



Special Alert

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Key Changes under the Vietnam's New Investment Law and Enterprise Law

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With a view to further improve the regulatory framework for investment and businesses, and to make Vietnam a more attractive investment destination, on 17 June 2020, the National Assembly of Vietnam has passed Law No. 61/2020/QH14 on Investment (the "**New Investment Law**") and Law No. 59/2020/QH14 on Enterprises (the "**New Enterprise Law**"), which both will come into effect on 1 January 2021 and respectively replace Law No. 67/2014/QH13 on Investment (the "**Current Investment Law**") and Law No. 68/2014/QH13 on Enterprises (the "**Current Enterprise Law**"). Some remarkable changes introduced under the New Investment Law and the New Enterprise Law are discussed below:

New Investment Law

1. Amended Definition of Business Investment

Under the Current Investment Law, the term "Business Investment" is defined as "*the expenditure of capital by an investor to conduct business activities via establishment of an economic organization; investment by capital contribution, purchase of a portion of capital contribution or shares in an economic organization, to conduct investment on the basis of a contract or implement an investment project*". In short, any activity of which the purpose is to implement an investment project will be regarded as a Business Investment. When the dispute arises in relation to such activities, subject to the agreement of the parties, it may fall under the jurisdiction of local or foreign arbitration institutions in accordance with Article 14 of the Current Investment Law.

This may not be the case under the New Investment Law as Business Investment now only comprises "*the expenditure of capital by an investor to conduct business activities*". Some argue that this change may somehow affect the jurisdiction of foreign arbitration institutions over foreign-related disputes in relation to Business Investment. In particular, the jurisdiction of foreign arbitration institutions will now be limited to disputes on Business Investment that involves the expenditure of capital only.

2. New Approach Introduced for Market Access Conditions

Under the New Investment Law, major investment conditions for foreign investors are separated into two groups, including:

- (a) Business investment conditions (the "**Business Investment Conditions**") which apply to any individual or entity (regardless of whether such entity is foreign invested or otherwise) engaging in certain conditional business lines included in a list regulated under an appendix of the New Investment Law (the "**List of Conditional Business Lines**"). Forms of Business Investment Conditions include requirements for obtaining (i) licenses, (ii) certificates, (iii) practicing / practitioner certificates, and (iv) confirmation letters and other statutory conditions to be met; and

- (b) Market access conditions (the “**Market Access Conditions**”) which foreign investors must satisfy to invest in certain restricted sectors. Sectors included with the Market Access Conditions will be included in a list to be issued by the Government (the “**List of Restricted Sectors**”). Market Access Conditions include (i) foreign ownership limits, (ii) statutory investment forms, (iii) scope of investment activities, and (iv) capacity of foreign investors and business partners participating in investment activities and other regulatory requirements.

With the List of Restricted Sectors, the New Investment Law provides a remarkable change by introducing a new approach for Market Access Conditions. This has been called the “negative-list” approach (*in Vietnamese: cách tiếp cận “chọn-bỏ”*). Particularly, for business sectors which are not included in the List of Restricted Sectors, the Market Access Conditions applicable to foreign investors are the same as those applicable to domestic investors.

While there has been some confusion under the Current Investment Law (and its guiding regulations) when determining whether foreign investment is fully allowed or otherwise restricted in specific sectors, this “negative-list” approach introduced by the New Investment Law demonstrates efforts made by local authorities that should help resolve the conflicting interpretations and create a consistent legal framework for market entry.

3. Update of the List of Conditional Business Lines

As compared to the list of conditional business lines in the Current Investment Law, the New Investment Law repeals 11 business lines, amends 19 business lines, and supplements 7 new business lines, in which:

- (a) Some business lines which are repealed include: commercial arbitration, franchising, debt trading services, logistics services, etc.; and
- (b) Business lines which are supplemented include: architectural services, data center services, electronic identification and authentication services, import press distribution services, fishing vessel registry, training crew members of fishing ships, and clean water services.

4. Debt Collection Service Banned

While some argue that legalizing debt collection services inadvertently created a loophole for several service providers to commit illegal activities that jeopardize public order and security, others take the view that it is still necessary for the market and must be subject to stricter conditions to be established and regulated by the authorities, and that it should not be prohibited. The Standing Committee of the National Assembly decided to submit both options (i.e. to prohibit or not to prohibit debt collection service) to the National Assembly.

After lengthy discussion, the National Assembly has added debt collection services to the list of sectors banned from investment and business with 90.27% of its members voting approving the decision.

5. Relaxation of Investment Conditions for Startups

Under the Current Investment Law, before establishing an economic organization (to be engaged in any sector), foreign investors must have an investment project and obtain an Investment Registration Certificate (“IRC”). Although this rule remains unchanged, an exception is made under the New Investment Law. Under the new law, a foreign investor, who incorporates a small and medium-sized startup innovative enterprise or an innovative startup investment fund, will not need to have an investment project, nor obtain an IRC.

With such a relaxation of investment conditions, this new regulation can be considered as a step in the right direction to attract foreign investment and facilitate the growth of innovative startups in Vietnam.

6. Change to Foreign Ownership Ratio Determining Foreign Investor Status

Under the Current Investment Law, an economic organization must satisfy the conditions and carry out investment procedures in accordance with the regulations applicable to foreign investors upon investment for establishment of an economic organization; investment in the form of capital contribution or acquisition of equity in an existing economic organization; or investment on the basis of a business cooperation contract, if:

- (a) 51% or more of its charter capital is held by a foreign investor(s), or a partnership has a majority of partners being foreign individuals in respect of economic organizations being a partnership;
- (b) 51% or more of its charter capital is held by an economic organization(s) prescribed in paragraph (a); or
- (c) 51% or more of its charter capital is held by a foreign investor(s) and an economic organization(s) prescribed in paragraph (a).

If capital contribution or acquisition of equity by an investor results in foreign invested status (i.e. results in 51% or more foreign ownership of the economic organization), an M&A Approval (as defined hereunder) must be obtained.

The New Investment Law reduces the foreign ownership ratio from “51% or more” to “more than 50%” for the purpose of being consistent with the provisions of controlling interest stipulated under the New Enterprise Law.

7. M&A Approval Requirement Clarified

Under the Current Investment Law, a foreign investor must obtain an approval (the “**M&A Approval**”) from the licensing authority before making capital contribution, or acquiring equity, in an existing economic organization where (a) such economic organization (target) operates in industries or business lines in which investment is conditional to foreign investors, or (b) capital contribution or equity acquisition results in 51% or more foreign ownership of the economic organization. However, there has been some confusion in terms of interpretation and implementation of this provision, mostly due to different legal points of view taken by the local licensing authorities in different provinces.

The New Investment Law regulates specific instances where M&A Approval is required. Those instances include:

- (a) An increase of foreign ownership in the (target) economic organization engaging in business lines listed in the List of Restricted Sectors;
- (b) An increase of foreign ownership in the (target) economic organization from less than or being equal to 50% to more than 50% of the charter capital;
- (c) An increase of foreign ownership in the (target) economic organization where foreign ownership of the charter capital is already exceeding 50% of the charter capital; or
- (d) The (target) economic organization is utilizing land located within areas having an effect on national security, such as sea-islands, borderlands and coastal areas, etc.

The New Investment Law thus removes the requirement for obtaining M&A Approval if the capital contribution or acquisition of equity does not result in an increase of foreign ownership ratio in the (target) economic organization.

8. Investment Policy Approval and Selection of Investors for Implementing Investment Projects

The New Investment Law introduces the mechanism for selection of investors for implementation of certain regulated investment projects / specific cases. In particular:

- (a) Investors will be selected via auction of land use rights for cases regulated under and in accordance with land laws;
- (b) Investors will be selected via bidding process for cases regulated under and in accordance with the bidding laws;
- (c) For cases subject to investment policy approval, investors may be selected directly by the competent authority, i.e., the National Assembly, the Prime Minister or the

Provincial People's Committee, without going through the process of auction of land use rights or bidding process, if:

- (i) The investors already have legitimate land use rights, except where the State retrieves the land use rights for auction purposes in accordance with land laws;
 - (ii) The investors acquire, rent the land use rights, receive land use rights contributed as capital, for implementing the project of investment for production and business and not subject to land acquisition by the State;
 - (iii) The investors implement project located in industrial park, high tech zone; and
 - (iv) The law does not require an auction of land use rights or bidding process to select investors.
- (d) For cases subject to both (i) the investment policy approval and (ii) either auction of land use rights or a bidding process for selection of the investor, the auction of land use rights or a bidding process will take place after the issuance of the investment policy approval.

It is contemplated that the Government will provide detailed regulations on this rule of selection of investors.

9. New Regulations on Investment Support and Incentive Regimes

Under the Current Investment Law, those projects with capital from VND6,000 billion of which at least VND6,000 billion is disbursed in the first three years, are entitled to investment incentives. Such projects, however, are subject to stricter conditions under the New Investment Law. They must have a minimum revenue of VND10,000 billion annually within three years after the first year of revenue generation or have more than 3,000 employees so as to be entitled to investment incentives.

Furthermore, the New Investment Law provides for additional sectors that will be subject to investment incentives, as well as supplement new regulations on application forms of investment incentives. Particularly:

- (a) New sectors which are considered as objects entitled to investment incentives include (i) social housing construction projects; (ii) projects using people with disabilities as employees; (iii) innovative startups projects and innovation centers; (iv) technology transfer projects with technologies in which transfers are encouraged in accordance with the Law on Technology Transfer, technology business incubators in

accordance with the law on high technology; and (v) investments in product supply-chains for small and medium-sized enterprises (SMEs); investments in technical facilities supporting SMEs, small and medium facilities for incubators; investments in working area(s) supporting innovative SMEs in accordance with the law on SMEs support; and

- (b) New investment incentives application forms are supplemented, including quick depreciation and increase of taxable income deduction.

The New Investment Law also stipulates an exceptional incentive regime for the following projects, which are considered as having significant socio-economic impacts:

- (a) Establishment of new R&D/innovation centers, or expansion of the existing R&D/innovation centers, with the total investment capital of at least VND6,000 billion; innovation centers aiming to support, facilitate innovative and entrepreneurial ecosystems on the basis of science and technology, contributing to innovation of growth models; and
- (b) Investment projects in business lines eligible for exceptional investment incentives having a total investment capital of at least VND30,000 billion, and at least VND10,000 billion being disbursed within three years.

With respect to these projects, the extraordinary incentives may not exceed 50% of the highest level of the incentive policy in accordance with the law. Similarly, the period for enjoying such incentives may not exceed 50% of the highest level of the period for enjoying investment incentives in accordance with the law nor exceed the project implementation period.

Notably, in cases where it is necessary to encourage the development of a particularly important investment project or special administrative - economic unit, the Government may submit to the National Assembly for decision on application of extraordinary incentives different from extraordinary incentives prescribed in this New Investment Law and the other applicable laws.

10. Amendments and Supplements of Project Termination

The New Investment Law further amends and supplements the cases where the operation of investment projects is terminated, including:

- (a) Cases of land acquisition by the State due to non-continuous use of land or due to delay in schedule of use of land in accordance with the land laws;
- (b) Cases where investors fail to pay or guarantee measures to pay escrow deposits as

security for performance of projects in respect of projects for which such deposit is required;

- (c) Cases where investors implement the investment projects on the basis of false civil transactions in accordance with the civil laws; and
- (d) Cases where an investor is forced to terminate the business investment activity as it jeopardizes national defense and security, social order and safety, social morals or the health of the community.

11. Nominee Arrangements May be Challenged

The New Investment Law enumerates instances where the operation of investment projects may be terminated by the licensing authorities. Notably, a new rule introduced under Article 48.2(e) of the New Investment Law provides that the investment licensing authority may terminate an investment project if the investor conducts the investment activities on the basis of “*false civil transactions in accordance with the civil laws*”.

To a certain extent, this new rule seems to be designed to limit the use of nominee arrangements, which have been viewed as a loophole in the current investment regime. A nominee arrangement is when foreign investors invest in prohibited or restricted sectors by using local nominees, or stand-ins, to be the signatory of the investment, thus obviating the need for seeking approval of a foreign investment. It remains unclear whether the definition of “false civil transactions” actually captures the nominee arrangements. While the Vietnamese Civil Code considers false transactions to be those that hide another transaction, usually illegal, the New Investment Law does not provide clearly whether it accepts that definition in its entirety or whether there is another definition it deems to constitute a “false civil transaction”. Given this, it is expected that further guidance will be provided by the Government. Until then, how the local authorities treat nominee arrangements remains uncertain.

New Enterprise Law

1. Amendments Regarding Corporate Seal

While the previous proposals to amend the Current Enterprise Law removed the requirement of the corporate seal, such a “removal provision” does not exist in the New Enterprise Law.

The New Enterprise Law also supplements the regulation on the use of digital signatures (in accordance with the laws on electronic transactions and digital signatures) as another form of corporate seal, along with the common seal. This may help facilitate and simplify online civil / commercial transactions among enterprises as well as administrative procedures with the State agencies.

2. Removal of Unnecessary Licensing Procedures

With respect to enterprise registration, the New Enterprise Law abolishes unnecessary administrative procedures, as compared to the Current Enterprise Law, including:

- (a) Procedures for notification of change on enterprise manager's information; and
- (b) Procedures for registration / notification of corporate seal samples before use.

3. Power of Legal Representatives

The New Enterprise Law requires that rights and obligations of each legal representative of a limited liability company (“**LLC**”) or a joint stock company / shareholding company (“**JSC**”) (if the company has more than one legal representative) must be clearly stipulated in the charter. If the rights and obligations of each legal representative are not clearly stipulated in the charter, all legal representatives will be considered to have full authority to act for and on behalf of the company with any third party, and will be jointly liable for damages caused to the company in accordance with the law.

4. Capital Transfer Transaction Payment Flow

Under the Current Enterprise Law, all payments for capital transfer transactions as well as the receipt of dividends by foreign investors must be made through capital accounts opened by the investors at banks in Vietnam, except for payments by assets. This current provision is not in line with the latest foreign exchange control regulation (Circular No. 06/2019/TT-NHNN of the State Bank of Vietnam dated 26 June 2019 guiding foreign exchange control for foreign direct investment (FDI) activities in Vietnam) as it allows payments for capital transfer transactions to be made between two offshore investors.

The New Enterprise Law merely requires that payments for capital transfer transactions be made in accordance with the FOREX regulations, except for payments by assets or other non-cash payments.

5. Adjustment and Further Guidance on Time-limits for Capital Contribution

The New Enterprise Law retains the requirement that charter capital must be contributed in full within 90 days from the date of issuance of the Enterprise Registration Certificate (“**ERC**”) of the company.

Further guidance is provided for the case of capital contribution to be made in-kind. For the cases of multiple member enterprises (i.e. LLCs and JSCs), the time for transportation, importation and other administrative procedures for the transfer of ownership of assets will not be included in the said 90-day limit. The New Enterprise Law remains silent on whether

such a provision is applicable to the case of a single member LLC.

With specific regards to the case of a multiple member LLC (“**MM-LLC**”), if the members fail to contribute in full to the charter capital, the time for carrying out the procedures for adjustment of the charter capital is reduced to 30 days (compared to 60 days under the Current Enterprise Law) from the last date on which the share of capital contribution is required to be fully paid.

6. Removal of Requirement for Inspector in a Single Member LLC Owned by an Organization

Under the Current Enterprise Law, an inspector is a mandatory position appointed and included in the corporate governance of a single member LLC (“**SM-LLC**”) owned by an organization. Under the New Enterprise Law, this position is no longer mandatory. Only State-owned enterprises (“**SOEs**”) incorporated as SM-LLCs must establish an Inspection Committee.

7. More Protection for Minority Shareholders in JSCs

The New Enterprise Law provides for improved protections for minority shareholders in JSCs as follows:

- (a) Any shareholder or group of shareholders holding at least 5% of the total ordinary shares, or a smaller percentage stipulated in the company’s charter, will have extra rights with regards to corporate governance, including the right to request the convening of a General Meeting of Shareholders (“**GMS**”) in certain specific circumstances, and the right to request the Inspection Committee to investigate issues relating to the management and administration of the company’s operation. Under the Current Enterprise Law, only a shareholder or a group of shareholders holding at least 10% of the total ordinary shares for a consecutive period of at least six months can make such a request; and
- (b) Any shareholder or group of shareholders holding at least 10% of the total ordinary shares, or a smaller percentage as stipulated in the company’s charter, will have the right to nominate candidates for election of members to the Board of Management / Board of Directors (the “**Board**”) and/or the Inspection Committee. Such shareholder or group of shareholders would not be required to hold such a percentage of shares for any particular period. The Current Enterprise Law requires the shareholder to have held his/her shares for a consecutive period of at least six months before exercising this nomination right.

8. Remarkable Changes to Corporate Governance in the JSC

Additional provisions of corporate governance in JSCs are introduced under the New Enterprise Law, including:

- (a) Extension of the scope of power of the GMS, including (i) decision on the budget or total remuneration, reward and other benefits for the Board and the Inspection Committee; (ii) approval of internal administrative regulations and operation regulations of the Board and the Inspection Committee; and (iii) approval of the list of independent auditing firms, appointment of a (specific) independent auditing firm to inspect the company's activities, and the dismissal of the independent auditors;
- (b) A resolution of the GMS that causes adverse changes to the rights and obligations of shareholders holding a specific type of preference shares shall only be passed if approved by either (i) the attending shareholders holding at least 75% of the total number of that type of preference shares, or (ii) in case of passing the resolution by way of collecting written opinions, by the shareholders holding at least 75% of the total number of that type of preference shares;
- (c) A more detailed regulation on the Audit Committee as a professional body of the Board, with the head of the Audit Committee being an independent Board member, which is responsible for overseeing the reliability of the company's financial statements and disclosures and effectiveness of the company's internal control and risk management systems, etc.;
- (d) The head of the Inspection Committee is only required to possess a university degree in finance, banking, accounting, audit or profession related to the company's activities (but is not required to be a professional auditor or professional accountant as currently stipulated by the Current Enterprise Law); and
- (e) Shareholders of JSCs are obliged to keep information provided by the company confidential, can only use such information to implement and protect their legitimate rights and interests, and must not disclose or provide such information to a third party.

9. Tightening Regulations on Private Placement of Corporate Bonds by Non-Public Companies

Under the current applicable regulations (Decree No. 163/2018/ND-CP of the Government dated 4 December 2018 on placement of enterprise bonds), both professional securities investors and non-professional securities investors may hold bonds issued under private bond placement.

The New Enterprise Law tightens the regulations on private placement of bonds by non-public companies (including both LLCs and JSCs) whereby non-public companies would only

be allowed to offer corporate bonds to:

- (a) Strategic investors, for private convertible bonds and warrant linked bonds; and
- (b) Professional securities investors (such as commercial banks and securities investment funds) for private convertible bonds, warrant linked bonds and other types of private bonds (e.g. non-convertible private bonds and non-warrant linked bonds).

Furthermore, a non-public company must satisfy the following requirements when issuing corporate bonds:

- (a) The company has made full payments of both principal and interest of the previously issued bonds or has fully paid all due debts for a period of three consecutive years prior to the company's decision on private bond placement (if any), unless the private bond placement is made by an innovative start-up enterprise or otherwise stipulated by the relevant laws;
- (b) The financial statements of the year preceding the year of the bond issuance have been audited by an auditor if the company has been established and operating for more than one year; and
- (c) Financial stability ratios and safety ratios for business operation must be ensured as prescribed under the applicable laws.

10. Introduction of the Non-voting Depository Receipts

For the first time, the regulation on non-voting depository receipts (the “**NVDRs**”) has been introduced. In particular, ordinary shares can be used as underlying assets to issue the NVDRs (so as to raise capital), and such ordinary shares shall be called the “underlying ordinary shares”. NVDRs have economic benefits and obligations corresponding to the underlying ordinary shares, except for voting rights. With this new regulation, the NVDRs may become an additional capital mobilization channel for JSCs in Vietnam.

It is contemplated that the Government will provide more detailed regulations on NVDRs.

11. Amended Definition of State-owned Enterprises

According to the Current Enterprise Law, only an enterprise in which the State holds 100% of the charter capital is defined as an SOE. Under the New Enterprise Law, an SOE is defined as an enterprise having more than 50% of the charter capital or voting shares held by the State. This seems to be a drawback, as this new rule would make more companies subjected to the SOEs related regulations if the State holds more than 50% of the charter capital or voting shares in the company.

It is expected that the new laws will ease the path forward for investors and enterprises in doing business and in protecting both foreign and domestic capital. If you have any questions regarding these new laws, please feel free to get in touch with your contact here at Indochine Counsel or contact us through our website at <https://www.indochinecounsel.com>.

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