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Competition in Thailand

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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),

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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 Ratanachantha, 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 Mingmaneeapakin, Summary Report on Legal Reform Structure to Reduce Monopoly and Promote Competition in Thailand's Economy of Dr Duenden Nikombirak, 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 an 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 improve 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 nationwide. 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

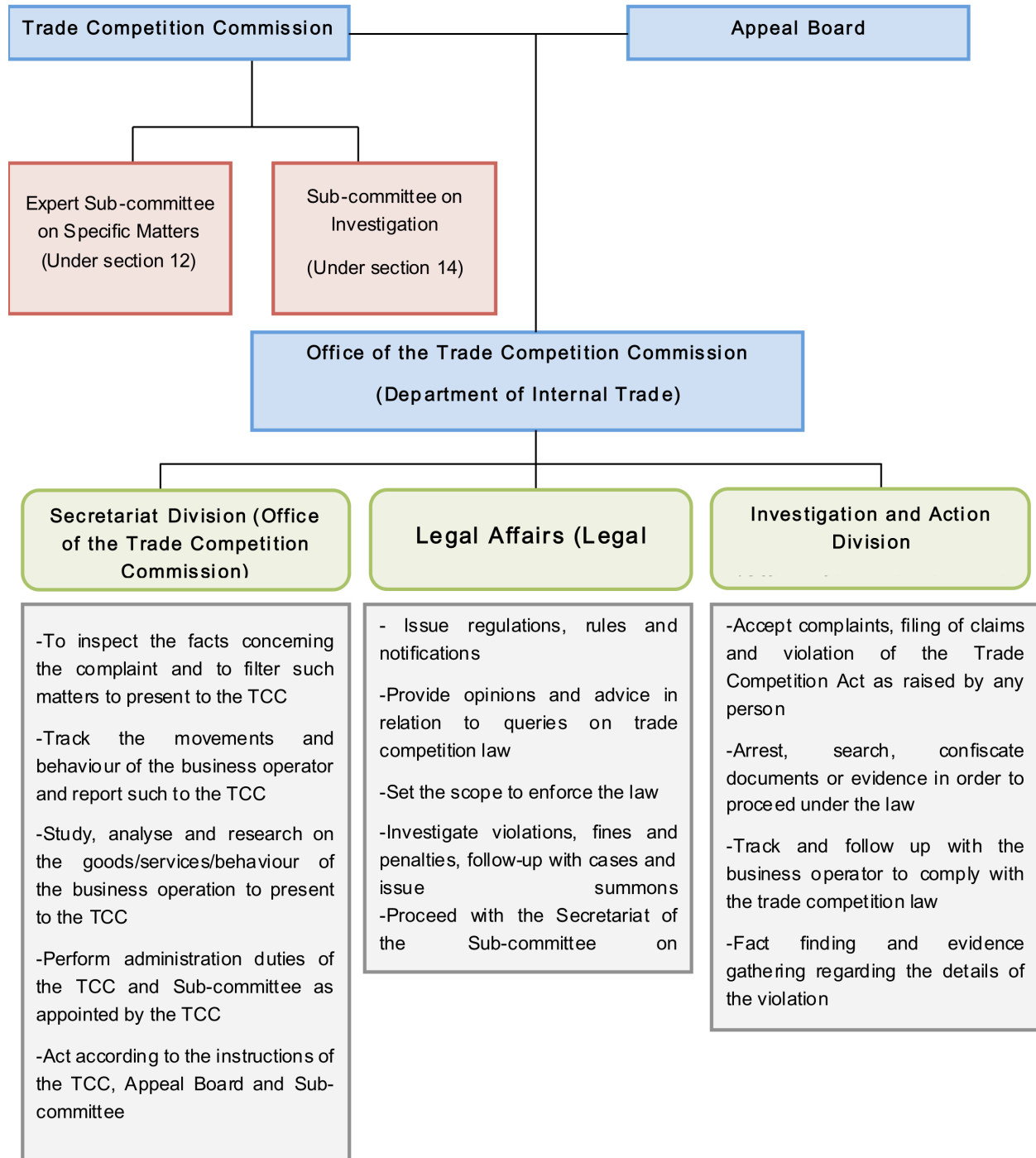
- Fixing a condition in the business operation which restricts the business operation of other business operators (except for franchisees and authorized dealers), exclusive dealing, tie-in sales, and/or resale price maintenance;

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.

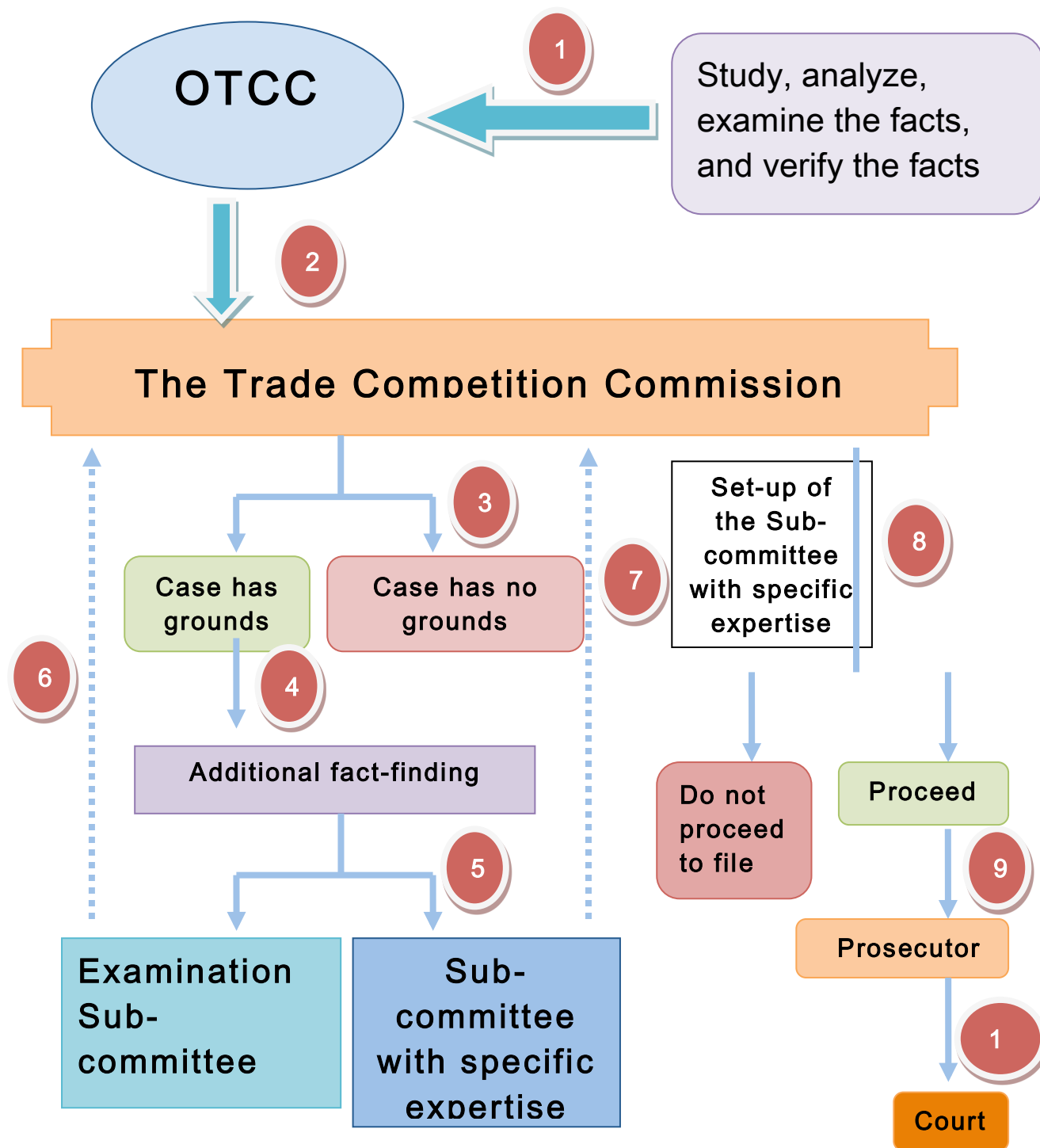
- Refusal to deal without reasonable grounds;
- Using higher bargaining power to take advantage of other persons, to force or induce the customers to enter into business with itself or fix any claims without a reasonable ground which caused damage to other business operators;
- Act in any way to obtain 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 Commission²⁸



²⁸ *Id.* 8.

APPENDIX C: RESPONSIBILITIES OF THE OTCC



Appendix D: Material content of each Chapter of the Trade Competition Bill²⁹ 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.