Settlement Program from Thailand's Trade Competition Act B.E. 2017 Perspective
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Abstract

This article aims to study the settlement program in accordance with Thailand's Trade Competition Act B.E.2560 and discusses some controversial issues relating to the settlement program. The key research question is whether there is any part in the criminal liability chapter, specifically in relation to the settlement program, of Thailand's Trade Competition Act B.E. 2560 that can or should be improved.

Keyword : Thailand's Trade Competition Act B.E. 2017

บทคัดย่อ

บทความนี้มีวัตถุประสงค์เพื่อศึกษาการเปรียบเทียบปรับตามพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2560 และอภิปรายบางประการเกี่ยวกับประเด็นถกเถียงซึ่งเกี่ยวเนื่องกับการเปรียบเทียบปรับ คำถามการวิจัยที่สำคัญคือมีส่วนใดในบทกำหนดโทษอาญาในพระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2560ที่สามารถหรือควรปรับปรุง

คำสำคัญ : พระราชบัญญัติการแข่งขันทางการค้าของไทย พ.ศ. 2560

I. Introduction

This article aims to study the settlement program in accordance with Thailand's Trade Competition Act B.E.2560 and discusses some controversial issues relating to the settlement program. The key research question is whether there is any part in the criminal liability chapter, specifically in relation to the settlement program, of Thailand's Trade Competition Act B.E. 2560 that can or should be improved.

Additionally, the authors comparatively research the antitrust laws in the United States as it is the origin of modern antitrust laws and is among the most influential systems of competition regulation.

This article studies the settlement program in Thailand's Trade Competition Act B.E. 2560 by conducting both documentary research and empirical studies. Thailand's Trade Competition Act B.E. 2560 and the United States antitrust law were studied, and a total of four interviews were conducted with experts from different fields of legal practice.

The settlement program can be found in Section 79 of Thailand's Trade Competition Act B.E. 2560, which reads:

"All offenses under this Act may be settled, by way of payment of a fine, by the Commission. In exercising such power, the Commission may entrust the Secretary-General to act on its behalf.

When the offender has made payment of the fine in such amount as required for the settlement within a specified period, the case shall be deemed to have been extinguished in accordance with the provisions of the Criminal Procedure Code.

The determination of the amount of a fine required for the settlement shall be in accordance with the rules, procedures, and conditions prescribed in the Notification of the Commission."

This Section gives the Office of Trade Competition Commission (hereinafter "OTCC") the power to settle cases that have criminal offenses. Giving the alleged person an option to pay the fine set by the Commission, which shall not exceed 10% of that year's total income of that business operator, and settle the case or to continue with the lawsuit and wait for the Court's judgement. Significantly reduce the time and resources needed. However, it also shifts the discretionary power from the Court to the OTCC in deciding on the amount of fine, which has limited guidelines on how much the fine should be.

Section 79 was firstly introduced in Thailand's Trade Competition Act B.E. 2560. However, this program was not in the original draft of the Act. Initially, the drafter introduced former Section 74 about the leniency program, which reduced sentences for the person(s) who admitted to the authority that they have taken part in an action or agreement that is in contrary to the law,[1] that reduces sentences for the person(s) who admitted to the authority that they have taken part in action or agreement that contradicts the law. This leniency program is adopted in many countries with the competition or antitrust law, including the United States [2] and Japan[3]. Unfortunately, in Thailand, it was rejected. So, the current Section 79 was adopted instead. According to Ajarn Aramsi, the former commissioner of the OTCC, this Section was adopted to help with the law-enforcing processes.

In this article, the authors have divided content into several chapters including the relevant provisions in Thailand's Trade Competition Act B.E. 2560, the relevant provisions in the antitrust laws of the United States, the case reviews in Thailand and in the United States, the case comparison, the advantage and disadvantage of the settlement program, conclusion of empirical studies (interviews) , suggestion for improvement of the settlement program in Thailand, and finally the conclusion of the article.

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[1] คณะกรรมการวิสามัญ พิจารณาร่างพระราชบัญญัติแข่งขันทางการค้า, (รายงานของคณะกรรมการวิสามัญพิจารณาร่างพระราชบัญญัติแข่งขันทางการค้า, 2560) <https://otcc.or.th/wp-content/uploads/2020/02/know-06-1.3.pdf> accessed 16 November 2021

[2] The United State Department of Justice, 'Corporate Leniency Policy' (LENIENCY PROGRAM, August 10, 1993) <https://www.justice.gov/atr/leniency-program> accessed 18 November 2021

[3] Japan Fair Trade Commission, 'Public Comments on the Draft of the Amendment of the Rules/Policy/Guidelines with the Amendment of the Antimonopoly Act' (Japan Fair Trade Commission Press Releases, April 2, 2020) < https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/200402.html> accessed 18 November 2021

II. Related Provisions

The settlement program can only settle the anti-competitive conduct with criminal sanctions. Under Thailand's Trade Competition Act B.E. 2560, Section 50 and Section 54 are the only provisions that the violation of these two provisions could result in criminal sanctions (imprisonment). Therefore, Section 50 and Section 54 of Thailand's Trade Competition Act B.E. 2560 are related provisions to the settlement program.

Section 50 is about the abuse of the dominant position in a market. This Section aims to restrict a dominant firm in a market or a dominant group of firms to engage in conduct that is intended to eliminate or discipline a competitor or to defer future entry by new competitors, with the result that the competition is prevented or lessened substantially. Having a dominant position means such firms own more than 60% of the market shares within the same market (or own market shares in the percentage of between 35% to 60% in some cases). However, merely having a dominant position in the market is not wrongful, as long as such firm does not abuse its position.

Section 54, this Section restricts the occurrence of hardcore cartels, which means a group of independent market participants within the same market collude with each other to improve their profits and dominate the market. By agreeing on any of these following terms; price-fixing, market allocation, bid-rigging, and output restriction as described in the four subsections of Section 54.

The criminal sanction of violating Section 50 and Section 54 are mentioned in Section 72 of the Trade Competition Act B.E. 2560, which read:

"Any person violating Section 50 or Section 54 shall be subject to a term of imprisonment of not more than two years or a fine of not more than ten percent of the turnover in the year of the offense, or both...."

A. Relevant Rules in the United States Antitrust Law

Even though the United States has a different legal system from Thailand, there are similar rules of law in the United States with the provisions about the abuse of dominant position and hardcore cartel in Thailand's Trade Competition Act B.E. 2560. Such rules of law are included in the Sherman

Antitrust Act of 1890 (the "Sherman Act"). It was a federal statute that prohibited activities that restricted interstate commerce and competition in the marketplace.[4]

The law regulating the abuse of dominant position is Section 2 of the Sherman Act. To be considered as violating this Section, a person shall be in possession of monopoly power in the relevant market, or in other words, in possession of the dominant position in the market. The standard of identifying whether a person is in possession of a monopoly in the relevant market is the same as the standard used in Thailand, which is owning more than 60% of the total market shares within the relevant market or between 35% to 60% of the total market shares in the relevant market in some special cases.

A person also shall be in willful acquisition or maintenance of its monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The key point of determining the acts committed by such person violating Section 2 of the Sherman Act is to figure out whether those acts are harmful to the competition, and the sanctions apply only when the acts are considered as harmful.[5] The sanction for violating this Section is punished by a fine not exceeding five thousand dollars, by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court.

The significant difference between Section 50 of Thailand's Trade Competition Act B.E. 2560 and Section 2 of the Sherman Act is that any person whose act fulfills the subsections of Section 50 will be considered as violating such Section, without the necessity to prove the harm caused by such act. However, under the Sherman Act, any acts fulfilling the subsections of Section 2 shall also be proven that those acts are harmful to the competition in the market, in order to judge that the person who committed such acts shall receive the sanctions.

The law that regulates the hardcore cartel is Section 1 of the Sherman Act. To be considered as violating this Section, the existence of concerted action shall be made among at least two distinct actors. Thus, this Section does not prohibit unilateral activity made by a single actor or between actors within the same firm. The concerted action shall also unreasonably

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[4] 'Sherman Antitrust Act' (*Legal Information Institute*) <https://www.law.cornell.edu/wex/sherman_antitrust_act> accessed 17 November 2021

[5] 'Section 1 of the Sherman Act: Horizontal Restraints of Trade and Communications Among Competitors' (*Sherman Act*) <http://www.bizlit.com/docs/about/articles/ShermanAct.htm> accessed 17 November 2021

restrains trade, and affects interstate or foreign commerce of the United States.[6] The punishment of violating this Section has the same consequence as violating Section 2 of Sherman Act.

The difference between Section 1 of Sherman Act and Section 54 of Thailand's Trade Competition Act B.E. 2560 is that this Section only restricts the agreements that restrain trade unreasonably, while Section 54 does not specifically mention the reasonability of the agreement. Two methods are commonly used to determine whether a hardcore cartel agreement is unreasonably, which are called the rule of reason and the per se rule of illegality.[7]

1. Cases review

The case between the United States and Microsoft Corporation regarding Antitrust Laws in 2001 would present decent importance in regarding the finding of ways to enhance Thai Competition law by demonstrating the usage of the Sherman Act by providing the similarity and differences between Section 2 of the Sherman Act and Section 50 of Thailand's Trade Competition Act B.E. 2560 and the similarity and differences between Section 1 of Sherman Act and Section 54 of Thailand's Trade Competition Act B.E. 2560 with the ultimate purpose of adoption of some provision in Sherman Act to the current Thai competition law and elimination resulting from the implementation of the Sherman Act.

a. *United States v. Microsoft Corporation*, 253 F.3d 34 (D.C. Cir. 2001)[8]

The competition laws in the United States ("Antitrust Laws") have a long and prominent history that influenced many competition laws around the world. Currently, there are four Antitrust Acts in the States which are the Sherman Act, the Clayton Act of 1914, the Federal Trade Commission Act of 1914, and the Robinson-Patman Act of 1936. The main Act that governs most competition cases is the Sherman Act. Moreover, this is the only Act that imposes criminal penalties. The following are the analysis of the famous *United States v. Microsoft Corporation*

[6] 'What Is a Monopolisation Claim Under the Federal Antitrust Laws?' (Bona Law Antitrust & Competition September 16, 2019) <https://www.bonalaw.com/insights/latest-news/what-is-a-monopolization-claim-under-the-federal-antitrust-laws> accessed 10 November 2021

[7] International Antitrust Cartel Handbook (American Bar Association, Antitrust Law Section 2019)

[8] The United State Department of Justice, 'US V MICROSOFT: COURT'S FINDINGS OF FACT' (US V MICROSOFT: COURT'S FINDINGS OF FACT, Updated July 26, 2018) <https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact> accessed 16 November 2021

case. This case dealt with the monopoly power in the market and raised the issues inside the Sherman Act.

The case of *United States v. Microsoft Corporation* happened in 2001. In this case, the Plaintiff are the Department of Justice ("DOJ") and the Attorneys General of twenty U.S. states[9], and the District of Columbia. The Defendant is the Microsoft Corporation. The Plaintiff sued the Defendant on behalf of the United States by alleging that the Defendant had violated Section 1 and Section 2 of the Sherman Act and other state statutes.

The Plaintiff accused the defendant of illegally maintaining its monopoly in the personal computer ("PC") market by the legal and technical restrictions it put on the abilities of PC manufacturers ("OEMs") and users to use Internet Explorer than using the other programs such as Netscape, Java, and Opera as the Defendant was tying and bundling its internet browser software program Internet Explorer to its Windows operating system. The other internet browsers were affected by such action since it would take time for customers to install it unlike the Internet Explorer that can be instantly used as it was already installed in the system.

At the District Court of Columbia, it was ruled that the Defendant's actions constituted an unlawful monopolisation by committing monopolisation, attempted monopolisation, and tying, which violated Section 1 and Section 2 of Sherman Act. Therefore, the court ordered a breakup of the Defendant into two separate units which are one to produce the operating system, and the other one to produce other software components.

However, the Defendant appealed the case. At the Federal Appellate Court, judge Colleen affirmed that the Defendant violated Section 1 and Section 2 of the Sherman Act; however, the court rejected the rule of per se illegality for the tie-in due to the impact it might have on the novations. Thus, the court seek for more proper liabilities for the Defendant. In the end, the DOJ and the Defendant made a settlement on November 2, 2001 by requiring the sharing of the Defendant's application programming interfaces with third-party companies.

[9] Andrew Beattie, 'Why Did Microsoft Face Antitrust Charges in 1998?' (25 October 2021) accessed 12 November 2021<https://www.investopedia.com/ask/answers/08/microsoft-antitrust.asp> accessed 12 November 2021

Our group's view toward this case is that we disagreed with Judge Colleen on her thought that the monopoly power that Microsoft has had no effects on the competitors. At that time, Microsoft was the most prominent computer technology corporation due to the release of Windows 95 and Internet Explorer.[10] From the record, the Internet Explorer was widely used in the US which accounted for 86.08% in 2000.[11] Microsoft was too powerful for the competitors to compete with at that time. We agreed that even though the act of Microsoft constituted a monopoly, the company should not be broken up and the rule of per se illegality as provided by the Supreme Court as a precedent may limit the novations. The breakup of Microsoft might not benefit the consumers that much since the consumers may have to pay the price for installing the internet browser. However, on the bright side, there was an emergence of the famous computer technology corporation like Apple because of the trial as it kept Microsoft losing ideas on the new products. This was affirmed by the excerpt of the Annual Report of Microsoft in 2008, which stated that "..These proceedings imposed various constraints on our Windows operating system businesses. These constraints include limits on certain contracting practises, mandated disclosure of certain software program interfaces and protocols, and rights for computer manufacturers to limit the visibility of certain Windows features in new PCs...".[12] Thus, our opinion regarding the case was that we were not so keen with the judgement from Judge Colleen; however, we agreed in some sense that the rule of per se illegality may limit the novations.

b. Trade Competition Commission v. M-150 company limited

There is a case that the Trade Competition Commission has decided under the Trade Competition Act B.E. 2542 concerning the M-150 company limited, an energy drink company, and the trade Competition Commission. The main focus of this case concern a situation whereby a business operator used its dominant position in the market by "imposing unfair compulsory conditions which, directly or indirectly, require other business operators who are his or her

[10] Historycom editors, 'Microsoft founded' (THIS DAY IN HISTORY APRIL 4, 9th October 2015) <https://www.history.com/this-day-in-history/microsoft-founded> accessed 12 December 2021

[11] Websidestory, 'Microsoft's Share of Browser Market Continues to Rise: Now More Than 87 Percent' (Press release, 11th February 2007)

<https://web.archive.org/web/20070211144452/http://www.websidestory.com/company/news-events/press-releases/view-release.html?id=1120&year=2001> accessed 12 December 2021

[12] Microsoft corporation, 'Annual Report for fiscal year ending' (30 June 2008) <https://www.sec.gov/Archives/edgar/data/789019/000119312508162768/d10k.htm#tx31450_3> accessed 15 November 2021

customers to restrict the supply of service, production, or purchase or sale of goods, or limit their opportunities to choose to purchase or sell the goods, to receive or supply service, or to secure credits from other business operators." under Section 25(2) and "interfering in the operation of the business of other persons without reasonable cause." under Section 25(4).

According to the Opinion of the Trade Competition Commission on the prohibition of selling competitors products in the energy drink market imposed on July 15th, 2559, M-150 company limited used its dominant position in the energy drink market by unfairly imposing conditions that limit the purchase of M-150 energy drinks and limit the opportunity to purchase or sell other brands of energy drinks under Section 25 (2) and interfering with the business of the four petitioners without reasonable grounds under Section 25 (4) of the Act Trade Competition 2542 and therefore sent the case to the Attorney General for consideration whether to issue a prosecution order.

According to the fact that there is a settlement program purpose under Trade Competition Act B.E. 2560 as Section 79, there is a question raised to whether the Trade Competition Commission is entitled to apply the provisions of offences under Section 50 and fine under Section 72 of the Trade Competition Act B.E. 2560, to the offence under Section 25 of the Trade Competition Act, B.E. 2542, which is punishable by fine under Section 51 of the Competition Act. Trade B.E. 2542 or not. The answer to this question can be found within the decision of the Trade Competition Commission published on July 25th, 2562.

In this case, the Trade Competition Commission concluded that the action of both alleged offenders who were directors of M-150 company limited is the offence under Section 25 of Trade Competition Act, B.E. 2542, in which Section 51 of the same act indicated that "Any person violating Section 25,..., shall be liable to imprisonment for a term not exceeding three years, or to a fine not exceeding six million Baht, or to both, and, in the case of repeat offence, shall be liable to twice as much the penalty." However, after Thailand's Trade Competition Act B.E. 2560 had taken effect, Section 3 of such act was indicated for the repeal of Thailand'sTrade CompetitionAct B.E. 2542.

Regardless of abolishing the Trade Competition Act B.E. 2542, the offence uses the dominant position in the market under Section 25 of the Thailand's Trade Competition Act B.E. 2542 was also included in the current competition law, The Trade Competition Act B.E. 2560, as

Section 50. Section 72 of the Thailand's Trade Competition Act B.E. 2560 indicated that "Any person violating Section 50 or Section 54 shall be subject to a term of imprisonment of not more than two years or a fine of not more than ten percent of the turnover in the year of the offence, or both." in which the Trade Competition Commission views that the idea behind the enactment of the new law, the Thailand's Trade Competition Act B.E. 2560, still wants to continue the existing criminal penalties regarding the use of dominance position under Section 25 of the old act. Therefore, the Trade Competition Commission shall apply the law which imposes more benefit to the offender regardless of whether such provision is in the Thailand'sTrade Competition Act B.E. 2560.or.the.Thailand's Trade Competition Act B.E. 2542.

There is a fundamental reason behind the enactment of the imprisonment penalty from three years imprisonment to two years imprisonment under the Thailand's Trade Competition Act B.E. 2560 in which it may create a significant change in the enforcement process as it would then allow the offender who was placed guilty by the Trade Competition Commission, before the case went to court, to request the use of Section 79 to their case. According to the fact that while the case was ended at the Trade Competition Commission and was sent to be considered by the attorney, the energy drink company contacted the Trade Competition Commission on July 19th, 2562 in requesting to use Section 79 of the Thailand's Trade Competition Act B.E. 2560 to be the legal ground of paying the compensation. Then on July 25th, 2562, the Trade Competition Commission concluded its decision that allows M-150 company to use the settlement program under Section 79 of the Thailand's Trade Competition Act B.E. 2560 to pay the fine of six million Baht for each of the two directions of M-150 company in which the overall fine, in this case, was twelve million Baht in total according to Section 51 of Trade Competition Act B.E. 2542 together with settlement program under Section 79 of the Thailand's Trade Competition Act B.E. 2560.

The main comment according to our opinion on the decision of this case concerning the settlement program imposed as Section 79 of the Thailand's Trade Competition Act B.E. 2560 is related to the fact that the Thailand's Trade Competition Act B.E. 2560 does not have the equipment to bring about the concealed facts, the leniency program, of the case when considering Section 50 and Section 54 regarding the use of dominant position and hardcore cartels, so the chance to access the constructive evidences regarding the crime is problematic as it essentially helps commissioners not have to start the investigation for scratch.

The first beneficial side of Section 79 can be seen as giving the Trade Competition Commission a legally authorised power in determining the person who would be subject to the penalty. The application of Section 79 of the Thailand's Trade Competition Act B.E. 2560 to the case of M-150 Company can be considered as beneficial but at the same time could create some negative impact to the society in terms of reducing the relevant market competition in preventing other businesses to entering into the same relevant market or indirectly forcing other companies in the relevant market to be out of the business.

The settlement program also presents another benefit which is it helps the Trade Competition Commission to maintain the cost of conducting the case effectively, the number of Human Resources used in the case, and the period the commission used in the case.

Regarding our key research question of whether there is any part in the criminal liability chapter, specifically about the settlement program, of Thailand's Trade Competition Act B.E. 2560 that can or should be improved, the case between the Trade Competition Commission and M-150 company limited present decent importance in regarding the finding of ways to enhance Thai Competition law. The presentation of the practical usage and the loopholes of the settlement program and the method of fine calculation implemented in section 79 of Trade Competition Act B.E. 2560 by confiding the brief historical development of the Thai Competition Act from the Trade Competition Act B.E. 2542 to the Trade Competition Act B.E. 2560 shows the application of the settlement program and its loopholes in the previous law to the recent enactment with the primary purpose to demonstrate and to find the more proper execution for our future competition law. According to the case between the Trade Competition Commission and M-150 company, it purposed that Section 79 of Thailand's Trade Competition Act B.E. 2560 can be used as the legal ground for paying compensation instead of imprisonment. However, this case also presents certain loopholes, which are the mode of fine calculation to be improved in the future.

Case Analysis

1) The difference between both cases is that according to the Thailand's Trade Competition Act of B.E. 2560, it gives the power to the OTCC to settle the case by using the settlement program in Section 79. However, in the antitrust laws in the US, the case must be pending to the Court. Moreover, in the *Trade Competition Commission v. M-150 company limited*, the punishment is the fine. However, in *United States v. Microsoft Corporation*, there is no fine punishment instead there is a settlement proposal.

2) The similarity can be found in the practical usage of criminal sanctions. From the United States standpoint, the United States government only authorised the case to be pursued by the Department of Justice in being able to impose the criminal sanction on the offender. Similarly, even though the Thailand's Trade Competition Act of B.E.2560 authorised the Trade Competition Commission the power to set the criminal sanction on the offender but in practice, the Trade Competition Commission has never imposed any criminal embargo for the offences in relating to Section 50 or Section 54 in which it initially imposes criminal liability on the offender who committed the offences under Section 50 or Section 54. In this case, the reason could be because the legal drafter seems to think in the same way that maybe criminal punishment might not be suitable for the offence relating to the abuse of dominant position and the tying and bundling cases.

3) Advantages and Disadvantages of the Settlement Program

To help identify characteristics of the settlement programs and its effectiveness, we have listed out the advantages and disadvantages of the settlement program. According to our research and interviews, these are the benefits of the settlement program;

1. Being able to settle the case without going to court saves a-lot of time and resources for both parties.

The settlement program allows the alleged business operator, who has been found guilty by the OTCC commission, to settle the case without having to go through court procedures by paying the fine as specified within the period. Business operators can quickly settle the case and move on, not having to deal with the lengthy process of lawsuit in courts. Thus, the settlement can

become the incentive for an alleged person who acted wrongly to confess. This can be quite helpful to the alleger, as the offences related to the settlement program are criminal offences, the alleger has to prove beyond reasonable doubt to the court that the alleged is guilty of the crime, which is not an easy task.

2. The imprisonment judgement from the court may not be as effective in deterring crimes as it sounds.

Even if the accused were to be found guilty by the court and be convicted with jail time, if the enforcement of the judgement is lenient, the wrongdoer will not be afraid to commit crime again. We are not saying that every person who committed business crimes should be imprisoned, the ultimate goal of imprisonment sanctions in business crimes is not to separate the wrongdoer from the society, but to make an example [13], so that others will think twice before committing a crime. There will not be such a deterrent effect if the wrongdoer who was convicted jail time were to easily get bailed out. In addition, there are ongoing debates whether the criminal sanction is appropriate for business crime or not[14].

So, with the effective of using imprisonment as deterrence being questionable, the settlement program that allows the commission to get fine payment from the wrongdoer may be more effective in deterring wrongdoing as the amount of fine of up to 10% of that year income is a considerable amount of money and potential wrongdoer, whose purpose of committing such act is for profit to begin with, will have to take the risk of getting fined into account and hopefully it will make them decide not to commit such wrongful act.

3. There are limits where some cases may not be allowed to be settled at the commission level.

According to the OTCC's notification, the repeat offender of more than three times cannot settle the case. This forces the repeat offender more than three times to go through the

[13] Bhornthip sudti-autasilp, 'Corporate Crime and criminal liability of Corporate entities in Thailand ' resources material series no.76 137TH International Training Course Participant' Papers

[14] Richard A posner , 'Optimal Sentences for White-Collar Criminals ' [1980] American Criminal Law Review(409) Chicago Unbound

court process. Thus, limiting the OTCC power from allowing cases to be settled without going to court indefinitely.

However, there are also disadvantages from the settlement program which are;

4. Allowing the wrongdoer to pay the fine instead of going to court may reduce the deterring effect of criminal sanctions of the trade competition act.

While it is debatable whether imprisonment sanction is really effective in deterring wrongdoing, it is undeniable that the word “imprisonment” is intimidating, especially to non-expert in legal practice. So, the punishment of a wrongful act being fined may sound less intimidating to potential wrongdoers, especially when combined with a meagre fine.

5. Section 79 shifted the discretionary power from the Court to the OTCC.

Originally, the discretionary power to determine the punishment i.e. amount of the fine belongs to the court. However, the settlement program gives the OTCC the discretion to set the fine which, if the alleged were to agree to pay, will extinguish the case.

There is also the issue of the credibility of the OTCC, whose selection process is not open to the public and since the OTCC is a relatively new organisation whose achievements, ie. decisions, is still a few, especially in cases related to criminal sanctions where there are only a few cases that had been decided making it hard to determine the consistency of the decisions.

6. The issues with the amount of fine.

As the law only provided that the fine should not be more than 10% of that year’s income, there are many uncertainties and concerns that the involved parties may have.

First is that there is no minimum amount specified. The commission may set the fine to as low as 1%, as it is within their discretion for the amount of fine.

Secondly, how is the 10% calculated? If the business operator has many businesses and one of its businesses violates the Act, will it be penalised only income from that business or all businesses of such business operators?[15]

7. The settlement program does not help with crime detection as in the leniency program, which settlement program was a substitute of.

In many countries that have Trade Competition Act or Anti-trust Act, they use a leniency program[16], which reduce sentences for the person(s) who admitted to the authority that they have taken part in action or agreement that is in contrary to the law, to increase the detection of wrongful act as majority of such act are internal agreement between few people, making it really hard for the outsiders to even know of such agreement, which resulting in the increasing of the deterrence effect of the law.

[15] Witchaya Khawjaroen, Thitaporn Wongpraparatana, R-Keera Panpanat, Interview with Rattakrai Limsiritrakul, 'Questions Concerning The Settlement Program Imposed As Section 79 Of The Trade Competition Act B.E. 2560' (2021)

[16] TheUnited State Department of Justice, 'Corporate Leniency Policy' (LENIENCY PROGRAM, August 10, 1993) <https://www.justice.gov/atr/leniency-program> accessed 18 November 2021 Japan Fair Trade Commission, 'Public Comments on the Draft of the Amendment of the Rules/Policy/Guidelines with the Amendment of the Antimonopoly Act' (Japan Fair Trade Commission Press Releases, April 2, 2020) < https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/200402.html> accessed 18 November 2021

IV. Interview

List of interviewees

Judge Monchai Chanintaraleela

Deputy Chief Justice of the Central Criminal Court for Corruption and Misconduct Cases

Khun Aramsri Rupan

Former Commissioner of Office of Trade Competition Commission

Pol.Lt Jaruwan Bumroungruksa

Law Lecturer at Royal Police Cadet Academy

Khun Rattakrai Limsiritrakul

Committee and Secretary to Legal Committee of the Federation of Thai Industries and Head of Investment & International Transaction of SCG Legal Counsel Limited

The authors interviewed the selected law enforcers and stakeholders who specialised in competition and criminal laws listed above about the current settlement program in accordance with Thailand's Trade Competition Act B.E.2560 section 79.

The Thai legal system imposes criminal penalties on the abuse of the dominant position and the hardcore cartel, which is not common in other legal systems. Other legal systems do not usually impose criminal penalties on the abuse of the dominant position. Other legal systems also introduce the leniency program to the cases of violation of competition law with criminal sanctions. As a result, the extra burden of collecting evidence and making judgments of the violation of the Trade Competition Act is put on the Thai jurisdiction system compared to other countries. Therefore, the existence of the OTCC settlement program provides a better solution for both the Court and the wrongdoers.

The OTCC settlement program quickly gained support from the corporations because of the punishment imposed for violating the Trade Competition Act. Another advantage of the settlement program is that the parties in the case no longer need to go to the Court to end the

cases since going to the Court, as we know, is complicated. In order to determine the process of the settlement program, the interviewees provided some cases in Thailand that violated Thailand's Trade Competition Act B.E. 2560 and resulted in criminal sanctions, yet ended the case through the OTCC settlement program.

Overall, interviewees agree that the existence of the OTCC settlement program helps reduce the burdens of the Court and deals with the cases about the violation of the Trade Competition Act in a fast and convenient way. However, the interviewees pointed out their concerns about the OTCC settlement program.

The first concern is that when the law gives power to the OTCC to settle cases in a way that allows the wrongdoer to choose to pay the fine instead of going to Court, the punishment might not be harsh enough to prevent the wrongdoer commit the same type of wrongdoing again in the future, as paying a fine may be regarded as a milder punishment compared to criminal penalty.

The second concern regards the credibility of the commissioners of the OTCC. One of the interviewees expressed that since the commissioners are nominated from various sectors, and the selection uses the appointment system, the process is not open to the public, their transparency is questionable. As a result, their discretion could be considered questionable. On the other hand, the commissioners were not trained to judge cases as the occupational judges had been. This means the professionality of the commissioners could be questionable as well.

The last concern is that the settlement program reduces the Court's authority. Since, if the alleged is happy with the OTCC's, the alleger, decision, the case will not reach the Court. As the alleged will not further pursue this case, enabling the Court from giving decision in that particular case

V. Suggestions and Analysis

According to the empirical study, it shows that the chapter regarding the criminal penalties implemented in the settlement program in Thai competition laws should be improved in many areas, for example, regarding the method of fines calculation imposed in Section 79 of Thailand's Trade Competition Act B.E. 2560 and the power of the OTCC in settling the cases that have the

criminal offences. Thus, the authors think that three main implementations can be developed and improved to establish a more efficient competition law in Thailand, which could, in practice, significantly enhance the efficiency of case management concerning competition matters in the future. The first implementation is to establish an inclusive guide on how the settlement program shall be implemented. The second implementation is adopting the leniency program to reduce the number of cases loaded to support crime management. The final performance is to adopt a minimum rate of fine to support the trust in the institution of the OTCC.

For practical implications;

1. There should be a comprehensive guide on how the settlement program will apply, including;
    a. Method of calculating the fines. What is the 10% calculated from The wrongdoer's net profit or only the profit that they acquired from such wrongdoing.
    b. Cases that cannot be settled by the OTCC and need to be judged by the court, if any. For example, legislators can set a rule that if the value of the case exceeds a certain amount of money, or if there is an impact on many areas in the country i.e. the cartel affects the consumers in the north province, such a case must go to court.
2. Thailand should adopt the leniency program to encourage and give the wrongdoer another chance to correct their mistake. Thus, increasing the efficiency of crime detection.
3. As currently there is only a maximum amount of fine without any minimum amount, the fine can be as low as the OTCC decides. This may cause suspiciousness toward the OTCC decision whenever someone deem the fine as too low. So, we suggest that there should be a minimum rate of fine specified.

VI. Conclusion

In conclusion, if we view the settlement program as the substitute of the leniency program, then the settlement program is insufficient as it does not help with the detection of crime, which is the most important function of the leniency program. However, if we view the settlement program on its own, this program is quite useful to the enforcement of competition laws in Thailand. The settlement program provides a short-cut to settle cases without going to the court, which helps the parties in the cases saving their time and resources. Also, since the imprisonment judgement made by the court is not as effective as people expect due to the practical issues, the existence of the settlement program fills up the blank that occurred from the inefficiency of the imprisonment judgement. Nevertheless, there are some areas that we found to need improvement, as we have
suggested in the previous topic.