

CONSUMER PROTECTION ENHANCED: NEW DIRECT SALES AND DIRECT MARKETING ACT

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Section 57 of the Constitution states that “the right of a person as a consumer shall be protected as provided by law”. The newest piece of legislation adopted thereunder is the Direct Sales and Direct Marketing Act 2002 (the “DSA”). This Act, passed on April 30, 2002, came into force on August 29, 2002.

The purpose of the DSA is to protect consumers from business operators who appear to be taking “willful advantage” of them through such undefined means as deception or coercion and thus are depriving consumers of their freedom of choice. A good part of the DSA focuses on restricting who can do direct sales or direct marketing business and the ways that business can be carried out. The DSA is silent on the types of transactions it governs and gives vague definitions of “direct sales” and “direct marketing”. It is likely that Internet sales and marketing, among others, fall within this scope.

Direct Sales

In the DSA, the term “direct sales” refers to the presentation and offer of goods or services for sale directly to consumers in their dwelling or at any place other than in a retail shop specifically visited by the consumer, through direct sales agents or independent distributors engaged in either one-level or multi-level sale. While the definition was more detailed in prior draft versions of the Act, it has been left vague in the final version with a note that it will be further circumscribed by Ministerial Regulations.

The DSA defines “direct sales agent” as an agent of a direct sales business operator who offers the operator’s goods or services for sale directly to the public (one-level sale). An “independent distributor” is defined as a person who buys the goods or services from the business operator and then resells these to the public (multi-level sale).

A direct sales business operator must register with the Registrar before conducting business. The application to the Registrar must be accompanied by various documents providing information on the business as well as a description of the offered goods/services, the procedure for selling the goods or services, and a remunerative plan.

The remunerative plan should detail the remunerative payment calculations and contain such other details as shall be prescribed by the Direct Sales and Direct Marketing Board (“Board”). Other instructions on the nature of the plan include restrictions on the methods of describing payment calculations and unreasonable persuasion of an independent distributor to buy products.

A business operator is further required to enter into a written agreement with its independent distributors or direct sales agents. The agreement must contain details of the remunerative payments and details of the fees payable to the business operator including membership admission fee and promotion material costs (which shall not exceed rates to be fixed by the Board). In the independent distributor's case, the agreement must allow for and further state the procedure and timeline for reselling a product and the promotion materials back to a business operator.

Direct Marketing

The DSA defines "direct marketing" as marketing goods and services by way of communicating a long-distance message to promote goods/services directly to consumers with the expectation that the consumers will respond by purchasing the goods/services.

In order to conduct this type of marketing business, an operator must be registered under the DSA's requirements for a direct sales business (see above), provided that no remunerative plan is required and must follow all applicable Ministerial Regulations. The DSA further specifies that the message communicated by the direct marketing operator shall also comply with consumer protection laws relating to advertising.

Consumer Protection

The DSA provides consumers with better protection in many ways.

The DSA requires that all sales documents be in the Thai language and contain the following information: the seller's and buyer's names, purchase date, delivery date of goods or services, and **information describing the consumer's right to terminate**. Warranties for goods and services must also be written in Thai and must clearly outline the consumers' rights under those warranties. For specific products (to be determined in future regulations), the sales documents must also contain additional information.

The consumer is entitled to and must be provided with a copy of the goods or services sales documents or else he is not bound by the particulars therein.

More importantly, the DSA provides consumers with a "cooling off period" in that a direct sales agreement is only legally binding for 7 days after the goods or services are delivered. Before the expiration of the 7 days, a consumer is given the right to change his mind by terminating the agreement and returning the product. A full refund shall be given within 15 days from receipt of the termination notification provided that if the goods are damaged by the consumer, he shall take financial responsibility for such damage. A description of the goods and services to be excluded from this 7-day delay will be provided by future regulations as will be the general procedures for returning goods or services.

Pyramid-like direct sales and direct marketing, where the consumer pays for goods or services and is granted some sort of benefit or business interest if they solicit further customers for the business operators, are prohibited. It is also prohibited to offer a non-employee agent or independent distributor benefits for the solicitation of other individuals to act as agents or independent distributors.

In addition to the above protections, the DSA protects consumer privacy by prohibiting independent distributors or sales agents from approaching a dwelling for the purpose of solicitation unless he has already been granted permission to do so by the dweller.

Recording of Direct Sales and Direct Marketing

The Director General of the Consumer Protection Board acts as Registrar under the DSA and is responsible for reviewing and registering direct sales and direct marketing applications. In reviewing applications, the Registrar may request further explanations or documents for examination.

Pursuant to the DSA, complete applications must be processed and registered within 45 days following receipt of such application. Incomplete applications must be altered or changed within a “reasonable time”. Upon receipt of such alterations or changes, the applications must then be processed and registered within 30 days following receipt of the application.

A business operator has 30 days to appeal either a rejection of his application or a cancellation of his registration under the DSA. The appeal is made to the Board and the Board’s decision is final.

Direct Sales and Direct Marketing Board

A Direct Sales and Direct Marketing Board (“the Board”) is to be created consisting of a Chairman appointed by the Cabinet, 4 *ex officio* members (the Director-General of Internal Trade Department, the Director-General of Industrial Promotion Department, the Chief of the Royal Thai Police and the Secretary General to Food and Drug Board), 4 appointed members from associations related to direct sales, direct marketing and consumer protection, and 4 suitable appointed members, 2 of which must come from the private sector. The Secretary General to the Consumer Protection Board shall be both member and Secretary.

The Board will consider consumer complaints, supervise direct sales and direct marketing operators, judge appeals against the order of the Registrar, advise the Cabinet on direct sales and direct marketing issues, oversee the performance of competent officials and government agencies in the area, lay down rules and notifications and suggest regulations to assist in the execution of the DSA. Further, the Board is empowered to apply settlements and conditions as it sees fit. More importantly, it also has the power to warn the public away from certain goods and services that may be “detrimental or prejudicial” and to disclose the identity of the direct sales business operator, direct marketing operator, agent or distributor offering such products or services. No further discussion of these terms is provided, meaning that the Board has a great deal of discretion.

The Office of Consumer Protection Board is to act as an advisor, administrator, and general overseer.

Penalties

The DSA provides penalties for any violations of its rules. The penalties vary depending on the offense. The maximum sentence is 5 years of imprisonment and fines can not exceed Baht 500,000. Such penalties may be applied not only to enterprises but also to managers, legal

representatives, or persons in charge of operations unless the offense was committed without their knowledge.

120 Days to Register

The Transitory Provision allows anyone involved in direct sales and direct marketing before the DSA came into force 120 days after the effective date of the DSA to seek registration.

Comments

The DSA, like many other pieces of legislation adopted for consumer protection, is strongly protectionist. This means that businesses can not participate in direct sales or in direct marketing unless they provide Thai translations of all required documents and register under the DSA.

In view of the uncertainty concerning the scope of application of the DSA, it is hoped that the Board will urgently recommend the adoption of further legislation.