

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 relevant to certain geographical areas where foreign investment is encouraged, as well as regulations with regard to restrictions on the percentage of foreign shareholding that is permissible.

Foreign investment projects that are in 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 dong, 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. In some cases there is no time limit to these limitations.

A new Law on Investment No. 67/2014/QH13 (New Law on Investment) and a new Law on Enterprises No. 68/2014/QH13 (New Law on Enterprises) adopted on 26 November 2014 by the National Assembly of Vietnam are expected to bring several significant changes to the legal framework. The New Law on Investment and the New Law on Enterprises will take effect from 1 July 2015 and will replace the current laws. To anticipate the application of the New Law on Investment and the New Law on Enterprises, reference to these new laws will be included where relevant. Particularly of interest is that, with regard to the licensing procedure, the New Law on Investment no longer mentions an evaluation procedure and provides for a single registration process. However, the New Law on Investment requires certain investment projects to undergo a procedure for obtaining an 'in principle' approval from the competent state authorities prior to licensing to guarantee national benefit, such as:

- the National Assembly in respect of projects having great effect or serious environmental impact (including nuclear power plant projects, projects with a requirement for relocation and resettlement of 20,000 people or more in mountainous areas or 50,000 people or more in other areas and projects with a requirement for conversion of land use purpose for wet rice cultivation on two harvests relating to an area of 500 hectares or more);

- the Prime Minister in respect of projects with a requirement for relocation and resettlement of 10,000 people or more in mountainous areas and 20,000 people in other areas, airport projects, seaport projects, projects of exploration, production and processing of petroleum, projects that include a casino business, projects for the production of cigarettes, projects of construction of golf courses, projects with total investment capital of 5,000 billion Vietnamese dong or more and projects of foreign investors in sea transportation, telecommunications with network infrastructure, afforestation, publication, press; and
- the People's Committees on a provincial level in respect of projects to which the state allocates or leases out land without tendering, auction or transfer and projects using technology belonging to the list of technology restricted for transfer.

In addition, any foreign merger or acquisition that results in the relevant parties together holding between 30 and 50 per cent of the market share in a defined 'relevant' market or markets must be approved by the Vietnam Competition Administration Department (VCAD) of 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 documents. According to these 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 pricing within the territory of Vietnam must be conducted in Vietnamese dong, with some exceptions. The New Law on Enterprises now requires that all activities of share purchase and sale, capital contribution assignment, receipt of distributed dividends and profit by a foreign investor must be conducted via a capital account of a foreign investor opened at a bank in Vietnam.

Vietnam-based resident economic organisations, credit institutions and individuals are allowed to borrow from abroad and are responsible for loan repayment on their own. Borrowers must register medium and long-term loans with the State Bank of Vietnam (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 (Law on Investment) (to be replaced by the New Law on Investment from 1 July 2015);
- the Law on Enterprises No. 60/2005/QH11 dated 29 November 2005 and its implementing and guiding regulations (Law on Enterprises) (to be replaced by the New Law on Enterprises from 1 July 2015);

- 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 documents (Law on Securities);
- Decision 88/2009/QĐ-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 documents (Law on Competition); and
- 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 documents.

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 commitments

Although Vietnam agreed to open up most service sectors to foreign investment under its WTO commitments, not all services 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. These service sectors are still in a list of conditional business activities under the New Law on Investment. As discussed in question 1, the New Law on Investment no longer refers to evaluation procedure and provides for a single registration process. However, investment projects of foreign investors in a number of service sectors, including sea transportation, telecommunications with network infrastructure, afforestation, publication and press, are subject to 'in principle' approval from the Prime Minister prior to licensing.

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.

Law on Investment and Law on Enterprises

The Law on Investment 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 Law on Investment and its guiding documents, such as 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 New Law on Investment provides a comprehensive list of 267 conditional business activities applicable to both foreign and domestic investors. This is an improvement in two aspects, first because the number has decreased from 386 to 267 and second because, at present, the activities are set out in different legal documents and are now in the appendix to the law. In addition to this, the New Law on Investment reduces the list of activities in which investment is prohibited to only six instead of 12 (ie, business in drugs, business in certain types of chemicals or minerals, business in certain specimens of wild fauna or flora, prostitution business, trading of humans and asexual reproduction).

The Law on Enterprises 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, 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 dong 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 Law on Investment, 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 in such business lines. It also means that foreign investors are subject to caps on ownership under Vietnamese laws and the WTO commitments.

The New Law on Investment provides a new definition of a foreign investor. A foreign investor is defined as an individual with a foreign nationality or an organisation established in accordance with a foreign law conducting business activities in Vietnam. The New Law on Investment no longer contains a definition of foreign investment but, instead, introduces the new term of 'business investment'. This term means:

- the expenditure of capital by an investor to conduct business activities via establishment of an economic organisation;
- investment by capital contribution, acquisition of capital contribution or shares in an economic organisation;
- investment on the basis of a contract; or
- implementation of an investment project.

The New Law on Investment requires the following entities (Foreign Controlled Entities) to satisfy the conditions and carry out investment procedures applicable to foreign investors upon investment in any form mentioned before:

- with 51 per cent or more of its charter capital held by a foreign investor or a partnership that has a majority of partners being foreign individuals;
- with 51 per cent or more of its charter capital held by an entity as specified in (i); and
- with 51 per cent or more of its charter capital collectively held by a foreign investor and an entity specified in (i).

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 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 established 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.

Under the New Law on Investment, in the case of an acquisition by a foreign investor of 51 per cent or more of the shares or equity in a company or acquisition by a foreign investor of shares or equity in a company that operates within a conditional business sector or sectors, the local Department of Planning and Investment (DPI) where the company is located will conduct a review upon the registration by a foreign investor before conducting such acquisition. However, in the case of an acquisition by a foreign investor of an interest of less than 51 per cent of the shares in a company that does not operate within a conditional business sector or sectors, the foreign investor can carry out the procedure for a change of shareholder or member structure quite easily. There is no registration formality and no review by the DPI.

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 a transaction on national interest grounds if all legal requirements 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 ample latitude for the authorities to apply their discretion in approving or rejecting a transaction. The Law on Investment 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 still depends, to a large extent, 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 under the WTO commitments retail activities have been fully open to foreign investment since January 2009, in practice, the prior approval of the MOIT is still required by the local competent licensing authority and it is still very time-consuming to obtain a licence to engage in the retail business. However, it is worth mentioning that 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 investment, 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 specific sectors stipulated in the WTO commitments and domestic laws. The Law on Investment 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 dong. Otherwise, the foreign investment simply needs to be registered with the proper authorities. For some specific 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.

Under the New Law on Investment, filing is only mandatory for investment projects of foreign investors and of Foreign Controlled Entities. The New Law on Investment no longer contains an evaluation procedure and threshold. The foreign investment is simply registered with the proper authorities. However, as discussed in question 1, the New Law on Investment requires certain investment projects to undergo a procedure of obtaining an 'in principle' approval from the National Assembly, the Prime Minister or the Provincial People's Committee prior to licensing.

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 (an investment certificate contains both business registration information and information about the investment project and also serves as an enterprise registration certificate for a foreign invested company);
- 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, such as the charter or joint venture contract, there are certain clauses that need to be included, as required by Vietnamese law, but the remaining terms can be freely negotiated by the parties as long as they comply with Vietnamese law in general. For the remaining documents, there are no standard forms.

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

As noted in question 6, under the New Law on Investment, an acquisition by a foreign investor of 51 per cent or more of shares or equity in a company or acquisition by a foreign investor of shares in a company that operates within a conditional business sector or sectors is subject to review by the DPI. The file for registration includes:

- a written registration; and
- the incorporation certificate of the investor.

For a new foreign investment, the New Law on Investment separately lists the documents required for the application for an investment registration certificate (which contains only registration information of the investment project). The New Law on Enterprises lists the documents required for the application for an enterprise registration certificate of a foreign-invested company.

10 Which party is responsible for securing approval?

In theory, all investors in a foreign-invested company formed from foreign investment are responsible for obtaining the approvals. In the case of a merger or an acquisition, the investor and the target may allocate this responsibility among themselves or even allocate 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 limit for the review process depends on 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 dong 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 dong 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 that there is 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 has 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, however, the industry sector. Investment in a sensitive sector will trigger greater scrutiny from the authorities. The licensing authority 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.

As for a new foreign investment, the New Law on Investment sets out a timeline of 15 days for issuance of an investment registration certificate with respect to an investment project of a foreign investor and of Foreign Controlled Entities.

With respect to an investment project in the category that requires an 'in principle' approval from the competent authority prior to licensing, an investment registration certificate will be issued upon approval from the competent authority. For projects subject to approval by the National Assembly, it is stipulated that these will take more than 98 days, which also depends on the session schedule of the National Assembly. For projects subject to approval by the Prime Minister and the Provincial People's Committee, it is stipulated that these will take more than 45 and 37 days respectively.

The New Law on Enterprises set out a timeline of three working days for issuance of an enterprise registration certificate.

For an acquisition by a foreign investor of 51 per cent or more of shares or equity in a company or an acquisition by a foreign investor of shares or equity in a company that operates within a conditional business sector or sectors, the DPI has 15 days from the date of receipt of a complete file to provide a written response.

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 depends on, 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 as sufficient proof by the relevant licensing authority. Because this requirement is rather vague it leads to arbitrary interpretations from the licensing authorities. In addition, a requirement to complete payment of the acquisition price before issuance or reissuance of the licence is not in line with international practice and results in a cumbersome and elaborate process for simple transactions. It also limits the possibility of post-closing price adjustment mechanisms, which are increasingly sought by both parties to transactions.

Under the New Law on Investment, for an acquisition by a foreign investor of 51 per cent or more of shares or equity in a company or an

acquisition by a foreign investor of shares or equity in a company that operates within conditional business sectors, the investor must register with the DPI and may only proceed with procedure for a change of shareholder or member structure following the written response from the DPI.

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 and 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 informal or formal guidance, as well as pre-filing dialogue or meetings, 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, but 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 consist of whether the transaction complies with the relevant master plan 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 has established some additional conditions to guarantee a national benefit. For example, for investment projects in retail services, an enterprise with foreign-owned capital willing to establish a second retail sales outlet must pass the 'economic needs test' (ENT). The criteria for the ENT are ambiguous and in most of the cases subject to random discretion of the relevant authorities.

The New Law on Investment sets out substantive tests for a transaction that requires an 'in principle' approval from the competent authorities prior to licensing. The substantive tests consist of whether the transaction satisfies investment conditions related to foreign investors and complies with master plan of the country, land use requirements, impact and socio-technical efficiency of the project and technology used in the investment project.

Update and trends

In an endeavour to facilitate foreign investment in Vietnam, the National Assembly passed the New Law on Investment and the New Law on Enterprises on 26 November 2014. Both laws will take effect on 1 July 2015.

The New Law on Investment brings numerous new provisions in an attempt to create a transparent investment environment in Vietnam. Under this New Law on Investment, an enterprise with less than 51 per cent foreign-owned capital will be treated as a 'domestic investor' and is not required to obtain an investment registration certificate before conducting investment activities. A foreign investor needs to obtain approval from the local licensing authority only where it plans to acquire of 51 per cent or more of equity in a company or acquire equity in a company operating in a conditional business sector or sectors. Any acquisition by a foreign investor of equity below such a threshold in a company that does not operate within a conditional business sector or sectors is not subject to any approval from the local licensing authority.

The New Law on Enterprises contains a number of provisions that are considered as being closer to the corporate law of developed

jurisdictions. Remarkably, the New Law on Enterprises loosens the regulations on corporate governance of a shareholding company, including lowering the quorum for convening a meeting (51 per cent for the first convening and 33 per cent for the second one, instead of 65 per cent and 51 per cent respectively as provided in the current law) and lowering the voting percentages for passing a resolution of the general meeting of shareholders (65 per cent for material issues and 51 per cent for other issues, being reduced from 75 per cent and 65 per cent respectively) as well as allowing the shareholders of a shareholding company to decide whether a company will have a supervisory board (which is compulsory for a shareholding company having more than 11 shareholders or with the institutional shareholders owning more than 50 per cent of the total shares of the company under current regulations) in its organisational and management structure. However, the New Law on Enterprises tightens the regulation on the time limit for capital contribution by the members and owners of limited liability companies. The currently applied time limit of three years is shortened to 90 days.

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 the 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. Note that 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 the transaction 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 broadened and narrowed arbitrarily.

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 an ample and broad 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, relevant information may be submitted to help persuade the authorities to approve the project.

21 Can a negative decision be challenged?

Under Vietnamese law, 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 the complaint 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 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.

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. An investor who has suffered damage as a result of the dissemination of information in the licensing process and has sufficient proof may be entitled, under these provisions, to file a claim 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

Effect of sector-specific regulations

Under the WTO commitments, a foreign investor is, from 11 January 2014, allowed to set up a wholly foreign-owned company to provide freight transport agency services. In January 2014, an American company submitted an application dossier for the establishment of a wholly foreign-owned subsidiary to carry out freight transport agency services and some other logistic services. However, so far, the company has not been granted an investment certificate. The licensing authority explained that there is an inconsistency with the sector-specific regulation on this point. This regulation sets out that, with respect to freight transport agency services, a foreign investor is only allowed to set up a joint venture with a Vietnamese partner with no limit on capital contribution of the foreign investor from 2014. The application dossier is still pending because the licensing authority is waiting for the guideline from the government. In the middle of 2014, it was known that the relevant local People's Committee had instructed all relevant departments and state bodies to stop examining application dossiers and granting investment certificates to foreign investors requesting an establishment of wholly foreign-owned subsidiary in the logistic services sector.

Case 2***Investment approval procedures***

Recently, a European company entered into a transaction to acquire shares from all shareholders of a domestic company operating in the agriculture field. The target company has been established since 2007. In August 2014, all required documents and forms under the relevant laws were submitted to the licensing authority to apply for the issuance of a new investment certificate for the target company reflecting the European company as the sole owner of the target company. After receipt of the application dossier, the licensing authority sent many official letters to different ministries and departments, including state bodies irrelevant to the licensing process, like the tax department, the social insurance department and the customs department, to collect their opinions on the issuance of an investment certificate for the target company. Although in accordance with the law it should normally take 30 to 45 business days to obtain an investment certificate, this application has been pending for almost six months.

Case 3***Power of competent authorities***

In a recent acquisition of a 70 per cent stake in a domestic company located in a Southern province by a Singaporean company, the licensing authority only requested the target to apply for an amendment to the enterprise registration certificate (ERC) and the investment certificate (IC) remained unchanged. The target holds the ERC containing a wide range of business lines and the IC only relates to its core business line. The applied procedure is simple and different from the practice in other provinces where the target is often required to apply for an amendment to the IC as well as to reflect all corresponding business lines in the ERC of the target company. The arbitrary interpretation and application of the law by different local licensing authorities is one of the main hurdles for foreign investment in Vietnam.

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