

Competition law and sectoral regulation on Thai energy sector: A review and the forward development plan

Presented at the 2nd CUTS-CIRC Conference

On Reviewing the Global Experience with Economic Regulation –

A forward looking perspective

April 18-20 2011 New Delhi

Pornchai Wisuttisak

- Admitted as a lecturer in law at Law faculty, Chiangmai University, Thailand
- Current PhD Candidate and casual tutor, School of Business Law and Taxation, University of New South Wales, Australia
- Master of Commercial law, Macquarie University, Australia
- BA in Political Science, Thammasat University, Thailand

Contact Detail: School of Business law and Taxation

Quadrangle Building Level 2,

Room 2039F, University of New South Wales

Sydney 2052 AUSTRALIA

Phone: +61 9385-7717

Mobile: +61 433223618

Email: p.wisuttisak@unsw.edu.au

Abstract: The paper attempts to explore the inappropriate liberalisation policy in Thai energy sector and to identify the problems in competition law and sectoral regulation which contribute the lack of competition development in Thai energy sectors. After identifying the problems, the paper will propose possible plan for improving both Thai competition law and sectoral regulation for facilitate the move toward competition for Thai energy sector. In the first part of the paper, it will provide the overview of liberalisation and market reform process which leads to the current uncompetitive structure of Thai Energy sector. In the second part of the paper, it will describe the problems on Thai competition law and sectoral regulation, regarding to uncompetitive Thai energy market. It will explore on the problems on ineffective competition law institution and on the problem of sectoral regulation that tends to favour monopoly structure of energy market under SOEs. In the third part of the paper, it will propose the plans for solving problems on the ineffective competition law and sectoral regulation for a development of competition in Thai energy sector. The plans will be in the short term strategy on the ERC action on creating market competition, the increase of public recognition on competition law and policy, and the initiation of co-operation role between both competition law and sectoral regulation. The paper then will consider on the long term strategy which sets a plan for reform on competition law and energy regulation in order to enable them to have collaborative work toward the establishment of competition in Thai energy market. In the fourth part, the paper will provide a conclusion and need of future research.

Key words: Competition law, Regulation, Thai energy sector

Introduction

Competition law and Sectoral regulation are the important legal mechanisms for preventing and creating market competition and efficiency in energy sector. Many developed nations have successfully employed competition law and sectoral regulation to create reform toward market competition for their energy sectors.¹ However, in developing countries, there are problems of ineffective competition law and inefficient sectoral regulation which lead to an inability to create competitive energy markets. The solid example of one of the developing countries is from Thailand which has futile competition law and ineffective sectoral regulation. Thai competition law, since its adoption in 1999, has not been applied to tackle with any abuse of monopoly power from the liberalised energy sectors. It is because the Thai competition law still maintain the exemption for the state owned enterprises (SOEs) which are the monopoly entities in energy markets. The Thai sectoral regulation which is required to be an important mechanism for creating market efficiency and competition in the liberalised Thai energy markets still face with the legal obligation to support the SOEs in the energy markets. This contributes to the persistency of uncompetitive structure in Thai liberalised energy sector. Moreover, Thailand, when implementing their liberalisation on its energy sector, employs only sectoral regulation to develop the competition for the energy market. It neglected to consider the role of competition law which can be the significant legal remedy for dealing with the market power of the liberalised SOE incumbents that tend to distort the creation of energy market competition.

The Petroleum authority of Thailand (PTT), which was listed in the Thai stock market gains significant annual profits from their market monopoly and is able to monopolise the oil and gas. The PTT, by its monopoly position, is the biggest listed firm in stock market which gain significant amount of annual profits. The SOE electricity generator- Electricity generation Authority of Thailand (EGAT) - can enjoy huge amount of profit by its monopoly power over electricity generation and distribution. The SOEs electricity distributors and retailers –Provincial electricity Authority of Thailand (PEA) and Metropolitan Electricity Authority of Thailand (MEA)- that are legally set to have monopolistic and geographical separation for supplying electricity power to Thai consumers in metropolitan and provincial areas also can gain significant profit by vertically integrate with the

¹ See experience of Australia, UK, and EU countries- Although some scholars may argue that the Australia, UK and EU energy market still face with considerable problems of employing competition for make their energy market competitive. However, when comparing to the developing countries, Australia, EU and UK are far more greater effective on employing competition law and sectoral regulation to improve coemptive conditions and behaviour of energy markets.

EGAT. The above uncompetitive energy market structure is undeniable derived from the inappropriate liberalisation program and the ineffective competition law and sectoral regulation.

Thus, this paper attempts to explore on the inappropriate liberalisation policy in Thai energy sector and identify the problems in competition law and sectoral regulation which contribute the lack of competition development in Thai energy sectors. After identifying the problems, the paper will propose possible plan for improving both Thai competition law and sectoral regulation for facilitating the move toward competition market in Thai energy sector. In the first part of the paper, it will provide the overview of liberalisation and market reform process which leads to the current uncompetitive structure of Thai Energy sector. In the second part of the paper, it will describe the problems on Thai competition law and sectoral regulation, regarding to uncompetitive Thai energy market. It will explore on the problems on ineffective competition law institution and on the problem of sectoral regulation which tends to favour monopoly structure of energy market under SOEs. In the third part of the paper, it will propose the plans for solving problems on the ineffective competition law and sectoral regulation. The plans will be in the short term strategy on the energy regulator's action on energy market competition, the increase of public awareness on competition law and policy, and the initiation of advocacy role between both competition law and sectoral regulation. The paper then considers on the long term strategy which sets the plan for reform on competition law and energy regulation in order to enable them to have collaborative work on establishing market competition in Thai energy sector. In the fourth part, the paper will provide the conclusion and need of future research.

Part I: Liberalisation and market reform on Thai energy sectors.

During 1980s, World Bank changed its loan policy for developing countries from financing state own enterprises to the policy on liberalisation and deregulation for stimulating more private participations.² The policy was used for Thailand and it conditioned Thai government to deregulate the public utilities, including energy sector. The Thailand then followed the condition by adopting liberalisation policy on energy sector in order to allow private investment to participate and to reduce the government's public debt.³ By this, The Thai government, in 1998, established the National Energy Policy Office (NEPO), having duties on making national liberalisation plan to the cabinet and

² World Bank, *The World Bank's Role in Electric Power Sector Policy for Effective Institutional, Regulatory, and Financial Reform* (World Bank, 1993) p 84

³ Chuenchom Sangarasri Greacen and Chris Greacen, 'Thailand's Electricity Reforms: Privatization of Benefits and Socialization of Costs and Risks' (2004) 77(3) *Pacific Affairs* 517 p 520

to lay down rules and conditions for prescribing the price of energy, on fuel and electricity.⁴ NEPO was set as the agency, authorised to be the permanent department which can directly report to the Prime Minister.⁵ The NEPO then played significant role as the strong institution, facilitating the process of liberalisation on Thai energy market. The NEPO furthered the liberalisation plan by recommending government to establish independent energy regulator and to implement the structural reform for facilitate the creation of market competition in Thai energy sectors both in electricity and gas.⁶

Liberalisation on Thai electricity sector

For the electricity sector, NEPO proposed the initial liberalisation program of permitting the private investor to operate in the Thai electricity generation. NEPO established the program to open market for private investment of the small power producer (SPP) and independent power producer (IPP).⁷ By the program, there were establishment of two large IPPs which generate electricity to Electricity Generation Authority of Thailand (EGAT) as monopoly SOE electricity generator. The two IPPs are Electricity Generating Company Limited (EGCO) and Ratchaburi Electricity Generating Holding Public Co., Ltd (RATCH). However, the two IPPs are still under the control of the (EGAT) because EGAT hold the majority of their shares.⁸

After the step on permitting the private investment, the energy liberalization plan was directed toward the NEPO's plans on liberalisation of electricity SOEs under State Enterprises Corporatization Act 2542(1999), aiming to corporatize the whole or part of government owned enterprises to be either private limited company or public limited company.⁹ According to the act, EGAT would be unbundled into three companies and there would be the establishment of the spot power pool markets. EGAT would maintain the holding of sole electricity transmission. The Metropolitan Electricity

⁴ National Energy Policy Council Act, B.E. 2535 (1992) s 6

⁵ The Administrative Organization of the State Affairs (No.3), B.E. 2536 (1993) and the Act Organizing Ministries, Sub-ministries and Departments (No.9), B.E. 2536 (1993)

⁶ National Energy Policy Office, 'Privatisation Master Plan Energy Sector Report Redraft' (National Energy Policy Office, Thailand, 1998) Retrieved from <http://www.eppo.go.th/doc/idp-04-priv-Sect18Sep-E.html> on 10 August 2010 ; London Economics, 'Thailand Regulatory Framework for the Energy Sector' (National Energy Policy Office, 1998) <<http://www.eppo.go.th/doc/idp-06-PP-RegStudySum.html>> Retrieved from <http://www.eppo.go.th/doc/idp-06-PP-RegStudySum.html> on 15 August 2010

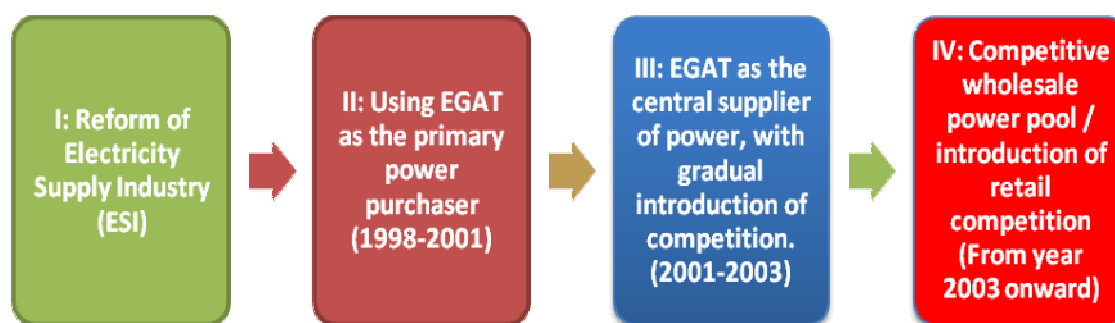
⁷ Pei Yee Woo, 'Independent Power Producers in Thailand' (Program on Energy and Sustainable Development, Stanford University, Working Paper # 51, 2005) <<http://pesd.stanford.edu/publications/20978>> p 7.

⁸ See EGCO, *History of EGCO*, Retrieved on July 10 2010 from http://www.egco.co.th/en/corporate_profile_history.asp and see Ratchaburi Electricity Generating Holding Public Co., Ltd, *Corporate Fact Sheet*, Retrieved on July 12 2010 from http://www.ratch.co.th/eng/4_3_1_corporate_fact_sheet.htm

⁹ State Enterprise Act 2542(1999) s 4; Supannika Wattana, Deepak Sharma and Ronnakorn Vaiyavuth, 'Electricity Industry Reforms in Thailand: A Historical Review' (2008) 2 *GMSARN INTERNATIONAL JOURNAL*

Authority (MEA) and Provincial Electricity Authority (PEA) would be separated into electricity delivery companies and meet with the competitive market. There would also be the establishment of independent regulator that can supervise and stimulate the competitive initiation to the electricity sector. This can be seen from diagram of the NEPO' step plans on liberalisation of Thai electricity sector below.

Diagram 1- The NEPO's step plan to liberalised Thai electricity sector



Sources: Adapted from National Energy Policy Office, (1999) *Privatisation and Liberalisation of the Energy Sector in Thailand*. National Energy Policy Office, (NEPO)

However, The NEPO' plan on liberalisation on the electricity was implemented in the very slow manner and, in 2003, the new cabinet under Prime Minister Taksin swiftly cancelled the plan of electricity liberalisation. The cabinet government then, in 2005, adopt a new plan of electricity liberalisation without considering on the structural change for electricity sector. By the new plan, the EGAT was privatised by Initial Public Offering (IPO) in Thai stock market without any unbundling and structural change.¹⁰ This presents the intention of Thaksin's cabinet in creating (privatising) EGAT as the national champion which will be monopoly electricity operator, having high stock market share prices.¹¹ By the adoption of the new electricity liberalisation plan, it created significantly uncompetitive electricity market structure and deriving state monopoly market power to privatised EGAT. The cabinet's adoption of the plan on electricity privatisation was, then, challenged by the Federation of Thai consumers in the Supreme Administrative court case. The case decision will be displayed below in the section on Supreme Court decision on energy corporation case below.

¹⁰ Royal Decree stipulating powers, rights and benefits of EGAT Plc, B.E. 2548 (2005) and Royal Decree stipulating time clause for repealing the law governing EGAT, B.E. 2548 (2005)

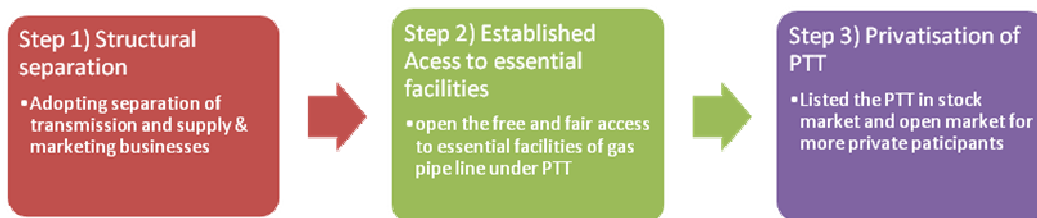
¹¹ Deunden Nikomborirak and Wanwiphang Manachotphong, 'Electricity Reform in Practice: The Case of Thailand, Malaysia, Indonesia and the Philippines' (Paper presented at the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 2007)

<http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p25asia_en.pdf> p 6; Surapong Chirattananon and Supattana Nirukkanaporn, 'Deregulation of ESI and privatization of state electric utilities in Thailand' (2006) 34(16) *Energy Policy* 2521

Liberalisation on Thai oil and gas sector

For the gas sector, NEPO also proposed plans to liberalise gas by deregulation of the gas sectors and privatisation of the Petroleum Authority of Thailand (PTT) in 1998. The Thai cabinet, in 1999, accepted and approved the plan and agreed to set the framework for the reform of gas sector.¹² The set framework was mainly focus on the open and disintegration of gas pipeline and distribution. The important steps plans are in the diagram 2 below;

Diagram 2- The NEPO's step plan to liberalised Thai electricity sector



Sources: National Energy Policy Office, 'Privatisation and Liberalisation of the Energy Sector in Thailand' (National Energy Policy Office, (NEPO), 1999) <<http://www.eppo.go.th/doc/idp-07-Priv29Mar99.html>>

However, the government implementation on the liberalisation of the gas sector is not according to the plan of NEPO above. The government implemented the PTT corporatisation without, steps 1) and 2) in the above stage plans. The government only shifted to implement step 3) by making initial public offering of PTT in Thai Stock market and the PTT thus became the PTT Public Company Limited ("PTT Pcl").¹³ This PTT corporatisation, without conducting steps on restructuring toward competitive structure contributed PTT Pcl to have significant market power over Thai oil and gas industries. After privatised and listed as public company, the PTT Pcl are able to

¹² National Energy Policy Office, 'Privatisation and Liberalisation of the Energy Sector in Thailand' (National Energy Policy Office, (NEPO), 1999) <<http://www.eppo.go.th/doc/idp-07-Priv29Mar99.html>> Retrieved from <http://www.eppo.go.th/doc/idp-07-Priv29Mar99.html> on 12 August 2010

¹³ Royal Decree Stipulating Powers, Rights and Benefits of PTT Pcl, B.E. 2543 (2001) and Royal Decree Stipulating Time Clause for Repealing the Law Governing PTT, B.E. 2543(20010

dominate the gas supply market that is essential energy sources for consumers, industrials and electricity plants.¹⁴ PTT Plc occupies all of the gas pipelines in Thailand and control the gas market as sole transporter of gas by the entitlement of state right giving considerable market control power over Thai oil and gas sectors.¹⁵ This then created the uncompetitive market structure in gas sector. The implementation of the corporatisation was then challenged in the Supreme administrative court case. The brief of the case decision will be presented below.

Supreme Administrative court decision on energy corporatisation cases

As provide above that the energy sector of Thailand were liberalised without considering the structural change toward market competition, the Foundation for Thai consumers thus requested to the Supreme Administrative court to decide whether the liberalisation on Thai energy sectors- 1) *electricity liberalization by corporatisation of the EGAT* and 2) *gas liberalisation by corporatisation of PTT*- can lead to the uncompetitive market, affecting Thai consumers or not. It is noted that the Thai Supreme Administrative court is the highest independent court established for hearing the dispute between government and people who are affected by the government policy.¹⁶

In the *EGAT corporatisation case*¹⁷, the Supreme administrative court held that the two Royal Decrees, stipulating the corporatisation of EGAT should be revoked and all the corporatistion process of listing the EGAT in stock Exchange was nullified. The court provided the reasons relating to the possibility on uncompetitive market condition after the EGAT corporatisation that the corporatized EGAT by having state power of land expropriation after the corporatisation can contribute to unfair market competition.

The court furthered that the conferring of the right to expropriate the land or property to the corporatized EGAT is unconstitutional because, according to the section 49(1) of Thai constitution BE 2540(1997), the right to expropriate has to be under the state action not the private one.¹⁸ The transferring of such a right would render to the creation of inequality on business competition with the

¹⁴ EPPO, 'Summary of the Conference Proceeding on the Thai electricity Development Plan' (Paper presented at the Thai Electricity Development Plan 2007-2020 (Translated from Thai language) 2007).

¹⁵ According to the Royal Decree Describing Powers, Rights and Benefits of the PTT Public Company Limited, B.E. 2544 (2001) and the Royal Decree Stipulating Time Clause for Repealing the Law Governing PTT BE. 2544 (2001). Both royal decrees confer the transferring of the state assets and right to PTT Plc which would have special rights and receives protection as prescribed and granted by the law governing Petroleum of Thailand- Special right in Petroleum Authority of Thailand Act, B.E. 2521 (1978) which provides privilege right to PTT to operate as the major state oil and gas business.

¹⁶ See further information of Thai supreme Court in website of http://www.admincourt.go.th/amc_eng/login_eng.aspx

¹⁷ Supreme Administrative court on Black case no. For. 14/2548 and Red Case No. For.5/2549

¹⁸ Ibid 51

result of inconsistency with the section 30 and 50 of the constitution BE 2540 (1997).¹⁹ Moreover, the court pointed out that not only transfer of the right to expropriate land and property will lead to the uncompetitive market circumstance but the transfers of property and asset of electricity infrastructure would also led to the inequality of competition in electricity sector as well.²⁰ Therefore, the court ordered the revocation of the government implementation of EGAT corporatisation.

In the *PTT corporatisation case*, the Supreme administrative court held that it is not necessary to revoke the Royal decrees on corporatisation of PTT but court ordered that there must be the;

- “Separation of state assets of land and gas pipelines from PTT Plc
- Cancel transferring of the state authoritative power to PTT Plc”²¹

The reason behind the Supreme Administrative court’s orders is because the Royal decrees which do not limit the state authoritative power to privatised PTT Pcl would be invalid upon public law. The court furthered that without separation of state assets from PTT Plc and without transferring back authoritative power, PTT Pcl would have significant market power over Thai oil and gas market.²² It, thus, would contribute to an unfair market competition for private firms that operate or intend to operate in the gas market.²³

However, the change according to the Supreme Administrative Court’ decisions on both the EGAT and PTT corporatisation cases above was put on hold because the uncertainty on political government. After the court decisions, the Thai government under Prime Minister Thaksin was unable to gain the public confidence on a merit of its energy sector corporatisation. The public sphere were disintegrated to groups of people who support Taksin’s cabinet and groups that like to see the stepping down of Thaksin’s government. The conflict between the groups of people was, then, followed by the military coup d’état, taking place on Tuesday 19 September 2006, when the Royal Thai Army completed plan of a coup against the elected government of Prime Minister Taksin. The Junta became in power and arranged new election. However, after new election, arranged by the Junta government, the political conflict in Thai society has not been solved. The bargaining of political

¹⁹ Section 30 of Thai constitution BE 2540(1997) state that “the person is equal before the law and shall equal protection under the law”; Section 50 of Thai constitution BE 2540(1997) states that “ the person shall enjoy liberties to engage in an enterprises or and competition and to undertake free and fair competition.”

²⁰ Ibid above n 17 p 52

²¹ Thai Supreme Administrative court (2007) Decision on Black case no. For. 57/2549 and Red Case No. For.35/2550 p 87

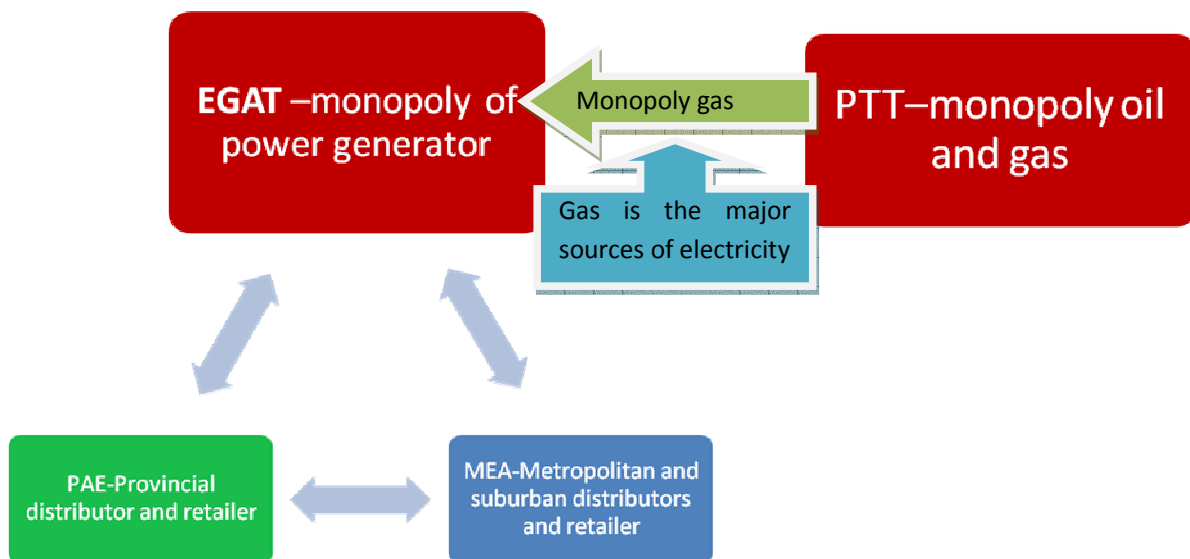
²² The power was from the Petroleum Authority of Thailand Act, B.E. 2521 (1978) that permit PTT to expropriate people asset for its business operation.

²³ Ibid above n 21 p 73

power between Taksin's supporters and the opponent of Taksin's government is still not defined and result to an instability of Thai government.

Thus, by the political uncertainty, the current structure of Thai energy sector is still under SOEs monopoly. The Thai electricity sector is still under EGAT's control with the vertical integration with the MEA and PEA. The gas and oil sector is under PTT Pcl, which monopolizes gas pipelines for electricity generation. The current uncompetitive structure of Thai energy sector is presented in the diagram below.

Current Structure 3 Thai Energy sectors under SOEs



Sources: Adapted from EPPO, 'Summary of the Conference Proceeding on the Thai electricity Development Plan' (Paper presented at the Thai Electricity Development Plan 2007-2020 (Translated from Thai language) 2007).

Part II: Problems on Thai Competition law and Energy sector regulation

From the above, Thai energy sector still have monopoly and uncompetitive structure both in important sectors of electricity and gas. There is thus requirement on regulatory and legal mechanism to build and protect the competitive structures in the Thai energy market. Nevertheless, at the present, both Thai competition law and the energy regulation are not able to deal with uncompetitive energy structure and anticompetitive behaviour from the SOEs. The Thai competition law is still having problems on ineffective institution and on its limited role on energy sector due to the competition law exemption. Likewise, the sectoral regulation, as the new hope to transform Thai energy market toward market competition still have to face with the problems on the regulatory conflict between supporting SOEs and promoting market competition, and on the lack of access to essential facility frameworks. Thus, in this part of the paper, it will discuss on the details of problems on Thai competition law and energy regulation.

Problems on ineffective competition law

The Thai Competition Act B.E.2542 (1999) as the main competition law rule still has futile enforcement for preventing anticompetitive conducts and for developing the market competition. For 11 years of its adoption, the competition Act has not been employed as the remedy to fight against the anti-competitive business conducts. The Thai competition commission has not enforced the act and bring the anticompetitive conduct to the court. The reason behind the ineffectiveness is from institutional problems on Thai competition commission and from, when focusing on the energy sector, the competition law exemption clause for SOEs operating business in energy industries.

Institution problems on Thai competition law

- Influence from government and business lobby

In the aspect of institutional problems, the Thai competition commission is lack of independence from both government and private sectors. The commission which is combined from four members appointed from government officers and twelve members appointed by cabinet tends to be captured by both political and business influence²⁴ Prof Poupongsakorn stresses that the composition of commission is clearly affects its degree of independence, and contributes to a conflict

²⁴ In Thailand, alignment of politician and business sector is notorious and create corruption.

of interests because half of commissions are from business sector.²⁵ This leads to issues on the conflict of interest when commissioners from business sectors have to consider cases relating to anticompetitive conduct of businesses.²⁶ The example of conflict of interest in the work of competition commission is in the cases of illegal tying of the whisky and beer companies.²⁷ In the case, one of the commissions considering whisky case had business relationship with a company affiliated with the powerful whisky conglomerate.²⁸ In the case result, even though the commission found that there was the breach of competition law, the commission did not undertake any legal action by the reason that there was no market dominance threshold at the time of the breach.²⁹ The competition commission only informed the whisky company that tying sales of beer and whisky was an inappropriate conduct.³⁰ The case significantly represents the conflict of interest in the commission investigation.

In addition, in the UBC case, the competition commission decision was also compromised by political influence.³¹ In the case, although the sub-committee, established by the competition commission, found that the excessive increase of TV subscription fees was in breach of competition law and rendered negative effect to consumer interest, the competition commission decided not to take any action and transferred the case to The Mass Communications Organization of Thailand (MCOT).³² The transferring of the case was understood as the direct and indirect lobbies from politicians who control MCOT and were able to decide the case in favour of UBC.³³

Moreover, according to the UNTAD's report, the competition commission is not independent because its office and staffs are an administrative agency.³⁴ The office of trade competition and commission is significantly influenced from bureaucratic and political power. The head director of the office is the government director general of the internal trade department and has to report to the Ministry of commerce. The staffs in office of competition commission are treated as government subordinates under the Ministry of commerce and can be transferred, by order of the Minister, to the

²⁵ Nipon Paopongsakorn, 'The New Competition Law in Thailand: Lessons for Institution Building ' (2002) 21 (2) *Review of Industrial Organization* 185 p 199

²⁶ Deunden Nikomborirak, 'The Political Economy Of Competition Law: The Case Of Thailand' (2006) 26(3) (Spring2006) *Northwestern Journal of International Law & Business* 597

²⁷ Takasila S., and Chitmunchaitham R., in *ibid* p 606

²⁸ *Ibid*

²⁹ Mark Williams, 'The Thai Competition Act 1999: What's Gone Wrong ' (2006) <<http://www.asialaw.com/Article/1971894/Search/Results/The-Thai-Competition-Act-1999-Whats-Gone-Wrong.html?Keywords=Competition+Act>>

³⁰ *Ibid*

³¹ Deunden Nikomborirak ,2005, "Cable Television Monopoly Case Study: An Investigation by the Thai Trade Competition Commission" in Chakravarthy, 'The need and Rational for the Objective of Competition Policy and Competition Law ' (2006) <<http://www.circ.in/pdf/CPS06-Rationale-For-Competition-Policy-Law.pdf>>

³² *Ibid*

³³ *Ibid*

³⁴ UNCTAD, 'Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia, Zimbabwe' (UNCTAD, 2005) <http://www.unctad.org/en/docs/ditcclp20052_en.pdf>

other government units (normally when officers did not obey the order from political government, they will be transfer to less important function of the ministry). The office of competition commission, thus, does not have independent autonomy for dealing with the anticompetitive cases because the office has to rely on order of higher-level government agencies and the office's decision to conduct any investigation on any cases may face with bureaucratic pressure from political and higher authority.³⁵ The staffs, in working for implementing and enforcing competition law, thus have to consider the administrative commands from their higher authority.³⁶ By this, to avoid conflict with the political and higher authority, the competition office's actions against anticompetitive business conducts are rarely appear.

- Financial constraint

The works of the competition commission and the office of competition commissions rely on the financial support from the Ministry of commerce's budget. Minister of commerce and cabinet normally approve annual budget of around \$US 0.1-0.3 million for the office of competition commissions. The amount of budget is insufficient for competition commission to create effective enforcement. The small amount of budget leads to difficulty to recruit and retain professionals who have experience and knowledge on economic and competition law.³⁷ The professional would prefer higher financial incentives from the business firms rather than work with the office of competition commission. This budget constraint imposes difficulty to competition commission to attract and retain competent and qualified staffs and it contributes to the ineffective enforcement of competition law.³⁸

Comparing to international competition law agencies, Thai competition commissions and office receive very small portion of government budget. Japan Fair Trade Commission and Korean Fair Trade Commissions have their annual budget around \$US80³⁹ and \$US17⁴⁰ million respectively.

³⁵ Ibid above n 25 p 202

³⁶ Martin Painter, 'Thaksinocracy Or Managerialization? Reforming The Thai Bureaucracy' (2005) *Working Paper Series No. 76* <http://www.cityu.edu.hk/searc/WP76_05_Martin.pdf>- Martin state that despite comprehensive reform in Thai government, Thai bureaucratic system remains in hierarchically organized giving priority to personal relations of patronage and dependency, with deference and loyalty being more important than merit; and it emphasized above all else security for its members. The legal authority and political power inherent in the traditional formal and informal structures of the bureaucratic establishment have not been swept aside over-night.

³⁷ See Michael W. Nicholson, 'An Antitrust Law Index For Emprical Analysis of International Competition Policy ' (2008) (April 22, 2008) *Journal of Competition Law and Economics* - Michael provides study on comparative budget for competition commission of each 38 countries. Even though there is no Thailand in comparative table but what it can be seen is that many countries have input high financial resources for their competition authority and they can gain effective work of competition law enforcement.

³⁸ John Preston et al, 'Competition Policy Reform, Growth and Poverty Reduction ' (Paper presented at the Asia Regional Consultative Conference on the Business Environment, Bangkok, 2006) <<http://www.dfid.gov.uk/pubs/files/competition-policy-reform-briefing.pdf>>

³⁹ JFTC, Staff and Budget (FY1995-2007), http://www.jftc.go.jp/e-page/reports/statistics/staff_budget.html

By the significant budget Japan and Korea are in very effective enforcement of their competition law and policy with internal development and international collaboration.⁴¹ The Thai competition commission with small amount of budget at \$US 0.1-0.3 million per year⁴² would be put on position unable to perform effective competition law enforcement. This small annual budget, thus, affect the office of competition commission to conduct investigation and making lawsuit against business firms which have substantial financial and political power.⁴³

In addition, the competition commissioners are not grouped as a full-time body but operated on occasional meetings for which only a small fee of US\$50-70 for each meeting is paid per a commissioner.⁴⁴ This raises the difficulty for some commissioners who have to work full time in the other government divisions or businesses entities to pay prudent consideration on complex competition law cases that are considered as a charity work.⁴⁵

- Lack of expert

The officers, in office of competition commission who have to analyse cases and develop competition law present no deep understanding of the competition law. The staffs are not well prepared to deal with the complex combination on legal and economic perspective for competition law analysis. The Thai government reported to OECD that; “Since the Act is quite a new law in Thailand, it caused difficulties, in the very first year, for operational staffs to have a deep understanding about the context of the act.”⁴⁶ To achieve effective enforcement, it needs the staffs who are expert in competition law and economics.⁴⁷ Yodmuangchareon, the ex-Director of the department of internal trade also submitted that the office of competition commission has significant challenge on building up expert staffs.⁴⁸ The office has to seek technical and training assistants from

⁴⁰ Joseph Seon Hur, 'How The KFTC Prosecuted The Graphite Electrode International Cartel' (Paper presented at the Submitted to UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 2006) p 8

⁴¹ See the JFTC and KFTC website for information of their advancement on competition law

⁴² The author was confirmed by government officer from Trade Competition Commission that the office receive annual budget of Baht7,342,000(2005) , Baht7,596,950(2006) , Baht2,797,510(2007), Baht 5,942,000 (2008); Approximately, the US\$1 equal to Baht 32

⁴³ Ibid above n 34 p 18

⁴⁴ This rates are based on the policy of Thai government on financial support for committee in various advisory boards

⁴⁵ Ibid above n 25p 202

⁴⁶ OECD, 'COMPETITION LAW AND POLICY IN THAILAND' (Paper presented at the OECD 'Global Forum of Competition law, 2001) <www.oecd.org/dataoecd/40/45/2491524.doc> Retrieved from www.oecd.org/dataoecd/40/45/2491524.doc on 12 September 2010

⁴⁷ Ibid

⁴⁸ Siripol Yodmuangchareon, 'Toward Effective Implementation of Competition Policies in East Asia : Thai's Perspective' (Paper presented at the The 2nd East Asia Conference on Competition Law and Policy, Bogor, Indonesia, 2005) <http://www.jftc.go.jp/eacpf/06/6_02_13_01.pdf>

international competition commission from Japan, Taiwan and USA.⁴⁹ The competition commissions in enforcing competition law are required to have significant knowledge on market analysis with which the inexperienced and part time commissioners may not be able to cope.⁵⁰ Moreover, the officers in the office of competition commission who help prepare data, research and reports are either former price control regulators or commodity experts or newly recruited officials who have inadequate research experience on industrial organization discipline, required as essential elements for competition law investigation.⁵¹ This then creates the ineffective enforcement of competition law remedy against anticompetitive conducts.

- Lack of coordination with sectoral regulation

The coordination between competition law and sectoral regulation is important to improve economy-wide competition. While sectoral regulations typically approach to ex ante aspects such as structure and pricing of utility services, the competition law focuses on prohibiting ex post aspects such as the abuse of market power conducts and the business cartel conducts.⁵² This is the complementary roles between competition law and sectoral regulation in order to create the competition in the regulated infrastructure utilities. Various countries have considered the importance of establishing the complementary relationship between competition law and sector specific regulation. Countries, such as USA⁵³, Mexico⁵⁴, UK⁵⁵, Australia⁵⁶, New Zealand⁵⁷, and Korea⁵⁸ have established the effective relationships between their competition law and sectoral regulation and they

⁴⁹ Ibid above n 25 p 202

⁵⁰ Ibid

⁵¹ Ibid

⁵² Alberto Heimler, 'Introduction to ICN work on antitrust enforcement in regulated sectors' (Paper presented at the Seoul ICN Annual Conference 2004 Antitrust enforcement in regulated sectors Introduction, Seoul, Korea, 2004)

<<http://www.internationalcompetitionnetwork.org/library.aspx?search=&group=6&type=0&workshop=0>>

⁵³ FTC, 'Creating Constructive Relationships Between Competition Policy and Sectoral Regulators: Submission of the United States' (Paper presented at the Latin American Competition Forum Fourth Annual Meeting, San Salvador, 2006)

<http://www.bid.org.uy/europe/files/news_and_events/2006/LACF2006/LACF2006.pdf>

⁵⁴ The Federal Competition Commission of Mexico, 'Improving Relationship Between Competition Policy and Sectoral Regulation Mexico Contribution' (Paper presented at the Latin American Competition Forum Fourth Annual Meeting, San Salvador, 2006)

⁵⁵ UK Department of Trade and Industry and HM Treasury, 'Concurrent Competition Powers in Sectoral Regulation' (Department of Trade and Industry and HM Treasury URN 06/1244 2006)

<<http://www.berr.gov.uk/files/file29454.pdf>>

⁵⁶ ACCC, 'The role of the ACCC in Australia's new regulatory regime' (Paper presented at the 2004 Energy Reform Summit, Sydney, 2004) <<http://www.accc.gov.au/content/index.phtml/itemId/577228>>

⁵⁷ Paula Rebstock, 'New Zealand Experience in Utility Regulation' (Paper presented at the ACCC conference 2004, Sea World Nara Resort, Gold Coast, 2004)

<<http://www.accc.gov.au/content/item.phtml?itemId=506371&nodeId=a43efe73d2b95a13c6ab9940c38997c7&fn=Session%203:New%20Zealand%20Experience%20-%20Paula%20Rebstock%20paper.pdf>>

⁵⁸ Park Jae Gul, 'The relationship between regulators and competition authorities in Korea' (Paper presented at the The 4th APEC Training Program on Competition Policy Kuala Lumpur, 2004)

<www.jftc.go.jp/eacpf/05/APECTrainingProgramMarch2004/korearelationships.pdf>

can enhance development of market competition in their utilities sectors with result to the enhancement of economic efficiency.

However, Thailand still faces with the lack of work relationship between the competition authority and sectoral regulators.⁵⁹ The Thai competition commission has not presented any intention to communicate with sector specific regulators in order to supervise the utilities market toward competitive market contexts. The commission has not involved in any development of regulation and policy adopted by utility regulators. Some sector specific regulators treated as government agencies are entitled to have excessive power on policy making, regulating and operating with the results on serious problem of conflict of interest.⁶⁰ This contributes to uncertainty that sectoral regulator will manage the utility market toward competition objective, where the regulators tends to support incumbent SOEs.⁶¹

The Competition law exemption and limited role on energy sector

As provide above that Thai energy sectors are still under control of the SOEs monopoly, it then creates the limited role of competition law enforcement on the energy sectors. This is because the competition law still contains exemption clause in its section 4, spelling out that it will not apply to the sectors of,⁶²

- Government entities
- State owned enterprises
- Farmers' groups, co-operatives or co-operative societies recognized by law and having objective to benefit farmers
- Businesses, in whole or in part, permitted by the Ministerial Regulation

The sectors above are excluded from the competition law enforcement and able to perform activities or making contract to restrict market competition. However, this exemption section is mainly employed by the state owned enterprise (SOEs) which provide the essential utilities services to Thai consumers. The exemption gives significant privileges to SOEs which are able to create anti-competitive activities to serve their business expansion on their scale and scope of operations.

⁵⁹Nipon Poapongsakorn, 'Institutional Arrangements for the Competition Authority in Thailand' (Paper presented at the The Fith Workshop Of The APEC-OECD Co-operative Initiative On Regulatory Reform, Paris, <<http://www.oecd.org/dataoecd/28/44/32689476.pdf>>

⁶⁰ Nipon Paopongsakorn and Deunden Nikomborirak, 'Review of regulatory reform in Thailand' (Paper presented at the Fourth Workshop of the APEC-OECD Co-operative Initiative on Regulatory Reform, Vancouver, Canada, 2004) <<http://www.apec.org.tw/doc/APEC-OECD/2003-10/007.pdf>>, p130

⁶¹ Ibid

⁶² Thai Competition Act 1999 section 4

During 1997 – 2005, Thai Government has implemented the policy on rapid liberalization and deregulation of public sector to improve Thai economy.⁶³ The Thai state enterprises (SOEs) were directed toward corporatization and privatization basing on the Corporatization Act of 1999⁶⁴, purported to implement corporatization and privatization of seven essential SOEs. The Thai main SOEs are grouped by business activities as

- *Energy*: EGAT, MEA, PEA, and PTT, Pcl.
- *Transportation*: State Rail Authority of Thailand, Mass Rapid Transit Authority OF Thailand, Bangkok Mass Transit Authority, Expressway Authority of Thailand, Port Authority, Thai Maritime Navigation Company Limited, Airport of Thailand Public.Co., Ltd, Thai Airway international Public Co.Ltd., and Thai Amadeus Southeast Asia(internet airline booking).
- *Telecommunication*: TOT public Company Limited, CAT Telecom Public Company Limited, Thailand Post Co., Ltd, MCOT public Co.ltd
- *Water*: Metropolitan Waterworks Authority, Provincial Waterworks Authority, and Waste Water management Authority
- *Banking and Financial*: Krung Thai Bank, Government Saving Bank, The Government Housing Bank, Bank for Agriculture and Agricultural Coop, Export - Import Bank of Thailand, Small and Medium Enterprise Development Bank of Thailand, Secondary Mortgage Corporation, Small Industry Credit Guarantee Corporation, Islamic Bank of Thailand.⁶⁵

The SOEs above are significant entities which are main players in Thai economy. Nevertheless, by the existing of their privileges from the government support and the immunization from competition law application, the SOEs, with significant degree of market power, contribute to the difficulty on creating competition in their specific markets. It is because they incline to use their privilege to discourage new market entry from private participation. When focusing on the energy sector as the specific consideration of the paper, the competition law, by the exemption provision, thus has very limited roles on preventing anticompetitive conducts from EGAT and PTT in energy sector.

⁶³ Douglas Webster and Patharaporn Theeratham, 'Policy Coordination, Planning and Infrastructure Provision: A Case Study of Thailand' (ADB-JBIC-World Bank East Asia, 2004)
<<http://siteresources.worldbank.org/INTEAPINFRASTRUCT/Resources/855084-1137106254308/Thailand.pdf>>

⁶⁴ Corporatization Act BE 2542(1998), Retrieved on 10 09 2009 from
<http://www.sepo.go.th/mbc/Uploads/Files/1224556766.pdf>

⁶⁵ Thai State Owned Enterprises Policy office, Grouping of SOEs by business activities, Retrieved on 04 01 2009 <http://www.sepo.go.th/b03.1.htm>

Problems on Thai Energy regulation

The Thai Energy regulation is based on the Energy Act 2007. The act established Energy Regulatory Commission (ERC) as the independent sectoral regulator for Thai energy sector. By the act, ERC will focus on regulatory supervision on the operation of the electricity and natural gas industries, including related interconnection networks, and the Ministry of Energy and the National Energy Policy Council will consider on the energy policy-making function.⁶⁶

The ERC is comprised of one Chairman and six other commissioners.⁶⁷ The commission has duty on regulating the energy industry and operation to ensure the compliance with the objectives of the Energy Act 2007, under the policy framework of the government.⁶⁸ The ERC has to issue regulation for energy firms in order to make reliable energy supply as well as protecting consumer interest.⁶⁹ The ERC, by considering on efficiency of the energy utilization, plant operations and market competition is also entitled to give licenses to firms that would like to operate in electricity and fuel industry.⁷⁰ However, upon the passing of Energy Act 2007, the ERC has not provided significant regulation relating to the reform on the structure and the tariff of electricity and gas industries. This is because of the problems, discussed below, on the ERC institution, the conflict between its duty to support SOEs and its duty to create market competition, and the lack of regulation for open fair access to energy essential facilities.

The problems on ERC institution

The ERC as a newly established regulatory institution still faces with challenging problems. According to Jarvis study on the ERC by the interview with the Chairman of ERC, there are problems for ERC due to,⁷¹

- No clear line of authorities in reviewing and setting tariffs because the tariffs review is in bargaining situation by ERC, National Energy Policy Committee, and Ministry of Energy. This would lead to the ERC role as commentator rather than the serious regulator for electricity and gas tariffs
- Lack of regulatory capacity due to the fact that ERC has a limit personals and budgets. The absences of adequate officers who are able to supervise and

⁶⁶ WTO (2008) *TRADE POLICY REVIEW Report by the Secretariat Thailand Revision*. WTO, p 109

⁶⁷ Energy Industry Act BE 2550 (2007) s 10

⁶⁸ Energy Industry Act BE 2550 (2007) s 11

⁶⁹ Energy Industry Act BE 2550 (2007) s 11

⁷⁰ Energy Industry Act BE 2550 (2007) s 51

⁷¹ Darryl S.L. Jarvis, 'Risk, Regulation & Governance: Institutional Processes and Political Risk in the Thai Energy Sector' (Lee Kuan Yew School of Public Policy National University of Singapore, Working Paper No.: SPP09-15, 2009)

<<http://www.spp.nus.edu.sg/docs/tr/RR1%20Institutional%20Processes%20and%20Political%20Risk%20in%20the%20Thai%20Energy%20Sector.pdf>>, p 16-20

surveillance on complicate electricity and gas market function would contribute ERC to be an institution having no rigid work toward energy market development. The

- ERC structure and research on energy sector mostly relies on private sector consultancies, with insufficient internal input into the adequacy of energy market development
- The applying of UK energy regulatory model in the Thai bureaucratic system and governance may create potentially large risks of ineffective institution.⁷²
- ERC will have to face with EGAT which has strong political influence and monopoly position in generation and transmission.

It is thus can be seen that the expectation on ERC as the major regulator to create an energy market reform toward market competition is in doubt of a possibility. The institutional problems could render ERC unable to have a rigid role on being main agency that drives the market reform in Thai energy.

Energy regulation and the Conflict between supporting SOEs and promoting market competition

The Energy Industry Act BE 2550 (2007) prescribes the role of the ERC to promote the competition of energy market by stating that the objectives of the act are to “promote competition in the energy industry and prevent abusive use of dominance in the energy industry operation and to promote fairness and transparency of the service provision of the energy network systems, without unjust discrimination”⁷³

Nevertheless, the provisions requiring promotion of competition in electricity market seems to be insufficient for reforming the market structure of Thai electricity market. The energy market, as provided above, is under the vertically integrated and monopoly EGAT as the single electricity buyer. There is no provisions stipulating the reforming of energy market structure, and managing market dominance position of EGAT. The act rather preserves the market dominant position of the three

⁷² *ibid* p 17-19; According to Jarvis, it is implied that the ERC is only institution that established for superficially modernizing the energy regulatory body. Jarvis also states that ERC purely perfunctory compliance obligations rather than being approached as tools that can further regulatory performance through establishing the regulator’s legitimacy or increasing industry understanding of the regulators processes, decision making systems, and its aims and objectives.

⁷³ Energy Industry Act BE 2550 (2007) section 7 (3), (4)

SOEs as the main suppliers of electricity sector. This can be seen in the section 8(5) of the Energy Act that requires the ERC to;

“Support the electricity industry as the fundamental public utility, the maintenance of the power system security and reliability; in this regard, the government will be responsible for the operation of the power network system business, the power system operator and hydropower plants – with the Electricity Generating Authority of Thailand being the operator of the power transmission system, and the Metropolitan Electricity Authority and the Provincial Electricity Authority being the operators of the power distribution systems -- including the retention of an appropriate share of the power generation capacity of the state-owned electricity industry.”⁷⁴

This section 8(5) that explicitly champions and maintains the oligopoly structure of Thai electricity market under SOEs would render ERC unable to make further reform in respect of the privatisation and deregulation in order to increase the private participations that can offer more efficient cost and services for Thai consumers. This also discourages the private participants to entering and competing with the existing SOEs, when considering to their disadvantage on the business competition.⁷⁵

It is noticed that the draft of the energy act does not have a provision supporting the SOEs. The draft is prepared by the Energy Policy and Planning Office (the successor of NEPO) but it was changed to include the section 8(5) that requires ERC to support the dominant market position of EGAT as well as support the existing structure of public electricity utility under the SOEs.⁷⁶ This would then contribute a lack of private participation or there will be private participations but have to heavily rely on the coordination from EGAT, PEA and MEA.

Moreover, it is unlikely that the ERC would be able to tackle on the abuse of market power in the energy sector. Although there is the Energy act provision 51(10) provides significant power to ERC to impose the conditional license to the energy firms, the incumbent entities in the electricity and gas market are the politically strong SOEs on which the ERC have to give a support. This means that, under the energy act which conditions ERC to support SOEs, EGAT, MEA and PEA are able to abuse market power, even though they are under the conditional license. The electricity SOEs thus can enjoy privilege over the over ambiguous regulation on prohibiting their conduct of an abuse of market

⁷⁴ Energy Industry Act BE 2550 (2007) s 8(5)

⁷⁵ See, Richard Geddes, *Competing with the Government: Anti-Competitive Behavior and Public Enterprises* (Hoover Institution Press, 2004)

⁷⁶ See draft of Energy act at section 7, from Eppo website Retrieved on June 20 2010 from <http://www.eppo.go.th/power/EnergyAct-rev27feb50-E.pdf> and Energy Industry Act 2007 section 8 for a comparison

power.⁷⁷ This could be the risks and threats to the new coming private participants which try to enter market and operate at competitive rate with the SOEs. When the private participants are abused from the SOEs, there will not be clear regulatory remedy by which they can seek for protection from the anticompetitive abuse.

Lack of rule for open to access to essential facilities or third Party access on electricity infrastructure

The legal framework of Access to Essential Facility (AEF) or Third Party Access (TPA) for the Thai energy sector has not been established in the sectoral regulation under Energy Act 2007. The AEF or TPA on power transmission and gas pipeline infrastructures is the important rule for competition to work in energy market. The rule would permit participants, operating in the energy sector, to have a legally enforceable right to access and use various energy network facilities owned by other companies.⁷⁸ Nevertheless, The Thai Energy Act 2007, which is placed as the sole regulation for energy sector contains no explicit provisions obligating the SOEs to open their essential facilities for private participants.⁷⁹ It is quite different from the other countries which explicitly state the provision on AEF in their energy regulation.⁸⁰ By lack of such clear provision relating to AEF, it would discourage the new market participant to enter the energy market when considering that there is a barrier of market on their access to energy essential facilities.⁸¹ In case that the private investors

⁷⁷ See Fereidoon Perry Sioshansi and Wolfgang Pfaffenberger, *Electricity Market Reform: An International Perspective* (Elsevier Science, 2006) See p. 49-52 for discussion on the possibility of abuse of market power in electricity utilities.

⁷⁸ Aleksander Kotlowski, 'Third-party Access Rights in the Energy Sector: A Competition Law Perspective' (2007) 16(3) *Utilities Law Review* p 101; Robert Pitofsky, 'The Essential Facilities Doctrine Under United States Antitrust Law' (US Federal Trade Commission, Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy: Notice of Public Hearings and Opportunity for Comment, 2001) <<http://www.ftc.gov/os/comments/intelpropertycomments/pitofskyrobert.pdf>>; Spencer W. Waller and William Tasch, 'Harmonizing Essential Facilities and Refusals to Deal' (2009) *Antitrust Law Journal*, Vol. 76, No. 3, 2010

⁷⁹ Energy Industry Act BE 2550 (2007) only states its objective on section 7(6) that the act is to protect the rights and liberty of the energy consumers, local communities, general public and licensees in terms of participation, accessibility, utilization and management of energy under the criteria that are fair for stakeholders. This objective is only focus on protecting consumers but neglect the market operators that have to rely on the SOEs electricity infrastructures.

⁸⁰ See the example of countries' explicit provision relating to AEF from UK

⁸¹ See Ibid above n 12-there was an attempt to set up the TPA framework in the master plan of privatization of electricity sector from NEPO that proposed in its second stage of the plan that EGAT would be a holding company, with a transmission operator under third party access, gradually introduced to allow power producers to sell directly to users, using the wheeling services of EGAT, and MEA's or PEA's distribution lines

would like to enter in the energy markets, they have to considerably rely on the permission from SOEs in order to start their business on supplying electricity and gas to Thai consumers.⁸²

Although, the provision 51(10) of the Energy act confers a power to ERC to impose the AEF condition to the energy incumbents via the conditional license, the provision seems to be insufficient to force the incumbents to open the access and it is still uncertain whether the ERC has the will or the capacity to set up the AEF in the conditional licence which containing AFE when considering that all incumbent energy operators are SOEs, having strong political power.

In addition, while the AEF is best dealt by the sectoral regulation, the competition law is another important complement remedy for forcing the incumbents to open of their access to the essential facilities. This can be seen from an experience of developed jurisdictions (EU, US, and Australia) which also rely on competition law as the remedy to obligate the incumbents to open their access to essential facilities.⁸³ However, as provide above, the Thai competition law is ineffective and has not dealt with any issues relating to the AEF and TPA cases. The refusal to deal and refusal to open network for competitors have never been brought to the attention of the competition law authority or to the court determination. It thus create the hindrance to private investment which will play important role as the market competitors to enter in the energy market when it realise that it has to face with the access barrier from the energy state owned incumbents. It thus requires considerable attention to develop AEF or TPA for Thai energy sector both in the electricity grids and the gas pipeline.

⁸² The EGAT, MEA and PEA are able to employ legal authority to permit or prohibit other electricity participants to operate with them

⁸³ See example of EU from Eryk Dziadykiewicz, 'Refusal to Grant Third-Party Access by an Electricity Transmission System Operator -- Overview of Competition Law Issues' (2007) 25(2) *Journal of Energy & Natural Resources Law* 114, see example of US and comparative between US and EU from Ali A. Massadeh, 'The Essential Facilities Doctrine Under Scrutiny: EU and US Perspective' (2011) *UEA Law Working Paper No. 2011-AM-1* see example of Australia from Brenda Marshall and Rachael Mulheron, 'Access to essential facilities under section 36 of the Commerce Act 1986: lessons from Australian competition law' (2003) *Canterbury Law Review* and from Australian case law of *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48

Part III: Plan for reform on competition law and sectoral regulation: the short and long term proposal.

The above part I and II of the paper discuss on the inappropriate liberalisation process on energy sector which led to the reform toward uncompetitive energy market, and on the problems in competition law and sectoral regulation which render the persistency of uncompetitive structure in Thai energy market. In this part III, the paper, will work on the plan to solve the problems on the competition law and sectoral regulation in order to build market competition in Thai energy sector possible. The proposal plan will be in the short term and long term plans. The short term plans deal with 1) ERC action on market competition, 2) building public recognition for competition law, and 3) advocacy work between competition law and sectoral regulation. In the long term plans, Thailand should pursue 1) Establishment of National Competition Agency or council, 2) Regulatory reform to amend the obligation on supporting SOEs and to establish access to essential facilities, 3) Competition law reforms on commission institution and on the exemption clause, and 4) Establishment of formal inter institutional works between competition law and sectoral regulation.

Short term plans

The short term plan is to initiate step plan that can be implemented and finished during 1-3 years and will provide a foundation for achieve the long term plan which involve with public debate and significant time period to accomplish. Thus, in the short term plan, the paper proposes that within 1-3 years there must be the adoption of conditional licence from ERC to tackle on the abuse of market power and access to essential facilities, the solid creation of public awareness over the competition law and competition in Thai energy sector.

1) ERC action on market competition

In the short term, ERC as the main sectoral regulator has to make and swift action by employing the available regulatory mechanism for creating the competition in Thai energy market. Although, there is the ambiguity whether the conditionality license would be able to tackle on the SOEs incumbents, it is the better choice for ERC to start utilising its power for creating the possible track for competition development in Thai energy sector. ERC may adopt the conditionality license to address concerns on abuse of market power in the energy sector. To begin with, ERC should draft competition conditionality for different types of licenses in order to safeguarding market competition. The license would have to impose the conditions which are;

a) “Prohibiting or limiting ownership of entities at different functional levels (generation, transmission, distribution and retail); and

b) Limiting market concentration in competitive, or potentially competitive, functions to some maximum share of market (e.g., say 20%) »⁸⁴

c) Opening free and fair access to the energy essential facilities for all market participants.

Moreover, the ERC can also revise gas transmission tariff that is believed to be excessive in order to ensure that there is not discrimination as well as helping balance the need to attract private investment against the policy objectives of minimizing monopoly power and encouraging competitive markets.

2) Build public recognition on competition law

It is agreed that the energy regulator rather than the competition commission that has main role to safeguarding and creating market competition. However, it would better to have an available remedy from competition law for dealing with uncompetitive market behaviour. It is because it could help check and balance the regulatory power of the sectoral regulator which might be subjected to the regulatory capture in which the regulator might give more favour to the energy operators rather than the consumers.⁸⁵

Thus, as provide above that the Thai competition law still face with the problems on ineffective institution, the short term plan on building the public recognition is important to create the public-wide recognition on the needs to improve competition law authority. The recognition will facilitate the people's needs on strengthening the competition law institution having duty to deal with anticompetitive conducts, especially in the energy sector. By this, the competition commission in short term plan has to stimulate the rapid public wide understanding on consumers' right from the competition act and on the real benefit of market competition.⁸⁶ This is because the very important element to make the successful competition policy and law success is to pursue a non-enforcement mechanisms by increasing public awareness of the benefits of competition.⁸⁷

It is important for the competition commission to work on the organising conferences, seminars and workshops to facilitate the public understanding on the role of competition in a market economy and to present how the competition law can enhance the market competition which deliver

⁸⁴ See Energy Regulators Regional Association, 'Regulatory Actions To Limit or Correct Abuses of Market Power' (Paper presented at the Regional Energy Regulatory Conference For Central/Eastern Europe & EURASIA, 1999) <<http://www.erranet.org/index.php?name=OE-eLibrary&file=download&id=3546>>

⁸⁵ George J. Stigler and Claire Friedland, 'What Can Regulators Regulate? The Case of Electricity' (1962) 5 *Journal of Law and Economics* 1; George J. Stigler, 'The Theory of Economic Regulation' (1971) 2(1) *The Bell Journal of Economics and Management Science* 3; Gregg A. Jarrell, 'The Demand for State Regulation of the Electric Utility Industry' (1978) 21(2) *Journal of Law and Economics* 269

⁸⁶ Elina Cruz and Sebastian Zarate, 'Building Trust in Antitrust: The Chilean Case' in Eleanor M. Fox and D. D. Sokol (eds), *Competition Law and Policy in Latin America* (SSRN, 2009)

⁸⁷ Advocacy Working Group, 'ADVOCACY AND COMPETITION POLICY' (ICN, Report from ICN's Conference Naples, 2002) <<http://www.internationalcompetitionnetwork.org/uploads/library/doc358.pdf>>

the economic benefits to Thai consumers.⁸⁸ In addition, the competition commission should create public recognition by using the media as a way to encourage wider public consumers to realise the significance of competition law.⁸⁹ By using the mass media, it will assist the generation of the knowledge on the competition law to the mass consumers. This will create the significant movement of people to support the enforcement of competition law and to champion the strengthening on competition law commission.

When focusing on the energy sector, the competition commission should display the current uncompetitive structure of the energy market under the Thai SOEs to the public consumers, and should emphasise the needs to establish the competition rules in the energy sector in the university courses. This then can help facilitate the understanding of competition law benefit as well as increase the public understanding about the issues of uncompetitive structure in the Thai energy sector. This important step of building public recognition is the fundamental ground to create the larger political wills in Thai consumers on the issues of uncompetitive energy sector and on the issues of anti competitive in the other economic sectors. In the research of Prof Pradeep S Mehta with the title on Political trumps economic which provides that the political interest can generate the support on the effective work of competition policy in emerging economy.⁹⁰ Once there is the start of public wide recognition on competition policy or public wide political acceptance of benefit of competition law and policy, it means that the politics will generate the effective support on the use of competition law and policy to tackle on uncompetitive structure and anticompetitive behaviours.⁹¹ Moreover, once the public consumers recognised the benefit of competition and competition law, they will have awareness on that liberalisation policy under competitive market.⁹² It would then create the solid and smooth start point to implement liberalisation policy on Thai energy sector with focus on market competition.

⁸⁸ This is the propose plan from Indian competition commission n as seen in Competition Commission of India, 'Public Awareness On Competition Law & Policy' (Competition Commission of India, 2003) <<http://www.cci.gov.in/images/media/Advocacy/Awareness/pacl.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00>> Retrieved from <http://www.cci.gov.in/images/media/Advocacy/Awareness/pacl.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstn7Rf00> on 10 November 2010

⁸⁹ InfoDEV and International Telecommunication Union, 'ICT Regulation Tool Kit-Legal and Institutional framework' (2010) <<http://www.ictregulationtoolkit.org/en/Section.1691.html>>

⁹⁰ Pradeep S Mehta, Manish Agarwal and Dr Singh, 'Politics Trumps Economics– Lessons and experiences on competition and regulatory regimes from developing countries' (Paper presented at the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 2007) <http://www.unctad.org/sections/wcmu/docs/c2clp_ige8p11Cuts_en.pdf>; Pradeep S. Mehta and Simon J Evenett, *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Regulation in Developing Countries (Volume I)* (Academic Foundation in Association with Consumer Unity and Trust Society (CUTS International), Jaipur, 2007)

⁹¹ Ibid

⁹² Rijit Sengupta and Cornelius Dube, 'Competition Policy Enforcement Experience From Developing Countries and Implication for Investment ' (Paper presented at the OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT VII: Best Practices in Promoting Investment for Development, Paris, France, 2008) <<http://www.oecd.org/dataoecd/42/55/40303419.pdf>>

3) Advocacy between competition law and the sector regulation

The other important short term plan to solve the problems on competition law and sectoral regulation in Thai energy sectors is on creating advocacy roles between competition law and sectoral regulation. Although there is no formal and legal requirement for both competition law and sector regulation to cooperate on creating market competition in the Thai energy sector, it does not have any prohibition on such a cooperative work. Thus, both ERC and competition commission should use this point to make a co-operative work in building and reforming energy market toward competitive circumstance. By this, competition law can increase its public recognition and can help facilitate the economy wide reform with the objective on market competition. This, in turn, helps solve the problems of ineffective competition law in Thailand because the competition law would then play more important role on the energy sector which is under significant consideration of mass consumers. This is also help enhance the consistency and complementary of work between both institution.⁹³

Moreover, when the competition law start to urge the energy regulation to consider on building market competition in the uncompetitive Thai energy market, it can be the start step for sectoral regulation to focus on building market competition for Thai energy sector.⁹⁴ The sectoral regulation then will start to consider on the structural reform and on the anticompetitive behaviour of SOEs in energy sector. This will also be the initial point for advising the SOEs to adjust themselves and percept the possibility of the market reform in the futures. This can be the significant trigger point to the SOEs to transform themselves from the market controllers to become market players.⁹⁵

⁹³ Dennis W. Carlton and Randal C. Picker, 'Antitrust and Regulation' (US National Bureau Of Economic Research, Working Paper 12902, 2007) <<http://www.nber.org/papers/w12902.pdf>> p 51

⁹⁴ See the possible recommendation of competition law advocacy to sectoral regulation in- ICN, 'Competition Advocacy in Regulated Sectors: Examples of Success' (ICN, Report from International Competition Network 2004 Annual Conference, 2004) <http://www.reseauinternationaldelaconcurrence.org/media/library/conference_3rd_seoul_2004/capacitybuild_sg4_seoul.pdf> and in Mari Pangestu et al, 'The Evolution of Competition Policy in Indonesia' (2002) 21(2) *Review of Industrial Organization* 205

⁹⁵ It is noted that the advocacy is the important way on influence the sectoral regulation to shape the market toward competitive conditions- see OECD Secretariat, 'Institutional Challenges in Promoting Competition' (Paper presented at the SECOND ANNUAL MEETING of the LATIN AMERICAN COMPETITION FORUM, 2004) <<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=408639>> p 7 for example

Long term strategy

The long term plan is to reform the framework of Thai competition law and sectoral regulation in energy sector. The plan requires the establishment of the main institution that can facilitate the economy wide competition as well as the energy market competition. It also requires the change and amendment on competition law and sectoral regulation in order to make the rules that can serve the creation and protection of market competition in Thai energy markets. In the last long term plan, it is to set up the obligation on institutional coordination between competition law and sectoral regulation that help enhance the complementary roles of each side.

1) Establishment of National Competition Council

After achieving the short term plans on the increase of the public recognition and the creation of initial cooperative work between competition law and sectoral regulation, Thailand should establish the main institution that can review and reform law and regulation, hindering the creation of market competition, especially in the Thai energy sector. The institution will be agency which directs the reform platform for both competition law and sectoral regulation and helps facilitates the cooperative work between competition law and sectoral regulation. The example is in the UK and Australia which not only do they have competition law and sectoral institution, but also they have the national competition council as the mainstream agency, facilitating the work for a reform on all economic sectors toward market competition.

In UK, the UK National Competition Commission (CC) is established as an independent public agency which works on in-depth inquiries into mergers, markets and the regulation of the major regulated industries, ensuring healthy competition between companies in the UK for the benefit of companies, customers and the economy.⁹⁶ All of the CC's works are undertaken following a reference made by the other authorities, most often the Office of Fair Trading (OFT) (which refers merger and market inquiries), or one of the sector regulators (which can refer markets within their sectoral jurisdictions or make regulatory references in relation to price controls and other licence modifications) or as a result of an appeal from a decision of one of the sector regulators. The CC thus plays important role to make the competition inquiry which facilitate the effective works of competition law and sectoral regulation.⁹⁷

In the Australia, the Australian National Competition Council is established as a research and advisory body for creating reform toward economy wide competition. The Council has main function to recommend on the competition issue and regulation of third party access to infrastructure services by a communication with all relevant ministers in relation to applications for declaration of

⁹⁶ UK Competition Commission, 'About us' (2010) <http://www.competition-commission.org.uk/about_us/index.htm>

⁹⁷ Ibid

services and also the certification of state or territory access regimes to all utilities infrastructures of rail, telecommunication, gas, and electricity.⁹⁸ The council then play major role to implement the Australian National Competition Policy, set by the agreement utilising market competition as a key stimulus to productivity improvement.⁹⁹

This when apply to Thai competition law and sectoral regulation, it thus needs to establish the peak agency which can facilitate the development of competition in Thai utility sectors, including energy sector. The National competition agency will be the main institution which encourages the change on Thai competition law and sectoral regulation of energy sector. This is similar to Derek Ireland proposal on the necessity to build functional competition policy for India that there should be an establishment on the peak agency of national policy council which has duty to supervise the reform on market competition and can be the main facilitator of market competition for both competition law and sectoral regulation.¹⁰⁰ This also can be seen from idea of Prof Pradeep and Manish that there should be an establishment of the national competition policy council, having the important duty on guiding principles in framing government policies of promoting competition in the market.¹⁰¹

It might seem that the proposal to establish the national competition council is unlikely to work in Thailand when both energy regulator and competition commission are not incapable on performing their own tasks. However, without the establishment of the national competition council, there would not be the start step to urge the regulator and competition commission to perform the work. It may be that Thailand may start by upgrading the current available institution to have role as the national competition council. For example, Thailand may upgrade the National Economic and Social Advisory Council (NESAC), established in order to be independent institution giving advice to the cabinet relating to Thai social and economic problems, to have additional role of national competition council which will facilitate the effective works of energy commission and competition commission.¹⁰² This would also contribute to the integration of competition policy in the Thai national economic development plans which are normally originated from NESAC.

⁹⁸ National Competition Council, 'Access to monopoly infrastructure' (2010) <<http://www.ncc.gov.au/>>

⁹⁹ Council of Australian Governments (COAG), 'Council of Australian Governments' Communiqué 19 August 1994' (2010) <http://www.coag.gov.au/coag_meeting_outcomes/1994-08-19/index.cfm>

¹⁰⁰ Derek Ireland, 'Towards a Longer-term Agenda for Competition Policy and Law in India' (Discussion Paper, CUTS Centre for Competition, Investment & Economic Regulation, 2009) <http://www.cuts-ccier.org/pdf/Towards_a_Longer-term_Agenda_for_CPL_in_India.pdf>, p 7

¹⁰¹ Pradeep S Mehta and Manish Agarwal, 'Time for a Functional Competition Policy and Law in India Mainstreaming competition principles into policy and legal framework is pro-development' (CUTS International, 2006) <<http://www.cuts-international.org/pdf/compol.pdf>> p 38

¹⁰² See further information about the National Economic and Social Advisory Council in NESAC, *The National Economic and Social Advisory Council : Background* (2010) <http://www.nesac.go.th/english/nesac_info/nesac_background.html> See also article 258 of Constitution of Kingdom of Thailand BE 2550 (2007).

2) Reform on Thai Energy sectoral regulation

The other long-term step plan is to reform on the Thai energy regulation (The Energy Act 2007) which provides support to the SOEs energy sector. This reform is included in the long term plan because it will not be done in the only two or three years. The energy act amendment has to be debate in the parliament. It thus advises the government and parliament to consider on the regulatory reform which needs to be adhered with the competition objective on structural change for competition creation, on competitive neutrality, and on access to essential facility.

The Thai energy act 2007 should be amended by included the explicit structural change in order to deal with significant market power of SOEs incumbent.¹⁰³ The act has to direct the structure reform on unbundling competitive parts and essential facility of energy market.¹⁰⁴ By the legal requirement on the structural change of unbundling in Thai energy market, it would reduce the market powers of Thai SOEs in energy sector as well as open the opportunity for the new investment to enter and compete with the SOEs in each unbundled parts of energy sectors. In respect of Thai electricity sector, the act should consider on obligating the unbundling of the generation and transmission. The Energy act should also focus on reducing market power of SOEs electricity generator by order the separation of transmission and distribution businesses. In respect of Thai gas sector, the act should stipulate the complete separation between PTT gas supply and gas pipeline. By this, it can help create structural change in energy market which help institute the energy market competition.

Moreover, the provision of the Energy Act 2007 that stipulates the duty of the Thai energy commission on having role to support the SOEs should be amended in order to create competitive neutrality between public and private operators in Thai energy sectors.¹⁰⁵ By making such an amendment for establish competitive neutrality, the distortion on market competition in Thai energy market will be removed and it obligates the Thai energy SOEs not to enjoy any net competitive advantage simply as a result of their public sector ownership.¹⁰⁶

¹⁰³ Michael Pollitt, 'The arguments for and against ownership unbundling of energy transmission networks' (2008) 36(2) *Energy Policy* 704; Paul L. Paul L. Joskow and Jean Tirole, 'Transmission Rights and Market Power on Electric Power Networks' (2000) 31(3) *The RAND Journal of Economics* 450; Paul Joskow, 'Transmission Policy in the United States' (Cambridge Working Papers in Economics, Faculty of Economics, University of Cambridge, 2004) <<http://ideas.repec.org/p/cam/camdae/0454.html>>

¹⁰⁴ Frank A. Wolak, 'Lessons from the California Electricity Crisis,' (University of California Energy Institute CSEM WP-110, 2003)

¹⁰⁵ OECD, 'State Owned Enterprises and the Principle of Competitive Neutrality' (OECD Document No. DAF/COMP(2009)37, 2009) <<http://www.oecd.org/dataoecd/43/52/46734249.pdf>>

¹⁰⁶ Rajesh Kumar, 'Ensuring competitive neutrality of networks' (2009) <http://www.cuts-ccier.org/ArticlesDec09-Ensuring_competitive_neutrality_of_networks.htm>; Pradeep S. Mehta, 'Competition Policy Rationale and Scope in Modern Developing Economies' (Paper presented at the 2010 ANZSOG Annual Conference, 2010) <<http://www.anzsog.edu.au/content.asp?pageId=173>>; Pradeep S. Mehta, *Competition and Regulation in India* (CUTS, 2007); Allan Fels, 'Lessons from International Experience' (Paper presented at the Competition Policy: The Road Ahead for Egypt, Conrad International Cairo, Nile Ballroom, 2001)

In addition, the Thai competition should be amended by including the significant rules on access to essential facilities. The essential facilities rules will give fair access to new entrant.¹⁰⁷ The rules enable new market entrants to have access to important infrastructure such as gas pipelines and electricity grids.¹⁰⁸ It thus requires a regulatory system in place which order, on an *ex ante* basis, an obligation on a network monopoly to open access to its essential infrastructure for new market competitors. When apply to the current Thai energy regulation, it should have an establishment of essential facilities rules, requiring the SOEs incumbents in energy sector to open access on their essential or bottleneck facilities to new competitors and to give the access at a reasonable price.¹⁰⁹ The amendment rules may include, according to OECD, “the access regime, interoperability (that different systems, products, and services work together transparently), standards, the importance of market definition in defining an essential facility, single versus joint ownership of an essential facility, legitimate reasons to deny access and possible remedies.”¹¹⁰

3) Reform on Thai competition law

Another important long term plan for shaping competition in Thai energy market is also on the reform on Thai competition law. The reform has to consider on the main obstacles which create the problems of competition law enforcement on energy sector. The obstacles are the competition law institution and the exemption clause for SOEs.

The important factor determines the effectiveness of competition law enforcement is on the work of competition law commission. As provide above, that there is still variety of problems that render the Thai competition law commission ineffective. Thus, it is necessary for Thai competition law to be reformed with the focus on establishing the competition commission which can perform the effective work to protect and build competition in the Thai economy, especially in energy sector. The reform on Thai competition act 1999 need to be changed to establish the independency of competition commission, and to provide sufficient financial and personal resources, capable to deal with the

<<http://webcache.googleusercontent.com/search?q=cache:FUBKa9B67FUJ:www.accc.gov.au/content/item.phtml%3FitemId%3D255597%26nodeId%3D8e01759974f43b0f57bc495479198d85%26fn%3DCompetition%2520Policy%2520speech.doc+energy,+developing+countries,+%22competitive+neutrality%22&cd=5&hl=en&ct=clnk&gl=au&client=firefox-a>>

¹⁰⁷ See the concept of essential facilities in International Energy Policy (IEA), *Competition in Electricity Markets* (IEA, 2001)

¹⁰⁸ Asian Development Bank, 'Competition Law Toolkit : Competition, Privatization, and Regulation- The Essential Facilities Doctrine and Interconnection Problems ' (2010)
<<http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw070700.asp> >

¹⁰⁹ OECD, 'The Essential Facilities Concept' (OECD Report No OCDE/GD(96)113, 1996)
<<http://www.oecd.org/dataoecd/34/20/1920021.pdf>>

¹¹⁰ Ibid

complex case and investigation relating to complex anticompetitive conducts.¹¹¹ The independency of Thai competition commission would create the accountability of competition enforcement and contribute to the successful work overcoming the anticompetitive conducts both from public and private firms.¹¹² The Thai competition act then has to be reformed by amending the section relating to establishing competition commission, consisted of government and business personals under the Ministry of Commerce. The amendment has to be on the establishment of competition commissions that consists of competent commissioners who do not have relationship with government or business. However, the independency of Thai competition commission should also be adhered with the sufficient financial and personals resources. By this, in reform of the Thai competition act, there should be provision stipulates suffice state budgets for works of the independent competition commission.¹¹³ This then helps provide the resource independency from Ministerial control and exert the effective work of the competition commission.

Moreover, the need to reform on the Thai competition law lies on the problem of the exemption clause for SOEs. The limited application of Thai competition law from the exemption clause for the SOEs should be amended and open the opportunity for competition law enforcement to control the anticompetitive behaviour of the important SOEs, especially in energy sectors. This will help broaden the Thai competition law application on to the energy sector and it will reduce rent seeking behaviour from the Thai politician and bureaucrats who conceal their rent interests over the shadow of public interest in the energy SOEs. The competition law will be used to subvert the rent interest of the Thai politician and bureaucrats who have rent seeking interest tying with the business men who like to protect their rent interest in shaping the application of competition law.¹¹⁴ Thus, the Thai competition law should be amended by removing the exemption provision and extent the competition application to the SOEs sectors, especially on the energy sectors in order to facilitate the market competition and the efficiency of economy in long run.

¹¹¹ See support ideas on establishing the independency and resource sufficiency for competition law in John Clark, 'Competition Advocacy: Challenges for Developing Countries' (2005) 6(4) *OECD Journal of Competition Law & Policy* 69; see also in http://www.oecd.org/document/17/0,3343,en_39048427_39049374_41887057_1_1_1_1,00.html

¹¹² Stefan Voigt, 'The Economic Effects of Competition Policy: Cross-Country Evidence Using Four New Indicators' (INTERNATIONAL CENTRE FOR ECONOMIC RESEARCH, Working Paper No. 20/2006, 2006) <<http://ssrn.com/paper=925794>> ; Paolo Buccirossi et al, 'Deterrence in Competition Law' (Governance and Efficiency of Economic System, Discussion Paper No. 285, 2009) <<http://www.sfbtr15.de/dipa/285.pdf>>

¹¹³ Tomas Serebrisky, 'What Do We Know about Competition Agencies in Emerging and Transition Countries? Evidence on Workload, Personnel, Priority Sectors, and Training Needs' (World Bank Policy Research Working Paper 3221, February 2004, 2004) <<http://ssrn.com/paper=610263>>

¹¹⁴ See example from Swaminathan S Aiyar, 'Expert Group appointed by the Ministry of Commerce, Government of India and Fingleton John, "Political economy insights from competition policy in Ireland in Pradeep S Mehta and Chakravarthy S, 'Dimensions of Competition Policy and Law in Emerging Economies' (Discussion Paper CUTS Centre for Competition, Investment & Economic Regulation 2010) <http://www.cuts-ccier.org/pdf/Dimensions_of_Competition_Policy_and_Law.pdf>

4) Establish formal and effective work coordination between competition law and sectoral

As provided above that the coordination of works between competition law and sectoral regulation is required in the short term plans, it is also significant for long-term plan. In the shorter term the work relationship is not in the formal establishment but increase the collaborative work of competition law and sectoral regulation in creating and preventing market competition in Thai energy sector. In the long-term plan, it thus requires the formal establishment for work coordination between competition law and energy sector regulation. The formal inter-institutional work would create the complementary roles for both competition law and energy regulation to make a reform toward competitive energy market.¹¹⁵ There are various optional forms of the established formal coordination in which the Thailand can follow. The forms are concurrency, combination, and competition law as the main institution.

The *combination form* is the formal inter-institutional works between competition law and sectoral regulation by the combination of competition law commission and sectoral regulation in one institution. The solid example is from Australia which employs the institutional combination between ACCC (Australian Consumer and Competition Commission) and AER (Australian Energy Regulator) to supervise energy market and prevent anticompetitive conducts in Australian energy sector.¹¹⁶ This combination can help facilitate the harmonisation of work between competition commission and energy sectoral regulator for shaping and preventing market competition in Australian market.¹¹⁷

The *concurrency form* is based on the UK model for cooperative works of the Office of Fair trade Commission (OFT) and other sectoral regulators, including the Office of the Gas and Electricity Markets (OFGEM).¹¹⁸ By this concurrency model, competition law is enforced in the UK primarily by the OFT but the sectoral regulators have 'concurrent powers' to apply and enforce competition law.¹¹⁹

¹¹⁵ See in the issue call for discussion paper of OECD from OECD, 'Competition Advocacy: Challenges for Developing Countries' (2004) <<http://www.oecd.org/dataoecd/52/42/32033710.pdf>>p 7; see also in Asian Development Bank, 'Competition Law Toolkit : Competition, Privatization, and Regulation- Ex Ante Regulation and Competition' (2010) <<http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw070400.asp>>

¹¹⁶ Ed Willett, 'Respective roles of the AER and ACCC' (Paper presented at the 2005 Energy Investment Forum, Sydney, 2005) <<http://www.accc.gov.au/content/item.phtml?itemId=676784&nodeId=e433d43ca5b083f5cd398c1de6e8c84c&fn=20050407%20Energy%20Investment%20Forum.pdf>>; Ed Willett, 'The benefits of a single Australian Energy Regulator' (Paper presented at the National Power Conference, Melbourne, 2004) <<http://www.accc.gov.au/content/item.phtml?itemId=572896&nodeId=a8d0aa647a6bf9e4a4bd0ff2aa7d26e4&fn=20040816+National+Power.pdf>>

¹¹⁷ ACCC and AER, 'ACCC-AER information policy: the collection, use and disclosure of information' (ACCC-AER, 2008) <<http://www.accc.gov.au/content/index.phtml?itemId=846791>>

¹¹⁸ Ibid above n 55

¹¹⁹ UK Office of Fair Trading, 'Concurrency' (2010) <<http://www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/Concurrency/>>

The important aspect of the concurrency power is that it extent of competition enforcement powers to sectoral regulators who have expertise and experience on their respective industries knowledge.¹²⁰ The model also contributes to the benefits of work consistency between OFT and other sectoral regulators on anticompetitive conducts in the regulated sectors.¹²¹

The other model is the form of *competition law as the main institution*. This model is from the EU approach to use competition law to increase the integrated competitive market of energy sector in EU economy.¹²² The model primarily gives favour to the competition law enforcement to circumvent the market barrier in EU energy markets. This can generate the significant market liberalization toward single and competitive market in EU energy sectors. Although, by the model, there is tension between managing the balance between enforcing competition law and employing sectoral regulation to create competition in the EU energy market, the EU competition commission is successful in using the competition law enforcement to build the further reform toward competitive development in the EU gas and electricity market.¹²³

The above are important models for establishment on the inter-intuitional work between competition law and sectoral regulation. This, when apply to Thai energy sectors, the formal establishment has to enable the competition law enforcement and sectoral regulation to make the collaborative work on creating competitive market in Thai energy sectors. The formal coordinative works on enforcement of competition law and sector regulation would then contribute to the development efficient competition in Thai energy sector.

Part IV: Conclusion

The paper, in the first part, provides the implementation of Thai energy liberalisation, leading the uncompetitive market structure and the Supreme Administrative court's decision, ordering the government to adjust the energy market structure toward market competition. In the second part, the paper, displays that the competition law and sectoral regulation still face with various problems rendering the difficulty to transform the Thai energy sector toward competitive market. After reviewing the current market structure and problems in the competition law and sectoral regulation, the paper propose the short and long-term plans to improve the competition law and sectoral regulation which will be the key mechanism to create the competition for the Thai energy sectors.

¹²⁰ Helen Weeds, 'Concurrency between OFT and regulators' (2004) 12(2) *Utilities Policy* 65, 'Concurrency

¹²¹ Ibid

¹²² Francesco Maria SALERNO, 'The Competition Law-ization of Enforcement: The Way Forward for Making the Energy Market Work?' (2008) EUI RSCAS 2008/07 <<http://cadmus.eui.eu/dspace/handle/1814/8108>>

¹²³ EU Commision, 'Energy: Overview on Liberalisation of the electricity and gas markets' (2010) <http://ec.europa.eu/competition/sectors/energy/overview_en.html>

However, it has to be noted that there is requirement on the future research on conducting the proposed plans into the practicable implementation process. This requires a research on how to build competent professionals for operating works of the energy regulation and competition law and on how to make Thai political economy consider the importance of the proposed short and long term plans for a development on Thai energy regulation and competition law.
