

# Unfair trading practice guidelines issued in Thailand



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**T**he Trade Competition Commission of Thailand (“the TCC”), acting under powers conferred upon it via Section 17(3) of the Trade Competition Act B.E. 2560 (2017) (the “TCA 2017”), has issued a new notification on December 6, 2019, containing the Guidelines for the Consideration of Unfair Trade Practices in Franchise Businesses (the “Guidelines”). The Guidelines, which are aimed at preventing franchisors from adopting overly restrictive and unfair contractual conditions that may cause damage to franchisees, are effective as of February 4, 2020.

The Guidelines compile a number of requirements that mirror provisions already set out in other laws

and regulations in Thailand, as the Contract Act and Code of the welcome



move, as franchising continues to be a popular business model in Thailand. In the absence of a single, codified franchising law in Thailand, these Guidelines assist prospective franchisors and franchisees during negotiations by injecting regulatory clarity in various aspects of franchising relationships. The longstanding draft Franchising Business Act in Thailand, which has been pending for many years and which contains similar restrictions laid down in the Guidelines, will also have further implications on franchising regulations in Thailand, if enacted.

### Definition of Franchise

Prior to the issuance of the Guidelines, there was no statutory or regulatory definition of what constitutes a “franchise” in Thailand. The Guidelines now define a “franchise” as any business whereby a franchisor and franchisee enters into a written agreement, by which:

- The franchisee engages in such business for a specific time period and territory;
- The franchisee conducts such business

using the model, systems, procedures and intellectual property rights that the franchisor owns, or is otherwise entitled to grant a license for;

- The franchisor administers control over the franchisee's business operations in accordance with the franchisor's business plan and system; and
- In return for such grant of rights, the franchisee is required to pay consideration to the franchisor.

The Guidelines further provide broad definitions of a “franchisor” as any person who grants the right to operate a franchise business, and a “franchisee” as any person to whom the right to operate a franchise business is granted. Based on the above, the Guidelines appear to be applicable to all parties whose business arrangements contain such features, even if they opt not to use the terms “franchise”, “franchisor”, or “franchisee” in their written agreements. The TCC may provide further guidance on this in the future as will very likely the draft Franchising Business Act (once enacted).

### New Pre-Contract Disclosure Requirements

A major change brought upon by the introduction of the Guidelines to the current franchising regime is the imposition of pre-contract disclosure requirements. Franchisors will now be required to disclose the following information to prospective franchisees before entering into agreements:

- Information on applicable payments and expenses relating to the franchise, such as franchise fees, royalties, marketing



expenses, training costs, costs of mandatory equipment and materials, as well as their respective calculation methods, payment details, and conditions for reimbursement;

- Information on the franchise business model, including matters relating to assistance, training, and advisory services to be provided by the franchisor, as well as information regarding the existing and future branches and their respective locations operated by other franchisees in the vicinity, and information on sales and promotion;
- Information on intellectual property rights, such as trademarks, patents and copyright, including their respective terms of protection, and their licensing scope and restrictions; and
- Information on the renewal, amendment, cancellation, and termination of the franchise agreement.

However, the Guidelines are silent on the deadline by which a franchisor must submit such disclosure documents or prospectus to a prospective franchisee. Currently, there is also no prescribed form issued by the TCC.

#### Obligations of Franchisors and Prohibited Franchising Practices

The Guidelines prohibit franchisors from engaging in the following trade practices, which are deemed capable of causing damage to the franchisees under Section 57 of the TCA 2017:

- Setting restrictive conditions for the franchisees without justifiable reasons, such as requiring the franchisees to purchase products or services that are irrelevant to the operation of the franchise business, exclusively from the franchisors or from sources designated by the franchisors, or requiring the franchisees to purchase more products or raw materials than actually required and refusing to accept the return of excessive purchases;



- Setting additional conditions for the franchisees to comply with, after the franchise agreements have been executed, such as requiring the franchisees to perform actions not stated in the franchise agreements. Exceptions may apply if there is a justifiable reason, or if such conditions are necessary in order to maintain the reputation, quality, and standards of the franchise business. In such cases, all additional conditions must be made in writing.
- Imposing product tying or purchasing restrictions on the franchisees without justifiable reasons, such as restricting the franchisees from purchasing products from other sources that offer products with comparable quality but at a lower price;
- Restricting the franchisees from offering discounts on perishable goods or products close to their expiration, without justifiable reasons;
- Stipulating discriminatory conditions among franchisees, without justifiable reasons; and
- Setting any inappropriate conditions for purposes other than to maintain the reputation, quality, and standards of the franchisors in accordance with the franchise agreement.

Additionally, the Guidelines also require franchisors to provide their franchisees with the first right of refusal whenever seeking to open and manage any new branches in the vicinities where such existing franchisees are currently operating in.

#### Impact on Foreign Franchisors and Local Master Franchisees

It is important to note that Section 58 of the TCA 2017 prohibits local business operators from entering into agreements with foreign business operators to carry out any conduct that may be deemed as an unfair restriction of trade. Under Section 60 of the TCA 2017, the TCC is empowered to issue an order requesting such local business operators who have violated or will violate Sections 57 or 58 of the TCA 2017 (which the Guidelines seek to address), to suspend, stop, correct, or change

such violating conduct in accordance with the conditions it prescribes. The recipient of a TCC order will have the right to judicial appeal within 60 days from the date of receipt of such order. In addition to the above, pursuant to Section 82 of the TCA 2017, an administrative fine not exceeding 10% of the turnover in the year of the offence shall be applicable, provided that such fine will be capped THB 1 million (approx. USD 32,200) if the violation was committed in the first year of such party's business operations. Further, a party that suffers damage due to such violations is also entitled to claim for damages within a limitation period of one year.

Although the Guidelines are silent on the retroactive applicability of its provisions, under the general principle of Thai laws with respect to retroactivity, these Guidelines would not be applicable to existing franchise agreements that are already in place as no action can constitute an offence unless expressly prohibited by law existing at the time such action is conducted. However, the Guidelines will be applicable when franchisors and franchisees enter into renewal or extension agreements of current contracts.

While the Guidelines do not apply directly on foreign franchisors who do not have a physical presence in Thailand as the penalty provisions above do not have extra-territorial application, local master franchisees appointed by such foreign franchisors will need to comply with all such requirements prescribed under the TCA 2017 and the Guidelines. Additionally, local franchisees may likely rely on certain terms in the Guidelines during negotiations and renewals/extensions with their foreign franchisors or during disputes. Therefore, foreign franchisors should ensure that the franchise agreement templates and disclosure documents to be used by their local master franchisees when appointing unit (sub)franchisees in Thailand are in full compliance with all local requirements.



# 泰国发布了 不正当贸易行为指引

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**泰**国贸易竞争委员会（以下简称“TCC”）根据《贸易竞争法》（Trade Competition Act B.E. 2560）（2017）（以下简称“TCA 2017”）第17(3)条赋予它的权力行事，已于2019年12月6日发布了一项新通知，其中包含《关于特许经营企业中不正当贸易行为考虑的指引》（“指引”）。该指引旨在防止授权商采用可能会对加盟商造成损害的过度限制性及不公平的合同条件，该指引于2020年2月4日生效。



该指引汇编了多项规定，这些规定与《不公平合同条款法》和《民法典》等泰国其他法律和法规中已经订明的条文相吻合。由于特许经营在泰国仍然是一种流行的商业模式，因此该指引的发布是备受欢迎的举措。由于泰国没有一部统一的特许经营法，这些指引通过在特许经营关系的各个方面进行法规澄清，能为谈判过程中的准授权商和加盟商提供帮助。泰国由来已久的特许经营商业法草案，已经悬而未决了多年，该草案包含《指引》中规定的类似限制，如果该特许经营商业法获颁布，也将对泰国的特许经营法规产生进一步的影响。

## 特许经营的定义

在该指引发布之前，泰国没有关于“特许经营”的法定或监管定义。该指引现在将“特许经营”定义为授权商和加盟商达成书面协议的任何业务，通过该协议：

- 加盟商在指明的时间段和地区从事该业务；
- 加盟商使用授权商拥有或有权授予许可的模式、系统、程序和知识产权进行此类业务；
- 授权商根据授权商的商业计划和系统对加盟商的商业运营进行管理控制；和
- 作为这种权利授予的回报，加盟商须向授权商支付对价。

该指引进一步提供了宽泛的定义，“授权商”是指授出特许经营业务经营权的任何人，而“加盟商”则是指任何被授予特许经营业务经营权的人。根据上述定义，即使他们选择在书面协议中不使用“特许经营”、“授权商”或“加盟商”等词汇，该指引似乎也适用于其业务安排包含此类特征的所

有各方。TCC未来可能会对此提供进一步的指导，很可能在《特许经营商业法》草案（一旦颁布）中提供指导。

## 新的合同前披露规定

该指引的出台为当前的特许经营制度带来的一个重大变化是，施加了合同前披露规定。现在，在签署协议之前，授权商将需要向准加盟商披露以下信息：

- 与特许经营有关的适用付款和费用的相关信息，例如特许经营费、特许权使用费、市场营销费用、培训费用、强制性设备和材料的费用，以及它们各自的计算方法、付款详情和偿付条件；
- 特许经营商业模式的相关信息，包括与授权商将提供的协助、培训和咨询服务有关的事项，以及有关现有和未来的分支机构以及由附近地区其他加盟商经营的他们各自的营业地点的信息。以及销售和促销信息；
- 知识产权相关信息，例如商标、专利和版权，包括它们各自的保护条款以及它们的许可范围和限制；和
- 续签、修订、取消和终止特许经营协议的相关信息。

但是，该指引对于授权商必须将此类披露文件或说明书提交给准加盟商的最后期限未作规定。目前，并没有TCC发出的规定表格。



## 授权商的义务和禁止的特许经营行为

该指引禁止授权商从事以下贸易行为，根据TCA 2017第57条的规定被认为能够对加盟商造成损害的行为：

- 在没有正当理由的情况下为加盟商设置限制性条件，例如要求加盟商从授权商或授权商指定的来源购买与特许经营业务无关的产品或服务，或要求加盟商购买超过实际需要的更多的产品或原材料，并拒绝接受过多购买的退货；
- 在签署特许经营协议后，为加盟商设置需要遵守的附加条件，例如要求加盟商执行特许经营协议中未规定的行动。如果有正当理由，或者为维护特许经营业务的声誉、质量和标准而有必要采用此类条件时，可以适用例外。在这种情况下，所有其他条件必须以书面形式提出。
- 在没有正当理由的情况下对加盟商施加产品捆绑或购买限制，例如限制加盟商从提供质量相当但价格较低的产品其他来源购买产品；



- 限制加盟商在没有正当理由的情况下，对易腐烂产品或即将到期的产品提供折扣；
- 在没有正当理由的情况下规定加盟商之间的歧视性条件；和
- 出于根据特许经营协议为维护授权商声誉、质量和标准以外的目的设置任何不适当的条件。

此外，该指引还规定，授权商须为其加盟商提供在现有加盟商目前经营所在的附近地区寻求开设和管理任何新分支机构时的优先权。

## 对外国授权商和本地主加盟商的影响

请务必注意，TCA 2017第58条禁止本地商业运营商与外国商业运营商订立协议进行任何可能被视为不公平贸易限制的行为。根据TCA 2017第60条，TCC有权发布命令，要求已违反或将要违反TCA 2017第57或58条（该指引试图解决）的本地商业运营商暂停、停止、纠正或根据其规定的条件更改此类违法行为。TCC命令的接收人有权在收到该命令之日起60日内提出司法上诉。除上述规定外，根据TCA 2017第82条的规定，应适用不超过违法行为发生当年营业额10%的行政处罚款应适用，但如果该违规行为发生在该方的商业运营的第一年，最高罚款不得超过100万泰铢（约合32,200美元）。此外，因此类违法行为遭受损害的一方也有权在一年内的限制期内要求损害赔偿。

尽管该指引对其条文的追溯适用性未作任何规定，但根据泰国法律关于追溯的一般原则，该指引将不适用于已经实施的现有特许经营协议，因为除非采取此类行动时现有法律明确禁止，否则任何行动均不构成犯罪。但是，当授权商和加盟商订立当前合同的续约或延期协议时，该指引将适用。

虽然该指引不适用于在泰国没有实体存在的外国授权商，因为上述罚则没有域外适用性，但由此类外国授权商指定的本地主加盟商将需要遵守TCA 2017和该指引中规定的所有此类要求。此外，本地加盟商在与其外国授权商进行谈判和续签/延期或发生争议时，可能会依赖该指引中的某些条款。因此，外国授权商在指定泰国的单店（子）加盟商时，应确保其本地主加盟商使用的特许经营协议模板和披露文件完全符合当地的所有规定。