

(Translation)

## Outcome of Decision on Case Settlement

### In a case of Prohibition of Selling Competitor's Products in Energy Drink Market

	Trade Competition Commission	the Accuser
<b>Between</b>		
	M-150 Company Limited	the Accused

#### Facts

In the case where the Trade Competition Commission received a complaint about the prohibition of selling the competitor's products in the energy drink market, the Trade Competition Commission was of the opinion on July 15, 2016 as in the text that follows. The Trade Competition Commission opined that M-150 Co., Ltd. exercised the dominance of market power in fixing conditions restricting the purchase of energy drink under a logo M-150 as well as limiting opportunities in selecting the purchase or sale of products in the type of energy drink under other logos in an unfair manner under Section 25 (2), and intervening in the operation of business of 4 complainants without justifiable reasons under Section 25 (4) of the Trade Competition Act B.E. 2542 (1999). Additionally, M-150 Co., Ltd. committed acts in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment and restriction of the operation of business of complainants, and resulting in damage, the lack of profit and revenue deriving from the sale of products in the type of energy drink under a logo M-150, including a loss of customer base under Section 29 of the Trade Competition Act B.E. 2542 (1999). Mr. Prathan Chiprasith, the company's director, who was responsible for the business operation of M-150 Co., Ltd. in relation to a trading and marketing policy, was required to be jointly liable the same as the company was under Section 54 of the Trade Competition Act B.E. 2542 (1999). The Trade Competition Commission would then make accusations and take legal actions against them. Furthermore, it was required to send a letter to the attorney general to give the consideration of prosecuting M-150 Co., Ltd. and Mr. Prathan Chiprasith according to the Criminal Procedure Code.

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The Office of the Trade Competition Commission sent the letter No. P.N. (S.K.KO.) 0416/5830, dated June 19, 2017, submitting the resolution of the meeting of the Trade Competition Commission and the file of the inquiry of case No. 1/2558 together with the alleged offenders to the public prosecutor.

Subsequently, the Office of the Trade Competition Commission received two letters dated July 19, 2019, from M-150 Co., Ltd., one sent by Mr. P. who was the liquidator of the company, the alleged offender No.1, and another one sent by Mr. Prathan, the alleged offender No.2, requesting the Trade Competition Commission to exercise its power to settle the offences under Section 79 of the Trade Competition Act B.E. 2560 (2017). The Trade Competition Commission then had the resolution at the meeting No. 28/2562 held on July 25, 2019 approving the settlement for M-150 Co., Ltd., the alleged offender No.1, and Mr. Prathan, the alleged offender No.2, in accordance with the requesting letter.

On July 31, 2019, the Office of the Trade Competition Commission received two letters dated July 31, 2019, from M-150 Co., Ltd., one sent by Mr. P. who was the liquidator of the company, the alleged offender No.1, and another one sent by Mr. Prathan, the alleged offender No.2, giving confessions and consent to be settled by way of payment of fines.

### **Issues of Decision**

1. It is whether or not the Trade Competition Commission can apply the administrative penalty under the Trade Competition Act B.E. 2560 (2017) to the offence under Section 29 of the Trade Competition Act B.E. 2542 (1999).

2. It is whether or not the Trade Competition Commission shall apply the provision concerning the offence under Section 50 and the stipulated penalty concerning the fine under Section 72 of the Trade Competition Act B.E. 2560 (2017) to the offence under Section 25 of the Trade Competition Act B.E. 2542 (1999) being subject to the fine penalty under Section 51 of the Trade Competition Act B.E. 2542 (1999).

### **Decision**

The first issue to be considered is whether or not the Trade Competition Commission could apply the administrative penalty under the Trade Competition Act B.E. 2560 (2017) to the offence under Section 29 of the Trade Competition Act B.E. 2542 (1999).

/In this issue,...

In this issue, the Trade Competition Commission has the resolution that the acts committed by the alleged offender No.1 and the alleged offender No.2 were the offences under Section 29 of the Trade Competition Act B.E. 2542 (1999). Section 51 of the Trade Competition Act B.E. 2542 (1999) provided that any person who violated Section 29 would be liable to imprisonment for a term of not exceeding three years or to a fine of not exceeding six million baht or to both; and any person who reoffended would be liable to the double penalty. Subsequently, the Trade Competition Act B.E. 2560 (2017), Section 3 has provided that the Trade Competition Act B.E. 2542 (1999) is repealed. However, the offence in the prohibited manner under Section 29 of the Trade Competition Act B.E. 2542 (1999) has still been enacted in Section 57 of the Trade Competition Act B.E. 2560 (2017). Despite this, the Trade Competition Act B.E. 2560 (2017) has not provided that the offence under Section 57 of the Trade Competition Act B.E. 2560 (2017) is the criminal offence. Section 82 of the Trade Competition Act B.E. 2560 (2017) has however provided that any person who violates Section 57 shall be liable to an administrative fine at the rate of not exceeding ten percent of proceeds in the year in which the offence is committed.

The Trade Competition Commission is of the opinion that the Trade Competition Act B.E. 2560 (2017) has no intention that the offence under Section 29 shall longer be the criminal offence. As a result, any person committing the offence under Section 29 shall be released from being a criminal offender. As regards the administrative penalty, the Trade Competition Act B.E. 2560 (2017) has no transitory provision to support the application of the administrative penalty under the Trade Competition Act B.E. 2560 (2017) to all offences as committed at the time when the Trade Competition Act B.E. 2542 (1999), the old law, was still in force. Consequently, the administrative penalty under the Trade Competition Act B.E. 2560 (2017) cannot be applied to the persons committing the aforesaid offences according to Section 2 of the Criminal Code.

The next issue to be taken into consideration is whether or not the Trade Competition Commission shall apply the provision concerning the offence under Section 50 and the stipulated penalty concerning the fine under Section 72 of the Trade Competition Act B.E. 2560 (2017) to the offence under Section 25 of the Trade Competition Act B.E. 2542 (1999) being subject to the fine penalty under Section 51 of the Trade Competition Act B.E. 2542 (1999).

/In this issue,...

In this issue, the Trade Competition Commission has the resolution that the acts committed by the alleged offender No.1 and the alleged offender No.2 were the offences under Section 25 of the Trade Competition Act B.E. 2542 (1999). Section 51 of the Trade Competition Act B.E. 2542 (1999) provided that any person who violated Section 25 would be liable to imprisonment for a term of not exceeding three years or to a fine of not exceeding six million baht or to both; and any person who reoffended would be liable to the double penalty. Subsequently, the Trade Competition Act B.E. 2560 (2017), Section 3 has provided that the Trade Competition Act B.E. 2542 (1999) is repealed. However, the offence in the manner of exercising the dominance of market power under Section 25 of the Trade Competition Act B.E. 2542 (1999) has still been enacted in Section 50 of the Trade Competition Act B.E. 2560 (2017). In addition, Section 72 of the Trade Competition Act B.E. 2560 (2017) has provided that any person who violates Section 50 shall be liable to imprisonment for a term of not exceeding two years or to a fine of not exceeding ten percent of proceeds in the year in which the offence is committed or to both.

The Trade Competition Commission is of the opinion that the Trade Competition Act B.E. 2560 (2017) has still had an intention that the offence in the manner of exercising the dominance of market power under Section 25 of the Trade Competition Act B.E. 2560 (2017) shall longer be the criminal offence. As a result, the law which is more favorable shall be applied to the offender regardless of the more favorable law being enacted in the Trade Competition Act B.E. 2560 (2017) or in the Trade Competition Act B.E. 2542 (1999), according to Section 3 of the Criminal Code. Section 72 of the Trade Competition Act B.E. 2560 (2017) has provided that any person who violates Section 50 shall be liable to imprisonment for a term of not exceeding two years or to a fine of not exceeding ten percent of proceeds in the year in which the offence is committed or to both. The facts are that M-150 Co., Ltd. had the sales volume proceeds in the year 2011 which was the year of committing the offence in the sum of xx,xxx million baht; and when the computation of the fine at the rate of ten percent of proceeds is made, the fine shall be equal to x,xxx.x million baht. Meanwhile, Section 51 of the Trade Competition Act B.E. 2542 (1999) provided that any person who violated Section 25 would be liable to imprisonment for a term of not exceeding three years or to a fine of not exceeding six million baht or to both; and any person who reoffended would be

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liable to the double penalty. Therefore, the fine for this case shall be in the sum of not exceeding x,xxx,xxx baht only. Section 51 of the Trade Competition Act B.E. 2560 (2017) is the law which is more favorable to the offenders. As a result, the Trade Competition Commission shall have to apply Section 51 of the Trade Competition Act B.E. 2560 (2017) to settle the case for both alleged offenders.

#### **Resolution of the Trade Competition Commission**

The Trade Competition Commission has a unanimous resolution to fix the sum of the fine to be settled for both alleged offenders, i.e. M-150 Co., Ltd., the alleged offender No.1, and Mr. Prathan, the Company's director, the alleged offender No.2, each of them being subject to payment of the fine of 6,000,000 baht in accordance with Section 51 of the Trade Competition Act B.E. 2560 (2017). In this regard, the Trade Competition Commission has entrusted the Secretary of the Trade Competition Commission with completing the settlement within 7 working days as from the date on which the Commission has the resolution.

Trade Competition Commission

July 25, 2019