Institutional Arrangements for the Competition Authority in Thailand[3]

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1. Introduction

Thailand has had a competition law since 1979 but 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). However, its implementation experience demonstrates that having a competition law is indeed no panacea. The causes of failure have been analysed in the literature (*e.g.*, Poapongsakorn 2002; Nikomborirak 2003). This paper will focus on the weakness of the institutional arrangements for the competition authority which is believed to be one of the most critical factor behind the poor performance of the Thai competition authority.

The paper is organized in 4 parts. Part 2 addresses the aspects of independence and account ability of the competition authority. The institutional arrangements and relationship between the authorities for competition and sectoral regulations are discussed in part 3. The due process rights of persons and firms either subject to the law or harmed by violation of the law is described in part 4. The final part is a conclusion.

2. Independency and Accountability of the Thai Trade Competition Authority

Before discussing the issues of independency and accountability, this section will briefly describe the trade competition law.

The 1999 Trade Competition Act aims to protect competition and the competitive process. Its, therefore, 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 deception 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, the law also 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.

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3. This paper is drawn heavily from two papers, *i.e.*, Poapongsakorn (2002) and Nikomborirak (2003).

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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 years jail terms and fines ranging from two to six million baht (approximately US$ 150 000 at 40 baht per dollar). Repeated offences can be subject to double penalties.

By design Trade Competition Commission is an executive body with judicial power. It has broad power to establish implementing rules and regulations, investigate competition cases and prosecute violators. When a firm violates the Trade Competition Act, the commission may issue a written order for the firm to suspend or correct its actions. It may also choose to prosecute the firm by filing charges against the particular firm in the Court of Justice. Although the prosecution of violators of the Trade Competition Act has to follow the Criminal Procedure Code, the law sets up a specific rule which allows the TCC Chairman to file its own charge against violators should the District Attoney refuse to file charges.

Given such broad power, the TCC must not only be experts in competition law and business, but also independent. As will be argued below, the drafters of the law put more emphasis on the first aspect.

a) Independence

The trouble with the 1979 anti-monopoly law was that no company was ever prosecuted. To investigate and prosecute a company, the government had to declare an industry to which the company belonged as the regulated industry. Such decision is obviously politically determined. To ensure that the new law would be enforceable, the draft committee introduced a legal novelty. It divided the 1979 law into two acts: the Price Determination Act 1999 and the Trade Competition Act 1999. The rationale was that price regulation is politically determined, while the enforcement of competition law should be based on rigorous economic and legal analysis rather than political factors. The Trade Competition Commission (TCC) was therefore established as “an expert” body with the responsibility of enforcing the new competition law. Except for the Minister of Commerce, the Commissioners must be neither politicians nor holders of a position with responsibilities in the administration of the political parties. The TCC consists of the Minister of Commerce as Chairman, the Permanent Secretary for Commerce as Vice Chairman, the Permanent Secretary for Finance, the Secretary General of the TCC and eight to twelve qualified persons. While almost half of the experts are economists, lawyers or professional senior bureaucrats with extensive legal and administrative experiences, the law oddly stipulated that at least half of the expert members must be from the private sector. Such a composition obviously affects its degree of independence, and leads to the likelihood of a conflict of interests.

Thus, in practice, the Federation of Thai Industry (FTI) and the Thai Chamber of Commerce each has 3 representatives in the Commission. No consumer representative has ever been present. Among the commissioners appointed in the year 2000, there was only one economist who specialized in the field of industrial organization and one lawyer who helped draft the competition law. The rest is made up of businessmen and bureaucrats. Similarly, the new commission appointed in the year 2002 by the new government, consists almost entirely of businessmen. But this time, no legal or economic experts in competition law and policy was present. With such a composition of commissioners, the Trade Competition Commission is not only vulnerable to political interventions, but is also at great risks of being captured by private interests. In fact, a study by the Campaign of Popular Democracy Committee, an NGO, revealed that several commissioners had financial interests in large businesses or businesses owned by politicians.

Upon request, the decision of the Commission can be reviewed by the appellate committee. The appellate body, however, is not independent of the commission since members of the appellate body are appointed by the commissioners themselves. Moreover, existing members of the body include representatives from large businesses, undermining the credibility and the impartiality of the appeals process.

b) Transparency and Accountability

Thailand has relatively advanced Administrative Law jAD 1996 and Public Information Act AD 1997 that help promote transparency and accountability in the application of administrative power. For example, the Administrative Law:

- Bars officials with financial and non-financial (i.e., family and other relatives conflict-of-interest from being involved in administrative procedures

- Requires that all government committees' decisions that have a bearing on the private sector be recorded with details describing the minority views and opinions as well as the signatures of every commissioner. The decisions must also be made publicly available according to the Public Information Act 1997.

- Requires that all government agencies set a specific time frame for responding to inquiries or complaints.

Most of these provisions were imported into the Trade Competition Act. Those that have been left out should apply nevertheless since the Administrative Law stipulates clearly that the standard of administrative procedures specified in other *sui generis* laws must, at the minimum, contain all the provisions specified in the Administrative Law. Unfortunately, however, the Office of Trade Competition (OTC) fails to comply to the provisions stated above. Since the legislation of the law in 1999, the authority has failed to establish clear rules and guidelines concerning the implementation of the law. In the four competition cases deliberated so far, neither finding-of-fact reports nor written decisions of the TCC were made available to the public. A complainant in the tied-sale case of whisky and beer who wanted to see the TCC's decision had to ask the Tribunal of Public Information on the Economy and Public Finance to order the OTC to release the report. It was not clear on what grounds the TCC derived its decisions and whether there were different views among commissioners.

Despite the existence of the advanced administrative law, the OTC officials are accountable to the Minister of Commerce because the OTC is just a division in one of the MOC's departments. Since the OTC's chief (who is the TCC's secretariat) has to report to the Minister, he and his office cannot act independently from the government.

3. Administration and Enforcement of the Law: Due Process, Complaint and Dispute Settlement

As described above, the TCC is an executive body with broad semi-judicial power. To prevent the TCC from abusing its power, the law imposes a framework and procedures governing its power. For example, in the consideration of the anti-competition cases, it must afford the accused business operator, members of a specialized subcommittee, members of an inquiry sub-committee or competent officials concerned, a reasonable opportunity to give explanations and present supporting evidence. In issuing an order against the violators, the TCC must specify reasons for such an order both in respect of questions of fact and questions of law. However, in the cable television case in which the subcommittee found that the cable operator abuse its monopoly power by denying consumers the choice of less expensive package, the

cable company complained that the sub-committee did not provide an opportunity to defend its case[5] (Nikomborirak 2003: 29). Finally, a business operator that receives an order from the TCC and disagrees therewith has the right to appeal to the Appellate Committee.

The enforcement of competition law is complaint driven. The law allows private persons[6] to become actively involved in two ways. They can file complaints about alleged unlawful conduct with the OTC, or those suffering injury as a consequence of unlawful conduct can initiate an action claiming compensation from the violator. The law also allows the Consumer Protection Commission or consumer associations to initiate actions for compensation on behalf of consumers.

One serious problem with the enforcement of competition law is the lack of protection of confidential information and complainant. The investigation is launched mainly when the competition authority receives a complaint from affected parties, be they competing businesses or consumers. But those who complain are mainly small businesses or consumers against large businesses that are in the position to affect their well being. For example, small suppliers that file a complaint against the large retailer may have their contracts terminated. Similarly, dealers that complain about manufacturers may have their supplies cut off. In the investigation of a complaint against a motorcycle producer, the complainant's identity was disclosed.

Effective enforcement also requires strict protection of confidential information provided by all parties involved. If confidential information is leaked, then the private sector will lose its trust in the competition authority. If that is the case, then the authority will face serious obstacles in gathering crucial information in the process of investigation. During the investigation of two first cases, some confidential information were frequently reported in the newspapers. The subcommittee on cable television case also found that some of its information was leaked.

4. The Relationship between the Competition Authority and Sectoral Regulators

The Trade Competition Act stipulates that all business enterprises – bar state enterprises and cooperatives – are subject to the law. In reality, however, the legal power of the TCC may be much more limited for two reasons. First, although the OTC is assigned by the competition law to coordinate with other government agencies concerned with the law, it is not given any mandate. So far, the government does not have any over-arching competition policy framework for this issue. Secondly, the regulated industries – *i.e.*, transport, telecommunications, water and electricity – are contingent on sector specific policies and rules that may run in contradiction with the substantive provisions of the competition law. In the absence of a clear demarcation of the legal jurisdiction and an establishment of a formal protocol between the two authorities, confusion is likely to arise. On the one hand, the two authorities may compete for territory. On the other hand, both may choose to side step the issues leaving regulated industries in a regulatory vacuum.

5. However, the TCC failed to address any of the subcommittee's findings, except the fact that the cable operator is found to be monopoly. But it was not found guilty of charging excessive price.

6. Private persons are defined either as the business operators or consumers harmed by violation of the competition law.

For example, in the case where the cable monopoly was alleged of setting excessive prices, the defense was that prices could not have been excessive since they were "regulated" by a state enterprise, the MCOT. The state enterprise, which operates a television channel of its own and, at the same time, issues cable license to private operators, was responsible for approving the price of cable services and monitoring compliance to the conditions spelled out in the concession. However, the MCOT hardly qualifies as a regulator. According to the term of the concession, in additional to its small equity stake in the private cable monopoly, the MCOT demands a 6% share of the private operators' revenue. Regardless of the obvious conflict of interest, the state enterprise was undeniably acting as a regulator. Thus, the TCC refused to handle the case and instead referred it to the MCOT.

While the legal boundary of TCC's authority remains unclear, there may be more instances in which the TCC will choose to avoid issues confronting it instead of try to enforce the law. Moreover, sector-specific policy and regulation are currently fragmented as the laws are being drawn up by different groups of people. There seems to be no clear policy whether regulated industries should be subject to the Trade Competition Act. The Telecom Act 2001 states explicitly that the industry is subject to the law. This has set precedence such that the draft Broadcasting Act that is still in the legislative pipeline also incorporates the same provision. However, there are no clear procedural rules how two authorities would co-operate and co-ordinate on competition issues that may arise in the future.

5. Final Notes: How to Make a Competition Authority Effective

Thailand's experience with competition law shows that having such a law is certainly no panacea. Political interventions, big business' opposition and institutional limitations proved to be major hurdles in law enforcement. In such an environment, a competition agency can be absolutely paralyzed. An institutional reform is a necessary condition for the competition law to be effectively enforced. But without strong public pressure, it is almost impossible for the government to launch the reform. Here are some suggestions on the development of such institutions and the building of public awareness.

a) Institutional Independence

There is no doubt that the TCC needs to be an independent body – *i.e.*, a non-ministerial body, much like the sector regulators in telecommunications and broadcasting that are in the process of being. However, should the TCC becomes an independent agency, the scope of its statutory power and its accountability would need to be carefully crafted to ensure that the agency does not abuse its independence. The domestic experience with two independent regulatory agencies in telecommunications and broadcasting so far shows that the selection of commissioners is likely to be most controversial and will be the subject of intensive public scrutiny. Therefore, to avoid such a problem, an independent TCC needs to ensure that its commissioners are selected in a transparent and objective manner.

b) Administration and Enforcement of the Law

As mentioned earlier, the provisions of the Administrative Law and the Public Information Act are designed to ensure "due process" in the administration and enforcement of laws in order to protect the rights of citizens to fair treatment. All state agencies, the OTC and the TCC included, must comply with every provision spelled out in these two laws. Thus, the public should demand that the OTC and the TCC, in compliance with these two laws, develop clear and transparent procedures regarding the following issues:

- Conflict of interest: Every commissioner should declare all financial interests before appointment. Should conflict-of-interest situations arise in the course of duty, the particular commissioner should recuse himself from the entire procedure.

- Complaint Procedure: All complaints need to be filed and documented and "formally" responded to in writing within a reasonable period of time as required by the Administrative Law. The Commission should give this issue a high priority by approving the draft complaint procedural rules as soon as possible.

- Dispute resolution: The OTC should establish own rules concerning formal and informal (if legally feasible) dispute settlement procedures in order to ensure fair treatment for parties involved. To promote transparency, clear rules regarding notification, hearings, responding, etc. need to be laid down. Rules governing communication between officials and the private sector also need to be established. That is, any communication between an officer and those involved in the on-going dispute cases should be made officially recorded. Such a rule is known as the *ex parte* rule in the United States. This can help avoid discriminatory or preferential treatment in competition cases. Having such rules will not only promote a better image for the competition authority, but would also help officers in determining what type of behaviour is deemed appropriate and what is not.

- Rule-making: When it comes to rule-making, the Administrative Law is rather silent. Who should have a say in determining the threshold market share used to define market dominance? It is certainly not the 16 commissioners alone. Since there are no clear procedural rules, the process has been opaque and thus vulnerable to political and private businesses' influences. Therefore, it is urgent that the TCC establishes an internal procedural rule governing rule-making that is transparent and fair to all interested parties involved.

- Classification of documents and strict rules regarding the handing of confidential documents and information: The TCC and the OTC require information from both the complainant and the defendant. If the anonymity of the identity and the information provided by the complainant and the secrecy of confidential information submitted by the defendant cannot be protected, then investigation will prove to be very little in the absence of co-operation of concerned parties.

c) Relationship with Other Regulatory Authorities

Except a few countries, most developed economies tend to assign the decision role to the sector-specific authorities with a clear mandate that their decisions have to take into account the competition policy. The competition authority has no decision role in the regulation of those specific sectors. But it has full authority to enforce the law against firms in those sectors that violate the competition law.

In Thailand, such institutional arrangements will not work well. As argued above, neither the competition authority nor the regulatory authorities would like to intervene in each other affairs. Since the law does not give the competition authority to intervene in the sectoral regulations, it is in its best interest to be silent. So do the sectoral authorities. More over, most regulatory bodies are subject to regulatory capture. To minimize such social cost, it may be more effective if more than one authorities are granted legal power to regulate the same industry. In other words, our proposal is to create competition in regulations among the authorities of competition and sectoral regulation.

d) Building Public Awareness and a Wider Constituency for Competition Law

In light of the various failings of the TCC as discussed above, pressures for changes must come from outside the government – *i.e.*, from the civil society, the academic community, or even business organizations such as business associations that have been adversely affected by unfair trade practices of larger competitors. That is, building "*public awareness*" on this relatively complex subject is most urgent and essential. But, who should take the lead?

The government has rarely established a good relationship with civil organizations. This is because they are often proponents of large-scale government projects on environmental issues. Thus, the possibility of having the OTC working with NGOs is quite bleak. As for business associations, few have taken genuine interest in advocating competition law and policy. This is because most business associations are dominated by large enterprises.

Academics seem to be the only alternative, as they tend to work with the state and the private sector as well as the media and the civil society on a wide variety of public issues. It is therefore most important that the academic circle becomes more involved in the process of disseminating information and knowledge concerning competition law and policy in order to help build a competition culture in Thailand. It will also need to work closely with civil organizations to monitor and scrutinizes the administration of the law. There is a strong synergy between academics and NGOs. The former can provide solid conceptual framework and research findings in order to back up NGOs advocacy-oriented activities.

But where would funding for building the much needed public awareness in competition law and policy come from? If the government opposes the law, why should it finance activities that would help to promote its enforcement? International assistance programs obviously can play a very important role.

Passing a competition law and implementing it and establishing the appropriate institutions are always an uphill battle. This is because the law not only runs against the interests of large and powerful businesses, it is also often associated with western capitalism or free-market propaganda. Thus, it can easily fall prey to nationalistic fervor that, in some cases, drummed up by local monopolists themselves. One must realize that while a competition law can be passed overnight, a competition policy will take much longer to realize in an economy and culture where the interests of big business and politicians are too closely aligned. This paper has argued that passing the western competition law will certainly not bring about competitive market environment unless the competition institutions exist. However, establishing the effective institutions do not come out of the air. Thus, competition policy advocacy will be as important, if not more important, than competition adjudication. A country needs to build a wide competition constituency among the academics, civil society as well as the media. It is indeed a Herculean task that is worth undertaking.