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New Guideline on Credit Terms for SMEs

Introduction

A new guideline on the use of "fair" credit terms between business operators and small and medium enterprises ("**SMEs**") will take effect on 16 December 2021. The new credit terms outlined are as follows:

- For trading, manufacturing and services businesses: not exceeding 45 days unless a shorter term has already been agreed; and
- For trading, manufacturing and services businesses only related to agricultural products or processed agricultural products using a non-complicated manufacturing process: not exceeding 30 days unless a shorter term has already been agreed.

The guidelines provide some room to fix credit terms different from the abovementioned terms, provided that there are justifiable reasons in respect of business, marketing or economics, subject to the terms and conditions of the agreement.

We explain the rationale behind the issuance of these guidelines and their intended scope further below.

Guideline of the Trade Competition Commission

The new guidelines have been issued by the Trade Competition Commission ("**Commission**") in the form of a Notification re: Guidelines for Consideration of Fair Trade Practices related to Credit Terms in the case of Small and Medium-sized Enterprises (SMEs) being Sellers of Goods or Services ("**Notification**"), which was published in the royal gazette on 18 June 2021 and will come into effect on 16 December 2021.

The stated intention of the Notification is to regulate business operation and to maintain free and fair competition, especially for SMEs that may be taken advantage of due to lower bargaining power in a manner which could be considered an "unfair trade practice" under Section 57 of the Trade Competition Act B.E. 2560 (2017) ("**TCA**"). Section 57 of the TCA states that:

"A business operator shall not undertake any conduct which results in damage to other business operators in the following manners:

- (1) *Unfairly obstructing the business operation of other business operators;*
- (2) *Unfairly utilizing superior market power or bargaining power;*

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- (3) *Fixing trade conditions which unfairly restrict or prevent the business operation of others;*
- (4) *Other conducts prescribed by the Commission."*

Statistically, there are more investigations and enforcement proceedings undertaken by the Office of the Trade Competition Commission ("OTCC") for alleged offences under Section 57 of the TCA than for other provisions.

What is the definition of "SME" used by the Commission?

According to the Notification, SMEs are business operators having the following characteristics:

- (1) A **Manufacturing business** which has 200 employees or less **or** has an annual revenue not exceeding THB 500 million;
- (2) A **Service, wholesale or retail business** which has 100 employees or less **or** has an annual revenue not exceeding THB 300 million.

Based on Clause 4(3) of the Notification and informal guidance given by the OTCC, the following documents should suffice in verifying the SMEs' status under this Notification:

- (1) Withholding Income Tax Return (PND.1) or Payment of Social Security Contributions form (SorPorSor.1-10) which supports the criteria of employment; and/or
- (2) Audited financial statements which support the criteria of revenue.

Is there any exception to this requirement?

Clause 4(1) paragraph two of the Notification provides some room to fix credit terms different from the prescribed credit terms. Upon the effective date of the Notification, a 30-day or 45-day credit term, as the case may be, must apply, unless an agreement between a business operator and SME regarding a longer credit term sufficiently satisfies the exemption. In such case, the agreement on such credit term must be justified by commercial, business, marketing, or economic reasons. However, there are no guidelines or samples for consideration in relation to such justifications. It thus appears that whether such longer credit terms are justified will be considered on a case by case basis taking into account the facts of each case.

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Penalties for non-compliance

We note that this Notification is not specifically issued pursuant to Section 57(4) of the TCA; however, a credit term arrangement with SMEs which does not meet the requirements of this Notification re: Credit Term, could be viewed as an unfair trade practice under Section 57(1) – (3) generally.

If such an agreement is found to be an unfair trade practice under Section 57 of the TCA, the business operator would be subject to an administrative fine of not more than 10% of its turnover in the year of offence, pursuant to Section 82 of the TCA.

Section 84 of the TCA further provides for individual liability of the directors and/or other responsible persons in the case where the offender is a juristic person.

It should also be noted that, according to Section 60 of the TCA, the Commission has the power to instruct the business operator to suspend, stop, correct or change its conduct where it has sufficient evidence to believe that such conduct has violated or will violate Section 57 of the TCA.

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