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Vietnam

FRANCHISING AND LICENSING OF MARKS IN VIETNAM

ベトナムでは、教育、小売などの分野で厳しい外資規制を回避するため、フランチャイズ方式を利用することがある。本稿では、フランチャイズ方式での事業展開に適用される法規制と、フランチャイズに伴って必要となる商標登録及びライセンスについて概説する。

Introduction

Many internationally recognized brands such as McDonald's, Starbucks, KFC and SevenEleven have penetrated the Vietnam market by franchising their business systems to local franchisees. Franchising is now a common practice in Vietnam. To some extent, franchising is an efficient way to overcome statutory restrictions/requirements in conditional sectors (such as training sector and retail sector). Mark license is an important and inseparable part of a franchise agreement. Along with franchised business systems, the relevant marks are licensed to the franchisees for their use in Vietnam.

Legal framework for franchising

The basic regulations on franchising are provided in the Commercial Law[1]. These regulations are elaborated in Decree No. 35/2006/ND-CP of the Government dated March 31, 2006 ("**Decree 35**"), and Circular No. 09/2006/TT-BTM of the Ministry of Trade[2] dated May 25, 2006, ("**Circular 09**"). Related regulations on franchising can also be found in the Law on Intellectual Property ("**IP Law**")[3]. These regulations apply to franchising between Vietnamese parties as well as to a foreign franchisor who grants a franchise to a franchisee in Vietnam and to a Vietnamese franchisor who grants a franchise to a franchisee in a foreign country.

Concept of franchising: The Commercial Law defines franchising as a commercial arrangement under which a party, the franchisor, grants another party, the franchisee, the right to carry out the business of selling its goods or supplying services under the following conditions:

1 Affective from January 1, 2006.
2 It is now the Ministry of Industry and Trade ("**MOIT**").
3 Affective from July 1, 2006, as amended first time on June 19, 2009 and second time on June 14, 2019.

- the franchisee may carry out the business under a format determined by the franchisor and may affix the franchisor's marks, tradenames, business logos, slogans, and advertisements at the franchisee's business premises; and
- the franchisor has the right to control and assist the franchisee in carrying out the franchised business.

Decree 35 gives a similar but more comprehensive interpretation of franchising that also covers the rights received by a primary franchisee from a franchisor under a master franchising agreement; rights received by a sub-franchisee from a sub-franchisor (i.e. the primary franchisee) under a sub-franchising agreement; and rights received by a franchisee from a franchisor under a franchising development contract, which allows a franchisee to carry out the franchised business at more than one location within a locality.

Franchising conditions: In order to franchise its business system, a franchisor, regardless of its place of incorporation must satisfy the following conditions:

(i) the business system to be franchised has been operating for at least one year. In case of sub-franchising, the Vietnamese primary franchisee must operate the franchise business for at least one year in Vietnam before sub-franchising;

(ii) the franchisor has registered the franchising activity with the competent authorities, if it is so required by law; and

(iii) the goods and services that are the subject of the franchise are not prohibited.

In summary, an offshore franchisor only needs to satisfy the condition on the operation period of the franchise system of at least one year and registration of its franchise system with the MOIT. The regulatory timeframe for MOIT to review the application for franchise registration and record the franchisor's name in the national database of franchising is 5 working days. It may take longer in practice. However, in comparison with the procedures to establish a foreign invested company in Vietnam, franchise registration is substantially simpler and less time and effort consuming.

Obligation to disclose information: After registering its franchise system with the MOIT, the franchisor may enter into franchise agreements with franchisees, provided that it has already fulfilled the obligation to disclose information about the franchised system to the franchisee at least 15 days in advance, unless otherwise agreed. The information to be disclosed by the franchisor comprises the sample of franchise agreement and the document named Franchise Introduction Document that is made in a standard form. The Franchise Introduction Document must be included in the dossier for franchise registration filed with the MOIT.

Besides the initial disclosure requirement required in the Franchise Introduction Document, a franchisor is required to keep its franchisees updated of all significant changes related to its franchise system. A "significant change" is defined as any change that may have an impact on the business activities of a franchisee. Circular 09 requires the franchisor to report to the MOIT any change in: (a) the name of the franchisor; (b) address of the head office; (c) telephone and fax number; (d) scope of business; or (e) type of business to be franchised. The report must be made within 30 days from the date on which the change occurs.

Franchise agreement: If the parties select Vietnamese law to be the governing law, a franchise agreement may comprise the following contents: (i) franchising contents; (ii) rights and obligations of the franchisor; (iii) rights and obligations of franchisee; (iv) price and periodic franchising fee, and payment method; (v) term of the contract; and (vi) extension and termination of the contract, and dispute resolution. In our experience though, the parties rarely select Vietnam law as the governing law for a cross-border franchise agreement and therefore the agreement would typically be as negotiated between the parties. Regarding the contract language, Decree 35 requires that all franchise agreements, other than the franchise agreement where the franchisor is a Vietnamese company and franchisee is overseas, must be in Vietnamese. That is, a franchise agreement must be in Vietnamese or at least translated into Vietnamese.

<u>Mark registration and license</u>

Mark license is often an essential and integral part of the franchising documents. In fact, franchising and mark license are regulated by two different laws and managed by two different state authorities (franchising is regulated by the Commercial Law and managed by the MOIT, meanwhile mark license is regulated by IP Law and managed by the National Office of Intellectual Properties ("**NOIP**") under the Ministry of Science and Technology). There is no mechanism for information exchange between the MOIT and NOIP regarding the franchise registration and mark registration/license. Decree 35 only requires that the application dossier for franchise registration must contain the mark registration certificates without clarifying whether such marks registration certificates must be issued by the NOIP or by the authorities of the franchisor's home country. In practice, the mark registration certificates issued in a foreign country are sufficient and accepted by the MOIT. While such tolerance facilitates the franchising registration procedures, it may trigger future litigations. This is because, under the IP Law, a mark is protected in the territory of Vietnam on the basis of its registration with the NOIP. If the franchisor fails to register its marks in Vietnam, the franchisee's use of such mark in Vietnam may infringe rights of a third party that has duly registered the mark (or a confusingly similar mark) with the NOIP. Moreover, there will be no effective mechanism to protect the franchisor's mark which may be cause for concern since intellectual properties infringement and counterfeit are rampant in Vietnam. It is therefore suggested that the franchisor register its marks in Vietnam before franchising its business system in Vietnam. For a mark that has already been registered in Vietnam, the mark license may, subject to the parties' negotiation, be registered with the NOIP.

In the past, the licensor and licensee were not inclined to register the mark license with the NOIP since the process of registration required significant time and effort. Article 148 of the IP Law provided that while a license is effective between the licensor and licensee from the signing date of the license agreement, it is only effective against third parties from the date on which the license is registered with the NOIP. Fortunately, in its commitments to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Vietnam has agreed to remove the requirement on registration of a mark license in order to make it valid against a third party. Consequently, a mark license will be valid against any third party as from its execution date regardless of its registration with the NOIP. This commitment has been inserted in the new amendment to the IP Law that has just been adopted by the National Assembly on June 14, 2019 and will be effective from November 1, 2019.

Conclusion

Franchising is an effective and relatively safe mode to seek an entry into the Vietnam market when a foreign investor does not want to invest substantially and take risks. However, in order to protect its rights over the franchised business, the franchisor should register its franchise with the MOIT and duly register the relevant marks with NOIP in advance.

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Philippines

NEW RULES ON EXPEDITED MERGER REVIEW

2015 年にフィリピンで競争法が施行されて以降、フィリピンの競争当局が審査した企業結合届出は累計 184 件、取引総額は約 2.87 兆ペソ（約 6 兆円超）に達した。過去の審査で得られた経験を踏まえ、2019 年 7 月、フィリピン競争当局は一定の要件を満たす企業結合に関してより審査を迅速に完了させる簡易審査制度を導入した。本稿ではこの簡易審査制度の概要について紹介する。

Background

Since the Philippine Competition Act (Republic Act No. 10667) came into effect on August 8, 2015, the Philippine Competition Commission ("**PCC**") has received 184 merger notifications with a total transaction value of Php2.87 trillion. Of this number, it has approved 174 transactions, and blocked 1 transaction.[1] Drawing on this experience, the PCC has determined there are certain mergers that are less likely to substantially prevent, restrict or lessen competition in relevant markets and adopted Commission Resolution 008-2019 re: Approving and Adopting the PCC Rules on Expedited Merger Review ("**Rules on Expedited Merger Review**") which took effect on July 2, 2019 and applies prospectively to merger reviews filed.

Scope of New Rules

Coverage of Rules on Expedited Merger Review

As used in the Rules on Expedited Merger Review, the term "merger" refers to both mergers, including joint ventures, and acquisitions.

The Rules on Expedited Merger Review provides that any of following transactions qualifies for an expedited review:

a) Mergers with no actual or potential overlap in business relationship (i.e., horizontal, vertical or complementary business relationship) between the ultimate parent entity of the acquiring and acquired entity

b) Global mergers (i.e., the acquiring and acquired entities in the definitive agreement are foreign entities) where the Philippine subsidiary merely acts as assemblers or manufacturers with at least 95% of such products exported to the foreign parents, subsidiaries, affiliates or third parties located outside the Philippines. The remaining 5% product sales in a market in the Philippines must be minimal in relation to the entirety of such Philippine product market.

c) Mergers involving a global relevant geographic market and the acquiring and acquired entities have negligible or limited presence in the Philippines

d) Incorporated or unincorporated joint ventures formed purely for the construction and development of real estate projects.

Notwithstanding, even if a notifiable merger may qualify for expedited review, the parties have the option to file and undergo the regular review process.

Difference between the Expedited and Regular Merger Review

a) Notification form

The Rules on Expedited Merger Review do not modify the thresholds for a notifiable merger transaction, nor do they modify the notification period that must be observed. The period to file the merger notification still continues to be 30 days after signing the definitive agreements relating to the merger, but prior any acts of consummation.

1 Philippine Competition Commission, https://phcc.gov.ph/press-releases/expedited-merger-review/

However, in a regular review, the ultimate parent entity of the acquired and acquiring entity (the "**Notifying Parties**") are required to, each, submit notification forms under the Rules on Merger Procedure ("**Regular Form**") within the notification period, while in an expedited review, the Notifying Parties must each submit the expedited review notification form (the "**Expedited Form**") within the notification period. In the Expedited Form, the PCC has identified specific documents that Notifying Parties should annex to their application based on the grounds cited for the expedited review.

b) Prior notice for Expedited Review

In addition to using the appropriate form, prior notice of filing the Expedited Form is required as part of the expedited review process. The Notifying Parties must inform the PCC's Mergers and Acquisition Office ("**MAO**") of their intention to submit their respective Expedited Forms at least 2 days prior to the target submission date.

c) Review Period and Process

There are also some differences in the review period and the review process that is observed in a regular review and an expedited review.

A regular review has two phases. Phase 1 review which lasts for a maximum of 30 days, during which period the PCC will assess if the notified merger raises any concerns that would warrant a more detailed review. If no competition concerns are raised, the merger may be cleared within the Phase 1 review period. Otherwise, the PCC will commence Phase 2 review, which lasts for a maximum of 60 days, during which period the PCC will conduct a more detailed and in-depth assessment of the merger.

On the other hand, an expedited review will last only for a maximum of 15 days. Generally, the review process observed during Phase 1 review and the expedited review are the same. The PCC may require additional information or documents from the Notifying Parties, or conduct site visits or inspections of the Notifying Parties, their customers or competitors. The PCC may also contact third parties (such as customers, suppliers, competitors, government entities, industry associations and think-tanks) by market calls or inquiry letters to receive relevant information regarding the market, their views on the merger and any competition issues.

However, in an expedited review, within 1 working day from the acceptance of the Expedited Form, the PCC will publish an abstract of the transaction on the PCC website and issue a call for comments, while no similar publication measure is adopted during the Phase 1 review.

d) Filing fee

The amount of the non-refundable filing fee payable by an acquiring entity will slightly differ depending on the type of merger review.

In an expedited review, the filing fee is Php 150,000, while in a regular review, the Phase 1 filing fee is Php 250,000 and should Phase 2 proceed, the Phase 2 filing fee is 0.01% of the transaction value, which shall not be less than Php 1 million nor exceed Php 5 million.

However, failure to pay filing fees will have the same consequences in both regular and expedited merger review, as it shall result in the return or non-acceptance of the notification forms and it is as if no notification of the merger has been made to the PCC.

Consequences if there are material competition issues
It is important to note that although the conditions for the use of the Expedited Forms are fulfilled, if the PCC determines that there are material competition issues that require additional information or an in-depth review or investigation, the Expedited Forms of the Notifying Parties will be returned and no notification shall be considered to have been made. However, the Notifying Parties will not be subject to penalties for late notification (i.e., fines of 0.005% of the transaction value, but not exceeding Php 2 million for failure to notify with notification period), provided they submit the Regular Forms <u>prior</u> to any acts of consummation of their transaction, and pay the applicable filing fees for the Phase 1 review.

Conclusion

While the Rules on Expedited Merger Review will shorten the PCC's review period, the Parties will have to also carefully consider and evaluate whether the preparation of the information and specific documents required for an expedited review may be as time-consuming for them as going through a regular review process. Further, since the PCC reserves the discretion to determine if the merger involves material competition issues, filing an expedited review, only to have such application returned because of such findings, will only serve to frustrate the parties' objective of fast-tracking the review process.

Considering the foregoing, it may well benefit the parties to request and have a pre-notification consultation ("**PNC**") with the PCC's MAO. While it is optional, the PCC encourages parties to avail of the PNC under the Rules of Merger Procedure and the Rules on Expedited Merger Review in order to assist parties in the planning and consideration of their proposed mergers, as well as afford them the opportunity to discuss the content and timing of their notifications. Although the parties only receive non-binding advice from the PCC during the PNC, nonetheless, such measure can streamline and facilitate both the regular review and expedited review process.

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Australia

AUSTRALIA -UPDATED GUIDANCE NOTE ON "GUN JUMPING"

ガンジャンピングとはいわゆるフライングを意味するが、競争法の文脈においては、企業結合審査が完了する前に合併や企業買収などの企業結合が完了する前に M&A 取引を実行してしまうことや、M&A 取引を実行する前に顧客情報や価格情報等の競争機微情報を交換する行為などを意味する。近年の傾向としてかかるガンジャンピング行為に対する規定が強化される動きがあり、本稿ではこれに関連する直近のオーストラリアの競争当局の動向を紹介する。

Background

On 23 May 2019, the Australian Competition and Consumer Commission (**ACCC**) issued an updated note regarding the potential risks that may flow to parties who are found to have "jumped the gun" when coordinating a merger or acquisition.

The note follows a recent successful prosecution by the ACCC for such conduct, which led to a penalty of AU$1.05 million being imposed on the guilty party.

What is "gun jumping"?

The phrase "gun jumping" refers to the circumstance where, in a merger transaction or an acquisition of another entity, the parties begin to coordinate their activities or behave as one entity (rather than as competitors) prior to the transaction being completed.

Under section 50(1) of the *Competition and Consumer Act 2010* (Cth), a corporation must not, either directly or indirectly, acquire the shares of a body corporate or the assets of a person in circumstances where the acquisition would have, or is likely to have, the effect of substantially lessening competition in any market. The ACCC is the body that is tasked with reviewing such mergers and acquisitions and, whilst notifying the ACCC of such proposed transactions is voluntary, the ACCC's Merger Guidelines provide that the ACCC expects to be notified of mergers where the:

- products of the merger parties are either substitutes or complements; and
- the final company will have a post-merger market share that is greater than 20% of the relevant market.

Even if the above matters are not concerns in a particular case, parties are able to approach the ACCC to review the transaction for any potential competition concerns.

Regardless of whether there is a request for a review, in the event that the ACCC is concerned that a merger may substantially lessen competition in a market, it may block the transaction or seek to have it annulled if it is already completed. In the latter case, pecuniary penalties may also be imposed.

What type of behavior is considered "gun jumping"?

It is important that, even whilst a proposed transaction is on foot, parties continue to act independently and in a manner that suggests that they are competing with each other. The ACCC's note makes reference to several examples of conduct that may be at risk of falling foul of Australia's competition laws. This is not an exhaustive list, with each case to be considered according to its own circumstances:

- engaging in the sharing of customers;
- agreements regarding pricing of the relevant products or services;

- sharing current and competitively sensitive information beyond what is require for the conduct of due diligence and future integration planning;
- any agreement not to market or sell to a particular sector of the market or audience;
- placing unreasonable restrictions on the target's business activities or ability to compete; and
- joint marketing activities.

Such conduct may amount to cartel behavior or concerted practice.

Recent example

In the matter of *ACCC v Cryosite Ltd* [2019] FCA 116, the ACCC imposed a penalty of AU$1.05 million for gun jumping behavior on Cryosite Ltd (**Cryosite**). Cryosite, a biotechnology company, had agreed to sell its assets in its cord and blood tissue banking business to another entity, Cell Care Pty Ltd (**Cell Care**). Cryosite and Cell Care were, at the time of the transaction, the only two suppliers of such services that enabled a customer to control the release and use of the cord blood or tissue that had been stored for that customer.

Under the relevant asset sale agreement (**Agreement**), Cryosite was required to refer all customer enquiries to Cell Care after the agreement was signed (but prior to the acquisition being completed). The Agreement also:

- restrained Cell Care from dealing with any Cryosite customer who had cord blood and tissue stored with Cryosite in the five years before the proposed acquisition; and
- prevented Cell Care from marketing to Cryosite's existing customers.

In return for doing so, Cryosite received an upfront payment of AU$500,000, and further annual payments totaling at least AU$2.5 million.

The ACCC alleged that this amounted to cartel conduct, which Cryosite admitted. The penalty imposed represented approximately 10% of both:

- Cryosite's anticipated annual turnover; and
- the maximum penalty in Australia for cartel conduct per contravention.

Following the decision, the ACCC Commissioner emphasized that "parties to a transaction must remain independent and continue to act as competitors, even after they have signed a business or share sale agreement, until the deal is completed".

Conclusion

The action taken by the ACCC against Cryosite, and its guidance note on the issue, make it clear that companies must ensure that they continue to remain independent and act as competitors until any relevant merger is completed and the consolidated entity is in place. This includes any sharing of information beyond what is necessary, any restrictions on marketing to particular sectors, and other such behavior. This guidance note also applies equally to foreign companies that have business operations in Australia.

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