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## Thailand's New Trade Competition Act

Long awaited amendments to Thailand's competition law were published in the Royal Gazette on 7 July 2017 and will become effective on 5 October 2017

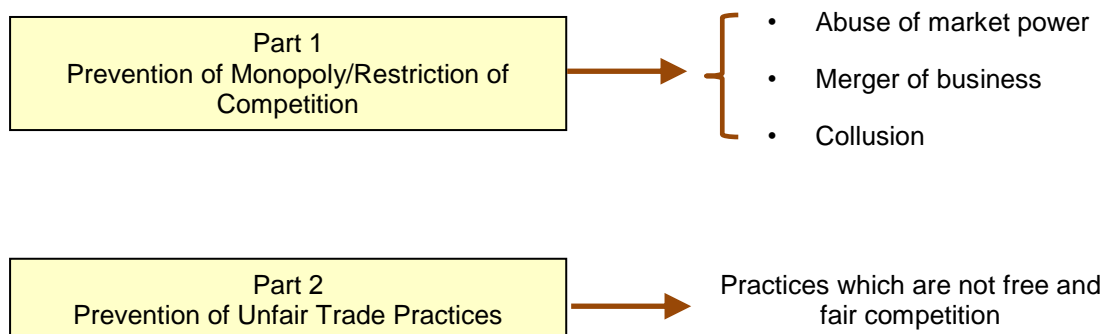
The new Trade Competition Act B.E. 2560 (2017) (**2017 Act**) will repeal and replace the first competition law in Thailand, the Trade Competition Act B.E. 2542 (1999) (**1999 Act**), which remains in force until the effective date of the 2017 Act. Further implementing regulations and notifications will also need to be issued in order to clarify the full scope of the 2017 Act.

The 2017 Act is expected to herald increased enforcement as it establishes the Trade Competition Commission (**Commission**) as a separate entity independent of the government, with its own budget.

Another key change is that, whereas state enterprises are completely excluded from the 1999 Act, under the 2017 Act they will be exempted only in limited circumstances, such as where they carry out activities pursuant to a law or cabinet resolution as required for national security, public interest, common interest or to provide public utilities.

Other groups exempted from the 2017 Act include: Central administration, provincial administration or local administration; Farmers' groups, co-operatives or co-operative societies recognized by law; and businesses which are specifically regulated by other specific laws on trade competition (e.g. under the Telecommunications Business Operations Act B.E. 2544 (2001)).

We have set out below a brief summary of the key provisions of the 2017 Act, divided into two sections.



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### **Abuse of market power**

The 2017 Act retains the principle of the 1999 Act by reaffirming that being a market dominant player does not automatically result in breach of the competition law. Instead, in order to constitute an abuse of dominance, it is necessary to consider whether the market dominant player is acting in any of the following manners:

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

(Section 50 of the 2017 Act)

Under the 1999 Act and its relevant regulations, dominance of market power is determined by market share and sales volumes. The 2017 Act retains the same principle, with an additional requirement that the Commission shall also take into consideration other factors, such as number of competitors, amount of capital, access to key production factors, distribution channels, business networks, infrastructure necessary to the business, relevant government regulations etc.

In addition, in determining the market power of a business operator, the 2017 Act provides that the market shares and sales volumes in a particular market of other business operators with a relationship in policy or control shall also be included for consideration. The Commission will publish the criteria to determine a business operator with market dominance under the 2017 Act. These criteria will be reviewed at least once every three years.

### **Merger of Business**

New requirements under the 2017 Act (in Sections 51-53) are as follows:

- **Post-merger notification:**
  - A business operator who engages in a business merger that may cause significant decrease of competition in a particular market pursuant to the criteria prescribed in the notifications of the Commission shall notify the result of the merger to the Commission within 7 days from the date of merger. Further implementing provisions are required to clarify when this requirement will arise.

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- **Pre-merger permission:**
  - Approval from the Commission is required for a merger of businesses which may result in monopoly or a business operator with market dominance.
  - Merger of business includes a merger which has the effect of maintaining the status of one business and terminating the status of the other business or creating a new business, the purchase of assets or shares whether in whole or part of another business with a view to control business administration policies, administration, management.
  - Except a merger of business for the purpose of reorganization of internal structure of business operators that are related by policy or administration.

**Collusion – also known as Anti-Competitive Agreements (“Cartels”)**

Section 27 of the 1999 Act does not distinguish between whether anti-competitive agreements are “horizontal” (i.e. between competitors in the same market) or vertical (i.e. with other business operators, such as between a retailer and a distributor), and specifies the same penalties for any cartels between “business operators”.

The 2017 Act makes a distinction between cartels between competitors in the same market leading to price fixing, market allocation, output control or bid rigging (Section 54), which are considered “hardcore cartels”, and cartels between other operators or “non-hardcore cartels” (Section 55).

Hardcore cartels are subject to criminal penalties, while the non-hardcore cartels are subject to administrative fines.

Agreement between competitors (Section 54)	Agreement with other business operators (Sections 55-56)	Agreement with business operator in a foreign country (Section 58)
<ol style="list-style-type: none"> <li>1. Fixing purchasing or selling price, or commercial conditions</li> <li>2. Limiting quantity of goods or services</li> <li>3. Bid-rigging</li> <li>4. Fixing geographical sale and purchase areas</li> </ol>	<ol style="list-style-type: none"> <li>Actions in 1, 2, and 4 where the business operators are not competitors</li> <li>5. Reducing quality of goods or services</li> <li>6. Appoint or entrust any person as a sole distributor</li> <li>7. Fixing conditions</li> <li>8. Others as prescribed by Notifications</li> </ol>	<p>Any juristic act or contract which results in monopoly or unfair restriction of trade without justifiable reason, and has a severe impact on the economy and the consumers’ interest</p>

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<p><u>Excludes</u></p> <ul style="list-style-type: none"> <li>Affiliated companies</li> </ul>	<p><u>Excludes</u></p> <ul style="list-style-type: none"> <li>Affiliated companies</li> <li>R&amp;D agreements</li> <li>Licensing agreement</li> <li>Specific forms of business as prescribed in the Ministerial Regulation</li> </ul>	
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**Practices which are not free and fair competition**

A business operator shall not carry out any act which causes damage to other business operators in the following manners:

- (1) Unfairly restricting the business operation of other business operators
- (2) Unfairly exercising the superior market power or bargaining power
- (3) Unfairly fixing commercial condition which restricts or impedes the business operation of other persons
- (4) Other acts as notified by the Commission

(Section 57 of the 2017 Act)

The 2017 Act narrows the scope of Section 29 of the 1999 Act, which has a broad interpretation and is generally referred to as a “catch-all” provision for any anti-competitive acts not falling under the scope of other provisions in the 1999 Act. Although the list of anti-competitive practices prescribed in Section 57 of the 2017 Act is still considerably broad, it should give more clarity, especially with further issuance of the Commission Notification.

**Penalties – Criminal and Administrative**

The 2017 Act empowers the Commission to impose administrative penalties, which will not require the commencement of criminal proceedings, and which is a substantial departure from the 1999 Act.

Previously, the regulator was required to pass a prosecution recommendation to the public prosecutor, who would then consider whether to commence the case. No breach of the 1999 Act ever proceeded to the Criminal Court.

The Commission will now be able to impose administrative penalties in certain cases or, in the case of criminal penalties, the Commission may seek the Attorney General’s prosecution of the case if the public prosecutor refuses to do so.

We note that, in order to minimise risks of violation of trade competition provisions, a business operator may file a petition under Section 59 of the 2017 Act to the Commission to consider passing a decision

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in advance on whether a particular act of such business operator is in violation of Section 50, 54, 55, 57, or 58 of the 2017 Act. In passing a decision on the petition, the Commission may set any conditions for compliance by the business operator so that it be in conformity with the 2017 Act. A decision of the Commission shall have binding effect only on the petitioner and within the scope and period of time prescribed by the Commission.

<u>Offense</u>	<u>Criminal penalty</u>	<u>Administrative penalty</u>
Abuse of market dominance (s.50)	Fine: ≤ 10% of revenue in the year of offence and/or Imprisonment : ≤ 2 years <u>First year:</u> Fine: ≤ 1M THB and/or Imprisonment ≤ 2 years	
Agreement between competitors (s.54)		
Merger of business (s.51-53)		<u>(notification)</u> Fine: ≤ 200,000 , Daily ≤ 10,000 THB <u>(permission)</u> Fine: 0.5% of value of merger transaction
Agreement with other business operators (s.55-56)		Fine: ≤ 10% of revenue in the year of offence <u>First year:</u> Fine: ≤ 1M THB
Agreement with business operator in a foreign country (s.58)		
Unfair practice (s.57)		

\*Juristic person: the director(s) or manager(s) or person(s) responsible for the operation of the juristic person is also liable for the same penalty of the offence. Please see our comment on individual liability below.

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**Individual Liability**

The wording on individual liability where the alleged offender is a juristic person has been amended in line with changes made to over 70 acts following Constitutional Court rulings which found that wording similar or identical to Section 54 of the 1999 Act was contrary to the constitutional presumption of innocence.

Section 54 of the 1999 Act:

*In the case where the person who commits an offence punishable under this Act is a juristic person, the managing director, the managing partner or the person responsible for the operation of the business of the juristic person in such matter shall also be liable to the penalty provided by the law for such offence unless it is proved that such act has been committed without his or her knowledge or consent or he or she has already taken reasonable action for preventing the commission of such offence from occurring.*

Section 77 of the 2017 Act:

*Where an offender is a juristic person, if a commission of an offence of such juristic person is caused by an instruction or an act of a director or a manager or any person who is responsible for the business operation of such juristic person or where such person has the duty to give an instruction or act and did not give the instruction or did not act, which caused such juristic person to commit the offence, such person shall also be liable to the punishment as specified for such offence.*

In brief, the prosecution would now need to show that the directors, managers or persons responsible for the business did something or had a duty to do something – and failed to do so, and that this resulted in the juristic person committing the offence.

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## **Other Useful Thailand Resources**

### **Practical Law**

#### **Employment and Employee Benefits in Thailand: Overview**

Authors: Rajah & Tann Partners Sui Lin Teoh, Supawat Srirungruang, and Saroj Jongsaritwang, and Senior Associate Yingrak Treesaranuwattana, have drafted the Thailand chapter, which forms part of the Practical Law global guide to employment and employee benefits law. From Practical Law:

*“The Q&A gives a high level overview of the key practical issues including: employment status; background checks; permissions to work; contractual and implied terms of employment; minimum wages; restrictions on working time; illness and injury; rights of parents and carers; data protection; discrimination and harassment; dismissals; redundancies; taxation; employer and parent company liability; employee representation and consultation; consequence of business transfers; intellectual property; restraint of trade agreements and proposals for reform.”*

The Q&A can be downloaded in PDF format at: <http://uk.practicallaw.com/8-617-6522?q=thailand>

### **Practical Law**

#### **International Trade and Commercial Transactions in Thailand: Overview**

Authors: Rajah & Tann Partners Surasak Vajasit, Melisa Uremovic, Pakpoom Suntornvipat and Supawat Srirungruang, with the assistance of Senior Associate Suwapak Jaru-ampornpan, have drafted the Thailand chapter, which forms part of the Practical Law International Trade and Commercial Transactions Global Guide. From Practical Law:

*“The Q&A covers key matters relating to sale of goods contracts, including rules on formation, price and payment, delivery, passing of title and risk, variation and assignment, enforcement and remedies, exclusion of liability, choice of law and jurisdiction, and arbitration. It also provides an overview of the rules governing storage of goods, imports, trade remedies, exports and international trade restrictions.”*

The Q&A can be downloaded in PDF format at <http://uk.practicallaw.com/5-617-8810>

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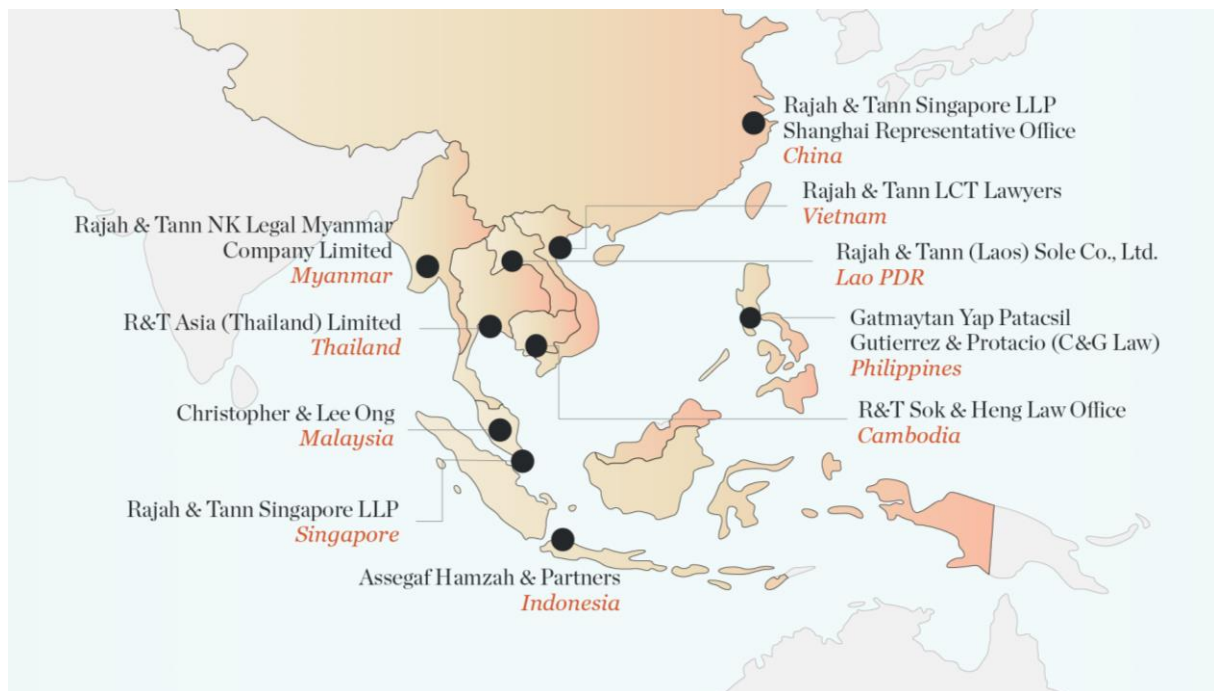
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