

Article 8

Case Study on the Commission Decision of the “Pumpkin Case”



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1. Introduction

Ever since the Trade Competition Act B.E. 2560 (2017) came into effect, the Trade Competition Commission has been overseeing complaints and publishing many of its decisions. The Office of Trade Competition Commission is obliged to publish the decisions to the general public. The decisions can be searched on the website of the Office of Trade Competition Commission (www.otcc.or.th). Cases published involve, among others, sale of mobile phones at a below-cost price via social media; termination of distributor and after-sale service agreement relating to industrial measurement device; imposition of condition prohibiting sale of competitors’ energy drink in the market; unfair trade practices committed by business operator with dominant position in asphalt emulsion rubber market and unfair trade practices committed by wholesale buyer of agricultural produce in Mae Hong Sorn province.

The Trade Competition Act B.E. 2560 (2017) is a legislation regulating business transactions in the sectors of agriculture, industry, commerce, finance, insurance, service and others as prescribed by relevant Ministerial Regulations to ensure free and fair-trade practices. Particularly, in the agricultural sector of Thailand in which the issue of unfair agricultural wholesale purchase arises. Such acts include lowering wholesale purchase price, imposing unfair trade conditions, unduly delaying agricultural harvest resulting in damage suffered by farmers, jointly setting the wholesale price and etc.

After contemplating the decisions given on previous cases, there are a number of cases relating to agricultural produce involving trade practices that are unfair to farmers. The Trade Competition Commission, therefore, pays great attention to cases involving trading of agricultural produce, among which is a case of unfair trade practices of agricultural wholesale buyers. Even though the value of damage for this particular case may be insignificant, if the unfair and exploitative behavior of wholesale buyers is allowed to continue, it will violate the principle of free and fair trade. Moreover, the decision of this case acts as a cautionary warning for agricultural wholesale buyers and induces fairness to farmers, preventing them from being exploited unfairly and without appropriate reason. This article is a presentation of the case involving unfair trade practices of an agricultural wholesale buyer in Mae Hong Sorn province, hereinafter called the “Pumpkin Case”.

2. Key points of the Commission Decision of the Pumpkin Case

In August 2018, the Trade Competition Commission rendered a decision on the Pumpkin Case, the key points of which are as follows:

2.1 The claim

The Office of Provincial Commercial Affairs Mae Hong Sorn received a letter of complaint from Damrongtham Center in Mae Sa Riang district claiming that the Complainant, a farmer producing and selling pumpkins, suffered from being able to sell the pumpkins only at a price fixed by a middleman who supplied the Complainant with pumpkin seeds. This behavior restricted the Complainant and other farmers in Mae Top Tai area from selling the pumpkins to other buyers or if others would like to purchase the product, they can only do so at the fixed price. This is considered an act of imposing trade restriction and unfair monopoly, the Office of Provincial Commercial Affairs Mae Hong Sorn, therefore, submitted this letter to the Secretary-General of the Trade Competition Commission.

2.2 Facts

The Office of Trade Competition Commission received a claim that Respondent No.1 and No.2 are middlemen who would purchase pumpkins from farmers and resell such produce to end-buyers. Both of them would supply farmers with pumpkin seeds and upon the harvesting season, they would force the farmers who took the pumpkin seeds to only sell the produce to them at a lowered price. They would also unrealistically downgrade the quality of the produce to lower the buying price to be paid to the farmers in the area of Baan Mae Top Tai. They would intimidate and obstruct other agricultural wholesale buyers in the same area from buying the pumpkins in this particular area by claiming that the farmers were supplied the seeds from them even though some of the farmers acquired the seeds by themselves. In a normal trade practice, the farmers in Baan Mae Top Tai have the liberty to sell their pumpkins to any of the 5 wholesale buyers.

2.3 Points to contemplate

1) Whether the Trade Competition Act B.E. 2542 (1999) or the Trade Competition Act B.E. 2560 (2017) shall be applied since Respondent No.1 and No.2 had been conducting the complained act continuously from the time when the Trade Competition Act B.E. 2542 (1999) was still in force and also continuing to after the Trade Competition Act B.E. 2560 (2017) came into effect;

2) Whether or not Respondent No.1 and No.2 are business operators with a dominant position and abusing their dominant position in violation with Section 50 of the Trade Competition Act B.E. 2560 (2017);

3) Whether or not the behavior of Respondent No.1 and No.2 prohibiting other wholesale buyers from purchasing the pumpkins in the area that they operate is considered an unfair trade obstruction resulting in damage to other business operators under Section 57 of the Trade Competition Act B.E. 2560 (2017).

2.4 Related legal provisions

1) Provision on the repeal of the Trade Competition Act B.E. 2542 (1999) according to Section 3 of the Trade Competition Act B.E. 2560 (2017);

2) Provision stipulating the definitions according to Section 5 of the Trade Competition Act B.E. 2560 (2017);

3) Provision prohibiting business operator in a dominant position from abusing its dominant position according to Section 50 of the Trade Competition Act B.E. 2560 (2017) in conjunction with the Announcement of Trade Competition Commission Subject: Criteria on being Business Operator in a Dominant Position B.E. 2561 (2018) which was issued by virtue of Section 5 and Section 17 (2) of the Trade Competition Act B.E. 2560 (2017);

4) Provision on unfair trade practices pursuant to Section 57 of the Trade Competition Act B.E. 2560 (2017) in conjunction with the Announcement of Trade Competition Commission Subject: Procedures in Determining Acts Damaging Other Business Operators B.E. 2561 (2018)

2.5 Decision of the Trade Competition Commission

1) **Issue No. 1** – the Trade Competition Commission considered that the behavior of Respondent No.1 and No.2 was a concurrent act committed since the time when the Trade Competition Act B.E. 2542 (1999) was in effect and continued until after the Trade Competition Act B.E. 2560 (2017) came into effect. Even though the Trade Competition Act B.E. 2542 (1999) was repealed whereby the Trade Competition Act B.E. 2560 (2017) shall be applied in replacement, the offence provisions in Section 25 and Section 29 of the Trade Competition Act B.E. 2542 (1999) were duplicated in Section 50 and Section 57 of the Trade Competition Act B.E. 2560 (2017). Hence, the Trade Competition Act B.E. 2560 (2017) which is the law in effect shall be applied in the contemplation of the claimed behavior of both Respondents.

Once the above issue is settled, the following issue to contemplate is whether Respondent No.1 and No.2, other agricultural wholesale buyers and the farmers are categorized as “Business Operator” pursuant to the definition stipulated in Section 5 of the Trade Competition Act B.E. 2560 (2017).

The Trade Competition Commission considered and determined that:

- **Respondent No.1, No.2 and other agricultural wholesale buyers** are purchasers of products for the purpose of reselling to gain interest in agriculture and commerce and shall be categorized as “Business Operator” under Section 5;

- **Farmers growing and selling pumpkins** are producers of goods for sale which is considered an act conducted to gain interest in trade and agriculture and shall be categorized as “Business Operator” under Section 5.

2) **Issue No. 2** – the Trade Competition Commission considered that in order to determine whether Respondent No.1 and No.2 are business operators in a dominant position, the market definition needs to be analyzed to determine the market share and turnover indicative of a dominant position.

- **Analyzing market definition**

- **Product market** – Pumpkin is a product with unique characteristics making it irreplaceable by other product, the product market for this case is, therefore, pumpkin market;

- **Geographic market** – The geographical characteristics of Baan Mae Top Tai are mostly mountainous, making transportation of human and goods inconvenient. Particularly for pumpkins which are heavy and difficult to transport and the fact that farmers do not have their own vehicles, making them unable to transport pumpkins to other areas outside of Mae Sa Riang district, Mae Hong Sorn province. In other words, there is no other alternative area in which the farmers can sell their produce. Hence, the geographic market for this case is Mae Sa Riang district, Mae Hong Sorn province.

- **Contemplating turnover and market share**

The criteria for a single business operator with a dominant position is defined as a business operator having more than 50% of the market share in the previous year and the turnover of more than 1 billion Baht.

In this case, the overall production of pumpkins in Mae Sa Riang district, Mae Hong Sorn province in 2017 was worth around 5 million Baht and 6 million Baht in 2018. It can be inferred that the overall production of pumpkins in Mae Sa Riang district, Mae Hong Sorn province in 2016 was worth less than 1 billion Baht and therefore none of the business operators can be considered as being in a dominant position.

3) **Issue No. 3** – Whether the conduct of Respondent No.1 and No.2 which involves lowering the wholesale purchase price of the pumpkins from the farmers in Baan Mae Top Tai is in violation of a provision prohibiting any business operators from conducting any acts which may result in causing damage to other business operators pursuant to Section 57 of the Trade Competition Act B.E. 2560 (2017).

- **Whether the conduct of the two Respondents can be categorized as exercising unfair bargaining power under Section 57 (2) of the Trade Competition Act B.E. 2560 (2017)**

It is evident from the facts that the end-purchasers have the power to set the purchase price. The increase or decrease in such price would depend on the demand of the end-purchasers and quantity of the pumpkin entering the market. Agricultural wholesale buyers like both Respondents are middle persons who gain benefit from the margin of the selling and buying prices in the amount of approximately 1 Baht per kilogram. If any farmers consider that Respondent No.1 and No.2 are taking advantage of them, they can deny selling the pumpkins to the Respondents. There was an example where Miss P. determined that she was being exploited by the two Respondents who downgraded her produce even though her pumpkins were heavier in weight. Miss P. denied selling her products to the two Respondents even though they were already loaded on the Respondents' truck. This is an example showing that the farmers can choose not to sell their produce to the Respondents.

Another example included a case where Mr. T, a farmer who was supplied the seeds from Respondent No.1. When it was time to sell the produce, Respondent No.1 fixed the purchase price below the rate agreed with Mr. T and also lower than the price offered by other wholesale buyers. Mr. T, therefore, decided that he would sell his produce to other wholesale buyers and then repay Respondent No.1 for the seeds. This resulted in Respondent No.1 agreeing to increase the purchase price for Mr. T which led to a successful transaction. This example indicates that the farmers have the liberty to negotiate the price even though they were given the seeds by Respondent No.1. It can be concluded that the behavior of both Respondents could not be categorized as abusing their higher bargaining power pursuant to Section 57 (2) of the Trade Competition Act B.E. 2560 (2017).

- **Whether the act of both Respondents can be categorized as unfairly imposing trade conditions that restrict or obstruct the operation of other business operator under Section 57 (3) of the Trade Competition Act B.E. 2560 (2017)**

There is consistent evidence presented by the Complainant and other agricultural wholesale buyers that during the planting season in 2018, the Respondents prohibited other wholesale buyers from purchasing pumpkins from the farmers in the area of Baan Mae Top Tai on the basis that the farmers were given the seeds from Respondent No.1 and No.2. Other wholesale buyers provided consistent statements that they were threatened not to purchase pumpkins from the farmers on the grounds that the pumpkin seeds were supplied by the Respondents. However, the farmers objected to such statements and informed them that the farmers acquired the seeds themselves. One of the wholesale buyers was also threatened by Respondent No.1

via telephone. Such conduct was reported to the police and recorded in a police journal at Kong Koi provincial police station. After an inquisition with Respondent No.1, Respondent No.1 admitted that there were prohibitions imposed upon other wholesale buyers restricting them from purchasing pumpkins from the farmers or not to purchase the produce at a higher price since the Respondents was the one who supplied the pumpkin seeds to the farmers. It was also admitted that phone calls were made to threaten other agricultural wholesale buyers.

The value of damage suffered by other agricultural wholesale buyers in this case is in the region of 1,000-10,000 Baht each, which totals to 21,000 Baht. Hence, the behavior of Respondent No.1 and No.2 prohibiting other wholesale buyers from purchasing pumpkins from farmers in Baan Mae Top Tai is considered an unfair imposition of conditions restricting or obstructing the business operation of other business operators under Section 57 (3) of the Trade Competition Act B.E. 2560 (2017) in conjunction with the Announcement of Trade Competition Commission Subject: Procedures in Determining Acts Damaging Other Business Operators B.E. 2561 (2018).

Therefore, the Trade Competition Commission imposed an administrative fine on Respondent No.1 in the amount not more than 50,000 Baht which shall not exceed 10% of the income of both Respondents in the year of offence. Both Respondents are partners who work and make a living together, the income gained is a family income and not divided to each of the Respondents. The function of their business operation is divided whereby Respondent No.2 was aware of neither the action of Respondent No.1 restricting other wholesale buyers from purchasing the pumpkins nor the threats made to other wholesale buyers. Respondent No.2 was responsible for meeting with farmers, proceeding with payment to farmers and coordinating with the end-purchaser. Negotiation on sale prices was entirely the responsibility of Respondent No.1. Due to the fact that both Respondents admitted to the claims and cooperated well with the hearing and also because this is their first offence, the Trade Competition Commission was of the view that the fine shall be reduced by half, resulting in the amount of 25,000 Baht and shall be imposed only on Respondent No.1.

2.6 Resolution of the Trade Competition Commission

The Trade Competition Commission reached a unanimous resolution providing that the act of Respondent No.1 is an offence under Section 57 (3) of the Trade Competition Act B.E. 2560 (2017) in conjunction with the Announcement of Trade Competition Commission Subject: Procedures in Determining Acts Damaging Other Business Operators B.E. 2561 (2018). The Respondent No.1 shall be liable for an administrative fine in the amount of 25,000 Baht.

3. Precaution for business operators

According to the facts of this case, even though Respondent No.1 and No.2 may claim that they were not aware that obstructing other agricultural wholesale buyers from purchasing pumpkins from the farmers is an offence under the Trade Competition Act B.E. 2560 (2017), such action is an unfair trade practice which prohibits other wholesale buyers from purchasing the produce of the farmers in such area and therefore cause damage to such other wholesale buyers. The aforementioned act conducted is an offence under Section 57 (3) of the Trade Competition Act B.E. 2560 (2017). If you are uncertain whether your business conduct can be categorized as an offence under the Trade Competition Act B.E. 2560 (2017), you may contact the Office of Trade Competition Commission at 0 2199 5400 on business days and during the operating hours of 8.30 a.m. - 4.30 p.m. or via email: info@ttcc.or.th.