

## **NBTC's Telecom committee approved the Draft of Revised Notification Restricting Foreign Dominance**

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The NBTC's telecom committee has approved the Draft of Revised Notification Restricting Foreign Dominance ("the Draft") and proposes forwarding it to the NBTC to consider before holding the public hearing, said Dr. Suthiphon. He reiterated that the benefit of the nation is the goal.

Dr. Suthiphon Thaveechaiyagarn, telecom commissioner and chairman of NBTC's subcommittee on regulation revisions revealed that the telecom committee had approved, in the 17/2012 meeting on 2 May 12, the Draft, which was revised by the subcommittee on regulation revisions. The telecom committee had agreed to forward the Draft to the NBTC to consider before holding the public hearing.

**The NBTC's commissioner said that there are still misconceptions about the Draft. Therefore, the NBTC would like to clarify as follows:**

1. The Draft amended the former notification, by defining the term "business dominance" as being dominant or influential either directly or indirectly by foreigners in policy making, management, operations, directors' appointments, senior executives' appointments that may affect business administration or telecom business operation of the applicant or licensee. This includes the conduct of (i) holding more than or equal to half of shares with voting right, (ii) having control of the majority vote at shareholders meetings, or (iii) being involved in appointing or removing more than or equal to half of the board of directors .

According to the definition, foreign dominance has to be considered "business dominance" first which could occur in 3 cases mentioned above.

Meaning that the NBTC has to consider whether conduct, circumstances, or facts, according to the Draft attachment, appear to be within scope of "restriction" specified in the Draft. In which, the NBTC has to consider whether such conduct, circumstances, or facts are caused

by foreigners having business domination as defined by “business dominance” or not. This is in line with the Securities and Exchange Act B.E.2535 and the Financial Institution Business Act B.E. 2551, and may be examined in the shareholder meeting minutes. Eight cases of dominance are provided in the attachment as examples for consideration of foreign dominance. Therefore, with the above reason, “business dominance” measurement has a clear guideline in determining which case is considered to be foreign dominance. It does not depend on indefinite discretion of the NBTC. The notification has framework for judgment that is firm, accountable, and standardized to all operators.

2. The attachment is necessarily to be provided as a guideline for operators to specify business dominance behavior and consideration framework for the NBTC. Nevertheless, the examples in the attachment are not prohibition itself (per se rule), meaning being under circumstances or facts as identified in the attachment doesn't imply that “foreign dominance” exists, but have to be considered as being “business dominance” first.
3. The underlying reason for maintaining this notification and revising it for clarity is because the section 8 paragraph 3 (1) of Telecommunications Business Act B.E.2544 as amended by the Telecommunications Business Act (No.2) B.E.2549 states that,  
  
“The applicant for Type Two and Type Three licenses shall not be a foreigner under the law on foreign business. In this regard, the Commission may prescribe the prohibition that the applicant for certain nature or categories of telecommunications business who is a juristic person shall not commit any act which has the nature of business takeover by a person who is not of Thai nationality.”

The NBTC, a regulatory body governing supervision of telecommunications business, therefore, issued this notification.

Foreign Business Act B.E.2542 is the generally used rule to limit the investment of foreigner. On the other hand, the Draft is the supplementary or reinforcement on business takeover by foreigner in telecommunications business. In addition, the essence of the Draft is to encourage transparency and disclosure in telecommunications business, in accordance with the spirit of the laws that promote free and fair competition.

The telecommunications business is a capital-intensive industry. Therefore, the supervision on foreign investment that is considered business dominance is necessary, in order to prevent a foreigner, who has advantage in term of financial access, from dominating the industry. Because the spectrum is the national limited resource and have impact on consumer at large. Furthermore, from the public hearing, the majority perceived the benefit of this notification, but the revision was needed for clarity and enforcement effectiveness.

4. For the issue of whether the Draft conflicts with Thailand's obligation under WTO agreement or not. In this matter, the NBTC issued the letter for consultation to Department of Trade Negotiations, Ministry of Commerce. The Department of Trade Negotiations responded, in letter dated 23 Apr 2012, that the old notification specified an exception clearly in No. 2 paragraph 2, stating the enforcement of this notification is effective to the extent that it does not conflict with agreements or treaties which Thailand is a member or is bound by its obligations. Therefore, in principle, the inconsistency or risk of conflict with subjected obligations should not occur in practice.

In addition, Department of Trade Negotiations also noted that the criteria in governing supervision, specifically for the use of discretion in the NBTC's consideration in this issue, if it is reasonable and unbiased, it will eventually lead to greater transparency, thus consist with international agreements. And, we would like to clarify that the Draft's wording and rules has been improved as suggested by Department of Trade Negotiations.

The Draft is issued under Telecommunications Business Act B.E.2544 which is related to Foreign Business Act B.E.2542. This also includes enforcement measures. If there is a violation, the enforcement measures under Telecommunications Business Act B.E.2544 will be used. Therefore, if there is a conflict with WTO agreement's obligation, Telecommunications Business Act B.E.2544 and Foreign Business Act B.E.2542 also conflict with WTO agreement's obligation, which is not true as it has never been a case.

5. For criticisms that the Draft is intended to discriminate in the 3G auction, we would like to clarify that – we understand that the telecom industry is a capital-intensive industry and hence requires funding and technologies from overseas, but the foreign shareholding must

not exceed 49 percent of the company. Moreover, the foreign investor must not exhibit behavior that falls into foreign dominance. Hence, the Draft asks license applicants and licensees to specify behavior of foreign dominance. The Draft specifies rules to prevent foreign dominance and unfair competition in the telecom industry and will make small or new operators that have their own networks report behavior which is prohibited according to the Draft and which are obligated to report that the act is part of normal commercial course of business and whose businesses are not dominated by foreigners, to meet the spirit of the law.

The Draft supports competition on level playing field because each player is regulated by the same rules without preferential treatment in order to truly meet the spirit of free and fair competition. In addition, the Draft supports and encourages the stable and effective development of the telecom industry. Therefore, the result is positive for small operators which will not be taken advantage of in the business sense by other operators that avoid the laws and allow foreigners to dominate their businesses. Thus, the Draft is about prevention of dominance of businesses by foreigners and does not discriminate against new operators that are interested to participate in the 3G auction whatsoever.

“In order to move along to the 2.1 GHz auction, it is necessary to have clarity on the rules regarding foreign dominance because this is a delicate matter and requires careful dealings. There may be people who agree and do not agree with telecom committee’s operation but we ask you to have confidence that this operation was done with genuine intentions and did not intend to favor any particular operator or make anyone at a disadvantage and is not preferential treatment but the operation was done in the nation’s best interest and in consideration with Thailand’s obligations that it has committed to in the past. Although this Draft is clear to a certain extent but when the NBTC approves the principles of the Draft, it must go through the public hearing process which will be held with transparency and allows people to fully voice their opinions to further improve the Draft in order to make it fair to everybody and truly benefit the country.” Dr. Suthiphon added.