



Trade Competition Commission Ruling on
The Prohibition of Liquor Agents selling Community-based Liquors

between {	Mr. A	1 st Claimant
	Mr. B	2 nd Claimant
	Mrs. C	3 rd Claimant
	Mrs. D	4 th Claimant
	Mrs. E	5 th Claimant
	Mrs. F	6 th Claimant
	Mrs. G	7 th Claimant
	Mrs. H	8 th Claimant
	Mrs. J	9 th Claimant
	Mrs. K	10 th Claimant
	Mr. L	11 th Claimant
	Mr. M	12 th Claimant
	Mr. N	13 th Claimant
	Mr. P	14 th Claimant
	Z Plc.	The Alleged

The Complaint

All claimants collectively signed and filed the complaint dated 1st of June 2012 claiming that the Alleged has imposed a restrictive trade measure by forcing its agents and subagents not to sell community-based distilled liquors, causing those agents and subagents refuse to buy the community-based distilled liquors, resulting injury to claimants and may constitute the offence in Section 25 and 27 of the Trade Competition Act B.E. 2542 (1999).

Facts

All claimants are undertakings that produce and sell community-based distilled liquors to community shops, agents, or subagents selling liquors, beers, and other beverages with terms and conditions on delivery and payment according to mutually and voluntary agreements between trading partners.

Around May 2012, the First Claimant delivered his community-based distilled liquors to Shop S, but Shop S presented him with a document entitled the intention to be the subagent bearing the name of Q Co., Ltd., partially stating that the subagent shall refrain from selling all community-based liquors, and, subsequently, Shop S refused to buy the 1st Claimant's liquors.

Later, the 1st to the 14th Claimants issued the petition to the Alleged requesting the cancellation of such trade restriction. The 1st Claimant knows that the real owner of beers, white distilled liquors, and whiskeys is the Alleged by considering the use of the similar trademarks. After the submission of petition, the 1st Claimant was able to sell and delivery of his community-based distilled liquors as usual. The 1st Claimant claimed that the damage was around xxx,xxx Baht but produced no proof of such claim. Other claimants suffered no injury but co-signed in the petition and the complaint because they were informed by representatives of the community-based distilled liquor producers' group in Chiang Mai that there was the prohibition of agents and subagents to sell community-based distilled liquors and were requested to co-signed the petition and the complaint because they might be later affected by such restriction.

After the hearing of agents, subagents, and miscellaneous shops, it is evident that they never witness the document entitled the intention to be the subagent from Q Co., Ltd., and never been requested from anyone to refrain from selling community-based liquors. Q Co., Ltd.'s main source of revenue is from buying white distilled liquors from Dh. Co., Ltd., and resell those liquors in the northern region without concluding any contract to be a dealer, agent, or subagent. The Alleged is a major shareholder of Q Co., Ltd., in which Q Co., Ltd., is responsible to inform the representative of the Alleged's board of director regarding its revenue and sale performance.

The Alleged is a holding company, investing in other companies, does not directly doing any business and is a shareholder of Q Co., Ltd., and Y Co., Ltd.

Market and Distributional Structure of Liquor in 2011

1. Market Structure of Liquor

1.1. The Alleged's group of companies has the market share of approximately xx.xx percent and has 20 producers under the same umbrella;

1.2. The network of Chiang Mai – Lamphun and Upper Northern region community-based distilled liquor producers, producing fruit wines, worts, palm wines, and distilled liquors, has around 4,000 members;

1.3. Four other producers having the market share of xx.xx percent;

1.4. Two importers having the market share of x.xx percent.

2. Distributional Structure

2.1. The network of Chiang Mai – Lamphun and Upper Northern region community-based distilled liquor producers produces and sells their products to shops that are mostly agents and subagents of the Alleged;

2.2. The Alleged's group of companies, investing in 20 distilleries and 3 breweries, sell their products to 3 liquor distributors and 2 beer distributors, which later resell their products to a group of 16 marketing companies, consisting of (1) a group of 8 liquor marketing companies and (2) a group of 8 beer marketing companies, whereby acting as a center of distribution selling products to agents and subagents to their respective areas of responsibility.

3. The Alleged owns 100 percent of shares in each and every company in distilleries, breweries, liquor and beer distributors, and liquor and beer marketing companies.

In 2011, the structure of market production and distribution consisted of 2,486 liquor producers. There were 4 groups of undertakings having the market share in the upper northern region which were (1) Dh Co., Ltd., with the market share of xx.xx percent and tax payable of xxx million Baht, (2) V Co., Ltd., with the market share of xx.xx percent and tax payable of xxx.xx million Baht, (3) the group of community-based distilled liquor producers, with the market share of xx.xx percent and tax payable of xxx.xx million Baht, and (4) the group of community-based fermented liquor producers with the market share of x.xx percent and tax payable x.xx million Baht.

Issues for Considerations

This inquiry has the following issues to be considered:

1. The action undertaken by the Alleged occurred when the Trade Competition Act B.E. 2542 (1999) was in force and later Section 3 of the Trade Competition Act B.E. 2560 (2017) has nullified the former, whether or not the Alleged's action was nullified by law;
2. Whether or not the Alleged is an undertaking with dominant position and exercising its dominant position in such a way that prohibited by Section 25 of Trade Competition Act B.E. 2542 or Section 50 of the Trade Competition Act B.E. 2560;
3. Whether or not the Alleged is an undertaking that colluding with other undertakings to monopolize, lessen competition, or restrict competition under Section 27 of the Trade Competition Act B.E. 2542 or Section 54 or 55 of the Trade Competition Act B.E. 2560;
4. Whether or not the Alleged has undertaken any conduct that was not free and fair competition that results in destroying, damaging, restricting, obstructing, or limiting other undertakings or prohibiting them from doing business or forcing them out of business under Section 29 of the Trade Competition Act B.E. 2542 or Section 57 of the Trade Competition Act B.E. 2560.

Decisions

The first issue to consider is the action undertaken by the Alleged occurred when the Trade Competition Act B.E. 2542 (1999) was in force and later Section 3 of the Trade Competition Act B.E. 2560 (2017) has nullified the former, whether or not its action was nullified by law.

The Trade Competition Commission, after thorough consideration, discovered that the Alleged's action occurred when the Trade Competition Act B.E. 2542, in particular its Section 25, 27, and 29, was in force. Even though the Trade Competition Act B.E. 2560 had annulled the Trade Competition Act B.E. 2542 but the provisions on similar offences are still present in Section 50, 54, 55, and 57 of the Trade Competition Act B.E. 2560. Thus, to consider the Alleged's action, the applicable law is the Trade Competition Act B.E. 2542 which was in force at the time of the Alleged's action was committed.

The subsequent issue to consider is whether or not the Alleged is an undertaking with dominant position and exercising its dominant position in such a way that prohibited by

Section 25 of Trade Competition Act B.E. 2542 or Section 50 of the Trade Competition Act B.E. 2560.

Considering the undertaking with dominant position, there are 2 things to evaluate: (1) market definition and (2) the criteria according to The Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018).

(1) Market Definition

In this particular case, the market definition shall be examined from the product and geographical dimensions as follow:

1) Product Dimension: The Trade Competition Commission ruled that the product substitutability shall be identified. The product-in-question is community-based distilled liquors or white distilled liquors which have its own clientele preferring its unique taste and scent. If consumers are unable to purchase the preferred brand of community-based distilled liquor or white distilled liquor, they would buy another brand of community-based distilled liquor or white distilled liquor but not switch to whiskey or beer. The relevant market here is the white distilled liquors;

2) Geographic Dimension: The Trade Competition Commission determined that each producer can sell and deliver their white distilled liquors to the agreed place of delivery throughout the upper northern region without different selling price. Thus, the geographic relevant market is the upper northern provinces of Chiang Rai, Chiang Mai, Lamphun, Lampang, Nan, Phayao, Mae Hong Son, and Uttaradit.

(2) Criteria described in The Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018), dated 18th of January 2018, requires the consideration of sale revenue and market share of the preceding year to the year of allegation. The Trade Competition Commission ruled that the Alleged committed the alleged action in 2012; thus, the Commission finalized the sale revenue and market share of 2011 shall be used. The analysis by the Office of the Trade Competition Commission revealed the undertakings in the upper northern region comprise of 4 groups: (1) Dh Co., Ltd., with the market share of xx.xx percent and tax payable of xxx million Baht, (2) V Co., Ltd., with the market share of xx.xx percent and tax payable of xxx.xx million Baht, (3) the group of community-based distilled liquor producers, with the market share of xx.xx percent and tax payable of xxx.xx million Baht, and (4) the group of community-based fermented liquor producers with the market share of x.xx percent and tax

payable x.xx million Baht. Despite Dh Co., Ltd., and V Co., Ltd., are wholly-owned affiliates of the Alleged but they are separate juristic persons and do not constitute as undertakings with dominant positions as described in the Trade Competition Commission Notice on Criteria for being an Undertaking with Dominant Position B.E. 2561 (2018) dated 18th of January 2018. For the case which the Alleged is a holding company, the Trade Competition Act B.E. 2542 did not have any provision on this matter. Therefore, this issue shall not be examined.

Next, it shall be considered whether or not the Alleged is an undertaking that colluding with other undertakings to monopolize, lessen competition, or restrict competition under Section 27 of the Trade Competition Act B.E. 2542 or Section 54 or 55 of the Trade Competition Act B.E. 2560.

To evaluate an undertaking that colluding with other undertakings to monopolize, lessen competition, or restrict competition, the agreement between undertakings, which may be horizontal – such as the agreement between one producer and another or the agreement between one distributor to another – or vertical – such as the agreement between one producer and a retailer or a distributor, shall be investigated. The Trade Competition Commission has thoroughly examined all facts and evidence and did not find anything indicating the Alleged has colluded with any other undertakings and there is no sufficient evidence or witness to believe that liquor producers or distributors have agreed among themselves or have agreed with agents or subagents to prohibit the sale of community-based distilled liquors or did anything to monopolize, lessen competition, or restrict competition in the white distilled liquor market. Hence, it did not constitute the offence under Section 27 of the Trade Competition Act B.E. 2542 or Section 54 or 55 of the Trade Competition Act B.E. 2560.

The final issue to consider is whether or not the Alleged has undertaken any conduct that was not free and fair competition that results in destroying, damaging, restricting, obstructing, or limiting other undertakings or prohibiting them from doing business or forcing them out of business under Section 29 of the Trade Competition Act B.E. 2542 or Section 57 of the Trade Competition Act B.E. 2560.

It is apparent from the 1st Claimant that there was damage of unable to sell his community-based distilled liquors between February and May 2012, losing around xxx,xxx Baht but this particular claimant was unable to produce any proof or evidence to confirm his damage. Moreover, the 2nd to the 9th Claimants testified in the same manner they never been refused by

any agent or subagent, and suffered no damage, as well as able to sell their products as usual. Additionally, the 3rd to the 10th Claimants testified that they never witness the document entitled the intention to be a subagent bearing the name of Q Co., Ltd., dated 3rd May 2012, as well as never been refused by anyone who sell their community-based distilled liquors.

The Trade Competition Commission has thoroughly considered this matter and decided that there is no evidence indicating the Alleged had conducted any action that was not free and fair competition that results in destroying, damaging, restricting, obstructing, or limiting other undertakings or prohibiting them from doing business or forcing them out of business under Section 29 of the Trade Competition Act B.E. 2542 and it cannot be concluded that the Alleged had conducted any action causing damage to any Claimants by unfairly restricting the Claimants' business operations, unfairly exercising market power or superior bargaining power, or unfairly imposing restrictive or obstructive trading terms and conditions against the Claimants under Section 57 of the Trade Competition Act B.E. 2560. Moreover, there is no witness or evidence proving the Alleged has done anything described in the complaint filed by the Claimants. Therefore, it did not constitute an offence under Section 29 of the Trade Competition Act B.E. 2542 or Section 57 of the Trade Competition Act B.E. 2560.

Resolution of the Trade Competition Commission

The Trade Competition Commission reached a unanimous decision that the Alleged did not abuse the dominant position per Section 25 of the Trade Competition Act B.E. 2542 and Section 50 of the Trade Competition Act B.E. 2560, was not the undertaking that colluding with other undertakings to monopolize, lessen, or restrict competition per Section 27 of the Trade Competition Act B.E. 2542 or Section 54 or 55 of the Trade Competition Act B.E. 2560, did not commit any action that was not free and fair competition that results in destroying, damaging, restricting, obstructing, or limiting other undertakings or prohibiting them from doing business or forcing them out of business per Section 29 of the Trade Competition Act B.E. 2542 and Section 57 of the Trade Competition Act B.E. 2560. Therefore, the Commission is recommending non-prosecution.

The Trade Competition Commission

10th February 2021