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The Challenges of Personalised Pricing, and Self-Preferencing of Online Platform to Thailand Competition Law

Rungnapa Adisornmongkon*
Associate Professor, Kasetsart University
Ph. D Candidate, School of International Law, Southwest University of Political Science and Law, 301 Baosheng Road, Yubei District, Chongqing, 401120, China
* E-mail: fsocrnp@ku.ac.th

Abstract
The digitalisation and algorithm-based machine enable online businesses to collect a vast amount of data related to consumers' online activity, which can be used for personalised pricing and self-preferencing. Personalised pricing, which involves charging different customers with different prices for the same product or service based on their personal behaviour, could be a form of abuse of dominance. However, there is ambiguity in some jurisdictions regarding whether discriminatory treatment against consumers can be considered an abuse of dominance. Also, the potential anticompetitive effects of self-preferencing, where dominant online marketplaces prioritize their own products or services over those of competitors. It raises questions about whether using data to favour oneself constitutes an abuse of a dominant position or is it necessary for the dominant position leverages its market power and the effects of the abuse to be in the same market, and whether competition law should regulate these practices. Indeed, when assessing the anticompetitive effect of these practices, it was found that they have adverse effects on competition. Therefore, it needs careful implementation of competition law to address these challenges effectively, and competition law regime of Thailand is inadequate to address personalised pricing and self-preferencing practices in digital economy.
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1. Introduction

An unfair trade practice is the unfair contractual terms and conditions that the firm places on their counterparty. By the market dominant power enables firms to impose unfair trading conditions on its parties, that typically is abuse of dominance. The unfair trade practice in digital markets may be committed to both business users and consumer users. Price discrimination regarding personalised pricing is one of the unfair trade practices to consumers. The advances in data-analytics enable online platforms to gain increasing access to consumers' personal data. Such an extensive value of consumer data can be used for adjusting price to fluctuations in demand or willingness to pay. However, personalised pricing is differentiated treatment resulting unfair to some consumers since it is a different price charges different consumers for a same or similar product or service, and the price difference does not reflect cost difference (Bourreau *et al* 2017). However, there are ambiguity in some jurisdictions that whether discriminatory treatment against consumers can be an abuse of dominance, also it considerably debates in the context of competition law whether it should be regulated due to personalised pricing has the potential to benefit some consumers.

As well as where the firm enjoys a position of superior bargaining power, and other parties are economically dependent on the online market platform provided by the firm. To take the opportunity that trove of data is in its control, a dominant platform imposes contractual terms and conditions with trading parties to allow the online platform's operator uses data from sellers or retailers who sell goods on its online platform or demotes ranking of competing products to favours its own ones. This self-preferencing practice enabling online marketplace's providers prioritises their own products or services over those of competitors that raises concerns of competition due to is detrimental to both trading parties and consumers. However, it is questionable that whether using data which are generated through the provision of those platforms to favour itself is abuse of a dominant position or is it necessary for the dominant position leverages its market power and the effects of the abuse to be in the same market. Since a dominant undertaking abuses its market power in one market, and accords favourable treatment to itself, resulting in harm to competition in another market.

These behaviours might not be familiar with competition authorities since they are new forms of abuse of dominance in data-driven online market. Thus, conventional approach of competition law may not cover these behaviours because competition law itself is ambiguous that whether such these unfair trade practices should fall under its control. These challenges require a careful implementation of law to determine if those distinct anticompetitive behaviours exist, how competition law can effectively address and regulate it. Therefore, this article examines the potential anticompetitive effects of these unfair trade practices and scrutinises the provisions of Trade Competition Act 2017 of Thailand to capture such these practices.

2. Personalised Pricing Practice

It is undeniable that nowadays the advancement of technology and data analytics has allowed online companies to have greater access to consumers' personal data. Not only they can collect traditional information such as gender, age, or education level, but they can also gather data about consumers' online activities, including the websites they visit, search queries, and online purchases. This extensive collection of personal data opens up various possibilities for businesses, including real-time price adjustments based on demand fluctuations, and personalised pricing. Including the emergence of big data in the last decade, the cost of collecting data at the individual customer level has significantly decreased. This has made it easier for firms to implement personalised pricing strategies and target customers with customised pricing plans (The White House 2015).

Personalised pricing refers to the practice of charging different customers different prices for the same product or service based on their personal behaviour. In other words, personalised pricing is a category of price discrimination which has become a highly debated topic in the context of the rapid growth of the digital economy. As well as it considerably debates in the context of competition law whether it should be regulated. This is because on the one hand price discrimination has the potential to benefit both sellers and low-end consumers by improving welfare, on the other hand, many members of the public view price discrimination as unfair and a potential threat to trust in digital markets (Bourreau *et al* 2017). On the side of low-end consumers opine that this is not necessarily harmful to welfare and consumer surplus, as it has the potential to make products more affordable for many consumers and improve sales for businesses, also society today is more accepting of wealthier individuals paying higher prices (Bourreau *et al* 2017). However, there are others who argue that price discrimination has been criticised as unethical (Bourreau *et al* 2017). A survey conducted among 1,500 U.S. households revealed that 91 per cent of respondents objected to retailers charging different prices for the same product using personal information (Bourreau *et al* 2017).

Additionally, the report of French and German competition authorities addressed that, from the negative side, price discrimination is often viewed as an unfair breach of consumer equality due to some consumers have to pay higher prices for their purchases than in the absence of discrimination (Autorité de la Concurrence and Bundeskartellamt 2016). As this grey area of it brings about a challenge in implementation of competition law that whether price discrimination is within the scope of competition law. One may argue that price discrimination is within the scope of competition law due to it is unfair to the public and it usually committed by companies with powerful market dominance. As the joint report of French and German competition authorities mentioned that a significant condition necessary for companies to implement an effective price discrimination strategy is market power, without any market power the company is not able to charge prices higher than the cost of producing and to set its prices in reference to the willingness to pay of consumers (Autorité de la Concurrence and Bundeskartellamt 2016). Further, it is arguable that every single consumer has equality in purchasing no matter what he or she is in prosperous area or the poorer area. If a consumer pays different price for the same source of a homogenous product, the firm' s conduct in charging different price seems to be arbitrary and infringes to consumer equality. One goal of competition law is to protect consumer welfare does not mean that the law discriminates by protecting someone and leaving others. Hence, there is no reason why competition should ignore the personalised pricing and do not protect consumer welfare as a whole. This subsequently would lead to the questionable problem that how does competition law regulate such this practice, and how to classify this practice in the category of anticompetitive behaviour provided by law. To find the answer it should determine whether price discrimination affects consumers, and what type of misconduct of this practice should be classified in the context of competition law.

2.1 The multi-dimensional effects of personalised pricing

Some scholars note that there is economic benefit of personalised pricing as it can increase allocative efficiency by serving low-end consumers who would otherwise be underserved (Hutchinson & Treščáková 2022). To illustrate this positive effect, taking into consideration on the example of a one-litre bottle of milk with a market price of USD 3. If we have two consumers, A and B, A is willing to pay up to USD 5 for the milk, while B is only willing to spend USD 2. With a uniform pricing system, only A would purchase the milk, resulting in a revenue of USD 3 for the supplier. However, if the company is allowed to personalise prices, both A and B can purchase the milk at their personal reservation prices. This means that A will pay an amount between USD 3 and USD 5, while B will pay an amount between USD 1 and USD 2. As a result, company's revenue increases to USD 5 instead of USD 3 under a uniform pricing system. This demonstrates that personalised pricing allows for a more efficient allocation of resources. Low-end consumers like B are better served, and sellers significantly increase their sales (Hutchinson & Treščáková 2022). Based on this example, it can be inferred that there is no economic rationale for banning personalised pricing outright (Hutchinson & Treščáková 2022). It has the potential to benefit both consumers and sellers by increasing sales (Bourreau *et al* 2017). However, personalised pricing is still met with scepticism by a majority of the public.

A survey conducted in the United States revealed that American adults overwhelmingly consider all forms

of price discrimination to be "ethically wrong" (Turow 2005). Similarly, in Europe, a survey published by the European Commission found that 20 per cent of respondents had reported negative experiences related to personalised pricing (European Commission 2018). These findings indicate that there is a general mistrust and disapproval of personalised pricing practices among consumers.

When taking a closer look in the negative side, price discrimination can be source of harm to consumer welfare. Firstly, while it may lead to welfare improvement for low-end consumers and sellers, but it can result in a loss of welfare for some consumers, particularly high-end consumers (Hutchinson & Treščáková 2022). This is because it charges wealthier consumers more than the uniform pricing system. To mention the upper area group, it does not mean that they are rich because personalised pricing relies on the behavioural activities via online, so no one should pay high price under regulating of competition law. Also, consumer surplus from the low-end group does not transfer to the high-end ones but transfer to the company only and at the same time company can take profit surplus from high-end group. This is apparent that the company takes advantage of all groups of consumers. Secondly, personalised pricing makes it challenging for consumers to discover a general market price and assess their options (Hutchinson & Treščáková 2022). For example, if a customer notices price discrimination on Amazon marketplace, they may choose to switch to a competitor's platform. However, if many retailers engage in personalised pricing, it becomes increasingly difficult for consumers to find a competitive benchmark or determine the fair market price. That means they would be trapped with the high prices while they did not aware. Thirdly, personalised pricing effectively transfers all the surplus that high-end consumers would have gained to sellers and producers. This raises concerns for competition authorities who prioritise the protection of consumer welfare. By shifting the surplus to sellers, personalised pricing may create an imbalance in the market and potentially harm consumer interests (Hutchinson & Treščáková 2022).

2.2 Competition approach to personalised pricing

As mentioned above that the condition reinforces the achievement of personalised pricing is market power of firms, that means whether they are abusing their dominances. Subsequently, the focal point of the challenge posed by price discrimination depends on which antitrust approach of abuse of dominance in each jurisdiction based on: -exclusionary abuse or exploitative abuse. It has been found that in countries that investigate exclusionary abuses and apply a total welfare standard, the likelihood of personalised pricing being considered a competition risk is low, but when taking consideration on the other hand the risk of price discrimination is high in jurisdictions that prosecute exploitative abuses and prioritise consumer welfare (Hutchinson & Treščáková 2022).

Under the scope of competition law, it has to assess personalised pricing that whether such this practice is to be considered as an abuse of dominance when carried out by a firm with a dominant position. In most jurisdictions, there are three basic conditions to be met in order to qualify the anticompetitive behaviour as an abuse of dominance (Hutchinson & Treščáková 2022).

1. Dominant position: In order to consider such behaviour as an abuse of dominance, the company involved must be in a dominant position on the relevant market and have market power that can unilaterally harm the competitive process.

2. Categories of abuse: The conduct under consideration should fall into a category of abuse provided for by law. There are two main categories of abuse: exclusionary and exploitative. Exclusionary abuses refer to behaviours by dominant firms that are likely to have a foreclosure effect on the market, denying access or expansion to potential competitors (Hutchinson & Treščáková 2022). Exploitative abuses involve attempts by a dominant undertaking to use its market strength to harm consumers, such as through unfair commercial terms, excessive pricing, or price discrimination (Hutchinson & Treščáková 2022). It is worth noting that exclusionary abuses, such as predatory pricing or refusal to supply, are typically enforced in competition law, while exploitative abuses are not prosecuted in most countries (Hutchinson & Treščáková 2022). For example, in the United States, exploitative abuses are not contemplated by antitrust law, while in the European Union, abuses of exploitation are investigated (Hutchinson & Treščáková 2022).

3. The behaviour must not lead to efficiency gains that offset any anticompetitive effects. This evaluation is done by using an "effects-based approach," which means that if a behaviour does not by itself constitute an infringement, it must be assessed on a case-by-case basis by using the "rule of reason" (Hutchinson & Treščáková 2022). This assessment involves assessing both the potential anticompetitive effects and the efficiency gains resulting from the behaviour. If the potential anticompetitive effects outweigh the efficiency gains, then the behaviour will be considered an abuse of a dominant position and an infringement of competition law.

In economic point of view when consumers pay less price than they are willing to pay, it brings about consumer surplus which conflicts to benefit of sellers or manufacturers (Pettinger 2018). Firms thus take this surplus from consumers to maximise their profits, and one way to reduce or eliminate consumer surplus is to engage in price discrimination (Pettinger 2018). It means sellers or manufacturers will charge the consumers

with the highest price they are willing to pay for a product or service. This way will transfer consumer surplus to sellers or manufacturers. Consumer surplus is an important indicator of whether there is a competitive market or not because in competitive market companies have to keep price relatively low for allowing consumers to gain consumer surplus (Pettinger 2018). Indeed, when consumers pay less price than they are willing to pay, it enables consumers to purchase a wider choice of products. On the other hand, if the market were not competitive, the consumer surplus would be less and there would be greater inequality (Pettinger 2018). It could state in another way that personalised pricing decreases total welfare through consumers' benefit. When assessing effect based on economic point of view personalised pricing may be more likely to have detrimental effects on consumer welfare and could be considered a violation of competition law (Pettinger 2018).

2.3 Implementation of Trade Competition Act 2017 of Thailand

When taking into consideration provisions of unfair trade practice and abuse of dominance under Trade Competition Act 2017, personalised pricing practice is not fall under the scope of both provisions. This is because the unfair trade practice' s provision of Section 57 cannot be applied to anticompetitive practice regarding personalised pricing. Due to Article 57 stipulates that:

"A business operator shall not carry out any act which prejudices **other business operators** in any of the following manner.

(2) unfairly exploiting superior market power or bargaining power." (emphasis added).

It means unfair trade practices of undertaking under the provision of Section 57 applies to business-to-business relations, whereas personalised pricing is the unfair practice conducted against consumers. Also, this practice cannot be regulated by the provision of abuse of dominance. According to Section 50(1) the abusive manner of unreasonably fixing purchasing or selling prices of goods or fees for services includes price discrimination (The Trade Competition Commission Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position 2018). According to Article 5 paragraph 3(a) of Guidelines for the Assessment of Practices by an Undertaking with Dominant Position stipulates that "Price Discrimination in which buying or selling prices of a product or service are determined or maintained differently for trading parties, as either one of the following: (a) Setting buying or selling prices of an identical product or service differently to different trading partners…". It means that price discrimination is a form of charging purchasing or selling prices of a homogeneous product or service differently to different trading partners. Therefore, Section 50(1) of Trade Competition Act 2017 of Thailand also cannot be applied for regulating personalised pricing which charges different price to different consumers, unless it could be interpreted the definition of trading partners would include final user as the consumers.

However, when comparing the context of provision of abuse of dominance between Trade Competition Act of Thailand and TFEU of the European Union, they are different since the provision of Article 102 TFEU is more flexible. It is worth studying to have a closer look at Article 102(c) of the Treaty of the Functioning of the European Union (TFEU 2012), which can be used to determine whether personalised pricing can be considered an abuse of a dominant position. This provision states that a firm in a dominant position engages in an abuse when it applies "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." In the context of price discrimination, it means that if a company with market dominance offers different prices or conditions to different customers for the same product or service, the practice is considered as a violation of Article 102(c) (Hutchinson & Treščáková 2017). Even the provision of Article 102(c) uses the word 'trading parties', but it is important to bear in mind that the provisions of Article 102 are not exhaustive, and it does not impose a general prohibition on personalised pricing that means it is not unlawful per se, it can be considered abuse of dominance subjected to an effect test. In the EU, personalised pricing could potentially be assessed as an exploitative abuse if it can be proven that higher prices are charged to some consumers without any justified cost reasons (Hutchinson & Treščáková 2017). Further, the protection of consumer welfare is prioritised by the EU Commission, thereby personalised pricing may be more likely to have detrimental effects on consumer welfare and could be considered a violation of competition law (Hutchinson & Treščáková 2017). In addition, some scholar addresses that personalised pricing could imply a discrimination between high-end and low-end consumers willing to purchase the same product or service, such this practice could potentially fall under the qualification of "dissimilar conditions to equivalent transactions" mentioned in Article 102 (c). Though, since those dissimilar conditions apply to "business partners", but it has a possibility that courts would interpret this part of Article 102 (c) as applying to business-to-consumer relationships (Hutchinson & Treščáková 2017).

3. Self-Preferencing Practices

Self-preferencing is the practice that a dominant platform gives preferential treatment to its own products or services when competing with other offerings on the same platform in particular the dominant firm is the online platform's operator. Firms serving as an intermediary platform, which gather sellers or retailers to connect with

consumers for having transactions in their online marketplaces, may engage in a various tactics for making sellers or retailers to be in line with the terms and condition they set. For instance, the firm may threaten sellers to remove a company from the product detail page of its website or to list the company as out-of-stock (Lancieri *et al* 2021). By the superior bargaining position in the framework of the big marketplace's provider, the sellers or retailers who wish to reach network effects of the online marketplace will accept such unfair terms and conditions. Some intermediary platform provider has two roles in the platform; one is an online marketplace's operator another is a role of a seller or a retailer. A firm can use its dominant position in one market to favour its products in a related market. According to the role of online market platform's provider which can control all information that be collected through its platform putting itself in advantageous competition by the imposition of unfair trading conditions with its customers. Firms that control data may use accessing to third-party data to favour its own business in the marketplace such as the search engine platform operator may put its own one on the best ranking or top of page result which increases its traffic and decreases competitors' traffic. Sometimes, a marketplace platform operator may use non-public data derived from sellers that sell products on its marketplace to promote its own offers or even demote competitors' products. This behaviour amounts to self-preferencing which is the ability of a company to give preferential treatment to its own products or services when they are in competition with products and services provided by other sellers or retailers (Hutchinson 2022). The practice affects not only to exclude potential competitors from the relevant market, but also can be highly damaging for consumers who have been prevented from making free choices between a platform's service and competitors' services

3.1 The multi-dimensional effects of self-preferencing

When taking into consideration the impact of self-preferencing in particular on consumers' side is ambiguous because it may result in both positive and negative welfare effects depending on factors such as quality competition versus price competition (Sariçiçek 2020). As positive effects can give consumers purchase on low prices sometimes, but it is observed that consumers have negatively affected because of not seeing the most relevant results for their queries and innovation is negatively affected since the rivals are disincentivised from innovation, as they did not expect to attract a sufficient volume of user traffic to compete with the dominant platform (*Google Search (Shopping)* case 2017). Hence, the precise effects and implications of self-preferencing are complex and can vary depending on the specific context.

Subsequently, theories of harm would fit into this framework as provided illustration in the investigation of EU Commission to determine the conduct in *Google Shopping* case. The theories of harm in cases concerning self-preferencing or leveraging have two central elements: foreclosure and consumer or user harm (Hunt *et al* 2022). Foreclosure refers to the exclusion of current and potential rivals in the market where the ancillary service is provided, which can occur through reduced access, increased costs, or diminished incentive to innovate (Hunt *et al* 2022). This can distort competition in the downstream market to the benefit of the platform operator's vertical affiliate (Hunt *et al* 2022). Further, when a company engages in self-preferencing, it can create an uneven playing field and disadvantage its rivals that can lead to a distortion of competition in upstream market where it is a direct competitor, and in downstream markets where the company may have an indispensable input (*Microsoft Corp. v Commission* 2007; *Amazon Marketplace* case 2020). In the case of Google Search, it acts as an upstream supplier of "traffic" which is an important input for comparison-shopping services including Google Shopping. Google's practice of demoting the organic ranking of rival comparison-shopping services and only allowing Google Shopping to have a prominent position on the search engine results page could be seen as a form of input foreclosure *(Google Search (Shopping)* case 2017). This conduct foreclosed rivals by reducing their supply of free clicks from the search engine results page and increasing the supply of free clicks to Google Shopping. It also increased costs for non-affiliated comparison-shopping services as they had to rely more on paid clicks through purchasing search advertisings *(Google Search (Shopping)* case 2017). The self-preferencing theory of harm focuses on how it harms to consumers materialises, in the case of Google Shopping, the EU Commission found that Google's conduct could lead to higher fees for merchants and higher consumer prices if merchants reflected the higher fees in their own prices *(Google Search (Shopping)* case 2017). Additionally, the Commission found that the conduct negatively affected consumers due to it could diminish consumers' ability to access the most relevant comparison-shopping service, as Google's comparison-shopping services did not always show the most relevant results and some consumers may not have been aware of this *(Google Search (Shopping)* case 2017). The EU Commission also stated that innovation was negatively affected as rivals were disincentivised from innovation due to not expecting to attract sufficient user traffic to compete with Google (*Google Search (Shopping)* case 2017). Also, Google did not have the motivation to improve its own service or innovate due to not competing on merits, this indirectly harming consumers through reduced quality or relevance (*Google Search (Shopping)* case 2017). It is important to note that European Commission tends to focus more on the evidence of foreclosure rather than actual consumer harm (Hunt *et al* 2022). This may be because it can be challenging to demonstrate harm to consumers in the context of digital platforms, especially when many

platforms offer their services for free or when the harm is indirect and dynamic in nature (Hunt *et al* 2022).
The European Commission opened the proceeding in 2010 and finally adopted a prohibition for decision in 2017 (*Google Search (Shopping)* case 2017). This decision resulted in a significant challenge for proving that Google's biased algorithm favoured its own products, as it required a substantial number of resources to be invested in order to successfully build a case (Sariçiçek 2020). This case demonstrates the potential harm of self-preferencing practices and the need for regulatory intervention to protect competition and consumer choice (Signoret 2020). In short. even self-preferencing can be abusive conduct under the EU competition law, but it is challenging for the competition authority to find negative effects on competition for outweighing the prohibition of such practice.

3.2 Competition approach to self-preferencing practices

Self-preferencing can be seen as a form of leveraging, where a dominant firm leverages its market power to gain an advantage in a separate market (Cremer *et al* 2019). In the context of the digital market like cases of *Amazon Marketplace* and *Google Shopping*, self-preferencing occurs when Amazon promotes its own products over those of third-party sellers on its online marketplace, or Google demotes the ranking of rival comparison-shopping services. This can create an unfair advantage for the dominant platforms and disadvantage others. The concern is that self-preferencing can be used as a tool to extend market power and restrict competition, which can have negative effects on innovation and customer choice. However, there are problems when handle with this practice; one is an exhaustive list of exclusionary behaviour, in some jurisdictions, that does not cover self-preferencing practice, another is that, in some jurisdictions, self-preferencing is found to be abusive, but it is subjected to an effect test.

In the case that self-preferencing does not fall within the exhaustive list of exclusionary behaviour. The competition law of many countries, including Thailand, specifies the behaviour’s list of abuse of a dominant position. This means that if new forms of exclusionary abuse arise, the law cannot extend its regulation beyond the exhaustive list provided by law. Even though self-preferencing is a common practice occurring not only in the digital economy, but also it occurs in the brick-and-mortar business. However, the self-preferencing practice in the digital market by using acquired third-party sellers’ data to manipulate the ranking in favour of its own products in the relevant market. By this way dominant platforms take advantage from data they hold to give preferencing to their own products that can be seen as the new form of abuse due to it is not competition on the merit. Especially, in the era that technology and algorithm is advanced including online platforms are in the data-driven market, it is easy for the dominant firms to have self-preferencing practices. Furthermore, digital platforms, like Amazon or Google that one of its roles acts as an intermediary in a market that has the authority to regulate the rules governing interactions on their platforms – as it can regulate the access to and exclusion from the platform; how to offer products, access to data generated on the platform (Cremer *et al* 2019). When these platforms have a dual role, it means they both facilitate transactions and display product rankings, thereby it is a possibility for abusive self-preferencing (Cremer *et al* 2019). Therefore, when the conventional approach of competition law does not give significance to the benefits that data can generate, it thus may not be aware of this type of practice.

In the better case, competition law of some jurisdictions provides the flexible provision to cope with all types of exclusionary behaviour. TFEU Article 102, for instance, according to Article 102(c), if a company applies different conditions to equivalent transactions with other trading parties, which places them at a competitive disadvantage, it may be considered an abuse (Cremer *et al* 2019). However, it is important to note that Art. 102 does not impose a general prohibition on self-preferencing that means it is not abusive per se, but if self-preferencing is found to be abusive and without any pro-competitive rationale, it can be considered a violation subjected to an effect-based approach (Cremer *et al* 2019). This means that the competition authority has to assess both the potential anticompetitive effects and the efficiency gains resulting from the behaviour. If the potential anticompetitive effects outweigh the efficiency gains, then the behaviour will be considered an abuse of a dominant position and an infringement of competition law.

Certainly, if taking into consideration of an effect test it is likely to result in a leveraging of market power to restrict competition so self-preferencing could be abusive (Hutchinson 2022). Some EU cases noted that self-preferencing can be held as abuse of a dominance if dominant firms leveraged their position to a separate market instead of competing on merits (*Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* 1974;. *Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB*) 1985). *Google Shopping*, for example, the EU Commission investigated practices on Google that involve unlawful self-preferencing. On a matter of fact shown that Google had a market dominant position because Google’s search engine held market share exceeding 90 per cent, also because its network effects gave rise high barrier to entry in comparison shopping markets. Thus, the EU Commission observed that the company exploited its powerful market position to promote its own comparison-shopping service in search results, while demoted those of competitors (European Commission 2015). This practice is a

form of an abuse of a dominant position by restricting competition (European Commission 2015). The EU Commission further observed that the Google's conduct had the potential of impeding competition in the comparison-shopping search because its services were an irreplaceable source of traffic which is essential ability for competing in the comparison-shopping search market (Google Search (Shopping) case 2017). This Google' practice increased the traffic of its products as Google Shopping as well as its revenues had been increased, while the traffic and revenue of its competitors decreased. After taking into account the effect test for finding the impacts of its practice the European Commission concluded that the Google's practice had deterred competition on the merits for comparison shopping markets and unlawfully protected its dominant position in general search (*Google Search (Shopping)* case 2017).

3.3 Implementation of Trade Competition Act 2017 of Thailand

In the context of Trade Competition Act 2017 of Thailand self-preferencing could be regulated under provisions of abuse of dominance if a firm is dominant, or provisions of unfair trade practice. However, when taking into consideration of Section 50 abuse of dominance which governs four types of abusive manners. First, the conduct of unreasonably fixing purchasing or selling prices of goods or services which are (1) predatory pricing; (2) price below cost; price discrimination; (3) margin squeeze; and (4) excessive pricing. Second, the conduct of fixing conditions in an unfair manner requiring its trade partners to restrict services, production, purchase or distribution of goods which are (1) exclusive dealing; (2) resale price maintenance; (3) tying; and (4) refusal to supply. Third, the conduct of suspending, reducing or restricting services, production with an object to reducing the quantity lower than the market demand. Fourth, the abusive conduct of intervening in the operation of business of other persons without justifiable reasons (The Trade Competition Commission Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position 2018). However, self-preferencing is not fall under scope of these four types of prohibited conduct. According to an exhaustive list of exclusionary abuse that is in Guidelines for the Assessment of Practices by an Undertaking with Dominant Position does not cover self-preferencing practice. It means that competition law regime of Thailand cannot be extended its regulation to apply for this such new form of exclusionary abuse.

Unfair trade practice' s provision of Section 57 governs four types of prohibited unfair practices which are:

(1) unfairly restricting other trade partners' businesses such as price discrimination or restricting rights of other trade partners in a mandatory manner without due cause.

(2) unfairly exercising market power or superior bargaining power over trade partners.

(3) unfairly imposing restrictive or obstructive trading conditions on other trade partners' business such as discriminatory trading conditions for different undertakings.

(4) carrying out any other action prescribed by the Notification of the Commission which are unfair practice in franchise business, fruit trading, and unfair trade practice in particular between retailers and distributors or producers.

When taking into account the above four types of unfair practice, self-preferencing could fall under a scope of type (2) of Section 57. Trade Competition Commission of Thailand's Guideline for the Assessment of Unfair Trade Practices Resulting in Damage to Other Undertakings (the Guideline) gives a list of aspects of unfairly exercising market power or superior bargaining power which includes the conduct of requirement for trading partners to offer trading or other benefits to the firm in question without due cause. In other words, a firm that has market power or superior bargaining power imposes contract terms or conditions to require its trading partners to allow the firm taking some benefits over them is prohibited under Section 57(2). For example, a case study of *Amazon Marketplace* (Case AT.40462 2022), Amazon makes agreement with sellers, that rely on its online marketplace for their selling, allowing its retail business to analyse and use third party sellers' data to promote its own products with better prices and offering consumers. It could state that where a large online platform' s firm enjoys a position of superior bargaining power, and other parties are economically dependent on the online market platform of the firm. The counterparties have to accept such unfair terms and conditions which make the firm has competitive advantage over its competitors.

However, such practice infringes Section 57(2) only when the firm, which commits specified unfair practice, must have 'market power or superior bargaining power' over another firm. Assessment of the position of being market power or superior bargaining power is crucial for determining the unfair practice under Section 57(2). When taking a closer look at a scope of which firms have 'superior bargaining power', it needs to consider the given definition by the Guideline. According to the Guideline firms with 'superior bargaining power' is assessed by the value of transaction which is buying or selling of goods or service between trading partners and the firm which is alleged having superior bargaining power. The firm would have superior bargaining power (i) where the revenue of the one with lesser bargaining power at least 30 per cent comes from the transaction with the firm with superior power, or (ii) 10 per cent or higher but less than 30 per cent of the revenue of the one with lesser bargaining power comes from the transaction with the firm with superior power, and the trading partners is implicitly acquiescent because no alternative suppliers, or dealing with an alternative one may incur significant

operating expenses exceeding benefits from dealing with an existing supplier (The Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices Resulting in Damage to Other Undertaking 2021). In other words, to assess the position of superior bargaining power it based on how significance of the trading partners rely on doing business with the firm with superior bargaining power which assessed by the value of transaction between them. If the value of transaction is high it is likely that the trading partners have to unavoidably accept unfair practice of the firm with superior bargaining power. As for the market power, according to the guideline it shall be assessed from an ability of a firm to determine price, quantity, or trading terms and conditions in a market, it shall be presumed that a firm with a market share of 10 per cent or higher is deemed to have market power (The Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices Resulting in Damage to Other Undertaking 2021). Thus, the infringement of Section 57(2) depends on the position of online platform's operator in question. If it is a large online platform' s operator like Amazon or Google which one of its roles acts as an intermediary in a market that have the authority to regulate the rules governing interactions on their platforms – as it can regulate the access to and exclusion from the platform, it can address that it has market power, but if the platform's operator is not large enough, it needs to assess whether the firm has superior bargaining power which may bring about a concern that if the value of transaction between them is lesser than the criterion set forth in the guideline, consequently, Section 57(2) cannot be applied. Furthermore, as the example of Amazon case, Amazon does not deal any transaction of selling or buying of goods with the retailers in its marketplace. Hence, when applying Section 57(2) to self-preferencing practice of online platform' s operator, only the market power shall be assessed. It can conclude that it cannot precisely address that Section 57(2) of Trade Competition Act can effectively apply to regulate unfair trade practice regarding self-preferencing because it may face an obstacle to meet with the criterion of assessment of superior bargaining power' s position.

4. Conclusion

If unfair trade manners such the self-preferencing which favours a dominant firm more than rivals, and personalised pricing practice, which have adverse effects to consumers, are not perceived and unchecked, it may have a greater adverse effect on the competitive market. The long-run consequence of these anticompetitive behaviours may not simply be higher price, but foregone innovation, and potential competitors. It is the responsibility of competition law to ensure that dominant firms do not directly and indirectly harm both counterparties and consumers with unfair practices, which they can simply impose due to their market power. Competition law, when sufficiently adjusted its content and approach can deter anticompetitive behaviours of online firms and keep competitive portal open. Indeed, the prohibition of all these behaviours increases fair competition in the market resulting in fair prices and practices, and thereby benefits the consumers. When the competitive portal opens and expands during the competitive environment can foster significant innovation, as well as maintain economic and consumer welfare. Therefore, it is a big challenging task for Thailand's legal providing to address and deal with those new forms of abuse of a dominance that happen in the digital economy.

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