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Franchise Guidelines under Thailand's Updated Trade Competition Act

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1. Introduction

Recently, there has been much discussion in Japan concerning various affects of the Antimonopoly Act on franchising, including application of the Antimonopoly Act to the franchisors and franchisees of convenience stores. However, Japanese companies operating franchises in Thailand need to be aware of another point of discussion as well: the guidelines issued by the Thai Office of Trade Competition Commission (“OTCC”), under the updated Trade Competition Act, came into effect on 4 February 2020. Amongst other things, these guidelines place emphasis on preventing franchisors from exploiting franchisees.

2. What is Franchise Business?

Franchise business generally refers to a form of business in which a franchisor grants franchisees the right to use specific trademarks, trade names, etc., and controls, instructs, and assists such franchisees in the sale of goods, provision of services, and other aspects of business and management in a unified manner (e.g. marketing campaigns), and in return the franchisees pay fees to the franchisor.

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3. Background of Regulations Affecting Franchise Business under the Transaction Competition Act

Franchise business is normally controlled by a franchise agreement between the franchisor and individual franchisees in order for the franchisor to oversee the quality of the goods and services provided under their name, and thereby ensure that the brand will not be devalued. In this regard, there have been instances in which franchisees have been adversely affected by “unfair” franchise agreements. For example, some agreements imposed conditions on franchisees that mandated the purchase of more goods than necessary from the franchisor, prevented the franchisee from selling goods produced by other brands, or prevented franchisees from providing services other than those approved by the franchisor.

Accordingly, in 2016, there were attempts in Thailand to enact a “Franchise Business Operation Act” to regulate said unfair conduct. It reportedly required that franchisors have Thai nationality and that franchise business be registered and disclosed. However, the Franchise Business Operation Act was not enacted due to concerns that it duplicated and overlapped elements of the new Trade Competition Act (“TCA”) which was being considered at the time (and was ultimately enacted in 2017).

While the TCA does not have specific provisions concerning franchise business, the aforementioned conduct is considered to fall within the scope of “unfair conduct which damages other business operators” under Section 57 of the Act. Section 57 prohibits any business operator from acting in a way that would result in damage to other business operators by unfairly obstructing their business operations; unfairly utilising superior market power or superior bargaining power; unfairly setting trading conditions that restrict or prevent the business operations of others; or acting in other ways prescribed in the announcements of the OTCC. On 1 November 2018, the OTCC promulgated an announcement regarding guidelines for actions that may be considered damaging to other business operators. The guidelines provide the definitions of “market power” and “superior bargaining power” and clarify actions that violate Section 57 of the TCA.

On 30 October 2019, the OTCC newly announced the guidelines for consideration of unfair trade practice in franchise business under Section 57 of the TCA (the “**Guidelines**”), which became effective on 4 February 2020, 60 days after publication in Thai Royal Gazette.

4. Outline of the Franchise Business Guidelines

The purpose of the Guidelines is to make competition in the realm of franchise operation free and fair, and to ensure that franchisors do not engage in conduct which may cause damage to a franchisee. The outline of the Guidelines is as follows:

➤ **Duties of the Franchisor**

- ✓ Before entering into a franchise agreement, the franchisor has a duty to disclose certain business operation details to the franchisee in order to provide free, fair, and transparent competition. Such details include, for example, the costs associated with franchise operation (the franchise fee, royalty fee, marketing fee, etc.); franchise operation plans (including the number and locations of other franchisees); the essence of the trademark, patent, or copyright which is licensed in the franchise agreement; and clauses in the agreement related to renewal, amendment, and revocation.

- ✓ Prior to the opening of any franchisor operated branch location, the franchisor must first inform the franchisees nearest to such locations, and give such franchisees the right to open a new branch first, along with a proper period of time to reply to the franchisor.

➤ **Trade practices causing damage to the Franchisee**

- ✓ Imposing conditions which limit the rights of the franchisee without reasonable grounds. For instance, requiring the franchisee to purchase: goods or services unrelated to the franchise; supplemental goods or services from the franchisor or producers, suppliers, or service providers indicated by the franchisor; or goods or raw material(s) at a rate that exceeds that of the actual demand while prohibiting the return of such leftover goods or raw material(s).
- ✓ Imposing additional conditions which the franchisee must comply with after signing the franchise agreement. For example, requiring the franchisee to purchase other goods or services, or conduct business other than as described in the franchise agreement. There is an exception to this point - where there are reasonable business grounds or such action is necessary to maintain the reputation, quality, and standards of the franchise business. However, even in such cases the additional conditions must be provided in writing.
- ✓ Prohibiting the franchisee from purchasing goods or services from other producers, suppliers, or service providers who sell such goods with the same quality and at a cheaper price, while compelling the franchisee to purchase such goods from the franchisor or the producers, suppliers, or service providers indicated by the franchisor without reasonable grounds.
- ✓ Prohibiting the franchisee from reducing the price of perishable goods or goods that are nearly expired without reasonable grounds.
- ✓ Imposing different conditions among franchisees without reasonable grounds, which results in discrimination by way of unfair trade practice.
- ✓ Imposing inappropriate conditions with an objective other than to maintain the reputation, quality, and standards of the franchisor.

If the franchisor violates the Guidelines and is deemed to have engaged in unfair trade practice, the franchisor shall be subject to an administrative fine of not more than 10% of the turnover in the year in which the offence was committed (Section 82 of the TCA).¹ In cases where an offence is committed within the first year of the offending franchisor's operations within Thailand, the offending franchisor shall be subject to an administrative fine of not more than Baht 1,000,000 (one million Thai Baht) (Section 82 of the TCA). In addition, if the offender is a juristic person and such offence is committed under an instruction or through the conduct of a director, manager, or any person responsible for the

¹ It is unclear on the face of the language of Section 82 of the TCA whether the administrative fine would be calculated based on the franchisor's total turnover, the turnover of franchisor's total presence in Thailand, or just the turnover in relation to the franchisees affected by the violating behavior. However, upon inquiry from Nishimura & Asahi, the OTCC has noted that they will only take the turnover in relation to the franchisees affected by the violating behavior into consideration.

operation of such juristic person, or in any case where a person has a responsibility to instruct or perform certain conduct but fails to do so, such responsible persons shall be subject to the same punishments noted above (Section 84 of the TCA).

5. Conclusion

Franchisors should review the content of their franchise agreements with a view to ensuring compliance with the Guidelines, for example noting whether associated franchisees are unfairly suppressed, in order to prevent imposition of administrative fines. Close attention should also be given to future trends of the OTCC regarding franchise business enforcement matters in Thailand.



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