IN-DEPTH

Cartels And Leniency

THAILAND

LEXOLOGY

Cartels and Leniency

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In-Depth: Cartels and Leniency (formerly The Cartels and Leniency Review) provides a practical overview of the laws and policies aimed at combating cartel activity across key jurisdictions worldwide. It addresses major emerging and unsettled issues surrounding unlawful agreements with competitors, and analyses recent enforcement trends and regulatory changes – offering valuable insights to practitioners and corporates alike.

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Thailand

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Summary

Introduction

Whether horizontal or vertical, cartels are prohibited in Thailand and fall directly under a relatively new legislation whose predecessor dated back to 1999. The overseeing authority's policy is one of complete intolerance, and there is no leniency programme to act as the last-resort, get-out-of-jail card, making the formation of cartels a very dangerous, irreversible and non-rectifiable act. Cartels have historically been prevalent in Thai markets and, to this day, some of the seasoned operators still have not caught on that there is a prohibition against this kind of conduct in the private sector. Although the number of cases is low compared to other areas of prohibition under antitrust and trade competition law, investigation for cases remains unyielding and the proportion of cases that end with penalties is much higher than in other prohibited areas.

Year in review

The authority generally does not publish all cases that have been investigated and will only publish cases that they deem worthy as examples. In 2024, only one case of cartel investigation was published, and that case ended without penalties due to lack of clear evidence. Although this case was dropped, its presence within the authority's system serves as a reminder that cartels are not tolerated and, when discovered or placed on the authority's radar, will be vigorously pursued at a high actual cost to the alleged wrongdoer. It is, therefore, best to avoid creating any hint of a cartel.

Enforcement policies and guidance

The primary body of law in Thailand that addresses antitrust and trade competition is the Trade Competition Act BE 2560 (the 2017 Act), which itself can be dissected into a few areas of concern, namely:

1. merger control and filing under Section 51, which can be split into pre-merger approval filing (requiring official approval) and post-merger notification filing (a simple post-facto notification for monitoring purposes);
2. unilateral misconducts, which can be split into abuse of dominance under Section 50 for large operators who are deemed under the definition as dominant operators and generic misconducts under Section 57, applying to all operators large and small; and
3. cartel and other arrangements, which can be split into hardcore cartel under Section 54, soft cartel under Section 55 and cross-border cartel under Section 58.

Although only seven years old, the Act is a second reincarnation of its former self: the Trade Competition Act BE 2542 (the 1999 Act), the first ever version of the antitrust and trade competition law in Thailand. The former legislation saw very little action as supplementary regulations did not exist and cases could not be sufficiently prosecuted or

even addressed. The 2017 Act was enacted to replace the former law and in most places includes verbatim passages of the former law, but with proper supplementary regulations that have been quickly enacted after the 2017 Act's own enactment; it has thus become a force to be reckoned with among the private operators. Numerous cases have so far been investigated and prosecuted, with some cases being dropped and some subject to fines. However, those cases mostly concerned merger filings and unilateral misconduct. Very few concerned cartels.

In detail, the area of domestic cartel is addressed by Sections 54 and 55 of the 2017 Act. Section 54 deals with hardcore cartel, which is structurally defined under the 2017 Act as a horizontal cartel between direct competitors dealing with price (which naturally includes trade conditions having effect on price), volume, bidding and geography (which includes market division.) Section 55, on the other hand, deals with every other kind of cartel not falling under Section 54, which includes:

1. vertical arrangements between operators with different positions within the chain of sale;
2. parallel-market cartels between the same type of operators whose actual market is too small to be conjoined as one market; and
3. horizontal cartels between direct competitors that involve issues not specifically flagged by Section 54.

The current policy of the Trade Competition Commission of Thailand (TCCT) (formerly known as the Office of Trade Competition Commission) is complete intolerance and enthusiastic prosecution of cartel arrangement once notified. The reason for this is because cartel arrangement is very hard to justify and has direct negative impact on the economy in terms of reduction of competition, inhibition of improvement and advancement, creation of inefficiency and additional costs in the chain of procurement, as well as increase in prices for consumers who will end up paying much more for products and services that can be much cheaper. The officers will enthusiastically prosecute a cartel as long as there is enough evidence, which may come in the form of meeting minutes, signed agreement or admission.

Although a cartel will ordinarily be pursued, the 2017 Act still lacks clarity on certain areas and the precedents do not fully address arrangements between operators with different positions or those with complimentary operations, whose discussion and agreement can be beneficial to the industry or the economy. Although the 2017 Act specifies guidance for exemptions, there is no precedent to back it up. We expect future precedents to clarify the playing field for these issues.

Cooperation with other jurisdictions

Historically, the authority has always cooperated with foreign regulators and has purposely announced to the public that it has done so to create a deterrent effect. The authority has cooperated with many authorities from prominent jurisdictions with long-standing antitrust and trade competition law, as they wish to learn from these regulatory bodies and their valuable experience. This has been demonstrated by visits by Thai officers to foreign

offices, visits by foreign officers to the Trade Competition Commission of Thailand (TCCT) and collaboration by way of seminars and webinars. The officers have also expressly stated on numerous occasions that they are collaborating and will be increasing their collaboration with other foreign regulators; specifically, where the relevant facts of any case have regional characteristics, the details will be shared between jurisdictions. This, in effect, has made it riskier for all operators that are part of a functional cartel that may have regional or global reach.

To our knowledge, there has yet to be a case of a regional cartel that required or came about because of cross-jurisdictional cooperation, as all cartel cases so far are very local in nature. However, the intention is to request and provide information if the need arises.

Jurisdictional limitations, affirmative defences and exemptions

When it comes to jurisdictional limitation, the 2017 Act is silent on the reach of the Trade Competition Commission of Thailand (TCCT), but it addresses the results of a cartel within Thailand, meaning the law gives a very broad power to the TCCT to pursue any cartel that produces negative effects in Thailand, including those perpetrated from abroad by colluding offshore entities. However, one obvious practical and functional limitation exists, which is the TCCT's actual ability to extend their reach beyond the national boundaries of Thailand. The implicit understanding is that the TCCT will not waste its energy on trying to reach out to offshore jurisdictions, but will instead use other tactics that are readily available to add pressure and deterrence, including notifying regulators in such offshore jurisdictions or commencing investigations of the domestic subsidiaries, importers or distributors for potential complicity, or at best putting such subsidiaries, importers or distributors on its radar for constant monitoring. As it is rare that a local entity is in perfect alignment with the law, a realistic threat can produce material deterrent impact on the part of the foreign decision-makers. In general, offshore operators should not rely on the operational and functional limit of the TCCT as a supporting rationale to continue to engage in an offshore cartel that produces effects in Thailand, as there is a lot of uncertainty that cannot be accounted for. The most crucial element of uncertainty is the fact that individual decision-makers who live abroad may still be prosecuted in the worst-case scenario and their travel to Thailand may be affected by the case.

In terms of parental or subsidiary responsibilities, the 2017 Act is very straightforward in providing that all entities that have taken an active part in the cartel will be prosecuted. However, following actions without knowing the rationale may present a good defence. This means that any subsidiary that follows the instructions of the parent entity without knowing of the rationale will likely not be pursued if its innocence can be reasonably proven, while at the same time the innocent parent entity not knowing of its subsidiary's malicious actions will likely not be prosecuted. The primary uncertainty, nevertheless, concerns the extent to which an entity that is easily deemed as commercially sophisticated and is regional in its operation will be able to claim to the TCCT that it has absolutely no clue as to why, and has zero curiosity to ask why, its parent has told it to do certain things in a certain way, or as to what its subsidiary has been doing throughout the years. Such a situation may present a big hurdle.

The 2017 Act provides for some exemptions, some of which will need discretionary proving, while others do not. An affirmative defence that requires no discretion is the threshold defence. Under the Act, any cartel operation whose combined market share does not reach 10 per cent will be exempted from the provision. The difficult issue, nevertheless, is to properly determine the scope of the market considering the possible challenges by the officers. Another affirmative defence that also requires no discretion is the single economic entity defence. If two colluding entities are proven to be connected and deemed as a single economic entity under the technical provision provided by the 2017 Act, whether through a shareholding structure or appointment of directors, the collusion is exempted. Other available exemptions will require consideration and judgment by the TCCT, such as when a company claims that the arrangement will improve production, distribution or technology in some material way, or when there is some type of authorised distribution or franchise relationship in place, although such exemptions cannot be liberally applied and are still capped by the 10 per cent market share threshold, thus rendering them structurally useless.

Leniency programmes

As at the date of writing, the Trade Competition Commission of Thailand (TCCT) is still exploring whether to institute a formal leniency programme in Thailand. The TCCT has historically granted leniency to investigated parties who quickly cooperated with it, but such leniency came in the form of varying discounts that were applied to the final fines imposed upon the entities and their executives who admitted guilt and collaborated well, and such lenient tendencies were never formally institutionalised as an announcement or a ruling, or under a precedent. Most notably, there has not been any case of complete leniency or immunity (such as for the first whistle-blower or the most cooperative company) like under a proper leniency programme that exists in other jurisdictions, simply because at least a minimal penalty must be applied to all parties that are adjudicated to avoid the allegation of dereliction of duty on the part of the officers and the TCCT.

The TCCT has shown its intention to institutionalise a leniency programme by having hosted numerous public forums to obtain opinions and objections from academics, law firms, private operators and other governmental and quasi-governmental organisations that are deemed as stakeholders. It is widely believed that a formal programme is in the making and will likely come out soon based on statements of the officers. It is expected that the characteristics of the leniency programme will mimic parts of other leniency programmes currently available throughout the world, such as complete amnesty for the first whistle-blower who fully cooperates and descending leniency for those who follow. The issue of marker application (i.e., the position of the application for a lesser penalty in the queue of such applications) has never been discussed by the TCCT, but it is expected that transparent and complete cooperation is required for any leniency to be applicable, meaning all operators need to monitor the situation closely if they wish to submit any paperwork.

As both the entity and decision-makers are liable under the law for any cartel action, a conflict of interest may arise when an entity retains a lawyer and the lawyer's work covers disclosure by the decision-makers. This is possible because the entity may wish

to collaborate as it can accept the reduced penalty, while the decision-makers may wish to fight. However, as long as the entity and its decision-makers are aligned in being the first whistle-blower or being a collaborating follower, conflict of interest may not practically arise.

There is no precedent regarding a request by a private party who has been affected by a cartel to obtain materials willingly disclosed to the TCCT by the cartel participants. In general, the TCCT's officers are obligated by the 2017 Act to keep complete confidentiality of details disclosed to it by the operators, meaning any willing or voluntary disclosure by the TCCT of details pertaining to a cartel investigation or whistle-blowing, whether discovered unwillingly or disclosed willingly, will likely need an order of from the court that is overseeing the private case.

Penalties

The 2017 Act provides for both an administrative fine and criminal liability for engaging in a cartel, depending on the kind of cartel an entity has participated in. For engagement in a soft cartel under Section 55 (those that are not addressed by Section 54), the involved parties will receive a fine of up to 10 per cent of the sales amount for all of the years during which the breach has occurred. The 2017 Act itself provides a very broad language concerning the calculation of a fine, meaning that in the worst-case scenario, the Trade Competition Commission of Thailand (TCCT) has the technical capacity to hand down a fine equal to 10 per cent of the sales amount of the company during such years, which can be operationally detrimental and financially crippling. However, in practice and by way of unofficial announcements, the TCCT will only apply the 10 per cent to business units within the corporate entity that have committed the cartel. This means that the 10 per cent figure should not apply to the sales amount of the whole company, but rather be limited to the involved units. Nevertheless, our explanation above is not a regulation and is a precedent at best, and therefore the risk of a major fine still lingers for all cartel cases.

In an event that a company is involved in a hardcore cartel under Section 54 (horizontal cartel involving price, volume, bidding or geography), the penalties become criminal in nature as the allegation is much more serious and its effects on the economy are more severe. The wrongdoer can expect to be charged with a crime that can result in a sentence for a term of imprisonment of up to two years and a fine of up to 10 per cent of the sales amount for the years during which the breach has occurred. Historically, no single person has been incarcerated for breaching Section 54, thus signifying that the authority has no intention to imprison anyone for breaching the 2017 Act, which, for lack of a better term, is only a commercial law. Nevertheless, this lack of imprisonment precedent should not serve as a positive note to encourage cartel involvement. Rather, it should serve as a reminder that a wrongdoer under Section 54 will not be able to effectively fight any case brought under Section 54, as possible imprisonment will naturally be used as a bargaining chip to obtain quick admission and payment of a fine. If the alleged wrongdoer decides to fight the allegation, it will mean that the risk of imprisonment becomes much more real. If the case is lost, the person can be held in a Thai prison. It is, therefore, best to avoid being involved in the first place.

Executives and employees who have actively taken part in a cartel decision and operation can also expect to be prosecuted along with their corporate entity. The 2017 Act allows the TCCT to issue the same penalties to both corporate entities and individuals, and historically the TCCT has consistently prosecuted both groups almost on an equal footing. The only difference is that in some cases the fine imposed upon the corporate entity is larger than that imposed on individuals, although such differences were likely results of discretion by the TCCT and not any clear guideline for leniency. Therefore, executives and employees should not expect to receive automatic leniency.

Regarding settlement, the Act itself does not provide for any procedural mechanism to facilitate settlement discussion. There is also no mechanism to obtain something neutral such as settlement or payment without admission. Furthermore, as investigation will be carried out by the officers of the TCCT, and only their reports will be sent to the TCCT without TCCT's active hands-on involvement during investigation, the accused party will have no realistic opportunity to meet or discuss with the regulatory body that will decide on the fine and other penalties. Therefore, the only way to negotiate a settlement is perhaps through unofficial discussion with the officers, which is not supported by regulatory procedures and carries no structural guarantee. Most notably, the procedure during investigation will require the accused party to first admit to the breach before the administrative fine is decided, in essence creating a lot of uncertainty for the party willing to settle. The only reliable factor that will likely reduce the fine is complete transparency and admission, but it may be impossible for the accused party to really know how much reduction it will receive until the figure is handed down by the TCCT. On the contrary, a strong-headed fight and defence will only serve to increase the fine if the case is lost.

'Day one' response

Although the officers have trained for conducting dawn raids and have expressly stated that they have the willingness to undertake a dawn raid for severe cases or cases whose evidence may disappear for any particular reason, a dawn raid in Thailand by the Trade Competition Commission of Thailand (TCCT) is still not a common occurrence. The common method for the TCCT officers is to send a letter requesting cooperation, explanation and evidence, which is an administrative order, not an unofficial request.

In an event that the officers undertake a dawn raid on a company in Thailand, one should expect to undertake the basic tasks that are also common in other jurisdictions. First, the representative of the company should review the documents presented by the officers, including the warrant and the identities of the officers, and quickly contact their counsel in-house or external counsel for a quick verification. In any case, decision-makers must not obstruct the search as that can invite another set of criminal charges that will be against the individuals. The best course of action is to lightly stall using proper rationale and negotiation to wait for assistance, and thereafter shadow the officers at all times, provide minimal factual replies without opinions and document all actions by taking notes of the officers' actions and the documents and equipment they have seized, and constantly report development internally and externally as required by internal regulations.

In the more common cases of documentary requests, the TCCT will normally request the accused to provide documents and visit their office for interview within a short time span.

It is almost always the case that the accused will not be able to communicate internally and procure all facts and documents required by the officers of the TCCT, and this will necessitate a quick response by the accused company to the responsible TCCT officers to request for extension. Historically, extension has been liberally given, but this is not a guarantee and therefore the best course of action is to ask for extension as soon as possible to ensure that, if for some odd reasons extension is not given, the company will still have time left to procure as much as possible.

One obvious tactic that a company may do is to review its own rationale for the cartel or whatever activity it is doing that may be deemed as a cartel. The company should then consult internally and externally and come up with a set of positive rationales as to why this questionable action is necessary and positive. A complete set of rationales sitting readily within the company's legal team's drawer or folder will come very handy when the company is inadvertently and suddenly investigated and given little time to reply. We believe that the best course of action is to avoid questionable activity as much as possible, but preparation of the defence is the second best if the company chooses to take risks.

In any case, a company should provide all facts, documents and explanations as requested by the TCCT officers. Blatantly resisting and not providing information will be equated with lack of cooperation, which in itself is another criminal office punishable by imprisonment and a fine. However, if a company cannot locate all of the documents or provide all of the facts as requested, but has shown the willingness to collaborate, then the company will likely not be charged with an offence, but instead the lack of some documents and facts will be used as part of the adjudication regardless of whether a breach has occurred.

Due to the commercial and secretive nature of operations of different companies, it is a common occurrence that the investigating officers may not have full understanding of the industry or the business, and they often request for documents and facts that may have little or nothing to do with the cartel. Sometimes such request may also be due to the curiosity of the officers or a fishing expedition to find other conducts that may breach other provisions of the law. Based on our experience, the officers are often reasonable and a proper explanation that certain requests may be outside the scope of their investigation and issues can often remove certain requests or narrow down the scope of investigation or discussion.

Private enforcement

Section 69 of the 2017 Act expressly allows private parties that have been affected by any prohibited actions within the Act to bring a private case against the alleged wrongdoer. Furthermore, the Consumer Protection Committee (CPP) or any association or foundation approved by the CPP may bring a case on behalf of the body of affected persons. This creates an additional complication as the CPP has virtually unlimited resources and legal manpower to undertake any case it deems appropriate, meaning that any alleged wrongdoer finding itself in the cross hairs of the CPP will likely face a protracted, well-funded and well-manned case, instead of a lesser-funded and -planned private case by a private individual.

In terms of statutes of limitations, Section 70 of the 2017 Act allows any affected party to bring the case forward within one year of learning of such impact or being deemed that they should have known of such impact.

As at the date of writing, to our knowledge there has been no private case in the system, as all affected parties have chosen the easiest and cheapest way to obtain justice, which is to notify the Trade Competition Commission of Thailand (TCCT) of the allegation and let the TCCT take its course.

In terms of timing tactics, should a party decide to bring a private suit forward, it would likely be a tactic of such party to notify the TCCT to investigate the issue while filing a private suit in parallel, and later utilise numerous available time-delay tactics to allow the private case to sit within the judicial system to wait for the judgment of the TCCT to be available, and if helpful to use the judgment as evidence for the private case.

Under the 2017 Act, the damages awarded by the court will need to be effectively proven by the claimant, which is not something that will be easy for a cartel case. The claimant will have to prove to the court how the cartel has affected it, whether by making the purchase price higher than what it should have been or the procurement price lower than what it could have been. This is not easy to prove as it will require economic considerations and complex calculations, and perhaps this is likely the reason why no party has brought any private case under the 2017 Act, as there are no statutory or punitive damages, but only actual damages, thus making this a time-consuming and pocket-draining legal journey with a small reward.

Outlook and conclusions

As at the date of the writing, there have only been a handful of cartel investigations, with only 10 case precedents issued for public review, only two of which ended in financial penalties. This is not unexpected considering that it is notoriously difficult to prove a cartel in the Thai context, as most discussions are held secretly by entities with little shift in policies and management composition. Nevertheless, we have seen that the officers are willing to pursue any lead and the Trade Competition Commission of Thailand (TCCT) will issue appropriate penalties if a case is proven or admitted to.

Conclusively, there is no other notable development on the cartel front except for the real possibility that a proper leniency programme will be put in place in the coming months. Therefore, our generic recommendations for all operators who were or are still part of a cartel and who wish to rectify the situation is to keep a close eye on the development, and meanwhile prepare all documents and facts so that once the leniency programme is enacted the operators will be able to quickly notify the TCCT and receive complete immunity as anticipated. If this development in Thailand follows what happened in other counties when their leniency programmes were enacted, we expect many cartels to be effectively broken up, as more and more companies are becoming international in nature and cartels become less acceptable in Thailand.

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