

Competition Law in the Internet Market
กฎหมายแข่งขันทางการค้าในตลาดอินเทอร์เน็ต

Yuxin Zhang
(หยู่สิน จาง)

Tanyalux Pimsorn
(ธัญลักษณ์ พิมพ์ศรี)

Sara Zilzila
(ซาร่า ซิลซิลลา)

Chanthawat Chartpanyawut
(ชาญวัช ชาติปัญญาวุฒิ)

นิสิตในหลักสูตรนิติศาสตรบัณฑิต
คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ ถนนพระจันทร์ แขวงพระบรมมหาราชวัง เขตพระนคร
กรุงเทพมหานคร 10200

LL.B Candidates
Faculty of Law, Thummasat University, 2 PRACHAN ROAD, PHRA BOROM MAHA
RATCHAWANG, PHRA NAKHON, BANGKOK 10200, THAILAND
Corresponding author E-mail; 6301640352@student.chula.ac.th

Abstract

In recent years, the Internet economy has developed rapidly, while also triggering more and more Internet competition, which needs to be regulated and guided by law. However, various defects in the current competition law are conspicuous in this matter. This paper aims to provide suggestions for the revision and improvement of the Anti-Unfair Competition Law and promote the adaptation of the Anti-Unfair Competition Law to the requirements of competition in the digital era.

Keywords: Competition Law, Internet Market, Internet

บทคัดย่อ

ในช่วงหลายปีที่ผ่านมา เศรษฐกิจอินเทอร์เน็ตได้พัฒนาอย่างรวดเร็ว การดังกล่าวส่งผลให้การแข่งขันทางอินเทอร์เน็ตเพิ่มมากยิ่งขึ้นตามไปด้วย ซึ่งสิ่งนี้จำเป็นต้องถูกควบคุมโดยกฎหมาย กระนั้น เรายังสามารถพบข้อบกพร่องของกฎหมายแข่งขันทางการค้าปัจจุบันในการควบคุมเศรษฐกิจอินเทอร์เน็ต บทความนี้มุ่งเสนอแนะการปรับปรุงกฎหมายการแข่งขันทางการค้าเพื่อให้สอดคล้องกับยุคแห่งดิจิทัล

คำสำคัญ: กฎหมายการแข่งขันทางการค้า, ตลาดอินเทอร์เน็ต, อินเทอร์เน็ต

Introduction

In recent years, the Internet economy has developed rapidly, but at the same time, it has also triggered more and more Internet competition, which needs to be regulated and guided by law. However, since competition in the Internet market is vastly different from that in the traditional market, and the constantly updated technology and business models make competition more hidden, resulting in a more complex competition relationship involving not only the law but also the economy and network technology, it becomes difficult to make a correct judgment on whether competition in the Internet market constitutes unfair competition and how to regulate it.

Currently, the main regulatory and competition law agencies in Thailand are the NBTC and the TCC. The main regulatory agencies related to telecommunications are the NBTC and the MICT. The NBTC has issued many regulations and set many licensing conditions to promote competition. Parallel to this regulator is the Trade Competition Commission (TCC), which is the general competition regulator in Thailand. The TCC is the general competition regulator and has the authority to enforce antitrust regulations and enforce antitrust regulations and rules against unfair trade practices in many industries.¹ However, looking at existing cases, such as the True-DTAC merger, the only board member of the NBTC abstained from voting on the grounds that the current law is unclear.² We can see that the current anti-competition law is not fully functional for new market segments.

The Internet market is also a market of constant innovation, and Internet companies can only keep from being eliminated from the market if they keep innovating. However, in terms of the form of innovation in the Internet market, it mainly includes technological innovation and business model innovation, but either of them is likely to break the existing

¹ The International Comparative Legal Guide to: Telecoms, Media & Internet Laws & Regulations 2016, 269

² <https://www.thaipbsworld.com/nbtc-board-member-explains-why-she-opposes-true-dtac-merger/>

interest pattern, competition order and original market rules of the market, and stimulate new conflicts and contradictions. Globally, the number of competition disputes arising from innovation in the Internet market is increasing, but the laws for this type of Internet unfair competition disputes are not perfect, and many judicial decisions are still using traditional thinking to deal with competition disputes arising from innovation, which is not conducive to the development of the national Internet economy.

Importance:

At present, there are still many imperfections in the law of competition in the Internet market, and this paper can provide suggestions for the revision and improvement of the Anti-Unfair Competition Law and promote the adaptation of the Anti-Unfair Competition Law to the requirements of competition in the Internet era.

Research Approaches:

The problem of competition disputes arising in the Internet market is a complex economic and legal issue, so the research of this paper will adopt various methods, including literature research, multidisciplinary analysis, comparative research, and case studies.

The research of this paper needs to read a lot of literature, including articles, books, online literature, laws and regulations, etc., to understand the research results of different scholars, and to have a deeper understanding of the basic theories of unfair competition, the legal system of competition in the Internet market, and the economics of innovation, so as to provide a theoretical foundation for the research of this paper. The comparative study method is that even if the cases of unfair competition in the Internet market are similar, the courts of different countries may make different decisions.

This article will discuss, first, the main concept of the competition in the internet market, including the ideas of “traffic and data”, “platform” and “oligopoly competition” as the main patterns. Second, we will discuss the characteristics of unfair competition, also the difficulties when dealing with it. Third, we will analyze the typical case regarding the competition in the internet market, which is HiQlab V LinkedIn (2017). Fourth, we will discuss the competition law from the OTT business and Telecommunication Market, Internet Market perspectives. Also, we will try to analyze the horizontal and vertical integration in the internet market and two sided market in the digital market. Lastly, we will talk about the legal system set up for innovation and incentive in the internet market.

1. Competition in the Internet Market

Before discussing unfair competition in the Internet market, let's try to understand the characteristics of competition in the Internet market. There are many similarities between competition in the Internet market and traditional market, and some scholars even believe that competition in the Internet market is not fundamentally different from competition in the traditional market, only that the medium is different, so many experts and scholars believe that the problem of unfair competition in the Internet can be solved as long as the Competition Law is applied flexibly, and there is no need to add special provisions regulating unfair competition in the Internet. However, in fact, there is a huge difference between the two, as the traditional market focuses more on price, quality and circulation of goods, while the operators in the Internet market focus on the number of Internet hits, user information and data control. The current competition in the Internet market has the following characteristics: traffic and data as the core of competition, platform as the medium of competition, cross-border transmission as the mode of competition, and oligopoly as the pattern of competition.

1.1 Traffic and data as the core of competition

Traffic is the lifeblood of the Internet industry and is of utmost importance to current Internet companies. With the development of the Internet economy, cloud technology, big data industry and artificial intelligence technology, "data" has gradually become a new energy indispensable for the development of the Internet market, and has become the core driving force of business competition in the Internet market.

In the current Internet market, with the development of various new technologies in the 21st century, Internet companies use technology to take control of users in the network, and are able to collect and analyze a large amount of users' data. Then through the analysis results of the data, enterprises can grasp the information of users' preferences, consumption needs, consumption levels, etc. Therefore, Internet technology can discover the relationship between users and goods, goods and goods, and users and users through data analysis, and on this basis, target advertising to users, push personalized goods and services, and innovate business models in a planned manner.³ Therefore, we can conclude that the advantage of information in Internet competition is a business advantage for operators. For Internet companies, regardless of their business scope, collecting, processing and utilizing user data is

³ <https://www.businessnewsdaily.com/10625-businesses-collecting-data.html>

one of their core objectives, this is the reason why many Internet companies have been involved in data unfair competition cases in recent years, such as the Facebook Data Privacy Scandal case.

1.2 Platform as a competitive medium

In The Internet market nowadays, it is difficult for a single good or service to meet the needs of users and cope with the competition in the Internet market, so a large number of Internet companies have started to provide diversified goods and services, and "platform competition is the main form of Internet competition nowadays".⁴ Unlike competition in traditional markets, the Internet tends to compete in bilateral markets, which refer to markets with two different but related customer bases.⁵

Internet market mainly adopts two main methods to earn the profit, which are the free market and the paid market, on the one hand, Internet companies provide free or low-cost quality services to the majority of Internet users through the free market to attract a large number of users and obtain traffic, on the other hand, they provide paid services to merchants, advertisers, etc. through the paid market to obtain economic profits, so as to achieve the overall profitability of the network platform. Several major Internet companies, such as Facebook, Google, Amazon, Youtube, etc., are operating in this mode. Internet platforms facilitate the integration of information and improve the efficiency of the use of information, thus reducing transaction costs, thus making it rapidly become the main business model in the current digital economy.

1.3 A market competition pattern dominated by oligopoly competition

The characteristics of the Internet market make the competition in the Internet market result in a situation where large enterprises often have an absolute market share with other small enterprises coexisting, thus leading to an oligopoly market pattern. In the Internet market, the company who enter into the market first can gather a large number of users in a short period of time, and the network viscosity makes users generally do not easily abandon the original product, which makes it difficult for other competitors who enter the same market later to obtain users, and this phenomenon is difficult to break through in the short term.

⁴ Jiangli Zhang, Internet Platform Competition and Antitrust Regulation from the Perspective of 3Q Antitrust Litigation, Peking University Law Journal Vol. 27, No. 1(2015) 265.

⁵ Daniel M. Tracer. Overcharge but Don't Overestimate: Calculating Damages for Antitrust Injuries in Two-sided Markets, Cardozo Law Review, 807, (December 2011).

In addition, the oligopolistic operator will use its market position and economic advantages to strengthen its competitive advantage, thus consolidating and developing its dominant position in the original market and in the new market. Therefore, the more traffic an operator receives and the more user data it has, the more its competitive advantage will grow and the more concentrated the market will be, making it more difficult for other companies to enter, develop and grow, or even eventually be eliminated from the market. For example, Facebook and Amazon in the United States have absolute market shares in the markets they operate in.

2. Characteristics of Unfair Competition in Internet Market

Based on the characteristics of the network, various unfair competition acts on the Internet, such as traffic hijacking and malicious interference with the operation of other software, are significantly different from traditional unfair competition acts in terms of behavior, environment and legal consequences, and also have significant characteristics.

2.1 Action is more concealed

As discussed above, the competition among Internet companies is different from the traditional market, which mainly revolves around price, product and quality. And the current business model of the Internet market is mainly in the form of a bilateral market, in which one side adopts free products to attract a large number of users, and the other side adopts a fee-based approach to obtain profits, so the focus of competition in the Internet market is no longer price. Therefore, the competition among Internet companies revolves around technological progress and competition for users, but it is difficult to find out because the network technology is too specialized and the technical means are very difficult to find by non-specialized public.

2.2 Unfair practice is more difficult to identify

The Internet market is a new market based on technology, including the externality of the network, bilateral market characteristics, disruptive innovation and platform competition, and also involves the development of Internet technology, business model innovation, consumer interest protection, etc. Therefore, in cases of unfair competition disputes, there are more factors to be considered and more complex, and it is more difficult to legally determine

whether the behavior constitutes unfair competition. The difficulty of determining whether an act constitutes unfair competition has increased.

For example, in Internet competition, there are various complex factors related to the constitution of competition, the determination of damage, fairness and efficiency, balance of private interest and public interest, whether innovation promotes competition or disrupts fair competition, and it is not easy to make judgments that are legal, reasonable and in line with the development of the Internet market. This makes it extremely difficult for administrative and judicial authorities to judge whether competition constitutes unfair competition when facing competition disputes in the Internet market.

2.3 Causing huge damages in a short period of time

Since traditional unfair competition, subject to the factors of geography, transportation and labor, the occurrence of infringement is a gradual process, and the damage caused by it is often gradually expanded with time, in the early stage of the action, it is difficult to detect the wrongdoing and the damage consequences are difficult to appear, only with the passage of time, the long-term infringement will produce serious damage consequences. However, in the Internet market, the interconnection of the Internet has broken through the traditional time and space restrictions, and the low cost of infringement makes it easier for Internet infringement to occur and spread at an unprecedented speed, causing huge losses to competitors within a short period of time.

3. Case Study

As mentioned above, "data" has become one of the most important resources in the Internet market and is the core of competition among Internet companies. At the same time, as enterprises increasingly recognize the value and importance of data, disputes over the use of data have emerged in recent years. Generally speaking, most of the existing disputes over "data" can be attributed to the following reasons. First, the ownership of data is unclear, and in many cases the parties in dispute often argue over the ownership of the data, and Thai law does not clearly define the ownership of data. In addition, the rights to the data remain controversial. Second, there is a conflict between the balance of data protection and utilization. Personal data in the Internet market can, on the one hand, provide Internet companies with more information, so that they can accurately provide better services to users, and make profits while the users are satisfied with the services provided. But on the other

hand, the leakage of personal data may also have a negative impact on users and make the Internet market form an unfair market environment. Therefore, it may be detrimental to the development of the Internet market if personal data is over-protected and prohibited from being used, but it becomes difficult to balance the use and protection of data when the legitimate rights of users and consumers have to be protected. Finally, the lack of laws regarding the competition in the Internet market of data, cases in recent years, such as the case of Facebook V Power (2009), HiQlab V LinkedIn (2017) are legal disputes because of the use of Internet data, but there is no relevant law to solve the problem. Here we will discuss HiQlab V LinkedIn (2017).

3.1 Case brief

LinkedIn is the world's largest professional social networking site for business customers, with the goal of creating a "one-stop career development platform" to help connect career professionals with unlimited opportunities. On LinkedIn, users can choose to register for different levels of privacy protection, including full disclosure, disclosure to associates, and disclosure to the network, and if they choose full disclosure, their information can be disclosed to people outside of LinkedIn. HiQ Labs ("HiQ") is a company mainly engaged in data analysis business, and its data is mainly from the public data on the LinkedIn platform, HiQ in the capture of LinkedIn data, through data analysis of employee behavior assessment, and the results of feedback to the commissioning department. In the past five years, LinkedIn has been accessing and using public data from the Linking website, and LinkedIn has never objected. However, in May 2017, LinkedIn suddenly asked HiQ to stop capturing data and to prevent HiQ from continuing to access data through technical means. HiQ then filed a lawsuit in court, alleging that LinkedIn had violated the California Unfair Competition Law, among other laws. Ultimately, the court required LinkedIn to remove any technical barriers that prevented HiQ from accessing its publicly available data within 24 hours.⁶

One of the issues in the case was whether HiQ could use its data without LinkedIn's authorization, whether its actions constituted unfair competition, and whether LinkedIn had the right to prohibit others from using the data publicly available on its website. In the case, the court upheld HiQ's claim and allowed HiQ to use LinkedIn's data.

⁶ See United States District Court Northern District of California: Case No. 17-cv-03301-EMC.

3.2 Case analysis

From the perspective of the case, HiQ's business model is based on LinkedIn's data, the relevant data processing, calculation, to provide companies with relevant staff assessment information, if HiQ does not have access to LinkedIn's data it is bound to end the business innovation, of course, allowing HiQ to use the Link data, not only reduces the business opportunities of LinkedIn (in fact, the case in the LinkedIn is planning to start a business similar to HiQ), inhibit the incentive of enterprises to collect and process information data, but also face the problem of public data infringement of user privacy, how to solve the dilemma is a dilemma, involving the weighing of the interests of all parties, but also a value choice problem.

In the Internet era, the development of artificial intelligence makes data more and more valuable, and through the analysis of big data, Internet enterprises can provide more accurate services to users, and the competition for data in the Internet market will be more intense. Data is different from ordinary objects, which can be used by multiple subjects repeatedly and will not disappear after being used by one subject. Moreover, in the Internet market, the more data is circulated and used by more people, the greater its value. The future development of the Internet cannot be separated from data, and if data is monopolized by a few data oligopolies and data cannot be circulated, it may not only make it difficult for Internet companies that rely on data to innovate and develop, but also hinder the innovative development of the entire Internet market, and the use of data must consider the public interest. In the LinkedIn case, the court also made clear that the public interest in granting or denying a preliminary injunction must be taken into account when dealing with disputes over the use of data.⁷

When we are judging whether a certain behavior has damaged the fair competition order of the market or promoted the innovation and development of the market, harmed the interests of competitors or increased the well-being of consumers, we also need to analyze and make value judgments on a case-by-case basis. Although the development of the Internet market is inseparable from data, the unauthorized use of other people's information cannot be considered as constituting unfair competition as a matter of course, but it is necessary to consider various factors to delineate the boundary of data utilization behavior in conjunction with the case situation, and to consider the role of data in the information society to promote economic development. Whether the circulation and sharing of data is conducive to further innovation and development of Internet market enterprises using data is in line with the needs

⁷ See United States Court Of Appeals For The Ninth Circuit: No. 17-16783 D.C. No. 3:17-cv-03301-EMC.

of public interest. In this case, both parties also claim that their positions will benefit the public interest by achieving the free flow of information on the Internet as much as possible, but the judges believe that while both parties have a significant public interest (LinkedIn claims to protect user privacy and HiQ claims to protect business development and market competition), the public interest, on balance, favors HiQ's position.⁸ If companies like LinkedIn are given the freedom to decide under what conditions their data can be collected and used, it could create the risk of information monopolies that would harm the public interest. And while the court's injunction allows HiQ to continue to use the data, the injunction does not preclude LinkedIn from continuing to use technology to prevent harmful intrusions or attacks against unscrupulous individuals.

Data monopolies and information silos are not conducive to the development of innovation in the marketplace, and innovation on the Internet should not be subject to unfair competition and restrictions by data-hoarding companies. Therefore, when determining whether the use of data violates the competition law and constitutes unfair competition, it is necessary to weigh the interests, taking into account the general direction of market development, public and personal interests, and the positive and negative effects of the behavior, under the principle of promoting the use of data. In general, a more liberal approach should be taken to the flow and sharing of data in the Internet market.

4. OTT business and Telecommunication Market, Internet Market perspective.

The internet Market governs a wide scope of business types. And today, we have a variety of newly emerged tech-based businesses. The telecommunication Market is included as a result. The competition law, which also deals with such business, shall be reconsidered to tackle such business in order to perform full protection.

The OTT service is the kind of business that delivers the service on an IP network or the internet. Also, it can be claimed that the newly emerged business is the direct consequence of the development of the internet market. The both legal and business perspective until further suggestions are provided by this report.

4.1 Telecommunication Market

4.1.1 Nature of service and definition

The player in the Telecommunication business can be classified by whether

⁸ See United States Court Of Appeals For The Ninth Circuit: No. 17-16783 D.C. No. 3:17-cv-03301-EMC.

they have their network owned for their service or not. Or can claim that the key distinction to consider is network owning. Can be explained further in the Business analysis.

4.1.2 The brief development of Telecommunication service in Thailand.

The brief history of the Thai communication business should start in the 2000s, which is the " Liberalized telecom industry" era; at that time, the Frequency Allocation Act B.E.2543 was enacted and stipulated the National Telecommunications Commission(NTC). In 2010, A new regulator emerged called "the national broadcasting and telecommunication commission(NBTC) until now.

4.1.3 System of telecommunication service business

The most common mobile telecommunication business is GSM (Global System for Mobile communication). Which compresses data and sends down a channel to another two other streams of users' data by requiring the site investment.

4.2 TCA Point of view

Section4... this act shall not be applied to acts of...(4) a business regulated by a specific law in respect of trade competition.

According to the fact that Telecommunication businesses have their own specific law which is Telecommunication Business Act B.E.2544 to govern such anti competitive conduct occurred in the Telecommunication Business already. Thus, under section4, the Trade competition act can not be applied to the Telecommunication business.

4.3 Business Point of view

4.3.1 MNO (Mobile Network Operator) is the term describing the Telecommunication operator, which has their own network for providing their service to their users or consumers.by owning, the network means MNO have their own transmission tower or be the one as Host, who permits another telecom business operator to access(called MVNOs). Mostly of MNO are major firms in the telecommunication Market for the reasons that authority's permission is needed. For example, TRUE, DTAC, AIS

4.3.2 MVNO(Mobile Virtual Network Operator) is new emerged telecommunication operator which operates their business by providing their service without having their own network(by assuming that they have a "Virtual" network). The rationale behind

this is to allocate the frequency spectrum more efficiently under a limited license by the National Broadcasting and Telecommunication Commission (NBTC) to tackle with increasing of users. Then, as a result, the MNO shall share their own spectrum to expand the telecommunication business according to the government policy by giving to MVNO for rent. An example is Myworld 3G, MVNO's operator in Thailand.

5. OTT service

5.1 Nature of service and definition

OTT, or the term that stands for "over the top" services, which is the term used to describe the new "delivery method" of the service, especially in audio, video, media, or content services such as Netflix. The key is that such delivery, to meet the customer's access, can be done over an IP NETWORK (i.e., the internet connection.). By the fact that from the global perspective. The OTT services trend, classified by Market values, in 2022 is worth 190.28USD Billion and, by forecasting, will go to reach 1,241 USD Billion by 2030. Furthermore, the research study on *"The impact of Over The Top service providers on the Global Mobile Telecom Industry: A quantified analysis and recommendations for recovery"*⁹ found that the main revenue of MNOs or MVNOs in "streams of voice calls" business is decreasing significantly and by the suggestion that the MNOs service provider shall reconsider their strategies and revenue sources. Moreover, by domestic study in Thailand claims that"Local mobile operators have experienced a drop in messaging revenue as a direct result of OTT clients on smartphones."..by such research studies on both global and domestic as mentioned with statistics on the decreasing of the MVOs,MNOs in the telecommunication Market, reflect that the OTT service has played a significant role in the global perspective. Such reasons can be analyzed and separated into 2 main part, which is the legal and business perspective.

5.2. TCA Point of view

According to the OTT's nature, it does not require any network for its service. Which means that it's not considered to be a Telecommunication service by its own nature. Thus, the OTT service provider is not in the scope of the Telecommunication Market. As a result, it will affect the applicable law to govern, especially in the eye of competition law, which

⁹<https://www.semanticscholar.org/paper/The-impact-of-Over-The-Top-service-providers-on-the-Awwad/d7fe06caf0451817dee8411f0d3fe7001f2d9c1c>

scoping the Market is actually required to determine another legal consequence that may arise in the anti-competitive practice, which is a matter of discussion in the analysis part of this report. Between 2 types of service providers, whether it shall be considered to be in the same Telecommunication market or not.?

5.3 Business Point of view

5.3.1 Cost

By using the OTT application. For example, WhatsApp. No additional cost is needed. For this reason, there is an IP-Based application which workable on the internet without any further requirements, as a result. The user can only be paid by internet cost rather than pay for telephone and internet separatable compared to the conventional mobile phone service.(even not counting the case that the user have only their own mobile phone and use public Wi-Fi to call via WhatsApp, which means their cost of communication is stuck to their phone only). As mentioned, we can also claim that COST is the main reason which triggers telecommunication users to change to OTT services.

5.3.2 Features

With easy and convenient that the OTT's application served that aren't provided by core network services .such as the feature which come to play an important roles in our daily lives. For instance, the line group feature. This makes the trend of communication more easier than ever before; when compared to the conventional mobile service(Telecommunication service) even has the "group call feature," which is not comparable to the "grop call" or "grop chat" via line. The evidence is many of workplaces use the line program seamlessly be the part of their work tools.

5.3.3 Convenience

The clear dividing line between the OTT service and conventional telecommunication service is Convenience. It can be clearly seen by comparison that, in the OTT service, users can send the sticker,emoji,symbol messages, or even phone calls also be, possibly by the same sound quality as the using of a telecommunication service. Thus, Convenience is what most users seek. As a result, be another key factor for rising of OTT service.

6. Analysis

As mentioned in TCA POV of the OTT service that whether, OTT service shall be considered to be the business in Telecommunication Market or not. As a nature of the product/business itself, which is the first requirement to determine the Market definition of such business (as clearly seen under section 5, TCA, which also states "Market" definition to be identified). Usually, both product (SSNIP TEST) and geographical Market shall be considered to identify such Market definition.

Suppose we look closely at the rationale in the process of Market scoping in the eye of competition law. To identify the Market. Product detail is needed to be considered by looking into the matter of Substitutability of such product by using the Small but significant and non-transitory increase in price (SSNIP test) as a tool for monitoring whether increasing in price for 5-10% for a period of time and see whether demand changes significantly or not. By decrease in demand then can lead to a conclusion that the product is substitutable and those products are in the same Market. Then, for this case, between the telephone service provider, which is the player in Telecommunication Market, and OTT service provider, which is located in an unclear Market. To identify between both business operators whether or not they are in the same Telecommunication Market or not, product substitutable needs to be considered. by the reason that at this time, no result of the SSNIP test on the telecommunication service provider and OTT service provider yet. But, as a report said... domestic study in Thailand claims that *"Local mobile operators have experienced a drop in messaging revenue as a direct result of OTT clients on smartphones."*¹⁰ meaning that even if the price of the telecommunication service provider remains the same, the buyer also still changes to use the OTT service instead, which is significantly a clue that both of the businesses are "substitutable". However, without such an SSNIP test does not mean such a hypothesis is invalid. By the fact that... *"To apply the SSNIP test quantitatively, precise economic data must be available to.... In reality, it is quite difficult to actually implement the SSNIP test as data requirements are often large. Alternatively, a regulator could look to see if a natural experiment can answer the question,.... For example, if a natural disaster occurred"*¹¹ this statement illustrated that. Even the SSNIP can use as a tool to determine the scope of the Market definition, but there is no main indicator. The other method and event as a "natural event" can also use as

¹⁰ <https://www.bangkokpost.com/tech/1213837/over-the-top-challenges>. View our policies at <http://goo.gl/9HgTd> and <http://goo.gl/ou6lp>. © Bangkok Post PCL. All rights reserved.

¹¹ <https://learneconomicsonline.com/blog/archives/1218>

well. Then, for this case, the new technology of OTT service providers can consider being a Natural event as well. Moreover, from the study, there are in the same geographical Market.

Thus, between the OTT service provider and telecommunication service provider is in the same Telecommunication Market by the reason of the substitutable between both services(correlation between the SSNIP test and Natural event, as an alternative).

However, when looking into the product's characteristics or nature, solely. For this scenario is, the system between both OTT service provider and Telecommunication service provider also have some significant difference.

As mentioned, the nature of the Telecommunication service provider (both MNOs,MVNOs)which is only depends on the NETWORK. To elaborate more on this term, it means *TELECOMMUNICATION NETWORK, which are transmission systems enabling information to be transmitted in analog or digital form between various different sites by means of electromagnetic or optical signals...*¹²,by such means, to able the telephone call, must have telephone number attached. Anyway, for the OTT service provider, by the meaning that, *on the protocol delivered using HTTP, a connected transport protocol...*¹³ or can claim that it only requires the internet to be base to deliver such service(no carriage). As mentioned the both nature of the service requirement. Have the clear distinction that the form or requirement of the system is different. Furthermore, such differences are the essence of the consumer's point of view in choosing such a service.or can be claimed that the essence of the product itself is distinct.

As a result, both telecommunication service providers and OTT service providers shall not be considered to be in the same Telecommunication market. For further suggestion,in the eye of competition law, which Market analysis is required. The new Market for OTT service provider should be established.by as foregoing reasons coupled with the new technologies has developed. It's a matter of law that should provide the prevention measure to deal with such technological change beforehand.

Thus, between the OTT service provider and telecommunication service provider is not in the same Telecommunication Market by reason of essential product characteristics itself. Between both services. And there shall be a new Market definition for OTT service provider service under the reason of technological changing.

¹²<https://www.nfon.com/en/get-started/cloud-telephony/lexicon/knowledge-base-detail/telecommunication-networks>

¹³<https://www.mediaentertainmentinfo.com/2013/04/19/2-concept-series-what-is-the-difference-between-ott-and-iptv>

From mentioned both argument. In Thailand's perspective, according to the Competition law, Especially, the Trade Competition Act. Which have main aim for preserving the competition level in the Market, among the business player, for the benefit of the customer and small business player under the Thai constitution. It shall be suitable to consider both Telecommunication service providers and OTT service providers in the same Telecommunication Market. By considering the conservative view (Substitutability and geographical Market) rather than looking deeply into the systematic mechanism itself. The purpose is to preserve, maintain and promote their competition level, which occurs within the same Market more effectively. Which benefit will come to the consumer in the end.

7. Internet market under the Thai Trade Competition Law

The Internet Market in Thailand is being protected under the Trade Competition Act 2017, the digital market is not considered as a business that is being regulated by specific law under Section 4 of the Trade Competition Act.

Section 4. This Act shall not apply to acts of:

- (1) the central administration, provincial administration and local administration;
- (2) a State enterprise, a public organization or any other agency of the State, only insofar as they are performed in accordance with the law or resolutions of the Council of Ministers necessary for the maintenance of State security, public interests, public benefits or the provision of public utilities;
- (3) a farmers' group, a co-operative or a co-operative federation which is recognised by law and of which the object lies in the operation of business in the interest of farmers' occupational pursuit;
- (4) a business regulated by specific law in respect of trade competition.

Moreover, the type of the internet market under Section 5 of the Trade Competition Act – relevant market of goods or services which are the same type in the internet market thus Digital marketing or the Internet marketing refers to any of the marketing strategies that has an electronic device in order to operate, which track consumers online. According to the source, there are 8 types of digital marketing: Search Engine Optimization, Email marketing,

Pay-Per-click, Mobile marketing, Social media marketing, Marketing analytic, Content marketing and Affiliate marketing.¹⁴

8. The competition in the internet marketing

Digital technologies have transformed the industries and business in every possible branch. Digital platform has created a borderless accessibility that helps save the cost of international interaction and transaction fees. For that reason, digital technologies help improve a business that allows the business to gain a massive potential way to reach the customers base. For instance, this allows small businesses the capacity to get new market support since the economy on the digital platforms is growing widely.

Consequently, with new business operators entering the market on a regular basis this created an ideal market structure where every business operator can offer compatible products with a reasonable price where all the producers improve their products quality and are innovative for the variety of choices which benefits the consumer at its best. Therefore, for the ideal marketing competition structure, abusive behavior by the business firm with dominant position in the market needs to be eliminated – to prevent the charge an excessive price for their products.

9. Horizontal and Vertical integration in the internet market

Horizontal operation which the company uses to increase their production of their products and services at the same supply chain. For instance, Uber and Grab; most transportation platform company has developed their service in this process where the firm was first operate their business as a ride-hailing service; nevertheless the firm has developed and grow their business to provide different other services but still in the same group, such as food delivery service, express service and other services that helps with the consumer needs.

Vertical amalgamation is where the digital service provider expands their business to cover different points of the other different parts of the supply chain. For instance, Amazon is a company with a high degree of vertical integration where their business takes place in all the different branches in different markets. Amazon is covering the warehouse, Amazon web service, delivery services or even banking services. Due to this reason, this led to less competition in the market.

¹⁴ Alexa Gustavsen Aug 31, 2022, et al. "What Are the 8 Types of Digital Marketing?" *Southern New Hampshire University*, 31 Aug. 2022, <https://www.snhu.edu/about-us/newsroom/business/types-of-digital-marketing>.

10. Two sided market in the digital marketing

Two-sided market allows two or three different groups of both buyers and sellers with the same interest to meet on the platform, this also allows both groups of consumers to exchange the service they were seeking for. If the number of a buyer group is increasing, this also makes the number of sellers increase since both groups rely on one another. One example of this is Grab platform, they addressed customer segments into two groups which are a Grab driver group and a user group. Due to this reason, this type of market can possibly lead to an abusive dominant position in the market. A data suggest that Facebook and Google, big two tech companies has gained over 73% of all the U.S digital advertising .¹⁵

According to those facts, it is merely possible for all the new competitors to enter into the market and be able to compete with, for the perfect competition in the market where All the sellers of the market are small sellers in competition with each other. There is no one big seller with any significant influence on the market.

11. Legal Systems to Stimulate Innovation

11.1 The importance of innovation

In this day and age, innovation and technology are at the forefront of the world economy. ‘Mobile technologies, in particular, generated a global revenue of around \$3.3 trillion in 2014, with more than 11 million jobs worldwide being related to mobile technology, and it is estimated that at least two-thirds of the mobile industry is based on innovation. Thirty-seven percent of the \$3.3 trillion revenue was generated by mobile devices (components and manufacturing, device retail, etc.), 44 percent by communication services (mobile infrastructure, mobile site operations and mobile operators), the rest was generated by mobile content and applications [BCG].’¹⁶ This shows that innovation is a major driver for economic growth as well as competitiveness in the industry.

¹⁵ D'Onfro, Jillian. “Google and Facebook Extend Their Lead in Online Ads, and That's Reason for Investors to Be Cautious.” *Yahoo! Finance*, Yahoo!, 27 Dec. 2017, <https://finance.yahoo.com/news/google-facebook-extend-lead-online-180618374.html>.

¹⁶ Sabattini, M., Ph.D. (2016). *DEFINING FAIRNESS: PROMOTING STANDARDS DEVELOPMENT BY BALANCING THE INTERESTS OF PATENT OWNERS AND IMPLEMENTERS*. Licensing Executives Society Thailand. <https://www.licensingthailand.com/article-october-2016/>

11.1.2 Thailand's initiatives in boosting innovation

Thailand has slowly been working forward in phases to boost the economy so they can move from being a middle income trapped country to a dynamic, innovating and high-income country. Thailand 4.0 will be the major player in pushing the economy to the world's economical forefront. The country wants to be a pioneer in research and development, innovation and inventions. Thailand has gone through three major industrial and economic leaps in the agricultural business then to light manufacturing to heavy manufacturing, the next natural step for Thailand would be the technological development in all fields. In order to be left behind in this fast-paced world Thailand requires digital transformation. Thailand 4.0 has four main objectives; economic prosperity such as increase the GDP per capita from 5,500\$ to 15,000\$ by 2032, secondly maintain social well being by reducing social disparity from 0.465 to 0.36 in 2032 by means of transformation for traditional farmers into smart farmers etc. thirdly, raising the human value by becoming part of the top 50 HDI in 20 years' time. Finally, environmental protection so that Thailand cannot develop and grow sustainably and be a pioneer in sustainable and ecological sound developments.¹⁷

11.1.3 Competitive Enhancement Act for targeted industries B.E. 2560 (2017)

In 2017 the Thai government brought the act in order to stimulate innovation, attract and encourage certain industries in order to push Thailand 4.0 into action. The government established a fund with a seed of THB 10 billion and these funds aim at certain aspects of innovation, R&D and inventions in particular industries. 'The funds aim to increase Thailand's national competitiveness for (i) industries with new methods of domestic production or service providers, and (ii) existing industries requiring the use of new technology or advanced production knowledge with the purpose of developing or promoting innovation.'¹⁸

11.1.4 Investment Promotion in Thailand Act (No.4) of B.E. 2560 (2017)

Successor of the 1977 act provides Thai and non-Thai investors with incentives tax and non-tax related board of investors also known as BOI are regulatory authority presiding over the act. It is one of the few act that has been change time and time to keep up with the

¹⁷ Allan, S. (2018) *The journey to Thailand 4.0: But how is it achieved: Explained*, Aware Group. Available at: <https://www.aware.co.th/powering-to-thailand-4-0/> (Accessed: November 17, 2022).

¹⁸ Global trade alert (no date) Thailand: The Competitiveness Enhancement Act of 2017. Available at: <https://www.globaltradealert.org/state-act/30630/thailand-the-competitiveness>

global economic growth and developments, it has changed according to the advancement of the society. The latest amendments are in favor of Thailand 4.0 to bring in investments relating to technological developments etc.¹⁹

12. Legal Incentives for Innovation in the Internet Market

Thailand 4.0 again is the driving force for initializing incentives to promote innovation in the industry. Mainly focusing on an investment led transformation, further prioritizing technology and human resources. This will do by focusing on certain core technologies in the five identified industrials clusters and these are, Agriculture and food, health and wellness, smart devices and robotics, digital and IOT, creative, cultural and high value services. Also plans to shift the focus from volume based to value based, less capital driven, and more innovation driven, prioritizing human capital over physical capital, and high value services.

12.1 Investment led transformation

It is important to focus on the five main objectives so that the investment-based transformation can take place.

12.1.1 promotion of core technology

Core technologies will play a big hand in the transformation as they be in the epicenter of the required innovative development. The have great potential in Thailand and has maximum incentives. Technologies such as biotechnology, nano technology, digital and advanced materials are integral to developments in Thailand. For example, one of the main backbones of the Thai economy is the agricultural industry. Biotechnology would be taking over the agriculture business globally in the foreseeable future and Thailand needs to be in line with the same idea moving forward or one of the biggest cash cows for Thailand will be left behind.

¹⁹ The Investment Promotion Act (no. 4) B.E. 2560: Price Sanond: Lawyers in Bangkok, Thailand (2020) Price Sanond. Available at: <https://www.pricesanond.com/knowledge/investment-related-laws/investment-promotion-act-no-4-b-e-2560.php#:~:text=Comments%20Offon%20The%20Investment%20Promotion%20Act%20%28No.%204%29, Thailand%20was%20affected%20by%20a%20world%20economic%20crisis> (Accessed: November 17, 2022).

12.1.2 promotion of research and development and technology transfer

It is very important to provide maximum incentives to research and development and also providing tax exemption on materials used for such research. Moreover, merit-based incentives such as CIT exceptions for additional 1-3 years the promote R&D activities as well as academic institutes. This incentive also applies to IP licensing, development of local suppliers, advanced technology training and packaging/product design. Emphasis on the cooperation between companies and research institutes to promote development of human resources and technology transfer.

12.1.3 promotion of the localization of technology

Promote the creation of International Consortiums in industrial technology between the public and private sectors (both domestic and international), as well as between Thai and foreign universities, by attracting a foreign party as a strategic partner, which will ultimately promote the localization of technology.²⁰

12.1.4 Human resource development

Cooperation programs with MOST, MOE, MOL and the private sector to enhance Thai human resource readiness before entering into targeted industries. These include STI WiL, Talent Mobility, Cooperative Education, and Dual Vocational Education and Training programs.²¹ Moreover, provide incentives to training and educational institutes in the private sector thus promoting them, this will create more opportunities for the future generation.

12.1.5 attract talents from abroad

Visas and work permit which are much more easily accessible if the person works in the desired field given straight from the BOI. Reduction of PIT (personal income tax) for experts. Encouraging foreign institution to establish bases in Thailand with focus on institutions based on the core technologies and industries.

²⁰ Thailand Board of Investment North America - Your Investment and business information source for Thailand - board of Investment Thailand Business Information Asian Investment (no date) Thailand Board of Investment North America - Your Investment and Business Information Source for Thailand - Board of Investment Thailand Business Information Asian Investment. Available at: <http://www.thinkasiainvestthailand.com/> (Accessed: November 17, 2022).

²¹ Ibid.

12.2 what are the action plans under the two legislatives acts

12.2.1 Under revised investment promotion policy

Targeting mostly based on the promotion of core technologies that show high potential in the Thai economic industry. One of the main incentives provided under this act is the CIT exemption of 9-13 years for projects that will be utilizing advanced technologies and innovation or research and development projects under the core criteria prescribed by the board. And other further incentives that are set out by the board of investors.

12.2.2 Under the competitive enhancement act

Targeted and strategic investments that are in line with the Thailand 4.0 idea and the national agenda for the country. Moreover focusing the investments on new technologies and high impact investments that cannot be attracted by other incentives. Some of the core incentives under the act is a maximum of 15 years CIT exemption for the targeted industries in like with Thailand 4.0. Ten billion Thai Baht in the form of grants for investment projects that are engaged in research and development, innovation or human resources development in the targeted industries. Furthermore, other incentives under the BOI act.²²

13. Consideration of Legal Innovation

It is important to consider legal innovation in internet competition. With the rise in technology and AI. The internet has become its own competitive marketplace separate to the physical world.

13.1 METAVERSE

Metaverse is one of the leading innovations that has taken the world by storm. It has become a virtual realm just like the physical one as it is an immersive and lifelike digital experience. Even though it is a new aspect to the digital world the potential for this to grow is unlimited. With this there arises issues of competitiveness and legal issues such as data protection, intellectual property issues, licensing etc. moving focus relating to competition law there are many issues that will be faced when metaverse will go into full swing. Business could possibly choose to enter exclusive agreements with each other inside the metaverse

²² *Thailand: New Law on Competitiveness in Targeted Industries*. 2017. Web Page. Retrieved from the Library of Congress, <www.loc.gov/item/global-legal-monitor/2017-03-01/thailand-new-law-on-competitiveness-in-targeted-industries/>.

this could potentially lead to antitrust issues.²³ Moreover, businesses could choose to price fix and form business cartels inside the metaverse thus providing the market leaders dominant positions that may be abused by them. Moreover, as with other areas of digital commerce, jurisdiction would play an important role here. Practices which may be legal in one country could be successfully challenged elsewhere.²⁴ Even though laws exist to stop such issues the question arises to whether they are covered under this and if a virtual realm such as metaverse should abide by the norms of the countries or not.

Conclusion

As one of the most active and important markets, the Internet market has been developing at a very fast pace and the Internet economy has become an important part of the market economy, however, the development of the Internet will certainly lead to an increase in market competition disputes. The characteristics of the Internet make the competition in the Internet market different from the traditional market competition in many ways, therefore, it is necessary to consider the characteristics of competition in the Internet market. The development of the Internet cannot be separated from the combination of technological innovation and business model innovation, which can stimulate competition and promote innovation. However, in the process of continuous innovation in the Internet market, new technologies and new business models will inevitably give rise to new competition law issues, and these new competition issues also require new competition rules.

It is an important issue to establish legal rules that can adapt to the development of the Internet market, because the law may either promote the development of competition in the Internet market or hinder the development of the Internet market. Therefore, in the face of the increasingly complex unfair competition disputes in the Internet market, the rules of anti-unfair competition regulation need to be constantly innovated so that the law should become a driving force rather than a resistance to the economic development of the Internet market.

At the same time, competition law should provide institutional safeguards and incentives for the innovative development of the Internet market, rather than just providing the function of organizing unfair competition, so as to adapt to and promote the development

²³ Schooneman, T. (2022) *The rise of the metaverse: Challenges ahead for the legal industry*, Kudun.

Available at: <https://www.kap.co.th/thought-leadership/the-rise-of-the-metaverse-challenges-ahead-for-the-legal-industry/> (Accessed: November 17, 2022).

²⁴ *Ibid.*

of the Internet market, establish a fair and orderly order of competition in the Internet market, and safeguard and stimulate the healthy and sustainable development of the Internet economy.