Article 3

Business Operators with a Dominant Position and Key Competitive Factors

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Economic liberalism: From the era of Big fish vs Small fish - Fast fish vs Slow fish - RIGHT fish!

Thailand offers freedom for the private sectors to choose operating businesses and formulate their own strategies to compete freely in the market under the principle of "Economic Liberalism". However, such freedom must be under the scope of the Trade Competition law to prevent exclusion or exploitation in unfair competition which may eventually cause monopoly or greatly restrict competition resulting in country's economic damage.

Over many decades, the trade competitiveness in Thailand has not been fully liberalized and formulated the business cycle of "Big fish vs Small fish" in which large business operators unfairly employed dominant market power to depress or suppress their competitors in the market. Therefore, small and medium business entrepreneurs with high potential might not be able to enter the market or compete freely and fairly with large business operators. For this reason, the Trade Competition Commission has a duty to redress and prevent these recurring problems.

Meanwhile, one of the most significant tasks of the Trade Competition Commission is to level the playing field in the same rules for all business operators on the edge of digital transformation. Currently, "Fast Fish eat Slow Fish" as digital technology plays an important role in doing business as well as forcing business operators to vigorously adjust themselves into "Agile Organization". Without intervention from business operators with dominant market power, this phenomenon eventually paves a way for a genuine competition.

Especially, the winners in this new era of trade competition will not only be measured by size or speed but they must be "the Right Fish." There are five key success factors including with 1) Right People; 2) Right Product; 3) Right Purpose; 4) Right Approach; and 5) Right Time. Due to abrupt change in the competitive world today, the market's size is no longer spread in larger scale but even narrower by removing lines between online and offline commerce. For this reason, it is crucial that the Trade Competition law aims to promote adaptation with incessant development for fair and free competition for small, medium, and large businesses.

Is it wrong to be a business operator with a dominant position?

In this digital economy era, new technology has been developed and changed rapidly not only creating new products and services but also drastically changed consumer behavior in such a way that has never seen before. This results in the exponentially high competition for trading in goods and services. As a consequence, it is indispensable for business operators to continuously adjust and improve their competitiveness factors by creating innovation, increasing technology development, escalating production supply, and applying new marketing strategies to compete with other business operators until archiving higher business turnover values and increasing market share.

- **Economies of Scale** is an expansion of production capacity in larger quantities to reduce the average production cost per unit of the product.

- **Economies of Speed** is the use of innovation and technology to increase business capability such as reducing production time and costs in manufacturing and fast-cycle product development.

- **Economies of Scope** is a proportionate saving gained by producing two or more distinct goods, when the cost of doing so is less than that of producing each separately.

New technology development and innovation illustrate this tremendous transformation quite well. For example, in the case of a mobile phone industry when new generations of cellphones were capable of performing all functions into a single device; as a result, Nokia was defeated by IPhone after introducing new touchscreen feature instead of pressing on the old fashion button – not to mention uncountable applications on IPhone. Only a few years later, the mobile phone business competed robustly when Samsung came up with an Android operating system incessantly developed by software programmers around the world. This was one of several reasons describing Samsung's product became popular with a variety of products at numerous prices. Likewise, when consumer's high demands shifted to camera function with smartphone, Huawei changed their strategy to become the best camera phone as a top selling point of its products and definitely succeeded with extreme turnover values. Obviously, it can be clearly seen that new entrepreneurs play an important role in generating competition in the market and ultimately become a dominant position of market power from innovation and technology.

Hence, there is no offense under the Trade Competition law for successful entrepreneurs with high value of business turnover and obtaining huge market share becoming a dominant position in a market. Unless they unjustly exercise market power to exploit or interfere with other business operations may be illegal; such as, intimidating their competitors or business partners by setting product prices below cost. Therefore, the Trade Competition law aims to promote free and fair competition in the market along with expectations from Thai's society as it is imperative that business operators in all sectors have to consider.

Who is a business operator with a dominant position?

The Trade Competition law has stipulated rules for considering who is a business entrepreneur with dominant position of market power into 2 categories: 1) a single business operator; and 2) the top three business operators which obtain market shares and annual turnovers in the past year as required by law as follows.

CASE 1 In the case of a Single Economic Entity. When there is a single business operator in the market of any product or service with the market share of 50% or more and turnover of 1,000 million Baht or more in the past year.

- In a domestic market of distributing parts of air conditioners, Company A held more than 75% of the market share with the turnover of 990 million Baht in the previous year. Company A is not a business entrepreneur with a dominant position of market power as its turnover in the last year was less than 1,000 million Baht.

- In a domestic selling notebook market, Company B obtained 49% the market share with the turnover in the last year of 1,000 million Baht. Company B is not considered as a business entrepreneur with a dominant position of market power since its market share was less than 50% in the past year.

- For green tea beverage business in Thailand, Company C achieved a market share of 51% with the turnover of 1,200 million Baht in the previous year. Definitely, Company C is a business entrepreneur with a dominant position of market power under the Trade Competition law.

CASE 2 In the case of a Collective Economic Entity. When there are the first top three business operators in the market of any product or service with the combined market share in the past year of more than 75% and turnover of 1,000 million Baht except the business operator with the market share less than 10% or turnover less than 1,000 million Baht in the past year.

- In a domestic market of distributing parts of automobile, Company A, Company B, and Company C are the first top three business operators in the market. Company A obtained 40% market share with the turnover in the last year of 4,000 million Baht. Company B attained 30% market share with the turnover in the last year of 3,000 million Baht. Company C held 10% of the market share with the turnover of 1,000 million Baht in the previous year. Therefore, Company A, Company B, and Company C are business operators with dominant positions of market power.

- In a domestic market of soft drink, Company D, Company E, and Company F are the first top three business operators in the market. Company D obtained 40% market share with the turnover in the last year of 4,900 million Baht. Company E attained 30% market share with the turnover in the last year of 3,600 million Baht. Company F held 9% of the market share with the turnover of 1,100 million Baht in the previous year. In this case, Company D and Company E are business operators with a dominant positions of market power while Company F are not considered as business operators with dominant positions of market power due to its market share was less than 10%

- In a selling mirror in domestic market, Company G, Company H, and Company J obtained market share and the turnover in the last year. Company G attained 40% market share with the turnover of 3,600 million Baht. Company H held 30% of the market share with the turnover of 2,700 million Baht.

Company J gained 40% market share with the turnover in the last year of 900 million Baht. Therefore, Company G and Company H are business operators with dominant positions of market power while Company J are not considered as business operator with a dominant position of market power due to its turnover in the last year less than 1,000 million Baht.

In addition, in order to defining market share and annual turnover of a Single Economic Entity, the law stipulates that "including with market shares and annual turnovers in a relevant market of all business operators who are relevant in policies or authorities (For further information please read the Announcement of the Trade Competition Commission Subject: the Criteria for considering entrepreneurs who are relevant in Policies or Authorities B.E. 2561 (2018) at the website of the Office of Trade Competition Commission (www.otcc.or.th) and all business operators with combined market shares and annual turnovers as being entrepreneurs who are relevant in Policies or Authorities shall be considered as "business operators with dominant positions of market power". Therefore, all business operators who are relevant in Policies or Authorities shall be deemed as a "Single Economic Entity" such as defining market shares and annual turnovers of covering parent and subsidiary company needed to be in the same market.

- For example, in a domestic market of distributing fertilizer, the first top five business operators in the market earned the turnovers of 1,000 million Baht in the previous year which are Company A, Company B, Company C, Company D, and Company E with market shares respectively: 40%, 5%, 5%, 5% and 3%. Without consulting the Announcement of the Trade Competition Commission Subject: the Criteria for considering entrepreneurs who are relevant in Policies or Authorities B.E. 2561 (2018), none of the top five business operators in distributing fertilizer is business operators with dominant positions of market power. Nevertheless, when the Trade Competition Commission thoroughly examines further detail and figure out that

- Company A holds shares with voting rights of 60% of the total voting rights in Company B.
- Company A has a direct power to control the majority votes at the shareholders' meeting of Company C.
- Company A has indirect control over the appointment of more than half of all directors in Company D.

As four companies are in the same market (Market of chemical fertilizer distribution) and have a relationship in terms of policies and authority in the same business. Therefore, the market share of all four companies must count together which is equal to 55% and the total turnover is over 4,000 million Baht. According to the law, Company A, Company B, Company C and Company D are the Single Economic Entity and considered as the business operators who have dominant power over the selling market of chemical fertilizer.

However, slightly altering to above-mentioned fact, if Company B and Company C do not conduct business in the same market with Company A, but only Company D is in the same market with Company

A. As a result, the calculation of the market share and turnover of Company A excludes Company B and Company C, only Company D will calculate the market share and turnover of Company A as they are in the same market considering as a Single Economic Entity with a total market share of 45%. Since the combined market share of Company, A and Company D is lower than the announced criteria, they are not considered as the business operators who have dominant power.

What are the key competitive factors?

Key competition factors are an essential driving force for business entrepreneurs entering into new business or even motivating business operators to increase production or expand business. As it may influence the decision of entering a market or staying away from it, the intensity of competitive conditions in the market is a significant element to promote competition in the market of goods and services. In addition, the Trade Competition law stipulates that to proclaim the business operators who have dominant power, the Competition Commission needs considering key market competition factors.

- **Number of entrepreneurs** determines the competitiveness condition for business operators in a certain market. If there is a high number of competitors in the market, it is likely that competitive condition is higher than the market with fewer business operators.
- **Investment amount** directly involves the competitiveness condition. If a large amount of investment is required, there will be fewer competitors in the market. This may easily allow the business operators with dominant positions of market power continue to exist.
- **Accessing important production factors** is a key market competition factor, if it is without difficulty to access important production factors, there will be more potential entrepreneurs entering the market, and vice versa.
- **Distribution channels** are considered as a key market competition factor. Once there are several channels to distribute products, it is a good signal for a highly competition in the market. Hence, it is more challenging for business operators with dominant market power to continue to exist in this particular market.
- **Network for business operations and the essential infrastructure for business establishment** are crucial factors to gain competitive advantage in business. Specially, the intrinsic network and the essential business infrastructure that require high technology and great investment will certainly reassure the possessor to obtain the dominant market position.
- **A government regulation** is another factor that encourages licensors to dominate the market.

Examples of abusing dominant market power

In some particular business practice, a businessperson with dominant market power may take competitive advantages by either manipulating prices and quantities of goods and services or stipulating the condition restraining free trade with other business operations. This also includes unlawful interference in the business of others. If a businessperson unreasonably or unfairly employs their dominant market power, his or her action might be violated by the Trade Competition law.

- A large cement manufacturer and distributor obtained a dominant market deliberately set sales prices below the Average Total Cost to eliminate competitors from the cement market. Obviously, abusing of its dominant position is violated by the Trade Competition law due to unfair pricing of products or services.

- A major department store with a dominant market has stipulated that any business operators in the store are not allowed to sell the same products in other department stores. This can be an exclusive dealing offense under the Trade Competition law by imposing unfair conditions for trading partners to buy or sell products or services only from that major department store with a dominant market.

Summary

The wind of changes in the digital transformation leads to exponentially increased trade competition where entrepreneurs must introduce new business strategies and abruptly adapt themselves to take more and more market share from other competitors. Therefore, the Trade Competition law serves as a trading constitution by providing a benchmark for promoting free and fair competition in a market. Any large business operators who fall within the scope of market dominance both single economic entity and the collective economic entity (the first top three business operators in a relevant market) are subject to the enforcement of the Trade Competition law.

Nevertheless, being business persons with dominant market power is not considered a violation of the Trade Competition law - only if when these large business operators with dominant market abuse their market power unreasonably; such as, unfairly determining or maintaining the purchasing or selling price, stipulating unjust conditions for their trading partners, or Interfering with others business without reasonable ground etc. For further information whether certain business practices are unlawful or not, please continue consulting next document “Abuse of Dominant Position”.