

ASSESSMENT OF INVESTMENT LAW AND ENTERPRISE LAW

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Significant Improvement in Licensing Process

The Enterprise Law No. 68/2014/QH13 (**Enterprise Law**) and the Investment Law No. 67/2014/QH13 (**Investment Law**) are enacted by the National Assembly on 26 November 2014 and have come into force on 1 July 2015. As of today, it has been nearly 2 years of actual implementation of the laws and we have seen much improvement to the legal framework for doing business in Vietnam.

Firstly, the Enterprise Law shows a strong respect to the principle of freedom of businesses under the Constitution of Vietnam. As stipulated by the Enterprise Law, enterprises are only barred from engaging into business activities prohibited by law. The Investment Law then clarifies the point by indicating clearly a list of which business lines are prohibited, e.g. trade of narcotic substances, trade of certain wild species, prostitution, etc. It is reported that the number of newly established enterprises has increased substantially. By information provided by the Business Registration Department of the Ministry of Planning and Investment, in the first quarter of 2017, Vietnam observed 26,478 additional enterprises with the registered capital of VND271,238 billion. It is an increase of 11.4% regarding the number of enterprises and 45.8% regarding the registered capital comparing with the same period last year. Additionally, in the first quarter of 2017, 9271 enterprises have returned to operation, which is two times the number as of the same period in 2014. The entrepreneurs appear to show their trust and support for the new legal framework.

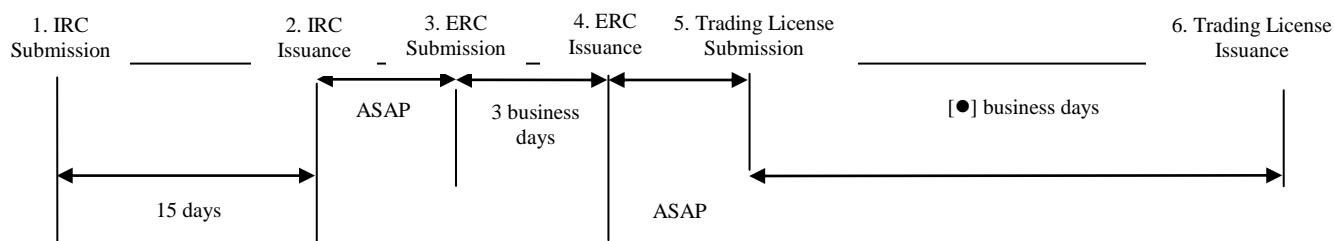
Secondly, the duration and the quality of public services for licensing and providing establishment permits also observe a tremendous improvement. In the past, it was not unusual to see a qualification stating that actual period to obtain an investment certificate may take longer than the time limit provided by law. However, we have observed in recent transactions that we are involved, the Department of Planning and Investment (**DPI**) has adhered to the time limit prescribed by law. Taking an example of the process to obtain an approval for foreign investors to acquire shares in a conditional sector, the DPI has granted its approval within one week while the law requires the time limit of 15 days. In another example relating to the establishment of a foreign invested company in Vietnam, the relevant foreign investor has obtained the Investment Registration Certificate (**IRC**) within 15 days and the Enterprise Registration Certificate (**ERC**) within 03 business days.

Thirdly, we have seen much improvement in the support services provided by DPI staff (particularly DPI Ha Noi and DPI Ho Chi Minh City). Nowadays, DPI staff are more willing to provide support and guidance for investors to complete the application documents in accordance with the law. In addition, support could also be provided via telephone and email which makes it more efficient and cost-saving as investors do not need to travel back and forth for guidance. In practice, we usually consult with DPI via telephone and email before submitting the relevant application dossiers to ensure sufficient and complete application dossiers are ready for submission.

Beside many improvements as mentioned above, we are aware of numerous outstanding issues.

1. Many Approvals and Licensing Steps and Many Required Documents

A foreign invested company engaging in the distribution business in Vietnam is required to obtain 03 different licenses: IRC, ERC and Trading License (please see the licensing chart below). It is very uncertain to know how long it could take to obtain the Trading License and the timing could be in a range from two to several months. Furthermore, an approval-in-principle (“chap thuan chu truong” in Vietnamese) is fails so required before IRC submission for various projects.



This multiple licensing process requires investors to prepare too many documents (please the schedule) which are quite time-consuming, particularly the consularisation requirement for certain documents made outside Vietnam. Consularisation requires the document to be authenticated by the relevant Vietnamese embassy outside Vietnam and they are only acceptable within three (3) months from the date of being certified by the Vietnamese embassy.

Recommendation: (1) The number of the above approvals and licensing steps should be consolidated into 1 or 2 approvals only and investors should only be required to submit one set of documents to the relevant DPI; (2) IRC contains too many details and any amendment to those details would require an amendment to IRC and those details should be tailored and simplified further; (3) Electronic submission should be allowed for all those licenses. In addition, a new regulation on trading and distribution for foreign investors should also be issued to replace the out of date regulation (Decree 23/2007).

2. M&A Approval for Share Acquisition

According to Article 46.2 of Decree 118/2015, a foreign investor is only required to obtain an approval from DPI when it acquires (i) shares in a conditional business sector or (ii) from 51% shares in a local company. In practice, however, such DPI approval has been required whenever a foreign investor subscribes new shares (even with 0,1% of the company’s charter capital) in any business sector, irrespective of conditional or unconditional sectors.

Recommendation: The requirement for M&A approval should be limited to those circumstances listed under those items (i) and (ii) only.

3. Unpractical Requirements

Several unpractical requirements have caused much difficulty to normal business operations, namely:

i) A company is required to make capital contribution within 90 days. This requirement is not practical for a large project as the investor is not able to arrange a big payment within a very short time period. In practice, we are aware of many companies having failed to make full capital

contribution within that time limit. Such failure prevents the company from making any amendment to IRC/ERC as the authority would conduct an inspection against the company and then impose a fine on the company before it could make an amendment to IRC/ERC. The inspection may take several months in practice which would have a negative impact on the company's normal operation. It was reported that one company that has failed to make capital contribution within 90-day period has been required to dissolve and to liquidate because it is not able to reduce its charter capital.

Recommendation: The time limit for capital contribution should be decided by shareholders, except for certain important projects.

ii) When one company's head office is located in one city and its branch/project is located in another city: there are separate IRCs for both the head office and the branch/project. However, many licensing authorities do not allow the company to consolidate the branch's equity capital into the head office's IRC and this situation has prevented the company from obtaining loans due to the borrowing limit set out under the head office's IRC.

Recommendation: The head office's IRC should be amended to consolidate the branch's equity capital.

iii) A company is required to reduce its charter capital when it buys back its shares. Effectively, this requirement has prevented a company from buying back its shares for its employee share option plan (ESOP). This requirement is disadvantageous to employees.

Recommendation: Like a public company, a private company should be allowed to buy back shares for treasury purpose.

4. Bank Account and Remittance Requirement

According to Article 36.3 of the Enterprise Law, all payment for acquiring shares or dividends must be paid to the foreign investor's capital account. However, the State Bank of Vietnam has regulations governing foreign direct (**FDI**) and indirect investment (**FII**): for FDI, payments are made to the project company's direct capital account while the payments under FII are made to the investor's VND account. In practice, it has been very confused with different interpretations adopted by banks in the market and it is difficult for foreign investors to understand which payments shall be made to the company's capital account or the investor's VND capital account.

Recommendation: Further guidance should be issued by the State Bank of Vietnam in order to create an uniform remitting requirement among banks in Vietnam.

5. Share Swaps

Unlike the Securities Law, the Enterprise Law does not provide for any provision relating to share swaps which prevents a company from acquiring another company by way of share swaps.

Recommendation: Share swap should be allowed and reference could be made to Decree 58/2012 as amended by Decree 60/2015.

SCHEDULE
DOCUMENTS REQUIRED FOR
ESTABLISHING A DISTRIBUTION COMPANY IN VIETNAM

Step	No.	Documents	Formalities	Notes/Timelines
1	APPLICATION DOSSIER FOR AN INVESTMENT REGISTRATION CERTIFICATE (IRC)			
	1.1	Application request for implementation of the investment project	In standard form by law In bilingual (English and Vietnamese)	Under the Investment Law, the time limit for DPI to consider the IRC application dossier and issue an IRC to the foreign investor is within 15 days from the date of receipt of a complete application dossier.
	1.2	Certificate of incorporation issued by the relevant authority of country where the foreign investor is domiciled	Notarisation, consularisation/apostilled (by the Vietnam's Embassy in the relevant country) and translation into Vietnamese are required for filing purposes	
	1.3	Articles of Association of the foreign investor	Notarisation, consularisation and translation into Vietnamese are required for filing purpose No. of copies: 2 originals	
	1.4	Proposal for the investment project, including specific information in relation to the project (e.g., investment objectives, investment scale, investment capital and method of raising capital, etc.)	In standard form In bilingual (English and Vietnamese)	
	1.5	Audited financial statements for the last 2 years of the foreign investor	Notarisation, consularisation and translation into Vietnamese are required for filing purposes	
	1.6	Memorandum of Understanding (MOU) signed between the foreign investor and a permitted landlord to secure the premises for the foreign investor in Vietnam Certified as true copies of the license/business permission and corporate documents of the landlord proving that the landlord is the	In bilingual (English and Vietnamese)	

		owner of the premises and is licensed to lease the premises out to the foreign investor		
	1.7	Decision on establishment of a local enterprise in Vietnam from the competent corporate level of the foreign investor and on appointment of an authorised signatory of the foreign investor in relation to all documents required for the establishment of the Vietnam enterprise of the foreign investor	In bilingual (English and Vietnamese)	
2.	APPLICATION DOSSIER FOR AN ENTERPRISE REGISTRATION CERTIFICATE (ERC)			
	2.1	An application request for registration of the enterprise	In standard form prescribed by law In bilingual (English and Vietnamese)	Under the Enterprise Law, the time limit for DPI to consider the ERC application dossier and issue an ERC to foreign investor is within 3 business days from the date of receipt of the application dossier.
	2.2	The charter (i.e., articles of association or by-law) of the Vietnam enterprise	In bilingual (English and Vietnamese)	
	2.3	Valid copy of passport of the President/Director of the foreign investor	Notarisation, consularisation and translation into Vietnamese are required for filing purpose	
	2.4	Valid copy of the identification card of the legal representative of the Vietnam enterprise	Certified true copy.	
	2.5	Certified as true copy of the IRC of the foreign investor	Certified true copy.	
	2.6	Letter of appointment of the President/Director of Vietnam enterprise issued by the foreign investor.	In bilingual (English and Vietnamese)	
	2.7	List of authorized representative(s) of the	In standard form prescribed by law	

		foreign investor in the Vietnam enterprise	In bilingual (English and Vietnamese)	
3.	APPLICATION FOR THE ISSUANCE OF A TRADING LICENCE			
	3.1	Application request for the issuance of a Trading Licence		Upon submission of the application dossier for trading licence, DPI shall have to consult with the Ministry of Industry and Trade (MOIT) regarding this application. Upon approval by the MOIT, DPI shall issue to the foreign investor a Trading Licence.
	3.2	<p>Explanation on satisfaction of a number of conditions for the company to be engaged in Trading Business, such as:</p> <p>(i) Being an investor from a country or territory which has acceded to an international treaty to which Vietnam is a signatory and under which Vietnam has committed to open its market for sale and purchase of good activities and activities relating directly to sale and purchase of goods (e.g., WTO members);</p> <p>(ii) Investing in a form in accordance with the roadmap committed in international treaties to which Vietnam is a signatory and in compliance with Vietnamese law;</p> <p>(iii) Dealing in goods or services in accordance with Vietnam's commitments on opening the market and in compliance with Vietnamese law;</p> <p>(iv) Having scope of operation in</p>	<p>In standard form In bilingual (English and Vietnamese)</p>	<p>For clarity, the time periods for preparation of the required documents are not included in the above time periods (e.g., time for obtaining notarised, consularised and Vietnamese translated documents). Usually, these preparation steps take about 1 month depending on the volume of the documents.</p> <p>By law, the time limit for DPI to consider the Trading Licence application dossier and issue a Trading Licence to the foreign investor is 33 business days from the date of receipt of an application dossier. In addition, this time limit has not taken into accounts any queries and requirements from DPI and MOIT to the foreign investor to provide additional documents or explanation to the</p>

		accordance with Vietnam's commitments on opening the market and in compliance with Vietnamese law.		application dossier. As such, in practice, it may take much longer than 33 business days for the issuance of the Trading Licence.
	3.3	Explanation on financial capability and experience of the foreign investor in carrying out the Trading Business	In bilingual (English and Vietnamese)	