

## Reviewing the Regulatory Reform Process in Thailand

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### 1. Introduction

As a member of APEC, Thailand has committed to implement the APEC Principles to Enhance Competition and Regulatory Reform. In fact, The Thai governments have actively carried out a series of regulatory reforms since the mid 1980's – long before the APEC Principles was declared. The reforms have been intensified in the early 1990's and again after the 1997 economic crisis (see a discussion of the policy reforms in the World Bank, Economic Monitor, various issues). A number of changes in economic and business laws including a new 1997 Constitution governing the regulatory reforms have been legislated since 1997.

However the reforms have not gone smoothly, particularly the establishment of the regulatory bodies and the implementation process. The delay, caused by the political factors, is not so bad as it looks. Of course, there are certainly some delay costs. But most of the delays are the sign of rapid development of increasing degree of public awareness and more active people participation in the reform process, which should bring about a better regulatory regime.

Since many reforms, particularly the key reforms in the regulatory areas involving the state enterprises which provide the network and infrastructural services, have not been readily implemented, the 1997 OECD Policy Recommendations on Regulatory Reform is too advanced for Thailand. And yet, it provides a useful guide for Thailand in designing its regulatory regime.

Given the above background, the objective of this paper has to be much more modest than the theme of the Fourth Workshop of the APEC-OECD Co-operative Initiative on Regulatory Reform. Instead, this country note will begin with a brief review of the existing piece-meal regulations by key government agencies in the areas of infrastructural services and competition policy. Some major weaknesses and problems arising from such regulations will be analysed in part 2. Part 3 is a discussion of the on-going reform process. Some observations and comments on the regulatory reform are made in part 4. Finally, part 5 attempts to assess Thailand's regulatory reform framework and implementation against the APEC Principles to Enhance Competition and Regulatory Reform, and give short answers to the Prototype of the Integrated Checklist which is developed from the APEC-OECD principles.

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## **2. Reviewing the Current Regulations in Thailand**

This part will first describe the salient characteristics of the current regulatory regime which is based upon the traditional institution of public administration. Then the regulations of the state enterprises providing public utility services and the competition regime dealing with the anti-competitive business practices will be discussed. Along with the description, the weakness and problems of the current regulatory regime will be identified, with an emphasis on the issues of competition.

### *a) Salient Characteristics of the Current Regulatory Regime*

Traditionally, three political features have moulded Thai state institutions and economic policy instruments: the bureaucracy, the system of administrative law and political patronage (Christensen, et. al. 1993). Thailand's code of administrative law gives great authority to subordinate laws, which are controlled by permanent officials and by ministers. As a result, officials can introduce whatever regulations they see fit. Another feature of the law was that, until the introduction of the 1997 constitution and its by-laws on administrative court, the rights of the individuals were not protected uniformly from the state. This gave officials considerable autonomy to decide who won and lost in the regulation. Despite their legal powers, officials are subject to the command of the ministers and also vulnerable to intervention from the business lobbying. This results in a patronage system.

The second characteristic of the Thai regulation system is that it is a complaint-based. Traditionally, the system does not allow any degree of public participation. In the past, despite a requirement that all regulations must be put publicly announced, many agencies did not have proper measures to inform the public.

Thirdly, although the regulations are implemented according to the strict letter of the law by the responsible official, the legal authority to issue, to change or to scrap the regulations is always vested with a committee. It is a Thai legal model that the committee consists of senior officials from the core agency as well as from other ministries whose activities are affected by the regulations. A group of outside experts, consisting of either academicians, business men, representatives from the business associations and former senior officials are also appointed. Except the broad qualification of the expert, the law does not specify the selection process. In some committees, the law also requires that the responsible minister be the chairman of the committee. As a result, some committee members may have conflict of interests. Moreover, most committees which are supposed to be independent, are either subject to capture from the business or heavily influenced by politics.

Fourthly, most conflict resolutions are done in the court. This has both positive and negative effect. When the private party does not agree with the officials' rulings, he or she can appeal with the court. Such procedure ensures that the public and the business are fairly treated. However, there are two problems. The transaction costs of the lawsuit are high to both the public and the private agents. Another problem arises from the fact that violations of the economic laws, unlike laws in other developed countries, are subject to criminal rather than civil penalties. Most business agents are afraid of such harsh penalties. As a consequence, they have to lobby for a compromise or sometimes bribe the officials. Such behaviour does not only weaken the enforcement but also result in non-transparent procedures and unfair treatment.

Finally, many government agencies, particularly the state enterprises providing infrastructure services, have three simultaneous functions, *i.e.*, policy making, regulator and operators. Such a system results in serious problem of conflict of interest.

#### *b) The Regulated Industries in Thailand<sup>20</sup>*

Like in most countries, the utility industries in Thailand are still monopolistic. They include telecommunications, energy, water and transportation. They are monopoly partly because of an argument that their services are natural monopoly, and partly because of the current regulatory regime that restricts entry into the industry.

The provision of public utility services in Thailand remains largely a domain exclusive to state-owned enterprises. These SOEs are often endowed with exclusive rights to provide basic services, some by law, others by government policies directed delivered through cabinet resolutions. As a result of rapid economic growth over the last decade before the crisis, most SOEs were not able to provide adequate services. Consequently, private participation in the expansion of public infrastructure and the operation of various services, in particular in the transport, electricity and telecommunications industries, was called upon. The role of the private sector in regulated industries was carefully tailored to preserve the prevailing monopolistic power of the SOEs, however.

It can be seen shown in Table 1 that most public utility services in Thailand are still dominated by monopolists or oligarchs, all of which involve state enterprises. A myriad of rules, regulations and policies serve to protect the interest of the SOEs. The most blatant of which is the statutory monopoly granted to state operators in the lucrative telecom sector.

The Telephone and Telegraph Act 1936 stipulates that the operation of communications services and the ownership of the infrastructure are exclusive to state enterprises or organizations. Private enterprises can only operate under concessions with a rather-odd arrangement known as the build-transfer-operate (BTO) scheme. Under such a scheme, the private concessionaire is responsible for mobilizing investment funds and installing the network. As soon as the construction is complete, the private operator must transfer ownership in the network to the state organization that had granted it the concession. In return, the private concessionaire would obtain an exclusive right to use the network throughout the life of the concession, which may range from 20 – 30 years. While an exclusive access to the network may appear to be a close substitute for ownership, there are several factors that divide them apart.

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20. This section is drawn from Deunden (2001).

Table 1: Public and private monopolies in major service industries

Industry	Type of Competition (number of license/operators)	Nature of Private participation	Government Operator	Anti-competitive nature
<b>Transport</b>				
- trucking	Competitive market	Competitive market	Express Transport Organization	- Captive state market - Operator of trucking terminal
- rail transport	G. Monopoly (1/1)	None	S.R.T.	Monopoly
- inter-provincial bus transport	G. Monopoly (routes from BKK to provincial capitals) (1/7)	Operate under co. license	Transport Company	Exclusive licensing
- maritime transport	Competitive	License	Thai Maritime Navigation Co.	- Captive state market
- metropolitan bus transport	G. Monopoly (1/3)	Operate under exclusive rights	B.M.T.A.	Exclusive licensing
<b>Telecommunications</b>				
- telephone (domestic)	Duopoly (1/2)	B.T.O. concessions	T.O.T.	- Revenue sharing
- telephone (overseas)	G. Monopoly (1/1)	None	C.A.T	- Equity holding
- cellular	Oligopoly (2/6)	B.T.O. concessions	T.O.T and C.A.T	- Limitation of private concessionaire's use of network through BTO arrangements
- pager	Competitive (3/7)	B.T.O. concessions	T.O.T., C.A.T. & D.P.T.	
- internet	Competitive (1/13)	B.T.O. concessions	C.A.T.	
- satellite	Private Monopoly (1/1)	B.T.O. concessions	M.O.T.C.	
- cable television	Private Monopoly (5/1)	Limited licensing	M.C.O.T.	Revenue sharing and equity share between MCOT and licensee
<b>Energy</b>				
- electricity generation	Dominant G. player (1/many)	IPPs and SPPs	E.G.A.T.	- sole purchaser of electricity
- electricity transmission	G. monopoly (1/1)	None	E.G.A.T.	- operator of transmission network
- electricity distribution in metropolitan area	G. monopoly (1/1)	None	M.E.A.	- monopoly
- electricity distribution in rural area	G. monopoly (1/1)	None	P.E.A.	- monopoly
- gas production	Competitive	Licensing	Private companies	
- gas transportation	G. monopoly (1/1)	None	P.T.T.	- monopoly
- gas distribution	G. monopoly (1/1)	None	P.T.T.	- monopoly
- oil	Competitive	Competitive	Competitive	- competitive

Industry	Type of Competition (number of license/operators)	Nature of Private participation	Government Operator	Anti-competitive nature
<b>Water</b>				
- metropolitan water production and distribution	G. monopoly (1/1)	None	M.W.A.	- monopoly
- rural water production and distribution	G. monopoly (1/1)	None (only in industrial estates)	P.W.A.	- monopoly
S.R.T. = State Railway of Thailand				
B.M.T.A. = Bangkok Metropolitan Transport Authority				
B.T.O. = Build-transfer-operate				
T.O.T. = Telephone Organization of Thailand				
C.A.T. = Communications Authority of Thailand				
D.P.T. = Department of Port and Telegraph				
M.O.T.C. = Ministry of transport and Communications				
M.C.O.T. = Mass Communication Organization of Thailand				
E.G.A.T. = Electricity Generating Authority of Thailand				
M.E.A. = Metropolitan Electricity authority				
P.E.A. = Provincial Electricity Authority				
P.T.T. = Petroleum Authority of Thailand				
M.W.A. = Metropolitan Water Authority				
P.W.A. = Provincial Water Authority				

Source: Duenden 2001.

First, as a user of the network, these private concessionaires do not hold a status of a “carrier”; they are merely “contractors” of state owned enterprises or government organizations that granted the concession. The only legitimate telecom operators to date are the two SOEs, the Telephone Organization of Thailand and the Communications Authority of Thailand. This means that once the regulatory body is set up and start to hand out licenses, these three-dozen-or-so private concessionaires will not qualify for a license as they are bound by the terms and conditions of the concession.

Second, although private concessionaires’ rights to exploit the network they had constructed is exclusive, but they are restricted by various clauses stipulated in those concessions that serve to shield SOEs from competition from their private subcontractors. For example, private concessionaires have to obtain permission from the SOE with regard to price adjustments and introduction of new services and expansion of the network.

Where monopoly is not legislated, exclusive licenses issued to SOEs are endorsed by cabinet decisions. In certain transport service markets, – *i.e.*, the metropolitan and inter provincial bus transportation services – private companies operate under exclusive licenses granted to the designated SOEs. For example, the Transport Company Ltd., an SOE, holds an exclusive license for all inter-provincial routes between Bangkok and the provinces. With limited financial resources, however, the state enterprise had subcontracted most of the operation to private operators. In exchange for the right to conduct business under the SOE’s exclusive license, private companies are required to pay a royalty fee based on the size of the operation – *i.e.*, the number of buses in operation – or enter a profit-sharing arrangement. Similar situation applies to the metropolitan bus service where the Bangkok Mass Transit Authority arranged to have at least two private bus operators operate many routes under its exclusive license. Indeed, these SOEs enjoy significant financial returns by capitalizing their monopoly rights. To their own detriment, some has become overly reliant on the “easy money” and neglected to improve their efficiency in service provision.

In markets where there is effective competition, privileges are granted to inefficient SOEs to keep them afloat. For example, in shipping, the Thai Maritime Navigation Company, a chronic loss-making joint venture between the government and the private sector, enjoy a special privilege in that all government organizations are required to use its services if price differentials were within a limited bound. The Express Transport Organization, a state owned enterprises involved in trucking, and Krung Thai Bank, a state commercial bank, also enjoy similar privilege. It should be noted that, despite the captive government market, these SOEs continue to accumulate losses. The government is thinking about closing down the Thai Maritime Navigation Company. For the Express Transport Organization, the government has not given up on it. As another attempt to boost its revenue, it has been allowed to take a stake in the trucking depot. Indeed, the stake in the essential infrastructure is likely to guarantee the state enterprise more rents and, at the same time, a competitive edge over its competitors.

There are two more problems with the SOEs that seriously affect market competition. Presently many state authorities have conflict of interest because they also hold an equity stake in, or enter into revenue-sharing scheme with, the business they regulate. Equity holding is seen as a simple and effective means by which the state can implement its regulatory rules without having to specify clear rules and procedures. It also generates additional sources of income in the form of dividends and capital gains, which state authorities no doubt appreciate. Of course, the concept of conflict-of-interest is relatively foreign to the local community. Examples of regulatory agencies with an equity stake in services they regulate are the Department of Post and Telegraph, which holds a few telecom concessions that involves revenue-sharing schemes and the Mass Communications Organization of Thailand, which regulates broadcasting (and) holds a 3.33% equity share in the private cable operator, to whom it had issues a license.

At the same time, many SOEs destined to be privatized also assume regulatory functions, some statutory, others through the term and conditions set out in the concessions they handout the private operators. For example, the Airport Authority of Thailand is authorized to set landing fee for all international airports.

Another problem is that concessions often involve revenue-sharing scheme or equity holding. For example, most telecom and transport concessions involve revenue sharing scheme between the private concessionaire and the SOE that granted it the concession. Such a scheme establishes commercial ties that may impede effective competition in the market in the future when exclusive licensing is abolished and when SOEs are privatized and should compete on equal footing with their private concessionaires.

Finally, as mentioned earlier, many SOEs are entitled to various privileges. This ranges from access to land owned by the Crown Property that usually carries low rents, government guaranteed loans and most importantly, a captive government market. Once privatized, the authority will have to be transferred the particular regulatory function to the appropriate regulatory body and the special rights that it used to enjoy will have to be terminated. That is, the competition agency will have to make sure that the transfer of rights, privileges and duties from SOEs to privatized entities in the corporatisation process is limited to only those that are fitting for service operators and those that will not obstruct fair competition in the market.

### *c) The Competition Regime*

Thailand has had a competition law since 1979 known as the Price Control and Anti-Monopoly Act B.E. 2522 (AD 1979). At the time, the law was to protect consumers from inflationary pressure and from widespread collusive practices among businessmen that had led to excessive pricing. While the price control mechanism was easily implemented and frequently enforced, the anti-monopoly provisions were never enforced. This is because the law required that a business alleged of anti-competitive practices be officially declared a “competitive business” by the cabinet. Since there were no clear rules on the definition of monopolistic business, only one business, ice trading, was declared a controlled business during the two decades when the law was in effect.

## **3. Reviewing the On-going Process of Regulatory Reforms and Competition Policy**

Although Thailand has a sizable private sector involvement in infrastructure, *e.g.*, toll roads, leased port facilities, independent power producers, state enterprises still dominate and, as discussed above, markets are not yet liberalized. Tariff and cost recovery issues continue to hinder private participation. As a result, the sector productivity is low. After the 1997 crisis, the government recognizes the need to enhance sector performance and competition which will increase the competitiveness of the Thai industries. It also wants to promote transparency and accountability. A series of regulatory reforms of SOEs and other policy reforms, therefore, have been initiated, beginning with the cabinet approval of a Master Plan for State Enterprise Sector Reform in 1998 which called for the most sweeping and comprehensive reforms in Thailand's long state dominated utility industries (see Table 2 for a list of regulatory reforms). The Master Plan calls not only for privatization, but also structural, institutional and legal changes.

*a) Reforms of the Regulated Utility Industries<sup>21</sup>*

According to the Master Plan, the reform is expected to achieve 4 main objectives: stimulating overall economic growth and efficiency; providing quality services at reasonable prices; reducing the government financial burden from the financial institution resolution; and activating local capital markets.

To ensure that quality services are properly and efficiently delivered, consumers are protected, and competition (where possible) is fair and open, the Master Plan, which deals only with the four infrastructure sectors, *i.e.*, telecommunication, energy, transport and water, redefines the role of the state. It foresees the primary role of the state as a policy maker, a planner and a regulator. The state should not operate any enterprise unless the operations are non-commercial or socially obligatory. Otherwise, the private sector should be allowed to operate and compete in commercial activities. The Master Plan, therefore, advocates clear separation of the following three functions: policy making, regulation, and operation.

There are three key features of restructuring in the Master Plan. First, the recommended guidelines for sectoral and market restructuring are to separate each sector into different activities, allow competition in the activities where more than one operator is economically desirable, and introduce proper regulation in those where monopoly is unavoidable. Secondly, the restructuring involves the corporatization, reorganization and privatization of existing state enterprises, as well as different types of private participation in service provision. The third feature is the introduction of an effective regulatory regime.

According to the restructuring plan for the energy sector, which so far has more details than the other three sectors, the future of the electricity sector will follow the competitive mode adopted in several countries which have privatized their state enterprises. All four segments of electricity supply industry, *i.e.*, generation, transmission, distribution, and retailing are currently handled by three state monopolies, namely the Electricity Generating Authority of Thailand (EGAT) in generation and transmission, and the Metropolitan Electricity Authority (MEA) and the Provincial Electricity Authority (PEA) in distribution and retailing. The recommended changes will lead to separation of generation companies from power transmission – the former to be open for competition and the latter to be a regulated monopoly (due to economies of scale). A competitive market, the “Power pool”, where wholesale trading will take place, is planned to be established by 2003. Distribution will become more competitive and regionally disperse, though distributing companies will be regulated because of their “locality” monopolistic nature. Retail competition will be introduced, initially for large customers, and would gradually expand to cover household users.

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21. This section is drawn heavily from Koomsup (2002), and partially from World Bank (2000, 2001).



Table 2. Modernizing Infrastructure Regulatory Framework and SOE Reform

Thai Reform Program	Implementation Benchmarks
<b>1. Strengthening regulatory framework, competition, and legislation for privatization</b>	
<p><b>Objectives:</b> The Government objectives are: to improve sector performance and productivity of the Thai economy; to promote greater efficiency; to promote greater efficiency and transparency in the state owned enterprises by facilitating the privatization process. A streamlined legal framework is required to enable SOEs to convert into independent legal corporate entities as step towards privatization. A regulatory framework for each sector in preparation for privatization is being prepared.</p>	<p><b>Corporatization and Regulation</b></p> <p>The Corporatization Act was passed in to law in December 1999 and will enable SOEs to become legal corporate entities. The State Enterprise Capital Policy Committee (SECPC) to initiate the corporatization process for SOEs was approved by the Cabinet and formed in July 2000.</p> <p><b>Telecom Sector</b></p> <p>Spectrum Allocation and Regulation in the Broadcasting Sector and the Telecommunication Sector Act 2000 (NTC Act) has been effective since March 2000.</p> <p>Establishment of an independent regulator under NTC Act (2QFY01).</p> <p>Enactment of the Telecommunication Act to establish the framework for telecommunications regulation (1QFY01).</p> <p>A Concession Conversion Committee has been established. Concession conversion for existing concessions and Telecommunications License preparation work. (4Q FY01).</p> <p>Corporatization of Telecommunication Organization of Thailand (TOT) and Communication Authority of Thailand) (CAT) (2Q FY01). Initial share sale (3Q FY01).</p> <p><b>Energy Sector</b></p> <p>Design of power pool and detailed sector restructuring was developed and approved by NEPC. Thailand power pool is expected to be operational by December 2003. Draft of new Energy Law was approved by the cabinet in October 2000 and is under review by the Council of State. Drafting of power pool rules and energy regulation is underway. Cabinet approved separation of Petroleum Authority of Thailand (PTT) gas trading and distribution. Third party access regime is being defined by Ministry of Industry</p> <p>Establishment of Energy Regulator (1Q FY02).</p> <p>Corporatization of PTT (3Q FY01).</p> <p><b>Transport Sector</b></p> <p>The cabinet approved the rescheduled privatization of THAI Airways on 14 March 2000. ATT corporatization is under preparation. The State Railways of Thailand (SRT) have been identified for corporatization</p> <p>SEPC Transport Subcommittee plan for restructuring the sector completed in July 2000. Submission to SEPC and Cabinet – (2Q FY01).</p> <p>Establish five independent regulators for Maritime, Air, and land Transport. Sub-sectoral regulation to be submitted for approval to the parliament (1Q FY02).</p> <p>Finalize Port Authority privatization plans (4Q FY02).</p> <p>Urban bus transport / restructuring to commence (2Q FY01).</p>

Thai Reform Program	Implementation Benchmarks
	<p><b>Water Sector</b></p> <p>Water Sector Restructuring and Privatization study is expected to be completed by March 2001. The Government is accelerating the sector regulation and tariff structure aspects of the water sector study in order to accelerate sector restructuring</p> <p>MOF will complete a comprehensive water sector reform plan (3Q FY01).</p> <p><b>Privatization Transactions</b></p> <p>In March 2000 the cabinet approved THAI Airways Public Offering scheduled for 2Q FY01 followed by a private placement with a strategic investor</p> <p>Ratchaburi Public Offering 40\$ EGAT employees allocated 15% (completed October 2000).</p> <p>Bangchak 32% share sale (2Q FY01)</p> <p>Airport Authority of Thailand (AAT) – private placement of regional airport company (3Q FY01).</p> <p>Partial share sale of telecommunications SOEs TOT, and CAT (2Q FY01).</p> <p>Petroleum Authority of Thailand (PTT)-Privatization and listing of shares (30%) on SET (3Q FY01).</p>
<b>2. Improving organizational structure for privatization and build capacity</b>	
<p><b>Objectives:</b> Introduce a framework for decision making for corporatization of SOEs Strengthening institutional capacity of the State Enterprise Policy Commission (SEPC) and State Enterprise Capital Policy Committee (SECPC) and the Office of State Enterprise (OSE) at the Ministry of Finance to oversee the implementation of corporatization and privatization strategies for SOEs</p>	<p>In July 2000, RTG established the State Enterprise Capital Policy Committee (SECPC) to supervise the process of transforming the legal status of the state enterprises into corporate entities to facilitate the reform process. The responsibility and mandate of the SECPC is clearly defined. The government is aiming to create an effective organizational structure for overseeing and implementing privatization in each sector and strengthening institutional capacity in Office of State Enterprise (OSE) to implement the reforms. This includes the separation of the OSE from the Comptroller General's Department in April 2000 and the allocation of privatization and corporatization work to a specialized group within the OSE in July 2000.</p> <p>Maintain an effective public information campaign on SOE reform (FY01-02)</p> <p>Regulatory Capacity Building/Training: The Government would take measures to build appropriate regulatory capacity in all sector (FY01-02).</p>

Source: World Bank (2001), *Thailand Country Partnership for Competitiveness*.

To run the power pool efficiently, the plan calls for three new entities, *i.e.*, an Independent System Operator (ISO) to monitor and control the power system operation in accordance with specified standards, and to control the overall generation cost of the system; a Market Operator (MO) to administer the power pool; and a Settlement Administrator (SA) to manage the billing and settlements among market participants.

EGAT would have to undergo significant changes with separation between generating and transmission businesses. Its generation assets will be divided into four groups and the first three groups will be corporatized and eventually privatized. The transmission company, initially owned by EGAT, may be privatized after the power pool is set up.

MEA and PEA will be transformed into about 13 regulated entities, providing distribution services and at first supplying power to all consumers in their respective geographical areas. At the retail level, other private firms will be allowed to compete fairly with them.

In the natural gas sector, the Master Plan calls for separation between transmission pipelines, distribution pipelines and gas trading of the Petroleum Authority of Thailand (PTT). Competition will be promoted by introducing the third party access rules on the transmission services, which will be regulated to ensure fair pricing and non-discriminatory treatment in pipeline services. PTT is to be corporatized and listed in the stock market.

The main objectives in of the telecommunication plan are to separate the roles of operator and regulator, to corporatize and privatize the two state enterprises (TOT and CAT), and to liberalize the industry. It also provides a framework for the formation of a holding company in which both TOT and CAT become operating subsidiaries. The holding company is designed to prevent wasteful competition between the privatized TOT and CAT in the future, and to be a channel through which profits from the telecom business can be used to cross subsidize the loss-making post service.

In accordance with Thailand's WTO commitment to liberalize the telecommunication market in 2006, the telecom master plan suggests a market structure with three types of operators: the service provider, the network provider, and the network-and-service provider. In the liberalization process, the first type will be allowed to compete in a relatively free market, while the other two types will be regulated because of their monopoly in the network service. There are currently about 30 concession contracts between the two state enterprises and private firms. The issue which remains unsolved is whether and how these contracts can be converted in such a manner that is fair to both parties to the contracts and is also conducive to free and fair competition in the future liberalized market.

In the transport sector, there are 14 state enterprises operating in the three modes (land, water, and air). As in other sectors, the Master Plan also calls for the some principle of role separation (policy, regulation, and operation) and market restructuring. There is also a proposal to have transport authorities, whose function is to manage the concessions granted to private operators. A comprehensive Transport Sector Framework Reform Study, which was finished in 1999, provides a framework for improved policy and planning in the transport sector, development of modal regulatory framework and the direction of reform for the 14 SOEs. The main issue for the transport sector is how to solve the losses of train and Bangkok bus operators. A detailed study suggests that the railway operations be divided into four activities, some of which to be financed by the government, and the rest be either privatized or state enterprise. In the case of Bangkok buses, a proposal was made to transfer the operation to the Bangkok local government, so that any subsidy would have to come from taxes and fees collected from the Bangkokians. The Thai Airways is also partially privatized.

A number of privatization and restructuring options for the water sector are suggested in the Master Plan and in a more detailed study. Two options for the Metropolitan Water Authority (MWA) are: to horizontally separate into two companies which grant concessions to private operators in some activities, and to corporatize MWA and find strategic partners to operate and manage through management contracts. For the Provincial Water Authority (PWA), it was proposed that after horizontal unbundling, PWA act as a contract manager overseeing concession arrangements for different regions. However, reforms in the water (and waste water) sector have lagged behind.

### *b) Progress in SOE Reforms and Shift in the Direction of Regulatory Reforms*

Three laws were enacted to facilitate the reform. The State Enterprise Corporatization Act, passed in 1999, is to facilitate corporatization and to set up mechanisms, and review processes and requirements for private participation in state enterprises. The other two laws legislated in 2000 are the Act on Organization of Radio Frequency Wave Allocation and Supervision of Radio Broadcasting and Radio Television Broadcasting Business and the Frequency Allocation Commission Act which requires the establishment of an independent regulator (called the National Telecommunication Commission or NTC). The last two laws were in fact required by the 1997 Constitution to make broadcasting of television and radio free from government influence by creating an independent commission for frequency allocation. Such approach of economic regulation by independent bodies is new to Thailand, and has resulted in a series of political conflicts among various interest groups. Moreover, the Corporatization Act and the State Enterprise Master Plan have also been heavily criticized by different interest groups based on various political, business and social motives and reasons (see details in Koomsup 2002).

After a landslide election victory in 2001, the Thaksin government put more emphasis on fast economic recovery and regarded the privatization part of the state enterprise reform as a driver in stimulating the economy. Fourteen state enterprises were identified for “fast track” corporatization and listing on the stock market by 2003. Among them are state enterprises in energy, infrastructure (telecom, airports, ports, water supply) and banks. Further share selling to private investors was also for other state enterprises already listed in the stock market. However, the government would still maintain its majority ownership in most of those state enterprises, and therefore retain its control on policy and management of those enterprises.

Related to its partially privatization strategy, the government will also create a state-owned super-holding company – the State Investment Corporatization (SIC)-to oversee the state enterprises' business policies and manage the government investment portfolio-the concept similar to a state-owned holding company in Singapore. The remaining state enterprises, which are not privatized, will provide “non-commercial but essential services”. Thus, a new National State Enterprise Policy Committee, chaired by the Prime Minister, will be created. Its role is to set policy for both commercial enterprises under SIC and non-commercial state enterprises under line ministries.

Meanwhile, the policy shift toward fast-track corporatization and partial privatization has drawn the government attention and efforts away from the market restructuring and regulatory reforms which are the other essential programs in the SOE Master Plan. The appointment of the regulator in the telecommunication sector (NTC) was delayed for two years because the independent Senate rejected the candidate selection process (on the ground of conflict of interest) and the government refused to take further action until the ruling of the recent new Administrative Court.

### *c) Competition Policy*

Although Thailand has had a competition law since 1979, it was never enforced (Poapongsakorn 2002). In 1999, the old price control and anti-monopoly law was replaced by two laws, namely, the Trade Competition Act B.E. 2542 (A.D.1999) and the Goods and Services Price Control Act B.E. 2542 (A.D.1999).

The Trade Competition Act (TCA) only deals with “anti-competitive practices” – *i.e.*, abuse of dominance, collusive practices, mergers and “unfair trade practices” that concerns business partners. Types of abuse of dominance and collusive practices that may constitute a violation of the law were also specified. Certain practices, such as price-fixing and bid-rigging are governed by a *per se rule*, while other types of collusive practices and mergers are governed by a *rule of reason*. Deceptive marketing tactics that directly concerns consumers such as false or deceptive advertisement or unfair contract terms come under the purview of the Office of Consumer Protection under the Office (CPO) of the Prime Minister. The CPO is responsible for most consumer protection laws including the Consumers Act 1979 and the Unfair Contract Act 1997.

In addition to the mentioned provision, section 29 prohibits any act contrary to free and fair competition, which results in the obstruction, damage, restriction of other business operations. The scope of the application of this particular provision remains unclear, as the letter of the law is rather broad and vague. This leaves much discretion to the administrator of the law.

The new competition law is therefore, comprehensive in terms of its substantive provisions compared with its predecessor. The Act automatically applies to all enterprises and business activities with the exception of state enterprises, co-operatives and agricultural and co-operative groups and government agencies.

It should also be noted that any violation of the Trade Competition Act, unlike most competition laws, is subject to criminal rather than civil penalties. Sanctions range from one to three year jail term and fines ranging from two to six million baht (approximately USD 150 000 at 40 baht per dollar). Repeated offences can be subject to double penalties.

The commission comprises of sixteen members with the Minister of Commerce as the chairperson. The agency has had two sets of commissioners. The first was appointed in the year 2000, a few months after the promulgation of the Trade Competition Act in late 1999. The second set of commissioners was appointed in June 2002 under a different government. Each has a two-year term. There is no staggering term so that a change in the government can change the entire composition of commissioners when their terms expire. Therefore, the commission is very much vulnerable to political influence.

Since its inauguration in 1999, the Commission has deliberated on only four competition cases. These include the case on excessive pricing of a cable television monopoly and a tied-sale case, whereby a near-monopoly whisky producer was alleged of tying the sale of beer with that of whisky, the unfair trade practice case against the foreign giant discount stores, and the unfair trade practice case against the largest motorcycle producer. No charges were made in the first three cases. The fourth case is now in the court.

Indeed, the track record of the TCC leaves much to be desired (see Poapongsakorn, 2002). Moreover, since the change in the government in February 2001, the TCC did not meet for approximately 16 months until June 2002 despite a backlog of complaints that were filed and already investigated. The fact that the law has not once been enforced despite its relatively comprehensive substantive provisions and its broad power no doubt raises concern about the government’s genuine commitment to establish fair trade in the economy. One hard evidence is that the commission has twice established a definition of market dominance threshold which is a necessary condition to enforce section 25 (market dominance) and section 26 (merger). The Office of Trade Competition submitted the proposed definition to the Cabinet for approval first in the year 2000 and again in 2002. Due to heavy lobbying by large business, the approval has been blocked.

The case of Thailand shows that having a competition law is certainly not a panacea. The miserable enforcement record can be explained by several factors. The OTC is faced with numerous limitations and challenges, be they institutional, procedural, legal or financial.

#### *d) Transparency and Accountability*

The 1997 constitution emphasizes the need to improve transparency and strengthen accountability. Seven related laws were passed in their regard. The Official Information Act in 1997 is to provide greater access to official information (be creating a principle that all official information must be publicly available with clear and limited number of exceptions). The Constitution also requires the establishment of new accountability institution. Those accountability institutions include the Administrative Court, the Constitution Court, the National Election Commission, the National Human Rights Commission, the Ombudsman, the State Audit Commission and the National Counter Corruption Commission. These institutions are known as the organizations independent from the government and bureaucrats.

Moreover, there is another important law passed in 1996, *i.e.*, the advanced Administrative Procedure law. The important articles promoting transparency and accountability of public officials are as follows:

- Barring officials with financial and non-financial conflict of interest from being involved in administrative procedures
- Requiring that all government committees' decisions that have a bearing on the private sector be recorded with details describing the minority views and options as well as the signatures of every commissioner. The decisions must also be made publicly available according to the Public Information Act 1999
- Requiring that all government agencies set a specific time frame for responding to inquires and complaints.

#### *e) Market Openness Policy*

This note doesn't discuss well this policy. Table 3 summarizes some of those policy reforms. It should be noted that Thailand is one of the most open economy in East Asia because it has continuously adopted both unilateral liberalization policy and IMF-imposed programs since the mid 1980's

Table 3. Competition Trade, and Foreign Investment Policies

Thai Reform Program	Implementation Benchmarks
<b>1. Competition Law-Policy Enforcement</b>	
<p>Objectives: TCC does not have sufficient resources (financial, human, and technical) to pursue all matters simultaneously that may fall within its powers. Hence, TCC will face the strategic challenges of determining a set of enforcement priorities, targeting at both voluntary and non-voluntary measures.</p>	<p>Develop outreach initiatives designed to acquaint all affected stakeholders with the requirements of the new laws and regulations and guidelines promulgated there under and to solicit feed-back on features of the new regime and its administration that may raise concerns to stakeholders.</p> <p>Institution of Advisory Opinions. (FY01,Q3,Q4)</p> <p>Institution of Corporate Compliance Programs. (3Q-4Q FY01)</p> <p>Develop Internal Case Studies in industries whose structure or performance seems to depart seriously from workably competitive conditions, prepared without the invocation of the TCC's investigative power but from publicly available data and voluntary interviews, which is then published and debated in relevant for a is likely to provide early warning signals of inappropriate practices with respect to what the TCC may wish subsequently to take formal investigative and subsequently to take formal investigative and enforcement initiatives unless the parties involved voluntarily agree to modify these practices. Such case studies may also serve to reveal the impact of other governmental or trade policies that are antithetical to effective competition in the industry in question and provide a basis for a policy advocacy role for the competition agency within government, (3Q-4Q FY01)</p>
<b>2. TRADE POLICY</b>	
<b>2.1 Modernizing the import regime</b>	
<p>Objectives: Sector such as motor vehicles, petrochemicals, agri-food, and textiles remain protected, either through taxes or non-automatic import licensing mechanisms. Also, a complex system of specific duties and exemptions remains in place. This system reduces transparency and generates economic distortions. The GOT program aims at promoting competition and innovation by accelerating trade liberalization in the context of WTO and AFTA agreements.</p>	<p>The land has been actively liberalizing its foreign trade system. In 1998 applied MFN tariffs averaged 18% compared with 23% in 1995. Tariff surcharges introduced during the crisis have been eliminated.</p> <p>MOF to complete a comprehensive review of the tariffs system and present an adjusted schedule which incorporates new tariff reductions under the ASEAN Free Trade</p> <p>MOC and MOF will identify mechanisms to simplify the current system of exemptions and specific duties (1Q FY01)</p>
<b>2.2 Modernizing customs</b>	
<p>Objectives: The government program aims at increasing transparency and levels of efficiency of the customs regime to reduce logistic costs and promote competitiveness. In the short-run the focus would be on the implementation of existing action plans and administrative reform.</p>	<p>Sine 1997, the authorities have initiated a customs modernization reform program. Considerable progress has been made. Amendments have been introduced to the Customs Act to implement the WTO Agreement on Customs Valuation, and to allow for the electronic submission of claims and the implementation of an ex-post auditing system based on importers and exporters customs records. The Management Information System is ready for operation.</p> <p>Guidelines and regulations to support the implementation of the new Customs Act will be approved and the regulations and infrastructure for electronic submission of claims will have been put in place (1Q FY01)</p> <p>The Customs Department will have prepared a Human Resources Action Plan. This plan will outline the major reforms in terms of organizational structure and human resources management required for effective policy making and service delivery (2Q FY01).</p>

Thai Reform Program	Implementation Benchmarks
<b>3. FOREIGN INVESTMENT REGIME</b>	
<b>3.1 Promoting Foreign Direct Investment</b>	
Objective: To stimulate private sector development in Thailand by promoting and facilitating foreign direct investment.	Thai Board of Investment has developed comprehensive investment promotion strategy that was approved by the cabinet in August 2000. High potential sectors are targeted and promotional efforts launched (1Q FY01) Site visits by potential investors (3Q FY01)
<b>3.2 Cost Effectiveness</b>	
Objective: The economic crisis has revealed fundamental weaknesses in the country's industrial structure. The cost structure is one of the major constraints that have hindered the competitiveness of Thai industries. Therefore, the government aims to improve the cost effectiveness of the industry.	Related government agencies such as Ministry of Industry (MOID), BOI, NESDB are reviewing major policies to enhance the capability of Thailand's industrial sector. NESDB will review and disseminate the information on cost structure of Thai industry including the transportation cost structure to line ministries and the private sector so that necessary policy reforms can be achieved (1Q FY01) BOI is investigating the competitiveness of three particular sectors: plastic textile, and steel. The results of these studies will be used to review the inventive framework.

Source: The World Bank, Thailand Country Development Partnership for Competitiveness, 2001.

#### **4. Some Observations about the Government Policy of Regulatory Reform and Competition Policy**

This part will provide a partial assessment on the government policy of regulatory reforms of the public utility sectors and the current competition policy. It will not discuss the issue of market openness policy because of time constraint. It should be noted that Thailand is widely accepted as one of the most open countries in East Asia.

##### *a) Government Policy on SOE Regulatory Reforms*

By selling of shares' of state enterprises in the stock market will bring substantial revenue to the government, which will not only lighten its fiscal burden but can also be used to stimulate the economy in the short run. But there are some negative consequences. Since those infrastructure sector SOEs are still majority-owned by the government, their future investment will still mainly the responsibility of the government, and hence may be constrained by the public debt situation. More important to the objective of regulatory reform, there is not guarantee that the government as an major shareholder will refrain from interfering in the SOE operation. The examples are the interventions to keep retail oil prices low.

The third problem is the government's major shareholding in SOEs could raise a question of fairness in the markets. It is possible that some regulations could be designed in such a way as to be biased in favor of the SOEs. Moreover, the SOEs are also exempted from profit tax, enabling them to gain unfair advantage over their private competitors. However the SOEs have to transfer parts of their profit to the government coffin.

Fourthly, the government also decided to sell SOEs shares mainly to individual Thai investors through the initial public offering. There have also been accusations that the IPO may not be fairly distributed.



Finally, the shift in policy from market restructuring and regulatory reforms towards fast-track corporatization and privatization may create uncertainties among private investors. More serious is the problem that without the proper regulatory reforms, privatization may lead to unfair competition and economic inefficiency.

*b) Competition Law Weakness<sup>22</sup>*

Thailand's short experience with competition law shows that having such a law is certainly no panacea. The enforcement has been severely restricted by political interventions, big business' opposition and institutional limitations.

First, since the Trade, Competition Commission (TCC) is given broad (semi-judicial) power, to establish implementing rules and regulations, investigate competition cases and prosecute violators, the administration and enforcement of the law can be arbitrary and discriminatory, particularly when the TCC fails to establish clear rules and guidelines concerning the implementation of the law. In the first two competition cases, neither finding-of-fact reports nor detailed formal written decisions of the TCC were available to the public.

Secondly, although the decision of the TCC can be reviewed upon request, the appellate body is not independent. Some members of the appellate body are also appointed by the commission themselves. Moreover, existing members of both TCC and the appellate body include representatives from big businesses.

Thirdly, as mentioned above, the enforcement of the competition law is still pending on the passing of key rules, namely the criteria defining the threshold of market share and sales figures have to be established for the sections on abuse of dominance and merger to be functional.

Fourthly, the Trade Competition Act provides a blanket exemption to state owned enterprises. This is ironic considering that most visible anti-competitive practices are carried out by SOEs.

Fourthly, since the language of the law is vague and the law contains very few short sections, leaving much discretion and interpretation to the enforcement authority. Thus there is an urgent need for implementing guidelines and regulations. Yet, three years have passed without any guidelines.

Fifthly, since the enforcement of competition law is complaint driven, investigation will be launched mainly when the competition authority receives a complaint from affected parties. Since no effective protection program for complainants and informants has been established, it is not surprised that the number of complaints in the past three years is very small, *i.e.*, only six cases.

The next problem is the human resource and capacity constraint. The objective of a competition law is to protect the competitive process and competition by prohibiting anti-competitive practices. But distinguishing business practices that are anti-competitive from those that are pro-competitive is certainly no easy task, and requires a thorough understanding of the law, the economics, the market and its dynamic nature as well as the business nature. But the institutional design of the TCC and the Office of Trade Competition (OTC) does not attract qualified persons. Commissioners are engaged only on a part-time basis with the compensation (called the meeting fee) of 250 baht per meeting (USD 6.25 at 40 baht per dollar). The OTC also faces a severe shortage of skilled personnel in terms of technical knowledge because their salary, based upon the civil-service pay system, is too low. Financial is also the biggest problem as the OTC is responsible for multiple tasks, ranging from the administration of law, investigating the complaints, doing research, and analysing the cases, etc.

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22. This sector is drawn from Poapongsakorn (2002) and Deunden 2003.

Last, but not best, is the lack of public awareness. A culture of competition has yet been established in Thailand. In policy making, consumers often take the back seat, while producers take the front seat. Most non-government organizations in Thailand focus on health and environmental issues and express little interest in competition policy. Moreover, according to a survey conducted by the Confederation of Consumer Organization there is currently little know ledge about the law in the provinces among the business community, consumers and civil society groups.

## 5. Conclusion

This section is an attempt to assess Thailand's regulatory reform efforts against the APEC Principles to Enhance Competition and Regulatory Reform. Then it will provide a short answer to the Prototype of Integrated Checklist of the APEC-OECD Principles.

### *a) Assessing the Thai Regulatory Reform Efforts Against APEC Principles*

Although Thailand has not yet finished its regulatory reforms set out in the Master Plan for SOEs partly as a result of the shift in the government policies which give high priority to economic stimuli measures, most important laws have been legislated since the 1997 crisis. The promulgation of the 1997 Constitution establishes the principles of transparency and accountability. On a *de jure* basis, Thai laws contain most of the APEC's core principles of competition and regulation, with two exceptions. The first exception is comprehensiveness. As mentioned, the 1999 Trade competition Law still exempts the SOEs, many of them are doing businesses in private goods and services. But after the current privatization effort is finished, investors will begin to put pressure on the government to reform its regulatory regime. The second exception is the non-discrimination principle. Legally speaking, the competition law does not discriminate against foreign business. But in practice, Thailand should not yet adopt the principle of non-discrimination in the implementation of the competition law. This is because an adoption of the non-discrimination principle would undermine on-going sector – specific negotiations in GATS (see argument in Deunden 2003).

Another weakness in Thailand's reform process is a lack of coherent policy framework. As discussed in part 2, the sectoral policy formulation is fragmented as the authority is legally vested at the departmental level and until recently, the Thai governments always consisted of a number of coalition parties. Each party would not intervene in the other parties' line of responsibilities. However, the situation has changed since the Thai Rak Thai party gained the majority votes in the parliament. The government has actively consolidated its power and is now able to effectively implement all of its policies without any opposition from the bureaucrats.

But the major weakness lies in the implementation stages. The above discussion of Thailand's experience with the 1999 competition law reveals the weakness in the Thai bureaucratic system which is still heavily influenced by both the pressure from top (*i.e.*, the politicians) and from below (*i.e.* the business community). Without a proper institutional design and political will (to not intervene in the markets), laws will not be the panacea.

The Thaksin government has redirected the policy towards SOE's. Although the regulatory reform is now delayed, the elected democratic government can legitimately choose to implement the policies that it has made a promise during the campaign. Such policy shift reflects the fact that the developing countries always put the development objective in front of other objectives.

b) Short Answer to the Prototype of Integrated Checklist

(1) Integrated policies

- No integrated policy. Only an integrated policy to regulate the utility industries exists
- The last government provided a strong message to support regulatory reform but was strongly opposed.
- The officials are required by two laws to implement all regulation on a basis of transparency and accountability. But in many government agencies, there are no guidelines and mechanism.
- No *de jure* discrimination. But like many other countries, there are unwritten practices in favor of Thai business.
- Yes, regulatory reforms have been encouraged at all levels of government, but no coordination has been attempted.
- Yes, policies and laws are transparent, comprehensible and accessible. But regulations, practices, and procedures are still the problems in some government agencies.
- No coherent reform. But in practice, there is policy sequencing, beginning with market liberalization, deregulation and then competition policy
- No inter-ministerial mechanism to coordinate regulatory reform
- Not enough resources, particularly skilled personnel
- There are training and capacity building programs which are supported by the WB.
- Yes, due process rights of process are ensured.

(2) Regulatory policy

- There is a central body in assuring the quality of regulation.
- Yes, legal basis and impact drafts are reviewed because of public participation. But it's a complaint-based.
- Transparent rules & institutions. But regulatory management is still the problem.
- There are extensive public participation with consultation mechanism.
- No regulatory impact analysis is required.
- Alternatives to control and command have been assessed and implemented.
- Compliance is still the serious problem.

### (3) Competition Policy

- Independent body is established, but it's not independent from the government and business.
- Many government bodies still have legal role to oversee and regulate SOEs under their supervision.
- No competition policy has ever been declared.
- Legally speaking, the objective is to promote and protect the competitive process and competition.
- The law covers all standard anti-competitive practices.
- SOEs are exempted from the law.
- No formal relationship between the competition authority and sectoral authorities.
- Competition authority has broad semi-judicial power.
- Advocacy has been extensively carried out.
- No measures to neutralize the advantages of government business activities.
- Firms and individual have access to the courts and appellate bodies.

### (4) Market openness policies

- There are mechanisms to foster awareness of trade and investment implications: BOI, DTN.
- Approaches to regulation are always trade friendly but there are still unnecessary costs of doing business.
- Custom procedures are the most frequent complaint issue.
- Public consultation mechanisms have been established and implemented. But it is mostly a one-way communication process.
- There have been series of public and civil society movements to make the procurement process more open and transparent.
- Foreign investment and ownership are not discriminated against, except in a few sensitive sectors.
- Harmonized international standards have been used as the basis for primary legislation, *e.g.*, intellectual property rights.
- Equivalent measures and MR have been encouraged, and accepted.