

(Translation)

## **Outcome of Decision of Trade Competition Commission**

**In case of Termination of Agreement for Being Distributor and Providing Services  
after Sale about Gauge Equipment to be used in Industrial Work**

	S. Company	the Complainant
<b>Between</b>		
	K. Company	the Respondent

### **Complaint**

The Complainant sent the letter dated October 12, 2018 to the Secretary - General of the Trade Competition Commission to complain about the Respondent. The complaint is summarized as follows. The Respondent, the Singapore office, granted the right to the Complainant to act as the distributor and to provide services after sale about the gauge equipment to be used in the industrial work in Thailand. Subsequently, at the end of the year 2017 the Respondent came into Thailand to apply for the registration of the establishment of N. Company without notifying the Complainant who was acting as the distributor of the Respondent in Thailand. N. Company offered the sale price of the products to the Complainant's customers in the same way as the Complainant did. Consequently, the Complainant could not distribute the products. In addition, the Respondent terminated the distributorship of the Complainant and refused to accept the return of the inventory of the Complainant. The Respondent also prohibited the Complainant from distributing the products and using the logo of the Respondent after the termination of the distributorship agreement. The aforesaid acts of the Respondent were the trade practice in an unfair manner.

### **Facts**

The Respondent was a juristic person having an office in Singapore. The Respondent's head office was located in Germany. The Respondent entered into agreements to appoint the Complainant to act as the distributor and to provide services after sale about

/the gauge equipment...

the gauge equipment to be used in the industrial work concerning paper, cement and chemical products in Thailand continuously as from the year 2013. The term of the agreement was one year for each agreement. It was provided in each agreement that the Complainant had the right to use the logo, there was the acceptance of the return of the products, etc. Prior to the end of each agreement, the Complainant and the Respondent would jointly negotiate to consider the extension of the term of the agreement once every year. However, the agreement of the year 2018 was changed the name from the old name “Distributor Agreement” to the new one “Local Business Partner Agreement”. Despite this, the Complainant’s rights and duties were still the same. However, more conditions were added in the agreement that the Complainant was prohibited from transferring its rights and duties to other persons and from implementing an advertising plan, a marketing plan and a sale promotion plan prior to receiving the Respondent’s consent. In addition, the condition that the Respondent would buy back the products and be responsible for the transportation fee (which had ever been set in the old agreement) was not set in the agreement of the year 2018. The Complainant later knew that there was no condition on the buyback of the products in the agreement of the year 2018.

Subsequently, on March 13, 2018, the Respondent sent an email to the Complainant informing that the Complainant did not pay the price of the products under the purchase order in February 2018 in the sum of XX,XXX.XX euros, being approximately equal to XXX,XXX baht. Additionally, the Respondent informed the Complainant of the discontinuation of sending the products to the Complainant on the grounds that the Complainant made the late payment of the product price, and the Respondent could not contact Mr. R, who was the director of the Complainant, for negotiation to jointly find out about the solution. On March 19, 2018, the Complainant sent an email to the Respondent informing the Respondent of the cancellation of the purchase order of the products on the grounds that the Respondent sent the products to the Complainant late. The Complainant also informed the Respondent that the Complainant wanted to sell back the inventory to the Respondent. This was because the Respondent established N. Company to become the branch office of the Respondent in Thailand. In addition, the Complainant informed the Respondent that the director of the Complainant was very busy; therefore, the Respondent was unable to

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contact the director of the Complainant to jointly find out about the solution, as the Respondent claimed. Subsequently, on April 2, 2018, the Respondent sent an email to the Complainant informing that the Respondent would cancel the Complainant's purchase order and not impose the fine for such cancellation. The Respondent also informed the Complainant that the Respondent would not buy back the Complainant's inventory. Nevertheless, the Respondent proposed two solutions to the problem as follows:

1. the Complainant had to repay the debt and the fine for the late payment of the product price, whereby the Respondent would not terminate the agreement appointing the Complainant as the distributor;

2. the Complainant had to repay all the debt without the fine for the late payment of the product price, however, the Respondent would terminate the agreement appointing the Complainant as the distributor.

The Respondent required that the Complainant had to confirm which solution would be chosen within three days. In the case where three days elapsed without confirmation, the Respondent would exercise the right to terminate the distributorship agreement. In spite of this requirement, the Complainant ignored to inform the Respondent of which solution the Complainant would choose. The Respondent then sent an email to the Complainant again on April 16, 2018, requiring the Complainant to pay off the outstanding debt in the total sum of XXX,XXX.XX euros, being approximately equal to X,XXX,XXX baht and terminating the distributorship agreement.

Ms. D., who is an attorney for the Complainant, gave the further statements that the Respondent appointed the agent or distributor to sell and to provide services after sale for each group of industry. Subsequently, in the year 2017 the Respondent established N. Company, and N company was entrusted to sell the gauge products and industrial equipment for which the Respondent had already appointed the agent or distributor. However, the registration of establishment of N. Company and the sale of the gauge products and industrial equipment carried out by N. Company were feasible matters and not deemed to violate the agreement appointing the Complainant as the distributor. In addition, although there were the aforesaid matters, the Complainant was slightly affected. This was because the volume of the

/products as sold...

products as sold by N. Company was few, and the sale price of N. Company was similar to the Complainant's sale price. In addition, Ms. D. accepted that the old distributorship agreement set the condition on the buyback of the products; however, such condition was deleted from the agreement as from the year 2017. Therefore, there was no condition which required the Respondent to buy back the products in the distributorship agreement of the year 2018.

As regards the payment of the product price to the Respondent, Ms. D. gave the statements that the Complainant was in the default of the payment of the product price within a specified period, and the Complainant did not negotiate with the Respondent to jointly find out about the solution. In addition, when the Respondent proposed the solution to the problem and required the Complainant to choose which way of solution, the Complainant did not reply to the Respondent. This caused the Respondent to send an email informing the Complainant of the termination of the agreement appointing the Complainant as the distributor. Although the cause of the termination of the distributorship agreement resulted from the Complainant's mistake, the imposition of the fine and the Respondent's refusal to buy back the Complainant's inventory caused the damage to the Complainant. This was because if the Respondent bought back the Complainant's inventory, the outstanding debt which the Complainant had to repay the Respondent would reduce approximately X,XXX,XXX baht.

### Issues of Decision

In this case, there are the issues of decision as follows.

1. It is whether or not the registration of establishment of N. Company by the Respondent and the conferring of the right to N. Company to sell the gauge products and industrial equipment in Thailand in the same way as the agreement appointing the Complainant as the distributor were the impediment to the business operation of the Complainant in an unfair manner under Section 57 (1) of the Trade Competition Act, B.E. 2560 (2017).

2. It is whether or not the termination of the agreement appointing the Complainant as the distributor and the refusal to buy back the Complainant's inventory as well as the demand for the Complainant to repay the debt and the fine were any act causing

/the damage to...

the damage to the Complainant in the unfair manner of the impediment to the business operation of the Complainant or the exercise of the market power or the superior bargaining power under Section 57 (1) and (2) of the Trade Competition Act, B.E. 2560 (2017).

3. It is whether or not the prohibition for the Complainant from using any logo or trademark of the Respondent after the termination of the agreement was the imposition of the trade condition causing the restriction or obstruction to the business operation of the Complainant in an unfair manner under Section 57 (3) of the Trade Competition Act, B.E. 2560 (2017).

### Decision

It is believed in the facts of this case that the Respondent entered into agreements to appoint the Complainant to act as the distributor and to provide services after sale about the gauge equipment to be used in the industrial work of the Respondent in Thailand. The term of the agreement was one year for each distributorship agreement. The Respondent renewed the distributorship agreement continuously and annually. The last distributorship agreement was the agreement of the year 2018. In the year 2017 the Respondent registered the establishment of N. Company and conferred the right to N. Company to sell the gauge products and industrial equipment in Thailand in the same way as the agreement appointing the Complainant as the distributor. Afterwards, the Respondent terminated the agreement appointing the Complainant as the distributor by claiming that the Complainant made the late payment of the product price. The Respondent also refused to buy back the Complainant's inventory and prohibited the Complainant from using the logo or trademark of the Respondent after the termination of the agreement.

The issue to be taken into consideration is whether or not the acts of the Respondent which were complained by the Complainant, i.e. the registration of establishment of N. Company, the termination of the agreement appointing the Complainant as the distributor, the refusal to buy back the Complainant's inventory, and the prohibition for the Complainant from using the logo or trademark of the Respondent after the termination of the agreement, were the acts violating Section 57 of the Trade Competition Act, B.E. 2560 (2017). In this issue, Section 57 of the Trade Competition Act, B.E. 2560 (2017) provides that the

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business operator is prohibited from committing any act which results in the damage to other business operators in one of the following manners: (1) the impediment to the business operation of other business operators in an unfair manner, (2) the exercise of the market power or the superior bargaining power in an unfair manner, (3) the imposition of the trade condition causing the restriction or obstruction to the business operation of others in an unfair manner, (4) the committing of any act in other manners as announced by the Commission. In addition, Clause 5 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018 prescribes that the offence under Section 57 must result in the damage to other business operators, whereby the economic loss under relevant facts shall be taken into consideration, e.g. the loss of revenue incurred to a business operator, the loss of market value incurred to goods or services, the loss of opportunity to produce goods or services, etc. Clause 8 prescribes that the impediment to the business operation of other business operators in an unfair manner was the impediment to other business operators by fixing the product price, the product quantity, or other trade means in relation to the production, purchase or sale of the business operator in one of the following manners: (1) the fixing of the low price for selling goods or services in an unfair manner, (2) the fixing of the high price for purchasing goods or services in an unfair manner, (3) the impediment to any business operator in participating in the operation of an association or in trade integration in an unfair manner. Clause 9 prescribes that the exercise of the market power or the superior bargaining power in an unfair manner has the following manners: (1) the business operator has the market power or the bargaining power superior to another business operator; (2) the business operator exercises the market power or the superior bargaining power for taking an advantage over or restricting such trade partner to have a choice in an unfair manner. In addition, Clause 10 prescribes that the imposition of the trade condition causing the restriction or obstruction to the business operation of others in an unfair manner has one of the following manners: (1) the imposition of the trade condition which discriminates between different customers or different business areas without justification, (2) the imposition of the trade condition which was discrimination by specifically facilitating some business operators in an unfair manner, (3) the imposition of the trade condition which facilitates the trade partner of the competitor without justification

/in order to...

in order to persuade such trade partner to do business with the business operator who is the persuader, (4) the imposition of the condition without justification in order to compel the trade partner to purchase other goods or services from the business operator who has compelled or from another business operator in the case where such trade partner wants to purchase specific and needed goods or services from the business operator who has compelled, (5) the imposition of the condition which prohibits the trade partner from conducting business or making a trade deal with the competitor of the business operator who has prohibited without justification, (6) the imposition of the trade condition which restricts or obstructs the business operation of the trade partner with another business operator in an unfair manner, (7) the control of appointing the officer of the business operator who was the trade partner in an unfair manner, (8) the interference in the business transaction of the competitor in an unfair manner, (9) the interference in the internal management of the competitor in an unfair manner by casting a vote, appointing an executive, or by other means in the business of the competitor, (10) the refusal to make a trade deal with the trade partner without justification. It is expedient for the Commission to take a decision on the acts of the Respondent as follows. In the case where the Respondent registered the establishment of N. Company and conferred the right to N. Company to sell the gauge products and industrial equipment in Thailand in the same way as the agreement appointing the Complainant as the distributor, the information on this case has been obtained from Ms. D., who is an attorney for the Complainant. Ms. D. gave the statements acknowledging that the aforesaid registration of establishment of N. Company was not deemed to violate the agreement appointing the Complainant as the distributor. Additionally, the volume of the products as sold by N. Company was few, and the sale price of N. Company was similar to the Complainant's sale price. The Complainant was not affected by the sale of products made by N. Company as a result.

The Trade Competition Commission is of the opinion that the registration of establishment of N. Company and the conferring of the right to sell the gauge products and industrial equipment in Thailand were the civil rights which the Respondent could exercise within the ambit of the law. Besides this, the Complainant did not present evidence to prove that the aforesaid acts were against the distributorship agreement made by and between the Complainant and the Respondent. Ms. D., who is an attorney for the Complainant, also gave

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the statements admitting that such acts were not deemed to be against the agreement appointing the Complainant as the distributor. Additionally, the aforesaid acts were not the impediment to the business operation of the Complainant in an unfair manner under Section 57 (1) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 8 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018. Also, the aforesaid acts were not the exercise of the market power or the superior bargaining power in an unfair manner under Section 57 (2) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 9 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018. In addition to these, the aforesaid acts were not the imposition of the trade condition causing the restriction or obstruction to the business operation of the Complainant in an unfair manner under Section 57 (3) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 10 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018.

Ms. D. gave the further statements admitting that the Complainant was not affected by the sale of products made by N. Company because the volume of the products as sold by N. Company was few, and the sale price of N. Company was similar to the Complainant's sale price. This admission was regarded that the acts committed by the Respondent did not result in the damage in the manner of the economic loss according to the facts under Section 57 of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 5 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018.

In the case where the Respondent terminated the agreement appointing the Complainant as the distributor and demanded the Complainant to repay the debt and the fine to the Respondent, the information on this case has been obtained from Ms. D., who is an attorney for the Complainant. Ms. D. gave the statements acknowledging that the Complainant defaulted on the payment of the product price to the Respondent within a specified period. Besides, when the Respondent endeavored to contact the Complainant's

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director, the Respondent could not contact him. In addition, the Complainant did not enter into the negotiation with the Respondent to jointly find out about the solution. And although the Respondent proposed two solutions to the problem and required the Complainant to choose the way of solution, the Complainant did not choose and ignored the proposal of the Respondent. Consequently, the Respondent informed the Complainant of the termination of the agreement appointing the Complainant as the distributor; and the Respondent demanded the Complainant to make the repayment of outstanding debt together with the fine.

The Trade Competition Commission is of the opinion that in case of the Complainant's default on the payment of the product price to the Respondent and the refusal to enter into the negotiation with the Respondent to jointly seek the solution including the ignorance about the solutions to the problem as proposed by the Respondent to the Complainant leading to the Respondent's termination of the agreement appointing the Complainant as the distributor, the aforesaid termination of the agreement resulted from the Complainant's breach in the agreement by not paying the product price to the Respondent within a specified period. The termination of the agreement was the exercise of the Respondent's right under the law. In respect of the demand for the payment of the fine, the Respondent had also the right to exercise under the law, which subsequently resulted from the termination of the agreement owing to the Complainant's breach in the agreement. The aforesaid acts of the Respondent were the exercise of the right under the law. And there was no act which was the impediment to the business operation of the Complainant under Section 57 (1) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 8 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018. Also, the aforesaid acts were not the exercise of the market power or the superior bargaining power in an unfair manner under Section 57 (2) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 9 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018. In addition to these, the aforesaid acts were not the imposition of the trade condition causing the restriction or obstruction to the business operation of the Complainant in an unfair manner under Section 57 (3) of the Trade Competition Act,

B.E. 2560 (2017) as coupled with Clause 10 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018.

With respect to the duty of the Respondent under the agreement to buy back the inventory of the Complainant, there were the facts that the distributorship agreements as made before the year 2017 imposed the condition that the Respondent had to buy back the inventory of the Complainant. In spite of this, the agreements as having been made since the year 2017, the aforesaid condition was cancelled. And in the agreement of the year 2018 which was the enforceable agreement made between the Complainant and the Respondent at the time when the dispute took place, there was no condition which required the Respondent to buy back the inventory of the Complainant. However, the Complainant argued that the Complainant later knew that there was no condition on the Respondent's buyback of the inventory of the Complainant in the distributorship agreement of the year 2018.

The Trade Competition Commission is of the opinion that the distributorship agreement of the year 2018 as made between the Complainant and the Respondent did not impose the condition requiring the buyback of the inventory of the Complainant. The Complainant did not deny that this agreement was imperfect or unenforceable. The argument that the Complainant later knew that there was no condition on the Respondent's buyback of the inventory of the Complainant in the aforesaid agreement was groundless. It is expected that the Complainant as a business operator would have understood that the business agreement resulted from the negotiation between the parties to the agreement; if the Complainant thought that some conditions were significant and had to be put in the agreement, the Complainant would negotiate and bargain with another party for putting such conditions in the agreement in a clear manner; and the Complainant would have to read the terms and conditions of the agreement before signing the name. Saying groundlessly that the Complainant later knew that the agreement of the year 2018 did not impose the aforesaid condition was the abnormality of a business operator and not credited. It is therefore believed in the facts that the agreement of the year 2018 was the one as made according to the real intentions of the Complainant and the Respondent. Due to the fact that the aforesaid agreement did not impose the condition requiring the Respondent to buy back the inventory

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of the Complainant, the Complainant's claim for the Respondent's buyback of the inventory of the Complainant was the enforcement to the Respondent to proceed beyond the imposition of the distributorship agreement. Therefore, the Respondent's refusal to buy back the inventory of the Complainant was not deemed to act against the condition of the distributorship agreement. In addition, it was not deemed that there having been no imposition of condition on the Respondent's buyback of the inventory of the Complainant in the agreement of the year 2018 was the exercise of the market power or the superior bargaining power in an unfair manner under Section 57 (2) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 9 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018. In addition, the aforesaid act was not the imposition of the trade condition causing the restriction or obstruction to the business operation of the Complainant in an unfair manner under Section 57 (3) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 10 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018.

With regard to the distributorship agreement of the year 2018 imposing the condition that the Complainant was prohibited from using any logo or trademark of the Respondent after the termination of the agreement, there was the fact that the aforesaid condition was the one which was imposed by the agreements as from the first agreement until the agreement of the year 2018.

The Trade Competition Commission is of the opinion that the condition of the distributorship agreement which prohibited the Complainant from using any logo or trademark of the Respondent after the termination of the agreement was imposed in order to protect the logo or trademark which was the right in the intellectual property of the Respondent. The imposition of the aforesaid condition in the distributorship agreement was therefore the exercise of the Respondent's right under the governing law on trademark. Despite after the termination of the agreement, there might be the event that the Complainant sold the inventory of products which the Complainant bought from the Respondent. The Complainant was within its rights to do so as the Complainant was the owner of the products. Although

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there was still the logo or trademark of the Respondent appearing on the products as sold, it was not deemed that the aforesaid sale of products was the use of the logo or trademark of the Respondent which was prohibited in the sense of the condition as imposed in the aforesaid distributorship agreement. This was because the right of Respondent over the inventory of products having the logo or trademark of the Respondent ended as from the date on which the Complainant bought and derived the ownership of the products according to the principle of the exhaustion of right. This was comparable with the judgment of the Supreme Court No.2817/2543. The imposition of the aforesaid condition by the Respondent was therefore the exercise of the right under the law. As the aforesaid logo and trademark belonged to the Respondent, the Complainant had the right to use the aforesaid logo and trademark by virtue of the right under the distributorship agreement. Upon the termination of the agreement, the Complainant had no right to further use the logo or trademark of the Respondent. Consequently, the distributorship agreement which prohibited the Complainant from using the logo or trademark after the termination of the agreement could neither affect the right of the Complainant nor cause the damage to the Complainant. Additionally, the imposition of the aforesaid condition was not deemed to be the imposition of the trade condition causing the restriction or obstruction to the business operation of the Complainant under Section 57 (3) of the Trade Competition Act, B.E. 2560 (2017) as coupled with Clause 10 of the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018.

For the above reasons, it was not regarded that the following acts as committed by the Respondent were those causing the damage to the Complainant in the unfair manner of the impediment to the business operation of the Complainant, the exercise of the market power or the superior bargaining power, or the imposition of the trade condition causing the restriction or obstruction to the business operation of the Complainant under Section 57 of the Trade Competition Act, B.E. 2560 (2017): the registration of establishment of N. Company by the Respondent and the conferring of the right to N. Company to sell the gauge products and industrial equipment in Thailand in the same way as the agreement appointing the Complainant as the distributor, the termination of the distributorship agreement and the refusal to buy back the Complainant's inventory as well as the demand for the Complainant

/to repay the debt...

to repay the debt and the fine, including the prohibition for the Complainant from using any logo or trademark of the Respondent after the termination of the agreement.

### **Resolution of the Trade Competition Commission**

The Trade Competition Commission passes a unanimous resolution that the acts of the Respondent were not deemed to be those violating Section 57 of the Trade Competition Act, B.E. 2560 (2017) as coupled with the Notification of the Trade Competition Commission regarding Guidelines on Considering Acts Resulting in Damage to Other Business Operators, B.E. 2561 (2018) dated October 4, 2018. The case is dismissed. The Complainant will further be informed of the resolution.

Trade Competition Commission

January 10, 2019