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Briefing note October 2012

Thailand: Telecommunications update

On 23 July 2012, the National Broadcasting and Telecommunications Commission ("NBTC") announced its foreign dominance regulation B.E. 2555 (2012) which became effective on 24 July 2012 (the "2012 FDR"), replacing the foreign dominance regulation passed in August 2011 (the "2011 FDR"). This new regulation introduced some key changes with respect to foreign ownership of telecommunications businesses.

The 2012 FDR broadens the definition of "controlling power".

Broader definition

The term "business takeover" now refers to a foreigner's ability to control or influence (directly or indirectly) the determination of policy, management, operation, appointment of directors or high-level executives, which may have an impact on the management or operation of the telecommunications business. For example:

- holding at least half of the total voting rights attached to shares;
- the power to control a majority of shareholders' votes; or
- the power to appoint or remove at least half of the total members of the Board of Directors.

Key requirements

The 2012 FDR principally maintains the same monitoring measures as applied under the 2011 FDR. Such key requirements include:

Adoption and compliance with foreign dominance restriction measures

The 2012 FDR requires new and existing operators to adopt or review measures to ensure compliance with foreign dominance restrictions. The authorized directors of the operators must certify that they will not take any action in violation of such restrictions.

Foreign dominance restrictions

The 2012 FDR provides a list of minimum restrictive measures required to be adopted by operators, which are slightly different from the 2011 FDR requirements. Such restrictions apply to the following, (amongst others):

- direct or indirect nominee shareholders
- preference shares with special voting rights
- appointment or controlling power over the board of directors or high-level executives
- legal relations with source of funding from foreigners (e.g., credit guarantee, soft loans)
- certain contractual arrangements having foreigners as beneficiaries
- transfer pricing of transactions with foreigners

Annual review and reporting obligations

The operator is required to conduct an annual review of the foreign dominance restriction measures and subsequently propose such measures to the annual general meeting of shareholders for approval. Once approved by the shareholders and certified by authorized directors, the operator must submit the measures and report its foreign dominance status to the NBTC within 30 days from the date of the shareholders' meeting. However, if there is a high risk of violation, the operator must report the risk to the NBTC immediately and propose preventive or remedial measures.

Other key changes

In addition to a new definition of "business takeover" applicable to telecommunications operators, there are certain material changes in the 2012 FDR. Such material changes include:

NBTC no longer has discretion in granting foreign dominance exemptions.

The 2011 FDR gave the NBTC a broad discretion in granting case-by-case exemptions from the foreign dominance requirements of the FDR if such foreign dominance actions were

in line with "generally accepted business practices". The 2012 FDR removed this provision because the meaning of "generally accepted business practice" was considered unclear and too broad.

No requirement for NBTC to consult national security agencies.

Previously the 2011 FDR required the NBTC to consult national security agencies about suspected foreign dominance. However, the 2012 FDR no longer contains such a requirement, with a view to ensuring the independence of NBTC's authority without intervention by the national security agencies.

If you have any questions in relation to the issues raised in this briefing please contact the author at the contact details below.

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This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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