

SPI Newsletter

NEW DRAFT NOTIFICATION SEEKS TO REGULATE UNFAIR PRACTICES IN THE FRANCHISE INDUSTRY IN THAILAND

RAWAT CHOMSRI (Partner)
RATTANAN JAROENPORNWORANAM (Associate)

The Draft Notification of the Office of Trade Competition Commission Re: The Guide for Unfair Practices in Franchise Businesses (“**Draft Notification**”) has recently been issued by the Office of Trade Competition Commission (“**Commission**”). The Draft Notification, prepared pursuant to section 57 of the Trade Competition Act B.E. 2560 (2017) (“**Act**”), is aimed at regulating the fast growing franchise industry in Thailand, which is currently estimated to be worth over THB 200 billion. In particular, the Draft Notification seeks to regulate and restrict unfair practices of a franchisor towards a franchisee under a franchise agreement. The key aspects of the Draft Notification are summarized below.



Definitions

In the Draft Notification—

“**franchise**” is defined as:

“The operation of business whereby a person referred to as a franchisor enters into a written agreement with another person referred to as a franchisee to undertake business by using the forms, systems, procedures, and rights in intellectual property of the franchisor or other rights which the franchisor may grant for the purposes of operating business for a specified period of time or in a specified location, and such operation of business is under the promotion and control of the franchisor pursuant to its business plan and the franchisee has the duty to pay remuneration to the franchisor.”

“**franchisor**” is defined as:

“Person(s) granting the right to operate a franchise”; and

“**franchisee**” is defined as:

“Person(s) who has been given the right to operate a franchise.”

Regulation

The Draft Notification stipulates the duties which a franchisor must observe when undertaking a franchise business in Thailand, which are as follows:

1. Duty of disclosure

Section 3 of the Draft Notification stipulates the following information which the franchisor must disclose to the franchisee:

- information relating to the pre-operational and operational costs of the franchise, for example: franchise fee, royalty fee, training costs, and costs of necessary tools and equipment necessary to operate the business, method of cost calculation, as well as details relating to payment and terms of refund.
- information relating to franchise business plan, for example: provision of assistance in management and training, offering of advice, the number and location of current as well as prospective nearby franchisees, and details relating to sales promotions.
- material information pertaining to related trademarks, patents and copyright, its effective period, scope of rights, as well as conditions and limitations.
- information relating to the extension of the franchise agreement, its amendment, its termination, and its revocation.

2. Duty to notify

Section 4 of the Draft Notification provides that if a franchisor wishes to open an additional store or branch in the same vicinity as the franchisee, the franchisor is required to provide advance written notice to the franchisee and must offer the franchisee the right to open that store or branch (as applicable). The franchisee in turn must respond to such offer in writing within the specified time. In this regard, the capacity of the franchisee to undertake such business must be taken into account.

Interestingly, the last sentence of section 4 which refers to the consideration of the franchisee's capacity to undertake business could be construed that if it is deemed that a franchisee does not possess the capacity to undertake the business the franchisor is seeking to open in the vicinity of the franchisee, then the notification duty does not apply to that particular franchisor. However, the Draft Notification does not expressly state who has the discretion to decide what is or is not beyond the capacity of the franchisee. Similarly, the franchisee's right to respond to the franchisor's offer within a specified time is ambiguous, in particular with respect to what a "specified time" means and who determines the specified time. This drafting may give rise to potential disputes between a franchisor and franchisee.



3. Duty to refrain from performing prohibited acts

Section 5 of the Draft Notification stipulates the following acts which a franchisor must refrain from performing:

- The specification of terms in a franchise agreement which limit the right of the franchisee without reasonable cause, such as specifying that a franchisee must purchase goods or services which are unrelated to the franchise business, or that a franchisee may only purchase goods or services from the franchisor or a specific supplier, or specifying a purchase quota which the franchisee must meet which is beyond what is actually required in the franchise business and prohibit the return of excess goods or ingredients.
- The specification of additional terms after the franchisor and franchisee have entered into the franchise agreement. For example, requiring the franchisee to purchase other goods or services, or perform any other acts beyond what is specified in the franchise agreement.
- Prohibiting the franchisee from purchasing good or services of the same quality at a lower cost from other suppliers by requiring that a franchisee may only purchase goods or services from the franchisor or a specified supplier without reasonable cause.
- Prohibiting a franchisee from selling perishable goods or near expiring goods at a discounted price without reasonable cause.
- Varying terms of franchise agreements between different franchisees without reasonable cause leading to discrimination.
- Specifying other unreasonable terms for any other reason other than to preserve reputation, quality, and standard of the franchisor pursuant to the franchise agreement.

It should be noted that a franchisor seeking to undertake business in Thailand must not only observe the duties specified in the Draft Notification but must also observe other general duties as contained in the Act and other applicable laws.

Penalties

Given that the Draft Notification is prepared pursuant to section 57 of the Act, failing to observe the duties specified in the Draft Notification will therefore result in a violation of section 57 of the Act as well. This will trigger a penalty under section 82 of the Act which provides that failure to comply with section 57 of the Act shall result in a fine not exceeding 10% of the total income of the year in which the offence was committed, or in the event the offence is committed in the first year of business operation, the fine shall not exceed THB 1 million.

Conclusion

The Draft Notification sets out prohibited unfair practices as well as providing some helpful examples to guide interpretation. However, due to the ambiguous drafting of certain sections of the Draft Notification, there is a risk that certain aspects of the current drafting might lead to disputes between franchisors and franchisees. Therefore, although this Draft Notification marks an important step in regulating the franchise industry in Thailand, it appears to require further refinement by the relevant legislative body for it to become an effective and balanced piece of legislation that fairly protects the rights of franchisees while promoting investment in the Thai franchise industry.

Looking ahead

A public hearing was held on 23 August 2019 to allow affected parties to express their comments on the Draft Notification. Following the public hearing, amendments were made to the Draft Notification which were approved by the Trade Competition Commission. All that is left is for the Chairman of the Trade Competition Commission to sign the Draft Notification, after which it will be published in the Royal Thai Government Gazette and come into force.