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TOWARDS A MORE FLEXIBLE LEGAL FRAMEWORK FOR FOREIGN INVESTMENTS IN THAILAND?

In anticipation of the regional common market set to be implemented in 2015 as part of the ASEAN Economic Community blueprint, Thailand has adopted a new regulation that provides special exemptions from foreign business license requirements. Should this move be perceived as a harbinger for a progressive liberalization of the foreign investment conditions in Thailand?

Foreign investment under control

In Thailand, as in other countries, one of the challenges arising from globalization is the balance sought by the government between the opening of its markets and the protection of its domestic companies and capital. The legal framework of foreign direct investment – generally governed by the Foreign Business Act, BE 2542 (1999) (ABE) and the Investment Promotion Act, BE 2520 (1977) - gives a subtle mix of attraction mechanisms and restrictive principles (applicable to specially protected activities). The controlled approach is implemented through various means, ranging from strict prohibition to prior approval schemes, applicable subject to relevant activity’s classification under prescribed lists. A typical example of so controlled activities is the service sector: before operating any business in this sector, one must obtain a Foreign Business License.

The acquisition or development of a project on a 100% foreign ownership basis in any controlled/protected sector may therefore involve administrative delays which are often incompatible with the financial constraints of the investor. Thus the only feasible choice is often a partnership structure with a local entity where the foreign party is restricted to a 49/51 minority stake in the project.

This legislation and these issues have been extensively analyzed and discussed. A lot of information is freely and easily accessible to potential investors in Thailand, notably in relation to financial activity as specifically listed and described in the new regulation. These services include financial consulting, asset and mutual fund management, securities, stock market exchange, and brokerage businesses (limited though to the Stock Exchange of Thailand). So in practice, any investor wishing to acquire an

New exemptions: ambitious enough?

One aspect of this column is to inform our readers of even partial developments in the relaxation of rules that may impact their business. In that regard, the ministerial regulation of 18 March 2013 adopted under the Foreign Business Act caught the authors’ attention as it provides for an exemption from the requirement to obtain a Foreign Business License for the benefit of services related to financial activity as specifically listed and described in the new regulation. These services include financial consulting, asset and mutual fund management, securities, stock market exchange, and brokerage businesses (limited though to the Stock Exchange of Thailand). So in practice, any investor wishing to acquire an
entity offering such services or to develop a new company in this sector will be free to do so without being subject to administrative turpitude of the Foreign Business License or a partnership.

At first sight, it would be easy to think that this partial liberalization looks like an announcement of a general relaxation of policy restrictions used on the entry of foreign investment in the service sector, perhaps in response to the insisting demands of the European business community (see the recommendations of the EABC in the 2012 European Business Position Paper).

Nevertheless, this assumption would be ignoring the specific economic context in which this regulatory initiative is taking place. Thus far, development of the capital markets in Thailand has not evolved as fast as those of some of its neighbors. Thailand’s market capitalization in 2011 represented approximately 84% of its GDP, as opposed to 256% for Singapore and 146% for Malaysia. However, growth in this sector is all but certain as evidenced by progression since 2003; where the same ratio in Thailand was only 37.5%. The capital markets appear to be waiting for a solid stimulus injection in order to move closer to parity with the regional heavyweights. This could come from increased foreign investment through the further relaxation of regulations.

Through the prism of the aforementioned data, general analysis of the latest developments regarding exemptions to the Foreign Business Act requirements may reveal a renewed ambition to become more competitive in Asian capital markets by utilizing the technical support and expertise of foreign operators. However, beneficial as this sector-specific reform is, without widespread liberalization across a multitude of investment arenas, Thailand’s regional financial market position might continue to be overshadowed by its less regulated neighbors. To be watched.

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