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New Rules for E-Commerce

Thailand: New Rules for E-Commerce

E-Commerce in Thailand and Southeast Asia is still in its infancy. However, the untapped potential is huge. In 2013, only 28 % of Southeast Asia's inhabitants used the internet and only 16 % could be classified as digital buyers.¹ Japan, at the same time, had 94 % internet users and 74 % digital buyers, whereas of Thailand's 65 million inhabitants, only 19 million (29 %) used the internet and only 14 million (22 %) were digital buyers. In Europe, between 5 to 8 % of total retail sales were related to e-commerce. In Southeast Asia, it was less than 1 %.

However, Southeast Asia is determined to improve e-commerce and already took necessary steps:

- ▷ In 1999, the ASEAN countries adopted the "*e-ASEAN Initiative*". This initiative was aimed at improving the ICT ("Information and Communication Technology") throughout ASEAN. One key provision was to establish and strengthen e-commerce. A framework agreement has been concluded in 2012.²
- ▷ In 2011, the "*ICT ASEAN Masterplan*" was introduced to facilitate the further digital integration of ASEAN and to boost e-commerce (see 4.a) below).³
- ▷ In November 2015, the new "*Blueprint 2025*" for the ASEAN Economic Community ("AEC") was introduced⁴, proposing to strengthen e-commerce throughout ASEAN by improving consumer protection and supporting small and medium enterprises to distribute their products by electronic means (see 4.b) below).

Nevertheless, challenges remain. Aside from structural challenges, practical challenges hinder e-commerce from flourishing, such as the big gap regarding digital infrastructure between rural and metropolitan areas.

1 eMarketer's Worldwide Retail Ecommerce.
 2 http://www.asean.org/?static_post=e-asean-framework-agreement.
 3 http://www.asean.org/?static_post=asean-ict-masterplan-2015.
 4 <http://www.asean.org/storage/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf>.

The following article shall give a brief overview of the legal framework for e-commerce businesses in Thailand (1.) and shall describe the most recent legal developments (2.). The article shall further outline the differences to related EU legislation (3.) and give an outlook on the future of e-commerce in Thailand (4.).

1. Market and Legal Framework

Thailand's network capacities are comparably well developed, at least in metropolitan areas. The Thai government keeps expanding the infrastructure, especially for mobile devices. In December 2015, two "4G-licences" were auctioned for a price of approximately THB 75 billion (roughly € 1.875 billion!). Analysts put this price at four times the actual market value of the licenses, indicating the importance of mobile internet in Thailand: "M-Commerce" is considered a very strong future market in Thailand.⁵

The most common forms of e-commerce in Thailand are online shops and Electronic Marketplaces ("EMP"). Big players are "*www.lazada.co.th*" and "*www.weloveshopping.com*". "Social Commerce", i.e. commerce taking place over social media, is also gaining momentum.

a) Foreign Investment Law

The Thai foreign investment law is rather restrictive and requires majority foreign-owned companies to obtain a Foreign Business License ("FBL") for most activities.⁶ Instead of the lengthy application process to obtain an FBL, investors can apply for investment promotion through the Thailand Board of Investment ("BOI"). Apart from the possibility to hold 100 % of the company's shares, BOI-promoted companies benefit from various tax and non-tax incentives.⁷

Regarding e-commerce, only the operation of Electronic Marketplaces is eligible for BOI promotion.⁸ The operation of online shops for trad-

ing products is not eligible for BOI promotion and is generally also not eligible for an FBL. The only way to operate an online shop is to increase the capital to THB 100 million (approx. € 2.5 million) which makes the company eligible for an exemption under the Foreign Business Act. Companies with a paid-up capital of at least THB 100 million are allowed to conduct retail or wholesale business in Thailand without requiring any further licence. Most larger European e-commerce players such as Lazada and Zalora make use of this exemption.

Special rights are granted to U.S. American investors under the Thai-US Treaty of Amity. The treaty gives majority U.S.-owned companies a fast track access to an FBL in nearly all areas including trading. However, to benefit from the treaty, ultimate beneficial U.S.-American ownership of the Thai company has to be proven to the authorities.

b) General Requirements

Enterprises offering goods or services on the internet, e.g. via online shops or EMP, have to apply for an e-commerce Certificate to ensure their compliance with quality standards.⁹ Furthermore, other applicable laws have to be complied with, such as providing a product warranty and complying with advertising guidelines. Details depend on the circumstances of the proposed business.

2. Recent Legal Developments

a) Direct Sales and Direct Marketing Act

Since 1 July 2015, all enterprises conducting direct marketing business in Thailand have to apply for a special Direct Marketing License, based on the *Direct Sales and Direct Marketing Act B.E. 2545 (2002)*.¹⁰

This requirement is intended to contribute to a higher degree of consumer protection, as consumers in online trade are not able to inspect the goods regarding their conformity with the advertised product before purchasing. Direct Marketing Licenses are usually issued within 60 days after the submission of

5 <http://www.bangkokpost.com/tech/local-news/753724/mobile-commerce-on-rise>.

6 Foreign Business Act B.E. 2542 (1999), Section 8.

7 BOI Announcement No. 2/2557 (2014), http://www.boi.go.th/upload/content/newpolicy-announcement%20as%20of%202013_58_23499.pdf.

8 BOI Announcement No. 2/2557 (2014), List of Activities Eligible for Investment Promotion, Section 5.8.

9 Electronic Transactions Act B.E. 2544 (2001), Section 32.

10 Central Company and Partnership Registration Office Regulation (No. 11) re: Company and Partnership Registration B.E. 2558 (2015), Section 13.

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complete application documents with the *Office of the Consumer Protection Board*.

Direct marketing without a proper license is subject to imprisonment of up to 1 year and/or fines of up to THB 100,000 (approx. € 2,500), as well as a fine of THB 10,000 for every day of continued direct marketing without a license.

b) Draft Legislation

Currently, Thailand is reviewing several proposals for new or revised legislation.¹¹ The details are still under discussion.

aa) Draft Electronic Transactions Act

The Electronic Transactions Act shall improve and secure electronic transactions. It foresees the establishment of the “*Office of the National Electronic Transaction Development*”.

bb) Draft Cyber Security Protection Act

The draft provides new regulations regarding cyber-security and their enforcement through the new “*National Cyber Security Protection Committee*”.

cc) Draft Data Privacy Act

The draft regulates the collection, utilization or disclosure of data which enables to identify individuals. It gives enforceable rights to data owners. It foresees the establishment of the “*Data Privacy Protection Committee*” to oversee and enforce the act.

The recent developments emphasize Thailand’s commitment to improving relevant legislature. Especially the improvements regarding cyber-security and data protection are necessary to facilitate the acceptance of e-commerce in Thailand and to bring it up to international standards.

4. Thai/ASEAN vs. EU Legislation

Legislation similar to Directive 2000/31/EC¹² does not exist in

¹¹ <http://www.thaigov.go.th/index.php/en/cabinet-synopsis/item/88954-88954.html>.

¹² <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32000L0031>.

Thailand and, therefore, compared to the EU, consumer protection in e-commerce is rather limited. However, ASEAN tries to improve and harmonise the respective domestic legislations.

a) The ICT ASEAN Masterplan 2015

The Masterplan 2015 aims to deliver the following four key outcomes:

- ▷ Establishing ICT as an engine of growth for ASEAN countries;
- ▷ Promoting the recognition for ASEAN as a global ICT hub;
- ▷ Enhancing the quality of life for peoples of ASEAN; and
- ▷ Contributing towards ASEAN integration.

The full implementation of the plan is still outstanding.¹³ However, the draft recognizes ICT as a major source of development, empowerment, and innovation. It sees the need to harmonise regulatory practices and ICT standards and it also urges the member states to provide incentives and promotions.

b) The AEC Blueprint 2025

The AEC Blueprint 2025 sets the goal of developing a comprehensive ASEAN agreement on e-commerce, addressing the following issues:

- ▷ Harmonising consumer rights and protection laws;
- ▷ Harmonising the legal framework for online dispute resolution, taking into account international standards;
- ▷ Developing interoperable, mutually recognized, secure, reliable and user-friendly e-identification and authorisation schemes;
- ▷ Developing a coherent and comprehensive framework for personal data protection.

c) Conclusion

Neither the “Masterplan 2015” nor the “Blueprint 2025” is comparable to the Directive 2001/31/EC. It re-

¹³ <http://www.asean.org/resources/publications/asean-publications/item/asean-ict-masterplan-2015>.

mains within the responsibility of each member state to introduce domestic legislation facilitating e-commerce.

For example, foreign (i.e. non-Thai) companies providing e-commerce services to Thai customers are not covered by Thai legislation as long as they are not conducting their business from within Thailand. Due to a lack of ASEAN-wide legislation, local companies might consider law-shopping, i.e. looking for the jurisdiction with the least strict laws on e-commerce to provide their services ASEAN-wide. To avoid a race-to-the-bottom regarding consumer protection, market-wide laws comparable to the EU would be desirable.¹⁴

5. Outlook

To tap the full potential of e-commerce not only in the Thai market but on an ASEAN-wide scale, an increase of regional integration will be required. In particular, an ASEAN-wide legislation regarding the following key aspects is desirable:

- ▷ Harmonized laws on consumer protection, comparable to the EU’s Unfair Commercial Practices Directive¹⁵;
- ▷ ASEAN-wide dispute resolution body;
- ▷ Setting up a regional task force against cyber crime, comparable to the EU’s Cybercrime Centre¹⁶.

Furthermore, to extend the internet broadband internet coverage, state-aided funding could foster private sector broadband deployment projects for remote areas where reliable internet coverage is currently not sufficiently available.

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¹⁴ See EU e-commerce Directive 2000/31/EC, Article 3.

¹⁵ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market.

¹⁶ The European Cybercrime Centre (EC3 or EC³) is part of Europol and coordinates cross-border law enforcement activities against computer crime and acts as a centre of technical expertise on the matter.