

Unfair Trade Practices and Consumer Protection

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Abstract

With the advancement of humankind from Stone Age to the current day, the relationship between the suppliers of goods and services and the consumers has undergone radical changes. Modern strategies for initiating consumer protection have been the element of business life since 1950s and 1960s. Some legislative control of these techniques has been introduced to attempt to ensure that the legitimate aim of promoting the benefits of the product can be achieved without misleading, confusing or deceiving the consumer and without harming the interests of competitors. Although the Constitution of the Republic of the Union of Myanmar, (2008), the Consumer Protection Law, (2019) and the Competition Law of Myanmar, (2015) prohibit unfair trade practices by enterprises, Myanmar still need to implement strong enforcement for such acts. It may be said that consumer protection policy prevents products from engaging in unfair practices while seeking to increase their sales. So, this paper analyses the necessity and challenges for protection to the consumers if there is unfair trade practices by some undertakings in the relevant market.

Keywords: Unfair Trade Practices, Consumer Protection, Competitors.

Introduction

Nowadays, the world economy has been developed and linked between the trading countries. When the countries whether developed or developing have adopted market economy system which encouraged the free competition between the competitors. However, there is a little hope of fairness in competition. Competition means the rivalry between two or more businesses to gain as much of the total market sales or customers' acceptance as possible. Although all countries agree that competition should be not only free but also fair, however, competition becomes unfair when its effects on trade, consumers, and society as a whole are more detrimental than beneficial.

The relation between competition and consumer protection is not a new one but rather a settled one. The consumer protection movement began in Europe and North America in the 1960s and got a boost and moral support from the late United States President John F. Kennedy in the historical declaration in Congress on March 15, 1962. Unfair trade practices not only harm to the consumers, but also harm other market players in the process, and more importantly, they harm the market as a whole as well. While preventing and punishing the unfair trade practices, consumer protection policy does more than safeguarding the interests of the consumers or promoting consumer welfare, it comes back to facilitate competition.

Materials and Methods

This topic is interesting because if there is unfair trade practice by undertakings, most of the consumers may have limited choice of products in the market at higher price and presumably, lower quality. So, in this instance the question that arises is: what are the best ways to increase the awareness of the community about which of the enterprises are infringing their rights as consumers? More importantly, it is the new Myanmar Consumer Protection and Myanmar Competition Law properly covering this issue and does it adequately facilitate consumer protection. Since this paper focuses on consumer protection from unfair trade practices, analytical study on relevant provisions of laws of Myanmar (the Competition Law,

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2015 and the Consumer Protection Law, 2019) is studied. Furthermore, there is no leading case in Myanmar for those acts the cases of other countries are also analyzed.

Concept of Unfair Trade Practices (UTPs)

For this purpose, firstly it is needed to examine what are unfair trade practices and consumer in accordance with relevant laws of Myanmar. According to the Competition Law of Myanmar, the followings are considered unfair trade practices and are prohibited:

- Misleading the consumers
- Disclosing trade secrets
- Coercing businessmen against each other
- Defaming the reputation of another business
- Disturbing the operation of the business
- Conducting advertising and sales promotions for the purpose of unfair competition
- Discriminating among businessmen
- Selling goods at a price less than the production cost or cost, insurance and freight in the market
- Abusing influence of business, inducing or instigating of a party under contract with other businesses to breach the contract
- Exercising unfair competitive act in violation of any stipulation by the commission for the interests of consumers when necessary.²

The Consumer Protection Law of Myanmar 2019 says that business must not engage in any conduct that misleads or deceives consumers. The Law also specifically prohibits a number of trade practices which are relevant for all businesses, such as, deceptive advertising³, misleading⁴ and misappropriate promoting⁵.

Unfair Trade Practices (UTPs) encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming off, dilution and disparagement.⁶

As a result, to protect the consumer against the inducing consumer transactions, the consumer should know and learn about the legal control of the unfair trade practices, deceptive and comparative advertising, packaging and labeling the products, restrictions on advertising and other sale practices. Moreover, UTPs is the reflection of the sociological, economic, moral and ethical concepts of a society, so it changes from the country to country and from time to time. The question “What is unfair?” depends too much upon the special circumstances and conditions of each case. There is a thin line to distinguish between what act is fair and unfair.

² Section 17 (Chapter 9) of the Competition Law of Myanmar, 2015

³ Section 63 (Chapter 23) of the Consumer Protection Law of Myanmar, 2019, the Law provide only for Myanmar Language version, the translation is only the idea of the author not the official translation.

⁴ Ibid, section 65.

⁵ Ibid, Section 64

⁶ Pham, Alice, *Competition Law in Vietnam: A Toolkit* (CUTS HRC Publishing Hanoi 2007) 64.

While during the time, on the other hand, we need to examine the word consumer, that is to say how they can be defined for the purpose of Myanmar Consumer Protection Law and Competition Law.

Consumer means person who buys or takes or uses goods or services not for commercial purposes or resale but use for personal or household.⁷ However, there is no definition of consumer in the Competition Law; it only contains the definition of business and businessman which provided as any business or businessman means, manufactures, distributions etc. or the person who carries out any business or service business. In this expression, an organization that operates business or service is also included.⁸

It may be said that the concept of unfair trade practice in Myanmar was first formed in the Irrawaddy Flotilla Company v. U Nar Auk dispute. U Nar Auk born in 1832 at the village of Kawnut, close to Mawlamyine.⁹ He was just a cattle boy and started his career as an assistant in paddy trade, later because of his efforts he became a timber business man. He used his wealth to fight back British's powerful company Irrawaddy Flotilla which had monopolized river transport business along the Irrawaddy River and to help the poor citizens avoid exploitation by British and Indian businessmen.

The Irrawaddy Flotilla and Burmese S.N. Co., Ltd., was formed in 1865 to implement a contract with the Government of India for the conveyance of His Majesty troops and mails on the Irrawaddy, together with general traffic from Rangoon to Mandalay. The company is considered to be one of the most interesting of its kind that ever existed and has made a notable and major contribution to the development and prosperity of Burma. The year 1875 was an important one in that the services were incorporated as the Irrawaddy Flotilla Co., Ltd., and at that time the fleet consisted of 13 steamers and 29 flats.¹⁰

The Irrawaddy Flotilla Company which had a successful business in Myanmar naturally had to face competition.

In 1920, U Nar Auk pioneered a new business by establishing the Burmese Steam Navigation and Trading Company. He sent his educated shareholder, ShweHlay, to buy nine ships- seven double deckers and two single deckers. He also builds a dock for the ships in the town of Mottama.¹¹

U Nar Auk's steamship company started plying the lower Thanlwin, Attaran and Gyaing rivers, routes previously used by the British-owned Irrawaddy Flotilla Company, which operated passenger and cargo ferries. The Irrawaddy Flotilla was challenged by U Nar Auk's new company. U Nar Auk charged the same fare, but he allowed monks, nuns, the elderly and children to ride free of charge. As a devout Buddhist, it was merit for him. But for the British, it meant a huge loss of customers.¹²

A kind of fare fighting then resulted. The Irrawaddy Flotilla cut its charges by half in an offer to win passengers back. Accordingly, U Nar Auk further reduced his fares more, provoking the British company to cut its charges again, until both sides decided to let everybody ride for free. Afterwards, ferry passengers were offered gifts, in addition to the free ride. The competition also affected other regions of business, with "dock fighting" developing as both sides went to court for rights to embark and disembark from the main jetties. In the end, however, U Nar Auk could not overwhelm the mammoth British company.

⁷ Section 2 (b) of Myanmar Consumer Protection Law 2019

⁸ Section 2 (i) and (j) of Myanmar Competition Law 2015

⁹ Zay Yar, Mr., Myanmar Lyukyaw 100, Unity Public House, 2010, p. 89.

¹⁰ Discovery.nationalarchives.gov.uk/download/GB%200136%20D-IR

¹¹ Zay Yar, Mr., Myanmar Lyukyaw 100, Unity Public House, 2010, p. 90.

¹² www.irrawaddy.com/feature/profiles/a-burmese-tycoon-you-can-find-today.html

After years of competition, he was forced to give way and sell his ships to the Irrawaddy Flotilla.¹³ Although U Nar Auk failed in the competition, however he won his fame because of his benevolence and patriotic spirit.

Nowadays, most countries whether developed or developing are adopting and practicing market economy systems; this allows free competitions between industrial and commercial enterprises. Free competition between enterprises is considered the best means of satisfying supply and demand in the market and of serving the interests of consumers, competitors and the whole community. However, there is a little hope of fairness in competition between the competitors. Sometimes competitors themselves breach the fair competition because there is a thin line which exists to decide what unfair trade practice acts are. UTPs between the enterprises not only harm market players but also harm the consumer and more importantly, they harm the market as a whole as well.

Protection for Consumer against UTPs

Protection against unfair trade practices in Myanmar contains in the Constitution of the Republic of the Union of Myanmar, 2008, which stated in Article 36 (b) of the Constitution, as follows:

“The Union shall protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities.”

The protection given under the Constitution is only for the monopolization of the enterprises. However, there are many acts which effected to the interests of the consumers. So, the Consumer Protection Law, 2019 prohibits the advertising or misleading of the entrepreneurs under the Chapter 23.

Under Chapter 23 of the Consumer Protection Law, misleading the consumers and comparative advertising are prohibited. Section 63 of the Law provided that the entrepreneur shall not offer for sale, promote sale and advertise with intent of misleading the buyer of user in the conditions of not fresh or good condition, goods or services that are not useful or available and using exaggeration are not approved with complete information which are included as the followings:

- (a) advertisements that are deceived to the consumers in respect quality of goods, quantity, ingredients in goods, mode of use to goods, price of goods, rate of service and time to be able to deliver the goods or services;
- (b) advertisements that are deceived on warranty of the goods or services;
- (c) advertisements containing false information in respect of goods or services;
- (d) advertisements that are not informed the risk of using the goods or services;
- (e) advertisements used on any person or any incident without the permission of the person concerned;
- (f) advertisements that violate the provisions of Law, ethics.

Therefore, it can be said that the Consumer Protection Law cover mostly for the areas of advertising and the defected quality of goods or services.

The Competition Law, 2015 covers all ranges of UTPs under Chapter IX, especially misleading the consumers, comparative advertising, coercing the consumers, giving the

¹³ www.irrawaddy.com/feature/profiles/a-burmese-tycoon-you-can-find-today.html

misleading information to the consumers relating to price, quality, designs, etc., organize a sale promotion with the intention to mislead and discriminating among consumers.

Section 18 of the Competition Law as; no businessman shall carry out any of the following acts which mislead the consumers:

- (a) carrying out with intention to compete with the use of deceptive information which misleads the legally registered name of goods, business slogan, logo, packaging, geographical indication and other elements.
- (b) carrying out business such as production of goods and services by using the information contained in sub-section (a).

Section 23 of Competition Law provides as follows:

No businessman shall, for the purpose of unfair competition, carry out any of the following advertising acts:

- (a) comparing directly goods or services of a business with those of the same type of other business;
- (b) misleading customers by imitative advertising of the goods of others;
- (c) broadcasting false or misleading information to the customers on one of the following matters;
 - (1) price, quantity, quality, utility, designs, varieties, packagings, date of manufacture, durability, origin, manufactures, place of manufacture, processors or place of processing;
 - (2) usage, service, warranty period;
 - (3) other false or misleading information;
 - (4) other advertising activities prohibited by any existing Law.

In Section 28 of the Competition Law of Myanmar, no businessman shall persuade or induce a person or a business who has concluded a contract with other businesses to breach such contract before the expiry of contract term. Moreover, Section 29 enacts that no businessman shall import goods into market through unfair means and sells such goods at price lesser than market price.

Moreover, Competition Law of Myanmar enacts that apart from the above acts of UTPs the Commission for the interests of consumers can be stipulated UTPs act when necessary.

Furthermore, Government must undertake to assure to consumers appropriate legal remedies to repress all the acts of UTPs. Generally, the nature of remedies is divided into three categories, civil measure, criminal measure and administrative measure. In most cases, (for unfair commercial practices) the first step is to seek injunctive relief. If the defendant is not stopping the infringement after the injunction is awarded, the plaintiff can claim for the damages. Apart from the injunction and damages the plaintiff can claim for other remedy like public apology, or disclosure, publication of judgment etc. by the consent of the court.

Criminal sanction is not enacted in the law of some countries. However, the Competition Law of Myanmar provided for the criminal sanction. Dishonest competitors who commit infringement of the Law shall be penalized and the punishment may be up to 3 years imprisonment. According to Ss 39 to 43, anyone who infringed the provisions of the Law shall be penalized for fine or imprisonment or both. The degree of fine and imprisonment may be changed from the infringement of the defendant.

The amount of fine provided in Myanmar Competition is minimum 100,000 kyats to maximum 15,000,000 kyats. Term of imprisonment is minimum of 3 months to maximum 3 years.

Also, if a consumer finds that a product is harmed, or that a product or service has caused harm, during the assurance time frame, the merchant, producer, trademark proprietor, and specialist co-ops will be liable. The Consumer Protection Law also provides details on prohibited activities and penalties. The maximum term of imprisonment is two years and the maximum fine is MMK 20 Million (roughly USD 13,250). Civil remedies remain available in addition to any criminal penalties incurred.

Administrative sanction is awarded by the respective Committee under the Consumer Protection Law and Competition Law, this includes warning, fine, reduction of market share and temporary or perpetual injunction.

Respective Committee under those Laws has the power to investigate suspect enterprise and may issue appropriate order. Some countries used injunction for alternative way to remedy and some didn't provide the criminal measure for remedy. However, most countries provided the remedy for damages.

There are no cases for the infringement of UTPs in Myanmar; however, in China the Supreme People Court of China decided in the Ferrero SpA case¹⁴ was prominent.

The Chinese Supreme People's Court upheld an appellate decision that the sale of chocolates in similar packaging to that of Ferrero Rocher branded chocolates breached Chinese Anti-Unfair Competition Law. Ferrero has sold its Ferrero Rocher chocolates in China since 1984. Initially, the packaging carried not only the Ferrero Rocher brand but the Chinese characters (pronounced 'Jin Sha').

Ferrero advertised Ferrero Rocher products not only in China but also in other Asian regions, including Taiwan and Hong Kong. Although it has owned the registered trade mark for Jin Sha in Taiwan and Hong Kong since 1990 and 1993, respectively, it could not register it in China. This is because the Chinese company MengTeSha (MTS) held the Chinese registration for Jin Sha, having bought it from another company in 2002. In that year, MTS started manufacturing and selling chocolates under the brand name Tre 'sor Dore ' Jin Sha in very similar packaging to that of Ferrero Rocher chocolates, but cheaper.

Ferrero sued MTS in the Tian Jin No. 2 Intermediate Court for unfair competition in 2004 for use of packaging with decorative features confusingly similar to those used in the Ferrero Rocher packaging, but lost this action in February 2005. The court found that MTS had sold its product in many parts of China before Ferrero had done so, and that the Tre 'sor Dore ' Jin Sha chocolates were more famous than those of Ferrero Rocher.

It is concluded that confusion was unlikely, particularly because the trade marks on the product were different and the products targeted different groups of consumers, based on the locations of sales.

Ferrero appealed and in January 2006, the Tianjin Higher People's Court (the 'Higher Court') concluded that MTS had breached unfair competition law. The Higher Court found that Ferrero Rocher, on the basis of its reputation not only in China but also in other countries, had been famous in China since 1984. MTS then petitioned the Supreme People's Court for a review of the Higher Court's decision and succeeded in obtaining a stay of the enforcement of the decision.

The Supreme Court upheld the Higher Court's decision that MTS violated the Anti-Unfair Competition Law and discussed four main issues.

¹⁴ Ferrero SpA v MengTeSha Company, Case No. 3, IP Civil Division, The Supreme People's Court (2006), 7 April 2008.

- Was Ferrero Rocher famous in China before MTS sold its product? The court held that it was, due to Ferrero's marketing efforts in China. The court rejected the Higher Court's reliance on Ferrero Rocher's global reputation but noted that fame acquired in other countries can increase fame in China.
- Is the Ferrero Rocher packaging distinctive? The court held that, although individual elements (including the transparent plastic box and the foil wrapping) may not be distinctive, the packaging as a whole is clearly distinctive.
- Is the public likely to confuse the MTS packaging with the Ferrero Rocher packaging? The court held that although there are differences, including different trademarks, the packaging is confusingly similar and thus violates the Chinese Anti-Unfair Competition Law.
- Would damages of RMB700, 000 (approximately US\$100,000) be appropriate?

The court held that, for Ferrero had not provided any information on MTS' profits from the sales of Tre ´sor Dore ´ Jin Sha chocolates, the amount should be reduced to RMB500, 000. This is the maximum statutory damages for trade mark infringement. The court reasoned that it could refer to the Trade Mark Law in determining damages. It took Ferrero over 4 years to obtain the landmark court judgment concerning the enforcement of the Anti-unfair Competition Law in China. According to Ferrero's spokes-person, the company is closely monitoring the enforcement of the Supreme Court's decision in China.

According to Section 15 of the Consumer Protection Law, the entrepreneur or advertiser shall be liable to the consequences of own advertisements. If any entrepreneur who violates the provisions of Section 14 shall, on conviction, be punished with imprisonment for a term not exceeding 3 years or with fine not exceeding 5,000,000 kyats or with both in accordance with Section 23 of the Law.

There is no reported case for this issue. However, there may be many challenges to implement these Laws, because, most of the consumers don't know about their rights are infringed by the competitors. The respective laws protect the consumers from unfair commercial practices of the competitors and want to know the consumers that if their rights have been infringed by dishonest competitors, they can claim their rights from this competitors through the respective Committee.

Conclusion

By enacting the law for protection of consumer against UTPs, the Government can control inappropriate or unfair competition of business. The main purposes of protection against unfair trade practices law, at first, aims to protect the honest competitors, but now law against unfair trade practices aim to ensure fair competition in the interests of all concerned i.e. the whole community.

So, in summing up, it can be said that UTPs means dishonest commercial practices which are more detrimental than beneficial to the community. In promoting the fair competition in commerce, benefit the consumer to get the goods or service at lower cost and higher quality, moreover, to promote the innovation between the undertakings. Free competition leads to lower prices, better goods and services and more choice for consumers as producers are forced to work with ever greater efficiency to maintain their position. So, it can be said that comprehensive protection against UTPs is the basis of successful protection for the businesses, consumers and the whole community at last.

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