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New Thai Trade Competition Commission's Regulation on Credit Terms applicable to SMEs

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1. Background

Many businesses have been severely impacted by the COVID-19 pandemic. The pandemic has caused, especially, to Small and Medium Enterprises (hereinafter referred to individually as an “SME” or collectively as “SMEs”) not only the loss of customers and revenue, but also a lack of cash flow from doing business. Unlike large businesses, SMEs have a more limited cash flow, and, in B2B (business-to-business) transactions, less negotiating power. In addition, SMEs are more likely to encounter cash conversion cycle problems with customers. If SMEs cannot properly manage this problem, there is a chance that the SMEs will suffer from a lack of liquidity and eventually go out of business. One of the methods to prevent such lack of liquidity from occurring with respect to SMEs is to ensure that SMEs will not be forced to accept unreasonably long credit terms with customers. It has been found that SMEs in Thailand, particularly when it comes to B2B transactions, are, very often, subject to credit terms the length of which are the longest in the ASEAN region, and such terms have tended to increase every year, i.e., 60 days on average and 120 days in some businesses (based on the information published in 2020)¹.

In response to such a strong need for protection of SMEs, the Thai Trade Competition Commission (the “TCC”) has issued a new regulation pursuant to Section 57 of the Trade Competition Act of 2017² (the “TCA”): the ‘Trade Competition Commission Notification on Guidelines for the Assessment of Unfair Trade Practices with respect to Credit Terms for SME business operators, in goods or services, dated 24 May 2021’ (“**Regulation on Credit Terms**”), to limit the length of the credit terms to be imposed against business operators dealing with SMEs. The Regulation on Credit Terms was published in the Government Gazette on 18 June 2021, and will be effective from 16 December 2021. It is expected that SMEs will benefit from this regulation significantly because it should provide an opportunity to receive timely payments and reduce the inequality as well as promote fairness in conducting business for SMEs.

2. Key takeaways from the Regulation on Credit Terms

- The Regulation on Credit Terms applies to written agreements in which SMEs, who are the sellers of the goods or services for the trade, manufacturing, and services, allow buyers, including buyers in the consignment arrangement or similar transactions, to make the payment for the goods or

¹ https://www.bot.or.th/Thai/ResearchAndPublications/articles/Pages/Article_20Aug2020.aspx

² Section 57 of the TCA: No business operator shall undertake any conduct resulting in damage on other business operators in any of the following ways:

- 1) by unfairly obstructing the business operation of other business operators;
- 2) by unfairly utilizing superior market power or superior bargaining power;
- 3) by unfairly setting trading conditions that restrict or prevent the business operation of others; or
- 4) by conduct in other ways prescribed in the Commission's notification.

services in accordance with the agreed upon conditions and timeframes set out in the Regulation on Credit Terms.

- Technically, the Regulation on Credit Terms could also apply to the stipulation of the Credit Terms (defined below) on transactions between SMEs and transactions with large companies' affiliates that meet the criteria of SMEs.
- The key definitions provided under the Regulation on Credit Terms are:
 - **"Small and Medium Enterprises"** (SMEs) is defined as:
 - A manufacturer of goods i) having no more than 200 employees; or ii) having an annual turnover not exceeding THB 500,000,000; or
 - A seller of goods or a service provider i) having no more than 100 employees; or ii) having an annual turnover not exceeding THB 300,000,000³.
 - **"Credit Terms"** is defined as the payment terms of trade credit, evidenced in writing, which sellers of goods or services allow the buyers of goods or services to settle payment within the agreed time frame⁴.

Regarding the definition of SMEs above, it seems as though meeting only one of either i) or ii) of the respective criteria could enable the business operators to be deemed as SMEs, and, thereby, allow for the protection provided under the Regulation on Credit Terms, however, in practice, the TCC may interpret that ii) would be a determining criteria in the case where only one of either i) or ii) meets such criteria⁵. For example, if a business operator is a manufacturer of goods having only 40 employees, but with an annual turnover of THB 520,000,000, the TCC may interpret that such business operator shall not be deemed as an SME⁶.

- The stipulation of Credit Terms between business operators and SMEs in accordance with unfair trade practices shall be as follows:
 - Credit Terms periods
 - For general trading, manufacturing, and services business sectors, Credit Terms shall not exceed 45 days⁷.
 - For agricultural-related products, or agricultural-related products with primary agricultural processing with a non-complex production process, Credit Terms shall not exceed 30 days⁸.
 - Parties may set longer Credit Terms if there are 'business, marketing, or economic justifications stipulated under the contractual obligations'⁹ related to the payment or Credit Terms. To date, there is no further clarification with respect to this exception. Therefore, the TCC will, should there be disputes between the parties, consider whether such setting of the longer Credit Terms would fall under this exception (i.e., considering the business, marketing, or economic grounds) on a case-by-case basis, taking into account the arguments raised by both parties.
 - How to count Credit Terms
 - The Credit Terms shall start from the day on which (i) such goods or services are delivered according to the quantity, type, and quality standard of goods or services as agreed; and (ii) the delivery of documentation is completed¹⁰.

³ Clause 2 of the Regulation on Credit Terms

⁴ *Ibid.*

⁵ This is because the definition of SMEs under the Regulation on Credit Terms is based on that of the 'Ministerial Regulation Prescribing the Criteria for Small and Medium Sized Enterprises of 2019 dated 20 December 2019' ("**Ministerial Regulation under SME Act**"), which was issued under the Small and Medium Sized Enterprises Promotion Act of 2000, hence, from the perspective of the TCC, the interpretation thereof should be based on the Ministerial Regulation under SME Act in which Section 5 provides, that, "*In the case that the enterprise has got a number of employees that matches one type of enterprise, but the sales matches another type of enterprise, the sales shall be used for the determination*" (**Note:** For clarity, the latter part could be read to mean "...for the determination of the type of such enterprise). This view is reinforced by the TCC's opinion and example provided on p.5 - 6 of the TCC's summary of the public hearing on the draft 'Trade Competition Commission Notification on Guidelines for the Assessment of Unfair Trade Practices with respect to Credit Terms for SME business operators, in goods or services, which was conducted between 8 February 2021 and 12 March 2021 dated May 2021.

⁶ *Ibid.*

⁷ Clause 4 (1) (a) of the Regulation on Credit Terms

⁸ Clause 4 (1) (b) of the Regulation on Credit Terms

⁹ Clause 4 (1) paragraph 2 of the Regulation on Credit Terms

¹⁰ Clause 4 (2) of the Regulation on Credit Terms

- In the case of consignment, it shall begin from the day of goods being sold according to the quantity or the rate agreed under the ordinary course of business¹¹.
- Payment for Credit Terms
The following processes must be taken:
 - The business operators who are the trading partners with an SME must provide proof of the steps for payment under the ordinary course of business. For instance, the method of payment, e.g., payment by cash, installment, credit card, deposit or other e-payments methods, must be clearly stipulated; and
 - The SME shall also show to the other business operators the evidence in relation to employment or document showing the turnover to confirm the status as an SME¹².
- Any act relating to the Credit Terms shall be deemed unfair in violation of the Regulation on Credit Terms if it falls under any of the following:
 - An unjustified delay in making payment for goods or services in excess of the stipulated Credit Terms;
 - An unjustified change of Credit Terms or other contractual obligations without at least 60 days' prior notice; or
 - Any other acts forced unfairly upon an SME by the other trade partners, such as the special stipulation on the Credit Terms conditions, which could cause unnecessary burden to the contractual party etc.¹³
- Failure to comply with the Regulation on Credit Terms may be subject to the following penalties under the TCA:
 - Suspension order issued by the TCC, e.g., the violator must appropriately reduce the Credit Terms;¹⁴
 - Administrative fines not exceeding 10% of annual turnover of the violator; and¹⁵
 - Civil damages claims brought by injured persons, e.g., SMEs.¹⁶

3. Our remarks

The Regulation on Credit Terms sets out stricter standards for Credit Terms. It should be noted that the Regulation on Credit Terms is only applicable to SMEs. As a result, it must be confirmed that the future sale and purchase agreements, as well as invoices and payments involving SMEs, contain the provisions regarding the Credit Terms, which are in accordance with the Regulation on Credit Terms. Business operators that have commercial interactions in the supply chain with SMEs should be aware of the requirements, including platform who may receive the payment on behalf of sellers, in order to be able to comply with the Credit Terms when transferring payments to sellers who are SMEs. Although there is still an exception that allows parties to agree otherwise on the Credit Terms, the criteria thereof still remain unclear and will depend on the consideration of the TCC and/or courts on a case-by-case basis. Thus, prudent business operators should, with the support of a professional legal advisor, ensure that transactions with SMEs that involve the Credit Terms are in line with the Regulation on Credit Terms, so as to avoid high penalties as stipulated above.

¹¹ Clause 4 (3) of the Regulation on Credit Terms

¹² Clause 4 (3) of the Regulation on Credit Terms

¹³ Clause 5 of the Regulation on Credit Terms

¹⁴ Section 60 of the TCA

¹⁵ Section 82 of the TCA

¹⁶ Section 69 of the TCA

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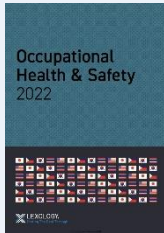
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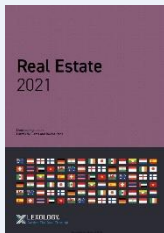
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