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New Guidelines on Unfair Trade Practices

Introduction

The unfair trade practices language in Section 57 of Thailand's Trade Competition Act B.E. 2560 (2017) (the "**Act**") serves as a catch-all provision prohibiting practices which are unfair and cause damage to other business operators, regardless of whether the business operator is market dominant or not. With effect from 19 February 2022, the Trade Competition Commission ("**Commission**") has issued a new notification prescribing guidelines on the consideration of unfair trade practices in respect of acts causing damage to other business operators ("**Guidelines**"), repealing and replacing a 2018 notification.

Enforcement proceedings have steadily increased under the Act, with the Commission taking a vocal and proactive role in announcing implementing rules and regulations, the number of complaints received (i.e. 71 in 2021), the outcome of its investigations (e.g. three criminal proceedings and administrative settlements with 26 offenders in 2021) and areas of focus (e.g. e-commerce, as according to the Chairman of the Commission in a widely reported interview earlier this year).

Business operators should be mindful of risk areas under Section 57 of the Act as they may be unaware of the Act's application to non-dominant operators. The Guidelines provide some guidance in this regard, as well as guidance on steps which can be taken to review the defensibility of business practices such as trade programs. This Update highlights some of the key elements of the Guidelines.

What Constitutes an Unfair Trade Practice?

Section 57 of the Act provides as follows:

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

The Guidelines clarify the scope of each of the above limbs of Section 57 and the provisions of general application described below.

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Damage

The Guidelines provide that an offence under Section 57 must be shown to cause damage to other business operators, with consideration to be based on economic loss according to facts, such as loss of revenue of the business operator, loss of market value or market share of goods or services, loss of opportunities in the manufacturing, buying or selling of goods or services, incurrence of increasing costs or expenses, loss of opportunities in conducting business with other business operators, etc.

In a ruling issued in January 2022 on a case involving agreements between food delivery platforms and restaurant operators with an exclusive dealing condition, the Commission found that the restaurant operators voluntarily agreed to such condition in order to receive a lower commission rate, in a reciprocal manner, and it did not appear that there was any punishment upon the restaurant operators who were in breach of such condition. The Commission found that such voluntary waiver of rights did not cause any damage to the restaurant operators, and thereby, it was concluded that the conduct did not constitute a breach of Section 57 of the Act.

Based on this ruling, it may be seen that the Commission will take a holistic approach to the determination of a breach of Section 57 of the Act, taking into consideration several factors and the surrounding facts. In this case, although the conduct may appear to fall within the scope of an unfair trade practice under the guidelines/notification, it may not entirely or automatically constitute a breach of Section 57 of the Act. In the view of the Commission, whether or not damage has occurred from an unfair conduct is an important element of an offence under Section 57 of the Act.

Unfairness or unreasonable acts

As can be seen from the wording of Section 57 of the Act, the "unfairness" of the conduct is a key element of an offence under Section 57.

The Guidelines provide that unfair acts or unreasonable acts shall be assessed by looking at the following criteria as a whole:

- (1) *It is an act that is unacceptable for fair economic, business, or market reasons.*
- (2) *It is an act that has never been carried out before and which is not a normal business practice.*
- (3) *It is a condition that is not specified in writing and has not been notified in advance to the trading partner within a reasonable period of time according to normal trade practice.*
- (4) *Other related factors.*

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The above wording can be considered as key to determining whether a business operator's conduct could constitute an offence under Section 57 or not.

This wording was also reflected in the repealed 2018 notification, and we have seen the importance of its application in Commission rulings. For example, in a February 2021 ruling in respect of the different services fees that an online food delivery platform charged to restaurant operators, the Commission ruled that this practice did not breach Section 57 as the alleged offenders had criteria for determining their service rate, such as the average food price per order (Basket Size), the number of branches of the restaurant, restaurant sales and reciprocal benefits in marketing received from restaurants, etc. After consideration, it was found that both alleged offenders would negotiate with the restaurant to determine the service fees and specify such service fees and rates in writing; therefore, the Commission viewed that this act could be justified for business, marketing or economic reasons. In addition, the criteria used for such determination were of a general nature according to market mechanism, applied across all restaurants, and did not appear to be a discriminatory offer to a specific restaurant or unfairly beneficial to any specific restaurant that was a contractual party to both alleged offenders.

Therefore, when considering how the Guidelines further explain the conduct which is assumed to constitute an offence under Section 57, it is important to note the use of the word "unfairness" and its place as a necessary element of any offence.

Unfair Obstruction of Business Operations

The Guidelines set out that the following conduct is considered as unfair obstruction of the business operation of other business operators under Section 57 (1):

- (1) *Fixing price for buying or selling of goods or services at an excessively high price or lower than costs, or fixing different prices, without reasonable grounds, such as, fixing excessively high buying price which causes other business operators not being able to buy goods or services, selling goods or services at a price lower than costs thereby causing other business operators not being able to sell goods or services, etc.*
- (2) *Fixing quantity of production, buying, or selling of his own goods or services, without reasonable grounds, such as, restricting quantity of sale of goods or services to other business operators, etc.*
- (3) *Denying other business operators to buy or sell goods or to provide services or to receive services without reasonable grounds, such as, setting an agreement that restricts the right of other business operators which is of a compulsory description (exclusive dealing) without reasonable grounds, etc.*

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- (4) *Denying other business operators to take part in a proceeding of a trade association or a trade group without reasonable grounds.*
- (5) *Intervening transactions of other business operators without reasonable grounds.*
- (6) *Intervening internal management of other business operators without reasonable grounds.*
- (7) *Fixing other trade methods for production, buying or selling of his own goods or services, goods storage, goods distribution, or other acts which are of a trade restriction which is not a normal trade practice without reasonable grounds.*

Unfair Use of Market Power or Superior Bargaining Power

Section 57(2) of the Act references the unfair use of market power or superior bargaining power, with the Guidelines clarifying the intended scope of the language.

Market power shall be assessed based on the capability of a business operator in fixing price, quantity, or condition of business operation in the market. It is assumed that a business operator with market share from 10% upwards has market power. However, other related factors shall also be considered, such as the number of business operators in the market, investment amount, access to significant manufacturing factors, sale channel, business operation network, necessary basic structure for business operation and rules and regulations of the State, etc.

Superior bargaining power shall be assessed based on superior capability of a business operator in controlling, instructing, or setting directions or conditions on business operation for another business operator, whereby said other business operator has to agree thereto implicitly. However, the Guidelines set out the following additional criteria:

- (1) *A business operator must rely on the business operation of a business operator who has superior bargaining power, whereby the value of buying or sale of goods or services between them is from 30% upwards of the total value of buying or sale of said goods or services of the business operator who has inferior bargaining power.*
- (2) *A business operator must rely on business operation of a business operator who has superior bargaining power, whereby the value of buying or sale of goods or services between them is from 10% but less than 30% of the total value of buying or sale of said goods or services of the business operator who has inferior bargaining power, and which falls on any one of the following descriptions:*

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- (a) *Not being able to, or having no alternatives in, switching to conducting business with other business operators.*
- (b) *Switching to conducting business with other business operators may incur business operation expenses more than the benefits to be received from the previous business operator.*

The following conduct is considered as unfair use of market power or superior bargaining power under Section 57(2):

- (1) *Requesting other business operators to buy or sell other goods or services without reasonable grounds, such as, requesting his trading partner to buy other goods or services which are not related to goods or services of normal trade practices, etc.*
- (2) *Requesting other business operators to buy or sell goods or services at a greater or lesser quantity than needed without reasonable grounds.*
- (3) *Requesting other business operators to accept certain terms which are different from that agreed upon in the contract without reasonable grounds, such as, reducing buying prices or increasing selling prices, assessing quality of goods or services which is different from actuality, etc.*
- (4) *Requesting other business operators to provide trade benefits or other benefits to himself or to others without reasonable grounds, such as, requesting staff of his trading partner to provide the service of sale of goods which are not related to the goods of the trading partner without making payment of in return to the staff of the trading partner, etc.*
- (5) *Requesting other business operators to sell goods or services according to the sale target so fixed without reasonable grounds.*
- (6) *Refusing to trade with other business operators without reasonable grounds, such as, refusing to sell goods or services necessary to business operation of other business operators, etc.*
- (7) *Conducting other acts which is of a description of exercising market power or superior bargaining power without reasonable grounds, such as, delaying payment of goods or services, refusal to pay fine as a result of unreasonably late payment of goods or services, etc.*

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Unfair Trading Conditions

The Guidelines set out that the following conduct is considered an unfair trading condition which unfairly restricts or impedes the business operation of others under Section 57(3) of the Act:

- (1) *Treating business operators differently or treating business operators differently basing on their business operation areas without reasonable grounds, such as, offering special discount to one buyer more than another who is within the same area and buys goods of the same quantity, etc.*
- (2) *Discriminatingly providing favours to certain specific business operators without reasonable grounds.*
- (3) *Requesting other business operator to buy goods or services from him or from another business operator either in whole or in part, if said other business operator buys goods or services of the type it wanted from him without reasonable grounds.*
- (4) *Requesting other business operator to conduct business or to trade with another business operator without reasonable ground, such as, setting conditions that restrict the rights of other business operator which is of a compulsory description (exclusive dealing) without reasonable ground, etc.*
- (5) *Executing other acts which are of a description of setting trade conditions which is a restriction or an impediment of business operation of others without reasonable grounds.*

Penalties for Non-compliance

A breach of Section 57 of the Act carries administrative penalties – namely, a fine not exceeding 10% of the offender's revenue in the year of the offence or not exceeding THB 1 million if the offence is committed in the offender's first year of business.

In the case where the offender is a company, a director, manager, or any person responsible for the operation of the company may also be liable to the penalties for that particular offence, provided the offence is committed under instruction or through the conduct of such person or if such person has the duty to instruct or perform any conduct but fails to instruct or perform such conduct, thus causing the company to commit the offence.

The Commission has broad power to issue a written order instructing a business operator to suspend, stop, correct or modify its conduct, as well as prescribe necessary conditions in such order. Any person

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violating such order of the Commission shall be subject to an administrative fine of not more than THB 6 million and a further fine of not more than THB 300,000 per day for the duration of continued violation.

Transitional Provision

Any proceedings which are being conducted by the Commission or the Trade Competition Commission of Thailand before the date these Guidelines became effective (19 February 2022) shall be conducted according to the 2018 notification until completion.

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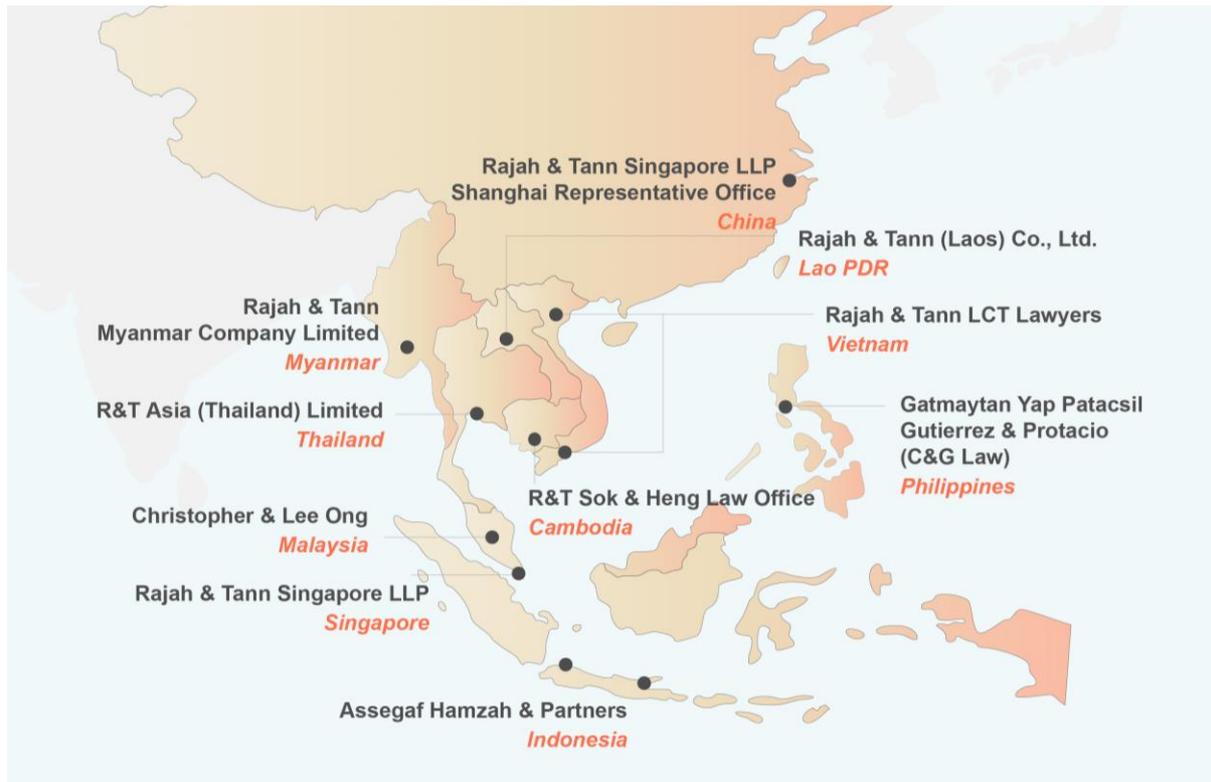
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