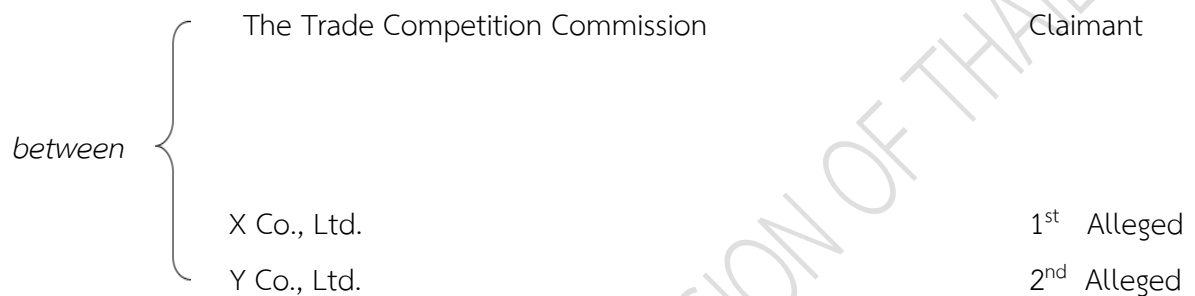




The Trade Competition Commission Ruling on the Collection of Virtual Print Fee (VPF) in Cinema



The Complaint

The Trade Competition Commission assigned the Secretary-General of the Trade Competition Commission to verify the case that the 1st Alleged and the 2nd Alleged collecting so-called ‘Virtual Print Fee’ or VPF from every filmmaker or film distributor in which the fees are levied differently for each filmmaker or film distributor and no explicit period of fee collection are specified. Such actions by the 1st Alleged and the 2nd Alleged may constitute offences under Section 50 and/or Section 57 of the Trade Competition Act B.E. 2560 (2017).

Facts

The facts, from fact-finding, have been established that in the past, filmmaking was based on 35mm film system whereby all production scenes were exposed onto the rolls of film. If there was any mistake, that exposed roll of film would be disposed of and that particular scene must be retaken on a fresh roll of film. Later when the technology has evolved from film-based production to digital system in which all data are saved in electronic files allowing deletion and editing with ease, as well as enhancing consistent motion pictures quality, this caused a significant cost reduction for filmmakers – both film duplication and film transportation to be shown at each cinema in each area. Meanwhile, movie theatres or cinemas perceived the same development through digital transition was merely technological change

without increasing the revenue for theatres themselves. Moreover, such digital transition incurred the higher costs for theatres to replace projectors, as well as servers and sound processors, to cope with the new system of movie showing. As a result, filmmakers or film distributors abroad offered financial assistance to support the investment in such upgrades, being coined as Virtual Print Fee (VPF).

The administration of VPF abroad is conducted through a third party or an intermediary called an integrator who is collecting VPF from anyone who wants to show movies in cinemas – regardless of whether they are large or small filmmakers or film distributors, or alternative filmmakers or film distributors – shall pay for VPF as described in contracts. Afterwards, once VPFs are received by integrators, financial supports would be transferred to cinemas. The financial support has a fixed period of around 5-6 years; after that, filmmakers or film distributors need not to pay VPF anymore. When the cinemas' expenses on digital transition have been paid off or the period prescribed in the contract between the integrator and the filmmaker or film distributor has been met, whichever earlier, the integrator would stop paying those financial support to the cinema. While paying those financial support, the integrator (or the bank, depending on each case) entitles as a rightful owner of digital film projectors. Once the digital transition has been completed or the contracted period has been lapsed, whichever earlier, the ownership of film projectors will be transferred to the cinema and the maintenance of those projectors shall be responsible for by the cinema itself. The integrators in the above-mentioned management of VPF earn the managerial fee as remuneration. However, the VPF contract may vary from one country to another. For instance, long-term contracts would be applied to large filmmakers or film distributors; while using short-term contracts with independent filmmakers or film distributors; or in some countries, the VPF is determined as a fixed rate and reducing overtime as a movie being shown.

For Thailand, the 1st Alleged and the 2nd Alleged have also implemented the VPF collection as well but the administration of VPF is responsible by either the 1st or the 2nd Alleged depending on filmmakers or film distributors that take movies to be shown in respective cinemas without any intermediary or integrator. The 1st Alleged and the 2nd Alleged concluded contracts to collect VPF with large filmmakers or film distributors and regional film distributors (or so-called 'film agents' – the intermediaries who take movies to be shown in provincial cinemas, except Chiang Mai) for the period of 5 years. After such contractual period has been lapsed, large filmmakers or film distributors need not to pay for VPF anymore. For

small or independent filmmakers or film distributors, VPFs are collected with no written contracts; thus, the term of fee collection has no expiration.

The VPF rates that the 1st Alleged charged from filmmakers or film distributors are not exceeding XX,XXX Thai Baht per each movie show per 1 copy of digital film, depending on agreements between filmmakers or film distributors and the cinemas. In Bangkok and Chiang Mai, VPFs are collected directly from filmmakers or film distributors by the 1st Alleged. For other provinces, VPFs are collected from regional film agents. It is apparent that the 1st Alleged have no explicit contracts with small filmmakers or film distributors to collect VPFs but the collection of VPF is based on the number of shows of each movie whereas VPFs are negotiable. This differs from what large filmmakers or film distributors as well as regional film agents have to pay for VPFs per contracts because large filmmakers or film distributors bring at least 10 movies per year to be shown in cinemas, with certain show times, and those movies usually are money-making but small filmmakers or film distributors show only 1 or 2 movies per year – in some years, there was no movie at all; additionally, movies from small filmmakers or film distributors frequently suffer losses, unable them to pay for VPFs. The 1st Alleged never legally prosecute those small filmmakers or film distributors.

The cost of digital transition by replacing projectors with digital ones (as of the end of 2019) for the 1st Alleged amounted X,XXX,XXX,XXX.XX Thai Baht, excluding the expenses on management, Xenon bulbs, repair, maintenance, and upgrading of quality, features, and technology. The revenue from collecting VPFs (as of March 2020) was XXX,XXX,XXX.XX Thai Baht. Currently, the 1st Alleged is contemplating the cessation of VPF collection from Thai filmmakers to support them and to enhance the competitiveness of Thai movies in the changing economic conditions and environment.

For the 2nd Alleged, there are 3 different types of VPF collection: (1) Full Rate, in which the movie has been shown at least 4 times per week per cinema screen for the first week, and at least 3 times per week per screen in the second week, is charged to large filmmakers or film distributors at the rate of XX,XXX Thai Baht per movie per screen and to small filmmakers or film distributors at the rate of XX,XXX Thai Baht per movie per screen; (2) Weekly Rate, in which the movie has been shown only in the first week at least 4 times per screen, is charged to large filmmakers or film distributors at the rate of X,XXX per screen per movie and to small-/independent filmmakers or film distributors at the rate of XX,XXX per screen per movie; and (3) Free Rider Rate, in which small-/independent filmmakers or film

distributors show their movies less than 4 times per screen, is levied at the VPF rate of XXX per show and this rate remains negotiable if the number of show is less than what previously agreed. The reason that the 2nd Alleged charges different rates of VPF to large and small filmmakers or film distributors is the continuity and consistency of large ones bringing movies to show at cinemas and they are regarded as long-established trading partners; while small-/independent filmmakers or film distributors are unable to ascertain numbers of movies to be shown and they are regarded to be temporary trading partners; sometimes they bring only one movie per year to be shown at cinemas. Charging the same rate of VPF is not suitable for the business model and does not corresponding with general trade practices. The 2nd Alleged, thus, concluded the contracts with some small filmmakers or film distributors and is in the process of concluding contracts with all small filmmakers or film distributors to have clearer schedules of VPF collection given different terms and conditions from one to another but the VPF rate remains negotiable if it is necessary.

The cost of the 2nd Alleged to replace its projectors with digital ones (as of July 2020) amounted XXX,XXX,XXX.XX Thai Baht, excluding maintenance, Xenon bulbs, and spare parts. The revenue from VPF (as of June 2020) for the 2nd Alleged is XXX,XXX,XXX.XX Thai Baht.

Issues for Consideration

Issues require the Trade Competition Commission to consider are as follow:

1. Whether or not the 1st Alleged and the 2nd Alleged are undertakings with dominant position conducting any action that is prohibited by Section 50 of the Trade Competition Act B.E. 2560 (2017);
2. Whether or not the 1st Alleged and the 2nd Alleged are conducting any action causing damage to other undertakings in which prohibited by Section 57 of the Trade Competition Act B.E. 2560 (2017).

Decisions

To determine whether or not the 1st Alleged and the 2nd Alleged are undertakings with dominant position conducting any action that is prohibited by Section 50 of the Trade Competition Act B.E. 2560 (2017), it is necessary to verify if both Alleged are undertakings with dominant position or not.

Under Section 5 of the Trade Competition Act B.E. 2560 (2017), the undertaking with dominant position is the undertaking or undertakings in a relevant market having market share and sales revenue exceed the criteria predetermined by the Trade Competition Commission whereby a factor or factors relevant to the competition within that market shall be evaluated, together with the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018), dated 4 October 2018, Item 3 stating “3. Any undertaking with market share and sales revenue as follow shall be deemed as an undertaking with dominant position: (1) An undertaking in a market of a particular product or service that has market share in the preceding year of 50 percent or more and has sales revenue of one billion (1,000,000,000) baht or more, or (2) First largest three (3) undertakings in a market of a particular product or service that have combined market shares of 75 percent or more and each and every undertaking has sales revenue of one billion (1,000,000,000) baht or more; The provision in paragraph 1 (2) above shall not be applied to any undertaking with market share in the preceding year lower than 10 percent.” Thus, the market definition shall be established from 2 aspects:

(1) Product Dimension

The distribution of movies from film makers to moviegoers consists of 4 channels: 1. Movie theatres or cinemas, 2. Home entertainment products – such as DVD, CD, Blu-Ray Disc, or online streaming services, 3. Pay TV or user-subscribed cable TV, and 4. Free TV. When all unique features of movie distribution in cinemas are considered, along with audience accessibility, advertising, as well as related marketing activities, values created by each movie after its premier, period of shows in each distributional channel, including feeling and experiences of moviegoers, it is apparent that other film distributional channels cannot substitute watching movies in cinemas. Therefore, the market definition in this case is the business of showing movies in movie theatres;

(2) Geographical Dimension

Large movie theatres have their branches throughout Thailand and abroad. Considering the collection of VPF in which all filmmakers or film distributors in every region of Thailand, covering almost every province, are being charged for the fee. Therefore, the geographical market for this case is nationwide.

Evaluating market share of cinemas in Thailand, in 2018, according to the date provided by the Department of Business Development, the 1st Alleged has the sales revenue

of X,XXX,XXX,XXX.XX Thai Baht and has the largest market share of XX.XX percent and the 2nd Alleged has the sales revenue of X,XXX,XXX,XXX.XX Thai Baht and has the second largest market share of XX.XX percent and Dh Co., Ltd. has the sales revenue of XXX,XXX,XXX.XX Thai Baht and has the third largest market share of X.XX percent. Thus, the 1st Alleged is considered to be the undertaking with dominant position per Section 5 of the Trade Competition Act B.E. 2560 (2017) and the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018), Item 3 (1) due to having the market share in the preceding year of 50 percent or more and having the sales revenue of 1,000 million Baht or more; however, the 2nd Alleged is not considered to be an undertaking with dominant position per Section 5 of the Act.

The next issue to be considered is whether or not the collection of VPF by the 1st Alleged is prohibited by Section 50 of the Trade Competition Act B.E. 2560 (2017).

The provision of Section 50 of the Trade Competition Act B.E. 2560 (2017) states “The undertaking with dominant position is prohibited to do any of the following action (1) unfairly determine or maintain the buying or selling price or fee...” and the Trade Competition Commission Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position B.E. 2561 (2018), dated 4 October 2018, states in Item 5 “Unfair price determination or price maintenance of a product or a service with one or more of the following characteristics shall be considered as the violation of Section 50: (3) Price Discrimination in which buying or selling prices of a product or service are determined or maintained differently for trading parties, as either one of the following: (a) Setting buying or selling prices of an identical product or service differently to different trading partners due to anything apart from differences in costs, quantity, quality, or any other characteristics of the product or service, and without any other due cause; (b) Setting an identical buying or selling price of a product or service to different trading parties even though there are differences in terms of costs, quantity, quality, or any other characteristics of the product or service to each party, and without any other due cause...”

The Trade Competition Commission have considered all relevant matters determines that the 1st Alleged collect VPFs from all filmmakers or film distributors to support its own investment in the transition of film projection from the film system to the digital system by arranging contracts to collect VPF with large filmmakers or film distributors for 5 years but agreeing to collect VPF – without any written contract – with all small-/independent

filmmakers or film distributors. The later agreement is deemed to be ongoing, without a specific expiration, resulted from the differences on numbers of movie, consistency, and profitability of movies being shown. Currently, the 1st Alleged is contemplating the cessation of VPF collection from Thai filmmakers to support the competitiveness of the Thai movies industry. Taking into account the data on the cost of projector replacement and the revenue from VPF of the 1st Alleged, it is discovered that the cost of projector replacement to the digital system amounted X,XXX,XXX,XXX.XX Thai Baht and the VPF revenue of XXX,XXX,XXX.XX Thai Baht, implying that the VPF revenue is less than the projector replacement cost by XXX,XXX,XXX.XX Thai Baht. It cannot be settled that the 1st Alleged has unfairly collecting VPF. Thus, the 1st Alleged's action did not constitute the offence of unfairly exercising dominant position to determine or maintain the buying or selling price of a product or service per Section 50 (1), together with the Trade Competition Commission Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position B.E. 2561 (2018), Item 5 (3) (a) charging different fees for identical service to different trading partners; (6) other price determination or maintenance without due cause.

Subsequently, it is necessary to evaluate whether or not the 1st Alleged and 2nd Alleged had commit any action that resulted in damage of other undertakings in which is prohibited by Section 57 of the Trade Competition Act B.E. 2560 (2017).

The provision of Section 57 of the Trade Competition Act B.E. 2560 (2017) states "an undertaking is prohibited to conduct any action in which causing damage to other undertakings of the following natures: (2) unfairly exercising market power or superior bargaining power; (3) unfairly imposing trade conditions that are limiting or obstructing others' business operations..." Thus, it shall examine that 1. Whether or not the 1st Alleged and the 2nd Alleged are undertakings with market power, 2. Whether or not such action is unfairly taking advantage of trading partners, and 3. Whether or not such action causes any damage to other undertakings.

Given the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October 2018, Item 5 stating "An offence under the provision of Section 57 incurring a loss to another undertaking shall be assessed from apparent and factual economic loss, such as revenue loss of that another undertaking, loss in market value of a product or service, and loss of opportunity in producing goods or service;" Item 6 "To assess market power, it shall be presumed that an undertaking

with a market share of 10 percent or higher is deemed to have market power and shall consider other additional factors concurrently; such as a number of undertakings in a market, registered capital, access to factors of productions, distribution channels, business networks, necessary infrastructure for doing business, and laws and regulation;” Item 9 stating “An unfair exercise of market power or superior bargaining power shall have the following characteristics: (1) An undertaking has market power or superior bargaining power over another undertaking; (2) An undertaking exercises its market power or its superior bargaining power to take advantage over, or restricting alternative(s) of, its trading party unfairly;” and Item 11 stating “To assess a certain action whether it is unfair, the following criteria shall be considered concurrently: (1) Such action is not commonly practiced as trade norms; (2) There is an imposition of condition(s) without written evidence and without prior notice in a reasonable period of time as normally practiced in such trade; (3) Such action has no justifiable explanation(s) from the perspective of business, marketing, or economics; (4) Other relevant factors.”

The Trade Competition Commission had considered these issues thoroughly and determines that the 1st Alleged has the market share of XX.XX percent and the 2nd Alleged has the market share of XX.XX percent in the movie theatre market in Thailand in 2018; both Alleged are undertakings with market power per the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), Item 6.

The next issue to be considered is whether or not the 1st Alleged and the 2nd Alleged had conducted any action that unfairly taking advantage of trading partners. It is established that the 1st Alleged and the 2nd Alleged collect VPF from every filmmaker or film distributor to support their investment in the transition of movie projection from the film system to the digital system whereby the 1st Alleged concluded the contracts to collect VPFs from large filmmakers or film distributors for 5 years but having no written contract with small filmmakers or film distributors and the 2nd Alleged also had the contracts to collect VPFs from large filmmakers or film distributors and concluded similar contracts with some small filmmakers or film distributors. The reason behind such practice that no written contract has ever been made with small filmmakers or film distributors is owing to the number of movie, the consistency of bringing movie to show at cinemas, and the profitability of movies shown at cinemas. Currently, the 1st Alleged is contemplating the cessation of VPF collection from Thai filmmakers to support the competitiveness of the Thai movies industry. Meanwhile, the 2nd Alleged is concluding written contracts to collect VPF with specific period of fee paying.

Together with the facts concerning their costs of projector replacement and their revenues earned from collecting VPF, it is evident that VPFs collected by both Alleged are less than the costs of replacing projectors. It cannot be settled that the 1st Alleged and the 2nd Alleged collected VPFs in a manner that unfairly taking advantage of small filmmakers or film distributors.

The subsequent issues to be considered are 1. Whether or not both the Alleged have imposed trading conditions that are limiting or obstructing others' business operations; 2. Whether or not such imposition of conditions is unfair; and 3. Whether or not such action causing damage to other undertakings.

Given the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October 2018, Item 5 stating "An offence under the provision of Section 57 incurring a loss to another undertaking shall be assessed from apparent and factual economic loss, such as revenue loss of that another undertaking, loss in market value of a product or service, and loss of opportunity in producing goods or service;" Item 10 stating "Imposition of trading condition(s) that restrict or prevent an operation of other undertaking unfairly having one or more of the following characteristics: (1) Discriminatory trading conditions for different customers or different geographical areas without due cause;" and Item 11 stating "11. To assess a certain action whether it is unfair, the following criteria shall be considered concurrently: (1) Such action is not commonly practiced as trade norms; (2) There is an imposition of condition(s) without written evidence and without prior notice in a reasonable period of time as normally practiced in such trade; (3) Such action has no justifiable explanation(s) from the perspective of business, marketing, or economics; (4) Other relevant factors."

The Trade Competition Commission had examined these issues and sees the 1st Alleged and the 2nd Alleged impose conditions to collect VPF from large and small filmmakers or film distributors differently due to the differences in their respective profitability and number of movies brought in by filmmakers or film distributors to be shown in cinemas of both Alleged in which directly affect the cost effectiveness in replacing projectors with the digital system, corresponding with general trade practices. When considering fairness and causes for such action, it is perceived by the Trade Competition Commission that VPFs collected from filmmakers or film distributors by the 1st Alleged and the 2nd Alleged are less than their investment to replace projects with the digital system. Moreover, the 1st Alleged is

considering the cancellation of VPF collection from Thai filmmakers or film distributors and the 2nd Alleged is in the process of concluding written agreements with all small filmmakers or film distributors to have specific period of VPF collection. The actions by the 1st Alleged and the 2nd Alleged are justified from the perspective of business, marketing, or economics.

Henceforth, the actions of the 1st Alleged and the 2nd Alleged did not constitute undertakings conducting any action that causing damage to other undertakings by unfairly exercising market power to take advantage of or limiting trading partners' alternatives per Section 57 (2) and not constitute the imposition of discriminatory trading conditions without due cause per Section 57 (3) of the Trade Competition Act B.E. 2560 (2017) and the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), Item 9 and Item 10 (1)

Resolution of the Trade Competition Commission

The Trade Competition Commission reached a unanimous decision that the collection of VPF by the 1st Alleged and the 2nd Alleged is not constitute as an action taken by undertakings with dominant position to unfairly determine or maintain the buying or selling price of a product or service fee per Section 50 (1) and not constitute as the unfair exercise of market power to take advantage of or to limit trading partners' alternatives, as well as not constitute the imposition of discriminatory trading conditions without due cause per Section 57 (2) and (3) of the Trade Competition Act B.E. 2560 (2017). The inquiry is terminated.

The Trade Competition Commission

4th February 2021