

Article 6

Conduct Jointly Undertaken by Business Operators
Which Monopolizes, Reduces, or Restricts Competition
in a Market



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1. Introduction

In principle, a person naturally enjoys the liberty to practice any profession, which is guaranteed by the Constitution. However, if the said liberty affects or obstructs fair competition, or causes monopoly, the law still can limit such liberty. A collaboration or cooperation between business operators is deemed to be the liberty to practice a profession, as provided in the Constitution. Business operators in the same industry may make an agreement as a business association or alliance for development of the industry or encouragement to trade competition, either in terms of price or other forms. This conduct is acceptable. Nevertheless, if an agreement is to distort the market mechanism or competition, the law needs to contemplate whether or not it is a monopoly, or reduction or restriction of competition in the market. Additionally, if it is, the business operators may be found to commit an offense.

Apart from the Trade Competition Act B.E. 2560 (2017), the Announcement of Trade Competition Commission Subject: Guidelines for Contemplating Joint Conduct of Business Operators, Which Monopolizes, Reduces Competition or Restricts Competition in the Market B.E. 2561 (2018), also provide with details concerning many cases of joint conduct of business operators, which monopolizes, reduces competition or restricts competition in a market, and the adverse effect or damage to competition in the market, as well as the penalty, vary with each case.

Joint conduct of business operators, which is considered to be illegal, is categorized into 2 groups, comprising of: joint conduct, which severely damages competition (Hardcore Cartel), in principle, the conduct is this group lacks justification for being allowed; and the second group is joint conduct, which mildly damages competition (Non-Hardcore Cartel). To contemplate joint conduct of business operators, which monopolizes, reduces competition or restricts competition in a market, being the offenses under Section 54 and Section 55 of the Trade Competition Act B.E. 2560 (2017), substantial elements are as follows.

2. Conduct must be jointly undertaken by business operators.

As the law prescribes that “Any business operators...”, it means 2 business operators or more, whose management is independent from each other, which must not be the same economic entity, and which may compete with each other. For example, Company A and Company B are both business operators in the automobile manufacture industry. If both companies make an agreement, it shall be deemed to be joint conduct.

Relations between business operators, which are governed by the law, include a case of joint conduct on a horizontal plane, meaning the business operators are in the same market of similar goods or services, and directly compete with each other, and a case of joint conduct on a vertical plane, meaning business operators

are in different levels of the market and do not compete with each other. For example, Company A, who is a manufacturer, and Company B, who is a distributor, mutually make an agreement for fixing prices, etc.

3. What is joint conduct undertaken by business operators, which is illegal?

The law provides with details of a “joint conduct”, regardless of whether it is in a form of:

- 1) An “agreement”, either in writing or in words, and regardless of whether or not it is lawfully enforceable;
- 2) A decision of an association or assembly of several business operators, which draws to a conclusion, such as a resolution or rule, etc.;
- 3) Joint conduct in any other forms, which do not appear in a specific agreement or does not have a record of the decision,

If such conduct impacts competition, causing monopoly, or reduction or restriction of competition in the market.

4. Joint conduct severely damaging competition (Hardcore Cartel)

In a case of joint conduct undertaken by business operators in the same market, which causes monopoly, or reduction or restriction of competition in the market, the severest damage or distortion to the competition may be inflicted, which will ultimately affect the consumers and the country's economy, such as a joint conduct between business operators, who compete with each other in the same market (horizontally joint conduct) under Section 54. For example, Company A and Company B are manufactures of similar goods in the same market, and both companies make a mutual agreement on increase of the prices, etc.

However, if Company A is the parent company of Company B, and both companies are related to each other in terms of policies or control power, then the power to make a decision is vested in Company A. Under the law on trade competition, both companies are deemed to be a single economic entity, which do not compete with each other. Therefore, joint conduct of both companies will fall into the exception under the last paragraph of Section 54. (Additional details can be found in the Announcement of Trade Competition Commission Subject: Criteria for Determination of Business Operators Related to Each Other due to Policy or Commanding Power B.E. 2561 (2018))

As such, Section 54 prescribes nature of relation between business operators as “Any business operators competing with each other in the same market shall not jointly undertake any conduct which monopolizes, reduces, or restricts competition in that market”, providing with 4 ways of prohibited conduct as follows:

1) To jointly fix prices or trade conditions

To jointly fix prices or trade conditions (price or condition collusion) is an offense, whereas Section 54 (1) prescribes that “to fix, whether direct or indirect, purchasing or selling price, or any trading conditions that affect the price of goods or services”. For example, Company A, Company B and Company C are the country's major manufacturers and distributors of refrigerators, and the goods were originally in a price competitive market. Subsequently, the three companies secretly make a mutual agreement, by holding a meeting for jointly increasing prices, where the fixed prices can be the same prices or agreed prices, or for jointly fixing other conditions, which affect the prices, such as discounts, fees, transportation costs, terms of payment, etc.

2) To jointly limit quantities of goods or services

To jointly limit quantities of goods or services (quantity collusion) is an offense, whereas Section 54 (2) prescribes that “to limit the quantity of goods or services that each business operator will produce, purchase, sell, or provide, as agreed”. It is deemed to be an offense of the same severity as the price collusion. Even though it does not directly fix the prices, the jointly limited quantity of goods or services to be lower than the demand in the market may result in scarcity, and the prices of the said goods or services will be higher than a normal competitive market.

As such, not only the law prohibits an act of jointly limiting “quantities”, but also prohibits an act of jointly fixing “proportion” and “quota” of manufacturing, purchasing or distributing goods and services for each business operator.

3) To establish an agreement or conditions

To knowingly establish an agreement or conditions in a bid or auction (bid rigging) is an offense, whereas Section 54 (3) prescribes that “to knowingly establish an agreement or conditions in order for one side to win an auction or to win in a bid of goods or services or in order for another side not to enter an auction or a bid of goods or services”. If there is no bid rigging, the price in the bid or auction for goods or services will reflect the truly competitive price. Nevertheless, if business operators jointly set up a specific member of their group as the winner of the bid or auction, by jointly agreeing or conspiring in advance, the resulting price may be higher than a case of no bid rigging.

Apart from this, a case where private entities undertake bid rigging for a government project is also governed by Act on Offenses Relating to Price Proposal to Public Agencies B.E. 2542 (1999), which is enacted to regulate public agencies, because the public agencies are not governed by the Trade Competition Act B.E. 2560 (2017).

4) To jointly allocate areas, or purchasers or sellers

To jointly allocate areas, or purchasers or sellers, causing monopoly, or reduction or restriction of competition in the market, is an offense under Section 54 (4), which prescribes that “to allocate areas in which each business operators will sell, or reduce a sale or purchase goods or services, or allocate purchasers or sellers to or from which each business operators will sell or purchase goods or services under the condition that other business operators shall not purchase or sell those goods or services”.

To jointly allocate areas means: (1) A case where business operators mutually agree on allocation of an area, in which each business operator will distribute or not distribute, or purchase goods or services. For example, Company A, who is a distribution agent in the North, and Company B, who is a distribution agent of the same brand of goods in the North East, agree on allocation of areas for distribution of the goods, etc.; or (2) A case where business operators agree on allocation of a buyer or seller, with whom each business operator will sell or purchase goods or services. For example, from the previous instance, forcing clients (wholesalers) in Chiang Mai to purchase the goods only from Company A, without purchasing from Company B, even though Company B sells the goods at prices lower than those of Company A.

5. Joint conduct mildly damaging competition (Non-Hardcore Cartel)

Other than the joint conduct in the aforementioned 4 ways, business operators can change the method of cooperation to different forms, which do not severely affect competition. Nonetheless, joint conduct of this description is still considered to be an offense, but the punishment for it is only an administrative one.

Section 55 provides a description of relations between business operators as “Business operators shall not jointly undertake conduct which monopolizes, reduces or restricts competition in a market”. It prescribes against joint conduct, which generally damages competition, covering from joint conduct between business operators, who compete with each other in the same market (horizontally joint conduct) to joint conduct between business operators, who do not compete with each other in any market (vertically joint conduct), in one of the following ways:

1) A case where prices or trade conditions are mutually fixed, quantities of goods or services are mutually limited, and areas, or buyers or sellers are mutually allocated, between business operators, who do not compete with each other in the same market (vertically joint conduct);

2) A case where the quality of goods or services is reduced to a condition lower than that previously produced, sold, or provided – this case may concern joint conduct between business operators, who either or not compete with each other in the same market. For example, Company A and Company B, who are automobile manufacturers in the same market, make a mutual agreement to use older models of parts, whose efficiencies are poorer than the latest models, in assembly of their latest models of automobiles, as to reduce the production costs, but still sell the automobiles at the same prices;

3) A case where any one person is appointed or assigned to exclusively sell the same goods or provide the same services, or of the same type;

4) A case where conditions or practices are set for purchasing or producing goods or services so that the practice follows what is agreed – this case may concern joint conduct between business operators, regardless of whether or not they compete with each other in the same market. For example, a manufacturer and a distributor mutually set conditions for types and descriptions of goods to be only one model, whereas there were previously several models for the consumers to choose;

5) A case where joint agreements are made in other manners as prescribed in the Trade Competition Commission's Announcement.

6. What are exceptions?

The law provides with exceptions of joint conduct in 4 types as follows:

1) the conduct of business operators, who are related to each other due to a policy or commanding power as prescribed in the Trade Competition Commission's Announcement, or who are a single economic entity;

2) joint conduct of business operators for the purpose of developing production, distribution of goods, and promotion of technical or economic progress;

3) joint conduct in the pattern of contracts between business operators of different levels, whereby one side grants the right in goods or services, and the other side is granted rights, such as a franchise contract or a licensed distributor contract;

4) the agreement type or business format as prescribed in a ministerial regulation on the Trade Competition Commission's Advice.

As of a joint agreement under paragraphs (2) and (3), it shall not result in any limitation exceeding its necessity in order to achieve the benefits. In other words, the benefits from an exception must be proportional to the negative impact from restriction of competition in the market, and must not cause a monopoly power or substantially restrict competition. As such, the Announcement of Trade Competition Commission Subject: Contemplating Joint Conduct of Business Operators, Which Monopolizes, Reduces Competition or Restricts Competition in the Market B.E. 2561 (2018) prescribes that business operators, who jointly undertake the conduct, must have total market share smaller than 10%, for being allowed to enjoy an exception.

7. What are consequences of violation?

Punishments for violations of undertaking the joint conduct are 2 types as follows.

1) Criminal punishments

Joint conduct, which severely damages competition (Section 54), is punishable by an imprisonment term of not exceeding 2 years or a fine of not exceeding 10% of the turnover in the year of the offense, or both, provided that, in a case where the offense is committed within the first year of the business operation, it is subject to an imprisonment term of not exceeding 2 years or a fine of not exceeding 1 million Baht, or both (Section 72).

Apart from this, in a case where the offender is a juristic person, Section 77 prescribes the punishment that, if such offense of that legal person is committed under instruction or through the conduct of a director, manager, or any person responsible for the operation of such legal person, or in a case where that person has the duty to instruct or perform some conduct but fails to instruct or perform the conduct causing

that legal person to commit an offense, such person shall also be subject to a punishment as prescribed for that particular offense.

2) Administrative punishments

An administrative punishment for a lesser offense in comparison to a criminal punishment, whereby joint conduct, which damages competition (Section 55) is subject to an administrative fine of not exceeding 10% of the turnover in the year of offense, provided that, in a case where the offense is committed within the first year of the business operation, it is subject to an administrative fine of not exceeding 1 million Baht (Section 82).

Apart from this, in a case where the offender is a juristic person, Section 84 prescribes the punishment that, if such offense of that legal person is committed under instruction or through the conduct of a director, manager, or any person responsible for the operation of such legal person, or in a case where that person has the duty to instruct or perform some conduct but fails to instruct or perform the conduct causing that legal person to commit an offense, such person shall also be subject to a punishment as prescribed for that particular offense.

8. Summary

There are different categories of joint conduct, which is prohibited by the law, and each category inflicts different severity of damage, in turn, the law prescribes different severity of punishments for each category. Therefore, business operators must understand the scope of cooperation in their own industry, as to know what conduct is illegal, while joint conduct, which is absolutely prohibited under Section 54, is especially the severest offense, because it directly impacts competition in the market. The most important thing is that business operators must realize and adjust their business ideas, in a case where they want to make an agreement or cooperate with each other, such as jointly fixing prices (price collusion), jointly fixing quantities (quantity collusion), or joint conduct in any other ways, which may damage competition in the market, and may violate the Trade Competition Act B.E. 2560 (2017).