

CHAPTER 23 TELECOMMUNICATIONS, IT AND E-COMMERCE

The increasing population of Thailand, and the growth of business and commerce have increased the demand for modern communications.

Historically, the government held an absolute monopoly over the right to provide such services. The consequence was inefficiency and delay in essential services, such as installing landlines or connecting new lines. In the face of growing pressure from business and consumers, the government was forced to grant concessions to the private sector to allow companies to install and operate fixed phone lines, mobile phone services, paging, information and other services.

Internet usage has increased steadily from the 1990s onwards. The use of electronic communications and making of business transactions by electronic means had also increased. It has been necessary to create new legal frameworks in which such activities can take place, and to regulate such activities.

Constitutional aspects Under the 2007 constitution (and under its predecessor the 1997 constitution as well) broadcasting frequencies and telecommunications are regarded as national resources. The 2007 constitution provides as follows:

- *Transmission frequencies for radio or television broadcasting and telecommunication are national communication resources in the public interest.*
- *There shall be an independent regulatory body with the duty to distribute frequencies under paragraph one and supervise radio or television broadcasting and telecommunication businesses, as provided by law.*
- *In carrying out an act under paragraph two, regard shall be had to the greatest public benefit at national and local levels in education, culture, state security, other public interests and fair and free competition, including public participation in providing public mass media.*
- *The supervision of businesses under paragraph two shall include measures for the prevention of merger, acquisition or control among the mass media or by other persons that may adversely affect freedom of information of the public or may impede the public in choice of information.*

Thus such assets are to be regarded as public resources, and private sector ownership and *a fortiori*, foreign ownership, is to be limited in accordance with this statement of general principles.

Telecommunications

Background Formerly, the Government, through its ministries and state enterprises had a monopoly over the provision of all telecommunications services and internet services. Formerly, any person or company that wished to supply such services in Thailand had to apply for a license or concession from the ministry or state enterprise that had power to grant a license or concession for the particular service or activity. This included internet service carriers and service providers.

Since the establishment of the National Telecommunications Commission (“NTC”) in 2004 as the independent telecommunications regulator, the NTC now has the sole power to grant licenses or vary existing licenses to operate telecommunications activities or IT services.

Relevant institutions

Ministry of Information and Communications Technology (MICT) The MICT (formerly the Ministry of Transport and Communications) has various responsibilities. These include the administration of telecommunications, broadcasting, internet services, postal services, post offices, and supervision of the state enterprises that come under it, most importantly, the Post and Telegraph Department.

In addition, the Ministry supervises the activities of other agencies namely:

1. the National Information and Communications Technology Office,
2. the National Information and Communications Technology Promotion and Coordination Office, and
3. the National Information and Communications Technology Research and Development Office.

It is intended that other agencies related to telecommunications and IT will also be transferred so as to be under MICT supervision.

CAT Telecoms Public Company Limited (formerly the Communications Authority of Thailand) The Communications Authority of Thailand was set up under the Communications Authority of Thailand Act (1976). CAT originally had responsibility for international telephone services, paging, maritime phone services, mobile radio services, internet services, telex and money order services. CAT also licensed internet service providers and internet service companies.

Under the government’s privatisation plans, CAT has been corporatised and renamed CAT Telecom Public Company Limited. All its telecommunications and

internet business activities have been transferred to the new company. All its shares are currently owned by the Ministry of Finance.

The government has announced that CAT Telecom will make its initial public offering on the Thai stock exchange. As at 1 December 2006, this has not yet taken place.

TOT Corporation Public Company Limited (formerly the Telephone Organisation of Thailand) The Telephone Organisation of Thailand was established under the Telephone Organisation of Thailand Act (1976). The Act transferred from the PTD to TOT the responsibility for domestic telephone services, international phone services for the four countries of Cambodia, Laos, Malaysia and Myanmar, data communication services, satellite based services, cellular services, paging, telepoint, leased circuits and other services. TOT also supplies certain services itself.

Under the government's privatisation plans, TOT has now been corporatised and renamed TOT Corporation Public Company Limited. All its telecommunications and internet business activities have been transferred to the new entity. All its shares are currently owned by the Ministry of Finance.

The government has announced that CAT Telecom will make its initial public offering on the Thai stock exchange. To date, TOT has not made its IPO.

Post and Telegraph Department (PTD) The PTD originally was originally established to have responsibility for postal services, post offices, telex, telegraph and money order services.

Responsibility for many of these services has subsequently been transferred to other state enterprises (see above).

The responsibility for providing postal services and post offices has now been transferred to a newly established company, Thailand Post Co., Ltd., which is wholly owned by the government.

The PTD is being transformed into the Office of the National Telecommunications Commission and will carry out any NTC policies and administration. All PTD's assets and liabilities will be transferred to the Office of the NTC.

Regulation of the telecommunications industry

Position of the Ministry The Ministry of Information, Communications and Technology historically had ultimate supervisory powers over several state enterprises, including, the PTD, CAT and TOT. The MICT ultimately controlled licensing, service rates, competition policy, foreign investment requirements,

frequency allocation, inter connection arrangements and all other aspects of telecommunications.

National Telecommunications Committee The NTC was set up in 2004 as the new independent regulator for the telecommunications industry. It now exercises regulatory powers over telecommunications, and has the right to grant new licenses and to supervise existing license holders. These rights were formerly exercised by the CAT, TOT or the Ministry (see further below).

The NTC has been grappling with longstanding issues that have affected the development of the telecommunications industry in Thailand, including:

1. The variation of concession agreements formerly granted by CAT or TOT and the concession fees payable by concession holders, now payable as an excise duty to the government. In a number of cases, the duty payable by concession holders as a percentage of gross income, is quite disproportionate and gives certain telecommunications companies an unfair commercial advantage over others.
2. The regulation of network connection charges imposed by one telecommunications carrier on another, when its network is used by a company that does not have its own network. Once again, the imposition of network connection charges has given certain companies an unfair commercial advantage over others.
3. The drafting of regulations regarding applications for telecoms licenses or variations of exiting licenses.
4. The conversion of shareholdings held by former state enterprises in internet service companies (see further below).

Telecommunications laws

Telecommunications Act (2001)

On 10 October 2001, the Telecommunications Act was passed.

Telecommunications businesses The Act applies to all businesses that engage in telecommunications, meaning the sending out, dissemination, or receiving of marks, letters, figures, pictures, sounds, codes or anything else made comprehensible by wireless or frequency waves, light, other electromagnetic systems or other systems, or other activities prescribed by law to be telecommunications activities.

Independent regulator The Act provides that the National Telecommunications Committee will be established as regulator for the industry. It will consist of seven

members, each of whom may hold office for a period of six years. Other provisions relating to the NTC are to be found in the Broadcasting Act (1999) (see below).

The members of the NTC have been appointed and are gradually grappling with the task of establishing an independent authority to regulate the industry (see further above).

Duty to obtain a license The Act provides that any person who wishes to operate a telecommunications business must apply for a license to the NTC, and submit an investment plan and its plan to provide telecoms services. The NTC may impose conditions requiring services to be supplied in remote areas or to disadvantaged or special groups, or other conditions.

Types of license The Act specifies that application may be made for three types of license:

1. to an operator without its own network;
2. to an operator with or without its own network, who supplies services to a section or sections of the public;
3. to an operator with a network, who supplies services to the public as a whole.

The NTC is empowered to formulate the rules for granting a license, which must be publicly available.

License applicants The Act sets out general qualifications for license applicants. In addition, applicants for the second or third type of license above must comply with the following requirements:

1. May not be a *foreigner*, as defined in the Foreign Business Act (broadly speaking, this means it must not be a foreign individual or company, or a Thai company that is majority owned by foreigners (see further Chapter 2 above).
2. Thai nationals must own at least 51% of the capital of the applicant company (*prior to January 2006, the figure was 75%*).
3. Three quarters of the applicant's directors must be Thai nationals, and
4. The authorised director(s) who have power to bind the company, must be Thai nationals.

In May 2005, a public consultation paper was issued setting out the draft rules for applicants for telecom licenses.

Anti-nominee provisions In April 2006, in the wake of the sale of the Shin telecommunications group to Temasek of Singapore, the NTC prepared a draft regulation containing provisions designed to deter the use of Thai nominee shareholders by foreign companies.

The draft regulation only applies to category (1) and (2) licenses. The draft prohibits or restricts many activities, including the use of nominees to hold shares, the holding of voting rights that exceed the number of shares held, the power to appoint senior executives, the right to have signatory power to bind the company, and other matters. Reporting requirements are imposed to require reporting of prohibited acts. The NTC is given authority to prepare a Watch List of companies suspected of breaking the regulation. Companies on the Watch List are subject to further reporting obligations. The NTC is given power to investigate companies and to issue regulatory orders and ultimately, to revoke licenses held.

This regulation was not passed when the military government ceased to hold office in December 2006.

Broadcasting Act (2000) The Broadcasting Act came into force in March 2000.

Two regulatory authorities The Act provided that two regulatory committees should be set up:

The National Broadcasting Committee The NBC will formulate policy and a national plan with regard to broadcasting, television and radio frequencies. It will prescribe the nature and types of broadcasting activities. It will grant licences for the use of radio and television frequencies. An office will be set up for the Committee to deal with claims arising from broadcasting activities.

Currently, the members of the NBC have been appointed, but regulatory powers have not been transferred to it. These powers are currently exercised by the Public Relations Department of the government (“PRD”) as the government agency involved and the Mass Communications Organisation of Thailand (“MCOT”) as the state enterprise responsible for broadcasting. Any application to operate a radio, television or cable TV business must be submitted to both the PRD and the MCOT.

The National Telecommunications Committee The NTC will formulate policy and prepare the model plan for telecommunications and radio frequencies, and prescribe the nature of telecommunications activities. A support office will also be created to service this committee.

Currently, the members of the NTC have been appointed, and their regulatory powers have been conferred. See further above.

Acting jointly These committees acting together as a joint committee will jointly administer rights to use frequency waves. Two further committees will be established to assess the activities of the NBC and the NTC.

Accordingly, the power to grant any new telecommunications licenses or vary any existing licenses currently lies with the NTC. Any application for a license to operate a new radio or television broadcasting license must be submitted to the PRD and the MCOT, which continues to retain this power.

Broadcasting Act (2007) The Broadcasting Act (2007) came into force on 5 March 2008. It repeals its predecessor, the Broadcasting Act (1955) in full. It governs the licensing of all categories of radio and television broadcasting, whether through frequency bands, cable, or satellite networks. The Act will regulate and supervise public, private, and community media outlets.

Broadcasting licenses Under the Act, licenses for broadcasting are classified into three types, those for: public service, community service, and commercial service.

Public service licenses Public service broadcasting licenses are divided into three categories:

(a) broadcasting devoted to education, religious affairs, arts and culture, science, technology, and the environment, agriculture, career promotion, health, sports, or the promotion of the people's quality of life.

(b) broadcasting related to national security and public safety.

(c) broadcasting related to promotion of understanding between the Government and the people and the National Assembly and the people, enhancing democracy, and providing information access for the disabled, the disadvantaged, or those who are interested in public service activities.

To obtain a license for public service broadcasting, an applicant must be a government agency, an independent organization formed in accordance with the constitution, a local administrative organization, or a public organization.

Community service licenses Licenses for community service broadcasting must be for the same purposes as those for public service broadcasting, but the purpose of the broadcasting operation must be to satisfy community or local needs.

To obtain a license for community service broadcasting, an applicant must be a foundation, an association, or a group of local people involved in community empowerment.

Commercial broadcasting license For commercial broadcasting, there are three categories of license, depending on the scope of broadcasting that will take place: (a) nationwide level; (b) regional level; or (c) local level.

To obtain a license for commercial broadcasting, an applicant must be a juristic person, a state enterprise, or a private company.

Duration of licenses Under the Act, radio licenses will last for up to seven years, and television licenses for up to 15 years. Applications for renewal must be made at least 90 days but not more than one year before the current license expires.

Enforcement The Act will be enforced by the NTC which will have the power to grant operating licenses, pending the establishment of the National Broadcasting and Telecommunications Commission as regulator of both telecommunications and broadcasting. However, the NTC will be restricted to granting licenses only to existing cable TV operators and community radio stations.

Independent Organization for Broadcasting and Telecommunications Bill (2008) On 10 June 2008, the Cabinet approved a draft Independent Organization for Broadcasting and Telecommunications Bill. Its purpose is to revise certain provisions of the Broadcasting Act (2000). It contains various provisions including proposals relating to the following matters:

(a) revised allocation of wavebands. Previous legislation committed 20% of the broadcasting spectrum to not-for-profit groups. The draft Bill makes no equivalent provision.

(b) The National Broadcasting and Telecommunications Commission (“NBTC”) would be set up and amongst other things, will have power to limit the revenue of community broadcasters, with any surplus revenue to be remitted to the local administration where the community broadcaster is located.

(c) The selection process for membership of the NBTC will be supervised by the Minister for Information and Telecommunications, potentially reducing its independence and excluding parliamentary oversight.

As at 1 August 2010, this Bill is still being scrutinized by parliament, and it is not clear what provisions will appear in the final version.

Other relevant laws

Foreign Business Act (1999) The Foreign Business Act places restrictions on foreign participation in 43 categories of business activities, grouped into three schedules. The restrictions that apply depend on which schedule the business falls under.

The business of newspaper publishing, radio and television broadcasting is listed in Schedule 1. This means that foreign involvement in such businesses is limited to minority ownership only, with no possibility of applying for majority foreign ownership.

Construction businesses are listed in Schedule 3 of the Act. This means that minority foreign ownership is permitted without a license, and it is possible to apply for majority ownership with the permission of the Department of Commercial Registration. In addition, the Act permits majority foreign ownership of construction businesses involved in construction of infrastructure, concerning public utilities and public communications which requires the use of specialist machinery, equipment, technology or skills, provided that at least 500 million Baht is invested by the foreign party.

Service businesses are also listed under Schedule 3 of the Act. This means that minority foreign ownership is permitted without a license, and it is possible to apply for majority ownership with the permission of the Department of Commercial Registration. See further, Chapter 1 above.

Trade Competition Act (1999) The Trade Competition Act came into force on 30 April 1999. It contains provisions regarding monopolies and unfair competition:

1. It restricts business operators with a dominant market position from using their market positions to prevent competition.
2. It prevents collusion between dominant market leaders.
3. It contains provisions designed to prevent mergers and acquisitions that would lead to the creation of a monopoly.
4. It establishes a Trade Competition Commission to monitor activities that are made illegal under the Act, and to issue regulations as to what constitutes anti competitive conduct. See further, Chapter 22 *Trade Competition and Monopolies*.

The TCC only has power to regulate companies and individuals; it has no powers over state enterprises or government departments.

There is a degree of overlapping between the activities of the TCC on the one hand, and the NTC and the NBC (once regulatory powers are transferred to it). It

is not clear at present which regulator would have power to determine issues of anti-competitive conduct by telecommunications or broadcasting companies.

Price of Goods and Services Act (1999) This Act came into force on 1 April 1999. It is intended to protect consumers and enable them to obtain fair prices for goods and services, and to prevent excessive increases in the price of goods and services. The Act establishes a committee to enforce the Act. The categories of goods and services which are subject to regulation are to be formulated in ministerial regulations. See further, Chapter 22 *Trade Competition and Monopolies*.

At present, telecommunications and broadcasting activities are not subject to price controls.

Liberalisation and privatisation of telecommunications

World Trade Organisation obligations Thailand is a member of the World Trade Organisation. By virtue of its WTO commitments, Thailand is obligated to liberalise its telecommunications industry and open it to foreign competition by 2006. As part of this aim, the government drafted a Telecommunications Master Plan as long ago as 1997.

Telecommunications Master Plan The Telecommunications Master Plan was approved by the Cabinet in 1997. It is to be a guide to liberalization and privatization of the industry. The Master Plan dealt with four areas of concern:

1. liberalisation of the industry;
2. establishment of an independent regulatory body called the National Communications Committee;
3. privatisation of CAT and TOT;
4. conversion of the revenue sharing agreements between concession holders and former state enterprises.

It can be seen from what is said earlier in this Chapter, that progress has been made to achieve the goals set out in the Master Plan, but full compliance has not yet been achieved.

Current status of privatisation, concession conversion and independent regulation

Privatisation As noted above, both CAT and TOT have been corporatised. Neither company has made its initial public offering. In each case, the Government has announced that it will retain 51% of the shares. Of the

remaining 49%, these shares will be made available to Thai retail investors, Thai institutional investors and foreign investors in specified proportions. The number of shares that will be offered and the proportions to be made available to each investor group have not yet been announced.

Concession conversion Both CAT and TOT have granted numerous concessions to the private sector for the installation and operation of landlines, the operation of mobile phone services, paging services, satellite services, information services and other telecommunications services. The concession periods vary from 17 to 25 years.

For many years, negotiations took place between the state enterprises concerned and concession holders for the conversion of these concessions. It has proved impossible to agree a formula for concession conversion. In 2002, the Government replaced the fees payable under concession agreements with a special excise duty. However, this only changed the identity of the party to whom the payment was made, and actual conversion of the concessions has still not been resolved.

In 2005, the government announced that further efforts to negotiate conversion of the concessions would be abandoned. It therefore seems that CAT Telecom and TOT Corporation's assets will be valued and the IPO price fixed, on the basis that the concessions will continue unaltered.

Independent regulation The plan for telecommunications and broadcasting to have independent regulatory bodies has now been achieved by the appointment of the NTC and the NBC, although the NBC is not currently able to exercise regulatory authority. Note that as at 1 August 2010, a joint regulatory authority may be set up, but this is not clear yet.

Internet services

Monopoly over the provision of internet services The NTC now has the right to issue licenses to operate as an internet service provider. This right was formerly held by the MICT, and before that, by CAT.

When CAT held this monopoly, its practice was to require that a person who applied for a license to operate internet services, must allocate 32% of the shares to CAT and a further 3% to CAT employees, both without payment by CAT. On any increase of share capital, the same percentages of shares issued upon a capital increase once again had to be allocated to CAT and its employees, without any payment.

These requirements served to perpetuate executive control and to discourage investment and development of IT services in Thailand.

The NTC has not yet drafted a formula for conversion of these shareholdings, or other measures to enable ISPs to operate more freely, rather than being under the influence of CAT.

Foreign business restrictions The relevant parts of the Telecommunications Act and the Foreign Business Act that apply to internet service providers are the same as apply to telecommunications (see above).

E-commerce

Laws affecting e-commerce Thailand is beginning to establish a framework of laws that will apply to electronic communications and the conduct of business transactions by electronic means. The first Act to be passed in this area was the Electronic Commerce Act (2001).

Electronic Commerce Act The Electronic Commerce Act (2001) came into force on 3 April 2002. Its contents are based substantially on the UNCITRAL Model Law on Electronic Commerce. An amendment was issued to the Act in February 2008.

Background Under Thai law, certain documents and transactions must be made in writing, evidenced in writing, or signed by the parties. These include: loan agreements, receipts, hire or lease of land or buildings, guarantees, settlement agreements, insurance policies, hire purchase agreements, sale of land or buildings, mortgage agreements, the appointment of an agent, and other documents and agreement. The Act is intended to provide a clear framework so that where certain documents are in electronic form and bear an electronic signature, they will still be legally enforceable.

Application The Act will apply to all civil and commercial transactions, except transactions excluded by regulations. The Act will not affect any laws concerning consumer protection (this expression is not defined). The Act will apply to all data messages, meaning information generated, sent, received or stored by EDI, e-mail, fax or telex.

Non excludable provisions Certain provisions of the Act are non-excludable, as follows:

1. Information will not be denied legal effect solely because it is in the form of a data message.
2. Where a transaction must be in writing, evidenced in writing or supported by a document, if the information is in a legible data message, then it is deemed to be duly made, evidenced or supported.

3. A data message is deemed duly signed, if the signatory is identifiable and has acknowledged it as his. The 2008 Act further refines this.
4. Where the law requires that information is presented or retained in an original document, information in a data message is deemed to fulfil such requirement.
5. A data message is not inadmissible in evidence solely because it is in the form of a data message. The 2008 Act contains provisions that enable a court to assess to assess the reliability of electronic data messages produced in evidence.
6. Where the law requires a document to be retained, retention by data message meets this requirement.
7. Any electronic transaction made using a secure procedure prescribed by regulation, is deemed to be reliably made.

Extension of definitions Under the 2008 amendment, a “person” includes a juristic person, and a “signature” includes an electronic corporate seal.

Certification services There are provisions for regulation of data message certification services. The 2008 Act states that if published electronic data is identical to electronic data and has been certified by a certifying authority, the published item can be used as the original.

Excludable provisions Other provisions of the Act may be excluded by mutual agreement, as follows:

1. An offer and acceptance may be made by data message. An agreement so made will not be denied legal effect, solely because the offer or acceptance was made data message.
2. A declaration of intention or notice may be made by data message.
3. A data message is deemed to be made by the originator, provided it was authorised.
4. An addressee can assume that a data message is authorised and act upon it, subject to certain qualifications.
5. An addressee is entitled to assume that the data message received was that which the originator intended to send and to act upon it, subject to certain qualifications.

Procedural requirements The Act contains procedural provisions regarding acknowledgment of data messages, and the deemed time of dispatch, place of dispatch and place of receipt.

Electronic signatures The Act contains provisions regarding the definition and deemed reliability of electronic signatures. Various duties of care imposed on the owner of an electronic signature. There are provisions regarding verification of electronic signatures. The legal effect of a certificate or electronic signature is defined.

Stamp duty The 2008 amendment provides that if a document is subject to stamp duty, duty paid by electronic means is deemed duly paid.

Regulation A regulator called the Electronic Commerce Commission will be established, to formulate policies and to supervise providers of certification services.

Computer Crime Act In June 2007, the Computer Crime Act was passed and came into effect in July 2007. The Act makes illegal certain activities regarding the use of computers, the internet, access to and storage of information electronically and the sale and distribution of computer programmes.

Definitions The Act defines the following terms:

Computer system means a computer or set of computers linked by instructions, data, sets of data or other things causing it to perform data processing.

Computer data means data, statements, instructions, sets of instructions, or any other thing contained in a computer system, which is in a state that can be processed by a computer, and includes electronic data as defined in the Electronic Commerce Act.

Computer traffic data means data concerning computer based communications which show their source, origin, destination, route, time, date, quantity, duration, type of service or other matters relating to the communications of that computer system.

Service provider means: (1) a person who provides services to another person who may access the internet or other communications via a computer, regardless of whether this is in his own name or in the name of another, or for another's benefit, or (2) a person who provides services concerning the storage of computer data for others.

Service user means a user who uses services provided by a service provide, either with or without service fee.

New criminal offences The Act specifies a large number of offences relating to computer and internet usage:

Illegal access to computer system A person who illegally accesses a computer system for which a special access protection measure is available and such measure is not provided for him, is liable to imprisonment for six months or a fine not exceeding 10,000 Baht or both.

Unlawful disclosure of access code A person who knows the access protection measure specially designed for others, and unlawfully discloses such measure, such that it may cause loss to another, is liable to imprisonment for one year or a fine not exceeding 20,000 Baht or both.

Unlawfully accessing data subject to an access code A person who accesses computer data subject to a special access protection measure and such measure is not provided for him, is liable to imprisonment not exceeding two years or a fine not exceeding 40,000 Baht or both.

Obtaining illegal access to data A person who illegally uses any electronic method to access another's computer data in a computer system, and such computer data is not for public or general use, is liable to imprisonment for three years or a fine not exceeding 60,000 Baht or both.

Damage, destruction or modification of data A person who illegally damages, destroys, modifies, interferes, or adds all or part to another's computer data, is liable to imprisonment for five years or a fine not exceeding 100,000 Baht or both.

Interference with another's data A person who illegally causes another's computer data to be suspended, delayed, obstructed, or disturbed, so it cannot work normally, is liable to imprisonment for five years or a fine not exceeding 100,000 Baht or both.

Concealing the source of data A person who sends computer data or electronic mail to other by concealing or falsifying the source which causes a nuisance to another's computer system, is liable to a fine not exceeding 100,000 Baht.

Aggravating factors Regarding the last two offences:

(1) If the offence causes loss to a person, either immediately or later, whether at the same time or not, the offender is liable to imprisonment for a term not exceeding ten years or to a fine not exceeding 200,000 Baht; and

(2) If the act causes loss to computer data or a computer system concerning national security, public safety, national economic security or public services, or

is an act is against computer data or a computer system provided for public benefit, the offender is liable to imprisonment for a term from three to fifteen years and to a fine from 60,000 to 300,000 Baht.

If an offence under (2) causes the death of a person, the offender is liable to imprisonment from 10 to 20 years.

Sale or distribution of programmes designed to commit offences A person who sells or distributes a programme developed so as to be a tool to commit any of the above offences, is liable to imprisonment for one year or a fine not exceeding 12,000 Baht or both.

Offences relating to entering of false data A person who commits any of the following acts:

- (1) entering false data into a computer system, regardless of whether it is wholly or partly untrue, which may cause loss to others;
- (2) Entering false data into a computer system, which may damage national security or cause public panic;
- (3) entering data into a computer system, which is an offence concerning the security of the country or terrorism under the Criminal Code;
- (4) entering data into a computer system, which is obscene and is publicly accessible;
- (5) distributing or forwarding data that is data under (1), (2), (3) or (4) above;

is liable to imprisonment for five years or a fine not exceeding 100,000 Baht or both.

Offences by service providers Where a service provider intentionally supports or allows the commission of any of offences (1) to (5) above in a computer system under his control, it is liable to the same penalty as the offender under the same section.

Criminal defamation A person who enters into a publicly accessible computer system, any data showing a person's image such that it can be accessed by the public, and such picture has been created, edited, added to or modified by electronic or other means, such that the person may be defamed, insulted, exposed to hatred or embarrassment, shall be liable to imprisonment for three years or a fine not exceeding 60,000 Baht or to both. If such action is a data entry made in good faith, such person is not guilty.

Transnational criminal aspects Where a person commits an offence under the Act outside Thailand and;

(1) the offender is a Thai and the government of the country in which the crime occurred or the injured person requests punishment; or

(2) the offender is a foreigner and the Thai government or a Thai is an injured person and he requests punishment;

then the offender may be punished in Thailand.

Investigatory powers Officials are given widespread powers to make enquiries, summon a person for questioning, demand documents, computer data, and other evidence if they believe an offence has been committed. Service providers are also subject to powers of investigation. Powers to decrypt data, order the decryption of data or to seize computers are also granted. Officials can apply to a court for the issue of a warrant for such purposes. Seized data or property can be retained for 30 days, extendable for a further 30 days by further application to the Court.

Where the offence is distributing data which may affect the security of Thailand or is contrary to public order or good morals, officials may apply to the Court for the issue of a suppression order to prevent distribution of such data.

Powers to prohibit sale or distribution of certain programmes If an official finds that any computer data has unsuitable features, he/she may apply for a court order to prohibit sale or distribution of such programme. *Unsuitable features* means a programme that causes data or a system to be damaged, destroyed, changed or added to, disrupted or to fail to perform as specified, or any other cause as stipulated in regulations, excluding programmes for protection or correction of such programme, as publicized in the regulations.

Obligations of service providers Service providers must maintain computer traffic records for not less than 90 days from the date of data entry in a computer system. If necessary, an official may order retention for longer than 90 days but less than one year. A service provider must maintain a user's data so as to identify a user from the beginning of service and maintain the data for a period of not less than 90 days from the date of service termination. A service provider who breaches these requirements is liable to a fine not exceeding 500,000 Baht.

Failure to comply with a Court or official orders A person who fails to comply with certain Court or official orders under the Act is liable to a fine not exceeding 200,000 Baht and to a daily fine not exceeding 5,000 Baht until compliance is effected.

Regulation issued under the Computer Crime Act In 2008, a regulation was issued under the Computer Crime Act. The general effect of this is that any person or entity that is deemed to be a *service provider* under the Act, is obligated to store all its computer traffic data and disclose this upon request to an enforcement authority. “*Service Provider*” is defined very widely, and could include e.g., hotels, condominiums, educational institutions, banks, internet cafes and other entities. Breach of the obligations imposed can lead to substantial financial penalties or imprisonment.

Other legislation Legislation regarding other aspects of IT and computer usage has been under consideration for several years. These include proposals for a Data Protection Act, an Electronic Funds Transfer Act, and a Universal Access Act.

Foreign business restrictions on electronic commerce transactions

Sale of goods or services via the internet Where goods or services are advertised by a foreign company on its own website, and a Thai party purchases such goods or services, the applicability of the Foreign Business Act is unclear. Is the *seller* of the goods or services on a website engaging in business in Thailand and liable to comply with the Foreign Business Act?

If other factors are present, for example, the foreign party has appointed an agent in Thailand, or maintains a stock of goods in Thailand to facilitate orders received via its website, or provides an after sales or repair service, then, it may be that the foreign seller or service provider would be held to be doing business in Thailand, and the requirements of the FBA should be observed. The current legal position is not clear.

Taxation of e-commerce transactions There are no specific tax laws that deal with the tax liabilities that arise when engaging in electronic commerce. It would be a matter of interpretation of the Revenue Code, the definitions of *permanent establishment* and aspects of any relevant double taxation treaty.

In general, income derived from a sale by a foreign seller is taxable only in the country in which the seller has its place of business. The country in which the buyer has its place of business, or from which the income is derived, should not tax the income arising, unless the seller has a 'permanent establishment' in Thailand. The definition of a '*permanent establishment*' is different in each double taxation treaty to which Thailand is a party. As an example, we quote from the United Kingdom-Thailand Double Taxation Treaty:

"A Permanent Establishment means a fixed place of business in which the business of the enterprise is wholly or partly carried on. It includes especially: a place of management; a branch; an office; a factory; a workshop; a warehouse, in relation to a person providing storage facilities to others; a mine, oil well,

quarry or other place of extraction of natural resources; a building site or construction or assembly project which lasts for more than 6 months.

A permanent establishment is deemed to exclude: the use of facilities solely for the purpose of storage, display or delivery of goods; the maintenance of a stock of goods or merchandise for the purpose of processing by another enterprise; the maintenance of a fixed place of business for the sole purpose of purchasing goods or collecting information; the maintenance of a fixed place of business solely for the purpose of advertising, for the supply of information, for scientific research or similar activities of a preparatory or auxiliary character and is deemed to include arrangements whereby a person in one state appoints a person to act in the other country (other than as a broker, general commission agent or any other agent), if such person has authority to conclude contracts on behalf of the enterprise or where he habitually maintains a stock of goods in the second country from which he regularly fulfils orders or make deliveries; or he habitually secures orders for the sale of goods in the second country exclusively or almost exclusively on behalf of the parent."

A degree of imagination is required to interpret and apply these principles to e-commerce transactions. The views expressed below are an opinion only. It is to be hoped that a notification of the Revenue Department or a decided court case will help to resolve the current uncertainty.

Website and server: a 'permanent establishment?' The sale and purchase of goods via the internet has two main aspects: a website and a server. A website is merely a combination of software and electronic data. It does not imply any territoriality or involve tangible property or facilities in Thailand. A website itself cannot constitute a 'permanent establishment.' The server is a tangible piece of electronic equipment where websites may be located and used. If the server is located in a country in which the purchaser resides or has a business establishment and the seller maintains the website with the server, then it may be that a tax authority will treat the seller as having a permanent establishment in Thailand, merely for the reason that it has opened a website through a local ISP.

Country in which the website is maintained A tax authority may hold that if the website is maintained in the country from which the income is derived, that should be sufficient to establish the liability of the purchaser to pay tax. This is in the situation where the foreign seller has no right to control the operations of the ISP and has no physical presence in the country in which the buyer opens the website.

If the foreign seller owns and operates the server on which the website is stored and through which it is accessed, some tax authorities may treat the foreign seller as having a permanent establishment in the country in which its own server is located.

Tax liability of sellers of goods The sale of goods by a foreign seller who is not doing business in Thailand is not subject to Thai tax, unless the seller has an employee, a representative or a go between carrying on business in Thailand. If this is the case, then the income derived from the business is subject to 30% corporate income tax and 10% remittance tax, where the profits are remitted out of Thailand to the foreign seller. If there is no representative, employee or go between, then no Thai tax liability arises.

If the ISP and the seller's website are both '*located*' in Thailand, it may be that the ISP should not be treated as the 'representative or go between' of the seller, and no Thai tax should be due from the seller. However the legal position is not clear at present, and clarification would be welcome.

Revised 1 August 2010