

## Some New Key Points of the New Vietnam Investment Law 2020

The National Assembly of Vietnam passed a new Investment Law on 17 June 2020 which will become effective on 1 January 2021 (**LOI 2020**) and replace the current Investment Law 2014 (**LOI 2014**). In this post, we briefly discuss some new key points of LOI 2020.

### 1. Market entry conditions and a potential “negative list” for foreign investors

1.1. For the first time, the LOI 2020 distinguishes between (1) market entry conditions which apply to foreign investors or Deemed Foreign Investors (defined below), and (2) investment conditions which apply to all investors. Regarding market entry conditions, under the LOI 2020, foreign investors are entitled to the same market entry conditions as applicable to domestic investors except for the areas which are subject to market entry conditions and are to be published by the Government (**Market Entry List**). This “negative list” approach is one of the applaudable changes in LOI 2020 and is similar to the approach that Vietnam adopts when it signed the CPTPP in 2018 (see [here](#)). The catch, however, is when and how the Government will publish the negative list promised under the LOI 2020.

1.2. The new approach, if implemented correctly, could save time for both foreign investors and licensing authorities in determining and appraising investment proposals and applications for registration of merger and acquisition activities (**M&A Approvals**). That said, it is not easy for the Government to review all treaties, laws, and regulations to produce an exhaustive and complicated Market Entry Lists applicable to foreign investors from all jurisdictions who may have different treatment levels under relevant bilateral treaties and/or multilateral treaties. Currently, the Ministry of Planning and Investment has published a consolidated list of investment conditions applicable to foreign investors in Vietnam (see [here](#)). If the Market Entry List is similar to the list published by the MPI, then it could be difficult to determine what belongs to the Market Entry List and what does not.

1.3. Moreover, there is no deadline for the Government to issue the Market Entry List. Until the Government produces a clear Market Entry List, the licensing authorities would still keep their practice of seeking opinions from relevant authorities if foreign investors propose investments in business lines that are not clearly opened to foreign investors under the WTO Commitments on Services of Vietnam. In practice, the application of bilateral treaties and multilateral treaties like CPTPP is not straight-forward procedures.

### 2. New encouraged business sectors and projects with special investment

**supports**

2.1. The LOI 2020 includes the following new business sectors and projects, which are encouraged for investment or are entitled investment incentives:

- (i) college education;
- (ii) manufacturing medical equipment and all pharmaceutical products (previously the LOI 2014 only encourage investment in certain pharmaceutical products);
- (iii) manufacturing products in supporting industries which falls within the list of development encouragement as provided in Decree 111 of the Government dated 03 November 2015;
- (iv) manufacturing products goods, providing services which create or participate in the value chain, associated industry (*sản xuất hàng hóa, cung cấp dịch vụ tạo ra hoặc tham gia chuỗi giá trị, cụm liên kết ngành*);
- (v) social housing project;
- (vi) innovative start-up project (*khởi nghiệp sáng tạo*);
- (vii) research and development centers;
- (viii) small and medium business incubators; and
- (ix) co-working space for small and medium businesses.

2.2. Under the LOI 2020, the Government can decide to apply special incentives and investment support to encourage projects which have material impacts on the development of economy and society falling within the following types:

- (i) investment project of establishing innovative centers, research and development centers with the total investment capital of VND 3,000 billion or more and disbursing at least VND 1,000 billion within 3 years since the issuance date of relevant IRC or in-principle approval;
- (ii) investment project of establishing the national innovative center under a decision of the Prime Minister;
- (iii) investment project falling within the sectors which are especially encouraged and have the total investment capital of VND 30,000 billion or more, and disburse at least VND 10,000 billion within 3 years since the issuance date of relevant IRC or in-principle approval.

2.3. That said, the LOI 2020 expressly excludes the following cases from the application of special incentives and investment support:

- (i) mining projects;
- (ii) manufacturing, trading of goods/services which are subject to special consumption tax (except manufacturing of car, plane, or boat);
- (iii) commercial housing projects; and
- (iv) projects having IRCs or in-principle approvals issued before 1 January 2020.

### **3. 50% (instead of 51%) Foreign Ownership for Deemed Foreign Investors**

3.1. A Vietnam economic organization (**Vietnam EO**) must satisfy the investment conditions and comply with investment procedures applicable to a foreign investor (such Vietnam EO, a **Deemed Foreign Investor**) when participating in the incorporation of another Vietnam EO, acquiring an ownership interest in an existing Vietnam EO, or investing in form of business cooperation contract *if more than 50%* of charter capital of the first-mentioned Vietnam EO is held by:

- (i) foreign investors (in that case, the Vietnam EO is considered as a **50% Top-level FIEs**); or
- (ii) 50% Top-level FIEs; or
- (iii) foreign investors and 50% Top-level FIEs.

3.2. The foreign ownership threshold in a Deemed Foreign Investor is reduced from 51% under LOI 2014 to more than 50% of the charter capital. Therefore, for a Deemed Foreign Investor, where foreign investors hold controlling shares (more than 50%) but less than 51% under LOI 2014, the following issues need to be further clarified:

- (a) whether the existing investments of a Deemed Foreign Investor under LOI 2020 (a) could continue to be regarded as an investment by Vietnamese investors (as it is under LOI 2014) or (b) must satisfy the conditions applicable to a foreign investor given the change of status of the Vietnam EO from a local investor into the Deemed Foreign Investors under LOI 2020; and
- (b) in the latter case, it is not clear what procedures the Deemed Foreign Investors must comply with.

### **4. National Security and Defence Conditions**

4.1. Under LOI 2020, an investors' investment project and business activities will be suspended, postponed, terminated if such activities cause damage, or could cause damage to national defence, or national security. It is not clear if an investor has no fault in causing the damages to national defence, or national security, then whether the investor could be compensated for forced suspension or termination of their legitimate investment and business activities. This is a valid question for many investors given the territorial dispute between Vietnam and China in the Bien Dong Sea (East Sea). The Petroleum Law provides that if petroleum operations are restricted for reasons of national defence, or national security, then the Government of Vietnam will compensate for any damages to investors resulting from such restriction.

4.2. Moreover, besides the market entry conditions, the following conditions must be satisfied by a foreign investor or a Deemed Foreign Investor if they want to purchase/subscribe shares or equity capital in a Vietnam EO (**Acquisition**):

- (i) ensuring the national defence and security in accordance with LOI 2020; and
- (ii) satisfying regulations of land law on conditions to receive land use rights of land lots located in islands, border areas, coastal areas.

In addition, an Acquisition of a Vietnam EO, which holds land use rights in the border area or the coastal area will be subject to an M&A Approval. These national security and defence conditions could apply to existing Vietnamese companies, which already have foreign investors when the Vietnamese companies raise capital from existing shareholders.

4.3. The satisfaction of these conditions would need to be considered by licensing authorities when foreign investors apply for an M&A Approval in either compulsory application or voluntary application. There is no clear criteria about national security and defense. Therefore, in many (if not all) cases, the licensing authority may need to seek opinions from the Ministry of National Defence, the Ministry of Public Security, and/or the Ministry of Foreign Affairs. This could substantially delay the investment process.

4.4. In addition, it is not clear how a foreign investor, who plans to acquire shares in a Vietnam EO, which is not subject to compulsory M&A Approval could determine whether the conditions on national defence and security are satisfied. Therefore, a prudent foreign investor may voluntarily apply for the M&A Approval to ensure that its investment does not raise any national defence or security concerns.

## 5. **Clearer guidance on M&A Approval**

5.1. The table below summarises the cases where an M&A Approval is required for an Acquisition under the LOI 2020:

Type of target companies	M&A Approval	No M&A Approval
Subject to market entry condition	<p>When there is an increase of the aggregate ownership of foreign investors.</p> <p>It is not clear of ownership held by a Deemed Foreign Investors is considered as ownership of foreign investors.</p>	Transfer among foreign investors or Deemed Foreign Investors
Not subject to market entry conditions	When (1) there is an increase of the aggregate ownership of foreign investors and Deemed Foreign Investors, and (2) the aggregate foreign ownership after the Acquisition is 50% or more.	<p>When the aggregate ownership of foreign investors and Deemed Foreign Investors after the Acquisition is less than 50%;</p> <p>or</p> <p>Transfer among foreign investors or Deemed Foreign Investors</p>
Having land use rights certificate in respect of land lots located in border areas, coastal areas, or areas affecting national defence, or security	All cases	Not applicable.

5.2. The wording of Article 26.1 of LOI 2020 suggests that a transfer of shares/capital among foreign investors or Deemed Foreign Investors, which results in no “increase” in the aggregate foreign ownership in a target company should not be subject to an M&A Approval. If it is the case in practice, it would save time and cost for foreign investors in many deals of transfer of shares among foreign investors.

5.3. Under LOI 2020, foreign investors, who are not subject to the compulsory M&A Approval, can voluntarily apply for an M&A Approval. As discussed

above, to address the concern about national defence, and security conditions, a foreign investor may still voluntarily apply for an M&A Approval.

## **6. Potentially Less Government Support for Large Projects**

6.1. Relating to large infrastructure projects, the LOI 2020 no longer contains express provisions about the ability of the Government to give performance guarantee regarding obligations of State-owned enterprises or to give guarantee about foreign exchange availability. Projects implemented under the Public-Private Partnership Law 2020 (**PPP Law 2020**) could enjoy limited foreign exchange availability guarantee under such law. Projects implemented under the LOI 2020 will have to rely on the potential “State assurance” (*bảo đảm Nhà nước*) under Article 11 of the LOI 2020, or the special investment supports under Article 18 of the LOI 2020 which in theory could cover all the guarantees and supports provided under the PPP Law 2020. However, logically, a non-PPP project under LOI 2020 should enjoy less government support and guarantee than a PPP project under the PPP Law.

## **7. Termination of investment projects based on a sham transaction**

7.1. LOI 2020 officially allows Vietnamese authorities to terminate an investment project if the investors conduct investment activities based on sham transactions (*giao dịch giả tạo*) under the Civil Code 2015.

7.2. Under the Civil Code 2015, a sham transaction is understood as a transaction established by the parties to conceal another underlying transaction. A nominee arrangement, where the nominee conducts the investment activities for the benefits of another person could be regarded as a sham transaction. The Civil Code 2015 provides that the court has the authority to declare whether a transaction is a sham transaction and invalidate such transaction. It is not clear whether under LOI 2020 a licensing investment authority can determine whether an investment project is conducted under a sham transaction, and terminate the relevant investment project or the licensing investment authority should wait for a valid court’s decision on the same issue.

## **8. Selection of investors**

8.1. LOI 2020 provides regulations on the selection of investors for a project in case of (i) auction of land use rights in accordance with the land law, (ii) bidding to select investors in accordance bidding regulations, (iii) issuing in-principle approvals without being subject to these former cases (a) and (b). The procedures to select investors under LOI 2020 are clearer but more complicated than the procedures under Decree 118/2015 implementing LOI 2014. In particular,

(b) Under Decree 118/2015, an investor, who wins the auction of land use rights or the bid for an investment project using the land, is not required to conduct the procedures to obtain an in-principle approval on investment. However, it is not clear under LOI 2014 and Decree 118/2015, how the relevant investment proposal has been prepared and appraised before the auction or the bid is held;

(c) LOI 2020 clarifies the unclear issues of LOI 2014 and Decree 118/2015 by providing:

- (i) the selection of an investor through the auction of land use rights or the bid for an investment project will be conducted after having an in-principle approval (except for the cases which are not subject to an in-principle approval); and
- (ii) a competent authority is entitled to propose an investment project and obtain an in-principle approval which is also a new point of LOI 2020 (Article 33.2 of LOI 2020).

#### **9. More carve-outs for 24-month limit of the implementation schedule extension**

9.1. The LOI 2020 has removed the provision regarding extension of project implementation schedule (*giãn tiến độ*) under the LOI 2014. Instead, the LOI 2020 allows an investor to amend the project implementation schedule by no more than 24 months except in the following cases (where extension of more than 24 months is permitted):(i) the State's delay in delivery of lands;

- (ii) at the request of the State authorities;
- (iii) the State authorities' delay in implementing administrative procedures;
- (iv) due to change of master plan by the State authorities;
- (v) change of objectives provided in the in-principle approval;
- (vi) supplement to objectives which are subject to an in in-principle approval; and
- (vii) increase of total investment capital of 20% or more which results in a change of the project scale.

The LOI 2014 allows an investor to apply to amend the project implementation schedule without any specific time limit. However, in practice, many licensing authorities do not allow any amendment of more than 24 months except in case of force majeure.

## **10. Other notable changes**

### *No extension of term for unwanted projects*

10.1. LOI 2020 makes clear that the following investment projects shall not be allowed to extend their terms of operation:

- (i) Investment projects using outdated technology, potentially causing environmental pollution, resource-intensive; and
- (ii) Investment projects in cases where the investors must transfer without compensation of assets to the Vietnamese State or Vietnamese parties.

### *No requirement of investment procedures applicable to foreign-invested startups*

10.2. A foreign investor, who incorporates a small- and medium-sized innovative startup enterprise or an innovative startup investment fund, is neither required to have an investment project nor obtain an investment registration certificate. The procedures to be certified as a small- and medium-sized innovative startup enterprise or an innovative startup investment fund are provided in Law on Assistance for Small and Medium Enterprises 2017. Although this exception could save some time for the foreign investor at the beginning, it may raise additional operational issues later on (e.g., difficulty in opening a “DICA” account with local banks).

### *Some clarifying points on investment procedures*

10.3. LOI 2020 clarifies certain ambiguity and inconsistencies regarding the procedures to implement an investment project:

- (i) there is no need to have an environmental impact assessment report (EIAR) before applying for an investment registration certificate. This clarifies the inconsistency between Decree 40/2019 (which is similar to LOI 2020), and the Law on Environment Protection 2014 (which requires an EIAR before issuance of the IRC); and
- (ii) a pre-feasibility study report under the construction law can replace for an investment proposal under LOI 2020.

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