

Chapter 7

Whether the Competition and Consumer Protection Laws in Thailand Comply with the Requirements of Chapter 16 (Competition Policy) of the TPP

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The Thai government on a number of occasions has shown its interest in joining the TPP. Assuming that the Thai government applies to join the TPP, this report assesses whether or not the Competition and Consumer Protection Laws in Thailand comply with the requirements of Chapter 16 (Competition Policy) of TPP.

There are many requirements in Chapter 16, and this report assesses each requirement in the following order.

1. Article 16.1 Competition Law, the Authorities, and Anti-competitive Business Conduct

(1) Each Party shall adopt or maintain national competition laws that proscribe anti-competitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to such conduct. These laws shall take into account the APEC Principles to Enhance Competition and Regulatory Reform prepared in Auckland, September, 1999.

The Competition Act of B.E.2542 (1999) meets the above requirement because Section 25, Section 26, Section 27, and Section 29 proscribe anti-competitive business conduct that are the abuse of a dominant position, Merger & Acquisition, cartel and bid-rigging, and unfair trade practices (unilateral conduct and unfair methods of competition) respectively.

2. Article 16.1 (2) Each Party shall endeavour to apply its national competition laws to all commercial activities in its territory. However, each party may provide certain exemptions from the application of its national

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competition laws, provided that such exemptions are transparent and based on public policy grounds or in the public interest.

Below is the provision of Section 4 of the Thai Competition Act.

“Section 4. This Act shall not apply to acts by:

(1) Central administration, provincial administration or local administration;

(2) State enterprises under the law on budgetary procedure;

(3) Farmers’ groups, Co-operatives, or Co-operative Societies recognised by law and having as their objective the operation of a business for the benefit of the occupation of farmers;

(4) Businesses prescribed by the Ministerial Regulation that may apply for exemption from the application of this Act in whole or only in respect of any particular provision thereof.”

It can be argued that the act of central administration, provincial administration or local administration; farmer’s group, co-operatives or co-operative societies; and specific businesses prescribed by the Ministerial Regulation are not subject to the Competition Act because their exemptions are transparent and based on public policy or in the public interest.

These is another Chapter in the TPP which deals directly with state enterprises; therefore, it is beyond the scope of this report.

3. Article 16.1 (3) Each Party shall maintain the authority or authorities responsible for enforcement of its national competition laws (national competition authority). Each Party shall provide that it is the enforcement policy of that authority or authorities to act in accordance with the objectives set out in Paragraph 1, and not to discriminate on the basis of nationality.

Thailand complies with the requirement to maintain the authority or authorities responsible for enforcement of its national competition laws. Thailand established the Competition Committee to enforce the Competition Act of B.E.2542 in 1999. Under the Competition Committee, there is the Trade Competition Committee (OTCC), which is the secretariat office supporting the work of the Competition Committee.

Below is the composition of the Competition Committee.

There shall be a Competition Commission consisting of the Minister of Commerce as the Chairman, the Permanent-Secretary for the Ministry of

Commerce as the Vice-Chairman, the Permanent-Secretary for the Ministry of Finance, and not less than eight, but not more than twelve, qualified persons with knowledge and experience of the law, economics, commerce, business administration, or public administration appointed by the Council of Ministers, provided that at least one-half of whom must be appointed from qualified members in the private sector, and members and the Secretary-General's office shall be a member and the secretary.

4. Article 16.2 Procedural Fairness for Competition Law Enforcement

(2) Each Party shall adopt or maintain written procedures pursuant to which its national competition law investigations are conducted. If these investigations are not subject to definitive deadlines, each party's national competition authority shall endeavour to complete their investigation within a reasonable time frame.

(3) Each Party shall adopt or maintain rules for the procedures and evidence that apply to the enforcement proceedings concerning any alleged violation of its national competition laws and to determine the sanctions and remedies thereunder.

There are certain provisions about how investigations shall be conducted in the Competition Act, i.e. Section 14, Section 15, Section 17, Section 18 (5) and (6), Section 19, Section 20, Section 21, Section 22, Section 23, and Section 24. Section 8 also authorises the Competition Committee to accelerate an inquiry (investigation) sub-committee's conduct of an investigation of offences under this Act.

Currently, the Office of the Competition Committee is in the process of standardising the enforcement proceedings concerning alleged violations of the Competition Act.

5. Article 16.2 (4). Each party shall provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek a review of the sanction or remedy, including a review of an alleged substantive or procedural error, in a court or other independent tribunal, established under that party's law.

A person who is subject to the imposition of an administrative order, a sanction, or remedy for violation of Section 31 or Section 37, is provided with the opportunity to seek a review of the said administrative remedy by appealing to the Appellate Committee established by Section 42 of the Competition Act. Furthermore, if the alleged person is not satisfied with the decision of the

Appellate Committee, he can appeal the said decision to the Central Administrative Court.

6. Article 16.2 (5). Each Party shall authorise its national competition authority to resolve any alleged violations voluntarily by consent of the authority and the person subject to the enforcement action. A party may provide such voluntary resolution to be subject to a judicial or independent tribunal approval or a public comment period before becoming final.

All violations under this Act, which are punishable by a fine or imprisonment for a term not exceeding one year, shall be subject to the power of the Competition Committee to settle the relevant case.

However, the current Competition Act does not comply with the requirement of Article 16.2 (5), because the penalties for a violation of Section 25 (Abuse of a Dominant Position), Section 26 (Merger and Acquisition), Section 27 (Cartel and Bid-Rigging), and Section 29 (Unilateral Conduct and Unfair Methods of Competition) are imprisonment for a term not exceeding three years. Accordingly, the Competition Committee does not have power under the Competition Act to settle such case.

7. Article 16.2 (8). Each Party shall provide protection of a business' confidential information, and other information treated as confidential according to the law, obtained by its national competition authority to use, or an intention to use that information, in an enforcement proceeding, the party shall, if it is permissible under the law and as appropriate, provide a procedure to allow the person under investigation timely access to the information that is necessary to prepare an adequate defence to the national competition authority's allegations.

A business' confidential information obtained by the Competition Committee or officials of the Office of the Trade Competition Committee (OTCC) is strictly protected. Namely, Section 53 specifies that any person who discloses information concerning the business or operation of a business operator's restrictive and confidential information, and if such person has acquired or knew on account the the performance under the Competition Act shall be liable to imprisonment for a term not exceeding one year, or a fine not exceeding 100,000 Baht, or both. Any person who acquires or has knowledge of any fact from the person under paragraph one of Section 53, and discloses such information in a manner likely to cause injury to any person, shall be liable to the same penalty.

8. Article 16.3 Private Right of Action

(2) Recognising that a private right of action is an important supplement to the public enforcement of the National Competition Law, and each party shall adopt or maintain laws or other measures that provide an independent private right of action.

The Thai Competition Act complies with this requirement. Section 40 of the Competition Act stipulates that any person suffering an injury in consequence of a violation of Section 25, Section 26, Section 27, Section 28, or Section 29 may initiate an action to claim compensation from the violator. Besides, Section 40 allows “Representative action” by allowing the Consumer Protection Commission, or an association under the law on consumer protection, the power to initiate an action to claim compensation on behalf of consumers or members of an association.

9. Article 16.6 Consumer Protection

(2) For the purposes of this Article, fraudulent and deceptive commercial activities refer to fraudulent and deceptive commercial practices that cause actual harm to consumers, or that pose an imminent threat of such harm if not prevented, for example:

a. A practice of making misrepresentations of material facts, including implied factual misrepresentations, that cause significant detriment to the economic interests of the misled consumers;

b. A practice of failing to deliver products or provide services to consumers after the consumer are charged; or

c. A practice of charging or debiting consumers’ financial, telephone, or other accounts without authorisation.

(3) Each party shall adopt or maintain consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities.

The Consumer Protection Laws in Thailand comply with the requirements of Article 16.6. In Thailand consumers are protected under the following consumer protection laws.

(1) The Consumer Protection Act B.E.2522 (1979), amended by B.E.2541 (1998). This Act established the Consumer Protection Board (CPB) and three Sub-Committees.

- The Sub-Committee on Advertising, which regulates commercial advertising in order to ascertain that consumers in Thailand

receive true and correct information before they decide to buy goods or services.

- The Sub-Committee on Labelling, which regulates commercial labelling in order to ascertain that consumers in Thailand receive true and correct information before they decide to buy goods.

(2) The Direct Sales and Direct Marketing Act B.E.2545 (2002). Consumers in Thailand are protected by this Act as follows.

- Sellers engaging in direct commercial sales or indirect marketing, or both, must provide true and correct “Essential information” to prospective buyer as required the Consumer Protection Board.
- After making decision to buy a good, a consumer still has right to cancel the sales contract entered into with a commercial operator within 7 days (“Cooling off period”).

(3) The Criminal Code imposes criminal sanctions (imprisonment and a fine) on business operators who engage in fraudulent and deceptive commercial practices that cause harm to consumers in Thailand.

10. Article 16.7 Transparency

(4) Each party shall ensure that a final decision finding of a violation of its national competition laws is made in writing and sets out, in non-criminal matters, the findings of the facts and the reasoning, including a legal and, if applicable, economic analysis, on which the decision is based.

Section 31 and Section 47 of the Competition Act comply with this requirement, because an administrative order issued by the Competition Committee and the final decision issued by the Appellate Committee are made in writing and set out the findings of facts and the reasoning.

Conclusion: I am of opinion that the Competition Act and the Consumer Protection Laws in Thailand comply with nine requirements in Chapter 16 of the TPP, with the exception of the requirement in Article 16.2 (5).