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## PUBLICATION

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### TIME TO TALK UP A PIVOTAL DECREE FOR TELCOS

*By Vuong Son Ha & Luu Tien Ngoc*

The Government on 6 April, 2011 promulgated Decree No. 25/2011/ND-CP, detailing and providing guidelines for the implementation of a number of articles of the Law on Telecommunications of 2009 ("Decree 25").

Decree 25 comprises 46 articles detailing issues related to telecoms services business; establishing networks and providing telecoms services; issuing telecoms licenses; telecoms resources, technological standards, quality, tariff and telecoms facilities.

Decree 25 shall come into force on June 1, 2011 and entirely or partially replace Decree No. 160/2004/ND-CP, dated 3 September 2004, of the Government, detailing and providing guidelines for the implementation of a number of articles of the Ordinance on Telecommunications, and regulations on telecoms investment in Decree No. 121/2008/ND-CP, dated 3 December 2008, of the Government, on the investment in the post and telecommunication areas, and regulations on telecoms in Decree No. 97/2009/ND-CP, on management, supply and use of internet services and of electronic information on the internet.

Some notable new features in Decree 25 are set out below:

#### *Standardized classification of telecoms services*

Contrary to its predecessor, Decree 25 classifies all telecoms services in Article 9, on the basis of the Vietnam's World Trade Organization (WTO) commitments, to be in compliance with international practices and avoidance of confusions during the implementation process as they were before in practice.

#### **Not simultaneously hold more than 20% of capital of two telcos**

Pursuant to Article 3.1 of Decree 25, an organization or individual who owns more than 20% of charter capital or shareholding in a telco shall not be allowed to own more than 20% of charter capital or shareholding in other telco(s) operating in the same telecoms market mentioned in list of telecoms services announced by the Ministry of Information and Communications (MIC").

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It is known that this policy riding open competition trend shall have a large impact on the capital structure and organizational model of some State-owned enterprises in the telecoms sector, which may include the Vietnam Posts and Telecommunications Group ("VNPT") as it currently owns 100 percent of capital in two of three biggest mobile network operators, being Mobile Information JSC ("MobiFone", which is an independent-accounting subsidiary of VNPT) and Telecoms Services JSC ("VinaPhone", which is a dependent-accounting unit of VNPT). If a dependent-accounting unit like VinaPhone is also subject to this limitation as it is clearly applicable to an independent legal and accounting entity like MobiFone, VNPT would likely be requested to dilute its ownership in the charter capital of either MobiFone or VinaPhone, regardless the different approvals on the different capital holding percentages by VNPT in its subsidiaries, including MobiFone and VinaPhone, which have been issued before Decree 25.

As initially planned in Decision No.58/2005/QD-TTg, dated March 23, 2005, of the Prime Minister ("PM"), approving the pilot project on establishment of VNPT, VNPT has been permitted to own more than 50 percent of charter capital of each of MobiFone and VinaPhone, and the equitization of such subsidiaries should be completed during the period from the second quarter to the fourth quarter of 2005. However, the equitization plan of MobiFone and VinaPhone has been timely failed. As most recently planned in Decision No.180/QD-TTg, dated January 18, 2011, of the PM, approving the Charter on organization and operation of VNPT, VNPT, which was converted into a single State member limited liability company under Decision No.955/QD-TTg, dated June 24, 2010, of the PM, shall play the role of parent company in the entire VNPT Group, and has dependent accounting units including VinaPhone and independent accounting subsidiaries, in which VNPT's mother company owns 100 percent of charter capital, including MobiFone.

### *Legal capital required for investment and business in telecoms services*

According to Decree 25, enterprises investing and doing business in telecoms services must ensure certain thresholds of legal capital and committed investment as detailed in Articles 19, 20 and 21. Accordingly:

- a) Enterprises applying for license of establishing a terrestrial fixed telecoms network not using radio frequency channel and number of telecoms subscribers must have VND5 billion as legal capital and commit to invest at least VND15 billion in the first 3 years for being able to operate within one province or city directly under the Central Government; have VND30 billion as legal capital and commit to invest at least VND100 billion in the first 3 years for

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- being able to operate within regional extent (from 2 to 30 provinces or cities directly under the Central Government); and have VND100 billion as legal capital and commit to invest at least VND300 billion in the first 3 years for being able to operate within nationwide sphere (over 30 provinces or cities directly under the Central Government).
- b) Enterprises applying for issuance of license for establishing a terrestrial fixed telecoms network using radio frequency channel and number of telecoms subscribers must have VND100 billion as legal capital and commit to invest at least VND300 billion in the first 3 years for being able to operate within regional extent; have VND300 billion as legal capital and commit to invest at least VND1,000 billion in the first 3 years and at least VND3,000 billion in 15 years for being able to operate within nationwide sphere.
  - c) Enterprises applying for issuance of license for establishing a terrestrial mobile telecoms network using radio frequency channel must have VND20 billion as legal capital and commit to invest at least VND60 billion in the first 3 years.
  - d) If applying for issuance of license for establishing a terrestrial mobile network not using radio frequency channel (virtual mobile telecoms network), enterprises must have VND300 billion as legal capital and commit to invest at least VND 1,000 billion in the first 3 years and at least VND3,000 billion in 15 years.
  - e) For enterprises applying for issuance of license for establishing a terrestrial mobile telecoms network using radio frequency channel, they must have VND500 billion as legal capital and commit to invest at least VND2,500 billion in the first 3 years and at least VND7,500 billion in 15 years.
  - f) While enterprises applying for issuance of license for establishing a fixed and mobile satellite telecoms network must have VND30 billion as legal capital and commit to invest at least VND100 billion in the first 3 years.

Within two years as from June 1, 2013, the telcos whose licenses are inconsistent with the provisions of Decree 25 shall have to carry out procedures for issuance or renewal of telecoms licenses under the guidance of the MIC.

### ***Business cooperation is permitted for foreign investors***

Despite no further detailed guidance on the permitted capital contribution

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percentage for foreign investors prescribed in Vietnam's WTO Commitments (i.e. 49 percent of capital in facilities-based telecom service company and 65 percent in non facilities-based telecom service company since January 2010, i.e. three years after Vietnam's accession to WTO) is given, Article 4 of Decree 25 confirms that the foreign investors can invest and do business in telecoms services in form of foreign direct investment ("FDI") or foreign indirect investment ("FII") in accordance with the laws on telecoms and investment as well as relevant international treaties in which Vietnam is a member. In the case of FDI, foreign investors are allowed to conduct joint ventures or to do business on the basis of business cooperation contracts ("BCC") with enterprises established in Vietnam to provide non facilities-based telecoms services and to conduct joint ventures or to do BCC with telcos licensed for establishing telecoms network in Vietnam But to provide facilities-based telecoms services.

In addition to requirements of the laws on investment, foreign investment projects on telecoms service business must satisfy the following conditions: being consistent with national planning on telecoms development, planning on telecoms resources and planning on passive telecoms infrastructure in investment area, and meeting conditions on legal capital and committed investment levels.

### *Tightening management of telecoms subscribers*

Pursuant to Decree 25, when entering into subscription contracts, the telcos must be provided by subscribers with information such as full name, date of birth, number and issuance date and issuance place of identity card (for Vietnamese) or passport (for foreigners) in case of individual subscribers; name of organization, working address, number and date of establishment decision, date of business registration certificate, number of identity card or passport of the person who represents the subscriber to enter into the contracts for use of telecoms services in case of subscribers being organizations.

Decree 25 also clearly requires that registration places for information of telecoms subscribers must meet four conditions: (i) having identified transaction place; (ii) having enough equipment to store and transmit information of subscribers in accordance with regulations of the MIC; (iii) having transaction staffs drilled and trained by the telcos on processes of and procedures for registering information of subscribers; and (iv) other conditions as prescribed by the MIC.

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Besides, owners of the registration places for information of subscribers are responsible for storing registered information of subscribers in accordance with regulations of the MIC and providing competent State bodies with such information if requested.

The information of subscribers are completely confidential and used only for purposes of ensuring national security, social order and safety, serving the State management of telecoms, serving management activities of network operation business and supply of telecoms services of the telcos; and for other purposes prescribed by the MIC.

In fact, the regulations on registration of information of telecoms subscribers have been promulgated for quite some time but in such a long time, this management has not been implemented strictly, especially for prepaid mobile subscribers. Even after the final deadline for registration of prepaid mobile subscribers, i.e. December 31, 2009, up to now, no telcos dare to affirm that all the registered information are 100 percent accurate. With this Decree 25, the registration of prepaid subscribers in particular and the registration of telecoms services in general are expected to be gradually put into order.

### *Commercial right fees collected*

Pursuant to Article 30 of Decree 25, licensed telecoms and internet operators in Vietnam shall have to pay commercial right fees, in which:

- a) For enterprises licensed for establishing a public interest telecoms network, payment of such fee shall be annually made at a fixed rate, and the payment level shall be subject to type of telecoms network, extent and scale of the telecoms network, quantity and value of telecoms resources to be allocated for setting up the network, and use of space, ground surface, soil underground, river bed and sea bed to construct the passive telecoms technical infrastructure;
- b) For enterprises licensed for provision of public interest telecoms services, payment of such fee shall be annually made at certain percentage of turnover from telecoms, however the maximum ratio shall not exceed 1% of turnover from telecoms services but also must not lower than a fixed rate depending on services permitted for being supplied, quantity and value of telecoms resources to be allocated;
- c) For organizations licensed for establishing private telecoms

network, or testing telecoms networks and services, such fee shall be paid once at a fixed rate for the whole term of the license;

- d) For organizations licensed for installation of telecoms sea cabling, such fee shall be paid once at a fixed rate for the whole term of the license and for each entry of vessel to survey, install, repair and maintain the cable line.

*Principles on promotion of telecoms services, single-purpose telecoms goods*

Decree 25 re-confirms what is provided by Circular No.11/2010/TT-BTTTT, dated 14 May 2010, of the MoIC, providing for sale promotions for mobile phone services, that the telcos are not allowed to promote by way of reducing rates for telecoms services and prices of single-purpose telecoms goods with respect to the telecoms services and single-purpose telecoms goods having specific price prescribed by the State and reducing rates to less than minimum level with respect to the telecoms services and single-purpose telecoms goods having price bracket or minimum price prescribed by the State. The level of material value used to promote one unit of telecoms services or single-purpose telecoms goods must not exceed 50 percent of the price of one unit of such promoted telecoms service or single-purpose telecoms goods, except for cases of promotion trial, providing free services or goods, chance promotion programs, etc. Total time for implementation of promotion programs must not exceed 90 days per year and 45 days per program, except for lucky drawing or other chance promotion programs where the application term shall not exceed 180 days per year and 90 days per program.

*Conditions on suspension of carrying on business in telecoms services*

According to Article 16 of Decree 25, the telcos are allowed to cease to partly or wholly carry on business in telecoms services only when they ensure lawful rights and interests of services users under the signed contracts for use of telecoms services and inform the specialized administrative body for telecoms. Exceptionally, the telcos holding essential facilities, dominating the market, or providing public interest telecoms services must obtain written approval from the MIC to cease its related services. In case of ceasing to conduct the business but not terminating operations, the telcos must ensure to provide telecoms services users with the alternative telecoms services, or change the users into using respective telecoms services of other telcos, or negotiate compensation for the users. If the telcos' cease to conduct the business is due to the



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termination of their operations, their reorganization, bankruptcy or dissolution plans shall have to comprise security measures to maintain the supply of telecoms services for the users.

**Conclusion**

With the new and clearer provisions as provided, it is expected that Decree 25 will have considerable contributions to standardizing telecoms services, clarifying conditions for investment and business in telecoms and internet services, and guaranteeing users' rights and interests in Vietnam in the coming time.