

BRIEFING

THAILAND'S TRADE
COMPETITION ACT

MARCH 2018

- THAILAND'S NEW TRADE COMPETITION ACT (2017) ("TCA") CAME INTO FORCE ON 5 OCTOBER 2017
- THERE ARE SEVEN KEY PROVISIONS OF THE TCA (2017) CONSIDERED IN THIS BRIEFING



On 5 October 2017, the Trade Competition Act (2017) ("the TCA") entered into force. The TCA repealed and replaced the former Trade Competition Act the TCA B.E. 2542 (1999) ("the 1999 Act"). As with competition laws in many jurisdictions, the TCA aims to prevent agreements, decisions and conduct which prevent, distort or restrict competition in the market.

The regulator also has a new power to impose fines for breaches.

Although a number of the changes adopt or implement regulations and legislation in a number of jurisdictions, the changes, if properly and fully implemented, represent a significant change in the approach to anti-competitive conduct and practices in Thailand.

We consider the impact and implementation of the Act after its first six months in operation.

Why was a new law necessary?

The 1999 Act resulted in just one successful prosecution and the fine imposed by the Court in 2001 has yet to be paid. The increasing sophistication of the Thai economy and its integration into regional and global markets has necessitated updating and replacing laws which do not reflect current and anticipated economic development, market forces and behaviour.

“IT IS HOPED THAT THIS WILL ALSO ENCOURAGE MORE CONSIDERATION OF APPROACHES TO INTERPRETATION, ENFORCEMENT ACTIONS AND JUDGMENTS IN OTHER JURISDICTIONS.”

Key provisions of the TCA

The Trade Competition Commission (“Commission”):

A key change is that the seven member Commission cannot be headed by anyone holding a ‘political position’. Under the 1999 Act, the Chair was the Minister of Commerce. The requirement of industry experience and the ban on politicians should allow for more objective analysis and outcomes. It is hoped that this will also encourage more consideration of approaches to interpretation, enforcement actions and judgments in other jurisdictions.

It is unclear how the Commission will apply the Act and to what extent it will reach outcomes and decisions which are consistent with those in other jurisdictions. For foreign investors, companies with operations in Thailand and those providing goods or services to the Thai economy, a key issue will be the extent to which these outcomes and decisions provide clarity, transparency and certainty.

The Commission also has a new power to impose administrative penalties. This is a significant change as all previous enforcement action had to be undertaken by a police prosecutor and involved court proceedings. If properly applied by the Commission, the prospect of quicker and industry-focused enforcement may have a much bigger impact on anti-competitive behaviour and arrangements than the risk of prosecution in the Thai courts.

Abuse of market dominant position:

The Act more clearly defines a “business operator with dominant position of market power” and now extends to joint dominance by multiple business operators who share a relationship of policy or control power, although this will be further clarified by a Commission Notification.

There is no change in position that market dominance is not an automatic breach.

“A KEY CHANGE IS THAT THE COMMISSION WILL PUBLISH CRITERIA FOR MARKET DOMINANCE AND THE CRITERIA ARE TO BE REVIEWED EVERY THREE YEARS. THESE REQUIREMENTS SHOULD ENSURE THAT THE ACT REMAINS RELEVANT TO THE ECONOMY.”

To determine whether there is an abuse of market dominant position, market shares and revenues of the business operator will be considered along with other “factors on competition conditions”, for example, number of competitors, capital, and distribution channels available for the business operator, networks, resources and infrastructure which are essential to the business.

Market share and sales volumes, together with overall market conditions are relevant factors. The latter includes the extent and nature of competitors, access to production inputs, distribution networks and channels, access to infrastructure; minimum necessary capital and the regulatory environment.

A key change is that the Commission will publish criteria for market dominance and the criteria is to be reviewed every three years. These requirements should ensure that the Act remains relevant to the economy, its development and that the criteria reflects the evolution of market dominance.

“THE NEW ACT REQUIRES THE ENABLING LEGISLATION TO BE PASSED BY 5 OCTOBER 2018, THE FIRST ANNIVERSARY OF 2017 ACT COMING INTO FORCE. IF THE ENABLING LEGISLATION IS PASSED AND ENFORCED, THIS WILL HAVE A SIGNIFICANT IMPACT ON M&A TRANSACTIONS IN THAILAND.”

The Commission will consider the following:

- Unfairly fixing, or maintaining purchasing, or selling price of goods or services;
- Unfairly fixing conditions requiring other business operators who are his or her trading partners to restrict service, production, purchase or distribution of goods or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;
- 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
- Intervening in the operation of business of others without justifiable reasons.

MERGER CONTROL:

The enabling regulations to give effect to the approval regime in the 1999 Act were never passed. The new Act requires the enabling legislation [for merger control] to be passed by 5 October 2018, the first anniversary of 2017 Act coming into force. If the enabling legislation is passed and enforced, this will have a significant impact on M&A transactions in Thailand.

The Act introduces a pre- and post-merger approval regime. Where a transaction creates a monopoly or leads to a dominant business operation, pre-closing approval from the Commission is required. For transactions which significantly reduce competition, notification is only required within seven days of the transaction closing.

The decisions of the Commission can be challenged in the Administrative Court within 60 days of receipt of the decision of the Commission.

The definition of merger now includes transactions with the effect of maintaining the status of one of the businesses in the transaction and reducing or ending the status of the other businesses, or where the outcome of the transaction will change the control of business administration and management. Merger does not include restructuring of internal structures or management of companies which are related by policy or administration.

“HARD-CORE CARTELS ARE ILLEGAL AND SUBJECT TO CRIMINAL AND ADMINISTRATIVE PENALTIES.”

CARTELS AND OTHER RESTRICTIVE AGREEMENTS:

Agreements which monopolise, reduce, or restrict competition in a market will be subject to the Act. The Act distinguishes between cartels which are hard-core and those which are not. Hard-core cartels are those between competitors in the same market leading to price fixing, market allocation, output control or bid rigging. Hard-core cartels are illegal and subject to criminal and administrative penalties.

Cartels which are not considered hard-core are not limited to companies in the same market. Decisions on market definition are likely to be critical in defining the extent to which the Commission can prosecute non-hard-core cartels.

“THE ACT PROHIBITS ANY AGREEMENTS OR CONDUCT BETWEEN THAI AND FOREIGN BUSINESSES WHICH WOULD UNFAIRLY RESTRICT COMPETITION OR CREATE A MONOPOLY AND SEVERELY IMPACT THE ECONOMY AND CONSUMER INTERESTS.”

Non-hardcore cartels applies to joint agreements between business operators whether they are in the same market or not. These are imposing conditions relating to price fixing, limiting the availability of goods and services or market allocation on a non-competitor; reducing of the quality of goods or services; appointing a sole distributor for the same goods or service; imposing conditions or practices relating to the purchase of goods or services in order to implement the joint agreement; and other agreements prescribed by the Commission. There are commercially justifiable exceptions for non-hardcore cartels, namely: joint agreements for the purpose of product/service development, technological or economic progress; and vertical joint agreements.

There is an express prohibition on contracts with foreign companies, which result in a monopoly or unfair trade restrictions that have a “serious impact to the economy and interest of the consumer as a whole.” It is unclear how this will be interpreted by the Commission and to what extent the Commission will seek to change, restrict or prohibit anti-competitive conduct by foreign companies.

The Act prohibits any agreements or conduct between Thai and foreign businesses which would unfairly restrict competition or create a monopoly and severely impact the economy and consumer interests. This is broader than the 1999 Act, which only prohibited conduct which prevented consumers from directly purchasing goods or services from the foreign firms. It is unclear how these provisions will be enforced, although it is likely that this will be on a case-by-case basis.

“THE TCA REPLACES THE GENERAL AND VAGUE PROHIBITION ON ANTI-COMPETITIVE UNFAIR TRADE PRACTICES UNDER THE 1999 ACT WITH A LIST OF PROHIBITED UNFAIR TRADE PRACTICES.”

UNFAIR TRADE PRACTICES:

The TCA replaces the general and vague prohibition on anti-competitive unfair trade practices under the 1999 Act with a list of prohibited unfair trade practices. These are:

- Unfair obstruction of business operations;
- Abuse of superior market position or superior bargaining power;
- Imposing unfair trade restrictions or conditions on other business operators, and
- Any other practices to be determined by the Commission.

The broad and expansive nature of these practices appears intended to both facilitate enforcement by the Commission and to provide more guidance to business on permitted and prohibited conduct.

EXEMPTIONS:

Under the 1999 Act, state owned enterprises and companies with a majority government shareholder were exempt from its provisions. This included the national airline, Thai Airways (“TG”), and the oil and gas company, PTT. The Act removes this blanket exemption and only allows an exemption for government and public agencies for activities in accordance with Thai law or Cabinet resolutions. The exemption must be necessary for “stability, public interests, common interests, or arrangement of public utilities”. This is considerably narrower than the exemption in the 1999 Act. It is unclear how it will be implemented and enforced and the initial decisions on exemptions are likely to be a key test of the Act and its enforcement. Where a Cabinet exemption is granted, it is hoped that this will be for specific activities and/or a defined period.

“THE BROAD AND EXPANSIVE NATURE OF THESE PRACTICES APPEARS INTENDED TO BOTH FACILITATE ENFORCEMENT BY THE COMMISSION AND TO PROVIDE MORE GUIDANCE TO BUSINESS ON PERMITTED AND PROHIBITED CONDUCT.”

There is no express ‘grandfathering’ provision in the Act and it is unclear if existing agreements and relationships are ‘grandfathered’, particularly where these were based on the repealed blanket exemption. Even if existing agreements and relationships are ‘grandfathered’, any new agreements and relationships and arguably changes to existing agreements and relationships would be subject to the jurisdiction of the Act and the Trade Competition Commission (TCC).

COMPLIANCE AND ENFORCEMENT:

As a pre-emptive measure, it is possible to apply to the Commission for a ruling on whether the conduct is or may be in breach of the five core measures or any other provisions under the Act. This appears intended to encourage interaction between the Commission and businesses. If rulings are disclosed, provide clear reasoning and are consistent, this may serve to promote voluntary compliance and encourage businesses to modify their conduct to comply with the Act. This may then reduce the need for enforcement.

The Office of the Trade Competition Commission (“OTCC”) and the Commission are responsible for the enforcement of the Act. Breaches of the Act may be pursued by a civil claim for damages, an administrative fine or criminal sanctions.

“BREACHES OF THE ACT MAY BE PURSUED BY A CIVIL CLAIM FOR DAMAGES, AN ADMINISTRATIVE FINE OR CRIMINAL SANCTIONS.”

Criminal and civil actions must be brought in the Intellectual Property and International Trade Court. A consumer must bring their claim within one year from the date they had, or ought to have had, knowledge of the grounds of such damage.

Criminal sanctions are only available for abuses of dominant positions and hard-core arrangements. The maximum criminal sanctions are two years’ imprisonment and/or a fine of 10% of the annual income of the offender in the year of the offence. If the offence is in the first year of business, the penalties are two years’ imprisonment and/or a fine of THB1m.

Administrative sanctions will be imposed for non-hard core violations, unfair trading practices and contracts with offshore entities. The maximum penalty is a fine of 10% of the annual income of the offender in the year that the offence is committed. If in the first year of business, the maximum fine is THB1m.

The Act does not expressly address whether the income is only based on the Thai entity or global income for a subsidiary of a multinational company. Arguably, the Commission only has jurisdiction over companies and individuals who are subject to the jurisdiction of the Act. Whilst this may provide some clarity for Thai subsidiaries of foreign companies, for Thai companies with operations outside Thailand, the position may be less clear. This may be one of the first issues for the Commission to address.

“PENALTIES APPLY TO COMPANIES AND THEIR AUTHORISED DIRECTORS.”

Penalties apply to companies and their authorised directors. The previous automatic presumption of guilt by a managing director or responsible person has been replaced with provisions which are likely to require prosecution to demonstrate that directors, responsible persons or managers took positive steps, or failed to discharge their duty and that this led the company to breach the Act.

“PREVIOUS RELIANCE ON THE PROSECUTOR TO DECIDE TO PROCEED WITH A CRIMINAL PROSECUTION IS REPLACED WITH PROSECUTION BY THE ATTORNEY-GENERAL IF A PROSECUTOR DECLINES TO PROSECUTE.”

Previous reliance on the prosecutor to decide to proceed with a criminal prosecution is replaced with prosecution by the Attorney-General if a prosecutor declines to prosecute. This should result in a more pro-active enforcement regime, which in turn should promote greater understanding of the provisions of the Act and voluntary compliance.

ACTION CHECKLIST

1. Ensure that Thai, regional and global in-house legal and competition teams are briefed on the changes;
2. Implement anti-trust compliance training programmes addressing the regulatory, legal and commercial changes resulting from the implementation of the Act. A critical aspect will be to ensure that the impact of the changes from a commercial perspective are clearly communicated to employees, management and directors;
3. Assess existing relationships and arrangements to determine if there are potential breaches or conduct which requires modification;
4. Assess potential risk exposure for directors and officers, and the extent which D&O insurance will respond to claims, investigations and changes; and
5. If any potential breaches are identified, seek legal advice before contacting the Commission.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.



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