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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution  
from Thailand****- Session II -****5 December 2019**

This contribution is submitted by Thailand under Session II of the Global Forum on Competition to be held on 5-6 December 2019.

More documentation related to this discussion can be found at: [oe.cd/cpta](http://oe.cd/cpta).

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## *Competition Provisions in Trade Agreements*

### **- Contribution from Thailand\* -**

1. As of now, Thailand has entered into 5 trade agreements with competition provisions, as follows:

1. Thailand-Australia Free Trade Agreement (TAFTA)
2. Thailand-New Zealand Closer Economic Partnership (TNZCEP)
3. Japan-Thailand Economic Partnership Agreement (JTEPA)
4. Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan (AJCEP)
5. Agreement Establishing the ASEAN-Australia New Zealand Free Trade Area (AANZFTA)
6. Regional Comprehensive Economic Partnership (RCEP) – in progress

2. Competition provisions in the aforementioned trade agreements have 4 main objectives which are 1) Establishment of Competition Law within the jurisdictions of the parties and ensuring independency of the Competition Authority, 2) Promotion of Competition in the markets of the parties by prescribing anti-competitive conducts, 3) Technical Cooperation and Exchange of Information between parties, and 4) Ensuring of non-discrimination, transparency and procedural fairness in Competition Law implementation.

3. Such trade agreements have significant impact in the enhancement of the competition framework in Thailand. Prior to 1999, Thailand did not have a generic competition law. Instead, there was the Pricing of Goods and Anti-trust Act B.E. 2522 (1979) which regulates pricing, monopolistic and unfair trade practices of specific services. At that time, the specific services were not specified by the 'Central Committee' which consists of Minister of Commerce, Permanent Secretary of Ministry of Commerce, Secretary-General of the Central Committee and 4 other representatives from the private sectors. Consequently, this act does not apply to all goods and services in a general manner. In 1999, as a consequence of the entry into force several trade agreements, Thailand adopted its first general law concerning Competition: The Trade Competition Act B.E. 2542 (1999). This act regulated all business operators with the main objective of promoting a level-playing field with fair and free competition in Thailand's markets.

4. Although the Trade Competition Act B.E. 2542 (1999) could be called the "Legal competition Reform" of the Competition Law in Thailand, it still had some limitations. The most important limitation we faced was the enforcement. The Trade Competition Act B.E. 2542 (1999) established 'the Trade Competition Commission' comprised of Minister of Commerce, Permanent Secretary of the Ministry of Commerce, Secretary-General of Trade Competition Commission (acting by Director-General of the Department of Internal Trade), and 8-12 other representatives appointed by the Cabinet (half of the representatives shall be from private sector). The Commission had the Office of Trade Competition

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\* This contribution was prepared by the Office of Trade Competition Commission of Thailand.

commission (which was an office under the Department of Internal Trade at that time) as its Secretariat. This setup led to ineffective enforcement of the act as the Commission and the Office were easily influenced by politicians and business operators who had conflicts of interest leading to the interference of law enforcement. This was where the competition provisions in the trade agreements came into play. They set forth competition enforcement principles and the most important one was the institutional design as it required the competition authority to be independent. Thailand followed this particular provision resulting in the enactment of Thailand's new Competition Law, the Trade Competition Act (TCA) B.E. 2560 (2017) in 2017 replacing the Trade Competition Act B.E. 2542 (1999).

5. The new act of 2017 establishes the Trade Competition Commission consisting of a Chairperson, a Deputy Chairperson, and 5 other Commissioners. Each Commissioner shall have achievements or have performed duties that demonstrate that he or she has requisite knowledge and has expertise and/or experience of not less than 10 years in one or more of the following fields including, law, economics, finance, accounting, industry, business administration, consumer protection, or other fields which benefit competition regulation. The new Act of 2017 also establishes the Office of Trade Competition Commission which is independent from the Executive branch, unlike the previous act in which the Office was under the Ministry of Commerce.

6. Furthermore, the Trade Competition Act B.E. 2560 contains several competition provisions which are in accordance with the trade agreements, for instance:

- Non-discrimination clause: in the previous Act, it exempted all State-owned Enterprises (SOEs) from its application. However, in the new Act of 2017, it exempted only SOEs which conduct their undertakings according to the law or resolutions of the Cabinet which are necessary for the benefit of maintaining national security, public interest, the interests of society, or the provision of public utilities.
- Transparency clause: According to section 29 of the TCA, the Office of Trade Competition Commission (OTCC) shall have the power and duty to disseminate the outcome of matters considered by the Commission to the general public and to produce an annual report demonstrating the results achieved and challenges met by the Commission and the Office, which shall be provided to the Cabinet and disseminated to the general public.
- Procedural fairness clause: Although it is not prescribed in the TCA but every Commission's administrative decisions are subject to Administrative Procedure Act B.E. 2539 which contains provisions concerning procedural fairness, for example:
  - The commissioner shall not have conflict of interest regarding the particular matter in which he/she is considering;
  - The Commission shall provide an interested person the adequate opportunity to be informed of the facts and to object thereon and to be able to adduce his/her evidence;
  - The person who is subject to the Commission's decisions may appeal against such;
  - decision within 15 days from the date he/she is notified thereof;

- In the criminal case, the Commission are subject to the Criminal Procedure Code which has a very strict and high standard regarding the procedural fairness.

7. In terms of impact of competition provisions in trade agreements, they have resulted in 3 main changes, as follows:

- **Independence:** Trade agreements encourage reforming the previous competition law, as well as reforming the organization to be an independent agency. The Trade Competition Act B.E. 2560 changes the selecting processes of the Trade Competition Commission (TCC) and determines roles and duties of the TCC to regulate anti-competitive conducts among the business operators, including state-owned enterprises to create an equal level-playing field, as well as to maintain free and fair competition in the market.
- **Comprehensiveness:** According to the new TCA, all SOEs, public organizations, or other government agencies which do not conduct their undertakings according to the law or resolutions of the Cabinet which are necessary for the benefit of maintaining national security, public interest, the interests of society, or the provision of public utilities shall be subject to the new act, and regulated by the OTCC. Also, the Act empowers the Trade Competition Commission to propose deliberations and recommendations to the Minister of Commerce and the Cabinet with regard to the government's policies on competition, as well as to give recommendations to government agencies on rules, regulations, or orders which are obstacles to competition and causing obstruction, restriction, or reduction of competition, and that may result in unfairness between business operators. Thus, the OTCC and the TCC are now having the significant roles in the policy changes concerning the SOEs sector.
- **Capacity building:** As a new independent agency, it is highly significant for the OTCC to develop knowledge and experiences by enhancing technical cooperation under various trade agreements in order to elevate the capacity building of OTCC and its officials in order to regulate competition issues conducted by both of private sector and SOEs sector efficiently and effectively

8. Previously, OTCC has joined and co-hosted numerous workshops and capacity building activities under the trade agreement, for instance, the Competition Law Implementation Program (CLIP) under the ASEAN Australia and New Zealand Free Trade Area (AANZFTA) Agreement which aims to draw on existing expertise in the AANZFTA region to deliver targeted capacity building projects designed to build the foundations for effective competition law enforcement and regulation within the region. Examples of activities are Expert Placement Programme, CLIP Secondment and Study Programme, and several capacity building workshops.

9. Concerning the dispute settlement of competition policy provisions in the jurisdiction's trade agreements, The Trade Competition Act B.E. 2560 doesn't prescribe any details with regard to this matter. As a young competition authority, the Office of Trade Competition Commission mainly aims to enforce the law efficiently, as well as conduct ex-ante and suppression procedure since the violations prescribed on the Trade Competition Act affect not only other business operators, but also affect the country's economy.

10. However, in the near future, dispute settlement measures might be used as appropriate when Thailand can enforce its competition law effectively and efficiently. According to trade agreements which Thailand has signed with several parties, not all of them would state the dispute settlement mechanism on Competition Chapter. Most of the signed trade agreements stated that dispute settlement shall not apply to the Competition provisions.

11. In terms of interpretation problems in implementing the competition provisions into national legislation of Thailand, OTCC has no concern as it takes adequate steps and time on consideration. Also, as the Ministry of Commerce and Ministry of Foreign Affairs are in charge of trade agreements as monitoring agencies, the different trade agreements would not result in inconsistent clauses on the competition matters with relevant national legislation, regulation, and guidelines.

12. As a Civil law system country, Thailand's legislative processes take sufficient time (approximately 2 years) to make final definitive judicial consideration. The legislative process commences after the Council of Ministers has taken office and stated its policies to the National Assembly. The Minister in charge of each policy is to then direct the responsible agency to draft the bill in accordance with the policy or administrative need and submit it to the Council of Ministers via the Secretariat of the Cabinet for policy approval. At this stage, the Council of Ministers does not need to approve the texts of the draft bill, but it is required that its approval is given in principle to the draft bill. The principle-approved draft bill is then sent to the Office of the Council of State for legal scrutiny. Normally, the draft bill will be examined by the Law Committee specialised in the field of law related to the content of the draft bill. After completion, the examined draft bill will be sent to the Council of Ministers again for approval on the texts of the draft bills. Upon approval of the Council of Ministers, the draft bill is then introduced to the National Assembly for further consideration. After the National Assembly has given its consent, the bill will be submitted to the King for His Royal Signature, and then sent back to the Secretariat of the Cabinet which is responsible for the publication of the bill in the Government Gazette, after which the bill will come into force as an Act.

13. In terms of OTCC's roles in the development and negotiation of trade agreements, OTCC doesn't directly involve in the negotiation of trade agreements, but we are involved in the negotiation process by providing our opinions and recommendations concerning the competition provisions in the trade agreements to the responsible authority, particularly the Department of Trade Negotiations, the Ministry of Commerce for further process of negotiation. Furthermore, according to the Trade Competition Act B.E. 2560, OTCC shall be able to exchange information, participate in negotiations, make an agreement and cooperate with other entities or agencies both in and outside the country, and to provide for or cooperate with other entities on training and knowledge development with regard to competition matters; therefore, OTCC is able to issue an opinion on draft legislation implementing competition clauses, on its own initiative, as well as to actively enhance active roles and duties in the development and negotiation of trade agreements with other related authorities in the near future.

14. However, there are still some challenges for the OTCC. We consider that at this moment, OTCC is at the beginning stage of enforcing the new trade competition act. Also, negotiations of trade agreements, particularly the competition chapters is a new practice area for OTCC since the office has been recently established, and Thailand have entered into only five FTAs which consist of competition chapters, and most of the competition provisions are technical cooperation, transparency, procedural fairness, non-discrimination, and exchange of information which are general principles concerning the enhancement of the competition law enforcement to be in accordance with the trade agreements.

15. Concerning the specific mechanism to monitor the effect of the trade agreements, OTCC hasn't set up such mechanism yet. However, according the Trade Competition Act B.E. 2560, we have a duty to produce an annual report demonstrating the results achieved and challenges met by the Commission and the Office, including the results of the implementation concerning the trade agreement, which shall be reported to the Cabinet and disseminated to the general public. Furthermore, OTCC will have a duty to report the results of the trade agreements to the related authorities such as the Department of Trade Negotiations, Ministry of Foreign Affairs, and Office of the National Economics and Social Development Board.

16. Conclusively, as the new trade competition act has recently come into force, OTCC will have to continually enforce competition law and implement competition policies effectively and efficiently. To be a law enforcement agency, this young organization still face many challenging competition issues under the trade agreements. Since OTCC is by its definition an organic legal entity could advise the Executive Branch of new competition positions, the Competition Act can be reviewed subject changing circumstances. Furthermore, we desire to raise our profile, roles and legal positioning on new issues in the practices as requested by the trade agreement to be able to benchmark ourselves with the international.