The Trade Competition Commission Ruling on
Unfair Trade Practice of Hypermarket

between	The Trade Competition Commission	Accuser
	A Co., Ltd.	Accused

The Claimant

B Co., Ltd, the Claimant, through Mr. Z – the authorized director – filed the Claimant requesting the Trade Competition Commission to investigate the case of hypermarket conduct unfair trade practice. It could be summarized that the Accused mistakenly charged the Claimant per 2 invoices. The first invoice dated 31 December 2018 for an amount of 250,000 Baht, and the second invoice dated 31 March 2019 for 500,000 Baht, or a total of 750,000 Baht. The procurement staff of the Accused, who used to be responsible for procurement, has retired and there was a new staff being assigned by the Accused. The new staff did not know the Accused had already charged partial payment for the New Item Fee from the Claimant, as specified in the agreement of trade terms of 2018 (the dispute edition) between the Accused and Claimant stating the New Item Fee was xx,xxx Baht per item. The Claimant was to be billed for xx new items, or a total of xxx,xxx Baht. The reason the Accused requested payment of new item fees for an amount exceeding what had been agreed upon without prior notice to the Claimant was that the Accused made changes to the details related to the New Item Fee in the dispute edition of the agreement on trade terms unilaterally, without notifying the Claimant and without the Claimant's consent. In addition, the Accused requested payment for money that was not stated in the dispute edition of the agreement on trade terms, such as clearance markdown fees and guarantee GP/compensation without prior notification to the Claimant and also sent the duplicated requests for the same payment.

Facts

The facts, from fact-finding of the subcommittee, have been established that, the Accused is an undertaking in the hypermarket business – producing and retailing finished products. The Claimant produces and sells products for children and automotive accessories, as well as importing automobile cleaning products. Both are trading partners by concluding the agreement from 2011 to 2019. The trading parent contract is made yearly, effective from 1 January to 31 December of each year. The Claimant's automobile accessories, automobile care products, automobile performance enhancing products, and all interior automotive accessories were made available for sale at the Accused's modern-trade Hypermarket. As normal trade practices, the Accused prepare two sets of the documents for every trading partners, including the Claimant, which are the buying-selling agreement (in Thai), having clauses on rights and responsibilities between the Accused and its trading partners which laid out as the standard terms applying to every trading partners and the agreement on trade terms (in English), establishing terms and conditions on product details, amount purchased, compensation, and expenses which the trading partner would have to pay to the Accused. This included categories and sub-categories which the Accused used with all trading partners, with different details in all categories and sub-categories according to the products of trading partners and trade conditions as agreed on in each year. The Accused used standard rates for the specific expenses, or compensation, in the agreement, but it would also depend on the negotiations between the trading partners and the Accused. The trading partners might not be required to pay every single item of such expenses or compensation, depending on the negotiations. Once an agreement was concluded, the annual agreement on trade terms would be arranged, effective for one year.

The buying-selling agreement and the agreement on trade terms which the Claimant concluded with the Accused on 30 March 2018 determined terms and conditions that the Claimant must make many payments to the Accused in various circumstances. These included for the New Item fee of xx,xxx Baht per one new item, whereby such payment would be deducted from the sale revenue of the Claimant's products. In the case that such payment exceeds the sale revenue of the Claimant's product, the owing amount would be carried over to the following month. That agreement on trade terms did not clearly specify terms and conditions for the collection of clearance markdowns and did not include a requirement for the Accused to notify the Claimant in advance. In addition, the Claimant and Accused had negotiated on the guarantee GP/compensation with no need for further negotiations. Should

the Claimant have any questions regarding any billing, the Claimant could inquire the Accused for settle on a solution.

Regarding procedures to remove products from shelves, this could take place under two circumstances: the trading partners wants to remove their own products from the Accused's shelves and the sales performance is lower than the average sales for products in the same category. A review of the sales performance is conducted twice a year. During the first review, the sales performance is examined, targeting at the products with lower sales than the average sales of products in the same category – which could be on the daily, weekly, or monthly basis, evaluating from the time on shelves of that product, approximately for the last 6 months or a year. Should the sales be lower than the average sales of products in the same category, the Accused would discuss the matter with the trading partner and find a way to boost sales for that product. Following improvement, should sales increase, the trading partners can keep the product on the shelves, subject to the possibility of a second sales performance review. However, if changes have been made and after the second review, the sales performance has not improved, the Accused will inform the trading partner of the review result and they may agree to remove the product from the shelves. The trading partner will know the results of the sales performance review from the meeting, electronic mail, web portal, or other communication channels.

However, when the agreement on trade terms has been signed, the Accused is unable to unilaterally amend or change the terms and conditions on rights and responsibilities in that agreement. Changing the symbol "A" under new items after the Claimant had signed the agreement of trade terms by the Accused's procurement officer to match the symbol used by the accounting department because the Accused had a policy to use the symbols "A" and "B" in 2018 to facilitate internal accounting, whereby the "A" is used to refer to the collection of expenses from the trading partners that are not proportionate to the sales of the trading partners – in which the Accused could charge those expenses only when all information and supporting documents have been reviewed in order to support the invoice and prior notification was made to the Claimant and the "B" refers to the deduction of the expenses by the Accused only when those expenses have been tabulated with to internal data regarding the rate card for that product, to ensure that the amount invoiced was a rate based on a reference or not. For "New Items," a "B" is applied in all cases and the Accused can request payment by deduction on these items without advance notice to the Claimant. The use of "A" or "B" does not have an impact on the rights and responsibilities in the

agreement on trade terms of the Claimant and Accused. The Accused can still collect expenses on new items according to the rate stated in the agreement on trade terms as usual. However, the in the agreement on trade terms between the Accused and the Claimant of 2019, the Accused identified "B" for use in the "new items" for which the Claimant did not deny the said item and signed the agreement of trade terms. A change in the symbol used did not result in a change in the method used by the Accused to collect payment for new items in each year and did not use a higher rate. The reason to collect expenses on new items was because with each change of new items, the old products had to be removed or reduce the area for the old products resulting in the Claimant may expose to the risk that new items may not sell as well as the old products. In addition, the Accused had additional expenses related to rearranging the products and changing the price tags. Moreover, reducing the space for old products would result in the Accused having an excess stock of that product, causing in an increase in overhead. In practice, in the past, a reduction of space for some old products rarely happened, with one old product being removed from the shelves when one new product arrived. The Accused would have a discussion with the trading partner regarding the planogram at least once a year to allow the trading partners to prepare their products to align with the planogram for new items. Therefore, the trading partners knew how much new item fee would be and the collection of those fee would take place when the new product is on display.

When ordering new items, the Accused would issue a purchase order and invoice in order to collect payment on the new items according to schedule without asking for consent from the Claimant or trading partners again. The Claimant would know the schedule of delivery date of the new item from the Accused no less than 60 days in advance. The Accused would send a purchase order via electronic data interchange (EDI) displaying details of the new item, in which the Claimant would know no less than 7 days in advance before the Accused deducted the expenses. Because the Accused had a change in personnel responsible for purchasing, that person was not aware of the request for new items fee already made to the Claimant. Therefore, on 31 December 2018, the Accused invoiced the Claimant for 250,000 Baht and, on 31 March 2019, invoiced for 500,000 Baht, for a total of 750,000 Baht. Following this, the Claimant notified the Accused and requested that the mistake in March 2019 be reviewed. When the review was finalized, the purchasing officer submitted documents for the Accused to refund the Claimant and the Claimant prepared documents supporting the refund. Later, on 10 April 2019, the Accused returned xxx,xxx Baht to the Claimant.

Issues for Consideration

This inquiry has the following issues to be considered:

1. 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;

2. 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.

Decisions

The first issue to consider 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

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 "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."

To determine whether or the Accused is an undertaking with dominant position, the market definition, sale revenues, and market shares shall be initially evaluated as follow:

1. Market Definition

1.1 Product Dimension

The Accused is offering the retailing service in which it means the service provider that collect goods and services to sell directly to end consumers including the service of selling consumables and groceries to meet end users' daily needs. The classification of

retailing varies from one country to another using different benchmarks, such as classified by the size of service area, classified by business models and ownerships, or classified by products.

The Accused operates the modern-trade hypermarket in the Kingdom of Thailand, the People Democratic Republic of Laos, the Kingdom of Cambodia, and the Socialist Republic of Vietnam and its business operations could be categorized as follow:

(1) Hypermarkets – operate under the names of A1, A2, and A3;

(2) Supermarkets – operate under the name of A4;

(3) Convenience store – operate under the name of A5.

There are two undertakings in hypermarket in Thailand: C Co., Ltd., under the name D and the Accused under the names A1, A2, and A3. This market is non-perfect competitive market which could be identified as competitive oligopoly.

When the facts revealed that the Claimant had its automotive accessories sold in hypermarkets belonging to both the Accused and D stores at xx.xx and xx.xx percent respectively. It is apparent that, in addition to the Claimant selling its products in hypermarkets operated by the Accused, the Claimant also has its products for sale in other hypermarkets, but not in other types of retail stores. Therefore, it can be considered that both hypermarkets – namely, the hypermarkets operated by the Accused and the hypermarkets operated by C Co., Ltd. – are substitute products in the market. The market definition in this case is the hypermarkets, excluding cash and carry services for large wholesale markets.

1.2 Geographic Market

The fact finding showed that both hypermarkets have branches all over Thailand and the Claimant's products are available for purchase at the hypermarkets operated by the Accused. In addition, the other hypermarket undertaking also has branches all across the country, as well. Therefore, the geographical market of the hypermarkets is Thailand.

2. Revenue and Market Share of the Accused

The Trade Competition Commission reviewed the facts, documents, evidence, and applicable laws and finalised that in 2017, which was the year prior to the accusation, C Co., Ltd., had revenues of xxx,xxx,xxx,xxx.xx Baht with the largest market share at xx.xx percent and the Accused had revenues of xxx,xxx,xxx,xxx.xx Baht with the second highest market share at xx.xx percent. Therefore, C Co., Ltd., is an undertaking with dominant position per Section 5 of the Trade Competition Act B.E. 2560 and the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561

(2018), Item 3 (1) because it has the market share in the preceding year of 50 percent or over and the sale revenue in the preceding year of 1 billion Baht or over. For the Accused, it has the market share of less than 50 percent; thus, the Accused is not an undertaking with dominant position under Section 5 of the Trade Competition Act B.E. 2560, 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 (1).

Henceforth, since the Accused is not the undertaking with dominant position as determined above, it shall not consider the action of the Accused if it is an offence under Section 50 of the Trade Competition Act B.E. 2560.

The next 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 Unfair Trade Practices between Undertaking in Wholesaling/Retailing and Producer or Distributor B.E. 2562 (2019), dated 28 June 2019, Item 3 states "undertaking in wholesaling/retailing" means an undertaking who is a wholesaler or a retailer of consumer goods with a modern system of distribution, having or not having branch, or having an administration of franchise and using modern technology for management to facilitate its customers, such as hypermarket, cash and carry, supermarket, specialty store, department store, and convenient store; "Producer or Distributor" means a producer, a distributor, or an importer for resale in the Kingdom or a service provider, and a supplier who is a producer for sale or a distributor shall be included in this definition" and Item 5 states "a trade practice of an undertaking in wholesaling/retailing in which may be deemed as an action that inflict harm to a producer or distributor unfairly shall be assessed by using the following guidelines: (2) an embezzlement of economic benefit by compelling a producer or distributor to transfer any benefit to an undertaking in wholesaling/retailing; this benefit includes money, property, asset, or service that the producer or distributor is not

obliged to do or unreasonably higher than what has been obliged in the agreement, taking into account of benefit a producer or distributor shall obtain reciprocally.."

When considering the meaning of "retailer/wholesaler" and "producer or seller" it was found that the Accused is the undertaking who is a wholesaler and a retailer of consumer goods with a modern system of distribution, having many branches nationwide, using modern technology for management to facilitate its customers. While the Claimant, who is a retailer in automobile care products, automobile enhancement products, and all internal automotive accessories, is deemed be a producer or seller according to Item 3 of the Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices between Undertaking in Wholesaling/Retailing and Producer or Distributor B.E. 2562 (2019), dated 28 June 2019.

The case required consideration on whether or not collecting payment on new items by the Accused resulted in damages to the producer or seller by unfairly embezzling economic benefits.

The Trade Competition Commission considered the facts, documents, and relevant laws, and finalized its decision that the new item fees were agreed upon in advance, in writing, by both the Claimant and Accused. In addition, the new item fee for which the Accused requested a xx,xxx Baht per item from the Claimant is the rate which was charged by the Accused to the Claimant since 2017 and requesting payment for new items is considered normal business practice with justifiable reason. Each time a new item is introduced, an old item must be removed or has its space reduced to make way for the new item, resulting in a risk for the Accused, as well as an increase in costs to reorganize or rearranging shelves for the items, and change the price tags. Furthermore, a reduction in space for the old item results in an overstock of that item for the Accused and an increase in cost. However, in the past, it was a common practice to remove one old item to make way for the new item. The partial reduction of space for old items was rarely occurred. The Accused would have a discussion with the trading partner regarding the planogram at least once a year to allow the trading partners to prepare their products to align with the planogram for new items. Therefore, the trading partners knew how much new item fee would be and the collection of those fee would take place when the new product is on display. The Accused also requested payment for the new item at a rate of xx,xxx Baht per new item, in the similar manner which was used with other sellers and the Claimant, which was a standard practice that the Claimant was aware of.

Therefore, the actions taken by the Accused were not an unfair embezzlement of economic benefit per Item 5 of the Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices between Undertaking in Wholesaling/Retailing and Producer or Distributor B.E. 2562 (2019).

The following issue to consider is whether or not the Accused had unfairly exercised its superior bargaining power to take an advantage of the other undertakings.

The Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October 2018, Item 5 says "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 7 states "to assess superior bargaining power, one or more of the followings shall be considered: (1) an undertaking has to rely on a purchase of goods or service from another undertaking whereby the value of transaction between these two undertakings is 30 percent or higher of the revenue earned from the purchase or the sale of that product or service; (2)...;" Item 9 states "an unfair exercise of market power or superior bargaining power shall have the following characteristics: (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; (3)..." and Item 11 states "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)..."

The finalized facts reveal that the Claimant offered his automotive accessories products for sales in the Accused's hypermarkets accounted for xx.xx percent of the Claimant's total revenue from automobile accessories. Therefore, the Accused is considered to have superior bargaining power over the Claimant according to Item 7 (1) of the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018). It shall be determined whether or not the Claimant has been unfairly taken advantage of by the Accused and suffered from the damages thereof.

This issue of unilateral amendment of details related to the price of new items in the disputed agreement on trade terms without notifying the Claimant in advance and without consent was considered by the Trade Competition Commission. The facts, evidence,

documents and related laws were considered and a unanimous decision reached that the Claimant was a signatory in the agreement of trade terms dated 30 March 2018, which at the time, when the Claimant signed on the new item category, the symbol "A" had already appeared. Once the Claimant signed the agreement, a duplicate of the trade terms was sent to the Accused by electronic mail. Following that, the authorized signatories of the Accused signed the agreement on trade terms on 23 March 2018, 1 April 2018, and 2 April 2018 respectively. A copy of the agreement on trade terms was returned to the Claimant via electronic mail as well. On 3 April 2018, the Claimant reviewed the trade terms again after all signatures had been provided and found that the Accused had changed the symbol for the new item from "A" to "B" and that it had been changed by one of the Accused's purchasing officers. A change in the symbol did not have an impact on the rights or responsibilities of the Claimant and Accused, and the Claimant and Accused testified correspondingly that delivery of the new item to the Accused would have a joint review process many months in advance through joint meetings. In purchasing the new item, the Accused would issue a purchase order and invoice to collect payment for the new item. In the past, the practice was that the Claimant would know the delivery schedule for the new item to the Accused, with no less than 60-days advance notice. In addition, the steps for issuing a purchase order (PO) to the Claimant via the electronic data interchange (EDI), the details of the new item would appear on the system, indicating the Claimant would have to make a payment no less than 7 days in advance to the Accused before the Accused would deduct said expense. The Claimant had the right to deny and not deliver the new item to the Accused without any restrictions on the Claimant. In terms of the new item, the rate of xx,xxx Baht per one new item, was the rate used by the Accused to collect payment from the Claimant since 2017 until now.

Even the symbol "A" indicating the Accused can charge the fee on that corresponding item if the Claimant has been notified in advance and the symbol "B" means the Accused can charge the fee on that corresponding item without prior notification to the Claimant, the procedures and steps for ordering new items, the preparation of new items, the ordering of new item, and the request of new item fee were steps taken before the actual collection of the fee in which the Claimant should have known how much it would be charged for new item fees. The actions undertaken by the Accused follow the normal trade practices whereby the Claimant acknowledged the new item fee beforehand prior to the request for collection is made. Since the Accused acknowledged the discrepancy and validated it, it is discovered that the new item fees were overcharged; the Accused rectified the situation by

refunding the new item fees back to the Claimant and the Claimant confirmed the receipt of such refund. Thus, it is not heard that the Accused has unilaterally amended the 2018 agreement on trade terms regarding new items without prior notice to the Claimant and has not collect the new item fee mistakenly causing damages to the other undertaking by exercising market power or superior bargaining power.

The issue of other collection of fees apart from the terms and conditions in the disputed agreement on trade terms; such as clearance markdown fee without notifying the Claimant in advance. The Trade Competition Commission considered the facts, documents, and relevant laws, and finalized its decision that the agreement on trade terms between the Claimant and the Accused did not specify conditions for collecting the fee on clearance markdown that the Accused shall inform the Claimant prior to the collection of such fee and, in practice, the removal of any product must be the product that has no sale according to the number of days agreed between the Claimant and the Accused. Thus, the Claimant shall be aware of the collection of clearance markdown fee if the agreed period has been lapsed because those removed products would be subsequently entering the removing process, which is a normal business practice recognized by the Claimant whereby the Claimant always pay for the clearance markdown fee. Notwithstanding, it was the Claimant's misunderstanding that the Accused should have inform prior to the collection of clearance markdown fee. The collection of such fees does not constitute the unfair exercise of market power or superior bargaining power.

The collection of other fees beyond the conditions specified in the disputed agreement on trade terms which is the fee on guarantee GP/Compensation without prior notification to the Claimant. The Trade Competition Commission considered the facts, documents, and relevant laws, and finalized that the collection of fee on guarantee GP/Compensation was consented by the Claimant and the Claimant issues the statement admitting that it was the misunderstanding of the Claimant itself. Therefore, there is no dispute on this issue.

The duplicate collection of fees according to the 2018 agreement on trade terms amounting xx,xxx.xx Baht. The Trade Competition Commission considered the facts, documents, and relevant laws, and finalized that the duplicate fee has been refunded to the Claimant, once the Accused realized its mistake.

Therefore, it cannot be ascertained that the Accused has committed any action that would be deemed as the unfair exercise of market power or superior bargaining power per Section 57 (2) of the Trade Competition Act B.E. 2560.

Resolution of the Trade Competition Commission

The Trade Competition Commission reached a unanimous decision that the actions of the Accused per the Complaint is not constitute the action causing damages to other undertakings by unfairly exercising market power or superior bargaining power to take advantage of or to restrict any alternative of trading partners 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), Item 9 (2). The case shall be terminated.

Trade Competition Commission

24th February 2021