(Translation)

Decision of Trade Competition Commission

In a case of Business Operator with Dominance over Asphalt Emulsion Rubber Market Making Unfair Trade Practice

Trade Competition Commission — the Accuser

Between

T. Company — the Accused No.1

L. Company — the Accused No.2

Complaint

The Complainant sent the letter of May 10, 2013 to the Secretary-General of the Trade Competition Commission summarizing that the Department of Highways, Songkhla Highway District, made a contract to hire the Complainant as a contractor to coat asphalt by means of Para Slurry Seal Type III on Highway Road No. 408, Control Passage 0501, Sathing Phra – Intersection to Khao Daeng Passage between Kilometer 144+000 – Kilometer 152+225 (RT), Wat Khanun Sub-district and Ching Kho Sub-district, Singha Nakhon District, Songkhla Province, by using the rubber Elastomeric Modified Asphalt Emulsion : EMAE which has Para rubber, as a composition, being important raw material in coating the road surface. The Complainant contacted both Accused in order to buy the rubber EMAE from them. However, both Accused refused to sell the aforesaid product to the Complainant, causing damages to the Complainant. This is due to the fact that the Department of Highways (Songkhla Highway District) terminated the contract as made with the Complainant since the Complainant did not have the rubber EMAE to be used for coating the road surface as stipulated in the contract. The acts of both Accused were the abuse of the position of the business operator with market dominance. In addition, the acts were not fair and free trade competition, causing the destruction, obstruction, impediment or restriction of business operation, or closing down the business operation. The acts violated Section 25 and Section 29 of the Trade Competition Act B.E. 2542 (1999).

Facts

The facts of the Complainant which have been obtained from seeking evidence by the subcommittee on investigation are as follows. The Complainant was the party to the contract with the Department of Highways, the contract for coating the asphalt by means of Para Slurry Seal Type III on Highway Road No. 408, Control Passage 0501, Sathing Phra – Intersection to Khao Daeng Passage between Kilometer 144+000 – Kilometer 152+225 (RT), for the distance of 8.225 kilometers, in the number of 4 items, Wat Khanun Sub-district and Ching Kho Sub-district, Singha Nakhon District, Songkhla Province, under Contract No. S.K. XX/XXXX. The

Complainant contacted both Accused in order to buy from them the rubber product EMAE (CCS-1h) being the mixture in coating the road surface in the form of Para Slurry Seal. The Complainant made the written contact twice for each Accused, i.e. on November 30, 2012 and March 21, 2013 in the same manner for both Accused. The Accused No.1 sent the letter to refuse to sell the product to the Complainant on November 26, 2013 on the grounds that the Complainant had inaccurate and incomplete qualifications in accordance with criteria as laid down by the Accused No.1. The Accused No.2 refused to sell the product to the Complainant via telephone without giving any reason for refusing. The Complainant ever sent the sample of rubber belonging to one company to the Bureau of Materials Analysis and Inspection, the Department of Highways, for inspection in order to be used for coating the road surface in accordance with the contract. However, Songkhla Highway District, the Department of Highways, sent the letter of December 19, 2012 informing that the result of the experiment of the rubber sample did not meet requirements and could not be used in the project under the contract. Additionally, Songkhla Highway District, the Department of Highways, demanded the Complainant to speed up making the mix design and to send the sample to the Bureau of Materials Analysis and Inspection, the Department of Highways to further proceed. However, the Complainant discontinued in part of the sample of rubber of this company. This is because the Complainant understood that the Complainant could contact both Accused in order to buy the product from them. In a case of a machine being necessary for coating the road surface in the form of Para Slurry Seal Type III, the Complainant did not have its own machine. However, the Complainant contacted J. Limited Partnership, SO. Company, K. Company, S. Company, and L. Company (L. Limited Partnership is correct) in order to rent the machine from them. In this regard, the aforesaid companies and partnerships were prepared to rent the machine to the Complainant. Afterwards, the Complainant sent the letter of March 25, 2013 to the Director of Songkhla Highway District requesting for the approval of the adjustment of the design of coating the road surface to the form of Slurry Seal Type III instead. The Complainant gave the reason in the aforesaid letter that the sample of rubber which the Complainant sent to the Bureau of Materials Analysis and Inspection, the Department of Highways, did not meet requirements. In addition to this, the Complainant contacted both Accused in order to buy from them the rubber product; however, the Complainant was refused by both Accused on the grounds that there was no raw material, they could not manufacture the rubber product to be used in the aforesaid project. Nevertheless, the Department of Highways did not give the approval of the adjustment of the design. Thereafter, the Department of Highways terminated the contract as made with the Complainant, and sent the letter demanding the Complainant to pay damages as a fine in the approximate sum of 10 million baht. However, the Department of Highways never filed a lawsuit against the Complainant for the fine in all respects.

As for both Accused, the facts which have been obtained from seeking evidence by the subcommittee on investigation are as follows. Both Accused were the manufacturers of the rubber EMAE being the important raw material in coating the road surface in the form of Para Slurry Seal Type III. In the year 2012 and the year 2013, the Accused No.1 gave the statement that the Accused No.1 had the sales volume of the rubber EMAE in the amount of XX,XXX tons and XX,XXX tons in the total price of XXX,XXX,XXX baht and XXX,XXX,XXX baht. The Accused No.1 also estimated that the Accused No.1 had the market share approximately XX% and XX% respectively. The Accused No.1 never received the letter of the Complainant dated November 30, 2012, but received contact via telephone from the Complainant around November, 2012 to buy the rubber EMAE (CSS-1hp). In the aforesaid telephone conversation, the Accused No.1 informed the Complainant of criteria regarding the sale of the product to a new customer, which required the consideration of a customer's history, readiness in terms of machine, the capability of paying the price, and being a contractor for road construction in the registered list of the Department of Highways, including compliance with procedures. According to such procedures, a customer was required to bring the sample of stone collected from the area of construction site to the Accused No.1 in order to make the mix design; thereafter the customer was required to send the sample of stone and the report of mixture to the Department of Highways for the inspection of mixture to be in accordance with the standard as provided in the contract. The aforesaid telephone conversation was a preliminary discussion. If there was real trading, there would be the inspection of the machine in the area of the Complainant's construction site carried out by the Accused No.1. Afterwards, around the end of March, 2013, the Accused No.1 received the letter of the Complainant dated March 21, 2013 to buy the product. The Accused No.1 then contacted the Complainant to ask for the inspection of the machine to be used in the construction and to demand the Complainant to comply with the procedures as laid down by the Accused No.1; however, the Complainant did not call back. In addition, the Accused No.1 heard that the Complainant contacted other firm to buy the product. The Accused No.1 then understood that the Complainant already bought the product from other firm. As a result, the Accused No.1 sent the Complainant the letter refusing the sale of the product on November 26, 2013 on the grounds that the Complainant had inaccurate and incomplete qualifications in accordance with criteria as laid down by the Accused No.1.

As for the Accused No.2, the facts are as follows. In the year 2012 and the year 2013, the Accused No.2 had the sales volume of rubber EMAE in the sum of XX million baht and XX million baht. The Accused No.2 also estimated that the Accused No.2 had the market share approximately XX% and XX% respectively. The Complainant never contacted and sent a purchase order to the Accused No.2 by means of facsimile of letter. However, the Accused No.2 ever received a telephone call from the Complainant asking whether or not the Accused No.2 had the rubber for coating the road surface in the form of Para Slurry Seal Type III to sell.

The Accused No.2 replied that the Accused No.2 had the product for sale on the conditions that a purchaser was required to send the Accused No.2 a purchase order for this product at least 14 days in advance and to inform the Accused No.2 of a quantity of use by calculating an using area based on an area for coating the road surface, and the Accused No.2 would sell the product to customers in order. In addition, the Complainant would ask the Accused No.2 for making the mix design and bring the letter regarding the aforesaid mix design to the Department of Highways or the Department of Rural Roads for designing the mixture. In this regard, the Complainant would send the Accused No.2 stone material and crushed dust to make the mix design. Additionally, the Complainant would be ready to have the machine that could accurately release the mixture in coating the road surface. If the mixture did not conform with the design which was made, the mixture could not be used to coat the road surface at all. Or, if the mixture could be used to coat, the road surface would be of poor quality because of unsuitable mixture. In a case of a purchaser who is a new customer, the Accused No.2 had the policy that the Accused No.2 had to consider the status whether it is a cash or credit customer, a customer had to already have a letter of guarantee and a letter regarding the aforesaid mix design issued by the Department of Highways or the Department of Rural Roads, and the customer had to have the machine for coating the road surface in the form of Para Slurry Seal on the conditions that the machine was ready to operate and had already been adjusted. In addition, the Accused No.2 would consider whether or not the Accused No.2 had enough product to be used in its stock and enough transportation vehicle to supply the product as had been planned by the customer. Furthermore, the Accused No.2 would consider the area where the transportation vehicle could enter to send the product. The Accused No.2 would also consider its production capacity. The Accused No.2 would consider selling the product to an old customer first and to be according to rubber usage plans in order. However, the Complainant contacted the Accused No.2 for asking information only. Afterwards, the Complainant discontinued contact to ask the Accused No.2 to make the mix design. The Accused No.2 therefore did not sell the product to the Complainant.

Issues of Decision

There are the issues of decision as follows:

1. The acts of both Accused took place during the time when the Trade Competition Act B.E. 2542 (1999) was still enforceable. Afterwards, the Trade Competition Act B.E. 2560 (2017), Section 3 provides that the Trade Competition Act B.E. 2542 (1999) is repealed, resulting whether or not the acts of both Accused under the Trade Competition Act B.E. 2542 (1999) have already been abolished.

2. The issue is whether or not both Accused were the business operators with market dominance and exercised the dominance of market power in the prohibited manners under

Section 25 of the Trade Competition Act B.E. 2542 (1999) or Section 50 of the Trade Competition Act B.E. 2560 (2017).

3. The issue is whether or not both Accused committed any act in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment or restriction of the business operation of other business operators, or for intervening in the business operation of others or closing down the business operation of others under Section 29 of the Trade Competition Act B.E. 2542 (1999) or Section 57 of the Trade Competition Act B.E. 2560 (2017).

Decision

The first issue to be considered is that the acts of both Accused took place during the time when the Trade Competition Act B.E. 2542 (1999) was still enforceable. Afterwards, the Trade Competition Act B.E. 2560 (2017), Section 3 provides that the Trade Competition Act B.E. 2542 (1999) is repealed, resulting whether or not the acts of both Accused under the Trade Competition Act B.E. 2542 (1999) have already been abolished.

In this issue, the Complainant made a complaint on May 10, 2013 that both Accused were the business operators with market dominance and exercised the dominance of market power in the prohibited manners under Section 25 of the Trade Competition Act B.E. 2542 (1999), or acted in the manner of not being fair and free trade competition, and causing the destruction, damage, obstruction, impediment or restriction of the business operation of other business operators, or for intervening in the business operation of others or closing down the business operation of others under Section 29 of the Trade Competition Act B.E. 2542 (1999) which was the enforceable law at the time when the Complainant made the complaint and when both Accused committed the acts leading to the complaint.

The Trade Competition Commission is of the opinion that the time when the incident occurred was the periods from 2012 overlapping to 2013 being the time when the Trade Competition Act B.E. 2542 (1999) was still enforceable, and thereafter, when the Trade Competition Act B.E. 2560 (2017) comes into force, Section 3 provides that the Trade Competition Act B.E. 2542 (1999) is repealed. However, even if it is provided in Section 3 of the Trade Competition Act B.E. 2560 (2017) to repeal the Trade Competition Act B.E. 2542 (1999), the provisions regarding prohibitions under Section 25 and Section 29 of the Trade Competition Act B.E. 2542 (1999) have still appeared in Section 50 and Section 57 of the Trade Competition Act B.E. 2560 (2017). Thus, the Trade Competition Act B.E. 2560 (2017) which is the newly enacted subsequent law has not resulted in the abolition of prohibitions under Section 25 and Section 29 of the Trade Competition Act B.E. 2542 (1999) in all respects.

The subsequent issue to be considered is whether or not both Accused were the business operators with market dominance and exercised the dominance of market power in the prohibited manners under Section 25 of the Trade Competition Act B.E. 2542 (1999) or Section 50 of the Trade Competition Act B.E. 2560 (2017).

In this issue, Clause 1 of the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance dated January 18, 2007 as issued pursuant to Section 8 (2) of the Trade Competition Act B.E. 2542 (1999) prescribed that (1) any business operator, in any particular goods or service market, having a market share in a previous year in excess of fifty percent and sales volume proceeds in a previous year in excess of one billion baht, or (2) the first three business operators, in any particular goods or service market, having an aggregate market share in a previous year in excess of seventy-five percent and sales volume proceeds in a previous year in excess of one billion baht. In addition, Clause 3 of the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance B.E. 2561 (2018) dated October 4, 2018 as issued pursuant to Section 5 and Section 17 (2) of the Trade Competition Act B.E. 2560 (2017) has prescribed that the business operator who has the following market share and sales volume proceeds shall become the business operator with a dominant position in a market : (1) any business operator, in any particular goods or service market, having a market share in a previous year in excess of fifty percent and sales volume proceeds in a previous year in excess of one billion baht, or (2) the first three business operators, in any particular goods or service market, having an aggregate market share in a previous year in excess of seventy-five percent and sales volume proceeds in a previous year for each business operator in excess of one billion baht. The criteria as prescribed by both Notifications are the same.

The Trade Competition Commission is of the opinion that in considering sales volume proceeds and a market share, the Commission must first reach the conclusion of a product market and a geographic market of the product in this case.

As regards the product market, the product in question is the rubber EMAE which consists of Para rubber (EMAE having CCS-1h as a symbol) being the mixture to be used in coating the road surface in the form of Para Slurry Seal. The competent officials of the Bureau of Highways Maintenance Management and the Bureau of Materials Analysis and Inspection, the Department of Highways, who are expert witnesses, gave statements that main materials used in coating the road surface in the form of Para Slurry Seal were crushed dust, chipped stone, cement, admixture, water and rubber EMAE. The coating work for the road surface in the form of Para Slurry Seal was divided into three types, each of which was different in terms of the size of stone to be used as the mixture. However, the three types of the coating work for the road surface in the form of Para Slurry Seal required to use the rubber EMAE all alike to comply with Road Standard No. TL.-M.415/2546. Additionally, it was provided in the contract

made by the Department of Highways and the Complainant that the Complainant was required to coat the road surface in the form of Para Slurry Seal, resulting that the Complainant was required to use the rubber EMAE in coating the road surface to comply with Road Standard No. TL.-M.415/2546. When the Complainant could not purchase the rubber EMAE to be used in coating the road surface, the Complainant sent the letter of March 25, 2013 to the Director of Songkhla Highway District requesting for the approval of the adjustment of the design of coating the road surface to the form of Slurry Seal Type III instead. However, the Department of Highways did not give approval, indicating that the Complainant was required to use the rubber product EMAE in compliance with the contract as made with the Department of Highways only, and the Complainant could not alter the use of rubber from the agreed material to other rubber or material instead. Therefore, the product market in this case is that of the rubber Elastomeric Modified Asphalt Emulsion : EMAE only.

As regards the geographic market, the Trade Competition Commission is of the opinion that in considering the geographic market, the Commission must consider whether or not an area where any product or service can be compensated, i.e. whether or not in the case where there is an increase in the price of product, there will be the purchase of such product from other area to compensate. The geographic market may possibly be local markets such as district, province, region or country by considering other factors, e.g. costs of transportation or durability of product, etc. The information on this issue has been obtained from the competent officials of the Bureau of Highways Maintenance Management and the Bureau of Materials Analysis and Inspection, the Department of Highways, who are expert witnesses, and Mr. S., who is an attorney for the Accused No.1. They gave statements that in the year 2012, there were 4 firms who manufactured the rubber EMAE in Thailand, i.e. both Accused, M. Company and SO. Company. Additionally, Mr. S., who is an attorney for the Accused No.1, Ms. N., who is an attorney for the Accused No.2, and Mr. P., who is an attorney for SO. Company, gave harmoniously statements that each manufacturer of the rubber EMAE could sell the product to purchasers in all provinces throughout the country. In this regard, each manufacturer had transportation vehicles for delivering the rubber EMAE to purchasers at agreed places. Transportation fees were different based on a transportation distance. In conclusion, each manufacturer could sell and deliver the rubber EMAE to purchasers at agreed places throughout the country by charging for different transportation fees based on the transportation distance. Therefore, the geographic market of the rubber product EMAE in this case is Thailand.

In considering sales volume proceeds and a market share for determining the position of the business operator with market dominance, it has been stipulated in the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance dated January 18, 2007 and the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance B.E. 2561

(2018) dated October 4, 2018 that the sales volume proceeds and the market share in the previous year of the year when an accused act occurs shall be taken into consideration. The facts of this case are that the acts of both Accused occurred during the periods from 2012 overlapping to 2013. For this reason, the Commission must first reach the conclusion that the sales volume proceeds and the market share in the previous year mean those in which year. Then the Commission must reach the conclusion whether or not the sales volume proceeds and the market share in the conclusive year have the number in compliance with the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance dated January 18, 2007 and the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance B.E.2561 (2018) dated October 4, 2018. The information on this issue is that the Complainant sent letters requesting for the purchase of the rubber product EMAE to both Accused by making the written contact twice for each Accused, i.e. on November 30, 2012 and March 21, 2013 respectively. The Accused No.1 sent the letter to refuse to sell the product to the Complainant on November 26, 2013. Mr. S., who is an attorney for the Accused No.1, also gave the following statements. The Accused No.1 never saw the letter of the Complainant requesting for the purchase of the product dated November 30, 2012. However, the Complainant contacted the Accused No.1 to buy the product via telephone for the first time in 2012. The Accused No.1 did not refuse to sell the product to the Complainant promptly, but there was a preliminary discussion on the sale of the aforesaid product as the Complainant was a new customer. The Accused No.1 informed the Complainant that the Complainant would have its readiness in terms of machine to be used in coating the road surface and bring the sample of stone to be used in the area of construction site to the Accused No.1 in order to make the mix design; thereafter the Complainant would send the sample of stone and the report of mixture to the Department of Highways to inspect and analyze whether or not they complied with the standard as provided in the contract. In addition, before trading, the Accused No.1 would send its officers to inspect the machine in the area of the Complainant's construction site. At that time, the Complainant and the Accused No.1 did not make a business deal. Afterwards, around the end of March, 2013, the Accused No.1 received the letter of the Complainant dated March 21, 2013 requesting for the purchase of the product. The Accused No.1 then contacted the Complainant to ask for the inspection of the machine to be used in the area of the construction site and to demand the Complainant to comply with procedures for becoming the customer of the Accused No.1; however, the Complainant did not reply the Accused No.1. As a result, the Accused No.1 sent the Complainant the letter refusing the sale of the product on November 26, 2013 on the grounds that the Complainant had inaccurate and incomplete qualifications in accordance with criteria as laid down by the Accused No.1. The Accused No.1 also heard that the Complainant contacted other firm to buy the product. The Accused No.1 then understood that the Complainant already bought the product from

other firm. This information is identical to the facts which the Complainant gave statements that the Complainant ever sent the sample of rubber belonging to other company to the Bureau of Materials Analysis and Inspection, the Department of Highways, for inspection. Thereafter, Songkhla Highway District, the Department of Highways, sent the letter of December 19, 2012 informing the Complainant that the result of the experiment of the rubber sample did not meet requirements. The facts to be believed are those which the Accused No.1 gave statements that the contact as made by the Complainant to buy the product in the year 2012 was the preliminary contact via telephone only, and the Accused No.1 did not refuse to sell the product to the Complainant. However, when the Complainant sent the letter requesting for the purchase of the product in the year 2013 and did not reply to proceed with criteria and conditions as laid down by the Accused No.1, the Accused No.1 refused the sale of the product clearly in writing in the year 2013 as a result. It is therefore believed that the Accused No.1 refused to sell the product to the Complainant in the year 2013. As for the Accused No.2, the facts as obtained from Ms. N., who is an attorney for the Accused No.2, are that the Accused No.2 was contacted by the Complainant via telephone asking whether or not the Accused No.2 had Para rubber in the kind of CCS-1h for coating the road surface in the form of Para Slurry Seal Type III to sell. The Accused No.2 replied that the Accused No.2 had the product for sale but a purchaser would send a purchase order in advance. In addition to this, the purchaser would ask the Accused No.2 for making the mix design and bring the letter as issued by the Accused No.2 regarding the mix design together with stone material, rubber and admixture to the Department of Highways or the Department of Rural Roads for designing the mixture. However, the Complainant did not ask the Accused No.2 for proceeding with such requirements. Although it is not obvious in the investigation of this case that in which year when the Accused No.2 refused to sell the product to the Complainant, it is believed that causes leading to the refusal of the Accused No.2 to sell the product to the Complainant took place in the year 2013 based on the evidence and consideration of the facts which have been obtained from the Accused No.1 as mentioned above and the facts that the Complainant sent the letters requesting for the purchase of the product for the second time to both Accused in the year 2013 and the Complainant sent the letter of March 25, 2013 to Songkhla Highway District informing of the problem in respect of the lack of Asphalt Emulsion together with requesting for the adjustment of the design. Therefore, the sales volume proceeds and the market share in the previous year to be taken into consideration to determine the issue of being the business operator with market dominance for both Accused in this case are those of both Accused in the year 2012 which is the year before 2013.

The next issue to be taken into consideration is whether or not the sales volume proceeds and the market share of both Accused have the number in compliance with the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance dated January 18, 2007 and the Notification of the Trade

Competition Commission regarding Criteria Determining Business Operator with Market Dominance B.E. 2561 (2018) dated October 4, 2018. The information on this issue has been obtained from the competent officials of the Bureau of Highways Maintenance Management and the Bureau of Materials Analysis and Inspection, the Department of Highways, who are expert witnesses. They gave statements that in the year 2012, there were 4 firms manufacturing the rubber EMAE (CCS-1h), i.e. both Accused, M. Company and SO. Company. Additionally, in the year 2012 the use of Para rubber in coating the road surface in the form of Para Slurry Seal for the Department of Highways was in the amount of X,XXX tons, in the total value of XX million baht. Mr. S., who is an attorney for the Accused No.1, gave the statement that in the year 2012 the Accused No.1 had the sales volume of Para Rubber Asphalt Emulsion EMAE (CCS-1h) in the amount of XX,XXX tons, in the total price of XXX,XXX,XXX baht by having the approximate market share about 60%. Additionally, Ms. N., who is an attorney for the Accused No.2, gave the statement that in the year 2012 the Accused No.2 had the revenue deriving from the sale of Para Rubber Asphalt Emulsion EMAE (CCS-1h) in the approximate sum of XX million baht by having the approximate market share about 25%. Subsequently, the Accused No.2 sent the letter informing of the information on the sale of rubber CCS-1h again that in the year 2012 the Accused No.2 sold the rubber CCS-1h in the amount of X,XXX.XX tons, in the total price of XX,XXX,XXX baht.

The Trade Competition Commission is of the opinion that the sales volume proceeds of each Accused for the rubber product EMAE in the year 2012 did not exceed one billion baht, which failed to meet the requirement of being the business operator with market dominance in accordance with Section 3 of the Trade Competition Act B.E. 2542 (1999) as supported by the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance dated January 18, 2007 and Section 5 of the Trade Competition Act B.E. 2560 (2017) as supported by the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance B.E. 2561 (2018) dated October 4, 2018. It is believed in the facts that both Accused were not in the position of the business operator with market dominance; as a result, both Accused might not commit acts which were prohibited by Section 25 (1) to (4) of the Trade Competition Act B.E. 2542 (1999) and Section 50 of the Trade Competition Act B.E. 2560 (2017). Thus, it is not necessary for the Commission to further make a decision on whether or not both Accused committed acts which were prohibited by Section 25 (1) to (4) of the Trade Competition Act B.E. 2542 (1999) and Section 50 of the Trade Competition Act B.E. 2560 (2017).

The next issue to be taken into consideration is whether or not both Accused committed any act in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment or restriction of the business operation of the Complainant, or for intervening in the business operation of the Complainant or closing down the business operation of the Complainant under Section 29 of the Trade Competition Act B.E.

2542 (1999), or committing any act which resulted in damage to other business operators in the unfair manner of impeding the business operation of other business operators or exercising the dominance of market power or a superior bargaining power in an unfair manner or fixing trading conditions which resulted in the restriction or obstruction of the business operation of others in an unfair manner under Section 57 of the Trade Competition Act B.E. 2560 (2017).

The information on this issue has been obtained from Mr. S., who is an attorney for the Accused No.1. Mr. S. gave the following statements. The Accused No.1 had its policy as follows: to sell the product to a contractor who made a contract with a government sector, and to accept a cash and credit limit for 30-40 days with collateral, i.e. a bank guarantee, a promissory note or without collateral only for a customer who had a good debt repayment history, but a post-date cheque was required as collateral. The Accused No.1 would also consider a customer's history, character, credibility, potentiality of previous work, personnel and partner. In addition, a customer had to own a permanent address, to work as a contractor for road construction, and to be a party to a contract with a government sector. Also, a customer had the capability and readiness of a machine for operation by owning the machine for coating the road surface in the form of Para Slurry Seal Type III. The aforesaid machine could accurately mix compositions, i.e. rubber, stone, water, cement and additive in accordance with the proportion of mix design as fixed by a government sector. Additionally, a customer had ability to pay the price. In this regard, the Accused No.1 would consider a customer's balance sheet, profit and loss statement, cash-flow statement including the value of project that a customer could bid as compared to the price of Para Rubber Asphalt to be purchased. Additionally, a customer was required to be on the registered list of contractors for road construction in any class from 4 classes. The aforesaid policy was applied to customers in general. In the case where a customer failed to meet the above requirements, the Accused No.1 would refuse to sell the product to the customer. In the case where the Accused No.1 refused to sell the product to the Complainant due to the fact that the Complainant did not pass the examination of qualification in terms of machine, the Complainant was not approved to open a trading account as the customer of the Accused No.1. Furthermore, the information on this issue has been obtained from Ms. N., who is an attorney for the Accused No.2. Ms. N. gave the following statements. In a case of the firm's new customer, the Accused No.2 would consider a customer's payment with cash or credit. In a case of cash, the transfer of money for paying the price of product would be made prior to the delivery of product. In a case of credit, there would be a letter of guarantee in a full limit of the purchase order. In addition, a customer was required to inform of a rubber usage plan at least 14 days in advance. The Accused No.2 would also consider whether or not a customer had a job mix formula from the Department of Highways or the Department of Rural Roads, and the readiness of the machine for coating the road surface in the form of Para Slurry Seal, which the machine had already been calibrated. Additionally, the Accused No.2 would consider whether or not there was enough

product as required in its stock, enough transportation vehicle to supply the product as had been planned by the customer. Furthermore, the Accused No.2 would consider the area where the transportation vehicle could enter to send the product. In a case of a risky point or a dangerous area, i.e. Umphang District, Tak Province, and some points in three southern border provinces, the Accused No.2 would not deliver the product. In a case of there being several simultaneous demands of purchase in excess of the firm's production capacity, the Accused No.2 would consider selling the product to an old customer first and to be according to giving the information of rubber usage plans in order. The Accused No.2 had ever made a refusal to sell the product to other purchasers if the quantity of purchase order was in excess of the production capacity of the Accused No.2 or if a purchaser did not proceed with the request for making the mix design for the road surface according to procedures. In a case of the Complainant, the Accused No.2 did not sell the product to the Complainant since the Accused No.2 received the contact from the Complainant for only asking information on whether or not there was the rubber product EMAE to sell. However, the Complainant did not contact the Accused No.2 to ask for making the mix design for the road surface in order to further apply for the approval from the Department of Highways.

In a case of a machine being necessary for coating the road surface in the form of Para Slurry Seal Type III, the information on this issue has been obtained from the Complainant. The Complainant accepted that the Complainant did not have a rubber paver for Para Slurry Seal. However, the Complainant made an excuse that the Complainant contacted to rent the machine from other firms, i.e. J. Limited Partnership, SO. Company, K. Company, S. Company, and L. Company (L. Limited Partnership is correct). In this regard, the aforesaid companies and partnerships were prepared to rent the machine to the Complainant. On the other hand, according to the statements made by Mr. J., who is an attorney for J. Limited Partnership, Mr. L., who is an attorney for SO. Company, Mr. S., a managing director of K. Company, Mr. W., a managing director of S. Company, and Mr. N., a managing partner of L. Limited Partnership, the aforesaid companies and partnerships never agreed with the Complainant to rent the machine in coating the road surface in the form of Para Slurry Seal. This was because each firm had only one machine and had to use the machine to operate for its own project.

The Trade Competition Commission is of the opinion that in selling the product in the kind of rubber EMAE (CSS-1h) to be used for coating the road surface in the form of Para Slurry Seal Type III, both Accused had criteria and procedures for selling the product to new customers who contacted them to buy the product. This was because the aforesaid product was that to be manufactured under a buyer's purchase order. The aforesaid product was not that to be kept in stock waiting for sale. In addition, the aforesaid product was not a ready-made one which a buyer could use it by himself/herself directly. The aforesaid product, however, was required to be mixed with other materials and to be approved by the Department of Highways prior to being used. Moreover, a machine for coating the road surface

with the rubber EMAE was required. It has been found that there was no evidence (both witness and documentary evidence) showing that the Complainant complied with the criteria and policy of both Accused on making the purchase order for the rubber product EMAE, particularly the request and sending of the sample of stone to the Accused No.1 and the Accused No.2 in order to make the mix design and to further apply for the approval from the Department of Highways. In a case of a machine being necessary for coating the road surface, it has been found that the firms from whom the Complainant contacted to rent the machine refused that they did not rent the machine to the Complainant. Based on evidence, it is therefore believed in the facts which have been argued by both Accused that the Complainant did not comply with criteria and procedures for making the purchase order for the rubber product EMAE and the Complainant did not have the machine being necessary for coating the road surface in the form of Para Slurry Seal Type III. Therefore, the facts that both Accused did not sell the rubber product EMAE to the Complainant were the acts of both Accused in the normal course of business in the care and prevention of damage which would result from not having been paid the price of the product owing to the unreliability of the customer who came to do business. It has not been found that both Accused committed any act in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment or restriction of the business operation of the Complainant, or for intervening in the business operation of the Complainant or closing down the business operation of the Complainant under Section 29 of the Trade Competition Act B.E. 2542 (1999). In addition, it has not been hold that both Accused committed any act which resulted in damage to the Complainant in the unfair manner of impeding the business operation of the Complainant, or exercised the dominance of market power or a superior bargaining power in an unfair manner, or fixed trading conditions which resulted in the restriction or obstruction of the business operation of the Complainant in an unfair manner under Section 57 of the Trade Competition Act B.E. 2560 (2017) in all respects. As a result, the acts of both Accused under the complaint made by the Complainant did not violate Section 29 of the Trade Competition Act B.E. 2542 (1999) or Section 57 of the Trade Competition Act B.E. 2560 (2017).

Resolution of the Trade Competition Commission

The Trade Competition Commission has a unanimous resolution that both Accused are not the business operators with market dominance according to Section 25 of the Trade Competition Act B.E. 2542 (1999) and Section 50 of the Trade Competition Act B.E. 2560 (2017). In addition, both Accused did not commit any act in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment or restriction of the business operation of the Complainant, or for intervening in the business operation of the Complainant or closing down the business operation of the Complainant according to Section 29 of the Trade Competition Act B.E. 2542 (1999). Also, both Accused did not commit any act

which resulted in damage to the Complainant in the unfair manner of impeding the business operation of the Complainant, or exercise the dominance of market power or a superior bargaining power in an unfair manner, or fix trading conditions which resulted in the restriction or obstruction of the business operation of the Complainant in an unfair manner according to Section 57 of the Trade Competition Act B.E. 2560 (2017). The Trade Competition Commission therefore has an order not to file a lawsuit against both Accused and without making accusations against them.