



Joint Foreign Chambers of Commerce in Thailand

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Air Chief Marshal Thares Punsri
Chairman
National Broadcasting & Telecommunications Commission
87 Phaholyotin Rd. Soi 8
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16 July 2012

and cc: NBTC Telecoms Commissioners

Dear Chairman:

Foreign Dominance Notification; Proposed revised Version

The Joint Foreign Chambers of Commerce in Thailand (JFCCT) has taken a keen interest in the telecoms sector for over a decade and, via the best expertise of our members has made consistent and continuing efforts during that time to offer what we believe to be are constructive recommendations for an industry which has been tied to outdated structures, and which has not had the opportunity to evolve so as to contribute to the overall Thai economy in the many ways that we believe it should.

We have welcomed the arrival of the NBTC as a major milestone in development of the telecoms and broadcasting sectors. The NBTC's step taken to review the Foreign Dominance Notification is commendable. We have actively participated at every stage in public hearings and all opportunities to provide our recommendations.

We have not yet seen a further revised version of the proposed foreign dominance notification following the 21 June public hearing but have seen a number of items of commentary uploaded to the NBTC website.

We would like to reiterate the same three points about effect of the regulation as we have done before and do so below.

Also, in the attachment to this letter (see Annex) we believe it useful and necessary to address the concerns raised by some of the on line commentary which we have seen.

Turning to the three points first; in our view the Notification or revised version will:

- i) ***Impede the competitive functioning of the sector*** through restrictions on the deployment of skilled professionals and leaders.
- ii) ***Cause uncertainty and confusion among present and prospective investors in the sector and many other sectors*** due to its vague criteria and because it conflicts with other legislation and standard valid global investment practices whereby non passive investment in the telecoms sector is the norm.



- iii) **Send a message that Thailand is protectionist** and does not welcome solid investment in the telecoms sector including in 3G; in an AEC context, this will surely not help Thailand to strengthen its position.

Our recommendation remains to revoke the Notification and not use a revised version. We do however have some concrete proposals about a notification which may work. We would urge the NBTC not to implement the currently proposed revision without further review.

With our sincere respects and best regards,

Nandor von der Luehe
Chairman, JFCCT

cc:

Minister for Finance & DPM
Minister for Commerce
Minister for Industry
Minister for ICT
NBTC Telecom Commissioners



Annex

Memorandum: Concerns with the Proposed Revised Notification and with explanations posted on the NBTC website

The opportunity to view certain on line postings (some short term) on the NBTC website is appreciated.

TOPIC 1: BEYOND THE GENERALLY ACCEPTED AND CURRENT LEGAL STANDARD FOR MEASURING FOREIGN EQUITY IN THAILAND.

The current standard in all relevant legislation in the Kingdom is in the Foreign Business Act (FBA) in which the relevant test is shareholding. Parliament has not relevantly provided otherwise. Section 8 of the Telecoms Business Act (as amended in 2006) refers to that standard.

Extensive market practice and legal opinion have relied on this FBA standard for a long time, since it was enacted in 1999.

The revised notification includes a definition of 'Dominance' which expands on shareholding to include:

- Voting rights at least half of total voting rights
- Authority to control majority of votes at general meeting
- Right to remove/appoint more than half of directors

The Notification relies on the permissive (not mandatory) rule-making power in s.8 of the TBA. In 2006, the previous reference to number of directors in that section was specifically removed by Parliament. Such provisions cannot therefore be inherent or implied in s.8.

It is also said that reliance is placed on other legislation (including constitutional provisions for 'free and fair competition') which is said to ground a basis for mandatory rule making. But there is no legal basis for founding a mandatory rule using such general notions where there are already specific limits elsewhere. To the contrary, the point might better be put that any rule made should be consistent with free and fair competition. Given that competition regulation is barely enforced and the playing field is not currently level, would a rule which has the appearance of favouring one operator be seen to be engendering free and fair competition?

Many would propose that competition law, applied fairly to the industry would be one appropriate way to support free and fair competition.

The proposed revised notification is thus considered highly controversial legally.



TOPIC 2: INDUSTRY AND PUBLIC SENTIMENT

At the 21 June public hearing, of the exactly or almost exactly 14 speakers from the floor:

- i) Seven (7) were against the proposed revised notification and the existing Notification completely or recommended significant and major revisions.
- ii) Two (2) were in favour of the proposed revised notification without change
- iii) Two (2) preferred the pre existing Notification
- iv) The others (say 3) recommended revisions of various kinds.

The written submissions, based on what was submitted for this hearing included at least five and probably more in group (i).

Industry and public sentiment in favour of better services – of serving consumers and serving the economy, should be the aim.

TOPIC 3: CONFUSION AND UNCERTAINTY

Issue (a)

Whether the behaviours in the Annex to the revised Notification are all intended to be read subject to the new definition of ‘Dominance’ as is suggested in NBTC materials found on line. For example – procurement and management roles – how would these impact the ability to exercise over 49% level of decision-making..” by holding shares with voting rights at least half of total voting rights, having the authority to control majority of the votes at the shareholders meeting, or the appointment or removal of at least half of all the directors” (which are all issues at company level). Is the Annex intended to illustrate the situations more broadly described in the language prior to the part quoted? If so, how do procurement and operational management positions for example relate to the shareholding issues?

Issue (b)

Is there supposed to be some kind of ‘proportionality’ principle – are the behaviours shown in the Annex intended to be quantified or quantifiable in some way? – a foreign supplier of a major system with hardware is assessed to add say 5% to shareholding thus bringing deemed overall influence over 49% and thus the licensee is ‘foreign dominant’?

The Annex must mean something, otherwise it would not be there.

TOPIC 4: INTERNATIONAL LEGAL CONTEXT

The proposed revised Notification is said to be valid in effect subject to the extent to which it is not. It is said in NBTC materials found on line that support for the notification derives from the view of the Department of Trade Negotiation of the Ministry of Commerce. But if on its face it there are concerns with respect to GATS, why rely on a situation by situation assessment?

Could the advice be made available publicly? If there is similar advice from the Ministry of Foreign Affairs, could that be made available also?

Thailand’s commitments limited the relevant exemption to equity only.



TOPIC 5: INTERNATIONAL PRACTICE CONTEXT

All countries have some kind of measures aimed to protect national interests.

(a) Industry advancement and evolution: All other countries referred to have also evolved by legislation and practice away from almost all dominant positions which the previous government departments or large corporations which used to run telecoms nationally had, to a competitively-based industry.

Thus the national interest protected is the industry as a whole, rather than SOEs (still 100% state-owned in Thailand) or some national corporations.

The industry in Thailand has not evolved in these ways and is almost unique in the world. Rather than a concern about being taken over, the concern might more appropriately be that the industry is lagging and Thailand will continue to slide, relatively. Foreign investors, business users Thai users (consumers, business) want to see a competitive, advance, innovative industry, not one which protects nationals simply through having that status.

There is a balance applicable to this topic 5; the current Notification and Proposed Revised Notification go too far towards protecting interests and not promoting the overall interests of the economy and users.

(b) Inconsistency of Treatment

The other countries also do not have different regimes governing foreign equity levels for different parts of the industry. In Thailand it is possible (quite rightly) for Category 1 licensees to be 100% foreign owned, yet severe restrictions are proposed for categories 2 and 3.

(c) Sudden and major change

In other countries referred to, safeguards have been put in place without a sudden change. The Notification and the proposed revised notification impact other sectors in their terms (eg suppliers in the telecoms ecosystem) and the interpretation of the FBA will surely be used by some as a precedent in other sectors. Given state practice and reliance on the law to date, any change should take into account impact. Has an impact assessment been done? A sudden and major change occurred in India and has had a devastating effect on foreign investment in the sector.

TOPIC 6: CRITERIA AND PROCEDURE FOR SPECTRUM LICENSING FOR IMT 2.1 GHZ (CLAUSE 8.2, OTHER)

Signing up to Foreign Dominance compliance is proposed as a precondition to participating in the 3G auction. A question is whether a duplication of obligation is necessary and due to the uncertainty will again raise concerns. The criteria and procedures document also contains many restrictions based on the approach in the Notification.

TOPIC 7: OPERATION OF THE REGULATION

As many commented at the 21 June public hearing, the Notification / proposed revised Notification is not self regulating. There are some self-reporting elements. The NBTC is given discretionary power by this regulation. A current licensee (concessionee) could be barred from bidding in a 3G auction or have the auction result annulled. Additionally the perception of non compliance or commercial uncertainty is an obvious issue in value – many companies are listed – analysts have and will continue to comment on the FD regulation being a source of value erosion.