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Thailand: Law & Practice

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THAILAND



Law and Practice

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Nagashima Ohno & Tsunematsu is an integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo. The firm's overseas network includes locations in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi, Jakarta (with the association of a local law firm) and Shanghai, and collaborative relationships with prominent local law firms throughout Asia and other regions. The over 500 lawyers of the firm, including experienced attorneys from various jurisdictions outside

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1. Legal System and Regulatory Framework

1.1 Legal System

The Thai legal system is fundamentally based on the civil law system where the laws are codified.

Apart from the Constitution, the major laws in Thailand are the Criminal Code, the Civil and Commercial Code (the “CCC”), the Criminal Procedure Code and the Civil Procedure Code. The CCC contains provisions relating to general principles, obligations, contract, property, etc.

In Thai’s judicial system, Thailand adopts a dual or parallel court system. There are four types of courts under the Constitution, namely the Constitutional Court, the Administrative Courts, the Courts of Justice and the Military Court. The courts which involve the private sector the most are the Courts of Justice, which can be classified into three levels, namely the Supreme Court, the Courts of Appeal and the Courts of First Instance. One of the measures which the Court of Justice has taken to increase the efficiency of Thailand’s judicial system is to establish specialised courts for adjudicating cases within a specific practice by expert judges under specific procedure laws, such as the Labour Court, Tax Court, Bankruptcy Court and Intellectual Property Court.

In terms of regulatory structure, each ministry is responsible for the regulation of the matter under its own authority and each local governmental authority may be authorised to announce subordinate regulations pertaining to specific matters and is in charge of the supervision of the actions of the private sector within its authority. Therefore, business operators may have to consider regulations prescribed by both central and local governmental authorities in the course of their business operation in Thailand.

1.2 Regulatory Framework for FDI

Principally, foreign direct investment (“FDI”) in Thailand is subject to Thailand’s Foreign Business Act of 1999 (the “FBA”), which prescribes a list of restricted businesses for an individual or entity considered a “foreigner”. The FBA defines the restricted businesses and classifies the list of restricted businesses into three lists by taking into account national safety and security, economic and social development, public order or good morals, the arts, culture and traditional customs of the nation, conservation of natural resources, energy and environmental preservation, consumer protection, size of business, employment of labour, technology transfer, research and development. Based on such reasons, some restricted businesses are absolutely prohibited for foreigners, while some restricted businesses are prohibited unless permission from the Cabinet of Thailand or the Foreign Business Committee (as the case may be) is obtained. At the same time, there are also some restricted businesses which are exempted from the requirement to obtain the aforementioned permission, but foreigners are still required to obtain certain permission described below.

Principally, the Department of Business Development, Ministry of Commerce of Thailand (the “DBD”) is in charge of the administration of applications for permission and the monitoring of compliance with the conditions and requirements thereunder. Details of this will be elaborated upon in **7. Foreign Investment/National Security**.

In addition, the activities of foreigners in specific industries and sectors are subject to specific regulations under specific regulatory bodies, eg, financial institution activities, which are subject to the approval of the Bank of Thailand, activities relating to insurance, which are subject

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to the approval of the Office of Insurance Commission, and activities relating to land transportation, which are subject to the restriction of the Department of Land Transport. Details of this will be elaborated upon in **8.1 Other Regimes**.

2. Recent Developments and Market Trends

2.1 Recent Developments and Market Trends

Overview of Thailand's Economic and Business Climate and FDI

After COVID-19, Thailand's economy has gradually rebounded, with domestic consumption and tourism as its key driving factors. In addition, FDI in various sectors is also playing an important role in enhancing Thailand's economy. Notably, FDIs in the electronic, automobile, EV and EV charging station, medical and healthcare sectors have become recent business trends.

Thailand remains one of the most attractive destinations for foreign investors, with FDI inflows in 2023 of over USD1.8 billion. FDIs were made in various forms:

- According to the DBD, over 400 foreign investors have been permitted to operate businesses in Thailand where the top source countries are Japan, Singapore, the United States, and China including Hong Kong SAR.
- According to the Board of Investment of Thailand ("BOI"), which is in charge of the granting of investment promotion to specified businesses, FDI is growing continuously as over 800 projects have been granted investment promotion, which reflects the trustworthiness attributed to Thailand particularly in relation to the strength of its infrastructure and supply chains.

- It is reported that over 100 FDIs were made in the Eastern Economic Corridor ("EEC"), which is an area-based development initiative with the objective of revitalising the well-known Eastern Seaboard where, for over 30 years, numerous business developers have experienced a rewarding investment journey and exceptional achievements which focus on three key Eastern provinces where investment, innovation and advanced technology for the future generation are encouraged.

Recent Developments in the Regulation Regarding FDI

The relevant authorities have introduced the following policies and strategies.

BOI

In 2022, the BOI approved its strategy on investment promotion for five years (from 2023 to 2027) aiming to encourage investment in the restructuring of Thailand's economy concurrently with supervision of the social and environmental effects for sustainability.

In 2023, the BOI introduced a new four-year proactive strategy (from 2024 to 2027) to encourage investment in five industrial sectors, namely Bio-Circular-Green (BCG) (agriculture, food, medicine and clean energy), automobiles (particularly electric automobiles), electronics, digital and creativity, and regional headquarters and international business centres. In this connection, the BOI will gradually issue the relevant measures in accordance with this new strategy.

EEC

In 2023, the EEC introduced a plan containing the contemplated actions to be implemented by the EEC to attract FDI in Thailand in the target businesses, namely medicine, digital, elec-

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tric vehicles and BCG. The key contemplated actions include the following:

- provision of incentives for business operators, such as tax exemption or reduction in personal income tax for expatriates and the right to own land, plus long-term visas; and
- facilitation of the application for approvals and licences under eight relevant laws, including building control law and factory law, by the EEC's being authorised to grant approvals or licences under those specific laws as a one-stop service centre.

It is worthwhile for foreign investors to keep up to date on the investment promotion policies which have been or will be introduced so as to maximise the available benefit, although there are no specific pending or anticipated changes to the economic, political or business climate or the regulation of FDI as of December 2023.

3. Mergers and Acquisitions

3.1 Transaction Structures

For either a private limited company or a public limited company, the most common M&A transaction structures are either share acquisition or business/asset acquisition, although a private limited company may instead choose merger or amalgamation and a public limited company may choose amalgamation.

The key considerations for foreign investors in selecting an M&A transaction structure are driven by various factors including regulatory restrictions, tax benefits and the complexity of the transfer procedures; however, we set out some factors which are typically considered when a foreign investor selects a transaction structure

between share acquisition and business/asset acquisition as follows:

- *Share Acquisition:* In a share acquisition transaction, the foreign shareholding ratio should be considered as it may trigger restrictions on the right to own land and to engage in certain businesses in Thailand. However, with the acquisition of shares, the foreign investors will become shareholders of the company which operates the business (including the entire assets of the company) without requiring additional procedures to be carried out for the transfer of assets, agreements (subject to change of control provisions), permits/licences (subject to change of control approval or notification requirements) and employees, while those acquirers will assume all the debts and liabilities, including contingent liabilities.
- *Business/Asset Acquisition:* A business and/or asset acquisition transaction allows the investors to carve out and purchase certain business units or specific assets. In addition, in an entire business transfer scheme under the Thai Revenue Code, certain tax exemptions will be granted provided that the conditions prescribed thereunder are met. However, as each of the assets is individually transferred, the procedures for the transfer of each of the specific assets, agreements, permits/licences and employees will be required to be carried out, while the acquirer may opt not to assume specific debts and liabilities, including contingent liabilities as all the indebtedness and liabilities are also individually transferred.

Matters of employment must also be taken into account for each type of M&A transaction – please refer to **10.3 Employment Protection**.

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In the case of minority investments in Thailand, these are usually in the form of share acquisitions, or subscriptions of newly issued shares in a company in the case of an increase of capital.

3.2 Regulation of Domestic M&A Transactions

Apart from the regulatory regime regarding FDI, another regulatory review/approval regime which must be considered for a domestic M&A transaction is the Thai merger control regime. Please refer to **6. Antitrust/Competition**.

For public limited companies, an acquisition of shares in a public limited company listed on the Stock Exchange of Thailand (“SET”) which reaches a specific threshold may trigger certain obligations prescribed under the regulations of the Securities and Exchange Act of 1992 (the “SEC Act”), including a disclosure obligation upon acquiring shares reaching every 5% of the total voting rights of the listed company and a mandatory tender offer requirement upon acquiring shares reaching the thresholds of 25%, 50% and 75% of the total voting rights of the listed company.

In addition, M&A transactions in specific sectors in Thailand (eg, financial institutions, insurance, telecommunications and land transportation) may also be subject to restrictions on foreign investment and a specific permission from the relevant regulators. Please refer to **8.1 Other Regimes**.

4. Corporate Governance and Disclosure/Reporting

4.1 Corporate Governance Framework

There are four types of legal entities based on the CCC and the Public Limited Company Act

of 1992 (the “PLC Act”), which are the major pieces of legislation governing the corporate framework:

- Unregistered ordinary partnership;
- Registered partnership;
- Private limited company;
- Public limited company.

The key implications for foreign investors to consider when selecting corporate or other legal entity forms will be, among others, the legal capability of those legal entity forms and their governance structures. The key considerations are as follows:

Private Limited Company

A private limited company is the most common legal entity and is recommended for foreign direct investors seeking to establish subsidiaries in Thailand, whether wholly owned, partly owned or joint venture. In the last five years (2019-2023), around 78% of newly registered entities in Thailand were in the form of a private limited company. FDI commonly uses the private limited company as its investment vehicle not only because of the legal limitation of shareholders’ liabilities only up to the amount of the unpaid share subscription price, but also because of the simplicity of its corporate governance structure. The private limited company is a stock company which simply requires at least two shareholders, and one director for its operation.

Partnership

As for partnerships (including unregistered ordinary partnerships and registered partnerships), they are less common and typically used for small businesses because the partners must be jointly and unlimitedly liable for the partnership’s obligations to third parties.

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Public Limited Company

A public limited company is also a stock company with the qualification of the limited liability of shareholders. While its corporate governance structure is similar to that of a private limited company, a public limited company is larger in terms of numbers, eg, at least 15 shareholders are required, and five directors for its operation. Generally, investors who aim to set up certain businesses, eg, an insurance company, commercial banking or finance business, must form a public limited company as a compulsory entity, including those who plan to launch an initial public offering (subject to the SEC Act).

In addition to the subsidiary type, for FDI, it is noteworthy that there are two other types of entities that are not legally separated but treated as belonging to the same legal entity as its overseas head office:

- *A representative office:* an office of a foreign entity aiming to conduct marketing and non-income-generating activities in Thailand to support its head office or affiliates; and
- *A branch office:* an office which is entitled to receive an income from its business activities, although the said branch office is legally considered as part of its headquarters and may be subject to the foreign business licence requirement if its activity is considered a restricted business under the FBA.

4.2 Relationship Between Companies and Minority Investors

As for minority shareholders/investors, the CCC and the PLC Act grant various rights to minority shareholders/investors to protect their interests in public and private limited companies. These typical rights include:

- the right to inspect the directors' performance, such as accessing the company's register of shareholders and obtaining a copy of the company's latest balance sheet;
- the right to request an official inspection of the company's books and accounts;
- the right to convene a shareholders' meeting and propose the agenda thereof;
- the right to veto a special resolution that requires a majority vote of not less than three-quarters of the total votes of attending shareholders;
- the right to request the court to revoke any resolution passed in violation of the law or the articles of association; and
- the right to subscribe for newly issued shares in case of an increase in share capital before such shares are offered to others (ie, pre-emptive right).

4.3 Disclosure and Reporting Obligations

Thailand does not impose specific disclosure obligations for FDI. However, apart from the disclosure and reporting obligations required for specific businesses (eg, financial institutions, insurance companies and telecommunications companies), there are general disclosure obligations that apply to all companies concerning changes in shareholding.

5. Capital Markets

5.1 Capital Markets

In Thailand, the main channels for businesses to access funding or financing can be divided into equity financing (eg, capital markets or increasing of shares) and debt financing (eg, bank financing and shareholder loan). There are various factors which businesses in Thailand may take into consideration when selecting the channels for their funding, eg, amount of funds,

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complexity of procedures, relevant regulations, interest rates, trends in financial markets, etc.

The Security and Exchange Commission of Thailand (“SEC”) is the main government body that oversees the development of capital markets in Thailand as a whole.

The main equity market in Thailand is the SET, which is overseen by the SEC. Companies which are eligible to be listed on the SET must have a minimum paid-up capital after initial public offering (“IPO”) of THB300 million. In addition to the SET, the Market for Alternative Investment (“MAI”) was also established as a secondary equity market to accommodate small and medium-sized enterprises. Companies which are eligible to be listed in the MAI must have a paid-up capital after IPO of at least THB50 million.

5.2 Securities Regulation

In Thailand, the main regulations which govern securities and capital markets are found in the SEC Act.

The SEC Act stipulates the framework to regulate the issuance and trading of securities in all aspects of capital markets in Thailand, for example:

- conditions and requirements of permission from the SEC for companies to issue securities;
- obligation of data disclosure by securities-issuing companies;
- rules concerning internal management of securities-issuing companies and fiduciary duties of directors;
- conditions and licence requirements to operate securities-related businesses; and
- unfair conduct in capital markets, eg, insider trading, share price manipulation, etc.

In addition to the main provisions under the SEC Act, investors should also observe any sub-regulations issued by the SEC under the SEC Act as these sub-regulations will stipulate details and even exemption from certain duties for securities-issuing companies.

To invest in a company listed on the SET, foreign investors have the two options of either buying shares of such company (either from the main board or foreign board) or buying non-voting depositary receipts (NVDRs). When purchasing shares, foreign investors should ensure that the foreign ownership limits of the listed company have not been exceeded. While purchasing NVDRs, there is no need to check the foreign ownership limit, as NVDRs allow foreign investors to invest beyond those limits. It is important to note that NVDR holders do not have voting rights in the listed company but are still entitled to all the other benefits, eg, dividends, capital gains and subscription rights. Further, the foreign investor should ascertain whether it is obtaining shares from the main board or foreign board because certain limitations over its rights as a shareholder may be imposed depending on the board where it purchases such shares.

5.3 Investment Funds

There is no specific regulation to FDI through foreign investors structured as investment funds in Thailand apart from the limitation of foreign shareholder ratios. Please refer to **7.1 Applicable Regulator and Process Overview**.

6. Antitrust/Competition

6.1 Applicable Regulator and Process Overview

Thailand has a merger control regime which is stipulated under the Trade Competition Act of

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2017 (the “TCA”) and governed by the Trade Competition Commission (“TCC”).

The TCA is the main merger control regulation which regulates M&A transactions in Thailand. However, certain types of business that are specifically regulated under other sectoral laws regarding competition matters and supervised by the relevant authority are not subject to the TCA, as follows:

- Telecommunications, broadcasting and television businesses are under the supervision of the National Broadcasting and Telecommunications Commission.
- Energy businesses are under the supervision of the Energy Regulatory Commission.

Definition of Merger

The TCA provides that an acquisition transaction which meets any of the following requirements is considered a merger:

- merger or amalgamation between manufacturers, distributors and service providers;
- direct or indirect acquisition of shares (or warrants or other convertible securities) resulting in the acquirer holding 25% or more of the voting rights in an SET-listed company;
- direct or indirect acquisition of shares with voting rights which results in the acquirer holding exceeding 50% of the voting rights in any other company (including listed company outside Thailand); or
- acquisition of assets exceeding 50% of the total value of the assets used in the normal business operations of the target in the previous accounting year.

Requirement for Pre-approval or Post-notification

There are two thresholds which trigger the merger control requirement under the TCA:

- Pre-merger approval is required to be obtained from the TCC before completion of the merger if the merger results in the creation of a monopoly or market dominance in the relevant market.
- Post-merger notification is required to be submitted to the TCC within seven days after completion of the merger if the merger does not result in the creation of a monopoly or market dominance, but any or all of the merging companies had a combined revenue in Thailand of THB1 billion or higher in the relevant market in the past year.

Definition of Market Dominance

Under the TCA, a company (or group of companies) is considered to have market dominance in a relevant market if in the past year:

- it had a market share of at least 50% and sales revenue of at least THB1 billion in the relevant market; or
- it was one of the top three business operators in order of highest market shares in the relevant market, whereby the cumulative market share of the top three business operators is at least 75%, and it has an individual market share of at least 10% and an individual sales revenue of at least THB1 billion in the relevant market.

For the purpose of calculating the market share and revenue of a company, the calculation must also include the market share and revenue in Thailand of all entities which are considered part of a single economic entity with it (see details below) that conduct business in Thailand.

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Definition of Single Economic Entity

Under the TCA, a “single economic entity” (“SEE”) refers to two or more companies which are under the same controlling interest. A company shall be deemed to have a controlling interest in another company if it:

- holds more than 50% of the shares with voting rights in the other company;
- has control over the majority votes in the shareholders’ meeting of the other company, either directly or indirectly; or
- has control over the appointment or removal of at least half of all directors of the other company, either directly or indirectly.

Exempted Transaction

The TCA provides an exception to the pre-merger approval or post-merger notification requirement in the case of the merger for internal restructuring purposes between entities within the same SEE.

Review Timeline

If pre-merger approval is required, the merger filing (ie, standard form and supporting documents) must be submitted to the TCC. After submission of the completed application, the TCC will consider, reach and notify the merging companies of its decision within the statutory period of 104 days (extendable up to 119 days).

6.2 Criteria for Review

According to the TCC’s current practice, the merger control requirement would be triggered if:

- *For pre-merger approval:* (i) the target company has existing market dominance prior to the merger, whether or not there is an overlapping market; or (ii) the merged company will have

market dominance after completion of the merger in an overlapping market.

- *For post-merger notification:* (i) the target company or acquirer has revenue in Thailand in any relevant market reaching THB1 billion, or (ii) the target company and the acquirer have a combined revenue in Thailand in any relevant market reaching THB1 billion. An overlapping market is not required.

Criteria for Review of Pre-Approval

When considering pre-merger approval, the TCC will consider the following four factors:

- business necessities;
- benefits for business promotion;
- no significant damage to the economy; and
- no adverse impact on the essential benefits to which consumers are entitled as a whole.

In addition, the TCC will review the competitive assessment in relation to the following topics:

- market concentration by using, among others, Herfindahl-Hirshman Index (HHI) as one of the indicators;
- market entry and expansion;
- non-coordinated effect;
- co-ordinated effect; and
- assessment of market efficiency after the merger.

6.3 Remedies and Commitments

The TCC decision on a pre-merger filing takes one of the three following forms:

- approval with no condition;
- approval with condition(s); or
- no approval.

The TCC has the authority to impose conditions/remedies on a case-by-case basis. In practice,

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there are two types of conditions/remedies that have been imposed on the merging companies:

- structural conditions, eg, prohibiting the merging parties (and their SEE) from entering into a merger with other business operators in the relevant market for a certain period, prohibiting any increase in shareholding for a certain period; and
- behavioural conditions, eg, requiring the merging parties to maintain trading terms with suppliers for a certain period, prohibiting sharing of information in a certain relevant market between SEEs, imposing an obligation to report business operations.

6.4 Enforcement

For an FDI which triggers pre-merger approval, the TCC has the power to block the FDI by not approving it. In addition, the TCC also has the power to order the business operators to suspend, cease or rectify any action which violates or will violate the pre-merger requirement. The merging parties may appeal against the TCC order to the Administrative Court within 60 days. In the case of making an investment without prior approval of the TCC, the merging parties will be subject to an administrative fine of up to 0.5% of the transaction value.

For an FDI which triggers post-merger notification, the TCC has no power to block the FDI as the TCC's clearance is not required prior to making the investment. However, if a post-merger notification is not submitted within seven days after completion of the merger, an administrative fine of up to THB200,000 will be imposed as well as a daily fine of THB10,000 throughout the period of violation.

7. Foreign Investment/National Security

7.1 Applicable Regulator and Process Overview

FDI Subject to Restriction and Review

FDI in Thailand is restricted under the FBA. Under the FBA, a “foreigner” cannot operate a restricted business, unless a certain permission issued by the DBD, namely a Foreign Business Licence (the “FBL”) under the FBA, is granted to such foreigner. The definition of “foreigner” under the FBA includes an individual of foreign nationality, or a juristic person that is registered outside Thailand or is registered inside Thailand but one-half or more of its shares are held by foreign individuals or entities.

The FBA also defines and classifies “restricted businesses” into three lists as follows:

- “List 1 Businesses”, meaning businesses in which it is not permissible for foreigners to engage, for example, press and radio broadcasting, livestock farming or land trading, etc.
- “List 2 Businesses”, meaning businesses relating to national safety or security or having an impact on arts, culture, traditions, custom and folklore, handicrafts or natural resources and the environment, for example, productions of firearms, domestic transportation by land, water or air, mining, or timber processing, etc. The right to consider and grant permission for a foreigner to engage in these List 2 Businesses is vested in the Cabinet of Thailand.
- “List 3 Businesses”, meaning businesses in which Thai nationals do not have the capacity to compete with foreign investors, for example, legal services, engineering, retail/wholesale, and general service businesses which are not exempted by the Ministerial Regula-

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tion issued under the FBA. Foreigners who engage in these List 3 Businesses will require permission granted by the Director-General of the DBD with the approval of the Foreign Business Committee established by the virtue of the FBA.

Aside from the FBL mentioned above, a foreigner can also obtain a Foreign Business Certificate (“FBC”) to operate its business in Thailand. The obtainment of an FBC requires only the notification of the business operation to the relevant authority (ie, the DBD). Foreigners who are eligible for the FBC channel are:

- foreigners whose business operation has received investment promotion from the BOI under the Investment Promotion Act of 1977 and Industrial Estate Authority of Thailand (“IEAT”) under the Industrial Estate Authority of Thailand Act of 1979; and
- foreigners with specific nationalities who are eligible for exemption from the FBL and relaxation of the foreigner shareholding ratio under international treaties that Thailand has with foreign states. Examples of such treaties include the Treaty of Amity and Economic Relation Between the Kingdom of Thailand and the United States of America, the ASEAN Comprehensive Investment Agreement, the Japan–Thailand Economic Partnership Agreement, etc.

Relevant Authority

Applications for an FBL or an FBC under the FBA must be submitted through the Bureau of Foreign Business Administration (the “BFBA”) under the DBD. In the case of the FBL, the BFBA also carries out an initial review of the application before proposing the application to the Foreign Business Committee or the Cabinet, as the case may be.

Timeline to Obtain an FBL or an FBC

Under the FBA, the consideration of the application for an FBL by the Foreign Business Committee or the Cabinet must be completed within 60 days after the submission of the application. In the case of the consideration of the Cabinet, the consideration period can be extended for another 60 days. After the consideration has been completed and the granting of the FBL is approved, the FBL will be issued within 15 days.

Despite the above timeline under the FBA, the applicant for an FBL should be aware that the 60-day consideration period mentioned above will start from the date when the application fee is paid, such that this date will be deemed the official submission date for the FBL application. In practice, the application which is submitted to the DBD will be initially reviewed by the officers of the BFBA. Additional information or documents regarding the business operation may be requested from the applicant by the officer during this review process. There is no specific time limit for this initial review, and the process may take up to two or three months before the application can be officially submitted to Foreign Business Committee for further consideration.

In the case of the FBC, the FBC will be issued to the applicant within 15 working days after the submission of the application form and required documents.

Exemptions

Business operations engaged in by foreigners who are not subject to the FBL and the FBC requirement (the “Permission Requirement”) are as follows:

- *Non-restricted businesses:* Manufacturing and export of goods businesses are not subject to the Permission Requirement because

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these businesses are not stipulated in any of the “Lists of restricted businesses” in the FBA. Nevertheless, it is noteworthy that the business of manufacturing by specific order/drawing or ODM contracts (ie, “made to order”) is deemed a service business by the DBD and requires the applicable permissions.

- *Exempted businesses with conditions:* Certain “List 3 Businesses” are exempt from the Permission Requirement providing that specific conditions concerning minimum capital or business characteristics are fulfilled. Examples of the exempted businesses under these conditions include construction businesses of public infrastructure in which the foreign business operators have more than THB500 million of minimum capital, retail and wholesale businesses in which the foreign business operators have more than THB100 million of minimum capital, and brokerage for procurement of goods or services provided by the foreigner business operators which is necessary for the production or the provision of services amongst affiliated enterprises, etc.
- *Exempted service businesses:* Certain service businesses which are designated by the Ministerial Regulation issued under the FBA are exempt from the Permission Requirement. These exempted service businesses are mostly businesses which are already regulated by other authorities, for example, representative office, regional office, trading of securities, management of mutual funds, financial institutions, insurance, or services which are provided among affiliated companies, such as a lease or intercompany loan which is given by a foreigner to its affiliates in Thailand.

7.2 Criteria for Review

Principally, the criteria considered when deciding whether to grant an FBL are the various

factors stipulated in the FBA, such as advantageous and disadvantageous effects on national safety and security, economic and social development of the country, environmental preservation, consumer protection, sizes of undertakings, employment opportunity for Thai persons, and contribution to research and development progress in Thailand. These criteria apply to all types of business entities which have the status of “foreigner” under the FBA, including business entities which are owned by foreign governments or government-affiliated entities.

7.3 Remedies and Commitments

In addition to the Permission Requirement, foreigners who engage in business operations in Thailand are subject to accessory conditions, such as minimum capital, place of residence for a responsible person, debt-to-equity ratio, and other conditions as may be specified by sub-regulations issued under the FBA. In case any violation to these accessory conditions is found, the Director-General of the DBD has the authority to send a warning letter and provide a rectifying period to the violator. If such violator is not able to rectify its violation within the given period, the Director-General of the DBD is authorised to issue an order to suspend the validity of the FBL or business operation of the violator for a period of 60 days. If the violator still cannot rectify its violation despite the lapse of such period, the Director-General will order the revocation of the FBL (in the case of List 3 Businesses) or propose to the Minister of Commerce to issue such revocation order (in the case of List 2 Businesses).

The violation of accessory conditions under the FBA as mentioned above is deemed a “light-weight” violation in which the violator is still given a chance to rectify. On the other hand, serious violations, such as colluding with other

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foreigners to evade the Permission Requirement (as will be mentioned in **7.4 Enforcement**), can result in revocation of the FBL without a rectifying period and suspension of business operation by order of the court.

7.4 Enforcement

Foreigners who engage in restricted business operation in Thailand without permission shall be subject to imprisonment for up to three years, a fine of THB100,000 to THB1,000,000, or both (the imprisonment penalty is applicable to an offender who is a natural person only). In addition to the imprisonment and fine penalties, the court shall order the cessation of business operation or cessation of shareholding or partnership within the violator's entities. In case of the violation of the court's order, the violator shall be subject to a daily fine of THB10,000 to THB50,000 during the period of violation.

The FBA also prohibits the following use of nominees or similar to circumvent the Permission Requirement:

- A foreigner who has received an FBL and who (i) aids or assists in the business operations of another foreigner who does not hold an FBL or (ii) operates the business jointly with a foreigner but presents itself as the sole owner of the business.
- A Thai person or juristic person who (i) aids or assists a foreigner to operate a restricted business under the FBA or (ii) operates the business jointly with a foreigner but presents itself as the sole owner of the business or (iii) agrees to hold shares in a juristic person on behalf of a foreigner.

Any person who engages in the above prohibited actions shall be subject to imprisonment for up to three years, a fine of THB100,000 to

THB1,000,000, or both. The court shall also order the cessation of the joint operation of business. In case of the violation of the court's order, the violator shall be subject to a daily fine of THB10,000 to THB50,000 during the period of violation.

8. Other Review/Approvals

8.1 Other Regimes

On top of the FBA, which is the general law governing business operation by foreigners in Thailand, foreign investors should also observe other laws and regulations which impose restrictions upon business operation in specific industries and transactions, as these specific laws will be applicable to such specific industries and transaction at first priority. Examples of these laws are as follows:

Land Ownership Restriction

Under the Land Code of Thailand, foreigners are prohibited from owning land and real estate in Thailand unless exceptions are given under specific laws; for example, foreigners are permitted to purchase and own a condominium unit under the Condominium Act of 1979. Business operators who have been granted investment promotion privilege under the BOI or IEAT scheme are also permitted to own land during the validity of their investment promotion terms. It is noteworthy that the Land Code applies a stricter threshold of shareholding than those under the FBA, ie, "more than 49%" to define the status of "foreigners".

Industry-Specific Restrictions

Specific laws governing industries which are likely to impact national security and the economy on a large scale and are regulated by specific state agencies may contain provisions which

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specifically limit the ratio of foreign shareholding and the nationality of directors inside foreign entities. Examples of industry-specific restrictions for FDI are as follows:

- *Financial institution businesses:* Under the Financial Institution Businesses Act of 2008, the operation of financial institution businesses in Thailand, ie, commercial banks, financing banks, credits fonciers and other specialised financial institutions, is subject to the obtainment of a business licence issued by the Minister of Finance on the recommendation of the Bank of Thailand (“BOT”). A financial institution is required to have at least 75% of its voting shares owned by Thai persons or entities and at least three-quarters of its directors must be persons of Thai nationality. In case a special permission has been granted from the BOT, a foreign shareholding ratio in a financial institution may be allowed to up to 49% of voting shares sold, and more than one-quarter but less than one-half of the total number of directors can be foreigners.
- *Telecommunications businesses:* Under the Telecommunications Business Act of 2001, the operation of telecommunications businesses, ie, the emission, transmission or reception of various information via various media such as radio waves, wire or another broadcasting system, is subject to the notification of business commencement to the National Broadcasting and Telecommunications Commission (“NBTC”) or the obtainment of a licence from the NBTC, depending on the category of telecommunications service provided. In this regard, a restriction on the foreign shareholding ratio is imposed upon the applicants for a “Type 2 Telecommunications Licence” (ie, telecommunications service without its own network) or a “Type 3 Telecommunications Licence” (ie, telecom-

munications service with its own network).

The applicants for such Telecommunications Licences must not have the status of “foreigners” under the FBA. Moreover, the NBTC may impose specific restrictions upon certain characteristics of the business to prevent the domination of foreigners in telecommunications business providers.

- *Life or non-life insurance businesses:* Under the Life Insurance Act of 1992 and Non-Life Insurance Act of 1992, providers of life or non-life insurance services shall obtain a licence from the Ministry of Finance and shall operate their business under the supervision of the Office of Insurance Commission (“OIC”). Life or non-life insurance service providers are required to have at least 75% of their voting shares owned by Thai persons or entities, and at least three-quarters of their directors must be persons of Thai nationality. In case a special permission has been granted from the OIC, a foreign shareholding ratio in a financial institution may be allowed to up to 49% of voting shares sold, and more than one-quarter but less than one-half of the total number of directors can be foreigners.

Fund Transfer (Currency Exchange Restriction)

The transferring of funds in both Thai baht and foreign currency into Thailand can be done without any legal restriction or limit of transfer amount. On the other hand, transferring of funds from Thailand to abroad is subject to the regulations issued by the BOT under the Exchange Control Act of 1942.

The transferring of funds outside Thailand for general purposes, such as payment of the purchase price of imported goods, distribution of dividends and payment of loans, is not subject to any requirement to obtain permission from

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the BOT, provided that, if the amount of the transferred fund is at least USD200,000 per one transfer, the transferor presents the evidence of objectives to the bank which performs the transfer under the transferor's instruction. Such evidence of objectives can be any documents which show the relationship between the transferor and the transferee, such as invoices (in the case of payment of the purchase price of goods), proof of shareholding and shareholders' resolution to distribute dividends (in the case of payment of dividends), or the loan agreement (in the case of payment of loans).

Unlike fund transfers for general purposes as described above, transfers of funds from Thailand for specific transactions which are listed in the "negative list" under the BOT's regulations require permission from the BOT in advance.

9. Tax

9.1 Taxation of Business Activities

Principally, the framework of the taxation system in Thailand is stipulated under the Revenue Code. The main categories of taxation which are imposed on companies that engage in business activities in Thailand under the Revenue Code are as follows:

Corporate Income Tax ("CIT")

CIT is income tax that is assessed on the basis of and collected from the net profit of any juristic person registered under Thai laws as well as any juristic person which is registered outside Thailand but is engaged in any business in Thailand or has representatives or employees engaged in businesses on its behalf in Thailand. The current rate of CIT is 20% of net profit.

Value Added Tax ("VAT")

VAT is taxation collected upon the sale of goods or the provision of services whereby VAT is included within the price of goods or services paid by consumers. Any natural person, juristic person registered under Thai laws or juristic person registered outside Thailand but having representatives or employees engaged in businesses on its behalf in Thailand, whose total income is more than THB1.8 million per year, shall be obliged to registered for VAT with the Revenue Department and shall monthly submit a tax return by offsetting output tax against input tax arising in a tax month to the Revenue Department.

Specific Business Tax ("SBT")

SBT will be collected from certain types of business which are specially designated under the Revenue Code, for example, banking businesses, life insurance businesses, and securities and quasi-banking businesses. The rate of SBT is from 0.01% to 3% depending on the transactions which are engaged in by the designated business operators.

Foreign companies with Thai permanent establishments may be subject to tax in Thailand.

9.2 Withholding Taxes on Dividends, Interest, Etc

By the virtue of the Revenue Code, payers of designated types of payments, such as salaries paid to employees, service fees paid to service providers, dividend or interest, are obliged to withhold tax from such payment at the rate of 1% to 15% depending on the type of payment and submit the withholding tax to the Revenue Department. Withholding tax rates apply to all juristic persons registered in Thailand regardless of the nationality of the shareholders. Payment of dividend or interest to a foreign investor that is

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a juristic person registered outside Thailand and has no business in Thailand is also subject to withholding tax at the rate of 10% (for dividend) and 1% (for loan interest).

In the case of cross-border payment, specific things rated for withholding taxes may be exempted or reduced under a double tax agreement (the “DTA”) that Thailand has with another country; for example, payment of agent fees to agents who do not have a permanent establishment in Thailand or Japan are exempted from withholding tax under the Thai-Japan DTA, and withholding tax deducted from royalties for software that are paid to US payees are reduced to 5% from the original rate of 15% under the Thai Revenue Code by virtue of the Thai-US DTA. In this regard, to prevent parties of non-related nationality from seeking advantage under a DTA (so-called “treaty shopping”), Thai law stipulates that persons who are eligible for tax reduction or exemption under the DTA must be Thai persons who reside in Thailand for more than 180 days in one year or juristic persons that are registered under the CCC.

9.3 Tax Mitigation Strategies

The tax mitigation strategies that are viewed as acceptable strategies under Thai laws must be strategies which utilise legal channels or the vagueness of the law without the intention to deceive or the making of any false declaration to the tax authorities. Examples of common tax mitigation strategies used by general companies in Thailand are as follows:

CIT Reduction Strategy for Small and Medium-Sized Enterprises (“SMEs”)

Under the current Revenue Code, SME companies are eligible for CIT exemption if their total profit does not exceed THB300,000 per year, or a reduction of CIT to 15% if the total profit

does not exceed THB30 million per year. In this regard, companies which fall within the scope of the SME must have (i) paid-up registered capital of not more than THB5 million, and (ii) total revenue from goods and services of not more than THB30 million per one accounting term. To become eligible for the CIT exemption or reduction for SMEs, some businesses may consider registering their companies separately to maintain the amount of registered capital and income within the SME threshold.

Stamp Duty Reduction Strategy for Lease Agreements

Lease agreements are subject to stamp duty at the rate of 0.1% of the lease fees throughout the lease term. Consequently, stamp duty can become a significant burden on both lessors and lessees, especially in the case of long-term lease agreements or commercial leases with high lease fees. A common strategy to reduce the amount of stamp duty is to separate fees which are accessory to the lease, such as service fees for the maintenance of common spaces in properties, into a separate agreement. This will result in the reduction of lease fees and consequently the amount of stamp duty.

9.4 Tax on Sale or Other Dispositions of FDI

There is no exemption from tax from capital gains derived from the sale or disposition of a business by foreign investors in Thailand. Capital gains derived therefrom are subject to CIT or personal income tax in the same manner as other types of income. It is noteworthy that an entire business transfer (“EBT”) which is done under the criteria designated by the Revenue Department may be eligible for CIT, VAT and stamp duty exemption.

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9.5 Anti-evasion Regimes

An anti-tax avoidance measure which is currently implemented under Thai law is the prevention of “transfer pricing” stipulated in the amendment to the Revenue Code which has been effective since 2019 (the “Anti-Transfer Pricing Measure”). Under the Anti-Transfer Pricing Measure, “transfer pricing” is described as the transferring of profits between related companies by engaging in a transaction which would not ordinarily occur if such transaction were done by non-related parties. Companies which had at least THB200 million of income in the previous financial year have the obligation under the Anti-Transfer Pricing Measure to submit a disclosure form for a transaction between related companies.

Besides transfer pricing, Thailand has enacted the Royal Decree on the Exchange of Information for International Agreements on Taxation of 2023 to comply with the commitment made at the Global Forum on Transparency and Exchange of Information for Tax Purposes to implement the automatic exchange of information between countries according to the Common Reporting Standard (CRS). This CRS aims to tackle international tax avoidance and evasion.

10. Employment and Labour

10.1 Employment and Labour Framework

Employment and labour matters in Thailand are regulated by three major pieces of legislation, namely:

- *Labour Protection Act of 1998 (the “LPA”)*: The LPA establishes the fundamental requirements and minimum standards for employment relationships between employers and employees.

- *Labour Relations Act of 1975 (the “LRA”)*: The LRA prescribes the criteria for the establishment and administration of labour unions, employers’ associations and employee committees as well as outlining the procedures for initiating collective bargaining and resolving labour disputes, including the rights of lock-out and strike.
- *Establishing Labour Courts and Labour Procedure Act of 1979 (the “ELCA”)*: The ELCA establishes the Labour Court in Thailand and outlines court proceedings concerning labour disputes arising from employment contracts or the rights of employers and employees under the LPA and the LRA.

It is worth noting for FDI that:

- Specific categories of workers, such as sea fishery labourers, homeworkers or freelancers, may be subject to specific regulations based on the nature of their work.
- Employers, including foreign investors considering FDI in Thailand, should be aware that Thai labour law is considered a matter of public order. Any employment contract that contradicts labour law and has a detrimental impact on the employee could be deemed invalid.
- In the event of a labour dispute, the interpretation of the law is usually in a manner that favours the employee’s rights.
- It should be kept in mind that if an employer terminates an employee, whether with or without cause, and even if all severance pay and other statutory compensations have been fully provided to the employee under the law, that employee still has the option to pursue legal action for unfair dismissal under the ELCA. The Labour Court will assess the fairness of the termination grounds and the termination process, and may order the

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employer to provide compensation for unfair dismissal or reinstate the terminated employee at the same wage level.

Labour Union and Collective Bargaining

Under the LRA, labour unions can be formed by groups of employees working for the same company or in work that is similarly described across different companies. As of October 2023, there were 1,427 labour unions formed in private enterprise in Thailand. When a labour union makes a demand for collective bargaining, the employer is obliged to enter into negotiations with the labour union within a specified time-frame. If an agreement cannot be reached, it shall be called a labour dispute, and the labour union must request the official assistance of conciliation. If the labour dispute remains unresolved, the labour union has the option to initiate a strike, while the employer may exercise the right to a lockout.

Additionally, when the number of employees reaches 50, the LPA mandates that the employer establish a Welfare Committee consisting of at least five employee representatives elected by all employees in the workplace. However, employees can alternatively form an Employee Committee under the LRA instead of a Welfare Committee since it has greater power and the members of the Employee Committee are protected from unilateral termination, wage reduction and disciplinary actions by the employer, unless approved by the Labour Court.

10.2 Employee Compensation

Employees in Thailand must receive their wages, overtime pay and holiday pay in cash commonly on a daily or monthly basis, unless they have agreed to a different arrangement. It is essential to ensure that the wage paid to employees is not lower than the minimum wage rate applica-

ble in the respective province. Other statutory benefits to which employees are entitled include leave entitlements, holidays, retirement pay, and contributions to the social security fund and the workmen's compensation fund.

In Thailand, it is common for employers to offer additional benefits to employees, beyond what is required by law. These may include position allowances, housing allowances, diligence allowances, petrol allowances, group insurance, provident funds and annual bonuses. However, it is worth noting that the granting of stock options is not a common practice in private limited companies in Thailand.

Compensation in the Event of Acquisition or Change of Control

In the event that there is an acquisition, a change of control or any other investment transaction in the employer, there is no legal requirement for either party to provide compensation to the employee. However, if the transaction results in the termination of the employment contract or the relocation of the workplace in a way that significantly affects the ordinary course of living of the employee or his or her family, in such cases, severance pay or special severance pay (as the case may be) may be provided to address these specific situations.

10.3 Employment Protection

Employment Protection in a Share Acquisition Transaction

In a share acquisition transaction, the employment relationship between a target company (as an employer) and employees remains unchanged, as well as the rights and duties between them. Therefore, there is no requirement to provide compensation or issue notices to the employees since there is no change of employer.

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Employment Protection in a Business/Asset Acquisition Transaction

In a business/asset acquisition transaction, all businesses/assets of the transferor entity are transferred to the transferee entity either wholly or partly (as the case may be), including employment contracts. In a case where the transfer of employment happens, it is considered a change of employer under the LPA. In such cases, the consent of each transferred employee is required for the transfer of employment; otherwise, the employee can remain working with the transferring entity as an existing employer. In this situation, if the transferring entity is to be dissolved after the business transfer transaction or there is no suitable position available for the employee, he or she will be entitled to severance pay from termination of employment by an employer. The transferee entity as a new employer is required to retain the same rights and benefits that the employees had with their previous employer together with the continuity of the service year.

Employment Protection in a Merger or Amalgamation Transaction

Regarding amalgamation, it is considered a change of employer for which the consent of the employee is required.

Regarding merger, since this concept was newly introduced by the CCC in 2022, the LPA has yet to be revised to recognise such a merger. However, based on the concept under the CCC, a merger is also considered a change of employer from the perspective of the LPA. Thus, the consent of the employee is required for the merger.

For other details, these are the same as for a business/asset acquisition transaction as described above.

11. Intellectual Property and Data Protection

11.1 Intellectual Property Considerations for Approval of FDI

In principle, intellectual property is not a main factor in the consideration of approval for FDI as described in 7. **Foreign Investment/National Security**.

However, for some businesses such as wholesale and retail by a foreigner in Thailand, the intellectual property relating to the products to be sold may be one of the factors which is taken into account by the DBD in the course of consideration of the application for the FBL as described in 7.1 **Applicable Regulator and Process Overview**. For clarity, generally, if the products to be sold are limited to products under a specific trade mark, particularly the trade mark of the parent or affiliated companies, the likelihood of the DBD granting approval could be higher.

11.2 Intellectual Property Protections

Although there is room to improve in terms of enforcement, Thai law generally covers major intellectual property rights which include, among others, copyright, patents and trade marks. While copyright is protected without the need of registration, patents and trade marks must be registered in order to be protected under Thai laws. The protection of intellectual property is overseen by the Department of Intellectual Property. The Central Intellectual Property and International Trade Court has been specifically established to hear and adjudicate intellectual property cases.

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11.3 Data Protection and Privacy Considerations

Thailand has promulgated the Personal Data Protection Act of 2019 (the “PDPA”), which came into full effect on 1 June 2022. Subsequently, subordinate regulations under the PDPA have been announced to supplement the PDPA. The PDPA aims to grant protection to the data subject whose personal data is collected, used and disclosed by setting out several obligations for the data controller such as obligations to obtain consent for the collection, use and disclosure of the personal data, to notify the objectives therefor, to respond to the exercise of rights of the data subject as stipulated under the PDPA, to prepare the security measures, and to make notifications relating to data breaches. The Personal Data Protection Committee was also established to oversee personal data protection in compliance with the obligations, conditions and requirements under the PDPA.

The PDPA has extraterritorial jurisdiction as it is also applicable to data controllers and data processors which are outside Thailand and which collect, use or disclose the personal data of the data subject in Thailand for specific purposes, ie, (a) offering goods or services to the data subject in Thailand, and (b) monitoring the behaviour of the data subject in Thailand.

The PDPA prescribes criminal penalties including imprisonment and fines as well as huge administrative fines up to THB5 million. In addition, under the PDPA, the criminal penalty could also extend to the director, manager or persons responsible for such matter. Therefore, although the current legal enforcement is not stringent since all subordinate regulations are not fully announced, any person including foreign investors in their own jurisdiction who are subject to the PDPA should be aware that a violation of the PDPA could lead to a penalty in Thailand.

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