

Competition Law for Thai Business

Session 1

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Why EU Competition law matters for Thai Business

Following on Session 1 which presented how Competition law in Thailand has evolved we look now at EU Competition Law. This session will cover:

- >Objectives of competition law**
- >Benefits to market integration and competitiveness**
- >Framework and Enforcement of EU Competition law**
- >Applications of law- recent cartel enforcement**
- >Complying with Competition law**

Objectives of Competition law-1

- >Business activity thrives and competitive opportunities are fully exploited when there is legal certainty, regulatory costs are low and transparent and finally markets function and develop efficiently.**
- >Objectives of Competition law are directed to ensuring that markets work to the mutual advantages of business, customers (often also businesses) and consumers.**
- >Some major impediments to functioning of markets are:**
 - excessive market power and high business concentration**
 - agreements, joint ventures highly restrictive of competition**

Objectives of Competition Law-2

Business often views competition law in terms of its costs of compliance; useful to focus also on the costs of no-competition law

Opportunities for efficient businesses and new comers are greatly reduced or absent where:

- >monopolies and abuses of dominant positions foreclose raw materials, contract trade, and increase costs for small and medium sized rivals**
- >cartels and bid rigging of raw materials increase business costs and distort market functioning**
- >anti-competitive combinations limit efficient new entry**

Benefits to business and consumers-1

Benefits result from a legal framework that covers

- Restrictive agreements and prohibits cartels as in section 27 of Thai law**
- Intervenes against abuse of dominance (section 25 of Thai law**
- Control of anticompetitive combinations (section 26 of Thai law)**

EU model beyond these basic provisions covers also

- Control of State Aid to public or private businesses to ensure a level playing field**
- Scope of law covers all undertakings whether state owned or private and all business sectors**

Benefits to business and consumers-2

Comprehensive coverage of Competition law makes a key contribution to :

- >Integration of the Common market that provides opportunities for all businesses EU based and foreign**
- >Business competitiveness by allowing competitive access to raw materials, technology and markets in the EU**
- >Enabling the full exploitation of economies of scale**
- >level playing field between private and publicly owned businesses**
- >open to intra-EU and extra-EU trade to maximise competitive opportunities (cf.section 28 of the Thai law)**

Framework and enforcement of EU Competition Law -1

For the benefits to be fully realised it is necessary that

>the legal framework of the law and the relevant guidelines for businesses are set out

>Competition authority is active and can cooperate with other jurisdictions to combat cross-border anticompetitive conduct and combinations

>enforcement is consistent and credible.

The EU model works in the following way

Framework and enforcement of EU Competition Law -2

- **In 1958 when the Treaty entered into force no member State had a domestic competition law. Now all 27 MS have a domestic competition law substantively and procedurally convergent with the EU law.**
- **Europe developed an administrative system of antitrust enforcement subject to judicial review.**
- **Prohibitions on restrictive agreements, abuse of dominance and anticompetitive mergers.**
- **For antitrust jurisdiction (*whether EU or domestic*) is based on whether intra EU trade is affected. For mergers jurisdiction is clearly defined on the basis of turnover thresholds.**
- **How was jurisdiction ascertained in antitrust? No litigation: effet utile and subsidiarity. Now every Authority applies community law.**

How does the Commission proceed in antitrust cases?

- **The Commission can open a proceeding either as a result of a complaint or ex-officio. Not every complaint leads to a formal case. There has to be sufficient evidence that a violation be found. The evidence needs to be convincing. Otherwise the Commission can ask further information to the complainant.**
- **If there is sufficient evidence that a violation may be found, the Commission shares the evidence of the case with Member States (and so do Member States on the complaints they receive) and a decision is taken on the institution that is better positioned to take the case.**
- **Criteria of case allocation: MSs are in charge if the relevant geographic market is not larger than 3 MSs, if firms that have allegedly violated the law are concentrated in a single MS, if the matter is not novel.**

Horizontal agreements

- **Competitors enter into a number of agreements among themselves that are not anticompetitive. To the contrary.**
- **R&D agreements, production agreements, specialization agreements, purchasing agreements, commercialization agreements, standardization agreements and information exchange.**
- **Competition law applies to independent firms (contracts, mergers within a group of companies subject to the same control do not fall under the provisions of the law).**
- **An agreement is restrictive if it provides an appreciable adverse impact on one of the parameters of competition: price, output, quality, innovation. What matters is the market effect, not the restriction on the parties ability to compete.**
- **The counterfactual is the absence of the agreement**

Safe harbors for horizontal agreements 1

- **If the parties have a low combined market share, horizontal cooperation agreements are unlikely to restrict competition.**
- **R&D agreements are presumed not to restrict competition below 25% market share. Above that share they still may not be restrictive. The more complementary are the roles of the parties to the agreement the less restrictive it is. The farther away the agreement is from commercialization the less restrictive it is.**
- **Production agreements (reciprocal specialization agreements) restrict competition between the parties. In general these agreements are presumed not to restrict competition when the combined market share of the parties is below 20% and the agreement does not extend to the commercialization phase.**

Safe harbors for horizontal agreements 2

- **Purchasing agreements are generally considered restrictive if they lead to an increase of market power in the selling market which negatively affects consumers. They are presumed not to restrict competition if the combined market share of the parties to the agreement is below 15% on both the purchasing and the selling market. Antitrust law is not concerned with economic dependence.**
- **Commercialization agreements are potentially the most restrictive among the horizontal agreements considered so far. They are however presumed not to restrict competition if the combined market share of the parties to the agreement is below 15%. Above that share a case by case analysis is required. The more independent the pricing function remains the less restrictive the agreement (for example common advertising).**

Safe harbors for horizontal agreements 3

- **Standardization agreements have as their primary objective the definition of technical or quality requirements to which producers may/should comply. They are restrictive only when they lead to reductions in price competition, to foreclosure of innovation, to the exclusion of companies not allowed to use the standard. If access to the standard is provided on fair, reasonable and non-discriminatory terms, the agreement will normally not be restrictive of competition.**

Abuse of dominance

- **According to EU case law, the provision against abuse of dominance does not prohibit dominance but only its abuse.**
- **Dominance is a legal concept that can be translated into economics by significant market power. What is an abuse is defined through the lenses of economic analysis and it relates to practices that go beyond the simple exercise of market power (high prices).**
- **In recent decades, abuse of dominance provisions have been mainly applied to exclusionary practices more than to exploitative practices: predation, refusals to deal, tying, bundling, margin squeezes.**
- **Guidance by the Commission on the enforcement of article 102.**

Article 102 and economic dependence

- Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Why economic dependence?

- Every country (developed and developing) is concerned about retail buying and selling power. However there has to be some caution.
- Indeed, society is generally well served when the level of efficiency in the process of distribution increases. The transformation of retailing brings benefits. Especially when there is rivalry between distribution chains.
- In some countries the degree of concentration in retailing is very high. Three players in Australia and the Netherlands; 4 players in the UK, but much lower concentration rates elsewhere, including France and Spain and of course Italy.
- Merger control is the only tool for influencing market structure. No major merger in Italy.
- The market for retail distribution is local, so that aggregate data may be misleading. However consumption patterns are not as predictable as imagined. Consumers do not seem to be attracted by hypermarkets as much as they were. Low cost brands (but value for money) are developing also outside of food (Ikea, Decathlon, HM, Zara, etc pioneered by Benetton)

Are rules on abuse of economic dependence justified?

- They mirror rather closely the legal discipline of unfair terms in consumer contracts. The rationale underpinning the relevant provisions is that in long-term contractual relations characterized by a significant imbalance in the bargaining position of the parties some firms may indeed be in the same position as end consumers vis-à-vis their contractual counterpart and should therefore be granted some protection against the risk of exploitation.
- Is the judge sufficient? Clearly not. If the supplier is really dependent, he/she will never take the case to the judge, unless the relationship is terminated.
- An Authority should therefore be in charge to address issues ex officio. It should intervene only if these issues are widespread (market/competition effects).
- Like with consumer issues, individual cases do not deserve a very costly administrative action. In any case, the incentive to report cases to the Authority will always be very low

What is the procedure for mergers?

- **Mergers are notified to the Commission if the turnover of the parties involved is above a given threshold. There are 2 criteria: 1) aggregate worldwide turnover more than EUR 5 billion; aggregate community wide turnover of each of at least 2 undertakings above EUR 250 million, unless 2/3 of the aggregate Community wide turnover of each of the undertakings is achieved within a one MS. 2) lower turnover thresholds but merger produces its effects in at least 3 MS.** Below the thresholds the merger is notified at the national level. The jurisdictional choice allows for some flexibility before notification (so part of a Community merger may be notified to a national authority or a non community merger to the Commission)

Why notify?

- **Mergers are usually non problematic. An investigation is opened very rarely. So in order to avoid unnecessary bureaucracy, some jurisdiction have opted for a system of voluntary notification (for example the UK or Singapore). A system of voluntary notification could also be justified by the fact that problematic mergers are well known, so that the Authority could request information even in the absence of a voluntary notification**
- **A system of mandatory notification is nonetheless preferable. It shelters the Authority from the pressure of not opening a case.**
- **The cost of notification is quite low: simplified form in the case of mergers resulting in low market shares.**

Why merger control?

- **A merger is prohibited in the EU when it significantly impedes competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.**
- **Why a dominant position is only prohibited if it is the result of a merger?** *(because internal growth is very difficult to achieve)*
- **Why abuse of dominance provisions are not sufficient?** *(because a company that acquires market power can abuse it in many different ways)*

Application of Law- recent cartel enforcement-1

EU competition law enforcement has in the recent years become more active in combating cartels-national, EU-wide and Global

- **A more effective leniency program introduced in 2006**
- **Fines on cartels increased significantly**
- **A special cartel directorate created in 2004**
- **Increased and specific focus on customer complaints and ex-officio enquiries to detect cartels**
- **Close cooperation within the European Competition Network and with other competition authorities**

Application of Law- recent cartel enforcement-2

Year	Cartel decisions	Cartel fines
2007	8	3.3 bio euros
2008	7	2.3bio euros
2009	6	1.6bio euros
2010	7	2.8bio euros

Application of Law- recent cartel enforcement-3

->Cartel cases prosecuted recently

product	Number of undertakings	Geographic scope	Total fines
detergents	3	EU-wide	315.2mio euros
Liquid crystal displays	7	Global	860.0mio euros
Airfreight	12	Global	1800.0mio. euros
Feed phosphates	6	EU regional	176mio. euros
Bathroom fittings	17	EU regional	622mio euros
Pre-stressed steel	17	EU regional	240mio. Euros
DRAN chips	10	Global	331mio. euros

Business Compliance with Competition Law-1

Complying with competition law is not a matter of avoiding a fine but to ensure that benefits of competition accrue to all and augment the economy's growth and welfare.

Just as compliance with regulatory ,health and safety standards are incumbent on all business so it is with competition law.

->What does Thai business need to know with EU competition Law?

>Cartels are prohibited in EU as in Thailand

Business Compliance with Competition Law-2

- **Expect cartel conduct having an *effect* in the EU to be prosecuted even if *agreed to* outside EU**
- **State-owned undertakings are just as liable to fines as private businesses for competition infringements**
- **Non-EU businesses have the same rights to Leniency and same rewards for cooperating with the authorities**
- **Doing business with and investing in the EU gives entitlement to all the possibilities available to EU based businesses including using complaints' procedure for anticompetitive agreements/ practices/ conduct**
- **Information on guidelines for restrictive agreements, leniency, fines available on Commission website.**

Competition law for Thai business

Session 3

Consequences and costs of violation- Commission procedure-1

In detail Commission procedure consists of the following steps

>Opening of procedure triggered by receipt of a letter to its address in EU and if no EU address then to its home address

>Commission requests for specific factual information relating to the infringement

>if the Commission believe there is an infringement then can expect a Written Statement of Objections. The recipient has a right to receive it in any of the EU's official languages.

Consequences and costs of violation- Commission procedure-2

- > Simultaneously with the Statement of objection each party has a right to a cd containing all the elements in the Commission's file (excluding business secrets and purely internal documents of the Commission)**
- > There follows an Oral Hearing after the parties have made written submissions on the Statement of Objections**
- > Hearing is chaired by a Hearing Officer who is independent of DG Competition and works directly to the Commissioner for Competition**

Consequences and costs of violation- Commission procedure-3

>duration of the Commission's administrative procedure varies according to the infringement and the size of the case(number of parties). For a cartel case duration is easily 3 years before receipt of Statement of Objections and then up to another year before the final decision with fines.

>Fines are calculated as follows

Basic fine= $a + b \times \text{duration in years} \times \text{affected turnover}$

Where $0.15 < a < 0.25$ and $0.15 < b < 0.25$ and affected turnover is cartel sales of the participating company in the last year of the cartel.

Consequences and costs of violation- Commission procedure-4

- >Final fine = Basic fine + aggravation factor- mitigation factor or leniency reduction**
- >Final fine< 10% of the global turnover of the company fined**

Appeal procedure

- Within 2 months of the receipt of a prohibition decision can introduce an appeal to the General Court, setting out the grounds for the appeal.**
- Most Cartel cases are appealed.**

Consequences and costs of violation-

Commission procedure-5

- Appeal procedure is at least 4 years, often longer depending on the complexity of the case and the number of appellants**
- Fine is not suspended during appeal- either the fine has to be paid or a bank guarantee provided**
- Most common grounds for appeal in cartel cases are**
 - >lack of probative evidence against the defendant for the whole or part of period of the cartel**
 - >Commission erred in treating the infringement as a single complex continuous infringement**

Consequences and costs of violation- Commission procedure-6

>error in calculation of fine

**>discriminatory and unequal treatment of the parties
by the Commission**

Overall record of the Commission in Court in cartel cases is average 11% reduction of fine for the period 2000-2006.

In regard to restrictive agreements and abuses of dominance not as many prohibition cases but generally record of the Commission is very good.

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Session 4

Conclusions and Recommendations-1

- **Competition was introduced in the Treaty as an instrument of peace. How can competition promote peace?**
- **The prize for a successful competition is to cooperate with customers in the realization of a better product. Competition is an instrument for enhancing cooperation among producers.**
- **Fighting cartels, avoiding exclusionary abuses, prohibiting anticompetitive mergers makes the economy more efficient and more competitive**
- **In a globalized world it makes Thai businesses aware of antitrust legislation and less subject to antitrust enforcement abroad**

Conclusions and Recommendations-2

- **Antitrust authorities are independent institutions that need reputation to operate effectively. Reputation of professional assessment of violations, expertise on competition oriented legislation.**
- **The more successful authorities of the world have the status of the central bank, traditionally the most respected institution of every country. In this way also competition would be respected, both by private parties and by politicians.**
- **Decisions of the Authority are subject to judicial review. The Chamber that deals with antitrust violations should always be the same so that judges would quickly become competent**
- **Advocacy powers should be ex-officio. But at the same time competition impact assessment is necessary.**

Annex on economic dependence

Competition law and issues related to economic dependence

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Regulation 1 2003

- Article 3.2 provides an exception with respect to article 102 type violations: member States have the possibility to be more rigorous than the Commission.
“Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings..”
- Abuse of economic dependence was identified as the provision article 3.2 refers to (recital 8). But is it really an antitrust type violation?

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Buyer power in the 102 guidance

- The guidance is about exclusionary conduct, not exploitation
- According to the guidance buyer power is a problem only if it affects competition on the sales market: *“There are certain potential situations where buyer power can lead to a competition problem if it has an effect on competition on the sales market – either in terms of higher prices or loss of choices or quality ... These would lead to direct disadvantages for the consumer which should be addressed by competition law”*.
- No European case where article 102 has been applied to buyer power issues.
- No Italian case where article 3 has been applied to buyer power issues.
- Some merger cases in Italy, but very old (Cereol-Continentale)

The 2006 Weyerhouser case and buyer power in the US

- According to the US Supreme Court predatory bidding may exist without proving an effect on consumer welfare.
- In a predatory-bidding scheme, a purchaser of inputs bids up the market price of a critical input to such high levels that rival buyers cannot survive (or compete as vigorously) and, as a result, the predating buyer acquires (or maintains or increases its) monopsony power. If all goes as planned, the predatory bidder will reap monopsonistic profits that will offset any losses suffered in bidding up input prices.
- A predatory-pricing scheme ultimately achieves success by charging higher prices to consumers. By contrast, a predatory-bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses.
- It is not clear that in the EU an abuse may have no effect on consumer welfare.
- Many jurisdictions have introduced provisions prohibiting the abuse of economic dependence.

Article 101: Purchasing agreements

- The competition concern is mainly on the output side: joint purchasing may reduce price competition; it may foreclose competing purchasers by limiting their access to competing suppliers.
- The recently published EC guidelines on horizontal agreements address issues related to economic dependence like purchasing agreements. These are exempted if the joint purchasing share is below 15%.
- Indeed according to the guidelines, if purchasers are not active on the same relevant geographic market and cannot be regarded as potential competitors it is highly unlikely that such joint purchasing agreements are anticompetitive.

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Abuse of economic dependence in Italy (Law 18 June 1998, n 192)

- (3) Any agreement to achieve abuse of economic dependence is null and void. The ordinary courts shall take cognisance of cases of abuse of economic dependence, including the grant of restraining orders and injunctions and the award of damages.
- (3-bis) The Competition Authority may issue warnings and impose penalties ... against any company or companies found liable for any abuse of economic dependence which may affect competition and the (functioning of) markets
- Economic dependence is defined as a situation of imbalance in terms of rights and obligations and is appreciated in terms of the alternatives available.
- Examples of abuse of economic dependence are: refusal to sell or refusal to purchase; imposition of burdensome contractual conditions; arbitrary termination of contractual relations. **These are not a competition law violations**

The practice of abuse of economic dependence in Italy

- A few cases in civil courts. Most of them were cases where the contractual relation was terminated.
- No cases in front of the Authority, even if there is the possibility of opening cases ex-officio. The reason is that “effect on competition” has been interpreted like in antitrust (consumer welfare). As a result no abuse of economic dependence could ever be found.
- The imposition of burdensome contractual condition (to be defined more clearly) could well be taken up as a case by the Authority, provided that it is sufficiently widespread (in such circumstances an imbalance between rights and obligations would affect competition and the functioning of markets). There is no consumer welfare effect in the abuse of economic dependence (nor in the abuse of buyer power).

Vertical agreements and abuse of economic dependence

- Rules on car dealers termination practices were until very recently contained in the EC car distribution regulation. Now they only appear in the accompanying guidelines.
- “Suppliers wishing to influence a distributor's competitive behavior may ... delay or suspend deliveries or threaten to terminate the contracts of distributors that sell to foreign consumers or fail to observe a given price level. Adhering to a Code of Conduct is one means of achieving greater transparency”
- These are unilateral type conduct. Abuse of economic dependence type provision may easily be used to protect car dealers.
- However litigation is not always the right approach, especially when the counterfactual is difficult to define. A voluntary Code of conduct promoted by retailers associations, as in the UK under the supervision of the Competition Authority, is a wiser approach, with abuse of economic dependence as a solution for marginal cases.

A new law on SMEs

- A draft law is under discussion in the Italian Senate after having been approved by the Chamber of deputies. Existing provisions prohibiting the abuse of economic dependence are strengthened
- The Antitrust Authority is empowered to act against large enterprises (including credit institutions) and public administrations should they abuse of the economic dependence of their suppliers, especially with respect to unexpected contractual changes.
- The market studies of the UK Competition Commission on retail distribution have shown that big retailers require or request from their suppliers various non-cost-related payments or discounts, sometimes retrospectively; impose charges and make changes to contractual arrangements without adequate notice; and unreasonably transfer risks to the supplier.
- Furthermore the Authority would be responsible to make sure that credit institutions do not discriminate against SMEs.
- A voluntary code of conduct by large retailers and car producers could be used to better define what an abuse of economic dependence is

Conclusions

- Very rarely a genuine case of abuse of economic dependence is communicated by an abused firm (unless the contractual relation is terminated).
- A code of conduct, like in Australia or in the UK would eliminate most of the worries on what an abuse may be. The text of the code should be under the control of the antitrust Authority.
- If antitrust enforcement is about consumer welfare, than the abuse of economic dependence is not an antitrust violation
- The Authority may nonetheless be in charge and should consider to act:
 - Only in situations of “ objective” or “ex ante” dependency;
 - Only in situations where the imbalance between rights and obligations is clearly significant
- And should investigate cases which are sufficiently important or frequent to have a strong negative externality on market functioning (given the limited resources of the Authority)