The Trade Competition Commission Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position B.E. 2561 (2018)

As Section 50 of the Trade Competition Act B.E. 2560 (2017) prohibits harmful business practices by undertakings with dominant position and for the purposes of clearly and consistently assessing any practices in violation of Section 50 of the Act, the Trade Competition Commission, pursuant to Section 17 (3) of the Trade Competition Act B.E. 2560, therefore, announces the Notice as follows:

1. This Notice is called "The Trade Competition Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position B.E. 2561."

2. This Notice shall be effective on the following day after the day that this Notice being published in the Government Gazette onwards.

3. The Chairperson of the Trade Competition Commission shall be in charge of this Notice.

Chapter 1

General Provision

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4. An undertaking commits an offence under Section 50 shall be an undertaking with dominant position pursuant to the criteria determined and announced by the Trade Competition Commission.

Chapter 2

Offences

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5. Unfair price determination or price maintenance of a product or a service with one or more of the following characteristics shall be considered as the violation of Section 50:

(1) Predatory Pricing which is a price determination of a product or service at an extremely low level to drive a competitor out of the market; it shall be presumed that the price determination of a product or service below average variable cost (AVC) is a predatory pricing; the undertaking with dominant position shall declare the reason(s) or rationale for such price determination, for instance, loss leading by reducing a price of a product to increase the sale of another product; short-run promotions to introduce a new product into a market or price reduction for survival in response to an unprecedented reduction of demand;

(2) Price Below Cost is a price determination of a product or service in such a way that the price is higher than average variable cost (AVC) but lower than average total cost (ATC); it is necessary to assess all factual information regarding reasons and objectives for such pricing to decide whether the price is reasonable or fair;

(3) Price Discrimination in which buying or selling prices of a product or service are determined or maintained differently for trading parties, as either one of the following:

(a) Setting buying or selling prices of an identical product or service differently to different trading partners due to anything apart from differences in costs, quantity, quality, or any other characteristics of the product or service, and without any other due cause;

(b) Setting an identical buying or selling price of a product or service to different trading parties even though there are differences in terms of costs, quantity, quality, or any other characteristics of the product or service to each party, and without any other due cause;

(4) Margin Squeeze whereby the undertaking with dominant position sets a price of a product or service that considered as a raw material for another undertaking who is both its customer and its competitor in an upstream- or a downstream-product or service market, with following characteristics:

(a) The undertaking with dominant position operates in such a way that it is a producer or a supplier in that market and a seller of a product or service in an upstream, or a downstream, market simultaneously;

(b) The undertaking with dominant position sets the price of a product or service to another undertaking who is both its customer and a competitor in an upstream, or a downstream, market at an extremely high level in which may result in an insufficient profit for that undertaking to continue its operation;

(5) Excessive Pricing is a price determination or price maintenance at a very high level, allowing the undertaking to earn excess profit or higher profit than it used to by assessing price determination and profitability of other compatible undertakings, domestically and internationally;

(6) Other price determination or price maintenance without due cause.

6. Imposition of unfair conditions on another undertaking who is a trading party, causing that undertaking to restrict its service, production, purchase, or distribution of products or to restrain itself from being able to purchase or sell a product, from receiving or providing a service, or from seeking other sources of finance from other undertakings with the following characteristics:

(1) Impose conditions to another undertaking who is its trading party, for instance,

(a) Discount Schemes for a product or service, such as Fidelity Discounts whereby a buying undertaking must buy in bulk or a whole lot which deemed excessive for the buying undertaking and prevent the buying undertaking to choose from other suppliers or requirement for a buying undertaking to buy a tied product to receive a discount;

(b) Exclusive Dealing whereby another undertaking who is a trading party must exclusively buy or sell a product or service from the undertaking with dominant position;

(c) Quantity Forcing whereby another undertaking, who is a trading party, must buy or sell a product or service at a specific quantity;

(d) Tie-in Sale whereby, to enable another undertaking, who is a trading party, to buy a particular product or service from the undertaking with dominant position – i.e. a tying product, that party must buy another product or service – i.e. a tied product;

(e) Resale Price Maintenance whereby the undertaking with dominant position requires its trading parties to sell their products at a suggested price or suggested price range;

(f) Refusal to Supply to its trading party;

(2) Such conditions in (1) shall feature one or more following characteristics:

(a) shall limit or restrict service, production, purchase, or distribution of its trading party;

(b) shall limit or restrict an opportunity for its trading party to buy or sell product, to be provided with service, or to offer service;

(c) shall limit or restrict an opportunity for its trading party to seek for sources of financing from other undertakings;

(3) Such conditions in (1) shall be imposed without due cause.

7. Suspension, reduction, or limitation of service, production, acquisition, disposal, delivery, import into the Kingdom without due cause, destruction, or causing damage to product, aiming to reduce the quantity in the market below the market demand with following characteristics:

(1) The action having one or more of the followings:

(a) suspend, reduce, limit service, production, acquisition, disposal, delivery, or import into the Kingdom without due cause;

(b) destroy or causing damage to product;

(2) There shall be an intention to reduce a quantity of product or service below market demand.

8. Intervention into other's business operation without due cause in which featuring following characteristics:

(1) Intervention into other's business operation that is not related to the undertaking with dominant position;

(2) There is no due cause for such intervention.

Chapter 3

Guidelines for the Assessment of Unfair Practice or Practice without Due Cause

9. To assess a certain action whether it is unfair or without due cause, the following criteria shall be considered concurrently:

(1) Such action is not commonly practiced as trade norms;

(2) There is an imposition of condition(s) without written evidence and without prior notice in a reasonable period of time as normally practiced in trade;

(3) Such action has no justifiable explanation(s) from the perspective of business, marketing, or economics;

(4) Other relevant factors.

This Notice is announced on 4 October B.E. 2561 (2018)

Sondhirat Sondhijirawong

Minister of Commerce acting as the Chairperson of

The Trade Competition Commission