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NEW ERA OF CONSUMER PROTECTION

デジタル社会の到来と共に電子商取引（オンライン取引）が増加し、消費者保護制度についてもかかる変化に対応した制度を導入する必要性が高まる中、インドでは2019年8月、新たな消費者保護法が制定され、33年ぶりに現代化が図られた。製造物責任に関する規定の新設、消費者保護の範囲の拡大、紛争解決手続きの迅速化等、同法の重要な改正点について紹介する。

Background

In its effort to bring consumer protection at par with digital and technological advancements, in August 2019, India enacted the new Consumer Protection Act, 2019 ("New CPA") to replace the three-decade old Consumer Protection Act, 1986 ("1986 CPA"). The New CPA has not come into effect as of November 2019, but upon coming into force will introduce new provisions regarding product liability, enhanced consumer protection and robust consumer dispute resolution.

Key Provisions

1. **Broadened Scope:** The definition of 'consumer' under the New CPA has been expanded to include a person who buys goods or avails services offline or online through electronic means or by tele-shopping or direct selling or multi-level marketing. Thus e-commerce transactions have also been included in the remit and a consumer buying goods through e-commerce platforms such as Amazon etc. would also be protected under the New CPA.
2. **Product Liability:** A key provision introduced in the New CPA is that of product liability. Each of the product manufacturer, product service provider and product seller can be held liable for any claim for compensation if their defective product or services provided in respect of the product cause 'harm' (which includes damage to property (excluding the product itself), personal injury, illness or death, mental agony or emotional distress) to the consumer. In terms of liability, the following can be held responsible:
 - (a) A product manufacturer will be liable if the product contains a manufacturing defect, or is defective in design; or does not conform to an express warranty; or fails to contain adequate instructions of correct

usage to prevent any harm or any warning regarding improper or incorrect usage. Absence of negligence or fraud in making express warranty of a product would not be a defence.

- (b) A product seller who is not a manufacturer may be held liable if (i) he has exercised substantial control over the designing, testing, manufacturing, packaging or labelling of a product that caused harm; or (ii) he altered or modified the product, which alteration or modification caused harm; or (iii) the product failed to conform to an express warranty made by the seller; or (iv) the identity of product manufacturer of such product is not known, or if known, the New CPA cannot be enforced against such manufacturer; or (v) the seller failed to exercise reasonable care in assembling, inspecting or maintaining such product or he did not pass on the warnings or instructions of the manufacturer regarding the dangers involved or proper usage of the product. A 'product seller' includes an electronic service provider which subsumes an online market place.
- (c) A product service provider may be liable if (i) the service provided was faulty or imperfect or deficient or inadequate in quality, nature or manner of performance; or (b) there was an act of omission or commission or negligence or conscious withholding of any information which caused harm; or (iii) the service provider did not issue adequate instructions or warnings to prevent any harm; or (iv) the service did not conform to express warranty or the terms and conditions of the contract.

Certain exceptions have been provided under the New CPA from liability claims, such as, no liability may be imposed where the product has been misused, altered or modified or if the nature of the product is such that the user should have known the associated dangers.

3. **Unfair Trade Practices:** The 1986 CPA listed certain practices to fall within the category of unfair trade practices. The scope of unfair trade practices has been further expanded to include:
 - (a) Failure or non-issuance of bills or cash memo or receipt for the goods sold or services rendered;
 - (b) Refusal to withdraw or discontinue defective goods/deficient services or refusal to refund the consideration paid towards such goods/services within the period stipulated in the bills or cash memo or receipt or in the absence of such stipulated period, within 30 days of the date of notice; and
 - (c) Disclosure to any third person of consumer's personal information given in confidence by the consumer, unless such disclosure is permitted by law.

Any breach of the aforesaid would constitute a ground for complaint by the consumer.

4. **Unfair contracts:** A new concept introduced under the New CPA relates to unfair, unreasonable or unilateral contracts and provides protection to consumers against such contracts. An unfair contract has been defined to include contracts between a manufacturer or trader or service provider on one hand, and a consumer on the other, having such terms which cause significant change in the rights of such consumer, including contracts containing the following terms:
 - (a) requiring excessive security deposit for the performance of contractual obligations;
 - (b) imposing penalty on the consumer disproportionate to the loss occurred due to breach;
 - (c) refusing to accept early repayment of debts or unilaterally terminating a contract without reasonable cause;
 - (d) permitting assignment of contract to the detriment of the consumer, without his consent;
 - (e) imposing on the consumer an unreasonable charge, obligation or condition which puts consumer at a disadvantage.
5. **Liability for spurious goods:** Spurious goods have been defined under the New CPA to mean goods which are falsely claimed to be genuine. In addition to the provisions contained in the Indian Penal Code, the New CPA provides that anyone who manufactures/stores/sells/distributes/imports any spurious goods is subject to be punished if such an act causes injury, grievous hurt or death with an imprisonment term and a fine.

6. **Ease of Filing Complaints:** Under the 1986 CPA, a complaint could be filed only at a forum situated at the place of purchase of the product or the registered office of the seller. To facilitate consumers and reduce inconvenience, the New CPA provides flexibility to the consumer to file complaints with the consumer forum located at the place of residence or work of the consumer. The New CPA also contains provisions for consumers to file complaints electronically.
7. **Establishment of Central Consumer Protection Authority:** A new regulatory authority known as the Central Consumer Protection Authority (CCPA) is proposed to be established under the New CPA. The CCPA will monitor consumer welfare, curb unfair trade practices and have wide powers of enforcement along with investigative powers to focus on breaches of consumer rights. The CCPA would also be empowered to take *suo-moto* actions, order product recalls, issue directions to manufacturers/endorsers regarding misleading advertisements, impose penalties, issue safety notices and file class action suits on behalf of multiple consumers.
8. **Misleading Advertisement & Criminal Liability:** Criminal liability has been introduced against a manufacturer or service provider who causes a false or misleading advertisement to be made which is detrimental to the interest of consumers. Heavy penalties of up to INR 1,000,000 as well as imprisonment of up to 2 years can be imposed on a manufacturer or an endorser, for a false or misleading advertisement. In case of a subsequent offence, the fine and imprisonment are higher. The CCPA can also direct the advertiser to discontinue or modify a false or misleading advertisement or cancel licenses.
9. **Provision for Speedier Dispute Resolution:** The New CPA provides for mediation as an alternate dispute resolution mechanism, making the process simpler and speedier. If, at any stage, the district consumer forum believes that a mutual settlement may be possible, it may direct parties to give written consent to settle their disputes by mediation through a mediation cell attached to the forum.

Conclusion

With the advent of the digital age and more transactions taking place electronically, introduction of the New CPA was crucial to safeguard the rights of consumers. The establishment of a new authority focusing on protection of consumer welfare and prevention of abuse of consumer rights is a welcome step. Introducing stricter penal provisions for defective goods, misleading advertisements etc. is likely to bring in more accountability on the part of manufacturers, sellers and advertisers.

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Vietnam

NOTABLE CHANGES UNDER VIETNAM'S COMPETITION LAW 2018

ベトナムでは新しい競争法（独占禁止法に当たるもの）が公布され、2019年7月に施行された。新法では競争制限の有無に関して実質的な基準が多く導入され、企業活動に抑止的効果を及ぼしうるものである。本稿ではその内容について概説する。

Background

Vietnam's Law on Competition, being promulgated on 12 June 2018, took effect from 1 July 2019 ("**Competition Law 2018**") and replaced the old Law on Competition dated 3 December 2004 ("**Competition Law 2004**"). This article provides a summary of some important changes introduced by the Competition Law 2018.

New Method to Calculate Market Share

The Competition Law 2004 only provided for two methods to determine the market share of an enterprise in relation to certain type of goods or services, based on the business indicator of such enterprise compared to the same business indicator of all enterprises conducting business in such type of goods or services in the relevant market:

- (a) based on the turnover from sales, and
- (b) based on the turnover of inward purchases.

The Competition Law 2018 now adds two more methods:

- (c) based on the quantity of units of goods or services sold, and
- (d) based on the quantity of units of goods or services purchased.

New Approach to Tackle Competition-Restraint Agreement

The Competition Law 2018 adds the following types of agreements that may be characterized as "agreements in restraint of competition" ("**Competition-Restraint Agreements**"):

- (1) agreements to share customers,
- (2) agreements not to trade with non-contracting parties,
- (3) agreements to limit the product sale market or sources of goods/services supply of non-contracting parties, and
- (4) other agreements which have or may have a competition-restraining impact.

All the above new types of Competition-Restraint Agreements, even among enterprises in the same relevant market, or among enterprises conducting business at different stages but in the same chain of production, distribution and supply of goods or services will be prohibited, if they are deemed as "causing or having the ability to cause a significant competition-restraining impact in the market". The Competition Law 2018 seems to give Vietnam's National Competition Committee ("**NCC**") - a new state agency established under the Competition Law 2018 itself - a broad discretion to determine if an agreement would "cause or have the ability to cause a significant competition-restraining impact" (and subsequently would be prohibited) on the basis of the following criteria ("**Restraint Criteria**"):

- (a) market share ratio of the contracting enterprises,

- (b) barriers to market access or expansion,
- (c) restriction of research, development and renovation of technologies, or technological capacity,
- (d) reduction of the ability to access or possess essential infrastructure,
- (e) increase of costs and time of customers in purchase of goods or services from contacting enterprises or when changing to purchase other relevant goods or services, and
- (f) hindering competition via the control of special factors in industries and sectors relating to the contracting enterprises.

These Restraint Criteria also apply to prohibit certain Competition-Restraint Agreements existing under the Competition Law 2004, which were formerly prohibited if the combined market share of contracting parties is 30% or more.

Exemption on prohibited Competition-Restraint Agreements may be granted by NCC for up to five years, with a chance for extension of exemption for another five years, if the concerned Competition-Restraint Agreements are proved to be beneficial to the consumer and meet at least one more factor relating to the macro-economy. Notably, labor agreements and agreements governed by specialized laws seem to be out of restrictive scope of the Competition-Restraint Agreements.

Dominant Market Position

The below table illustrates the concept of “dominant market position” under the Competition Law 2018 (^{NEW} indicates new regulation under the Competition Law 2018):

Subject	Aggregate market share	Other criteria	Notes
One enterprise	≥ 30%	N/A	
	N/A	Having significant market force	Significant market force will be determined based on the following factors of the concerned enterprises:
A group of enterprises	N/A	Acting together to cause a competition-restraining impact and having significant market force ^{NEW}	<ul style="list-style-type: none"> (a) correlation of market shares, (b) financial strength and scale, (c) barriers to access or expansion to others, (d) ability to possess, access and control the market, (e) advantages of technologies and technical infrastructure, (f) ownership and right to possess and access infrastructure, (g) ownership and right to use intellectual property rights, (h) ability to switch to other relevant goods or services, and (i) special factors in the industry in which the enterprise is conducting business.

Two enterprises	≥ 50%	N/A	Enterprises which have a market share of less than 10% will be excluded
Three enterprises	≥ 65%	N/A	
Four enterprises	≥ 75%	N/A	
Five enterprises NEW	≥ 85%	N/A	

Generally, unlike the Competition Law 2004, the Competition Law 2018 prohibits activities of abusing dominant market position regardless of the occurrence of actual consequences. Abusing activities which may eliminate competitors, cause damage to customers, or prevent the market access or expansion of other enterprises are also prohibited.

Merger Control Regulations

Broadened concept of acquisition: For the purpose of merger control, the concept of “acquisition” is now broadened to include indirect acquisition, and acquisition of equity interests to control or govern the acquired party or its businesses.

Prohibited economic concentration transactions: The Competition Law 2018 prohibits economic concentration transactions (i.e. merger, consolidation, acquisition, joint venture etc.) which cause or may cause the effect of significantly restricting competition in the market of Vietnam. NCC will have the power to evaluate if the effect of restricting competition is significant by relying on the following factors:

- (a) combined market share of contracting parties,
- (b) extent of concentration in the relevant market before and after the transactions,
- (c) relationship of the contracting parties in the chain of production, distribution and supply of a certain type of goods or services or whose business lines are mutual inputs or complementary to each other,
- (d) competitive advantages brought by the transactions in the relevant market, (dd) ability of a contracting party after the transactions to significantly increase prices or the rate of return on sales,
- (e) ability of a contracting party after the transactions to impact market access or expansion, and
- (f) other special factors in the industry that the contracting parties operate.

These factors are vaguer than the threshold of 50% of combined market share, which was used by the Competition Law 2004 to prohibit economic concentration transactions.

Merger filing: Under the Competition Law 2018, the parties to economic concentration transactions must inform NCC if they are subject to notification thresholds which are based on (a) total assets or total turnover of contracting parties in Vietnamese market, (b) transaction value, or (c) combined market share in relevant market. Before 1 July 2019, economic concentration transactions were needed to be reported to the competition authority, if the combined market share of the contracting parties was between 30% to 50% of the relevant market.

The Competition Law 2018 introduces two-stage appraisals i.e. preliminary appraisal and official appraisal, compared to the single appraisal that the parties to economic concentration transactions had to undergo under the old law. Transactions that pass the preliminary appraisal may be conducted immediately, whereas other transactions will be subject to official appraisal and may be either conducted straightforwardly, conducted with certain conditions attached, or prohibited.

Monetary fine for violation of merger control regulations is reduced to 5% (from 10% under the earlier law) of the total turnover of the violating party in the relevant market in the preceding financial year.

New Regime of Leniency Policy

Parties to prohibited Competition-Restraint Agreements may be entitled to exemption or reduction of the level of penalty if they voluntarily declare the act in breach before being issued investigation decision, and cooperate with the competent authority during the investigation and resolution of the act in breach. However, as such leniency policy applies to the first three successful applicants only, the entitlement to leniency will be determined by the Chairman of NCC based on (a) order [sequence] of declaration, (b) timing of declaration, and (c) degree of honesty and value of provided information and evidence.

Conclusion

The Competition Law 2018 seems to introduce various subjective factors (which depend on the unanticipated judgement of NCC) to determine if an agreement, transaction or arrangement falls under its restrictive regulations. Pending the official promulgation of implementing regulations detailing the Competition Law 2018, one is recommended to consult with the competent authority to confirm if its contemplated transaction is subject to any requirement under the new competition laws.

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Thailand

RECENT RELAXATION ON FOREIGN BUSINESS RESTRICTION IN THAILAND

タイでは外国人事業法に基づきサービス業が広く外資規制の対象とされており、グループ会社間サービスであっても、外資企業が行う場合には同法に基づくライセンスの取得が求められてきた。この点について、本年6月25日付の省令において規制緩和が行われ、一定のグループ会社に対する業務（タイ国内貸付、ユティリティの提供を含む事業用スペースの賃貸、並びに、経営、マーケティング、人事及びIT関連の助言業務）は外資規制の対象から除外され、ライセンスの取得が不要となった。

Background

The Ministerial Regulation on prescription of exempted service businesses in doing foreign businesses No.4 B.E. 2562 (2019) has been enacted on 25 June 2019. This Ministerial Regulation facilitates foreign investors in doing business in Thailand and eases the regulatory requirements for certain restricted businesses, considering that the exempted businesses have little impact on Thai business operators competing with foreign investors. Also, it aims to reduce the cost of operation resulting in higher efficiency of business units in the national economy as well as providing flexibility amongst affiliated/group companies in their administration and management.

In light of that, it is possible for any restricted businesses under the Foreign Business Act to be reviewed and get exempted from obtaining the Foreign Business License (“**FBL**”) once the approval is granted by the Cabinet.

The Foreign Business Act, B.E. 2542 (1999) (“**FBA**”) is the primary statute in regulating all business activities carried out by foreigners in Thailand. The law defined the scope of foreigner as well as provided the classification of the businesses into three lists. The lists range from List 1 which sets out the businesses which are strictly prohibited and closed to

foreigners to List 2 and 3 where foreigners may be permitted to be engaged in certain businesses upon obtaining requisite licenses and approvals from the relevant authority. More specifically, any service businesses which are not listed and deemed as non-restricted business would generally be considered as “other service businesses” under List 3 (21) of the FBA, which requires a foreigner to obtain the FBL to operate businesses.

Generally, the Foreign Business Commission, which is responsible for ensuring compliance with the FBA has the right to determine and review the categories of businesses annexed in the list of the FBA annually and to prepare an opinion for the Minister. Based on the recent Ministerial Regulation, the following relaxation has been granted.

Key Relaxation

Regarding the recent relaxation, the following categories of service businesses have been excluded from List 3 (21) of the FBA:

- 1) Provision of loan to affiliated/group companies in Thailand;
- 2) Provision of renting services of office space with public utilities to affiliated/group companies; and
- 3) Provision of advisory services to affiliated/group companies on four fields which are management, marketing, human resource and information technology.

There are two key points to consider as follows:

1. Definition of affiliated/group companies

The exemption is applicable to the companies where more than half of the shareholders or partners in a company are the shareholders OR partners representing more than half of the shareholders or partners in another company or a shareholder or partner holding at least 25% of the value of the capital in a company holds at least 25% of the value of the capital in another company OR a company holds shares or is a partner with a value of 25% or more of another company’s capital OR more than half of the authorized directors of a company are more than half of the authorized directors of another company. If their relationship does not meet any of the abovementioned conditions, it is still required to obtain the FBL.

Noticeably, the definition of affiliated/group companies under this Ministerial Regulation is way more specific than the general definition given by the Ministry of Commerce. This is because the requirement of the control power of one company over another company is excluded from being considered as affiliated/group companies under this Ministerial Regulation.

2. Scope of the relaxation

Considering the exempted businesses, there are some observable characteristics as follows:

- The provision of loan to affiliated/group companies is solely applicable to the companies registered under the law of Thailand. In addition, the loan must be provided within Thai territory for the reason that it intentionally encourages foreign investors to have more investment in Thailand.
- Regarding the renting services of office space with public utilities to affiliated/group companies, the term “public utilities” must be strictly interpreted. In practice, it covers only the provision of the electricity, water supply, and telephone service. Other office facility services i.e. cleaning, security, or parking service are not exempted.
- Also, the provision of advisory services limits to four fields: management, marketing, human resource, and information technology while other services such as accounting and legal service are not liberalized since such other services are still considered as the businesses where Thai nationals are not ready to compete with foreigners.

Future Development

More recently, on 25 September 2019, the Director-General of the Department of Business Development considered liberalizing the following businesses from obtaining the FBL:

- Telecommunication services for business operators type 1;
- Treasury centers;
- Aviation maintenance; and
- Software development.

The reason behind this move is to reduce redundancy in regulatory requirements from having both specific and foreign business law that regulate the businesses at the same time. Besides, it is foreseen that granting exemption for those businesses would attract more foreign investors and benefit Thais especially for innovation development as such knowledge could be extensively contributed and transferred in the country. As of now, this preliminary outline awaits further consideration from the relevant authorities prior to the implementation.

Conclusion

Looking to the future, this would be a favorable step to encourage foreign investors in doing business in Thailand. Since the Government has boosted Thailand to be an investor-friendly country, the exception list and the current move are expected to attract more and more businesses. This is mapped out in line with the development plan as a part of Thailand Plus Package as well as Thailand 4.0 scheme to further drive economic growth through innovation.

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