Rethinking Transparency in Thai Competition Decision Making:

the Case of Tying and Bundling

By

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Abstract

The Thai competition regime suffers from a severe lack of transparency in decision-making process. Legal requirements for decision making do not guarantee the right to be given reasons to the public. Instead, they only protect the public's right to be informed. As a consequence, governmental entities rarely provide reasons regarding their decision making to the public, because they do not have to. They only provide what the laws require them to do - informing the public the results of their decisions. This is particularly true in the competition law regime. While most of governmental commissions are reluctant to provide more transparency in their decision makings, the Thai competition commission (TCC) is active in ensuring that they would not provide any other transparency than what the laws require them to do, *i.e.* the outcomes of competition decisions. Because of that, the public misses opportunity to learn about criteria and rationales of competition decisions.

The literature suggests that to achieve better transparency one needs to access adequate and relevant information. Regarding transparency in laws, one needs to access legal precedents to know how the laws apply and learn from them. Regarding transparency in competition law, one needs to access competition law precedent to learn the criteria and rationales of competition cases. Therefore, transparency is the key to better policy learning. To achieve better policy learning for Thai competition law, the public needs to access adequate and relevant competition legal precedent, containing criterion and rationales of competition decisions as provided by a properly transparent regime.

The Thesis begins by identifying the lack of transparency and policy learning in Thai competition decision making (Chapter 1). It moves on to discuss the linkage among transparency, legal precedent, and policy learning (Chapter 2). It has shown that all three are dependant to each other. By providing transparency, legal precedent and policy learning will follow. The Thesis goes on to identify the missing opportunity to establish legal tests as a policy learning in T&B decisions (Chapter 3 and 4). Then it suggests new legal frameworks and additional enforcement mechanism to introduce more transparency to Thai competition decision making (Chapter 5).

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Acronyms

CTO	The Competition Transparency Ombudsman
EU	The European Union
FOIA	The Freedom of Information Act 2000
ICO	The Information Commissioner's Office
OIA	The Official Information Act
OIC	The Official Information Commission
OTCC	The Office of Trade Competition Commission
TCC	Thai Competition Commission
T&B	Tying and Bundling
UK	The United Kingdom

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Chapter 1

Introduction: Thai Competition Decision Making

Part I: Introduction

1. Thai competition decision making

If any would try to research Thai competition law, he/she would immediately run into the problem of information lack regarding competition case laws. This is not mainly because of language barriers or bureaucratic difficulties, but simply because the information is just not there. There is no competition case laws for general public to access. This is a big problem for anyone trying to learn how Thai competition law applies because there is no application shown from the competition authority.

The origin of this problem is in the legal framework itself. Thai laws are just unfriendly to transparency for decision making process. They grant too much discretionary power to authorities to decide who sees what, while granting too little rights for the public regarding to the information. Consequently, governmental entities are discouraged from adopting a more transparent approach regarding to their decisions. This end up by most of the governmental entities do not publish their decisions to the public at all. Some only publish results of their decisions without the decisions themselves. The Thai competition commission ('*TCC*') is exceptionally active on ensuring that they would not provide any other transparency than what the laws require them to do -results of competition decisions. Thus, all the public knows about competition decision making is on the results of the decisions. Because of that reason, the public misses opportunity to learn about criteria and rationales of competition decisions. The public needs to know criteria and rationales of competition decisions because they need to comply with the laws. They cannot do that unless they know how the laws apply and what are the criteria and rationales the authority using to decide what is legal and what is not.

The Thesis suggests that transparency is the key to solve this problem. With adequate transparency, the public will be able to access legal precedent of Thai competition laws. Thus, the public can learn them and can comply their activities better with the laws. This leads to the research question of the thesis:

How to achieve a better transparency for the public regarding Thai competition decision making?

The Thesis aims to find the best possible way to achieve greater transparency for the public regarding Thai competition decision making. It found that gaining transparency through policy learning from the TCC is the best possible way for the public transparency. This is because policy learning allows the public to understand how competition laws apply and

what are the criteria and rationales of competition law decisions. This policy learning should be provided by the TCC because the TCC is the only official entity holding information regarding competition decision making. That way, the policy learning from such official body would bare the best possible accountability. One can argue that there are other ways for Thai public to learn about competition law decision making *e.g.* learning from other decisions taken by other countries or international organizations. However, these decision makings do not reflect Thai competition laws which Thai public has to rely upon. They only represent how foreign laws apply in foreign jurisdictions. Although they might bare many contributions to global competition laws, but they do not answer how Thai competition laws apply in Thailand. Thus, having policy learning from the Thai competition authority is the only realistic way to achieve transparency.

2. Difficulties of undertaking legal research related to transparency in Thailand

Admittingly, the Thesis faces difficulties in carrying out its discussions. These difficulties come from various reasons, namely legal restrictions on freedom of expression, scarcity of official information, and language barrier of the authorities. That being said, the most severe difficulty has been discussions on transparency under Thai jurisdiction. This is largely due to legal limitations in Thailand regarding freedom of speech. One cannot always express their opinions as freely as in other democratic societies. Academic literatures and theses are not exempted from these legal obligations. These legal limitations revolve around law on defamation and particularly the Computer-related Crime Act (2017). Another difficulty is the increasingly unpredictable and questionable legal interpretation of the foresaid legal framework towards pro-democracy individuals. This is largely due to the current political landscape of Thailand which will be discussed below. This leads to discrimination on legal enforcement among the legal subjects regarding their political standpoints and thus subjects people whom support democratic principles to a very dangerous possible abuse of law enforcement.

As a consequence, the Author, as a supporter of transparency as a democratic principle, is inevitably placed at a dangerous crossroad. Too little discussions on transparency might be seen as inadequate for a Doctor of Philosophy, while being outstandingly robust on support of the democratic principle and criticism of the ones in power might land the Author on the very wrong side of the legal enforcement, thus the risk on personal welfare of the Author.

Yet, to fully understand the struggle for and risk to seek democracy and its principles in Thailand, one needs to see the bigger picture of Thai democracy and its *coup d'etat* history.

Although there were 13 successful *coup d'etat* since 1932, Thailand is, as it claims, a democratic country.[1] In fact, the current government is a consequence following the latest coup in 2014. The current Prime Minister -

Prayut Chan-o-cha, was the one leading the 2014 coup who has always been in power ever since.[2] Therefore, one can reasonably question the democratic status of the system. Although most of the coups were not popular among the people, because of the obvious reason -taking rightful power from the people and placed in the hands of few individuals whom were not chosen by the people, there are those who support the illegitimate actions. Thus, there are the people who protest the undemocratic coups and support democratic principles in running the country and those who support the coups and thus the government from the coup. For convenience, they will now be called '*pro-democracy camp*' for the former and '*pro-government camp*' for the latter.

It is important to note that the 2014 coup, and every successful coup in the history of Thailand, has been endorsed by the King soon after.[3] Unfortunately, because of the seriousness of the *lèse majesté* law and its enforcement, the Author will have to leave the monarchy out of the discussion.[4]

The political conflicts between these two camps have always been intense since the dawn of the 2014 coup. As mentioned above, a group of military generals (which was led by the current PM -*Chan-o-cha*) took power over legislative, executive, and judicial branches of Thailand. Immediately, they established their self-proclaimed militant government to rule the country under the name of the National Council for Peace and Order (NCPO). It issued literally hundreds of enforced declarations and orders against freedom of speech and check-and-balance powers.[5] One of the landmark declarations was to totally eliminate freedom of expression and press in the country by totally banning the broadcasting of all media and presses and forced them to broadcast information only from the military.[6] Unsurprisingly, this further upset lots of democracy-loving people, as the freedom of speech and press are ones of the essential principle in democratic society.[7] Not long after pro-democracy people started to protest the undemocratic coup and its subsequent orders, the NCPO started enforcing their

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[1] Satrusayang C. and Maneechote P, *'Grading Thailand's 13 successful coups'* [22 May 2020] Thai Enquirer <https://www.thaienquirer.com/13406/grading-thailands-13-successful-coups/> accessed Dec 2020

[2] South East Asia Post, *'Coup leader General Prayuth is Thailand's new PM'* [22 August 2014] Vol. 0205/16 <https://www.southeastasiapost.com/news/224972447/coup-leader-general-prayuth-is-thailand-new-pm> accessed Dec 2020

[3] The Late King of Thailand (Bhumibol Adulyadej), *Royal Appointment of the Head of the National Council for Peace and Order* (in Thai) [2014] Royal Proclamation <http://www.ratchakitcha.soc.go.th/DATA/PDF/2557/E/082/1.PDF> accessed Dec 2020

[4] For a quick glance of Thai *lèse majesté* law and how it is enforced -BBC, '*Lese-majeste explained: How Thailand forbids insult of its royalty'* [6 October 2017] <https://www.bbc.com/news/world-asia-29628191> accessed Dec 2020

[5] National Assembly of Thailand, *'Notifications and Orders of the National Council for Peace and Order'* (in Thai) [2020] Official Website <https://library2.parliament.go.th/giventake/ncpo.html> accessed Dec 2020

[6] The National Council for Peace and Order (NCPO), *Order 4/2557 on Radio, Television, and Local Radio Broadcasting* (in Thai) [2014]

[7] Loewy A.H., *'Freedom of Speech as a Product of Democracy'* [1993] Vol.27 (No.3) University of Richmond Law Review

own laws and arresting the people who spoke against those in power.[8] This trend of legislating to limit freedom of expression and charging or arresting those who oppose the law is still very active today.[9] Rather surprisingly, there are pro-government supporters who support the origin and actions of the government. These people are generally called 'the Yellow Shirts' who initially supported the power taking back in 2014,[10] those of which are of older generations. Arguably, these groups of people have been experiencing more favourable enforcement from the authority. Generally speaking, it seems that they receive better freedom of expressions than the pro-democracy ones from the law enforcement because of their supports to the government.

Thus, the difficulties of undertaking legal research related to transparency in Thailand could be categorized into two main subjects.

2.1. Legal limitations regarding freedom of speech: the law on defamations

From the background presented above, it is not surprising anymore to say that freedom of speech in Thailand is rather limited. Under this section, current legislations regarding freedom of speech in Thailand will be laid out and discussed. For the proportionate scope of the Thesis, it will focus on those legislations which oppress fundamental freedom of speech, namely the law on defamation, and more particularly, the Computer-related Crime Act (2017).

In Thailand, the law on defamation can generally be categorized into traditional defamation which does not involved in electronical means of communication and the newly enacted Computer-related Crime Act (2017) on defamation which involves electronical means of communication.

2.1.1. The traditional defamation laws

The traditional defamation laws can be generalized into 3 categories, namely defamation to private individuals, to the governmental officials, and to the King and the monarchy (*lèse*

[8] Almost immediately after the coup, hundreds of laws have been passed by the militant government without participation nor observation of the people and at least 428 people have been arrested for protesting against the coup. *See* iLaw, *'Three years of the NCPO and its reinforcement of "stable, prosperous and sustainable" powers'* [2017] News Article <https://ilaw.or.th/node/4506> and BBC, '6 years from the coup' [2020] News Article <https://www.bbc.com/thai/thailand-52755912> accessed Dec 2020.

[9] BBC, *'Thai protests: Student leader Parit Chiwarak arrested on sedition charges'* [14 Aug 2020] News Article <https://www.bbc.com/news/world-asia-53783697> accessed Dec 2020 and Parpart E., *'Updated List of Arrested Activists and Student Protest Leaders'* [25 Aug 2020] Thai Enquirer <https://www.thaienquirer.com/17524/updated-list-of-arrested-activists-and-student-protest-leaders/> accessed Dec 2020.

[10] Bangkok Post, *'Yellow shirts gather to 'protect' parliament from protesters'* [25 Oct 2020] News Article <https://www.bangkokpost.com/thailand/politics/2008003/yellow-shirts-gather-to-protect-parliament-from-protesters> accessed Dec 2020.

majesté). However, because of the foresaid difficulties around the latter, only the former two will be discussed.

Defamation laws on private individuals and governmental officials contain similar criteria. Thus, they will be discussed side-by-side. Both categories can be found in the Criminal Code of Thailand (1956).

Table 1: Traditional Law on Defamation: private individuals and governmental officials

	Private Individuals	**Governmental officials**	**More punishment and fine for publication of defamation**
Legislation	the Criminal Code of Thailand (1956)		
Subject of defamation	1. Any person (Section 326)	1. Governmental officials (Section 136) 2. Judges (Section 198)	1. Anyone
To the third party	Yes	No	Yes/No
The offence	*'…imputes anything to the other person before a third person in a manner likely to impair the reputation of such other person or to expose such other person to be hated or scorned…'* (Section 326) [emphasis added]	*'…insulting the official doing the act according to the function or having done the act according to the function [of the government]…'* (Section 136) *'insulting means to scorn, disrespect, or insult causing embarrassment…'*[11] [emphasis added]	*'If the offence of defamation be committed by means publication of a document, drawing, painting, cinematography film, picture or letters…'* (Section 328) [emphasis added]
Penalty	*'…imprisonment not exceeding one*	*'…imprisoned not out of one year or fined not out*	*'…the offender shall be punished with*

[11] Case 4327/2540 (in Thai) [1997] The Supreme Court of Thailand

	year or fined not exceeding twenty thousand Baht, or both. (Section 326) [emphasis added]	*of two thousand Baht, or both.'* (Section 136) [emphasis added]	*imprisonment not exceeding two years and fined not exceeding two hundred thousand Baht.*

As we can see from *Table 1*, defamation on private individual and governmental officials are somewhat similar, yet they bare distinctions. Firstly, defamation on private individuals aims to prohibit statement that is likely to impair personal reputation and for the person to be hated by others.[12] At the same time, defamation on governmental officials is similar to that of private individuals, but is also extended to statements that might cause embarrassment to the acting officials.[13] With the inclusion of embarrassment, this represents wider protection for governmental officers (when on duty) comparing to ordinary people. Secondly, the former needs a third party to hear the defamed statement in order to activate the charge,[14] however, the latter does not.[15] This also represents less criterion for the defamation on governmental officers. Thirdly, although defamation to governmental officials seems to cover more actions and bears less burden of proof, it is the defamation on private individuals that is more severely punished.[16] Besides the same possible imprisonment of no more than 1 year, defaming on ordinary people could be fined up to 20,000 Baht while doing so on governmental officials could be fined at maximum of a thenth at 2,000 Baht.[17]

The foresaid two charges are more intensively punished when involved in publication of such statement.[18] As shown in *Table 1*, once the defamation, both to private individual and governmental officials, is published by any traditional means, the possible imprisonment and fine are doubled and, for the latter case, 10 times more. These traditional means include but not exhaustive of publication of a document, drawing, painting, cinematography film, picture or letters. In other words, making traditional means that does not involve electronic methods of publication of any defamation should be subjected to heavier sentences under Section 328.

2.1.2. The Computer-related Crime Act (2017)

Defamation law involving electronic means of communication falls under and the newly enacted Computer-related Crime Act (2017). The Act basically regulates any form publication of defamation by electronical means, *i.e.* using internet, with heavier punishment and fine. Since the Act covers any input of information into computer system as regarded

[12] The Criminal Code of Thailand (1956) Section 326
[13] ibid. Section 136
[14] ibid. Section 326
[15] ibid. Section 136
[16] ibid. Section 326 and 136
[17] ibid. Section 326 and 136
[18] ibid. Section 328

wrongful by the Act, the Thesis (as currently being typed into a computer) falls indirectly into this category.

Table 2: Laws on Traditional and Electronic means of Publication of Defamation in Thailand

	Traditional means of publication of defamation	**Electronical means of publication of defamation**
Legislation	The Criminal Code of Thailand (1956) Section 328	Computer-related Crime Act (2017) Section 14
Subject of defamation	Anyone	Anyone
The offense	*'If the offence of defamation be committed by means publication of a document, drawing, painting, cinematography film, picture or letters…'* [emphasis added]	*'Any person who perpetrates the following offenses…* *(1) with ill or fraudulent intent, put into a computer system distorted or forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to other person or the public, in which the perpetration is not a defamation offense under the Criminal Code;* *(2) put into a computer system false computer data in a manner that is likely to damage the maintenance of national security, public safety, national economic security or public infrastructure serving national's public interest or cause panic in the public;* *(3) put into a computer system any computer data which is an offense about the security of the Kingdom or is an offense about terrorism, according to Criminal Code;*

		(4) put into a computer system any computer data which is <u>obscene</u> and that computer data <u>may [be] accessible by the public</u>; *(5) disseminate or forward any computer data <u>when being aware</u> that it was the computer data as described in (1), (2), (3) or (4).'*
Penalty	*'…the offender shall be punished with imprisonment <u>not exceeding two years</u> and <u>fined not exceeding two hundred thousand Baht</u>.*	*'shall be subject to imprisonment <u>up to five years</u> and a <u>fine not exceeding one hundred thousand baht</u>, or both'*

From *Table 2*, discussion can be divided into three main issues.

Firstly, it is noted in Section 14 of the Computer-related Crime Act (2017) that the Act covers wrongful input of information with ill or fraudulent intention into computer system. It also mentions in Section 14(1) that the Act does not extend to defamation offense which is enforced under the Criminal Act. This means that technically the offense under the Act is not a defamation according to Thai laws. Yet, considering from the offenses of the Act, the Thesis argues that it is an extensive version of the defamation law. This is because each of the offense under the Act can be categorized under the traditional defamation law as '*…in a manner likely to impair the reputation…*'.[19]

Secondly, the range of offenses has been extended comparing to the tradition defamation previously discussed in *Table 1*. Under the Section 14, any violation considered against either (1), (2), (3), or (4) can be immediately subjected under the offense including sharing the information online. The first criterion covers the traditional mean of defamation which is to input information which is likely to cause damage to other persons or the public.[20] The rest of criteria deal with extensive offenses from the traditional defamation. The second criterion deals with input of information considered against national security, public safety, national economic security or public infrastructure serving national's public interest or cause panic in the public.[21] The third deals exclusively with the input of information that is considered an offense about the security of the Kingdom.[22] The fourth deals with obscenity which is unfortunately considered illegal in Thailand.[23] Lastly, sharing those types of information online would be subjected to the same punishments.[24] This exceeding range of defamation

[19] ibid. Section 326
[20] The Computer-related Crime Act (2017) Section 14(1)
[21] ibid. Section 14(2)
[22] ibid. Section 14(3)
[23] ibid. Section 14(4)
[24] ibid. Section 14(5)

offenses is clearly far-reaching from the traditional means of publication of defamations under Section 328 that covers only the publications of information that is likely to impair the reputation of other person, equivalent to the Section 14(1).

Thirdly, the punishments are more severe. The imprisonment jumped from not exceeding 2 years to 5 years and the fine increased 5 folds from not exceeding 20,000 Baht to 100,000 Baht.[25]

As mentioned above, the Thesis falls directly under the Computer-related Crime Act because it is produced on a computer platform and submitted using electronic means. In addition, the Thesis openly supports transparency which is one of the main principles of democracy. Thus, the Thesis should be considered as one of the pro-democracy camp which poses concerns on legal enforcement discriminations.[26] Together with the fact that there is no exception for academic purposes work from this legislation, the Computer-related Crime Act represent a significant difficulty in carrying out the Thesis.

The following section will present the increasingly unpredictable and questionable legal interpretation of the Computer-related Crime towards pro-democracy individuals. It will practically demonstrate, on case-by-base examples, what the Author of the Thesis would likely have faced if the Author wrote the Thesis freely regardless of the foresaid legal framework on limitation of freedom of expression.

2.2.Increasingly unpredictable and questionable legal interpretation of the Computer-related Crime Act towards pro-democracy individuals

The previous section discusses the problematic legal framework that represents theoretical difficulties to writing the Thesis. Under this section, such difficulties will be demonstrated by case-by-case examples to show that writing academic works, although with pure and truthful intentions to academic merits, might be subjected to litigations and possible arrests if the works do not comply with the previously discussed legal framework. The difficulties revolve around legal interpretations of the Computer-related Crime Act (2017) from the authorities namely police and legal enforcing entities. The Thesis argues that such interpretation is becoming more and more extensive and unpredictable, as it diverts and extends way beyond the scope of the law itself. In addition, it is highly noticeable that these problematic legal interpretations are likely focused on pro-democracy camp. Consequently, legitimacy and integrity of such considerations should be called to question.

Some of the cases are aimed as SLAPP lawsuits (strategic lawsuit against public participation) where the plaintiffs do not aim to win but rather to silence the defendant by prolonged and expensive lawsuits. Accordingly, SLAPP sometimes represents a mean of

[25] *The Criminal Code of Thailand* (n 12) Section 328 and *The Computer-related Crime Act* (n 20) Section 14
[26] See the alleged discrimination between *pro-democracy camp* and *pro-government camp* above.

silencing freedom of speech and democratic debates. They are more worrying when they are directly pursued by the authorities themselves.

Table 3: Increasingly Unpredictable and Questionable Legal Interpretation to the Computer-related Crime Act (2017) Towards Pro-Democracy Individuals: example cases

Year of the case/ incident	Section	The actual offenses according to the laws	Legal interpretation of the offenses by authorities	The plaintiff/complaint pursuer
2017	14(1)	'…put into a computer system distorted or forged computer data, partially or entirely, or false computer data, in a manner that is likely to cause damage to other person or the public.'	The defendant made several posts on Facebook criticising arrests made by the government to not to comply with humanitarian standard.[27]	Legal Department of the National Council for Peace and Order (NCPO)
2018	14(2) and (5)	'(2) put into a computer system false computer data in a manner that is likely to damage … national security, public safety, national economic security or public infrastructure…' '(5) disseminate or forward any computer data when being aware that it was the computer data as described in (1), (2), (3) or (4).'	The defendant criticised the wife of Prayut Chan-o-cha (the PM) on her expensive purse by a Facebook post.[28]	The Director of Technology Crime Suppression Division
2018	14(2) and (5)	*ibid.*	The defendant criticised THEIA satellite purchase of the government on Facebook.	Legal Department of the National Council for Peace and Order (NCPO)

[27] iLaw, *'Case Law Database'* (in Thai) [2020] Freedom of Expression Documentation Center (iLaw) <https://freedom.ilaw.or.th/th/case/811#progress_of_case> accessed Jan 2021

[28] BBC Thailand, *'Prof. Dr. Charnvit Kasetsiri before reporting to the PM's wife purse charge'* (in Thai) [2018], BBC Thailand <https://www.bbc.com/thai/thailand-42868770> accessed Jan 2021.

2018	14(2)	*ibid.*	Thanathorn Juangroongruangkit, the former PM candidate of pro-democratic camp, broadcasted on his Facebook Live about MP votes in the Parliament.[29]	Legal Department of the National Council for Peace and Order (NCPO)

Table 3 shows how the authorities tend to interpret the Computer-related Crime Act (2017) which is clearly far-reaching than the Act. The interpretations tend to divert and extend way beyond the scope of the legislation. The input of distorted or forged data into a computer system under Section 14(1) is surprisingly extended to negative criticism of governmental actions, as well as the purse of PM's wife has become the matter of damage to national security under Section 14(2). From these examples of litigation pursuance by authorities, any action against the government (or the spouses) is at risk of lawsuits or SLAPP. On the other hand, this extensive litigation pursuance by governmental organizations cannot be seen on pro-governmental camp.

The stand of the Thesis is clear. It openly supports transparency which is an underlining pillar of democracy. Therefore, it falls directly into the pro-democracy camp. In describing Thai case laws, the thesis made its best attempts to include all the possible details it can find. Yet, some reservations had to be made in cases of names of individuals, companies, and authority officials. This is because from the litigation precedents, it is clear that mentioning the name of the person under the question could lead to litigations funded by governmental organizations. It has to be emphasized that these litigation or SLAPP risks are personal risks. The authorities are ready to peruse litigations to the persons making expression, not to the work or the organizations the person works with or for. These extensive personal risks are far too unacceptable for the Author and his family. Therefore, the writing under this Thesis had to be as detailed and engaging as possible as long as it does not risk personal safety and welfare of the Author who live under the Thai jurisdiction.

2.3. **Difficulties of undertaking legal research related to access of documents**

Previous section deals with difficulties regarding legal limitations and personal welfare of the Author. Under this section, another type of difficulties will be discussed. Although it is not as personally intimidating, it is by no means less problematic. Thai competition law regime is in a serious shortage of official information. There is no official publication of any competition decisions by the TCC. Consequently, no competition case laws are accessible to the general public. This is particularly problematic for anyone (including this Thesis) trying to learn how Thai competition law applies because there is no legal precedent shown from the competition

[29] Prachachat, *'Thanathorn walks in to the TCSD on his Facebook Live'* (in Thai) [2018] Prachachat Newspaper <https://www.prachachat.net/politics/news-197719> accessed Jan 2021.

authority. This is also the main reason for the existence of the Thesis -more transparency is needed in the Thai competition regime.

This nature of scarcity and secrecy of competition official information is elaborated in Chapter 4 of the Thesis where all the selected competition cases are reconstructed and rewritten by the Author in order to demonstrate how scarce the information is. The reconstruction was done by the Author gathered all the available information about the TCC's decisions (in this case, tying and bundling decisions) from all possible sources, both official and non-official, with adequate reliability. Then, the Author needed to patch the information together and rewrite the cases from the ground up. This certainly posed difficulties for the Thesis both in term of time and allocating and verifying information. Further information about the methodology of this process can be found in *'Methodology and Road Map of the Thesis'* topic and in the *Chapter 4* of this Thesis.

2.4. Difficulties of undertaking legal research related to language barriers

Another possible difficulty for anyone who research across disciplines of languages would also be language barrier. Apparently, Thai competition regime only uses Thai language in any document and communication and English for that matter of the EU jurisdiction. As the Thesis needs to be researched, compared, and analysed across the two jurisdictions, it is inevitable that barrier between the languages would have a role in difficulties of undertaking the legal research. Expertise in both of the languages is required to successfully carry out the task. Although Thai language is not a particular an easy one and the Author does not have any Thai linguistic qualification, being a native speaker definitely eases these difficulties. On the other hand, English is the second language for the Author which means it does not come natural for the Author. Although the structure and grammatical rules of the language is simpler comparing to Thai, the Author still finds it uneasy to communicate the idea through English words and sentences effectively, particularly in legal researches.

Another dimension of this difficulty is language barriers created by official translations from Thai authorities. Some Thai official documents are already translated by the authorities and therefore they hold official status. Consequently, the Author is in no place to alter the wordings and grammars to suit the manner of the language. These poor translations also pose difficulties for the research as the Thesis needed to quote it exactly as written and thus may cause confusions, or at least irritation, to the readers. For example, the Criminal Code of Thailand (1956) Section 136 states in its English version that the penalty for defamation on governmental officials are *'…imprisoned <u>not out of one year</u> or fined not out of two thousand Baht, or both.'*[30] It is clear that there is language barrier here. It should have been better translated into, for instance, *'…imprisoned not exceeding one year…'* or *'…imprisoned no more than one year…'*. Although the Author knew that there are mistakes in the English version, he is in no place to correct the official translation of the law. Fortunately, most of the mistranslations do not essentially impair the definitions of the laws. Yet, this is admittedly

[30] *The Criminal Code of Thailand* (n 12) Section 136

irritated for the mistranslation to be included in the text of the Thesis. Thus, this is another difficulty faced by the Thesis

In conclusion, there are several difficulties faced by the thesis in carrying out discussions related to transparency in Thailand. These are legal restrictions on freedom of expression, scarcity of official information, and language barrier of the authorities. The most severe difficulty has been discussions on transparency under Thai jurisdiction due to legal restrictions on freedom of expression. The discussions under this Thesis are inevitably affected by these problems. However, the Author can assure that the Thesis is delivered in the most robust and coherent manner as possible under the circumstances and that no more detailed discussions could have been done without risking personal safety and wellbeing of the Author.

3. Literature review and contribution of the Thesis to the existing literatures

Overall, the existing literatures have been contributing to what transparency and policy learning are and how they operate, both in general and competition law. In particular, there are literatures demonstrating how transparency brings about efficiency and how policy learning contributes to better understanding of the public. However, there are less literatures regarding transparency and policy learning on general competition law. In Thai competition law, literatures revolve around the lack of transparency in competition decision making. They indicate the cause of the lack of transparency, the ineffective enforcement of competition law, and suggest that there should be more transparency in Thai competition law. However, they do not demonstrate the lack of transparency in Thai competition law. They do not suggest concrete solution to deal with the lack of the transparency. And they do not deal with the ineffective competition law enforcement. This is where the Thesis comes to fill the gap in competition law literatures. The Thesis has 3 major contributions. Firstly, the Thesis demonstrates the lack of transparency in Thai competition law by identifying the missing opportunity to establish legal tests in T&B decisions. Secondly, the Thesis suggests a new legal framework for more transparent Thai competition law regime. And thirdly, the Thesis suggests additional law enforcement mechanism to ensure the efficiency of the new legal framework.

This literature review is thematically divided into 4 key themes: transparency and policy learning, transparency and policy learning in competition law, transparency and policy learning in Thai competition law, and the Thesis's contributions to the existing literatures.

3.1.Transparency and policy learning

Integrity of transparency is often considered self-explanatory. There is often no need to explain or defend the goodness of transparency.[31] The concept of transparency is largely left

[31] Maupin J., *'Transparency in International Investment Law: The Good, the Bad, and the Murky'* [2013],

undiscussed and, therefore, in development.[32] Yet, a compromised concept of transparency can be drawn from existing literatures that it is generally transparent when there is publicly accessible information with minimal to none costs for the accessing party.[33] The best possible mechanism to oversee transparency is multidimensional transparency where all parties have their own roles of ensuring transparency.[34] The most probable degree of transparency is semi-transparent where things should be as transparent as possible with necessary exemptions.[35] Advantages and downsides of transparency are also discussed.[36]

Policy learning is a process of data accumulation regarding problems and solutions in a variety of contexts in order to acquire new information and knowledge to achieve policy goals.[37] It can be divided into three categories: convergence, diffusion, and learning.[38] Policy learning derives from understanding legal precedent that comes out from transparency.[39] Policy learning is important because it helps the public to comply their activities better to the laws.[40]

Klaaren J., *'The Human Right to Information and Transparency'* [2010] Transparency in International Law, Bianchi A., *'On Power and Illusion: The Concept of Transparency in International Law '* [2013] Transparency in International Law, and Etzioni A., *'Is Transparency the Best Disinfectant?'* [2010] Vol. 18 (No. 4) The Journal of Political Philosophy

[32] Bianchi A., *'On Power and Illusion: The Concept of Transparency in International Law '* [2013] Transparency in International Law

[33] ibid., Mock W., *'An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development'* [2000] 18 (2) Dickinson Journal of International Law, and Han B., *The Transparent Society* (An Imprint of Stanford University Press, Stanford, California)

[34] Stirton L. and Lodge M., *'Transparency Mechanisms: Building Publicness into Public Service '* [2001] Vol. 28 (No. 4) Journal of Law and Society

[35] Maupin J., *'Transparency in International Investment Law: The Good, the Bad, and the Murky'* [2013] Transparency in International Law, Mock W., *'An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development'* [2000] 18 (2) Dickinson Journal of International Law, and Songsujaritkul W., *'Rethinking Media Plurality Regulation: Promoting Exposure Diversity and Controlling the Power of New Online Selection intermediaries'* [2018] PhD Thesis, University of East Anglia

[36] Duxbury N., *The Nature and Authority of Precedent* (Cambridge University Press, UK), Moyson S. *et al*., *'Policy Learning and Policy Change: Theorizing Their Relations from Different Perspectives'* [2017] Vol. 36 (No. 2) Policy and Society, Lindberg H., *Knowledge and Policy Change in Knowledge and Policy Change* (Cambridge Scholars Publishing, Great Britain), Fox J., *'The Uncertain Relationship between Transparency and Accountability'* [2007] Vol. 17 (No. 4-5) Development in Practice, Chen J., *Useful Complaints: How Petitions Assist Decentralized Authoritarianism in China* (Lexington Books, USA), Curtin D. and Meijer A.J., *'Does Transparency Strengthen Legitimacy?: A critical analysis of European Union policy documents'* [2006] Information Polity, Sickles R.C. and Zelenyuk V., *Measurement of Productivity and Efficiency: Theory and Practice* (Cambridge University Press, United Kingdom), Kolstad I. and Wiig A., *'Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?'* [2009] Vol. 37 (No. 3) World Development, and Edelen C., *'Transparency is Essential to Efficient Markets'* [2019] Propmodo E-Journal

[37] Moyson S. *et al*., *'Policy Learning and Policy Change: Theorizing Their Relations from Different Perspectives'* [2017] Vol. 36 (No. 2) Policy and Society

[38] See Freeman R., *'Learning in Public Policy'* in The Oxford Handbook of Public Policy (Oxford University Press, Online Publication)

[39] *Moyson* (n 37), Lindberg H., '*Knowledge and Policy Change'* in Knowledge and Policy Change (Cambridge Scholars Publishing, Great Britain), and Heiner R. A., *'Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules'* [1986] Vol. 15 (No. 2) The University of Chicago Press for The University of Chicago Law School

[40] Heiner R. A., *'Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules'* [1986] Vol. 15 (No. 2) The University of Chicago Press for The University of Chicago Law School

3.2.Transparency and policy learning in competition law

Literatures have shown that maximized transparency or perfect information is not desirable for competition law because it might increase motivation to collude which would bring detriment to competitive market and consumers.[41] Yet, the minimum requirements of transparency should be established: transparency in provisions, regulations, and guidelines,[42] investigation and consideration processes,[43] and the results, criteria an rationales of decisions.[44] On the face of policy learning for the public, there are evidently endless lines of case laws and competition analysis to learn from. By only landmark case laws themselves provide comprehensive legal tests used in competition laws. For example, dominant position test in abuse of dominant position was established in the *Hoffmann-La Roche* case[45] and objective justification test in the *Hilti* case.[46]

3.3. Transparency and policy learning in Thai competition law

Literatures on Thai competition law about transparency and policy learning revolve around identifying the lack of them rather than suggesting concrete ways of dealing with them. Thai competition law has long been criticized that it lacks transparency and together with policy learning.[47] It is also criticized for weak legal enforcement that results to ineffectiveness of the law.[48] And that it is in the dire need for more transparency.[49] However, the literatures fall short on analysis of the problem and suggesting concrete solution to the problem. This is where the Thesis comes in to fill the gap of the existing literatures.

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[41] Gugler P., '*Transparency and Competition Policy in an Imperfectly Competitive World'* in The Oxford Handbook of Economic and Institutional Transparency (Oxford University Press, Online Publication)
[42] Hobson C.F., *The Great Chief Justice: John Marshall and the Rule of Law* (the University Press of Kansus, USA) and Mock W., *'An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development'* [2000] 18 (2) Dickinson Journal of International Law
[43] *Gugler* (n 41), Organisation for Economic Co-operation and Development (OECD), *'Procedural Fairness and Transparency: Key Points'* [2012] Competition Committee, Paris, The EU Commission, *'Best Practices on the Disclosure of Information in Data Rooms in Proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation'* [2015], and The EU Commission, *'Guidance on Confidentiality Claims During Commission Antitrust Procedures'* [2018]
[44] The Treaty on the Functioning of the European Union (TFEU), The Charter of Fundamental Rights of the European Union, Article 41, and The Treaty on European Union (TEU)
[45] Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 40
[46] Eurofix-Bauco/Hilti [1988] OJ L65/19, para. (g)
[47] Nikomborirak D., *'Political Economy of Competition Law: The Case of Thailand, the Symposium on Competition Law and Policy in Developing Countries'* [2006] vol.26 (no.3) Northwestern Journal of International Law & Business, Thanitcul S., *Explanation and Case Study of the Competition Act B.E.2542* (in Thai) (Winyuchon Publisher, Bangkok), and Poapongsakorn N., *'The New Competition Law in Thailand: Lessons for Institution Building'* [2002] vol.21 Review of Industrial Organization
[48] Yemyoo P., *'The Problems in Trade Competition Act 1999 Application in the Case of Complaint about Tying Beer with Whisky'* (in Thai) [2000] Master of Political Science Thesis, Faculty of Political Science Thammasat University, Thailand, 39 *and* Luewadwanich N., *'Strategic Competition in Beer Business'* (in Thai) [2007], Nikomborirak D, *'The Paper Tiger and the Monopolization of the Giants'* (in Thai) [September 2012] vol. 53 Way Magazine, and Thanitcul S., *'Competition in Thailand'* [August 2015] vol.8 (no.1) Competition Policy International (CPI) Antitrust Chronicle

[49] ibid. and *Nikomborirak* (n 47)

3.4. The contributions of the Thesis

The Thesis has 3 major contributions to the existing literatures.

3.4.1. Identifying the missing opportunity to establish legal tests as a policy learning in T&B decisions

The Thesis identifies the missing opportunity to establish legal tests in Thai competition decisions (T&B cases). The Thesis starts by identifying the problem of the lack of transparency and policy learning in Thai competition decisions making in Chapter 1. It goes on to discuss how transparency, legal precedent, and policy learning play roles in decision making in Chapter 2. Then the Thesis demonstrates that, with transparency, there would be existing legal tests as a form of policy learning in decisions making in Chapter 3. And in Chapter 4, the Thesis identifies the missing opportunity for Thai competition decision making to establish legal tests. This is done by rewriting all competition decisions (T&B decisions) with existing information to show that there are hardly any legal tests present in the face of intransparency. It is also the first attempt to put together Thai competition decisions in one coherent decision writing. This contribution has never been done before in the existing literatures.

3.4.2. Suggestion of the new legal framework for more transparency in Thai competition law regime

There are existing literatures on brief suggestions that there should be better laws.[50] But they do not discuss what legal framework should be put in place or how to do that. The Thesis, therefore, fills in this gap of the existing literatures by suggesting the new legal framework for more transparency in competition law decisions makings in Chapter 5. The Thesis suggests the possible legal framework in 3 possibilities. All of them aims to establish the right to be given reasons to specific policy areas in Thailand. Firstly, the Thesis suggests the most probable framework to establish the right to be given reasons for competition law. This is the easiest and thus most probable action because it only amends the Competition Act and not other laws. Secondly, it suggests alternative framework to amend both Competition Act and the Official Information Act to establish the right to be given reasons. This would ensure greater transparency for competition law and other policy areas. And thirdly, the Thesis goes further to suggest ambitious amendment of Competition Act, Official Information Act, and the Constitution to raise constitutional status of the right to be given reasons. The latter is the least probable because it involves amending the Constitution which is less likely comparing to amending lower ranking laws.

Nonetheless, with future researches, all of the suggested legal frameworks for competition law could be used as the blueprint for future transparency reforms in other areas. This will

[50] For example, *Nikomborirak* (n 47), *Yemyoo, Thanitcul*, and *Nikomborirak* (n 48)

pass forward better transparency hopes to wider policy areas and not limited to competition policy.

3.4.3. Suggestion of additional law enforcement mechanism to ensure the efficiency of the new legal framework

There are existing literatures arguing that the competition enforcement is ineffective on catching the anticompetitive conducts.[51] Yet, there is no literatures suggesting a concrete alternative way or additional help to reinforce better competition enforcement. The Thesis proposes Competition Transparency Ombudsman (*'CTO'*) as an additional enforcement mechanism to ensure efficiency of the new legal framework. The CTO is meant to provide anther layer of assurance that decision making of the TCC is as transparent as possible. The CTO should receive complaints from the public about problematic discretionary power of the TCC to decrease transparency in its decision making. It should recommend measures to ensure better transparency to the TCC. It should also issue press releases about the work they are doing to the public. The aim of this CTO is not to undermine authority of the TCC. It should not question the criteria and rationales of the TCC in decision making. It also should not undermine the authority of the Official Information Commission ('*OIC*') whom has authority to correct transparency-related issue for governmental entities. The existence of the CTO is to ask transparency question and address the issue to the public. This would raise the public attention of the transparency issue which would increase the probability for better transparency handling by the TCC.

4. Institutional and enforcement context of competition in Thailand

In order to understand Thai competition law, one needs to understand its institutional and enforcement context. This section aims to give the reader a thorough picture of Thai competition law operation, the enforcing institutions, the coverage of the law, the existing policy instruments, *etc*.

The section will start with the competition law institutions and their powers, namely the TCC, the public prosecutor, and the Court. Then, it will move on to introduce the hard laws *i.e.* the current legal framework of Thai competition law including the fines and punishments. Then, it will describe the soft laws *i.e.* guidelines issued by the TCC. Lastly, efficiency of the guidelines will be discussed. This is to show that the TCC fails to follow its own guidelines when they make decisions. Consequently, the guidelines become unsuitable mean for public policy learning.

[51] *Yemyoo, Luewadwanich, Nikomborirak,* and *Thanitcul* (n 48)

4.1.The enforcement authorities

There are three layers of competition law enforcement: the TCC, public prosecutor, and the Court. These layers of institutions are hierarchical *i.e.* a competition matter has to go through the first stage before moving on to the next. Therefore, if a matter does not pass the prerequisite layer, it is unlikely that the matter would be able to proceed to the following stage. This means that the matter would likely be terminated with less to none chance of appeal. All three layers will be described hierarchically.

4.1.1. The TCC

The TCC or Thai Competition Commission is the only authority to deal with all competition matters at the beginning. According to the Competition Act, the TCC has the following duties and powers.[52]

> *'**Section 17:** The Commission shall have the following powers and duties:*
>
> *(1) to make recommendations to the Minister in issuing ministerial regulations pursuant to this Act;*
>
> *(2) to issue regulations or notifications for the performance of duties under this Act;*
>
> *(3) to regulate business operations and impose guidelines to maintain free and fair competition;*
>
> *(4) to consider complaints and make inquiries regarding offences under this Act;*
>
> *(5) to consider and make decisions on requests under Section 59;*
>
> *(6) to impose regulations on investigation and inquiry undertaken by sub-committees of inquiry;*
>
> *(7) to notify the appointment of officers to perform duties under this Act;*
>
> *(8) proceed with criminal cases according to a complaint of injured persons under Section 78;*
>
> *(9) to consider and impose administrative fines under Section 80, Section 81, Section 82, and Section 83, as well as to file lawsuits in administrative courts;*
>
> *(10) to invite any person to provide factual information, explanation, recommendations, or opinions;*
>
> *(11) to propose opinions and recommendations to the Minister and the Cabinet with regard to the government's policies on competition;*
>
> *(12) to give recommendations to government agencies on rules, regulations, or orders which are obstacles to competition and causing obstruction, restriction, or reduction of competition, and that may result in unfairness between business operators;*
>
> *(13) to determine plans, strategies, and guidelines on management of the Office;*

[52] The Competition Act (2017) Section 17

(14) to issue regulations or rules regarding organizational structure, personnel management, budgeting, finance, and property and other operations of the Office;

(15) to perform other duties as the law prescribes as powers and duties of the Commissioners.

Generally applicable regulations or notifications shall take effect when they are published in the Government Gazette.'

The duties and powers of the TCC can be categorized into 3 main groups: duty and power relating to decision making, recommendation duty, and administrative duties. For the first category, the TCC is tasked with considering and making decisions regarding competition matter.[53] It is also tasked to issue regulations and guidelines regarding competition matter.[54] These regulations and guidelines are equivalent to those of the EU, for example, the Guidance on Article 102.[55] The TCC also has administrative power to impose fines and pursue litigation to the Administrative Court.[56] It also has the power to summon anyone to question any factual information and opinion regarding to competition law matter.[57] Because Thai competition law involves criminal punishments, the TCC is also empowered to proceed criminal cases.[58] For the second category, the TCC is tasked to recommend strategies, suggestions, and opinions to Ministers, the Cabinet, and governmental agencies.[59] It is worth to point out that the recommendations given by the TCC is not binding to those entities. For the last category, the TCC is tasked with administrative duties regarding to its own organization, namely, determining plans and budget management for its own office.[60]

Any complaint or initiative regarding competition law needs to come through the TCC. It is the only organization to consider whether a competition case should go further to the public prosecutor by convicting the alleged anti-competitive conduct or to dismiss the case all together. At this process, private individual cannot go directly to public prosecutor or the Court.[61] Therefore, if a competition case is terminated by the TCC, the infringed party cannot seek the justice by his/her own. They can only attempt to appeal the TCC decision to terminate his/her case.

Any decisions by governmental agencies can be appealed to the Administrative Court of Thailand. The Court is empowered to sustain, reverse, or make amends of such decisions.[62] Therefore, in theory, any party disappointed with the TCC decision to drop his/her case can appeal it to the Administrative Court. Unfortunately, a landmark caselaw of the Court says otherwise. Case *อ.89/2556* (2013) of the Administrative Court ruled that a decision given by a

[53] ibid. Section 17 (4) and (5)
[54] ibid. Section 17 (2), (3), and (6)
[55] The EU Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] 2009/C 45/02
[56] *The Competition Act* (n 52) Section 17 (9)
[57] ibid. Section 17 (10)
[58] ibid. Section 17 (8)
[59] ibid. Section17 (1), (11), and (12)
[60] ibid. Section 17 (13) and (14)
[61] ibid. Section 78 *'The infringed party can bring the matter to the TCC but they reserve no right to continue the litigation by themselves.'*
[62] Act on Establishment of Administrative Court and Administrative Court Procedure (1999), Section 9

rightful governmental agency with the power of discretion is final and absolute. Such decision cannot be appealed to the Administrative Court or other Courts with the purpose to reverse the decision.[63] According to this landmark caselaw, it is unlikely that any appeal would be successful. Since 1999, there are 96 competition cases in totally according to the TCC's data.[64] 84 of them are terminated by the TCC without justifiable explanation.[65] And none of them appears again in the justice system. The implication is that, if a competition case is terminated at the TCC, it is likely to be terminated for good.

4.1.2. Public prosecutor

Once the TCC agrees that the alleged conduct is anticompetitive, it shall make a decision in support of prosecution to the public prosecutor. Then the public prosecutor shall consider whether to litigate in Court.[66] According to the data found on the TCC official website, only 3 decisions were ever received by the public prosecutor and all of them were terminated by the public prosecutor.[67] As in most cases, no reason or further explanation given.

Also, one can argue that these numbers given by the TCC do not add up. According to the TCC's data, there are 96 cases in total, 84 dismissed by the TCC. Thus, there should be 12 cases filed to the public prosecutor. Nevertheless, only 3 cases reached the prosecutor. Legal wise, the TCC has to either convict the firm and submit to next process for litigation or dismiss the case all together.[68] This means that there are 9 competition cases that missing or pending. Without more transparency there is nothing which can be said further about these cases.

4.1.3. The Court

The Intellectual Property and International Commerce Court has the jurisdiction over all competition cases.[69] Unfortunately as the public prosecutors so far have dropped all the decisions, the Court has never seen any competition case at all. Thus, no legal precedent or transparency can be expected from the Court.

The question remains, however, whether the Court could exert control over the TCC's decisions not to publish its decisions. The short answer is that it is unlikely. First of all, if a party wants to appeal the TCC's decision to ban publication of competition decisions, the person needs to file the appeal to the Official Information Commission ('*OIC'*), he/she cannot bring the matter directly to the Court.[70] Unfortunately, so far there is no record of any appeal regarding competition decision to the OIC. Second of all, if the OIC decision does not come

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[63] Judgement of the Administrative Court of Thailand *อ.89/2556* [2013]

[64] TCC, '*The Background of Thai Competition Law'* (in Thai) [2021] Official Website <https://otcc.or.th/history-of-thailands-trade-competition-law/> accessed March 2021

[65] The problematic approach of the TCC not to explain and give rationale for its decision is thoroughly discussed in Chapter 1: Introduction: Thai Competition Decision Making, Part II: The Problems

[66] *The Competition Act* (n 52) Section 25

[67] *TCC* (n 64)

[68] *The Competition Act* (n 52) Section 17

[69] ibid. Section 26

[70] The Official Information Act (1997), Section 18

out in favour of transparency, it could set a worse legal precedent which could deteriorate transparency in decision-making process to a greater degree. This is because the decision of the OIC is final and absolute,[71] one cannot further appeal to the Administrative Court or other Courts to turn over the decision.[72] This could be the last nail on the transparency's coffin as there would be a harder chance for things to change for the better in the future. This chance is too risky as it might set the tone for all other governmental entities to be less transparent regarding their decision-making process. The Thesis argue that Thai transparency cannot afford to take this chance.

4.2.The hard laws

The current legal framework of Thai competition law consists of four main categories: monopolization and cartels, abuse of dominant position, merger control, and unfair commercial conduct. All of these are packed into the only one legislation -the Competition Act (2017). The fines and punishments for all the conducts are also listed in the legislation.

4.2.1. The Competition Act and its objectives

Competition law in Thailand is governed by the Competition Act- the only legislation involving all competition matters in the jurisdiction. There are two versions of the Competition Act in total. The previous one was in 1999, which is now abolished, the present one was enacted back in 2017 and is still in force today. The objectives for the enactment of Thai Competition Act are described as the following.[73]

> *'The Act was enacted to prevent monopolization and anti-competitive behaviours.'*

> *'The Act aims to promote freedom to compete in markets. Thirdly, it aims to safeguard against unfair competition practices.'*

In the nutshell, the objectives of the Act are rather similar to those of well-developed competition regimes –to prevent and control anticompetitive behaviours and to promote free and undistorted markets. However, they fail to emphasize the welfare of consumers. This underlines an important implication. It signals that consumers welfare is not one of the goals of Thai competition law enforcement. Consequently, the enforcer *i.e.* the TCC, does not have to be concerned for the public's welfare. This inevitably set the enforcement tone for the TCC not to be concerned about whether it provides adequate transparency to the public because transparency is neither TCC's duty nor an objective of competition law.

4.2.2. monopolization and cartels

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[71] ibid. Section 37

[72] ฎ.*89/2556* (n 63)

[73] The Competition Act (1999) (abolished), the End Note

Section 54 and 55 of the Competition Act prohibit monopolization, cartels, and any other kinds of concerted practices committed by firms. Exemptions of the offense are provided in the last paragraph of Section 54 and in Section 56.

Overall, any kind of concerted practices which reduce or restrict competition is illegal.[74] An exemption is concerted practices which are related to policy or order of the TCC, although they might result in reducing or restricting competition, they shall be legal.[75] The rest of the exemptions are, for example, efficiency justification,[76] agreements related to intellectual property rights,[77] and any other agreements prescribed in ministerial regulations.[78] It will be shown later that the TCC divides the charges into hardcore cartel and ordinary cartel in one of its guideline.[79]

> *'**Section 54**: Any business operators competing with each other in the same market shall not jointly undertake any conduct which monopolizes, reduces, or restricts competition in that market in one of the following ways:*
>
> *(1) to fix, whether direct or indirectly, purchasing or selling price, or any trading conditions that affect the price of goods or services;*
>
> *(2) to limit the quantity of goods or services that each business operator will produce, purchase, sell, or provide, as agreed;*
>
> *(3) to knowingly establish an agreement or conditions in order for one side to win an auction or to win in a bid of goods or services or in order for another side not to enter an auction or a bid of goods or services;*
>
> *(4) to allocate areas in which each business operator will sell, or reduce a sale or purchase goods or services, or allocate purchasers or sellers to or from which each business operator will sell or purchase goods or services under the condition that other business operators shall not purchase or sell those goods or services.*
>
> *The provisions under paragraph one shall not apply to the conduct of business operators related to each other due to a policy or commanding power as prescribed in the Commission's notification.'*

[74] *The Competition Act* (n 52) Section 54 - 55
[75] ibid. Section 54
[76] ibid. Section 56 (2)
[77] ibid. Section 56 (3)
[78] ibid. Section 56 (4)
[79] See *2.3.1. The Guideline on Concerted Practices and Monopolization* above

*'**Section 55**: Business operators shall not jointly undertake conduct which monopolizes, reduces or restricts competition in a market in one of the following ways:*

(1) to establish conditions referred to under Section 54 (1), (2), or (4) among business operators which are not competitors in the same market;

(2) to reduce the quality of goods or services to a condition lower than that previously produced, sold, or provided;

(3) to appoint or assign any one person to exclusively sell the same goods or provide the same services, or of the same type;

(4) to set conditions or practices for purchasing or producing goods or services so that the practice follows what is agreed;

(5) to enter joint agreements in other manners as prescribed in the Commission's notification.'

*'**Section 56**: The provisions under Section 55 shall not apply to one of the following situations, where:*

(1) the conduct of business operators is related to each other due to a policy or commanding power as prescribed in the Commission's notification;

(2) the joint business agreement is for the purpose of developing production, distribution of goods, and promotion of technical or economic progress;

(3) the joint agreement is in the pattern of contracts between business operators of different levels, in which one side grants the right in goods or services, trademarks, business operational methods, or business operation support, and the other side is granted rights, with a duty to pay charges, fees, or other remunerations for the rights granted;

(4) the agreement type or business format is prescribed in a ministerial regulation on the Commissions' advice.

A joint agreement under paragraphs (2) and (3) shall not result in any limitation exceeding what is the necessary in order to achieve the benefits mentioned above, shall not cause a monopoly power or substantially restrict competition in a market, and impact on consumers shall be considered.'

4.2.3. Abuse of dominant position

Section 50 of the Competition Act prohibits abuses of dominant position.[80] Overall, holding a dominant position alone is not illegal. However, using the position to exploit a market or other firms unfairly or without justification is.

The Section can be divided into two categories: unfair exploitation and exploitation without justification. The former involves fixing or maintaining purchase[81] and imposing a condition for other firms.[82] If the foresaid conducts are done unfairly, they should be illegal according to the Section. The latter consists of altering import goods into the country[83] and intervening other firms.[84] Doing so without justifiable reasons will be illegal according to the Section. The interpretation of the Section, as given by the TCC, will be discussed later on in the TCC guidelines.[85]

> *'**Section 50**: A business operator shall not apply its dominant position in a market in any of following ways:*
>
> *(1) by unfairly fixing or maintaining the level of purchasing or selling price of a good or service;*
>
> *(2) by imposing an unfair condition for another business operator which is its trading partner in order to limit services, production, purchase, or sale of goods, or to limit an opportunity in purchasing or selling goods, receiving or providing services, or seeking credits from other business operators;*
>
> *(3) by suspending, reducing, or limiting service provision, production, sale, delivery, importation into the Kingdom without any appropriate reason, or destroying or damaging goods for the purpose of reducing the quantity to be lower than demand of the market;*
>
> *(4) by intervening in the business operation of others without any appropriate reason.'*

4.2.4. Merger control

Section 51 of the Competition Act oversees all aspects of merger control in Thailand. It aims to regulate market concentration as a merger takes place. The Section can mainly be divided into two categories: merger which has to be notified and merger which has to be permitted.

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[80] *The Competition Act* (n 52) Section 50
[81] ibid. Section 50 (1)
[82] ibid. Section 50 (2)
[83] ibid. Section 50 (3)
[84] ibid. Section 50 (4)
[85] See *2.3.3. The Guideline on Prohibited Conducts of Dominant Firms* above

The former is when such merger may substantially reduce competition in a market. The merging firm has to inform the merger to the TCC within a certain period of time.[86] The latter is a merger that may cause a monopoly or result in a dominant position in a market. The merging firm has to get TCC's permission before merging.[87] There are also reservations in case of merger to adjust the internal structure with a greenlight from the TCC. In such case, the merging firm need to neither inform nor ask for permission from the TCC, although such merger would lead to substantially reduction of competition, dominant position, or monopoly.[88]

> *'**Section 51**: Any business operator conducting a merger which may substantially reduce competition in a market under the criteria prescribed in the Commission's notification shall notify the outcome of such merger to the Commission within 7 days from the date of merging.*
>
> *Any business operator planning to conduct a merger which may cause a monopoly or result in a dominant position in a market, shall seek permission from the Commission.*
>
> *The notification under paragraph one shall indicate the minimum amount of market share, sales revenue, capital amount, number of stocks, or assets to which business operators shall be subject.*
>
> *Mergers shall include:*
>
> *(1) Mergers among producers, sellers, producers and sellers, or service providers, resulting in one business remaining and the others' business terminating, or a new business coming into existence;*
>
> *(2) Acquisition of all or part of the assets of other business in order to control its policy, business administration, direction, or management in accordance with the criteria prescribed in the Commission's notification.*
>
> *(3) Acquisition of all or part of the stocks of the other business, whether directly or indirectly, in order to control policy, business administration, direction, or management in accordance with the criteria prescribed in the Commission's notification.*
>
> *Notification of outcome of a merger under paragraph one, and a request for permission, and the permission for a merger under paragraph two, shall be in accordance with the criteria, procedure, and conditions prescribed in the Commission's notification.*

[86] *The Competition Act* (n 52), Section 51, para. 1
[87] ibid. Section 51, para. 2
[88] ibid. Section 51, para. 6

The provisions under paragraph one and paragraph two shall not apply to a merger conducted in order to adjust the internal structure of a business operator related to each other due to a policy or commanding power as prescribed in the Commission's notification.'

4.2.5. Unfair commercial conduct

Section 57 of the Competition Act prohibits any conduct which may unfairly damage other firms. These conducts include, but not exhaustive of, unfairly obstructing the business operation of other firms,[89] unfairly utilizing superior market power or superior bargaining power,[90] unfairly setting trading conditions that restrict or prevent the business operation of others,[91] and any other conducts prescribed by the TCC.[92] The matter of being 'unfair' will be discussed later in the TCC guideline.[93]

*'**Section 57**: No business operator shall undertake any conduct resulting in damage on other business operators in one of the following ways:*

(1) by unfairly obstructing the business operation of other business operators;

(2) by unfairly utilizing superior market power or superior bargaining power;

(3) by unfairly setting trading conditions that restrict or prevent the business operation of others;

(4) by conduct in other ways prescribed in the Commission's notification.'

4.2.6. Fines and punishments

The Competition Act also covers fines and punishments resulting from the foresaid prohibitions. They can be divided into two categories: criminal and administrative punishments.

Section 71 – 79 deal with criminal punishments. Monopolization, cartels, and abuse of dominant position can get up to 2 years imprisonment and no more than 10% fine of the previous year income, or both fined and imprisoned.[94] Those who violate orders or authorities of the TCC may get up to 1 year imprisonment and no more than 100,000 THB.[95]

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[89] ibid. Section 57 (1)
[90] ibid. Section 57 (2)
[91] ibid. Section 57 (3)
[92] ibid. Section 57 (4)
[93] See *2.3.5. The Guideline on Unfair Conducts to Competitors* above
[94] *The Competition Act* (n 52) Section 72
[95] ibid. Section 71, and 73-75

The latter punishment also applies to anyone who reveals information in which the TCC considers '*…normally reserved and not revealed…*'.[96]

Section 80-85 deal with administrative punishments. Anyone who violates merger control requirements or commit unfair commercial conducts shall be subjected to administrative punishments. For the merger control, the violating party can get up to 200,000 THB administrative fine or 0.5% of the transaction value in the merger.[97] Anyone who commits unfair commercial conducts shall be subjected up to 10% of the previous year income.[98]

4.3.The soft laws

The soft laws of Thai competition can be seen through the TCC's guidelines, notices, prescriptions, announcements, *etc*. Many names have been called by the law. All of them are equally legal binding to all parties.[99] By that reason and for the sake of simplicity, the Thesis will call them 'guidelines'.

There are currently 5 TCC's guidelines in total. They are guidelines on concerted practices and monopolization,[100] holding dominant position,[101] prohibited conducts of dominant firms,[102] merger control,[103] and unfair conducts to competitors.[104] Three of them were published in 2018, another two in 2019 and 2020. These guidelines should provide enforcement priorities of the TCC and the TCC's interpretation of the competition law. However, it will be shown that the TCC fails to follow its own guidelines when they make decisions. Consequently, the guidelines become unsuitable mean for policy learning of the public.

4.3.1. The Guideline on Concerted Practices and Monopolization

This guideline was issued in accordance of Section 54 and 55 of the Competition Act on monopolization and cartels. The guideline separates hardcore cartels and ordinary cartels, together with the exemptions of both categories.

Hardcore cartel prohibition has been legislated in Section 54. The guideline describes its scope in its Article 8 and exemption in Article 9. The description focuses on direct

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[96] ibid. Section 76
[97] ibid. Section 80 - 81
[98] ibid. Section 82
[99] ibid. Section 17(2)
[100] TCC, *'Guideline on Concerted Practices and Monopolization'* (in Thai) [2018]
[101] TCC, *'Guideline on Dominant Position'* (in Thai) [2020]
[102] TCC, *'Guideline on Prohibited Conducts of Dominant Firms'* (in Thai) [2018]
[103] There are 2 separate guidelines on merger control: TCC, '*Guideline on Merger Notification*' (in Thai) [2018] and TCC, '*Guideline on Merger Permission'* (in Thai) [2018]
[104] TCC, *'Guideline on Unfair Conducts to Competitors'* (in Thai) [2019]

anticompetitive conducts which may directly harm competition. The conducts include imposing purchase or selling price, [105] limiting quality,[106] rigging binds,[107] and market allocation. [108]

> ***'8.*** *Joint actions between competing business operators that transgress Section 54 that have any of the characteristics as follows:*
>
> > *(1) To determine the purchase price or selling price or any commercial conditions, whether directly or indirectly to price fixing that has any characteristics which are as follows:*
> >
> > > *a) To determine the purchase price or selling price of a product or service in the market such as determining the same price or in the agreed price range or in the same direction. Determining the price range or the proportion that each business operator can raise or lower the price*
> > >
> > > *b) The determination of trade conditions, whether directly or indirectly, that affects the price of products or services in the market such as discounts or any fees such as freights, extra services, payment and warranty terms.*
> >
> > *(2) Quantity Limitation are as follows:*
> >
> > > *a) To determine the quantity of production, purchase or distribution of products or providing services for each business operator.*
> > >
> > > *b) To determine the proportion of production, purchase or distribution of products or providing services for each business operator.*
> > >
> > > *c) To determine the quota of production, purchase or distribution of products or providing services for each business operator*
> >
> > *(3) Determining terms or conditions in the same manner to allow another party to receive an auction or bid for a product or service or to prevent another party from competing in the bid rigging that has any characteristics which are as follows:*

[105] *TCC* (n 100) Article 8 (1)
[106] ibid. Article 8 (2)
[107] ibid. Article 8 (3)
[108] ibid. Article 8 (4)

a) The bid rigging and

b) Determining any terms or conditions that have any objectives which are as follows:

1) To allow any business operator to receive an auction or bid for that products or services.

2) In order to prevent any business operator entering the competition in the auction or bidding for such products or services.

(4) To define the area where each business operator shall sell or reduce sales or purchase products or services in that area or to determine the buyer or seller that each business operator will distribute or purchase products or services which other business operators will not purchase or sell or purchase that product or service which is called "Market Allocation" with any of the characteristics which are as follows:

a) Determining the area that each business operator shall sell or reduce the sale or purchase of products or services in that area.

b) Determining the partners such as buyers or sellers that each business operator will distribute or purchase products or services by other business operators shall not purchase or sell or purchase that products or services.'

The guideline also provides exemption for the hardcore cartel prohibition under Article 9. Basically, all conducts shall not be deemed hardcore cartel as the TCC gives a greenlight.

*'**9.** Actions between business operators that are related to the policies or the power to order according to the announcement of the Competition Commission on criteria for consideration of business operators that are related to the policies or power orders B.E. 2561 that is not an offense under Section 54.'*

Ordinary cartel prohibition has been legislated in Section 55. The guideline describes its scope in its Article 10 and exemption in Article 11. The description focuses on less severe and indirect anticompetitive conducts which may not directly or immediately harm competition. The conducts include imposing purchase or selling price, limiting quality, and market allocation of other firms which are not direct competitors,[109] reducing quality of

[109] ibid. Article 10 (1)

products or services,[110] appointing exclusive distributor,[111] and setting conditions in purchase or selling according to contract.[112]

*'**10.** Any joint action between business operators that offend Section 55 that has one of any characteristics which area as follows:*

(1) Joint actions under the article 8 (1) (2) or (4) between business operators who are not competitors in the same market that will be considered according to the criteria in article 8.

(2) Reducing the quality of products or services to be lower than previous production, selling or providing services by considering the reduction of the quality of products or services in the market of each business operator to be lower than previous production, selling or providing services.

Therefore, each business operator may reduce the quality of products or services in different details.

(3) Appointment or assignment to any person who is the sole distributor of the same product or service which are as follows:

a) The appointment or the assignment may be in writing or other forms

b) A person who is appointed or assigned may be a natural person or a juristic person.

c) A person who has been assigned or appointed as a distributor or representative for services in the same market or the same category.

(4) Determination of conditions or practices relating to the purchase or sale of products or services in order to comply with the agreed terms which are as follows:

a) To determine conditions or procedures for each business operator to follow which may be in writing or other forms.

[110] ibid. Article 10 (2)
[111] ibid. Article 10 (3)
[112] ibid. Article 10 (4)

b) To be a condition or practice relating to the purchase or sale of products or services in the market.'

The guideline also provides exemptions for ordinary cartel prohibition under Article 11. Overall, any conduct shall not be deemed cartel and therefore prohibited if the TCC approves by its announcement,[113] it has successfully proven efficiency,[114] or in case where it is related to other legal rights *e.g.* intellectual property rights.[115]

*'**11.** Any actions in this exception is not an offense under Section 55*

(1) Actions between business operators that are related to the policies or the powers in accordance with the announcement of the Competition Commission on the criteria for consideration of business operators that are related to policies or power orders B.E. 2561

(2) Mutual agreement in a business that is intended for the development of production, product distribution and promoting technical or economic progress.

(3) Mutual agreement in the form of a business that has a contract between business operators at different levels by another party being the right to use the right in products or services, trademark, business practices or support business operations and another party is the licensee who is responsible for paying the right, fees or any other compensation as specified in the contract such as franchise agreement and authorized dealer.'

4.3.2. The Guideline on Holding Dominant Position

This guideline is issued in accordance with Section 50 of the Competition Act on abuses of dominant position. It aims to regulate what construes dominant position which would subject a dominant firm under Section 50 on the prohibition not to abuse its dominant position.

Overall, dominant positions can be categorized into single firm dominance and collective dominance. In case of the former, any firm with market share of 50% and more and with an income of one billion THB or more shall be deemed dominant. [116] In case of the latter, first three largest firms can be deemed a collective dominance when the combined market share is 75% and above and each has individual income of one billion THB.[117] However, collective dominance shall not form if one of the firms has market share lower than 10%.[118] Interestingly, all of the market share and income are considered from the previous year only

[113] ibid. Article 11 (1)
[114] ibid. Article 11 (2)
[115] Ibid. Article 11 (3)
[116] *TCC* (n 101) Article 3 (1)
[117] ibid. Article 3 (2)
[118] ibid. Article 3 (3)

and other factors indicating dominance are not recognized under Thai abuse of dominant position.

> *'**3.** Any undertaking with market share and sales revenue as follow shall be deemed as an undertaking with dominant position:*
>
> > *(1) An undertaking in a market of a particular product or service that has market share in the preceding year of 50 percent or more and has sales revenue of one billion (1,000,000,000) baht or more, or*
> >
> > *(2) First largest three (3) undertakings in a market of a particular product or service that have combined market shares of 75 percent or more and each and every undertaking has sales revenue of one billion (1,000,000,000) baht or more;*
> >
> > *The provision in paragraph 1 (2) above shall not be applied to any undertaking with market share in the preceding year lower than 10 percent.'*

4.3.3. The Guideline on Prohibited Conducts of Dominant Firms

This guideline is also issued in accordance with Section 50 of the Competition Act on abuses of dominant position. It aims to regulate what to be the prohibited conducts of a dominant firm according to Section 50.

Overall, a firm with dominant position cannot commit the following four main conducts. Firstly, a dominant firm cannot determine or maintain price of product or service unfairly. This includes predatory pricing,[119] price below cost,[120] price discrimination,[121] marginal squeeze,[122] excessive pricing,[123] and any other price determination or price maintenance without due cause.[124] Secondly, a dominant firm cannot impose unfair conditions on other firms that the dominant firm does business with. This includes discount schemes,[125] exclusive dealing,[126] quantity forcing, [127] T&B, [128] resale price maintenance, [129] and refusal to

[119] *TCC* (n 102) Article 5 (1)
[120] ibid. Article 5 (2)
[121] ibid. Article 5 (3)
[122] ibid. Article 5 (4)
[123] ibid. Article 5 (5)
[124] ibid. Article 5 (6)
[125] ibid. Article 6 (1) (a)
[126] ibid. Article 6 (1) (b)
[127] ibid. Article 6 (1) (c)
[128] ibid. Article 6 (1) (d)
[129] ibid. Article 6 (1) (d)

supply.[130] Thirdly, interventions to importation of goods into the country.[131] And Lastly, Intervention into other's business operation without due cause.[132]

> *'**5.** Unfair price determination or price maintenance of a product or a service with one or more of the following characteristics shall be considered as the violation of Section 50:*
>
> > *(1) Predatory Pricing which is a price determination of a product or service at an extremely low level to drive a competitor out of the market; it shall be presumed that the price determination of a product or service below average variable cost (AVC) is a predatory pricing; the undertaking with dominant position shall declare the reason(s) or rationale for such price determination, for instance, loss leading by reducing a price of a product to increase the sale of another product; short-run promotions to introduce a new product into a market or price reduction for survival in response to an unprecedented reduction of demand;*
> >
> > *(2) Price Below Cost is a price determination of a product or service in such a way that the price is higher than average variable cost (AVC) but lower than average total cost (ATC); it is necessary to assess all factual information regarding reasons and objectives for such pricing to decide whether the price is reasonable or fair;*
> >
> > *(3) Price Discrimination in which buying or selling prices of a product or service are determined or maintained differently for trading parties, as either one of the following:*
> >
> > > *(a) Setting buying or selling prices of an identical product or service differently to different trading partners due to anything apart from differences in costs, quantity, quality, or any other characteristics of the product or service, and without any other due cause;*
> > >
> > > *(b) Setting an identical buying or selling price of a product or service to different trading parties even though there are differences in terms of costs, quantity, quality, or any other characteristics of the product or service to each party, and without any other due cause;*
> >
> > *(4) Margin Squeeze whereby the undertaking with dominant position sets a price of a product or service that considered as a raw material for another*

[130] ibid. Article 6 (1) (f)
[131] ibid. Article 7
[132] ibid. Article 8

undertaking who is both its customer and its competitor in an upstream-or a downstream-product or service market, with following characteristics:

(a) The undertaking with dominant position operates in such a way that it is a producer or a supplier in that market and a seller of a product or service in an upstream, or a downstream, market simultaneously;

(b) The undertaking with dominant position sets the price of a product or service to another undertaking who is both its customer and a competitor in an upstream, or a downstream, market at an extremely high level in which may result in an insufficient profit for that undertaking to continue its operation;

(5) Excessive Pricing is a price determination or price maintenance at a very high level, allowing the undertaking to earn excess profit or higher profit than it used to by assessing price determination and profitability of other compatible undertakings, domestically and internationally;

(6) Other price determination or price maintenance without due cause.

6. *Imposition of unfair conditions on another undertaking who is a trading party, causing that undertaking to restrict its service, production, purchase, or distribution of products or to restrain itself from being able to purchase or sell a product, from receiving or providing a service, or from seeking other sources of finance from other undertakings with the following characteristics:*

(1) Impose conditions to another undertaking who is its trading party, for instance,

(a) Discount Schemes for a product or service, such as Fidelity Discounts whereby a buying undertaking must buy in bulk or a whole lot which deemed excessive for the buying undertaking and prevent the buying undertaking to choose from other suppliers or requirement for a buying undertaking to buy a tied product to receive a discount;

(b) Exclusive Dealing whereby another undertaking who is a trading party must exclusively buy or sell a product or service from the undertaking with dominant position;

(c) Quantity Forcing whereby another undertaking, who is a trading party, must buy or sell a product or service at a specific quantity;

(d) Tie-in Sale whereby, to enable another undertaking, who is a trading party, to buy a particular product or service from the undertaking with dominant position – i.e. a tying product, that party must buy another product or service – i.e. a tied product;

(e) Resale Price Maintenance whereby the undertaking with dominant position requires its trading parties to sell their products at a suggested price or suggested price range;

(f) Refusal to Supply to its trading party;

(2) Such conditions in (1) shall feature one or more following characteristics:

(a) shall limit or restrict service, production, purchase, or distribution of its trading party;

(b) shall limit or restrict an opportunity for its trading party to buy or sell product, to be provided with service, or to offer service;

(c) shall limit or restrict an opportunity for its trading party to seek for sources of financing from other undertakings;

(3) Such conditions in (1) shall be imposed without due cause.

7. *Suspension, reduction, or limitation of service, production, acquisition, disposal, delivery, import into the Kingdom without due cause, destruction, or causing damage to product, aiming to reduce the quantity in the market below the market demand with following characteristics:*

(1) The action having one or more of the followings:

(a) suspend, reduce, limit service, production, acquisition, disposal, delivery, or import into the Kingdom without due cause;

(b) destroy or causing damage to product;

(2) There shall be an intention to reduce a quantity of product or service below market demand.

8. *Intervention into other's business operation without due cause in which featuring following characteristics:*

(1) Intervention into other's business operation that is not related to the undertaking with dominant position;

(2) There is no due cause for such intervention.'

4.3.4. The Guideline on Merger Control

There are two guidelines on merger control according to the Section 51 of the Competition Act. One for merger that may substantially reduce competition. The merging firm is required to notify the TCC.[133] And the other that may cause a monopoly or result in a dominant position. The merging firm has to get TCC's permission before merging.[134]

Overall, from both guidelines, the threshold for the need to notify or ask for permission from the TCC is subjected to two tests. Firstly, the merger need not to constitute a monopoly. Secondly, the combined incomes of the merging firms shall not exceed 1,000 million THB. As both of the tests meet, the merging firm only has to notify the TCC of the potential merger, no permission is required. In contrast, if the monopoly would be constituted and the combined incomes would be more than 1,000 million THB, a permission from the TCC is required.[135] In addition, a list of requirements for permission to merge is also given in the Guideline on Merger Permission.[136]

The Guideline on Merger Notification

*'**3.** In this Notice,*

A merger that may substantially restrict competition in a particular market means a merger of undertakings with either one's sales revenue or combined sales revenue of 1,000 million baht or higher and which does not constitute a monopoly or an undertaking with dominant position in the market;
....

Monopoly means a sole undertaking in a particular market in which it has a substantial power to determine price and quantity of a product or service independently and has the sales revenue of 1,000 million baht or higher;

....'

The Guideline on Merger Permission

[133] TCC, '*Guideline on Merger Notification*' (in Thai) [2018]
[134] TCC, '*Guideline on Merger Permission'* (in Thai) [2018]
[135] *TCC* (n 133) Article 3
[136] *TCC* (n 134), Article 6

*'**6.** An application for merger approval shall be completed with required information in a form predetermined by the Secretary-General of the Office of the Trade Competition Commission along with supporting documents or evidences as follows:*

(1) a proposed merger plan and related timeline;

(2) details of merging and merged undertakings which at least containing shareholding structures, voting and control rights, sales revenues, and market shares;

(3) merger studies and analysis which at least comprising of the following documents:

(a) shareholding structure analysis, voting and control rights of those undertakings to assess policy relations and/or controlling rights, before and after the proposed merger;

(b) market structure analysis of products or services of those undertakings to assess any impact which may arise after the proposed merger in which at least comprising of analyses on:

1) Pre- and post-merger market structure analysis;

2) Market definition;

3) Market share of the undertakings before and after the merger;

4) Sales revenues of the undertakings before and after the merger;

5) Assessment of impacts on competition in relation to following issues:

a) market concentration;

b) entry of new entrants and expansion of competing incumbents by considering factors such as laws and regulations, transportation costs, accessibility to existing patents, and accessibility to raw materials or other essential production inputs;

c) non-coordinated effects on competition from a merged undertaking means effects from a merged entity in the market which lead to its higher profitability through increase in price or reduction of product quality.;

d) coordinated effects on competition means the effects from the proposed merger allowing the higher possibility for undertakings to coordinate with each other to increase the price;

e) impact on general economic welfare and consumers;

f) other impacts that may influence competitive constraints in the market (if any);

(4) Studies and Analysis of Factors pursuant to Section 52, para 2 that shall cover the following issues:

(a) Reasonable business necessities and benefits for promoting business operations;

(b) Damage or potential competition harm to the economy;

(c) Impact on economic benefit allocation to consumers as a whole'

4.3.5. The Guideline on Unfair Conducts to Competitors

This guideline is issued in accordance with Section 57 of the Competition Act on unfair conducts to competitors. It aims to define what would construe 'unfairness', and thus illegality, to other firms in the market.

Overall, the guideline gives some possible characteristics of prohibited unfair conducts to competitors, namely, setting an unfairly low selling price,[137] setting an unfairly high buying price,[138] preventing other firms from any business association.[139] More importantly, it attempts to define 'unfairness' which is the key word for Section 57. It explains that in order for a conduct to be unfair, the following characteristics shall apply. Firstly, it shall not be commonly practiced as trade norms.[140] Secondly, it shall be imposing new trading condition

[137] *TCC* (n 104) Article 8 (1)
[138] ibid. Article 8 (2)
[139] ibid. Article 8 (3)
[140] ibid. Article 11 (1)

without written evidence and without prior notice.[141] Thirdly, it shall be unjustifiable.[142] Lastly, the TCC reserves discretion power on '*other relevant factors*'.[143]

> *'**8.** An unfair discriminatory practice is a practice conducted by an undertaking against other undertaking(s) by setting price, quantity of product, or other trade practices in production, acquisition, or distribution in such a way that correspond with one or more of the following characteristics:*
>
> *(1) Set an unfairly low selling price;*
>
> *(2) Set an unfairly high buying price;*
>
> *(3) Prevent an undertaking to participate in any association or business gathering unfairly.'*

> *'**11.** To assess a certain action whether it is unfair, the following criteria shall be considered concurrently:*
>
> *(1) Such action is not commonly practiced as trade norms;*
>
> *(2) There is an imposition of condition(s) without written evidence and without prior notice in a reasonable period of time as normally practiced in such trade;*
>
> *(3) Such action has no justifiable explanation(s) from the perspective of business, marketing, or economics;*
>
> *(4) Other relevant factors.'*

4.3.6. The guidelines and policy learning

The existing guidelines of the TCC might give the reader an image of achievable competition policy learning as they should provide some information about enforcement priorities of the TCC. However, the Thesis would like to point out that there is not much that can be learned from the guideline as policy learning. This is because the TCC often fails to follow its own criteria set out in its own guideline when it decides a case. In those cases, the TCC also fails

[141] ibid. Article 11 (2)
[142] ibid. Article 11 (3)
[143] ibid. Article 11 (4)

to provide reasons for not following the guidelines. Thus, the guidelines become unsuitable mean for public policy learning.

All the existing guidelines are very new, only a couple of years since publication. Consequently, there applications in competition cases are yet to be seen. For that reason, the Thesis will demonstrate its argument by an older version of guideline which was in force at the time of the cases.

Back in 2009, the TCC issued the first Guideline on Prohibited Conducts of Dominant Firms.[144] It was later on replaced by the Guideline on Prohibited Conducts of Dominant Firms,[145] as discussed above.[146] During 2009 – 2017, the guideline regulated what conducts firms with dominant position could not do, namely predatory pricing,[147] exclusive dealing,[148] tying and bundling,[149] *etc*. The guideline was moderately detailed. In the case of T&B, it ruled that for any T&B to be illegal, the following conditions must be presented. Firstly, the firm under question needs to hold dominant position.[150] Secondly, the buyers are forced to buy both products.[151] Lastly, other competitors are barred from competing or entering the market.[152] Some of these criteria contain similar features to those of the EU *i.e.* the former two.[153] This should have meant that the guideline provided some enforcement priorities of the TCC. Unfortunately, that thought was short-lived when the TCC decided to go against its own guideline in the two following T&B cases of 2012.[154]

In 2012, the TCC decided on two T&B decisions and released them on a short decision summary.[155] Both of the cases involved in T&B on beverages sales and contain different legal tests. The first case was ruled that in order for the T&B to be illegal the customers need to be forced to purchase both tying and tied products. That was the only legal test required to form illegality.[156] The second case was ruled on the same legal test as the former, in addition, objective justification is also needed to deny the wrongdoing.[157] Whether the justification was an additional criterion or an alternative way to escape liability for the firm would remain unknown as long as the TCC insists to be intransparent about its decision makings. These two cases showed that the TCC ignored most of its own guideline as it failed to consider the three criteria for T&B (or at least mention why they were not considered).[158] Only one criterion

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[144] TCC, *'Guideline on Prohibited Conducts of Dominant Firms'* (in Thai) [2009 - 2017] (abolished)
[145] *TCC* (n 102)
[146] See *2.3.3. The Guideline on Prohibited Conducts of Dominant Firms* above
[147] *TCC* (n 144) Article 7.1.4
[148] ibid. Article 7.2.1
[149] ibid. Article 7.2.3
[150] ibid. Article 7.2.3
[151] ibid. Article 7.2.3
[152] ibid. Article 7.2.3
[153] The EU's legal tests for T&B are thoroughly discussed in Chapter 3: Economic and Legal Analysis of Competition Law: The Case of Tying and Bundling.
[154] According to the TCC short summary of its decisions. See the rewritten version of these decisions in Chapter 4: Rewriting Thai Competition Cases: the Case of Tying and Bundling.
[155] All Thai T&B decisions have been reconstructed and thoroughly discussed in Chapter 4 Rewriting Thai Competition Cases: the Case of Tying and Bundling.
[156] See *the Non-alcoholic Beverage Tying Case I* (2012) in Chapter 4.
[157] See *the Non-alcoholic Beverage Tying Case II* (2012) in Chapter 4
[158] *TCC* (n 102) Article 7.2.3

was applied that is force to purchase, but the other two were completely ignored. This suggests that the TCC does not always follow its own legal test published in its own guideline, nor explain the deviation of such decision. It also shows that the guideline did not represent the actual enforcement priorities taking place in actual competition decisions. This is problematic as it implied that the guideline did not provide policy learning in the approach of the TCC as intended. In contrast, it provided the inaccurate policy learning on how Thai T&B applies. The TCC's guideline is, therefore, an unsuitable mean for policy learning.

5. Methodology and Road Map of the Thesis

The Thesis is a qualitative research which adopts documentary analysis methodology. It focuses on analysing legal and economic literatures and case laws to find the best possible answer to the research question. The Thesis also uses comparative methodology to compare how transparency is utilized between the EU and Thai competition case laws.

Once the problem is identified (Chapter 1), the Thesis analyses legal and economic literatures to conceptualize transparency, legal precedent, and policy learning (Chapter 2). This analysis process shows what the foresaid concepts are and how they work. Most importantly, it shows how they are linked together. That is, the Thesis seeks more transparency in competition decision making for the public. To achieve that policy learning from the competition authority needs to be present for the public. That policy learning derives from legal precedent which should be provided by the authority. And that legal precedent would exist when there is adequate transparency provided by better legal framework. The Thesis moves on to combine the comparative methodology with documentary analysis in Chapter 3 and 4 where legal and economic tests of T&B decisions are discussed. These Chapters discuss legal and economic tests appear in T&B decisions of EU and Thailand. The Chapters aim to identify distinctions between existing legal tests of more transparent competition decision making process, *i.e.* the EU jurisdiction, and less transparent one *i.e.* Thailand. This process aims to compare the existing legal tests to demonstrate that with more transparency, there will be more legal tests present. In contrast, with less transparency, the existing legal tests will be less and often incoherent and inapplicable. The Thesis will move on to suggest a new legal framework and additional enforcement mechanism to encourage the desired transparency.

The methodology of why the T&B decisions are chosen as the competition conduct category for Chapter 4 is separately and elaborately discussed above.[159] In short, T&B were chosen by the Thesis to demonstrate the lack of transparency in Thai competition decision making because of their number of cases available and the wellness of the available information. There are no other plausible alternatives to successfully deliver efficient academic discussions.

[159] See *6. The Methodology: Why Tying and Bundling?* below

To carryout the comparative methodology, the Thesis compares Thai competition law decision making with the EU competition case law. This is because of 2 reasons. Firstly, the EU decision making in competition law is highly transparent. Full competition decisions are published with criteria and rationales of each decisions. There are often summaries of decisions for quick reading. In addition, there are also guidelines suggesting the enforcement approach of the EU Commission with case law citation to ensure policy learning of the public.[160] Secondly, the competition enforcement of the EU is, for the better or for the worst, clearly effective. There are landmark cases where the face of competition law changed because of the legal enforcement. For example, the shift from traditional approach to more effects-based approach of T&B in *Microsoft I*.[161] Although, there are comments that sometimes the effectiveness of the EU Commission is somewhat too effective that it might wrongly punish competitive players in the market.[162] Nonetheless, this effectiveness is definitely something Thai competition authority could learn from this comparative methodology.

The thesis aims to set the benchmark for appropriately transparent decision making at the consistency of legal tests application. This means the Thesis will consider a decision making transparent when a set of legal tests are consistently considered or cited in similar circumstanced decisions. However, this does not mean that legal tests cannot be changed. To the contrast, legal tests should be timely updated to ensure the efficiency of the law. Currently, the legal tests of Thai competition decision making are nowhere near consistent. In the cases with similar circumstances, T&B decisions applied different set of legal tests without justifiable reasons.[163] The suggested solutions in Chapter 5 aims to achieve more transparency by providing new legal framework. This framework will introduce more transparent and consistent information requirement from the competition authority.

6. The methodology: why tying and bundling?

In order to identify the missing opportunity to establish legal tests in Thai competition decisions, the Thesis will compare a category of competition decision of Thailand and the EU. This comparative method will empower the Thesis to effectively describe the concept by bringing into the focus of potential similarities and differences among the decisions.[164] The chosen category needs to contain the same or similar set of legal tests. This will facilitate the comparison between the existing legal tests in one jurisdiction and the missing opportunity to establish legal tests in another jurisdiction.[165] Naturally, different categories of competition conducts contain different set of legal tests. Therefore, it is illogical to compare competition

[160] For example, *the Guidance* (n 55)
[161] Case COMP/C-3/37.792 *Microsoft* (Brussels, 21 April 2004), C(2004)900 final
[162] Satariano A., *'Google Fined $1.7 Billion by E.U. for Unfair Advertising Rules'* [March 20, 2019] The New York Times <https://www.nytimes.com/2019/03/20/business/google-fine-advertising.html> accessed June 2020
[163] Legal tests of Thai T&B decisions are elaborately discussed in Chapter 4.
[164] Hirschl R., '*Case Selection in Constitutional Law*' [2005] Vol. 53 The American Journal of Comparative Law, 129
[165] This case selection method is called the 'most similar cases' logic. *See* ibid.

decisions cross categories. By this reason, the Thesis needs to choose one category of competition conducts to identify the lack of transparency in its decision making.

Tying and bundling (*T&B*) decisions were chosen in the Thesis in order to identify the missing opportunity to establish legal tests. This is because of three reasons. Firstly, T&B contains significant development in legal precedent and policy learning. Secondly, there is considerable number of T&B cases for the comparison, and T&B contain the best possible quality and extent of the available information in all Thai competition cases. These three reasons will be discussed consecutively.

6.1.Significant development in legal precedent and policy learning

There has been considerable development in policy learning in the economic and legal analysis of T&B in the EU over the last 4 decades. Thus, choosing T&B as case study allows the Thesis to show how the lack of transparency negatively affects policy learning. Chapter 3 has elaborately discussed the legal and economic analysis of T&B.[166] It shows that T&B have been through many waves of legal and economic evolutions. Thus, the T&B category is a realistic choice for demonstrating what could have been learned by the public if the there was more transparency in Thai competition law decision making. Although the issue has been lengthy discussed in Chapter 3, it will be briefly mentioned here in order to show the significant development in legal precedent and policy learning and why T&B is the realistic choice for the Thesis.

Firstly, T&B has been through many waves of economic discussions and debates whether it is a good thing for competition and markets, should it be controlled or *laissez-faire, etc*. The waves are namely Pre-Chicago School (the leverage theory), Chicago School (the single monopoly profit theory), and Post-Chicago School.[167] It took decades for the EU T&B to result in somewhat settled economic theories as we see today. Secondly, T&B also has been through a length of legal evolution by the case laws. The legal tests for the T&B had been continuously evolving. Discussions, debates, and criticisms helped to form today's legal test for illegal T&B as we know today.[168] Landmark case laws which had contributed to the legal evolution of T&B can be categorised into the classical case laws and the effects-based case laws. The former includes *Hilti* and *Tetra Pak II.* They played important roles to create fundamental legal tests, namely, dominant position condition, distinctive products, customer choice to buy the products, and objective justifications.[169] The latter includes *Microsoft I and II* and *Android*. These landmark cases led EU competition law into a new era of effects-based approach. The additional legal tests from these cases are namely influence from strong demand-related efficiencies and barriers to entry, likeliness to exclude equally efficient competitors in the tied market, and likeliness to maintain or strengthening market power on any relevant market.[170]

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[166] See *Chapter 3: Economic and Legal Analysis of Competition Law: The Case of Tying and Bundling*
[167] See '*2. The evolution of the economic thinking of T&B*' in the Chapter 3.
[168] See '*3. The evolution of the legal treatment of T&B: EU case laws*' in the Chapter 3.
[169] See '*3.1. The classical case laws*' in the Chapter 3.
[170] See '*3.2. The effects-based case laws*' in the Chapter 3.

This evolution of policy learning of the T&B allows the Thesis to effectively show how the lack of transparency negatively affects policy learning as it points out what has Thai competition law missed out by not providing adequate transparency in decision making. Thus, the T&B category is a realistic choice to demonstrate the lack of transparency in Thai competition decision making.

6.2.The number of cases

Apart from the category section, the number of decisions per category also plays an important role in consistency of the demonstration. The number should present repetitive missing opportunities on establishing legal tests. Ideally, the more decisions would represent the more repetition the missing opportunities, and thus the better for the demonstration. Although Thai competition cases are limited, the number of the cases (although small) shall help to carry out as efficient analogy as possible.[171]

There are in total 108 competition cases to date (1999-2018). The information regarding these cases is briefly published by the TCC. As far, the TCC provides no information about any competition cases in 2019-2020.

[171] This limited number of cases method in case selection is called ‘Prototypical Cases’. See *Hirschl* (n 164)142

Table 4: Total numbers of competition cases in Thailand[172]

Year	Total Number of Cases	Anti-Competitive Categories					
		Unfair Practices	**No information**	**Cartels**	**Tying and Bundling (T&B)**	**Predatory pricing**	**Merger Control**
2018	6	5	1	-	-	-	-
2017	2	1	1	-	-	-	-
2016	4	1	1	2	-	-	-
2015	1	-	1	-	-	-	-
2014	2	-	-	2	-	-	-
2013	3	-	3	-	-	-	-
2012	11	3	3	3	2	-	-
2011	3	1	2	-	-	-	-
2010	1	1	-	-	-	-	-
2009	1	1	-	-	-	-	-
2008	4	2	2	-	-	-	-
2007	9	6	-	2	1	-	-
2006	7	2	3	1	1	-	-
2005	9	3	3	2	1	-	-
2004	12	6	4	1	1	-	-
2003	13	3	-	8	-	2	-
2002	7	2	2	2	1	-	-
2001	7	4	1	-	2	-	-
2000	4	3	-	-	-	-	1
1999	2	1	-	-	1	-	-
Total	**108**	**45**	**27**	**23**	**10**	**2**	**1**

Table 4 describes the total numbers of competition decisions by the TCC to date (as published by the TCC) which are categorised by alleged anticompetitive conducts. The Author garnered all the cases and classified them into the presented conduct categories. There are 108 cases in total which can be categorized into the following categories. Firstly, unfair practices hold the highest numbers of cases at 45 cases of out 108. Secondly, cartels category holds the second place of 23 cases of out 108. Thirdly, T&B holds 10 cases out of 108. And the other 2 categories of predatory pricing and merger control hold 2 cases and 1 case

[172] Thai Trade Competition Commission, *'Summary of Competition Decisions'* (in Thai) [2020] Official Website < https://otcc.or.th/complain-summary/2/> accessed June 2020

respectively out of 108 cases. In addition, there is also an unidentifiable conduct category holding 27 cases out of 108.

These unidentifiable conduct cases are decisions that the TCC does not provide any information about the nature of the cases or simply labels them as 'under investigation'. For example, the TCC published results of 4 decisions in 2008. 2 of the 4 decisions are simply labelled as '*A major department store is selling at low prices' and 'Advertisement on low-price products*'.[173] These cases do not provide any detail about why they are problematic to competition law. This is because, obviously, selling and advertising at low prices, by themselves, should not establish anticompetitive conducts. In addition, there are many cases being labelled 'under investigation' without any update for almost a decade. For example, there are 2 cases the TCC labelled '*under investigation*' and no other details provided from 2011, without any further update since.[174] Therefore, they remain unidentifiable regarding to what competition category they should subject to. Not being able to categorize them makes it harder to logically identify or suggest the right legal tests needed for more transparency. By that reason, these cases are considered inappropriate for the Thesis to use in demonstrating the lack of transparency.

As the unidentifiable conduct category is out of the picture, the logical choice for the categories would be unfair practices (45 cases), cartels (23 cases), T&B (10 cases), predatory pricing (2 cases), and merger control (1 case), respectively. Yet, the number of cases alone cannot be a decisive factor to select a category. The chosen category needs to have adequate quality and extent of information to make comprehensive idea of what they are about.

6.3. Quality and extent of the available information

Quality and extent of available information presented in a decision is an important factor of selecting any case study.[175] Naturally, quality and extent of the information help to clarify the decision or case and enable the reader to draw a comprehensive conclusion about the case. In other words, quality and extent of the information in a decision provide good policy learning. The quality and extent of information available differ from category to category. The 'quality and extent' using here should mean how much information is given, how relevant it is to the issue at hand, and how comprehensive a conclusion could be drawn from the available information. To have a viable option to demonstrate the lack of transparency, the chosen category needs to have a fair degree of quality and extent of information to draw a conclusion of what the decisions are about and how they are linked together as a category. A decision category with quality and extent of information, at very least, should tell what the charge is

[173] Thai Trade Competition Commission, *'Summary of Competition Decisions in 2008'* (in Thai) [2020] Official Website < https://otcc.or.th/wp-content/uploads/2020/05/2551.pdf> accessed June 2020
[174] Thai Trade Competition Commission, *'Summary of Competition Decisions in 2011'* (in Thai) [2020] Official Website < https://otcc.or.th/wp-content/uploads/2020/05/2554.pdf> accessed June 2020
[175] Seawright J. and Gerring J., '*Case-Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*'[2008] Political Research Quarterly, 2

being alleged to the firm under question. It also needs to show that all the decisions under the category is under the same charge.

The categories of unfair practices and cartels, although they encompass high number of cases (45 and 23 respectively), prove to hold poor quality and extent of information for the Thesis to effectively demonstrate the lack of transparency. They often lack the information regarding the nature of conducts and sometimes contain conflicting information within a decision. Overall, they do not provide a good picture of what a decision is about. For example, unfair competition practice and abuse of dominant position in Thailand are two separate charges under separate Sections.[176] The TCC randomly labelled a decision in 2017 as an 'unfair competition practice' while applying dominant position test on it before dismissing the case because the lack of the dominant position.[177] With this confusing information, it is impossible to be sure if this decision should be under unfair competition practice or abuse of dominant position. Consequently, it is difficult to apply the correct legal tests -unfair practice or abuse of dominant position. Additional example could go to a cartel category decision from 2016. Ice manufacturers were accused under concerted practice over fixing ice prices. As such, the decision should be considered regarding concerted practice tests (concerted practice -Section 54 and 55). Instead, the case was dismissed because, *inter alia*, the firm did not hold dominant position (abuse of dominant position -Section 50) and the conduct was not unfair (unfair competition practice -Section 57).[178] Similar to the prior example, the conflicting information in this case makes it difficult to apply legal tests. Therefore, the Thesis considers these two categories unsuitable to demonstrate the lack of transparency in Thai competition decision making.

On the other hand, T&B category holds better information comparing to the former two categories. Although the T&B's quality and extent of information are still far from the ideal transparency (hence the reason for the Thesis), it is the best possible category to demonstrate the lack of transparency in competition decision making. Commentators and media had a lot to do with the existing information regarding T&B. The T&B cases caught a lot of attention from commenters and media, especially during the very first years of the Competition Act enactment. As a result, there had been academic articles and news regarding to T&B cases comparing to other categories. There is information regarding to the nature of the decisions, alleged charges, case analysis, and criticisms. This available information of T&B category is elaborately discussed later in Chapter 4 where all T&B decisions are rewritten.[179] Overall, the T&B decisions have shown some information regarding alleged charges to the firms under questions and, particularly, legal tests regarding to illegality of Thai anticompetitive T&B. There are 10 T&B decisions so far. 3 of the decisions contain 2 T&B legal tests, 6 of them contain 1 T&B legal test, and 1 decision does not contain any test.[180] These tests may not

[176] Unfair competition practice is under Section 57 (former Section 29) and abuse of dominant position is under Section 50 (former Section 25) of the Competition Act.
[177] Thai Trade Competition Commission, *'Summary of Competition Decisions in 2017'* (in Thai) [2020] Official Website < https://otcc.or.th/wp-content/uploads/2020/05/2560.pdf> accessed June 2020
[178] Thai Trade Competition Commission, *'Summary of Competition Decisions in 2016'* (in Thai) [2020] Official Website < https://otcc.or.th/wp-content/uploads/2020/05/2559.pdf> accessed June 2020
[179] See *Chapter 4 Rewriting Thai Competition Cases: the Case of Tying and Bundling*
[180] See '*Table 1: The legal tests of all 10 Thai T&B case laws*' in Chapter 4 Rewriting Thai Competition Cases: the Case of Tying and Bundling

seem significant when considering that there are around 5-7 legal tests for anticompetitive T&B in EU jurisdiction.[181] However, these are the best possible ones to demonstrate the lack of transparency in Thai competition decisions making.

For the foresaid reasons, the Thesis selects T&B category to identify the missing opportunity to establish legal tests and rationales of the decisions and the lack of transparency in Thai competition law. Each of the 10 T&B decisions will be elaborately discussed in Chapter 4 to show the missing legal tests which would otherwise be shown if the decisions were published.

7. The beneficiary of greater transparency: the public

Generally speaking, transparency often brings desirable features namely legal precedent, policy learning, accountability, legitimacy, efficiency, security, risk management and so on.[182] These features are very beneficial to the public as they lift up the overall quality of societies. The public is, therefore, the initial beneficiary from transparency. As the Thesis provides suggestion for greater transparency, the public thus becomes direct beneficiary from the suggestion. Yet, the question remains -who exactly is the public? For the clarification, the Thesis would like to define and categorize 'the public' as the following.

Oxford Dictionary defines the public as '*ordinary people in society in general*'.[183] Accordingly, the word is meant to address general people of certain societies without being specific to any group or categories. By this definition, the concept is similar to that of '*reasonable person*' in law where the person is an impersonal fiction without special characteristics.[184] The concept of reasonable person is used to represent how a typical member of a certain community should behave in certain situations.[185] Therefore, we can conclude that the public should mean:

Ordinary people or entities without special characteristics

This definition goes along with literatures on beneficiaries from transparency. For example, the word 'public' in political and legal fields has always been associated with any place generally open to the population in general with no exclusivity.[186] It also means the common good or common interest of the people in a society.[187] It also has been pointed out that

[181] Anticompetitive legal tests of T&B in EU are discussed in Chapter 3.
[182] See '*1. Transparency*' in Chapter 2 Transparency, Legal Precedent, and Policy Learning
[183] '*the public'*, (Oxford's Learner's Dictionaries Online, Feb 2021) <https://www.oxfordlearnersdictionaries.com/definition/english/public_2?q=the+public> assessed Feb 2021
[184] Bedder v Director of Public Prosecutions, 1 WLR 1119 (1954)
[185] *DPP v Camplin* [1978] UKHL 2, para. 4
[186] Price V., '*Communication concepts: Public Opinion*' [1992] SAGE Publications, 7
[187] ibid.

citizens and the public are the beneficiaries from transparency.[188] Similarly, it is implied that clients or citizens, as beneficiaries from transparency, can demand accountability from service providers.[189] Beneficiaries from transparency include the general public, consumers, employees, or even employers.[190] Basically, the public can mean anyone or any party in any society without being specific or any reserving to special characteristics.

Once we have our definition of the public, we shall move on to the categorization. Although the public should not mean special groups of people or society, it can still be categorized into different groups of beneficiaries from greater transparency. These beneficiaries can be named as firms and business operators, legal practitioners, and the people.

7.1.Firms and business operators

Firms and business operators within the scope of this topic cover all of those within a certain jurisdiction (in this case, Thailand). No specification for any firm or company to be excluded from the category. Thus, in term of business sector, all the firms and business operators are one of the public.

The first and foremost casualty to lack of transparency in competition decision would be firms and business operators. They have responsibility to design their business model, operations, and how to execute those measures. Without knowing how the laws around their businesses apply, it would bring about unnecessary legal uncertainty to their operations. Not only are these uncertainties inconvenient, they are also likely to be detrimental to business as they are at more risks to break the law and to be exploited from anticompetitive behaviours by others. It is important to note that knowing how the laws apply is not the same as knowing the laws. Everyone should already know what the laws are since they are openly enacted and published *i.e.* the Competition Act.[191] On the other hand, how the law actually applies in practice is not included in the legislation. For that, legal precedent needs to be demonstrated by competition decisions and subsequently case laws. As those are not published but kept secret, firms and business operators are left in the dark as to how competition law should apply. For example, the Thai law on T&B indicates that one cannot anti-competitively tie one product to another.[192] Yet, firms and business operators are in no position to know what they should do to avoid breaking the law. Without knowing the legal precedent on how the law actually applies, many of their commercial promotions are likely to be at risk of infringing the legislation, namely bundling products in packages, buy 1 get 1 free, or selling a product that comes with warranty package. This is because all of these tactics include tying or bundling one product to another.[193] This situation is more than inconvenient for businesses as

[188] Fung A, *et al, 'Full Disclosure: the Perils and Promise of Transparency'* [2007] (Cambridge University Press, United States of America)
[189] Kosack S. and Fung A., *'Does Transparency Improve Governance?'* [2014] Annu. Rev. Polit. Sci., 70 - 71
[190] Buell R.W., *et al*, 'Creating Reciprocal Value Through Operational Transparency' [2016] Management Science
[191] *The Competition Act* (n 52)
[192] ibid. Section 54
[193] Jones A. and Sufrin B., *EU Competition Law: Text, Cases, and Materials* (4th edn, Oxford University Press, Great Britain) 454

it does not only make the trade unnecessary difficult but also riskier for competition litigations. It also poses more risks for abusers. It is certainly easier for some firms or business operators to expressly and deliberately commit to anticompetitive T&B, since they are no existing legal precedent available on illegality of T&B. They can practically commit to anticompetitive T&B with chances to get away with it since there is no real precedent of the T&B offences and no one has ever been prosecuted for it. It will also be detrimental to the consumers or general public (the people) as will be discussed below.

Thus, as greater transparency in competition law is provided, it would definitely benefit firms and business operators as they would know how to behave competitively and not to be anticompetitively exploited by the bigger fishes in the markets. It would also prevent anticompetitive exploitation from those with ill intentions.

7.2. Legal practitioners and academics

Legal practitioners can be considered a part of the public as long as no privilege is given to specific individuals. They are separately categorized from the business sector because of its distinction in term of operation.

Legal practitioners and academics are those who are in the legal professions namely lawyers such as solicitors, barrister, public prosecutors including many forms of legal consultants and the other is law related academics and education facilitators. The first group are the lawyers who may or may not directly involve with the foresaid firms and business operators. Their works are mainly to discuss and give advices regarding competition law to such organizations and may have to involve in litigation in the court of law. It is easy to understand why ambiguous legal application would bring about difficulties for these practitioners as their jobs are to analyse legal precedents and application then give advice their clients. Without adequate information about competition law, *i.e.* legal precedent or application of the law, there is no way these practitioners could efficiently do their work. The second group is those involve in academia. They need to have enough information to make meaningful contribution to academic field. One could argue that this field of work holds great significance because they shape how competition law should be and review the current framework for better improvement. This Thesis is a good example of the second group. Born out of frustration of not being able to find enough relevant Thai competition cases, its existence indicates that there is inadequate transparency regarding Thai competition law for academic purposes.

There is another group of legal practitioners that might benefit from the greater transparency in competition law -judges. Judges are tasked with of deciding what is right or wrong according to existing legalisations in the court of law. They might benefit because in order to make a just decision regarding to a competition case, they need to access to essential information for such case. Therefore, accessing to competition decision by the TCC in order to issue a judgement regarding to Thai competition law is vital. However, judges already have their legal power to demand any information they need to do their jobs from any

governmental organization.[194] This means that if they ever needed any information regarding competition case, they could just demand for it and the other parties would have to comply.[195] This represents exclusivity of this group of individuals. The right to demand any information one needs or wants is, by no mean, general and accessible to everyone. This makes judges lack of public's persona that there should be no special characteristics. The general public does not have this exclusive power to demand what they want to know. In contrast, they are prohibited to know by the legal framework and how it is interpreted by those in power. By this reason, the Thesis does not include judges into the list of beneficiaries of the Thesis as they can invoke the right to know by their own legal power.

7.3.The general public (the people)

Last but not least, the general public or the people should be one of the beneficiaries. Access to official information that is related to general public is a form of human right and is recognized as such under the Universal Declaration of Human Rights.[196] Therefore, the people should have the right to access official information that is not restricted by legal framework *e.g.* national security or other reasons such as intellectual property rights. Furthermore, as the people are more aware of how their competition law works, they would know how their related rights are enforced and consequently be able to defend their rights more efficiently. For example, a person could make informed decision when they are required to buy more than they need or want as a bundled package. Also, there should be no distinction between the general public (the people) and consumers since they represent the same generic group. Each of a person is a consumer and each consumer is a person. Furthermore, the words pubic and consumers are used interchangeably in literatures as they are considered to be the same beneficiaries of transparency. [197]

It is important to note that this 'right for all' means everyone should access the official information equally, not that all information should be made available equally. The Thesis recognizes legal limitations on what information should be kept out from exposure as mentioned above.

For the sake of simplicity to the discussions, the Thesis will hereinafter refer to all three of these categories '*the public*' or '*the general public*'.

[194] Establishment of Administrative Courts and Administrative Court Procedure (1999) Section 9 grants jurisdiction for the Administrative Courts over any conflict between governmental entities and the general public. This comes with the power to request any related information from both parties.
[195] However, there has not been any Thai competition case to the court of law. Therefore, the chance for the court to apply the power is yet to come.
[196] Universal Declaration of Human Rights Article 19
[197] For example, in *Fung* (n 188) and *Kosack S. and Fung* (n 189)

8. What the Thesis has found and its limitations

8.1.The lack of transparency and policy learning

The Thesis has found and proven that Thai competition decision making suffers from severe lack of transparency. There is also not enough and coherent policy learning for the public to understand. This is demonstrated by the discussion about the problem and current legal framework in Chapter 1. It is shown that the TCC does not provide adequate and coherent decision-making information for the public to learn. Thus, the public do not have efficient understanding of what is the priority of competition enforcement.

8.2. Identifying the missing opportunity to establish legal tests as a policy learning in T&B decisions

The Thesis moves on to demonstrate the missing opportunity of the TCC to establish legal tests as a policy learning in T&B decisions in Chapter 3 and 4. All Thai T&B decisions are, for the first time, written for the public to access. It is demonstrated that even with all possible information from all sources, the essential legal tests for illegal T&B are still missing. As compared to the EU competition case laws, more than half of T&B legal tests are neither considered nor acknowledged under Thai competition law. This brought about inefficiency of Thai T&B decision making.

8.3. Suggestion of the new legal framework and additional competition enforcement mechanism

The Thesis moves on to suggest more transparent legal framework and additional competition enforcement mechanism in Chapter 5. The Thesis suggests 3 alternatives to the new legal framework from the most probable to the most ambitious. The first alternative is to amend the Competition Act. the Second is to amend the Competition Act and the Official Information Act. and the third is to amend the former two and the Constitution. Each of them has different scope of effectiveness. But all of them shall result in desirable transparency and policy learning for Thai competition regime. The Thesis also suggests the additional competition enforcement mechanism -the CTO, to provide more assurance that the suggested legal framework will be put into effect.

8.4. The limitations

Firstly, the purpose of the Thesis is to enhance transparency of Thai competition decision making. Although the Thesis acknowledges that transparency in other policy areas are equally important, but they are not the focus of the Thesis. Therefore, the Thesis mainly recommend the most possible and easiest alternative to the new legal framework, that is to amend only the Competition Act. The Thesis acknowledges that there would have been more benefits for transparency in all policy areas if the new legal framework is locked to the most ambitious alternative -to amend the Competition Act, the Official Information Act, and the

Constitution. However, the latter approach is less probable to happen as 3 pieces of legislations, including the Constitution, would have to be amended. Comparing to the former option, the latter seems less likely. Nevertheless, all alternatives are discussed in the Thesis to be a blueprint for future transparency research in other policy areas.

Secondly, it is acknowledged that the suggested Competition Transparency Ombudsman (CTO) would not be legal binding to the TCC under the new legal framework. This is because there are organizations who supposes to have these powers *i.e.* the Official Information Commission (OIC) and the Ombudsman Thailand. For the CTO to have legal binding power to compel transparency will overlap the authorities of OIC and the Ombudsman Thailand. Furthermore, there are currently no organization asking the right transparency questions to the TCC. The aim of the CTO is to ask the right transparency question and promote awareness of the public to the issues at hand, not to directly enforce transparency to the competition authority. Some might argue that the research could turn to improving the OIC and the Ombudsman Thailand instead of establishing CTO. Whilst the argument holds merits, the Thesis aims to provide indirect approach when it comes to additional enforcement mechanism. Thailand had tried all direct enforcement methods on competition *i.e.* re-enactment of the Competition Act in 2017 and reforming the TCC soon after. Unfortunately, they all failed (hence the origin of the Thesis). Thus, the Thesis is trying a different approach for the hope of different outcome. Yet, it is still interesting to see future researches on improvement of the OIC and the Ombudsman Thailand.

Part II: The Problems

Part II introduces the two fundamental problems of Thai decision making. The first section will discuss the lack of transparency in decision making which is encouraged by transparency-unfriendly legislations. The second section brings the reader to the second problem which is directly caused by the first problem, the lack of policy learning from the absence of legal precedent that should have been present in the published decisions. As the result, the public loses the opportunity to policy learning. Consequently, they do not have a clear guideline of how to comply with the laws.

1. The lack of transparency in Thai competition decision making

Generally, transparency in decision making has been defined as being open as possible about the decisions and any actions in the decisions with clear reasons of the decisions. It will only be restricted when public interest is clearly demanded.[198] If we define transparency in such

[198] Lord N, the First Report of Committee on Standards in Public Life [1995] Cm 2850-I 14 and Birkinshaw. P. J. *'Freedom of Information and Openness: Fundamental Human Rights' [2006]* Vol.58 No.1 Administrative Law Review 190

way, then Thai competition has never seen such transparency. The available information about decision making of the TCC is neither shown nor explained. The significant parts of the decision making, in particular, criteria and rationales of the decision, are inaccessible to the public. And because of the absence of explainable criteria and rationales, there is no legal precedent on how competition law is being enforced. The only available information is the short summaries of decisions results on yearly basis which offers none of the foresaid transparency elements. This is the only closest form of transparency Thai competition decision making currently has. Yet, it is neither explainable nor transparent.

Table 5: An example of the TCC summary of a decision in 2016[199]

Order number	Date	Case	The Complaint	Section	The decision and termination
1.	21/01/06	Monopolization of Pattavikorn Market executives	Experiencing troubles and unfairness from Pattavikorn Market executives	29	The TCC acknowledges and agrees with the sub-committee to terminate the investigation.

Table 5 shows how the TCC publishes information regarding its decision. The whole decision is shown in one row of table often containing less than 30 words of explanation about the case. Legal or economic analysis is not something a reader would see. One certain thing a reader would be able to conclude is that the case is now terminated, although he/she might not understand why.

A significant reason for the TCC to arrive with this incoherent approach of decision publication is not solely on how the TCC rolls out its policy. The origin of it starts at the laws which govern how governmental agencies handle and publish their decision-making information. There are at least 3 pieces of legislations involving in this matter –the Constitution, the Official Information Act, and the Competition Act. The Thesis argues these legislations are unfriendly to transparency in decision making and play parts in encouragement of intransparent competition decision making.

1.1.The Constitution

Transparency in decision making by a governmental entity is included in the public right to be informed. The public right to be informed is protected under the Thai Constitution. Thus, the Constitution is the origin of the right. However, the Constitution leaves the authority to decide what to disclose to the public (and what not to) to the secondary legislation.

[199] *TCC* (n 177)

Unfortunately, it will be argued that the secondary law has done a bad job on defying what must be informed and leaving too big discretionary gap for governmental entities. Under this light, the Constitution is the legal origin of intransparent decision-making process of the entire public sector.

> *'A person and community shall have the right to …(1) be informed and have access to public data and information in possession of a State agency as provided by law; … '*[200]

The new Constitution of the Kingdom of Thailand (2017) is, supposedly, the supreme law of the land in which other laws must adhere.[201] It dictates the grounding principles in which the government is obligated to uphold, including the right to access information of the public. Unlike other respected constitutions like in the UK and the US where right to be informed is not directly protected as a constitutional right but under other legislations,[202] Thai right to be informed (at least in theory) is. However, this constitutional status does not necessarily mean superior protection in practice. This is because the Constitution does not specify what information is to be disclosed. It requires the duty to inform to be legislated by secondary legislation. Unfortunately, the secondary law states that the public only holds the right to be informed of the results of decisions and not the decisions themselves.[203] Every governmental entity do not have duty to explain why they have done something. They only have to tell the public about what they have done. This situation made the Constitutional protection worthless because it does not help the public to learn anything at all. It can be argued that there is a need for new Constitutional framework in order to encourage governmental entities to provide more transparency to the public.

1.2.The Official Information Act

The Official Information Act (*'OIA'*) implements the constitutional right for the public to access information held and controlled by governmental entities (including the TCC). However, the Act falls short on encouraging transparent decision-making process in two dimensions, one with significance to intransparent decision making and one which facilitates it. The former is that the public right to access information is limited to only results of the decision makings. Other elements such as criteria and rationales of decision making are left out. This means that governmental agencies are not obliged to provide other essential information apart from the results of decision making. It will be shown that the governmental agencies incline to do just that and nothing more. The latter is other aspects of the Act which facilitate intransparent decision making *i.e.* absence of judicial review by the Courts and

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[200] Thai Constitution, Article 41(1)

[201] However, the Constitution establishes the veto power for the Head of the National Council for Peace and Order (NCPO) to override any constitutional rights regardless of legislative, executive, or judicial force. In that regard, the Constitution might not necessarily be the supreme law of the land. *See* ibid. Article 265 and Thai Constitution (2014) (abolished) Article 44.

[202] Although there are arguments that it should hold constitutional status. *See* Peled R. and Rabin Y., *'The Constitutional Right to Information'* [2011] Vol. 42 (No. 357) Columbia Human Rights Law Review

[203] Discussed below in *1.2.The Official Information Act* and *1.3. Competition Act*

discrimination in granting the right to access information. This Act, thus, poses significant difficulties to transparency in decision makings by governmental entities.

The OIA is the secondary legislation demanded by the Constitution to implement right to access official-held information to the public.[204] Comparing to the UK, the OIA is designed to serve the same purpose as the Freedom of Information Act 2000 (*'FOIA'*) *i.e.* to provides public access to information held by public authorities.[205] However, unlike the FOIA, the OIA does not see the right to be informed as a human right. Internationally, the right is recognized as a human right under Universal Declaration of Human Rights,[206] which the UK and Thailand ratified since 1948.[207] As such, the right should be respected regardless of individual's status and nationality. The FOIA grants right to access information equally to everyone regardless of nationality or interest of the person with the information.[208] However, OIA is not as indiscriminate. It only grants the full right to Thais but leaves the right of others, who do not hold Thai citizenship, to the mercy of the ministerial regulations. Unfortunately, to date, there is no ministerial regulation regarding what to do with the right of aliens.[209] Thus to date, OIA only protects the right to access information of Thais.

The OIA is designed to provide the right to access any governmental information in two ways: obligation of authorities to publish[210] and the right to request information by the public (*i.e.* only Thais).[211] In circumstances where the foresaid two procedures failed, a Thai person is entitled to appeal to the Official Information Commission (OIC) when governmental agency denies such access.[212] The Act also grants the right to a person to object public access to official information which might affect his/her personal interest.[213] It is crucial to note that the final say when it comes to OIA is not the Courts but the OIC itself. The law and the published opinion of the Administrative Court are compatible, any decision by the OIC is final. The Courts (the Admirative Court, in this case) do not have jurisdiction to review such decisions.[214] The implication is that the OIC holds absolute power over any matter in the OIC without possibility of judiciary review.

The OIA poses several difficulties to transparency in decision making by governmental entities. They can be categorised into the difficulty which causes intransparent decision

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[204] The Constitution that demanded the enactment of the Act was the Constitution of 1997. However, the principle of the right to access information of the public have been passed on to the following Constitutions including the current Constitution of 2017. See *the OIA* (n 70)
[205] *The OIA* (n 70) End Note
[206] *The UDHR* (n 196) Article 19
[207] UN General Assembly Resolution A/RES/217A (1948)
[208] The Freedom of Information Act 2000, Section 1(1)
[209] Office of the Council of State, *'Ministerial Regulation Search'* (in Thai) [2019] Official Website <http://www.krisdika.go.th/wps/portal/general/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A2czQ0cTQ89ApyAnA0__EIOAQGdXA4MAM_2CbEdFAHco68Y!/> accessed April 2019
[210] *The OIA* (n 70) Section 7
[211] ibid. Section 9 (third para.)
[212] ibid. Section 13, 18, and 33
[213] ibid. Section 17
[214] ibid. Section 37 and Sripeng S., *'The Binding Effect of the OIC Decisions to Other Governmental Agencies'* (in Thai) [2010] The Administrative Court Publication <http://admincourt.go.th/ADMINCOURT/upload/webcms/Academic/Academic_151014_101148.pdf> accessed March 2019

making and the difficulties which facilitate it. The former is that the OIA only demands the result of decision to be published and not other crucial parts of decisions such as criteria and rationales of the decision. The later difficulties do not directly cause the intransparent decision making, but they play part in facilitating such intransparency. They are the absence of check and balance in separation of power or the gatekeeper situation where the OIC holds absolute power over the right to access information and discrimination in granting the right to access information.

The first category, the OIA demands only the result of decision to be published.[215] This means when it comes to decision making process, a governmental agency is only obliged to provide results of their decision or consideration and not other important elements such as criteria and rationales of the decisions. This is problematic because criteria and rationales of the decisions are not guaranteed to be made available to the public which would make decision making process intransparent. For example, Thai Competition Commission can make a decision on a tying and bundling case and publish only the result that the case is now terminated. The Commission is not legally obliged to inform the public why or even the legal tests constituting the conduct. And these are all legal.

> *'… a State agency shall make available at least the following official information for public inspection… (1) a result of consideration or decision which has a direct effect on a private individual including a dissenting opinion and an order relating thereto… '*[216]

One can argue that the law does not prevent public agencies from publishing more than the law requires. While this is correct, but it is proven to be ineffective in practice. From observation, it is clear that they are more willing to publish when they are told by law or regulation to do so. For example, the National Human Rights Commission of Thailand (NHRC), the Office of Consumer Protection Board (OCPB), and the Election Commission of Thailand (ECT) do not have public access to the criteria and rationales of their decision making at all. However, they do have what the law requires which is results of their decisions or consideration. In 2016, the ECT has two pages summary table for the results of their decision making and prosecution.[217] It is only OIC itself who has every decision making available on its website (yearly basis). The publication contains at least the narrative of decisions including rationales and criteria using in the decision making.[218] Yet, it is only one agency out of many dozens, which will not face legal consequences if one day it decides to cease its decision making publication.

Comparing to the UK, governmental agencies are not only required to publish results of their decisions when it comes to decision making. Policy proposals, decisions, decision making processes, internal criteria and procedures, and consultations are all minimum requirement

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[215] *The OIA* (n 70) Section 9(1)
[216] ibid. Section 9(1)
[217] The Election Commission of Thailand, *'The Report of The Election Commission of Thailand 2016'* (in Thai) [2016] <https://drive.google.com/file/d/1FWkDxIdCQiAJSdv-_cdrSHz-N_bo9P7z/view> accessed March 2019 31-32
[218] For example, this is 1,084 pages of every official decision made in 2016 by the *OIC* on its website. *TCC* (n 10)

for a government agency to proactively publish or make available.[219] These minimum requirements are called the model publication scheme which is demanded by the FOIA[220] and have to be approved by the Information Commissioner's Office (*'ICO'*).[221] With these minimum requirements, publication of important parts of decision making such as criteria and rationales of decision making cannot be left out. Consequently, any governmental agency is obliged by law to make available of such information instead of being at the discretion of the agency like in Thailand. This ensures better transparent decision-making process in the UK.

The second category of difficulties does not directly cause the intransparent decision making, but it plays parts to facilitate the intransparent decision making. The difficulties are the absence of judicial review by the Courts and discrimination in granting the right to access information.

It is impossible to seek judicial review or appeal any decision by the Official Information Commission (OIC). Judicial review is a mean to carry out check and balance in separation of power to prevent concentration of unchecked power in the three-separate power of a state, that is, legislative, executive, and a judicial.[222] The Act clearly states that the OIC decision is final.[223] The Administrative Court, which would otherwise have jurisdiction over such matter, also confirms that the decision of the OIC is final and cannot be appealed to any Court.[224] This implies possibility of less transparency for decision making. Consider this situation, when a governmental agency denies granting access to information, a person is entitled to appeal to the OIC.[225] However, if the OIC denies the access, the matter is final and the information will never be accessible. In this case, there should be another layer of external judicial review which would grant the final say of whether the matter should be kept secret forever *i.e.* a tribunal or a court. The FOIA has such system. Any decision made by the Information Commissioner can be appealed to the Tribunal by a person (complainant) or public authority.[226] The Tribunal would be the external judicial review for the final say of whether the decision to disclose or grant access should stand. This adds another layer of ensuring protection against inappropriate use of power by a single authority.

> *'The extent to which an alien may enjoy the right under this section shall be provided by the Ministerial Regulation.'*[227]

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[219] Information Commissioner's Office, *'Model Publication Scheme'* Version 1.2 (20151023) Official Document <https://ico.org.uk/media/for-organisations/documents/1153/model-publication-scheme.pdf> accessed April 2019
[220] *The FOIA* (n 208) Section 20
[221] Information Commissioner's Office, *'What Information do We Need to Publish?'* [2019] Official Website <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/publication-scheme/#2> accessed April 2019
[222] Persson T., *et al.*, *'Separation of Powers and Political Accountability'* [1997] Vol.112 (No. 4) Quarterly Journal of Economics
[223] *The OIA* (n 70) Section 37
[224] *Sripeng* (n 214)
[225] *The OIA* (n 70) Section 13, 18, and 33
[226] *The FOIA* (n 208) Section 57
[227] *The OIA* (n 70), Section 9

The OIA discriminates in granting the right to access information among the public. The Act only grants the right to Thais and leaves others, whom do not hold Thai citizenship, out.[228] Although, the Act does not technically ban other nationals from the right, instead it pushes the task of regulating it to the executive branch to issue a Ministerial Regulation regarding the alien's right to access information. Unfortunately, there has never been a Ministerial Regulation regarding such right since the enactment of OIA in 1997. Consequently, aliens in Thailand do not have the right to access information of governmental agencies by request. This situation diminishes the cycle of information access and the integrity of the right. If the person is not a Thai, he/she cannot, in practice, request any information from governmental agencies. It also reveals that the OIA does not see right to access information is a form of human rights, otherwise it would have granted the right indiscriminately regardless of nationalities. Thus, if a following Ministerial Regulation would apply, it should have applied to all, regardless of their nationalities, In contrast, the FOIA indiscriminately grants public right to access information by request to any person regardless of nationality or interest of the person with the information.[229] This does not unnecessarily restrict the cycle of information like the OIA. It also implies that, in the UK, the right to access information is a form of human right. In fact, the right to know is entrenched in freedom of expression under the Human Right Act 1998 as *'…[the right] to receive and impart information and ideas without interference by public authority and regardless of frontiers'*. [230] The quoted text is almost an identifiable version of Universal Declaration of Human Rights Article 19, in which the UK has ratified since 1948. Thus, the UK implemented the right to know from the Declaration. As the matter of fact, Thailand also ratified the Declaration together with the UK in the same year of 1948.[231] However, it does not seem like the Thai OIA implemented the right to know in its freedom of information law. This human-right shortcoming may not be the direct factor to cause intransparent decision making, however it may facilitate it.

Although, the enactment of OIA had ratified the constitutional right to be informed for public, it still falls short of encouraging transparent decision-making process. The OIA actively and passively diminishing the cycle of information access. Most importantly, the demand to publish results of decision and not the decisions themselves significantly encourages Thai governmental agencies to publish only the results. The OIA, thus, poses difficulties to transparency in decision makings by governmental entities.

1.3.Competition Act

The main piece of unfriendly legislation to transparency in competition decision making is the Competition Act. The foresaid Official Information Act generally diminishes cycle of information access due to the general application of the Act in which applies to all governmental agencies. Yet, it does not directly demand intransparent decision-making information access. The Competition Act, together with the legal interpretation of the TCC, diminish cycle of information access greater. They directly demand the intransparency in decision-making process in competition law by prohibiting any further information regarding

[228] ibid. Section 9
[229] *The FOIA* (n 208) Section 1(1)
[230] The Human Right Act 1998 Article 10
[231] *UN Resolution* (n 207)

decision makings to be published apart from the results of the decisions. In other words, the Act introduces secrecy of information to be the principle and transparency as the exemption. The Competition Act, thus, poses significant difficulties to transparency in competition decision makings greater than what the Official Information Act already has done.

There have been two Competition Acts to date. The first one was adopted in 1999 and has been replaced by the one in 2017. Since the 1999 Act is now abolished, it will not be the focus of the discussion. Nevertheless, some of it may be brought to light where relevant. Overall, the Chapter considers that there are two Sections of the Act that cause intransparent decision makings: Section 29(12) on solely demanding results of competition decision and Section 76 with legal interpretation of the TCC on prohibition of competition decision publication.

> *'The Office shall have the following powers and duties: … (12) to disseminate the outcome of matters considered by the Commission to the general public; … '*[232]

In strict interpretation of the Competition Act Section 29(12), it demands release of the results of decision makings by the TCC to the public and does not prohibit further release of information.[233] Thus, it is a replica version of the OIA Section 9(1) recently discussed above. Together, they set the minimum standard of transparent decision making for all the governmental agencies (in case of the OIA) and particularly the TCC (in case of the Competition Act) to publish at least the results of their decision makings. Thus, the same effects apply to the Competition Act in the same manner as to the OIA.[234] The only guaranteed right to be informed for the public is the results of competition decision making and *not* other crucial parts of decisions such as criteria and rationales of the decision. This is problematic because the competition decision-making process is not guaranteed to be transparent. Although, it does not necessarily have to be intransparent because there is no law preventing the TCC to opt in for more transparency in their decision-making process. Unfortunately, that is not the case of Thai competition decision making. It has already been shown earlier that the TCC does not release any further information except the very short results of their decisions.[235] Essential information such as criteria and rationales of the case are left out.

The real difficulty about the Competition Act, however, lies in between Section 76 and the TCC's interpretation of it. The TCC interprets Section 76 to be a total prohibition of any release of further information apart from the short decision summary the TCC puts online. This means that the Competition Act, which is interpreted and enforced by the TCC, does not only require too little information but bans any further information regarding competition decisions as well. This includes the criteria and rationales of the decisions. Therefore, the interpretation of Section 76 ensures the intransparent decision-making process.

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[232] *The Competition Act* (n 52) Section 29(12)
[233] ibid. Section 29(12)
[234] See *2. The Official Information Act (OIA)*discussed above
[235] See *Table 5: An example of the TCC summary of a decision in 2016*

'Any person revealing factual information regarding the business or operation of a business operator that is factual information normally reserved and not revealed by a business operator and was received or known due to performance of duties under this Act, shall be subject to an imprisonment of... There is an exception to this case when the disclosure is in accordance with the performance of government duty or for the benefit of investigations, inquiries, case proceedings, or the operation of the Office.

Any person receiving or knowing any factual information from the person under paragraph one and revealing that information in a manner that will likely damage any person, shall be subject to the same penalties.'[236]

Section 76 itself is not in itself troublesome because, according to the wording and exemptions of the Section, it does not prohibit the TCC from publishing competition decision. However, the TCC interprets the Section to be the total prohibition of any further information regarding to competition decisions apart from the short summary it provides online. The Section only prohibits anyone from revealing factual information about the firm which is normally kept secret. Unsurprisingly, there is exception of this nondisclosure. The exception is based on the operation of the office of TCC. That is, if the disclosure is for the TCC to be able to carry out its tasks within its legal boundary, the disclosure should be justified. This exception makes a lot of sense in terms of publication of decision-making process. Because in a decision-making publication, at least some of factual information about the firms under the question would have to be revealed in order to make a comprehensive decision. For example, legal tests for the conduct, criteria, and rationales of the case.

However, the TCC does not see The Section that way. It sees the Section as a total prohibition of any further information apart from the short decision summary it puts online.[237] Hence, in the eyes of the TCC, the Section expressly prevents it from publishing competition decisions and that if they had done so they may face imprisonment according to the Act. This interpretation of the Section by the TCC was a reply letter to the Author's official information request under FOIA. This reply letter will hereinafter be called *'the Letter'*.[238] The Letter denies the Author's request under the FOIA with two following reasons; the TCC had already provided the access by short summary online, and that it does not provide full access of competition decisions to the public according to the TCC's interpretation of the Section 76.

Figure 1: The Letter[239]

'Referring to Book No. ศธ 0590.16/006 on 20 January 2015

According to the referred Book, you required the access of the publicly available online data base of full-official decisions of the TCC.

The TCC, thereby, report to you as the followings;

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[236] *The Competition Act* (n 73) Section 76 (2017 Act -in force) and Section 53 (1999 Act -abolished)
[237] See *Table 2: An example of the TCC summary of a decision in 2016*
[238] The Letter from the TCC to the Author *("the Letter"*) 2015 s No. พณ (สขค) 0416/1532
[239] Translated by the Author

1. The TCC has the online data base of complaints in summary from 1999-current, publicly available at www.dit.go.th/otcc.

2. However, the TCC does not provide any full-official decisions to the public availability according to the Section 53 of the Competition Act 1999 "Any person who discloses facts of enterprises or any work of other undertakings which should be ordinarily undisclosed, that is acquired by the person or by compliance of the Act, shall be subjected to not exceeding 1 year imprisonment and not exceeding 100,000 Baht fine or both. The disclosure shall be exempted if it is done in official duty, investigation, or litigation." In addition, undertakings filing the complained have asked the TCC to keep the process as secret and not to disclose its information to the public. [emphasis added]

This statement is for you to acknowledge.

Best regards

[signature]

(Mr.Bunyarit Kanlayanamit)

Director-General of the Department of Internal Trade

Secretary of the TCC'

It is important to note that Section 76, which is currently enforced under 2017 Competition Act, is the same to Section 53 of 1999 Competition Act (abolished). The reply was written in 2015, thus, the Section was named Section 53 and not 76. Yet, they are the same in wordings and substance (Thai versions). As the same Section is, word-by-word, transposed into the current Competition Act. The transposition is without further correction on the interpretation, the enforcement remains the same *i.e.* all information regarding competition decisions are banned to be published, with exemption of the results of the decisions.

This interpretation does not only diminish cycle of information access, but it also introduces intransparency in decision-making process to Thai competition law. It was the first time Thai competition authority expressly admitted that they do not hold intention to come out transparent about its decision making. This interpretation was also without consideration of the exemption provided under Section 76 which excludes the release of information within the operation of the office of the TCC.[240] If considered, full competition decisions including their criteria and rationales should have been published because decision making is a legal duty of the TCC.[241] Section 76 and the legal interpretation of the TCC, therefore, pose significant difficulties to transparency in competition decision makings greater.

It is seen that 3 foresaid legislations are unfriendly to transparency in decision-making process. However, the legislations are not the ones to take all the blame. This is because the legislations themselves do not prohibit transparency. It is the inappropriate, and perhaps incorrect, interpretation of law that does the trick. For that reason, Thai competition decision making has been put into the dark corner of transparency since the enactment of the Act in

[240] *The Competition Act* Section 76 (2017 Act -in force) and Section 53 (1999 Act -abolished)
[241] *The Competition Act* (n 52) Section 17(4)

1999. This intransparent decision making process does not stop there. It results to further damage to Thai competition as will be discussed in the next topic.

2. The lack of policy learning

Because competition decision making is intransparent, no one knows what are the criteria and rationales of anti-competitive conducts contained in the unpublished decisions. The legal precedent of Thai competition law is, therefore, kept secret by the competition authority. This creates lack of policy learning outside of the inner circle of the decision makers. Legal precedent should always be known to (or learnt by) everyone -the public. The reason is that the public needs to know what is legal and what is not in order to comply with and adapt their activities to the laws. To be known or learnt is, therefore, the whole point of legal precedent. If the precedent is kept secret and known only to the inner circle of decision makers, the people cannot learn what is legal competitive conduct and what is anti-competitive conduct. Consequently, the laws do not function properly and equally to all the people. Above all, there is no legal certainty of how Thai competition law is enforced. To improve the lack of policy learning, decision-making process has to be more transparent, so the criteria and rationales of competition decisions will be known to the public.

Policy learning is a process of data accumulation regarding problems and solutions in a variety of contexts in order to acquire new information and knowledge to achieve policy goals.[242] In other words, policy learning is when we learn how others face and solve policy problems and trying to apply what we learn to fix our similar problems. Because policy learning is a process of learning from the precedent, it is viewed as the easiest and the most trustworthy way to solution for any difficulties faced by policy makers and practitioners. However to achieve policy learning, the learners must be able to access adequate information for such learning.[243] Without the necessary information, policy learning cannot take place.

Policy learning in law often follow legal precedent. Legal precedent occurs when a judiciary decision is made and is expected to be repeated again in the future if similar circumstances present with valid reason to make the same decision again.[244] Legal precedent comes in two forms: binding and persuasive. In common law jurisdictions, *e.g.* the UK, legal precedent is binding, that is, the Courts and legal authorities would have to follow the precedent established in the past, unless other circumstances occur. Therefore, it is a form of law. In civil law jurisdictions, *e.g.* Germany, France, and Thailand, legal precedent often plays persuasive role. That is, the precedent would be seriously considered in similar circumstances but not legally binding to the Courts or legal authorities.[245] However, it has been argued that

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[242] *Moyson* (n 37)
[243] Lindberg H., *Knowledge and Policy Change* in Knowledge and Policy Change (Cambridge Scholars Publishing, Great Britain) 1
[244] Landes W. M. and Posner R. A., *'Legal Precedent: A Theoretical and Empirical Analysis'* [1976] Vol.19 The Journal of Law and Economics 250
[245] Koopmans T., *Stare Decisis in European Law* in *Essays in European law and integration; to mark the silver jubilee of the Europa Institute Leiden* (Kluwer Law and Taxation, USA) 11-12 *and* Leeds J., *'Introduction to the*

the line between these two fashions is less defined as common law side increasingly codifies their laws while civil law side increasingly rely on precedents from higher courts.[246] Nevertheless, this does not necessarily mean that the role of legal precedent will change across jurisdiction systems. Legal precedent would show its policy-learning feature by being known to the public. This is because the existence of legal precedent is for, *inter alia*, the public to adapt their activities among themselves and to the laws by ability to predict the judiciary decisions.[247] This implies that the public needs to know the legal precedent in order achieve such adaptation. Thus, legal precedent needs to be publicly accessible.

The situation of Thai competition law is that the legal precedent in competition decisions are not known to the public. Therefore, the public does not benefit from policy learning from the competition precedent. Consequently, the people cannot make informed prediction about judicial decisions and thereby cannot comply their activities with the laws. To improve the lack of policy learning, decision-making process should be more transparent, so the legal precedent, especially the criteria and rationales of competition decisions, will be known to the public.

Part III: An Overview of the Solution

The Chapter introduced the two fundamental problems of Thai decision making *i.e.* the lack of transparency in decision-making process and the lack of policy learning. This Part will introduce readers to the suggested solution of the Thesis *i.e.* legal framework for more transparent decision making and additional enforcement mechanism. The suggested solution will be elaborately discussed again in Chapter 5.

As we can see in Part II, the problem of intransparent decision-making process and lack of policy learning in Thai competition law comes down to non-obligatory publication of the creations and rationales of decisions by the TCC. Therefore, the publication should be obligatory so providing transparent decision making and policy learning will no longer be a choice but a duty. The competition authority should be able to opt out form intransparent decision-making process. The best way to do so is to introduce legal framework assigning the duty to publish official decisions, in which include criteria and rationales of the decisions, obligatory rather than leaving it to the disposal of the competition authority. Because the Thesis focuses on transparency in competition decision making, the legal framework will mostly focus on the Competition Act and how it should be interpreted. However, other influencing aspects such as the Constitution and the Official Information Act will be briefly discussed where relevant.

Legal System and Legal Research of the Kingdom of Thailand' [2016] GlobaLex electronic legal publication <https://www.nyulawglobal.org/globalex/Thailand1.html> accessed May 2019, 3.4

[246] *Koopmans* (n 245) 11-12

[247] Heiner R. A., *'Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules'* [1986] Vol. 15 (No. 2) The University of Chicago Press for The University of Chicago Law School 229

If history has taught us anything about Thai competition, it would be that introducing laws is easily achievable but enforcing them has always been a challenge for Thailand. Because of the poor enforcement mechanism, these laws are rarely enforced. Most importantly, there is no effective review of the discretionary power of TCC's decisions. The Thesis will suggest additional mechanism to ensure that the framework will be enforced and maintained. The suggested mechanism is Competition Transparency Ombudsman (*'CTO'*).

For the legal framework, all 3 bodies of laws will be suggested amendments i.e. the Competition Act, the Official Information Act, and the Constitution.

1. The Competition Act

Although the official philosophy of Thai governmental entities regarding transparency and openness is *'To disclose is the key, to conceal is the exemption.'*[248] The Competition Act, by the interpretation of the TCC, sees it in contrast. It proposes secrecy as the key while disclosure as exemption.[249] Yet, this is the understanding of the TCC to the law and the law itself does not say so. Nevertheless, the law is being too loose and, therefore, leaves too much discretionary power to the TCC which enables them to interpret transparency in such way. To fix this, the Competition Act should be more direct about what the TCC needs to publish rather than what it cannot publish. This is because when the Act focuses on what the TCC cannot publish *i.e.* the so called 'factual information' which is normally reserved and not revealed,[250] and imposes criminal charge from failure to keep such information secret.[251] It is unsurprising to see the TCC being reluctant to expose any information at all. There is neither legal precedent nor law supporting exposure of further information on competition decisions apart from their results (in which requires by law).[252] Thus, upon exposing information that is beyond the requirement of the law and legal precedent, the commissioners and staffs of the TCC would personally risk criminal charges of overexposure under Section 76. This could potentially discourage the TCC from exposing more than it is obligated to. Thus, the Act should impose direct obligation to publish competition decision including criteria and rationales of the decisions to the TCC.

To do that, there are two issues to be dealt with. Firstly, the Act should focus less on what the TCC cannot release. Therefore, Section 76 should be amended. The Section should be more precise on what information would fall into 'no-release category' and leave less discretionary power for the TCC to decide what it does not want to publish. More importantly, the Section should ensure that criteria and rationales of competition decisions will not fall into the no-release category. This will also encourage the TCC's interpretation and approach towards

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[248] Office of the Official Information Commission (OIC), *Official Website of the OIC* [2019] <http://www.oic.go.th/web2017/en/main.html#> accessed June 2019
[249] See *Part II: The Problems*
[250] *The Competition* Act (n 52) Section 76
[251] ibid. Section 76 imposes imprisonment up to 1 year and 100,000 THB (approximately 2,500 GBP) fine.
[252] *The OIA* (n 46) Section 9(1) *and* ibid. Section 29(12)

more transparent decision-making process in competition law. Secondly, the Act should focus more on what the TCC should release. Publication of a decision by an authority is internationally respected and widely practiced. Under an EU Regulation, the EU Commission is obligated to grant public access to its decisions (including documents drawn up and received by the Commission) as much as possible[253] while restriction of the access can only take place when necessary.[254] This means that the EU Commission has to publish its competition decisions which includes important matters like criteria and rationales of its decisions.[255] Looking back to the Thai Competition Act, to focus more on what the TCC should release, the Act should amend Section 29(12) to be narrower. This would force the TCC to publish competition decisions and not only results of them. Also, the Section should ensure that criteria and rationales of the decisions are included. Although this may sound redundant as 'the matter' of decision should already include criteria and rationales of it, but the experience tells us that what is not directly demanded by law, it is unlike that the TCC will deliver. This direct demand from the Act will force the TCC to change its approach towards decision-making process in competition law to be more transparent.

2. The Constitution and the Official Information Act

Although the Constitution and the Official Information Act are not the focus of the Thesis because the Thesis aims to achieve transparent decision-making process in Thai competition law and not other discipline of laws, they are still relevant and influential to the Competition Act in its transparency approach. Thus, they are worth discussing.

In a nutshell, it will be demonstrated in later Chapters that the current constitutional 'right to be informed' is inadequate for transparent decision making. By requiring governmental entities to only inform and not to give reason results to the entities to do just that. The Constitution should also guarantee the right to be given reasons to ensure that official decisions will be explained and the decision makers will be held accountable for their decision making.

Moving on to the Official Information Act (OIA), The Act directly influences the Competition Act on intransparent in decision-making process. The Act guides how governmental entities in Thailand is obliged to grant access to official information to the public.[256] Consequently, governmental entities, including official commission like the TCC, are obliged to follow the guideline laid out by this Act and the Official Information Commission (OIC). The Act demands the publication of 'results' of official decisions without the need to include criteria and rationales of such decisions. Consequently, almost all official

[253] Council Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43, Article 10-11
[254] ibid. Article 9
[255] In which the EU Commission provides on its online database <http://ec.europa.eu/competition/elojade/isef/index.cfm?policy_area_id=0>
[256] *The OIA* (n 70) the End Note

commissions in Thailand publish only the results and not other important matters of their decisions. Additionally, the Act cuts out judicial review and discriminates against nationalities among the public.[257] A request for information regarding competition decisions are not entitled to judicial review by the Courts. The OIC holds all the discretionary power. Also, the Act does not regard the right to be informed as a human right. It discriminates on the basis of nationality on requesting governmental information. These situations unjustifiably and unreasonably limit the cycle of information which should have been wider without such limitations. To fix these, the Act should be more generous on public access to information, namely provide possibility of judicial review to request of information and put an end to the discrimination against nationality in public right to request information.

In summary, the Thesis will suggest the Competition Act to take more direct approach towards what the TCC needs to publish instead of what they do not need to publish. This approach will leave less discretionary power to the TCC on decision-making transparency and force the TCC to publish essential parts of competition decisions *i.e.* criteria and rationales of the decisions. It will be adequate to gain transparency in competition decision-making process by amending the Competition Act. Although to achieve equity in transparency across other legal disciplines, the Official Information Act also needs to be amended. The change to transparent decision making will equally affect all the governmental entities. On top of that, Constitution plays an important role to the fundamental rights of Thailand. Therefore, it should guarantee the right to be given reasons of the public as well. Although amending the Constitution for the sake of transparency in Thailand is a very ambitious task, it will be a major win for transparency in decision making for all public sectors in Thailand.

3. The Conclusion

Chapter 1 has discussed introduction of Thai competition decision making landscape, identified the problem at hand, and given a brief overview of how the solutions will be delivered. In the introduction, the Thesis has laid out background of Thai competition law, methodologies used in the research, how the Thesis fits into the existing literatures, what the Thesis is set to achieved, its limitation, and so on. The Chapter also identifies the problem at hand of Thai competition decision making. That is, the current legal framework is unfriendly to transparency for Thai competition regime. To fix that, a brief overview of the solutions is introduced.

In the next Chapter, theoretical discussions of transparency, legal precedent, and policy learning will be carried out in more detail. Their concepts, key factors, and mechanisms will be analysed in order to find the most beneficial way to apply them to the research.

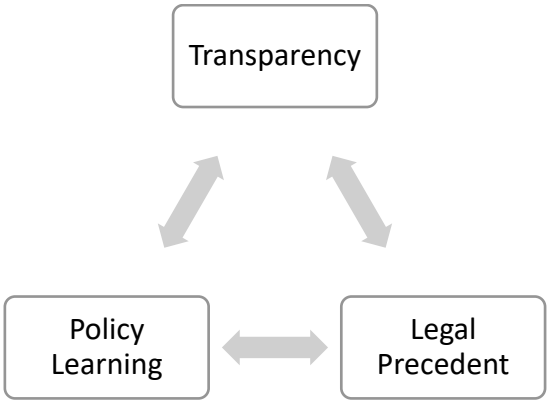
[257] Thoroughly discussed in *Part II: The Problems*

Chapter 2:

Transparency, Legal Precedent, and Policy Learning

Chapter 1 concludes that transparency in Thai competition law decision making is lacking and the lack directly results the absence of legal precedent and then of policy learning, in which is very much needed in Thai competition law. It also suggests the mean to achieve such policy learning *i.e.* amending the current legal framework to accommodate more transparency. Yet, theoretical discussions about transparency, legal precedent, and policy learning are still left unexplored by the Thesis. Thus, this Chapter will discuss theoretical natures of transparency, legal precedent, and policy learning. Their concepts, key factors, and mechanisms will be explored and analysed in order to find the most beneficial way to employ the suggested solution by Chapter 1. The aim of this Chapter is to demonstrate the essences of transparency, legal precedent, and policy learning and their impacts on competition policy. Overall, it will be demonstrated that transparency, legal precedent, and policy learning are one big cycle fully dependant on each other. Without transparency, there shall not be legal precedent, and thus no policy learning. Likewise, without policy learning, there shall not be transparency and legal precedent.

Figure 1: The depending cycle of transparency, legal precedent, and policy learning.



The Chapter will be discussed in three main bodies: transparency, legal precedent, and policy learning. For each of the bodies, the concepts, key factors, and mechanism will be discussed.

1. Transparency

Transparency is frequently mentioned in a variety of topics especially in economics and politics. Generally, when transparency is mentioned, it would only be brief because the general society trusts in transparency to speak for itself. There is often no need to explain or defend the goodness of transparency. The concept of transparency is, therefore, largely left undiscussed. Although its righteousness and desirability are largely unquestioned, its norm or principle is still seen as 'developing'.[258] Nevertheless, an attempt will be made to conceptualize the principle in the way that is relevant to the Thesis.

For the scope of this Thesis, the attempt to define transparency will be restricted only in law. By this way, the definition achieved by the Chapter will be specific for the Chapter's task -to discuss theoretical concepts of transparency in competition law. This will also help to avoid being too general and, thus, vague in the definition.

1.1. The *not-always* simple concept of transparency

Perhaps to someone's surprise, the concept of transparency is not always simple to explain. This is largely because the nature of transparency is difficult to be put into a universal term of content or in a legal term. One could say that understanding of transparency is rather intuitive than explained.[259] Transparency could cover many areas from business, legislature, executive, and judiciary and so on. It is difficult to imagine setting a standard definition for transparency and having to use the same standard for everything. Say, in judicial system, the process has to be as transparent as possible to ensure the integrity of the institution while in business, the ingredients of the products or where they are made should be on the label, yet they still need to protect their other information like trade secrets. These two areas contain different circumstances and, thus, different 'needs' for transparency. The former needs to be as transparent as possible while the later only needs to be transparent in the degree that ensures safety and fairness to consumers and not to risk its trade secret or reverse engineering. Therefore, applying the same standard for transparency to both disciplines might jeopardize the integrity and accountability of judiciary or the business firm. For that reason, defining transparency is usually done within specific area that is safe enough for the definition. For example, Transparency International defines transparency in the context of corruption environment[260] and others do so within their specific areas.[261]

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[258] Bianchi A., *'On Power and Illusion: The Concept of Transparency in International Law '* [2013] Transparency in International Law, 6

[259] An attempt to define this difficulty is *'What then is transparency? If one asks of me, I know; if I wish to explain to him who asks, I know not'*, showing that understanding of transparency is rather intuitive than explanation. See ibid., 9

[260] *'Transparency means shedding light on shady deals, weak enforcement of rules and other illicit practices that undermine good governments, ethical businesses and society at large.'* See Transparency International, *'What is Transparency?'* [2019] Official Website <https://www.transparency.org/what-is-corruption> accessed August 2019

[261] Maupin defies transparency specifically within international investment law, *see* Maupin J., *'Transparency in International Investment Law: The Good, the Bad, and the Murky'* [2013] Transparency in International Law

Yet, there is a general understanding and expectation of transparency:

It is generally transparent when there is publicly accessible information with minimal to none costs for the accessing party.[262]

From this above general understanding, transparency has two key factors. Firstly, there should be information which is publicly accessible. This means that the information could not be restricted to certain group of people or, if interpreted strictly, should not be subjected to any discretion of a judicial entity who has power to decide who sees what. The information would literally be for general public to access regardless of nationalities or races. Secondly, the costs of accessing such information should be kept free or at least at the minimum for only occurring operational costs in which is ideally should be at least partially subsidized by states.

1.1.1. Publicly accessible information

It should be noted that when we talk about publicly accessible information, it should mean information within public policy, *i.e.* the information which is held and used for the public. This is because the information is about administrating the public and thus the public should be able to access such information.[263] This should include laws, regulations, policies, any decision making of governmental entities, *etc*, as well as how they are processed.[264] On the other hand, information outside public policy cannot always be called to transparency. This is because it is not directly relevant to public welfare and might unnecessarily jeopardize other non-public entities, *e.g.* personal privacy and intellectual properties. However, in case of the later information becomes relevant to public policy, it might need to be called to transparency in order to maintain the wellbeing of public welfare.

In the perfect world of full transparency, all information in which the government holds should be made public or, at least, to be accessible to the directly affected parties.[265] Nevertheless, we all know that's never the case.[266] There are always exemptions to transparency, *e.g.* for national security reasons or other reasons such as intellectual property rights. Thus, transparency in reality is more like 'transparency with exemptions' rather than 'full transparency'. However, such exemptions should justify the necessity for public good of

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and Klaaren does so within human right to information, *see* Klaaren J., 'The Human Right to Information and Transparency' [2010] Transparency in International Law

[262] These general understanding and expectation can be found in all disciplines. For example, in area of international law, *Bianchi* (n 258), Mock W., *'An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development'* [2000] 18 (2) Dickinson Journal of International Law. In area of social science, Han B., *The Transparent Society* (An Imprint of Stanford University Press, Stanford, California), and so on.

[263] Blanke H. and Perlingeiro R., *'Essentials of the Right of Access to Public Information: An Introduction'* [2018] Springer-Verlag GmbH Germany

[264] Braman S., *'Defining Information Policy'* [2011] Vol. 1 Journal of Information Policy, 3

[265] United Nations Economic and Social Commission for Asia and the Pacific, *'What is Good Governance?'* [2007] Official Website <https://www.unescap.org/sites/default/files/good-governance.pdf> accessed September 2019

[266] Fung A. *et al.*, *Full Disclosure: the Perils and Promise of Transparency* (Cambridge University Press, Cambridge) xii

withholding the information. Yet, we may never know that the withheld information is really for the good of the public since we know nothing about the information.

Therefore, the practical concept of publicly accessible information is transparency with exemptions. Publicly accessible information can be generally understood as things that the public know or should know or easy to discover.[267] Things that are already known or should be known are, for example, laws and other announced regulations. Things that are easy to discover are, such as, judicial decisions which have been published on official websites. However, if the only choice to access the information is to travel from one corner of the jurisdiction to another just to obtain physical copy of the information would unsurprisingly be considered as difficult. The access should be, as it has been put into a metaphor -as easy as looking out a clean window.[268] Looking out of a clean window should not require great afford to be able to see through it. If one would have to manually clean the fog and dust out of the window before being able to see, then that window should not be considered transparent. To put it in a practical form of legal transparency, a law is transparent if its process and effects are predictable so that the public can understand what to expect and comply with it.[269] The nature of the understanding should be as clear as looking out a clean window.

1.1.2. Costs of accessing the information

Costs of obtaining the information could be a burden to prevent people from accessing public information. These costs are not limited to financial costs, but also time cost, opportunity cost, convenience, *etc*. The ideal costs paid by requesting party for transparency to access public information should be none or should be covered by other entities, such as authorities, and not left to be the burden for the public information requestors.

Clearly, financial costs for accessing information is the most tangible one to discuss. These costs are the amount of money charged to the public information requestors for the expenses in creating, gathering, and/or providing the information. Again, the ideal cost should be no cost at all. But in case there is a cost, not only it should be kept at minimum, it should also be predictable. The low and predictable costs are less likely to discourage people from accessing the information. Whom these costs are placed upon and whether are they expensive depend on each jurisdiction. The UK has ‘the appropriate limit’ which anyone can request without any payment under £600 for central government and £450 for all other public sectors.[270] That is, if a request exceeds the foresaid limits, the requestor shall pay the additional costs. In other words, the costs within the first £450 or £600, whichever the case, shall be placed upon the UK government and the additional from those costs shall be placed upon requestors. In the US, a requestor shall initially pay up to $25 upfront. However, they would be given other

[267] Maupin J., *'Transparency in International Investment Law: The Good, the Bad, and the Murky'* [2013] Transparency in International Law, 151
[268]Fenster M., *'Seeing the State: Transparency as Metaphor'* [2010] Vol. 62 Administrative Law Review
[269] Mock W., *'An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development'* [2000] 18 (2) Dickinson Journal of International Law, 295
[270] ICO, *'Requests Where the Cost of Compliance Exceeds the Appropriate Limit (Freedom of Information Act)'* [2019] Official Document <https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf> accessed September 2019

options in case of fee exceeding the amount, *e.g.* pay more to access the requested information or pay the upfront amount and get the information that *meets* the payment.[271] However, such fee could be waived as such information is of public interest.[272] In other words, a requestor would be expected to pay upfront (although in a far smaller amount comparing to what UK government is bearing) before the state would do so. This could possibly make requestors 'think again' before making an information request, especially when it is harder to justify the public interest. In Thailand, on the other hand, there is no central rule regarding financial costs placing on requestors. However, any requested governmental entity can request its own set of fees upon a requester with approval of the Official Information approval.[273] This produces no legal certainty in filing for a request and thus makes it harder and less likely for a requestor to file one.

Overall, these costs should not be unreasonably high and prevent people from requesting public information. Moreover, they should be predictable and kept as minimum as possible.

There are also other costs placed upon requestors and might discourage them from requesting public information. These costs could be the time requestors spend on, lost opportunity cost, convenience, *etc*. When these costs are high *i.e.* they need to spend a lot of time on the bureaucratic process of requesting the information or it is very inconvenient to do so, these factors may discourage people from accessing the information. In contrast, these costs are lower in case where there is time limit where a requested public entity shall fulfil the information request, thus less burden placed upon requestors. For example, in both UK and US, the requestors must be responded within 20 days of the request.[274] One can see that 20 days are not unreasonable period of time to handle a request. However, the certainty of the time gives predictability which is crucial to the request, because people are able to predict when they are going to get the response (although they may have to wait longer to get the requested information). This situation can be considered to contain time cost which reflects to the costs of requestors. Yet, this cost is limited and predictable. On the other hand, in Thailand, there is no time limit imposed to governmental entities. The law only requires them to respond 'within appropriate time'.[275] However, it is the discretion of the authority to decide how 'appropriate' should be. Therefore, there is no certain of timeframe in Thailand on information request at all. This places unlimited and unpredictable time cost to requestors in which is not helpful to transparency.

The concept of transparency is tricky to be captured. Although, we can roughly summarize the concept as a situation where there is publicly accessible information with minimal to none costs for the accessing party. Yet, the concept might vary depending on legal contexts of each

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[271] U.S. Department of State, *'Fees, Requester Categories, & Fee Waivers (Fees Charged)'* [2019] Official Website <https://foia.state.gov/Request/Fees.aspx> accessed September 2019
[272] ibid.
[273] The Official Information Act (1997), Section 9, para. 2
[274] Freedom of Information Act 2000 (UK), Section 10 (1) *and* U.S. Department of Justice, *'Freedom of Information Act Guide -Time Limits' [*2014] Official Website <https://www.justice.gov/oip/foia-guide-2004-edition-procedural-requirments#N_131_> accessed September 2019
[275] *The OIA* (n 273) Section 11, para. 1

jurisdiction. Some jurisdictions may have more exemptions of publicly accessible information than others and some may have higher costs of transparency than others.

1.2. Mechanism of transparency

Although with a proper concept of transparency, it is still crucial to have a good mechanism for a successful employment of the concept. A good mechanism of transparency works as the rules of the game which govern how transparency should be achieved. In case of public information, They should also govern the duties and rights of public and private sectors regarding publicly accessible information.

Generally, proposals for transparency mechanism revolve around releasing and accessing information, for example, right to access public information, automatic disclosure, accessing decision-making, limited exception to the disclosure, *etc*.[276] While these feathers of obtaining information are important, there are also other factors to consider. The foresaid features are a dimension of transparency *i.e.* the 'output' dimension where people have to gain the access of information and be in a receiver role. Mechanism for transparency should be multifunctional where there should be 'output' factors as well as 'input' factors. This way the public shall have a role in how transparency is interpreted and employed in which should have some impact to the transparency.

A plausible proposal of transparency mechanism is suggested by Stirton and Lodge where transparency is observed in multidimensions where it needs attention from all parties involved to make transparency work.[277] It is suggested that transparency has to come from input actions *i.e.* 'voice' meaning the people would have to complain when there is a need for more transparency and 'representation' where those voices are united and make significant impacts. Also, it has to come from output actions *i.e.* 'information' meaning the access of information should be granted and 'choice' meaning the information granted should not be the only option for the public, they should be able to choose other alternatives *e.g.* information from independent entity such as an ombudsman.

Multidimensional mechanism is good because transparency would not be monopolized by the one sector on providing the information. This means that each party would have a role in activating transparency. If the government does not publish it or publishes it but inadequately, the public can request for it or more of it. Multidimensional mechanisms can be generally seen in democratic societies where people are encouraged to complain or fight for their rights. For example, the UK government, that is promised to be a proactive government on transparency and participation by its information disclosure and procedural guidance,[278]

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[276] See for example, Vervynckt M., *'An Assessment of Transparency and Accountability Mechanisms at the European Investment Bank and the International Finance Corporation'* [2015] European Network on Debt and Development.

[277] Stirton L. and Lodge M., *'Transparency Mechanisms: Building Publicness into Public Service '* [2001] Vol. 28 (No. 4) Journal of Law and Society

[278] Transparency International, *'How Open is the UK Government: UK Open Governance Scorecard Results'* [2015] <https://www.transparency.org.uk/publications/how-open-is-the-uk-government/> accessed September 2019

has its *gov.uk* website to provide a database covering many areas of publicly accessible information in relevance to the UK government. The database is, therefore, one of the sources of 'information' people can access besides other alternatives such as FOIA or press. Because of these multiple sources of information, people are presented with more 'choices' for the information. Having access to information from multiple sources shows a good level of 'output actions' of the mechanism. Most importantly, the public also has its own power on the transparency. They can make their 'voices' heard by requesting the information. The voice could be employed both in cases of inadequate transparency or no transparency at all. Therefore, the voice can be considered as an 'input action' made by other parties than the information issuers to aid transparency deficit. For example, restaurants in the UK are *not* compelled to have the hygiene rating of their own restaurant publicly displayed.[279] People can make their 'voices' heard by expressing their needs for the rating by either directly complaint or indirectly by dinning only at places with the rating displayed, and so on. These input and output dimensions work well together by balancing the power between the information issuers and the information receivers.

While transparency mechanism is encouraged in democratic societies, it is not always so to less democratic jurisdictions such as Thailand. The multiple dimensions mechanism seems to be less effective. It is typical to see transparency being monopolised by the government rather than being empowered by multiple parties of the society. Yet, this does not mean that the public is totally banned from making their 'voices' heard. Instead, doing so may not be as free or convenient as in well-developed democratic societies. In Thailand, there are overreaching laws to restrict the freedom of what people can and cannot say. For example, The Public Assembly Act (2015) requires that the authority should be informed about details of any public assembly at least 24 hours prior to the event.[280] Then the authority has right to order corrections to such public assembly[281] *e.g.* not to be too close to important places namely the royal palace and the parliament and not to disrupt public facilities.[282] However, in practice, the authority seems to exceed the correction orders beyond its legal power. Local police of Nang Lueng District ordered corrections of a public assembly to *'…be careful of [public] expressions …. Do not oppose the National Council for Peace and Order,*[283] *including all signs must not be protesting the work of the government and the National Council for Peace and Order.'*[284] The authority ordered the people not to protest against the government, which is clearly outside the boundary of the its power given by the law. Thus, technically, the order was illegal. But the order was enforced nonetheless.[285] Therefore, in practice, people in Thailand are not allowed to make their voices heard in the same manner as

[279] Except in Wales and Northern Ireland where the food hygiene rating is compulsory. *See* BMG Research, *'Display of Food Hygiene Ratings in England Northern, Ireland, and Wales'* [2018] research project commissioned by the Food Standards Agency
[280] The Public Assembly Act (2015), Section 10
[281] ibid. Section 11
[282] ibid. Section 7-8
[283] Whom had taken the power over Thailand by the *coup* in 2014.
[284] Nang Lueng District Police Order, *'The Summary of the Public Assembly*' (in Thai) [30 Oct 2015] ตช 0015.(บก.น.1)8/848
[285] Thai Lawyers for Human Rights, *'Summary of the Public Assembly Act (2015) (Part I)'* (in Thai) [2016] Thai Lawyers for Human Rights Online Journalism <https://tlhr2014.wordpress.com/2016/03/01/public_assembly_act/> accessed Dec 2019

in more democratic societies. Consequently, multidimensions of transparency in Thailand are definitely less effective than in well-developed democratic societies.

1.3. Degrees of transparency

A glass window can have many degrees of visibility. It could be super clear that looks like no glass standing between inside and outside. It could be clear with minor spots, although they may cause inconvenience, but they should not jeopardize visibility. In some cases, the spots could get bigger and irritate the visibility to the outside. It could get foggy and the visibility might be temporarily or partially impaired. It could be fully covered with dust and visibility is bare minimal.[286]

The efficiency of transparency depends on applicable degrees of transparency. However, it does not necessarily mean full transparency will always result more efficiency. It will be shown later that, in contrast to our democratic hope for transparency, full transparency may not always be possible. Therefore, it is important to outline degrees of transparency and to find the degree that is likely to be efficient with minimum downsides.

Generally, more information is made available, the more transparent it is. Therefore, degrees of transparency can be categorized according to how much information is made available. One way to efficiently describe degrees of information and transparency is by using game theory. Game theory is a study of strategic interactions between rational decision-makers.[287] The theory aims to understand choices and strategies available to the parties in constructed negotiations or competition.[288] The definitions of 'game' does not only include the kinds of conventional games we like to play *e.g.* chess or Monopoly board game, but also all kinds of structured interactions with defined rewards such as police questioning a criminal suspect, job hunting, product pricing in a competitive market, *etc.*[289]

Having good information in games is normally the key to winning. Therefore, playing for relevant information is a strategy worth investing in (even with costs). When information is totally free to access, the costs of locating, obtaining and analysing this information are minimal, except when it is in a very complicated format or mixed with irrelevant information. A game in which the cost of locating, accessing and assessing (processing) all relevant information is nearly costless is referred to as a 'perfect information' game. In contrast, 'imperfect information' games are games with restricted information. Therefore, when the cost of acquiring information is high, players would attempt to find ways to improve their information (apart from paying the costs to get it) by observing the actions of others. This may lead to attempts at false signalling, deception, *etc*.[290] When it comes to transparency,

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[286] The original idea of this 'window metaphor' should be credited to *Fenster* (n 268)
[287] Myerson R.B., *Game Theory: Analysis of Conflict* (Harvard University Press, United States of America) 1
[288] *Mock* (n 269) 33
[289] ibid. 297-298
[290] ibid. 299

there are hence two categories of games: the ideal of perfect information games and the more realistic imperfect information games.

1.3.1. Perfect information games

Games with perfect information are those games where rules of the games and all their related information are transparent *i.e.* freely accessible. This also includes the situations where information is effortless to discover[291] such as a published document on a governmental website. There is minimal to no cost of locating, obtaining, or analysing the information. As an implication, there is little reason to make false signalling or deception to competitors. A good example of perfect information game is chess where both sides know the applicable rules, all the pieces on the board, and the available choices for both sides.[292] Applying the theory of perfect information to law, a perfect information legal regime would be a legal regime where legislations, regulations, and information on how they would apply and alter in the future are freely available. A player, say a commercial firm, would not have the cost of locating, obtaining, or analysing information. A firm would not have to make 'grease payments' to obtain interpretations or applications of the law.[293] With these costs at or near zero, the risks of doing business in the legal regime are also minimized. Therefore, the perfect information legal regime will likely provide lower-cost business opportunities and better potential for profit than less transparent regimes.[294]

However, the idea of a perfect information game is like the idea of the perfect competition model. They are both more a model than reality. In the real world, information is usually imperfect and often asymmetric.[295] This is when some players have better information than others. In reality, in a competitive market, sellers and buyers are unlikely to have perfect information and even if they do, not all of them are likely to correctly analyse and apply it to their advantage.[296] The same is true of games. Not all games enjoy perfect information like chess. This can be the case even if legislations and regulations would be certain and the enforcement is predictable. Enforcement and even rules can always change in the future due to many uncontrollable factors such as politic crisis, economic depression, legislative changes, natural disasters, *etc*. Information about the future is rarely certain and different information are fed into different populations. The businessmen may have one set of information while politicians and lobbyists may have another. Thus, perfect information games tend to be exclusively those we play for fun rather than for business.

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[291] *Maupin* (n 267) 151-155
[292] *Mock* (n 269) 299-300
[293] ibid. 300
[294] ibid. 304
[295] Songsujaritkul W., *'Rethinking Media Plurality Regulation: Promoting Exposure Diversity and Controlling the Power of New Online Selection intermediaries'* [2018] PhD Thesis, University of East Anglia, 222-223
[296] Jones A. and Sufrin B., *EU Competition Law: Text, Cases, and Materials* (4th edn, Oxford University Press, Great Britain) 11-13

1.3.2. Imperfect information games

In contrast to perfect information games, imperfect information games are those games each player has different and limited information. Each of them would know information at his/her end but does not know the other's. They might be able to guess, but they would never be certain of it. This forces players to come up with creative ways to hunt for more information while protecting his/her own information *e.g.* false signalling and deceiving. A good example for this type of games are card games.[297] In most of card games, each player would have certain information about his/her own cards. However, they would not know what cards their opponents have until they reveal it in playing. There should be certain information that all players know in order to fairly operate the game and to keep the players from bailing out from it *i.e.* the rules of the game. Yet, each player would have to seek for more information to win the game by strategic actions namely biding and signalling. They also would like to trick opponents to have incorrect information by false signalling and deceiving so they would have better opportunity to win the game. As an implication, the costs from locating, obtaining, and analysing information are substantial. Players are likely to heavily invest in these information-related costs comparing to perfect information games.

Comparing imperfect information game to law, an imperfect legal regime would be a jurisdiction where players, say commercial firms, would have to hunt for additional information about legislations, regulations, legal enforcement, and how their future approaches or changes. Thus, firms would have to bear the costs of locating, obtaining, and analysing the information. By doing so, the costs of business would increase which may affect the decision to or how to invest. Imperfect information legal regime also includes jurisdictions with confusing regulations and large discretions to officials.[298] Frankly, we can see from the discussion of perfect information game above that perfect information situations are rare. This means that most of the games or legal regimes would contain a degree of imperfect information situation where everyone does not symmetrically have the same information. Thus, we can conclude that most of them would be in imperfect information type of games.

1.3.3. How much imperfection should there be?

Although it is now clear that perfect information games are rare in reality, we are still left with the question of how much imperfection is acceptable. When it comes to imperfect information, it can be generally categorised into when there is barely information at all and when there is some information available. For the sake of discussion and the scope of the Thesis, the following discussions should be specified to law.

[297] General idea of this example should be credited to *Mock* (n 269)
[298] *Mock* (n 269) 303-304

1.3.3.1.Non-transparent legal regimes

This category of imperfect information describes a jurisdiction where important public information is barely accessible. Private entities (who are players in the game) are expected to seek signals about legal requirements and effects.[299] Thus, they are expected to pay substantial information-related costs. As an implication, the costs of doing business in such non-transparent legal regimes would be tremendously high. This may discourage new players to invest in the market. Also, higher information related costs would mean only fewer players can afford them. This might form a concentrated market where only few capable players group together which can create a monopoly or an oligopoly market. This type of regime is generally presumed undesirable to the general public because the majority would have less control on the markets.

1.3.3.2.Semi-transparent legal regimes

This category usually covers most of legal regimes where there is some public information available and some are hidden. In most of the cases, information would be disclosed as the principle and concealed as exemptions. This category includes cases where raw information is available, but it may not be ready in forms that is useful or easy to understand. In these situations, there would be some information-related costs, *i.e.* locating, obtaining, and analysing information, to those who would like to utilize the information. But the costs should not be as substantial as in the non-transparent legal regimes.

Even in most democratic regimes, semi-transparent features can still be seen. they include trade secrets, confidential business information, information protected by professional or other legal privileges, *etc*.[300] Although, this does not necessarily mean the foresaid features are bad. They represent necessity to preserve other rights in which should be upheld as much as we should to transparency. Thus, not only semi-transparent legal regimes are unavoidable, they are probable.

1.4. Advantages and downsides of transparency

It is generally accepted that transparency is a good thing for the public.[301] The merit of it is rarely questioned. However, it does not mean that it should not be. Before we take transparency as self-evident, we should at least realize its possible downsides in order to make the best efficiency out of our most desired transparency.

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[299] ibid. 300
[300] *Maupin* (n 276) 156-159
[301] Etzioni A., *'Is Transparency the Best Disinfectant?'* [2010] Vol. 18 (No. 4) The Journal of Political Philosophy, 389

1.4.1. Advantages of transparency

Transparency certainly contains many desirable features namely legal precedent, policy learning, accountability, legitimacy, efficiency (both to the government and economic performance), security, risk management and so on. Each of them has its own efficiency in which the public benefits.

Note that legal precedent and policy learning will be separately discussed later as they are two other important topics of this Chapter.[302]

1.4.1.2. Legal precedent

Legal precedent is directly linked to transparency. In a nutshell, legal precedent results from transparency because transparency provides information. With the relevant information, we can learn what has been earlier enforced and then we can apply or adopt it to the future cases with similar circumstances.

Legal precedent is a principle or rule which is established in previous legal case that is either persuasive or binding to the Court of the following cases with the same or similar circumstances.[303] It has been deeply rooted in common law system and is another category of law with binding effects.[304] Additionally, it also has persuasive effects to civil law system by being guidance to courts and authorities to adopt in future similar cases. This means that the courts and authorities do not technically obliged to it, but they are encouraged to take it into account when considering future similar cases.[305]

Legal precedent cannot be a precedent unless the information regarding the established cases is published. That is, if there is no transparency in the first place, there shall be no information regarding the established cases available, and thus there should be no legal precedent. This brings us to the next advantage of transparency -policy learning.

1.4.1.3.Policy learning

Policy learning is a process of data accumulation regarding problems and solutions in a variety of contexts in order to acquire new information and knowledge to achieve policy goals.[306] In the other words, policy learning is when we learn how others and ourselves face and solve policy problems and trying to apply what we learn to fix the similar policy problems. Therefore, to know how to fix the previous problems, we shall know the

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[302] See *2. Legal Precedent* and *3.Policy Learning* below
[303] Duxbury N., *The Nature and Authority of Precedent* (Cambridge University Press, UK), 12
[304] ibid. 31
[305] Thailand is a good example of persuasive legal precedent. See Darling C.F., *'The Evolution of Law In Thailand'* [1970] Vol. 32 (No. 2) The Review of Politics, 216
[306] Moyson S. *et al*., *'Policy Learning and Policy Change: Theorizing Their Relations from Different Perspectives'* [2017] Vol. 36 (No. 2) Policy and Society

information regarding to what have been previously done.[307] Without transparent information, there can be no policy learning.

The potential of policy learning to our world can go without saying. It is how we learn from history and try to be better at making it. It is how we make our economy, law, politics, agriculture, and society better and to avoid repeating previous mistakes by our ancestors. And the shortest way of obtaining it is through transparency of information.

1.4.1.4.Accountability

Accountability is when the public is able to hold a person liable for the things that he/she has committed.[308] Transparency is believed to bring about accountability to the authorities. These two concepts of transparency and accountability are somewhat 'twin' concepts which are always expected to come together. The reason to this is smartly put as *'One person's transparency is another's surveillance. One person's accountability is another's persecution'*.[309] This means we are at ease when there is transparency because we can observe others and bring them to justice when we they commit wrongdoings. On the other perspective, it is believed that the observed subjects would behave better when they think they are being watched.[310] This concept of self-regulating is also employed in other areas, for example, CCTV cameras usage for businesses. Apart from using the footage as evidence for criminal prosecution, the presence of the CCTV itself is tested to reduce the crime rate in business premises.[311]

The whole concept about relationship between transparency and accountability is largely questioned. However, the arguments to this concept will be discussed later on the downsides of transparency.

1.4.1.5.Legitimacy

Legitimacy is a value where something or someone is recognized and accepted to be right or proper.[312] It is necessary for authorities to seek legitimacy because it validates the power employed on the public. On the other hand, legitimacy is the consent of the people to be governed by the authority.[313] Transparency is another way which has often been employed to

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[307] Lindberg H., *Knowledge and Policy Change* in Knowledge and Policy Change (Cambridge Scholars Publishing, Great Britain) 1
[308] Dykstra C.A., *'The Quest for Responsibility'* [1939] Vol. 33 (No. 1) American Political Science Association
[309] Fox J., *'The Uncertain Relationship between Transparency and Accountability'* [2007] Vol. 17 (No. 4-5) Development in Practice, 663
[310] Ball K., Lyon D., and Haggerty K.D., *Routledge Handbook of Surveillance Studies* (Routledge , USA and Canada)
[311] Gill M. and Spriggs A., *'Assessing the impact of CCTV'* [2005] Home Office Research Study 292
[312] Chen J., *Useful Complaints: How Petitions Assist Decentralized Authoritarianism in China* (Lexington Books, USA), 165
[313] Ashcraft R., *John Locke: Critical Assessments* (Routledge, London), 524

legitimize one's authority. This is usually done by making process of policy making transparent, *i.e.* accessible, and by doing so, social acceptance would be gained.[314]

1.4.1.6.Efficiencies

Efficiency is another benefit believed to result from transparency. Generally speaking, it is efficient when unnecessary waste of resources is avoided and productivity is maximized.[315] There are two main efficiencies when it comes to transparency regarding to publicly accessible information: enhancement of governmental efficiency and of the markets.

Governmental efficiency is when a government performs better when it is being observed by the public comparing when it is not. The better performance includes less corruption, better selection of efficient bureaucrats or partners, better incentive to contribute to public welfare, and so on.[316] Yet, the transparency alone would not result governmental efficiency. There shall be other elements working together with transparency to achieve such goal, such as education and freedom of expression.[317]

Economic efficiency or market efficiency is when economics or markets perform better with the released information from transparency. For example, in global real estate market, highly transparent markets take up to 75% of all commercial real estate investment.[318] This is simply because investors are more comfortable with the investing in what they know or what they can vet than in blind investment. Yet, it does not mean that these highly transparent markets contain perfect information. The information presents in these markets are still asymmetry and not available to all, *e.g.* leases are not public knowledge and the data is very complicated which can pose barrier to entry for new investors.[319] Thus, these highly transparent markets are still in the imperfect information game category.

1.4.2. Downsides of transparency

Transparency is often taken for granted without being seriously questioned. This makes its claimed advantages assumptions rather than facts. Admittingly, transparency is very much better than complete lack of transparency, because it clearly has its value. But it is worth considering its downsides in order to maximize its advantages.

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[314] Curtin D. and Meijer A.J., *'Does Transparency Strengthen Legitimacy?: A critical analysis of European Union policy documents'* [2006] Information Polity, 116
[315] Sickles R.C. and Zelenyuk V., *Measurement of Productivity and Efficiency: Theory and Practice* (Cambridge University Press, United Kingdom),
[316] Kolstad I. and Wiig A., *'Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?'* [2009] Vol. 37 (No. 3) World Development, 522-523
[317] ibid. 524
[318] JLL and LaSalle's, *'The 2018 Global Real Estate Transparency Index'* [2018] 2018 Rankings & Index Methodology <https://www.us.jll.com/en/trends-and-insights/research/global/global-real-estate-transparency-index/greti-ranking-and-methodology> accessed September 2019
[319] Edelen C., *'Transparency is Essential to Efficient Markets'* [2019] Propmodo E-Journal <https://www.propmodo.com/transparency-is-essential-to-efficient-markets/> accessed September 2019

1.4.2.1.Illusion of full transparency

Perhaps we can conclude from the discussions above that full transparency is not a thing in reality. The situation where all information held by the government can be all made public never happens. There are always exemptions to transparency, *e.g.* for national security reasons or other reasons such as intellectual property rights.[320] In addition, information is always asymmetrical. [321] People are unlikely to have perfect information. Even if they do, not all of them is likely to correctly analyse and apply it to their advantage.[322] With these conditions, full transparency becomes a fantasy rather than a reality.

1.4.2.2.Information overload

Increasing transparency means increasing information availability. If the information is too much, there can be information overload. The stage of information overload can cause poor decision makings, creating stress to individuals, indirect problematic information diversity, and when it happens to a consumer, it may reduce the purchase probability.

In general, today's problem about information is rather the overload of it than the lack of it.[323] Nowadays in digital age, information streams from everywhere. The ability to create contents is no longer monopolised by press or governments but is available to everyone with a smart phone. Content can be instantly created and shared by many easily accessible and free (at least financially) online platforms. Before we know it, there is ocean of information out there -relevance, irrelevance, accurate, and inaccurate.

Unlike computers, people cannot handle the infinite flow of information. When the quantity of information goes beyond cognitive capability of a person, the person would start to face difficulties on how to efficiently deal with it.[324] Information overload is likely to occur when the information is uncertain, ambiguous, complex, or intense.[325] The core difficulty of it is not only to absorb and process all the information, but to distinguish which information is true or false and which is relevant or irrelevant.[326] This task is proven to be hugely consuming. One would normally search for information (most of which is unstructured) taking around 30% of a worker's time (and up to 50-60% in public sector).[327] Then, it has to be evaluated, organized, and stored for later use.[328] All of these steps can cause information

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[320] *Fung* (n 266) xii
[321] *Songsujaritkul* (n 295) 222-223
[322] *Jones* (n 296) 11-13
[323] *Songsujaritkul* (n 295) 7
[324] Eppler M. J. and Mengis J., *'The Concept of Information Overload: A Review of Literature From Organization Science, Accounting, Marketing, MIS, and Related Disciplines'* [2004] Vol. 20 (No. 5) The Information Society
[325] Krishen A., Raschke R., and Kachroo P., *'A Feedback Control Approach to Maintain Consumer Information Load in Online Shopping Environments'* [2011] Vol. 48 (No. 8) Information & Management
[326] Pijpers G., *Information Overload: A System for Better Managing Everyday Data* (John Wiley & Sons, Inc., USA) 22-23
[327] ibid. 19-20
[328] ibid.19-20

overload for individuals in an organization which eventually affect the performance of the organization.

Information overload can result several downsides. Firstly, it can start small inconvenience from disability to set priorities and difficulty to recall information to bigger problems like creating stress and resulting poor decision making and dysfunctional performances.[329] Secondly, people may narrow down their attention to concentrate on fewer sources of information,[330] which could cause problematic information diversity. Thirdly, studies in consumer behaviour suggest that information overload reduces purchase intention and high perceived risk of a consumer.[331] Good examples of information overload in business world can be too much alternatives on cereal shelves in a supermarket or a label with too much detailed information about the product.[332] In these situations consumers may suffer the frustrated decision makings or stop searching for the best brand and pick the most convenient brand out of information overload frustration. By doing so, they may miss out the benefits of comparing the best value for the purchase. 'More is better' is generally not applicable in the case of transparency.

1.4.2.3. Assumptions of advantages

Some of the advantages are argued to be assumptions. For example, from the real estate markets example above, the raw data presented in the 'highly transparent markets' is not made ready and available for everyone. It is complicated that would be barrier to new investors. From this perspective, more information does not always produce more efficient markets.[333] Another example, on accountability, it is argued that transparency will bring accountability only when the exposed one is vulnerable to shame. This is because transparency is a shaming mechanism. If the exposed one is immune to shame, then transparency only brings truth but would fail to deliver justice.[334]Another example, on legitimacy, by releasing more information does not mean the public will directly pay attention to the newly released information. On the other hand, it would mostly attract journalists who are mostly interested in negative information (to the releasing organization) simply because negative news sells. As a result, more (and most likely only) negative news would reach the population, undermining legitimacy than no transparency.[335]

1.5. Transparency and competition policy

Transparency has a big role in competition world. Its presence or absence in a market would influence behaviour of economic agents in the market, and also of competition authority

[329] *Eppler* (n 324)
[330] *Songsujaritkul* (n 295) 222-223
[331] Soto-Acosta *et al., 'The Effect of Information Overload and Disorganisation on Intention to Purchase Online: The Role of Perceived Risk and Internet Experience'* [2014] Online Emerald Group Publishing Limited <https://www.emerald.com/insight/content/doi/10.1108/OIR-01-2014-0008/full/html> accessed Jan 2020
[332] *Krishen* (n 325)
[333] *Fung* (n 266) 173
[334] *Fox* (n 309) 663
[335] *Curtin* (n 314) 120

exercising power within that market.[336] With adequate information, a consumer may be able to make informed choices of his/her purchase, a firm may decide to compete or to take a backseat, and competition authority can ensure that its enforcement would bring about competitive rather than negative effects to the market and consumers. In contrast, lack of information would make those foresaid situations less likely. However, a big question remains- if the transparency for competition is so good, should we have complete and uncompromising transparency where all information is available for every party in a market? This means consumers, firms, and competition authority would obtain the same information about a market in everything *e.g.* prices, demands, willingness to pay, market conditions, *etc*. It will be suggested later that this 'perfect information' competition is not only unrecommended for the sake of competitive environment, but also is impossible in reality.

1.5.1. Game theory in competition transparency: multidimension of asymmetric information

As discussed earlier, game theory can explain degree of transparency according to how much information is made available.[337] It can be put into two categories: perfect information games and imperfect information games. The former is where rules of the games and all their related information are freely accessible to all parties and there is no information-related cost. In contrast, the latter is where rules and related information are limited and each player has different information. Therefore, information-related costs are high. Players would engage in signalling or false signalling in order to obtain information. It was also discussed that most of the games are imperfect information games, because it is rare to have a game where everyone has the same information without any information-related costs.

Competition is a good example of imperfect game theory. In a market perspective, there are two parties to a competition game: firm and consumer. Both of them hold different information and want to access information held by other parties. Firms hold information about their market strategies and possible anticompetitive plans to maximize the profit which are preferably not known to anyone else. They also want to seek willingness to pay of consumers in order to efficiently price their commodities. At the same time, a consumer holds consumer behavioural information which is most valuable to business firms nowadays. Firms have great motivations to get a hold of this information to enhance how they would capitalise the market and to get ahead of the competitors. Most available forms of this information collection are those of social platforms where the consumers are offered the services for free of charge in exchange of their information. However, many consumers are reluctant to give away their information about what they do online so easily due to their right of privacy. This conflict of needing to access information held by others and keeping secret creates the main characters of imperfect information game: information-related costs and signalling. Firms bear the cost of organizing the services for free to get information. Likewise, consumers would have to bear the cost by paying their information to use the services. In contrast, if it

[336] Gugler P., *Transparency and Competition Policy in an Imperfectly Competitive World* in The Oxford Handbook of Economic and Institutional Transparency (Oxford University Press, Online Publication) 2
[337] See *1.3. Degrees of transparency* discussed above

were a perfect information game, none of information-related cost would have ever existed, because all information would have been freely accessible.

From these characters found in competition, the imperfect information is not a one-way traffic. The lack of information comes in many directions to many parties. This 'asymmetric information' situation is 'multidirectional'.[338] The implication is that no one is a clear winner of the game and therefore the fight for information intensifies, following by increasing information-related costs. Competition is, therefore, an intensified imperfect information game.

1.5.2. Perfect information as a model for real competition

Although it is now clear that perfect information dream for competition may not be possible in reality. Yet, it should still be the ideal for competition to look towards to. That is, information should be as free as possible as long as its efficiency outweighs its negative effects. Admittingly, this idea is easier said than done. Let us start by exploring the model of perfect information in relevance to competition policy before diving into the trade-offs between efficiency of more information and its downsides.

There are several reasons why perfect information (or as close as it gets to it) should be upheld as a model for competition policy. The most emphasized one for the relevance of the Thesis is that availability of information provides legal certainty and compliance of the law. It is a duty of the people to comply with the laws of the land. Yet, it would be difficult to comply with such laws without knowing how the laws are interpreted and applied. Without transparency of information regarding the laws, the public might not know how to comply with them which would cause reduce legal certainty. For example, the Thai Trade Competition Commission (*'TCC'*) did not have the definition of 'dominant position' issued for 8 years.[339] During those years there is no legal certainty about what constituted dominant position.[340] Consequently, relevant sections of the Competition Act were not applicable during those 8 years, freezing the development of the principle of special responsibility of dominant firms for almost a decade.[341] Furthermore, on market transparency, the highest consumer surplus can be achieved with more market transparency.[342] This is because, with adequate information, a consumer can compare products and prices all across a market, access technical information of a product, minimize search costs for a product, *etc*. Also, the accountability of a competition authority depends on its transparency. This is because public feels more secured to know what their competition authority is doing and that they can hold

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[338] Laffont, J.-J., and Martimort, D., *The Theory of Incentives: The Principal-Agent Model* (Princeton University Press, United Kingdom)
[339] During 1999 - 2007
[340] Nikomborirak D., *'Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries'* [2006] Vol. 26 Northwestern Journal of International Law & Business, 597
[341] The first definition of dominant position was prescribed by the TCC in 2007. *See* Thai Trade Commission (TCC), *'Criterion for Dominant Position'* (in Thai) [2007] Official Document.
[342] Møllgaard, H. P., and Overgaard, P. B. *'Market transparency and competition policy. CIE Discussion Papers'* [2001] University of Copenhagen, Department of Economics, Centre for Industrial Economics, 2

the authority liable for its actions.[343] On investigation transparency, firms have incentive to hold or even destroy information detrimental to themselves instead of turning in to competition authorities, although they may be legally obliged to do so.[344] Therefore, having enough information to enforce competition law is essential for a competition authority. This could be done by alternative channel like leniency program where immunity to competition law enforcement is granted in order to obtain more information about the existence of a cartel.

Perfect information ideal to competition policy also has its downsides. Perfect information refers to maximized openness of information, that is, all information should be completely accessible to anyone. This means that the method of perfect information does not care about other detriments that come because of the maximized release of information. These downsides are unfairly placed on economic agents which, in turn, could indirectly hurt economic efficiency. With exceeding price transparency, anticompetitive collusions between firms are more likely to take place. A good summary by *Gugler* has shown that incentive to collude is intensified by three elements: perfect information, product homogeneity, and small number of competitors (oligopolistic markets).[345] Anticompetitive collusions often result in detriment of consumers[346] and, therefore, is undesirable under competition policy. By this perspective, perfect information partly contributes anticompetitive effect on competition. Perfect transparency in competition enforcement can also alarm real wrongdoers and unfairly hurt accused party under competition investigation. In carrying out investigation by competition authority, there would be a stage where an authority has to make decision whether to reveal the case build-up to the firm under investigation. On one hand, the authority needs information from the firm to proceed with the case. On the other, it is always risk of the firm being alarmed by the informing and hind or destroy any anticompetitive evidence it may have.[347] Also, by releasing full and immediate information about competition investigation public may jeopardize reputation of the accused firm under the investigation in case the firm turns out to be innocent.[348]

Now that we have seen the discussion about efficiencies of transparency and its downside in competition policy, the next question should be -what is the proper degree of transparency? Where is the threshold for most unharmful transparency that produces most efficiency without sacrificing unnecessary detriments?

1.5.3. Maximum vs optimal transparency

We know that total opaqueness should not be an option when it comes to transparency in competition policy. What is left can be categorized into two groups: maximum transparency which is equivalent to perfect information type of transparency and optimal transparency

[343] *Dykstra* (n 308)
[344] *Gugler* (n 336) 16
[345] ibid. 5-6
[346] Organisation for Economic Co-operation and Development (OECD), *'Price Transparency'* [2001] Round Table, Paris, 25-31
[347] *Gugler* (n 336) 16
[348] ibid. 16

which is located somewhere between perfect transparency and opaqueness. It is also demonstrated that maximum transparency may not always be a good idea due to its unnecessary harm it causes to economic agents and inconvenience to competition investigation. What seems to be the best available option now remains to be optimal transparency. However, determining what should be optimal transparency to competition policy may not be as easy some would imagine. This is because there are increasing chances that the released information, no matter how carefully selected, could be traced back and could still pose detriment to economic agents.[349] Therefore, how and what to release for optimal transparency can be a hard call for a competition authority.[350] Yet, a reasonable framework for optimal transparency can be suggested that, at the very least, there should be the following information published in order to prevent competition from descending into opaqueness.

- Provisions, regulations, and guidelines
- Investigation and consideration processes
- The results, criteria and rationales of the decisions

1.5.3.1.Provisions, regulations, and guidelines

Firstly, the law itself should be known to all. This is because 'the rules of the game' should always be declared to anyone in the game to keep the game fair and enjoyable, and most importantly to keep players in the game playing by the rules. These legislations consist of legal provisions, as well as regulations and related guidelines. Their contents should be as clear and consistent as possible.[351] The publication would bring about the very essence of legal enforcement: the rule of law. The rule of law is a fundamental doctrine for any legal application. It justifies the power of the law, and together within it, the legitimacy of its application by requiring all members of a society (including the lawmakers) to be considered equal under publicly disclosed legal provisions and processes.[352] Because the rule of law requires all parties to be openly treated as equal under the law, the existence of the rule of law itself represents a transparent legal system[353] which is a prerequisite of being an optimal transparent regime.

1.5.3.2.Investigation and consideration processes

This is probably the hardest part when it comes to *'how-optimal-transparency-should-look-like'* question. This is because the investigation process is the riskiest stage where all kinds of unconfirmed information flow without knowing for certain which is fact or just pure rumour. Transparency in investigation process may jeopardize the litigation and the involved firms in

[349] This is particularly probable today as the development of 'big data' makes piecing together data into coherent information very much easier, faster, and more in volume than ever before.
[350] *Gugler* (n 336) 17
[351] ibid. 16
[352] Hobson C.F., *The Great Chief Justice: John Marshall and the Rule of Law* (the University Press of Kansus, USA) 57
[353] *Mock* (n 269) 304

case they turn out innocent.[354] The litigation could be affected if the relevant firm knows too early that it is being investigated by a competition authority. It would have incentive to hind or destroy any existing evidence of their anticompetitive behaviour and so it would be harder to litigate the firm. Also, if the firm later turns out innocent, the reputation of the firm could have been damaged. On the other hand, if the whole investigation and consideration process is hidden. There could be questions of fairness of the competition authority and perhaps the legitimacy of the case, especially from the firms involved in the investigation. Therefore, some level of transparency is needed here.

Transparency under investigation and consideration period could be divided into two levels categorized by the involvement degrees. For the alleged party, *i.e.* the accused firms, the involvement degree is higher as they are being investigated. Therefore, they should be informed about the details of the investigation and allowed to express their side of the story. They should have the right to access evidence, to have full knowledge of the case, details concerning alleged violations against itself, and to respond to the case before the decision is taken.[355] Under EU competition procedural laws, an investigated firm[356] is entitled the right to defence of him/herself by being able to access non-confidential information held by the Commission regarding to his/her case.[357] This is to allow the firm to examine the evidence so that he/she is in the position to express their views on it and defend themselves against the charge.[358] However, there are other information that a firm under question cannot access *e.g.* business secret and other confidential information.[359] For the public, the involvement degree in the investigation process is lower. Therefore, the need to know such detailed information should not be as high as the parties involved, especially given that information released to outsiders at this stage could unnecessarily jeopardize other economic agents. Yet, they should be generally informed about the case being investigated by press release or similar source of communication. This is to keep the population engaged and not to be totally 'left out'. This could come in the form of press releases. This approach to the public is as good for the competition authority as it is to the public, because this keeps the authority on the good side of transparency fence where it appears to care for transparency. Most importantly, this would take the competition authority ahead of the 'transparency game' with the public according to the game of theory. Because the information is imperfect, each side would have to eventually play tricks to get information. The public would eventually cry for transparency when they do not have it. This is a situation where competition authority can initiate transparency before the public requires. Not only the authority gets legitimacy and accountability from the opponent of the game, it also is able to 'choose' which information to release, framing a better transparent image for itself. Such choosing might not be so easy if the authority ignores transparency in the first place and let the public pursues its own transparency.

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[354] *Gugler* (n 336) 16
[355] Organisation for Economic Co-operation and Development (OECD), *'Procedural Fairness and Transparency: Key Points'* [2012] Competition Committee, Paris, 25
[356] By the 'External Advisor' *i.e.* the external economic advisors and/or the external legal counsel only. See ….
[357] The EU Commission, *'Best Practices on the Disclosure of Information in Data Rooms in Proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation'* [2015], (5) and (8)
[358] ibid. (5)
[359] The EU Commission, 'Guidance on Confidentiality Claims During Commission Antitrust Procedures' [2018], (2)

1.5.3.3. The results, criteria, and rationales of the decisions

Lastly, the outcomes of the competition work should be known to the public and not limited to the firms involved. This is a normal process for most of jurisdictions where a competition authority adopts a decision, it should be published and explained. It is significant to the authority's credibility and to minimize discretionary decisions.[360] For example, Article 296 of the TFEU requires EU institutions to *'…state the reasons on which they were based…'*[361] as well as Article 41 of the Charter of Fundamental Rights of the European Union that requires *'…the administration to give reasons for its decisions.'*[362] These two rules are in a form of hard law which is fully enforced by national and European courts.[363] Moreover, it has been recognized by the ECJ that the duty to give reasons is included in the principles of good administration which is applicable to Member States when they implement EU law.[364] Therefore, only the result of a decision stating guilty or not guilty is inadequate. The need for transparency extends to significant matters like criteria and rationales of the decision. This has been done in the EU by legally requiring the Commission to publish its decisions[365] including important matters like criteria and rationales of its decisions.[366] Any restriction on the information is possible but only with necessity.[367]

Anything less than the foresaid transparency, there are risks of too much asymmetric information ratio where the public has way less information than they think they should do, comparing to what the authority holds. Under credibility viewpoint in this situation, it does not matter if the authority were rational and not discretionary in making decisions at all, the credibility and accountability of the organization is likely lost. Thus, it is wise to come clear and clean at the first place. Yet, it needs to be careful of sensitive information that might unnecessarily harm other innocent economic agents which might happen to be in the decisions. Under policy learning viewpoint, it is absolutely crucial for the public to learn what an authority has decided. It is an important way the public can access and ensure the discretionary power of the governing.[368] Knowing the results of decisions also helps the people to comply or harmonize their activities with the laws better since they would know what is decided to be right or wrong.

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[360] *Gugler* (n 336) 17
[361] The Treaty on the Functioning of the European Union (TFEU), Article 296
[362] The Charter of Fundamental Rights of the European Union, Article 41
[363] The Treaty on European Union (TEU), Article 6(1)
[364] Hofmann H. and Mihaescu C., *'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case'* [2013] Vol.9 (No.1) European Constitutional Law Review
[365] Council Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43, Article 10-11
[366] In which the EU Commission provides on its online database <http://ec.europa.eu/competition/elojade/isef/index.cfm?policy_area_id=0>
[367] *Regulation 1049/2001* (n 365) Article 9
[368] To do this, the public should also be able to access the laws and (at least some of) the investigation process as discussed above as well.

1.5.4. Enforcement mechanism

A practical mechanism is significant to achieve transparency in competition. As we can now see that competition law is similar to many disciplines where information poses crucial role in the game. We also see that competition law is an imperfect information game where no one knows everything and the things ones knows, may not be the same others do. Thus, imperfect information game of competition creates asymmetric information situation between parties of the game. Moreover, this asymmetry of information is not a one-way traffic.[369] The outsider, *i.e.* the public, always need information about what is going on the inside of competition law *e.g.* decision-making process and results. Whilst, the insider, *i.e.* competition authority, needs insight information to consider or prosecute its competition cases, *e.g.* hidden information about competition law infringement, which is always available outside of a competition authority. Competition transparency is, therefore, multidimensional and cannot be considered using one-sided information basis. As a good mechanism for competition transparency, it should take into account of such multidimensional nature. Therefore, the Chapter suggests that the mechanism should be a multidimensional one. It should, at least, provide two directions of information origins *i.e.* external and internal mechanism.

1.5.4.1. Internal transparency

From the perspective of a competition authority, it needs to promote transparency to the public because of, *inter alia*, the legitimacy and accountability it brings to the authority. The public can be considered as outsider because it is not directly involved in a competition case like an investigated firm. The competition authority is the only entity in place to provide such information. In legal perspective, laws usually demand the competition authority to provide the information regarding the cases in hand.[370] In information science perspective, the authority should hold the best available information about the case it is prosecuting, in term of quantity and quality. This direction of transparency can be called the internal transparency because information is communicated from inside to the outside of the inner competition circle.

The discussed three types of transparency are considered to be the minimum threshold for the acceptable transparency to the public. These elements could be limited where it is necessary to protect other economic agents' welfare and the necessity to carryout successful investigation of a competition authority. Although, the essence of them should remain intact. For example, it is acceptable to not mention the names of the firms being investigated during the investigation period, but once the decision is conclusive, the names of the firms and their nature of behaviours need to be clearly indicated together with the full-published decision.

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[369] The Author credits original argument of 'multidimensional transparency' to Stirton and Lodge (discussed earlier). See *Stirton* (n 277)

[370] For example, the EU Commission is obligated to grant public access to its decisions (including documents drawn up and received by the Commission) as much as possible while restriction of the access can only take place when necessary. See *Regulation 1049/2001* (n 365) Article 9-11

1.5.4.2.External transparency

In order to investigate or prosecute a competition case, a competition authority needs information from 'insider' of the wrongdoers' side to build a comprehensive competition case. The access of this information can be regarded as external transparency as it comes from one of the firms who are associated with anticompetitive behaviours, outside of a competition authority.

Although there are many ways to obtain the external information, competition authorities still face with difficulty to access such information due to its secretive nature of anticompetitive behaviours.[371] Given a case of cartel, the authority can collect evidence from outsider of the cartel *e.g.* citizens or firms outside the cartel, exercise its legal power and summons one of the suspicious firms to question, or to persuade one of the firms to cooperate in exchange of full or partial immunity from competition law (leniency program), *etc*. These methods aim to extract information from insider about possibility of anticompetitive activities. However, the first two methods might be harder to achieve the goal since a firm may not have much incentive to cooperate with the authority.[372] In contrast, leniency program is expected to be more effective because it encourages a guilty firm to willingly cooperate. The program gives incentive for a knowingly guilty firm to willingly come forward and expose the cartel with essential evidence for an exchange of partially or full immunity from the legal consequences, may it be fine or imprisonment. [373] A good employment of the program could be very effective on acquiring information about anticompetitive behaviours, especially about cartels. The external transparency is significant to enhance enforcement efficiency of the competition authority. That is, the authority would have more options of sources of information and evidence for enforcing the law.

It is noteworthy to mention that Thai competition law, as a target of this study, does not run leniency program. Thus, it is worth to consider employing the program to enhance external transparency for the efficiency of competition law enforcement. Although, employing the leniency program to Thailand should be subjected to another research due to its distinctive functions and the fact that Thailand has never accepted any type of leniency programs or plea bargains in its judicial system. Thus, the program may not be suggested by the Thesis.

It is suggested that the perfect information competition, or in other words -full transparency, is not only unrecommended for a competitive market, but also is impossible in reality. To avoid undesirable effects of it, optimal transparency can fill in the gap by providing optimal information about laws, investigation process, and the results of decisions. Yet, perfect information competition should still be looked up as a utopia on information management

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[371] Whish R. and Bailey D., *Competition Law* (7th edn, Oxford University Press, UK) 513
[372] *Gugler* (n 336) 8
[373] Jinadasa M.S., *'The Role of the Leniency Programme in the Enforcement of Competition Law in the UK: A complementary enforcement procedure or an admission of the failure of enforcement authorities to tackle anticompetitive behaviour head on?'* [2018] PhD Thesis of Brunel University London, 31

and only be compromised when it is absolutely necessary *e.g.* to protect innocent economic agents and to facilitate successful investigation of a competition authority.

2. Legal precedent

Legal precedent is a direct result from transparency. Without adequate transparency in decision making, legal precedent cannot be known to the public. Once the legal precedent is no known, the public thus cannot learn from it. This is the exact problem about Thai competition law regime as suggested in Chapter 1. There is inadequate transparency in decision making, thus legal precedent is unknown, thus no policy learning.

Legal precedent is a result of a judiciary decision. It is expected to be followed in the future if similar circumstances are present with valid reasons to make the same decision.[374] Legal precedent comes in two forms: binding and persuasive. In common law jurisdictions, *e.g.* the UK, legal precedent is binding, that is, the Courts and legal authorities would have to follow the precedent established in the past, unless other circumstances occur. Therefore, it is a form of law. In civil law jurisdictions, *e.g.* Germany, France, and Thailand, legal precedent often plays persuasive role. That is, the precedent would be seriously considered in similar circumstances but not legally binding to the Courts or legal authorities.[375]

Legal precedent should be accessible to all members of a society, because in order for them to comply with the laws and their enforcement, one needs to know how the law is interpreted and enforced so they can act accordingly. In the other word, practical legal precedent should always be accessible to the public. Thus, the precondition for useful legal precedent is transparency. Legal precedent will be discussed in three topics: its concept, its link to transparency, and its link to competition policy.

2.1. Stare decisis and legal precedent

The doctrine of *stare decisis* (or 'let the decision stand') is the backbone of legal precedent. The doctrine is defined as something done and said that may serve as an example or rule to authorize or justify a subsequent act under the same or similar circumstances.[376] The objective of stare decisis is clear -to ensure that the same principles used in previous cases are applied in the next ones.[377] It employs reasoning by analogy with past decisions and, thus,

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[374] Landes W. M. and Posner R. A., *'Legal Precedent: A Theoretical and Empirical Analysis'* [1976] 19 The Journal of Law and Economics 250

[375] Koopmans T., *Stare Decisis in European Law* in *Essays in European law and integration; to mark the silver jubilee of the Europa Institute Leiden* (Kluwer Law and Taxation, USA) 11-12 *and* Leeds J., *'Introduction to the Legal System and Legal Research of the Kingdom of Thailand'* [2016] GlobaLex electronic legal publication <https://www.nyulawglobal.org/globalex/Thailand1.html> accessed May 2019, 3.4

[376] Merriam, W., *Webster's Ninth New Collegiate Dictionary* (Merriam-Websters , USA)

[377] Heiner R.A., *'Imperfect Decisions and the Law: On the Evolution of Legal Precedent and Rules'* [1986] Vol. 15 The Journal of Legal Studies, 228

justifies legal precedent. Because the terms legal precedent and stare decisis are similar in objective and function, it is important not to merge these terms together. Stare decisis is a legal doctrine or a reason employed to justify a set of rules derived from a past decision *i.e.* legal precedent. Legal precedent is a caselaw which, can be altered and evolved, but stare decisis is a universally settled doctrine.

Legal precedent can be easier understood as a set of rules the earlier decision provides for the subsequent decisions to follow under the same or similar circumstances of the case.[378] It is also called 'judge-made rules of law' since it is a form of law[379] and is made by judicial branch and not by legislative one. As discussed earlier, legal precedent is either binding or persuasive, depending on each jurisdiction. In common law system, such as the UK, legal precedent is binding to lower courts.[380] Effectively, legal precedent is considered a category of law. However, in civil law system *e.g.* Germany, France, and Thailand, legal precedent is not considered binding. A lower court is not obliged to follow it. It only plays a persuasive role for judges of a lower court to take into account when deciding subsequent cases with same or similar circumstances.[381] However, it has been argued that the line between these two legal systems is less defined as common law jurisdictions increasingly codifies their laws while civil law jurisdictions increasingly rely on precedents from higher courts.[382] For the case of Thailand, it is true that Thailand is a civil law jurisdiction and does not regard legal precedent as a law. But in practice, Supreme Court's judgements or, in the Thai term, 'Dika' is respected and cited in lower courts as frequent and effective as case laws in common law jurisdictions like we can see in the UK.[383]

Stare decisis and legal precedent are like a coin with two sides. On one side, they are considered cost-effective in terms of time, finance, and effort. They generate legal stability, facilitate certainty and predictability. They also guarantee uniformity of treatment under the law to all[384] *i.e.* if strictly applied, two individuals committing identical actions under the same circumstances should face the same legal outcomes. These are beneficial to private parties and citizens as they can harmonize their activities better among themselves and with the laws. [385] These dominating arguments supporting authority of precedent are called 'consequentialist'[386] which believes the past results should remain valid because they had happened before. However, there are the other side of the coin which argues that legal precedent fails to justify using the results from the past to apply on the present. This opposition does not oppose the foresaid good side of the legal precedent, instead it directly criticizes the validity of the whole idea of it. The consequentialist fails to justify a single theory that explains why we shall apply the past decision's results with the present one's.[387]

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[378] *Landes* (n 374) 2-3
[379] In some jurisdictions, legal precedent only has persuasive role and is not legally binding.
[380] *Duxbury* (n 303) 12
[381] *Koopmans* (n 375) 11-12 *and* Leeds (n 375)
[382] *Koopmans* (n 375) 11-12
[383] *Darling* (n 305) 216
[384] Blume L.M. and Rubinfeld D.L., *'The Dynamics of the Legal Process'* [1982] Vol. XI Journal of Legal Studies, 408
[385] *Heiner* (n 377) 229
[386] Pattinson S.D., 'The Human Rights Act and the Doctrine of Precedent' [2014] Vol. 35 (No. 1) Legal Studies, 146
[387] *Duxbury* (n 303) 12

Because there can be no identical cases in term of circumstances,[388] thus, there is no justification to treat a case like another one. Moreover, stare decisis totally separates *ratio decidendi* from *obiter dicta*,[389] meaning that the doctrine does not regard rationales of the case, but only follows the past decision simply because it had happened and judged before. Thus, the whole idea of stare decisis and legal precedent should be invalid.

Regardless of the opposition, legal precedent and its doctrine- stare decisis are universally accepted and employed throughout all legal systems.

2.2. Legal precedent and transparency

Legal precedent can only be effective with transparency. If it is kept secret and the public does not know about it, all the benefits listed above from the consequentialist side would never exist. Private entities would face a hard time to adapting their activities among each other and to comply with the laws. There would be a society of, not just imperfect information, but extremely lack of information where everyone has to look for signals in order to make any move in the game. The information-related costs would be very high. The gap of information access in the society would be immense. Consequently, legal precedent would have failed to do its job -being established legal rules.

Of course, it is absurd to imagine a modern jurisdiction with legal precedent which the public has absolutely no access to it. There is always a degree of information access in legal precedent. The question is whether the public has adequate information to make informed choices regarding to such legal matters. This comes back to the degree of transparency the Chapter discussed earlier that there should be a reasonable frame work for 'optimal transparency'.[390] One of the three minimum elements of optimal transparency suggested was 'results, criteria, and rationales of the decisions'. Not only because they are significant to the authority's credibility and to minimize discretionary decisions,[391] they are also essential to achieving policy learning, which is the goal of this Thesis. Therefore, this suggested minimum transparency is required in order to achieve meaningful legal precedent.

2.3. Legal precedent in competition policy

Legal precedent might be needed when laws need an interpretation or require example cases. Such cases are even more important when it comes to more complex area of laws which is more difficult to understand without good case studies. Competition law is a law deepening in economics. One need a fair understanding of economics to effectively understand competition law. Thus, competition law involved at least two main disciplines -law and economics. Without access to legal precedent, a lawyer (especially one without experience in economics) would face a hard time interpreting a competition case at hand. In other words,

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[388] *Heiner* (n 377) 228
[389] *Pattinson* (n 386) 145
[390] See *1.5.3. Maximum vs optimal transparency*
[391] *Gugler* (n 336) 17

the lawyer would face difficulty in policy learning because he/she does not have adequate access to legal precedent.

Thai competition law regime is a jurisdiction with difficulties in accessing coherent and detailed legal precedent in competition law. There is no publication of competition decisions from the Trade Competition Commission (TCC). Only brief results of the decisions are published online with almost no criteria or any other details besides the outcome of the case.[392] Although there is competition precedent established (the results), but it is useless because no one can conclude what had happened in the decision making. What are the legal tests? What are the rationales of the commission to arrive with the results? What were the counterarguments and how they were weighed against the outcome of the case? Were there any economic theories being employed in the process? These questions can go on and on as long as the criteria and rationales in competition cases are not disclosed.

In contrast, these questions are unlikely to arise with transparent and coherent competition decision publication. Under such transparency, the competition precedent would be adequately detailed with the criteria and rationales used in decision making. Let's us demonstrate this by EU precedents on tying and bundling. In order to create a tie, there has to be at least two distinctive products. Although, this might not be as easy to distinguish a product from another as one might imagine -door and knob, mobile phone and charger or earphone, *etc*. In *Hilti*, the Court had given an example of how this might be interpreted. In case of nail guns, cartridge strips which act as nail-magazine inserted into the gun and the nails are three distinctive products and not combined as one system.[393] The test for separate products was that the existence of other firms running independent nail and cartridge stripe without producing nail guns proved that there was demand to purchase the two product separately from nail guns. Thus the 3 products were not one integrated system but are separate products.[394] Furthermore, a tie tends to be illegal when, *inter alia*, it deprives choices of consumers. This has become precedented in *Belge d'Etudes* that the tie was illegal because, *inter alia*, the firm limited commercial freedom of the consumers.[395] Similarly to *Microsoft I* where the tie was illegal because it foreclosed competition and did not give consumers other choices but Windows with Media Player,[396] putting consumers to detriment.[397] Competition precedents like these two do not exist in Thailand, despite the two-decades existence of competition law because no coherent competition precedent is published.

[392] The Trade Competition Commission (TCC), *'Summary of Complaints'* [2019] Online Official Publication <https://otcc.or.th/article-more.php?cid=85&lang=TH> accessed November 2019
[393] Case T-30/89 *Hilti AG v Commission* [1990] ECR II-163, para 66
[394] ibid. para.57
[395] Case 311/84 *CBEM v CLT* [1985] ECR 3261, para 26-27
[396] Case T-201/04 *Microsoft Corpn v Commission* [2007] ECR II-3601, para 856 and 859
[397] ibid. para 857 and 859

3. Policy Learning

Policy learning is a process of data accumulation regarding problems and solutions in a variety of contexts in order to acquire new information and knowledge to achieve policy goals.[398] As discussed earlier, policy learning is when we learn how others and ourselves face and solve policy problems and trying to apply what we learn to fix our similar policy problems. However, learning is not simply copying what had been done and blindly apply it to the problem at hand. Learning is the ability to obtain, analyse, and conclude information and then intelligently select useful knowledge to the case at hand. It is to pick what's good and try not to repeat what's bad from others' experience. *Freeman* smartly divides stages of learning process into three categories: convergence, diffusion, and learning.[399] Convergence is the first stage of learning. It is when a group of entities act in similar pattern for a certain period of time. They are following such pattern because others are doing it. Next stage is diffusion. It is when an entity adopts or imitates a practice, policy, or program because it has been proven successful to other entities. Basically, it a take-up of ides and information and directly apply to their own cases at hand. Lastly, we have learning. It is when information about a successful practice, policy, or program from others is analysed and concluded. The conclusion would identify good and bad parts that should or should not be applied to the case at hand. This latest information is called knowledge which arrives from intellectual process of learning from other's experience.[400] Then, the new knowledge would be applied to the case at hand.

3.5. Policy learning and legal precedent

Because policy learning relies on previous information, the forthright and sensible way to construct a solution for any difficulties faced by policy makers and practitioners is to learn from precedents. Bluntly enough, to achieve policy learning, the learners must be able to access adequate information for such learning.[401] Without the adequate access to information, there can be no policy learning. This is where legal precedent plays the vital role of making policy learning possible. Without established precedent, one can hardly learn what had been done in competition cases and cannot predict the future outcomes of the law and consequently fail to harmonize themselves to others and to the laws.[402]

3.6. Policy learning and competition policy

The Thesis seeks to achieve better policy learning for the general public. It is the reason the Thesis discusses transparency and legal precedent as they are prerequisites to achieving competition policy learning. Policy learning arriving from legal precedent would help the public to better understand and adapt their activities to the laws. Although, one could argue

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[398] *Moyson* (n 306)
[399] *See* Freeman R., *Learning in Public Policy* in The Oxford Handbook of Public Policy (Oxford University Press, Online Publication)
[400] *Moyson* (n 306)
[401] *Lindberg* (n 307) 1
[402] *Heiner* (n 377)

that there are other sources of information to learn when it comes to competition policy besides legal precedent from the Thai competition authority. For example, one could learn from the International Competition Network, EU case laws, *etc*. A strong counterargument to that could be those sources do not apply in Thailand. It does not matter how much anticompetitive tests are developed under EU competition law, learning the information would not help the public to know how the same tests apply in Thailand (if there are any anticompetitive tests at all). Thus, policy learning about Thai decision making should only come from the decisions made in Thai jurisdiction.

To effectively demonstrate this lack of policy learning in Thai competition policy, let's us briefly look at example case laws from Thailand and the EU. Then we will be able to compare what we have learned and what we have not.[403] For narrowing scope of discussion, the comparison will be limited within tying and bundling cases.

3.6.1. Holding dominant position

In abusive tying and bundling, one of the essential elements to the charge is that the firm must hold dominant position in the relevant market. In the EU, the landmark precedent of how to access and identify dominant position dated back to 1979 when the Court referred to 'substantial market share as evidence of the existence of a dominant position' in the *Hoffmann-La Roache* case.[404] Although to our knowledge today, it was not extremely accurate to assess market power by heavily relying on market share. However, this is how we learn from previous policy. Policy development evolves from policy mistakes in the past as we learn from them. Without the past errors, it is harder to see what has been done wrong and is in need for improvement. Later on, in the Commission Guidance, the role of market share has been reduced to proxy for dominance.[405] This shows that policy learning of dominant position test in the EU evolves over time. In contrast, TCC had the first opportunity to set the precedent of how they wanted dominant position be assessed in the *Beer Tying Case in 1999*.[406] Yet, it failed to publish the precedent for the public. It was only 8 years later that the TCC arrived with written criteria of how to assess dominant position in 2007.[407] Consequently, Thai public faced 8 years of lost opportunity in policy learning about how the dominant position is assessed.

3.6.2. Objective justification

Any abusive behaviour by dominant firm can theoretically be weighed against by objective justification. This means that any justifiable argument can be brought up by firms to justify

[403] Detailed analysis of Thai and EU tying and building case laws will be discussed later in Chapter 3.
[404] Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, para. 40
[405] The EU Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] 2009/C 45/02, para. 13-15
[406] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 1999'* (in Thai) (Official Document) < https://otcc.or.th/ewt_dl_link.php?nid=561&lang=TH> accessed November 2019
[407] Trade Competition Commission (TCC), *'Notifications of Trade Competition Commission on Criteria for Business Operator with Market Domination '* (in Thai) [2007] Official Document

what they had done against the anticompetitive effects of the behaviours.[408] An EU landmark case of how to interpret these justifications arrived in the 1988 *Hilti* case. The Court ruled that the argument of the firm that the tie ensured quality and safety of the products was turned down,[409] as it failed to apply less restrictive means than tying *i.e.* communicating the concern about safety to other nails manufactures.[410] The precedent was followed by similar ruling in 1991 *Tera Pak II* where the firm tried to justify its tie by protection of public health and its reputation. As the precedent before it, it was turned down.[411] The evolution of the precedent on justification can be seen through digital age where 2007 *Microsoft I* had lost all their attempted justifications *i.e.* lowering consumer transaction costs, protecting performance of the product (Windows), and the tie provided standard of functionality.[412] EU Economic agents, who are included in the general public, learnt that claiming objective justifications is not easy under abuse of dominant position. Therefore, they could harmonize their activities better. In contrast, the first objective justification claimed in Thai tying and bundling cases occurred in 2001 where the *PC Game Tying Case* was dismissed because of few justifications.[413] However, the nature of the justifications was never published. Therefore, Thai public have lost learning opportunity regarding the interpretation of objective justification in tying and bundling since 2001.

Those two categorizes of precedents in abusive tie are good examples for what the general public has been missing out when policy learning is absent. They also show what EU jurisdiction has learned over the years of evolving tying and bundling precedent. It suggests not only that policy learning is desirable, it is indispensable. It also suggests that policy learning does not happen overnight. It takes decades through economic and legal evolution before arriving to today's version of policy learning.

4. The Conclusion

The Chapter has shown that it is transparent when there is publicly accessible information with minimal costs for the public assess. Good transparency should come with good mechanism to ensure such transparency. Multi-dimensional transparency is chosen by the Chapter to be the preferred mechanism because it ensures that transparency does not come from one source but a variety of sources. The proper degree of transparency is optimal transparency where there should be as transparent as possible with exemption of absolute

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[408] ICN, *'Unilateral Conduct Workbook Chapter 6: Tying and Bundling'* [2015] Presented at the 14th ICN Annual Conference Sydney Australia, April 2015 <http://www.internationalcompetitionnetwork.org/uploads/2014-15/icn%20unilateral%20conduct%20workbook%20-%20chapter%206%20tying%20and%20bundling.pdf> accessed February 2018, para. 109

[409] Eurofix-Bauco/Hilti [1988] OJ L65/19, para. (g)

[410] ibid. para. 89.4

[411] Elopak Italia/Tetra Pak [1991] OJ L72/1, para. 117

[412] *Microsoft I* (n 396) paras 1144-1167

[413] Office of Thai Trade Competition Commission (OTCC*), 'Summary of Competition Decisions in 2001'* (in Thai) (Official Document) <https://otcc.or.th/ewt_dl_link.php?nid=558&lang=TH> accessed November 2019, para. 7

necessity for the public's good. When transparency is present, legal precedent would be accessible. It suggests how the laws apply outside of the book and what priorities the authority focuses when it comes to law enforcement. The legal precedent would help the public to learn about policy of the authority. Consequently, the people would understand how the laws apply and how to adapt their activities better to the laws.

Particularly, the Chapter has shown that transparency, legal precedent, and policy learning are three depending elements to each other. In order to gain transparency, one would have to learn what has been done and why. To gain that policy learning, one would have to access legal precedent to see what has been done. To access legal precedent, there should be adequate transparency to facilitate the release of the legal precedent, so on and so forth.

In the next Chapter, economic and legal analysis of competition law will be discussed. It will show that economic and legal thinking of competition law is not simple and requires decades of policy learning to develop. The Chapter will include EU case laws to show the EU evolution of competition legal tests over the time.

Chapter 3

Economic and Legal Analysis of Competition Law:

The Case of Tying and Bundling

This Chapter discusses economic and legal analysis of competition law. The objective of the analysis is to demonstrate two points. Firstly, the analysis will show that our understanding evolved over time by the help of economic policy learning and case laws. And that such understanding has played an important role in the EU competition law development. Secondly, it will show that details matter when it comes to whether or not there is any harm to competition. Consequently, policy learning is an essential process to understand these details and how they apply.

To carry out the analysis, competition case laws will have to be discussed. Particularly, the criteria and rationales of each case will be analysed. To do that with precision, it is more convenient to discuss one category of competition case law rather than randomly discuss any case across categories. This is because different categories of competition case laws contain different legal tests which require different analysis. Mixing up competition categories in the analysis may come to inaccurate conclusion. The Thesis choses tying and bundling (*'T&B'*) to be the subject of the analysis. As discussed in Chapter 1, T&B were chosen because of two reasons.[414] Firstly, Thai T&B decisions contain adequate number of decisions to present repetitive missing opportunities to establish legal tests of T&B conducts. Secondly, the information contained in T&B decisions are well enough to to draw a conclusion of what the decisions are about. There are other categories of competition conducts such as predatory pricing and merger controls,[415] but there is just inadequate information to go on. On the other hand, T&B contain more information about fragmented criteria applied and circumstances around the cases. Obviously, the given information on T&B is unsatisfying, hence the reason of this Thesis, but they are the best alternative we have to demonstrate the evolution of competition law through policy learning.

This Chapter will proceed in three topics. All will show that our understanding of T&B evolved over time by policy learning from past discussions. Firstly, the Chapter will discuss T&B and their functions. Secondly, the Chapter will discuss the evolution of the economic thinking in T&B. This will show that the understanding of T&B and their implications on economics does not come overnight. There were initiative theories, counter arguments, and ongoing debates for decades before arriving in a relative settlement. The discussion consists of classical leverage theory, Chicago critique, and Post-Chicago School. Lastly, the Chapter

[414] See *6. The methodology: why tying and bundling?* in Chapter 1.
[415] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions'* (in Thai) Official Document <https://otcc.or.th/complain-summary/> accessed April 2020

will move on discuss the evolution of the legal treatment of T&B in the EU. Likewise to the first topic, it will show the evolution of how T&B is viewed by the EU Commission overtime. This will show that our understanding of case laws evolved overtime and that understanding has played an important role in EU competition law development.

1. Tying and Bundling

T&B are common commercial practices where products are sold together in a single sale. T&B are generally welcomed because they provide better products or cost effectiveness. However, they can be abused by dominant firms and harm consumers and competition by creating foreclosure effect to competition.[416] If the weight of efficiencies created by the conducts does not outweigh the foreclosure effects to competition, such T&B are deemed undesirable for a competitive market.[417] Although the two are similar and sometimes overlapped, the distinctions can still be seen between them.

1.1. Tying

In tying, customers who purchase one product (tying product) would be required to purchase or obtain[418] another product (tied product).[419] Tying can be categorized into contractual and technical ties. In contractual tying, the tie would be created by contract and does not have technical or physical necessity to tie the product together. For example, the beer and whisky tie in the Beer Tying Case 1999 of Thailand where whisky would only be sold if customers bought specific brand of beer with it.[420] In technical tying, both products are designed to only work properly together (without other alternatives offered by competitors)[421] or that the two products are physically integrated and can only be sold together.[422]

1.2. Bundling

In bundling, customers would be offered a package of products. Bundling can be categorized into pure and mixed bundling. In pure bundling, both products are sold together.[423] Therefore, pure bundling is an interchangeable term of technical tying. In mixed bundling, customers would be offered advantageous deal if customers buy both products.[424] Customers would buy

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[416] The EU Commission, *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* [2009] 2009/C 45/02, para 49
[417] Russo F. *et al*., '*European Commission Decisions on Competition: Economic Perspectives on Landmark Antitrust and Merger Cases* (Cambridge University Press, Cambridge), 149
[418] By being imposed to obtain the tied product without choice is adequate for the tie to be abusive because it already results anticompetitive effect. Therefore, whether the customer pays for the tied product is irrelevant.
[419] *The Guidance* (n 416), para. 48
[420] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 1999'* (in Thai) (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2542.pdf> accessed June 2018
[421] *The Guidance* (n 416), para. 48
[422] Jones A and Sufrin B., *EU Competition Law: Text, Cases, and Materials* (4th edn, Oxford University Press, New York) 454
[423] ibid. 455
[424] ibid.

cheaper than they would buy products separately (if they want and buy both). Mixed bundling often come with choices for customers to choose buying the bundle or buying separately.

Due to the similarity and the overlap of T&B, the Chapter will use T&B interchangeably. This is also because the Chapter does not focus on technical forms of the conducts, but rather their impacts to the markets.

T&B are common everywhere. They could come directly as a limited-edition package of your favourite trilogy films or in a less-obvious form such as shoes and laces, cars and wheels, smartphone and built-in electric compass, *etc*. In modern time where markets are tilted into information and technology, integration of products are vital and increasingly unavoidable.[425] It is the time where technologies are integrated. For example, now all mobile phone, alarm clock, camera, radio, campus, maps, voice recorder, *etc* are integrated into a single smart phone. Information services are also integrated. An online account service can access multiple online services and tends to keep on expanding. For example, a Google account can access Google search (search engine), Google Maps (online world map), YouTube (broadcasting site), Google Drive (online information storage), Gmail (email), *etc*. These integrations are welcomed by growing consumer demand for the integrated technologies which boost motivation for firm to invest in more integration technology. These integrations are our modern form of T&B.

2. The evolution of the economic thinking of T&B

The economic thinking of T&B dates back to early 20th century. Theories of foreclosure in T&B have been through 3 major waves of evolution. It started with the old leverage theory which believed in *per se rule* where T&B were likely to be illegal. Decades later, the form theory was replaced by the single monopoly profit theory which insists that T&B should be *per se* legal. Later on, the post-Chicago School replaced theories by *quasi per se* rule which considers T&B's illegality based on assessment of anti-competitive effects of T&B.

2.1.Pre-Chicago School (the leverage theory)

The leverage theory dates back to 1910s where it was *per se* illegal when a seller requires his/her customers to buy a tie.[426] The theory assumed that a firm with monopoly power would leverage the power from the tying market into the tied market(s) and thus earning extra monopoly profits from the tied market(s) and by doing so putting consumers in detriment.[427]

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[425] Sanad A., *'The Inadequacy of the European Commission's Remedies for Microsoft's tying practices in the Microsoft Cases: Casting Doubt on the Suitability of the Commission's Approach for an Information Technology Economy'* [2014] (No.7) Global Antitrust Review, 115

[426] Markovits R., *'Tie-ins, Reciprocity, and the Leverage Theory'* [1967] Vol. 76 (No. 7) Yale Law Journal, 1397

[427] *Virgin Atlantic Airways, Ltd. v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001); see also *United States v. Griffith*, 334 U.S. 100, 107 (1948); *Berkey Photo, Inc. v. Eastman Kodak* Co., 603 F.2d 263, 275 (2d Cir. 1979);

According to the theory, the leveraging of market power is, therefore, a profit-maximising strategy to extract monopoly profit by eliminating competitors in tied market(s) and then charge monopoly price for the tied products.[428] The theory is sometimes viewed as 'the most intuitive' and 'simplistic' theory of harm as it is quite straightforward.[429] The theory assumes that the leverage would harm economy and competition in tied markets without properly proof of the conclusion.[430] T&B at time was, therefore, viewed as anticompetitive and was likely to be illegal, thus *per se* rule.

The weakness of this initial theory is that it was based on assumption and without proper economic analysis. Consequently, this leverage theory had been heavily criticised of its integrity by the Chicago School who presents the famous single monopoly profit theory.

2.2.Chicago School (the single monopoly profit theory)

Later around 1950s, Chicago School presented the single monopoly profit theory, particularly to argue the contrary to the leverage theory. The theory insists that a monopoly firm in one market cannot increase its monopoly profits by using tying or bundling to leverage its market power into another market.[431] This is because in monopoly market, a monopolist can already extract monopoly price without foreclosing sales in complementary market (tied market).[432] Therefore, a monopolist would have no motivation to leverage its market power from tying market to tied market.[433] On the other hand, monopolists would be purely motivated to tie by efficiencies, in which also benefit consumers, of the T&B.[434] Accordingly, the Chicago School holds that T&B should be *per se* legal, instead of what had been suggested before in the leverage theory, *per se* illegality.[435]

Although this theory of Chicago School has influenced widely in how Courts and scholars consider T&B cases,[436] it also depends on several key assumptions, namely fixed usage of the tied product, strong positive demand correlation, fixed usage of the tying product, fixed tied market competitiveness, and fixed tying market competitiveness.[437] To assume that all of these features should be simultaneously present in a market is a very weak argument in the real world. In case of one or more of these assumptions are not met, the single monopoly

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William F. Dolan, *'Developments in Private Antitrust Enforcement in 2000'*, 1252 PLI/CoRP 891, 978 (2001); Daniel L. Rubinfeld, *'Antitrust Enforcement in Dynamic Network Industries*', 43 ANTITRUST BULL. 859, 877(1998)

[428] Monti G., *EC Competition Law* (Cambridge University Press, Cambridge) 188

[429] Nazzini R., *'The Evolution of the Law and Policy on Tying: A European Perspective from Classic Leveraging to the Challenges of Online Platforms'* [2018] Vol. 27 Journal of Transnational, 6

[430] *Markovits* (n 426) 1397

[431] Bork R., *The Antitrust Paradox* (Basic Books Inc., New York); Bowman W.S., *'Tying Arrangements and the Leverage Problem'* [1957] Vol.67 Yale Law Journal; and Director A. and Levi E.H., *'Law and the Future: Trade Regulation'* [1956] Vol.51 Northwestern University Law Review.

[432] ibid.

[433] Posner R., *Antitrust Law: An Economic Perspective* (University of Chicago Press, US) 173

[434] ibid. 173

[435] Elhauge E., *'Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory'* [2009] Vol.123 Harvard Law Review, 5

[436] ibid. 1

[437] ibid. 5

profit theory would be problematic. In the other word, unless *all* of these assumptions are met (which they rarely are in reality), the single monopoly profit would be faulty because T&B will increase monopoly profits.[438] The fact that the theory only works in the circumstance where *all* of those assumptions are met makes the theory an exception instead of the rule for T&B.[439]

2.3.Post-Chicago School

The Post-Chicago School is the latest economic thinking currently influencing US and EU courts. The theory holds some of the original ideas of leveraging theory that the leverage is possible where conditions on single monopoly profit theory fail.[440] But, the illegality of T&B shall not be *per se* illegal. It shall be based on assessment of anti-competitive effects of T&B such as tying market power unless the firm can prove offsetting efficiencies of the conducts.[441] Thus, the theory of the Post-Chicago School is called the *quasi-per se* rule because it combines the ideas of the leverage theory and the single monopoly profit theory with correction on effects-based approach. Originally, the Harvard School suggested T&B should be illegal only when a substantial foreclosure share is shown.[442] The Post-Chicago School then argues that even *without* substantial foreclosure share, T&B can still increase monopoly profits and put competition and consumers in harm.[443] The Chicago School presented that efficiencies can be achieved by T&B.[444] Thus, The Post-Chicago School holds that there can be efficiency justifications which firm can prove to justify its tying or bundling. The *quasi-per se* rule of the Post-Chicago School is applicable in both US and EU under the same principle on placing liability on tying market power instead of requiring proof for substantial tied foreclosure shares.[445] In the US, it is illegal for a firm with market power to tie separate products together and significantly foreclosures amount of sales in the tied market, unless the firm can prove offsetting efficiencies of such tying or bunding.[446] Although, that opinion does not go on without a debate. The landmark legal test of Jefferson Parish is still effective in US Courts today. The test relies on *per se* illegal rule where T&B would be considered illegal when the Jefferson Parish test is fulfilled.[447] This is despite the fact that there are overwhelming supports for the US case law to move away from *per se* illegal rule to more effects-based approach where economic rationalization replaces *per se* illegality.[448] In the EU, it is illegal for a dominant firm to tie separate products without providing other alternative(s) to customers, and by doing so, forecloses the competition, unless the firm can prove a valid objective justification.[449] Example of the justification

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[438] ibid. 21
[439] ibid.
[440] *Nazzini* (n 429), 8
[441] *Elhauge* (n 435) 22
[442] ibid. 1
[443] ibid. 82
[444] ibid. 1
[445] ibid. 22-23
[446] Elhauge E., *United States Antitrust Law and Economics* (Foundation Press, US) 358-360
[447] Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984)
[448] Evans D., *'Untying the Knot: the Case for Overruling Jefferson Parish'* [2006] (US Department of Justice Official Website) <https://www.justice.gov/atr/untying-knot-case-overruling-jefferson-parish#1> assessed July 2020
[449] Case T-201/04 Microsoft v. Commission [2007] ECR II-3601 (no further appeal to the ECJ)

includes, but not exhaustive of, the conduct provides efficiencies which may lead to lower price for consumers.[450]

The Post-Chicago School is currently supported to be the correct leverage theory because it contains more robust assessment of anti-competitive effects of T&B more than the other former two. The original leverage theory is based on presumptions and is likely to put effective competition in detriment as it presumes all T&B are anticompetitive. The single monopoly profit theory is also based on rare multiple presumptions which have to be simultaneously met. Without *all* the presumptions present, the theory appears to be wrong. Therefore, the theory is more likely to be an exemption rather than the governing theory on T&B. The theory also places effective competition in danger as it argues that T&B should be *per se* legal. Thus, the *quasi-per se* rule by the Post-Chicago School seems to be the most convincing theory because it is more satisfactory in economic assessment.

The economic analysis has shown that our understanding of T&B evolved over time by the help of policy learning. Such understanding has played an important role in the development of T&B thinking to find the best possible analysis for T&B. This evolution does not happen overnight. It needs time to grow as people continuously learn from past debates and compose better arguments. Without learning from these past debates, we might just misunderstand the economic implications of T&B and might end up allowing T&B to harm competition rather than to foster it.

3. The evolution of the legal treatment of T&B: EU case laws

As we walked through evolution in economic thinking for T&B, let's us now explore the evolution of T&B legal treatment. The objective is to show that our understanding evolved over time by the help of the case laws. And that such understanding has played an important role in the EU T&B development. It will be demonstrated that when it comes to matter like T&B, details about economic assessment matters on deciding whether the T&B are illegal. Consequently, policy learning is an essential process to understand these details and how they apply.

To carry out the analysis, T&B case laws will have to be discussed. Particularly, the criteria and rationales as so-called 'legal test' of each case will be analysed. The Chapter chose to do so by selecting EU T&B cases because of the following reasons. Firstly, the EU Commission and the Courts are currently doing well on carrying out assessment on economic analysis on T&B in decision making. Although, they formally adhere the original leverage theory, but they do consider economic assessment on effects-based approach suggested by the Post-Chicago School. Secondly, with the limited scale of the Thesis, it is impossible to visit all evolutions of T&B treatments out there.

[450] *The Guidance* (n 416), para. 61

The discussion will be categorized into two topics *i.e.* the classical case law and the effects-based case law. The former are the ones laying out foundation for the legal analysis of T&B. They generally consist of Pre-Chicago School ideas that a dominant firm in one market can exclude its competitor in another market if it can force customers to buy product A and B together. On the other hand, the latter are the ones bringing more robust economic analysis to the field, which represent ideas from Post-Chicago School. They introduce analysis of economic and anti-competitive effects of the T&B. They are responsible for more complex tests such as exclusion of equally efficient competitors of the tied market and likeliness to lead to acquisition or maintenance of market power in the affected market.

3.1. The classical case laws

These cases law are the ones setting fundamental precedents of how illegal T&B should look like. They are criticized for their lack of robust economic assessments. Yet, they show us the initial period on how T&B had formed themselves on the earlier days. The top two landmark cases in this classical categorizes go to *Hilti* and *Tetra Pak II*.

Hilti and *Tetra Pak II* are responsible for the following legal tests on T&B.

1. The firm under question is dominant on the tying market.
2. The tying and tied products are separate products.
3. Customers are forced to buy both products.
4. T&B are not objectively justified.

Overall, both cases pose as Pre-Chicago School representatives (*per se* rule) as the T&B were very likely to be illegal when conditions 1-3 are met. Yet, there was the exemption where the firms could justify themselves by proving that the T&B bring in greater efficiency than the harms they cause to the competition. However, the objective justification is rarely applicable in practice.

3.1.1. Hilti Case

The Hilti case is a classical landmark competition case law in T&B about consumables to the primary products. It is a decision from the EU Commission, in which has been endorsed by the General Court and the ECJ, provides necessary information about the case including criteria (legal tests) and rationales of the case. Particularly, the case is famous for laying foundation for all four criteria for T&B legal tests.

In modern construction industry, nails are no longer being hammered by hand but by semi-automatic nail guns.[451] These nail guns are faster, more efficient, and safer than traditional method of nail hammering, thus they help to reduce costs, *e.g.* financial, time, injuring

[451] *Eurofix-Bauco v. Hilti* (IV/30.787 and 31.488) Commission Decision 88/138/EEC [1988] OJ L 65/19, para.6

employees, *etc*, and to bring about efficiency to the construction industry. For these nail guns to work, cartridge stripes and nails have to be inserted in the guns or magazine of the guns. The cartridge stripe acts as the holder of nails, feeding them for the firing. Then nails would be fired out of the cartridge stripes by the operation of the gun. These nail guns require specific type of nails and cartridge stripes for proper penetration and fastening.[452] Interoperability of the cartridge stripes and nails was not common between brands of nail guns.[453]

Customers are forced to obtain both products: Hilti Aktiengesellschaft ('*Hilti*') is a large firm producing a variety of fastening systems including nail guns and relevant accessories.[454] It held patents over its nail guns and cartridge strips, however not over its nails.[455] Hilti, *inter alia*, compelled its customers to purchase its nails together with its cartridge strips without other alternatives.[456] *Hilti* had been accused of abuse of dominant position by tying under Article 86 of the EEC Treaty[457] with intention to exclude independent nail makers out of the tied market.[458]

Separate products: The Commission considered Hilti-compatible cartridge strips to be in the tying market, in which Hilti held legal monopoly by patent and nails to be in the tied market. This was because they were produced by different technologies and firms and customers should have choice to purchase them separately. The nail gun was found to be in its own separate market.[459] The decision also records *Hilti*'s argument that it considered all three goods *i.e.* nail gun, cartridge strip, and nail as one integrated system and therefore there were no tying and tied markets. The Commission denied this view by reasoning that the existence of other firms running independent nail and cartridge stripe without producing nail guns proved that there was demand to purchase the two product separately from nail guns. Thus the 3 products were not one integrated system.[460] The General Court confirmed the Commission stand on separate markets and endorsed that other firms should be able to produce consumables intended to be used with equipment's produced my other firms.[461]

Dominant position*:* Although only proving dominant position in tying market would be adequate to subject a firm to abuse of dominant position litigation,[462] the Commission considered *Hilti* to hold dominant positions over all 3 separate markets *i.e.* nail guns, cartridge strips, and nails. The main assessment on dominant position was in the tying market (cartridge strip). The Commission paid large amount of its attention to *Hilti*'s legal monopoly position in the tying market in which was protected by intellectual property rights ('*IPRs*').[463]

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[452] ibid. para.8
[453] ibid. para.10
[454] ibid. para.1
[455] ibid. para.12
[456] ibid. para.30
[457] Equivalent to the current Article 102 of the TFEU
[458] The *Hilti Decision* (n 451) para. 75
[459] ibid. para.55
[460] ibid. para.57
[461] Case T-30/89 *Hilti AG v Commission* [1990] ECR II-163, para. 68
[462] Later on, the Commission confirmed in its Guidance on Article 102 that dominant position must be found in tying market and not necessarily in other markets. See *the Guidance* (n 416), para 50
[463] The *Hilti Decision* (n 451) para.66

The Commission also conveyed that the connection on *Hilti*'s dominant positions between its nail gun market and the tying market (cartridge strip) was used to strengthen *Hilti*'s market power in the tying market.[464] This was because only Hilti-compatible cartridge strips could be used with *Hilti*'s nail gun. Therefore, *Hilti*'s dominance (monopoly) in the nail gun market locked the customers into the cartridge strip market as well. Accordingly, the Commission considered *Hilti* to hold dominant position in, *inter alia*, tying market.[465] *Hilti* did not argue the Commission's finding on its dominance.

Objective justification*: Hilti* attempted to justify its tying conduct by referring to the tie as motivated by a desire to ensure safe and reliable operation of the nail gun. However, *Hilti* agreed that the tie was not the least restrictive measure to make sure of that safety.[466] There could be other less restrictive ways to ensure such safety of product usage, *e.g.* communicating the safety concerns in writing to customers or Hilti-compatible nail producers, in which *Hilti* rarely or never did.[467] The Commission dismissed the attempted justification and stated that *Hilti* committed the tie because of commercial interest and not purely motivated by consideration of safety.[468]

Per se rule: After separate markets are identified, dominant position found, and objective justification rejected, the Commission held *Hilti* in breach of abuse of dominant position by, *inter alia*, tying.[469] The General Court and the ECJ later upheld this decision.[470] This swiftly found illegality without further economic assessments puts the *Hilti* case in the *per se* rule of Pre-Chicago School idea. [471] The case relied almost solely on the leveraging theory *i.e.* Hilti, who held dominant position in the tying market would leverage its power from the tying to the tied market and thus earn extra monopoly profit and put consumers in detriment. The School questioned why *Hilti* would leverage its market power from the tying market (cartridge strips) to the tied market (nails) when it could raise the price in the cartridge market (because Hilti was monopoly) and sell nails at marginal cost.[472] Furthermore, EU abuse of dominant position enforcement aims to protect competitive process in which benefits consumers more than protecting other competitors in the market.[473] It has been argued that the tie by *Hilti* did not result harm to the consumers or competition (or as the Commission puts it -anticompetitive foreclosure).[474] This is because there was a fixed number of nails being used in the cartridge strips, and therefore *Hilti* could not gain additional profit by pricing the nails high and tying them to the cartridge strips or pricing the nails low and

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[464] ibid. paras.69-71
[465] ibid. para.71
[466] ibid. para. 88
[467] ibid. para. 89.4
[468] ibid. para. 90
[469] ibid. paras. 97-98
[470] *The Hilti Case of 1990* (n 461) *and* Case C-53/92 *Hilti AG v EC Commission* [1994] ECR I-667
[471] *Jones* (n 422) 459
[472] Nalebuff B., *'Bundling, Tying, and Portfolio Effects*: *PART 1 - Conceptual Issues'* [2003] Department of Trade and Industry (DTI) Economics Paper No.1 <http://faculty.som.yale.edu/barrynalebuff/BundlingTyingPortfolio_Conceptual_DTI2003.pdf> accessed June 2018, 21
[473] *The Guidance* (n 416) para. 5
[474] ibid.

cartridge strips high.[475] The only proved harm done by *Hilti* was the harm which had been placed on Hilti-compatible cartridge strips and nails producers as they were foreclosed to the markets but no harm to competition nor consumers was proven.[476] Therefore, the tie was not anti-competitive as it hurt competitor and not necessarily the competition. This also strengthened the *pre se* rule stand of the case.

Overall, *Hilti* poses as a Pre-Chicago School representative of *per se* rule. This is because T&B were very likely to be illegal when conditions 1-3 are met. Yet, there was the exemption where the firms could justify themselves by proving that the T&B bring in greater efficiency than the harms they cause to the competition. However, the objective justification is rarely applicable in practice.

3.1.2. Tetra Pak II Case

The Tetra Pak II case is another landmark competition law case in T&B consumables to the primary products. This EU Commission case is endorsed by the General Court[477] and the ECJ.[478] It provides necessary information about the case including criteria (legal tests) and rationales of the case. Particularly, the case is famous for reinforcing the foundation of all 4 T&B legal tests established in *Hilti*.

79% of liquid food packaging industry at the time was milk.[479] The markets were divided into aseptic and non-aseptic markets. The non-aseptic market was the liquid food packaging market for pasteurised form (fresh milk) and the aseptic market was for aseptic condition (UHT milk). The two markets applied different technologies which were not interchangeable and therefore not substitutable. There are also packaging machine markets which carried out packaging process of milk into those two categories of cartons. They are also not interchangeable and therefore not substitutable.[480]

Customers are forced to obtain both products: Tetra Pak group of companies ('*Tetra Pak*'), who was the world leader in the field of packaging liquid and semi-liquid foods in cartons,[481] compelled its customers in non-aseptic packaging market to purchase its carton to be used with the non-packing machines *Tetra Pak* supplied.[482] The T&B was contractual because it was based on contractual obligation and not technical matters relating to the products.

Separate markets: The Commission considered that there were 4 separate markets; 1. The packaging machine for aseptic condition market 2. The aseptic packaging carton market 3. The packaging machine for non-aseptic condition market 4.The non-aseptic packaging carton

[475] *Nalebuff* (n 472) 20
[476] *The Hilti Decision* (n 451), para. 74
[477] Case T-83/91, *Tetra Pak (II) v. Commission* [1994] ECR II-755
[478] Case C-333/94P, *Tetra Pak (II) v. Commission* [1996] ECR l-5951
[479] *Elopak v. Tetra Pak* (IV/31043 – Tetra Pak II) Commission Decision 92/163/EEC [1991] OJ L 72/1, para 6
[480] The *Tetra Pak II Decision* (n 324), para. 103
[481] ibid. para. 1
[482] ibid. para. 116

market.[483] The main reasons for these definitions was that the packaging machines and cartons were not technological interchangeable and there were unlikely substitutions between aseptic and non-aseptic carton markets.[484] *Tetra Pak* argued that there were no 4 separate markets. Instead, there was a single market *i.e.* 'integrated distribution systems for liquid and semi-liquid foods intended for human consumption'.[485] The Commission disapproved this view of *Tetra Pak*. *Tetra Pak* was alleged for tying its non-aseptic cartons to its non-aseptic machines. Therefore, the tying market was 3. (the packaging machine for non-aseptic condition market) and the tied market was 4. (the non-aseptic packaging carton market).

Dominant position: The Commission found *Tetra Pak* held dominant positions in 1. and 2. (aseptic sectors) with 90-95% of market share.[486] However, it did not reach to a conclusion whether *Tetra Pak* held dominant position in 3. and 4. (non-aseptic sectors) which the firm held around 50-55% of market share.[487] Instead of traditional approach where dominance has to be found in the tying market, the Commission used the connection between aseptic and non-aseptic sectors to justify dominant position requirement of the Article 86. The Commission states that there was association between the 4 markets in which enabled power for *Tetra Pak* to commit abuses on markets 3. and 4. (non-aseptic sector markets).[488] Later on, *Tetra Pak* appealed to the General Court on, *inter alia*, whether or not it was dominant in 3. and 4. markets (non-aseptic sector markets). The Court endorsed the Commission's position on the 'associative links' which demonstrate dominant positions in the non-aseptic markets.[489] This concept of associative links between markets is therefore acknowledged by the Commission and the Court that abuses could be committed in the markets in which a firm was *not* dominant if there were close links to a dominant market in association with the original market.[490] In conclusion, the dominant position in the tying market requirement was fulfilled without considering *Tetra Pak* dominant in the tying market.

Objective Justification: *Tetra Pak* attempted to justify its tying conduct by referring to its concerns of public health and safety, the need to protect its reputation, and that the products were the integrated distribution system which was one product and not a tie.[491] For public health and the firm's reputation, *Tetra Pak* explained that the tie would ensure the output products to be safe for human consumption and it has legitimate interest to protect its reputation. The Commission dismissed these rationales because there were other less restrictive ways to achieve such outcome *e.g.* publication of standards and specifications to comply with existing legal frameworks.[492] This less restrictive approach of the Commission goes along with the *Hilti case* discussed above. The Commission also dismissed the integrated distribution system claim by giving the reason that there was no 'natural links'

[483] ibid. para. 11
[484] ibid. para. 93
[485] ibid. para. 118
[486] ibid. para. 12
[487] ibid. para. 13
[488] ibid. para. 104
[489] *The Tetra Pak II Case of 1994* (n 477) paras. 117-123
[490] *Nalebuff* (n 472) 9
[491] *The Tetra Pak II Decision* (n 479) para. 118
[492] ibid. para. 119

between the product to create the system.[493] This natural-links approach was later confirmed by the General Court[494] and the ECJ.[495]

Per se rule: Similarly to the *Hilti* case, the Commission has been criticised for its *per se* abuse approach towards *Tetra Pak* as the abuse had been found shortly after the dominant position, separate markets, and no objective justification were identified without further assessment of the markets.[496] Additionally, the Commission also has been criticised for taking form based approach *i.e.* it heavily focused on the behaviour of *Tetra Pak* and not the effects of such behaviours being posed to the markets.[497] Accordingly, the Commission is suggested to take more effects-based approach by focusing more on the effects of T&B on the markets. This would allow the Commission to have a stronger stand on its decision making.

More economic analysis is suggested to the case. The existence of *Tetra Pak* T&B also poses barrier to entry. *Tetra Pak's* T&B limited the size of the non-aseptic carton market which would otherwise be available to new entrants. The remaining available market for the new entrants was therefore the market that used non-Tetra Pak machines[498] which was a small market. Additionally, the new entrants were likely having to operate at both machine and carton markets, because they would not be able to access *Tetra Pak*'s machines, which is more difficult than carton market alone.[499]

Similarly to *Hilti*, *Tetra Pak* also poses as a Pre-Chicago School representative of *per se* rule. The T&B were very likely to be illegal when conditions 1-3 are met. Yet, there was the exemption where the firms could justify themselves by proving that the T&B bring in greater efficiency than the harms they cause to the competition. However, the objective justification is rarely applicable in practice.

3.2. The effects-based case laws

As the time passed, the legal treatment of T&B evolved gradually. The economic analysis has become more robust on identifying foreclosure on anti-competitive effects. The legal treatment approach developed from Pre-Chicago School of *per se* rule to more Post-Chicago School of *quasi-per se* rule. Although, the change did not happen completely. The case laws still formally apply the traditional tests for T&B, but with further considerations paid to more economic analysis and foreclosure on anti-competitive effects. The top three landmark cases in this effects-based category goes to *Microsoft I and II* and *Android*.

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[493] ibid.
[494] *The Tetra Pak II Case of 1994* (n 477) para. 40
[495] *The Tetra Pak II Case of 1996* (n 478) paras. 34-38
[496] *Jones* (n 422) 459
[497] Gustafsson D., *'Tying under EC Competition Law: The Tetra Pak II Case'* [2007] Thesis, Department of Economics, Lund University, Sweden, 32-33
[498] Because the Tetra Pak-machine market had all been tied with Tetra Pak's cartons.
[499] *Nalebuff* (n 472) 14-15

These 3 landmark cases are responsible for the following additional tests on T&B foreclosure that they could be anti-competitive if they meet the traditional tests, and:

5. The tied market is influenced by strong demand-related efficiencies and barriers to entry.

6. T&B are likely to exclude equally efficient competitors in the tied market.

7. T&B are likely to maintain or strengthening market power on any relevant market (tying or tied market).

These latter tests are the additional tests to those of classical case laws. Their existence significantly improves economic analysis of EU's T&B case law to be more robust and avoid making inaccurate decisions that might jeopardize competition rather than fostering it. These additional tests represent Post-Chicago School (quasi-*per se* rule) idea that T&B should meet additional economic tests before being convicted to illegality.

3.2.1. Microsoft I Case (Media Player)

This Microsoft's Windows Media Player case (*'Microsoft I'*) is the landmark case for one of the first effects-based approach taken by the EU Commission towards abuse of dominance in EU competition law. Overall, the decision provides necessary information about the case including criteria (legal tests) and rationales of the case. Particularly, the case is famous for introducing additional tests for T&B which demonstrated that the Commission paid better attention to effects-based approach.

Microsoft Corporation ('*Microsoft*') is a software firm who manufactures, licenses and supports a wide variety of software products for many computing devices.[500] Its most significant business was in PC operating system by its Windows PC operating system (*'Windows'*) which it held more than 90% of market share.[501] *Microsoft* also ran in media player market by its Windows Media Player ('*WMP*'). *Microsoft* compelled the Original Equipment Manufacturers (*'OEMs'*) whom assembled computer parts together including PC operating system in which Microsoft was overwhelmingly dominant to pre-install its WMP in every Windows being installed in every computer without other alternatives.

The case repeated the traditional tests for illegal T&B namely dominant position, separate products, forcing customers, and objective justification. Furthermore, it demonstrated more tests on anti-competitive effects of the T&B on top of the traditional tests. This showed a more-robust economic analysis for the first time in EU T&B.

The following are the legal tests of abusive T&B laid out by the decision, both classical and effects-based;

[500] Case COMP/C-3/37.792 *Microsoft* (Brussels, 21 April 2004), C(2004)900 final, para. 1
[501] ibid. para. 431

Dominance in the tying market: The Commission found that Microsoft held dominant position over the tying market (PC operating system market) by Microsoft's very high market share and significant barrier to entry.[502] For market share, the Commission found that Microsoft held over 90% of the market share in the tying market since 2000 and continuingly increased to the time of the decision.[503] The Commission considered this overwhelming market share which occupied almost the whole market as an approach of monopoly position and overwhelmingly dominance.[504]

Separate Products: The Commission employed the consumer demand criterion used in *Hilti* and *Tetra Pak II* in Microsoft. The existence of independent manufacturers who specialized in the tied product would prove that there was separate consumer demand and therefore separate markets between tying and tied products.[505] The fact that there were other firms providing media players separately from PC operating systems was evidence for separate consumer demand in media players and therefore the PC and media player markets were separate.[506]

Customers are forced to obtain both products: The OEMs were not given choice to obtain Windows without pre-installing the WMP. Although, the OEMs could install other non-Microsoft media players on their own will, they still had to pre-install the WMP.[507] In addition, to uninstall WMP would make the Windows and other software malfunctioned or not working properly.[508] Microsoft responded two arguments to these allegations by the Commission. Firstly, it argued that the end users did not have to use the WMP and could use other non-Microsoft media players. And secondly, the WMP was free of charge.[509] The Commission dismissed the arguments by the following reasons. Firstly, it is not necessarily that the customers have to pay for the tied product in order to make the tie anticompetitive under Article 82 of TEC (currently Article 102 of TFEU) because the 'paying' does not indicate whether competition is harmed.[510] Secondly, by compelling the OEMs to obtain WMP, Microsoft would place other competitors in media player market in competitive disadvantage which a burden to be pushed back to competition and consumers.[511] In the Commission's view, not providing alternatives to the consumers (the end users) for obtaining the tying product alone contributes to competition and consumer harm because the consumers are *'likely'* to use the tied product, although they did not necessarily want to obtain and use it, and other competitors on media player market are placed at a competitive disadvantage.[512] Other competitors might be put into disadvantage because they simply could not reach to customers since the customers were already obtained WMP. Although one might argue that

[502] ibid. para. 429
[503] ibid. para. 431
[504] ibid. para. 435
[505] ibid. paras. 801-803
[506] ibid. para. 804
[507] ibid. para. 827
[508] ibid. para. 829
[509] ibid. para. 830
[510] ibid. para. 831
[511] ibid. paras. 832-833
[512] ibid.

customers could still buy more product, but it might be less likely since they already had WMP for the job.

Objective justifications: The idea of objective justifications is to weigh between the procompetitive and anticompetitive effects the alleged abusive conduct causes.[513] If the procompetitive effects surpassed the anticompetitive effects, the conduct should be justified and legal, and *vice versa*. Microsoft attempted to justify its T&B by putting forwards the followings objective justifications; 1. The T&B created efficiency related to distribution and 2. The T&B created efficiency related to WMP as a new platform for contents and applications. Although, the Commission considered the objective justifications of the T&B submitted by Microsoft to be inadequate and disproportionate to anticompetitive effects the T&B caused. Additionally, they primarily reflected Microsoft's own profitability (not adequately profiting competition or consumers).[514] For efficiency in distribution, Microsoft argues that the T&B lowered transaction costs for consumers, reduced time and effort for consumers to set default in personal computer,[515] and saved resources otherwise spent for maintaining separate distribution system for both products.[516] The Commission denied Microsoft's arguments by stating that Microsoft failed to differentiate between consumer's benefit of having WMP preinstalled and Microsoft's handpicking WMP for consumers.[517] For the consumer to truly benefit of the bundle, Microsoft should have let OEMs to do their jobs as they were experts in assembling computer parts rather than dictating the assembly itself[518] and benefiting by monopolizing the tied market. For distribution cost saving, the Commission disproved Microsoft's point by stating that, in software industry, distribution costs are insignificant because of the near-zero marginal cost per additional unit. Thus, it could not be outweighed by the distortion the tie caused to competition.[519] For efficiency of WMP being a new platform for contents and applications, Microsoft argued that software developers wanted the superior technical product performance of the integrated version of Windows with WMP. However, Microsoft failed to demonstrate evidence supporting its argument[520] and that the developers would still benefit from WMP pre-installation of OEMs without Microsoft's compulsory tie.[521]

Therefore, the tie was not indispensable as Microsoft claimed but rather driven by Microsoft's own profitability. Moreover, all efficiency effects did not surpass anticompetitive effects. Microsoft's objective justifications were, therefore, invalid.[522]

Foreclosure effects: The Commission went further to discuss the anti-competitive effects of the T&B, showing that more consideration was paid to effects-based style of analysis. This can be seen through additional tests 5-7 on foreclosure effects mentioned above, namely, the

[513] *The Hilti Case of 1990* (n 461) paras. 102-119, and later on entrenched in *the Guidance* (n 416) Section III, D
[514] *The Microsoft I Decision* (n 500) para. 970
[515] ibid. para. 956
[516] ibid. para. 958
[517] ibid. para. 956
[518] ibid. para. 957
[519] ibid. para. 958
[520] ibid. para. 962
[521] ibid. para. 965
[522] ibid. para. 970

tied market is influenced by strong demand-related efficiencies and barriers to entry, T&B are likely to exclude equally efficient competitors in the tied market, and T&B are likely to maintain or strengthening market power on any relevant market.

The tied market is influenced by strong demand-related efficiencies and barrier to entry: This situation is when customers are locked-in to the tied market by efficiencies they prefer, thus it is unlikely that they would switch to other competitors. This is a new feature to the classical case laws. The best two examples of this would be network effect and barrier to entry. Network effect is a situation that customers are locked-in to a platform because they need to (or want to) rely on the platform. A dominant technologic platform would normally have many existing customers in the platform. These customers would draw in more developers and investors to create more products for the platform. These products are normally not compatible with other platforms. Thus, more and more customers are attracted to the platform and are unlikely to switch to other competitors. [523] Windows was a good example for this network effect. Microsoft's T&B constituted network effect between the tying and tied markets. The network effect locked end users, whom already used the dominant Windows, into WMP in the tied market, which in turn, further strengthened Windows' position in the tying market. This would lead to other products being invested to join the Windows and thus attract more end users to the Windows and so on. An existing strong network effect would discourage potential competitors to enter the market because almost all consumers are locked into the tying and tied markets by a potential monopoly, creating significant barrier to entry.[524]

Exclusion of equally efficient competitors in the tied market: Unlike other foreclosure effects that appear to the market, this one occurs to a competitor. T&B are likely to be illegal if they exclude equally efficient competitor from the tied market.[525] Firstly, 'equally efficient competitor' needs to be defined. The definition suggested by the case law can be put as it does not matter if the actual foreclosed competitor is equally efficient to the dominant firm. What matter is that if the competitor were as efficient as the dominant firm, it could not be successful, not because the firm is bad at that but before the T&B by the dominant firm.[526] In this case, RealNetworks ran Real Player in competition with the WMP.[527] Although it was far from being equally as efficient as Microsoft, it was considered that RealNetworks was in a weaker financial position because of the T&B.[528]

T&B are likely to maintain or strengthening market power on any relevant market: In Commission's view, the tie ensured that *WMP* would be to ubiquitous in the tied market as its Windows was in the tying market.[529] This was because the Windows had already acquired more than 90% of the tying market and appeared to be ubiquitous among worldwide end

[523] ibid. para. 451
[524] ibid. paras. 420 and 459
[525] *Nazzini* (n 429) 41
[526] Thomas H. Au, *'Anticompetitive Tying and Bundling Arrangements in the Smartphone Industry'* [2012] Vol.16 (No. 1) Stanford Technology Law Review
[527] *Microsoft I* (n 449) 945
[528] ibid. 953
[529] *The Microsoft I Decision* (n 500) para. 844

users. By tying WMP with Windows, WMP would instantly appear with Windows everywhere, meaning WMP would access the same ubiquity *Windows* did. And because the end users took WMP by default, it was unlikely for them to pursue additional purchase of non-Windows media player,[530] especially when they had identical functions. Thus, the T&B certainly strengthened Microsoft's market power in the tied market. Its market share in the tied market overwhelmingly increased during the period of T&B.[531]

Per se to quasi-per se rule: The Commission has added economic values to its traditional T&B analysis. The Commission demonstrated detailed analysis foreclosure on competition which did not occur the two former traditional cases of *Hilti* and *Tetra Pak II*.[532] This approach is consistent with the quasi-per se rule established by the Post-Chicago School which requires foreclosure effect as a legal test for illegal T&B.[533]

There have been other criticisms to this case. The case is viewed as a restrictive measure to freedom of commerce in offering new built-in features and innovative products to consumers[534] which might have caused anticompetitive effects instead of protecting competition and protecting competitors more than consumers.[535] The case has also been criticise for the lack of discussion in theory of harm to the consumers. Only impact of the tie and market foreclosure on consumer's choice were discussed.[536] This might have poorly justified the condemnation on the tie to be abusive.

Overall, *Microsoft I* represents the start of policy development from *per se* rule influenced purely by Pre-Chicago School to include economic analysis of Post-Chicago School. The development brought with it additional tests for illegal T&B based on sound economic thinking. This change also tells us a couple more things. It demonstrates that our understanding evolves over time by the help of policy learning and case laws which play an important role in the EU competition law development. It also shows that details matter when it comes to T&B. Three more economic tests and we see major policy shift from traditional approach to a modern economic robust approach. Therefore, our learning is crucial to understand these details and how they apply.

3.2.2. Microsoft II Case (Internet Explorer)

This Microsoft's Internet Explorer tying case ('*Microsoft II*') was similar to the Windows Media Player tying case in 2004 ('*Microsoft I*') due to software application being tied to the same tying platform (Windows). The end results of both cases were also similar *i.e.*

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[530] ibid. paras. 845-847
[531] *Microsoft I* (n 449) 900- 944
[532] *Jones* (n 422) 464 and Ahlborn C. and Evans D., *'The Microsoft Judgement and its Implications for Competition Policy towards Dominant Firms in Europe'* [2009] 75 (3) Antitrust Law Journal, 18
[533] *Nazzini* (n 429) 43
[534] *Jones* (n 422) 465
[535] Vesterdorf B., *'Article 82 EC:Where do we stand after the Microsoft judgement?'* [2008] the ICC Annual Competition Law and Policy Lecture <http://www.icc.qmul.ac.uk/media/icc/gar/gar2008/Vesterdorf.pdf> accessed July 2018
[536] Ezrachi A., *EU Competition Law: An Analytical Guide to the Leading Cases* (2nd edn, Hart Publishing, USA) 231

Microsoft T&B were illegal. Although how it terminated and the remedies placed on Microsoft were different. Firstly, Microsoft decided not to prolong the fight and gave in to the Commission by offering its commitments and thus terminated the *Microsoft II*. Secondly, Microsoft had to unbundle in *Microsoft I*, but it had to offer Choice Screen in the *Microsoft II* in addition to the unbundling, which were far more reaching commitments than the *Microsoft I*.

In 2009, the Commission alleged Microsoft of abusive T&B of its Internet Explorer browser (*'IE'*) to its dominant Windows operating system. In doing so, the Commission adopted the Statement of Objections containing preliminary analysis of the abusive T&B[537] and notified to Microsoft.[538] Eventually, Microsoft decided not to fight the Commission and submitted its Commitments[539] in which met the Commission's concerns in preliminary analysis in its Statement of Objections regarding its tie.[540] The Commission found the Commitments satisfactory and found no longer ground to take further action against Microsoft. The Commission then adopted the IE decision accordingly to the Commitments.[541] The final Commitments by Microsoft, which has been made binding by the IE decision, can be summarized into two main issues. Firstly, Microsoft would let Original Equipment Manufacturers (*'OEMs'*) to preinstall any web browser of their choice which Microsoft would not circumvent and retaliate against, on the basis of the web browser(s) OEMs choose to preinstall.[542] Secondly, Microsoft would distribute 'Choice Screen' to the existing Windows users. The Choice Screen would enable Windows users who already had IE as their default to optout and/or choose to install other web browsers as they see fit.[543]

Overall, the decision provides necessary information about the case including criteria (legal tests) and rationales of the case. Although the information is very similar to those in *Microsoft I* case. The Commission wholly adopted the legal tests applied in *Microsoft I*.[544] As in the Commission's Statement of Objections, the Commission listed *Microsoft I* tests out one by one *i.e.* Microsoft held dominant position in PC operating system market (the tying market),[545] the Windows (the tying product) and the IE (the tied product) were in separate markets,[546] neither OEMs nor end users were able to obtain the Windows alone without IE and it was technically impossible to remove IE from Windows,[547] and that the tying foreclosed competition on the merit.[548]

[537] Case COMP/C-3/39.530 – *Microsoft (tying)* 2009/C 242/04, para. 6
[538] ibid. para. 7
[539] ibid. para. 15
[540] ibid. para. 113
[541] ibid. Article 1
[542] ibid. Annex (the Commitments), paras. 1-6 and 18-19
[543] ibid. Annex (the Commitments), paras. 7-17
[544] See *Microsoft I* discussed above.
[545] Summary of Commission Decision (Case COMP/C-3/39.530) 2010/C 36/06, para. 2(i)
[546] ibid. para. 2(ii)
[547] ibid. para. 2(iii)
[548] ibid. para. 2(iv)

Because the traditional tests (number 1-4) are identical to those of *Microsoft I*, they will not be repeated here. Instead, effects-based tests (number 5-7 and so on) will be discussed. The followings are the effects-based tests of abusive T&B laid out by the decision.

Foreclosure effects: The Commission paid most of its attention in *Microsoft II* to foreclosure effects the T&B posed to competition. In fact, it is the only topic that the Commission discussed in detail. The analysis can still be grouped into the same categories discussed in *Microsoft I*, namely, the tied market is influenced by strong demand-related efficiencies and barriers to entry, and T&B are likely to maintain or strengthening market power on any relevant market.

The tied market is influenced by strong demand-related efficiencies and barrier to entry:

The Commission also adopted the same analysis of network effect from *Microsoft I* to *Microsoft II*. By tying IE to Windows, Microsoft equally accessed 90% of the end users in PC operating system market for its *IE*. Consequently, software developers and content providers would have pressing incentive to design their software and content for IE and not for other web browsers, because of the potential size of the end users.[549] Therefore, the network effect also played a part in foreclosing competition in the web browser market. The Commission also paid a good amount of attention to barriers to switch in the web browser market. Because the end users would always obtain IE together with Windows and OEMs were often did not preinstall additional web browsers together with the PC they sold, the end users would have to install other web browsers themselves if they wanted to use them. At this stage, end users inclined to have barrier to switch web browsers which gave edge to IE as it already had the end users in its hands unless they decided and acted to switch. The Commission found that more than two third of the end users who already acquired IE would not switch to other web browsers.[550] This barrier to switch, which was majorly characterized by significant deficit of information and interest on the part of the end users, [551] made it easier for competition to be foreclosed to IE. Lastly, the Commission assessed that the tie gave Microsoft artificial distribution advantage in which other web browsers were unable to match.[552] The firm mainly used two channels to distribute its IE *i.e.* through tying to its Windows to the OEMs and by internet downloading.[553] By the tying channel, Microsoft, with its overwhelming market power in its Windows, tied IE to Windows by licensing agreement without alternatives for OEMs to obtain Windows alone without IE. This discouraged OEMs to additionally preinstall other web browsers, because of the similar basic functionality.[554] By the internet downloading channel, the Commission accepted the fact that with increasing rapid internet at the time, other web browser firms also had advantage of their own distributing channels via internet downloading. However, the Commission did not see it as sufficiently effective distribution channel to compete with *IE*[555] because of the lack of interest and information of

[549] The *Microsoft II Decision* (n 537) paras. 55-56
[550] ibid. para. 50
[551] ibid. para. 52
[552] ibid. para. 39
[553] ibid. para. 41
[554] ibid. para. 44
[555] ibid. para. 46

the end users.[556] Therefore, in the view of the Commission, the internet downloading channel could not compensate disadvantages posed by the tie in distributing other web browsers to compete with *IE*.

T&B are likely to maintain or strengthening market power on any relevant market: The Commission considered that, despite many years of unimproved *IE*, Microsoft was still able to maintain its market share in the tied market. Although after the improved version of IE 8.0 in 2009, it did not seem to be superior than its main competitor, Firefox.[557] This showed the foreclosure effect to competition in the web browser market *i.e.* although Microsoft did not have innovative product, it could still maintain the market share as if it had an innovative product. The Commission also considered that, by tying, Microsoft granted itself opportunity to preserve its dominance in PC operating system market. IE is a web browser which was specifically written for Windows, other web browsers were not. Therefore, the large-scale deployment of non-Windows web browsers posed 'platform threat' to Windows' dominance, because they had the potential to work on other PC operating systems and not restricted to Windows. The use of other web browsers would reduce the dependency of customers on Windows platform. Thus, if other web browsers were able to reach customers, they would give the customers option to switch web browsers or even the underlying operating system. Likewise, the tie was considered an attempt to maintain Microsoft's own dominant position in the tying market.[558]

Per se to quasi-per se rule: Since *Microsoft II* was a reinforcing case of *Microsoft I*, the case is seen as a confirmation of the move to more *quasi-per se* rule of EU T&B case laws.

Criticisms: *Microsoft II* has seen several criticisms regarding the Commission analysis of the T&B by Microsoft. However, it should be noted that Microsoft gave in quickly after the Commission action and the Commission was able to make a decision without a fight from Microsoft. Naturally, this did not present pressures for the Commission to do further analysis when the firm had already given in the fight and accepted the wrongdoings. Yet, further effects-based discussions on the following issues would have shielded the Commission from such intensive criticism.

The mismatched consumer harm story and remedy: It is argued that the Commission did not develop story of consumer harm well enough for Choice Screen remedy provided by Microsoft. The Choice Screen was one of 'the most far reaching remedies', while the developed theory of consumer harm was less demanding and could have been more explained.[559] Although the Choice Screen remedy itself was not opposed by the commentators, the less demanding consumer harm assessment created a conceptual mismatched and was said to damage development of competition law and economic growth in general.[560] In addition, it has been criticized that the Commission's remedy to unbundle the

[556] ibid. para. 47
[557] ibid. para. 54
[558] ibid. paras. 57-58
[559] Economides N. and Lianos I., *'A Critical Appraisal of Remedies in the E.U. Microsoft Cases'* [2010] Vol. 2010 (No. 2) Columbia Business Law Review, 418
[560] ibid. 418-419

tie in *Microsoft I* was adequate and more proportionate than the Choice Screen, given that the same consumer harm story was considered.[561]

Effectiveness of the remedy in restoring competitive market structure: In addition to being proportionately fit with theory of harm to consumer, the remedy should also be cable of restoring competitive market structure.[562] Nevertheless, the Choice Screen remedy was criticized to protect competitors rather than restoring competitiveness of the markets. This was because the Choice Screen guaranteed access to Windows, which was dominant, as a distributing channel to competitors of IE. The incentive of those competitors to invest and develop in new and innovative technological platform to compete with Windows would be largely decreased.[563] There should be less motivation to invest in expensive innovation on a platform which does not promise potential return than to free-ride dominant platform without risks. Therefore, the Choice Screen tends to protect competitors rather than addressing the restoration of competitive market on the expense of dominant firm's facility.

T&B or essential facility: Under the light of Choice Screen remedy, it is also argued that *Microsoft II* should have been considered in essential facility doctrine under refusal to deal, not in T&B.[564] This was because by providing Choice Screen, Microsoft would have to open its Windows for distribution of other internet browsers (which were Microsoft IE's competitors), the same way seaport should give adequate access to other ferry service providers in essential facility case.[565] The Choice Screen, at least in the Commission's view indicated indispensability of Windows to other firms in order to maintain competition on the merit. Thus, the Choice Screen remedy fulfilled essential facility doctrine under refusal to deal and should be considered according to the doctrine. The consequence of applying T&B instead of essential facility doctrine does not only have conceptual difficulty. It also created distorting standard for T&B and essential facility assessments. Now a dominant firm might have responsibility, besides not to abusively tie, but also to grant access for its competitors to use their dominant platform for the competitors' business without having to meet essential facility tests. This is very problematic because a smart competitor could have use T&B allegation to gain access to dominant firm's platform for its own business operation without having to invest or taking risks creating its own platform. Most importantly, they can achieve this by not meeting 'tougher' criterions in essential facility doctrine under refusal to deal assessment.[566] In order for the abuse in essential facility doctrine to be established, the facility has to be 'indispensable to carry on business' and no other alternative distribution methods available.[567] The same indispensable standard still applies even though the available alternative distribution methods are less advantageous. [568] The Commission would have failed to prove essential facility standard in *Microsoft II* because Windows was not the only way to distribute internet browsers. There were other ways to effectively and cheaply distribute

[561] ibid. 419
[562] *Sanad* (n 425)124
[563] ibid. 127-128
[564] *Economides* (n 559) 419
[565] See *Sea Containers v. Stena Sealink* —Interim measures (IV/34.689) Commission Decision 94/ 19/EC [1993] OJ L15/8
[566] *Sanad* (n 425) 131-132
[567] Case C-7/97 *Oscar Bronner v. Mediaprint* [1998] ECR I-7791, para. 41.
[568] ibid. para. 43

internet browsers such as by search engines. [569] Together with the successful *Microsoft I* precedent, it was more convenient for the Commission to pursue *Microsoft II* via T&B than essential facility doctrine. Although it came with the price of competition law deterioration, both conceptually and practically.

Microsoft's customers were not coerced to purchase the tied product: In order for a tie to be illegal, customers must have been forced to buy the tied product with the tying product.[570] In *Microsoft I* and *Microsoft II*, it has been argued that the customers were not forced to buy the tied products because they were provided for free. Customers were free to install and use as many internet browsers and media players as they wanted. Therefore, customers' freedom of choice was wholly preserved.[571] However, the Commission had a different perspective. The Commission was clear since *Microsoft I* that it is not necessarily for the customers to pay for the tied product in order to make the tie abusive because the 'paying' does not indicate whether competition is harmed.[572] Therefore, in the Commission's view, the tie would be abusive when, *inter alia*, customers are forced to obtain the tied product without alternative.

The position in the Commission in information technology economy: By considering the Commission's position in applying T&B instead of essential facility doctrine, some commentators argued that the Commission poorly positioned itself in information technology economy. Development of information technology economy heavily depends on integration of products into a new product. These integrations can always be considered T&B and, according to tying analysis standpoint of the Commission from both Microsoft I and II, are vulnerable to be illegal. The integration, however, can be justified by consumer demand. For example, Microsoft Office is a compulsive T&B of spreadsheets, word processors, presentation software, *etc*.[573] Users cannot obtain, *e.g.*, spreadsheets alone without word processors. Yet, there is no major consumer demand of spreadsheets separately without word processors. The same situation could go with smartphone as a tie of mobile phone, alarm clock, camera, radio, campus, voice recorder, *etc*. The Commission's position to categorize the *Microsoft II* into T&B and not essential facility doctrine under refusal to deal weakened technological T&B standard and therefore made it harder for firms to innovate new products out of existing products.[574] By this reason, the Commission was criticized as being on the wrong side of the new technology market.[575]

Overall, *Microsoft II* confirms *Microsoft I* approach on policy development from *per se* rule influenced purely by Pre-Chicago School to include economic analysis of Post-Chicago School. Although, more effects-based analysis could have been more extensively done. It would have shielded the Commission from several criticisms from the case, and most importantly, it would have ensured the accuracy of the decision. Moreover, *Microsoft II*

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[569] Petit N. and Neyrinck N., *'Back to Microsoft I and II: Tying and the Art of Secret Magic'* [2011] Vol. 2 (No. 2) Journal of European Competition Law & Practice, 120
[570] ibid. 118
[571] ibid. 118-119
[572] *The Microsoft I Decision* (n 500) para. 831
[573] Yu Q., *'Market Power and Competition Law in the Software Industry'* [2017] Doctoral Thesis, Leiden University, Netherlands, 170
[574] *Petit* (n 569) 121
[575] *Sanad* (n 425) 135

demonstrates that our understanding evolves over time by the help of policy learning and case laws which play an important role in the EU competition law development. Without *Microsoft I*, the criticisms of *Microsoft II* would not have been so vivid since there would not have been a perfectly comparable case. It also shows that details matter when it comes to T&B. Therefore, learning is crucial to understand these details and how they apply.

3.2.3. Google Android Case

The Google Android case (‘*Android case’*) can be considered another landmark T&B case under EU competition law. Arguably, unlike *Microsoft I and II*, Android case is a landmark case not because it shifts towards more *quasi-per se* rule but because it shifts backwards to *per se* rule finding abuse easily after the classical tests are filled. It is criticised to be taking precautionary approach on big teach company *i.e.* lack of knowledge, shifting burden of proof, and lack of evidenced harm. In the other words, it was short on effects-based promise EU competition law offered since the hopeful *Microsoft cases*. Nevertheless, this does not say that Android case did not consider effects-based tests at all. It had taken into account of anti-competitive effects the T&B might have caused to competition. Although, the economic analysis could have been more engaging in the decision.

Google Inc. and Alphabet Inc. (*‘Google’*) is convicted of, *inter alia*, abusive T&B in 2 occasions. The Commission accused Google to tie (1) Google Search app and (2) Google Chrome with Google’s Play Store, and for the latter case, also with Google Search app.[576] Google required original equipment manufacturers (*‘OEM’*) to pre-install both of them on their devices as a condition for them to access Play Store. The Commission found the T&B abusive despite Google’s vigorous, but unsuccessful, contest on the legal tests.

Expectedly, the case uniformly preserved all the traditional tests established since *Hilti* and *Tetra Pak II*. The Commission found that Google holds dominant position in the worldwide market (excluding China) for Android app stores, Play Store and Google Search app are separate products, the Play Store cannot be obtained without Google Search app, and no objective justification.[577] The case cites all the landmark cases *i.e. Hilti, Tetra Pak II*, and *Microsoft*. The analysis of these traditional tests plays no distinction to those discussed above in classical case laws.

Foreclosure effects: On the effects-based tests, the case does consider anti-competitive effects of the T&B. However, it has been argued that the consideration could have been better on economic analysis of Big Tec industry.[578] The Commission considered that the T&B in both occasions were *‘cable of restricting competition’*.[579] Particularly, the T&B provided significant competitive advantage that competing general search service providers cannot

[576] Case AT.40099, *Google Android*, C(2018) 4761, 752-753
[577] ibid. 11.3 and 11.4
[578] For example, Portuese A., *'The Rise of Precautionary Antitrust: An Illustration with the EU Google Android Decision'* [2019] Competition Policy International (CPI) and Petit N., *'EU engaged in antitrust gerrymandering against Google'* [2018] 07/31/18 The Hill
[579] *The Google Android Case* (n 576) 11.3.4 and 11.4.4

offset and helped to maintain, strengthen Google's dominant position, increased barriers to entry, deters innovation and tends to harm consumers. To put them in perspective of the effects-based tests, the Chapter divides them into categories as earlier discussed.

The tied market is influenced by strong demand-related efficiencies and barrier to entry:

Firstly, the T&B in both occasions provided significant distribution advantage that competing general search services providers cannot offset.[580] The Commission maintained that via T&B Google ensured a significant competitive advantage in distributing its product. The distribution is so efficient that other general search services cannot offset. This distribution method is abusive because the pre-installation instantly supplied the product and it is impossible to uninstall the product.[581] This 'distributing channel' rule is straight out of the playbook from *Microsoft II*. The Commission assessed that the tie gave Microsoft IE artificial distribution advantage in which other web browsers were unable to match.[582] Secondly, the first T&B (tying Google Search with Play Store) is considered to be a barrier to entry that shielded Google against competition from general search services that could challenge its dominant position. This is because the potential competitor would have to spend resources to overcome the *status quo* advantage by pre-installation.[583]

T&B are likely to maintain or strengthening market power on any relevant market:

In both T&B occasions, Google is convicted of maintaining and strengthening its dominant position in market for general search services.[584] The T&B make it harder for competitors to gain search queries, respective revenues, and data they might otherwise had from their services.[585] For the Google Search tying, the Commission did not carry on further economic analysis. On the other hand, on the Google Chrome tying, the Commission considered the fact that Google Search is set as a default general search service on Google Chrome and OEMs cannot change this setting helps to maintain Google's dominance.[586]

The Commission also discussed further analysis on consumer harm and deterrence of innovation, although in a very brief manner. The Commission states that the T&B could have harmed consumers because consumers may see less choice of general search services available.[587] Also, the T&B reduce incentives of competitors to invest in developing innovative features, such as innovation in algorithm and user experience design.[588]

Criticisms: *Android case* has seen criticisms regarding the Commission analysis of the T&B by Google. According to the commentators, the Commission fell short on discussing

[580] ibid. 11.3.4.1 and 11.4.4.1
[581] ibid. 775 and 898
[582] *The Microsoft II Decision* (n 537) para. 39
[583] *The Google Android Case* (n 576) 861
[584] ibid. 11.3.4.2 and 11.4.4.2
[585] ibid. 859 and 972
[586] ibid. 859 and 973
[587] ibid. 863
[588] ibid. 862

economic analysis of the anti-competitive effects of the T&B but would rather quickly find abuse after the relevant market was narrowly found and traditional tests were fulfilled.

Relevant markets: It has been argued that the Commission defied the relevant product market too narrowly. Consequently, the main potential competitors was left out of the relevant market and Google's dominance was conveniently found.[589] The relevant market for the *Android case* was defied as freely-licensable operating systems, rather than general operating systems. This definition instantly put Apple's iOS out of the relevant market and Google's Android was also instantly found dominant. Although, iOS and other operating systems do compete with Android and thus should be in the same 'general' operating system market. For instance, Android is offered for free to manufacturers and consequently pushed other operating systems to lower their paid license prices down to close or to zero. This is an evidence of fierce competition among the general operating systems.[590] Instead, the Commission only referred to the competition as 'indirect constraint'.[591] Google's dominance would not have been easily found (if it would have been found at all) if the relevant product market was defied with reflection of the real competition among the operating systems.

Precautionary competition in Big Tech: When it comes to abuse of dominant positions in Big Tech companies, the Commission is criticised of taking precautionary approach in its decisions. The so-called precautionary competition enforcement is featured by the lack of clear knowledge and evidenced (or foreseeable) harm.[592] Instead, the precautionary test would be hinted at, rather than illustrated and proven.[593] *Android case* is argued to lack proven consumer harm. The Commission only took the reduction of choices to constitute abusive T&B without requiring proof that the end consumer faced detriment.[594]

Per se or quasi-per se rule: This is a two-sided coin dilemma. One can argue that the Commission took into consideration of effects-based tests when it considered *Android*. The Android case obviously include sections of anti-competitive effect discussions.[595] This is particularly true when comparing to classical T&B cases, *i.e. Hilti* and *Tetra Pak II*, where effects-based tests rarely existed.[596] Thus, *Android case* was more or less tilted into *quasi-per se* rule rather than *per se* rule like the classical cases. However, it can also be argued that such consideration of effects-based tests could have been better. This includes more reasonable product market definition, better proof of harm, and so on.[597] Coupled with the fact that such effects-based tests were highly praised in *Microsoft I*, this makes *Android case* looks like it has taken a step backwards to *per-se* rule of the classical T&B cases rather than moving forwards to more effects-based approach of the *quasi-per se* rule.

[589] *Portuese* and *Petit* (n 578)
[590] *Portuese* (n 578) 3
[591] *The Google Android Case* (n 576) 242
[592] *Portuese* (n 578) 3-4
[593] ibid.
[594] ibid.
[595] *The Google Android Case* (n 576) 11.3.4 and 11.4.4 (on both T&B)
[596] For example, *Nazzini* (n 429)
[597] For example, *Portuese* and *Petit* (n 578)

Overall, *Android case* is another landmark case where the Commission had opportunity to straighten its approach on the move from *per se* rule towards more *quasi-per se* rule. Although it has been debates on whether the Commission is successful on that. Either way, *Android case* demonstrates that our understanding evolves over time by the help of policy learning and case laws which play an important role in the EU competition law development. It also shows that details matter when it comes to effects-based tests on T&B. Therefore, learning is crucial to understand these details and how they apply.

4. The Conclusion

Table 1 below shows existing legal tests in each landmark T&B case from 1988 – 2018. The Table demonstrates that by the help of transparency (transparent decision making process - publication of decisions) and legal precedent (the existing legal tests), the public has been able to learn the evolution of T&B through the time. At first, there were 4 legal tests for T&B cases. As the decision making is transparent, the public was able to access the tests and understood how T&B applied in competition law at the time. Moving forwards to 2004, as the legal tests changed, the public was also able to learn the change and understood the updated criteria and rationales of the decisions. The public has always been able to understand what criteria are likely to form an illegal T&B and why. It will be shown in the next Chapter that such policy learning rarely exists in Thai competition law because these legal tests rarely existing in Thai competition decision making.

Table 1: The legal tests of EU landmark T&B case laws

No.		Legal Tests	Hilti (1988)	Tetra Pak II (1994)	Microsoft I (2004)	Microsoft II (2009)	Google Android (2018)
1	**Traditional Tests**	The firm under question is dominant on the tying market.	Yes	Yes	Yes	Yes	Yes
2		The tying and tied products are separate products	Yes	Yes	Yes	Yes	Yes
3		Customers are forced to buy both products.	Yes	Yes	Yes	Yes	Yes
4		T&B are not objectively justified	Yes	Yes	Yes	Yes	Yes
5	**Effects-based Tests**	The tied market is influenced by strong demand-related efficiencies and barriers to entry	No	No	Yes	Yes	Yes
6		T&B are likely to exclude equally efficient competitors in the tied market.	No	No	Yes	Yes	Yes
7		T&B are likely to maintain or strengthening market power on any relevant market (tying or tied market).	No	No	Yes	Yes	Yes
Total Count of Tests (out of 7)			4	4	7	7	7

Yes = the test is shown
No = the test is *not* shown

From the discussions of both economic and legal evolutions of T&B and the demonstration by Table 1. It can be concluded that (1) our understanding evolved over time by the help of economic policy learning and case laws. And that such understanding has played an important role in the EU competition law development, and (2) Details matter when it comes to whether or not there is any harm in T&B.

Chapter 4

Rewriting Thai Competition Cases:

the Case of Tying and Bundling

The big problem for competition decisions in Thailand is that there is no decision, at least not for the public. The Thai Competition Commission (*'TCC'*) does not release any competition decision at all. Once requested, the TCC states that it is prohibited to release any further details about any decision by law.[598] Thus, unlike the EU, there is no official competition decision to refer to in Thailand. All information about Thai tying and bundling (*'T&B'*) case laws is scattered around several sources, namely academic articles, commissioners' interviews, and so on. As the result, there is a need to unify all information in one place in order to compare policy learning from available information to EU competition case laws.

This Chapter has 2 contributions. Firstly, the Chapter reports all T&B case laws from all the existing information available. This is the first and the only time anyone ever writes about all the Thai T&B case laws. The aim of the rewrite is to identify the legal tests the TCC uses for considering T&B case laws. Secondly, the comparison between the legal tests of Thai T&B case laws and those of the EU will be carried out. The aim is to show that by publishing decisions the public has more opportunities to learn about the legal tests of T&B and how they evolve. The public would be able to learn what contributes abusive T&B and why, and consequently adapt their activities better with the laws.

It is important to note that T&B in Thai competition law consist of abusive and unfair categories. This is different than the EU where abusive T&B would be the only type of T&B the EU Commission focuses on while unfair T&B can be pursued under domestic competition law. As the Thesis focuses on abusive T&B modelled by the EU competition, the Chapter will focus on legal tests of abusive T&B. This is because Thai unfair T&B is a different landscape to abusive T&B. While general abusive T&B focuses on competitiveness and consumer welfare, Thai unfair T&B focuses exclusively to welfare of competitors.[599] The case laws will also show that the objective of protecting competitors by the TCC literally aims to protect the competitors and no welfare of competitive market is considered at all. Thus, any legal test of Thai unfair T&B cannot be compared with general abusive T&B. However, separating the two in Thai T&B case laws is not easy. The available information from the TCC is always short and incoherent. It often does not differentiate between the two

[598] This is one of the problems about the current Thai legal framework discussed earlier in Chapter 1.
[599] The Competition Act (2017) Section 57 (former Section 29) *'No business operator shall undertake any conduct resulting in damage on other business operators…'*

conducts. Thus, the provided legal tests are often mixed up. However, the Chapter will put the best effort in identifying legal tests for abusive T&B.

There are total of 10 T&B Thai case laws up to date. Although they fall short of providing useful legal tests for abusive T&B, they are still lengthy. Thus, the Chapter concludes the case laws in Table 1.[600]

Table 1 shows existing legal tests for Thai T&B, as modelled by EU T&B case laws.[601] The 10 Thai T&B case laws are chronicled from case number 1 to number 10. The tests are divided into traditional test (test 1-4) and effects-based tests (test 5-7). The data has shown that there are severely limited legal tests shown in Thai T&B case laws. Out of all 10 case laws, there are 3 case laws that have shown 2 out of 7 legal tests, 6 case laws that have shown 1 out of 7 legal tests, and 1 case law that has shown no legal test at all. The traditional tests are not fulfilled (total absence of separate product test). In addition, the effects-based tests have never been present in Thai T&B case laws. Overall, the modelled legal tests for T&B are barely fulfilled as a direct result of no publication of T&B decision. Overall, the Table demonstrates that Thai public misses opportunity to learn the evolution of criteria and rationales of T&B decisions through T&B legal tests because intransparent decision making process of the TCC.

Table 2, as shown earlier in Chapter 3, presents the legal tests for abusive T&B as established by the EU published precedents in T&B case laws. All of the present case laws are the published landmark case laws of T&B. They are chronicled from *Hilti*, *Tetra Pak II*, *Microsoft I* and *II*, to *Google Android*. The tests are also divided into traditional and effects-based approach. The data has shown that the published EU case laws provide more legal tests for the public to learn than the unpublished Thai case laws. Out of 5 case laws, there are 2 case laws that have shown 4 out of 7 legal tests and 3 case laws that have shown all 7 legal tests. Particularly, the effects-based tests are all shown in the last 3 case laws. It is clear that by publishing decisions, the public has more opportunities to learn about the legal tests of T&B through evolution of case laws.

Overall, the Chapter will demonstrate that the failure to publish T&B decisions by the TCC directly results in the lack of legal tests learned by the public. Thai T&B only sees total of 3 inconsistent legal tests out of 7 with inconsistency of the tests. On the other hand, the published EU T&B legal tests show all 7 legal tests with far better consistency. This is because the EU decisions are published with adequate information about the legal tests that stimulate the process of learning. Therefore, Thai competition should publish its decisions armed with criteria, rationales, and most importantly, legal tests to improve policy learning.

[600] The methodology for T&B decisions is previously discussed in Chapter 1.
[601] T&B case laws of the EU is discussed in Chapter 3.

Table 1: *The legal tests of all 10 Thai T&B case laws*

No.		Legal Tests	Case 1 (1999)	Case 2 (2001)	Case 3 (2001)	Case 4 (2002)	Case 5 (2004)	Case 6 (2005)	Case 7 (2006)	Case 8 (2007)	Case 9 (2012)	Case 10 (2012)
1	**Traditional Tests**	The firm under question is dominant on the tying market.	Yes	Yes	No	No	No	Yes	Yes	No	No	No
2		The tying and tied products are separate products	No	No	No	No	No	No	No	No	No	No
3		Customers are forced to buy both products.	No	No	No	No	Yes	Yes	Yes	Yes	Yes	Yes
4		T&B are not objectively justified	No	No	Yes	No	No	No	No	No	No	Yes
5	**Effects-based Tests**	The tied market is influenced by strong demand-related efficiencies and barriers to entry	No	No	No	No	No	No	No	No	No	No
6		T&B are likely to exclude equally efficient competitors in the tied market.	No	No	No	No	No	No	No	No	No	No
7		T&B are likely to maintain or strengthening market power on any relevant market (tying or tied market).	No	No	No	No	No	No	No	No	No	No
Total Count of Tests (out of 7)			1	1	1	0	1	2	2	1	1	2

Yes = the test is shown
No = the test is *not* shown

Table 2: *The legal tests of EU landmark T&B case laws*

No.		Legal Tests	Hilti (1988)	Tetra Pak II (1994)	Microsoft I (2004)	Microsoft II (2009)	Android (2018)
1	**Traditional Tests**	The firm under question is dominant on the tying market.	Yes	Yes	Yes	Yes	Yes
2		The tying and tied products are separate products	Yes	Yes	Yes	Yes	Yes
3		Customers are forced to buy both products.	Yes	Yes	Yes	Yes	Yes
4		T&B are not objectively justified	Yes	Yes	Yes	Yes	Yes
5	**Effects-based Tests**	The tied market is influenced by strong demand-related efficiencies and barriers to entry	No	No	Yes	Yes	Yes
6		T&B are likely to exclude equally efficient competitors in the tied market.	No	No	Yes	Yes	Yes
7		T&B are likely to maintain or strengthening market power on any relevant market (tying or tied market).	No	No	Yes	Yes	Yes
Total Count of Tests (out of 7)			4	4	7	7	7

Yes = the test is shown
No = the test is *not* shown

The selection of information sources for the rewrite is carefully done by reliable sources. The selection range is from primary sources namely information from the TCC and other governmental entities and reliable secondary sources such as academic articles and theses. In addition, there are needs to use news articles to compensate the lack in certain parts of the writing. As the credibility of the news articles is significantly less than academic papers, attention is specifically paid to the reliability and credibility of the news selection. In most cases, the news articles would be used to describe further minor details of a case, while primary sources would be used to set up the structure and important bits of a case.

The Chapter pays significant attention to the search terms using in the research. To ensure accuracy and the best coverage available of information, the search is carried out in both Thai and English. They consist of the following features; (1) The types of conduct under question *i.e.* T&B. (2) The tying and tied products names or categories *e.g.* beer, cigarette, scooters, *etc*. (3) The names of the parties under question (if known). And (4) Other references found in articles or any other types of documents in which appear during the information gathering. The exact search terms for each decision will also be indicated in the summary of each decision.

1. The Beer Tying Case (1999)

Search terms in Thai: *ขายพ่วงเหล้าเบียร์, ขายพ่วงเบียร์, ขายพ่วงเหล้า, ขายพ่วงเบียร์ช้าง, บุญรอดขายพ่วง, ไทยเบฟขายพ่วง, ศักดา ธนิตกุล, เดือนเด่น นิคมบริรักษ์, นิพนธ์ พัวพงศกร,*

Search terms in English*: whiskey and beer tying/tie, beer tying/tie case, whiskey tying case, Chang beer tying, Singha Beer tying case, Boon Rawd Brewry tying case, Boon Rawd Brewry vs, Surathip/Sura Maharasadorn/ThaiBev, Sinee Sankrusme, Poapongsakorn, Nikomborirak, Thanitcul*

Sura Maharasadorn (*'Sura'*) (a former name of ThaiBev) was a statutory monopoly in whisky market in Thailand.[602] *Sura* tied its new Chang beer to its monopoly rice whisky. The customers, who were *Sura*'s distributors (wholesalers), did not have choices to buy the whisky separately. The only way to purchase the monopoly whisky was to purchase Chang beer in addition. The tie put the customer into detriment which is later passed on to the end consumers.

Up to early 1990s, rice whisky held the highest demand in all alcohol beverages in the country, especially in suburb areas. This is because back in the time, refrigeration was not widespread outside of cities and rice whisky, like vodka, is meant to be drunk at room temperature while beer had to be drunk ice cold because of the tropical temperature of the

[602] *Sura* owned 15 years concession of all whisky markets (including rice whisky) from 1984 – 1999, *See* Sianphanit C., *'The Liquor Market Structure in Thailand After Liberalization*' (in Thai) [2006] Master of Art in Political Economy, Faculty of Economics Thammasat University, Thailand, 36-38

country.[603] Popularity of beer came in with 2 major factors; a wider access of refrigeration in provincial areas in 1990s and the beer liberalization policy in 1992. In 1992, the government introduced beer liberalization policy which allowed foreign investment into Thai beer market.[604] The policy opened up competition for Thai beer markets.

The tie of *Sura* can be categorised into 2 stages: the initial tie to enter and aiming to gain dominant position in the beer market and the latter tie to maintain its market dominance from potential competition.

1.1. The initial tie (Chang vs Singha)

Sura saw the potentials of the freshly liberalized beer market. However, Boon Rawd Brewery Company (*'Boon'*) who had been the statutory monopolist in beer market since 1933 by its 'Singha' beer,[605] held dominance over the market. It held dominant position in the beer market with more than 80% of market share[606] and having strong consumer loyalty to the brand.[607] Entering the beer market was potentially challenging. *Sura* decided to enter the beer market by employing tying strategy using its statutory monopoly advantage in whisky market[608] and its distribution network throughout the country.[609] 'Chang' was the new beer brand launched in 1995 by *Sura*. Chang was pushed into the beer market as a tied product to *Sura*'s monopoly and highest-in-demand rice whisky. The tying strategy of *Sura* did not take place directly with consumers, but with its existing distributors in whisky markets.[610] *Sura* compelled its distributors to purchase Chang beer with its monopoly rice whisky.[611] The rice whisky generally was not released to a distributor whom did not order Chang beer with it. Although the tie was not standardized across the country, some distributors eventually received only-rice whisky order with delay while some did not receive it at all.[612] At this initial tie stage, *Sura* had tied 3-12 bottles of Chang beer with 1 sale unit of rice whisky

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[603] Asasappakij P., *'The Legend of Whisky and Beer Tying'* (in Thai) [2015] Komchadluek Newspaper (Online) <httpwww.komchadluek.netnewseconomic212542> accessed June 2018

[604] Yemyoo P., *'The Problems in Trade Competition Act 1999 Application in the Case of Complaint about Tying Beer with Whisky'* (in Thai) [2000] Master of Political Science Thesis, Faculty of Political Science Thammasat University, Thailand, 39 *and* Luewadwanich N., *'Strategic Competition in Beer Business'* (in Thai) [2007] Master of Economics Thesis, Faculty of Economics Thammasat University, Thailand, 39

[605] Sankrusme S., *'A Study of the Beer Market Leader: Challengers and Niche Strategies'* [2008] vol. 43 World Academy of Science, Engineering and Technology, 492

[606] Sankrusme S., *'Marketing Strategy Analysis of Boon Rawd Brewery Company'* [2013] vol. 7 (no. 7) World Academy of Science, Engineering and Technology International Journal of Economics and Management Engineering, 2162

[607] *Sankrusme* (n 605) 493

[608] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 1999'* (in Thai) (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2542.pdf> accessed June 2018

[609] Sankrusme S., *'Strategy to Be Market Leader of Chang Beer'* [2016] Conference paper, Entrepreneurship, Responsible Management, and Economic Development, Cyrus Institute of Knowledge (MA, USA) and the School of Business American University in Cairo, Egypt, 117

[610] United Nations Conference on Trade and Development (UNCTAD*), 'Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries Thailand, Lao, Kenya, Zambia, Zimbabwe'* [2005] UNCTAD/DITC/CLP/2005/2, 23-24

[611] *OTCC 1999 Case Summary* (n 608) *and* Poapongsakorn N., *'The New Competition Law in Thailand: Lessons for Institution Building'* [2002] vol.21 Review of Industrial Organization, 193

[612] ibid. 194

[1995-1997].[613] Chang beer had increased the market share from when it first entered the market at 7% (1995) to 14% (1996),[614] and 31% (1997).[615]

The direct consequences of the initial tie, besides of *Sura*'s prosperity, are the prices change in the rice whisky and Chang beer. Distributors were forced to take the tie, bearing the price of purchasing both products although Chang beer had low demand from consumers. The distributors had to push Chang on the market although they had to take some loss from it. The final price of Chang beer was reduced from 40 THB[616] to 35 THB per bottle (100 THB per 3 bottles).[617] Unsurprisingly, the distributors pushed this loss to the consumers. They increased the price of rice whisky from 40 THB to 55 THB per bottle[618] (in some source says the price was pushed up to 66 THB per bottle).[619] The short-term implications from the price change benefited consumers in beer market as they gained more choices and lower price than the only longstanding Singha beer. On the other hand, rice whisky consumers had to suffer massive price raise in which they did not have other choices because of the statutory monopoly market.

Economists might have a question that why *Sura*, the distributors, and resellers of rice whisky did not raise up the rice whisky price even before the tie. They were in position to do so as the rice whisky was a statutory monopoly and consumers never had bargaining power over the price. From the available information, the question could be answered as the followings; Firstly, the rice whisky has always been the economy market for high percentage alcohol markets in Thailand (35% alcohol and above). Colour whiskies are considered to be in the upper market as they are more 'western' and has always been approximately 3 times more expensive than rice whisky.[620] Therefore, rice whisky markets operate around low-income population with high price sensitivity. This meant that increasing the price might be a risky move to the sale volume. Secondly, the economic crisis of 1997 dramatically increased the domestic price sensitivity, even a slight change in the price would affect immediate sale volume.[621] This was particular true from an economy market such as rice whisky in which was already sensitive to price change. 3. The tie was a good excuse for the distributors to increase the rice whisky price. They could argue to consumer that they did no carried out the tie and thus the price increase was not up to them. The excuse might not sound flawless, but it was rather better than no excuse at all. Together with the economic situation of the market at the time, it was a good opportunity, and perhaps also necessity, to increase the rice whisky price after the tie.

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[613] *Sankrusme* (n 605) 494
[614] However, *Yemyoo* states that in 1996 Chang held 10.25% of market share. See *Yemyoo* (n 604) 43.
[615] *Sankrusme* (n 454) 118
[616] Thanitcul S., *Explanation and Case Study of the Competition Act B.E.2542* (in Thai) (Winyuchon Publisher, Bangkok) 314
[617] *Sankrusme* (n 609) 119
[618] *Thanitcul* (n 616) 314
[619] *Sankrusme* (n 609) 119
[620] For example, current market price (June 2018) for rice whisky and coloured whisky from *Sura* (40% alcohol and 700 ml) are 95 THB and 279 THB accordingly.
[621] *Sankrusme* (n 609) 117

In addition, there are also indirect consequences of the initial tie; new beer markets and competitiveness from *Boon* -the long steady beer monopolist from 1933. Because of the tie, *Boon* no longer could keep on its backseat of a monopolist. It became significantly more competitive in improvement of quality and price. One of the moves *Boon* employed was to launch 'Leo' beer in direct competition with Chang beer in 1998. *Boon* designed Leo to compete in economy beer market with cheap price while keeping Singha on the upper market.[622] The launch of Leo followed by another stage of intensified tie by *Sura*.

1.2. The latter tie (Chang vs Leo)

In 1998, Chang held a significant position over the beer market with 41% of market share while Singha held 39% of the market share.[623] This indicates that the initial tie by *Sura* was very effective in penetrating the market and gaining significant market share in which pushed Chang to a slightly higher position than Singha in term of market share. With the arrival of Leo beer, 2 things are important to note: the new 'economy beer market' was introduced and Chang's leadership of that market was threatened.

The market of Thai beer has changed. Now Leo was the new potential competitor to Chang in economy beer market while Singha was kept on the upper market (standard beer market), yet both Leo and Singha are from *Boon*.[624] Because Leo was meant to directly compete with Chang on prices,[625] Chang's leadership in the market was challenged. *Sura* went on to protect Chang's leadership in the economy beer market by increasing the intensity of the existing tie of its Chang beer with the rice whisky. To protect its position in the beer market, *Sura* wanted its Chang beer price to be lower than the new entrant Leo's. To achieve this, *Sura* increased the amount of Chang beer tied to its rice whisky from less than 1 dozen bottles to 2 dozen of Chang beer per 1 sale unit of rice whisky.[626] This flooded the beer market with Chang beer and the distributors needed to push the beer out of their hands. The distributors reduced the price of Chang beer from the initial tie of 35 THB per bottle (100 THB per 3 bottles) to 20-25 THB per bottle.[627] While this price benefited beer consumers, rice whisky consumer continually suffered from the increasing price. The distributors compensated its loss from dumping the Chang price on the rice whisky. The price of rice whisky was increased from 55 THB (66 THB in some information source) to 75/80 THB per bottle.[628]

As the result of the later tie, Chang was able to protect its leadership of the market and later gained dominant position in the economy beer market. The market share of Chang went up to 41%, 58%, and 60% [1998-2000] after the second tie.[629] These ties distorted the mechanism

[622] ibid. 119
[623] ibid. 118
[624] See in general, *Luewadwanich* (n 604)
[625] *Poapongsakorn* (n 611) 193
[626] *Sankrusme* (n 605) 494 *and Sankrusme* (n 609) 119
[627] *Sankrusme* (n 609) 119
[628] ibid.
[629] ibid. 118

of demand and supply of the market by forcing the market to be dependent on *Sura*'s policies which monopolized market mechanism.[630]

In 1999, *Boon* filed a complaint in accordance to the Competition Act 1999 to the TCC,[631] asking the TCC to intervene the tying *Sura* was continuously carrying out with its rice whisky and Chang beer throughout 1995-1999. The complaint alleged that *Sura* committed abusive and unfair tie on its rice whisky and Chang beer in which in breach of Section 25 (2) on abuse of dominant position by tying and Section 29 on unfair trade practice.[632] However, regardless of the overwhelming market power *Sura* had in the tying market and the effects posed to competitive process and to the consumers, the TCC dismissed the complaint giving the reason because *Sura* was not defined as holding a dominant position in any market.[633] Under Competition Act 1999, a firm would hold dominant position only if the firm fills the criterion according to the Notification of Dominant Position published by the TCC.[634] However, at the time the TCC did not yet issued the Notification, therefore the TCC denied the enforcement of anything regarding to dominant position because they did not have the written criterion of how to assess dominant position.[635] In addition, the TCC denied any public access to the decision.[636]

As the consequence, *Sura* was able to keep using its T&B strategy throughout the coming years and maintained its dominant position on economy beer market. Chang held up to 75% market share in economy beer market in 2004 while Leo held 23%. Although later Leo stepped up its marketing and gained market share of 35% in 2006, Chang still held 63% and was still the dominance.[637] In addition, because the TCC chose not to act on this decision and enabled *Sura* to keep using its abusive tying strategy, *Sura* went further to tie its drinking water to the rice whisky in addition to the Chang beer, resulting another tying case in *The Drinking Water Tying Case (2001).*[638]

In conclusion, the *Beer Tying Case* had the unique opportunity to establish legal tests for T&B cases of Thailand. Unfortunately, it completely failed to do so as they decided not to publish its decision. It only published a short message of why it dismissed the case. Thus, the only legal test the TCC presented was that to carry out any investigation, the firm under

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[630] ibid. 121
[631] The Competition Act 1999 (abolished), Section 55: '*A person sustaining damage in relation to the offences … shall have the right to file a complaint with the Commission for consideration pursuant to this Act.'*
[632] *Thanitcul* (n 616) 312 *and Yemyoo* (n 604) 45
[633] *OTCC 1999 Case Summary* (n 608)
[634] *The Competition Act 1999* (n 631) Section 8(2)
[635] Nikomborirak D., *'Political Economy of Competition Law: The Case of Thailand, the Symposium on Competition Law and Policy in Developing Countries '* [2006] vol.26 (no.3) Northwestern Journal of International Law & Business 603, Intamano N., *'Applying the Korean Experience to the Development of the Thai Trade Commission*' [2009] vol. 2 (no. 1) Naresuan University Law Journal 97, OTCC, *Poapongsakorn* (n 611) 194, *Yemyoo* (n 604) 46, and *Thanitcul* (n 616) 316
[636] The Official Information Commission, Department of Fiscal Policy, *'Decision of the Official Information Commission '* (in Thai) [2002] ศค 6/2545, 6
[637] *Luewadwanich* (n 604) 44-46
[638] Discussed below.

question needs to hold dominant position. Overall, only 1 out of 7 legal tests was shown in the case.

2. The Drinking Water Tying Case (2001)

Search terms in Thai: *ขายพ่วงเหล้าน้ำดื่ม, ขายพ่วงน้ำดื่ม, ชมรมผู้ผลิตน้ำดื่ม ขายพ่วง, ช้างขายพ่วงน้ำดื่ม, กรมการค้าภายใน ขายพ่วงน้ำดื่ม, ช้าง ชมรมผู้ผลิตน้ำดื่ม, ตลาดสุราไทย,ราคาเบียร์ช้าง 2544, ราคาสุรา 2544, กลยุทธ์ตลาดสุราไทย*

Search terms in English: *Thai drinking water tying/tie case, tying sale of drinking water in Thailand, Chang drinking water tie/tying, whisky and water tying/tie Thailand, Thai whisky market, Chang beer price 2001, Thai whisky price 2001, Thai whisky tying strategy*

This case is a continued tying strategy by Sura Maharasadorn ('*Sura'*) from the Beer Tying Case 1999. As a consequence from the TCC's 1999 decision when the TCC decided not to enforce and to rule out criterion on abuse of dominant position, *Sura* took the advantage of the enforcement gap and created another tie to a new market -bottled drinking water, in the same manner as it did in the beer market.

In 2001, Thailand Drinking Water Institute ('*the Institute*') filed a complaint to the TCC alleging *Sura* of abusive T&B[639] and unfair T&B[640] of its new Chang drinking water to its monopoly whiskies and the dominant Chang beer.[641]

The whisky markets in Thailand were liberalized in 2000 after the last 15-year concession by *Sura* from 1984 – 1999.[642] The government immediately arranged an auction of its 12 whisky factories to the public as the policy of the government at the time encouraged private competition in whisky markets. *Sura* won 4 out of 12 of the auctions and eventually bought majority of shares in the rest 8 factories.[643] By 2001, *Sura* ended up owned all and only 12 whisky factories in Thailand and maintained its monopoly position in all whisky markets, in which, at the time, were divided into rice whisky and colour whisky markets.[644]

Sura also held dominant position in the economy beer market by its Chang beer at the time of the drinking water tying. It acquired this dominant position from the tie of Chang beer with

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[639] *The Competition Act 1999* (n 599) Section 25(2)
[640] ibid. Section 29
[641] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2001'* (in Thai) (Official Document) < http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2544.pdf> accessed June 2018
[642] The Excise Department Thailand Ministry of Finance, *'Notification of the Excise Department on Regulation and Procedure in Whisky Administration'* (in Thai) [6 October 2000] and Department of Industrial Works Ministry of Industry, *'Notification of Ministry of Industry on Regulation and Conditions of Whisky Factory Permission'* (in Thai) [3 April 2000].
[643] *Sianphanit* (n 602) 40-42
[644] *Thanitcul* (n 616) 313

its statutory rice whisky back in 1999. A research indicates that up to 2004, Chang beer held 75% of market share in economy beer market while its new and most efficient competitor - Leo beer from Boon Rawd Brewery Company (*'Boon'*) held only 23%.[645]

By holding strong positions in both whisky and economy beer markets, *Sura* had potentials to leverage its market power from both of the markets to its fresh entered drinking water market. *Sura* compelled its distributors to purchase Chang drinking water together with its monopoly whiskies and/or the dominant Chang beer.[646]

However, unlike the Beer Tying Case, the nature and the amount of the compulsory purchase were not recorded. Also, the information about the category of one of the tying product, the whisky, is not present. *Sura* produces wide range of whiskies in which can be categorized in different markets, for example, rice whiskies (Ruang Khao, Phai Thong, Niyomthai, White Tiger, White Bear, *etc*), and colour whiskies or rum (SangSom, Mekhong, Phraya, Hong Thong, *etc*).[647] By not knowing the category and the brand of tying whisky, it would be difficult to define the tying market and assess the leverage of market power.

Nevertheless, we do know that the price of *Sura*'s rice whiskies were at 75-80 THB per bottle at the end of 2001, in which significantly increased from 55-66 THB per bottle in earlier time.[648] It is important to note that the rice whiskies are only a possibility for being a tying product because it is one of the whiskies produced by *Sura*. There is no confirmation nor denial from any information source. If the rice whiskies were the tying product, this could pose as an indication for abusive tie because the price of the tying product was increased while the price of the tied product (Chang drinking water) was decreased. The distributors were forced to purchase Chang drinking water without having adequate demand from the market, they pushed the drinking water off their hands by reducing the price from 40-45 THB to 20 THB per a dozen bottle.[649] They compensated the loss from Chang drinking water by charging more on rice whiskies price. This price compensating strategy by the distributors is the same case in the Beer Tying Case 1999 discussed earlier.

Chang beer was one of the tying products, however its price did not increase with significance after the tie. This is because the liberalization of the beer market in 1992 drew in competition or potentials to compete[650] and the economic crisis of 1997 in which crippled the country for decades to come making drinkers turning to economy beer market,[651] competing

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[645] *Luewadwanich* (n 604) 51
[646] *Thanitcul* (n 616) 310 *and* SorSor , *'Thailand Drinking Water Institute Terminates Compliant Against Chang Drinking Water'* (in Thai) [18 January 2001] RYT9 Online Press <https://www.ryt9.com/s/prg/238547> accessed June 2018
[647] Thai Beverage Public Company Limited, *'Product Groups'* [2018] ThaiBev Official Website <http://www.thaibev.com/en08/product.aspx?sublv1gID=12#tab> accessed June 2018
[648] *Sankrusme* (n 609) 119
[649] Thailand, *'OECD Global Forum on Competition: Contribution from Thailand'* [26 September 2001] CCNM/GF/COMP/WD(2001)8, 5 *and* ibid. 119

[650] The most efficient competitor of Chang beer in the economy market was Leo (form *Boon*). *See in general, Luewadwanich* (n 604)
[651] *Sankrusme* (n 606), 77

on prices seemed to be the preferred battlefield for firms. In 2003, Chang beer's price was at 27.18 THB per bottle,[652] showing no significant change since the tie in 1999 in which drove down Chang beer price to 4-5 bottles per 100 THB.[653]

From considering the prices of the products in the tie, it can be observed that the tie might have similar effects to competition and consumer to the Beer Tying Case 1999 where the price of the tying product increased and the price of the tied product decreased according to the tying policy of *Sura*.

The TCC carried out an investigation and terminated the complaint because *Sura* was not defined as holding a dominant position as the TCC had not yet issued the Notification of Dominant Position.[654] The outcome of this decision is similar to the Beer Tying Case 1999, especially where the decision was terminated because of the absence of dominant position criterion.[655] In addition, the TCC showed its inclination to care for customers' harm (and not to care for consumers' harm) although it did not explain how the theory of harm should be evaluated. Additional measure the TCC took in this decision was to send an official letter to *Sura* commenting the firm's behaviour as 'inappropriate',[656] yet the TCC did not require any competitive commitment from *Sura* although it had power to do so under the Competition Act.[657]

Also, there is a conflict of information about the termination of the decision. The TCC indicates the termination with two legal reasoning discussed above. On the other hand, *RYT9* -an online news platform, who wrote the only two direct articles about this decision states that *the Institute* was the one who terminated the complaint by withdrawing its allegation.[658] There is no other source of information further confirming the termination of this decision.

In conclusion, the case is very similar to the *Beer Tying Case*. The case also missed the opportunity to establish legal tests for T&B cases of Thailand. The only legal test the TCC presented was that to carry out any investigation, the firm under question needs to hold dominant position. Thus, only 1 out of 7 legal tests was shown in the case. Most importantly, the public missed the opportunity to learn the evolution of Thai T&B case laws because there is no development of legal tests shown in comparison with the previous decision.

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[652] Chunsom N., *'Excise Tax for Beer: Differentials among Firms'* [2003] vol.43 Thai Journal of Development Administration (in Thai) <http://library1.nida.ac.th/nida_jour0/NJv43n3_03.pdf> accessed June 2018, 113
[653] *Sankrusme* (n 609) 119
[654] *The Competition Act 1999* (n 631) Section 8(2)
[655] *OTCC 1999 Case Summary* (n 608)
[656] ProSor , *'Ministry of Commerce Commenting Whisky Distributors' Behaviour'* (in Thai) [23 November 2001] RYT9 Online Press <https://www.ryt9.com/s/ryt9/229818> accessed June 2018
[657] *The Competition Act 1999* (n 476) Section 8(6), 30, and 31
[658] *SorSor* (n 646)

3. PC Game Tying Case (2001)[659]

Search terms in Thai: *ขายพ่วงเกมส์คอมพิวเตอร์, ถูกจำกัดสิทธิ์ซื้อเกมคอมพิวเตอร์, ขายพ่วงเกมส์ 2544, ขายพ่วงเกมส์คอม 2544, เกมส์คอม 2544, เรื่องร้องเรียนคณะกรรมการแข่งขันทางการค้า,*

Search terms in English: *Thai PC game tie/tying, Thai PC game tying 2001, Thai game tying 2544, computer game tying 2544, Thai game tying, Thai competition case laws*

This decision is the third T&B case for Thailand. Since the first two had not received much of enforcement from the TCC, this third decision seemed to receive significantly less attention from the public including commentators and press. It is briefly mentioned in a competition law textbooks, but no press coverage. It is observed that this was because the public had lost confidence with the TCC and believed that by discussing another tying case would not do any good.[660]

An unnamed PC game firm (*'the firm'*) was alleged to compel its customers to purchase PC game A (tied product) with PC game B (tying product) in 'packages' without providing alternatives to them.[661] The conduct was alleged to breach Section 25(2) on abusive tying and Section 29 on unfair tying. *The firm* denied all charges by stating that it purchased PC game A and B from a manufacturer oversea in an integrated 'package' and it simply sold the products 'as is' in the same package without tying the products together.[662] The TCC dismissed the complaint. However, the reasonings the TCC gave for the dismissal only answered to unfair tying under Section 29 and nothing was explained about dismissing abusive tying under Section 25(2). The reasonings given are 1. No tie was created. *The firm* sold the products 'as is' in the same manner it purchased from the manufacturer. Also, selling both products together creates economy of scale which results as cheaper price. 2. There was no other business operators' harm by the conduct. Therefore, there was no tie, and even if there was one, the tie was not unfair and did not breach Section 29.[663]

The details of how the T&B was carried out and assessed are severely limited. Most importantly, some fundamental issues about tying conducts are not discussed at all in the decision. For example, market power of *the firm* in the tying market, whether and/or how the products are linked together, whether the games had network effects to the customers, the theory of harm, on what ground did the TCC dismissed the decision under Section 25,[664] *etc*. Without discussing them, it is difficult to justify the merit of the outcome of the decision.

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[659] *OTCC 2001 Case Summary* (n 641)
[660] Nikomborirak D, *'The Paper Tiger and the Monopolization of the Giants'* (in Thai) [September 2012] vol. 53 Way Magazine <https://tdri.or.th/2012/11/waymagazine_duenden/> accessed June 2018
[661] *OTCC 2001 Case Summary* (n 641)
[662] *Thanitcul* (n 616) 311
[663] *OTCC 2001 Case Summary* (n 641)
[664] *The firm* was charged with Section 25(2) and 29, the TCC gives reasoning for dismissing the decision only under Section 29.

In conclusion, the case missed the third opportunity to establish legal tests for T&B cases of Thailand. The only legal test the TCC presented was that 'economy of scale' *can* justify the T&B in this case. Although, the TCC ironically denied that the conduct was T&B in this case. In other words, the TCC indirectly admitted that economy of scale can be used as objective justification for T&B. Thus, only 1 out of 7 legal tests was shown in the case. Likewise, the public also missed the opportunity to learn evolution of Thai T&B case laws because of the absence of legal tests development from the previous decisions.

4. Scooters and Accessories Tying Case (2002)[665]

Search terms in Thai: *29 พฤษภาคม 2545 แข่งขันทางการค้า, การกีดกันทางการค้า รถจักรยานยนต์, ห่วงขาย รถจักรยานยนต์ กับ อุปกรณ์ตกแต่ง, จักรยานยนต์ แข่งขันทางการค้า, ตลาดรถจักรยานยนต์, ตลาดรถจักรยานยนต์ 2545,กลยุทธ์การ แข่งขันอุตสาหกรรมจักรยานยนต์*

Search terms in English: *29th May 2002 Thai competition case, Thai motorcycle tying/tie, Thai Honda competition case, Scooter market in Thailand, Thai Honda tying/tie case, Thai Honda exclusive dealing*

Scooter bike market in Thailand was booming in the first half of 2000s. The scooter bike market is defined as any motorbike with no more than 150 cubic centimetres of displacement (cc), above this cc threshold would be considered in different market due to higher price and the usability.[666] The economic crisis in 1997 played significant part for the people to turn away from cars to scooters to save their living expenses. The growth rate of scooter market from 2002-2003 was 15.75% and 46.91% respectively and continued to progressively grow until 2005.[667]

In early 2000s, Honda Motorcycle Thailand ('*Honda*') had been alleged in multiple competition charges in this case. The charge which caught attention of the public was exclusive dealing where *Honda* required scooter distributers stores whom were in business with it not to sell or market other scooter brand (including Suzuki, Yamaha and Kawasaki) and to do so only with *Honda*'s scooters. The reason it caught attention of the public comparing to all other competition complaints was because this case was the only competition decision which the TCC agreed that anti-competitive offense has been done[668]

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[665] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2002 (in Thai)'* (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2545.pdf> accessed June 2018

[666] Thammachat J., *'Competition Strategic Analysis of Thai Scooter Industry*' (in Thai) [2006] Master of Economics Thesis, Faculty of Economics Thammasat University, 16

[667] Motoring Column , *'Sale Growth Skyrocketed: 1.75 Million Scooters'* (in Thai) [22-24 January 2004] Thansettakij Newspaper <http://www.worldlease.co.th/register008.html> accessed June 2018, 43 *and Thammachat* (n 666) 33 and 48-49

[668] On exclusive dealing, but the tying charge was dropped.

and submitted the case to the Attorney-General to prosecute.[669] Unfortunately, the TCC spent a decade to gather evidence before submitting, and once submitted, the case was already precluded by prescription.[670] However, this charge not is the one being discussed here. The following information will discuss another charge in this complaint: *Honda*'s tying conduct of its scooters and scooter's accessories.

The timing of this scooters and accessories tying case is unsettled. The record of the TCC indicates that the complaint has been filed and considered in 2002,[671] however other sources indicate that the case took place in 2001,[672] or 2003.[673]

During the time, *Honda* required its scooter distributing stores ('*dealers'*) to purchase integrated *Honda*'s scooters with accessories *e.g.* license plate, bumper, front basket, *etc*.[674] The tying product market here was the scooter market in which *Honda* held dominant position with market share of 70%,[675] 75%,[676] or 80%[677] (information differs from sources to sources). The tied markets were scooter accessories markets which were operated by local *dealers* across the nation.[678] Each local region had its own market by local *dealers*. Unfortunately, there is no further detail of the tied market defined in the decision. The *Honda* integrated its accessories with the scooters before supplying them to the *dealers* without alternatives and the *dealers* had to pay for the additional accessories.

Therefore, the *dealers* were allegedly harmed in 2 ways; by being forced to sell its competitor's products (scooter's accessories) and being unable to sell their own accessories because the scooters were already integrated with *Honda*'s accessories.[679] The end consumers would already receive the accessories when they buy scooters.

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[669] Thai Trade Competition Commission (TCC), *'EU Competition Law for Thai Business'* (in Thai) [25 May 2011] Conference Document, Grand Millenium Sukhumvit Hotel, Bangkok, <http://eddy.ots.co.th/bel/b1/wp-content/uploads/2017/11/EU-Competition-Law.pdf> accessed June 2018, 23

[670] Phusadee A., *'Honda Dealer Case Dropped'* [11 April 2013] Bangkok Post Online Newspaper <https://www.bangkokpost.com/news/politics/344961/unfair-trade-case-against-ap-honda-dropped> accessed June 2018

[671] *OTCC 2002 Case Summary* (n 665)

[672] Just-Auto authors and correspondents, *'THAILAND: Honda unit found breaching trade law'* [1 May 2003] Just-Auto -Online Global automotive industry news, data and analysis <https://www.just-auto.com/news/honda-unit-found-breaching-trade-law-bangkok-post_id75761.aspx> accessed June 2018

[673] *Phusadee* (n 670)

[674] *Thanitcul* (n 616) 311

[675] Thanitcul S., *'Competition in Thailand'* [August 2015] vol.8 (no.1) Competition Policy International (CPI) Antitrust Chronicle, 10, *Phusadee* (n 670), and *Motoring Column* (n 667) <http://www.worldlease.co.th/register008.html> accessed June 2018, 43

[676] *Thammachat* (n 666) 19

[677] *Nikomborirak* (n 635) 605

[678] *OTCC 2002 Case Summary* (n 665)

[679] ibid.

The TCC dismissed the charge by stating that the tie *'...does not restrict, obstruct, or destroying business operation, therefore, the conduct is not illegal under the Competition Act'.*[680] No further reasoning for the dismissal was mentioned.

In conclusion, the decision maker had gotten comfortable about having no need to give any legal tests to the public regarding its decision making. Neither legal tests nor reasoning were communicated to the public. It is important to note that the information about dominant position of *Honda* discussed above is given by academic commentators and not from the TCC. Therefore, it is safe to say that the TCC does not provide holding dominant position as a legal test for the case. As usual, the public missed another opportunity to learn the evolution of T&B decisions because the legal tests were lacking.

5. Whisky and Beer Mixed Bundling Case (2004)

Search terms in Thai: ขายพ่วงเบียร์ ภูเก็ต, ขายพ่วงเบียร์ 2547, ภูเก็ต เหล้าพ่วงเบียร์, ขายเหล้าพ่วงเบียร์ครั้งใหม่, เบียร์ช้าง ขายพ่วง ภูเก็ต, *เบียร์สิงห์ ขายพ่วง ภูเก็ต, เบียร์ช้าง ขายพ่วง 2547, เบียร์สิงห์ ขายพ่วง 2547*

Search terms in English*: Phuket beer tying/tie, Thai beer tying/tie 2004, Phuket whisky and beer tying/tie, new whisky and beer tying/tie, Chang beer tying/tie Phuket, Singha beer tying/tie Phuket, Chang beer tying/tie 2004, Singha beer tying/tie 2004*

During the time, it was common to see beer tied to whisky in Thailand. Together with the fact that the TCC has not been active in enforcing the Competition Act on tying since 1999, this made firms feel more welcome to create whisky and beer T&B throughout the country. Also, the public seems to accept that whisky and beer ties are common and are just another business strategy which is completely legal. Therefore, when the whisky and beer T&B are no longer uncommon and not interesting, press ceased being keen on investigating and reporting it. In academic world, when a whisky and beer T&B issues are discussed, the landmark Beer Tying Case of 1999 would be brought up and there is no need to discuss other liquor tying cases because of the similar circumstances and the same results.

In this Whisky and Beer Mixed Bundling Case, there is no other source of information beside the result of the decision issued by the TCC online. However, the circumstances are not identical with the previous Beer Tying Case 1999 and the Drinking Water Tying Case 2001. While both cases took place in national scale and were contractual tying, this case was a local scale and was a mixed bundling *i.e.* buying multiple products with price incentives.

An unnamed distributor of an unnamed alcohol beverage firm ('*the distributor*') created a mixed bundling in Phuket Province where customers could buy its whisky and beer together with cheaper price than buying separately. *The distributor* also had provided the products

[680] ibid.

separately before the bundle. The TCC dismissed the complaint because the customers were provided with alternatives than the bundle.[681]

In conclusion, the case missed another opportunity to establish legal tests for T&B cases of Thailand. The only legal test the TCC presented was that the customers were not forced to take both products. Thus, only 1 out of 7 legal tests was shown in the case. However, the public misses the opportunity to learn other possible legal tests from the decision.

6. Cigarette Tying Case (2005)

Search terms in Thai: *ขายพ่วงบุหรี่, ขายพ่วงบุหรี่ 2548, ขายพ่วงบุหรี่ แข่งขันทางการค้า, ขายพ่วงบุหรี่นำเข้า, ขายพ่วงบุหรี่นำเข้า 2548, ตลาดบุหรี่ประเทศไทย, การแข่งขันตลาดบุหรี่*

Search terms in English*: Thai Cigarette Tying/tie Case, Thai Cigarette Tying/tie Case 2005, Thai cigarette tying/tie competition, Thai imported cigarette tying/tie, Thai imported cigarette tying/tie 2005, cigarette markets in Thailand, Thai cigarette competition*

This Cigarette Tying Case is another case that the public and commentators did not pay attention to. The only information source found about the decision is the TCC's result of decisions on its website.

Historically, cigarette markets in Thailand can be categorized in domestic and imported markets. The domestic market has been statutorily monopolized by the Thai Tobacco Monopoly where brands of cigarettes are produced and marketed.[682] On the other hand, the imported market is open for competition since 1990[683] when the General Agreement on Tariffs and Trade (GATT) Panel ruled out that Thailand's ban on imported cigarettes are in contrary to the General Agreement.[684] However, recently, the threshold of the markets seems to be blurry because the domestic cigarette tax has been largely increased in 2017.[685] This made the price of domestic cigarette became 30% higher and gave competitive edge for the imported cigarettes to compete.[686]

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[681] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2004'* (in Thai) (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2547.pdf> accessed June 2018

[682] The Tobacco Act (1966), Section 16

[683] Tungtangtham S., *'Political Economy on Cigarettes'* (in Thai) [1997] vol. 5 (no. 3) Health Systems Research Journal <http://kb.hsri.or.th/dspace/bitstream/handle/11228/1073/jv5n3-2.pdf?sequence=1&isAllowed=y> accessed June 2018, 192

[684] Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes [1990] DS10/R - 37S/200, Article 87

[685] The Excise Act (2017), Part II

[686] Panyalimpanan T., *'Increased the Price, Less Smokers?'* (in Thai) [14 September 2017] BBC Thailand (Online) <https://www.bbc.com/thai/thailand-41250293> accessed June 2018

In the time of this decision (2004), the imported cigarette market was not yet in competition with the domestic market because of the high price and the luxurious perception of imported cigarettes. A 20-pack domestic cigarette was 40-50 THB while the imported cigarettes were 72 THB and above.[687] An unnamed cigarette importing firm (*'the firm'*) tied a brand of imported cigarette A to a brand of imported cigarette B to its distributors. However, the distributors did not compel their own customers (retailers) to buy the tie. The retailers could choose to buy cigarette A and B separately.[688] The price of the tie and the separately purchased products were not mentioned in the decision.

The firm was alleged to breach Section 25(2) on abusive tying. The TCC dismissed the complaint by giving the following reasons; 1. *The firm* was not defined as holding a dominant position because the TCC had not yet issued the Notification of Dominant Position.[689] 2. The retailers could always choose to buy the products separately. Therefore, *the firm* did not breach the foresaid Sections.[690]

The case was a step up for Thai T&B case laws. All previous cases had provided 1 legal test or even no test at all. The cigarette tying case was the first case to provide 2 legal tests *i.e.* dominant position and customers being forced to take the products. Unfortunately, these provided tests were not visited by the TCC at all. They were mentioned within 2 lines of the case summary and no analysis or explanation shown. Thus, the case is still far from ideal transparent decision making. The public also missed the opportunity to learn other legal tests regarding T&B decision making.

7. White and Brown Sugar Tying Case (2006)

***Search terms in Thai**: ขายพ่วงน้ำตาลทรายชนิดพิเศษ, ขายพ่วงน้ำตาลทราย, ขายพ่วงน้ำตาล, ขายพ่วงน้ำตาลทรายขาว, ขายพ่วงน้ำตาลทรายแดง, ตลาดน้ำตาลทราย, ตลาดน้ำตาลทราย 2549, กฎหมายน้ำตาล, ตลาดน้ำตาลทรายขาว vs แดง, ตลาดน้ำตาลทรายขาว น้ำตาลทรายแดง, มูลค่าตลาดน้ำตาลทรายขาว น้ำตาลทรายแดง,*

***Search terms in English**: Thai sugar tying/tie case, Thai sugar tying/tie case 2006, Thai sugar markets, Thai sugar markets 2006, Thai white sugar tying/tie, Thai brown sugar tying/tie, Thai sugar laws, white spirit Thailand, rice whisky Thailand, market value Thai sugar, brown sugar in Thailand, Thailand sugar exporters history*

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[687] Plientid L., *'Price Dumping of Imported Cigarettes'* (in Thai) [28 May 2017] Thai Rath Newspaper (Online) <https://www.thairath.co.th/content/1137098> accessed June 2018

[688] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2005* (in Thai) (Official Document) < http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2548.pdf> accessed June 2018

[689] *The Competition Act 1999* (n 631) Section 8(2)

[690] *OTCC 2005 Case Summary* (n 688)

This decision is another case that the public and commentators did not pay attention to. The only information source found about the decision is the TCC's result of decisions on its website.

Thai domestic sugar markets can be categorized into 2 major markets: refined sugar (commonly called 'white sugar') and brown sugar markets. The white sugar has always been under heavily regulated market in term of domestic price and selling quota.[691] On the other hand, the brown sugar market has always been free from regulations and its price is driven by market mechanism in free competition. The reason for the necessity to regulate white sugar industry is because white sugar is a vital product in which affects economic stability of the country[692] and thus the government wants to take control over the pricing and quota in production. However, the brown sugar does not pose such importance to economic stability of the country. In term of consumer demand, white sugar has been more popular than brown sugar among Thais. A historic reason of this goes back to early 1900s when brown sugar was locally produced but the so called 'white' sugar had to be imported because of the higher 'western' technology in production. Therefore, the white sugar was expensive and thus a sign of wealth.[693] In term of usage, white sugar has been generally used in everyday cooking while brown sugar was occasionally used for dessert.[694] In term of market values, domestic market value of white sugar in 2000s was around 26,000 million THB (approximately 596 million GBP),[695] unfortunately this Part could not find market value of brown sugar recorded anywhere. Nevertheless, it can be concluded that white sugar market has more potentials to Thai economy more than brown sugar market.

An unnamed distributor of a sugar firm (*'the distributor'*) tied a 1 kilogram-package of brown sugar to every sale of its white sugar. *The distributor* held market share of 10%,[696] which can be generally deemed not to hold significant market power.

The charge was filed on unfair tying under Section 29 and not on abusive tying under Section 25. This was because *the distributor* had market share of 10% in the tying product market. Thus, it could not be considered in a dominant position and not subjected to Section 25 on abusive of dominant position. [697]

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[691] Under the Sugar Cane and Refined Sugar Act (1984) *and* The Goods and Service Prices Act (1999)
[692] The Sugar Cane and Refined Sugar Act (1984), the Note on the reason for enacting the Act.
[693] Phaka K., *'Sugar: History, Class, Thai State, and The Journey from Wealth to Danger for Health'* (in Thai) [16 Feb 2017] The Momentum (Online Publisher) <https://themomentum.co/momentum-opinion-history-of-sugar-thai/> accessed June 2018
[694] Muksong C., *'Sugar and the Changing Taste for Sweetness in Thai Society, 1961 - 1996'* (in Thai) [2005] Master of Arts Thesis, Faculty of Liberal Arts Thammasat University, Thailand, 100
[695] Office of the Cane and Sugar Board, *'Market Value and Income of Sugar Cane and Sugar Industries of Thailand'* (in Thai) [2012] Office of the Cane and Sugar Board of Thailand <http://www.ocsb.go.th/th/faq/index.php?gpid=18> accessed June 2018
[696] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2006'* (in Thai) (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2549.pdf> accessed June 2018
[697] ibid.

The TCC dismissed the complaint by giving the following reasons; 1. *The firm* was not defined as holding a dominant position because it held only 10% of market share. 2. The TCC carried out investigation on other customers. The result of the investigation indicates absence of tying conduct between them and *the distributors*. 3. The customers were able to purchase these products from 'other' firms. And 4. There was 'miscommunication' between *the distributor* and customers. *The distributor* only offered to sell additional 1 kg of brown sugar with every sale of white sugar and the offers were not compulsory. The TCC states that the customers misunderstood the communication, although it does not explain how or why.

The fact that this case was filed under unfair T&B and not abusive T&B might pull this case away from being a perfect comparison with EU T&B cases. EU T&B case laws feature abusive T&B and not unfair T&B while Thailand does both categories. However, this does not change the fact that the TCC still failed on providing legal tests for such T&B. So far, it only provides that unfair T&B shall hold dominant position and customers must be forced to buy both products. The decision does not analyse how these conditions constituted 'unfair' T&B. Therefore, the case is still far from ideal decision making for any type of T&B.

8. PC Game Tying Case (2007)

Search terms in Thai: : *ขายพ่วงเกมส์คอมพิวเตอร์, ถูกจำกัดสิทธ์ซื้อเกมคอมพิวเตอร์, ขายพ่วงเกมส์ 2550, ขายพ่วงเกมส์คอม 2544, เกมส์คอม 2544, เรื่องร้องเรียนคณะกรรมการแข่งขันทางการค้า ,คณะอนุกรรมการเชี่ยวชาญ เฉพาะเรื่องธุรกิจที่เกี่ยวกับลิขสิทธิ์, ขายพ่วงอย่างไม่เป็นธรรม, ขายพ่วงเกมส์อย่างไม่เป็นธรรม*

Search terms in English: *Thai PC game tie/tying, Thai PC game tying 2007, Thai game tying 2550, computer game tying 2550, Thai game tying, Thai competition case laws, Thai unfair tying/tie, Thai game unfair tying*

This decision is another case that the public and commentators did not pay attention to. The only information sources found about the decision is the TCC's result of decisions on its website and an official document found on Department of Internal Trade database.

This decision is the second PC game tying case filed to the TCC (the first one was in 2001). These two cases share similar circumstances *i.e.* PC game tied to another PC game allegedly without choices for the customers and involving intellectual property right.[698] However, there is no information recorded whether these two cases are continuous behaviour of the same PC game firm or connected to each other in any way.

[698] However, in *the PC Game Tying Case (2001)*, the TCC did not discuss about the intellectual rights related to the case.

An unnamed PC game firm (*'the firm'*) allegedly compelled its customers, whom were PC game cafes, to purchase PC game A (tied product) with PC game B (tying product) without providing other alternatives.[699]

The complaint was filed on abuse of dominant position under Section 25 and unfair tying under Section 29.[700] Note that the complaint was not filed directly on abusive T&B, instead it was under general abuse of dominant position. There is no recorded reason of this. Nevertheless, from the precedent of the TCC decision makings, it can be observed that when a complaint filed under abusive T&B, the complaint would immediately be dropped and unprosecuted. This might discourage *the firm* from pursuing abusive T&B charge and filed under general dominant position instead with less chance of getting immediately dropped.

There were 2 separate occasions of T&B. Firstly, *the firm* allegedly compelled the PC game cafes to purchase PC game A (tied product) with PC game B (tying product) as a precondition to grant copyright license for the cafes to operate PC game B in their PC games café businesses. If the PC game cafes did not take the T&B, the firm would refuse to supply the copyright license to the cafes and thus the cafes could not run the PC game B on their business platforms. Secondly, *the firm* allegedly continued the T&B after the licensing.[701]

The TCC started processing the complaint by appointing subcommittee to investigate the matter in 2013, 6 years after the complaint was filed.[702] Later, the appointed subcommittee decided that the complaint should be dismissed, by the followings reasons: 1. The usage of the first T&B as a precondition to copyright licensing is legal 2. The second tie did not contain compulsory nature. The subcommittee insisted that the customers had choices to purchase them separately. 3. The firm did not intend to destroy, damage, obstruct, impede, or restrict business operation of other business operators.[703] 4. The destruction, damage, obstruct, impeding, or restriction of other business operators were not proven (or in other words, the theory of harm was not proven). Thus, the tie was not illegal on unfair tying under Section 29. Nevertheless, the subcommittee did not publish its finding about the breach of abusive dominant position charge under Section 25 (if it had any).

The TCC confirmed the finding of the subcommittee and dismissed the complaint accordingly without further reasoning or statement.[704]

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[699] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2007'* (in Thai) (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2550.pdf> accessed June 2018

[700] ibid.

[701] ibid.

[702] Teriyaphirom B. (Secretariat of the TCC), *'Notification of the Thai Trade Competition Commission on the Appointment of Special Sub-Committee on Copyright Related Businesses*' (in Thai) [31 January 2013] Official Document of the TCC <http://law.dit.go.th/Upload/Document/b275708b-b5d0-4928-aa85-890f790af616.pdf> accessed June 2018

[703] These are elements extracted from unfair trade practices under Section 29.

[704] *OTCC 2007 Case Summary* (n 699)

In conclusion, the case fulfilled 1 legal test out of 7 model tests *i.e.* the customers were not forced to buy the products. As usual, the provided test was not analysed by the TCC. It was only mentioned as the reason to dismiss the case.

9. Non-alcoholic Beverage Tying Case I (2012)

Search terms in Thai: *ขายพ่วงน้ำอัดลม, ขายพ่วงน้ำอัดลม 2555, ขายพ่วงน้ำอัดลม น้ำดื่ม, ขายพ่วงเครื่องดื่ม, ผู้ผลิตเครื่องดื่มรายใหญ่*

Search terms in English: *Thai soft drink tying/tie, Thai soft drink tying/tie 2012, Thai soft drink drinking water tying/tie, Thai beverage tying/tie, Thai incumbent beverage, Pepsi out Thai market*

There were 2 non-alcoholic soft drink tie cases filed to the TCC in 2012. The facts (as given by the TCC) of the 2 cases are rather similar to each other. The differences, however, were the market definition (one case was on national scale, another was on district scale) and the price incentives (one case was pure bundling -without price incentive, another was mixed bundling -contains price incentives). The 2 cases took place in 6 months apart. The only source of information regarding directly to these 2 cases is only found in the TCC's result of decisions on its website. There is no evidence or information whether these 2 cases are linked together or whether they were continuous behaviours of the same firm. Although, they were highly possible, given the same strategic tying approach (tying weaker beverage to an incumbent beverage to distributors and not directly to consumers) and the huge distribution network in which owned by few firms.

An unnamed incumbent beverage firm ('*the firm*') allegedly tied 3 dozen of drinking water (tied product) to every crate of soft drinks (tying product) sold. The case was filed under abusive T&B under Section 25(2). [705] Note that, unlike other previous tying cases, the complaint was not filed on unfair tying (Section 29). The reason for the shift is not recorded.

The result of the decision by the TCC did not directly indicate whom the T&B was imposed to.[706] However, by looking at the type of soft drink container used in the decision, it is likely that the T&B receivers were the distributors of *the firm* or beverage retailers and not end consumers. The types of soft drink packages in Thailand can tell the categories of the customers. Traditional wholesale glass bottles type normally comes in 'crate' and contains 2 dozen bottles (330 ml) or 1 dozen bottles (1 litter).[707] Glass bottles in crate style is not

[705] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2012* (in Thai) (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2555.pdf> accessed June 2018
[706] ibid.
[707] Damrongsakkul S. and Ngamsinlapasathian S., *'Study of the Properties of Plastic Crates Used for Soft-Drink Bottle Transportation for Recycling Purpose'* [2011] funded research for National Metal and Materials Technology Center (MTEC)

popular in household market because the crates and glass bottles have to be returned to the manufacturer to reuse, causing them inconvenience. In the other hand, this style is popular among sit-in food businesses because the wholesale price is cheaper than the plastic bottle style and often includes delivery and pickup. In contrast, plastic bottles type is popular among household market because of the conveniently disposable plastic package and bottles. The plastic package and bottles look similar to those in the UK, in which the number and size of the bottles can be anything from 4 bottles to 3 dozen and at any bottle size. This plastic style can also be seen in the sit-in food businesses, especially in tourist or busy areas where customers tend to eat fast and take the drink out with them. Nevertheless, 'crate' was the type of container involved in the decision.[708] Therefore, it is likely that the tied receivers in the decision were distributors or retailers and not end consumers.

The TCC dismissed the case by giving the reason that; 1. The alleged T&B was not compulsory. It was an *'asking for cooperation'* and the customers purchase the T&B by their own consent. 2. The alleged T&B did not prevent other business operators from having choices of purchase. Thus, the alleged conduct did not violate Section 25(2) on abusive tying.[709]

In conclusion, the case fulfilled 1 legal test out of 7 model tests *i.e.* the customers were not forced to buy the products. As usual, the provided test was not analysed by the TCC. It was only mentioned as the reason to dismiss the case.

10. Non-Alcoholic Beverage Tying Case II (2012)

Search terms in Thai: *ขายพ่วงน้ำอัดลม, ขายพ่วงน้ำอัดลม 2555, ขายพ่วงน้ำอัดลม น้ำดื่ม, ขายพ่วงเครื่องดื่ม, ผู้ผลิตเครื่องดื่มรายใหญ่*

Search terms in English: *Thai soft drink tying/tie, Thai soft drink tying/tie 2012, Thai soft drink drinking water tying/tie, Thai beverage tying/tie, Thai incumbent beverage, Pepsi out Thai market*

This is the second non-alcoholic beverage tying case in 2012 and the last tying case in Thai competition law ever been considered by the TCC. The existing facts (based on information provided by the TCC) are similar to the first case.[710] The only differences between this case and the former one are the narrower market definition from national scale to district scale and the presence of price incentives in the tie *i.e.* mixed bundling. This second case took place 6 months apart from the first one. And similarly to the first case, the only source of information

<https://www.researchgate.net/publication/39025399_Study_of_the_properties_of_plastic_crates_used_for_soft-drink_bottle_transportation_for_recycling_purpose> accessed June 2018

[708] *OTCC 2012 Case Summary* (n 705)

[709] ibid.

[710] See *Non-Alcoholic Beverage Tying Case I (2012)* discussed above.

directly regarding to the case matter is only found in the TCC's result of decisions on its website.

An unnamed incumbent beverage firm in Bang Khun Thian District, Bangkok ('*the firm*') allegedly tied 12 dozen packs of drinking water (tied product) to every 20 crates of soft drinks (tying product) sole. However, the T&B contained price incentive to customers *i.e.* it would be cheaper for the customers to buy both products together than buying them separately. And the investigation by the TCC also indicated that the T&B was not compulsory. The customers could choose to buy the T&B (with price incentive) or buy separately (without price incentive). And like the first non-alcohol beverage tying case, this case was filed on abusive tie under Section 25(2).[711]

The TCC came to conclusion to dismiss the case by the following reasons; 1. The tie was not compulsory. It was a *'condition in which benefits customers'* such as price reduction with multiple purchases and free giveaways as the customers purchase an item. 2. The alleged tied product (the drinking water) had high demand in the market. Therefore, there was no need to tie. Thus, the alleged conduct did not violate Section 25(2) on abusive tying.[712]

This last T&B case provides a bit more information about the legal tests than usual. There are 2 legal tests present in the case *i.e.* customers were not forced to buy both products and an objective justification. Interestingly, it was the second and the last case the TCC utilized an objective justification to dismiss a T&B case.[713] Unfortunately, the TCC missed the chance to analyse economic or legal thinking of both tests. They were simply mentioned and left unexplained. Most importantly, as the latest T&B decision, it missed the unique opportunity to explain evolution of legal tests in T&B. Likewise, the public missed the opportunity to learn from such evolution. Thus, although the case contains a bit more information about legal tests than usual, the case still far from being ideal T&B decision making.

11. The Conclusion

The Chapter reports all T&B decisions in Thailand by all reliable information sources. It found that the existing legal tests of Thai decisions are significantly less in numbers than those of the EU's. They are also inconsistent and do not demonstrate evolution of T&B case laws. These factors discourage policy learning by the public as they do not promote efficient learning by giving adequate and consistent information.

Overall, Thai T&B decisions produce, at best 2 legal tests for public's policy learning, while the EU T&B decisions produce 7 legal tests. Moreover, the existing tests of Thai T&B are incomplete and left unexplained or analysed on many occasions, while the EU legal tests are

[711] *OTCC 2012 Case Summary* (n 705)
[712] ibid.
[713] The first one was *PC Game Tying Case (2001)* discussed above.

elaborately explained (although with some disagreements from commentators). Thai T&B decisions also lacks consistency. One legal test does not equally apply to all similar-circumstance cases. In a case, a legal test might be applied, while in another, it does not. This brings much inefficiency to the public's policy learning. Most importantly, Thai T&B decisions do not reflect evolution of T&B decision development. The EU's T&B decisions show how T&B policy developed over the years of 1988 – 2018. Therefore, the public has had opportunities to learn the T&B policy. On contrast, Thai T&B decisions do not show any consistent evolution of the cases throughout the years. Thus, they pose significant barrier to efficient policy learning of the public.

Chapter 5

The Suggested Solutions:

Legal Framework and Competition Transparency Ombudsman

Chapter 5 aims to respond to the problem introduced by the Thesis that is there is a severe lack of transparency in Thai competition decision making. As a result of being barely transparent, policy learning of competition law to the general public is also impaired. The Chapter aims to suggest solutions in order to provide greater transparency, and together with it, more policy learning to Thai competition regime.

Generally speaking, there are two main issues to look at here. First is the need of a better legal framework for transparency of Thai competition law. Second is the mechanism to enforce and maintain the transparency. The former is the first thing to be done because nowadays Thai competition authority ('TCC') (and other governmental entities with judiciary power in that regard) does not have direct duty to provide coherent transparency regarding to its decision-making process.[714] As the result, the TCC has been providing incoherent and intransparent information regarding to its decision-making process.[715] Once there is inadequate information, the public loses opportunity to learn how the law applies in the real world and consequently fails to adapt their activities accordingly. Thus, the Chapter will provide with a workable legal framework for more transparency in Thai competition decision-making process. Secondly, the additional mechanism to ensure that the suggested legal framework will be enforced and maintained will be suggested. If history has taught us anything about Thai competition, it would be that introducing laws are easily achievable but enforcing them has always be a challenge for Thailand. For a long time, Thai competition regime has been 'the tiger paper'.[716] There are competition laws against cartels, abusive commercial behaviours, anticompetitive mergers, and even unfair commercial behaviours against markets and competitors.[717] Unfortunately, these laws are rarely enforced. Once they are, the cases are likely to be dismissed out of incoherent reasons and unexplained legal tests. There has never been a firm punished by the Thai competition authority since the enactment of the Competition Act 1999.[718] Thus, it is very likely that the existing models for law enforcement obviously are not working for Thai competition. An additional mechanism has

[714] The problem of the lack of Thai competition law transparency is thoroughly discussed in *Chapter 1*
[715] Case-by-case demonstration of how TCC provide ineffective information is thoroughly discussed in *Chapter 4.*
[716] Nikomborirak D., *'Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries'* [2006] Vol. 26 (No. 3) Northwestern Journal of International Law & Business, 613
[717] The Competition Act 1999 (abolished) and 2017 (in force)
[718] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions'* (in Thai) Official Document <https://otcc.or.th/complain-summary/> accessed April 2020

to be created in order to ensure that the suggested legal framework will be applicable and no longer a tiger paper. The Chapter will introduce the concept of a Competition Transparency Ombudsman who is working independently to ensure more possibility that Thai competition transparency is enforced. It will encourage the TCC to provide more coherent, adequate, and explainable information regarding to its decision-making process. Without legal power over the TCC, it should not be able to order relevant corrections if the competition authority fails to fulfil its duties on transparency. This is because there are other organizations already holding these powers.[719] Yet, it should have persuasive power to ask the right transparency questions to the TCC and bring these neglected or intentional transparency issues to the attention of the public. This will be a form of 'soft' check-and-balance in information related power of the TCC. It should ensure more possibility that the newly suggested legal framework will no longer be neglected and swept under the carpet. The real power of the ombudsman does not lay upon its legal forces, but rather to the public's who should hold the true power in democratic system.

For efficiency of answering the problem, the Chapter divides into two Parts: the suggested legal framework and the introduction of Competition Transparency Ombudsman.

Part I: The Legal Framework

The current legal framework for transparency in Thailand is generally problematic. The laws do not impose direct duty for the governmental entities to come clean when it comes to their decision-making process. It all starts from the Constitution that does not grant the right to be given reasons to the people. The only right guaranteed is the right to be informed.[720] This facilitates the trend of only informing the *results* of decisions instead of to explain them. Moving on down the hierarchy, the Official Information Act (*'OIA'*) only requires the governmental to provide *results* of their decision making and not the reasons of the decision making.[721] This goes along with the approach of its superior law, the Constitution, by providing the right to be informed and not the right to be given reasons. When it comes to competition law, it is unsurprising to see the Competition Act taking similar approach to the foresaid laws. It requires the TCC to only publish the *results* of the decision making and not necessarily the reasons of the decision making.[722] As the result, the TCC is not obliged to given reasons for its decision makings and it has been demonstrated that the TCC surely maintain that standard.[723] Therefore, a new legal framework for more transparency needs to be created.

[719] Discussed below, see *Part II: Competition Transparency Ombudsman*
[720] Thai Constitution, Article 41(1) *'A person and community shall have the right to …(1) be informed and have access to public data and information in possession of a State agency as provided by law; …'*
[721] The Official Information Act 1997, Section 9(1)
[722] *The Competition Act 2017* (n 717) Section 29(12)
[723] Case-by-case demonstration of how TCC provide ineffective information is thoroughly discussed in *Chapter 4.*

Logically, when the problem originates from the Constitution, which lays out fundamental principles for power control of the whole jurisdiction, solving such problem should start from the Constitution. Yet, the Thesis realizes that it will be very ambitious and perhaps less practical to suggest amending everything from the Constitution, the OIA and down to the Competition Act. In addition, the issue at hand is to grant more transparency to Thai competition decision making and not to all entities in Thailand. The Constitution and the OIA apply to all governmental entities on how they should provide transparency, not specifically to competition authority. While this may widely benefit the public, the focus of the Thesis is only the transparency for Thai competition decision making. Therefore, suggesting amendments on the Constitution and the OIA shall not be the priority of this Chapter. The focus of the Thesis is to provide more transparency for Thai competition decision making process. The law that governs how competition decision making process goes is the Competition Act. Therefore, renewing framework for more transparency of the Competition Act shall be the focus of the Chapter. However, the suggested solutions of this Thesis could definitely be a blueprint for transparency reforms in other areas, especially for the Constitution and the Official Information Act.

By this reason, the suggested legal framework will start from the amendment of the Competition Act. Secondly, the Chapter will discuss the possibility for expanding transparency for both the OIA and the Constitution.

1. The Competition Act

It has been elaborately discussed in Chapter 1 that there are two problems with the Competition Act. Firstly, the Act itself is unfriendly to transparent decision-making process. Secondly, the interpretation of the TCC to the Act further sends Thai competition regime to the complete dark age.

On the former, the Act requires only 'outcome of competition decisions to be published.[724] Although, this does not prohibit the competition authority to publish further information regarding to the decisions, the authority is not obliged to do so. In addition, the Act imposes criminal charges to anyone (including the individuals of the TCC) whom exposes *'…factual information (which is) normally reserved and not revealed…'.*[725] The charge includes 100,000 THB (approximately 2,500 GBP) fine and imprisonment. This surely is not encouraging any individual of the TCC to risk personal fortune and freedom to expose any other information besides what the law directly requires. On the latter, the TCC has interpreted this as it shall not publish anything else but only the results of their decisions.[726]

[724] *The Competition Act 2017* (n 717) Section 29(12)
[725] ibid. Section 76
[726] The official letter from the TCC to the Author *("the Letter"*) 2015 No. พณ (สขค) 0416/1532

Hence, all the publication of Thai competition cases came with severely limited information, barely nothing more than the result of each decision.[727]

By this reason, the Act should be more specific on responsibilities of the TCC. It should impose more than just publishing the results of the decisions, but other essential information needed to explain and justify the decision-making process of the authority. The Act should also leave less room for the TCC to use its discretionary power to interpret the Act in further non-transparent manner than the Act states. This would benefit both the public and the TCC at the same time. The public would gain more transparency while individuals of the TCC can be sure that by providing more transparency for the public, they would be safe from necessary legal liability they might otherwise face. To achieve this, the Chapter suggests an amendment of Section 29(12) the Competition Act as the initial solution.

Originally, the Section 29(12) demands only the duty to publish the results of the decisions from the TCC. The TCC is not obliged to provide any other information to the public besides the results of its decisions. This is fundamentally problematic because the Section does not impose the obligation to give reason to the TCC. A governmental entity should be given the duty to give reasons to the public regarding its actions and decision makings and not just duty to inform the public for such actions and decision makings. This argument has been thoroughly discussed in Chapter 2.[728]

Looking across the border, the EU Commission is the authority who is responsible for upholding the EU treaties including competition matters.[729] Its duties include establishing government transparency and ensuring its own actions to be coherent and transparent.[730] More precisely, the EU Commission is legally obliged to give reasons for its actions and decisions. As discussed earlier in Chapter 1, Article 296 of the TFEU requires EU institutions to *'…state the reasons on which they were based…'*[731] as well as Article 41 of the Charter of Fundamental Rights of the European Union that requires *'…the administration to give reasons for its decisions.'*[732] Additionally, it has been recognized by the ECJ that the duty to give reasons is included in the principles of good administration which is applicable to Member States when they implement EU law.[733] The EU Commission cannot provide only results of its decision making because that would be illegal. Thus, the EU Commission has

[727] See the detailed discussion in *Part I: The Problem* in *Chapter 1: Introduction: Thai Competition Decision Making.*
[728] See *1.5 Transparency and Competition Policy* in *Chapter 2: Transparency, Legal Precedent, and Policy Learning,*
[729] Europa, *'Institutions of the EU: The European Commission'* [2007] <http://europa.eu/institutions/inst/comm/index_en.htm> accessed March 2020
[730] Treaty on European Union (TEU), Article 11
[731] The Treaty on the Functioning of the European Union (TFEU), Article 296
[732] The Charter of Fundamental Rights of the European Union, Article 41
[733] Hofmann H. and Mihaescu C., *'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case'* [2013] Vol.9 (No.1) European Constitutional Law Review

the duty to give reason and not only the duty to inform. It is further regulated that any restriction on the information is possible but only with necessity.[734]

The Chapter recognizes that the duty to give reason is a missing essential element for transparency in Thai competition law. Therefore, it suggests that the amendment of the Competition Act should establish the duty for the competition authority.

Table 1: the current and the suggested amendment of Section 29(12)

Duty to inform under **current Section 29(12)**	**Duty to give reason under** **suggested amendment of Section 29(12)**
'The Office shall have the following powers and duties: … (12) to disseminate the outcome of matters considered by the Commission to the general public; …' *[emphasis added]*	'The Office shall have the following powers and duties: … (12) to disseminate the outcome of the matters, the charges and allegations, and the criteria and the rationales of the decisions to the general public. All of the information should be provided in two forms: full decision publication and press releases.' *[emphasis added]*

The suggested amendment establishes the duty to give reason to the competition authority by imposing more obligations to the TCC to inform and give reasons to the public about what they are doing and why they are doing regarding to a competition case. To be precise, it suggests amendments in two forms: full decision publication and press releases.

1.1. Additional information besides the 'outcome' of competition cases

Clearly, more information about competition cases is needed. This additional information is the very least the public needs to know about.

Firstly, the charges and allegations made to the firm under question need to be informed. There are many anticompetitive charges and many more in similar natures. Each of them has different rationales and criterions of why such conduct is illegal. Without informing what the

[734] Council Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43, Article 9

firms are being charged or alleged for, it is very hard to know what ground the authority is using to condemn the firms. For example, it is a huge different between the abusive tying and bundling (*'T&B'*) (Section 50) which prohibits abusive T&B with detriment to the markets and consumers and unfair T&B (Section 54) which prohibits unfair T&B with detriment to competitors. The former is a prohibition on T&B against markets and consumers while the latter is T&B against unfair treatment from rivals or competitors of the firm. If the charges and allegations are unclear (which they are, in many cases of the TCC), one can only doubt the integrity of the decision. In 2004, the TCC fails to inform the public what were the charges to a firm with T&B on whisky and beer. Yet, it dismissed the case even no obvious charges revealed.[735] In term of universal human right, the right to know charges and allegations against oneself is a universal fundamental right under the Universal Declaration of Human Rights.[736] Thailand was one of the first nations that have ratified the Declaration since 1948.[737] In competition law's context, the right does not play much different role to that in human rights. The EU Commission states that the firm or individual representing the firm under question has the right to know what they are being charged with, so they can defend themselves accordingly.[738] Thus, it is crucial that the Competition Act should impose the duty to inform the charges and allegations in the decisions.

Secondly, and perhaps most importantly, the criteria and the rationales of the decision need to be explained. This is the main idea of holding the duty to give reason *i.e.* to guarantee transparency and the credibility of the authority and to minimize discretionary decisions.[739] As mentioned earlier, the right to be given reasons is guaranteed under TFEU and the Charter of Fundamental Rights of the European Union.[740] Accordingly, the EU Commission publishes the criteria and rationales of its decisions in every decision publication. For example, the Commission laid out the criterions used to establish Microsoft's abusive T&B in the Microsoft case[741] together with the rationales of doing so. In general, the Microsoft case established that for a tie to be abusive, the authority should consider these criteria -separate markets,[742] dominance in the tying market,[743] alternatives for customers,[744] and foreclosure effects on competition.[745] Failure to do this would result to a breach of the law. In contrast, failure to provide criteria and rationales of the decision by the TCC results to nothing

[735] Office of Thai Trade Competition Commission (OTCC), *'Summary of Competition Decisions in 2004'* (in Thai) (Official Document) <http://otcc.dit.go.th/wp-content/uploads/2015/04/year-2547.pdf> accessed June 2018
[736] Universal Declaration of Human Rights, Article 10 and the Human Right Act 1998 (UK), Article 6
[737] The Permanent Mission of Thailand to the United Nation, *'Human Rights and Social Issues'* [2017] Official Website <http://www.thaiembassy.org/unmissionnewyork/en/relation/80917-Human-Rights.html> accessed March 2020
[738] The EU Commission, *'Best Practices on the Disclosure of Information in Data Rooms in Proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation'* [2015], (5)
[739] Gugler P., *Transparency and Competition Policy in an Imperfectly Competitive World* in The Oxford Handbook of Economic and Institutional Transparency (Oxford University Press, Online Publication) 17
[740] *TFEU* (n 576) Article 296 and *CFR* (n 577) Article 41
[741] Case COMP/C-3/37.792 *Microsoft* (Brussels, 21 April 2004), C (2004)900 final
[742] ibid. paras. 801-803
[743] ibid. para. 429
[744] ibid. para. 827
[745] ibid. para. 841

because, currently, no law imposes the duty to give reason to the TCC. Therefore, it is crucial to impose the duty of providing such information for the TCC.

1.2. The two forms

Besides what to publish, how to publish is equally important. If there is only one form of publication with all information thrown in, it might result to information overload which could be as harmful as the lack of it.[746] Information overload can cause poor decision making, the public might misunderstand the case and jeopardize their process of policy learning.[747] Yet, the fully detailed decision should also be available for deeper analysis of information *e.g.* academic purposes. Therefore, there should be at least two platforms: full decision publication and press release.

There should be a short and easy form of publication for the public. This could come in a form of summary decision or press release where the authority would briefly report what they are doing regarding to a certain case. They should contain only precisely the necessary information about what is going on with a decision-making process without extensive details which may otherwise be found in a full decision publication. For example, EU Commission issued a press release regarding its decision to fine Google for its abusive online advertising. The press release states the background information of the case, the charges, Google's strategy for online search advertising, criterions for breaching EU competition laws, and the consequences of the decision.[748] In general, there is adequate information in the Commission's press release. There is information about the charges, the creations and rationales of the decision making, and the outcome of the decision.

Another form is the full decision publication. It is the official document with full details on a certain decision. All the information intended to be published about a certain decision shall be the content of the publication. This should include lengthy background information about the case, extensive explanation of the criteria and rationales of the case, relevant precedents on which the decision is based, *etc*. The aim of the publication should be for anyone who wants to analyse the decision deeper than what is already provided in the summary decision or the press release. For example, legal practitioners or academics may find the extensive explanation of a certain case useful for their works. This is not to say that all information regarding a certain decision should be released. Certain information should remain confidential due to the nature of the information and the lack of benefit to the public if it is otherwise published. Nevertheless, these 'exemptions' to decision publication should be granted only when it is absolutely necessary to restrict such information. It should not be exempted only when it suits the convenience of the authority or any other influencing parties. Examples of these exemptions are national security, intellectual property rights, trade secret,

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[746] Krishen A., Raschke R., and Kachroo P., *'A Feedback Control Approach to Maintain Consumer Information Load in Online Shopping Environments'* [2011] Vol. 48 (No. 8) Information & Management

[747] Eppler M. J. and Mengis J., *'The Concept of Information Overload: A Review of Literature From Organization Science, Accounting, Marketing, MIS, and Related Disciplines'* [2004] Vol. 20 (No. 5) The Information Society

[748] European Commission, *'Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising'* [20 March 2019] IP/19/1770 Press Release

personal data, *etc*. In the EU, the EU Commission is obligated to grant public access to its decisions (including documents drawn up and received by the Commission) as much as possible[749] while restriction of the access can only take place when necessary.[750] Likewise, the TCC should include all the information in the full decision publication except those information with absolute necessity to be kept undisclosed for the benefit of the public.

Note: the above suggestions are only the rationales of the proposed Competition Act amendments. The additional mechanism to enforce the Act and to ensure the work of the competition authority will be discussed later in Part II.

2. The Official Information Act (OIA)

In general, the problem of the OIA is similar to the one with the Competition Act. Section 9(1) of the Act only requires a governmental entity to publish the 'outcome' of the its decision and not other essential information such as charges, criterions, or rationales of its decision.[751] The different between the OIA and the Competition Act is that the former applies to all governmental entities (including the TCC) but the latter only applies to the TCC.

As discussed earlier, the amendment of this Act is not absolutely necessary to bring transparency to Thai competition regime because only imposing the duty to give reason to the TCC in the Competition Act would be adequate to bind the TCC to publish what is needed. However, if the OIA is amended in the same manner with the Competition Act. The implication for transparency in decision makings would spread to *all* governmental sectors of Thailand. This would bring another level of meaningful improvements to the public as the benefit of transparency would not be restricted only in the field of competition.

Therefore, it would be better to amend OIA for the better transparency of Thai public in general. Although, it is not absolutely necessary for the purpose of the Thesis.

Since the suggested amendments are in the same manner as the one discussed for the Competition Act, *i.e.* transforming the duty to inform to the duty to give reason, and they are not the focus of the Chapter, the discussion will be brief.

[749] *Regulation 1049/2001* (n 734) Article 10-11
[750] *Regulation 1049/2001* (n 734) Article 9
[751] *The OIA* (n 721) Section 9(1)

Table 2: The current and the suggested amendment of Section 9(1)

Duty to inform under **current Section 9(1)**	**Duty to give reason under** **suggested amendment of Section 9(1)**
'… a State agency shall make available at least the following official information for public inspection… (1) a result of consideration or decision which has a direct effect on a private individual including a dissenting opinion and an order relating thereto…' *[emphasis added]*	'… a State agency shall make available at least the following official information for public inspection… (1) a result of consideration or decision, the charges and allegations, and the criterions and the rationales of the decisions to the general public. All of the information should be provided in two forms: full decision publication and press releases.' *[emphasis added]*

The OIA came out in 1997, 20 years prior the current version of the Competition Act in 2017. These two Acts have one thing in common -the duty to inform of governmental entities.[752] Since 1997, any governmental organization in Thailand have been required to provide the results of their decisions to the public according to Section 9(1) of the OIA. For 20 years, it undoubtedly has become the norm of transparency requirement for Thai government organizations to publish the 'results' of their decisions but not necessarily their decision-making processes. This norm of publishing only the results of decisions is spread among many governmental organizations in Thailand. Some examples of this norm have been given earlier in Chapter 1.[753] The National Human Rights Commission of Thailand, the Office of Consumer Protection Board, and the Election Commission of Thailand only have results of their decisions published and not criteria and rationales of the decisions. This norm is perfectly legal since the law requires only the results to be published, not how or why such results have been reached. This norm does not only influence how transparent governmental originations would be, it could have influenced how later laws enactment. 20 years later after the OIA came into force and widely adapted by governmental organizations, the Competition Act 2017 required the same norm for its transparency in decision making.[754] This put the newly enacted Competition Act in harmonization with the prior enacted OIA. As the result, the intransparent decision making requirement of OIA could have influenced the same intransparent decision making requirement of the Competition Act. However, there is no written proof that the Competition Act cited the legal doctrine from the OIA. Yet, it is a

[752] ibid. and *The Competition Act 2017* (n 717) Section 9(1) and Section 29(12)
[753] See *2. The Official Information Act (OIA)* in *Chapter 1*,
[754] *The Competition Act 2017* (n 717) Section 9(1) and Section 29(12)

common practice to legislate new laws to be in harmonization with the existing ones. So, there would not conflict with the existing laws. The Chapter will not say that the intransparent decision making norm in the OIA is the predecessor of the one in the Competition Act. Although, it was likely to hold influence over how the duty to inform is re-established in the Competition Act.

The suggestion to amend the Act is to transform the duty to inform to the duty to give reason in the same manner the Chapter suggests in earlier on the Competition Act. The detail of the suggestion can be seen in the *Table 2*. The achievements from this suggestion could be categorised into two benefits -a better influence on the suggested amendment of the Competition Act and wider transparency to all governmental entities.

Firstly, the amendment of OIA will make the suggested amendment of the Competition Act more likely. The OIA is a wider enforcer of transparency requirement for Thai governmental entities, while the Competition Act covers only with the competition authority. This means the OIA has jurisdiction on *all* governmental entities including the competition authority or TCC.[755] If the OIA required all governmental entities to publish more than results of their decisions, the TCC would undoubtedly be included. The failure to publish further information on its competition decisions would be in breach of the OIA. Thus, if the OIA were to be amended, there would be more possibility that the Competition Act would be amended in the same manner, that is, to provide more transparency.

Secondly, since the OIA covers all governmental entities, all public sectors will benefit from more transparent decision-making process. Nowadays, all governmental organizations are only required to publish the results of their decisions. If the OIA is amended as suggested, all of them will have to publish not only the results, but the charges, allegations, criterions, and rationales of their decisions to the general public. They also have to provide the information in a full form and a simplified form. This would undoubtedly widen the scope of transparent decision-making process throughout Thai jurisdiction.

3. The Constitution

Generally speaking, the Constitution is the main piece of legislation that governs overall principles of how a jurisdiction operates. It should lay out general duties and rights of public and private entities, fundamental principles, and legal basis of a certain jurisdiction.[756] The Constitution of the Kingdom of Thailand outlines, *inter alia*, the fundamental rights and responsibilities between the state and citizens.[757] One of the fundamental rights Thai Constitution preserves is the right to be informed of the public under Article 41(1).[758]

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[755] *The OIA* (n 721) Section 4
[756] McKean E., *The New Oxford American Dictionary* (2nd edn, Oxford University Press) 2051
[757] *Thai Constitution* (n 720) the Preamble
[758] ibid. Article 41(1) *'A person and community shall have the right to …(1) be informed and have access to public data and information in possession of a State agency as provided by law; …'*

However, it does not specify what information is to be informed. It leaves the authority to decide what is to inform the public to the following hierarchy of law. Consequently, the authority to decide falls on the Official Information Act which requires only the results of decisions to be informed.[759] And this approach was later followed by the Competition Act.[760] By solely granting the right to be informed, the right to be given reason is left out of the Constitution. Thus, Thai public is only assured the right to be told but not the right to know the reasons. Under this light, the Constitution is the legal origin of intransparent decision-making process of the entire public sector.

However, as discussed earlier, the amendment of the Constitution is not the focus of the Thesis. This is because while a constitutional reform would be the most desirable outcome, it is just very difficult to achieve. Also the aim of the Thesis is to introduce transparent decision-making process to Thai competition regime, not necessarily to the whole country. Nevertheless, this does not mean that putting the right to be given reasons into the Constitution is undesirable. It would definitely introduce transparent decision-making process across all governmental entities including the TCC. As the Constitution requires all governmental entities to provide the right to be given reasons, such right will be constitutional right which should lead to immediate amendment of the Competition Act to provide the same protection. Thus, amending the Constitution, although far-reaching and ambitious, would be the silver bullet to all intransparent decision-making processes.

When looking across the borders, the right to be given reasons often receives constitutional or similar status as one of the fundamental rights. In the EU, it is *'the obligation of the administration to give reasons for its decisions'* as a right to good administration.[761] This has become a constitutional right of the EU citizen when it has been included in the Treaty of Lisbon in 2007.[762] In the US, although the right to be given reasons is not expressively protected under the Constitution, the Supreme Court did state that the decision makers should state the reasons for the decisions with legal basis and evidence he/she relies on.[763] This is to make sure that the decision given is not a charade, but is based on sounded evidence and legal rules.[764]

Therefore, the Chapter suggests that the Constitution should provide the right to be given reasons together with the existing the right to be informed as presented in *Table 3* below.

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[759] *The OIA* (n 566) Section 9(1) *'... a State agency shall make available at least the following official information for public inspection… (1) a result of consideration or decision which has a direct effect on a private individual including a dissenting opinion and an order relating thereto…'*
[760] Discussed above.
[761] *CFR* (n 732) Article 41(2)(c.)
[762] Treaty of Lisbon, Article 6(1)
[763] *Goldberg v. Kelly*, 397 U.S. 254 (1970)
[764] Mashaw J.L., *'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance'* [2007] The George Washington Law Review, 107

Table 3: The current and the suggested amendment of The Constitution Article 41(1)

Duty to inform under **current Article 41(1)**	**Duty to give reason under** **suggested amendment of Article 41(1)**
'A person and community shall have <u>the right to …(1) be informed</u> and have access to public data and information in possession of a State agency as provided by law; …' *[emphasis added]*	*'A person and community shall have <u>the right to …(1) be informed, the right to be given reasons</u> and have access to public data and information in possession of a State agency as provided by law; …'* *[emphasis added]*

Table 3 suggests that, besides constitutionalizing the right to be informed, the right to be given reasons should as well be included. This would ensure that the secondary laws is obliged to impose the duty to give reasons to governmental entities, including the TCC. Consequently, both the Official Information Act and the Competition Act would have to include the right to be given reasons for the public, otherwise both of the legislations would be unconstitutional.

4. The Conclusion

The current legal framework for transparency in Thailand is problematic. It does not grant the right to be given reasons to the public. The existing right to be informed is evidently inadequate to motivate governmental entities, including the TCC, to provide reasons and criterions for their decisions. It is obvious that there is a need for new legal framework in order to encourage governmental entities to provide more transparency to the public. Generally, the Chapter suggests that the new legal framework should include the right to be given reasons alongside with the existing right to be informed. By this way, the governmental entities will need to provide reasons for their decision.

The Chapter proposes the amendments to 3 different laws -the Competition Act, the Official Information Act, and the Constitution. However, the focus of the Chapter is on the first piece rather than the latter two because of two reasons. Firstly, the focus of the Thesis is transparency in Thai competition decision-making process. Secondly, the amendment of the Official Information Act and the Constitution is very ambitious and less possible than the Competition Act. Successful amendment of the Competition Act, transparency in Thai competition law will be achievable which is satisfactory for the Chapter. However, one can

imagine that with successful amendment of the latter two, although less possible, transparency of the whole Thai public sector will be achievable. In addition, these ambitious amendments have merits to be the blue print for future researches for more transparent decision making in Thailand as a whole country.

However, with the suggested new legal framework is inadequate to achieve transparency in competition law. The history of Thai competition law enforcement has taught us that enacting legislations and left them for the competition authority to enforce without judiciary review is unsuccessful. There is a need for a new and special mechanism to ensure that the suggested legal framework will be enforced and maintained. Part II will introduce the concept of a Competition Transparency Ombudsman to aid this enforcement deficiency.

Part II: Competition Transparency Ombudsman

If history has taught us anything about Thai competition, it would be that introducing laws are easily achievable but enforcing them has always been a challenge for Thailand. The competition laws themselves are comparable to those more experienced jurisdictions. They cover many competition categories like cartels, abusive commercial behaviours, anticompetitive mergers, and even unfair commercial behaviours against markets and competitors.[765] But because of the poor enforcement mechanism, these laws are rarely enforced. Once they are, the cases are likely to be dismissed out of incoherent reasons and unexplained criteria. Most importantly, there is no effective review of the discretionary power of these decisions.

As Part I suggests the workable legal framework for better transparency for Thai competition law, Part II suggests that there should also be additional mechanism to ensure that the framework will be enforced and maintained. The suggested mechanism is Competition Transparency Ombudsman (*'CTO'*). In a nutshell, the CTO is an independent organization working to ensure more possibility that the Trade Competition Commission (*'TCC'*) complies with transparency measures set up by the suggested legal framework. The CTO should have power to receive and examine complaints regarding transparency on competition decision-making process of the TCC, to recommend transparency measures to the TCC, and to make press releases about its work. The CTO would play the significant role on ensuring that the intransparent measures on competition will be communicated to the public and the right questions will be asked.

The CTO is significantly influenced by the EU Ombudsman model. This is because of its independence and direct link to democratic origin. This would ensure less probability for the CTO to work for a certain person or the government and more probability for it to work for the public.

[765] *The Competition Act 1999* and *2017* (n 562)

1. The additional mechanism: Competition Transparency Ombudsman (CTO)

Absolute power of discretion in decision-making process is never an ideal to the principle of good governance. Administrative discretion should be as transparent as possible and citizen's participation in decision-making should be guaranteed.[766] However, that is not the case of Thai competition when it comes to discretion in decision-making process. Today, the TCC is solely in charge of transparency in Thai competition regime. With the help of the current legal framework, it has full discretionary power to decide what will or will not be shown in its decision-making process.[767] The only mandatory information it needs to provide to the public is the result of its decisions. More importantly, there is currently no effective reviewer to vet this discretionary power.

This is when the Competition Transparency Ombudsman comes in to play. The CTO shall be a specialised entity to review transparency in Thai competition decision-making process. It should investigate any problematic decision making either by receiving complaints or by its own initiatives. Using an ombudsman model, the CTO shall be empowered to inquire, recommend transparency measures, and making press releases on its findings. The idea of the CTO is to provide more persuasive and non-legal binding pressure to the TCC to comply with the new suggested legal framework on transparency in decision-making process.

The CTO needs to be fully independent. It can neither be selected by the government or the Prime Minister nor takes order from one. It would be difficult for the public to entrust the CTO to vet discretionary power of a government entity while it is already working for the government. Similar approach regarding to the independence is taken by the EU ombudsman.[768]

2. CTO duties

The suggested CTO should be directly responsible for taking complaints from the public or starting investigation on its own initiative about poor transparency involving decision-making process by the competition authority, to recommend measures regarding the shortcoming decision-making process of the competition authority, and to make press releases about it to the public.

Firstly, the CTO should be the entity people can go to when there is problematic use of discretion by the TCC. As the TCC is solely in charge of transparency in Thai competition regime, there is a desperate need for someone to question the use of this discretionary power. According to the current legal framework, the TCC is in charge of deciding which

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[766] Cheshmedzhieva M., *'The Right to Good Administration'* [2014] American International Journal of Contemporary Research 64, 67

[767] Full discussion of the TCC power and its approach on transparency can be found in *Part I* of this Chapter.

[768] The EU Ombudsman is elected by the EU Parliament and does not work for any EU government (TFEU, Article 228)

information regarding to its decision-making process should or should not be published.[769] The TCC is obviously not shy about exercising this power to deprive any other information apart from the results of its decisions. It publishes only the results of competition decisions and small details regarding the cases while leaving all essential information out.[770] When the public decided to request addition information, the TCC denied by claiming that it has full discretionary power on what to and not to publish as it sees fit.[771] On this point, one might argue that the requestor can always appeal this decision not to publish to the Official Information Commission (*'OIC'*) as the commission is responsible for transparency in decision making of governmental organizations. It had been elaborately discussed in Part I that the current legal framework for the OIC does not encourage a more transparent approach and that it is very unlikely the OIC will come up with more transparent approach by itself. Once the OIC is no longer our hope, there is a dire need for a new entity to vet the discretionary power of the TCC. The CTO should fill in this power gap by receiving complaints about intransparent decision makings. For the sake of the CTO work, the TCC should also be obliged to response to CTO regarding transparency inquiries in due time. This is compatible to the EU Ombudsman model where EU institutions need to response to the Ombudsman inquiries.[772]

Numbers of complaints might be red flags for those organizations being complained. But for a reviewing organization like an ombudsman, they are probably a good sign for efficiency, or at very least, necessity of the ombudsman's existence. Similar to the suggested CTO, the EU Ombudsman is empowered to receive complaints from any EU citizen regarding maladministration of EU bodies.[773] The EU Ombudsman has been dealing with gradually increasing complaints from 2016 to 2019 (291, 363, 545, and 560 respectively).[774] This shows necessity of the organization for the people and also shows that the Ombudsman is functioning. One can only guess whether this will be the case for the CTO. But given the transparency problems at hand, it is more than likely to see transparency-related complaints following in once the CTO is set up. This was the same case when the TCC was newly established. There was a flood of complaints relating competition coming in. During the first decade, there was the average of 10 complaints per year (1999 – 2009). But after all of the complaints were dismissed without proper reasoning giving, people started to lose faith in TCC's decision making and the rate of complaints dropped drastically to 2-3 cases a year. There was only one complaint throughout the year 2009.[775] A research from one of the top Thai competition law researchers has shown that this was because the public started to see anticompetitive practices as business as usual and stopped bothering to seek remedy.[776] Although, one might argue here that it could be because the TCC is so good at the job that no one violates competition law. These numbers show that it is essential for the CTO to establish and maintain the faith of the public earlier at its establishment. Failure to do so might

[769] *The Competition Act 2017* (n 717) Section 76
[770] *Summary of Competition Decisions* (n 718)
[771] *The Letter* (n 726)
[772] TFEU (n 731) Article 228
[773] ibid.
[774] European Ombudsman, *'European Ombudsman Annual Report 2019'* [2020] Official Report, 38
[775] *OTCC Decisions Summaries* (n 615)
[776] Padumkuekunpong K., *Thai Competition Law and Agricultural Monopoly: The Case of Eggs* (OpenWorlds, Bangkok) 17

inevitably paralyzed the whole legal framework. By being independent from political influences, there is a higher hope for the CTO not to look the other way when it comes to stepping up for more transparency.

Secondly, the CTO should be empowered to recommend measures to create, maintain, and restore transparency to the competition authority in which the entity under question has to provide a response to the recommendation. That is to say, the public will now have an official representative to suggest the TCC what it needs to do to improve its quality of transparency. Traditionally, the TCC would set its own standard regarding to how transparent it would like to be. With the current legal framework on its side, it can decide whether they would publish more than 'results' of its decisions. Obviously, it chooses that only results are enough for the Thai public.[777] Now the CTO can recommend that, for example, solely results are inadequate there should be other essential information regarding a competition case, *i.e.* criteria and rationales of the case, and so on.

This duty of recommendation is truly a suggestion. There is no binding effect upon the TCC. There are 2 reasons for this. Firstly, if the CTO were to have authority over an governmental organization on transparency, it would put the CTO in direct conflict of power with the Official Information Commission (*'OIC'*) whom already has judiciary power to review transparency of governmental organizations.[778] Secondly, it would be harder to produce an output with legal binding effect because there would be more concerns about legal implications that would surely follow. Thus, the CTO would possibly be held back from recommending useful measures for competition transparency. Similarly, the EU Ombudsman also has no binding effect from its recommendation. The Ombudsman only suggests the measures and receive back responses from the organization under question.[779] An example of this model exercise would be the EU Ombudsman's recommendation to EU institutions to ensure transparency while handling COVID-19 situation.[780] Although the EU institutions are not obliged to comply with the recommendation, they need to response to the Ombudsman then the Ombudsman needs to report the issue to the European Parliament.[781] This 'soft' impact is to remind the institutions of their duties to provide transparent decision-making process to the public.

Lastly, and most importantly, the CTO needs to make press releases about its works to the public. Asking important questions and recommending transparency measures to the TCC would not be effective unless the public is aware of them. The impact from the public to demand more transparency is way more powerful than of the CTO alone. That is how the CTO turns its soft impact to the TCC to a critical one. To do that, the CTO needs to make summarized, interesting, and reader-friendly press releases about each inquiry and recommendation. The EU Ombudsman is doing very good on the online press release. The

[777] The current and suggested legal frameworks of Thai competition law are elaborately discussed in *Part I.*
[778] But because of the problematic legal framework, the OIC is discouraged from perusing more transparency for governmental organization. This is thoroughly discussed in *Part I.*
[779] *TFEU* (n 731) Article 228
[780] EU Ombudsman, *'Ombudsman Asks EU Institutions to Ensure Transparency of EU COVID-19 Response'* [21 April 2020] EU Ombudsman Press Release
[781] *TFEU* (n 731) Article 228

information provided is short, coherent, and easy to read. There are also categories of topics for the readers to browse as well as search slot to look for specific keywords or cases.[782]

3. Democratic origin

One problem about state entities fighting for government-transparency related issues in Thailand is that they are often heavily influenced by the government itself. The easiest way to look at this is to look at their administration boards. They often consist of Ministers as the Chairmen and other high ranked military officers. Therefore, it is less likely for us to expect these entities to fight the government on transparency for the public when they are already working for the government on their fulltime jobs. For example, the Official Information Commission who is the to-go organization responsible for government-related transparency consists of a Minister personally handpicked by the PM.[783] These entities are, therefore, not suitable for the objective to reserve transparency against discretionary power of a governmental entity.

Therefore, the first thing is to ensure that the origin of the CTO is linked to democracy as much as possible. That is to say, the CTO needs to come from the people in order for it to fight for the people. It also needs no gatekeeper where one person, say the PM, is expected to signoff for a certain person to take the CTO job. Of course, holding a general election for all the people to elect the CTO to far too ambitious and expensive. We barely got through a single legitimate general election for the government ourselves in the past decade.[784] Thus, the general election, although linked directly to democracy, is not the ideal. The other democratic way is suggested by the EU Ombudsman model. The EU Ombudsman shall be a fully independent EU organization with an independent origin as it is elected by the European Parliament.[785] Likewise, the CTO should be directly elected by the democratic Parliament with no need for anyone else to signoff after being elected. This way the public can be more confident that there is less chance the organization would be influenced by political pressure if it was to be handpicked by a certain person.

4. The distinction from other entities

There are existing entities containing similar functions to the CTO. Their duties include ensuring transparency in governmental organizations. The top two entities would be the Official Information Commission and the Ombudsman Thailand. From the surface, it may

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[782] EU Ombudsman, *'Press releases'* (Official Website 2020) <https://www.ombudsman.europa.eu/en/press-releases> accessed May 2020
[783] *The OIA* (n 721) Section 27
[784] The last legitimate general election was in 2011, 3 years before military took the power in the 2014 *coup d'etat*. There was a general election in 2019. Yet the legitimacy is controversial as it was wholly held by the military government from the 2014 *coup d'etat* who also won its own election.
[785] *TFEU* (n 731) Article 228

seem that they are doing the same duties as the suggested CTO. But it will be pointed out that the CTO has its distinction when it comes to aiding transparency in Thai competition law.

Strictly speaking, the Official Information Commission ('OIC') oversees the discretionary powers of governmental organizations on providing information to the public.[786] It receives complaints from Thai nationals about failure of any governmental organizations to comply with their duty to publish and apply its judicial power to order changes.[787] However, there are some fundamental challenges that affect its efficiency when it comes to promoting transparency in competition law. Firstly, the OIC complies to its own code *i.e.* the Official Information Act, not the Competition Act or other Acts.[788] The most probable outcome for more transparency in Thai competition as the Thesis suggests would be to build a new legal framework only for the Competition Act.[789] This outcome is most probable because the scale of change is the smallest and is limited only in competition field. The effect of this new framework would fall upon the competition authority -the TCC, and not to others such as the OIC. Thus, even if this change comes through successfully, the OIC holds no obligation to comply with it. In fact, the OIC would still have to enforce the same old standard of the Official Information Act which is mandatory publication of only the *results* of decisions.[790] Consequently, there is a need for another external review of the TCC's discretionary power on the new competition legal framework. Secondly, the OIC is *not* independent. The whole commission is fully influenced by politics. The entire OIC commissioners are personally selected by the PM.[791] In contrast, the suggested CTO would be fully independent from one person's power as it will not be selected by PM, but by the democratic parliament.

The Ombudsman Thailand is the nation's model of ombudsman *i.e.* an official overseeing public wellbeing and investigating complaints from the public of malpractice and mal-administration of governmental entities.[792] One can see that the task is enormous. With this scope of duties, it is not surprising to see intransparent decision-making process of all governmental organizations including the TCC be included in it. While is technically covers the desired field of competition's transparency, it is mostly impossible for an ombudsman to cover all the tasks at hand. The small country of Thailand sees complaints to the Ombudsman of 4,762 cases in the year 2019 alone, and only roughly half of the number is processed.[793] In comparison, the EU Ombudsman, who takes responsibility for over 27 countries throughout the EU, took only 2,510 complaints in 2011.[794] In the same year, the UK, as a country, was responsible for 141 complaints to the Ombudsman.[795] The Thai Ombudsman is obviously taking more than it can chew. Thus, it is unsurprising to see some areas left unexplored. Competition is certainly one of those areas left unattended by the Ombudsman. Although, the

[786] *The OIA* (n 721) Section 13
[787] ibid. Section 28 (4)
[788] *The OIA* (n 721) Section 28 *'The Commission holds the following duties ….according to [the Official Information] Act.'*
[789] See *Part I: The Legal Framework, 1. The Competition Act*
[790] *The OIA* (n 721) Section 9 (1)
[791] ibid. Section 27
[792] *Thai Constitution* (n 721) Article 230
[793] Raksagecha C., *'Police top target of complaints'* Bangkok Post (BKK, 5 February 2020) 2
[794] EU Publications (EC) DOI:10.2869/5243 *European Ombudsman Overview 2011* [2011]
[795] ibid.

Ombudsman should not be the one who takes the blame, considering the work workload that is put upon. It is, however, a reason to lighten up the workload by having specialised entity designed to take care of transparency issue in competition area. In addition, the ombudsman is appointed by the King.[796] Although, the appointment shall be from the suggestion of the Parliament, it is still a gatekeeper situation where one signature rules the end result of who is to be or not to be the ombudsman. The aim of the suggested CTO is to link its origin to democracy as much as possible for the reason that the CTO should serve the people and not one certain person. Therefore, to have the CTO elected directly from the democratic Parliament is always the ideal.

5. The Conclusion

The Chapter acknowledges that the CTO may not have 'real' power to change competition enforcement because it does not have legal binding power over the TCC on competition transparency. The added value of the CTO is rather to put persuasive pressure on the TCC to be more transparent in its decision-making process than to rule the TCC. This is not only to avoid conflict of powers with the OIC, the Ombudsman Thailand, and the TCC itself, but also because, without legal power, the CTO would have more flexibility at its tasks. The CTO shall be free from bureaucratic difficulties that come with legal power which may prevent frequent and robust transparency-related questioning by the CTO. The real power of the CTO, however, lays on it's the public. The questioning, recommendation, and press release aim to inform the public of problematic transparency approach in competition law. As armed with necessary information, the public could make informed choices when they need to demand their right to more transparency in competition law.

There is no silver bullet to recover transparency deficit of Thai competition. It takes several measures and adjustments to form a better picture for more transparency. It is demonstrated in this Chapter that a new legal framework alone may not successfully introduce more transparency to the TCC decision-making process. There should be another additional mechanism to keep the framework functioned. By both of these strategies working together, there will be a better chance to ensure transparent decision-making process in Thai competition regime.

[796] *Thai Constitution* (n 720) Article 228

The Conclusion

Thai competition law decision-making process is severely intransparent. This intransparency is represented by the absence of publication of Thai competition decisions and relating information. In this absence, the public is deprived of the chance to learn competition policy from competition legal precedent given by the competition authority. Thus, the public cannot properly adapt their activities to comply with the laws since they do not know how the laws apply.

The Thesis sets out to explore the best way to introduce greter transparency to Thai competition law regime under the research question:

'How to achieve a better transparency for the public regarding Thai competition decision making?'

This conclusion summarizes the main findings and the contributions of the Thesis.

1. The lack of transparency and policy learning in Thai competition law decision making

The Thesis demonstrated that Thai competition decision making lacks transparency and policy learning by identifying inefficient current legal framework (Chapter 1). It has been concluded that by enshrining the right to be informed is inadequate to provide the much-needed transparency. The right to be given reasons needs to be recognized and preserved. The Thesis went on to discuss the linkage among transparency, legal precedent, and policy learning (Chapter 2). It has been shown that all three are dependant to each other. By providing transparency, legal precedent and policy learning would follow. Thus, by pursuing more transparency, the public would access to more policy learning.

2. Identifying the missing opportunity to establish legal tests as a policy learning in T&B decisions

The Thesis went on to demonstrate the lack of transparency and policy learning of Thai competition by comparing T&B decisions between Thailand and the EU (Chapter 3 and 4). It has found that, comparing to the EU case laws, Thai decisions are missing out opportunities to establish legal tests for the public to learn from the competition policy. Because there is no transparency in decision making, legal tests in the decisions are either non-existent or incomplete, and with great inconsistency. Moreover, Thai public is also deprived of opportunity to learn the evolution of competition decisions. While EU T&B decisions have

seen consistent growth in numbers of legal tests present from 4 tests in 1988 to 7 tests in 2018, Thai T&B decisions have seen only inconsistence of 0 - 2 tests from 1999 – 2012.[797] The public could see the increasing growth of reasoning through the evolution time of the EU T&B policy. They cannot, however, see this evolution on Thai T&B decisions, because the legal tests were rarely present. Thus, the public is missing the chance to competition policy learning in Thai competition decision making.

3. Suggestion of the new legal framework and additional competition enforcement mechanism

The Thesis moves on to suggest solutions for the Thai competition shortcoming on transparency (Chapter 5). The suggested solutions aim to introduce greater transparency to Thai competition decision making as they will together increase policy learning for the public. There are two areas of suggestions: the new legal framework and the additional enforcement mechanism.

The new legal framework has been suggested in three different possibilities from the most probable to the most ambitious. Firstly, it is suggested to amend the Competition Act to compel the competition authority (TCC) to publish full competition decisions. This would instantly put competition decision making on the better side of transparency. While this might be the easiest and most probable choice of suggestion, it will leave the rest of Thai policy areas at the same intransparent corner. Secondly, it is suggested to amend both the Competition Act and the Official Information Act (the OIA). This will have the same effects as the first suggestion and also to expand the transparency to other Thai policy areas. This is because the OIA covers all governmental entities and not limited only to competition authority. While this will achieve far greater benefits for the public, it is harder and less probable as it will affect wider policy areas. There can be more pushbacks from many governmental sectors. Thirdly, the Competition Act, the OIA, and the Constitution are suggested to be amended. This is the most ambitious alternative in all three solutions. This should have the same effects as the former, but with the greater effect. It is suggested that the constitution should enshrine the right to be given reason to have constitutional status. By doing so, the right will hold greater merit and should be harder to be restricted or violated. However, while this constitutional reform would be the most desirable outcome, it is just very difficult to achieve.

The additional enforcement mechanism of Competition Transparency Ombudsman (CTO) has been suggested to ensure that the new legal framework will be enforced. The CTO should receive complaints from the public regarding transparency-related issues in competition laws, recommending transparency measures to the competition authority, and making press releases of the work to the public. The CTO shall have persuasive pressures on the competition authority rather than having legal binding effects. This is because there are already other entities which have legal binding powers over transparency in governmental organizations and that having no legal power should give the CTO more flexibility to work.

[797] See *Table 1 and 2* in *Chapter 4*

The real power of the CTO is to be the official entity to ask transparency-related questions to the TCC and put it to attention of the public. Then the public would be able to make informed choices when they decide to pursue their right to be given reasons.

4. The future research and limitations

The suggested legal framework to amend the constitution for constitutional right to be given reason is meant to be the blueprint for future researches. It is clearly desirable to introduce the transparency in decision making to all public sector in the country and to uphold such right to have constitutional status. However, more researches need to be done to account for effects and the best possible way to achieve the goal.

The Thesis acknowledges that information gathered in the rewritten version of the Thai T&B decisions is very lacking (Chapter 4). This is because there is simply no more reliable information regarding the cases. The information given the rewritten version is, therefore, the best possible information the thesis and the public could get. However, it is adequate for the Thesis to prove the shortcoming of legal tests and policy learning from Thai competition decision making.

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