



Is it Possible for a Foreigner to Gain Majority Ownership of a Company in Thailand?

publié le 12/09/2013, vu 4863 fois, Auteur : [Vincent BIROT](#)

While Thailand is not hostile to foreign capital per se, it has clearly preferred, where it is possible, for it to be in the form of minority ownership. The most emblematic measure is the Foreign Business Act that forbids foreign investors to own more than 49% ownership in a large field of activities unless a special licence has been granted.

Thailand has drawn in the interests of foreign investors for many years. As a matter of fact, direct foreign investment may surpass 400 billion Baht in 2013 and 2014, according to Siam Commercial Bank. Even so, there are numerous laws and legislations limiting the amount of foreign ownership across a variety of business activities. Hence, foreign investors willing to set up a company can only gain majority ownership in non-restricted activities or, when possible, by obtaining a special license. These rules have pushed foreign investors to use structuring strategies with the aim of circumventing restrictions on business activities.

1. Prohibited and Controlled Business Activities

The first thing to check is if the intended business activity is restricted or limited to foreign investors. The Foreign Business Act B.E. 2542 (1999) (FBA) is the main law that governs foreign investment in Thailand^[1]. It is composed of forty-three activities, divided into three lists. Prohibited activities are listed in FBA List 1, and all controlled activities are divided into FBA List 2 and FBA List 3 (see appendix for the full list):

- **List 1** is made up of business activities not permitted to foreigners. These activities include publishing newspapers, rice farming, and land trading.
- **List 2** is made up of business activities related to national safety, national culture, and the use of natural resources. Foreign investors authorized by the Cabinet (Council of Ministers) can own up to 75% of the share capital^[2].
- **List 3** is made up of business activities in which Thai nationals are not yet ready to compete with foreigners^[3]. These activities include wholesale, retail, sale of food or beverages, and so on. Need to pay attention to paragraph 21 which explicitly states that “service activities” are limited unless stated otherwise by ministerial regulations. As of today, only one ministerial regulation has been issued and it concerned securities business^[4] (activities under the Securities and Stock Exchange Act). Foreigners that have obtained a Foreign Business License can own 100% of the share capital for activities listed on List 3.

Where business activities are not prohibited or controlled by the FBA, they can be freely carried out by foreigners without applying for the Foreign Business License. For examples, the majority of manufacturing activities and exporting business are not restricted, allowing foreigners to enjoy full ownership.

2. Obtaining an Authorization to carry out a Controlled Activity

There are three ways in which a foreign owned company can obtain an authorization to pursue controlled activities under the FBA.

- **Foreign Business Licence (FBL)**

??A foreign investor seeking to engage in a restricted activity, as stated in the FBA List 2, must obtain authorization from the Cabinet. For activities restricted under List 3, the foreign investor must obtain authorization from the Bureau of Foreign Business Administration, Department of Business Development, of the Ministry of Commerce.

Applications are considered on a case-by-case basis. One of the most important factors taken into account during the review process is the transfer of technology. The applicant is also required to provide evidence that the intended activity could not be properly carried out by a Thai company. These conditions make it difficult to obtain a license. For example, how one can justify that a pub or a restaurant[5] can only be carried out in the form of a foreign owned company? What about the transfer of technology's criterion? This is why numerous activities are in reality excluded from the scope of the license. A license is more likely to be granted to more complex activities, where Thai people do not have the know-how or the technology.

- **The Board of Investment and the Industrial Estate Authority of Thailand**

The Board of Investment (BOI) has the power to grant a wide range of incentives called "promotions" depending on how the foreign investor will contribute to the development of Thailand. The promoted activities are detailed on the BOI website[6] and notably include manufacturing, mining, production of chemical products, and the construction of public utilities.

The Industrial Estate Authority of Thailand (IEAT) is in charge of [decentralization](#) of industrial activity away from the capital to less developed regions. To achieve its aims, the IEAT has the authority to grant privileges to companies that are located in specific industrial estates.

The Bureau of Foreign Business Administration will usually issue a certificate (equivalent of a FBL) to a foreign owned company that has been promoted by the BOI or which has received permission from the IEAT under Section 12 of the FBA.

- **Privileges Granted Under Bilateral Agreements**

Under the Treaty of Amity[7] signed by Thailand and the United States, Americans are granted a national treatment and are exempted from most FBA restrictions[8]. To benefit from provisions of the Treaty, an American owned company needs to obtain a Treaty certification from the US embassy in Bangkok and only after will the Bureau of Foreign Business Administration issue a certificate.

The Treaty of Amity expired in 2005 but common practice shows that Americans are still enjoying its benefits today.

Thailand has also entered into bilateral treaties with Japan and Australia that limit certain FBA

restrictions in certain situations.

3. Alternative Means to Ensure Control of the Company

Foreigners looking to engage in restricted or controlled business activities without an appropriate license cannot obtain majority ownership, but this does not necessarily hold true in practice.

Under Thai law^[9], a company is considered "foreign" if 50% or more of its share capital belongs to foreigners (individuals or juristic entities). This definition is focused on the ownership of shares rather than the actual control of the company. Therefore, as long as foreigners do not hold more than 50% ownership, the company is still considered a "Thai" company, regardless of who is in control.

This loophole has been used by foreigners to engage in activities controlled by the FBA. For example, it is possible to add preference shares in the articles of association in order to allocate the majority of voting rights to the minority foreign shareholders. Although banned, a widespread scheme is to use a Thai nominee who holds the share on behalf of the foreign shareholder. It is also possible to set up more complex structures with Thai juristic entities nominees and several levels of ownerships. Nevertheless, any set-up with the sole purpose of circumventing the restrictions of the FBA will be considered illegal. Hence, the foreign investment will never be totally safe. Furthermore, foreign shareholder and Thai nominees may face criminal charges if caught^[10].

The ownership restrictions imposed on foreigners under List 3 of the FBA are not in line with the economic development of Thailand. For now, we can only hope Thailand will amend the Foreign Business Act in the wake of the launch of the ASEAN Economic Community in 2015.

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Annexes: Lists attached to the Foreign Business Act B.E. 2542 (1999)

List 1: Business Which Aliens Are Not Allowed to Operate for Special Reasons

- (1) Newspaper publication, radio or television station business
- (2) Rice, field crops or horticultural farming
- (3) Livestock farming
- (4) Forestry and wood processing from natural forests
- (5) Fishery, but only the catching of aquatic animals in Thai territorial waters and in the Exclusive Economic Zone of Thailand
- (6) Extraction of Thai herbs
- (7) Trade and auction of Thai antiques or objects of national historical value
- (8) Manufacture or casting of Buddha images and manufacture of alms bowls

- (9) Trading in land

List 2: Business Involving National Safety or Security or Affecting Arts, Culture, Traditional Customs, Folk Handicrafts or Natural Resources and the Environment

Chapter 1 Businesses involving national safety or security

- (1) Manufacture, sale and maintenance of
 - (a) firearms, ammunition, gunpowder and explosives,
 - (b) components of firearms, ammunition and explosives,
 - (c) armaments, military ships, aircraft or vehicles,
 - (d) accessories or components of war equipment of all kinds
- (2) Domestic land, water or air transport, including domestic aviation business

Chapter 2 Business affecting arts, culture, traditional customs and folk handicrafts

- (1) Trade in antiques or objects of art, being Thai works of art or handicrafts
- (2) Manufacture of wood carvings
- (3) Silkworm raising, manufacture of Thai silk threads, Thai silk weaving or Thai silk pattern printing
- (4) Manufacturing of Thai musical instruments
- (5) Manufacture of products from gold, silver, niello, bronze or lacquer
- (6) Manufacture of crockery or earthenware which are Thai culture arts

Chapter 3 Business affecting natural resources or the environment

- (1) Manufacture of sugar from sugar cane
- (2) Salt farming, including efflorescent salt production
- (3) Rock salt mining
- (4) Mining, including stone blasting or crushing
- (5) Wood processing to make furniture and utensils

List 3: Business in Which Thai Nationals Are Not Yet Ready to Compete with Aliens

- (1) Rice milling and production of flour from rice and field crops
- (2) Fishery, but only aquaculture
- (3) Forestry from cultivated forests

- (4) Manufacture of plywood, wood veneer, chip-board or hard-board
- (5) Manufacture of lime
- (6) Accounting service business
- (7) Legal service business
- (8) Architectural service business
- (9) Engineering service business
- (10) Construction, except

(a) construction of things providing fundamental services to the general public in respect of public utilities or communications requiring special equipment, machinery, technology or expertise, with alien minimum capital of 500 million baht or more;

(b) other types of construction prescribed in ministerial regulations.

- (11) Brokerage or agency business, except

(a) brokerage or agency in trading securities or services relating to trading in agricultural commodity futures, financial instruments or securities;

(b) brokerage or agency in the purchase and sale or procurement of goods or services necessary for production or the provision of services by an affiliated enterprise

(c) brokerage or agency in the purchase and sale, purchase, distribution or acquisition of markets, both domestic and foreign, for the distribution of domestically manufactured or imported goods, in the nature of operation of an international business, with alien minimum capital of 100 million baht or more

(d) other types of brokerage or agency prescribed in ministerial regulations.

- (12) Auctioneering, except

(a) auctioneering in the nature of international bidding other than for antiques, historical objects or objects of arts, being Thai works of art, handicrafts or antiques or objects of national historical value;

(b) other types of auctioneering prescribed in ministerial regulation

- (13) Domestic trade in local agricultural products or produce not yet prohibited by law

(14) Retail sale of goods of all kinds, with a total minimum capital of less than 100 million baht or a minimum capital of each store of less than 20 million bah

(15) Wholesale sale of goods of all kinds, with a minimum capital of each store of less than 100 million baht

- (16) Advertising business

- (17) Hotel business, except for hotel management service
- (18) Tour agency
- (19) Sale of food or beverages
- (20) Seed planting, reproduction or improvement business
- (21) Other service business, except service businesses prescribed in ministerial regulations.

[1] There are others foreign ownership restrictions in specific legislation that applies to particular activities such as telecommunication, banking and finance and insurance

[2] Section 15 of the Foreign Business Act requires that no less than 40% of the capital must be held by Thai nationals or juristic persons. The ratio of Thai ownership can be decreased to 25% with a specific approval from the Cabinet

[3] At least that was the aim of the government when they enacted the Foreign Business Act in 1999

[4] Ministerial Regulations prescribing service businesses not subject to application for permission for foreign business operation B.E. 2556 (2013)

[5] The sale of food or beverages is limited under paragraph 19 of the FBA List 3

[6] www.boi.go.th/english/

[7] Formerly the Treaty of Amity and Economic Relations Between the Kingdom of Thailand and the United States of America

[8] The treaty expressly excludes the following activities: Communications, transport, fiduciary functions, banking involving depository functions, exploitation of land or other natural resources and domestic trade in indigenous agricultural products.

[9] Section 4 of the Foreign Business Act

[10] Section 36 of the Foreign Business Act punishes foreigners implicated in this scheme and the Thai nominee(s) of a minimum of 3 years imprisonment or a fine from 100 000 bahts to 1 million baht, or both