

# International Comparative Legal Guides



Practical cross-border insights into digital business law

## Digital Business 2022

Third Edition

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# Thailand

Kudun and Partners



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## 1 E-Commerce Regulations

**1.1** What are the key e-commerce legal requirements that apply to B2B e-commerce in your jurisdiction (and which do not apply to non-e-commerce business)? Please include any requirements to register, as well as a summary of legal obligations specific to B2B e-commerce.

E-commerce entities are subject to various regulations, including those related to the Electronic Transactions Act (2001), the Commercial Registration Act (1956), and the Direct Sale and Direct Marketing Act (2002) (the “**DSDMA**”). In general, an e-commerce operator will be required to obtain commercial registration from the relevant commercial registration office under the Commercial Registration Act. The e-commerce operator may also be required to obtain direct marketing registration at the Office of the Consumer Protection Board (OCBC) under the DSDMA if online trading can be conducted through online channels. In that case, the operator shall comply with the requirements under the DSDMA.

In addition, the Thai government is expected to implement a draft decree to regulate digital platform service businesses (the Decree on Digital Platform Service Businesses), which will govern digital platforms that provide services as media between small business operators and consumers by using computer networks to offer goods, services or intangible assets, including online marketplaces, social commerce, food delivery, space sharing, and online search engines. Those platform operators will be required to notify the Electronic Transactions Development Agency (the “**ETDA**”) before conducting their businesses.

**1.2** What are the key e-commerce legal requirements that apply to B2C e-commerce in your jurisdiction (and which do not apply to non-e-commerce business)? Please include any requirements to register, as well as a summary of legal obligations specific to B2C e-commerce.

The laws and regulations mentioned in question 1.1 are also applicable to B2C e-commerce businesses. In addition, the DSDMA, the Consumer Protection Act (1979) and the Unfair Contract Terms Act (1997) are key regulations for enhancing protection for customers in various aspects.

## 2 Data Protection

**2.1** How has the domestic law been developed in your jurisdiction in the last year?

The Personal Data Protection Act (2019) (the “**PDPA**”) is Thailand’s first consolidated law that governs personal data protection. The PDPA will require all organisations to enhance measures concerning the collection, use and/or disclosure of personal data by a personal data controller or a personal data processor and to maintain all rights concerning personal data.

Even though the PDPA was published on 28 May 2019, the enforcement thereof has been postponed to 1 June 2022 onward. The PDPA contains numerous principles for personal data protection, but specific practices are to be further set out in subordinate regulations, which are to be issued and implemented by the Personal Data Protection Committee (the “**PDPC**”). The PDPC is the main regulator for data protection in Thailand, but since it was only recently established in January 2022, it has not yet issued any subordinate regulations under the PDPA.

**2.2** What privacy challenges are organisations facing when it comes to fintech, retail, AI and digital health?

The PDPA provides a number of requirements in relation to the collection, use, and disclosure of personal data, and thereby imposes certain restrictions on organisations’ use and disclosure of personal data.

To comply with the PDPA, organisations will have to identify the type of personal data they wish to use – general personal data or sensitive data – and they will have to identify lawful bases for processing such personal data. The lawful bases on which to process general personal data are: consent; contract; legal obligation; legitimate interests; public task; vital interests; and archives for public interest or research or statistics. The lawful bases on which to process sensitive data are: explicit consent; legal claims or judicial acts; vital interests; legitimate activities by non-profit bodies, where they are made public by the data subjects; and legal obligations for specific purposes.

For instance, personal data obtained by the use of AI machines is considered biometric data, which is defined as sensitive data under the PDPA. The PDPA describes biometric data as “personal data arising from specific technical processing

relating to the physical or behavioural characteristics of a natural person, which allow or confirm the unique identification of a natural person, such as facial recognition data, iris recognition, or fingerprint recognition data". Therefore, when processing the biometric data, data controllers or data processors must obtain explicit consent from data subjects, except processing of health data can be done by relying on other lawful bases.

Digital health includes mobile health applications, electronic health records (EHRs), electronic medical records (EMRs), wearable devices, telehealth, telemedicine, and personalised medicine. These applications, records and devices collect health data of data subjects. Since healthcare-related personal data is considered "sensitive data" under the PDPA, the data controllers or data processors who use digital health must obtain explicit consent from data subjects, except when the processing of healthcare-related personal data can be done by relying on other lawful bases.

Moreover, when fintech or retail organisations or business operators process personal data for direct marketing, such organisations must rely on explicit consent as a lawful basis for processing personal data under the Thailand Data Protection Guidelines (the "TDPG"). Explicit consent must be obtained from the data subjects because direct marketing is very invasive of the privacy of the data subjects and thus the organisations cannot expect such direct contact without requesting the data subjects' consent beforehand.

The organisations have to ensure the implementation of appropriate and adequate organisational and technical security measures for personal data protection. The TDPG suggests a few organisational security measures that organisations can implement, such as a security policy and procedures for personal data protection, an access control policy, personal data breach management procedures, a bring-your-own-device policy, and personnel training. The TDPG also suggests additional technical security measures, such as access control and authentication, logging and monitoring, server/database security, network security, data back-up, and data disposal.

### 2.3 What support are the government and privacy regulators providing to organisations to facilitate the testing and development of fintech, retail, AI and digital health?

The PDPC, as the privacy regulator, is in the process of drafting and establishing the subordinate regulations under the PDPA, while the Digital Economy Promotion Agency (DEPA), the National Innovation Agency (NIA), and ETDA are the major regulators driving support for and promoting AI-related businesses, and encouraging the digital industry in Thailand to adopt new technologies. In addition, the Bank of Thailand (the "BOT") has developed key infrastructures to support upcoming new digital products from fintech sectors and digital transformation by collaborating with private or government sectors to work toward digital transformation. As fintech startups are gradually playing an increasingly important role in the financial industry and the Thai economy, the Thai government is offering support to and regulating fintech startups to increase access to financial services, improve efficiency and stimulate competition, as well as create new innovation in the financial system.

## 3 Cybersecurity Framework

### 3.1 Please provide details of any cybersecurity frameworks applicable to e-commerce businesses.

The framework for policies and measures for the security of information technology systems is governed by the National

Cybersecurity Committee (the "NCS") under the Cybersecurity Act (2019) (the "CSA"). The CSA specifically prescribes the prevention of cyber threats, and provides minimum standards for cybersecurity of organisations in both private and public sectors and important measure to cope with the risk of cyber threats from both inside and outside Thailand. The NCS will have the authority to monitor and supervise compliance under the CSA.

Apart from the CSA, there is no specific legislation relating to the cybersecurity of e-commerce businesses. Nevertheless, e-commerce businesses that wish to facilitate their customers by providing payment gateways need to first obtain a payment licence from the BOT. One of the requirements for the payment service provider is adequate IT security measures that shall comply with the BOT's standards. Please see our response to question 11.1 for more detailed information.

### 3.2 Please provide details of other cybersecurity legislation in your jurisdiction. If there is any, how is that enforced?

The major regulations that apply to cybersecurity are:

1. The Criminal Code.
2. The Computer Crime Act (2017).
3. The Cybersecurity Act (2019) (the CSA).
4. The Personal Data Protection Act (the PDPA) (to be fully enforced in June 2022).
5. The Electronic Transactions Act (2001).
6. The Financial Institutions Businesses Act (2008) (FIBA).
7. The Telecommunications Business Act (2001) (TBA).
8. The Payment Systems Act (2017) ("Payment Systems Act").

These laws are applicable and enforceable to all relevant persons specified thereunder.

## 4 Cultural Norms

### 4.1 What are consumers' attitudes towards e-commerce in your jurisdiction? Do consumers embrace e-commerce and new technologies or does a more cash-friendly consumer attitude still prevail?

Driven by the growth of digital technologies and internet connectivity, e-commerce has been widely embraced by Thai consumers, and its popularity has increased rapidly in Thailand. In addition to being the second largest e-commerce market in ASEAN, research shows that e-commerce in Thailand will continue to expand by around 20% each year for the next five years.

With the introduction of social distancing and lockdown regulations due to the COVID-19 pandemic, which have restricted consumers from visiting physical stores, it appears that the pandemic has become an important factor in influencing consumers' move towards e-commerce and cashless payment even further due to their convenience.

### 4.2 Do any particular payment methods offer any cultural challenges within your jurisdiction? For example, is there a debit card culture, a direct debit culture, a cash on delivery-type culture?

In alignment with global trends and according to the Thailand 4.0 policy, the Thai government has been encouraging the culture of cashless society and the use of e-payments through various methods, including, most recently, governmental measures. These include the Rao-Chana programme (We Win), a

financial aid scheme to an additional 2.4 million people that provides cash incentives to new users, and the Khon-La-Khrueng programme (Let's Go Halves), a co-payment scheme to encourage cashless payments in the food and travel industries whereby the government will pay half of the price of food or accommodation for travellers, through business owners who registered with the programme, via a digital wallet.

#### 4.3 Do home state retailer websites/e-commerce platforms perform better in other jurisdictions? If so, why?

There is no evidence that Thailand-based websites perform better in jurisdictions other than in Thailand.

#### 4.4 Do e-commerce firms in your jurisdiction overcome language barriers to successfully sell products/services in other jurisdictions? If so, how and which markets do they typically target and what languages do e-commerce platforms support?

Like any other e-commerce firms doing business in other jurisdictions, the local languages of the relevant target markets and consumers are used when selling products or services in such other jurisdictions. However, it is typical for e-commerce firms to use bilingual text (Thai and English) when marketing to overseas customers.

#### 4.5 Are there any particular web-interface design concepts that impact on consumers' interactivity? For example, presentation style, imagery, logos, currencies supported, icons, graphical components, colours, language, flags, sounds, metaphors, etc.

Thai consumers prefer web-interface design concepts that are user-friendly, quick and responsive with readily available filters and diverse payment methods.

#### 4.6 Has the COVID-19 pandemic had any lasting impact on these cultural norms?

The COVID-19 pandemic has hastened the shift of consumers' shopping and consumption of goods and services habits towards e-commerce.

## 5 Brand Enforcement Online

### 5.1 What is the process for online brand enforcement in your jurisdiction?

The Department of Intellectual Property (the "DIP") is the regulatory authority responsible for IP-related matters in Thailand. For online intellectual property rights enforcement, in the case that goods that are infringing on another person's IP rights are being sold on e-commerce platforms, clear evidence of infringement as well as the name of the infringing seller, prices of infringing goods and products, and the location of the infringing goods and products should be collected. The next step is that the owner of the IP rights should inform the e-commerce platform about the person who is counterfeiting or imitating the IP rights so that the platform operator can then order them to stop the sale of those infringing goods and products on the platform.

Under Thai law, any person who counterfeits a trademark, service mark, certification mark or collective mark registered in Thailand by another person shall be liable to imprisonment not exceeding four years or a fine not exceeding THB 400,000, or both.

### 5.2 Are there any restrictions that have an impact on online brand enforcement in your jurisdiction?

In the event that the owner of the IP rights requests an e-commerce platform to serve the notice mentioned in question 5.1 to the person who committed the infringement, it is common that the e-marketplace website service provider would request the owner of the IP rights to present the registration certificate issued by the DIP as evidence of ownership before serving the notice to the person who committed the infringement. Therefore, the owner of the IP rights should ensure the registration certificate is in place, valid and ready as it may be requested by the e-marketplace website service provider.

## 6 Data Centres and Cloud Location

### 6.1 What are the legal considerations and risks in your jurisdiction when contracting with third party-owned data centres or cloud providers?

Cloud service providers and third party-owned data centres are considered data processors under the PDPA. Therefore, any entities which contract with third party-owned data centres and cloud service providers shall enter into a data processing agreement ("DPA") which outlines the scope and purposes of the data processing. In the absence of the DPA, such entities should check the terms and conditions to establish whether the scope and purposes of the processing have been addressed.

The use of cloud service providers and data centres located in other countries is considered a transfer of personal data to foreign countries pursuant to the draft subordinate regulation of the PDPA. It is advisable that business operators and related organisations should further monitor this once the decisions are issued to decide whether any additional measures are required to be put in place for such transfer of personal data.

### 6.2 Are there any requirements in your jurisdiction for servers/data centres to be located in that jurisdiction?

Pursuant to the Notification of the NBTC Prescribing Type and Category of Telecommunication Business Requiring the Telecommunication Business License, a service provider for a data centre needs to obtain a licence from the Office of the National Broadcasting and Telecommunications Commission (NBTC) before operating its business in Thailand. As previously discussed, the servers/data centres located in Thailand are considered data processors under the PDPA; consequently, DPAs must be entered into between the data controllers and such servers/data centres. However, there are no issues regarding cross-border transfers when transferring personal data to such servers/data centres.

## 7 Trade and Customs

### 7.1 What, if any, are the technologies being adopted by private enterprises and government border agencies to digitalise international (cross-border) trade in your jurisdiction?

No specific technologies have been adopted by private enterprises and government border agencies to digitalise international trade.

**7.2 What do you consider are the significant barriers to successful adoption of digital technologies for trade facilitation and how might these be addressed going forward?**

Thailand's adaptation of digital technologies requires collaboration between both the public and private sectors, and should start with the government sector incentivising users and encouraging the digitalisation of all transactions in order for such users to integrate technology into their daily lives. Since Thailand has been using analogue technology for such a long time, there is a huge opportunity to move forward into the digital age, but it needs the full support of the government.

## 8 Tax Treatment for Digital Businesses

**8.1 Please give a brief description of any tax incentives of particular relevance to digital businesses in your jurisdiction. These could include investment reliefs, research and development credits and/or beneficial tax rules relating to intellectual property.**

Recently, the Thailand Board of Investment (the "BOI") amended its promoted business activities under the Investment Promotion Act (1979) by repealing the promotion of software (category 5.7), e-commerce (category 5.8) and digital services (category 5.9), and adding a new category involving the development of software, a platform for digital services, and digital content activities (category 5.10). The privileges under these new BOI-promoted businesses include, among others, eight-year corporate income tax and machine import duty exemptions. To qualify for these BOI privileges, business owners must fulfil certain requirements and conditions as prescribed by the Investment Promotion Act and its related regulations.

**8.2 What areas or points of tax law do you think are most likely to lead to disputes between digital businesses and the tax authorities, either domestically or cross-border?**

The Securities and Exchange Commission of Thailand has expanded the scope of personal income tax to cover digital assets, namely cryptocurrency and digital tokens. Any person who makes capital gains from digital assets must pay withholding tax on the profit they received on the trade and the cumulative capital gains for each calendar year. If they receive any incentives from the tokens (investment token or utility token), such person needs to report this to the Revenue Department and pay a 15% personal income tax on such amount. This could be considered a double tax payment that may be a barrier for investors and token developers and jeopardise Thailand's position a country that supports digital assets businesses. Nevertheless, as this has only recently been announced, the guidelines for this tax deduction are not rigid in practice. Nevertheless, despite opposition from taxpayers, these guidelines are currently being enforced, and further updates will be announced by the tax authority.

## 9 Employment Law Implications for an Agile Workforce

**9.1 What legal and practical considerations should businesses take into account when deciding on the best way of resourcing work in your jurisdiction? In particular, please describe the advantages and disadvantages of the available employment status models.**

The Thai government has been encouraging all companies to support their employees by using technology solutions, especially

in the COVID-19 pandemic era in which technology has played an important role in supporting companies. It has steepened the learning curve for all private and public sectors to comply with technology, such as e-filing and cloud services for data warehouses. This includes the mandated notification for government officials to change from hard to soft copies and store them in a cloud system. This mandatory measure also helps to facilitate individuals when they contact officials, since they can access a big data warehouse that is protected by the CSA. However, it means that a huge number of government officials may face technology disruption and layoffs.

**9.2 Are there any specific regulations in place in your jurisdiction relating to carrying out work away from an organisation's physical premises?**

There is no specific regulation to support remote working from companies' offices in Thailand. However, Thailand's government has encouraged all companies to allow their employees to work from home to prevent the spread of COVID-19.

**9.3 What long-term effects or changes are likely to result from the COVID-19 pandemic?**

Thailand has embraced the work-from-home culture and encouraged the whole country to adopt online meetings and online payments. This adaptation can be seen in the growth of online shopping and new e-commerce businesses established to serve the demands of cultural change.

## 10 Top 'Flags' for Doing Business as a Digital Business in Different Jurisdictions

**10.1 What are the key legal barriers faced by a digital business operating in your jurisdiction?**

The movement of Thai markets towards digital business has accelerated rapidly; as a result, improvements to the existing legal and regulatory frameworks governing e-payments should and are required to be improved, or tax relief programmes should be provided concurrently with the expansion.

**10.2 Are there any notable advantages for a digital business operating in your jurisdiction?**

Apart from that mentioned in answer to question 4.2, there is no direct regulation that provides any incentive for digital businesses, but the BOI has nonetheless extended their promoted business activities to cover more digital business activities that qualify for tax incentives in Thailand, as mentioned in question 8.1.

**10.3 What are the key areas of focus by the regulator in your territory in respect of those operating digital business in your territory?**

The Thai government is currently focused on improving of the logistics and warehouse sectors, facilitating and supporting e-payment systems, and expanding online retail markets throughout the region.

## 11 Online Payments

### 11.1 What regulations, if any, apply to the online payment sector in your jurisdiction?

The Payment Systems Act was introduced to regulate all payment gateways that might have an impact on the public sector. As mentioned in question 3.1, service providers need to obtain a licence to conduct a payment system business in Thailand; there are three types of licence, the appropriate licence depending on whether they are for an Acquirer, Payment Facilitator or Payment on Behalf of Others. Service providers need to obtain the relevant licence from the BOT.

### 11.2 What are the key legal issues for online payment providers in your jurisdiction to consider?

Please see our answer to question 11.1. For e-payment service providers regulated by the BOT, the penalty for not complying with the notice requirement is a fine of between THB 1 million and THB 2 million, depending on the type of e-payment service provider.

## 12 Digital and the Green Economy

### 12.1 With the current global emphasis on the environment and sustainability, is there any current or anticipated legislation in that area which is likely to impact digital business in your jurisdiction?

There are currently no existing or anticipated regulations that may impact digital businesses in Thailand.

### 12.2 Are there any incentives for digital businesses to become "greener"?

There are currently no regulations to encourage digital businesses to become more environmentally friendly.

### 12.3 What do you see as the environmental and sustainability challenges facing digital businesses?

Digital businesses consume a considerable amount of energy, which is a major concern in terms of global warming and natural disasters. Hence, this is not merely an issue that affects one jurisdiction but in fact a global issue. Protecting the planet should be a joint effort. All countries should work toward this by introducing relevant and effective regulations to support greener business, especially for digital businesses.

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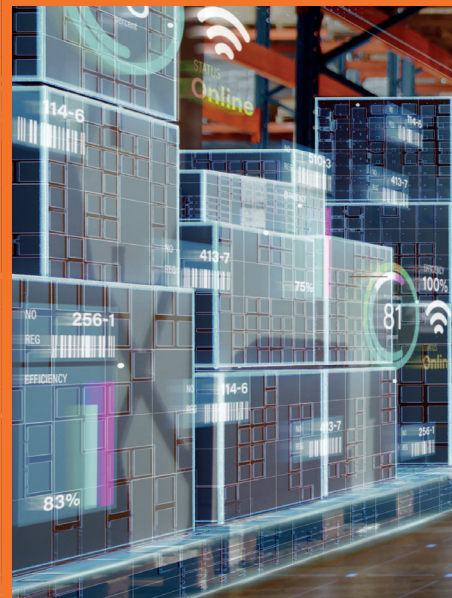
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