

LEGAL ARTICLE

ASEAN ECONOMIC COMMUNITY ("AEC"): SPECIAL PRIVILEGES FOR ASEAN INVESTORS IN THAILAND

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As the country members of the Association of Southeast Asian Nations launched the ASEAN Economic Community ("AEC") on December 31, 2015, Thailand has already committed itself to open the market to ASEAN investors in certain types of business.

In Thailand, the Foreign Business Act, B.E. 2542 (1999) (the "FBA") prohibits (i) a foreign owned company, and (ii) a foreign company from engaging in restricted activities listed in the Schedules attached to the FBA to protect local industries. The restricted activities are classified into three categories.

Table 1: Categories of Restricted Activities

Category	Conditions
Schedule 1 Activities	The activities in Schedule 1 attached to the FBA are totally closed to foreign competition.
Schedule 2 Activities	The activities in Schedule 2 attached to the FBA may be engaged by the foreign owned company only after the foreign owned company obtains a foreign business license from the Commerce Minister with the approval of the Thai cabinet.
Schedule 3 Activities	The activities in Schedule 3 attached to the FBA may be engaged by the foreign owned company only after the foreign owned company obtains a foreign business license from the Director General of the Department of Business Development, Ministry of Commerce with the approval from the Foreign Business Board.

DEFINITION OF FOREIGN OWNED COMPANY

Any limited company incorporated in Thailand is considered the foreign owned company under the FBA if one or more foreign shareholders holds at least 50% of the total shares in the limited company. This threshold means practically a foreign shareholder can hold up to 49.99% of the total shares in the limited company and the limited company still maintains the status as the Thai owned company under the FBA.

Once the foreign shareholder owns 50% or higher of the total shares in the limited company, the limited company will be deemed the foreign owned company under the FBA. As the foreign owned company, the limited company will have to obtain a foreign business license prior to engaging in the restricted activities under Schedule 2 and Schedule 3 attached to the FBA.

SPECIAL PRIVILEGES FOR ASEAN INVESTORS

However, there is an exception to the foreign business license requirement for the ASEAN investors. The ASEAN Framework Agreement on Services (“AFAS”) and the ASEAN Comprehensive Investment Agreement (“ACIA”) allow ASEAN investors to hold shares up to 100%, 70%, 60% or 51% in a locally incorporated company engaging in specified restricted activities under the FBA without a need to obtain any foreign business license. While the lists under the AFAS and the ACIA are not terribly comprehensive and largely allow the ASEAN ownership up to 51% or 70% of the total shares in the locally incorporated company, some items on these lists are noteworthy.

The lists include land and marine mining, marine animal farming, accounting services for filing for related companies, international law advice, advice services pertaining to software, database services, condominium management services, computer server lease service, furniture lease service, sale of advertisement space on the internet, market research service, human resources services, management and administration consultancy services, translation and interpretation services, building construction, mine and industrial plant construction, fast food franchise services, some categories of private hospitals, 6 star or superior deluxe hotel, tourist information services, theme park, library, museum, and small port services.

While the lists come up with many terms and conditions, which potentially make a proposed activity of an ASEAN investor disqualified, it is not that bad that Singaporean or Malaysian investor can own up to 70% of the total shares in the company that operates a six star hotel in Thailand. While the AFAS and the ACIA have come into force for quite some time, this privilege is not popular yet. As of the time of writing, ASEAN investors have not taken full advantage of the AFAS and the ACIA yet.

STEPS FOR GETTING AFAS OR ACIA PROTECTION

These are steps for getting AFAS or ACIA protection.

- 1.**
Incorporate a local limited company with qualified ASEAN shareholding
- 2.**
Obtain a sponsor letter from a relevant ASEAN country embassy
- 3.**
Apply for the Certificate of AFAS or ACIA Protection from the Department of Business Development
- 4.**
Start operating the restricted activity under the AFAS or ACIA Protection

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