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New Regulations on Unfair Trade Practices in Franchise Businesses

New TCC Notification for Franchise Businesses

On December 6, 2019, the Trade Competition Commission (TCC) promulgated another notification in relation to the new Trade Competition Act B.E. 2560 (2017) (TCA) in the *Government Gazette*. The notification came into force 60 days after its publication. Issued under the TCA, it addresses certain nuances of franchise businesses' legislative implications.

To date, Thailand does not have any single piece of legislation relating to the regulation of franchise business operations in Thailand. Thai courts often construe franchise agreements in the context of a mutually agreed commercial contract under the freedom-of-contract principle, where a franchisor and a franchisee share their benefits *pari passu*, making the competition law seem out of context. In reality, as franchise business schemes are vertical integrations, franchisors' interference in franchisees' business operations often entails vertical restraints in violation of Thailand's trade competition law, whereby franchisors often subtly assume dominant positions in their markets. These vertical restraints arising from franchise agreements can be in the form of price-fixing or resale price maintenance, tie-ins, exclusive dealings, territorial exclusivity, or any acts intervening in the business operations of franchisees or imposing unfair compulsory conditions on franchisees.

Under the TCC notification, these unfair or hostile business interventions of franchisors will be subject to legal implications and ramifications under the TCA.

Key Regulations under the New TCC Notification

The notification was enacted in light of section 57 of the TCA, with the main purpose of regulating the activities of franchisors during the validity of a franchise agreement. Three key requirements are set forth for franchisors under this notification:

1. Pre-contract signing disclosure to franchisees

To enhance free trade and fair competition in franchise businesses, the notification expressly stipulates a franchisor's obligation to disclose essential information to a franchisee prior to entering into a franchise agreement. This required information is mainly in relation to (1) the franchise business's monetary information (e.g., franchise fees and royalty fees, marketing, personnel training, and inventory expenses), (2) the franchisor's business plans and scope of after-service assistance given by the franchisors and (3) the franchisee's scope of entitlement to intellectual property rights—mainly trademarks, patents, and copyrights—and the enforceability thereof.

2. Offer to franchisees in close proximity to a franchisor's new franchise location

Territorial exclusivity is one of the common pitfalls found in franchise agreements. In exchange for exclusive licenses, franchisees are often restricted by geographical

region in many aspects of operating their franchise businesses, from the distribution of goods and services to the purchase of raw materials thereof.

Under the new notification, franchisors are obligated to notify their franchisees prior to the establishment of their new franchises in proximity to any of their existing franchisees. A franchisee whose franchise location is in proximity to that new franchise location can be offered the right to operate the new franchise before it is offered to any third parties. By doing so, the franchisees are given more leeway in operating their franchise businesses, thus alleviating the territorial exclusivity concern under the trade competition law.

3. Prohibition of unfair trade practices

In line with section 57 of the TCA, the notification sets out a non-exhaustive list of franchisors' unfair trade practices arising during the course of a franchise agreement that may violate the TCA. These unfair trade practices include the following:

- ▶ Unfairly obstructing the business operations of franchisees (e.g., forcing a franchisee to purchase a specified amount or quota limitation, or exclusive dealings);
- ▶ Unfairly imposing extra-contractual conditions on the franchisees after the contract signing;
- ▶ Unfairly setting trading conditions that restrict or prevent the business operations of the franchisees (e.g., restrictions on selling perishable goods at a discounted price or restrictions on purchasing goods from other suppliers having the same product quality at a lower price);
- ▶ Unfairly treating franchisees on a discriminatory basis; and
- ▶ Unfairly conducting the business relationship in a manner other than to retain the goodwill and standards of the franchisors.

Section 57 of the TCA is considered to be a catch-all provision applicable to any unfair trade practice that does not fall under other more specific provisions set out under the TCA. When this notification is enacted under section 57, its application and implications can thus be broad enough to cover any acts of franchisors that can be deemed unfair trade practices against franchisees.

Legal Ramifications of the Notification

In line with section 57 of the TCA, franchisors who violate the regulations set out under this notification can be subject to an administrative fine of up to 10 percent of their sales turnover in the year of the offense, under section 82 of the TCA. Apart from this, a third party who suffers damage due to such violations will also have the right to file a civil lawsuit for pecuniary damages against the franchisor under section 69 of the TCA.

Intellectual Property Implications of the Notification

The intellectual property rights portfolio is a vital component of franchise agreements—especially those related to the licensing of rights. Conceptually, the intellectual property regime aims to promote rights holders' exclusivity of rights, which are considered restraints to trade, while the trade competition regime aims at promoting fair trade and a competitive market. Nevertheless, the intellectual property law's exclusivity of rights must be under the umbrella of trade competition to a certain extent, as any unjustifiably anticompetitive activities could be deemed illegal under several intellectual property provisions. Now that franchise businesses in Thailand are to be governed by the TCA, the intellectual property rights-related conditions under franchise agreements can be regulated and enforced in a more robust manner with regard to franchise businesses by another definite piece of law. 🏠