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LAWS ON INVESTMENT & ENTERPRISES

**- Updates and Key Consideration –
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Law on Investment No. 61/2020/QH14

Last 17 June 2020, the National Assembly, following their thorough consideration, finally approved the promulgation of Law No. 61/2020/QH14 on Investment (the “**New LOI**”) which will replace the current Law No. 67/2014/QH13 on Investment (the “**Current LOI**”) since 1 January 2021.

The New LOI provides for numerous changes to the contents of the Current LOI which cover, among other things, matters of conditional businesses, investment conditions and forms, investment licensing procedures and termination of investment projects.

This newsletter focuses on the following new changes in the New LOI that the investors should pay attention to.



1. Industry and Trade being Prohibited and Subject to Conditions

The notion of *Conditional Industry or Trade* remains unchanged under the new LOI while defining such industry or trade as the one in which the conduct of investment, business activities must satisfy certain conditions for the reasons of national defence or security, social order and safety, social ethics and community health.

To adapt to the development of the society and changes to the business lines, the new LOI revised the List of Conditional Industry, Trade by:

- removing 22 business lines including, *inter alia*, the sale and purchase of debt; logistics services; foreigners’ consultancy urban planning; franchising; commercial arbitration activities; classification and examination of medical equipment; training relating to real estates;
- revising details of 25 business lines notably covering: registration and maintenance of domain business which will apply to all domains instead of limiting to “.vn” domain only as before; limiting conditional businesses to activities of film release and distribution instead of film production as in the Current LOI.
- supplementing 7 more business lines including: freshwater business; architecture services; data centre services; trade on imported newspapers and magazines; fishing vessel registry; training fishing seafarers; electronic identification and authentication services.

There is no notable change to the List of Prohibited Industry, Trade except for the supplement of the activity of “debt collection service” into the list. It is clear that as from the date of effectiveness of the New LOI, the investors shall be prohibited to invest into sector of “debt collection”. This may be considered as the prevention by the State against the abuse by the criminals of this kind of activity to conduct usury and black credit activities.

2. Market Access Conditions Applied to Foreign Investors

Under the New LOI, the investment conditions applicable to foreign investor shall be known as *market access conditions*. Those conditions include:

- (i) capital ratio held by foreign investors;
- (ii) form of investment;
- (iii) scope of investment scope;
- (iv) capability of the investor and its partner participating in the investment; and

- (v) other conditions under the laws, resolutions promulgated by the National Assembly, ordinances, resolutions promulgated by the National Assembly Standing Committee, the decrees promulgated by the Government or the international treaties to which Vietnam is a member.

The Government is in process of issuing a detailed List of Industry, Trade for Which There Has Not Yet Been Market Access and the List of Industry, Trade for Which Market Access is Conditional.

For any industry, trade not falling into those two lists, the foreign investors shall be subject to requirements as applied to the local investors.

3. Industry, Trade in which the Outward Investment is Prohibited or Subject to Conditions

In relation to outward investment, the New LOI specifies for the first time the industry, trade in which the conduct of outward investment is prohibited or is subject to conditions.

The industries, trades in which the outward investment is prohibited cover:

- a) industries, trades in which the conduct by foreign and domestic investors of investment, business activities are prohibited;
- b) industries, trades of the technology, products of which are prohibited from export in accordance of regulations on foreign trade management; and
- c) industries, trades are prohibited in accordance with the foreign country regulations.

The industries, trades in which the outward investment is subject to conditions cover:

- a) Banking;
- b) Insurance;
- c) Securities;
- d) Journalism, broadcasting and television program; and
- e) Real estate business.

4. Investment Form

Generally, under the New LOI, there are still four main investment forms, including the following:

- (i) establishment of a new economic organisation;
- (ii) capital contribution, or purchase of share or portion of capital contribution;
- (iii) implementation of investment project; and
- (iv) investment under a BCC.

A new remarkable point is that the Government is entitled to determine a new investment form. This competence granted to the Government enables a more diversified investment environment. However, it is not clear for the time being whether a new investment form shall be decided by the Government on a case-by-case basis or will be governed by a new framework issued by the Government.

5. In-principle Approvals on Investment Policy

The New LOI replaces the term of “*investment policy decision*”, as previously used to in the Current LOI with “*in-principle approval on investment policy*”.

Regarding the projects that are subject to the in-principle approval on investment policy, the New LOI amends the list of projects which are subject to in-principle approval on investment policy by each authority. In particular:

- projects being subject to National Assembly’s competence for in-principal approvals on investment policy remain unchanged;
- regarding projects being subject to the Prime Minister’s competence for in-principal approvals on investment policy:
 - *supplementing* projects (i) being subject to the authority of two or more People’s Committees and (ii) projects on housing; and
 - *removing projects* of (i) golf; (ii) cigarettes; (iii) wholly foreign-

invested science and technology;
and (iv) sea transport of foreign investors.

- regarding projects being subject to the Provincial People's Committee competence for in-principal approvals on investment policy:
 - *supplementing* (i) projects on housing not subject to the Prime Minister's competence; (ii) golf projects and (iii) projects on borderland or islands;
 - *removing* projects using restricted technology transfer.

The New LOI additionally clarifies that the Management Board of Industrial, Economic, Export Processing, or High-Tech Zones shall be in charge of projects which are under competence of granting in-principal approvals of the Provincial People's Committee and is located in the zones.

The New LOI also simplifies the procedures for obtaining the in-principle approvals on investment policy of the Prime Minister and the National Assembly following which in either case, the Investor will submit the application file directly to the Ministry of Planning and Investment, instead of the licensing authority at provincial level as before. It will help the investors to save time for logistics.

6. Cases and Methods for Selection of Investors

The New LOI specifies methods for selecting investor to implement investment project in certain cases where the in-principle approval on investment policy is required. The selection of investors to implement the projects must be in either form of:

- (i) auction of land use rights in accordance with the laws on land; or
- (ii) bidding in accordance with the laws on bidding; or
- (iii) approval on investor selection where:
 - (a) the auction of land use right is organised but there is only one participant; or in case the auction

fails or in case the bidding is organised but there is only one investor registering to participate; or

- (b) the project is subject to the procedure for in-principle approval on investment policy and:
 - the investor is entitled to land use right, except where the State recovers the land for defence and security purposes, for economic development, for the State and public interest; or
 - the investor receives the transfer, capital contribution, leases agricultural land use right for implementation of non-agricultural projects of investment, business which is not subject to the land recovery by the State; or
 - the investor implements the project in industrial and high-tech zones; or
 - the project is not subject to auction or bidding.

It is quite clear under this new provision when a project will be subject to an auction for land use right or bidding for investor selection. This will help to avoid the overlap in the relationship of the authorities when approving a project or selecting an investor.

One more notable amendment in the New LOI is the approval of the investment policy and the investors shall be made concurrently instead of separately as before, in case of projects which are not subject to land use right auction and bidding for investor selection.



7. Investment Projects Not Required to Be Registered

Generally, the Current LOI requires the foreign investors, when establishing any new entity, to apply for an investment registration certificate as a basis for the competent authority to evaluate its feasibility and social – economic impact.

The New LOI provides for two exceptions where the foreign investors of *small and medium creative start-up enterprises* or *creative start-up investment funds* shall not need to carry out the procedures for investment registration certificates. This aims at creating favourable environment to attract foreign investment in creative businesses.

8. Projects Being Subject to Requirement on Carrying Out of Investment Procedures

Article 23.1 of the Current LOI is amended following which the figure of “*from 51%*” turns to “*more than 50%*”. Accordingly, an *economic organisation* is subject to investment conditions and procedures applicable to foreign investors where falling into any of the following cases:

- a) more than 50% of that economic organisation’s charter capital is held by the foreign investor(s), or in case of a partnership, the majority of partners are foreign individuals;
- b) more than 50% of that economic organisation’s charter capital is held by the economic organisation mentioned in the paragraph a) above;
- c) more than 50% of that economic organisation’s charter capital is jointly held by the foreign investor(s) and economic organisation(s) mentioned in the paragraph a) above.

9. Cases Where Capital Contribution or Purchase of Share/Portion of Capital Contribution of An Enterprise (“M&A Approval”) is Required to Be Registered

The requirement for M&A approval, which has already been clarified under Decree No. 118/2015/ND-CP to the Current LOI, is adapted to the New LOI. Accordingly, the M&A approval will be required when the

acquisition by the foreign investor leads to:

- an increase of foreign shareholding in the target company engaged in businesses which are subject to market access conditions for foreign investors; or
- an increase of foreign shareholding in the target company from less than 50% or 50% to more than 50% of the charter capital of that company; or
- an increase of foreign shareholding in the target company foreign shareholding in which is already exceeding 50% of the charter capital.

The New LOI supplements one more circumstance where the foreign investors are required to apply for a M&A Approval. This new circumstance relates to the case where the target enterprise owns a land use right certificate over areas affecting national defence and security such as sea-island, border or coastal area.

10. Extension of Operation Term of Project

Due to the lack of clear guidance under the Current LOI, it is purely at discretionary decision of the local authorities on the extension term of a project. Under the New LOI, an extension of a project term shall not exceed 50 years if a project is outside the economic zones OR 70 years if a project is inside an economic zone. This provision will enhance the certainty of foreign investors in investment in Vietnam.

11. Use of Profits Gained from Outward Investment

Under the Current LOI, the profits from outward investment can be retained offshore for capital increase or project expansion purposes. The New LOI supplements the purposes for which the profits can be retained offshore including:

- (i) fulfilling capital contribution obligation;
- (ii) increasing of investment capital; and
- (iii) implementing new investment project in foreign country.

12. Investment Incentives and Supports

The New LOI expands the scope of

projects which will be entitled to investment incentives and supports, and supplements types of investment supports, significantly for the projects in the development of small and medium creative start-up enterprises and of technology encouraged to be transferred.

Special investment incentives and supports are new provisions which aim at attracting the giant corporates' investment in Vietnam. The Government is competent to grant those special investment incentives to projects which have significant impact on socio-economic conditions, including:

- project of new establishment (including an expansion of an existing project) of creative, research and development centres with total investment capital of at least VND3,000 billion in which VND 1,000 billion must be disbursed within 3 years from the date of respective investment registration certificate or in-principle approval;
- project in the encouraged industries with total investment capital of at least VND30,000 billion in which VND10,000 billion must be disbursed within 3 years from the date of respective investment registration certificate or in-principle approval on investment policy.

Also, under the New LOI, the Government is entitled to propose to the National Assembly any investment incentive other than those provided by laws in some significantly important cases. There is yet guidance on how a project will qualify as a significantly important case.

13. Termination of Investment Projects

The New LOI clarifies that an investment project will be terminated by the competent authority due to breach of land use schedule as provided by the regulations on land. This provision is clearer and consistent with the provision on land recovery due to breach of regulation on land use schedule.

The New LOI supplements two cases where the competent authority decides to terminate operation of an investment project in part or in whole. In particular:

- where the investor fails to perform the deposit obligations according to the laws; and
- where the investors carry out investment activities based on fraudulent civil transactions in accordance with the civil laws.

The latter case is the result of the Vietnam authorities' thorough consideration on the genuine intention of the investors. This is however unclear under this New LOI whether the determination of a civil transaction to be fraudulent or not shall be subject to the discretion of the licensing authority in charge of investment or a decision of the competent court.

As this new provision under the New LOI is anticipated to have significant impact on current investment structures of various foreign investors (especially those are structured under nominee arrangement), the Government is expected to issue the guidance at the earliest to avoid the inconsistency in application of legal regulations by local authorities and to protect the legitimate interest of the investors.

Law on Enterprises No. 59/2020/QH14

On 17 June 2020, the National Assembly of Vietnam approved the promulgation of new Law No. 59/2020/QH14 on Enterprises (the “**New LOE**”) to replace the current Law No. 68/2014/QH13 on Enterprises (the “**Current LOE**”) as from 1 January 2021.

This newsletter highlights the remarkable changes in the New LOE which cover, among other things, amendments to provisions on capital contribution, organization and management structures, requirement on corporate stamp and definition of State-owned enterprise.



I. GENERAL AMENDMENTS

1. Objects Prohibited from Establishing and Managing Enterprises

The New LOE supplements the following objects into the list of those being prohibited from establishment and management of an enterprise:

- Persons having difficulty in perceiving or controlling their own acts;
- Commercial entities prohibited from conducting business or operating in certain industries as provided by the Criminal Code; and
- Public security workers except where they are authorised by the State to manage its capital contribution in the enterprise.

The first two supplements are made to create consistency between the New LOE with the current Civil Code and with the Criminal Code. Meanwhile, the third supplement aims at covering the actual situation where public security workers are

managers of State-owned enterprises without authorization by the State.

The New LOE also clarifies that managers and professional managers of State-owned enterprises are only prohibited from establishing and managing another enterprise in case of a State-wholly-owned enterprise. This amendment is made in parallel with the amendment to the definition of State-owned-enterprise under the New LOE.

2. Further Clarification on Capital Contribution Period

Under the New LOE, the timeframe for capital contribution remains unchanged (i.e. within 90 days from the date of issuance of the enterprise registration certificate). However, the New LOE clarifies that this 90-day period will exclude the time during which the assets for contribution are imported and transported, and the assets ownership transfer procedures are carried out.

This new provision may help the investors to avoid breaching the requirement on capital contribution period due to spending too much time on carrying out procedures for import and transport or transfer of ownership in respect of assets used for capital contribution.

3. Corporate Stamp

The implementation of the Current LOE during the past five years has proven great advantages in entitling an enterprise to make and manage its stamp. However, under the Current LOE, enterprises are still required to notify its stamp sample onto the National Business Registration Portal.

A new development of the New LOE is the removal of requirement on notification of stamp sample. It means that the enterprises shall at their discretion decide to use either physical corporate stamp or digital signature in accordance with laws on electronic transactions without a need to notify or register with the authorities.

4. Removal of Regulations on Business Households

Regulations on business households

stipulated in the Current LOE are removed under the New LOE. Accordingly, the Government shall later issue other specific regulations governing the registration and operation of business households.

II. SPECIFIC AMENDMENTS

❖ In case of Limited Liability Company (LLC)

1. Shortening Period for Compulsory Adjustment of Charter Capital

In case any member of a multi-member LLC fails to contribute his/her/its capital part within the 90-day period, under the Current LOE, such LLC has to register the compulsory adjustment of its charter capital within 60 days from the last day of the required period for capital contribution. Such required period is now reduced to 30 days under the New LOE. This amendment is likely to be consistent with the provisions on compulsory adjustment of charter capital in case of failure to fulfil capital contribution obligation in one-member LLC and JSC.

2. Mandatory Suspension of Operation or Doing Certain Jobs

Under the New LOE, in case:

- the owner or member of an LLC is a commercial entity prohibited by competent court from conducting certain activities in its registered scope of business lines; or
- the owner or member of an LLC is an individual prohibited by competent court from practicing/doing certain jobs,

that individual owner or member is not allowed to do those certain jobs in the company, or the company must suspend, terminate those relevant activities according to decision of competent court.

3. Removal of Requirement on Having Inspector(s)

The New LOE no longer requires a one-member LLC owned by an organisation to have inspector(s) under its management structure. This exemption is however not applicable in case of a one-member LLC owned by the State.

4. Issuance of Bonds and Shares

Under the Current LOE, a multi-member LLC is entitled to convert into a JSC. However, the Current LOE prohibits the multi-member LLCs from issuing shares in any case. Those provisions of the Current LOE is confusing while prohibiting the multi-member LLCs from shares issuance, which is necessary for the purpose of its conversion into a JSC.

The inconsistency under the Current LOE is now fixed by the New LOE, which now allows the multi-member LLCs to issue shares to convert into the JSCs. In addition, the New LOE expressly prescribes the multi-member LLCs are also entitled to issue bonds in accordance with the laws while the Current LOE is silent on this.

❖ In case of Joint Stock Company (JSC)

5. Internal Auditing Committee – Change of Name and New Operating Mechanism

Under the New LOE, internal auditing division as defined under the Current LOE shall be known as the auditing committee under the Board of Management. The organisation of the auditing committee comprises at least two members. The chairman of the auditing committee must be an independent member of the Board of Management while other member(s) must be non-executive member of the Board of Management.

Generally, the auditing committee is competent to:

- supervise the auditing process of the auditing firm, including the truthfulness of financial statements and official reports relating to financial results of the JSC;
- monitor the JSC's internal control and risk management;
- monitor transactions between the JSC with its related persons which are subject to approval of the Board of Management or the General Meeting of Shareholders; and
- ensure that the JSC complies with the laws, requirements of management agency and other internal rules of the company.

6. Conditions for Private Share Placement

The New LOE for the first time provides for conditions on private share placement of a non-public JSC. In particular, the law requires that the placement:

- shall not be carried out via mass media; and
- shall be open for (a) less than 100 investors excluding professional securities investors; or (b) for professional securities investors only.

The New LOE expressly simplifies the procedure for private share placement of non-public JSC where not requiring the JSC to notify the authority of the same. Under the Current LOE, the JSC must notify the authority within 05 working days from the date of the decision on placement. This new law also clarifies that subscription of shares by foreigner investors in this case shall be subject to approval on shares acquisition by the competent authority in accordance with the investment laws.

The New LOE also grants the existing shareholders of the JSC the pre-emption right to subscribe shares under the private placement (except where there is a merger or consolidation) and to assign such right to other persons or entities.

7. Change of Provision on Minority Shareholders

Under the New LOE, a shareholder or a group of shareholders qualifies as minority shareholder or a group of minority shareholders respectively if that shareholder or that group of shareholders holds at least 5% (or a smaller ratio provided in the company's charter) of the total ordinary shares of the JSC, regardless of holding duration of those shares. The ratio under the Current LOE is 10% during the period of at least six consecutive months.

Despite the above amendment, in order to nominate candidates to the Board of Management and the Inspection Committee, the New LOE still requires the shareholder or the group of shareholders to hold at least 10% (or a smaller ratio provided in the company's charter) of the total ordinary shares of the company. The six consecutive month period under this

circumstance, however, is also no longer required.

8. Resolution of General Meeting of Shareholders

Currently, shareholders holding preferential shares are not entitled to attend a meeting or vote for resolution of the General Meeting of Shareholders. However, under the New LOE, any resolution of the General Meeting of Shareholders that adversely affects the rights and obligations of shareholders holding preferential shares shall only be passed if it is agreed by:

- in case of voting at the meeting, the attending shareholders holding at least 75% of the aggregate preferential shares of the same type; or
- in case of collecting written opinions, the shareholders holding at least 75% of the aggregate preferential shares of the same type.

This provision is expected to better ensure the rights and benefits of the shareholders holding preferential shares.

In addition, voting threshold for passing a resolution of the General Meeting of Shareholders is reduced "from 51%" to "more than 50%" of the total number of voting slips of attending shareholders in case of voting at the meeting OR of the total votes in case of collection of written opinions.



9. Transactions Required to be Approved by General Meeting of Shareholders and Invalidity of Transactions

Except where the Charter of the company provides otherwise, under the New LOE, the company's General Meeting of Shareholders shall approve:

- contracts, transactions valued from 35% or more of the total financial assets of the company as recorded in its latest financial statements and entered into by and between the company and:
 - (i) its shareholder(s), representative(s) of its shareholder being organisation which holds more than 10% of the total ordinary shares of the company and related persons of those shareholder(s) or representative(s);
 - (ii) its member of the Board of Management, Director or General Director and their related persons;
 - (iii) enterprises that the company's members of the Board of Management, Inspectors, Director, General Director and other managers must declare their related benefits in such enterprises.
- loan contract, transaction of borrowing, lending, sale of assets are (a) entered into between the company and its shareholder(s) holding from 51% of the total voting shares or between the company and related person(s) of that shareholder(s); and (b) valued from 10% or more of the total value of the company's assets as recorded in its latest financial statements.

Also, under the New LOE, any contract

and transaction, if falling within any of the above cases, is not approved by the General Meeting of Shareholders of the company before execution shall be null and void without considering the damages caused to the company.

❖ In case of State-Owned Enterprise

10. Broadening Definition on the State-owned Enterprise

Under the New LOE, an enterprise shall qualify as a State-owned enterprise if more than 50% of its charter capital is held by the State. The ratio of 50% is also the controlling capital ratio under the laws.

The New LOE also divides State-owned enterprises into two groups which are:

- State-owned enterprise of which 100% of the charter capital is held by the State; and
- State-owned enterprise of which from 50% of its charter capital or total voting shares is held by the State.

In the first scenario, the company shall be structured in the form of a one-member LLC while in the second scenario, the company shall be structured under the form of a multi-member LLC or a JSC. This will lead to difference in organisation and management structure of the company.

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