

## Can State Agencies Engage in a non-core Business? - The Case of the MEA and its Proposed Telecommunications Services

A non-core business of a State agency (e.g. State Enterprises, Government agencies etc.) may be a business which competes with the business of the private sector. Competition between the business of a State agency and the private sector is an issue which has long been considered, as it raises issues from both commercial and constitutional perspectives.

To avoid unfairness caused by the State's advantages and to maintain a level playing field, the principle was upheld under the Constitution that the State cannot operate a business in competition with the private sector except in necessary cases. Questions are therefore frequently raised as to whether a certain activity can be undertaken by a State agency; many by the State agency themselves before taking on a non-core business. Opinions are usually sought from the government's legal arm, the Council of State (the "**Council**").

In its recent opinion No. 696/2553 (2010), the Council provided its view in relation to the scope of the telecommunications business which can be directly operated by the Metropolitan Electricity Authority (the "**MEA**"), where it considered the MEA's scope of objectives and MEA laws. In its opinion, the Council also commented on constitutionality of the proposed activity.

### What were the activities proposed by the MEA?



The MEA proposed to provide telecommunications services through its optical fiber cables and other equipment. The proposed telecommunications services to be provided to the public include virtual private network service (VPNs) and public broadband multimedia service, which are services already licensed by the National Telecommunication Commission (NTC). The objective is to create higher benefit and avoid redundant investments. In addition, it was noted that these proposed services would not affect its usual electrical services and number of personnel.

**The MEA therefore decided to check the legality of the proposed activities with the Council; whether it conflicted with the MEA Act.**

### What is the MEA authorized to do under the Act?

Under Section 6 of the MEA Act, the main objectives for the establishment of the MEA include among others:

- (i) procurement and sale of electricity; and
- (ii) carry out electricity business, and other related businesses or businesses which benefit the MEA.

The MEA also has power to construct, purchase, sale, lease, lease-out, lend, and etc. under Section 13 of the MEA Act.

## Can the MEA be telecommunications service provider?

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กระทรวงพาณิชย์  
การไฟฟ้านครหลวง  
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The Council ruled that other related business under Section 6 of the MEA Act must be those businesses relating to electricity. Additionally, businesses which benefit the MEA must also be those businesses which benefit the main business of the MEA, which is that concerning electricity.

The proposed activity of providing the telecommunications services to the public is a proposal by the MEA to act as a telecommunications service provider.

**As a State Enterprise established under the MEA Act, the MEA's business can only be those authorized and specified in its main objectives. The proposed services are not those within the scope of objectives specifically provided under Section 6 of the MEA Act.**

## Is there a potential breach of Section 84 (1) of the Constitution?

The Council also commented that **interpreting the definition of "businesses which benefit the MEA" under Section 6 of the MEA Act without any limitation may result in a breach of Section 84 (1) of the Constitution.** The rationale is that State Enterprises are established for the main purpose of maintaining national security, safeguarding public interests or providing public utilities, the State must therefore set the main objectives for each State Enterprise.

**The proposed activity of providing the telecommunications services by the MEA cannot be operated as it does not fall within the scope of the MEA's objectives, which are those related to the electricity business.**

## Are there any exceptions for non-competition under the Constitution?

Under Section 84 (1) of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) (the "**Constitution**"), a State agency may engage in a business which competes with a business of the private sector if necessary for the purpose of:

- (i) maintaining national security;
- (ii) safeguarding public interest; or
- (iii) providing public utilities.

## Comments and Other Examples

This opinion again clearly indicates that the operation of State Enterprises must be limited to a non-core business. Also, they are governed not only by the State Enterprises' laws, but the non-competition principle under Section 84 (1) of the Constitution.

In addition, there have been other earlier occasions where it has been viewed by the Council that a State agency cannot engage in a non-core business which competes with that of the private sector such as:

- All activities of the Provincial Administrative Organization must be those provided in its objectives and authority under the laws. Investment, establishment and management of NGV stations are not actions within the Provincial Administrative Organization's objectives and authority. Therefore, it is unable to undertake such service.

- The Sub-district Administrative Organization's proposed action of purchasing tractors to provide rice harvesting services to farmers within the sub-district area and trailers to provide transportation services for the tractors is not within the scope of its establishing law, and is an action of providing services to the public which is an activity undertaken by the private sector, and may therefore be a business which competes with the private sector.
- The Marketing Organization's activity of rice export for profit is not included in the Marketing Organization's scope of business under its establishing law. Therefore, it is unable to undertake such activity.

**Therefore, if you are wondering whether a State agency is engaging in a non-core business and whether it is competing with your business, these principles would be the basic tools for your initial investigation.**

**For more information,  
please contact:**

Wanchai Yiamsamatha, Partner  
Administrative and Constitutional Law Practice Group  
Email: [wanchai@lshorizon.com](mailto:wanchai@lshorizon.com)

April Marie Rungsang, Associate  
Email: [april@lshorizon.com](mailto:april@lshorizon.com)

Tel: 662 627 3443  
Fax: 662 627 3250



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