



## The Trade Competition Commission Ruling on Unfair Discriminatory Trade Practice of Food Delivery Services via Application

|                |                                  |                         |
|----------------|----------------------------------|-------------------------|
| <i>between</i> | The Trade Competition Commission | Claimant                |
|                | A Co., Ltd.                      | 1 <sup>st</sup> Alleged |
|                | B Co., Ltd.                      | 2 <sup>nd</sup> Alleged |

### The Complaint

It is apparent to the Trade Competition Commission that two food delivery service providers via applications, namely A Co., Ltd., or the 1<sup>st</sup> Alleged, and J Co., Ltd., following investigations revealing in 2019, split their business on the application-based food delivery service to be registered as B Co., Ltd, the 2<sup>nd</sup> Alleged. The 2<sup>nd</sup> Alleged charges the service fee using its application for each restaurant differently, varying from 0 percent to 30 percent, in which may be constituted as the unfair imposition trade terms and/or conditions in which restrictive or obstructive to others' business operations under the Trade Competition Act B.E. 2560 (2017).

### Facts

The facts, from fact-finding, have been established that, in 2020, there were four main providers of food delivery services via application in Thailand which are:

1. The 1<sup>st</sup> Alleged is registered as a juristic person under the name of A Co., Ltd., providing services as Application "A," as a licensee, providing matching services of delivery orders between consumers and drivers/riders for documents/packages/food delivery/retail items and groceries, as the case may be. This is also known as hail-riding services to call for vehicles to pick up and deliver packages, documents, containers, etc., and food through Application A, under the name of A service. The revenue from providing food pick-up and

delivery via the application in 2019 was xxx,xxx,xxx.xx Baht. The service fee schedules are provided below:

1.1 Maximum fee is not exceeding 30 percent;

1.2 Service fee of less than 30 percent is calculated based on factors related to the number of branches restaurants have, the food value per order or basket size, the marketing privileges received from restaurants, popularity and reputation of restaurants, as well as other costs and expenses. This includes expenses related to minimum revenue guarantee, starting at 40 Baht per order and increases proportionate to the distance per each order, benefits for the delivery persons, Application A development costs in order to be more efficient, costs of full time staff, cost of hiring staff in the call center which is available 24 hours, every day, health insurance and employee benefits, expenses related to activities related to sales and advertisements, and other expenses which occur from operating a business;

Between 16 February to 31 March 2020, the 1<sup>st</sup> Alleged adjusted its service fee from 30 percent to 35 percent only for new restaurants signing up for the service in the said period. This happened according to the business plan under the previous management under Mr. Dh, in order to counter the losses incurred offering the service of Application A, which were a result of increases in costs related to food delivery drivers/riders and other expenses due to a growth of food delivery service via application in relation to new partner restaurants. However, since the spread of Coronavirus 2019 or COVID-19, the 1<sup>st</sup> Alleged adjusted the fee to 30 percent on 1 April 2020;

When negotiations with restaurants to determine a rate were finalized, the 1<sup>st</sup> Alleged would clearly specify the said rate in writing in the contracts for service.

2. The 2<sup>nd</sup> Alleged is registered as a juristic person under the name B Co., Ltd., having J Co., Ltd., as its major shareholder of x,xxx,xxx shares (from a total of x,xxx,xxx shares), doing business on development and providing services via Application "B." Most of the partner restaurants had to conclude contracts with K Co., Ltd., and the 2<sup>nd</sup> Alleged. With an exception for large restaurants with many branches, where contracts are made directly with the 2<sup>nd</sup> Alleged or J Co., Ltd. Regardless which company a contract was made with, services would be provided on Application B solely by the 2<sup>nd</sup> Alleged. In 2019, the 2<sup>nd</sup> Alleged had revenue from providing food pick-up and delivery services estimated at no less than xx percent of total revenues of xxx,xxx,xxx.xx Baht (xxx,xxx,xxx.xx Baht) and the service fee schedules are of the following:

### 2.1 Fee during initial trial service period

The fee is calculated based on factors related to each restaurant such as the number of branches and monthly sales of each branch. Service fees are calculated at 3 ranges: 10 to 15 percent, 15 to 20 percent, and 20 to 28 percent;

### 2.2 Current schedule (effective since the end of 2019)

The fee is calculated based on factors related to the restaurant namely the number of branches, monthly sales of each branch, and the percentage of the highest sales of all restaurants within the same provincial area. There are 4 ranges of service fees: 10 to 15 percent, 15 to 20 percent, 20 to 28 percent, and 28 to 30 percent. In addition to this, restaurants are able to negotiate the service fee in each range to suit characteristics, type of foods, and service provided by each restaurant and restaurant costs;

Once the negotiations are finalized, the 2<sup>nd</sup> Alleged would clearly state, in writing, the service fee as agreed upon in the service contract.

3. C Co., Ltd., provides services via Application “C” having revenue from food pick-up and delivery service via the application in 2019 at xxx,xxx,xxx.xx Baht. There are two methods for the food pick-up and delivery services via the application: the first method – customers do not have to pay a service fee but the service fee would be charged to the restaurants at no more than 30 percent; and the second method – customers have to pay the service fee which is calculated from the restaurant at no more than 29 percent, which would be negotiated and agreed upon based on various factors, such as number of branches, advertising and promotions of services provided by C Co., Ltd., and monthly sales of restaurants, as well as service costs of C Co., Ltd.

4. D Co., Ltd., is a service provider of Application “D” having revenue from food pick-up and delivery service via the application in 2019 at xx,xxx,xxx.xx Baht. Food pick-up and delivery services are provided using two methods via the application: in the first method, restaurants are non-partners and no fee is levied upon the restaurants; the second method treats restaurants as partners and service fees further differentiated into two groups. The first group is called managed accounts, whereby D Co., Ltd., assigns salespersons to closely take care of the services and the fee charged to those restaurants at a rate of between 10 percent to 30 percent. The second group is unmanaged accounts which a service fee of 30 percent is charged to the restaurants.

### Issues for Consideration

This inquiry has the following issues to be considered:

1. Whether or not the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged are undertaking with dominant position committing any conduct prohibited by Section 50 of the Trade Competition Act B.E. 2560;
2. Whether or not the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged has undertaken any conduct causing damage to other undertakings under Section 57 of the Trade Competition Act B.E. 2560;
3. Whether or not the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged has colluded with other competing undertakings in the same market to conduct any action that monopolizing, lessening competition, or restricting competition in the particular market in which prohibited by Section 54 of the Trade Competition Act B.E. 2560.

### Decisions

To consider whether or not the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged are undertaking with dominant position committing any conduct prohibited by Section 50 of the Trade Competition Act B.E. 2560, it shall be established whether or not they are the undertakings with dominant position.

Under Section 5 of the Trade Competition Act B.E. 2560 (2017), “the undertaking with dominant position is the undertaking or undertakings in a relevant market having market share and sales revenue exceed the criteria predetermined by the Trade Competition Commission whereby a factor or factors relevant to the competition within that market shall be evaluated,” together with the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018), dated 4 October 2018, Item 3 stating “any undertaking with market share and sales revenue as follow shall be deemed as an undertaking with dominant position: (1) An undertaking in a market of a particular product or service that has market share in the preceding year of 50 percent or more and has sales revenue of one billion (1,000,000,000) baht or more, or (2) First largest three (3) undertakings in a market of a particular product or service that have combined market shares of 75 percent or more and each and every undertaking has sales revenue of one billion (1,000,000,000) baht or more; The provision in paragraph 1 (2) above shall not be applied to any undertaking with market share in the preceding year lower than 10 percent.”

Thus, prior to determine whether an undertaking is the one with dominant position, the market definition, sale revenues, and market shares shall be established as follow:

## 1. Market Definition

### 1.1 Product Dimension

In this case, the market definition is defined as the food delivery services via application.

### 1.2 Geographical Dimension

Geographic dimension is the service area for food pick-up and delivery via application, which covers services in Bangkok and various provinces in Thailand. Therefore, the geographic market is Thailand.

## 2. Revenues and Market Share of the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged

Based on data of undertakings providing food pick-up and delivery services via applications, it was found that in B.E. 2562 (2019), the 1<sup>st</sup> Alleged had revenues from its application based food pick-up and delivery services of xxx,xxx,xxx.xx Baht, having the highest market share of xx.xx percent. C Co., Ltd., had revenues from application based food pick-up and delivery services of xxx,xxx,xxx.xx Baht, having the second highest market share of xx.xx percent. The 2<sup>nd</sup> Alleged had estimated revenues from application based food pick-up and delivery services ranging from xxx,xxx,xxx.xx Baht to xxx,xxx,xxx.xx Baht, having the third highest market share (calculated on the period with the highest estimated revenue) of xx.xx percent. D Co., Ltd., had revenues from application based food pick-up and delivery services at xx,xxx,xxx.xx Baht, having a market share in the fourth place of x.xx percent. The total market share of the three highest undertakings was xx.xx percent. However, the revenues of the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged were less than 1 billion Baht; therefore, the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged are not undertakings with dominant position as defined by Section 5 of the Trade Competition Act B.E. 2560 and the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018), Item 3(2).

The subsequent issue for consideration is whether or not the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged has undertaken any conduct causing damage to other undertakings under Section 57 of the Trade Competition Act B.E. 2560.

The provision of Section 57 of the Trade Competition Act B.E. 2560 (2017) states “an undertaking is prohibited to conduct any action in which causing damage to other undertakings of the following natures: (3) unfairly imposing trade conditions that are limiting or obstructing others’ business operations...” and the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4 October 2018, Item 10 stating “Imposition of trading condition(s) that restrict or prevent an operation of

other undertaking unfairly having one or more of the following characteristics: (1) Discriminatory trading conditions for different customers or different geographical areas without due cause; (2) Discriminatory trading conditions favoring some specific undertakings unfairly;” and Item 11 stating “11. To assess a certain action whether it is unfair, the following criteria shall be considered concurrently: (1) Such action is not commonly practiced as trade norms; (2) There is an imposition of condition(s) without written evidence and without prior notice in a reasonable period of time as normally practiced in such trade; (3) Such action has no justifiable explanation(s) from the perspective of business, marketing, or economics; (4) Other relevant factors.”

The Trade Competition Commission considered the facts, documents, evidence, and applicable laws and finalized that the 1<sup>st</sup> Alleged and the 2<sup>nd</sup> Alleged determined different service fees for each restaurant; these differences are based on differences in costs and expenses of operating food delivery services via application. The 1<sup>st</sup> Alleged and the 2<sup>nd</sup> Alleged have clear fee schedules which are used in the service fee calculation, such as the basket size value per order, the number of branches, total sales for the restaurant, and reciprocal marketing benefits from the restaurant. These negotiations are following market mechanisms, in which the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged negotiating and reaching an agreement on services fees with restaurants and clearly specify in writing, the agreed-upon fee in the service contracts for each restaurant. The actions of the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged are reasonably acceptable in terms of business, marketing, and economics. In addition, the use of said schedule by the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged were generally applied to restaurants, without discrimination for or against any particular restaurant, or to favor any particular partner restaurant unfairly; therefore, the actions of the 1<sup>st</sup> Alleged and the 2<sup>nd</sup> Alleged did not constitute the imposition of discriminatory trading conditions for different customers or different geographical areas without due cause or discriminatory trading conditions favoring some specific undertakings unfairly per the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4<sup>th</sup> October 2018, Item 10 (1) and (2).

Henceforth, the actions of the 1<sup>st</sup> Alleged and the 2<sup>nd</sup> Alleged did not constitute undertakings conducting any action that causing damage to other undertakings per Section 57 of the Trade Competition Act B.E. 2560 (2017) and the Trade Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4<sup>th</sup> October 2018, Item 10 (1) and (2)

The last issue to consider is whether or not the 1<sup>st</sup> and the 2<sup>nd</sup> Alleged has colluded with other competing undertakings in the same market to conduct any action that monopolizing, lessening competition, or restricting competition in the particular market in which prohibited by Section 54 of the Trade Competition Act B.E. 2560.

Section 54 of the Trade Competition Act B.E. 2560 states “any undertaking competing with each other in the same market shall not jointly undertake any conduct which monopolizes, reduces, or restricts competition in that market in one of the following ways..”

Prior to the consideration, it shall be finalized whether or not the 1<sup>st</sup> Alleged, the 2<sup>nd</sup> Alleged, C Co., Ltd., and D Co., Ltd., who are competitors in the food-delivery service via application, were colluding to determine the fee at 30 percent.

The Trade Competition Commission considered the facts, documents, evidence, and applicable laws and finalized that the 1<sup>st</sup> Alleged, the 2<sup>nd</sup> Alleged, C Co., Ltd., and D Co., Ltd., determined fees according to their respective schedules by taking into consideration various factors of restaurants such as costs and expenses related to services or reciprocal marketing benefits, having similar business models that set with the service fees at a maximum of 30 percent. There were adjustments to lower or consideration of lowering the services fees to be lower than 30 percent according to their own schedules. No actions indicated a mutual agreement, or mutual assistance, or division of responsibilities between the 1<sup>st</sup> Alleged, the 2<sup>nd</sup> Alleged, C Co., Ltd., and D Co., Ltd., in which may be constituted as collusion which is an offence.

Therefore, the actions of the 1<sup>st</sup> Alleged, the 2<sup>nd</sup> Alleged, C Co., Ltd., and D Co., Ltd., are not constituted as jointly undertake any conduct which monopolizes, reduces, or restricts competition in the particular market under Section 54 of the Trade Competition Act B.E. 2560.

### **Resolution of the Trade Competition Commission**

The Trade Competition Commission reached a unanimous decision that the determination of service fees for each restaurant using different percentages ranging from 0-30 percent by the 1<sup>st</sup> Alleged and the 2<sup>nd</sup> Alleged are not undertakings with dominant position committing any prohibited actions as defined by Section 50 of the Trade Competition Act B.E. 2560, did not constitute the imposition of discriminatory trading conditions for different customers or different geographical areas without due cause or discriminatory trading conditions favoring some specific undertakings unfairly per Item 10 (1) and (2) of the Trade

Competition Commission Notice on Guidelines for the Assessment of Harmful Practices B.E. 2561 (2018), dated 4<sup>th</sup> October 2018, and did not colluding with C Co., Ltd., and D Co., Ltd., to jointly undertake any conduct which monopolizes, reduces, or restricts competition in the particular market under Section 54 of the Trade Competition Act B.E. 2560. The case shall be terminated.

Trade Competition Commission

24<sup>th</sup> February 2021