

Foreign Investment Review

in Thailand

Report generated on 13 May 2020

Table of contents

LAW AND POLICY

Policies and practices

Main laws

Scope of application

Definitions

Special rules for SOEs and SWFs

Relevant authorities

PROCEDURE

Jurisdictional thresholds

National interest clearance

Review process

Involvement of authorities

SUBSTANTIVE ASSESSMENT

Substantive test

Other relevant parties

Prohibition and objections to transaction

Challenge and appeal

Confidential information

RECENT CASES

Relevant recent case law

UPDATES & TRENDS

Key developments of the past year

LAW STATED DATE

Correct on

Contributors

Thailand



Apinya Sarntikasem
apinya.s@jurists.jp
Nishimura & Asahi

**NISHIMURA
& ASAHI**



Jirapong Sriwat
jirapong.sriwat@jurists.jp
Nishimura & Asahi

LAW AND POLICY

Policies and practices

What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Thailand, as a member of the WTO, adheres to the national treatment principle and provides equal treatment for local and foreign investors. However, foreigners may be restricted from engaging in certain business activities that are mainly prescribed in the following three lists of the Foreign Business Act 1999 (FBA):

List One

Business activities that are strictly prohibited to foreigners due to special reasons, such as newspaper, television broadcasting and land trading.

List Two

Business activities that concern national security or safety, or could affect arts, cultures, traditions, customs, folklore handicrafts or natural resources and environment, such as production and trading of firearms, domestic transportation and mining.

List Three

Business activities that Thai nationals are not yet ready to compete in with foreigners, such as retail, wholesale and provision of certain services.

Apart from the restricted business activities under the FBA, foreigners may also be restricted by other specific laws, as discussed in question 2, from engaging in certain businesses such as financial business, land transport business and business that may involve land ownership.

Main laws

What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

Apart from the FBA, foreigners may also be subject to a restriction on their operation of certain businesses in Thailand by other specific laws, such as the Financial Institutions Businesses Act 2008 (FIBA), the Land Transport Act 1979 and the Land Code.

For the purpose of this article, we will focus on the foreign investments regulated by the FBA, which covers a broad spectrum of businesses and has the most impact on how foreign investments are structured in the Thai market.

Scope of application

Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

Foreign investment restriction under Thai law regime is generally triggered by foreign shareholding in the company engaging in the restricted businesses. That is, if foreigners hold shares in the operating company such that the

operating company falls within the definition of a 'foreigner' under the relevant law (see question 4), the operating company would be subject to the foreign investment restriction. In terms of merger and acquisition transactions, if foreign investors acquire shares in the Thai company such that their shareholdings in the Thai company exceed a certain threshold, the Thai company may become a 'foreigner' and thereby subject to the foreign investment restriction.

Definitions

How is a foreign investor or foreign investment defined in the applicable law?

Under the FBA, a 'foreigner' is defined as:

1. a natural person who is not of Thai nationality;
2. a juristic person not registered in Thailand;
3. a juristic person registered in Thailand of which at least 50 per cent of the share capital (ie, paid-in capital) (or at least 50 per cent of the capital invested in it) is held by the persons set out in (1) or (2) above and if a limited partnership or a registered ordinary partnership, whose managing partner or manager is not of Thai nationality;
or
4. a juristic person registered in Thailand of which at least 50 per cent or more of the share capital (or at least 50 per cent or more of the capital invested in it) is held by any of the persons set out in (1), (2) or (3) above.

In addition to the FBA, foreigners may also be subject to other specific laws which impose foreign investment restrictions. For instance, the FIBA requires a financial institution operating financial businesses in Thailand to have at least 75 per cent of its total number of issued shares with voting rights held by Thai nationals and at least three-quarters of its directors be of Thai nationality. In addition, a 10 per cent ceiling is imposed on the shareholders of the financial institution such that no person may hold, directly or indirectly, more than 10 per cent of the total issued shares in any financial institution, unless permission from the Bank of Thailand is granted.

The Land Transport Act 1979 imposes similar requirements for a company applying for a licence to operate fixed route transport, non-fixed route transport, and transport by a small vehicle. That is, the company applicant is required to have: (i) Thai nationality (ie, incorporated under Thai laws and having headquarters located in Thailand); (ii) at least half of its directors be of Thai nationality; and (iii) at least 51 per cent of its shares held by, among others, a Thai national.

Furthermore, foreigners are also prohibited by the Land Code from owning a plot of land in Thailand. Thereby, foreigners may be restricted from engaging in businesses that require land ownership in Thailand. In this regard, in the case of a company, it would be deemed as a 'foreigner' from the perspective of the Land Code if either of the following conditions are met:

- more than 49 per cent of the company's registered capital are held by foreign entities (ie, shareholding percentage); or
- the number of its foreign shareholders is more than half of its total number of shareholders (ie, headcount).

In light of the foregoing, foreign investors would need to devise their plans for investment and business operations in Thailand by taking into account the above-mentioned foreign investment and land ownership restrictions. These foreign restrictions are the primary reason most of the foreign investments in Thailand are in the form of joint ventures between foreign and Thai investors. Considering the definitions of a 'foreigner' under the FBA and the Land Code, the joint venture company with foreign joint venture parties that wishes to hold ownership over a plot of land in Thailand would have (i) at least 51 per cent of its total shares held by Thai investors; and (ii) the number of its foreign shareholders being not more than half of its total number of shareholders.

Nonetheless, exemptions from the foreign investment and land ownership restrictions are generally available to the companies which, among others, are granted investment promotion from the Board of Investment of Thailand (BOI) or

operate their businesses in the industrial park regulated by the Industrial Estate Authority of Thailand (IEAT). Further details on this issue are discussed in question 11.

Special rules for SOEs and SWFs

Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There is no special foreign investment restriction for the SOEs and the SWFs. If these entities fall within the definition of a 'foreigner', they would generally be subject to foreign investment restrictions under the respective laws.

Relevant authorities

Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The Ministry of Commerce, the Ministry of Finance and the Ministry of Interior are the regulating bodies of the FBA, the FIBA and the Land Code, respectively. On the other hand, the Land Transport Act 1979 is regulated by both the Ministry of Transport and the Ministry of Interior.

Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

In terms of the FBA, the Ministry of Commerce typically establishes a general internal policy that allows the responsible officials to exercise their discretion under such policy on a case-by-case basis. An example of the current policy of the Ministry of Commerce includes the policy that the officials may grant the foreign business licence for the operation of retail or wholesale business listed in List Three of the FBA only when the retail or wholesale products concern high technology or are necessary for the industrial section. In this regard, the responsible officials may exercise their discretion as to what constitutes the high technology or necessity for the industrial section, among others.

PROCEDURE

Jurisdictional thresholds

What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

The main factors that subject an entity to the foreign investment restriction are its foreign shareholding and the type of business activities in which it is to be engaged. In terms of the FBA, if foreigners hold at least 50 per cent of the total shares in the company which is to engage in the FBA-restricted business activity, such company would be required to obtain the foreign business licence or foreign business certificate (see question 9) before commencing the FBA-restricted business activity in Thailand.

National interest clearance

What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

In the case where a foreigner under the FBA wishes to engage in the business activities listed in List Two of the FBA, it would be required to obtain a prior permission of the Minister of Commerce, with the approval of the Cabinet. On the other hand, in the case where a foreigner under the FBA wishes to engage in the business activities listed in List Three of the FBA, it would be required to obtain prior permission from the Director-General of the Department of Business Development, at the Ministry of Commerce (DBD), with the approval of the Foreign Business Committee. These permissions and approvals are generally referred to as the 'foreign business licence'.

If a foreigner is granted, among others, an investment promotion from the BOI or a permit to operate its business in the industrial estate regulated by the IEAT (see question 11), it would be eligible to obtain the foreign business certificate for the operation of the FBA-restricted business instead of the foreign business licence. In general, obtaining the foreign business certificate would be simpler and often faster than the foreign business licence. In the case of the foreign business certificate, the authority is bound to issue the certificate if the applicant satisfies the qualification requirement. On the other hand, in the case of the foreign business licence, the authority is empowered to exercise its discretion whether to grant the licence or not.

To apply for the foreign business licence or foreign business certificate, the applicant needs to submit the application, together with supporting documents such as the applicant's company affidavit and identification document of the applicant's representative in Thailand, to the DBD. The fee for the application is generally 2,000 baht while the fee for the licence generally ranges from 40,000 baht to 500,000 baht, depending on the type of applicant, (ie, natural or juristic person), type of the licence and registered capital of the applicant (if applicable).

Which party is responsible for securing approval?

The foreign target company wishing to engage in the FBA-restricted business activities in Thailand would be responsible for securing the foreign business licence or foreign business certificate, as the case may be.

Review process

How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The timelines for obtaining the foreign business licence and foreign business certificate depend largely on the completion of the required documents and workload of the responsible officials. The entire process for applying for the foreign business licence may take between three months and one year while it may take from two to six months in the case of obtaining the foreign business certificate. In either case, the 'fast-track' option is not available to the applicants.

Exemptions from the requirement for the foreign business licence are available for the business operators who, among others, obtain an investment promotion from the BOI or permission to operate their businesses in the industrial park from the IEAT. In addition, investors from a country having entered into a treaty with Thailand, such as the Treaty of Amity and Economic Relations between Thailand and the United States, may be eligible for the exemption if they satisfy the qualification requirement (eg, the majority shareholders are US citizens) and do not operate the Treaty-restricted businesses (eg, inland transportation and banking involving depository functions). The applicants who fall within any of the exemptions from the foreign business licence may simply apply for the foreign business certificate, the issuance of which does not involve the exercise of discretion by the officials.

Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

The unique point of the foreign business licence and foreign business certificate is that they are obtainable only by a foreigner under the FBA. Therefore, there will always be a time gap from the company incorporation or share acquisition which renders the target company being deemed as a 'foreigner' under the FBA until the receipt of the foreign business licence or foreign business certificate, during which the company will be barred by the FBA from engaging in the FBA-restricted business activities. In Thai market practice, in order to mitigate the risk of FBA violation, the parties may set forth a condition precedent in the joint venture or share purchase agreement that the approval in principle (ie, provisional approval) be obtained from the DBD prior to the closing of the underlying transaction.

In the case of the FIBA, if a foreigner wishes to hold more than 25 per cent but not more than 49 per cent of the total number of issued shares with voting rights of a financial institution, such foreigner would need to obtain a prior permission from the Bank of Thailand. If it wishes to hold more than 49 per cent shares, it would need to obtain a prior permission from the Minister of Finance with the advice from the Bank of Thailand. Unlike the foreign business certificate and foreign business licence, these permissions under the FIBA can be obtained by the prospective foreign shareholder before its acquisition of shares in the financial institution that reaches the foreign restriction threshold mentioned above.

Involvement of authorities

Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

In Thai market practice, the investors may seek prior consultation with the authority or submit a request for a ruling of the DBD prior to engaging in questionable business activities in Thailand. The request for a ruling should elaborate the shareholding structure of the operating company as well as all activities to be engaged in by the operating company. The request may be submitted under the operating company's name or under the name of other relevant person, such as the operating company's representative or legal adviser. The rulings are generally issued within one to two months from submission, depending mainly on the workload of the officials.

When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

There is no such lawful informal procedures to facilitate or expedite the process to obtain the foreign business licence and foreign business certificate. The timelines for obtaining the foreign business licence and foreign business certificate depend largely on the completion of the required documents submitted to the authority and workload of the responsible officials.

What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The FBA does not empower the Ministry of Commerce to challenge the legality of the foreign business licence or foreign business certificate that has already been issued to the business operator. However, in the case where the business operator violates certain provisions of the FBA (eg, engaging in the FBA-restricted business with another foreigner who does not have the requisite permit under the FBA so as to allow such foreigner to circumvent the FBA restriction), the Director-General of the DBD would be entitled to revoke the foreign business licence or foreign business certificate of such business operator.

In this regard, the holders of the foreign business licence or foreign business certificate should be mindful that, after receiving the respective licence or certificate, they would be subject to the following post-closing obligations:

- display the foreign business licence or foreign business certificate at the place of business operation;
- bring in the minimum capital investment to Thailand within the specified time frame (eg, if the holders are to operate the FBA-restricted for three years or more, 100 per cent of the minimum capital shall be brought into Thailand within three years);
- maintain the loan-to-capital ratio of 7:1 at minimum;
- report any business discontinuance, office relocation, change in local representative, change in the holders' name and new branch to the Ministry of Commerce;
- submit the report on business operation result and technology or know-how transfer to the Ministry of Commerce;
- have at least one representative reside in Thailand; and
- submit the financial statements within five months from the end of each financial year.

Failure to comply with the post-closing obligations may result in punishment under the FBA, and thereby revocation of the foreign business licence or foreign business certificate, at the discretion of the director-general of the DBD or the Minister of Commerce, as the case may be.

SUBSTANTIVE ASSESSMENT

Substantive test

What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test for obtaining the foreign business licence is not publicly available. As discussed in question 7, the Ministry of Commerce typically sets out a general policy which gives some room for the responsible officials to exercise their discretion whether to grant the licence or not. To be on the safe side, foreign investors normally seek consultation or ruling from the DBD prior to commencing their businesses in Thailand.

To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

The FBA does not require the officials of the Thai Ministry of Commerce to consult with officials in other countries in assessing whether to grant the foreign business licence to any entity or not.

Other relevant parties

What other parties may become involved in the review process? What rights and standing do complainants have?

Third-party review is not required in granting the foreign business licence. The grant of licence will be based on the authority review only.

Prohibition and objections to transaction

What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Under the FBA, the court may order the cessation of the joint business operations between a foreigner permitted to engage in the FBA-restricted business activities in Thailand and a foreigner who is not so permitted, if the purpose of such joint operation is for circumventing the FBA restriction. In this regard, an imprisonment of not exceeding three years and/or a fine of 100,000 to 1 million baht may be imposed on the FBA-permitted foreigner whose foreign business licence or foreign business certificate may also be revoked by the director-general of the DBD. In addition, a daily fine of between 10,000 and 50,000 baht may be imposed throughout the period of violating the court order.

In the case where a Thai nominee arrangement is implemented (ie, a Thai entity holds shares in the company engaging in the FBA-restricted business activities in Thailand on behalf of a foreigner) so as to circumvent the FBA restriction, an imprisonment of not exceeding three years and/or a fine of between 100,000 and 1 million baht may be imposed on the Thai nominee and the foreign conspirator. In addition, the court may order the cessation of the joint business operations. Violation of such court order may result in a daily fine of between 10,000 and 50,000 baht throughout the period of violation.

Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

To mitigate the risk of FBA violation, it is advisable for the foreign investors to seek consultation with the authority and/or submit a request for a ruling of the DBD prior to engaging in the business activities in Thailand. See question 13.

Challenge and appeal

Can a negative decision be challenged or appealed?

In the case where the director-general of the DBD refuses to grant a foreign business licence to a foreigner for operating the restricted business activities listed in List Three of the FBA, such foreigner may appeal the order of the director-general to the Minister of Commerce within 30 days from the date of receiving the order.

Confidential information

What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Information of the holders of the foreign business licence and foreign business certificate, which is available to the public via the DBD online database, is very limited. Only the holder's address, telephone number and facsimile number, together with the number of the licence, date of licence issuance and scope of permitted business activities, are available to the public. Although the information on the businesses and applicant for the foreign business licence need to be specified in detail in the licence application, a third party may not obtain a copy of such application from the DBD.

RECENT CASES

Relevant recent case law

Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

In general, the result of the application for foreign business licence would not be disclosed to public. Only the applicant and the DBD would know whether the application is successful or rejected.

As for the case concerning violation of the FBA, the most notorious one would be the Kularb Kaew case, which involves the acquisition of shares in Shin Corporation, a family business of Thailand's former prime ministers, by Temasek Holdings, a Singaporean company. In this case, it is alleged that Kularb Kaew Company Limited, which was a holding company used in acquiring Shin Corporation, had implemented a nominee structure whereby certain Thai individuals held majority shares in Kularb Kaew on behalf of Cypress Holdings Limited, which was then a foreign company under the FBA and was also a shareholder in Kularb Kaew. The investigation revealed that, among others, almost all of the investment into Kularb Kaew by the Thai shareholders was derived from Cypress Holdings, the Thai shareholders were entitled only to minimal percentage of dividends and had minimal voting rights while Cypress Holdings had a de facto control over Kularb Kaew (ie, the management of Cypress Holdings were the authorised signatories of Kularb Kaew's bank accounts). As the defendants fled the country, this case remains unresolved.

Based on the online database of the Supreme Court Decisions, there have not been any cases involving violation of the FBA that are decided by the Supreme Court of Thailand.

UPDATES & TRENDS

Key developments of the past year

Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

24 Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

In June 2019, the Ministry of Commerce promulgated the Ministerial Regulation Prescribing Service Businesses Which do not Require a Foreign Business Licence (No. 4). As a result, the following service business activities, which were previously restricted by List Three of the FBA, are now exempted from the foreign business licence requirement:

- the granting of a domestic loan;
- the lease of office space with public utilities; and
- advisory services regarding management, marketing and information technology between related juristic persons.

LAW STATED DATE

Correct on

Give the date on which the information above is accurate.