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The issue of direct sales and direct marketing law and enforcement in Thailand: A comparative study of the relevant UK and Malaysia laws



Sareeya Galasintu*, Susom Supanit, Chontida Chaiittivej

Department of Law, Faculty of Social Sciences, Kasetsart University, Bangkok 10900, Thailand

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ABSTRACT

Following the formation of the ASEAN Economic Community (AEC), this research paper reviewed the enforcement problems from the Direct Selling and Direct Marketing Act 2002 (DSDMA) that was concluded in 2015 using a documentary or qualitative study and related laws in Thailand, the UK, and Malaysia for a comparative study on individual issues reflecting the problems that need to be solved. In addition, direct field surveys, (in-depth interviews and focus groups) can help clarify the problems based on the experiences of the relevant groups of people (consumers, business sectors, and sales agents). The findings revealed that the income and profit from the direct-sales business has increased worldwide as shown from the records of the World Federation of Direct Selling Associations with income in 2016 of USD 182.6 billion (WFDSA, 2017) with the biggest ASEAN market. Its mechanism, pattern, and a high remuneration influenced some swindlers to disguise businesses and resulted in the formation of pyramid schemes which affected the country's economy. In order to protect consumers from such fraud, border enforcement, sub-laws, and guidelines need to be in position. In the short term, it is suggested to reconsider and clarify the relevant laws, and business practices and to increase sanctions especially for money scheme fraud. The Office of the Consumer Protection Board (OCPB) is proposed to be the principal agency through integration with other relevant organizations to adopt a more proactive strategy. In the long term, the OCPB may adjust to be a quasi-organization that is autonomous. Consumers should also be more aware of business fraud and learn to be more protective to eliminate some problems. If self-regulation were in place, specific legislation might not be needed, but could instead be integrated into general legislation, for example, contract and criminal law as in the USA and perhaps in Malaysia in the near future.

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Introduction

DSDMA has been enforced since 29 August, 2002 or for nearly 16 years. The pattern of direct sales business has expanded rapidly, increasing income and playing a positive role in the country's economy. However, some business

entrepreneurs or sales' agents only aiming at profit are not concerned about the method or strategy they applied in selling which has resulted in consumption of goods or services where consumers unintentionally buy or have no choice or freedom to choose and decide or no channel to return the goods or claim for damages and thereby infringing a consumer's rights. New patterns of gathering groups of purchasers to consume or invest in pyramid schemes (Figure 1) disguise the direct sales business especially selling through the media (radio, television, and

* Corresponding author.

E-mail address: fsocsyg@ku.ac.th (S. Galasintu).

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Figure 1 Pyramid scheme, showing how the business work and cause damages to all investors

websites) and also dilute business and cause damage overall. These problems cannot be solved efficiently by the DSDMA, especially under the marketing business transformations that occur from time to time.

Thailand, a member of the ASEAN Economic Community (AEC), is bound to what is prescribed under the single market policy according to the ASEAN Charter to make all members competitive in the regional economy, to increase the value chain, and finally to be globally competitive. Consumer protection is one of the policies the AEC would enhance by its members harmonizing their laws to act in the same direction and to provide protection in each individual country for ASEAN consumers. Most consumer protection laws basically will scrutinize and determine that business sectors comply with the law and consequently consumer protection is automatically implied. The DSDMA is one part of the consumer protection legislation that prescribes the direct selling and direct marketing entrepreneurs to abide by the law; for example, registration is needed, and promotional information must be fair and clear to the consumers. The DSDMA becomes important since direct sales and marketing sales businesses are spread through the region and also there are pyramid schemes infiltrating society using the pattern of a direct sales business to extensively damage the official economy. To be specific, such schemes cause huge damage resulting in fraud and money laundering. It reflects the inefficiency of legislation that might consider to be often delayed and tardy where business styles are always changing and are no longer regulated under the current laws because of the rapid change and updating of today's business structures. Consequently, studying enforcement problems arising from the DSDMA in Thailand is of significance in analyzing the law in order to propose amendments to the DSDMA to be consistent with the current business model and also to make the country less prone to pyramid scheme manipulation.

Literature Review

Consumer protection laws including the DSDMA have arisen from inequality due to the business entrepreneurs having more bargaining power. Without perfect competition, sometimes there is a risk for consumers in terms of an

information shortage especially in this borderless and hi-technology era, and even more so when an invisible hand is involved. The single market policy in the EC and AEC actually aims for the sources of goods and services to be united in one place to provide an opportunity for business entrepreneurs to access consumers. Policy makers then should consider what are the roles and mechanisms for consumer protection, what is the method, at what level, and who is a consumer. It is then necessary for the state to regulate this business for the purpose of consumer protection (Howells, 2015).

Starting with the history of direct sales and direct marketing to demonstrate the business format and problem arose in order to determine the solution. Direct sales originates from a barter trade system (Krea-ngam, 2006) where both the seller and buyer were well informed on the products and the theory of *caveat emptor* was applied (Supanit, 2006). Heretofore, the business patterns have developed in six periods—production concept, product concept, selling concept, marketing concept, society marketing concept, and holistic marketing concept, and direct sales business started are usually associated with the selling concept (Rungruangphon, 2010). The growth ratio during 2008–2012 was 11.39 percent which was considered as high potential growth (E-SAAN Centre for Business and Economic Research, 2016) and it remained the same in 2013 (Thai Direct Selling Association, 2016). In the history of direct marketing sales, the first step was in the society marketing concept, it continued to the holistic marketing concept and developed into new patterns with nowadays four periods—catalog marketing (Bianco, 2014), telemarketing (Called.com, 2014), direct response television (DRTV) and electronic commerce or E-commerce (Rungruangphon, 2010).

The DSDMA is essential as this new sales behavior developed from the previous mentioned patterns offers products to consumers by intruding into their normal, daily life and it occasionally clouds the consumer's decision to purchase and allows no choices for consumers. Differentiated types of direct sales are improved and adapted from those mentioned patterns to persuade consumers to buy, that is, single-level marketing and multi-level marketing.

The latter system can be separated into stair step, brake away, matrix, unlevelled, binary plan, tri-nary, matching, and party plan. Without business ethics, all these plans can be used to disguise consumer fraud. Marketing sales may not meet expectations when the products cannot be checked or tested before ordering. Significantly, sales persons who promote a public network or gather a group of consumers to purchase large amounts of products may not conduct business in good faith, but instead lead into a pyramid scheme. These kinds of fraud make it crucial for the state to regulate sales behavior.

The DSDMA regulates businesses from the business registration until withdrawal of its registration including the fraud scrutiny in between. It is enforced and regulates business by the provision of registration (the Act, Articles 20 and 27) before starting the business and the Direct Sales and Direct Marketing Sales Board, the authority, has the power to scrutinize the business after its registration (the Act, Article 13) with the assistance of the OCPB as a secretariat office (the Act, Article 18). Sales agents are also protected from business entrepreneurs by a contract that is regulated by law (the Act, Article 23) and by the regulations on commission payment (the Act, Article 21), among others. In accordance with business sector regulation by the Board, consumer protection regulation is also carried out as a consequence of business sector control (the Act, Article 13). Consumer protection measures are provided in the Act including the purchasing document to the consumer (the Act, Articles 30 & 31), a guarantee policy (the Act, Article 37), and contract rescission (the Act, Article 30, 32–34), among others. All these regulations are enforced and have criminal sanctions. In addition, other related laws are also applied, such as the Business Registration Act 1956, the Electronic Transactions Act 2001, and the Unfair Contract Term Act 1997.

Although there is the main Act and other relevant laws and regulations, vagueness still exists, for example, the definition of “direct sales” is not suitable to the current business model, the definitions of “sales agent” and “direct marketing” should be adjusted, direct marketing should be separately regulated, and a cooling off period should be reconsidered. Moreover, problems from direct sales and marketing sales keep arising especially pyramid schemes which damage economic value. Since 1977, the first scheme of “Chamoi money scheme” caused at least THB 5,000 million damage (Supanpong, 2014). Later cases had even higher damages (Rauthajetcharoen, 2014) and the statistics on complaints are less than the cases and damages cost (Financial Consumer Protection Center, 2014a). In 2008, the Department of Special Investigation declared a fraud offence against the Easy Network company with damages of THB 132 million and 453 victims which was only about 20 percent of the total

Table 1
Statistics of complaints regarding direct selling and direct marketing

OCPB number of complaints		
Year 2011	Year 2012	Year 2013
15	20	21

Source: OCPB (2014)

number of people affected (Rauthajetcharoen, 2014). It can be seen from the statistics of the OCPB complaints in Table 1 that there are only some complaints each year which are incomparable to the damages caused by the pyramid schemes and the financial threat complaints statistics in the second quarter of 2014 recorded of only 36 complaints (Table 2).

Methods

This documentary or qualitative research mainly studied various legal documents, not only legislation but also statistics, relevant policy and practices evidence including case studies in order to learn what the problems are that need amendment to be suited to society nowadays. Data collection using in-depth interviews and focus groups from stake holders specified by the OCPB was undertaken which extended the understanding of the problems found. The focus groups shared and discussed information with three groups of stake holders—business entrepreneurs from the three main associations in Thailand, a few independent entrepreneur sales agents from the members of the associations, and consumers from a list of purchasers of the association including a few independent consumers. Analysis commenced with data collection and the comparative study on the three different types of national legislation, with the methods of in-depth interviews and focus group discussion being applied to emphasize the problems found and solutions.

Results and Discussions

The comparative study of the Thai DSDMA and at least the UK Consumer Protection (Distance Selling) Regulations 2000, the legislation in the Malaysia Act 500 Direct Sales Act 1993 and the Amendment Act of 2010 including statistics of problems, complaints, and policy making revealed that there are enforced problems from the DSDMA as detailed below.

Definition of vocabulary is not updated and almost invalid. Commission plans under the direct sales business nowadays are various and flexible so that some plans are not regulated by law, in particular, a plan where the sales agent is the same person as the consumer does not fall under the definition of (1) “direct sales” according to Article 3 which defines a sales agent as a different person

Table 2
Statistics of financial threat complaints in the second quarter of 2014

Statistics of complaints, 2nd quarter 2014		
Type	Numbers of complaints	Percentage
1. Phone cheating	150	51
2. Email/Social media fraud	41	14
3. Documentary fraud	32	10
4. Electronic cards used by others	23	8
5. Electronic cards counterfeit	15	5
6. Others, e.g., pyramid scheme, investing in foreign currency, etc.	36	12

Source: Financial Consumer Protection Center (2014b)

for the sale compared to the end consumer and therefore the transaction of no sales agent is void from the law. (2) “Direct marketing” has no definition of the payment method which is needed in the business and no scrutiny measures are provided. Only 400 registered direct marketing companies were updated after the research (OCPB, 2016) while thousands of companies are utilizing this selling pattern, indicating there are many illegal businesses and the administration process is out of control. In contrast, the UK Consumer Protection (Distance Selling) Regulations 2000, Article 3, although it has no definition of “direct selling” it does have an “off-premises contract” definition which is more specific and broader than the DSDMA. Likewise, the Malaysia Act 500 Direct Sales Act 1993 and the Amendment Act of 2010, Article 2 have specific definitions of “door-to-door”, “a mail order” and “a sale through electronic transaction” and covers the current pattern of business which is also broader than the Thai Act. It can be seen that definitions from the UK and Malaysian law are broader than in the DSDMA. (3) “Direct sales business entrepreneur” should also include a person who is not the owner nor doing the business himself but receives an income from some activity for example offering spaces for traders to do their own business through any intermediary, such as a website for free and the person gains benefit via advertisements. Considering these two different kinds of business, direct selling and direct marketing, the in-depth interviews and the focus group of the business participants shared the idea of having two individual laws for each dissimilar business format since there are no common characteristics for them to be under the same law. The last definition of (4) “Goods” to be distributed by these two types of businesses is too broad and needs to be limited. Some categories of products are not available and unsuitable for this kind of selling, for example, housing, software, and underwear which should be under the “no return policy” with some conditions, for example, unpacked software or used underwear should not be resalable. There is no Thai ministerial regulation on a negative goods list, yet since 2002 this has existed in the UK and Malaysia. In the UK, the prohibited list of goods, mostly in the contract form, will be controlled by the UK Regulations 1998, the contract as prescribed in other laws, or the Consumer Credit 1974 Amendment 2006, sales contract and land purchase contract. In Malaysia, the prohibited list of goods would be at least negotiable instruments, shares, debentures, and money according to the Malaysian Act, Article 2. In Thailand, the interviewees mostly agreed to the issuing of a ministerial regulation on goods list so the business could be clearly monitored.

The required subordinate laws have not been issued and there could be a lack of legislation which has resulted in business regulation inefficiency. Some examples are: a royal decree on a negative list of goods that would not be obliged under the 7-day cooling-off period, which is the same as the period in the UK Act while the Malaysian Act provides 10 days; Ministerial regulations on a negative list of direct sales and no return policy goods; and the Direct Sales and Marketing Sales Board’s notifications on a commission plan, information

distributed in direct marketing; and details in a warranty document. The in-depth interview from the business sectors supported this issue and identified the subordinate laws as part of the key to effectively run the business. The authority in charge has to rapidly issue all those pieces of pending legislation and importantly, to be in accordance with the main DSDMA.

Registration process is not explicit. Only three sections—Articles 20, 38 and 39—clarify that business entrepreneurs must register and the required documents are spread over various sections. Although the timeframe is 45 days from a receiving date and the Registrar has the authority to withdraw a registration pursuant to Articles 41 and 42, respectively, there is no specific involved process which may cause confusion and uncertainty for an applicant and raise the question of transparency. One main issue discussed was a comparison of the registered capital of a company wanting to register as a direct sales company, The Thai and UK Acts have no minimum requirements, while the Malaysian Act, Article 4, requires MYR 100,000–500,000 for a Malaysian and MYR 500,000–5,000,000 for a foreigner. Even though Thailand and Malaysia have a registration regulation, the UK has none due to their policy of free trade in a single market, allowing anybody to freely enter the market. The interviewees explicitly agreed with the proposal of issuing a license to the business sector to manage the business within a duration limited by law. The focus group of business and consumer participants also pointed out the issue of obtaining a renewal of the license. Some interviewees did not agree and argued that applying the minimum registered capital to apply for the license needed to be specified just as has been provided in the Malaysian Act. In this sense, there were conflicting opinions from the focus group of the business sectors to fix the minimum registered capital as one of the requirements, as opponents disagreed because small enterprises would not be able to enter a competitive market if the figure were too high. Additionally, both the in-depth interviews and focus group discussion involving business and consumer participants agreed that it would be the best practice if the OCPB publicly announces legal and valid commission plans on the website for the benefit of public awareness and pyramid scheme protection. The focus group of the agent participants also raised the issue of having commissions clearly specified.

Pyramid scheme prohibition as provided in Article 19 is too broad which covers only entrepreneurs and not sales agent. The consumer cannot be protected as a whole from this pyramid schemes because there are cases of deception by the sales agent or groups of sales agents. The UK Act has no specific law, and action must be applied as a cheating and fraud offence under the criminal law, while the Malaysian Act, Article 27A prohibits any person or group of persons carrying out a pyramid scheme which is not limited only to entrepreneurs. The DSDMA prescribes the offence with regard to business entrepreneurs as a criminal sanction, as in the UK and Malaysian Acts. The focus group of the consumer and sales agent participants stressed the need to increase criminal sanctions; however, if a wrongdoer is a juvenile (and such youths are often selected to be involved in the

deception), then leniency could be applied by considering a civil sanction instead. To provide a warning and caution to both consumers and other business companies, the interviewees proposed a “black list” of businesses that had breached the law to be published; nevertheless, the focus group of the business participants identified a drawback of using the black list where the business is run by nominees.

Protection measures are not entirely provided and preventative. One consideration for sales agent, although there are provisions regarding contracts and commissions between the entrepreneur and a sales agent, problems or disputes arising in term of *sales agent protection measures* need to be settled by the parties or in court. The UK and Malaysia have no specific laws but general contract law applies. Another consideration for consumers, the *consumer protection measure* in the DSDMA has no redress mechanism but needs other laws, for example, the Product Liability Act 2008 and the Consumer Civil Procedure Act 2008. In addition, *there is no data or privacy protection prescribed*. The sales agents and consumer information can be illegally distributed without permission. As such, selling can be resulted in unwanted contact being made to the annoyance of consumers. The in-depth interviews and the focus group of the business and consumer participants agreed with this point, that is, the DSAMA needs to have protection measures for both consumers and sales agents. One interviewee also proposed setting up a fund to redress consumer losses. An OCPB guarantee mark is also recommended for the benefit of consumers.

The specific law. Thailand and Malaysia have specific laws as mentioned above, while the UK does not promulgate specific laws but rather exerts control over relevant businesses under the UK Consumer Protection (Distance Selling) Regulations 2000 and any dispute or criminal offence arising would be governed under the commercial and criminal codes. Discussion occurred on whether a specific law or general law (civil and criminal codes) is more suitable to be applied. Some participants emphasized applying the criminal code as it could deal with fraudulent acts and so specific law was unnecessary, whereas others considered that the economic damage occurring at present justified enforcement using specific laws. However, self-regulation as applied in the USA and perhaps to be introduced by Malaysia in the future was supported by a small number of participants. Enforcement problems are associated not only with the legislation but also due to the authorized body (the OCPB) having a *problem of staff shortage*. This has resulted in insufficient coverage of enforcement although the Board does have some ancillary powers of scrutiny and can cooperate with other relevant organizations, such as the Department of Special Investigation and Consumer Protection Police Division and the Anti-Money Laundering Office. Voluntary measures from relevant associations or foundations can be used but these are not as systematic and efficient as the OCPB. Discussion of a suitable authorized body offered the OCPB, Ministry of Commerce or an independent organization as choices. Most participants clearly supported the OCPB to remain in charge, while a minority suggested the Ministry of Commerce or setting up a new independent organization instead.

Conclusion and Recommendation

The study can be concluded that direct selling business model in Thailand is changing existing patterns so that a sales agent can now also be a consumer. In such a case, the existing law is inapplicable and is almost invalid based on the current definition of “direct selling”. Direct marketing using various intermediaries is also a part of the new pattern and damages society through the operation of pyramid schemes. Therefore, the enforcement problems of the Direct Sales and Direct Marketing Sales Act 2002 are: 1) the definition of terms as discussed above and the difficulties regarding enforcement by the OCPB due to the lack of legislation and the best practice; 2) the lack of subordinate laws creates difficulties in regulating business sectors; 3) the process for controlling registration is unclear and many entrepreneurs do not register with the OCPB and so are not covered by the legislation; 4) protection measures for the sales agent and consumer need to be revised as well as the sanctions applying to juveniles to protect consumers from deception, especially from pyramid schemes; 5) specific legislation on direct sales and direct marketing is still needed in Thailand as self-regulation scheme is not well prepared; and 6) the OCPB should remain as the general authority regarding consumer protection with the cooperation of other relevant organizations to provide the greatest benefit to the public.

The recommendations for the short term are: 1) to revise the Act to be enforceable and to cover all problems faced, that is, to promulgate subordinate laws, to have a clear registration process as discussed above including having a black list for businesses that breach the laws and regulations; 2) to consider protection measures for consumers and the business sector using the OCPB guarantee mark; and 3) the business sector should provide information and the required documents to the OCPB before commencement of operations for the protection of direct sales agents.

Measures for the long term are: 1) to revise the Act to be enforceable and to cover the all problems faced, by defining rights and providing all-encompassing definitions, setting the minimum registered capital and period for registration, prohibiting the on-selling of licenses, describing the duty of entrepreneurs to declare to the consumer and agents any necessary information before entering into a contract, identifying any dishonest sales agents and their teams as wrongdoers who should be punished by law as well as prosecuting the company involved in the direct selling, and juvenile punishment should be revised into a lower sanction; 2) to introduce a Data Protection Law/Privacy Law; 3) to make protection measures more permanent by establishing a fund for redressing injured persons and revising the Act to provide protection for the agent and in any case, business ethics should be strongly encouraged; and 4) to disseminate process knowledge and to provide updated training for the officers in charge so they are able to address the periodic changes that occur in deceptive practices.

Conflicts of Interest

None.

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