Article 7

Unfair Trade Practices

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1. **Introduction**

In general business operations, there are competing business operators of multiple scales and sizes, from large, medium and small, covering both the markets of products and services. The strategies applied in their competition differ. Some of such strategies may be categorized as violation of trade competition legislation. In the case that a large business operator with a dominant position exercises such position illegitimately, causing monopoly or unfair trade practices against their competitors, such conduct shall be governed according to Section 50 of the Trade Competition Act B.E. 2560 (2017).

"Unfair Trade Practices" pursuant to Section 57 is one of the essential provisions prohibiting business operators from undertaking any conduct resulting in damage to other business operators. It should be observed that the characteristics of such conducts prescribed by Section 57 are the same or similar to the conducts provided in Section 50 (Abuse of Dominant Position). The difference between the two provisions is that for Section 57, the business operator does not have to be in a dominant position and that there must be damage as a result of such conduct.

2. **Prohibited unfair trade practices which resulted in damage to other business operators under Section 57 can be determined based on the following elements:**

   1) **Undertaking of one of the following unfair trade practices**

      1.1) unfairly obstructing the business operation of other business operators

      1.2) unfairly utilizing superior market power or superior bargaining power

      1.3) unfairly imposing trading conditions that restrict or prevent the business operations of others

      1.4) conducting in other ways prescribed in the announcement of Trade Competition Commission

   2) **Resulting in damage to other business operator**

The procedure to determine the damage of other business operators will be based on the factual economic loss being the loss of revenue of other business operators, the loss of market value of the product or service, the loss of opportunity in producing goods or services, etc.

3. **Procedure in considering details of unfair trade practices resulting in damage of other business operator**

   1) **Unfairly obstructing the business operation of other business operators**

Obstruction under this provision is an act of restricting other business operators through unfair means. Conducts that are considered as obstruction are as follows:

1.1) **Price obstruction which can be divided into 2 cases**

(1) Fixing unfairly low price for product or service; e.g. Company A sells its products at a below-cost price resulting in Company B, its business competitor, being unable to sell its product competitively whereby selling at a below-cost price is not a regular business conduct nor is there any legitimate reason business-, marketing- or economic-wise.

(2) Fixing unfairly high price for product or service; e.g. Company A is a fruit wholesale buyer having more reserved funds than other business operators. Company A, therefore, sets a higher buying price for fruits to be purchased from farmers than other business operators for the duration that can be damaging. Farmers refuse to sell their products to other operators and prefer selling to only Company A due to the higher price they receive. After that, other business operators gradually shut down their businesses due to the inability to compete with Company A.

1.2) **Unfairly obstructing any business operator from participating in the operation of a trade association or trade collective**

E.g. For certain businesses, the business operator is required to be a member of a trade association in order to conduct their business on a competitive basis. However, such business operators may be obstructed from becoming a member of a trade association or collective without any appropriate reason causing economic loss to the obstructed business operator.

2) Unfairly utilizing superior market power or superior bargaining power

The term "Superior Market Power" is different from "Superior Bargaining Power" whereas:

2.1) **"Superior Market Power"** means when a business operator has the power and ability to steer or impose conditions on business operations in the market. It shall be assumed that the business operator with more than 10% market share has superior market power but the elements on obstruction of market entry shall also be considered i.e. number of business operators in the market, amount of capital, accessibility to material production input, rules and regulations, etc.

2.2) **"Superior Bargaining Power"** means when a business operator has the power and ability to control, instruct, steer or impose conditions of business operations on another business operator whereby such business operator has no option but to comply. The determination of whether a business operator has a superior bargaining power is not based on the volume of its market share but instead on its superior status compared to a more inferior one of other business operators. An inferior business operator also needs to rely on the superior business operator which can be determined based on the reliance on buying/selling of products and services between such business operators, based on the following criteria:

(1) Value of business transactions between the business operators is more than 30% of the revenue from the sale and purchase of product or service;

(2) Value of business transactions between the business operators is less than 30%. It needs to be further considered whether the inferior business operator has the option to trade with another operator or not. If so, would that transitions incur administrative cost higher than the benefits being earned from the same business operator.

3) Unfairly imposing trading conditions that restrict or prevent the business operation of others

Unfairly imposing trading conditions that restrict or obstruct operation of other business operators shall have one or more of the following characteristics:

3.1) Imposing discriminating trading conditions for different customers or those in different geographical areas without any appropriate reason; e.g. Company A is a manufacturer and distributor of electric fans. Company A sets the selling price differently for each of its customers for the same volume of purchase. This is considered an act of imposing discriminating trading conditions without any appropriate reason.

3.2) Imposing discriminating trading conditions by unfairly and selectively benefiting certain business operators; e.g. Company A receives purchase orders from Company B, the owner of which is a close relative of Company A's executive officer. Company A grants excessive discount to Company B in comparison to the same purchase volume of other customers, resulting in other customers having to unfairly pay for the products at an excessively higher price.

3.3) Imposing trading conditions that benefit trade partners of a business competitor without any appropriate reason to induce them into doing business; e.g. Company C is an emerging electric fan manufacturer and new business competitor gaining popularity in the market. Company C offers a buy 10 get 1 free promotion with additional 5% discount for specified volume of purchase for an unduly long period. Such offer resulted in the original trading partners of Company A switching to buy from Company C and thus reducing the number of Company A's trade partners by half during such period.

3.4) Imposing trading conditions without any appropriate reason requiring trade partners to purchase other goods or services from the business operator or others along with the primarily required goods or services (tie-in conditions); e.g. Retailer A imposes a condition requiring Company B, manufacturer and seller of pre-packaged rice of Retailer A, to only use the method of transportation as required by Retailer A otherwise the product of Company B cannot be distributed in Retailer A's facility.

3.5) Imposing trading conditions prohibiting trade partners from doing business or trading with its business competitor without any appropriate reason; e.g. Company A, a manufacturer and seller of energy drinks, prohibits its trade partners from selling the energy drinks of other business competitors by claiming that such other operators are its competitors. Company A will suspend distribution to any disobliging trade partners.

3.6) Unfairly imposing trading conditions restricting or obstructing business transactions between trade partners and other business operators; e.g. Company A is a manufacturer and distributor of a fabric softener with numerous trade partners. Company B is an emerging business recently invested in the fabric softener market and possesses an innovation which makes the product more concentrated, requiring only one-third of the usual amount for the same outcome. Company A attacked Company B by attempting to claim that the chemical in Company B's raw material is carcinogenic and is harmful for consumers. The statement is untrue but still resulted in a reduced amount of sales of Company B's product.

3.7) Unfairly exercising control over assignment of employees of its trade partners; e.g. Company A is the major shareholder of Company B, its significant trade partner. Company A imposes a condition requiring Company B to inform and acquire Company A's consent for any appointments of its executive officer.

3.8) Unfairly interfering with the business transaction of its business competitor; e.g. Company A and Company B are business competitors. Company A has information on 3 major shareholders of Company B and therefore contacted all of the 3 shareholders to offer many forms of benefits in exchange with Company B's insider information. Should any of the 3 shareholders refuse, such shareholder will be pressured and its own business operation will be obstructed.

3.9) Unfairly interfering with internal management of its business competitors through voting, appointment of executives or any other means; e.g. Company A is a manufacturer of weight-loss supplement in Thailand having Company B as its competitor. Company B requires certain raw material from Company A who is an exclusive patent owner in Thailand. When there is a change of the executive officer of Company B, Company A wants its personnel who was sent to work at Company B to be appointed as the new executive. Company A therefore forces Company B to comply with the requirement or otherwise the license agreement for the patented raw material will be revoked.

3.10) Refusing to do business with a trade partner without any appropriate reason; e.g. Company A is a cosmetics manufacturer and seller and has been doing business with Shop B by supplying the latter with its product for more than 10 years. However, Company A became aware that Shop B has been selling its products lower than the price fixed. Company A, therefore, reminded Shop B not to sell the products at a lower price as it will affect the image of the brand but Shop B continues to do so and eventually Company A terminates its distribution to Shop B permanently.

4) Conducting in other ways prescribed in the Commission's announcement

In order to govern unfair trade practices, the Trade Competition Commission issued the Announcement of Trade Competition Commission as a guideline for the consideration of trade practices in many business facets i.e. retailing, franchising, agricultural wholesale buying, etc.

4. Punishment for violation

Business operators who undertake any unfair trade practices (Section 57) shall be subject to an administrative fine at the rate not more than 10% of the turnover in the year of offence. If the offence is committed in the first year of the business operation, the administrative fine shall not be more than 1 million baht (Section 82).

Additionally, if the offender is a juristic person, Section 84 stipulates that if such offence is committed under instruction or through the conduct of a director, manager, or any person responsible for the operation of such juristic person or in a case where that person has the duty to instruct or perform some conduct but fails to instruct or perform the conduct causing that juristic person to commit an offence, such person shall also be subject to a punishment as prescribed for that particular offence.

5. Summary

Even though the punishment stipulated for the undertaking of unfair trade practices may be lighter than other types of conduct, it should be noted that business operators of all sizes and scales shall be governed by Section 57. Even without a dominant position, the business operator shall be observant and mindful of its trade practices that may unfairly exploit or restrict trade competition, resulting in the damage to other business operators.