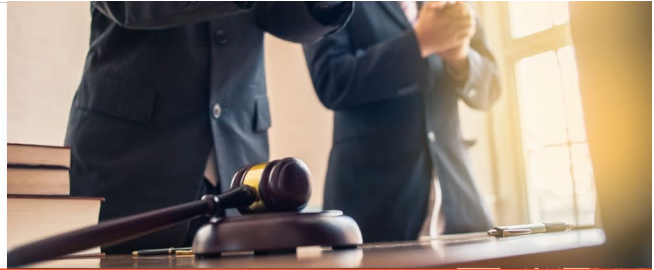


# KUDUN & PARTNERS



Thought Leadership | Antitrust and competition

## Anti-Trust Law: What are the key points for companies to consider?

With its Price Fixing and Anti-Monopoly Act of 1979, later replaced in 1999 by the Trade Competition Act (TCA), Thailand became one of the first ASEAN countries to regulate anticompetitive practices. 2017's Trade Competition Act, known as the "New TCA", applies to unfair trade practices across many industries.

Although Thailand had not always been known for its strict enforcement of antitrust measures, the recently revamped law has tightened several loopholes and been used more assertively in the context of company mergers. Thailand's top authority for competition law, the Trade Competition Commission (TCC), has likewise taken a more proactive stance in conducting its duties, which also include policing unfair trade practices.

### Recent anti-trust law development

From 2018 to early 2020, the TCC issued a series of new anti-trust guidelines clarifying the criteria for identifying offenses, such as abusing a dominant position, conducting unjust trade practices, and entering into anticompetitive mergers. Regulatory responses included the provision of cease and desist orders, and initiating procedures for fact-finding in cases requiring administrative or criminal investigations.

Further guidelines have also been released with regard to retail and wholesale businesses, as well as unfair trade practices for franchisees. These changes have been backed up by action: Upon identifying a manufacturer that was abusing its dominant market position, the TCC imposed a THB 12 million fine on the offending company. Two other offenders were fined 10% of their respective

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### Get in touch

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total annual turnovers, after being caught engaging in unfair trade practices.

These developments, all taking place in 2019, helped usher in a new era for the TCC. Though the Commission had long been regarded as 'soft' on antitrust issues, this recent period marked the first time in its history that three separate investigations involving legislative action were taken to this level of enforcement.

Most of the TCC's recent cases have revolved around unfair treatment and competitive barriers like refusal to deal, exclusivity and territorial restrictions. Yet the current incarnation of the TCC takes a fully modern approach to antitrust regulation, encompassing a fairly complete range of business activity – including mergers.

### Merger reporting

The new TCA requires businesses to file both pre- and post-merger reports in certain circumstances. Under their definition, mergers shall include:

- (1) Mergers among producers, sellers, producers and sellers, or service providers, resulting in one business remaining and the others' business terminating, or a new business coming into existence;
- (2) Acquisition of all or part of the assets of other business in order to control its policy, business administration, direction, or management in accordance with the criteria prescribed in the Commission's notification.
- (3) Acquisition of all or part of the stocks of the other business, whether directly or indirectly, in order to control policy, business administration, direction, or management in accordance with the criteria prescribed in the Commission's notification.

The required reports are designed to strengthen the notification process. In the first instance, a notification is needed to request authorization from the TCC for mergers whose combined entity would spawn a monopoly or control a majority of the market share. The TCC then has 90 days, with the ability to extend the period for an additional 15 days, to make a decision on the merger. As part of this process, the TCC may impose additional conditions when issuing the pre-merger clearance. Any party disagreeing with this decision

## About Us

### Antitrust & Competition Practice

Our Antitrust & Competition practice is integrated with our Corporate and M&A practice. We can provide comprehensive advice to our valuable clients on business strategies, corporate compliance, merger control including pre- and post-merger approval and notifications, as well as other competition-related laws in Thailand. Our partners have gained vast knowledge throughout their career on competition laws and continue to advise Kudun and Partners' clients on non-competition agreements, distribution agreements, licensing agreements, due diligence and other agreements between competitors and commercial partners.

can file an appeal with the Administrative Court within 60 days from the date of the decision.

A post-merger notification may be needed if the result of the transaction decreases a particular market's competitiveness by a significant amount. A post-merger report is also required following transactions where any of the parties involved has sales over THB 1 billion in its current market, but where the merger does not give rise to a dominant business position or create a monopoly. This type of notification must be submitted within seven (7) days after the merger is completed.

Exemptions under certain conditions can be provided for non-hardcore joint actions, if mergers are required to support the distribution of goods or help in developing production without affecting the market's competition significantly, and if the combined market share of the participating parties totals no more than 10 percent.

### **Abusing a dominant position**

The above reporting requirements, in addition to general antitrust law enforcement, require businesses to know whether they are abusing their dominant position either to monopolize or to decrease a certain market share. Before entering into an agreement, companies should consider whether they are establishing unfair pricing schemes that revolve around margin squeezing, low-cost pricing, over-pricing, or predatory pricing that affects the overall price of goods or services in the current market.

Another area of concern involves imposing unjust conditions that restrict a trading partner's service or production capacity. This category covers limiting their ability to purchase or sell products and impeding their opportunity to buy, sell, receive, or provide services by means of quantity limitation. Other practices with antitrust implications include exclusivity agreements, resale price maintenance, fidelity discounts, refusal to provide, and quantity forcing.

Most of all, the TCC scrutinizes companies that are considered to dominate a certain market. If a company's market share is at least 50 percent, with sales totaling over THB 1 billion in the past year, they will likely be on TCC's radar. Close attention is also given to the activities of any of the top three business operators who own a

combined 75 percent market share, with sales value exceeding THB1 billion in the previous year.

### **Checking for unfair trade practices**

Your trade practices may be deemed unfair if they do not comply with the TCA's renewed antitrust policy on abusing a dominant market position. Potential offenses include bid-rigging, where a party has agreed to set the terms and conditions for a second party not to take part in an auction or to win one. Market allocation – where competitors conspire to divide markets between them – is likewise considered a criminal offense.

Other offenses involve unfairly obstructing business operations by lowering the quality standards of goods or services. In some cases, it is also prohibited to establish unfair trade conditions surrounding the sale or purchase of a particular product or service, including enforcing a sole distributorship agreement.

### **Ignorance of the law is not an excuse**

Some companies may not be aware that they are in breach of the TCA's new antitrust policies, especially if they control a sizable market share. They may unknowingly be in breach of newly updated regulations, which nevertheless put them in the crosshairs of the TCC. Those in violation of applicable laws may be subject to large fines and/or prison sentences.

The new TCA also has an extraterritorial reach, if the matter at hand affects Thailand's consumers and economy by means of prohibited agreements made between or among local and foreign parties.

Now more than ever, as the TCC takes a more proactive stance toward regulatory enforcement, it is essential for businesses to stay on the right side of the law. For expert legal guidance on all business matters, and to ensure that your business dealings and future strategy measure up to Thailand's current anti-trust law, get in touch with Kudun & Partners today.