



The Trade Competition Commission Ruling on Unfair Trade Practice of Snack Distributor

Between { The Trade Competition Commission Accuser
A Co., Ltd. Accused

The Complaint

Z Co., Ltd, the Claimant, complained, in writing, to the Trade Competition Commission that the Claimant was the distribution center appointed by the Accused. The Accused stopped the financial support to the Claimant's employees in the position of route trainer and reduced the Claimant's distribution route, making the Claimant unable to achieve the targets determined by the Accused. Afterwards, the Accused informed, in writing, the Claimant that the distribution contract shall not be renewed, which was discrimination against the Claimant, resulted damages to the Claimant.

Facts

The facts have been established, through the fact-finding of the special task force and the sub-committee considering the administrative offence, that the Claimant has been appointed as the distribution center by the Accused between 2017 and 2018, responsible for selling snacks in the area, as prescribed in the contract, of Eastern Bangkok, part of Samut Prakan, and part of Pathum Thani, using mobile units (or van sales). The Accused determined and was responsible for policies, targets, staffs' salaries/wages, per diem, fuel expenses, toll charges, and all other expenses. The Claimant was responsible for staff recruitment, hiring, and fulfilling the Accused's policies. The Claimant had 2 staffs in the position of route trainer, whereby the Accused had supported their wages.

Later, the Accused's executives had a policy to stop supporting the wage for route trainers, due to the discovery that some distributor centers asked route trainers – financially supported by the Accused – to do something else beyond the scope of the job description in the distribution contract or those route trainers had performed inefficiently, not worth the expenses. The Accused, then, informed all distribution centers in its annual meeting of 2016 and gradually pursued this policy, in order to avoid disrupting the performance of distribution centers and overall sales targets by considering factors affecting workloads of each distribution center. The timeframe for implementing this policy was to phase out route trainers by December 2017. Additionally, the Accused assigned one staff in the position of Distributor Executive (DE) to assist all distribution centers, the Claimant included, to facilitate this transition.

However, during the transitory implementation of this policy, in October 2017, the Accused devised another policy to transfer local supermarkets and shops with sales value of less than 50,000 Baht – which are customers under the Claimant's responsibility – to other proper distribution centers because the Claimant was unable to thoroughly take care of them. The transfer to the suitable distribution center was commenced and the Accused, then, reconsidered its financial support of route trainers to all distribution centers, including the Claimant, in April 2018.

For the distribution routes, formerly, the Claimant was responsible for 21 routes; later in March 2018, the Accused reduced the routes down to 12 because the Claimant could not achieve the determined sales targets continuously for almost a year, due to the lack of staffs, resulting in the loss in sales for the Accused. The Accused did warn and suggest the Claimant in many occasions but the Claimant did not comply. After the evaluation of the Claimant's sales performance in 5 aspects, which is called Distributor Health Check, covering sales management, financial management, inventory and transportation management, personnel management, and workflow management, in 2017, the Claimant earned the score of less than 70 and has been designated in Division C (subject to the revision of sales areas/routes) 5 times consecutively. If the Claimant could not achieve the determined criteria or could not achieve the KPIs targets prescribed in the contract for distribution using mobile unit, the Accused has to revise the sales area or route under the Claimant's responsibility as appropriate or to decide to terminate the contract for distribution using mobile unit. The Claimant had acknowledged the evaluation results of the improvement of the standard

operating procedures and agreed to allow the Accused to revise sales area or route specified in the contract dated 27 March 2017 or terminate the contract as the Accused sees fit without requiring the consent from the Claimant. Subsequently, the Accused informed, in writing, that the contract for distribution using mobile unit would not be renewed.

Issues for Consideration

This inquiry has the following issues to be considered:

1. Whether or not the Accused's actions described by the Claimant are under the provisions of the Trade Competition Act B.E. 2542 (1999) or the Trade Competition Act B.E. 2560 (2017).

2. Whether or not the Accused is an undertaking with dominant position and whether or not Accused had committed any conduct prohibited by Section 50 of the Trade Competition Act B.E. 2560;

3. Whether or not the Accused has undertaken any conduct causing damage to other undertakings under Section 57 of the Trade Competition Act B.E. 2560 and whether or not there is any person shall be held responsible for the offence, if any, under Section 84.

Decisions

The first issue to consider is whether or not the Accused's actions described by the Claimant are under the provisions of the Trade Competition Act B.E. 2542 (1999) or the Trade Competition Act B.E. 2560 (2017). The Trade Competition Commission considered this issue and ruled that, although the Accused had stopped supporting route trainers' wages in March 2017, in which the Trade Competition Act B.E. 2542 was effective, later in 2018, the Accused reinstated the support for route trainers' wages and allocated the distribution routes to the Claimant less than before – from 21 to 12 routes, as well as excessively set the monthly sales targets; until 31 December 2018 which is the expiry of the contract and the Claimant was unable to achieve those sales targets, the Accused did not renew the contract in 2019. The Accused's actions were unfair for the Claimant and resulted in damages from unable to get the contract renew. Henceforth, since the Accused's actions occurred when the Trade Competition Act B.E. 2560 is effective. The Trade Competition Act B.E. 2560 is applicable to this case.

The following issue for consideration is whether or not the Accused is an undertaking with dominant position and whether or not the Accused had committed any conduct prohibited by Section 50 of the Trade Competition Act B.E. 2560. Section 50 of the Trade Competition Act B.E. 2560 along with the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018), dated 4 October 2018 are effective during the complained actions happened, Item 3 stating “any undertaking with market share and sales revenue as follow shall be deemed as an undertaking with dominant position: ...(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.” It shall be determined whether or not the Accused is the undertaking with dominant position.

To determine whether or the Accused is an undertaking with dominant position, the market definition is considered from product and geographic dimensions:

1) Product Dimension

Salty snacks mean the small portion of food or non-sugar confection consumed between meals; they could be classified in 9 types: 1. Potato chips, 2., Extruded snacks, 3. Peanuts, 4. Seaweed, 5. Fish snacks, 6. Cuttlefish snacks, 7. Prawn crackers, 8. Rice crackers, and 9. Popcorn. Considering the consumer behavior on snacks, it is apparent that consumers will switch to other types of snack when the needed product is unavailable. The switch from one type of snack to another indicates that they are substitutes. The market definition in this case is all snacks.

2) Geographic Dimension

Since snacks are widely distributed throughout Thailand, thus, the geographical market of the hypermarkets is Thailand.

Considering the market share of snacks in Thailand, the Accused is among the first three undertakings with highest market share, with the first highest market share of xx percent, in which not exceeding 50 percent of the snack market. Moreover, the combined market shares of the first three undertaking is only 44.2 percent of the market which is not meet the criteria of the undertaking with dominant position according to Section 5 of the Trade Competition Act B.E. 2560 and with the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018), dated 4 October 2018 as one of the elements of the offence in terms of the offender’s attributes. The

Accused's actions are not constituting an offence of being an undertaking with dominant position and whether or not Accused had committed any conduct prohibited by Section 50 of the Trade Competition Act B.E. 2560. It is also not necessary to consider the issue of applying the Trade Competition Act B.E. 2560 to the offender under the Trade Competition Act B.E. 2542.

The only remaining issue for consideration is whether or not the Accused has undertaken any conduct causing damage to other undertakings under Section 57 of the Trade Competition Act B.E. 2560. 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: (1) unfairly obstructing or restricting business operations of other undertakings; (2) unfairly exercising market power or superior bargaining power; (3) unfairly imposing trade conditions that are limiting or obstructing others' business operations; (4) conducting any other actions prescribed by the Commission" and the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October 2018, 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; (2) discriminatory trading conditions favouring some specific undertakings unfairly;... (10) Refusal to deal with a trading party without due cause;" which are examined sequentially as follow.

First, whether or not the end of the financial support for wages of 2 Claimant's route trainer by the Accused without doing the same thing to other undertakings was the discrimination without due cause, causing the Claimant unable to achieve the sales targets. The circumstantial evidence of such action has been finalized that the Accused has the policy to abandon the wage support in the position of route trainer nationwide in which complied with the parent company abroad having the timeframe to accomplish by March 2018 but it was apparent that there are differences from one distribution center to another, making some distribution centers require the support for that position more than the others. The Accused, therefore, the complete end of the support in one go may adversely affect some distribution centers' operations. Thus, the plan to gradually reduce or stop the support on so-called position was devised by commencing in March 2017 and completing in December 2017. Moreover, the Accused assigned one of its employees in the position of Distributor Executive

(DE) to each and every distribution center that has their route trainers discarded, the Claimant included. The Trade Competition Commission has thoroughly considered and see that the conception of business policy or the change of business policy of the Accused to comply with the policy from its parent company abroad is to solve the business problems making it flexible to do business and to achieve the predetermined goals. Therefore, the contemplation and the implementation to stop the wage support for route trainers are the Accused's discretion as normal business practices. The implementation by the Accused corresponding to that policy was normal business operations that shall be carried out progressively not to adversely affect the business operations of distribution centers per their contracts by recognizing differences between each distribution center. Moreover, the facts revealed that the Accused did assign one DE, who has higher potential than a route trainer, to each distribution center, including the Claimant. Thus, the actions by the Accused to gradually stop the wage support for route trainers were normal implementation of its business policy and were not deemed to be discriminatory without due cause.

Second, whether or not the end of the financial support by the Accused causing the Claimant unable to achieve the sales targets. Circumstantial evidence confirmed the Accused had changed the Claimant distribution routes in Samut Prakarn because the Claimant suffered from the lack of staff and did not sell products in the area, making it continuously unable to achieve the sales targets. But after the Accused transferred the area to another distribution center, the sales targets were attained. Even though the Claimant was later supported the wage for route trainers as other distribution centers since April 2019, the Claimant's business performance was not improved. The Trade Competition Commission has thoroughly considered and see that the Claimant's poor business performance – unable to achieve the predetermined sales targets – was not a direct result of the Accused's termination of the wage support for route trainers. The Claimant's claim on this matter was not substantiated. Regarding the Accused's alleging some distribution centers asked route trainers to do something else beyond the scope of the Accused, no evidence indicating the Claimant had ever done so.

Third, whether or not the Accused determined excessive sales targets for the Claimant causing the Claimant unable to achieve those targets and its contract was not renewed and whether or not the non-renewal of the contract by the Accused was the direct consequence of the excessive determination of sales targets. The Trade Competition

Commission has thoroughly considered and see that the Accused's sales target determination was using the same calculation for all distribution centers and having the clear criteria by considering many factors. The investigation reveals that no evidence indicating the Accused used different sales target calculations for different distribution centers. Thus, it is the normal business operation to do so. Moreover, the Claimant has the contractual duty to recruit sale staffs to replace those salespersons who have resigned whereby the Accused shall support the wage of that salesperson but the Claimant was unable to hire any replacement. Thus, when the Claimant admitted that the Accused warned the Claimant to rectify the problem in many occasions – which shall be considered as an opportunity for solving the problem – but the Claimant's sales performance still was not up to the Accused's predetermined targets, in which it is the contractual right for the Accused to terminate the contract without delay and the Accused did not exercise the right to terminate the contract. And later, the Accused issues the letter informing the Claimant of contract non-renewal for the following year. From those facts, it is evident that the Accused did not renew the contract with the Claimant based on the evaluation of the Claimant's performance in which fell below the sales targets predetermined by the Accused, the compliance to the Accused's policy, and other cooperation. In addition, the Accused did not renew the contract with the Claimant following the conditions set in the contractual terms in which is normal business practices for the Accused to consider and choose those undertakings that could achieve its sales targets and prescribed policy. Therefore, the Claimant's poor performance below the sales targets set out by the Accused was not the direct consequence of the sales target determination but the Claimant's business operations. This case is not the refusal to trade with the trading partner without due cause.

Finally, whether or not the Accused did look after employees of other distribution centers but did not do so for the Claimant's employees after the contract was not renewed. Circumstantial evidence confirms Y Co., Ltd., one of the distribution centers, had decided voluntarily to end the contract due to the financial distress and the Accused had coordinated to transfer its staffs and trucks to another distribution center but was not responsible for paying any compensation to those employees. Furthermore, the Accused did coordinate in similar manner for the case of B Co., Ltd. However, the contract for distribution using mobile unit does not oblige the Accused to buy, or coordinate with a new distribution center to buy, the trucks; nor the transfer of employees from the terminating distribution

center to the new distribution center. It is not apparent that the Accused had offered the similar assistance to every distribution center when there was no renewal of the contract for distribution using mobile unit in which may constitute as a discriminatory treatment to the Claimant. The Trade Competition Commission has thoroughly considered and finalized that when the Accused did facilitate Y Co., Ltd., and B Co., Ltd., were the specific assistance to each of them depending on suitability and willingness of the Accused which were normal business practices; it does not constitute as the unfair imposition of discriminatory trading terms favoring some undertakings.

The actions of the Accused, hence, were not considered as the unfair trade practices resulted in damages to other undertakings under Section 57 of the Trade Competition Act B.E. 2560, together with Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October 2018, Item 10 (1), (2), and (10).

Resolution of the Trade Competition Commission

The Trade Competition Commission reached a unanimous decision that the Accused's actions were not the unfair trade practices causing damages to other undertakings by imposing discriminatory trading conditions on different trading partners without due cause under Section 57 of the Trade Competition Act B.E. 2560 and the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October 2018, Item 10 (1), (2), and (10). The case shall be terminated.

The Trade Competition Commission

7th January 2021