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**Enforcing competition law in digital markets and ecosystems:
policy challenges and options**

Contribution

Trade Competition Commission of Thailand

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"Enforcing competition law in digital markets and ecosystems: Policy challenges and options"

1. Introduction: Regulatory Challenges on Digital markets

Trade Competition Commission of Thailand (TCCT) is pleased to contribute to the IGE's Roundtable on "Enforcing competition law in digital markets and ecosystems: Policy challenges and options". This submission primarily draws on the TCCT's experience in enforcing compliance with the competition provisions of the *Trade Competition Act 2017* (the "TCA") in digital markets.

The transition to digital platforms has fundamentally transformed business operations, consumer interactions, and economic activities. However, regulating this rapidly evolving sector poses significant challenges. The distinctive nature of digital markets marked by rapid innovation and intricate interdependencies complicates traditional regulatory approaches. This has presented numerous challenges. The main areas of concern in this submission include market definition and market dominance test as follows:

Market definition

Pursuant to the TCA, the Trade Competition Commission Notice on Guidelines for the Assessment of Market Definition and Market Shares B.E. 2561 (2018)¹ provides a guidance for defining markets.. In summary, market definition involves analyzing facts related to products or services, considering relevant product and geographic markets. The methods or tools for determining these market boundaries are detailed in Point 3 of the guidelines. This also includes principles such as demand substitutability, supply substitutability, potential competition which are stated in Point 5.³These methods collectively contribute to the assessment of relevant markets, ensuring a comprehensive analysis of competition dynamics and market boundaries.

However, digital platform is a business with certain distinctive characteristics such as the multi-sided nature of a market where a firm operates as a platform, selling different products to different consumer groups, with the demand from one group dependent on the demand from the other group(s). . When combined, the platform business creates a unified ecosystem. Operating a business with such a multi-sided nature involves dealing with network effects, where the impact of the network on one side of the platform affects the other side(s). In addition, multi-sided business models utilize network effects to generate value for users, while economies of scale and high switching costs strengthen the positions of established businesses. Additionally, combined

¹ The Trade Competition Commission Notice on Guidelines for the Assessment of Market Definition and Market Shares B.E. 2561 (2018) – Please see https://tcct.or.th/assets/portals/1/files/2_NoticeOnMarketDef.pdf

“Relevant Market” means relevant product market and relevant geographic market;

“Relevant Product Market” means a market comprises of all products or services which are interchangeable or substitutable by consumers, when products’ characteristics, prices, or intended use are considered;

“Relevant Geographic Market” means a market comprises of the area in which products or services are interchangeable or substitutable by consumers and subject to the similar conditions of competition;

“Market Definition” means the analysis of facts related to products or services that are interchangeable or substitutable by assessing relevant product market and relevant geographic market to identify the boundaries of competition between firms for the purposes of enforcing the Trade Competition Act B.E. 2560. Available at <https://tcct.or.th/view/1/Guideline/EN-US>

³ The Trade Competition Commission Notice on Guidelines for the Assessment of Market Definition and Market Shares B.E. 2561 (2018) – point 5 to identify market definition, conditions that may restrict competition of products or services in terms of demand substitutability, supply substitutability, and potential competition shall be considered together

with substantial barriers to entry, these factors can result in markets being dominated by a few major platforms⁴, then causing challenges in forming competition and regulatory policies.

The abovementioned guidelines can be, to a certain degree, applied to digital platforms, including e-commerce platform. For example, according to Point 3 and 5 - the Trade Competition Commission (TCC) has used various factors in considering the relevant market boundaries, such as purchasing patterns and evidence of customers switching to desired products from other areas, price comparisons between regions, differences and similarities in product substitutability, views of customers and competitors, trade flows/shipping patterns, and switching barriers and costs. These factors remain consistent with the principles of demand and supply substitutabilities and competition potential that may arise, focusing on the relevant market boundaries. Therefore, the principles outlined in the 2018 guideline can be, to some extent, applied as methods or tools for determining relevant markets for digital platform businesses, similar to their use in related goods or services markets.

As previously explained, it is also necessary to consider the market by segmenting it into different sides, as is done with related goods or services markets, to define geographical boundaries. Each market side will have distinct considerations, potentially leading to different market boundaries. However, the assessment of each market side must account for the interconnections and relationships between the various sides of the market. It can be assumed that the guidelines do not fully encompass all the considerations and factors that should be included in defining market boundaries. For instance, they fail to incorporate data, which is crucial and impacts market boundary determination, or considerations related to the digital services provided by businesses. Additionally, these guidelines tend to focus on price analysis as the primary benchmark, whereas digital platform businesses often compete in ways that are not price-based or the none-price dimension.⁵ Therefore, defining the market boundaries for digital platform businesses may require additional considerations to ensure that the assessment is appropriate, comprehensive, and aligned with the unique characteristics of the business. This approach should also conform to the spirit of competition law, which aims to promote free and fair trade.

Defining market boundaries in multi-sided platform businesses is a complex and demanding task. This complexity arises because each digital platform typically offers a variety of products and services simultaneously. Determining the boundaries of the market in which a platform competes can be challenging. Some argue that market definition may not be necessary if the impact on competition is evident. However, when market definition is required, appropriate analytical tools must be employed. It is proposed to use the transaction versus non-transaction nature of the platform as a tool to define market boundaries.

Market Dominance

In the Trade Competition Act (TCA) 2017, Section 50 prohibits a business operator from abusing its dominant market position in several ways.⁶ The violations are subject to criminal

⁴Graef, Inge, EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility (PhD summary) (June 29, 2016). EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility, Kluwer Law International 2016, Available at SSRN: <https://ssrn.com/abstract=3635378>

⁵ Korawin Kanjanapiboon, Market definition for E-Commerce business. (2021). Chulalongkorn University Theses and Dissertations (Chula ETD). 5228. <https://digital.car.chula.ac.th/chulaetd/5228>

⁶ Trade Competition Act B.E. 2560 (2017), Section 50 A business operator shall not apply its dominant position in a market in any of following ways:

(1) by unfairly fixing or maintaining the level of purchasing or selling price of a good or service;

penalties, including fines and/or imprisonment, and are handled through criminal procedures involving public prosecutors and the jurisdiction of the Intellectual Property and International Trade Court. Treating such cases as criminal offenses presents challenges in digital platform cases. Firstly, determining whether the conduct constitutes a crime can be controversial. Secondly, these cases often demand detailed qualitative and quantitative analysis, which depends on the availability and quality of data and the methods of investigation. As a result, achieving proof beyond a reasonable doubt in these cases is highly challenging, if not nearly impossible.

In addition, The Trade Competition Commission of Thailand Notice on Criteria for being an Undertaking with Dominant Position defines a business as having a dominant position if it has significant market power to control prices and exclude competitors. A business is dominant if it holds a market share of 50% or more for the past year, or if a group of businesses has a combined market share of 75% or more, with each having at least 10%. The notice aims to ensure fair competition and protect consumer interests by preventing monopolistic practices.⁷ In brief, the notice identifies a firm's dominant position only based on market share thresholds and market turnover. In practice, many additional factors contribute to a firm's market power and dominance position. These factors include the firm's ability to influence market prices, the strength of competitors, the degree of product differentiation, the availability of substitute products, barriers to entry, and customers' switching costs.⁸ Thus, identifying market dominance factors in digital platforms is complex task.

The Trade Competition Act, BE 2560 (2017), stipulates that assessing market dominance should consider "one or more competitive factors of the market." These factors include the number of business operators, the amount of investment, access to key production factors, distribution channels, business operation networks, essential infrastructure, government regulation, and other factors as specified in the Notification of the Commission. It does not limit the assessment of market dominance to market share and turnover alone. Therefore, the notification of a dominant position can be revised without amending the Trade Competition Act.

It is worth noting that measures such as revenue and market share may not accurately reflect a platform's actual market influence. Frequently, primary revenue sources stem from supplementary activities like advertising or data sales, complicating the assessment of financial and market power. Additionally, the number of registered users can be misleading, as many accounts may not engage in actual transactions, thereby overestimating the perceived market position.

(2) by imposing an unfair condition for another business operator which is its trading partner in order to limit services, production, purchase, or sale of goods, or to limit an opportunity in purchasing or selling goods, receiving or providing services, or seeking credits from other business operators;

(3) by suspending, reducing, or limiting service provision, production, sale, delivery, importation into the Kingdom without any appropriate reason, or destroying or damaging goods for the purpose of reducing the quantity to be lower than demand of the market;

(4) by intervening in the business operation of others without any appropriate reason.

In practice, if an action does not fall under the prohibited actions outlined in this section, it may still be considered unfair trade practice under Section 57 which can be legally evaluated.

⁷ The Trade Competition Commission of Thailand Notice on Criteria for being an Undertaking with Dominant Position. Available at <https://tcct.or.th/view/1/Guideline/EN-US>

⁸ Wannawipang Manachotipong (2023). "Review Project of Thai Competition Law and Policy for the Regulation of Digital Platform Businesses: Final Report." Page 132. The Asia Foundation

2. The implementation of the TCA 2017 in Digital Market

Despite the challenges mentioned earlier, at a certain level, the TCA 2017 can accommodate digital markets by addressing issues of interpretation and application.

In terms of interpretation, the sections of the TCA 2017 specify actionable conduct that can be interpreted flexibly. This flexibility allows for the identification of behaviors that fall under unfair trade practices as outlined in Section 57. These practices can be evaluated ex-post to determine if any actions taken were unjust. In other words, this section addresses behaviors that qualify as unfair trade practices. For example, it examines conduct that may be deemed unfair after it has occurred, providing a basis for determining if there have been any violations.⁹ Furthermore, in terms of application, the ACT empowers the Competition Commission to issue guidelines that serve as benchmarks for assessing behaviors.¹⁰ This authority has led to the development of the TCC notice on "Guidelines on Unfair Trade Practices between Digital Platform Operators for Food Delivery and Restaurants" in 2020 after the surge in complaints by the by restaurant operators, account of 75% of the food delivery cases before the implementation. It is due to the unfair trade practices adopted by certain Online Food Delivery Platforms, such as overcharging and the imposition of higher commissions. The guidelines describe best-practice principles and outline the arrangements, conditions, and restrictions that food delivery platform operators may or may not impose on participating restaurants. The main principle is that the business conduct and commercial conditions imposed by platform operators must be fair, noncompulsory, and nondiscriminatory, and must not obstruct another party's business operations. Additionally, terms and conditions should be written, clear, and justifiable.¹¹ The success of the notice implementation is evident, as complaints regarding unfair treatment of restaurants by platforms dropped to 0% post-implementation.

Additionally, TCCT actively conducts market studies as ex-ante tools. These studies are proactive measures to understand and address potential competition issues before they become problematic.

- 2021-2022: Studies on Online Travel Agencies (OTAs), Food Delivery, and E-Marketplace.
- 2023: Focus on the Line Platform and E-Marketplace.

These studies help the TCCT monitor and analyze market dynamics, identify emerging issues, and develop informed guidelines and regulations to promote fair competition.

3. The operation across agencies

Currently, the primary regulatory instrument is the Royal Decree on the Operation of Digital Platform Service Business Subject to Prior Notification B.E. 2565 (2022) under the enforcement of the Electronic Business Development Agency (ETDA). The main objectives are

⁹ Trade Competition Act B.E. 2560 (2017), Section 57 No business operator shall undertake any conduct resulting in damage on other business operators in one of the following ways:

- (1) by unfairly obstructing the business operation of other business operators;
- (2) by unfairly utilizing superior market power or superior bargaining power;
- (3) by unfairly setting trading conditions that restrict or prevent the business operation of others;
- (4) by conduct in other ways prescribed in the Commission's notification.

¹⁰ Ibid. Section 17(2) The Commission shall have the power to issue regulations or notifications for the performance of duties under this Act

Section 57(4) No business operator shall undertake any conduct resulting in damage on other business operators in one of the following ways (4) by conduct in other ways prescribed in the Commission's notification.

¹¹ The Trade Competition Commission of Thailand Notice on the Guidelines on Unfair Trade Practices between Digital Platform Operators for Food Delivery and Restaurants. Available at <https://tcct.or.th/view/1/Guideline/EN-US>.

to ensure transparency and fair use of digital platforms, to implement measures to protect users, to improve collaboration between government agencies, and to encourage the development of good practices and self-regulation on platforms. Operators' obligations are to submit required information to ETDA, as well as to meet criteria for operating digital platforms and to designate a point of contact in Thailand (international platforms).¹²

Despite this jurisdictional distinction, ETDA and TCCT actively collaborate to address regulatory challenges. This cooperation has led to the development of the Draft Principles for the Platform Economy Act, with Principle 10 focusing on ex-ante gatekeeping regulations in summary as follows:

- Ex-Ante Regulatory Approach

Principle 10 of the Draft Principles for the Platform Economy Act focuses on maintaining fairness in competition within the digital platform economy through a preventive regulatory approach, known as ex-ante regulation. Unlike ex-post regulation, which addresses issues after they occur, ex-ante regulation aims to prevent unfair practices and market dominance before they happen. This proactive approach is crucial in dynamic digital markets where issues can escalate quickly and have far-reaching consequences.

- Gatekeeping Status

The ex-ante regulatory framework emphasizes the concept of gatekeeping status. Gatekeepers are major digital platforms that control access to significant market segments, such as online marketplaces, social media platforms, and search engines. These platforms have substantial influence over market conditions and can set terms that affect a wide range of businesses and consumers. Identifying and regulating gatekeepers is essential to prevent abuse of market power and ensure competitive fairness.

- Platforms Under the Act

Under the proposed Platform Economy Act, specific platforms identified as gatekeepers would be subject to additional obligations and prohibitions. These measures are designed to ensure that gatekeepers do not engage in unfair practices that could harm competition or exploit smaller businesses and consumers. The Act would set clear criteria for determining which platforms qualify as gatekeepers, considering factors such as market share, user base, and control over data.

- Obligations and Prohibitions

The obligations and prohibitions imposed on gatekeepers aim to foster a fair and competitive digital marketplace. Obligations might include requirements for transparency in business practices, non-discriminatory access to platform services, and fair contract terms for businesses using the platform. Prohibitions could prevent practices like self-preferencing, where a gatekeeper might prioritize its own services over those of competitors, or restrictive agreements that limit market entry for other businesses.

¹² Royal Decree on the Operation of Digital Platform Service Businesses That Are Subject to Prior Notification, B.E. 2565 (2022). Available at <https://www.eta.or.th/getattachment/Regulator/DigitalPlatform/law/Clean-Royal-Decree-on-DP-Corrected-1.pdf.aspx?lang=th-TH>

4. Summary

The complexities of market definition, requiring further considerations, and market dominance, which the traditional measures may not cover the real influence, of digital and e-commerce businesses presents significant challenges for the TCCT. Despite the limitations, the Trade Competition Act 2017 provides a flexible framework to accommodate the current challenges of digital markets. Through both ex-post assessments, resulting in the Guidelines on Unfair Trade Practices between Digital Platform Operators for Food Delivery and Restaurants, and proactive market studies, the TCCT work streams to ensure that competition remains fair and that businesses are protected from unfair trade practices. Moreover, there is the collaborative efforts of ETDA and TCCT in the development and implementation of the Draft Platform Economy Act, particularly Principle 10's focus on ex-ante gatekeeping regulations.