Vietnam

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Law and policy

1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Oversight of foreign investment in Vietnam is generally based on three criteria: the type of industry, the geography and the amount of invested capital. Vietnam maintains a relatively complex oversight framework pursuant to which all foreign investments are subject to a review and approval process. There are comprehensive regulations prescribing the industry sectors in which foreign investment will be either encouraged, restricted or prohibited. In addition, there are regulations involving certain geographical areas where foreign investment is encouraged, as well as restrictions on the percentage of foreign shareholding that is permissible.

Foreign investment projects that fall into the list of 'encouraged' industry sectors (those that are expected to provide a national benefit, create many jobs or bring high-technology into the country) or that are in areas of socio-economic need may be entitled to various investment incentives in the form of a preferential corporate income tax rate, a corporate income tax exemption or reduction, an exemption from payment of or a reduction in land rent.

For foreign investment projects in restricted sectors (commonly known as conditional sectors) or where the investment is valued at more than 300 billion Vietnamese dongs, Vietnam may apply some form of foreign ownership limitation or require the project to undergo an evaluation procedure involving central authorities to guarantee national benefit. Any investment project that is detrimental to national defence and security and the public interest, or which is detrimental to historical relics, culture, ethics and Vietnamese traditional customs will be prohibited in Vietnam. In addition, certain specific limitations (including foreign ownership caps or requirements relating to the form of joint ventures), resulting from the transition provisions applicable to Vietnam's accession to the World Trade Organization (WTO), also apply (continuing in some cases with no time limit).

In addition, any foreign merger or acquisition that results in the relevant parties together holding between 30 per cent to 50 per cent of the market share in a defined 'relevant' market or markets must be approved by the Vietnam Competition Administration Department (the VCAD) at the Ministry of Industry and Trade (MOIT).

The remittance of investment capital and profit, the payment of loan interest or the conversion into foreign currency are subject to foreign exchange control legislation under the Ordinance on Foreign Exchange Control No. 28/2005/PL-UBTVQH11 dated 13 December 2005 as amended by Ordinance No. 06/2013/UBTVQH13 and its guiding regulations. According to regulations, foreign invested enterprises must open a direct investment capital account at an authorised bank in Vietnam for receipt of capital contributions and disbursement of capital, profit and other legal revenue of foreign investors. In addition, all transactions, payments, quotations, advertisements and pricings within the territory of Vietnam must be conducted in Vietnamese dongs, with some exceptions.

Resident economic organisations, credit institutions and individuals are allowed to borrow from abroad and must be responsible for loan repayment on their own. Borrowers must register medium and long-term loans with the State Bank of Vietnam (the SBV).

2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

There is no single law governing acquisitions and investments by foreign nationals in Vietnam on the basis of the national interest. The main laws and regulations governing these areas are:
- WTO commitments: Schedule of Specific Commitments in Services, which prescribes certain specific limitations, including ownership caps applicable to foreign investment in different service sectors;
- the Law on Investment No. 59/2005/QH11 dated 29 November 2005 and its implementing and guiding regulations (the LOI);
- the Law on Enterprises No. 60/2005/QH11 dated 29 November 2005 and its implementing and guiding regulations (the LOE);
- the Law on Securities No. 70/2006/QH11 dated 29 June 2006, as amended by Law No. 62/2010/QH12, and its implementing and guiding regulations (the LOS);
- Decision 88/2009/QD-TTg dated 18 June 2009 and its implementing and guiding regulations (Decision 88);
- the Law on Competition No. 27/2004/QH11 dated 3 December 2004 and its implementing and guiding regulations (the Law on Competition); and
- the aforementioned Ordinance on Foreign Exchange Control and its guiding regulations.

In addition, foreign investment in certain regulated sectors (in particular, the banking, financial services and insurance industries) will be subject to more specific regulations dealing with investment in these industries.

3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

WTO commitment

Although Vietnam agreed to open up most service sectors to foreign investment under its WTO commitments, not all service sectors are at present open to full foreign investment. As discussed in question 1, there are still some restrictions on foreign investment in certain service sectors including the permitted forms of investment, and the maximum amount of foreign ownership in a joint venture. Some of these restrictions continue in perpetuity.

Incidentally, all service sectors defined under the WTO commitments are, by definition, labelled 'conditional sectors' under Vietnamese law and are therefore subject to an evaluation procedure involving a cumbersome and time-consuming administrative process with both local authorities in relevant provinces and central authorities.

The service sectors that are open to foreign investment may be entered into by establishing a commercial presence through a business cooperation contract, a representative office, a joint venture or a 100 per cent foreign-invested enterprise. The ability to establish a Vietnamese branch by a foreign company is still limited, except in some sectors such as banking, legal services, franchising services and construction and related engineering services.

LOI and LOE

The LOI regulates investment activities, including the form of investment, the rights and obligations of investors, guarantees of the lawful rights and interests of investors, as well as state administration of investment activities in Vietnam.

The LOI and its guiding provisions, Decree 108/2006/ND-CP dated 22 September 2006 (Decree 108) provide a list of sectors in which investment by foreign investors is conditional (eg, production, publishing and distribution of cultural products, real estate business), and a list of sectors in which all investment is prohibited (ie, production and processing of drugs, investment in and commercial operation of secret investigation services violating the state interests, lawful rights and interests of organisations and individuals, prostitution business and trading of women and children).

The LOE provides a legal framework relating to the establishment, management, organisation and operation of the enterprises established in Vietnam.

In some specific sectors, foreign ownership is limited by certain caps. For example, there is an aggregate cap of 30 per cent, which is applicable to foreign investors acquiring shares in any Vietnamese bank. In addition, foreign investors are limited to holding only 49 per cent of a public company (ie, shareholding companies with at least 100 investors (excluding professional securities investors) and paid-up charter capital of 10 billion Vietnamese dongs or more)).

Sectors that incur special scrutiny include the banking industry (overseen by the SBV) and other conditional sectors as listed in Decree 108, including broadcasting and television, mining, real estate and education. These sectors are subject to the additional oversight of specific relevant ministries or agencies.

4 How is a foreign investor or foreign investment defined in the applicable law?

Under the LOI, a foreign investor is defined as any non-Vietnamese organisation or individual using capital in order to carry out an investment activity in Vietnam, and foreign investment is defined as the remittance of capital in monies and other lawful assets by a foreign investor into Vietnam in order to carry out an investment activity.

Further, a foreign investor is anyone who is not a Vietnamese national (for an individual), or that is not established in Vietnam (for an entity). However, for the purposes of an acquisition by a foreign investor of a stake in an existing Vietnamese enterprise, Decision 88 further stipulates that an entity established and operating in Vietnam with a capital contribution from foreign parties of more than 49 per cent is also regarded as a foreign investor.

The effects of being defined a foreign investor in Vietnam are twofold: certain business lines are only open to Vietnamese enterprises meaning that foreign invested entities may not engage such business lines; and foreign investors are subject to caps on ownership under Vietnamese laws and the WTO commitments.

5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

There are no special rules for investments made by foreign SOEs and SWFs under Vietnamese laws and Vietnamese law does not include any definitions of SOEs or SWFs in relation to foreign investment. Accordingly, when conducting investment activity in Vietnam, SOEs or SWFs must comply with the general rules applicable to all foreign investors.

6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

Vietnam does not have a specific procedure to review mergers or acquisitions on national interest grounds. All mergers and acquisitions will be reviewed in general by the local competent licensing authorities. National interest is only one of the issues for consideration.

The officials or bodies that have the authority to review mergers and acquisitions will depend on the location and the relevant investment sector. In general, the Provincial People's Committee where the company is located will often review these transactions. For projects located in industrial zones, this will often be the industrial zone's management authorities. However, for some regulated sectors, the local competent authorities may also require specific ministerial-level consent. In addition, if a merger or acquisition triggers monopolistic or antitrust concerns, the VCAD may become involved.

7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

In theory, the authorities do not have discretion to reject transactions on national interest grounds if all requirements of the law have been met or complied with. However, the concepts of national interest and national security are not well-defined under Vietnamese law. Therefore, in practice, the concept is rather nebulous and provides wide latitude for the authorities to apply their discretion in approving or rejecting transactions. The LOI sets out the principle that foreign investors will be permitted to invest in all sectors and in all industries and trades that are not prohibited by law. However, the review, consent and approval process is still, to a large extent, dependent on the discretion of the authorities. The grounds for approving or rejecting a foreign investment or acquisition are not clearly set out in the legislation or the guidelines, and the opportunities to challenge a decision of the authorities in relation to consent and approval are limited. For example, although retail activities have been fully open to foreign investment since January 2009 under the WTO commitments, in practice, the prior approval of the MOIT is still required by the local competent licensing authorities and it is still very time-consuming to obtain a licence to engage in the retail business. However, approvals with limitations imposed (including limited operational duration or business scope, or both) are far more common than outright rejections.

Procedure

8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Filing is mandatory for all foreign investments in Vietnam. Any foreign investments, whatever size or sector, will be subject to review by the competent authorities. However, the extent of review by the authorities is subject to some jurisdictional thresholds.

Jurisdictional thresholds apply in some special sectors stipulated in the WTO commitments and domestic laws. The LOI stipulates that foreign investments are subject to an evaluation procedure if the investment is in a conditional sector, or if the investment is for more than 300 billion Vietnamese dongs. Otherwise, the foreign investment simply needs to be registered with the proper authorities. For some special sectors, the WTO commitments stipulate a cap of foreign investment in a Vietnamese company. For example, for the banking sector, the total equity held by foreign institutions and individuals in any Vietnamese joint-stock commercial bank may not exceed 30 per cent of the bank's chartered capital. In addition, foreign ownership of public shareholding companies is limited to 49 per cent of the total number of shares.

If a foreign investor is proposing to invest in a Vietnamese company that is engaged in multiple business lines, including business lines for which the stipulated caps applicable to foreign investors are different, the foreign investor will be limited to the lowest percentage among those business lines.

9 What is the procedure for obtaining national interest clearance of transactions and other investments?

As noted in question 6, there is no separate national interest clearance procedure for transactions and other investments. Merger and acquisition transactions by foreign investors are subject to general approval from the licensing authorities.

Subject to the sector and the size of the foreign investment, the licensing authorities will require different documents for completion of the application, including, among other documentation:

- a request for issuance of investment certificate;
- a joint venture contract (in the case of a joint venture);
- the charter of the company;
- a list of members and shareholders;
- an economic and technical explanatory statement;
- a report on the financial capability of the investor;
- an explanatory statement on the ability to satisfy the required conditions;
- documentation relating to the investor (including, in particular, incorporation certificate, charter or articles of association);
- an identification document of the legal representative of the investor;
- an identification document of the authorised representative or representatives; and
- the lease agreement or letter of intent from a prospective landlord.

There are standard forms for the request for issuance or amendment of an investment certificate and the list of members or the authorised representative. For other corporate documents (ie, the charter or joint venture contract), there are certain clauses that are required by Vietnamese law but the parties may then negotiate the remaining terms as long as they comply with Vietnamese law generally. For the remaining documents, there are no standard forms.

No filing fee is required for approval from the licensing investment authorities.

10 Which party is responsible for securing approval?

In theory, all investors in a foreign-invested company resulting from a foreign investment are responsible for obtaining the approvals. In the case of a merger or acquisition, the investor and the target may allocate this responsibility among themselves or even to the target company.

11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

The statutory time limits for the review process are dependent upon the type of review required (ie, the amount of money invested and the relevant industry sector).

For foreign investment projects with investment capital of less than 300 billion Vietnamese dongs that are not in conditional sectors, the investment certificate should, in theory, be issued by the competent authority within 15 business days from receipt of a completed file from the investor.

For projects that exceed the 300 billion Vietnamese dongs investment capital threshold or involve a conditional sector (including, among others, sectors related to national defence; social and public order and security; banking and finance; culture, information and media; entertainment; real estate; education and training; and sectors mentioned in the WTO commitments), the projects must undergo an evaluation process and the issuance of an investment certificate is stipulated to take from 30 to 45 business days.

However, in practice, the approval from the authorities may take much longer than the timelines stipulated in Vietnamese law. The authorities may return applications citing insufficient documentation, or request additional documentation, meaning that a 'completed file' has not been received. In our experience, the issuance of an investment certificate may take several months or even a year.

For transactions subject to monopolistic or economic concentration review, the VCAD have 45 business days from the date of receipt of a complete file to provide a written response.

The registration process is much simpler than the evaluation process; however, it still may take more than prescribed 15 business days due to additional requests for documentation or inconsistencies in documentation.

The most important factor in determining the length of the review process is the industry sector. Investment in sensitive sectors will trigger greater scrutiny from the authorities. The licensing authorities may also consult the relevant branches or ministries for their opinions, which can result in further delays.

There are no exemptions, expedited or fast-track options provided for under Vietnamese law.

12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Approval by the Vietnamese authorities (ie, issuance of the investment certificate or amendments to the business registration certificate) must be granted before the transaction can be completed. Approval, however, is dependent upon, among other things, evidence that the transaction has been completed. In practice, a letter from the parties stating that the transaction is completed may in some cases be considered by the relevant licensing authority as sufficient proof. This vague requirement leads to arbitrary interpretations from the licensing authorities. In addition, a requirement to complete payment of an acquisition price before issuance or reissuance of the licence is not in line with international practice and results in cumbersome, elaborate structuring for simple transactions. It also limits the possibility of post-closing price adjustment mechanisms, which are increasingly sought by both parties to transactions.

There is no penalty if the parties move to implement the transaction prior to receiving approval from the Vietnamese authorities. However, if the authorities do not approve a transaction, any actions taken by the parties will be invalid.

For economic concentration reviews, the parties must notify the VCAD and may only proceed with the competent licensing authorities following approval from the VCAD. Failure to notify the VCAD may result in a fine of between 1 to 3 per cent of the total revenue in the financial year prior to the year in which the breach was committed.

13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Vietnamese law is silent on the rules for meeting prior to a filing being made. In practice, parties may liaise with the authorities to obtain their guidance, officially or unofficially, prior to a filing being made.

However, guidance obtained from the authorities through pre-filing dialogues, meetings or phone calls is unofficial and non-binding. Official and binding guidance may be obtained by submitting questions and requests in writing to the relevant authorities. However, there is no deadline by which the authorities must respond, and prompt replies are quite rare.

14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

It is not common practice for a foreign investor to involve government relations, public affairs, lobbying or other specialists to assist in the review and approval process. However, good relations with the reviewing or consulting authorities through Vietnamese partners (if any) could potentially ease the process.

There is no special rule or procedure to facilitate or expedite clearance under Vietnamese law.

15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?

The authorities only have the power to review, challenge or unwind a transaction that has been approved and revoke the investment certificate or business registration certificate if the investment certificate or business registration certificate contains false information, or if the business was allowed to operate in a line of business that is prohibited.

Substantive assessment

16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive tests are whether the transaction complies with the relevant master planning of the country, land use requirements, the project implementation schedule, environmental issues and any other conditions that the project must satisfy.

For some sensitive sectors, the state establishes some additional conditions to guarantee a national benefit. For example, for investment projects in retail services, an enterprise with foreign-owned capital wanting to establish a second retail sales outlet must pass the 'economic needs test' (ENT). The criteria for the ENT remain ambiguous and in most of the cases subject to the relevant authorities' discretion.

17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

There is no legal framework or obligation on the part of Vietnamese authorities to consult or cooperate with officials from other countries during the substantive assessment of an investment project. Vietnamese officials may nevertheless solicit the opinions of representatives of countries that may have an interest in a certain transaction.

18 What other parties may become involved in the review process? What rights and standing do complainants have?

Officially, only relevant local or central government agencies may be consulted by the competent licensing authorities in the investment approval process.

Third parties may become involved in the review process through the Law on Competition. As with most countries, Vietnam has anti-trust laws to ensure that monopolies do not dominate any sector of the economy. The Law on Competition prohibits any economic concentration that results in the companies involved in such transaction having a market share of more than 50 per cent in the relevant market (exemptions are allowed for certain specific cases).

In addition, the VCAD must be notified of any economic concentration that results in a combined market share of between 30 and 50 per cent of the relevant market. The VCAD must grant approval in writing of the proposed economic concentration before it can proceed.

Parties that believe their legal rights and interests have been infringed under the Law on Competition may file a complaint with the relevant authorities.

The major issue that arises with these requirements under the Law on Competition is that, while defined in the law, the terms 'relevant market' and 'market share' are rather elastic and may be expanded and narrowed as circumstances require.

19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?

In principle, the Vietnamese authorities do not have the right to prohibit or otherwise interfere with a transaction if it satisfies all conditions required for an investment certificate. In practice, due to unclear and inconsistent regulations, the authorities have a wide discretion to require extra documentation or consultation from various government agencies, which may lead to lengthy delays in the approval process.

20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?

Since there is a recognised procedure for the approval of investment projects, the provision of undertakings will not remedy the authorities' objections to a project. If an applicant, however, believes that there is a misunderstanding, or additional helpful information that would help the authorities in their decision making process, these may be submitted to help persuade the authorities to approve the project.

21 Can a negative decision be challenged?

Under the LOI, an applicant for foreign investment approval will have the right to file an administrative complaint against a rejection by the licensing authority. If a decision on resolution of the complaint from the licensing authority is not satisfactory, the applicant may institute an administrative proceeding against the relevant licensing authority. However, in practice, the opportunities to challenge a negative decision are limited as any negative decision would be based on the consulting opinions from relevant local and ministerial bodies.

22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Unlike some Vietnamese laws that contain specific provisions regarding confidentiality, the investment laws and regulations do not contain any specific confidentiality provisions for investment applications.

Update and trends

The newly released Decree 01/2014/ND-CP on the purchase by foreign investors of shareholdings in Vietnamese credit institutions dated 3 January 2014 (Decree 01), which will come into force on 20 February 2014, allows modest increases in foreign ownership in Vietnamese credit institutions. A strategic foreign investor may now hold up to 20 per cent in a Vietnamese credit institution without prior approval and may own an amount in excess of that cap with special approval from the prime minister on a case-by-case basis where the credit institution is in difficulty or in order to ensure the safety of the banking system. Decree 01 loosens the foreign ownership limits in credit institutions but still falls far short of the hopes of foreign investors in the financial institutions sector.

Following this trend, it is understood that Decision 55/2009/QD-TTg on percentage participation of foreign investors in the securities market of Vietnam, dated 15 April 2009, will soon be amended, raising the new cap on voting shares owned by foreign entities in listed companies from 49 per cent to 60 per cent. Once the draft is adopted, it is likely that numerous transactions will be made in relation to profitable listed joint stock companies, in which the foreign ownership has already reached the current limit. The draft is also understood to allow foreign investors to buy non-voting shares above that 60 per cent limit.

Notwithstanding the fact that there is no specific confidentiality provision pertaining to the licensing authorities, there is a general provision under the Vietnamese Civil Code that provides for compensation to be paid if there is any damage caused by a civil servant in the performance of their duties. Investors who have suffered damage as a result of the dissemination of information in the licensing process and have sufficient proof or evidence may be entitled to file a claim, under these provisions, against the relevant authorities.

Recent cases

23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Case 1

Limits of foreign ownership in the Vietnamese securities market

Under applicable law, foreign ownership is limited to 49 per cent of the total number of issued shares of a public shareholding company. This limitation is a significant barrier to raising foreign capital by public companies in general and listed companies; in particular, by limiting their ability to develop their business. Therefore, public companies must find alternative means to access capital in order to grow their business. In a recent case, the general meeting of shareholders of a local Vietnamese aquatic processing company passed a resolution approving the delisting of the company even though the company's financial statements recorded profits in the nine months preceding the delisting, which was followed by a resolution of the board of management approving the deregistration of the company. At the time of delisting, the foreign shareholder of the company held 48.89 per cent of the charter capital of the company and the company had planned to purchase shares held by minority shareholders. It is likely that the delisting and the deregistration were initial steps taken to allow for the increase of foreign ownership in the company, which would otherwise have exceeded the cap of 49 per cent.

Case 2

Investment approval procedures

Recently, a North American company applied for an investment certificate for a business dealing in the manufacturing and installation of water pipes. All required documents and forms under the relevant laws were submitted to the licensing authority in the fourth quarter of 2013. During the approval process, it was requested several times that the business lines be amended due to different interpretations of the description of central product classification. The foreign investor was also required to prove financial capacity for the loan capital (according to the law, an investor is required to provide documents evidencing the investor's capacity to fully contribute the charter capital but not to prove financial capability for the loan capital). The authorities explained that the investor needed to prove its capacity for loan capital to ensure the steady development and operation of the future company even though this is not compulsory under the law. Although, in accordance with the law, it should normally take 30 to 45 business days to obtain an investment certificate, in this case the investment certificate had been issued after four months and the reason for such a delay was not explained.

Case 3

Power of competent authorities

In another case, a joint venture between a Vietnamese investor and a foreign investor was rejected by the licensing authority due to the claim from a former employee of the foreign investor that the incorporation documents of the foreign investor were falsified and asking for a delay of the issuance of the certificate. The incorporation documents had been duly legalised by competent authorities. In the absence of explicit guidance, the licensing authorities have the discretion on whether to grant an investment certificate and it is difficult for investors to challenge a negative decision.

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