(Translation)

Outcome of Opinion of Trade Competition Commission
In case of Prohibition of Selling Competitor's Products in Energy-Drink Market

Trade Competition Commission — the Accuser

Between

M-150 Company Limited — the Accused

Complaint

The Complainants No. 1, No. 2 and the Complainants No. 3, No. 4 made complaints to the Trade Competition Commission on August 22, 2012 and September 14, 2012 respectively. The complaints are summarized as follows. Around the end of the year 2011, the four Complainants were prohibited by the Accused from selling energy-drink products under a logo: Carabao Energy Drink. In the case where the Complainant failed to comply with the prohibition, the Accused would discontinue the supply of the Accused's products in the type of energy drink under a logo: M-150 to the four Complainants. Subsequently, around May, 2012, the Accused discontinued the supply of the M-150 energy-drink products to the four Complainants due to the fact that the four Complainants continued with the sale of Carabao Energy Drink products. In addition to the discontinuation of the supply of the M-150 energy-drink products to the four Complainants, the four Complainants lost opportunities to buy energy-drink products under other logos which were produced and supplied by the Accused or the Accused's subsidiary companies. Consequently, the four Complainants were required to seek and to buy the M-150 energy-drink products from other supplying sources in order to resell them to the customers of the four Complainants. The four Complainants encountered difficulties owing to paying the higher prices of the purchased products or the higher costs of transportation. As a result, the higher costs of the purchased products were incurred, and the four Complainants lost certain customers. These brought about damage to the businesses and reduction in the profits of the four Complainants. The aforesaid acts of the Accused were the abuse of the position of the business operator with market dominance against the four Complainants in an unfair manner under Section 25 of the Trade Competition Act B.E. 2542 (1999).

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Facts

The facts which have been obtained from seeking evidence by the subcommittee on investigation are as follows. As for the Complainant No. 1, the facts are that the Complainant No. 1 sold the M-150 energy-drink products in the area of Bangkok. The name of the shop of the Complainant No. 1 was "J". The Complainant No. 1 bought the M-150 energy-drink products from the shop named "B", which was the distributor (agent) of the Accused, in the approximate amount of 7,000 boxes (each box containing 50 bottles) per month. Besides, the Complainant No. 1 bought the energy-drink products under logos: Lipovitan-D and M-Sport from the shop named "J", which was the distributor (agent) of L. Company. As regards the M-150 energy-drink products, the "B" shop set the conditions that the Complainant No. 1 was required to buy the products at least 4,410 boxes per month; and the Complainant No. 1 would get a refund at the rate of two baht per box in every three month, including being given a refund at the rate of two baht per box together with one plane ticket to go to Europe with a package in every year. The Accused would also hold a party for subagents together with drawing prizes and giving gifts once a year. Additionally, the Complainant No. 1 was the agent who supplied the Carabao Energy Drink products. Subsequently, around the end of the year 2011, the officer of the Accused requested the Complainant No. 1 to slow down the sale of the Carabao Energy Drink products. Thereafter, the officer of the Accused requested the Complainant No. 1 to completely discontinue the sale of the Carabao Energy Drink products. However, the Complainant No. 1 did not comply with the request. The Accused then discontinued the supply of the M-150 energy-drink products to the Complainant No. 1 since May, 2012. This caused damage to the business of the Complainant No. 1, resulting from there being insufficient products for customers and losing certain customers who needed to buy the M-150 energy-drink products from other shops instead. This also caused the Complainant No. 1 to lose an opportunity to sell other types of product such as alcoholic beverages, beers, cigarettes, etc. This was because the customers needed to buy all types of product from the same shop. The Complainant No. 1 could not buy the M-150 energy-drink products from the distributor (agent) of the Accused, including other products of O. Company which was the Accused's subsidiary company. This caused the Complainant No. 1 to buy the M-150 energy-drink products from modern trading firms or other small shops to resell. In this regard,

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the Complainant No. 1 had to pay the higher price and incurred the cost of transportation by itself. There was no profit as a result. Additionally, in the case where the customer of the Complainant No. 1 who bought the M-150 energy-drink products from the Complainant No. 1 in the amount of 100 boxes upwards per each time, the Accused would approach such a customer to persuade him/her to buy the products from other distributors instead of the Complainant No. 1. This resulted in damage to the Complainant No. 1, by reducing the profit of the Complainant No. 1 approximately XXX,XXX - XXX,XXX baht per month.

As for the Complainant No. 2, the facts are that the Complainant No. 2 sold the M-150 energy-drink products in the area of Pathum Thani province. The Complainant No. 2 bought the M-150 energy-drink products from the Accused's distributor (agent) being stationed in the area of Pathum Thani province. The Complainant No. 2 never directly bought the M-150 energy-drink products from the Accused. In mostly making the price payment of the products, the Complainant No. 2 would transfer the money into the bank account of such an agent directly. The Pathum Thani agent sometimes requested the Complainant No. 2 to transfer the money into the bank account of the Accused directly. The Complainant No. 2 paid the price in cash to the Pathum Thani agent on some occasions prior to the delivery of the products. In making the purchase order of the M-150 energy-drink products, the Pathum Thani agent laid down the rule that the Complainant No. 2 would have to order the products in the quantity of ten six-wheeled trucks per month (one six-wheeled truck containing 630 boxes, each box containing 50 bottles) in order that the Complainant No. 2 could buy the products at the price available to subagents, being cheaper than the products which were sold in general modern trading shops. As regards energy-drink products under other logos such as Lipovitan-D or M-Sport, the Pathum Thani agent did not fix the quantity of making the purchase order. Around the year 2007, the Complainant No. 2 started to sell the Carabao Energy Drink products. Around two years later, the Complainant No. 2 was unofficially appointed as the distributor (agent) to supply the Carabao Energy Drink products. In the year 2011, the Complainant No. 2 was officially appointed as the distributor (agent) to supply the Carabao Energy Drink products in the area of Pathum Thani province due to the fact that the Complainant No. 2 had capacity to continuously increase the sales volume of the Carabao Energy Drink products. Meanwhile, there was a decrease in the sales volume of the M-150 energy-drink products of the

Complainant No. 2. Around the end of the year 2011, the Accused started to reduce the quantity of supplying the M-150 energy-drink products to the Complainant No. 2 from the usual quantity of ten ten-wheeled trucks per month to the quantity of eight ten-wheeled trucks per month, and to the quantity of three ten-wheeled trucks per month successively. The salesman of the Accused informed the Complainant No. 2 of the reason for the reduction in the quantity of supplying the products. The reason was that the Complainant No. 2 sold the Carabao Energy Drink products. Subsequently, around the end of May 2012, the officer of the Accused informed the Complainant No. 2 that the Accused made a policy that in the case where the Complainant No. 2 did not stop selling the Carabao Energy Drink products within the end of May 2012, the Accused would discontinue the supply of the M-150 energy-drink products, including the Lipovitan-D and M-Sport energy-drink products being those of the manufacturer who was the affiliate of the Accused, to the Complainant No. 2. However, the Complainant No. 2 refused to comply with the policy and continued with the sale of the Carabao Energy Drink products. The Accused then discontinued the supply of the M-150 energy-drink products and those under other logos as mentioned above to the Complainant No. 2 completely. The Complainant No. 2 had talks with other distributors (agents) about the aforesaid matter, and learnt that the officer of the Accused, who informed the Complainant No. 2 to stop selling the Carabao Energy Drink products, made other persons understand that the prohibition on the sale of the Carabao Energy Drink products by the Complainant No. 2 was his own arrangement (it was not the policy of the Accused). The Accused's discontinuation of the supply of the M-150 energy-drink products to the Complainant No. 2 caused the Complainant No. 2 not to get the M-150 energy-drink products to sell. This also affected the sale of the Lipovitan-D and M-Sport energy-drink products because they were the products of the manufacturer who was the affiliate of the Accused. The shop of the Complainant No. 2, which was a wholesale shop, needed to have all types of product to sell to customers. As a result of not having all types of product, more than fifty percent of the customers of the Complainant No. 2 did not come to the shop of the Complainant No. 2 to buy the products. The Complainant No. 2 endeavored to seek and buy the M-150, Lipovitan-D and M-Sport energy-drink products from other distributors (agents) being stationed in the area and neighboring provinces. However, such distributors (agents) refused to sell the products to the

Complainant No. 2 because they were afraid of committing guilt. The Complainant No. 2 therefore needed to buy the M-150 energy-drink products from modern trading firms such as Makro, Lotus or other small shops to resell. In this regard, it was difficult for the Complainant No. 2 to buy and to fully compete against other wholesalers in the area. This also made the customers lack confidence in the Complainant No. 2, and certain customers did not contact to buy products from the Complainant No. 2 any longer. Besides, this affected the sales volume of the Carabao Energy Drink products for which the Complainant No. 2 was the distributor. The aforesaid policy of the Accused was different from the policy on distributorship for the Carabao Energy Drink products which never had or did not set the condition that the distributor was prohibited from selling energy-drink products under other logos. The action of the Accused resulted in damage to the Complainant No. 2, by reducing the profit of the Complainant No. 2 approximately XX,XXX baht per month.

As for the Complainant No. 3, the facts are that the Complainant No. 3 engaged in the business of beverage wholesale including energy-drink products in the area of Khon Kaen Mueang district, Khon Kaen province. The Complainant No. 3 started selling the M-150 energy-drink products since the year 1995. In the first period, the Complainant No. 3 bought the M-150 energy-drink products from the cargo truck of KHO. Company. Subsequently, around the year 2003 the Complainant No. 3 bought the products from the shop named “P” which was the distributor (agent) of the Accused in the area of Khon Kaen province. The Complainant No. 3 was a subagent. There were 3 types of subagent. The subagent on grade A was required to have the quantity of purchase order of five ten-wheeled trucks upwards (one ten-wheeled truck containing 810 energy-drink boxes, each box containing 50 M-150 energy-drink bottles). The subagent on grade B was required to have the quantity of purchase order of one-five ten-wheeled trucks upwards. The subagent on grade C was required to have the quantity of purchase order of one ten-wheeled truck. The quantity of purchase order of the M-150 energy-drink products was to be adjusted by requiring the Complainant No. 3 to start buying from the quantity of one ten-wheeled truck per month up to the quantity of seven-eight ten-wheeled trucks per month. The Complainant No. 3 would make the price payment to the distributor (agent) of the Accused upon receiving the products. The Complainant No. 3 would sell the products pursuant to the price structure as fixed by the Accused. In the case where the

Complainant No. 3 failed to sell the products pursuant to the fixed price structure, the Accused would discontinue the supply of the M-150 energy-drink products to the Complainant No. 3. During past periods, the Complainant No. 3 never had an experience of facing the discontinuation of the supply of the M-150 energy-drink products. Subsequently, the Complainant No. 3 made the purchase order of the Carabao Energy Drink products to resell in the quantity of 100 boxes per month (each box containing 50 bottles). There was neither setting of condition nor fixing of price structure in making the purchase order of the Carabao Energy Drink products to resell. Subsequently, around October, 2011, the officer of the Accused informed the Complainant No. 3 that normally, the Accused would request its customer to stop selling the Carabao Energy Drink products. Thereafter, the Accused would compensate for damage by offering an extra reward to the customer. In case of the Complainant No. 3, there was the high sales volume of the Carabao Energy Drink products. Therefore, if the Accused had to compensate for the damage, the Accused would pay a lot of compensation. In this regard, the Accused was unable to pay, and it was necessary for the Accused not to supply the M-150 energy-drink products to the Complainant No. 3. Consequently, the Accused discontinued the supply of the M-150 energy-drink products to the Complainant No. 3 since then. This caused the Complainant No. 3 not to get the M-150 energy-drink products for sale, including the Lipovitan-D and M-Sport energy-drink products because they were the products of the manufacturer who was the affiliate of the Accused. In order to solve a problem for allowing the shop of the Complainant No. 3 to have all types of product, the Complainant No. 3 needed to buy the M-150 energy-drink products from modern trading firms such as Makro or Lotus to replace. In this regard, the Complainant No. 3 had to pay the higher price than that of the products being purchased from the Khon Kaen distributor (agent). Additionally, the Complainant No. 3 had to incur the cost of transportation by itself, bringing about the higher cost of the products. Furthermore, the Complainant No. 3 could not compete against other wholesalers in the area fully. This also made customers lack confidence in the Complainant No. 3. In addition, more than fifty percent of the customers of the Complainant No. 3, who were retailers, did not come to buy the products from the Complainant No. 3 any longer. The Complainant No. 3' s sales volume of the M-150 energy-drink products reduced immensely from the sales volume of 6,000 boxes per month to 200 - 300 boxes per month only.

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Moreover, the Complainant No. 3 lost an opportunity to sell the Carabao Energy Drink products and other products due to the fact that it was inconvenient for the customers because of there being insufficient types of product. The Complainant No. 3 had talks with other business partners, and learnt that the Accused treated R. Company, who was the subagent for selling the M-150 energy-drink products, in the same way as the Complainant No. 3. Subsequently, in the year 2012, K. Company appointed the Complainant No. 3 as the distributor (agent) for selling the Carabao Energy Drink products in the area of Khon Kaen province. In this regard, K. Company had no rule to prohibit the Complainant No. 3 from selling energy-drink products under other logos and did not fix the price structure. K. Company only issued guidelines on the sale of products at recommended prices. The aforesaid action of the Accused resulted in damage to the Complainant No. 3, by reducing the profit of the Complainant No. 3 approximately XX,XXX - XX,XXX baht per month.

As for the Complainant No. 4, the facts are that the Complainant No. 4 engaged in the business of retail and wholesale of various products, alcoholic beverages, beers and energy-drink products in the area of Nakhon Ratchasima province since the year 1990. As regards the M-150 energy-drink products, the Complainant No. 4 bought them from S. Company, who was the distributor (agent) of the Accused, on the condition that the Complainant No. 4 would buy the M-150 energy-drink products in the quantity of six - seven ten-wheeled trucks per month (one ten-wheeled truck containing 810 boxes, and each box containing 50 energy-drink bottles). In making the payment of the price of the products, the Complainant No. 4 would transfer the money into the bank account and receive a discount as a reward (a discount at the end of the bill). S. Company would give a promotion at the end of the year upon selling the products on target by giving a ticket for the overseas trip. The Complainant No. 4 was also the distributor (agent) for selling the Carabao Energy Drink products. In making the payment of the price of the products, the Complainant No. 4 would transfer the money into the bank account of K. Company, and K. Company would then deliver the products to the Complainant No. 4. In acting as the distributor (agent) for selling the Carabao Energy Drink products, K. Company had no rule to prohibit the Complainant No. 4 from selling energy-drink products under other logos. The Complainant No. 4 had the sales volume of the Carabao Energy Drink products to be similar to that of the M-150 energy-drink

products. Around the end of the year 2011, the officer of the Accused offered the Complainant No. 4 to stop selling the Carabao Energy Drink products by offering an extra reward to the Complainant No. 4. However, the Complainant No. 4 refused the offer on the grounds that the Complainant No. 4 was the shop which would have to sell products to meet customers' needs and to benefit the Complainant No. 4. As a result, the Accused reduced the quantity of supplying the M-150 energy-drink products and other products being affiliated with the Accused from the quantity of six ten-wheeled trucks per month to the quantity of four ten-wheeled trucks per month. Subsequently, around May, 2012, the officer of the Accused informed the Complainant No. 4 that the Accused made a policy on the discontinuation of the supply of the M-150 energy-drink products and affiliated products to the Complainant No. 4. This was because the Complainant No. 4 did not stop selling the Carabao Energy Drink products. Consequently, the Complainant No. 4 had to buy the M-150 energy-drink products from other distributors (agents) being stationed in the area of Saraburi province. The product price was more expensive (two baht per box). Additionally, the Complainant No. 4 had to pull barcodes out of bottles before resale in order that the Accused did not know that the Complainant No. 4 had brought the products from Saraburi province to resell. The Complainant No. 4 might buy the M-150 energy-drink products from Makro, the price of which equaled that of the products as purchased from the distributors (agents) in Saraburi province. Nevertheless, in the case where the Complainant No. 4 bought the products from Makro, the Complainant No. 4 had to incur the cost of transportation by itself, bringing about the higher cost of the products. The Complainant No. 4 encountered these difficulties and wasted more time in seeking and buying the M-150 energy-drink products and other affiliated products of the Accused to resell. As the shop of the limited company. O. Company was the parent company of the Accused. O. Company held shares issued by the Accused in the number of XX percent. The Accused had the structure of directors like that of O. Company. The Accused engaged in the business of supplying the M-150 energy-drink products through distributors (agents), department stores, and cash-car units. In the past, the Accused supplied the M-150 energy-drink products through KHO. Company. Subsequently, the Accused established its own company in order to become the supplier of the M-150 energy-drink products through the system of distributorship. The Accused would directly supply the products to its

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distributors (agents) only. Shops which were subagents were required to make the purchase order of the products of the Accused to the distributors (agents) only. Such shops could not purchase the products from the Accused directly. The distributors (agents) had made the price payment of the products to the Accused (the subagents had made the price payment to the distributors (agents)) before the Accused supplied the products to the distributors (agents) according to the number of products as ordered by the distributors (agents). The Accused might facilitate the transportation to the subagents in case of there being the great volume of purchase order as made to the distributors (agents), and the shops of the subagents being located on a transportation route. Rewards to be given to the subagents would be fixed by the distributors (agents). In case of remote areas, the Accused would provide vehicles to sell the products directly. The Accused would send its officers to supervise its customers both agents and subagents in the case where there was a problem of sale target or other problems such as a lack of products, a customer's demand for extra products, a demand of urgent products, etc. This would help the distributors (agents) to manage sale targets. In respect of appointing the distributor (agent), the Accused would consider potential in selling products. In the past, a person who was appointed as the distributor (agent) would be conferred a certificate by the Accused. Subsequently, the Accused would make a contract with a shop which was appointed as the distributor (agent). The Accused's list of distributors (agents) was as follows: in the area of Pathum Thani province: V. Company, in the area of Nakhon Ratchasima province: K. Company, in the area of Khon Kaen province: P. Partnership and S. Company, and in the area of Bangkok: J. Company, B. Partnership, the shop named "TO", CH. Company, TH. Company, and T. Company. The director of the Accused would be responsible for appointing the distributor (agent) upon nomination made by the sales department. The sales department would be responsible for determining sale areas and discounts without the approval of the director of the Accused. Besides, the sales department would be responsible for considering all cancellations on agents without the approval of the director of the Accused. With respect to the price of the M-150 energy-drink products, the Accused did not fix the price structure. However, the Accused fixed the sale price of the M-150 energy-drink products in a clear manner, i.e. a retail price of 10 baht per bottle. This was because it was a standard price and the middle price of the sale of energy-drink products in general in Thailand for a trader or

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a consumer. It was no reason that a customer would not sell the products pursuant to the middle price, otherwise other customers would be affected by the price, and the middle-price structure would be negatively affected. In the case where the customer did not comply with the price structure, the distributor (agent) would give the customer a warning and did not supply the products to the customer. However, the customer was able to buy the products from Makro or other sources such as department stores. It was provided in the distributorship agreement (the contract appointing the distributor (agent) to sell the products) that the distributor (agent) was prohibited from selling the products of competitors. However, there was no such prohibition at a subagent level. The distributor (agent) would supervise the subagent's shop on the condition that the distributor (agent) might warn or punish the subagent in order to achieve a sale target. The Accused made a policy on sale management only for an agent level. The Accused were informed by the marketing department that certain distributors (agents) such as the Nakhon Ratchasima distributor (agent) sold products under other logos to the customers who came to buy the M-150 energy-drink products. According to the Accused's opinion, the aforesaid act of the distributor (agent) was the taking of advantage of popularity of the M-150 logo. The Accused spent a lot of money and employed many personnel to create the popularity of the M-150 logo. The aforesaid act of the distributor (agent) restrained the Accused's sale target, which the Accused could not achieve its marketing objective as planned. The aforesaid distributor (agent) was warned by the Accused to stop committing such act. In spite of this warning, the aforesaid distributor (agent) did not stop committing such act. Consequently, the Accused discontinued the supply of the products. Besides, there was other shop which was prepared to be appointed as a new distributor (agent) instead. The Accused then made the cancellation on distributorship with the aforesaid distributor (agent). As for the four Complainants, they had ever been appointed as the distributors (agents) to supply the M-150 energy-drink products, and they had been conferred distributorship certificates by the Accused. The four Complainants also made verbal agreements with the Accused whereby they would not sell energy-drink products under other logos. However, the four Complainants did not comply with such agreements. The officer of the Accused gave the four Complainants several warnings including the discontinuation of the supply of the products to the Complainant No. 1 and the Complainant No. 2 for an

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approximate period of 1 – 2 months. The officer of the Accused also offered the four Complainants to sign written contracts for appointing agents, but they refused to do so. Additionally, it was found that the Complainant No. 1 and the Complainant No. 2 put the Carabao Energy Drink products in place of the M-150 energy-drink products for selling to their customers. Furthermore, they gave the Carabao Energy Drink products to their customers in exchange for the broken M-150 energy-drink products. Moreover, the Complainant No. 1 and the Complainant No. 2 sold the products at the price lower than the middle price as fixed by the Accused, which made other shops suffer. The manager for supervising the Bangkok Metropolis region of the Accused then made the cancellations on distributorship with the Complainant No. 1 and the Complainant No. 2, and reported to the deputy director of the sales department of the Accused on the aforesaid acts. In this regard, the Bangkok manager neither reported to nor asked the director of the Accused for the approval before making the cancellations on distributorship with the four Complainants. This was because the Bangkok manager opined that the acts were within the power of the manager to handle by himself, and it was deemed that such handlings were situations that the Accused exercised its rights under the agreements appointing the four Complainants as the distributors (agents) despite not having made the written distributorship contracts with the four Complainants. Although the agreements were made verbally and the distributorship certificates were conferred only, these were the applicable procedures for appointing the distributors (agents) as usual. There were conditions in the agreements that the distributors (agents) were prohibited from selling the products of competitors. If the distributors (agents) failed to comply with such conditions, the cancellations on distributorship would be made. The conditions were set for the purpose of protecting trade secrets, particularly the secret of sale promotion. If the competitors knew such secret, the business strategy of the Accused would be affected. Even though the Accused made the cancellations on distributorship with the four Complainants, the four Complainants could buy the M-150 energy-drink products through other distribution channels such as shops or modern trading firms. However, the Accused used barcodes to prevent the distributors (agents) from selling the products outside the fixed areas. Therefore, the four Complainants were unable to buy the M-150 energy-drink products from other distributors (agents). The use

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of barcodes for controlling the sale was aimed to protect the sales volume of each distributor (agent). It was not aimed to prevent the purchase of the products. Thus the cancellations on distributorship with the four Complainants were the common practice of this business type, which did not violate the law. The Accused had never ordered or made a policy which generated unfair trading. On May 1, 2015, the Accused was registered the dissolution of the company. Mr. P., the director of the Accused, was appointed as the liquidator. The reason for dissolving the company was that there was change in the structure of all the subsidiary companies of O. Company in order to be prepared for being a listed company in the Stock Exchange. In this regard, T. Company became the supplier of the M-150 energy-drink products instead of the Accused. The Accused transferred all its assets and personnel to T. Company. All the distributorship contracts for the M-150 energy-drink products were also transferred to T. Company. However, the liquidation of the Accused had not been completed yet, the registration of the completeness of liquidation was not made as a result.

Issues of Decision

There are the issues of decision as follows:

1. It is whether or not the Accused was the business operator with market dominance and exercised the dominance of market power in the prohibited manner under Section 25 of the Trade Competition Act, B.E. 2542 (1999).

2. It is whether or not the Accused committed any act in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment or restriction of the business operation of other business operators, or for intervening in the business operation of others or closing down the business operation of others under Section 29 of the Trade Competition Act, B.E. 2542 (1999).

3. The Accused was already registered the dissolution of the company, but being in the process of the liquidation; it is whether or not the Accused would be liable or prosecuted for a criminal offence under the Trade Competition Act, B.E. 2542 (1999).

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Decision

The first issue to be considered is whether or not the Accused was the business operator with market dominance and exercised the dominance of market power in the prohibited manner under Section 25 of the Trade Competition Act, B.E. 2542 (1999).

In considering whether or not any business operator has the market dominance, the Commission must first reach the conclusion of a product market and a geographic market. The facts on this issue which have been obtained from the investigation of the Office of the Trade Competition Commission are as follows. Energy-drink products were the controlled products under the Notification of the Ministry of Public Health No. 214, B.E. 2543 (2000). It was stipulated in the Notification that the main mixture of energy-drink product was caffeine which was required to be less than 50 milligrams for a packing size of 100 – 150 milligrams, and there were mixtures such as vitamin B_1 ranging from 0.5 to 20 milligrams, vitamin B_2 ranging from 1.3 to 1.75 milligrams. There were 4 firms who produced the energy-drink products in Thailand, i.e. 1. O. Company who appointed M-150 Company Limited (the Accused) and Y. Company as suppliers; 2. S. Company Limited who appointed D. Company Limited as a supplier; 3. K. Company Limited who hired KO. Company as a supplier, whereby the hiring contract expired in October, 2012, and subsequently appointed T. Company as a supplier since November, 2012; and 4. B. Company Limited who hired the factory named "H" as a producer, and B. Company acting as a supplier by itself. The market for the energy-drink products was an oligopoly, which the distribution model consisted of a producer acting as a supplier and a producer setting up a company to supply products. In case of appointing the company as the supplier, such a company would further supply the products to distributors (agents) and warehouse stores. Afterwards, the distributors (agents) would further supply the products to their customers such as subagent shops, "Sapua" shops and general retail shops. The distributors (agents) had the subagent shops in their own distribution network. The supplier company also had cash-car units to bring the products to sell to small retail shops which had low purchasing powers in remote areas far from cities. One bottle of energy-drink contained the main mixture of caffeine not exceeding 50 milligrams, taurine 0.13 – 1.5 grams, inositol 25 – 75 milligrams, and sucrose. The energy-drink market was divided into two types according to the price structure. The 1st type was the high-end market, i.e. energy-drink products under

logos: Lipovitan-D, Ready, Zorus and CZ, each of which was sold at the price of 12 – 15 baht per bottle. The 2nd type was the low-end market, i.e. energy-drink products under logos: M-150, Carabao Energy Drink, Red Bull, Theoplex-L, Superlukthung and Shark, each of which was sold at the price of 10 baht per bottle. Consumers who liked to consume the energy-drink products classified in the low-end market never changed their behavior to consume those classified in the high-end market. This was because the prices of the latter were higher than those of the former, and the consumers stuck to the taste of the energy-drink products in the low-end market.

The Trade Competition Commission is of the opinion that the energy-drink products were the controlled products under the Notification of the Ministry of Public Health No. 214, B.E. 2543 (2000), which stipulated the main mixture. Although the physical features of both groups of the energy-drink products were not different, a group of consumers were distinctly separated by the price structure. The energy-drink products of all logos classified in the low-end market were equally priced at 10 baht. In addition, the consumers of the energy-drink products in the group of the low-end market never changed their behavior to consume those in the group of the high-end market. The product market of the M-150 energy-drink products was therefore that as classified in the group of the low-end market. Upon having found that the energy-drink products in both groups of the high-end market and the low-end market being sold in all the areas throughout Thailand, the Commission is of the opinion that the geographic market of the energy-drink products was the same market throughout Thailand.

The subsequent issue to be considered is the market share of the Accused. In this issue, Section 3 of the Trade Competition Act B.E. 2542 (1999) provides that “the business operator with market dominance” means one or more business operators, in any particular goods or service market, having a market share and sales volume proceeds in excess of those as stipulated by the Commission with the approval of the cabinet and announced in the government gazette, whereby the condition of market competition shall also be taken into account. The Trade Competition Commission with the approval of the cabinet has issued the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance dated January 18, 2007, which has been enforceable since February 8, 2007, prescribing the market share and the sales volume proceeds of the business

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which shall be deemed to fall within the criteria of being the business operator with market dominance as follows: (1) any business operator, in any particular goods or service market, having a market share in a previous year in excess of fifty percent and sales volume proceeds in a previous year in excess of one billion baht, or (2) the first three business operators, in any particular goods or service market, having an aggregate market share in a previous year in excess of seventy-five percent and sales volume proceeds in a previous year in excess of one billion baht, except for any business operator having a market share in a previous year below ten percent, or having sales volume proceeds in a previous year less than one billion baht.

The Trade Competition Commission is of the opinion that the facts given by the four Complainants that the Accused prohibited them from selling the Carabao Energy Drink products occurred at the end of the year 2011. Therefore, the Accused's market share and the sales volume proceeds derived from the Carabao Energy Drink products occurring in the year 2010 shall be taken into account. In this regard, the Office of the Trade Competition Commission has gathered information and found that in the year 2010, the energy-drink market classified in the type of low-end market was an oligopoly. There were only 4 firms engaging in the business of supplying the energy-drink products. The details about the name of business operator, the market share and the sales volume proceeds were as follows: 1. M-150 Company Limited having the market share of 64.30 percent and the sales volume proceeds of X,XXX million baht, 2. K. Company having the market share of 16.05 percent and the sales volume proceeds of X,XXX million baht, 3. D. Company having the market share of 13.21 percent and the sales volume proceeds of X,XXX million baht, and 4. Y. Company having the market share of 6.44 percent and the sales volume proceeds of XXX million baht. The aforesaid facts indicate that in the year 2010, the Accused had the market share in excess of fifty percent and the sales volume proceeds in excess of one billion baht, resulting that the Accused was the business operator with market dominance pursuant to the provision of Section 3 of the Trade Competition Act B.E. 2542 (1999) as supported by the Notification of the Trade Competition Commission regarding Criteria Determining Business Operator with Market Dominance dated January 18, 2007.

The next issue to be considered is whether or not the Accused exercised the dominance of market power in the prohibited manners under Section 25 of the Trade Competition Act B.E. 2542 (1999).

/In this issue...

In this issue, Section 25 of the Trade Competition Act B.E. 2542 (1999) provides that the business operator with market dominance is prohibited from committing any act in any of the following manners: (1) unfairly fixing or maintaining purchasing or selling prices of goods or fees for services; (2) setting conditions in the unfair manner of directly or indirectly compelling other business operators who are customers to restrict the services, production, purchase or distribution of goods, or to restrict the opportunity of selection of purchasing or selling goods, receiving or providing services, or obtaining credit from other business operators; (3) suspending, reducing or restricting services, production, purchase, distribution, delivery or importation into the Kingdom without reasonable justifiable reasons, or destroying or causing damage to goods, with the aim of reducing the quantity to be lower than the market demand; (4) intervening in the operation of business of other persons without justifiable reasons. The information on this issue which has been obtained from the four Complainants is that the four Complainants were the subagents to sell the M-150 energy-drink products of the Accused. Around the end of the year 2011, Mr. D., the manager for supervising the Bangkok Metropolis region of the Accused, and Mr. T., the manager for supervising the northeast region of the Accused, prohibited the four Complainants from selling the Carabao Energy Drink products, otherwise the Accused would discontinue the supply of the M-150 energy-drink products to the four Complainants. Upon receiving the four Complainants' refusal to comply with the prohibition verbally made by Mr. D. and Mr. T., the Accused then discontinued the supply of the M-150 energy-drink products to the four Complainants to sell in their areas.

According to the Trade Competition Commission, the Accused made the statements that the four Complainants were the distributors (agents) of the Accused. The Accused did not make the written distributorship contracts with the Complainants. The distributorship agreements were made verbally. Besides, the distributorship certificates were conferred, which was the applicable procedures for appointing the distributors (agents) as usual. There were conditions in the agreements that the distributors (agents) were prohibited from selling the products of competitors. If the distributors (agents) failed to comply with such conditions, the cancellations on distributorship would be made. The conditions were set for the purpose of protecting trade secrets, particularly the secret of sale promotion of the Accused. According to the statements made by Mr. D. and Mr. T., the witnesses of the Accused,

/they however...

they however admitted that the Accused imposed the conditions of prohibiting the sale of the products of competitors. The conditions were imposed verbally in the first stage. The conditions were imposed in the written distributorship contracts subsequently. The four Complainants however refused to comply with the agreements and to sign the distributorship contracts which the Accused offered. It is indicated that at the time when the case took place, the four Complainants did not make the distributorship contracts with the Accused. In addition to this, according to the facts obtained from the identical statements of the four Complainants without the objection of the Accused, the four Complainants made the purchase orders for the M-150 energy-drink products from the distributors (agents) of the Accused. The four Complainants did not directly purchase the products from the Accused. This corresponds to the statement made by Mr. Y., the witness of the Accused. According to Mr. Y., the Accused would sell the products to the distributors (agents) only. The shops which were the subagents would purchase the products through the distributors (agents), they could not directly purchase the products from the Accused. It is therefore believed based on the facts that the four Complainants were not the distributors (agents), and there was no prohibition on the sale of the products of competitors. The four Complainants were the subagents of the Accused only. Mr. Y. also made the statement that at a subagent level, the Accused did not announce the prohibition on the sale of the products of competitors. Therefore, the acts of Mr. D. and Mr. T. were deemed as those committed without right and authority under the law when Mr. D. and Mr. T. prohibited the four Complainants from selling the Carabao Energy Drink products, otherwise the Accused would discontinue the supply of the M-150 energy-drink products to the four Complainants. Mr. Prathan Chiprasith, the managing director of the Accused, made the statement that the criteria and procedures or conditions on appointing distributors (agents), determining sale areas, providing discounts, including considering all cancellations on distributors (agents), would be under the operation of the sales department, which the sales department could operate without receiving Mr. Prathan's approval, except for appointing distributors (agents) for denying any liability. Despite this statement, Mr. Prathan admitted that he was the person who made policies on marketing, fixing prices, setting targets. In addition to this admission, when Mr. D. and Mr. T. who were the officers of the Accused prohibited the four Complainants from selling the Carabao Energy Drink products and discontinued the supply

/of the M-150...

of the M-150 energy-drink products to the four Complainants, the aforesaid acts of Mr. D. and Mr. T. were deemed to comply with the marketing policy as made by Mr. Prathan who was the authorized director of the Accused. The Accused was bound to the acts of Mr. D. and Mr. T. as a result. The Accused's argument could not be accepted. For this reason, when Mr. D. and Mr. T. announced the prohibition on the sale of the Carabao Energy Drink products to the four Complainants and when the four Complainants refused to comply with such prohibition and the Accused subsequently discontinued the supply of the M-150 energy-drink products to the four Complainants, such acts were deemed as the situation where the Accused who was the business operator with market dominance set conditions in the unfair manner of directly compelling the four Complainants who were the Accused's customers to restrict the purchase or distribution, or to restrict the opportunity of selection of purchasing or selling of the M-150 energy-drink products of the Accused. The acts of the Accused were prohibited by Section 25 (2) of the Trade Competition Act B.E. 2542 (1999). The acts of the Accused were also deemed as the situation where the Accused intervened in the operation of business of the four Complainants who were the subagents of the Accused without justifiable reasons under Section 25 (4) of the Trade Competition Act B.E. 2542 (1999).

The subsequent issue to be considered is whether or not the Accused committed any act in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment or restriction of the business operation of other business operators, or for intervening in the business operation of others or closing down the business operation of others under Section 29 of the Trade Competition Act, B.E. 2542 (1999).

In this issue, Section 29 of the Trade Competition Act B.E. 2542 (1999) provides that "the business operator is prohibited from committing any act in the manner of not being fair and free trade competition, causing the destruction, damage, obstruction, impediment or restriction of the business operation of other business operators, or for intervening in the business operation of others or closing down the business operation of others". According to the facts obtained from the identical statements of the four Complainants, the four Complainants were the subagents to sell the M-150 energy-drink products of the Accused. In addition to the sale of the M-150 energy-drink products of the Accused, the four Complainants sold energy-drink products under other logos. Around the end of the year 2011, Mr. D. and

Mr. T., the officers of the Accused, verbally informed the four Complainants of the prohibition on the sale of the Carabao Energy Drink products. The four Complainants failed to comply with the prohibition as they needed to have complete and various products to meet the requirements of their customers. Consequently, the Accused discontinued the supply of the M-150 energy-drink products to the four Complainants. Besides, the four Complainants could not buy energy-drink products under other logos or other products which were those produced or distributed by the subsidiary companies of the Accused. These facts correspond to the statements made by Mr. D. and Mr. S., the witnesses of the Accused. According to Mr. D. and Mr. S., the Accused implemented its policy because it was common business practice to discontinue the supply of products to the four Complainants who sold the products of competitors. After the Accused had discontinued the supply of the M-150 energy-drink products to the four Complainants, the four Complainants sought and bought the M-150 energy-drink products from other sources such as Makro. However, this brought about the higher costs of the products because of all the costs of transportation being incurred by themselves. Although the four Complainants could buy the products from distributors (agents) being stationed in other areas, this also brought about the higher costs of the products. In addition, they were required to pull out barcodes before resale in order that anyone could not know from which province they brought such products. Some distributors (agents) refused to sell the products to the four Complainants because they were afraid of committing guilt. The four Complainants encountered difficulties in seeking and buying the M-150 energy-drink products and other affiliated products of the Accused to resell, including the higher costs of the products. The four Complainants could not sell all types of product continuously, which made their customers lack confidence and inconvenienced them to buy the products. The four Complainants lost certain customers as a result. In addition, the profit of the Complainant No. 1 dropped approximately XXX,XXX - XXX,XXX baht per month, the profit of the Complainant No. 2 dropped approximately XX,XXX baht per month, the profit of the Complainant No. 3 dropped approximately XX,XXX - XX,XXX baht per month, and the profit of the Complainant No. 4 dropped approximately XX,XXX - XX,XXX baht per month.

The Trade Competition Commission is of the opinion that the four Complainants were not the distributors (agents) of the Accused. They were the subagents of the Accused.

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The four Complainants did not make agreements not to sell the energy-drink products of competitors as mentioned above. The Accused never made the policy on the prohibition on the sale of the energy-drink products of competitors for the subagents to comply. Throughout the past periods, the four Complainants had the freedom to sell energy-drink products under all logos. It is believed that the reason for the Accused changing its policy which prohibited the four Complainants from selling the Carabao Energy Drink products was that the four Complainants had the great sales volume of the Carabao Energy Drink products and certain Complainants were appointed as the distributors (agents) for selling the Carabao Energy Drink products. Consequently, the Accused prohibited the four Complainants from selling the Carabao Energy Drink products. The four Complainants did not comply with the prohibition. The Accused then discontinued the supply of the M-150 energy-drink products to the four Complainants, causing the four Complainants not to get the M-150 energy-drink products to sell. Despite the fact that the four Complainants could obtain the M-150 energy-drink products for resale due to buying them from modern trading firms or other shops, the four Complainants could not compete against other sellers owing to the higher costs of the products. All the aforesaid acts of the Accused were not those committed in the manner of being fair and free trade competition, and causing the damage, obstruction, impediment or restriction of the business operation of the four Complainants, or for intervening in the business operation of the four Complainants for selling the M-150 energy-drink products. The acts of the Accused were therefore prohibited by Section 29 of the Trade Competition Act, B.E. 2542 (1999).

The subsequent issue to be considered is that the Accused was already registered the dissolution of the company, but being in the process of the liquidation; it is whether or not the Accused would be liable or prosecuted for a criminal offence under the Trade Competition Act, B.E. 2542 (1999).

In this issue, despite the fact that an investigation has been under way, M-150 company limited was registered the dissolution of the company by the Department of Business Development, the Ministry of Commerce on May 1, 2015, but being in the process of the liquidation. In this regard, Section 1249 of the Civil and Commercial code provides that a partnership or company is deemed to continue after its dissolution as far as it is necessary for the purpose of liquidation.

/The Trade...

The Trade Competition Commission is of the opinion that despite the fact that the Accused who was a juristic person in the type of limited company filed for the registration of the dissolution of the company with the Department of Business Development, the Ministry of Commerce, Mr. P. who was the managing director of the Accused was still appointed as the liquidator of the Accused. Mr. P. made the confirmation that the Accused was being in the process of the liquidation, and the registration of the completeness of liquidation was not made. The status of being the juristic person of the Accuse still remained, which the Accused could be prosecuted for the criminal offence. This view corresponds to the opinion of the Legal Affairs Bureau, the Department of Business Development, the Ministry of Commerce. The Legal Affairs Bureau replied to the letter of the Trade Competition Commission that as far as the company was not registered the completeness of liquidation, the company could be prosecuted for the criminal offence. The Trade Competition Commission opined that the Accused who was the business operator with market dominance committed acts in the manner of trade monopoly, intervening in the operation of business of the four Complainants without justifiable reasons, and being the business operator committing any act in the manner of not being fair and free trade competition. The acts of the Accused were the several distinct and different offences pursuant to Section 25 (2) and (4) and Section 29 of the Trade Competition Act, B.E. 2542 (1999) as supported by Section 90 and Section 91 of the Criminal Code. The Trade Competition Commission opined whether or not the Accused who was a juristic person in the type of limited company committed criminal offences, the managing director or any person who has responsibility for the operation of the Accused would jointly be liable with the Accused. In this issue, Section 54 of the Trade Competition Act, B.E. 2542 (1999) provides that in the case where the person who committed an offence and must be penalized under this Act is a juristic person, the managing director, the managing partner or the person who has responsibility for the operation of the juristic person for such matter shall also be liable to the penalty as provided for such offence, except for proving that such offence was committed without his/her involvement or consent or that he/she managed the matter as appropriate to prevent the commission of the offence. In this issue, the facts are that at the time when the incident took place, there were 4 managing directors of the Accused as registered with the Bangkok Metropolis Company and Partnership Registration Office, i.e. Mr. R., Mr. V., Mr. N., and

/Mr. Prathan,...

Mr. Prathan, and directors who could sign to bind the company were two directors jointly signed together with the affixing of the company's seal. In addition, the information which has been obtained from the statement made by Mr. Prathan is that Mr. Prathan was the director and the senior vice president of O. Company. O. Company entrusted Mr. Prathan to act as the managing director who had the responsibility for the operation of M-150 Co., Ltd., the Accused. M-150 Co., Ltd. was the subsidiary company of O. Company. O. Company held shares issued by M-150 Co., Ltd. in the number of XX percent. As the managing director of the Accused, Mr. Prathan was the person who made policies on marketing, fixing prices, setting targets, and approving the appointment of distributors (agents) only. Other details were under the supervision of the officers of the sales department. This means that Mr. Prathan entrusted the officers of the sales department to operate such matters. The officers of the Accused implemented the trading and marketing policies pursuant to the Accused's policies, which prohibited the four Complainants from selling the energy-drink products of competitors. When the four Complainants failed to comply with the prohibition, the officers of the Accused discontinued the supply of the M-150 energy-drink products to the four Complainants. Mr. Prathan, the managing director and who had the responsibility for the operation of the Accused, did not give evidence to prove that the aforesaid acts committed by the officers of the Accused were those without his involvement or consent or that he managed the matters as appropriate to prevent the commission of the aforesaid offences. Mr. Prathan made an argument without evidence that the aforesaid acts were under the power of the sales department of the Accused, which the sales department could commit without receiving the approval of Mr. Prathan as the managing director of the Accused. The Trade Competition Commission has made the above decision that the Accused was bound to the acts of Mr. D. and Mr. T., the officers of the sales department of the Accused. Based on evidence, it is therefore believed that Mr. Prathan involved and consented to the acts of the officers of the Accused, which violated the Trade Competition Act, B.E. 2542 (1999). Mr. Prathan did not take any action to prevent the commission of the aforesaid offences. Mr. Prathan's argument cannot be accepted. For this reason, Mr. Prathan as the managing director of the Accused and who had the responsibility for the operation of the Accused shall jointly be liable to the penalty with the Accused under Section 54 of the Trade Competition Act, B.E. 2542 (1999) and Section 83 of the Criminal Code.

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The Trade Competition Commission is of the opinion that the Accused was the business operator with market dominance committing acts in the manner of trade monopoly, intervening in the business operation of others without justifiable reasons, and being the business operator committing any act in the manner of not being fair and free trade competition. Besides, the acts of the Accused were the several distinct and different offences under Section 25 (2) and (4) and Section 29 of the Trade Competition Act, B.E. 2542 (1999) as supported by Section 90 and Section 91 of the Criminal Code. Mr. Prathan as the managing director shall jointly be liable to the penalty with the Accused under Section 54 of the Trade Competition Act, B.E. 2542 (1999) as supported by Section 83 of the Criminal Code. In this regard, the Trade Competition Commission shall make accusations and take legal actions against them, including sending a letter to the attorney general to give the consideration of prosecuting the alleged offenders according to the Criminal Procedure Code.

Trade Competition Commission

July 15, 2016