

Communications: regulation and outsourcing in Thailand: overview

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THE TELECOMMUNICATIONS MARKET

1. Give a brief overview of the structure of the telecommunications market in your jurisdiction. Briefly set out any major recent developments, such as mergers and acquisitions, restructurings and insolvencies.

Market structure

CAT and TOT are telecommunications companies operated by the Thai state, and they compete with private firms in a number of sectors:

- **Private mobile telecommunications.** There are currently three major private mobile carriers: AIS, DTAC and True, as well as the state-owned TOT and CAT.
- **Landline services.** These are provided primarily by the state-owned TOT, and by True (which is private).
- **Internet and network infrastructure.** TOT and CAT compete with a range of private operators. Beyond these, there are numerous non-facilities-based operators.

Recent developments

The Frequency Allocation Act has been amended to provide for changes to the constitution and authorities of the National Broadcasting and Telecommunications Commission (NBTC), as well as changes to the management and use of revenue from licence fees. In addition, the Act was amended to change provisions in respect of director liability.

The Ministry of Digital Economy and Society (MDES) has been established to replace the Ministry of Information and Communications Technology, in the context of a reorganisation.

The NBTC announced requirements for OTT (over-the-top) video operators to register with the NBTC. These plans were eventually put on hold, pending additional consideration.

The Computer Crimes Act was amended to provide a safe harbour in respect of service provider liability for illegal content, as well as to specify a new offence in respect of nuisance messages. As a result, the MDES has promulgated regulations in relation to these amendments.

RESTRICTIONS ON FOREIGN OWNERSHIP

2. Are there any restrictions on foreign companies entering the telecommunications market in your jurisdiction?

There are three types of licence granted to provide telecommunication or internet services in Thailand (see *Question 4*). Type 2 and Type 3 licences cannot be granted to "foreign" applicants, as defined by the Foreign Business Act. Type 2 and

Type 3 licensees are also subject to the National Broadcasting and Telecommunications Commission (NBTC) Notification on Prevention of Foreign Dominance, which has the effect of preventing the use of a range of methods by which a foreigner could otherwise exercise control over a company not deemed foreign under the Foreign Business Act.

Type 1 licences, in contrast, are available regardless of the nationality of ownership, and the NBTC Notification on Prevention of Foreign Dominance is not applicable to Type 1 licensees. However, a licensee regarded as foreign must have a foreign business licence, under the Foreign Business Act, in order to operate.

REGULATORY FRAMEWORK

Legislation and regulatory authorities

3. Give a brief overview of the regulatory framework for telecommunications in your jurisdiction. Which authorities regulate telecommunications services in your jurisdiction? Is there a separate regulator for competition law issues in this sector?

Regulatory framework

In addition to general provisions of law, the Thai telecommunications sector is governed by the following legislation:

- The Radio Communication Act.
- The Telecommunications Business Act.
- The Frequency Allocation Act.
- The Computer Crimes Act.

In addition, there is a considerable body of administrative regulations and notifications promulgated under each of these laws.

Regulatory authorities

Telecommunications business is primarily regulated by the National Broadcasting and Telecommunications Commission (NBTC), though the Ministry of Digital Economy and Society (MDES) also plays a significant role, particularly in matters relevant to the internet.

Authorisation and licences

4. What notification, authorisation and licences are required to provide telecommunications services? What is the licence application procedure and fee?

There are three categories of licence, Type 1, Type 2, and Type 3, each of which is designated for either telecommunications or



internet. Each type of licence can authorise different types of telecommunications business:

- **Type 1 licence.** This licence is for certain types of telecommunications business deemed appropriate for full liberalisation. Importantly, these licensees must provide services without their own networks.
- **Type 2 licence.** This licence is for certain types of telecommunications business, wherein the services are intended for a limited number of end users or that would have no significant impact on competition, consumers, or the public interest. These licensees can provide service either with or without their own networks, depending on the provisions of the individual licence.
- **Type 3 licence.** This licence is for certain types of telecommunications business, wherein the services are intended for use by the general public or which can impact competition, consumers, or the public interest. These licensees are authorised to provide services using their own networks.

Annual licence fees are calculated as a percentage of the licensee's income from telecommunications, ranging from 0.25% to 1.5%. If there is a revenue-based annual fee for use of spectrum, that fee combined with the licence fee, cannot exceed 2% of the licensee's net income from telecommunications. There are also application fees ranging from THB5,000 to THB10,000, and for Type 3 licences, a renewal fee of THB10,000.

To apply for a telecommunications licence, an applicant must submit a complete application to the National Broadcasting and Telecommunications Commission (NBTC). Licences for some services are regarded as automatic; for these, the regulations provide for review/feedback on applications within a single business day, and formal approval within seven business days. For other services, longer periods of consideration apply.

5. How long does a telecommunications licence typically last and what are the usual conditions attached to it? Can conditions be varied? Are licences available for public inspection?

While the National Broadcasting and Telecommunications Commission (NBTC) has some discretion concerning licence duration, the normal licence validity for a facilities-based licensee is 15 to 25 years, and for a non-facilities-based licensee, only five years. Each telecommunications licence is issued subject to licence conditions. Though these conditions can differ from licence to licence, particularly among different types of licence, there are a number of topics that are addressed in general licence terms (see *Question 9*).

Penalties for non-compliance

6. What are the consequences of non-compliance with the telecommunications regulations?

Penalties can include:

- Administrative fines.
- Suspension of licence.
- Criminal fines.
- Imprisonment.
- Revocation of licence.

Where a criminal offence is committed by a legal entity, the directors and/or persons with management responsibility can be subject to the relevant penalty if the:

- Offence results from the instructions or action of the director.
- Director has a duty to give instructions or take action but omits to do so, which results in the legal entity committing an offence.

Appeals

7. Can decisions of the regulators be appealed and on what grounds?

Regulations set out a process by which National Broadcasting and Telecommunications Commission (NBTC) decisions can be appealed within the NBTC itself. Thereafter, an appeal could be made to the Administrative Court, depending on the circumstances (*Administrative Procedure Act*).

Universal service obligations

8. Is the incumbent provider or other large providers with significant market power subject to specific regulations? Do universal service obligations apply? Are there provisions for the structural separation of a network?

Universal service obligation fees are calculated on the basis of net income from a licensee's telecommunications business; the percentage of contributions is currently 3.75%. Regulations set out permissible deductions from gross income, for the purposes of computing net income. For such purpose, a licensee can benefit from an exemption of up to THB40 million per year.

General conditions

9. What general conditions apply to telecommunications services? Which other regulations must be complied with?

Each telecommunications licence is issued subject to licence conditions. Though these can differ from licence to licence, particularly among different types of licence, there are a number of topics that are addressed in general licence terms:

- Definitions.
- Qualifications of the licensee.
- Licensing period and renewal of the licence.
- Scope of licence.
- Addition to and extension of the scope of licence, suspension or end or termination of the business, and modification of business plan.
- Extension, improvement, change, or enlargement of service area.
- Fees and payment of fees for operating telecommunications business.
- Fees and tariffs in telecommunications business.
- Accounting and cost accounting for telecommunications business.
- Telecommunications resources.
- Measures for competition.
- Protection of users and the public.
- Rights to privacy, personal information, and freedom of communication by means of telecommunications.
- Provision of special services.
- Emergency incidents and disasters.

- Compliance with international rules or agreements.
- Announcement of particulars and disclosure of information.
- Submission of reports and presentation of documents.
- Power to inspect and requirements on submission of information.
- Sending of documents, orders or notifications.
- Standard of telecommunications equipment and devices.
- Shared use of telecommunications equipment, and modification to the system.
- Right of access to telecommunications network.
- Amendment of the licensing conditions.
- Fine, suspension, and revocation of the licence.
- Termination of licence.
- Measures to be taken after termination of licence.
- Dispute settlement.

SPECTRUM USE

10. Which authorities allocate spectrum use and how is it managed?

The Frequency Allocation Act grants authority to the National Broadcasting and Telecommunications Commission (NBTC) to manage spectrum and to consider and grant permits by auction, although other methods are permissible in certain circumstances. Regulations under the Act set out frequency allocation plans, as well as tendering procedures, and related matters.

11. Can spectrum use be traded or sublicensed?

Spectrum must be used for the specified business by the licensee to which it was assigned. It cannot be traded, nor can the licensee appoint a third party to carry on such business in its place.

INFRASTRUCTURE AND NETWORK MANAGEMENT

12. Do communications providers have any powers to place their equipment on third party sites?

Under the Telecommunications Business Act, the NTC (the predecessor to the National Broadcasting and Telecommunications Commission (NBTC)) promulgated regulations setting out criteria and procedures for exercising rights of way in erecting poles, laying ducts or cables, and installing accessories for providing telecommunications services. These regulations are still applicable. It may be necessary to provide notice to the owner or to negotiate an agreement with the owner, depending on the circumstances. Agreements must be concluded on the basis of equality, fairness, and impartiality. For access and interconnection, see *Questions 13 and 14*.

Access and interconnection

13. Does access to infrastructure and a network have to be given to other providers?

Several regulatory notifications have been promulgated concerning interconnection and network access. In brief, facilities-based licensees must allow other licensees to:

- Interconnect with their networks.
- Utilise their networks as a means of access to their own networks.

However, they can refuse to do so if their networks are insufficient to accommodate other licensees, or in the event of technical difficulties of access that might interfere with or obstruct the telecommunications business.

14. Is the interconnection of networks required? Are interconnection prices regulated and how are interconnection disputes resolved?

Facilities-based licensees must:

- Provide reference access offers and reference interconnection offers.
- Compile information on the calculation of charges for network access, interconnection, and unbundled components, and submit this information as part of their licence applications.

The National Broadcasting and Telecommunications Commission (NBTC) has set standards and pricing methodologies for this purpose, and the NBTC can order licensees to make changes. In addition, the NBTC has the authority to set charges as it deems appropriate. Contracts must be submitted to the NBTC after execution, and the NBTC can require that changes be made. A dispute settlement mechanism is provided in regulations.

Data protection and security

15. What data protection or consumer privacy regulations apply to the telecommunications sector, including both generally applicable and sector-specific laws? Are communications providers required to retain communications data? If yes, which data and for how long? What are the penalties for breach of these regulations?

Overview

Generally, Thailand lacks a comprehensive data protection regime such as those which exist in some other jurisdictions. Nevertheless, a party that discloses personal data in a way that causes damage can be held liable in tort. This applies to both economic damage and reputational damage (such as defamation). Criminal defamation charges are also possible, depending on the circumstances. In addition, the Constitution provides for a general right to privacy and forbids exploitation of personal data, except where it is for the purposes of the state.

Beyond this, business operators in certain sectors certain individuals, and certain types of information are covered by additional provisions of law and/or regulatory obligations relating to personal data, which are specific to those sectors, occupations, and/or information, as applicable. The range includes, among others:

- Financial institutions.
- Securities companies.
- Credit bureaux.
- Electronic payment licensees.
- Physicians.
- Certain government officials.
- Telecommunications licensees.
- Personal health information.

Data protection requirements of telecommunications licensees

General requirements. Thai telecommunications licensees are subject to additional legal provisions and regulatory obligations, including that:

- The licensee can process personal data only when it has obtained the consent of the service user, and the processing must be carried out:
 - for the purpose of the operation of the telecommunications business; and
 - in compliance with the regulatory requirements.

This is subject to a number of exemptions (*see below*).

- When sending or transferring personal data abroad, the licensee will also be subject to additional regulations that may be promulgated by the NBTC, though at present, these have not yet been promulgated.
- The licensee must collect personal data from the service user directly, as necessary for the telecommunications business operation and according to lawful objectives. The licensee must not collect the following personal data of the service user:
 - physical disability, except for the collection of that data for the purpose of providing suitable services according to his or her disability;
 - genetic descriptions; or
 - data that can clearly affect the feelings of, or which can cause damage or may harm the freedom of, the service user, as prescribed by the NBTC.

Exemptions from obtaining consent. The exemptions from obtaining consent to process personal data concern:

- Disclosure of personal data to a government agency or a government officer under provisions of a law specifically for the security of the state or for the purpose of maintaining peace and order or good morals of the public. The processing must be carried out in full compliance with that law.
- Usage or disclosure of personal data necessary to prevent or stop danger to life, body, or health of the service user.
- Sending of personal data to the National Broadcasting and Telecommunications Commission (NBTC) or the Office of the NBTC, on the request of the NBTC or Office of the NBTC, for the purposes of supervision by the NBTC or Office of the NBTC of telecommunications business operations.

Service user rights. The service user can take the following actions while the licensee holds his or her personal data:

- Request for inspection, a copy, or a certified copy of personal data of the service user.
- Request amendment or change of personal data of the service user so that it is correct and complete.
- Request suspension of usage or disclosure of personal data of the service user.
- Revoke his or her consent for processing at any time.

The exercise of those rights must be made as a written request submitted to the licensee. If the licensee fails to take action, the service user can notify the Office of the NBTC in writing for enforcement. A licensee can charge the actual costs incurred in providing a certified copy of the personal data of the service user, in accordance with criteria set by the NBTC for such purposes.

Measures to preserve and protect. The licensee must also implement technical and organisational measures to preserve and protect personal data, in a way that is suitable for

telecommunications service. This must include, at a minimum, changing the access system and encryption system every three months and adjusting the level of security so that it is appropriate to the actual risks according to technological developments.

The licensee must also create confidence concerning communicating by telecommunications, according to which the licensee must not engage in, and must put in place a system to prevent:

- Eavesdropping, examination, holding of signals, or disclosure of communicated matters between persons via telecommunications, whether it be in any form, except under a specific law for the purpose of state security or for the purpose of maintaining peace and order or good morals of the public (in such a case, it must fully comply with that law).
- Any actions that change the meaning of the data.

The licensee must prepare criteria on the protection of rights of service users concerning personal data, privacy, and freedom of communications via telecommunications, in line with NBTC regulations and related laws. These criteria must be submitted to the NBTC for prior approval, and then published for public information.

Notification requirements. A licensee must notify the service user of personal data matters, including at least the following:

- The period for which personal data is to be retained.
- The rights of the service user with respect to reviewing, correcting, or suspending use of his or her personal data (*see above, Service user rights*).
- Listing of persons at the NBTC to whom the service user's personal data has been sent and how the personal data are managed.
- Criteria concerning how the rights of the service user concerning personal data, privacy rights, and freedom are to be protected (as approved by the NBTC (*see above, Measures to preserve and protect*)).
- The service user's right to lodge a complaint regarding personal data matters.

Service users can file complaints where their rights concerning personal data, privacy, or freedom of communications via telecommunications have been infringed.

Retention of data. A licensee has certain obligations to retain the personal data of each service user, as provided by regulations issued under the Telecommunications Business Act. In addition, pursuant to regulations issued under the Computer Crimes Act, service providers (as defined in that Act) must retain certain data that is provided and generated by their users in the course of signing up for and using the service. The service providers must store that data according to the requirements and periods of time as specified in regulations and make it available to officials so empowered under the Act, on request. The specific data service providers are required to retain depends on the type of business.

16. What are the rules relating to the interception of calls? How and on what grounds can government authorities require disclosure of communications data? What are the penalties for breach of these rules?

In principle, Thai law protects communications from access, interception, and disclosure, but provides certain exceptions for government authorities, particularly in the case of maintaining national security, or public order or good morals of Thailand. In the normal course, these apply through the regulatory framework applicable to:

- Information technology service providers (*Computer Crimes Act*).
- Telecommunications operators (*Telecommunications Business Act*).
- Those who have obligations under the Telecommunications Business Act will also have obligations under the Computer Crimes Act. However, an obligation under the Computer Crimes Act will not necessarily constitute an obligation under the Telecommunications Business Act.
- In addition, special powers are available to certain government officials handling certain types of cases (*Special Investigation Act*), and in emergency situations (*Emergency Decree*), as well as in Order 3/2558 of the National Council for Peace and Order (NCPO).

The relevant provisions of the Telecommunications Business Act are addressed elsewhere. The key provisions of the other three laws are explained below.

Computer Crimes Act

This empowers competent officers of the Ministry of Digital Economy and Society (MDES) to:

- Send enquiry letters.
- Summon concerned persons for interrogation.
- Request statements, documents, computer data, computer traffic data, and evidence from service providers.

These officers can also order service providers to hand over certain data pertaining to users, which providers must keep, under the law.

In addition, the officers can take further actions, but only with a court order, including:

- Copying computer data or computer traffic data.
- Ordering a service provider to hand over computer data, computer traffic data or devices.
- Examining and accessing computer systems, computer data, computer traffic data, or devices.
- Decrypting communications.
- Ordering a service provider to decrypt communications.
- Ordering a service provider to assist with decryption.
- Seizing/attaching a computer system, as necessary.

The Computer Crimes Act distinguishes between content data and non-content data. As a general matter, a court order is not required to access or obtain non-content data; the competent officer is already authorised to request such data from service providers or other relevant persons. While the Computer Crimes Act does not specifically use the term "intercept" when describing the authorities of the MDES with respect to these issues, such activities could be regarded as included within an officer's authority to examine and access computer systems, computer data, computer traffic data, or devices (see *above*). While there is no court decision to offer guidance on this point, it is the authors' view that the competent officer's authority extends to both stored data and that in transmission.

Special Investigation Act

This generally applies to alleged criminal violations of certain laws, which are unusually complex, relevant to national interests, involve influential people or certain officials, or cases that are otherwise selected by the Special Case Board.

With respect to data interception or access, the Special Investigation Act requires Special Case Inquiry Officials to obtain a court order prior to access and acquisition of any documents or information in transmission through various means of

communication which have been or can be used to commit a Special Case Offence (as defined in the Act). The competent officer must file a petition requesting the court to issue an order authorising access to or acquisition of data.

Emergency Decree

The Emergency Decree, among others, offers expanded investigative powers usable in the event of an emergency declaration made by the Prime Minister. The Decree gives broad powers to the Prime Minister to act in virtually any way necessary to maintain public order or otherwise maintain control in emergency situations. In such an event, the Prime Minister can, among other actions, authorise a competent official to issue an order to inspect any means of communication or issue a notification prohibiting any act or instructing the doing of anything necessary for maintaining:

- Security of the state.
- Safety of the country.
- Safety of the people.

This is sufficiently broad to include interception of, or access to, data, as may be deemed necessary.

Interim Measures

The National Council for Peace and Order (NCPO) has issued an order that, among other things, allows specified military officers to carry out searches and to carry out any other order the NCPO may assign. These provisions could be interpreted in a way that they would authorise interception by, as well as disclosure of computer data to, state actors.

17. Are there any network or data security obligations imposed on communications providers?

Telecommunications licensees are subject to general requirements to operate networks that are secure and provide for subscriber confidence in use of the service. As part of the licence application process, an applicant must address network security matters. Once a licence is granted, matters specified in the approved application effectively become licence conditions. In addition, there are general security requirements in respect of the requirements for service providers' storage of data to be retained, as provided under the Computer Crimes Act.

PRICE REGULATION

18. How are prices and charges regulated?

Certain regulated charges imposed by telecommunications licensees are subject to approval by the National Broadcasting and Telecommunications Commission (NBTC). For those charges, in brief, licensees must propose the charges to the NBTC, and the NBTC will decide whether they are acceptable. Some charges may also be subject to regulation under the Act on Price of Goods and Services.

TELEPHONE NUMBER AND SUBSCRIBER MANAGEMENT

19. How are telephone numbers allocated and managed in your jurisdiction?

The National Broadcasting and Telecommunications Commission (NBTC) has adopted a comprehensive numbering plan. Numbers in each category are allocated to telecommunications licensees based on the applications they file. The types of numbers available

depend on the category of service. The NBTC charges the licensee fees for each number.

20. Does access have to be provided to certain services, such as the emergency services and directory enquiries?

Licensees must route calls as notified from time to time pursuant to the National Broadcasting and Telecommunications Commission (NBTC) regulatory notification on numbering, within specified deadlines after having received notice. When a service user dials the number specified for emergency services, directory assistance, or any other number, the call must be routed accordingly.

21. Are there regulations relating to specific consumer services, such as acquiring and transferring subscribers, number portability, complaint handling, and nuisance and silent calls?

The Telecommunications Business Act contemplates number portability, and some years after it was enacted, Thailand's mobile number portability system was launched. In brief, mobile service users have the right to number portability, and operators are prohibited from obstructing the exercise of such rights, subject to exceptions for technical and other reasons. Specific rules are set out in regulatory notifications.

Other regulations require licensees to have in place mechanisms for handling consumer complaints. There is also a range of consumer protection measures, such as pricing and contract controls.

22. Are consumer telecommunications contracts subject to specific regulations?

Regulations issued under the Telecommunications Business Act require contracts with customers to be clear and succinct, so that customers can easily understand the contractual terms and make informed decisions.

Among other requirements, each contract must include:

- Name and addresses of service provider.
- Type and nature of service.
- Standard and quality of service to be provided.
- Service rates and how rates are charged.
- Any limitations to or conditions on services provided.
- Grounds for refusal to provide services.
- Rights and obligations of each party.

Contracts are to be made in duplicate, with one original to be delivered to the customer. Forms for customer contracts require National Broadcasting and Telecommunications Commission (NBTC) approval.

In addition, the Consumer Protection Act and the Unfair Contract Terms Act set out relevant requirements.

23. Are there restrictions on the use of Voice over IP technology in your jurisdiction?

VoIP is regarded as part of internet service, and is regulated accordingly. There are three primary regulatory notifications. Within these three primary regulatory notifications, four different categories of VoIP service are set out, with some different requirements applicable to each.

24. Are there regulations relating to the maintenance of net neutrality in your jurisdiction?

Existing law gives the National Broadcasting and Telecommunications Commission (NBTC) sufficient authority to impose net neutrality, but at this stage, no specific regulations have been promulgated. There are regulatory notifications on competition, abuse of dominance, non-discrimination between customers, and so on, but these do not specifically require net neutrality.

OUTSOURCING AND TELECOMMUNICATIONS

25. Are there specific regulations for the outsourcing of telecommunications services or the management of these services?

While National Broadcasting and Telecommunications Commission (NBTC) regulations do not explicitly address outsourcing of telecommunications services by end users, there are important regulatory implications. Among these, the law provides that a telecommunications licensee must carry on the licensed business itself; it cannot simply transfer all of its rights and obligations to a third party to carry on the business. In practical terms, this means that core functions must be carried on by a licensee directly, while ancillary services could, in most cases, be outsourced.

26. Briefly set out the current trends in outsourcing transactions in the telecommunications sector.

Increasingly, multinational clients tender for bundled telecommunications and IT services, from vendors that can serve them across multiple jurisdictions. It is also notable that more and more vendors, from a variety of jurisdictions, are entering the sector.

27. Who are the key providers of outsourced telecommunications?

The key providers of outsourced telecommunications tend to be foreign-based IT service providers.

28. What are the current technologies influencing or affecting outsourcing by telecommunications operators?

End users' demands for new technologies often drive outsourcing arrangements, simply due to costs. Customers dislike making repeated large expenditures on IT equipment, and outsourcing arrangements can make the cost more manageable, with a simple monthly bill covering equipment, support, and (depending on the vendor) telecommunications services. Such seat contract

arrangements can also make it easy to add more capacity and/or workstations, with only incremental costs.

29. From a contractual perspective, what are the key issues in a typical telecommunications outsourcing transaction in your jurisdiction?

Key issues include:

- Whether the outsourcing operator holds a telecommunications licence or, if not, must co-ordinate with a telecommunications licensee.

- Quality of service guarantees.
- Transfer of the customer's employees to the outsourcing operator.
- Mechanism for providing support.
- Length of term and renewal provisions.
- Termination provisions.
- Transitional arrangements.

ONLINE RESOURCES

National Broadcasting and Telecommunications Commission (NBTC)

W www.nbtc.go.th

Description. This is the official website of the NBTC. It is regularly updated, but English translations are limited. It should be noted that only the original Thai laws/regulations have legal effect.

Ministry of Digital Economy and Society (MDES)

W www.mdes.go.th **Description.** This is the official website of the MDES.

Council of State

W www.krisdika.go.th

Description. This is the official database of Thai statutes that remain effective. It provides information on codified laws and regulatory notifications. Some English translations are available, but it should be noted that they have no legal effect.

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