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Issue: September 2020

New law on investment

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→ New Law on Investment

Following our Legal Update of May 2020 on the Draft New Law on Investment, we are pleased to share this month´ s Legal Update with you on the new Law on Investment (the new "LOI") which has officially been enacted by the National Assembly of Vietnam on 17 June 2020, and will takes effect on 1 January 2021.

In this Legal Update, we will highlight significant changes of the New LOI compared to the current LOI to help you in getting much more to the point forthcoming important reforms in the legal framework for inward direct investment in Vietnam.

→ New Law on Investment

Rigid: two-conditions on business applied to investors

As a general rule, the New LOI adopts a clearly defined mechanism of dual conditions for investors, irrespective of their nationality, when carrying out investment activities in Vietnam.

Market-access conditions for foreign investors

Under the New LOI, the law emphasizes the same treatment to be granted to foreign investors and domestic investors when they enter into Vietnam market in the same sectors. There is no discrimination between local investors and foreign investors, aside from some specific exceptions in which the government of Vietnam reserves the right to compose a list of businesses restricted to market entry for foreign investors ("List of Businesses Restricted to Market Entry").

By adopting a "negative list" approach, the New LOI provides that the Government lists sectors/businesses for which Vietnam imposes restrictions and conditions to foreign investors to participate in the domestic market. This means that all sectors not covered by the negative list are considered as liberalized by default and open for foreign investors. In this respect, the New LOI utilizes the "negative list" techniques which are similar to those opted for in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in services and investment.

Compared to the current LOI, this approach of the New LOI is significantly different from the "positive list" scheduling approach of the Schedule of Specific WTO Commitments in Services of Vietnam (the "Schedule") to determine the level of openness of the market for foreign investors. Under the Schedule, only the sectors for which Vietnam opens its market to foreign investors are specified, while the remaining sectors will solely rely on the discretion of competent authorities. Vast investment projects of foreign investors operating in sector(s) not prescribed in the Schedule have showed that the registration procedures will have to involve seeking the assessment of relevant authorities in most cases - which are usually impeded by various bureaucracies to determine eligible investors for market access, not to mention the high degree of flexibility or even the misuse of the discretion of Vietnamese agencies in handling similar issues by different approaches on case-by-case basis or influenced by lobby policies.

A far-reaching benefit from the adoption of a "*negative list*" approach in providing market-access conditions under the New LOI is therefore the reduction in barriers to licensing procedures (in the phases of establishment of subsidiaries and M&A activities in Vietnam), where restrictions or limitations on investment imposed to foreign investors are more transparent and predictable. To some extent, by choosing the "*negative list*" legislation technique, Vietnam can honor their commitment to the non-discrimination of foreign investors in investment policy to establish a level playing field, while still maintaining a trade protection policy for sensitive sectors.

Investment-business conditions

Investment-business conditions are those applied after the market access and prior to the commencement of business in sectors that are subject to the list of conditional businesses specified in Annex IV of the New LOI. There are 227 conditional businesses in total in accordance with Annex IV. Aside from our update on the list of conditional investment-business in the Legal Update of May 2020, two (02) more businesses have been added to this list (*Auxiliary activities related to insurances; Trading of pure water*), while there are ten (10) businesses (*HIV testing services; Cell and Tissue Banking; Cryopreservation of Embryos and Oocytes in Human Assisted Reproduction; Testing of microorganisms causing infectious diseases; Vaccination; Opioid substitution therapy; Surrogacy services; Sale of foods under the administration of the Ministry of Health; Medical equipment classification services; Medical equipment testing services; Sale of biological preparations from waste treatment*) which have been eliminated from the list.

The New LOI also sets forth compulsory contents of the regulations about investment-business conditions, namely: subject matters and sphere of application, method of application, contents of conditions, application dossier and administrative orders and procedures, competent authorities, validity of license/certificate/confirmation.

→ New Law on Investment

Forms of Investment

There is no change in forms of investment activities between the current LOI and the New LOI, except for the change in the substantive contents of each investment form, and the separation of provisions for investments in public private partnerships from the New LOI into a new legal instrument (Law on Public Private Partnership No. 39/2019/QH14).

Setting up new economic organization

For the first time, the requirements for setting up an investment project and obtaining an investment (registration) certificate have been lowered for foreign investors in the establishment of innovative startups being SMEs and innovative start-up investment funds under the New LOI, except for deviating requests by the investors.

M&A

Prior to implementing an M&A transaction, depending on the case, the investor may need to obtain an M&A approval from the Vietnamese authority. The New LOI made notable changes to this M&A approval requirements. To be specific, the New LOI does not require any M&A approval in case the M&A transaction does not lead to an increase in foreign ownership ratio in the economic organization doing business, subject to market entry conditions applicable to foreign investors.

In addition, it is required to get an M&A approval in case the M&A transaction results in an increase of foreign ownership ratio in the company to more than 50 per cent, and in case the foreign ownership ratio had already exceeded 50 per cent.

Besides the aforementioned cases, the New LOI supplements two new categories re-quiring M&A approval: (i) safeguard of national security and defense in accordance with the New LOI, and (ii) conditions of acquisition of land located in areas deemed vital to national security (e.g. islands and in border and coastal communes, wards and towns).

Resident foreign direct investment enterprises (FDI enterprises)

Notably, there is a change in the criterion of foreign ownership ratio in FDI enterprises for identifying and determining the investment conditions and procedures under the New LOI. Accordingly, the foreign ownership threshold as a criterion to treat a resident FDI enterprise as a foreign investor has been reduced from a 51 per cent ratio under the current LOI to a more than 50 per cent ratio under the New LOI.

Due to such change, in the near future when the New LOI comes into effect, all FDI enterprises with a foreign ownership ratio of more than 50 per cent will be subjected to investment conditions and procedures applicable to current foreign investors.

→ New Law on Investment

Investment incentives

The New LOI simultaneously supplements forms of investment incentives and objects entitled to investment incentives.

Forms of investment incentives

The New LOI regulates one new form of investment incentive which is the accelerated depreciation and increase in the amount of deductible expenses when calculating taxable income. This results in 4 forms of investment incentives to investors.

Objects entitled to investment incentives

The government of Vietnam remains supportive in high-technology, renewable energy, IT , education industries, etc. same as current regulations to attract more foreign investment. Nevertheless, certain strict conditions have been added to projects with a capital scale from VND 6,000 billion such as conditions on revenue and number of employees. The investment projects for the construction of commercial residential housing have been eliminated from the incentive list of the New LOI.

In addition, in an effort to support startups, SMEs in Vietnam as well as the enterprises in environmental protection industry, the government has already put in place incentives for these, hoping to provide better conditions for a strong and sustainable development in near future. Rödl & Partner Vietnam accompanies and assists clients of all kinds in their business activities in Vietnam.

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Imprint

Client Alert, September 2020

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