

# ALLEN & OVERY

## New Competition Law in Thailand – *Draft Approved by Cabinet*

December 2016

### *Speed read*

On 11 October 2016, the Cabinet approved the draft Trade Competition Act B.E. ... (the **New Act**). As we reported in our e-Bulletin titled [Ground-breaking Antitrust Reform in Thailand](#), published 30 May 2016, the New Act contemplates, inter alia, establishing an independent regulatory body, lifting the exception to state-owned enterprises, clarifying the rules on cartels and other anti-competitive arrangements, streamlining the application of abuses of dominance, creating a post-closing merger control regime, and introducing administrative sanctions. These changes will transform Thai competition rules and better align it with international peers.

### *Where is the New Act now?*

After the New Act was commented on and passed by the Council of State in mid-2016, it was approved by the Cabinet on 11 October 2016. It is now under review by the National Legislative Assembly and, if approved, will come into force 90 days after being published in the Government Gazette. The Office of the Trade Competition Commission (OTCC) commented that the government is aiming to push for the New Act to come into force by May 2017. Please note that the Key Changes set out below remain subject to further amendments by the National Legislative Assembly, in which case the abovementioned timeline may also be pushed back.

### *Key changes*

#### THE REGULATORY BODY

As it is the case in many jurisdictions, the OTCC will be established as a State entity which will be independent from the government. The New Act provides a separate budget for the OTCC. It also grants extensive powers and duties of the Competition Commission and the OTCC (as the administrative office of the Competition Commission). In particular, the Competition Commission will have the power to impose administrative fines on business operators in breach of relevant offences under the New Act and to issue orders for a business operator to suspend, cease or change any contravening conduct. The OTCC will also make publically available the outcome of the Competition Commission's decisions on all claims and hold public hearings for all secondary legislation to be published under the New Act (eg dominance thresholds).

#### APPLICATION OF THE NEW ACT

As noted in our [previous e-Bulletin](#), State-owned enterprises will no longer be exempt from the application of the New Act, subject to limited exceptions. However, the New Act will not apply to businesses which are governed by a specific legislation regulating competition within a certain sector and administered by a sector-specific regulator. Currently, this would concern businesses regulated by the National Broadcasting and Telecommunications Commission and the Energy Regulatory Commission.

#### ANTI-COMPETITIVE AGREEMENTS

The New Act distinguishes hard-core cartels and non hard-core cartels. Hard-core cartels only apply to agreements between competitors such as price fixing and bid rigging. Anti-competitive agreements between business operators that have 'a relationship in policy or control' will be exempt from both hard core and non-hard core arrangements. We presume this exemption is intended to capture arrangements between companies that are part of the same group, as it is usually the case abroad.

## ABUSE OF DOMINANCE

Under the current Trade Competition Act B.E. 2542 (**Current Act**), a criteria for dominance based on market share in the relevant product or service market and turnover of a business operator (as a single legal entity), as published by the Competition Commission, is applied. The New Act instead suggests considering market share as well as the factors relating to the competitive condition of the market (eg number of competitors, distribution channels, amount of capital etc.). This is more aligned with international practice.

Interestingly, in considering a business operator's market share, the authority will consider the aggregated market share of the business operator and "all companies with a relationship in policy or control" (as above, presumably companies within the same group). The Competition Commission will publish the criteria to determine whether companies have such a relationship within one year after the New Act comes into force.

For the rest, the behaviours that would constitute an abuse of dominance remain unchanged compared to the Current Act and related guidelines, despite the arguable need for clarification.

## MERGER CONTROL

The Current Act provides a pre-closing merger control regime; however, so far no notification thresholds have ever been adopted, rendering the current regime unenforceable in practice.

The New Act will adopt a post-closing notification regime, whereby any merger or acquisition which may materially reduce competition in a relevant market will have to be notified to the Competition Commission within seven days from the date of completion of the transaction. Details of the notification thresholds and procedures will be published by the Competition Commission within one year from the date the New Act comes into force.

## UNFAIR TRADE PRACTICES

The provision relating to unfair trade practices in the Current Act is a broad catch-all provision which prohibits any unfair practice that would have the effect of damaging or restricting competition of other business operators. The New Act aims to provide more clarity by having the Competition Commission publish a list of what will be considered to be unfair trade practices. The OTCC noted that unfair trade practices in the New Act would cover both horizontal and vertical practices.

## LIABILITIES OF DIRECTORS AND MANAGEMENT

Not only managing directors but also other persons "responsible for the operations of any legal entity" may be subject to the same criminal and administrative sanctions as the legal entity. This applies if the offence resulted from an order or an act, or an omission of order or act, which was the duty of that person.

## SANCTIONS

The below table shows the change in how sanctions are imposed for different offences under the New Act:

Behaviour	Criminal Sanctions (imposed by the IPIT Court)	Administrative Sanctions (imposed by the Competition Commission)
Cartels/ Anti-competitive agreements	Hard core Up to three years imprisonment and/or a fine of up to 10% of turnover of the year preceding the offence	Non-hard core Up to 10% of turnover of the year preceding the breach
Abuse of dominance	Up to three years imprisonment and/or a fine of up to 10% of turnover of the year preceding the offence	
Failure to notify post-M&A		A fine of up to THB200,000 (approx. USD5,620) and a daily fine of up to THB10,000 (approx. USD281) per day throughout the period of the breach
Unfair Trade Practices		Up to 10% of turnover of the year preceding the breach
Failure to comply with orders from Competition Commission		Up to 10% of turnover of the year preceding the breach

Note: The USD currency exchange rate applied in the above table is at USD1 = THB35.58.

Table source: OTCC

## NEXT STEPS

As mentioned above, the New Act is still subject to the final review by the National Legislative Assembly. If the National Legislative Assembly approves the New Act with no further comments, the legislation should come into force by mid-2017 as anticipated.

Overall the New Act will substantially align with international precedents and practices. However, it is not clear how Thailand will apply its new post-closing merger control regime. This type of regime is often quite business friendly because it cannot derail closing, but also criticised as parties with substantial deals might hesitate to close their transactions with the fear that the authority could impose remedies after the event. In practice, this may mean that some form of consultation pre-closing may be required for certain transactions.

We will update you on the progress of the New Act and the issuance of the underlying criteria and guidelines which will hopefully give practitioners and operators more certainty in the application and compliance with competition law in Thailand.

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