

Article 4

Abuse of Dominant Position



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What are the prohibited conducts of business operators in a dominant position?

In general trade practices, all business operators, whether large or small, have the freedom to conduct their businesses. However, in reality, large-scale business operators often leverage their positions, implement multiple strategies or approaches beyond acceptable boundaries which affect the rights and liberty of other business operators and also consumers. Hence, legislations are required to govern business operations through clear stipulations of permitted and prohibited conducts of business operators.

Large-scale business operators who maintain the “dominant position” status as stipulated by the law shall be governed by the rules and regulations regarding “Abuse of Dominant Position”. That is, **a business operator will not become illegal or liable from having a dominant position unless such business operator behaves or commits any prohibited conducts under the law.** It can be concluded that **2 elements** are required for one to be liable under Section 50 of the Trade Competition Act B.E. 2560 (2017). To determine whether a business operator is in a dominant position, either as a single or multiple business operators according to the Announcement of the Trade Competition Commission Subject: Criteria for a business operator in a dominant position B.E. 2561 (2018), consideration on **the first element on market structure** has to be made based on the size of the business operator in the market. If a business operator is in a dominant position, **the second element relating to the behavior** will be considered to determine whether or not its conducts are committed unfairly or without any appropriate reason according to Section 50 (1) to (4). If any business operator possesses both elements, it shall be legally liable and criminally penalized.

Prohibited conducts of a business operator in a dominant position

Generally, the goal of any business operation would be to achieve the highest number of customers or profits through implementation of various bona fide strategies which, in some occasions, may eventually result in the elimination of other business operators from the market due to their inability to compete. In such cases, the law will not interfere or control the behavior of the business operator in a dominant position as it is an exercise of its competitive efficiency in the market. However, the law will interfere only when such the business operator in a dominant position acts unfairly or without any appropriate reason, or in other words “abuse” its dominant position, in its business conduct which is prohibited under the law.

The abuse, according to Section 50 (1) to (4), will be considered based on the “**unfair**” and “**without any appropriate reason**” criteria in order to determine whether there is an offence. The abuse of dominant position can be categorized into 2 major categories as follows:

- (1) Abuse of dominant position which **directly affects** other **business competitors**
- (2) Abuse of dominant position in the form of **exploitation** of both its trade partners and consumers

The **abuse of a dominant position against a trade partner** can include imposition of conditions or forcing the trade partner into a position of disadvantage and limiting its options. The **abuse of dominant position against consumers** is the act of taking advantage and unfairly limiting the options of the consumers.

What conducts are considered abuse of a dominant position?

Prohibited behaviors of a business operator in a dominant position as stipulated by the law can be categorized into **4 main categories as behaviors that directly affect its competitors, trade partners and consumers**. To ensure clarification in the enforcement of Section 50, the Trade Competition Commission had issued “the Announcement of the Trade Competition Commission Subject: Procedures in Determining Prohibited Conducts of Business Operator in a Dominant Position (hereinafter referred to as the “**the Announcement of the Trade Competition Commission Subject: Guidelines for considering the prohibition of a business operator in a dominant position B.E. 2561 (2018)**”, which will also facilitate the understanding of business operators as to the core principles of Section 50 on prohibited conducts, having the following details:

Unfair price fixing

Section 50 (1) of the Trade Competition Act B.E. 2560 (2017) prohibits a business operator in a dominant position from “**unfairly fixing or maintaining the level of purchasing or selling price of a good or service**”. In other words, unfairly the fixing of the purchasing or selling prices is prohibited and such price includes the price of services as well.

Unfairly fixing or maintaining a price level can be divided into 4 cases being 1) fixing lower than reasonable price; 2) fixing higher than reasonable price; 3) fixing price discrimination; and 4) other approaches of price fixing. All 4 types of conducts can impact business competitors, trade partners and consumers, as the case may be.

Why is fixing lower than unreasonable price illegal?

Fixing lower than reasonable price may not directly affect the consumers but can directly affect other business competitors. Hence, the law focuses on the conduct of fixing lower than reasonable price as well. The core principle in considering whether the price fixed is lower than reasonable is to take into account the “**cost**” and the cost criteria to be applied to determine the liability. The Announcement on Prohibited Conducts under Section 50 stipulates 2 types of costs which can be applied for this purpose. The first type is the “**Average Total Cost or ATC**” which is the average total cost per one unit of product. It is the combination of Average Fixed Cost and Average Variable Cost. The second type of cost is the “**Average Variable Cost or AVC**” which is the cost less the Average Fixed Cost and will be lower than the Average Total Cost.

There are 2 types of below-cost price fixing which may be categorized as illegitimate under the law of trade competition:

Fixing selling price excessively below the cost

The first type is **fixing excessively lower price** with the intention to **eliminate competitors from the market (Predatory Pricing)**. The law requires that the **Average Variable Cost (AVC)** criteria shall be applied in order to determine the liability. If the price is lower than the Average Variable Cost (AVC) without any appropriate reason or explanation during a certain period of time and it affects the market or business competitors, the offending business operator shall be liable. However, there are certain exemptions including fixing lower prices for expiring products, during sale seasons or as part of new product launch. For example, Company A has the Average Variable Cost (AVC) of 80 Baht for its product, however, Company A fixes the price of such product at 55 Baht. Initially, in this case Company A may be liable from having the intention to fix predatory pricing in order to eliminate its business competitors without any appropriate reason.

Fixing selling price below the cost in general

The second type is fixing the price lower than the Average Total Cost (ATC) but higher than the Average Variable Cost (AVC) which can also be referred to as **fixing price below cost**. The extent of illegitimacy for this type of conduct is lower when compared with the first type. However, it remains necessary to also consider other surrounding facts i.e. the reason and purpose of fixing the price below cost. For instance, from the aforementioned example, Company A has the Average Total Cost (ATC) of 100 Baht but fixes the selling price of its products at 90 Baht which is the price between the Average Total Cost (ATC) of 100 Baht and the Average Variable Cost (AVC) of 80 Baht. Company A may also be liable for this conduct if it cannot explain the appropriate reason in setting such a price.

Who are affected by fixing excessively higher price?

Unfairly fixing excessively higher price directly affects the business competitors, trade partners and consumers. Such conduct is stipulated in the Announcement on Prohibited Conducts under Section 50 as **fixing of the selling price to achieve higher than normal or previously gained profit** compared to the selling price fixed or profit gained by other business operators in both domestic and international markets. Based on the aforementioned example, Company A originally fixed the price of its product at 120 Baht. However, when Company A notices a golden opportunity to make more profit from consumers for a short period of time, it increases the price of its product to 250 Baht. This may constitute an offence under the law if there is no appropriate reason in increasing such a price. The Commission will make a comparison between the profit previously gained by Company A and the profit gained by other companies within the same market and also consider other relevant factors to determine whether Company A shall be liable. In another example, Company A and Company B are manufacturers of readymade products whereby Company A is much larger in scale than Company B. Company A offers to buy essential and rare raw material from Company C at a price excessively higher than previous occasions and Company A continues

to sell the products at the same selling price. Consequently, either Company B will be unable to seek the same raw material at a normal price or the cost of such raw material will be excessively higher. This will result in Company B having to fix a higher selling price of its products and making it unable to compete with Company A, constituting an abuse of dominant position.

What is price discrimination?

Occasionally, business operators may implement discriminatory pricing marketing strategies which may be referred to as **price discrimination**. Price discrimination is the fixing of the prices for the same product or service differently for each of the buyers or group of buyers. Unfair price discrimination can be divided into 2 types as follows:

The first type is fixing different selling price of the same product or service without any basis on cost, quantity or quality and without any appropriate reason. For example, Company A manufactures and sells carbonated drinks on the condition that for any purchase over 100 bottles, the price per bottle would be 40 Baht. While Shop B was charged 40 Baht per bottle for the purchase of 100 bottles, Shop C was charged 50 Baht for the same quantity. In this case, Company A may be liable from price discrimination without any appropriate reason.

The second case is fixing the same selling price for different quantity purchased by different customers without any appropriate reason while the cost and quality of such products are the same. For example, Shop A may be required to purchase the carbonated drinks in the amount of 100 bottles at the price of 40 Baht per bottle. However, Shop B can purchase only 10 bottles at the same price of 40 Baht. This will result in a higher cost for Shop A than Shop B, constituting price discrimination.

Other approaches of price-fixing which may constitute an abuse of dominant position.

Imposition of certain conditions can also constitute an offence

Apart from unfair fixing and maintaining of price pursuant to Section 50 (1) of the Trade Competition Act B.E. 2560 (2017), the Act also **prohibits directly or indirectly imposition of unfair conditions on trade partners**. Imposition of “conditions” by a business operator with a dominant position may constitute an offence since such conduct may limit options of trade partners without any appropriate reason and affect the market competition system. The law stipulates many types of unfair imposition of conditions, including:

Imposing different conditions on quantity between customers

For example, Company A imposes sales conditions requiring every trade partner to purchase the minimum of 100 units of its product. However, Company B can purchase the product from Company A in the amount of only 50 units unlike other trade partners. This constitutes an abuse of dominant position.

Imposing conditions requiring trade partners to only do business with the business operator

Imposition of conditions by a business operator in a dominant position requiring partnering shops to only purchase or sell products or service to/from itself and prohibiting the trade partners from entering into any transaction with other business competitors. If any trade partners violate this condition and sell products of the business competitors, the business operator will refuse to enter into any transaction with them or may sell its products to such trade partners at a significantly higher price. For example, Company A is the manufacturer of carbonated drinks and sells its products to Shop B on the condition that Shop B shall not sell carbonated drinks manufactured by other business operators who are its competitors.

Imposing tie-in conditions on products or service

Imposition of tie-in conditions is requiring trade partners to purchase product or service that they do not need along with their required products or services. Generally, **tie-in sale** condition can be imposed either directly or, in some cases, indirectly. The condition may be imposed by requiring that should the purchaser (trade partner) purchase the products separately, the required products will be sold at an unreasonably higher price. For example, Company A is the manufacturer and seller of carbonated drinks with the market share of 60%. Company A's products are popular and has high demand in the market and often face shortages. At the same time, Company A starts to manufacture and sell mineral water which, at its initial market entry, the mineral water product of Company A is not quite well-known with the market share of only 5%. Company A, therefore, implements tie-in sale strategies of the carbonated drinks and the mineral water. Consequently, the trade partners are left with no option to only purchase the carbonated drinks. This conduct will automatically increase the market share for the mineral water of Company A from the tie-in sale and also affect the business competitors in respect of the mineral water from the decrease of their sales.

Imposing conditions on price

There are various approaches in imposing conditions on price. The imposition of price-related conditions which can be categorized as the most severe violation of the law is **resale price maintenance**. Resale price maintenance is the imposition of condition requiring the trade partners to resell product or service at or within the price range fixed by the business operator. For instance, based on the aforementioned example, Company A manufactures and sells carbonated drinks at a wholesale price to Shops B, C and D at 35 Baht per bottle. Normally, Shops B, C and D would have the freedom to fix their selling prices independently. However, if Company A imposes the conditions requiring the 3 shops to resell the carbonated drinks only at the price specifically fixed by Company A at 40 Baht per bottle, such

imposition will force the buyers to purchase the carbonated drinks of Company A at only 40 Baht per bottle regardless of where they purchase them. The 3 shops will not be able to fix a competitive price. This conduct is called “resale price maintenance” which restricts competition on price among trade partners and is prohibited by law.

Other approaches of imposing conditions on a price which are illegitimate under the law is **imposition of conditions on the discount of products or services** whereby trade partners are required to purchase products or services in the large quantity, excessive of their required quantity, or otherwise the trade partners will not be granted the discount.

Refusing to sell products or services to trade partners

In respect of refusing to sell products or services to trade partners, buyers and sellers generally have the liberty to sell or not to sell their products pursuant to the legal framework of the Civil and Commercial Code. However, according to trade practices, the business operator may be liable for refusing to enter into a transaction with its trade partners without any appropriate reason. In order to determine the liability, there needs to be consideration on whether or not the trade partners have any other option. For example, Company A refuses to sell carbonated drinks to Shop B without any appropriate reason. In this case, even though Company A may, as a fact, refuses to sell its products to Shop B, the liability of Company A cannot be immediately concluded and surrounding factors also need to be considered i.e. whether or not Shop B is able to find other substitute seller of carbonated drinks with similarity in terms of price, quantity and quality.

Suspending, reducing, limiting and destroying to reduce product quantity to be lower than market demand

Section 50 (3) prohibits the business operator with a dominant position from conducting any of the following actions: **(a) suspending, reducing, or limiting service provision, production, purchasing, sale, delivery, importation into the Kingdom without any appropriate reason** and **(b) destroying or damaging goods**. However, actions stipulated in (a) or (b) are both measures to control the quantity of products to be lower than the demand of the market and directly affects the competition system of the market. For example, Company A is a business operator with a dominant position for a certain type of product, the monthly demand of which is 1 million units. However, Company A, with the intention to cause shortage and increase the price, manufactures and sells such products only in the quantity of 500,000 units while other competing manufacturers are unable to manufacture and sell such products.

Intervening in the business operation of others

Section 50 (4) broadly stipulates that the business operator with a dominant position is prohibited from intervening in the business operation of others without any appropriate reason. The conduct needs to be an intervention of the business operation of others and not their own. Such intervention can affect both business competitors and trade partners i.e. by prohibiting a logistics company from delivering goods

or providing service to its business competitors or by sending its employees to disrupt or obstruct the operation of its business competitors through various approaches to prevent customers from buying products from the competitors.

What are the offences?

If the business operator in a dominant position commits any action under Section 50 (1) (2) (3) and (4), such business operator shall be subject to criminal liability. Section 72 prescribes the penalty of **not exceeding 2 years of imprisonment or a fine of not more than 10% of the turnover in the year of the offence, or both**. In a case where the offence is committed in the first year of the business operation, the term of **imprisonment shall be not more than 2 years or a fine in the amount not exceeding 1 million Baht, or both**.

Furthermore, if the offender is a juristic person, Section 77 prescribes that **if the offence of such juristic person is committed under instruction or through the conduct of a director**, manager, or any person responsible for the operation of such juristic person or in a case where that person has the duty to instruct or perform some conduct but fails to do so causing that juristic person to commit an offence, such person shall also be subject to **a punishment as prescribed for that particular offence**.

The Commission has the power to settle the cases under Section 79 which is the power to compare criminal penalty to a fine and once the offender pays the fine pursuant to and within the amount and time specified, the case shall be deemed settled pursuant to the provisions of the Criminal Procedure Code.

Summary

By merely holding a dominant position does not make a business operator liable. However, such the business operator shall take precautions and prevent any conduct under Section 50 (1) – (4) from being committed. Such conducts stipulated therein are illegitimate, affect business competitors, trade partners and consumers. If the business operator is uncertain whether its action is against the law, the business operator may file a claim to the Trade Competition Commission for a ruling to be issued pursuant to the criteria stipulated under the law.