1. Criteria for being a market dominant business operator

The Trade Competition Commission ("TCC"), with permission from the Cabinet, issued a notification on 18 January 2007, effective from 8 February 2007, which determined the market share and sales turnover of the business for being a market dominant business operator, as follows: Clause 1 - Any business operator in any particular goods or services market which has the market share in the previous year of fifty percent or more and has the sales turnover of at least Baht one billion; or Clause 2 - Any top three business operators in any particular goods or services market which together have the market share in the previous year of seventy five percent or more and has the sales turnover of at least Baht one billion.

This excludes any business operator that has the market share in the previous year of lower than ten percent and has the sales turnover of at least Baht one billion.

2. Determination of the Relevant Market, market share and sales turnover

In determining a geographical market, regard must be made to the area where there are substitutable goods or services, for which the Relevant Market according to the geographical market may be a local market, such as amphur (district), changwat (province), region or nation-wide. This can be considered from the following factors, among others: cost of transportation; and durability of goods, etc.

In determining a product market, regard must be made to whether the goods or service is in the same market or is substitutable by considering the following seven factors, with the order of importance as follows:

1. Cross elasticity of demand: considering the price level, price correlation and SSNIP test (to consider whether or not the particular goods or services which have five to ten percent price increase can affect and lower the consumption of such goods or services, and whether or not the consumption of other goods or services would clearly increase or substantially increase).
2. Cross elasticity of supply: considering the response to the price increase by the manufacturer by considering the manufacturing capacity, use of raw materials,

[17] Section 25 - A business operator having market domination shall not act in any of the following manners: (1) Unreasonably fixing or maintaining the purchasing or selling prices of goods or fees for services; (2) Unreasonably fixing compulsory conditions, directly or indirectly, thus requiring other business operators who are such business operator's customers to restrict services, production, purchase or distribution of goods, or to restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators; **(3)** Suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand; and (4) Intervening in the operation of the business of other persons without justifiable reasons.

manufacturing process, technology, switching cost from switching from one type of goods to another type of goods etc. If any manufacturer can shift the manufacturing from one type of goods to substitutable goods easily and with lower costs, it can be said that such manufacturer is the manufacturer in the same market.

3. End use: By considering the objective of the use of the goods or services of the consumers and the cost of the consumer, if the consumer would like to switch from one type of goods to use another type of goods (switching cost), the consumer would have high costs as such goods or services are in a different market.
4. The perception and response of the consumer constitutes the opinion or attitude of the consumer in relation to the use of any particular goods or services, including relevant persons such as academics, specialists/experts, business operators etc. In practice, there will be a questionnaire or research, where use of the research has been previously made.
5. The channel of distribution for the same type goods or services which are vastly different and where the consumer cannot access each type of sales distribution channel easily, the goods or services are in different markets, such as the fact that the goods which are distributed through an agent system are different from the goods sold through the direct sales system.
6. Price/quality of the goods or services that have vastly different prices and qualities may be in different markets.
7. The physical quality of the goods or services which have the same use objective but have different physical qualities are normally in different markets as the consumers may have the preference of consuming goods or services which have different physical qualities.

3. Calculation of the market share

The calculation of market share of goods or services will be made based on the domestic manufacturing or sales and imports for sale in the country excluding exports, which have the two following approaches:

a) In case the goods or services have the same standard unit of sale, e.g., metric tons or liters, and the sales price have a similar unit or not very different unit, e.g. paper pulp, steel rods or cement, the market share will be calculated from the sales volume of the goods or services; or
b) In case the goods or services have different standard units of sale or the type and size of the goods or services are different, e.g. soap and shampoo, the market share will be calculated from the sales volume of the goods or services.

Calculation of the market share in general uses the one-year interval.

4. Calculation of the sales turnover

This will be considered from the revenue of selling the goods or services of any particular goods or services within the past one year. For the business operator which has the manufacturing/sales or services provision of more than one type of goods or one service, which have the total sales turnover of every type of goods or services, the calculation will only consider the sales turnover of one particular type of goods or one particular service in question.

5. Prohibited Behaviors

The Guidelines in considering the prohibited behaviors under Section 25 (1), which prohibits unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services, include the behavior of the market dominant operator as follows:

1. Unfairly fixing of a high purchase price, including unfairly fixing the purchase price of goods/services or the semi-finished goods or raw materials. This is through fixing the purchase price or adjusting the purchase price to be higher than the market price at normal competition level, or higher than the previous purchase price or higher than the competitor's purchase price in the market during a normal period of competition. This causes the other competitor to not be able to purchase, compete or create a barrier to entry against a new business operator.
2. Unfairly fixing of a low purchase price, including unfairly fixing the purchase price of goods/services or the semi-finished goods or raw materials. This is through fixing the purchase price or adjusting the purchase price to be lower than the market price at normal competition level or lower than the previous purchase price, which causes damage to the seller of goods, semi-finished goods or raw materials and causes the other competitor to purchase at a higher price, thus being unable to sell due to higher costs and being, therefore, unable to compete. This also includes creating a barrier to entry against a new business operator, e.g. the animal feeds manufacturer fixes the price of purchasing agricultural products as raw materials in manufacturing the animal feeds at a very low price, which causes the farmers to suffer, and other animal feeds manufacturers who purchased at a high price could not compete due to the high price.
3. Unfairly fixing of a high selling price, which means to fix the high selling price of goods/services or unfairly adjusting the high selling price to be higher than the increased costs, which is at the higher level than the market price at normal competition level; in order to achieve excessive profit or a higher than appropriate level of profits during the normal trading of each business, or higher than previous rates of profits received.
4. In case there is a shortage of goods or services due to a sharp increase in demand, and that there is no sufficient manufacturing activities to suit such demand, the selling price may increase only during such goods shortage.
5. Sale below cost can be separated into two types, as follows:
   a) "sale below cost" means to fix a low purchase price of goods/services or adjusting the purchase price to be lower than the average total cost, which comprises of the production cost or purchase cost, and adding such to the costs, services and other expenses. This is because the business operator can withstand a period of loss or use of other goods' profit to compensate against such loss; thus, other business operators could not compete, and made new business operators decide against entering the market as it would not provide any return on investment; or
   b) "predatory pricing" means to fix the price of selling goods/services or adjusting and reducing the price to be lower than the average variable costs,

which include the cost of raw materials purchased for manufacturing goods or the cost of purchasing goods for sale, excluding other costs and expenses; which causes other competitors unable to compete. This may remove competitors from the market except for the goods that have to be sold fast, such as easily spoiled goods and expiring goods; and the business operators who suffered may not be able to continue business operation or may have to cease operating.

6. "Discriminatory pricing" means fixing the selling price of goods/services, providing a rate or discriminatorily setting other trading conditions against the customer or purchaser purchasing the same product, having the same quality and at the same selling quantity and having equal selling costs; and where it is the same level of customer or purchase.

6. Compulsory Conditions

Section 25 (2)—The business operator unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are its customers to restrict services, production, purchase or selling goods, receiving or providing services or obtaining credits from other business operators, means the behavior of the following market dominant operator:

1. "Exclusive dealing" means unfair restriction on the rights only on trading terms—both direct and indirect terms—which means that the customer has to accept the conditions and strictly comply without any effect to the effectiveness or quality of the goods, the service provision or after-sales service. This also includes the prohibition of the sale other business operators' goods; a requirement to purchase goods/raw materials without specific quality; to enter into the financial facility with the person specified by the business operator and to set other conditions in the business operation of the customers etc. If the customers do not adhere to the conditions, they will be subject to punishment, such as not being allowed to sell goods, reducing delivery volume to be lower than the normal level or delayed delivery.
2. 'Territorial division' means the unfair territorial division or sales area, both to directly or indirectly force customers to accept and comply with certain conditions; to restrict the sales area or to arrange for the customers only in certain areas to divide the sales area or type of customers to the authorized agent of the business operator without any effect to the effectiveness or quality of the goods or the service provision. This causes non-competition among intra-brands but there is still inter-brand competition, such as fixing the area in which each authorized agent can only sell to the customers in such area, and customers in other areas would not be able to purchase.
3. 'Tying' means an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he/she will not purchase the product from any other supplier. Regarding such behavior, the business operator will use its key goods, in which it has market dominance, in order to tie other goods with such key goods. This causes the other manufacturer of such other goods that have been tied to the key goods to not be able to compete or sell its goods. Moreover, the

new business operator of the tied goods would not enter the market and could create a monopoly.

4. "Resale price maintenance" means to require the customers to sell the goods or services at the price the business operator sets; if the customer does not comply there will be punishment. This causes non-competition between the authorized agent and retailers, especially in the case of selling below cost, which prevents consumers from buying the goods at a low price. However, there is an exemption for the suggested price or franchising, which will promote the effectiveness, quality or standard of the goods or services.
5. Force customers to deny trading with other persons, which means to force customers to not sell or contact other business operators without any normal trading reasons.

7. Restricted Services

Section 25 (3)—"Suspending, reducing or restricting services, production, purchases, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand." means the following behavior:

1. Suspending, reducing or restricting services, production, purchases, distribution, deliveries or importation without justifiable reasons, such as reduction of manufacturing capacity or importing goods at a volume lower than normal manufacturing, or reduction of import capacity to increase the goods price in the market; or
2. destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand at normal level, such as to destroy the existing stock or to reduce the sales volume to be lower than the market demand in order to hike up the price.

8. Unjustifiable Intervention

Section 25 (4)—Intervening in the operation of the business of other persons without justifiable reasons. This is an act that has no normal commercial reason, which causes competitors to not be able to compete or create a barrier to entry against a new business operator, e.g. to intervene or hurt other business operators in any manner which causes unfairness on price, quality and volume of the sale of goods or services.

B. Merger of businesses that may create monopoly or unfair competition (section 26)[18]

1. Criteria for a merger

After the Trade Competition Act became effective in the year 1999, the Trade Competition Commission set up a Sub-committee/Working Committee to study the criteria and set the scope of permission of a merger and to revise the criteria to suit the economic structure.

- The Trade Competition Commission (Mr. Supachai Panitchpak, Minister of Commerce, as the Chairman), in the meeting no. 1/2543 dated 21 January 2000, passed a resolution to appoint the Sub-committee to study the criteria and measures on a merger. During the Trade Competition Commission meeting no. 3/2543 on 18 August 2000, the Sub-committee proposed a Guideline for the merger but such Guideline has not been published in the Government Gazette because it is a criteria for the market share and sales turnover, which is based on the market dominant operator criteria pursuant to section 25; of which the Commission has not published the market dominant operator criteria.[19]
- The Department of Internal Trade has issued an order to appoint the Working Committee on the Trade Competition on 20 March 2003 with the Director-General of the Department of Internal Trade (Mr. Siripol Yodmungcharoen) as the Chairman of the Working Committee. During the Trade Competition Commission meeting no. 1/2547 on 14 May 2003, the Working Committee proposed a merger guideline but the Trade Competition Commission had a resolution for the Working Committee to review the proposed criteria for a merger. This is to ensure suitability and fairness to all parties. Representatives from the Economic Office, the Ministry of Finance, the Office of the Securities and Exchange Commission, and the Bank of Thailand, as well as the Department of Insurance, were invited to such meeting as it concerned finance, banking and insurance.[20]
- The Trade Competition Commission, in its meeting no. 1/2548 dated 28 November 2005, passed a resolution to appoint the Academic Sub-committee with the Director-General of the Department of Internal Trade (Mr. Siripol Yodmungcharoen) to act as

[18] Section 26 - A business operator shall not carry out a business merger that may result in monopoly or unfair competition, as prescribed and published in the Government Gazette by the Commission, unless the Commission's permission is first obtained. The publication by the Commission under the previous paragraph shall specify the minimum amount or percentage of market share, sales volume, capital, shares or assets; in respect of which the merger of business is governed thereby. The merger of business under paragraph one shall include: (1) a merger made by a producer with another producer, by a distributor with another distributor, by a producer with a distributor or by a service provider with another service provider, which has the effect of maintaining the status of one business and terminating the status of the other business, or creating a new business; (2) a purchase of the whole or part of the assets of another business with a view to controlling business administration policies, administration and management; (3) a purchase of the whole or part of the shares of another business with a view to controlling business administration policies, administration and management. The application by a business operator for the permission under paragraph one shall be submitted to the Commission under section 35.

[19] Siripol Yodmuengjaroen, *supra* note 2 at 23-24.

[20] *Id.* 24-25.

Chairperson of the Sub-committee; to consider and propose the opinion on the exercise of the market dominance, merger, reduction or restriction of competition. However, the Thai economy was volatile during such time; therefore, it would only create a burden to the private sector. Setting of the criteria concerning the business merger was thus delayed.[21]

- The Trade Competition Commission (Mr. Boonsong Teyapirom, Minister of Commerce), in its meeting no. 3/2555 dated 5 November 2012, passed a resolution to appoint the Sub-committee to set the merger criteria in order to study the ways to set appropriate supervisory criteria on a merger. This would be suitable for Thailand's economic structure and supports the ASEAN Economic Community commencement in the year 2015. Moreover, the Trade Competition Commission, in its meeting no. 2/2556 dated 6 June 2013, decided on a resolution in favor of the Sub-committee's proposed criteria, as follows:
    - before or after the merger, there was a market share of 30 percent or more and the sales turnover in the previous year was Baht 2 billion per year in any particular goods or services market; and
    - the acquisition of shares or the acquisition of the shares with voting rights, regardless of whether or not on one or on many occasions, of a public company limited must be at least 25 percent of the total shares; for a private limited company, it must be at least 50 percent, and any one entity or together having the market share of 30 percent or more and the sales turnover of Baht 2 billion per year in any particular goods or services market;[22]

There was an assignment to the Sub-Committee to: (1) study comparative law in the issue of the enforcement of criteria in certain types of mergers with an existing specific law; (2) consider the guidelines on a merger and the application form for merger permission.[23] This is to propose to the Trade Competition Commission for its further consideration.

However, regarding such criteria, it shall be published in the Government Gazette before being legally effective. The Cabinet, in collaboration with the Ministry of Industry, Board of Trade of Thailand, Federation of Thai Industries and Thai Bankers' Association have reviewed and considered such criteria by considering the impact against the competitiveness at all levels of business together.[24]

At present, the criteria for mergers have not yet been published.

[21] *Id.* 25-26.
[22] *Id.* 26.
[23] *Id.* 26-27.
[24] *Id.* 27.

C. Monopolies and Restricted Competition: Collusion to create monopoly or restriction of competition (Section 27)[25]

The OTCC has created Guidelines in relation to section 27's prohibited behaviors, as follows:

1. Absolutely Prohibited Conducts: Section 27 (1 -4)

a. Fixing selling prices of goods or services as a single price or as agreed:

- fixing the selling price of goods or services at the same price or as agreed;
- fixing the value or the rate of the sale price increase;
- fixing the value or the rate of the sale price decrease;
- fixing the time period of sale;
- fixing the lowest or highest price;
- fixing the sale price calculation formula;
- fixing the discount or target discount;
- fixing the credit term; and
- fixing the structure or factor of the sale price.

Restricting the sales volume of goods or services:

- fixing the sales volume as agreed; and
- increasing, maintaining, or reducing the sales volume as agreed.

b. Fixing buying prices of goods or services as a single price or as agreed, or restricting the purchase volume of goods or services: Section 27 (2)

Prohibited pricing actions include:

[25] Section 27 - Any business operator shall not enter into an agreement with another business operator to perform any act amounting to monopoly, reduction of competition or restriction of competition in the market of any particular goods or any particular service in any of the following manners: (1) fixing selling prices of goods or services as a single price or as agreed, or restricting the sales volume of goods or services; (2) fixing buying prices of goods or services as a single price or as agreed, or restricting the purchase volume of goods or services; (3) entering into an agreement with a view to having market domination or market control; (4) fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or a tender for the goods or services, or in order to prevent one party from participating in a bid or a tender for the goods or services; (5) fixing geographical areas in which each business operator may distribute or restrict the distribution of goods or services, or fixing customers to whom each business operator may sell goods or provide services to the exclusion of other business operators from competing in the distribution of such goods or services; (6) fixing geographical areas in which each business operator may purchase goods or services, or fixing persons from whom business operators may purchase goods or services; (7) fixing the quantity of goods or services of which each business operator may produce, purchase, distribute or provide with a view to restricting the quantity to be lower than the market demand; (8) reducing the quality of goods or services to a level lower than that in the previous production, distribution or provision, regardless of whether the distribution is made at the same or at a higher price; (9) appointing or entrusting any person as a sole distributor or provider of the same or similar type of goods or services; and (10) fixing conditions or practice with regard to the purchase or distribution of goods, or the provision of services in order to achieve the uniform or agreed practice. In the case where it is commercially necessary that the acts under (5), (6), (7), (8), (9) or (10) be undertaken within a particular period of time, the business operator shall submit an application for permission to the Commission under section 35.

- fixing the purchase price of goods or services at the same price or as agreed;
- fixing the value or the rate of purchase price increase;
- fixing the value or the rate of purchase price decrease;
- fixing the time period of purchase;
- fixing the lowest or highest price;
- fixing the purchase price calculation formula;
- fixing the discount or target discount;
- fixing the credit term; and
- fixing the structure or factor of the purchase price.

Restricting the purchase volume of goods or services:

- fixing the purchase volume as agreed; and
- increasing, maintaining or reducing the purchase volume as agreed.

c. Entering into an agreement with a view to having market dominance or market control. Section 27(3)

Entering into an agreement with a view to having market dominance or market control. This is a case where the business operator at the same level (horizontal) or different level agrees to any act which relates to market dominance, or any act to control the market, e.g. to determine who has the right to operate business. This also includes the fixing of the list of goods or services that will be sold in the market, including any market dominance condition or market control that is a distortion to the market.

d. Collusive Activity. Section 27(4)

Section 27 (4) - Fixing an agreement or condition in a collusive manner in order to enable one party to win a bid or a tender for the goods or services, or in order to prevent one party from participating in a bid or a tender for the goods or services:

- to jointly determine the bid winner or the auction winner of goods or services in which the members agree to not enter the bid or auction, or pretend to offer a higher bid so the designated member will win the bid or auction of the goods or services;
- collusion to fix the winning bid price or the winning auction price, which shall be higher than the normal competitive market price so the designated member will win the bid or auction of the goods or services;
- to rotate the bid winner so the members have an agreement - a collusion to rotate the bid winner or the auction winner of the goods or services;
- collusion to prevent certain business operators from entering the bidding process or auction process of the goods or services.

In case of collusion in terms of corrupt bidding practice with a State Agency, there is the Act on Violation Concerning the Price Bidding to State Agency BE 2542, which is the direct measure to control this matter.

The National Anti-Corruption Commission is the body which has the duty to supervise the conduct and compliance with the law, and there is a higher punishment for violation with regard to corruption than the Trade Competition Act BE 2542.

2. Restrictive Geographical Areas. Section 27(5) and (6)

Section 27 (5) - Fixing geographical areas in which each business operator may distribute or restrict the distribution of goods or services, or fixing customers to whom each business operator may sell goods or provide services, to the exclusion of other business operators from competing in the distribution of such goods or services.

Such section includes the following matters:

- separate the areas for the sale of goods or services;
- separate the areas for the relay of market entry at different periods of time; and
- separate or allocate customers for the sale of goods or services.

Section 27 (6) - Fixing geographical areas in which each business operator may purchase goods or services, or fixing specific persons from whom business operators may purchase goods or services.

Such section includes the following matters:

- separate the areas for the purchase of goods or services;
- separate the areas for the relay of market entry at different periods of time to purchase the goods or services in order to create market power in the purchase of goods or services; and
- separate or allocate customers for the purchase of goods or services.

3. Other Restrictions Under Section 27

Section 27 (7)—Fixing the quantity of goods or services which each business operator may produce, purchase, distribute or provide with a view to restricting the quantity to be lower than the market demand. This act would have the intention to fix the price not according to the normal market mechanism and would affect the price, and consumers.

Section 27 (8)—Reducing the quality of goods or services to a level lower than that in the previous production, distribution or provision, regardless of whether the distribution is made at the same or at a higher price.

Section 27 (9)—Appointing or entrusting any person as a sole distributor or provider of the same or a similar type of goods or services would affect the market competition and reduce the chances and choice of consumers.

Section 27 (10)—Fixing conditions or practice with regard to the purchase or distribution of goods, or the provision of services in order to achieve the uniform or agreed practice. This would reduce market competition.

D. Collusion with Overseas Business Operators

Industrialization made many countries become a Newly Industrialised Country ("NIC") in the 1990s, including Thailand. This created a new middle class and a new upper class, thus creating a demand for the import of luxury cars from Europe. However, certain business operators that sold cars obstructed other business operators from importing the cars under the brand which the business operator was selling. This led to the drafting of section 28 in the Ministry of Commerce's draft, which has entered the stage of consideration by the National

Legislative Council. Furthermore, during the Senate Committee's consideration, there was a revision of section 28. The previous version of section 28 originally had the intention for collusion with a foreign business operator where the foreign business operator would not be punished. However, there would be punishment of the Thai operator who made such agreement and damaged trade. Later, section 28 was amended to be the current version. [26]

The Sub-committee on Trade Competition and Anti-Monopoly, which is a Sub-committee under the Law Reform Commission, has the opinion that section 28 concerns consumer protection. Section 28 does not concern trade competition; thus the Trade Competition Bill is about the memorandum and suggestion on drafting the Trade Competition Law. It was signed by Professor Dr. Kanit Na Nakorn, President of the Law Reform Commission (LRC), and submitted to the Prime Minister, the National Legislative Council and the LRC on 28 November 2014. Section 28 is no longer present in the Trade Competition Bill.

E. Unfair Trade Practices (section 29)[27]

OTCC has Guidelines concerning section 29, as follows:

1. Elements of violation

It is an act between business operators that is not free and fair competition; and such act caused the other business operator's business to:

- be destroyed;
- be damaged;
- be obstructed;
- be a restricted business operation;
- prevent other persons to operate business; and
- to cease business operation.

2. Actions that are prohibited under section 29

- unfairly fixing or maintenance of the purchase price/sale price of the goods or services;
- fixing an unreasonably high or excessively high sale price; and fixing an unreasonably high or excessively high purchase price;
- unfairly fixing or maintenance of low level cost or sale-below-cost. Sale-below-cost can be divided into two types: sale below cost and predatory pricing; and
- fixing an unreasonably low purchase price.

3. Discriminatory pricing

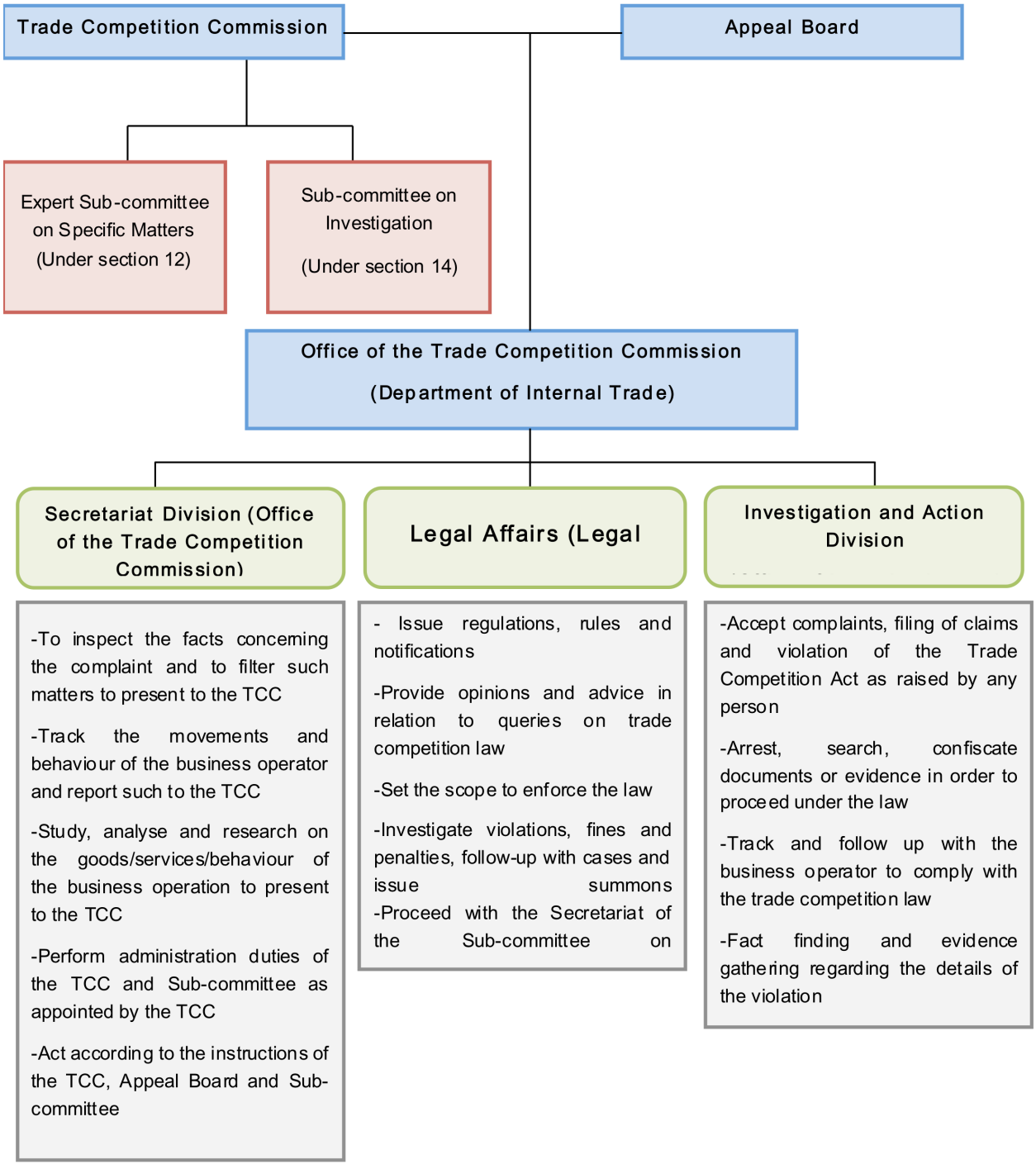
- Fixing a condition in the business operation which restricts the business operation of other business operators (except for franchisees and authorized dealers), exclusive dealing, tie-in sales, and/or resale price maintenance;

[26] Siripol Yodmuengjaroen, *supra* note 2 at 10, 12.

[27] Section 29 - A business operator shall not carry out any act which is not free and fair competition and has the effect of destroying, impairing, obstructing, impeding or restricting business operation of other business operators or preventing other persons from carrying out business, or causing the cessation of their business.

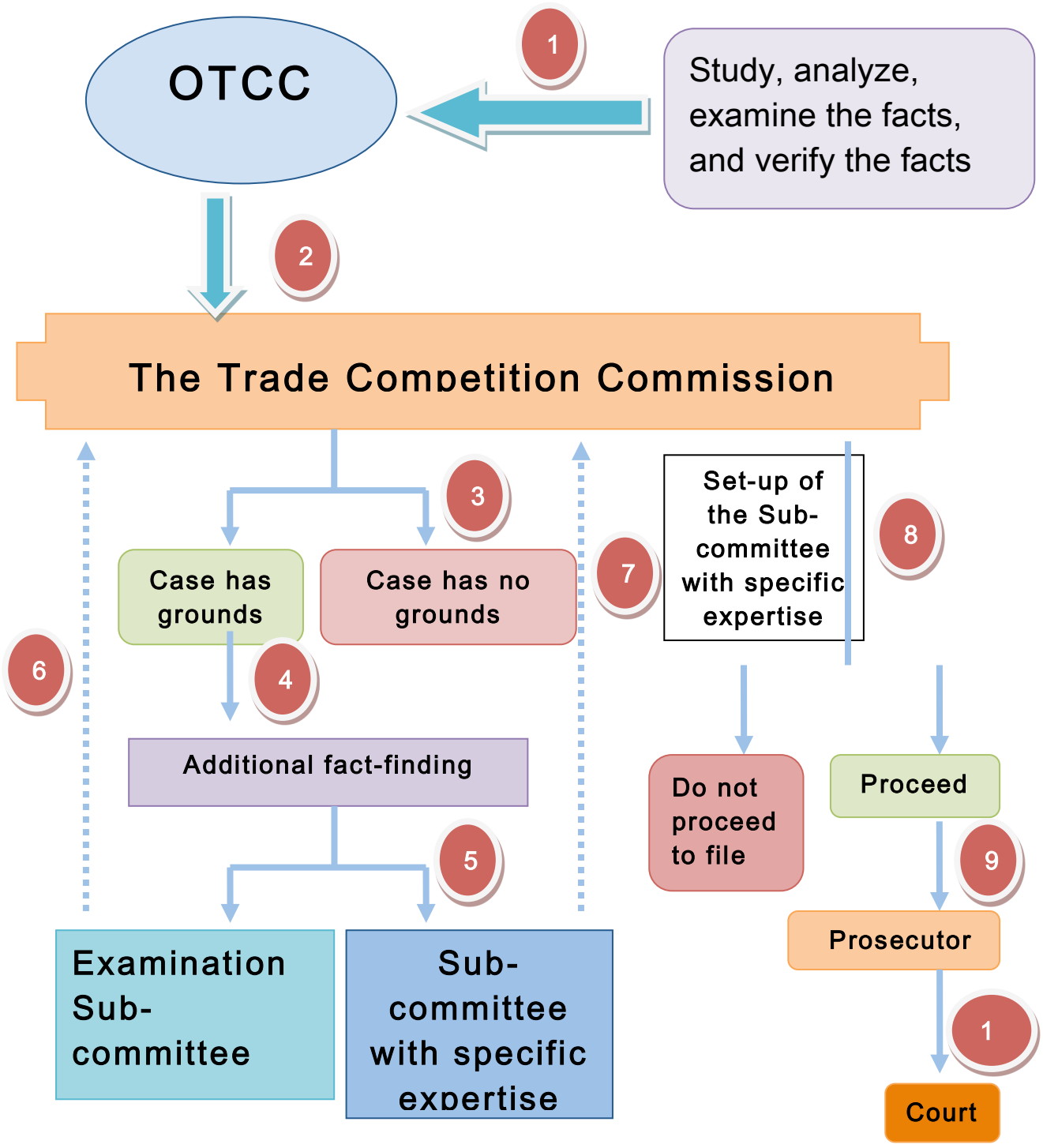
- Refusal to deal without reasonable grounds;
- Using higher bargaining power to take advantage of other persons, to force or induce the customers to enter into business with itself or fix any claims without a reasonable ground which caused damage to other business operators;
- Act in any way to obtain information on trade secrets, or technology of other business operators; and
- Any other act that is not a normal trade and has the intention to destroy, obstruct, prevent or restrict business operation or stop other business operators from operating business, or to cease their business operation.

APPENDIX B: Organization Chart, as well as the roles and duties of the Trade Competition Commission[28]



[28] *Id.* 8.

APPENDIX C: RESPONSIBILITIES OF THE OTCC



Appendix D: Material content of each Chapter of the Trade Competition Bill[29] is as follows:

Section 5 of the Bill prescribes that a State Enterprise in certain business sectors that compete with the private sector shall be subject to the Trade Competition law and, in case there is already a specific law concerning competition, such law shall apply to those business sectors.

Section 6 of the Bill aims to resolve any enforcement burdens and difficulties

According to the current Trade Competition Act BE 2542, there are many Ministers in charge of the Act's execution, such as the Minister of Commerce and the Minister of Finance who have joint responsibility on financial matters. Therefore, to resolve such matter, the Trade Competition Bill has assigned the Prime Minister as the person in charge of the Act's execution, as the Head of Government is responsible for the State's administration.

1. Chapter I – The TCC's Four Features (Sections 7-28 of the Bill)

This new Bill is different from the current Act, as follows:

The TCC needs to be able to freely act with agility, credibility, transparency and unity, free from dominance and intervention by the executive branch, political division and large size businesses, including preventing problems concerning conflict of interest. Therefore, there should be the setting of the factors of the Sub-committee. The required qualifications, methods and appointments, as well as the terms and removal from position, powers and duties of the Sub-committee and the organization, shall have the characteristic of a free organization.

Part 1 - Member numbers, qualifications and prohibited characteristics of the TCC (sections 7 to 9 of the Bill): It is required that there is committee be established in each industry to enable a comprehensive TCC with knowledge and experience in fields which are of importance and necessary for trade competition in all facets. The members of the TCC shall be at least 45 years old; this is in order to obtain persons in the fields with not less than 20 years of experience.

Part 2 - Selection and Appointment of the members of the TCC (sections 10 to 13 of the Bill): There are 11 members of the Nomination Committee, which comprise of: 1) high level officials having the position in relevant ministries to the economy, finance, industry or law—in the total of five persons; 2) one representative from a Higher Education Institution and one representative from the private sector, one representative each from the fields of law, economics, business management and administration (total of three persons); and 3) one representative from a non-profit organization who has clear performance of not less than five years from self-selection (total of three persons). This is to ensure diversity in the Nomination Committee that comes from various relevant fields.

Part 3 - Term and Removal from Term of the members of the TCC (sections 14 to 17 of the Bill)

[29] *Id.* 24-30.

Each member would have the term of six years in order to ease the process of counting the terms of members who would have to rotate every three years. This is due to section 14, paragraph two of the Bill. Also, if it appears that the TCC is unable to perform its duties effectively under law; then such persons as designated by the law have the right to request from the Chairman of the Senate Committee for the Senate Committee to pass a resolution to remove every member from their positions. This provision is equivalent to other independent organizations, which also contain such similar provision.

Part 4—Powers and responsibilities of the members of the TCC (sections 18 to 28 of the Bill)

In order for the TCC's case management to be expedient, effective, and convenient for facilitating fairness for business operators, if the TCC is of the opinion that the complaint should be provided to the public attorney, then the objection to the decision of the public attorney to not proceed with the complaint would be subject to the Criminal Procedure Code. The TCC's Chairman would be the person who exercises the power of the Chief Police Commissioner or the Governor of the Province, whichever is the case. Moreover, the TCC would be an injured person pursuant to the Criminal Procedure Code, which equates to the Act in relation to the Constitution on the Election Committee BE 2550.

2. Chapter II—Office Of The TCC (Sections 29 To 51 Of The Bill)

In order for the action of this newly established organization to work effectively, there shall be sufficient budget to support its operations. Section 31(2) of the Bill prescribes that the budget which the government will allocate to the TCC Office should not be lower than 0.002 percent of the Annual State Budget—or approximately Baht 500 million (the Total Annual State Budget would be Baht 2.5 trillion). This would be reported to the Cabinet and the Parliament every year.

3. Chapter III—Prevention Of Monopoly (Sections 52 To 60 Of The Bill)

The Trade Competition Act BE 2542 which is currently in force has practical application problems concerning the actual proof of whether or not the business operator is a Market Dominant Operator. Furthermore, the Market Dominant Operator status is not in itself a violation of the law until there is a behavior that restricts or limits trade competition as prescribed by the law. Therefore, there is a problem concerning the burden of proof on whether or not there is an actual restriction or limitation on trade competition. Moreover, the current Act is unclear on the criteria of a merger that could result in there being a Market Dominant Operator.

As for the filing of a complaint seeking damages by the private sector or consumer caused from monopoly; it is required that the findings of the TCC be relied upon. This is impractical in reality because the TCC has not been able to file a complaint against any one business operator with monopolistic behavior, as well as having other problems and issues in the practical application of the Trade Competition Act BE 2542. At present, the monopoly prevention law would need to keep up with the current conditions of the economy, market mechanism and constant business developments.

In order to achieve a law that is effective and up-to-date in accordance with the current conditions of the economy, market mechanism and constant business developments, it is appropriate to revise the law to ensure control and supervision of the economy, market mechanisms and business operations. Furthermore, the legal content shall be dynamic and internally recognized. In terms of the competition law, it is accepted that, regarding the application of this type of law, the TCC would publish the details, method and guidelines for the purpose of familiarization by the business operator of the legal provisions, as well as guidelines in order to revise and develop the law with ease, and to keep up with the development of the economy and business.

Furthermore, the Bill prescribes clearer guidelines for criminal punishment without the requirement for interpretation (criminal law requires strict interpretation of the law) for a serious offense, such as collusion to fix the price of goods or services (price collusion).

Moreover, for expedient, fair, unified and effective application of this law, which also contains criminal provisions that are the fines and imprisonment terms, it is necessary that the Court of Justice be the venue for the enforcement of such law.

4. Chapter IV—Permission Application And Consideration For Permission (Sections 61 To 65 Of The Bill)

The main content of the proposed Act is still be similar to the content of the existing Trade Competition Act BE 2542 but existing section 37, would now be moved to section 63 of the Bill. The last paragraph of section 63 prescribes, "the business operator which has been notified of the TCC's order and disagrees with such order has the right to submit such matter to the Court of Justice. Currently, the existing law does not provide the right for the business operator to appeal such decision within 30 days from the date of being notified by the TCC. This is thus the new addition.

5. Chapter V—Claim For Damages (Sections 66 To 67 Of The Bill)

The Trade Competition Act BE 2542 is under the supervision of the TCC; thus if the injured person has filed a complaint or a claim with the TCC, there should be time provided for the TCC to consider such complaint or claim, and to make a resolution on such matter first. Therefore, the time prescription of the civil claim shall stop running (not expire) during the TCC's consideration in order to prevent the injured person from filing a claim before the TCC makes a resolution due to fear of being time-barred in filing a civil claim.

6. Chapter VI—Punishment (Sections 68 To 78 Of The Bill)

As violation of certain sections of the Act would result in a significant negative impact towards the economy of the State and Economic Welfare of the public, and may damage other business operators, it is prescribed that violation of certain provisions of the Act would be subject to serious punishment in order to deter violation of the Act and to discipline the offender. Section 71 of the Bill prescribes the criminal punishment in whichever degree, high or low, depending on the seriousness and extent of the impact to the economy at large. The Court may exercise its discretion regarding the fines, Baht 1 million to Baht one billion.

Furthermore, the gathering of evidence to support the consideration of the case has been difficult as the evidence would be in the possession of the offender. Therefore, for the sake of

convenience, expediency and effectiveness in the investigative process or fact-finding process, there are criteria for leniency for the accused, abettor, aider or witnesses to come forward, repent and assist the State.

The Trade Competition Act BE 2542 is a law in relation to the economy and business operation which requires expediency, stability, and security in the protection of rights and duties. Therefore, it has been prescribed that the criminal case can end outside of Court. Moreover, there would be an opportunity provided to the offender who has repented to return to business operation according to section 78 of the Bill, which equates to the Revenue Code BE 2481 and the Customs Act BE 2469.