

COMPETITION LAW IN THAILAND: A PRELIMINARY ANALYSIS

SAKDA THANITCUL *

I. INTRODUCTION

A. History

Due to the rapid economic growth that occurred in Thailand from 1987 to 1990,¹ the economic structure in Thailand changed drastically.² Therefore, the Thai Ministry of Commerce (MOC) established a Working Committee consisting of MOC officials and university professors to examine whether the existing Price Fixing and Anti-Monopoly Act of 1979 (PFA) was still suitable for the economic structure that had gone through such a remarkable growth period.³ The Working Committee concluded that the PFA had two serious flaws.⁴ First, the primary objective of the PFA was to control the market prices of goods and services for the benefit of consumers, and its antimonopoly provisions only served as an additional measure of controlling prices.⁵ Second, in order to enforce the PFA's antimonopoly provisions, it first was necessary to enforce the price fixing provisions.⁶ These two flaws created tremendous legal and political difficulties for the Thai Fair Trade Commission (TFTC) to enforce the PFA. In fact, since the enactment of the PFA, the enforcement agency has taken only one action against a price fixing cartel.⁷

The author interviewed a number of high-ranking MOC officials and representatives of Thai businesses and there are conflicting views about who originally backed the current Thai Trade Competition Act (TCA).

* Member, Faculty of Law, Chulalongkorn University, Bangkok, Thailand.

1. See THE WORLD BANK, TRENDS IN DEVELOPING ECONOMIES 1996, 491 (1996).

2. Pallop Rattanadara, *Kodmai Karnkaenkan Tang Kanka Khong Pratettai [Thailand's Competition Law]*, 12 CHULALONGKORN L. REV. 1, 20-21 (2000).

3. See Price Fixing and Anti-Monopoly Act of 1979 (Thail.), available at <http://www.apeccp.org.tw/doc/Thailand/Competition/thcom02.html>.

4. See Sutee Supanit, *Economic Law Reform and Competition Policy*, in LAW, JUSTICE AND OPEN SOCIETY IN ASEAN 301 (Piruna Tingsabadh ed., 1997).

5. *Id.*

6. *Id.*

7. CHAIYOS HEMARAJATA, KAMATIBAY KODMAI WADAUY KARN KAMNODRAKASINKA LAE KARNPONGKANKARPOOKAD [COMMENTARY ON THE PRICE FIXING AND ANTI-MONOPOLY ACT OF 1979] 169-71 (1994).

MOC officials insist that Thai officials initiated the idea of creating the TCA,⁸ but representatives of Thai industries believe the Thai government initiated it under pressure from the United States.⁹ The author learned from interviewing key members of the Working Committee that the Working Committee modeled substantial parts of the TCA after the South Korean Monopoly Regulation and Fair Trade Act (MRFTA),¹⁰ the Taiwanese Fair Trade Law (FTL),¹¹ the Japanese Antimonopoly Law of 1947,¹² and the German Act Against Restraints of Competition.¹³

B. Statutory Framework

The Working Committee patterned the TCA largely after the antitrust statutes of more advanced market economies, particularly those of South Korea and Taiwan. The TCA reflects the Working Committee's presumption that Thailand's economic structure, where the majority of the domestic product markets are monopolistic or oligopolistic, is similar to South Korea's.¹⁴ The TCA therefore focuses on eliminating unreasonable or anticompetitive pricing behavior from dominant firms rather than directly prohibiting monopolization or monopoly itself.¹⁵

The structure of the Thai economy falls somewhere in-between South Korea's economic structure, where thirty *chaebols* dominate the domestic market, and Taiwan's, where 98% of firms are small and medium-sized enterprises (SMEs). The Thai economy is closer to the Taiwanese economy because (1) there are fewer market dominant firms in Thailand

8. See Rattanadara, *supra* note 2, at 21 (writing that the MOC had to push for the enactment of the TCA because Section 50 of the Thai Constitution required the government of Thailand to support and maintain the market economy). See also THAI CONSTITUTION, reprinted in Sompong Sucharitkul, *Kingdom of Thailand*, in 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 12 (Gisbert H. Flanz ed., 1998).

9. See Bodin Asavanich, Ensuring Compliance and Cooperation in Competition Law Enforcement 2 (Mar. 13, 2001) (unpublished manuscript, on file with author).

10. See Dokjummith Gongjung Gurae Gwanhan Popryul [Monopoly Regulation and Fair Trade Act], Law No. 6043, Dec. 28, 1999, available at <http://www.moleg.go.kr/mlawinfo/english/htmls/html/law10.html>.

11. The full text of the Fair Trade Law is available at <http://www.ftc.gov.tw> (last visited May 20, 2002).

12. Shiteki Dokusen no Kinshi Oyobi Kosei Torihiki no Kakuho ni Kansuru Horitsu [Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade], Act No. 54 of Apr. 14, 1947 [hereinafter Antimonopoly Law], reprinted in HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN app. A, at 387 (1994).

13. See Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition] (F.R.G.), available at <http://www.bundeskartellamt.de/GWB01-2002.pdf>.

14. See Supanit, *supra* note 4, at 303.

15. See Rattanadara, *supra* note 2, at 22.

than in South Korea and (2) most of the Thai firms are SMEs.¹⁶ Furthermore, unlike the South Korean government, the Thai government never has adopted nationalist economic policies to promote national champions. The hallmark of Thailand's economic development is neo-liberalism: trade and investment liberalization with few government industrial policies.¹⁷

The myth about the similarity between the economic structures of South Korea and Thailand leads to an overemphasis on regulating the behavior of market-dominant firms and, consequently, an oversight of regulating the behavior (especially the unfair trade practices) of Thai SMEs.¹⁸

C. Administration

When a firm violates the TCA's substantive provisions, the TFTC may issue a written order to the firm to suspend, stop, or correct its actions. In the order, the TFTC also may prescribe rules, procedures, conditions, and time restraints on compliance.

The TFTC possesses almost exclusive jurisdiction to enforce the TCA. The Thai Ministry of Justice does not have a unit specifically charged with enforcing the antitrust laws, and although the District Attorney may prosecute violations of the TCA, such prosecution is contingent on a request by the TFTC.¹⁹ A firm that is unsatisfied with the decision of the TFTC may appeal to the Appellate Committee, whose ultimate decision is final.

16. See generally UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION, THAILAND: COPING WITH THE STRAINS OF SUCCESS 66 (1992). Most Thai economists agree that more than 90% of all enterprises in Thailand are SMEs. See Suphat Suphachalasai et al., *Karn Dumnoen Mattakarn Sanabsanoon SMEs Khong Yeepoon, Taiwan, Italy Lae Australia [Measures to Promote SMEs in Japan, Taiwan, Italy and Australia]*, 2001 INST. OF SOC. & ECON. POL'Y (Bangkok, Thai.) 1-1.

17. See SCOTT CHRISTENSEN ET AL., WORLD BANK, THE LESSONS OF EAST ASIA: THAILAND: THE INSTITUTIONAL AND POLITICAL UNDERPINNINGS OF GROWTH 2-5 (1993).

18. This myth is evident in the policy goals of the TCA:

The reasons for the promulgation of this Act are as follows: Whereas there has been a repeal of the existing law governing fixing of prices of goods and prevention of monopoly, which contains both the provisions of fixing of prices of goods and prevention of monopoly in the same law. It is appropriate to revise the rules concerning prevention of monopoly and to specifically enact a law governing trade competition so that there are systematic provisions regarding prevention of acts constituting monopoly, reduction or limitation of competition in business operations, which will promote the free operation of business and prevent unfair practice in business operations.

See Remarks of the Trade Competition Act B.E. 2542 (1999) (on file with the Washington University Global Studies Law Review).

19. See THAI CRIMINAL PROCEDURE CODE §§ 141-142 (1989).

There are several issues currently under debate in Thailand about judicial review of Appellate Committee decisions. First, is it legally permissible for an unsatisfied firm or business operator to bring the decision of the Appellate Committee to a court for judicial review? Second, which court—the court of justice or an administrative court—has jurisdiction to review the decision?²⁰

II. AN OVERVIEW OF SUBSTANTIVE LAW

A. *Relations with Competitors*

Public education about the objectives of the TCA conducted by the Department of Internal Trade (DIT) within the MOC has helped the Thai public to understand that the TCA will promote and maintain the *process* of fair and free market competition rather than the actual market competitors. In addition, the DIT emphasized that the TCA aims to regulate the anticompetitive behavior of business operators rather than the actual structure of the businesses.

The Thai government always has tried to promote SMEs. However, its current promotional policy raises an important issue: how can the TFTC reconcile its promotion of SMEs with the TCA's objective of maintaining a free and fair competitive process without paying attention to the SMEs being wiped out by larger competitors?

B. *Exemptions*

The TCA does not apply to acts of:

- (1) A central, provincial, or local administration;
- (2) State-owned enterprises regulated under the laws governing budgetary procedure;
- (3) Farmer groups, co-operatives, or co-operative groups recognized by law and having business objectives for the benefit of farmers;

20. Thailand enacted the Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 in 1999. If the decision of the Appellate Committee is considered to be an "administrative order," then it falls under the jurisdiction of the Administrative Courts. See Act on the Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 § 9(3) (1999) (Thail.), available at <http://www.krisdika.go.th/law/text/lawpub/ee028/text.htm>.

(4) Businesses identified in the ministerial regulations, which may exempt the application of any or all provisions of the TCA.²¹

Of the four exempted groups listed above, the state-owned enterprises (SOEs) are the most controversial. Large Thai firms opine that it is unfair that the TCA regulates their conduct²² but does not regulate the conduct of SOEs.²³ Thailand's SOEs are concentrated in natural monopolies (i.e. the electricity, telecommunications, and railroad industries) and gradually are being "privatized."²⁴ The current debate centers on whether these newly privatized firms should be placed under specific regulatory regimes similar to those in the United States and Europe or under the broad regulatory authority of the TCA. The current trend for the former SOEs doing business in the electricity, telecommunications, and railroad industries is to place them under specific regulatory regimes.²⁵

C. Abuse of a Dominant Position

The TCA does not directly prohibit the possession or acquisition of monopoly power. However, it does proscribe unreasonable or anticompetitive behavior by large firms with substantial market shares. Section 25 of the TCA forbids "the abuse of a market dominant position."²⁶ Sections 3 and 8 of the TCA authorize the TFTC, with the approval of the Cabinet, to prescribe the market share and total sales above which a firm will be deemed a business operator with a market dominant position.²⁷ The specific standard under the proposal that is currently awaiting Cabinet approval is a large firm with (1) more than a 33% market share, and (2) whose gross domestic sales total more than one billion Thai Baht (approximately US\$22 million). The TFTC specifically identifies market dominant firms using these two criteria and then publishes the names of these firms in the Royal Gazette. Thus, Section 25 does not

21. Trade Competition Act B.E. 2542 § 5 (1999) (Thail.).

22. *Id.* § 25.

23. See Deunden Nikomborirak, *State-Owned Enterprises: The Last Bastion of Monopoly and the Greatest Challenge to Competition Authority 1-2* (Mar. 13, 2001) (unpublished manuscript, on file with the Washington University Global Studies Law Review).

24. *See id.*

25. See The Royal Thai Government, *Planmaebot Karnpatiroob Ratwisahakit* [Master Plan for State Enterprise Reform], available at <http://www.mof.go.th/sepc/sepcfnmenu.htm> (last visited May 20, 2002). See also Mitsuhiro Kagami, *Privatization and Deregulation: The Case of Japan*, in *PRIVATIZATION, DEREGULATION AND ECONOMIC EFFICIENCY: A COMPARATIVE ANALYSIS OF ASIA, EUROPE AND THE AMERICAS* 11-28 (Mitsuhiro Kagami & Masatsugu Tsuji eds., 2000).

26. Trade Competition Act B.E. 2542 § 25 (1999) (Thail.).

27. *See id.* §§ 3, 8.

cover monopolistic behavior by an SME that does not fall within these criteria. However, unlike its model, the South Korean MRFTA, this behavior by Thai firms may not even fall within the category of unfair trade practices prohibited by Section 29.

Any firm designated by the TFTC as a market dominant firm will receive scrutiny. The commission of the following conduct by a market-dominant firm constitutes an abuse of its dominant position in violation of Section 25 of the TCA:

- (1) unfairly fixing or maintaining the levels of sale or purchase prices of goods or services;
- (2) setting conditions which, directly or indirectly, unfairly compel other business operators who are customers of the Business Operator to limit the provision of services, production, purchase or distribution of goods, or their opportunity to choose to buy or sell goods, accept or provide services, or obtain credit from other business operators;
- (3) suspending, reducing, or limiting services, production, purchase, distribution, delivery, or importation into [Thailand] without reasonable grounds, or to destroy or damage goods in order to reduce supply to less than market demand;
- (4) interfering with the business operations of other people without reasonable grounds.²⁸

The striking similarity between Section 25 of the TCA and Article 3 of the MRFTA²⁹ reflects the fundamental presumption of the Thai Working Committee: the Thai economy is similar to the South Korean economy due to its monopolistic and oligopolistic markets. However, the Working Committee's presumption was inaccurate, and it led to a wrong design of the TCA.

D. Mergers and Other Business Combinations

The Working Committee modeled Section 26 of the TCA after Article 6(1) of the Taiwanese FTL.³⁰ The purpose of Section 26 is to prevent the

28. *Id.* § 25.

29. See Seung Wha Chang, *Korea*, in *WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES* § 36.5 (James J. Garrett ed., 1997 & Supp. 1999).

30. See Lawrence S. Liu, *Taiwan (Republic of China)*, in *WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES*, *supra* note 29, § 37.8.

creation of monopolies and the lessening of competition. It empowers the TFTC to regulate “business combinations.”³¹ Under Section 26 of the TCA, a business combination may take any of the following forms:

- (1) a merger between manufacturer and manufacturer, distributor and distributor, manufacturer and distributor, or service provider and service provider, which results in the continued existence of one business and the demise of another, or the establishment of a new business;
- (2) the purchase of assets, whether in whole or in part, of another business to gain control over business management policy, supervision or administration;
- (3) the purchase of shares, whether in whole or in part, of another business to gain control over business management policy, supervision or administration.³²

The Working Committee intended Section 26 of the TCA to apply only to large business combinations. Currently, there is no official threshold for what constitutes a “large” business combination, but if the Cabinet approves the TFTC’s criteria proposed in Section 25, then a “large” business combination will possess (1) more than a 33% market share, and (2) a combined sales volume of at least one billion Thai Baht.³³

E. Horizontal and Vertical Restraints

Section 27 of the TCA prohibits the following horizontal and vertical restraints:

- (1) fixing the sales price of goods or services to be the same or at an agreed price, or limiting the sales volume of goods or services;
- (2) fixing the purchase price of goods or services to be the same or at an agreed price, or limiting the purchase volume of goods or services;
- (3) entering into an agreement to take over or control the market;
- (4) fixing agreements or conditions in a collusive manner to enable the other party to win a bid or tender for the sale of goods or services

31. Trade Competition Act B.E. 2542 § 26 (1999) (Thail.).

32. *Id.*

33. *See supra* Part II.C.

or to prevent the other party from competing in a bid or tender for the sale of goods or services;

(5) allocating areas where each Business Operator may distribute or reduce the distribution of goods or services, or specifying customers to whom each Business Operator may distribute goods or services without competition from the other Business Operators;

(6) allocating areas where each Business Operator may purchase goods or services, or specifying customers from whom the Business Operator may purchase goods or services;

(7) fixing the volume of goods or services which each Business Operator may manufacture, purchase, distribute or provide in order to keep the volume less than the market demand;

(8) lowering the quality of goods or services compared with the previous manufacture, distribution or provision, but maintaining or raising the price;

(9) appointing or assigning a person as sole distributor or provider of the same type of category of goods or services;

(10) fixing conditions or methods of practice in the purchase or distribution of goods or services to be of the same pattern or as agreed.

In case business reasons necessitate any act under (5), (6), (7), (8), (9) or (10) in any certain period, the Business Operator shall file an application for permission with the Commission in accordance with Section 35.³⁴

The author is of the opinion that Section 27 is a mixture of South Korea's prohibition of undue collaborative activities³⁵ and Taiwan's prohibition of non-price vertical restraints and exclusionary practices (i.e. territorial and customer restrictions).³⁶

F. Restrictions in International Agreements

Section 28 of the TCA reflects certain Thailand-specific consumer traditions that were prevalent when the Working Committee drafted the TCA. During the period of economic growth, a small portion of the newly rich Thai wanted to buy luxurious German automobiles (especially

34. Trade Competition Act B.E. 2542 § 27 (1999) (Thail.).

35. See generally Stanley P. Wagner, *Antitrust, the Korean Experience 1981-85*, 32 ANTITRUST BULLETIN 471, 471-522 (1987).

36. Liu, *supra* note 30, § 37.15.

Mercedes-Benz) directly from dealers in Germany. However, the German dealers were unable to sell the cars to Thai buyers because of dealer contracts that prohibited them from doing so. The corporate headquarters of Mercedes-Benz in Germany wanted Thai buyers to buy directly from dealers in Thailand. Hence, Section 28 of the TCA exists for the very specific purpose of forbidding Thai dealers from entering such contracts:

A Business Operator having a business relationship, whether by contract, policy, partnership, shareholding, or any other relationship of like nature with a business operator outside [Thailand], is prohibited from performing any activity which will restrict the freedom of a person in [Thailand] desirous of purchasing goods or services for his/her own use, to purchase the goods or services directly from the business operator outside [Thailand].³⁷

Section 28 of the TCA differs from Article 32(1) of the MRFTA, which applies specifically to agreements or business dealings between Korean firms and foreign firms.³⁸ Unfair trade practices in import agency agreements under Article 32(1) include:

(1) unreasonably restricting the agent from handling competitive products; (2) imposing unreasonable requirements on the agent to purchase parts or supplies for the contract products from the foreign party or from a supplier designated by the foreign party; and (3) unreasonably restricting sales quantities or designating an unreasonably high minimum sales target.³⁹

In essence, Article 32(1) of the MRFTA aims to protect South Korean import agencies from unfair exploitation by foreign manufacturers while Section 28 of the TCA aims to enable wealthy Thai to buy luxurious automobiles directly from foreign dealers.

G. Unfair Trade Practices

The author is of the opinion that the Working Committee patterned Section 29 of the TCA after Article 24 of the Taiwanese FTL. Both contain a catchall rule prohibiting other methods of unfair competition.⁴⁰ In addition, both provide that firms may not engage in any act that

37. *Id.* § 28.

38. *See* Monopoly Regulation and Fair Trade Act art. 32(1) (1999).

39. Chang, *supra* note 29, § 36.8.

40. Liu, *supra* note 30, § 37.16.

adversely affects orderly functioning of the markets.

Section 29 of the TCA states: "A Business Operator is prohibited from performing any act contrary to free and fair competition and which results in the destruction, damage, obstruction, hindrance or restriction of the operations of other business operators, in order to prevent them from operating their business or cause the dissolution of their business."⁴¹

The South Korean MRFTA focuses primarily on regulating the behavior of the thirty largest Korean *chaebols*,⁴² but it also aims to regulate the unfair trade practices of a number of medium-sized firms. Article 23 of the MRFTA (Prohibition of Unfair Trade Practices) is patterned closely on the Japanese Antimonopoly Law. Between 1981 and 1990, there were only eleven complaints of abuses of market dominant firms while there were 2,592 complaints against unfair trade practices.⁴³

One of the substantive flaws in the TCA lies in Section 29: it is too vague to be enforced. To remedy this flaw, the TFTC should adopt guidelines similar to the Japanese Fair Trade Commission's (JFTC) 1982 General Designations of Unfair Trade Methods. This would clarify for the Thai business community the types of business behavior that are anticompetitive and likely to violate Section 29. However, there is one legal obstacle to adopting similar guidelines: unlike Section 2(9) of the Japanese Antimonopoly Law, Section 29 of the TCA does not empower the TFTC to designate unfair business practices.⁴⁴

H. Special Issues Involving Intellectual Property Rights

Industrial policies receive more attention in Japan and South Korea than they do in Thailand. Section 6 of the Antimonopoly Law and Articles 23-25 of the MRFTA reflect the Japanese and South Korean governments' great concerns over the importation of technology. Both governments set up screening schemes to eliminate unfair clauses contained in technology inducement contracts.⁴⁵ The TCA, however, contains no similar provision, and Thailand benefits from its omission. Officials in charge of enforcing

41. Trade Competition Act B.E. 2542 § 29 (1999) (Thail.).

42. See discussion *supra* Part I.B.

43. KOREA FAIR TRADE COMM'N, COMPETITION POLICY IN KOREA: THE FIRST TEN YEARS 9-10 (1992) (copy on file with the Washington University Global Studies Law Review).

44. Compare Antimonopoly Law § 2(9) with Trade Competition Act B.E. 2542 § 29 (1999) (Thail.).

45. See SAKDA THANITCUL, INDUSTRIAL LADDER AND TECHNOLOGY IMPORT REGULATION: EXPERIENCES OF JAPAN, SOUTH KOREA, MEXICO, AND LESSONS FOR THAILAND 135-91 (Nititham Publ'g House 1999).

the TCA would encounter too many difficulties if they had to screen unfair clauses contained in technology importation agreements between Thai buyers and foreign technology suppliers.

I. Other Exemptions

Unlike the Antimonopoly Law,⁴⁶ the TCA does not exempt the following activities from its purview: export/import transactions; export cartels; import cartels; depression cartels; small business cartels; and insurance.

The lack of depression cartels and small business cartels led to criticism of the TCA by the Federation of Thai Industries (FTI), the most powerful interest group in Thailand. The FTI strongly criticized the TCA on the grounds of its bad timing (each member of the FTI experienced serious difficulties after the 1997 economic collapse), lack of safeguard measures, and substantial restriction of the Thai government's current policy of promoting SMEs.

III. ENFORCEMENT

A. The Thai Fair Trade Commission

The TFTC is the only administrative agency in Thailand with direct enforcement authority over the TCA. The Public Prosecutor's office holds certain functions in the enforcement scheme as well, but these functions are narrowly drawn.

The TFTC is composed of the Minister of Commerce (who serves as Chairman), the Permanent Secretary for Commerce (who serves as Vice Chairman), the Permanent Secretary for Finance, and between eight and twelve experts appointed by the Cabinet to serve as commission members. The Cabinet must appoint at least half of the experts from the private sector, and they must have knowledge and experience in law, economics, commerce, business management, or government administration. Currently, the TFTC is composed of sixteen members, with three representing the FTI and three representing the Thai Chamber of Commerce. This gets to the heart of the TFTC's serious flaws: (1) there are too many TFTC members; (2) many of the members are not qualified competition law experts; (3) the members only work on a part-time basis

46. MITSUO MATSUSHITA & JOHN D. DAVIS, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 88-94 (1990).

and convene only two meetings every eight months; (4) there is a vast overrepresentation of the private sector; (5) TFTC members receive an extremely low level of compensation; (6) there are no rules regarding how proceedings are conducted; and (7) the TFTC has weak administrative and secretariat support.⁴⁷

The Office of the TFTC is anchored in the DIT within the MOC. The director-general of the DIT is the secretary-general, in charge of the performance of the Office. The Office of the TFTC has a few serious flaws. First, there are only about forty-five officials who work within the Office, all of whom were transferred from the DIT while they were still government officials. The TFTC is supposed to be independent, but the Office and its staff are an administrative agency and therefore not independent. Second, the mentality of the officials in the Office cannot switch from market intervention to market promotion automatically. Most of them enforced both the PFA and TCA before their transfer to the Office of the TFTC. In addition, most are unfamiliar with the concept of competition law and never received adequate training. Third, there are no formal hearing or investigative procedures that the officials can follow.

The composition of the TFTC and its weak secretariat and administrative support make enforcement of the TCA ineffective. The decision making process is extremely long while the actual decisions are extremely short and provide almost no explicatory rationale.

B. Sanctions

Section 51 of the TCA appears to follow the pattern of the Taiwanese FTL.⁴⁸ The TFTC may impose a maximum three-year term of imprisonment, or a criminal fine of up to six million Thai Baht (approximately equal to US\$120,000), or both for either any violation of Sections 25 through 29 of the TCA or a failure to comply with Section 39. The serious flaw with the penal provisions of the TCA is that the TFTC may impose a maximum three-year term of imprisonment for either failing to apply to the TFTC for permission to merge businesses⁴⁹ or violating the unfair trade practices provision.⁵⁰ The TFTC should punish violators of these particular provisions with nothing more than monetary fines.

47. See Nipon Poapongsakorn, Kodmai Kaengkan Tang Kanka: Naewtang Karnpattana Bangkok Chay Kodmai [Competition Law: Ways to Develop Its Enforcement] 1-6 (July 12, 2000) (unpublished manuscript, on file with author).

48. See Liu, *supra* note 30, § 37.7.4.

49. See *supra* Part II.D.

50. See *supra* Part II.G.

C. TFTC Enforcement Procedure

Any person who discovers a violation of the TCA may report it to the Office of the TFTC. The secretariat of the Office of the TFTC conducts investigations, but if necessary, designated staff members may take appropriate measures, including collecting information from the alleged violator's business premises or summoning the parties for an investigative hearing.⁵¹

Japan's enforcement procedure is well developed and is quite similar to a court proceeding.⁵² In contrast, Thailand's enforcement procedure is still in the early stages of development. Although Sections 8(11) and 8(12) empower the TFTC to prescribe enforcement procedure, the TFTC has made no progress in doing so.⁵³

IV. CURRENT DEVELOPMENTS

The Office of the TFTC currently employs independent researchers for four specific research projects:

- (1) Research on the one hundred most important products in the domestic market in order to build a database necessary to enforce the TCA;
- (2) Research on unfair trade practices in order to clarify the vague wording of the catchall provision of TCA Section 29;
- (3) Research on independent agencies in order to change the legal status of the Office from an administrative agency closely associated with the MOC to an independent agency like its counterparts in Japan, South Korea, and Taiwan;
- (4) Research on business practices in Thai industries in order to identify business practices that might violate the TCA.⁵⁴

51. Trade Competition Act B.E. 2542 § 19 (1999) (Thail.).

52. MATSUSHITA & DAVIS, *supra* note 46, at 81-83.

53. See Poapongsakorn, *supra* note 47, at 5.

54. See Department of Internal Trade, Summary of the Work on the Trade Competition Act, available at <http://www.dit.go.th/english> (last visited May 20, 2002).

V. CONCLUSION

The purposes of the TCA are to prevent monopolization and the reduction or limitation of competition in business operations. Unfortunately, the TFTC's enforcement of the TCA has been rather disappointing. A wrong design of the substantive provisions (primarily an overemphasis on monopoly and the abuse of a dominant position), a poor institutional design (i.e. too many members of TFTC with a lack of experience), weak secretariat support, the lack of well developed procedural rules, and imprisonment for all violations regardless of their seriousness all have contributed to the TFTC's lack of success. However, the secretariat's recent action to obtain its budget from the Thai government and subsequently spend a substantial portion of it to commission independent research is a good sign. The knowledge and experiences of many advanced industrial countries on how they deal with similar problems certainly will prove helpful for Thailand.

