

# **Summary of Constitutional Court Ruling\***

## **No. 10/2556 (2013)**

**Dated 10<sup>th</sup> July B.E. 2556 (2013)**

**Re: Whether or not section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) was contrary to or inconsistent with section 39 paragraph two, section 40(5) and section 30 of the Constitution.**

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### **1. Summary of background and facts**

The Saraburi Provincial Court referred the objections of the third to eleventh defendants (Mr. Pitch Potaramik and others, a total of 9 defendants) in Criminal Black Case No. 4659/2552 to the Constitutional Court for a ruling under section 211 of the Constitution. The objections stated that the provisions of section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) provided a legal presumption resulting in the third to eleventh defendants as authorized directors of the first and second defendants, as the case may be. The prosecution was not required to prove the actions or intents of the third to eleventh defendants. Thus, the actions of the first and second defendants, as the case may be, which were juristic persons and other persons, were not applied as conditions for a factual presumption which constituted elements of an offence. This presumption was inconsistent with the rule of law. In addition, the provision drew the defendants into the criminal justice process as suspects and defendants, and thereby imposing restrictions of certain rights and liberties, such as arrest or detention, without reasonable evidence. Moreover, the third to eleventh defendants, as company's directors, were denied safeguards in regard to proof of innocence on the same basis as the first and second defendants, which were companies. Section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) was therefore contrary to or inconsistent with section 39 paragraph two, section 40(5) and section 30 of the Constitution.

The Saraburi Provincial Court found that section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) was a provision of law, which the court may to apply to a case and there had not yet been a ruling of the Constitutional Court in regard to such provision. The objections of the third to eleventh defendants were therefore referred to the Constitutional Court through official channels for a ruling under section 211 of the Constitution.

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\* Published in the Government Gazette Vol. 130, Part 90a, dated 8<sup>th</sup> October B.E. 2556 (2013).

## **2. Preliminary issue**

The preliminary issue considered by the Constitutional Court was whether or not the Constitutional Court had the competence to admit this application for a ruling under section 211 paragraph one of the Constitution.

The Constitutional Court found as follows. This application raised an objection that section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) was contrary to or inconsistent with section 39 paragraph two, section 40(5) and section 30 of the Constitution. The Saraburi Provincial Court may apply such provision of law to a case and there had not yet been a ruling of the Constitutional Court in relation to such provision. The case was in accordance with section 211 paragraph one of the Constitution in conjunction with clause 17(13) of the Rules of the Constitutional Court on Procedures and Rulings B.E. 2550 (2007). The Constitutional Court therefore ordered the admittance of this application for consideration.

## **3. The issue considered by the Constitutional Court**

The issue considered by the Constitutional Court was whether or not section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) was contrary to or inconsistent with section 39 paragraph two, section 40(5) and section 30 of the Constitution.

The Constitutional Court found as follows. Section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001) provided a legal presumption of the defendants' guilt. The prosecution was not required to prove the actions or intent of the defendant from the outset. The wrongdoing of another person was applied as a condition for a presumption of the defendants' guilt and criminal liability. This finding followed from a presumption that in the event where a wrongdoer was a juristic person, the managing director, manager or any person responsible for the juristic person's operations shall be jointly be liable with the offending juristic person, unless it could be proven that such action was committed without one's knowledge or consent. The prosecution was not required to prove the actions or intent of the managing director, manager or person responsible for the operations of the juristic person as regards the nature of involvement in the wrongdoing of the juristic person. The only proof required was the juristic person's wrongdoing under this Act and that the defendant was a managing director, manager or any person responsible for the operations of such juristic person. Thus, there was a presumption of the involvement of the managing director, manager or any person responsible for the operations of the juristic person in the juristic person's commission of wrongdoing. As a consequence, the burden of proof was shifted to the managing director, manager and persons responsible for the operations of the juristic persons. This section provided for a presumption of guilt of a suspect or defendant in a criminal case on the basis of a person's status. This was not a presumption of facts constituting certain elements of an offence following the plaintiff's proof of certain actions relating to the offence alleged by the defendant. The provision was also inconsistent with the rule of law

which stated that a plaintiff shall bear the burden of proving all the elements of a defendant's offence. In addition, such provision drew a person into the criminal justice system as a suspect and defendant, thereby possibly restricting such person's rights and liberties, such as by arrest or detention, without reasonable preliminary evidence that such person had committed or had any intent relating to the alleged wrongdoing. Hence, section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001), in relation to the presumption of criminal wrongdoing of a suspect and defendant without a finding that the suspect and defendant had committed or had any intent in regard to the wrongdoing, was therefore contrary to or inconsistent with section 39 paragraph two of the Constitution.

The Constitutional Court, by five Constitutional Court Justices, namely Mr. Wasan Soipisut, Mr. Jarun Pukditanakul, Mr. Chalermpon Ake-uru, Mr. Chut Chonlavorn and Mr. Boonsong Kulbupar, held that section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001), only in regard to the presumption that the managing director, manager or any person responsible for the operations of a juristic person shall have joint criminal liability with the juristic person without any finding of an action or intent relating to the commission of wrongdoing by the juristic person, was contrary to or inconsistent with section 39 paragraph two of the Constitution.

Three Constitutional Court Justices, namely Mr. Charoon Intachan, Mr. Nurak Marpraneet and Mr. Suphot Khaimuk held that section 78 of the Telecommunications Business operation Act B.E. 2544 (2001) was neither contrary to nor inconsistent with section 39 paragraph two, section 40(5) and section 30 of the Constitution.

#### **4. Ruling of the Constitutional Court**

The Constitutional Court held that section 78 of the Telecommunications Business Operation Act B.E. 2544 (2001), only in regard to the presumption that the managing director, manager or any person responsible for the operations of a juristic person shall have joint criminal liability with the juristic person without any finding of an action or intent relating to the commission of wrongdoing by the juristic person, was contrary to or inconsistent with section 39 paragraph two of the Constitution. The provision was unenforceable under section 6 of the Constitution. Upon this finding, there was no further need to decide on whether or not such provision of law was contrary to or inconsistent with other sections of the Constitution.

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