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India

Compulsory Dematerialisation of Securities of Private Companies

インドの会社は公開会社 (public company) と非公開会社 (private company) に分類されるところ、インドの企業省が 2023 年 10 月に公表した会社法下の規則の改正により、非公開会社の有価証券の発行や譲渡を行うためには、電子化して行う必要があることになった。公開会社の有価証券について 2018 年に電子化が求められることになったのに続く動きである。電子化が必要になるまで一定の猶予期間があるが、M&A 取引を含めて本改正は実務に影響があるため内容を概説する。

The Ministry of Corporate Affairs of India (“MCA”) issued the Companies (Prospectus and Allotment of Securities) Second Amendment Rules, 2023 (“PAS Amendment Rules”) on 27 October, 2023 which mandates compulsory dematerialisation of securities of private companies, excluding small companies¹ and government companies (including stocks, bonds, debentures, share warrants, preference shares). “Dematerialisation” is a process by which physical security certificates are converted into electronic form. Earlier, only public companies, with certain exceptions, were required to have their securities in dematerialised form.

Key requirements set forth by the PAS Amendment Rules:

- Every private company which is not a small company as per its audited financial statements on or after 31 March, 2023, shall facilitate dematerialisation of all its securities within 18 months from the end of its financial year (i.e. by 30 September 2024 if such company’s financial year ended on 31 March 2023) (“Specified Date”) by making relevant application to a depository². Further, with effect from the Specified Date, such private company shall issue the securities only in dematerialised form.
- After the Specified Date, a private company making any offer for issue of any securities or buyback of securities or issue of bonus shares or rights offer shall ensure that before making such offer, the entire holding of securities of its promoters, directors, key managerial personnel has been dematerialised.
- If a security holder intends to transfer securities on or after the Specified Date, such security holder shall ensure the securities are held in dematerialised form before the transfer.
- If a security holder intends to subscribe to any securities of such private company whether by way of private

¹ Small company means a company, other than a public company, having paid up share capital not exceeding INR 40 million and turnover not exceeding INR 400 million, except for certain companies which *inter alia* include a holding or subsidiary company.

² There are two depositories in India: National Securities Depository Limited (NSDL) and Central Depository Services (India) Limited (CDSL)

placement or bonus shares or rights offer on or after the Specified Date, such security holder shall ensure that all securities of such person are held in dematerialised form before such subscription.

Key takeaways:

- The requirement of dematerialisation applies to all securities (including stocks, bonds, debentures) and not just equity shares of the concerned private company.
- A private company can issue securities in physical form before the Specified Date. However, if such private company intends to issue securities after the Specified Date, it has to issue them in dematerialised form, as such, it is advisable to consider issuing securities in a dematerialised form even if issuance takes place before the Specified Date.
- Transfer of securities of a private company can happen in physical form before the Specified Date. However, if a security holder intends to transfer its securities on or after the Specified Date, all of its securities have to be dematerialised before the transfer.
- Relevant private companies may need to alter their articles of association to provide for issuance of securities in dematerialised form.

Procedure for offering demat facility by the company – A brief

In order to facilitate dematerialisation of securities and offer demat securities, the company has to approach the depository (NSDL and/or CDSL) to procure ISIN (International Security Identification Number) for each type of security issued by it.

A private company may appoint a registrar to an issue and share transfer agent (“RTA”) to carry on the activities of registrar to an issue (RTI) and those of share transfer agent (STA).

A private company has various obligations under the PAS Amendment Rules vis-à-vis depository and RTA, including: (i) making timely payment of fees (admission as well as annual) to the depository and RTA in accordance with the agreement executed between the parties; (ii) maintaining security deposit, at all times, of not less than two years’ fees with the depository and RTA, in such form as may be agreed between the parties; and (iii) complying with the regulations or directions or guidelines or circulars, issued by the Securities and Exchange Board of India or the depository. If the company violates these obligations, it is prohibited from making offer of any securities, etc., till the payments to depositories or RTA are made.

Procedure for opening a demat account by a shareholder

In order to convert physical securities into dematerialised form, the relevant security holder must first appoint a depository participant (“DP”) such as a stockbroker in India to open an account in the name of the security holder called “demat account” with the DP. A DP acts as an intermediary between the depository and the security holder. Thereafter, the security holder is required to fill and sign a demat request form obtained from the DP with whom the demat account is to be opened and submit certain documents, such as self-attested PAN (permanent account number) card, board resolution for opening and operating of demat account, proof of address, bank account details, relevant certificates of securities (which are required to be defaced by writing "SURRENDERED FOR DEMATERIALISATION")³. The documents submitted to the DP are required to be notarized /apostilled/consularised if they are executed outside India.

Other considerations

Indian companies are classified into two categories, i.e., public company and private company, and vast majority of Indian companies are private companies due to lesser compliance requirements applicable to such companies. An Indian subsidiary in the form of a private company is the most common route for establishing a local presence by a foreign investor. In such a case, in practice, with certain exceptions, there has been no advantage of issuing or holding securities in dematerialised form, therefore, securities are physically issued by the Indian company.

³ These are only indicative requirements. Additional documents/information may need to be submitted depending on the requirements of a DP, NSDL or CDSL.

However, going forward, in light of the PAS Amendment Rules, all securities including shares of a private company will need to be held in dematerialised form.

A security holder has to open demat account with a DP to dematerialise the securities. To open a demat account, there are various requirements including the ones which are practically burdensome such as satisfying strict KYC (know-your-customer) requirements, submitting various documents such as board resolution, notarization of documents to be submitted, etc. It may take a few months to open a demat account and even to prepare an application of opening of the demat account, and dematerialisation process itself may take some time.

In the course of application of dematerialisation of securities, certificates of securities must be physically delivered to a DP. If the certificates are kept outside of India, relevant regulation of the country where the share certificates are located must be complied with for export of the certificates, such as obtaining approval of customs office.

With respect to an M&A transaction in which transfer of shares is involved, since dematerialisation of shares before the transfer is required under the PAS Amendment Rules, not only completion of dematerialisation by the transferring shareholder, but opening of a demat account by a transferee will also be one of the conditions precedent to closing if closing takes place on or after the Specified Date. Also, if an acquirer subscribes to shares of the target private company, not only completion of dematerialisation of securities held by its promoters, etc., but opening of a demat account of the acquirer will be one of the conditions precedent to closing. As stated above, opening of demat account and dematerialisation take some time, as such, this aspect should be taken into account in considering timeline of the transaction.

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Thailand

Draft New EEC Notification on the Incentives for the Operators in Special Economic Promotional Zone

タイ政府の外資誘致策の一環として、東部経済回廊（EEC）における事業者のための投資恩典を定めた新告示案が公表され、2024年1月1日に施行される見通しである。当該告示案においては、EEC内のSpecial Economic Promotional Zoneにおいてスマートエレクトロニクス、ロボット、航空、物流、デジタル等のターゲット分野に従事する事業者を対象として、法人税及び関税に関する税務恩典、並びに、外国人による土地所有、コンドミニアム所有、EECビザ等の非税務恩典が定められている。

1. Background

In October 2023, the Eastern Economic Corridor (“EEC”) Policy Committee (the “**Policy Committee**”) has considered the Draft 1-Year Action Plan (October 2023 - September 2024) to attract investors from across the globe to Thailand in 5 core clusters namely: (i) medical and healthcare, (ii) digital, (iii) electric vehicles (EV), (iv) bio-circular-green (BCG) economy, and (v) services, in order to develop sustainable economy and increase competitiveness in the international market. Accordingly, urgent actions are being undertaken in various aspects including formulating framework, developing incentives to attract investments, creating ecosystem for investments and driving development of infrastructure.

This article will particularly emphasize on the incentives being offered by the EEC to operators in Special Economic Promotional Zone, which will have an impact on foreign direct investment in Thailand.

2. EEC Incentives Granted in Special Economic Promotional Zone**I: Incentives under Current Notifications**

Under Section 48 of the Eastern Economic Corridor Act of 2018 (the “**EEC Act**”), an operator in the Special Economic Promotional Zone can obtain one or more incentives, for example, right to ownership of land for business operation or condominium unit for business operation or residence, right to bring in foreigners, right to tax and duties exemption or reduction. The EEC Policy Committee may grant incentives to each operator differently by considering the purpose of the establishment of each Special Economic Promotional Zone. As the EEC Act only stipulates the outline of each incentive, the incentives provided as well as the procedure to obtain such incentives under the EEC Act are neither clear nor certain.

In addition to the EEC Act, currently, there are only 2 EEC Notifications, i.e., (i) EEC Notification Re: Incentives for Operator in Special Economic Promotional Zone for Special Business of 2022 dated 15 August 2022 and (ii) EEC Notification Re: Incentives for Operator of E-Commerce for Smart Product Management Center in Special Economic Promotional Zone for Industrial Business related to E-Commerce Business of 2019 dated 3 July 2019, issued pursuant to the EEC Act, which stipulate certain requirements and incentives for the operators. However, both EEC Notifications only prescribe requirement and incentives for certain Special Economic Promotional Zone e.g., industry and digital innovation promotion zone, genomic medicine of Burapha University (Bang San), or for specific business i.e., e-commerce of smart product management center where the operator is required to fulfil requirements prior to obtaining any incentives.

In furtherance of the EEC Act, the Thailand Board of Investment (“**BOI**”) issued the BOI Notification No. 17/2565 Re: Investment Promotion Measure for EEC Area dated 8 December 2022 (“**BOI Notification 17/2565**”) which became effective earlier this year. Under the BOI Notification 17/2566, operators undertaking the targeted activity (in Group A1+, A1-A4 of the BOI) in 3 provinces in EEC i.e., Chacheongsao, Chonburi and Rayong Province were permitted to obtain additional incentives, e.g., additional corporate income tax (“**CIT**”) exemption for 2 years for activity in Group A1+, CIT reduction for net profit gained from investment at the rate of 50% of a normal rate for 3 years as from the date of expiration of CIT exemption for activity in Group A1-A4, subject to the activity project engaging in human resources development or research and development of technology and innovation and fulfilling other requirements specified therein. Compared to the above EEC Act and the EEC Notifications, the BOI Notification 17/2565 prescribes incentives more explicitly. The operator in the EEC may choose to apply for the

incentives from either BOI or the EEC Policy Committee. Incentives granted by BOI and the EEC Policy Committee to the operator in the EEC will not be in addition to one another.

Except for those stated above, there are no notifications detailing incentives prescribed under the EEC Act for other operators and business sectors.

II: Incentives under New Draft Notification

This year, in response to the Government’s policy on attracting foreign investment through granting incentives, the EEC Policy Committee prepared the draft of the EEC Notification Re: Incentives for Operators in Special Economic Promotional Zone (the “**Draft**”) and planned to promulgate the Draft by end of December 2023. Based on the Draft, it is expected to become effective from 1 January 2024 onwards. Upon coming into effect, the Draft will repeal the 2 EEC Notifications, mentioned above.

Unlike the current EEC Notifications which prescribe requirement and incentives for certain Special Economic Promotional Zone, the Draft provides the incentives which cover all the Special Economic Promotional Zone within the EEC. According to the Draft, incentives will be granted to the operator of special targeted industries¹ provided that the operator possesses necessary qualifications and completes the procedure of application.

To apply for incentives under the Draft, as a first step, the operator is required to obtain permission to be an operator in Special Economic Promotional Zone by presenting its qualifications² and submitting documents and evidence³ to the EEC office. The Secretary-General of EEC will consider the application and if approved, the EEC office shall issue the permission to be an operator in Special Economic Promotional Zone.

Regarding incentives under the Draft, the operator in Special Economic Promotional Zone or any person shall submit the investment proposal to the EEC Office with the relevant details in the prescribed form. The EEC Policy Committee will consider and negotiate incentives with the applicant. Once the resolution on incentives is concluded, the EEC Office shall send the letter informing the decision to the applicant within 7 days and the applicant shall submit the acceptance letter to the EEC Office within 2 months from the date of receiving such letter. After the submission of acceptance letter, the EEC Office shall prepare an agreement on incentives with the applicant (the “**Incentives Agreement**”). The incentives that can potentially be granted to an applicant are classified with the details in the table below:

Type of Incentives	Details
1. Right to ownership of land	<ul style="list-style-type: none"> • The foreign operator can own the land to the extent set out in the Incentives Agreement. • The land owned by the operator in Special Economic Promotional Zone for permitted business may be allocated as residence for the operator’s personnel and his/her family as follows: <ul style="list-style-type: none"> • Land for specialist, executive or professional staff shall not exceed 200 square wah per family and in total, not exceed 5 Rai; and

¹ The EEC issued a Notification Re: Prescribing Special Targeting Industries in Special Economic Promotional Zone dated 24 April 2019. Examples of special targeted industries include smart electronic, robots, aviation, logistic, digital, or of business which are relevant or beneficial to the development of special targeted industries in Special Economic Promotional Zone.

² The person who applies for permission to operate business in Special Economic Promotional Zone shall be, for example, an industrial or commercial operator in Special Economic Promotional Zone under the law related to industrial estate, a lessee or a sub-lessee of land or construction in Special Economic Promotional Zone.

³ E.g., operation or project plan on special targeted industry, evidence showing stable financial status and ability in funding for operation or project plan.

Type of Incentives	Details
	<ul style="list-style-type: none"> Land for general personnel shall not exceed 1 Rai per 100 families and in total, not exceed 10 Rai.
2. Right to ownership of condominium units	<ul style="list-style-type: none"> The foreign operator can own condominium units to the extent set out in the Incentives Agreement. The ownership ratio of condominium units shall not exceed the rate as permitted under the law related to investment promotion or industrial estate.
3. Right to bring in foreigners	<ul style="list-style-type: none"> Foreigner must have an employment agreement with the operator or with other person which designates such foreigner to work for the benefit of the operator. Foreigner must be qualified specialist, executive, or professional including their spouse or dependent. Period of residence in Thailand must not exceed 10 years. Once the approval to bring in foreigners is obtained, the foreigner can apply and receive EEC Visa and EEC-Work Permit. Foreigners shall have the right to work under the position related to special targeted industry irrespective of such work being prohibited for foreigners. The operator shall obtain insurance with the amount of not less than USD 50,000 per year for each foreigner throughout their period of residence in Thailand.
4. Right to tax exemption or reduction	<p>The operator can obtain tax incentives as follows:</p> <ul style="list-style-type: none"> CIT exemption for net profit gained from the operation or CIT reduction at the rate set in the Incentives Agreement; Exemption or reduction of import duty for machinery; and Exemption or reduction of import duty for raw materials and necessary materials.

Conclusion

As abovementioned, the Government intended to notify the Draft by December 2023. As of the date of this newsletter, the public hearing process for the Draft has been completed. Normally, after public hearing, public comments need to be taken into account for consideration, and this process may take some time. Thus, it is uncertain that the Draft will be enacted by December 2023 and become effective in January 2024 as planned. However, since the Draft will set clearer procedure and criteria for incentives, the operator must take note of the Draft provisions and make the requisite preparations in order to gain benefit therefrom.

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