

Legal Update

FLOOD REHABILITATION AND PREVENTION MEASURES

Various efforts on flood relief, rehabilitation and prevention were organized by the government, local businesses and non-governmental organizations, fortified by the strong sense of community and charity that exists in Thailand. The government has been implemented strong efforts to rehabilitate industrial estates affected by the recent flooding. The government's policies are being put forward to strengthen the investment environment in Thailand that continues to make Thailand one of the best locations for investors through immediate, near-term and long-term flood measures, including but not limited to the following measures:

Immediate and Near-Term Flood Relief and Assistance

- The Ministry of Industry and the Industrial Estate Authority of Thailand have implemented a water-removal action plan to allow effected industrial estates to resume operations swiftly.
- The Board of Investment ("BOI") has provided certain emergency relief measures for the promoted companies affected by flooding, such as:
 - (1) Temporary waiving the restrictions on moving machinery and raw materials away from the site of promoted projects by not requiring BOI's prior approval as usual;
 - (2) Granting promoted companies exemption of import duties on machinery brought in to replace flood-damaged equipment.
 - (3) Granting urgent permission for flood-affected companies to bring in foreign experts or engineers to inspect equipment toward restarting operations.
 - (4) Raw materials entitling to duty-free importation under section 36 of the Investment Promotion Act that were damaged by flooding can be counted as part of companies' waste allowance and therefore would not incur any tax burden. Further, raw materials that are still usable can be transferred to another BOI-promoted project that is still entitled to section 36.
 - (5) The promoted companies affected by flooding are also allowed to outsource part of their manufacturing process on a temporary basis to avoid business interruptions.
- The Ministry of Finance plans to allocate Baht 250 Billion to assist and rehabilitate entrepreneurs and industrial estate developers.
- The Bank of Thailand and other commercial banks have set aside a substantial amount for soft loans toward the rehabilitation of businesses affected by the flooding.
- The government is proposing a new credit line with a special interest rate, tax incentives and various investment privileges to industrial operators whose factories have been affected by flood.

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Long-Term Flood Prevention

- The Government has planned to promote integrated water management and water resources management and to implement for better and more systematic water management to enhance the efficiency of Thailand in preventing, mitigating, and tackling recurring floods and droughts.
- On 9 November 2011, a draft bill relating to Baht 2.38 Trillion in the 2012 national budget would be allocated to support the royal rainmaking operations, expand irrigation zones, divert and distribute water in critical areas, and develop community water sources was presented to the House of Representatives for debate. For water resources management, Baht 7.92 Billion baht would be allocated for developing the management mechanisms and rehabilitating water resources. Knowledge relating to water and flood matter would be disseminated through people's network and local administrative organizations. The Government plans to develop various water sources to solve flood and drought problems.

Other Measures

- Thailand will quickly resume business operations in all areas by working together in public-private sector cooperation in order to strengthen the nation's infrastructure and economy and maintain the status as one of the best locations in the world to do business.
- The Small and Medium Enterprise Development Bank of Thailand (**SME Bank**) will be offering loans for flood affected entrepreneurs according criteria and the Government Savings Bank will begin a debt moratorium, debt extension and increasing credit line initiative. The Export-Import Bank of Thailand (**EXIM Bank**) will also be offering extensions on debt repayments and measures to address revolving export and import credit and long-term loans. Various commercial banks are also working to mitigate the impact of the floods.
- The Customs Department will be waiving certain fees and has opened a Customs Service Center, providing 24-hour service for entrepreneurs in flood affected areas.
- The Ministry of Labor has a project to train about 150,000 workers whose jobs are temporarily suspended.
- In order to help the flood-affected foreign companies operating in Thailand, One of the flood relief measures of the Ministry of Commerce is to temporarily relax requirements on necessary application and supporting documents and expedite the their procedures and accelerate their consideration in connection with the applying of the foreigners which are the parent or affiliated companies of the companies affected by the current flood for obtaining relevant Foreign Business License the Foreign Business Act relating to the lending and/or loan guarantee businesses provided for their subsidiaries and/or affiliates.

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NBTC'S NOTIFICATION ON PROHIBITION OF CONDUCTS DEEMED AS BUSINESS DOMINATION BY FOREIGNER IN TELECOM OPERATION

Under Section 8 of the Thailand Telecommunications Business Act B.E. 2544 (A.D. 2001) ("**Act**"), the telecom operator must not be foreigner according to the Foreign Business Act 1999 ("**FBA**"). A Notification on prohibition of conducts deemed as business domination by foreigner ("**Notification**") has been issued under the Act by the National Telecommunications Commission ("**NTC**"), temporarily acting as the National Broadcasting and Telecommunications Commission ("**NBTC**"), the regulator of the radio, television and telecommunications businesses with effect from 31 August 2011, onwards.

Under the said Notification, when foreigner has controlling power of 50% or more over the business of the licensee under the Act, it will be deemed as business domination by foreigner.

"**Controlling power**" means the status of having controlling power or influence, either directly or indirectly, in policy designation, administrative management, operation, appointment of directors and/or senior executives, or any other act that may affect the business administration or operation of telecom business of the license applicant or the licensee.

In applying for the telecom license, it is required that the license applicant shall provide a certification signed by the signatory person that the license applicant will not do any act that violates such prohibition. Further, a certification approved by the licensee's annual general meeting of shareholders ("**AGM**") must be annually submitted to NBTC within 30 days of the AGM's date.

Prohibition on business domination includes any of the following acts:

- (1) Business domination through the holding of shares, either directly or indirectly, in the licensee by the foreigner or its agent.
- (2) Business domination through the holding of shares by the foreigner's nominee or its representative in other nature in order to avoid this Notification.
- (3) Business domination through the holding of shares by the foreigner itself, its representative or agent, which such shares have preferential right in voting in AGM more than the proportion of actual shares so held, or have any more preferential rights than the shares held by Thai national.
- (4) Business domination through the participation of the foreigner in the appointment or control of the Board of Directors or senior executives.

"**Senior executives**" means chairman, managing director, manager, director, chief procurement executive, chief finance executive, or any other person having controlling power or influence on telecom business administration or operation of the license applicant or the licensee.

- (5) Business domination through any juristic acts with source of investment fund and loan from the foreigner or its subsidiary e.g. loan guarantee, loan with interest rate lower than the market rate, the business risk insurance, or granting credit on special basis.
- (6) Business domination through the arrangement of the intellectual property agreement, franchise agreement, or exclusive agreement with the foreigner or its subsidiary and such agreements cause transfer of expenses and consideration /benefit to the foreigner.
- (7) Business domination through the arrangement of the procurement agreement or the management agreement with the foreigner or its subsidiary or the employee of the foreigner or its subsidiary in the manner which causes transfer of expenses and consideration / benefit to the foreigner.
- (8) Business domination through the joint venture with the foreigner or its subsidiary thereby allocating or sharing operation cost in the manner which causes transfer of expenses or consideration / benefit to the foreigner.

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- (9) Business domination through the transfer pricing or pricing collusion transaction with the foreigner or its subsidiary.
- (10) Business domination through any other conducts whereby the foreigner or its agent has controlling power, either directly or indirectly, over the licensee's business.

Some telecom operators disagree with this Notification on the ground that this Notification may be contrary to the Thailand Constitution 2007, the free trade principles and commitments on trade and investment that Thailand made with other countries and international organizations since the said Notification contains more prohibitions on foreign investment and business operation than provisions of FBA.

Currently, True Corporation Plc. ("**True**") is the only local telecom operator without a foreign strategic partner. While Total Access Communication Plc. ("**DTAC**") and Advanced Info Service Plc. (**AIS**) have Norway's Telenor and Singapore Telecom as strategic partners, respectively.

On 2 December 2011, NBTC held a public hearing for sharing views and opinions from various economic and law experts, such as representatives from relevant government agencies and private sectors, foreign embassies in Thailand, Thai and foreign chambers of commerce, Thailand Development Research Institute ("**TDRI**"), and for further consideration and evaluation by NBTC whether the said Notification preventing foreign domination in telecom industry should be reviewed and amended or not.

During such public hearing, TDRI's representative had a view in opposing to the said Notification as they might scare away foreign investment, especially at this time when Thailand still needs to attract more foreign investment. While a representative / member of NBTC and relevant advocates explained and clarified that the purpose of this Notification was protect national security as well as to promote the disclosure of information by telecom operators and thus ensure transparency in the sector.

True's representative said that the Notification did not discourage the foreign investment in the sector but were meant to ensure transparency. If the regulator failed to ensure transparency, it might risk facing the accusation of negligence of duty.

DTAC has had concerned that said foreign domination Notification might adversely affect business and restrict competition and not support the country's ambitions and long-term strategy to attract more foreign investment. On 23 November 2011, DTAC filed a lawsuit with the Central Administrative Court claiming that such Notification issued by NTC at that time being were illegal and unconstitutional because the said Notification has taken in effect in August 2011, while NBTC has since replaced NTC in overseeing the telecom and broadcasting industries thereafter. DTAC therefore requested for cancellation of such Notification. The case is now pending consideration of the court.

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