

CHAPTER 23 TELECOMMUNICATIONS, IT AND E-COMMERCE

The increasing population of Thailand, and the growth of business and commerce from the 1980s onwards, 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 2016 Thai constitution, rights and duties regarding broadcasting and telecommunications are described as follows:

- *The state shall maintain transmission frequencies and the right to access and use satellite orbits, which are national resources in the interests of the country and the people.*
- *The use of transmission frequencies regardless of the purpose of radio and television broadcasting and telecommunications or any other purposes, shall give regard to the utmost benefit of the people, the security of the state, and the public interest, and shall allow people to take part in the utilization thereof, as provided by law.*
- *The state shall provide for establishment of an independent state organization entrusted with the duty to govern the operation pertaining to broadcasting frequencies in a manner specified under paragraph two. In this regard, such organisation shall develop measures to prevent unfair exploitation of or excessively unnecessary burdens for consumers, interference with frequencies, acts that result in obstructing the freedom or knowing or hindering the receipt of true information or news of the public, and prevent a person or group of persons from utilising frequencies with no regard to the rights of the general public. The organisation shall further determine the minimal proportion to be undertaken by users of frequencies in the interests of the public, as provided by law.*

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.

The first independent telecommunications regulator was the National Telecommunications Commission (“**NTC**”) established in 2004.

The current regulator for both broadcasting and communications is the National Broadcasting and Telecommunications Commission (“**NBTC**”), established in 2011 pursuant to the Broadcasting and Telecommunications Services Act (2011). The NBTC now has the sole power to grant licenses or vary existing licenses to operate telecommunications activities, IT services and broadcasting services, and to regulate them. In addition, the NBTC has power to: regulate interconnection of services; determine the standard of services; regulate anti-competitive conduct; protect privacy and freedom of communication; regulate mergers and market dominance. It will be noted here that its areas of activity duplicate rights granted under the Thai Constitution regarding privacy and freedom of communication, and under the Trade Competition Act regarding the supervision of mergers and anti-competitive conduct (see also *Chapter 22 Trade Regulation and Monopolies* above).

Relevant institutions

Ministry of Digital Economy and Society This Ministry (formerly the Ministry of Information and Communications Technology) has various responsibilities. These include the administration of telecommunications, broadcasting, internet services, postal services, post offices, and supervision of the state enterprises that supervise these services, namely the National Statistical Office of Thailand, the Thai Meteorological Department, the Electronic Transactions Development Agency, Thailand Post, TOT, and CAT Telecom.

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 MDES 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 was corporatised and renamed CAT Telecom Public Company Limited. All its telecommunications and internet business activities were transferred to the new company. All its shares are currently owned by the Ministry of Finance.

Many years ago, the government announced that CAT Telecom would make its initial public offering on the Thai stock exchange. This has not 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 was corporatised and renamed TOT Corporation Public Company Limited. All its telecommunications and internet business activities were transferred to the new entity. All its shares are currently owned by the Ministry of Finance.

Many years ago, the government announced that CAT Telecom would make its initial public offering on the Thai stock exchange. This has not taken place.

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.

All PTD's assets and liabilities were transferred to the Office of the NTC.

Regulation of the telecommunications industry

Position of the Ministry The Ministry of Information, Communications and Technology (the predecessor of MDES) 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 Broadcasting and Telecommunications Commission The National Telecommunications Commission was set up in 2004 as the first independent regulator for the telecommunications industry.

All its powers have now been transferred to the NBTC. The NBTC now exercises regulatory powers over telecommunications and broadcasting, and has the right to grant new licenses and to supervise existing license holders. These rights were formerly exercised by the NTC, CAT, TOT or the Ministry (see further below).

The NBTC now has the responsibility to deal with longstanding issues that have affected the development of the telecommunications and broadcasting 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 or broadcasting licenses, or variations of exiting licenses.
4. The conversion of shareholdings held by former state enterprises in internet service companies (see further below).
5. The issue of licenses to provide 3G, or indeed 4G, services.

Telecommunications and broadcasting 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 provided 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 tasked with 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 ("Category 1 licence");
2. to an operator with or without its own network, who supplies services to a section or sections of the public ("Category 2 licence");
3. to an operator with a network, who supplies services to the public as a whole ("Category 3 licence");

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 an *alien*, 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.

Telecommunications Act (No.2) (2006)

A short amendment to the 2001 Act was issued in 2006. Under it:

- an applicant for a category 2 or 3 license may not be an *alien* under the Foreign Business Act. The regulator may prescribe prohibitions for an applicant for certain categories of telecommunications business who is a juristic person not to commit any act which is in the nature of business takeover by a person who is not of Thai nationality; and
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- a telecommunications licensee may not collect a deposit or any other payment in the nature of a deposit. The collection of pre-paid service charges shall be in accordance with the conditions prescribed by the regulator in the interests of consumer protection or the public interest.

Broadcasting and Television Act (2008)

This Act was passed and came into force in March 2008.

Establishment of National Broadcasting and Television Committee The Act established a new regulator, the National Broadcasting and Television Committee to supervise airwave allocation and to supervise radio and television, broadcasting and telecommunications.

License required Any person who operates broadcasting or television is required obtain a permit or license to operate it from the NBTC. The regulator may determine requirements and criteria for licensees.

Three types of license The Act defines three types of license:

1. Permit/license for Public Services, for a license/permit granted mainly to serve public purpose activities, with three variations;

1.1 Public Service Permit/ license for broadcasting and television. This license will be granted for broadcasting and television activities for the main purpose of obtaining knowledge, education, religion, art and culture, science and technology and environment, agriculture, and to promote careers, hygiene, health, sport or quality of life.

1.2 Public Service Permit/ license for broadcasting and television. This license will be granted for broadcasting and television activities for the main purpose of the security of the country/state or for public safety.

1.3 Public Service License for broadcasting and television. This license is for broadcasting and television activities for the main purpose of broadcasting information to promote understanding between government or parliament and the people, including information services for the public, those with disabilities, the underprivileged or groups of people engaged in community activities.

2. *Permit/ license for Community Services:* This is a licence performing activities with the main purpose of community service, but serving community need or local people who receive the services.

3. *License for Business:* This is a license to performing activities intended for profit, with three variants:

- *National Business license:* A license granted for broadcasting or television activities which cover all regions in the country.
- *Regional Business License.* A license granted for broadcasting or television activities that serve groups of provinces.
- *Local Business License.* A license that is granted for broadcasting or television activities that serve areas within provinces.

Licenses The Act defines those organizations that may apply for public service licenses, namely government organization and not-for-profit organizations. The criteria for other types of license holder are also defined. The extent to which a license holder may be foreign owned or have foreign directors are defined.

Criteria for granting licenses, duration, renewal and fees The Act sets out the criteria for granting licenses in each particular case, the maximum duration of licenses, renewal of licenses, and fees payable.

Further regulation In 2012, the NBTC also issued a detailed regulation concerning applications for licences to operate television and radio broadcasting services. The regulation is lengthy and a detailed discussion of its provisions is outside the scope of this Chapter.

Prevention of monopolies The Act contains provisions designed to prevent monopolies from arising. These to an extent duplicate those that may be applied by the Trade Competition Commission (see also Chapter 22 *Trade Regulation and Monopolies*).

Programme content There are provisions prescribing minimum content for news and documentary items for each type of license holder, and for advance notification of programme plans to the regulator, and changes to those plans. Programming must take into account those with disabilities. Programming must not undermine constitutional democracy. In default, the regulator has power to suspend or terminate a license.

Interconnection There are provisions whereby a license holder must agree to facilitate interconnection with other license holders, for the determination of connection or interconnection disputes, and for appeals against decisions regarding inter connection.

Enforcement The Act contains machinery for enforcement of duties imposed. These include: the right to compel production of evidence or to interview involved persons or third parties; to enter and search property; and to prevent interruption of services. Fines and/or imprisonment are set out for violation of certain duties imposed under the Act. Where the wrongdoer is a juristic person, if the violation was a duty of a director, manager or any person responsible for that juristic person's operations, that person shall be liable to the same punishment as that which applies to the juristic person, except where the individual can prove that such offence was done without his acknowledgement or consent.

Broadcasting and Telecommunications Services Act (2010) This Act was passed in December 2010.

Main purposes of the Act The main purposes of this Act are to regulate radio broadcasting frequencies, and to establish the National Broadcasting and Telecommunications Commission to regulate radio and television broadcasting and telecommunications (*in greater detail than under the 2008 Act discussed above*), and to issue licenses to operate radio and television stations and telecommunications services. It repeals the previous Act of 2000 concerning broadcasting and telecommunications.

National Broadcasting and Telecommunications Commission The Act establishes the National Broadcasting and Telecommunications Commission to regulate radio and television broadcasting and telecommunications, and to issue licenses to operate radio and television stations and telecommunications services. In particular, the NBTC has power to:

- (a) formulate frequency master plans, broadcasting master plans, and telecommunications master plans;
- (b) to license and regulate radio and television frequencies and telecommunications services and their operation;
- (c) to prescribe the characteristics of radio, television and telecommunications services;
- (d) to prescribe licensing criteria and conditions and determine licensing fees;
- (e) to deal with inter connection, access or inter connection charges;
- (f) to determine tariffs and prices;
- (g) to prescribe standards and technical specifications;
- (h) to prevent anti competitive conduct and unfair competition;
- (i) to protect individual rights, personal privacy and freedom of communication;
- (j) to regulate mergers and market dominance;
- (k) to advise the government; and
- (l) to issue regulations.

Public hearings Public hearings must be convened to discuss plans for regulation of broadcasting and telecommunications.

Unfair treatment of consumers The NBTC is empowered to take action to protect consumers from unfair treatment by business operators.

Protection of privacy The NBTC is empowered to take action to protect the right of privacy and freedom of communication. The regulator may revoke or suspend any license granted where the violator is a licensee.

Broadcasting Commission and Telecommunications Commission Under the umbrella of the NBTC, a separate Broadcasting Commission and Telecommunications Commission are established, with respective regulatory and other powers as described above.

Broadcasting licenses Any person wishing to operate broadcasting services must obtain a license. The Act sets out the types of license that may be applied

for, criteria for granting licenses, conditions for licenses, provides for sale of frequencies by auction, criteria for auction bidders, license fees, restrictions on transfers of licenses, and rights to suspend or terminate license for non-compliance with conditions.

Telecommunications licenses Any person wishing to operate telecommunications services must obtain a license by bidding at auction. The Act confers the right to determine license fees, restricts transfers of licenses, and gives the right to suspend or terminate a license for non-compliance with conditions.

Enforcement The Act contains provisions for imposing fines or imprisonment upon operators who are in breach of duties imposed under the Act.

Transitional provisions The separate regulatory authorities for broadcasting and telecommunications set up under previous legislation discussed above, continued to hold office until the members of the NBTC were finally appointed, which occurred in September 2011 (see below).

All licenses issued under previous legislation, continue to be valid.

All regulations issued under previous legislation, continue to be valid, unless inconsistent with the Act.

Anti-foreign dominance regulation On 31 August 2011, a regulation issued by the NBTC concerning foreign dominance in telecommunications came into effect.

Definitions The regulation contains the following definitions:

"Alien" means a foreigner as defined under the Foreign Business Act (broadly, this means a foreign entity, a foreign individual, or a Thai company that is majority owned by foreigners)

"license" means a telecom license as defined under the Telecommunications Business Act (2001)

To which licenses and license holders does the regulation apply? The regulation applies to Type 2 or 3 licenses granted under the Telecommunications Business Act, or license holders under the Broadcasting Act, and includes both existing license holders and license applicants.

What does dominance mean? *"Dominance"* means being dominant or influential either directly or indirectly in policy making, management, operations, directors' appointments, senior executives' appointments, and other acts that may affect business administration or telecom business operation of the applicant or licensee. The schedule to the Regulation gives examples of dominance:

(1) through use of foreigners or proxies to hold shares directly or indirectly in a licensee

(2) through shareholding by foreigners via nominees, or by authorized persons in other ways, which results in avoidance of the regulation

(3) through shareholding by foreigners, or agents or proxies, where the shares have voting rights at shareholders meetings that are greater than the actual shares held, or shares that have greater privileges than Thai shareholders

(4) by foreigners being involved in appointing or controlling the board of directors, or senior executives

“Senior executive” here means the chairman of the board, the managing director, manager, director, chief procurement executive, chief financial executive, or other persons who have controlling power or influence on business administration, or telecom business operations.

(5) by having a legal relationship with investment or loan sources from foreigners or affiliated juristic persons, such as loan guarantees, granting a loan at an interest rate that is lower than the market rate, business risk insurance, or granting credit in a discriminatory manner

(6) through entering into an agreement relating to intellectual property, franchising, or granting exclusive rights with foreigners or affiliated juristic persons, and such agreement results in transferring expenditure and returns to foreigners

(7) through entering into a procurement agreement, or management agreement with foreigners or affiliated juristic persons, or employees, or employees of foreigners or affiliated juristic persons, where such agreement results in transferring expenditure and returns to foreigners

(8) through joint operation with foreigners, or affiliated juristic persons, by allocating or dividing operating costs in a manner that results in transferring expenditure and returns to foreigners

(9) through transactions that use transfer pricing, or price fixing with foreigners, or affiliated juristic persons.

(10) Dominating business through other conduct that results in foreigners, or their proxies having controlling power over business, directly or indirectly.

What degree of foreign dominance does the regulation apply to? The regulation applies where foreigners dominate at least half of the business.

Application for exemption It is possible to apply for exemption from the Regulation to the NBTC, which will consider this on a case by case basis.

Annual reporting obligations: Every year, a licensee must report conduct and foreign dominance status to the NBTC, and this must be done immediately in a case of high risk.

Powers of the NBTC If the NBTC deems that the acts of a license applicant or licensee are not in accordance with the regulation, the NBTC may ask for explanations, additional documents, or require action to be taken.

Where the NBTC deems that the regulation has been violated Where the NBTC determines that a violation against prohibited conduct has taken place, or there is foreign dominance, and such action poses a danger to state security, peace, or the good morality of the people, then action may be taken as follows:

(1) Where the applicant or the licensee reports to the NBTC on the risk of violating prohibitions prescribed by the applicant or the licensee in addition to prohibitions listed in the regulation, the NBTC shall order the applicant or licensee to rectify such matters within one year.

(2) Where the applicant or licensee reports to the NBTC on the risk of violation of prohibitions in addition to those in (1), the NBTC shall order the applicant or licensee to rectify such matters within six months.

(3) In other cases, the NBTC shall order the applicant or licensee to rectify such matters within three months.

As to any order under the first paragraph, the NBTC may determine any remedial measure as appropriate to be taken by the applicant or licensee, or may notify the applicant or licensee to propose remedial measures for conduct that does not violate the prohibitions or foreign dominance, to the NBTC for approval.

The applicant or licensee also has a duty to submit any information relating to remedial action for violating prohibitions or foreign dominance, to the NBTC.

Powers of the NBTC If an applicant or licensee fails to comply with the requirements of the regulation, then he may be regarded as lacking qualifications as prescribed by law, and the NBTC to refuse the application, impose an administrative penalty, or suspend, or withdraw, the license.

If the applicant or licensee vindicates its position Where the applicant or licensee has proved to the NBTC that it has complied with remedial measures, or the NBTC agrees that the act that is a violation against prohibitions no longer exists, the NBTC may take the following actions:

(1) Accept the application of the applicant, or

(2) Notify its decision to the licensee, and where the license was suspended, order cancellation of the suspension.

Obligation to report Within 180 days from the date of the regulation, applicants or licensees who have applied for a license before the date of the regulation shall determine prohibited acts according to the regulation, and submit them to the NBTC for consideration. The NBTC may extend the period for consideration for another 180 days, upon request.

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 (2017) The Trade Competition Act came into force in 2017. 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 them). It is not clear 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 was obligated to liberalise its telecommunications industry and open it to foreign competition by 2006. As part of this aim, the government drafted its first Telecommunications Master Plan as long ago as 1997.

Concession conversion Since the early 1990s, both CAT and TOT 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 have taken place for the conversion of these concessions. It 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.

Many of these concessions have expired or are coming close to their expiry date. The question is whether they will be allowed to expire or renewed on terms.

Independent regulation The plan for telecommunications and broadcasting to have an independent regulatory authority was finally achieved in September 2011 with the appointment of the NBTC committee members.

Internet services

Licensing of internet services The NBTC (as successor to the NTC) now has the right to issue licenses to operate internet services.

The procedure for applying for a license to offer internet services is now set out in a NTC regulation issued in 2005. There are three types of licence:

- (a) Category 1 license; a person without his own telecom network can apply for this. Such a license may be issued for one year.
- (b) Category 2 license: a person with or without his own telecom network can apply for this. The applicant must provide services for specific groups and provided their operations do not impact upon free competition or public benefit. Examples of such services are: leased lines, switched data services, bandwidth services, data centre, etc. Such a license may be issued for a maximum of five years.
- (c) Category 3 license: a person with his own telecom network can apply for this. Their services are available to large groups of persons and may impact upon free competition or public benefit or may need consumer protection. Examples of such services are: international gateway, internet exchange, broadband services, international private leased circuits, etc. Such a license may be issued for a maximum of ten years.

Where a person has its own network and applies for a Category 2 or 3 license that requires the use of radio frequencies or other resources, they may also have to apply for to the NTC for a licence to use such frequencies.

The NTC regulation also contains criteria for license applicants and the information and documentation to be submitted with license applications, including shareholding structure and shareholder profile (including associated entities or connected persons); the period for consideration of applications; applications for renewal; and the circumstances in which the regulator may suspend or revoke licenses. The regulation also grants power to NTC to regulate

mergers between licensees and transfers of licences, and measures to ensure free competition.

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 has established certain laws that 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 amendment 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 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.

Trans-national 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.

Computer Crimes Act (No. 2) (2017) In 2017, an amendment act to the Computer Crime Act was passed. Its most significant features can be summarized as follows:

- It revises some of the offences committed under the earlier Act, and the penalties for violation
- It grants increased powers to officials to require content to be deleted on specific grounds, in some cases, this is provided that a court order has been obtained for this
- Regulations may be issued to prevent the issue of “undesirable instructions”
- ISPs may be required to retain traffic data for up to two years.

Cyber Security Act (2019) In May 2019, the Cyber Security Act was passed. The main purpose of the Act is to maintain the security of data and communications made via computer, and to make illegal any acts or programmes to damage a computer system or data. Its main provisions are summarized as follows:

- A National Cyber Security Committee is appointed as the regulator under the Act, to issue policies, plans and regulations to ensure cyber security, etc. An office is also established to support the Committee.
- The Act defines the criteria for cyber security policies and plans
- The Act defines “Critical Information Infrastructure” as that which is important to national, military or economic infrastructure or public order, and empowers the regulator to reduce, deal with or mitigate risks to cyber security in these areas.
- The Committee can issue notifications to prescribe organisations that provides the following or other services as an “Organisation of Critical Information Infrastructure” (“**OCII**”), including the following organisations:
 1. National security
 2. Public services
 3. Banking and finance
 4. IT and telecoms
 5. Transport and logistics
 6. Energy and utilities
 7. Public health
- OCII are to be made subject to obligations for reporting information, maintenance of cyber security standards, and conducting risk evaluations
- Those who are not regulated as OCII may still be made subject to regulations issued by the Committee
- The Act defines “cyber threats” and how these should be dealt with

- The Act defines certain offences and the fines for violation

Personal Data Protection Act (2019) This Act defines “personal data” and regulates its acquisition, storage and distribution. It also imposes duties on personal data controllers. It is summarized and discussed in Chapter 24 *Consumer Law*.

Electronic Payment Systems The Electronic Payments Systems Act (2017) came into force in April 2018. Its purpose is to supervise payment systems and payment services. The Bank of Thailand is appointed as regulatory authority to ensure compliance with standards and procedures under the Act and those who provide payment services.

Other legislation Legislation regarding other aspects of IT and computer usage has been under consideration for several years. These include proposals for 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.

But the current legal position is not clear.

Taxation of e-commerce transactions There are currently 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.

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