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主 論 文 の 要 旨

論文題目 An Empirical Study of Law Governing Cartels and Leniency Program to
Combat Hardcore-cartel in Thailand

(タイにおけるハードコアカルテル防止のためのリニエ
ンシー制度及びカルテル規制に関する実証研究)

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論 文 内 容 の 要 旨

Hardcore cartels are very harmful types of anti-competitive conducts as they allow firms to exert market power and artificially restrict competition and increase prices, thereby reducing welfare. By creating cartel, producers in theory can increase their price and raise illegal profits because this form of collusion make firms gaining market power to control the market price and quantity. In other word, cartels generally behave similarly to monopoly to earn more profits. Thailand's economic structure in various industries is oligopoly with few players with high market share within market e.g. hospitals, airlines, oil and gas, telecommunication, power producers etc. There were cartel cases claimed to the OTCC from 1999 to

2018, accounted for 30 cases covering various market industries particularly in everyday-consumption goods (e.g. cement manufacturing, polyethylene manufacturing, film industry, rubber industry, fisheries etc.) and services. Although there are few cases claimed to Thailand's competition authority, the figure shown is actually not represented that Thailand is the country with a low cartel rate. The main rationale underlying this is an obstacles to find direct evidences to prosecute hardcore cartel conducts. According to Thailand's Trade Competition Act 1999 section 27 and Trade Competition Act 2017 section 54, hardcore cartels are subject to criminal sanction both in terms of punitive fine and imprisonment and therefore carry a very high standard of proof -- "*proof beyond reasonable doubt*" in accordance with section 227 of Thailand's Criminal Procedural Code. Nevertheless, direct evidences in hardcore cartel cases e.g. minute of meeting details of agreement, voice record, witnesses who know agreement etc. are very difficult to find in practice unless competition authority gets corporation from insiders or through the use of leniency program.

Detecting and prosecuting cartels are very difficult in practice as evidences

themselves are hindered among cartel members. Competition authorities globally thus have been facing difficulty to crack down cartel without cooperation of insiders. Leniency program thus has become very crucial tool to assist competition authority to obtain direct evidence with the help from insiders in an exchange of privileges either in the form of immunity or reduction of surcharge or criminal sanction. However, different leniency models achieved different level of success. This is due to the facts that there are various factors supporting an effectiveness of leniency program e.g. high risk of being detected, severe sanction, predictable liabilities, transparency and clear criteria etc., whilst empirical economic studies show that there may be adverse effect of leniency program if it is too lenient.

This research aims to provide middle to long term projection with empirical evidences on how to combat hardcore cartel effectively in Thailand with concentration on cross-dimensional issue of law governing cartel and leniency program. The research will analytical insight the main characteristics of Thailand's anti-cartel regime as well as awareness and perception of business sectors as a prospective applicants, lawyers, stakeholders, competition law experts etc. toward

law governing cartel and leniency policy in Thailand. It is undisputed that one anti-cartel policy and leniency model may be suitable and successful in one jurisdiction while it is less functional or not so successful in another. Thus, it is essential to firstly investigate and draw an attention toward such issues before analytical insight into different world-leading anti-cartel policy and leniency model theoretically as well as their underlined legal justifications. After the theoretical legal research in combination with an empirical test, this research will provide the final conclusion on what should be done to combat hardcore cartels effectively with mechanisms that suit the legal, economic, and cultural environment of Thailand.

This research combines two main research methods to support each other: theoretical and documentary analysis and empirical research. Firstly, concerning theoretical and documentary analysis, the author analyzed a wide range of primary and secondary documentation to examine the rationale, main objectives, and key characteristic of anti-cartel regime, social and economy in Thailand toward the historical evolution and investigate the impetus and possible impact for leniency program in Thailand in comparison with experiences with both leniency policy,

design, and enforcement practice in the US, EU, and Japan. EU, Japan and the US have been chosen because their successful extensive history in enforcing leniency program. In addition, Thai's Trade Competition Act section 27 in relation to anti-cartel provision is also heavily influenced from the EU's Treaty of Rome article 101 (formerly article 81) and the US's Sherman Act section 1 via Japan's Antimonopoly Law. To examine the rationale, main objectives, and key characteristic of anti-cartel regime, social and economy in Thailand, researcher will get through parliamentary debate papers, journals, books, and articles. In order to identify impetus and likely impact for leniency program, the researcher will review documents in three countries (the US, EU and Japan), particularly focusing on development of leniency design and policy and their characteristics.

Secondly, empirical legal research methodology is employed through the combination of quantitative and qualitative methods. The data in this section is primary data and was collected by the author during the period from 2017 to 2019. Concerning quantitative survey, the author conducted survey by allocating questionnaires during 2017 and 2018 from the total sample population of 936

people, focusing on three main areas including (i) the public's attitude and acceptability of settlement program and leniency policy; (ii) the public's attitude toward privileges granted; and (iii) quantitative analysis to test whether privileges granted either in terms of waiver or reduction of surcharge or waiver/ reduction of imprisonment term has any effect upon cartelists' decision to cooperate with the state. Variables are tested via logistic regression model. According to Krejcie & Morgan's table to determine sample population size, the collected sample populations are over 663 and research result represents population's perception with confidence interval level of 99 percent with the margin of error about 4 percent.

Regarding quantitative survey, the author conducted self-completion survey both online and paper forms distributed among sample research groups. Survey questions are divided into two types : (i) questions aim to test public opinion about law governing cartel and settlement program, and (ii) questions aim to test relationship between quantitative independent variables --percentage of surcharge applied and reduction of jail terms granted and dependent variable—the decision

to apply for settlement or future leniency. Thus, the second set of questions aims to test the hypothesis whether two independent variables (level of administrative surcharge applied and reduction of jail term granted) affect dependent variable (decision to cooperate with the state). The first set of questions will however take the answer from wide range of sample population into consideration including those from business sectors, law firms, academia, and government sectors. The second set of questions, on the other hand, will be mainly used in the sample groups which are prospective applicants, including business sectors who are member of Trade Association, the Federation of Thai Industries etc. (as settlement program or leniency prospective applicants) and lawyers who generally represents their clients in settlement or leniency program. Researcher conducted survey with the total sample population comprising of 936 people including those from public sectors (25.2%), academia (6.5%), business sector (15.7%), lawyer (45.8%), and others (6.7%).

Information from two sample groups, comprising of 406 people including business sectors and lawyers however will be used to make an analysis whether jail

term or surcharge reduction have an effect on the decision to cooperate with the state in accordance with section 79 of the Trade Competition Act B.E.2560 (2017) through the statistical analysis method. Regarding researcher's hypothesis in this section, H_0 or Null hypothesis is "jail term or surcharge reduction have an effect on the decision to cooperate with the state", while H_1 or alternative hypothesis is "the decision to cooperate with the state either via settlement program or leniency is not depend on level of administrative surcharge applied and reduction of jail term granted. This sample population represents result with confidence interval of 95 percent and margin of error of 5 percent. The paper surveys were allocated during competition law conference "The New Era of Trade Competition Act B.E.2560 (2017)" organized by Thailand's Office of Trade Competition Commission on September 19th, 2017 with approximately 600 participants including those from business sectors, law firms, academia, public sectors etc. and allocated in law firms and business enterprises with the response rate around 60 per cent from all surveys distributed. To provide the more precise outcome, the sample groups will be selected randomly including wide range of business industries and sizes (e.g.

SMEs, large business enterprises with market dominance etc.). Logistic regression method is selected because independent variables in this research are “quantitative scale”, while dependent variable is “dichotomous nominal scale” and the normal regression model cannot be used in this case because the dependent variable in this research is “decision”--dichotomous variable. Thus, it takes the value 1 of the one who choose to apply for settlement and 0 otherwise. The survey answers from selected questions will be used to process in SPSS program to see the correlation of research variables.

Qualitative in-depth interview method is nevertheless mainly used for exploratory, explanatory and descriptive research regarding cartel regulation, punishment and leniency program and to draw causal inferences from the data and adopts an appropriate data collection method and modes of data analysis in order to answer the research questions posted. The author aims to cross-check the quantitative result via the qualitative in-depth interview and explores perceptions into details. Among 32 interviewees, 25 people were interviewed on a face-to-face basis, while three of interviewees were interviewed via email and Facebook

message. Two interviewees were asked interview questions by the author during Q&A session of law conferences. Two interviewees however requested to give an interview on phone. In-depth interviews were conducted with broad range of people of 32 interviewees in total including those from business sectors, stakeholders, academia etc. The selection criteria is on the other hand focusing on those with certain competition law background, those who engage in competition law enforcement or law drafting, those who are at the management level of the leading business enterprises or even who are the executive members of Federation of Thai Industry where market-leading business enterprises get together and discuss over their business plan etc. The researcher also conducted interviews competition law experts from oversea to get in-depth perception from developed economy point of view.

According to the author's research, there are two main factors obstructing cartel enforcement and leniency program implementation in Thailand. Firstly, there is no tool assisting competition authority to obtain direct evidences from insiders where hardcore cartels are secret by nature and are subject to very high

standard of proof – proof beyond reasonable doubt. The second factor is that the perception of law drafting committee and the council of state that are not familiar to provide power to reduce sanctions to other institutions rather than the Court of Justice. From the author's viewpoint, there are small rooms to apply hardcore cartel provisions pursuant to section 54 of Thailand's Trade Competition Act in practice without an implementation of leniency program or other tools. This is because hardcore cartels are subject to criminal sanction and thus are subject to very high standard of proof. The court also generally accepts only direct evidences in practice whereby direct evidences are very difficult to find. Hence, cartel adjudication processes face difficulty since investigation stage in which competition authority needs to gather direct evidences before prosecution. Settlements in accordance with section 79 allowing cartel participants settle the case is also less beneficial in practice because negotiation can be done after competition authority conclude its investigation. Thus, from the author's point of view, leniency program is a very crucial instrument to assist competition authority to combat hardcore cartels in practice.

Various jurisdictions adopted leniency program as a tool to fight against hardcore cartels. Nevertheless, there is no “one-size-fit-all” leniency model that is applicable and effective to all countries. Thus, apart from comparative legal research, the author also employed empirical studies to gain in-sight perception and test factors affecting leniency application in Thailand’s context. This research makes contribution in terms of primary quantitative and qualitative data collected from Thailand. Actual problems occurring in Thailand and perceptions were collected. Factors affecting decision of business sectors to cooperate with competition authority are also tested through selected statistic regression model and are cross checked quantitative outcome with in-depth qualitative interview. This research was carefully designed and obtained survey data reaching enough number of respondents to test public perception with confidence interval of 99 percent and margin of error of 4 percent. Logistic regression was tested to gain perception from specific groups who will be leniency applicants or representatives of business sectors for leniency application, accounted for 406 people. Thus, regression result falls within the research standard to represent whole population’s perception with

confidence interval of 95 percent and margin of error of 5 percent. This research also contributes to primary qualitative interview data collecting from stake holders who have been engaging in competition law drafting processes or competition authority. Data were also gained from executives or directors of firms with market dominance in Thailand and executives of the Federation of Thai Industries and Thai Chamber of Commerce which are the main business associations in Thailand to obtain in-sight aspects.

The research result thus proposed what shall be done as prerequisites before an implementation of leniency program that is essential tool to combat hardcore cartels. In the short run, the author proposes that Thailand should firstly develop clearer legal framework with more independent and transparent institutional design, create more public awareness toward harm of anti-competitive conducts especially hardcore cartels, set higher cap of administrative surcharge and punitive fine level to suit with net profit margin of firms to create higher deterrence, using settlement and broaden the scope of circumstantial evidence acceptance in cartel cases by the court. In short run, competition authority should also combat hardcore

cartels through the use of existing tools e.g. settlement, private litigation etc.

In the long run, after fulfilling all prerequisites required during short term milestone, the author views that Thailand should implement leniency program to assist competition authority in cartel prosecution, create more flexible provision to tackle new types of collusions generating from advancement of new technologies and enter into international cooperation. The author further proposed leniency design in accordance with supporting empirical research result. Action plan in terms of implementation steps was also included in research result. Short term proposal could initially take action via the use of soft law mechanism e.g. competition authority's guidelines etc., whilst long term proposal could be approached through hard laws. These proposals are the main contributions and originality of the research as supporting evidences are based on primary quantitative test and qualitative data that were collected by the author.

**Keyword : Hardcore Cartels, Leniency Program, Settlement Program,
Competition Law, Quantitative and Qualitative Resear**