

**กฎหมายการแข่งขันทางการค้าของไทยกับกรอบนโยบายการแข่งขัน
ทางการค้าของ ASEAN**

**Thai Trade Competition Laws and the ASEAN Framework on
Competition Policy***

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Abstract

Competition policy and law is a vital tool to level playing field to all market participants to create free and fair competition, which is desirable for consumer welfare and ASEAN economic integration. This is a rationale behind the ASEAN Regional Guidelines on Competition Policy (ASEAN Guidelines being issued to be a common framework for all ASEAN Member States to develop their national competition policy and law. This study found that there were many areas under the Trade Competition Act B.E.2542, which did not conform to the ASEAN Guidelines, including the inappropriate exclusion for all types of state-owned enterprises, merger control being inapplicable in practice, the imposition of criminal sanction to unfair trade practices and some problems concerning enforcement and due process. However, the Trade Competition Act B.E. 2542 was applicable before the introduction of the ASEAN Regional Guidelines on Competition Policy. Therefore, under the new competition law reform the Trade Competition Act B.E. 2560 was designed to be basing more on the ASEAN

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Guidelines and international best practices. Some problems about the inappropriate exclusion and the delay in issuing the Commission criteria concerning merger control were solved by the new competition act. More independence, impartiality, transparency and accountability are guaranteed in application and enforcement of the competition law. The Trade Competition Act B.E.2560 clearly shows the development of competition law in Thailand basing on the framework of the ASEAN Guidelines.

Keywords: The Trade Competition Act B.E.2542, the Trade Competition Act B.E.2560, ASEAN Regional Guidelines on Competition Policy

บทคัดย่อ

นโยบายการแข่งขันทางการค้าและกฎหมายการแข่งขันทางการค้าเป็นเครื่องมือสำคัญในการสร้างสภาพการแข่งขันที่เท่าเทียมกันให้กับคู่แข่งในตลาดทั้งหมดโดยช่วยให้เกิดการแข่งขันที่เสรีและเป็นธรรมซึ่งเป็นสิ่งสำคัญต่อความเป็นอยู่ที่ดีของผู้บริโภคและการรวมกลุ่มทางเศรษฐกิจของอาเซียน ด้วยสาเหตุเหล่านี้อาเซียนจึงจำเป็นต้องจัดทำ ASEAN Regional Guidelines on Competition Policy ขึ้นมาเพื่อเป็นกรอบร่วมกันในทุกๆประเทศสมาชิกอาเซียนในเรื่องนโยบาย และกฎหมายการแข่งขันทางการค้า โดยมุ่งหมายให้ทุกๆประเทศพัฒนานโยบายและกฎหมายการแข่งขันทางการค้าภายใน ประเทศให้อยู่ในกรอบร่วมกันดังกล่าว งานวิจัยนี้พบว่าพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 มีหลายส่วนที่ไม่สอดคล้องกับหลักการของ ASEAN Regional Guidelines on Competition Policy เช่น เรื่องข้อยกเว้นการบังคับใช้กฎหมายที่ไม่เหมาะสมสำหรับรัฐวิสาหกิจทุกประเภทตามกฎหมายว่าด้วยวิธีการงบประมาณ การควบรวมกิจการที่ไม่สามารถถูกควบคุมได้จริงในทางปฏิบัติ การกำหนดโทษทางอาญากับการปฏิบัติทางการค้าที่ไม่เป็นธรรมและปัญหาเกี่ยวกับการบังคับใช้กฎหมายและหลักคุณนิติกระบวนการที่ดี (Due Process) แต่พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 มีผลบังคับใช้ก่อนที่จะมีการออก ASEAN Regional Guidelines on Competition Policy ดังนั้นการปฏิรูปกฎหมายการแข่งขันทางการค้าในรูปแบบของพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560 ได้ถูกออกแบบมาให้อยู่บนหลักการของ ASEAN Regional Guidelines on Competition Policy และแนวปฏิบัติที่ดีที่สุดในระดับนานาชาติมากยิ่งขึ้น ปัญหาบางประการเกี่ยวกับข้อยกเว้นการบังคับใช้กฎหมายที่ไม่เหมาะสมและความล่าช้าในการออกหลักเกณฑ์ เกี่ยวกับการควบรวมกิจการได้ถูกแก้ไขโดยบทบัญญัติของกฎหมายการแข่งขันทางการค้าฉบับใหม่ มีหลักประกันความเป็นอิสระ ความเป็นกลาง ความโปร่งใส และหลักความรับผิดชอบในการใช้และการบังคับใช้กฎหมายที่ดีขึ้น พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560 ได้แสดงให้เห็นถึงพัฒนาการของกฎหมายการแข่งขันทาง

การค้าของประเทศไทยอย่างชัดเจนว่าได้มีการพัฒนาให้อยู่ภายในกรอบของ ASEAN Regional Guidelines on Competition Policy มากยิ่งขึ้น

คำหลัก: พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542, พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560, แผนนโยบายการแข่งขันทางการค้าในระดับภูมิภาคของอาเซียน

Introduction

Competition policy and law are important because their roles are levelling playing field, protecting the competition process leading to economic benefits of competition, improving quality and more variety of goods and services while the prices are reduced, promoting consumer welfare, supporting well-functioning market economy, improving allocative and productive efficiency.¹ By having competition policy and law to level playing field, free and fair competition can be created, which facilitate the ASEAN economic integration. This is a reason why the AEC Blueprints include the competition policy part as a main element to create competitive, innovative and dynamic ASEAN.² It is also necessary to create the suitable market environment with free and fair competition to facilitate other the AEC Blueprint's goals particularly ,to enable to market access into the ASEAN single market. These benefits deriving from having competition in the market create the well-being of consumers and social wealth.³ Competition policy and law are an important tool to the process of the ASEAN liberalization and the formation of single market.⁴ Thus, ASEAN member states must introduce a nation-wide competition policy and law and develop them basing on the international best practices and ASEAN Regional Guidelines on Competition Policy (ASEAN Guidelines).⁵ The

¹ Ulla Schwager, Elizabeth Gachuri, "Objectives and Scope of Competition Law and Policy & Institutional Arrangement for Competition Law Enforcement," [Online]. Available at: http://www.diplomacydialogue.org/images/files/Schwager&Gachuri_Combined%20PPT%20on%20comp%20lawandpolicy%20institu%20framework.pdf. Access date February 1, 2018.

² AEC Blueprint 2016-2025

³ Lawan Thanadsillapakul, "The Harmonisation of Asean Competition Laws and Policy from an Economic Integration Perspective," [Online] Accessed: 12 September 2016. Available at: <http://www.thailawforum.com/articles/theharmonisation.html>. Access date February 1, 2018

⁴ ASEAN Competition Action Plan (2016-2025)

⁵ AEC Blueprint 2015. See also: Strategic measures of the AEC Blueprint 2016-2025

ASEAN Guidelines is provided for AMSs to be the common framework, which basing on international best practice, to create free and fair competition environment in national and regional level. If all AMSs implement the Guidelines into their competition regimes, it will fasten the development of competition law and facilitate the achievement of the AEC's Blueprint goals. However, Thai Trade Competition Act B.E. 2542 was applicable before the ASEAN Guidelines being issued. This made some parts of Thai competition law did not conform to the ASEAN Guidelines. Moreover, this competition act was widely criticized about the inappropriate provisions that inconsistent with the international best practices of competition law, including the exception of application to state-owned enterprises, the imposition of criminal sanctions to unfair trade practices and anti-competitive mergers. Ineffective enforcement, structural problem of the Commission and Office of Trade Competition Commission (OTCC) and some due process issues were the problems of the Trade Competition Act B.E. 2542.⁶ Overall, the Trade Competition Act could not successfully fulfill its objectives.

These problems resulted in Thai competition law B.E. 2542 not conforming to international best practices and the ASEAN Guidelines.⁷ As a result of these problems, competition law in Thailand need to be developed by using the ASEAN Guidelines as the framework. The ASEAN Guidelines is a good framework because its contents basing on country experiences and international best practices with the objective to enhance and expedite the development of domestic competition policy and law of all AMSs.⁸ Thai government realized that there were many restrictions in the enforcement of the Trade competition act B.E. 2542. The role of competition law in creating free and fair trade is necessary for the Thailand 4.0 policy of this government because promoting free and fair competition will improve market access and trading environment in Thailand. More competition will force all market players to improve their products so enabling creativity and innovation. The ultimate goal is

⁶ วันรัช มิ่งมณีนาคิน, “รายงานที่ตีอาร์ไอ เรื่องพระราชบัญญัติว่าด้วยการแข่งขันทางการค้า พ.ศ. 2542: ข้อจำกัดและการปฏิรูป” ฉบับที่ 92 เดือนมีนาคม 2554 (ฉบับพิเศษ), พิมพ์ครั้งที่ 1 เดือนกรกฎาคม 2554 Available at: <https://tdri.or.th/wp-content/uploads/2012/09/wb92.pdf>. Access date February 3, 2018

⁷ Sathita Wimonkunaruk, Implementing “the ASEAN Regional Guidelines on Competition Policy” in Thailand, Indonesia, Singapore and Vietnam: Challenges and Opportunities (Doctoral Thesis) Faculty of Law, Chulalongkorn University. (2017)

⁸ ASEAN Regional Guidelines on Competition Policy, (i)-(ii)

competitiveness in Thailand will be enhanced.⁹ Thus, the competition law reform was initiated. The Trade Competition Act B.E. 2560 is the new applicable competition law in Thailand. It is interesting to assess whether it really conforms to ASEAN Guidelines and international best practices or not.

This article has an objective to disseminate the findings of the research concerning the development of Thai competition laws under the ASEAN competition framework. This article is divided into three parts. The first part is introduction. The second part is the comparative analysis of the Thai Trade Competition Act B.E.2542 and Thai Trade Competition Act B.E.2560 to assess the development of competition law in Thailand by using the ASEAN Guidelines as the benchmark in the main important issues. While the last part presents conclusion and recommendations for the further development of competition in Thailand.

The Development of the Thai Trade Competition Acts Basing on the ASEAN Framework on Competition Policy?: The Analysis of Thai Trade Competition Act B.E.2542 and Thai Trade Competition Act B.E.2560

The scope of analysis in this paper focuses only on important issues as follows:

Scope of Application and Exclusions

The first issue is about the scope of application and exclusions. Under the Trade Competition Act B.E. 2542, there was controversial exclusion, particularly on states-owned enterprises (SOEs) being excluded from the application of this act¹⁰ so creating unlevelled playing fields between business operators and SOEs. This exclusion made some SOEs, which operating for making profits and directly competing with businesses, also fall within the scope of exclusion. These SOEs are excluded without sound justifications behind. This is against the principle of the application of competition law under international best practices and the ASEAN Guidelines. Under the ASEAN Guidelines, competition law should have general application to all commercial economic entities, including state-owned enterprises.¹¹ Under the Trade Competition Act B.E. 2560, one of the objectives of law reform was to amend this controversial

⁹ Office of Trade Competition Commission, “Thai Trade Competition Act B.E. 2560”, Available at: <http://otcc.dit.go.th/wp-content/uploads/2017/10/OTCCPresentationat.pdf>. Access date February 5, 2018

¹⁰ Trade Competition Act B.E. 2542, Section 4(2)

¹¹ ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.2

exclusion of the Trade Competition Act B.E. 2542. The new exclusions are better and basing more on ASEAN Guidelines¹² and international best practices because the exclusion on SOEs was made clearer only on SOEs that undertaken for the benefits of maintaining national security, public interest, the interests of society or for the provisions of public utilities according to the law or Cabinet resolution necessary.¹³

Main Prohibited Conducts

The second issue is about the main prohibitions of competition law.

(a) Abuse of Dominant Position

The scope of abuse of dominant position under the Trade Competition Act B.E. 2542 is not changed from those of indicating in the Trade Competition Act B.E. 2560. Both acts have quite similar provisions on the abuse of dominance prohibition. The contents of both acts on abuse of dominant position have already based on the ASEAN Guidelines and international best practices. Section 92 of the new act enables the criteria for identifying the dominant position under the Trade Competition Act B.E. 2542 remains effective. Therefore, under the abuse of dominance area, almost nothing is changed unless the new appointed Commission will issue the new notification on the criteria for business operator with market domination.

(b) Hardcore Cartels

Under Trade Competition Act B.E. 2542, hardcore cartels are in Section 27(1)-(4). The restrictive agreements that fall within Section 27(1)-(4) cannot ask for permission from the Commission to undertake like the non-hardcore cartels that indicated in the Section 27(5)-(10). Hardcore cartels are agreements between competitors to fix price, restrict output, to have market domination or market control and bid-rigging. The ASEAN Guidelines and international best practices also categorize these restrictive agreements between competitors as hardcore cartels.¹⁴ In this area Thai Trade Competition Act B.E. 2542 bases on the framework of the Guidelines and international best practices.

While the hardcore cartels under the Trade Competition Act B.E. 2560 is completely separated from non-hardcore cartels in specific provision, which is Section 54. Market allocation between

¹² Ibid, Chapter 3.5.4

¹³ Trade Competition Act B.E. 2560, Section 4(2)

¹⁴ ASEAN Regional Guidelines on Competition Policy, Chapter 3.2.2

competitors is categorized as hardcore cartels under the new act. By including market allocation between competitors into hardcore cartels makes the Thai competition law more conform to international best practices and the ASEAN Guidelines.¹⁵ However, agreements between non-competitors to allocate market is non-hardcore cartels and falling under Section 55(1). The new act considers the principle of single economic entity¹⁶ as the exception of Section 54, which create clearer interpretation of this provision.

(c) Non-Hardcore Cartels

While non-hardcore cartels are identified in the Section 27(5)-(10) of the Trade Competition Act B.E. 2542. If business operators have commercially necessary reasons to undertake what fall within Section 27(5)-(10) for a specific period of time, they can submit an application to the Commission to consider granting permission. While the non-hardcore cartels, including vertical agreements, are prohibited under Section 55 of the new competition act. The exceptions of this prohibition are clearly indicated in the Section 56, which are the actions conducted by business operators regarded as single economic entity, agreement for the purpose of research and development, agreements related to the use of intellectual property rights and any agreements prescribed in the ministerial regulation on the Commission's advice. By indicating the clear exceptions reduces the ambiguity, which is the flaw of the old act. These exceptions are sound because they fall within the scope of the ASEAN Guidelines and international best practices.¹⁷

(d) Merger Control

Merger control under the Trade Competition Act B.E. 2542 was the pre-merger control identified in the Section 26. This merger control under this provision requires the Commission criteria specifying the minimum amount or number of market share, sale volume, capital, shares or assets in order to be applicable. Unfortunately, the merger control under Section 26 had never been applicable because no such Commission criteria concerning merger being

¹⁵ Ibid, Chapter 3.2.2

¹⁶ The single economic entity is generally accepted principle under international competition law. A business operator that are related to the other business operator through policy or commanding powers as prescribed in the Commission's notification are regarded as the same single economic entity so their jointly conducts or agreements are not considered hardcore cartels under Section 54.

¹⁷ ASEAN Regional Guidelines on Competition Policy, Chapter 3.5 Exemptions or Exclusions from Application of Competition Law

issued. During the application of the Trade Competition Act B.E.2542, the merger control was inapplicable for almost two decades, which was consider the unduly delay. Therefore, in Thailand the merger had never been controlled in practice so in this point made Thai competition law fail to conform to the ASEAN Guidelines.¹⁸ This problem was widely criticized because the criteria determining dominant position was also delayed in issuance. However, the problem about the delay in issuing the related ministerial regulations, notifications or criteria under the old competition act is solved by the new act by requiring the issuance of these related regulations, notifications and criteria within 365 days from the effective date of the Trade Competition Act B.E. 2560.¹⁹ This sets the maximum timeframe to prevent the unduly delay of such issuance.

Under the Trade Competition Act B.E. 2560, the merger control is divided into two categories. The first category is mergers leading to monopoly or dominant position in the relevant market. Permission from the Commission is required for this category of mergers.

While the second category is mergers that may substantially reduce competition in the market requiring no permission. However, there is an obligation to notify the outcome of the merger within seven days from the date of merging occurred to the Commission. The ASEAN Guidelines leaves the room for AMSs to decide whether to use pre or post merger control, voluntary or mandatory notification in merger control as long as mergers leading to substantially lessening competition are prohibited.²⁰ The kinds of business transactions falling within the scope of merger are similar between the old and the new competition acts, which are mergers and acquisitions by acquiring all or part of the assets or stocks of others business. A development is found in an exclusion of merger control under the new act, which is merger control will not be applied to mergers conducted with the objective to adjust internal structure of a business operator.²¹

(e) Unfair Trade Practices

Unfair trade practices under the Trade Competition Act B.E. 2542 aimed to be the sweeping provision for anti-competitive behaviors that not falling within the scope of other main

¹⁸ Ibid, Chapter 3.4 Prohibition of Anti-competitive Mergers

¹⁹ Trade Competition Act B.E. 2560, Section 92

²⁰ ASEAN Regional Guidelines on Competition Policy, Chapter 3.4 Prohibition of Anti-competitive Mergers

²¹ Trade Competition Act B.E. 2560, Section 51

prohibitions. The main broad concept was given without raising any example of what actions can fall within this provision. However, under the Trade Competition Act B.E. 2560, the clearer scope of unfair trade practices is given. To violate this prohibition the business conducts must fall within one of the Section 57(1) to (4). However, this does not mean that the scope of this prohibition narrower than the Trade Competition Act B.E. 2542 because Section 57(4) enables the Commission to issue notification to identify more unfair trade practices beyond what prescribed in the Section 57(1)-(3). The ASEAN Guidelines just simply mentions that national competition law of AMSs should include the prohibition of unfair restrictive trade practices without clarifying its scope.²² Therefore, in this area Thai competition laws; both the old and new acts, base within the ASEAN Guidelines' framework.

(f) Unreasonable Agreement with Foreign Firms

Unreasonable agreement with foreign firms provision under the Trade Competition Act B.E. 2542 (Section 28) is quite broad comparing to the equivalent provision under the Trade Competition Act B.E. 2560. Section 58 of the new competition act gives clearer and more specific scope for this prohibition. The new prerequisite conditions for this provision are being a business operator carrying out a legal act or entering a contract with a business operator in a foreign country without appropriate justification. This must result in a monopoly conduct or unfairly restricting trade and causing serious harm to the economy and consumers' benefits as a whole. Therefore, it seems to be more difficult to fall within the scope of Section 58 than under the equivalent prohibition under the competition act B.E. 2542. Under the framework of the ASEAN Guidelines, it does not have equivalent prohibition as unreasonable agreement with foreign firms. Therefore, the ASEAN Guidelines will not be benchmarked in this point. In fact, all AMSs have flexibilities to develop national competition laws basing on the broad framework of the ASEAN Guidelines. Differences in competition laws among AMSs can be found. ASEAN is not in the level to unify or harmonize competition laws in all AMSs. As long as all AMSs have the common main prohibitions, which are the abuse of dominant position, anti-competitive agreements, merger control and unfair trade practices, it is acceptable.

²² ASEAN Regional Guidelines on Competition Policy, Chapter 3.1.1.2

Enforcement

Both acts contain both public and private enforcement, which consistent with the ASEAN Guidelines²³ and international best practices. Public enforcement is the main enforcement channel but private enforcement is allowed for suffered parties to claim damages occurred from the violation of competition law. Representative suit is enabled in both acts.²⁴ Public enforcement is a main responsibility of the Commission with the help of the Office of Trade Competition Commission (OTCC).

Enforcement Agency

(a) The Trade Competition Commission

New structure of the Thai Trade Competition Commission more conforms to the ASEAN Guidelines in terms of due process: more independence and impartiality guaranteed, which make the qualifications of the commission less vulnerable to the political influence and reduces some criticisms about

1. Level of independence of the commission
2. Too many representative commissioners from private sectors
3. Not working full-time
4. Outnumbered of the Commission causing difficulty in the operation and making an appointment.²⁵ In fact, many competition regimes face this problem.²⁶ Under the old competition act, the number of the Trade Competition Commissioners was quite high causing difficulty and delay in their performance. The number of the Trade Competition Commission under the new competition act is, thus, reduced to only 7 Commissioners. This can lessen a problem about difficulty in finding the perfect date to organize the Commission's meeting.

The working term of each Commission under the new competition act is expanded from a two-year term under the old competition act to a four-year term. This is appropriate

²³ ASEAN Regional Guidelines on Competition Policy, Chapter 6

²⁴ Trade Competition Act B.E. 2542, Section 40, Trade Competition Act B.E. 2560, Section 69

²⁵ The Trade Competition Act B.E. 2560, Section 8, 9, 10

²⁶ William Kovacic, "AEC and Competition Laws: Opportunities and Challenges," (Academic Seminar Proceedings organized by the Chulalongkorn University (2013).

because it can ensure continuity in the operation, which is consistent with the due process under the ASEAN Guidelines.

(b) The Office of Trade Competition Commission (OTCC)

The significant development under the new competition act is on the more independent of Thai competition agency. This made the Trade Competition Act B.E.2560 more consistent with the principle of the ASEAN Guidelines in ensuring the degree of administrative independence of the competition agency as much as possible. Under Section 27 of the new competition act established the Office of Trade Competition Commission as a government agency with the status of legal person. It is not a part of civil service nor a state-owned enterprise. This is one of the major reform of this act. By establishing the OTCC outside the Ministry of Commerce having its own legal status, not being a part of civil service nor a state-owned enterprise, this makes the OTCC acquiring higher degree of independence in its operation. There are some internal regulations of the OTCC that shows the higher degree of independence in many aspects, for example higher degree of independence in internal administration and operation of the OTCC²⁷ and independence in controlling human resource management.²⁸ Currently, Thai competition agency not only reaches the ASEAN Guidelines' standard but also conforms to the good structure of competition agency that is supposed to be according to the view of Kovacic and Winerman . They believe that the good competition agency needs to strike the right balance between maintaining independence and not being completely isolated and disconnected from the government.²⁹

²⁷ ระเบียบคณะกรรมการการแข่งขันทางการค้าว่าด้วยการบริหารงานสำนักงานคณะกรรมการการแข่งขันทางการค้าเป็นการชั่วคราว พ.ศ. 2560 Available at:

<http://otcc.dit.go.th/wp-content/uploads/2015/02/botcc-reculate-manage.pdf>. See also ระเบียบคณะกรรมการการแข่งขันทางการค้า ว่าด้วยโครงสร้างและการแบ่งส่วนงานภายในของสำนักงานคณะกรรมการการแข่งขันทางการค้า พ.ศ. 2561 Available at: <http://otcc.dit.go.th/wp-content/uploads/2015/02/botcc-regulate-structur.pdf>

²⁸ ระเบียบคณะกรรมการการแข่งขันทางการค้า ว่าด้วยการบริหารทรัพยากรบุคคลของสำนักงานคณะกรรมการการแข่งขันทางการค้า พ.ศ. 2561 Available at: <http://otcc.dit.go.th/wp-content/uploads/2015/02/botcc-regulate-human.pdf>

²⁹ William Kovacic and Marc Winerman, "The Federal Trade Commission as an Independent Agency :

Sanctions

Another point to consider is concerning sanctions under competition laws. The ASEAN Guidelines indicates that AMSs may impose criminal, administrative or civil sanctions upon substantive and procedural infringement of competition law.³⁰ According to Section 51 of the Trade Competition Act B.E. 2542, criminal sanction in terms of imprisonment and/or criminal fines between two to six million Baht are applied to all main prohibitions under this act. The term of imprisonment that can be applied for the violation must not exceed three years. This is considered quite high for the violation of merger control and unfair trade practices because they merely cause economic damages. Unfair trade practices are not likely to cause substantial economic damages so imposing imprisonment for committing unfair trade practices is quite high sanction. The sanctions under the new competition act show some development. They are modernized to be more consistent with the international best practices, which laying down the principle that criminal sanctions under competition law should be maintained only for hardcore cartels. However, under the Trade Competition Act B.E. 2560 criminal sanctions are maintained for the violation of abuse of dominance under Section 50 and anti-competitive agreements (hardcore cartels) under Section 54. The maximum period for imprisonment is reduced to only two years.³¹ Similar to the competition act B.E.2542, the criminal sanction is maintained for not complying with the summons document, not facilitating officers or obstructing officers in the performance of their duties.³²

Another major change under the new competition act is an introduction of administrative sanction in terms of administrative fines. Administrative fines are applied if Section 51,53, 55,57 or 58 is violated, which replacing the imposition of criminal sanction. The violation of Commission's orders, for example cease or suspend orders and correct or change of conduct orders also leads to the administrative fines.³³ Replacing criminal sanction with the

Autonomy, Legitimacy, and Effectiveness, "Iowa L. Rev., 2085-2113)2015.(Available at: <https://ilr.law.uiowa.edu/assets/Uploads/ILR-100-5-Kovacic-Winerman.pdf>, Access date February 1, 2018

³⁰ The ASEAN Regional Guidelines on Competition Policy, Chapter 6.7 Sanctions

³¹ Trade Competition Act B.E. 2560, Section 72

³² Ibid, Section 73, 74 and 75

³³ Trade Competition Act B.E. 2560, Section 83

administrative fines is reasonable because these violations mainly cause economic damages. Imposing criminal sanction to these business actions is inappropriate and proving guilty under the principle of proving beyond reasonable doubt in the criminal procedure put the competition authority a high burden of proof. This high burden of proof for filing criminal lawsuit is a main problem of the competition act B.E.2542. Therefore, the imposition of administrative fines instead of criminal sanctions seems to be a good idea.

Due process

Due process is fundamental in ensuring the effective application of competition law so it is specifically mentioned in Chapter 7.1 of the ASEAN Guidelines.³⁴ According to the international best practices and the ASEAN Guidelines, competition enforcement authority should guarantee independence, impartiality, transparency, accountability, consistency, confidentiality, timeliness, check and balance system and commission's decisions should be subjected to the judicial review.³⁵ These due process should be guaranteed to make the effective competition agency.³⁶ However, many due process problems are found in the competition act B.E.2542. More accountability and transparency were required in terms of the publishing minutes of commission's meetings and commission's decisions with the clear legal reasoning behind.³⁷ Moreover, accountability can be shown by publishing the annual report. However, there are only two annual reports available through the OTCC's official website, which are the report in 2013 and the report in 2014.³⁸ The new competition act solves this

³⁴ ASEAN Regional Guidelines on Competition Policy, Chapter 7.1

³⁵ Ibid, Chapter 7

³⁶ UNCTAD, "The Foundation of an Effective Competition Agency" Available at:

http://unctad.org/en/Docs/ciclpd8_en.pdf. Access date October 8, 2017

³⁷ ศักดา ธนิตกุล และคณะ, "รายงานฉบับสมบูรณ์ โครงการศึกษาวิจัยเรื่องการปรับปรุงกลไกการบังคับใช้พระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542", p. 209. See also: UNCTAD, "Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries Thailand, Lao, Kenya, Zambia, Zimbabwe " Available at: http://unctad.org/en/Docs/ditccplp20052_en.pdf, Access date January 31, 2018. p. 21

³⁸ Office of Trade Competition Commission, "2014 Annual Report," Available at: http://otcc.dit.go.th/?page_id=286. Access date February, 3 2018.

problem by clearly obliging the OTCC to publish commission's decision³⁹ and annual reports.⁴⁰ This helps enhancing the level of due process in Thai competition law.

Under the Trade Competition Act B.E. 2542, investigation and case-handling process before the prosecutor bringing the case to the court faced the timeliness problem. This appears in the complaint against Honda Company that it forced its customers to do the exclusive agreement. This case could have been a milestone case; however, the prosecutor decided not to sue by giving the reason that there was an inadequate evidence to bring the lawsuit. This made an unhappy ending to ten-year attempt of the commissions and the OTCC because the prosecution was precluded by ten-year prescription.⁴¹ This is another major problem of the competition act B.E. 2542. Consequently, Section 25 of the new act lessens this problem by obliging the Attorney General to notify the commission for any details for incomplete areas to file a lawsuit and establishing a joint working group to consider any incomplete evidence and gather additional evidence.⁴²

Furthermore, impartiality and transparency of the commission was questioned because some of commissioners were bureaucrats and half of them were representative from private sectors.⁴³ This made the Thai commission's structure different from those of other commissions in the international level.⁴⁴ The institutional structure of the OTCC and status of OTCC's officials as civil servants in the Internal Trade Department Ministry of Commerce made it harder to avoid the political influence in the eyes of the outsiders.⁴⁵ The degree of independence of competition agency affects the transparency and impartiality of competition

³⁹ Trade Competition Act B.E. 2560, Section 29(12)

⁴⁰ Ibid, Section 29(13)

⁴¹ เดือนเด่น นิคมบริรักษ์, "การสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย: การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย" (กรุงเทพฯ: เป้นไท 2555), หน้า.24.

⁴² Trade Competition Act B.E. 2560, Section 25

⁴³ Trade Competition Act B.E. 2542, Section 6

⁴⁴ เดือนเด่น นิคมบริรักษ์, "การสำรวจองค์ความรู้เพื่อการปฏิรูปประเทศไทย: การปฏิรูปเพื่อลดการผูกขาดและส่งเสริมการแข่งขันในเศรษฐกิจไทย" (กรุงเทพฯ: เป้นไท 2555), หน้า.35.

⁴⁵ Duenden Nikomborirak, "Political Economy of Competition Law: The Case of Thailand the Symposium on Competition Law and Policy in Developing Countries," *Northwestern Journal of International Law & Business* , 600-601

agency.⁴⁶ This is why the ASEAN Guidelines recommends all ASEAN members to guarantee administrative independence as much as possible.⁴⁷

It can be seen that the Trade Competition Act B.E. 2542 did not fully guarantee due process required by the ASEAN Guidelines. This led to a lot of criticisms on this act. Thus, guaranteeing more independence of the OTCC in its operation and resource management⁴⁸ as well as impartiality and full-time working for the commission are the main development of the Trade Competition Act B.E. 2560.⁴⁹ While the decisions of commission are subjected to the judicial review in both old and new competition acts. The criminal court had jurisdiction under old act. However, under the new act any criminal or civil lawsuits shall be under the jurisdiction of intellectual property and international courts.⁵⁰ This is also an improvement in Thai competition law because competition cases requiring the specialized knowledge in both legal and economics areas. The new competition law puts competition cases under the jurisdiction of specialized courts are more appropriate and conform to the ASEAN Guidelines.⁵¹ While appealing commission's orders concerning mergers is under the jurisdiction of administrative court.⁵² Section 85 indicates that administrative courts have power to enforce administrative fine and administrative orders. Overall, the new competition law improves the due process in the operation of the Commission and the OTCC.

Competition advocacy

Competition advocacy is another vital task of competition agency to build culture of compliance among businesses and foster competition culture in Thailand. Under the ASEAN

⁴⁶ OECD, "Independence of Competition Authorities – from Designs to Practices," Available at: [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)56/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)56/en/pdf). Access date January 30, 2018

⁴⁷ ASEAN Regional Guidelines on Competition Policy, Chapter 4.3.3

⁴⁸ The new competition act Section 29(11) and Section 44-45 enable the OTTC to receive fees, remunerations and service charges from its operation will be used for its operating expenses, appropriate charges and benefits to commission and sub-committees

⁴⁹ Trade Competition Act B.E. 2560, Section 7-10, 16

⁵⁰ Ibid, Section 26

⁵¹ ASEAN Regional Guidelines on Competition Policy, Chapter 7.1.4.3

⁵² Ibid, Section 52

Guidelines, competition advocacy can be divided into two main groups, which are competition advocacy for government and public authorities and competition advocacy for businesses and the rest of the stakeholders in the society. These two groups of competition advocacy are consistent with the international best practices.⁵³ However, under the Trade Competition Act B. E. 2542, the commission was not empowered to provide competition advices to the government. In fact, this type of advocacy is the important part of competition advocacy. However, the development in this competition advocacy area is found under the new Trade Competition Act B.E.2560. It is made clear for the first time in Section 17(11) of the new competition act stating that the commission has a duty to provide competition advices to Ministers and Cabinet. This provision improves competition advocacy in Thailand and makes it more conform to the AMSs' advocacy obligation imposed under the ASEAN Guidelines.⁵⁴

Summary Table

Conformity with the ASEAN Regional Guidelines on Competition Policy	Trade Competition Act B.E.2542	Trade Competition Act B.E.2560	The Development of Thai Competition Laws
Scope of Application and Exclusions	No, because the competition act B.E.2542 did not have general application to all	Yes, the new exclusions conform more on the ASEAN Guidelines ⁵⁶ because the	Yes, there is a development of Thai competition laws in this area because the

⁵³ ICN. "Advocacy and Competition Policy." Paper presented at the the Advocacy Working Group ICN's Conference Naples, Italy, 2002. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>. Access date January 30, 2018.

⁵⁴ ASEAN Regional Guidelines on Competition Policy, Chapter 9.1.4

⁵⁶ Ibid, Chapter 3.5.4

	commercial economic entities. Section 4(2) States-owned enterprises were being excluded from the application of this act ⁵⁵	exclusion on the SOEs was made clearer only on the SOEs that conducting for the benefits of maintaining national security, public interest, the interests of society or for the provisions of public utilities	exclusion concerning SOEs is narrower. The SOEs that are excluded must be SOEs operating for the benefits of maintaining national security, public interest, the interests of society or for the provisions of public utilities. Other SOEs must be under the scope of the application of the competition law. The new competition law helps levelling playing field for all market players.
Abuse of Dominant Position	Yes	Yes	Both acts have quite similar provisions on the abuse of dominance prohibition.
Hardcore Cartels	Yes Hardcore cartels were agreements between competitors to fix price, restrict output, to have market domination	Yes Anti-competitive agreements falling under the hardcore cartels are similar to the old competition act.	Yes By including market allocation between competitors into hardcore cartels makes the Thai competition law more conforms to the ASEAN Guidelines.

⁵⁵ Trade Competition Act B.E. 2542, Section 4(2)

	or market control and bid-rigging.	The change is on market allocation between competitors being added as hardcore cartels under the new act. ⁵⁷	The new act considers the principle of single economic entity ⁵⁸ as the exception of Section 54, which create clearer interpretation of this provision.
Non-Hardcore Cartels	Yes	Yes	Yes Sound exceptions are clearly introduced under the new act, which are 1. single economic entity 2. agreement for the purpose of research and development 3. agreements related to the use of intellectual property rights 4. any agreements prescribed in the Ministerial Regulation on the Commission's advice. These exceptions are sound and conform to the ASEAN Guidelines.

⁵⁷ ASEAN Regional Guidelines on Competition Policy, Chapter 3.2.2

⁵⁸ The single economic entity is generally accepted principle under international competition law. A business operator that are related to the other business operator through policy or commanding powers as prescribed in the Commission's notification are regarded as the same single economic entity so their jointly conducts or agreements are not considered hardcore cartels under Section 54.

Merger Control	<p>Not in practice.</p> <p>Thailand did have provision on merger control but there was a serious delay in the issuance of Commission criteria concerning merger. Thus, in practice mergers had never been controlled during the application of the Trade Competition Act B.E. 2542.</p>	<p>The problem under the old competition law will be solved because under the new act sets the maximum timeframe to prevent the undue delay of such issuance. Thus, it is expected that the Commission criteria concerning merger will be issue within 365 days from the effective date of the Trade Competition Act B.E. 2560.</p> <p>Under the new act, the merger control is divided into two categories.</p> <p>1. Permission from the Commission is required for mergers leading to monopoly or dominant position</p>	<p>Yes</p> <p>There is a provision clearly sets the maximum timeframe for issuing Commission criteria concerning merger.</p> <p>Another development is found in an introduction of an exclusion of merger control under the new act, which is merger control will not be applied to mergers conducted with the objective to adjust internal structure of a business operator.⁵⁹</p>
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⁵⁹ Trade Competition Act B.E. 2560, Section 51

		in the relevant market. 2. Notification about the outcome of the merger within seven days from the date of merging occurred to the Commission for mergers that may substantially reduce competition in the market	
Unfair Trade Practices The Guidelines just simply mentions that national competition law of AMSs should include the prohibition of unfair restrictive trade practices without clarifying its scope.	Yes, the Trade competition Act B.E.2542 prohibited unfair trade practices so it based within the ASEAN Guidelines' framework.	Yes, the Trade competition Act B.E.2560 prohibits unfair trade practices so it bases within the ASEAN Guidelines' framework.	Yes, under the Trade Competition Act B.E. 2560, the clearer scope of unfair trade practices is given in Section 57(1) to (4).

Enforcement	Yes	Yes	Both acts enable both public and private enforcement, which consistent with the ASEAN Guidelines.
Sanctions Under the ASEAN Guidelines, criminal, administrative or civil sanctions may be imposed for substantive and procedural infringement of competition law.	Yes, there were two types of sanctions: criminal and civil sanctions. However, the criminal sanction in terms of imprisonment and/or criminal fines between two to six million Baht were applied to all main prohibitions under this act. The problem was imprisonment seem to be quite high for the violation of merger control and unfair trade practices.	Yes, there are three types of sanctions: criminal, administrative and civil sanctions.	Sanctions are modernized to be more consistent with the international best practices. Criminal sanctions are maintained only for hardcore cartels and the violation of abuse of dominance. The maximum period for imprisonment is reduced to only two years. There is an introduction of administrative sanction.
Due process	There were some provisions aimed to guarantee due	More accountability, transparency,	Yes, there are some improvement in guaranteeing the due

	<p>process just like indicated in the ASEAN Guidelines.</p> <p>However, there were still some problems concerning due process, including the lack of independence of competition authority.</p>	<p>independence, impartiality and timeliness are guaranteed through many provisions under the Trade Competition Act B.E.2560.</p>	<p>process under the new competition act.</p>
<p>Competition advocacy</p> <p>Two groups of competition advocacy</p>	<p>Yes, the Trade Competition Act B.E. 2542 based partly within the ASEAN Guidelines' framework but not complete because under the Trade Competition Act B.E.2542 the commission was not empowered to provide competition advices to the government.</p> <p>Therefore, only one</p>	<p>Yes, there are two groups of competition advocacy.</p> <p>Section 17(11) of the new competition act stating that commission has a duty to provide competition advices to Ministers and Cabinet.</p>	<p>Yes, competition agency and the commission are empowered to conduct both types of competition advocacy under the new competition act rendering more conformity to the ASEAN Guidelines.</p>

	type of competition advocacy was conducted during the application of this act.		
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Conclusion and Recommendations

In summary, the new Trade Competition Act B. E. 2560 shows the big development of competition law in Thailand. Many inappropriate provisions and problems under the Trade Competition Act B.E.2542 were solved by the new act. This competition law reform in Thailand makes it more conform to the ASEAN Guidelines in many areas, for example scope and exclusion of competition law, guaranteeing of independence and impartiality of the commission and competition agency and the improvement on due process. The reform of competition law in Thailand is regarded as the major development and makes the the Trade Competition Act B.E.2560 basing more on the framework of the ASEAN Guidelines and the international best practices. Although during the application of the Trade Competition Act B.E.2542 its enforcement was ineffective for almost two decades, the competition law reform resulted in the substantial improvement on both substantive and procedural areas of competition law; though not a complete one. Therefore, it can be said that currently Thailand can fulfill the ASEAN competition strategic measure indicated in the AEC Blueprint 2016-2025 in basing national competition law on the international best practices and the ASEAN Guidelines.

The area that the OTCC and the commission are required to focus in the first place is advocating the new competition law to the public, particularly undertakings falling under the scope of application under this act. Thailand does not have strong competition culture so competition awareness is not high. Hence, the OTCC needs to put efforts and consistency in conducting competition advocacy in order to gradually educate public about the benefits of competition and foster competition awareness and culture in the Thai society. The recommendation is setting competition advocacy's objectives and clear advocacy plan tailored to suit different groups of targets with the post evaluation of competition advocacy

activities. Competition advocacy task is as important as enforcement task. The enforcement must be accompanied by competition advocacy⁶⁰ because the overall success of competition policy and law depend on both the enforcement and advocacy.⁶¹ Interpretation of the main prohibitions and the enforcement mechanism of this act should be made available to the public through commission's notifications or regulations.

Concerning the enforcement mechanism of the new act is set to reduce ineffectiveness under the Trade Competition Act B.E.2542. Therefore, many stakeholders are waiting to see whether the competition law reform can enhance the enforcement of competition law in Thailand or not. The high burden is put on the new structural competition law enforcement agency, which is set to be more independent, and the commission. It is expected that the new development in guaranteeing the more independent and impartiality of the OTCC and commission can lead to more effective enforcement of competition law. Moreover, internal training to build staff's expertise and capacity building should be supported. Thai government should support the enforcement of this act by providing adequate financial resources to the new competition agency and not inserting political interference in the enforcement of this act. A milestone competition case will gradually improve credibility of competition enforcement agency in the eyes of the public. Regarding the further development of Thai competition law, the introduction of leniency program is an interesting tool to increase opportunities in cartels enforcement. There is an evidence that the leniency program can increase the number of cartel detection both domestic and international cartels in many countries, for example the US, EU and Japan.⁶² The development of Thai competition laws can be seen from many problems under the Trade Competition Act B.E. 2542 to the new competition law reform under the Trade Competition Act B.E. 2560. It is too soon to conclude the result of the law reform so the application and the enforcement of the Trade Competition Act B.E. 2560 is

⁶⁰ ICN. "Advocacy and Competition Policy." Paper presented at the the Advocacy Working Group ICN's Conference Naples, Italy, 2002. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>. Access date January 30, 2018

⁶¹ ASEAN, "Toolkit for Competition Advocacy in Asean.", p. 6

⁶² Scott D. Hammond, "Cornerstones of an Effective Leniency Program," [Online] Accessed: 25 January 2016. Available from: <https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program>

worth keeping an eye on whether it will bring about the more effective enforcement in practice or not.

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